

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

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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SC Court of Appeals

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

v.

Cathy G. Harkness Respondent

RECORD ON APPEAL – VOL. I

Ms. Julie C. Jackson-Bailey, Esquire
PO Box 41771
Charleston SC 29423
(843) 419-8828

Mr. Donald Higgins Howe, Esquire
PO Box 31324
Charleston SC 29417
(843) 225-2523

Michelle Jennifer Weil, Esquire
1317 N. Main St. Ste. M-235
Summerville SC 29483
8438854743
Attorneys for Respondent

Robert B. Varnado SC Bar #0007085
Alexis Wimberly McCumber SC Bar #101611
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

Glenn Gunnells, Individually and as the Personal Representative of The Estate of Helen B.
Gunnells vs. Cathy G. Harkness

APPELLATE CASE NO. 2017-001131

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STATE OF SOUTH CAROLINA	)	IN THE PROBATE COURT
	)	
COUNTY OF CHARLESTON	)	CASE NO.: 2014-ES-10-202-2
	)	
Cathy G. Harkness,	)	
	)	
<i>Petitioner,</i>	)	
	)	
Glenn A. Gunnells, Individually and as	)	RESPONDENT'S PROPOSED ORDER
Personal Representative of the Estate of	)	
Helen B. Gunnells.	)	
	)	
<i>Respondent.</i>	)	
	)	
In the Matter of:	)	
<u>Estate of Helen B. Gunnells</u>	)	

THIS MATTER CAME before the Court on August 19 2015, at 9:00 a.m., on the Petition of Cathy G. Harkness ("Petitioner") to remove Glenn A. Gunnells ("Respondent") as Personal Representative of the Estate of Helen B. Gunnells, pursuant to S.C. Code Ann. § 62-3-611 (filed April 16, 2015). Appearing as counsel for Petitioner were Donald G. Howe, Esq., Michelle Weil, Esq. and Julie Jackson-Baily, Esq. of Charleston. Appearing on behalf of Respondent were Alexis M. Wimberly, Esq. and Robert B. Varnado, Esq. of Mt. Pleasant. Both Petitioner and Respondent were present in the courtroom but did not testify.

Upon careful consideration of the evidence and arguments of counsel, and for the reasons set forth herein, the Court DENIES the instant Petition and leaves the parties *status quo ante* pending final disposition of the Petitioner's July 28, 2014 Petition to set aside the Will of Helen B. Gunnells, as amended on April 16, 2015. At this time, the Court does not impose a bond on Respondent under S.C. Code Ann. § 62-3-603 herein.

PROCEDURAL HISTORY AND FACTUAL STATEMENT

Helen B. Gunnells ("Decedent") died testate on February 7, 2014 in Charleston County, South Carolina. She was the widow of the late Aiken A. Gunnells and mother of Respondent and

Petitioner – as well as a third adult child, Ms. Belinda Davis, who is not a party to these proceedings. Decedent executed a Last Will and Testament (“Will”) on July 3, 2013 which had been prepared by Suzanne Klock, Esq., of The Klok Law Firm, Mt. Pleasant. Therein, Decedent appointed Respondent as the Personal Representative of her Estate (“Estate”) and made him the sole beneficiary under the Will. The Will replaced the Decedent’s prior will of November 7, 2006 (“Standby Will”).

The Court appointed Petitioner as the Personal Representative of the Estate on February 25, 2014 following his filing of the *Application for Informal Probate of Will of Helen B. Gunnells* and *Information to Heirs and Devisees*, on the same date and incorporated herein by reference. On April 10, Petitioner filed *Affidavit of Publication* evidencing notification to all creditors of the Estate administration. The *Inventory and Appraisement* was dated April 16, 2014 and filed April 20, 2014.

Erroneously, the *Inventory and Appraisement* did not identify any household items or personal property of the Decedent. As of the time of the hearing, the inventory had not been supplemented pursuant to S.C. Code Ann. § 62-3-708. The only significant Estate asset was the Decedent’s residence located at 1931 Capri Drive, Charleston, South Carolina 29407 (“Residence”).

With respect to the Residence, Respondent was the sole devisee and the Will specifically authorized Respondent to sell it. Accordingly, Respondent executed a *Deed of Distribution* on April 16, 2014 to himself. This Deed was not recorded in the Charleston County RMC office, however, until July 28, 2014.

On that same day (July 28, 2014), Petitioner filed a *pro se* petition to set aside the Will in this Court, which was served on Respondent on August 16, 2014 by Affidavit of Service filed with this Court on August 18, 2014.

Respondent subsequently listed and entered into a contract with Charles Medlock Proctor and Stacey Erin Jefferson (“Buyers”), who selected the local firm of Weeks & Irvine to handle the closing. The closing took place on November 25, 2014 with a sales price of \$495,777.00. The proceeds from the sale of the Residence were used to satisfy a three-hundred thousand dollar (\$300,000.00) reverse mortgage attached to the property, and Respondent received the balance after closing costs. Respondent ultimately purchased a new home using some of the proceeds as well as his own funds.

Petitioner served discovery relative to the petition to set aside on November 13, 2014, which Respondent’s counsel answered on January 20, 2015 after being retained by Respondent. Petitioner took no further substantive action until April 16, 2015, when her new counsel filed the instant Petition [as well as amended petition to set aside the Will]. In the instant Petition, Petitioner listed the following as possible reasons for removal:

“Petitioner is informed and believes that the Estate of Helen B. Gunnells may have claims against Glenn A. Gunnells, individually, for causes of action including but not limited to the following: (a) failure to provide and administer medications as prescribed after having undertaken the care of the decedent, Helen B. Gunnells; (b) breach of fiduciary duty that Glenn A. Gunnells owed to Helen B. Gunnells by virtue of a Power of Attorney which she had given to him.” ¶ 4, Petition for Removal.

“Petitioner is informed and believes that Glenn A. Gunnells as Personal Representative cannot effectively represent the Estate of Helen B. Gunnells in an investigation of and potential action against himself.” ¶ 5, Petition for Removal.

“Due to a potential action against the Respondent, the Petitioner is informed and believes that there exists a cause for concern that the Estate will not be properly or effectively preserved by the Respondent . . .” ¶ 6, Petition for Removal.

At the Removal Hearing, Petitioner failed to present any arguments to support paragraphs 4 and 5 of the Petition. As such, Petitioner has abandoned those arguments and they are considered waived.

To support Petitioner's sole remaining claim under the Petition for Removal, that "there exists a cause for concern that the Estate will not be properly or effectively preserved by the Respondent," Petitioner presented one witness at the Removal Hearing – Ms. Robin Ciaccio, Esq. – attorney for the Buyers of the Residence.

LEGAL AUTHORITIES

Under S.C. Code Ann. § 62-3-611(a), "[a] person interested in the estate may petition for the removal of the personal representative for cause at any time." Under S.C. Code Ann. § 62-3-611(b):

Cause for removal exists when removal would be in the best interests of the estate, or if it is shown that a personal representative or the person seeking his appointment intentionally misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the court, has become incapable of discharging the duties of his office, or has mismanaged the estate or failed to perform any duty pertaining to the office. Unless the decedent's will directs otherwise, a personal representative appointed at the decedent's domicile, incident to securing appointment of himself or his nominee as ancillary personal representative, may obtain removal of another who was appointed personal representative in this State to administer local assets.

However, there is a strong deference shown by the Courts to the personal representative chosen by the testator. *Church v. McGee*, 391 S.C. 334, 343-44, 705 S.E.2d 481, 486 (Ct. App. 2011).

"The Courts have ever been reluctant to take the management of an estate from those to whom it has been confided by the testator, for to that extent the intention expressed in his will would be defeated. **The power to remove a personal representative 'should be executed with great caution, and not at all,** unless it is made to appear to be necessary for the protection of the estate, to prevent loss or injury to it from misappropriation, maladministration or fraud."

Blackmon v. Weaver 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005) (declining to remove personal representative for failing, *inter alia*, to collect a \$70,000.00 debt of the estate).

In *Church v. McGee*, the Court of Appeals held that in the absence of credible evidence of malfeasance on the part of personal representative it will affirm a decision to reject a petition under S.C. Code Ann. § 62-3-611(b). 391 S.C. at 344, S.E.2d at 486 (declining to remove personal representative, *inter alia*, after he paid capital account value to buy decedent's interest in a real estate partnership which he later sold for more value). In *Blackmon v. Weaver*, the Court of Appeals similarly ruled that a “showing of fault” is a prerequisite for a petition to remove the personal representative. 366 S.C. at 251-252, 621 S.E.2d at 45 (“[w]ithout a showing of fault, the court will not remove a personal representative simply because the parties do not get along”).

This requirement of a showing of malfeasance/fault by the personal representative resulting in injury to the estate is consistent with the pre-South Carolina Probate Code case law, where the Supreme Court held: “[i]n the absence of any allegation or proof of any wrongful act or omission on his part, which has resulted in loss or injury to the estate, or that there is any real danger of such loss or injury, the court was not warranted in taking from him the rights conferred upon him by the testatrix and by the law, under his appointment as executor.” *Smith v. Heyward*, 115 S.C. 145, 164-165, 105 S.E. 275, 282-283 (1920). *Smith* continues to be cited with approval nearly 100 years later. *Church*, 391 S.C. at 344, S.E.2d at 486; *Blackmon*, 366 S.C. at 251-252, 621 S.E.2d at 45.

In South Carolina, an action to remove a personal representative is considered to be equitable in nature. *Blackmon v. Weaver*, 366 S.C. at 246, 621 S.E.2d at 43; *Dean v. Kilgore*, 313 S.C. 257, 259, 437 S.E.2d 154, 155 (Ct. App. 1993). When sitting in equity, “[c]ourts have the inherent power to do all things reasonably necessary to ensure that just results are reached to the

fullest extent possible.” *Buckley v. Shealy*, 370 S.C. 317, 323–24, 635 S.E.2d 76, 79 (2006); *see also Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 252, 715 S.E.2d 348, 354 (Ct. App. 2011).

In the *Regions Bank v. Wingard Properties* case, the Court of Appeals held:

The notion “equity looks to substance rather than form” evolved out of judicial regard for that which ought to be done. This maxim applies by “dispensing with pure formalities which would otherwise defeat the equity.” When applying this principle, courts look to the substance and intent of the parties, and give a construction consistent with such intent.

394 S.C. at 252, 715 S.E.2d at 354.

The decision to grant equitable relief is in the sound discretion of the trial judge. *Straight v. Goss*, 383 S.C. 180, 207, 678 S.E.2d 443, 458 (Ct. App. 2009). When a court is sitting in equity, and thus viewing evidence for its preponderance, it should “consider the equities of both sides, balancing the two to determine what, if any, relief to give.” *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005). When providing an equitable remedy, the Court may not ignore statutes, rules and other precedent – i.e. equity follows the law. *Wingard Properties*, 394 S.C. at 254, 715 S.E.2d at 355. However, in any event: “[a] judgment or decree, whether in law or equity, must accord with and be warranted by the pleadings and proof of the party in whose favor it is rendered. *Wingard v. Lee*, 287 S.C. 57, 62, 336 S.E.2d 498, 501 (Ct. App. 1985).

CONCLUSIONS OF LAW

After reviewing the evidence, weighing the credibility of the witness and the evidence, considering the arguments of counsel and reviewing the law, I make the following findings of fact and conclusions of law.

1. Administration of Creditors’ Claims.

The first ground alleged by Petitioner at the hearing as justification to remove Respondent

as personal representative is his purported failure to satisfy creditor claims.

The Court records show that five (5) credit card companies filed notices of claims in the total amount of \$17,415.78 in unsecured debt owed by the Decedent. No other creditors filed claims and the time to file creditor claims has lapsed. Petitioner does not challenge the sufficiency of the *Affidavit of Publication* nor has she demonstrated the existence of additional creditors with valid claims against the Estate. By order of July 15, 2015, this Court extended the filing deadlines for this Estate until August 15, 2015. Counsel for Respondent, as an officer of the Court, represented that four (4) of the claims had been allowed and compromised with the creditors; one (1) claim was disallowed due to the inability to locate the creditor, but Respondent's counsel averred that she had attempted to contact the creditor and was holding in her IOLTA account a sum sufficient to fully satisfy that last credit card company should it contest disallowance. Respondent's counsel further advised that she filed the Allowance/Disallowance forms with this Court and was waiting on Satisfaction.

Petitioner's counsel did not contest the resolution of the creditor claims, nor take exception to the statements of Respondent's counsel. Instead, Petitioner argued that the creditor claims has been resolved in an untimely manner. The Court is unpersuaded by this argument primarily because of the extension granted on July 15, 2015 and allowance/disallowance by the Court's deadline. Moreover, notwithstanding the extension, the Court is unpersuaded that any delay in resolution of the creditor claims reaches the level of maladministration, or resulted in prejudice to the Estate, the creditors or the Petitioner. In the absence of countervailing testimony or evidence from Petitioner, she has failed to prove there is any need to protect the Estate from any loss or injury resulting from the Respondent's administration of the creditor claims. I specifically find no malfeasance or willful misconduct on the part of Respondent with respect to the creditors, or any

cause under § 62-3-611(b).

Accordingly, in the absence of malfeasance or prejudice vis-à-vis the administration of creditor claims, and considering the equities of both sides, this Court finds that the Petitioner has not made a showing her burden on her first ground. *Church v. McGee*, 391 S.C. 334, 343-44, 705 S.E.2d 481, 486 (Ct. App. 2011); *Blackmon v. Weaver* 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005); S.C. Code Ann. § 62-3-611(b); *Anderson v. Buonforte*, 365 S.C. 482, 493, 617 S.E.2d 750, 755 (Ct. App. 2005).

2. Title Issues as to the Residence and Failure to Escrow Closing Funds

The second ground alleged by Plaintiff at the hearing as compelling Respondent's removal as personal representative is based on the allegation that his conduct resulted in conveying faulty title to the Buyers of the Residence, and that he was required to escrow closing funds in an Estate Account. The Court is unpersuaded by these argument for the following reasons.

The Buyers' current attorney, Robin Ciaccio, Esq. of Conway, S.C., testified that her clients could not obtain title insurance through her agency relationship with Fidelity Title Insurance, for a home-equity type loan for renovations at the Decedent's former Residence. While the Buyers had been able to borrow some money unsecured from a bank in Conway, they could not borrow more without title insurance. Ms. Ciaccio explained that she could not convince Fidelity to write a title policy because (i) there was a need for Quit-Claim Deeds from Petitioner and Ms. Belinda Davis (the non-party sister) arising out of pre-Estate transfers between the Decedent and her late husband; and (ii) because of the cloud caused by the Petition to set aside the will. Under cross-examination, Ms. Ciaccio conceded several salient facts:

- the sale of the Residence was performed by a competent local law firm selected by her clients, who were in a dual representative capacity at the time of closing as consistent with common real estate closing practice;

- her clients purchased title insurance at closing through a reputable title insurance carrier, Stewart Title, whom she had made a claim against on their behalf but had not heard back from;
- she had never contacted Weeks & Irvine, nor reviewed that firm's file or title work;
- notwithstanding the foregoing fact, she conceded that the fact that the property was transferred via a chain of title including the Deed of Distribution would have been known and readily apparent at the time of the closing;
- she had not requested that Stewart Title to extend title insurance coverage for her client, nor sought out the closing attorney (Ray Smith, Esq.) to apply to Stewart for the same [because as she explained, she only wrote Fidelity policies and her clients had instructed her not to seek title insurance elsewhere];
- that she had not specifically asked Fidelity to reconsider their coverage denial based on the applicability of S.C. Code Ann. § 62-3-910(b).

It should be noted that Ms. Ciaccio did not opine to any maladministration or mishandling of the sale by Glenn Gunnells, his realtor or the closing attorney. Ms. Ciaccio's testimony did not mention any cause for removal of Respondent as the personal representative (in fact no witness testified to that effect).

While the Court is not unsympathetic to the Buyers predicament, their problems are not the responsibility of Respondent as a matter of law or equity. Under S.C. Code Ann. § 62-3-101, real property devolves to the person named as the devisee of the Decedent's last will – which under the Will is Respondent. Moreover, S.C. Code Ann. §§ 62-3-711(a), (b) and (c) together provide that a personal representative “has the same power over the title to property of the estate that an absolute owner would have” and if the Will permits, may sell the property to a purchaser for value, with that purchaser taking title clear of any claims pursuant to S.C. Code Ann. § 62-3-910(b).

Because the Buyers are protected by S.C. Code Ann. § 62-3-910(b) and the sale of the Residence was entirely lawful under the Probate Code, any title “deficiencies” which the Buyers face are not grounds to remove Respondent. Therefore, I find no malfeasance or maladministration

on the part of Respondent toward the Buyers, nor cause under § 62-3-611(b), arising out of the sale of the Residence to the Buyers. *Church v. McGee*, 391 S.C. 334, 343-44, 705 S.E.2d 481, 486 (Ct. App. 2011); *Blackmon v. Weaver* 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005); S.C. Code Ann. § 62-3-611(b).

The Court rejects Petitioner's argument that Respondent failed in some duty to "pass clear title" under the facts at bar. First, it is unsupported by any case law or citation to authority; to the extent Ms. Ciaccio testified to a duty to pass clear title, that is an improper legal opinion. Second, she offers no compelling argument that clear title was not passed, or that any error in that regard does not lie with current and past counsel. Finally, the Will permitted the sale; applying rules of testamentary and statutory construction, under the Will and Probate Code, Respondent is in full legal compliance with his obligations and rights as devisee and Personal Representative. *Dreher v. Dreher*, 370 S.C. 75, 80-81, 634 S.E.2d 646, 648-649 (2006)("[t]he words of the statute must be given their plain and ordinary meaning without resorting to subtle or forced construction to limit or expand the statute's operation"); *May v. Riley*, 279 S.C. 248, 250, 305 S.E.2d 77, 78 (1983)(holding that in construing a will, the purpose of the courts is to discover and give effect to the intent of the testator). The closing was handled by a reputable, local law firm, selected by the Buyers, and who furnished title insurance to them.

Petitioner's counsel further argued that the Respondent should have held the proceeds of the sale of the Residence in an Estate account. While this might be prudent practice, it is not mandated by the Probate Code. Thus, this Court finds no maladministration or malfeasance under § 62-3-611(b) on this ground, either, warranting Respondent's removal. *Church v. McGee*, 391 S.C. 334, 343-44, 705 S.E.2d 481, 486 (Ct. App. 2011); *Blackmon v. Weaver* 366 S.C. 245, 621 S.E.2d 42 (Ct. App. 2005); S.C. Code Ann. § 62-3-611(b).

Additionally, the equities do not favor Petitioner in advancing the argument that Respondent improperly handled the sale of the Residence. She never testified that she lacked notice of the listing or sale. She waited six (6) months after the closing on the Residence to file the instant Petition and argue alleged improprieties concerning the closing. Moreover, she failed to seek an order of restraint under S.C. Code Ann. § 62-3-607. She has shown little interest in seeking a hearing on the petition to set aside the will.

Finally, there is the issue that the Petitioner's entire argument is moot if she does not convince this Court that the Will should, in fact, be set aside. The Court has advised the parties it will set a hearing on that issue as soon as practical. As a matter of judicial economy it makes sense that the Court refrain from terminating the Respondent's appointment for cause, on such thin and unsubstantiated arguments, if the Court is not inclined to set aside the Will.

3. Issues with Inventory.

The third ground put forth by Petitioner in support of the Petition at bar is that Respondent erred in completing the Inventory and Appraisal by: (i) not including Decedent's personal property; and (ii) by failing to answer discovery questions relating to the Estate administration that were promulgated before this Petition was filed, as part of the Will contest.

With respect to the Inventory, the Court concludes that Respondent did err because S.C. Code Ann. § 62-3-706 obligated him to inventory the personal property. In spite of the foregoing, however, the Court declines to find this maladministration rises to the level of malfeasance that necessitates his termination. The Probate Code addresses the way this error can be easily corrected via S.C. Code Ann § 62-3-708 through filing of a supplemental inventory. Moreover, there was no testimony offered by Petitioner as to the value of any personal property unaccounted for, or whether she believes she has a personal claim to the same.

This failure of proof on the part of Petitioner is highly relevant. If there is no evidence regarding the value of the property, then Petitioner has not shown its value exceeded \$10,000.00 which would have required an order of the Court to dispose under S.C. Code Ann. § 62-3-711(b). If there is undisposed personal property that might lawfully go to Petitioner, then the Respondent is well within his three (3) years from the date of death to distribute it. S.C. Code Ann. § 62-3-101. In any event, under the Probate Code title to personal property goes to the Personal Representative for use is payment of creditor claims and administrative costs. S.C. Code Ann. §§ 62-3-101, 62-3-711. It might very well come to pass that the personal property is of such low value that it is less than the 5% fee allowed by § 62-3-719 or his expenses in defending Estate litigation under § 62-3-720. Accordingly, weighing the equities here, I find Respondent's failure to complete the Inventory correctly can and should be corrected by a Supplemental Inventory. However, it does not rise to a level of malfeasance that would warrant his termination under S.C. Code Ann. § 62-3-611(b). The same holds true for errors in the Non-Probate Inventory.

The Court is also mindful of the holding in *Gibson v. Belcher*, 287 S.C. 315, 318-319, 338 S.E.2d 330, 332-333 (1985), in which the Supreme Court cited with approval *Williams v. Mower*, 29 S.C. 332, 339, 7 S.E. 505, 507 (1888)) and the following holding:

"In the present case, the executor mistakenly failed to include the household goods in the inventory. As to unintentional errors or mistakes, the *Mower* case states, "It [the law] recognizes the liability [sic] of the best and most careful persons to make mistakes and omissions, and therefore we cannot say that an inventory returned under oath by an executor is so absolutely conclusive against the executor as to preclude him from offering evidence to show such errors."

Consequently, this Court takes the position that the South Carolina Courts will forgive administration errors that include failing to account for household goods, so long as the personal representative rectifies the same to the best of his ability. *Cf.* S.C. Code Ann. § 62-3-711

(permitting a personal representative to correct maladministration during pendency of petition to terminate him for cause).

With respect to the argument of Petitioner's counsel that Respondent "has done enough damage," the Court finds that rhetoric to be overheated. As to Respondent's discovery responses being inadequate, he would argue that any insufficiency, if any should exist, is not an adequate ground for removal as Petitioner could have moved to compel more definite answers; especially since no additional discovery was served with the instant Petition and the Respondent's discovery answers were entirely within the companion petition to set aside the Will.

The Court also finds the following matters salient to its decision to deny the instant Petition based on errors regarding the inventory.

First, the administration of the Estate is almost complete. Respondent, as Personal Representative, already furnished funeral costs and expenses, filed necessary paperwork, notified creditors, sold the Residence, paid off the reverse mortgage and other debts of the Estate and was wrapping up the Estate when the instant Petition was filed. Absent an Application for Settlement, which cannot be completed until after a final hearing on the Will Contest, there is nothing left to do with regard to the administration of the Estate. As such, removal of Glenn Gunnells as Personal Representative would serve no useful purpose at this time and would not be in the best interest of the Estate. This consideration is further grounds in support of my findings on Petitioner's first and second arguments.

Second, the instant Petition was filed fourteen (14) months after Decedent's death and a year after the Respondent filed the Inventory. As such, Petitioner's claim that Respondent failed to protect Estate assets is both untimely and self-serving. Petitioner essentially sat on her rights throughout the administration of the Estate only, at the final hour, to assert her possible claims,

which remain unfounded and unsubstantiated. She knew or should have known the Inventory did not include personal property but either (a) chose not to act; or (b) like Respondent did not understand the error. Either way, she should not be allowed to spring a trap on Respondent a year later. Under the case of *Reed v. South Carolina Nat'l Bank*, 293 S.C. 357, 360 S.E.2d 527 (Ct. App. 1987) – cited with approval as applicable in probate cases by the Court of Appeals in *Blackmon* – it is well within the court's discretion to find that by waiting nearly a year to raise this issue, the Petitioner waited too long. *Blackmon*, 366 S.C. at 251, 621 S.E.2d at 45.

Third, as with Petitioner's second argument, the Court is aware that concerns about failing to properly inventory the Decedent's household items – even if easily correctable – is moot if the Petitioner cannot prevail in setting aside the Will. Moreover, the Court is faced with the fact that by arranging to have the instant Petition heard first (and separately) from her petition to set aside the Will, the Court cannot consider at this time that the Will is invalid. In fact, “[i]t is the settled law of this state that when the formal execution of a will is admitted or proved, a prima facie case in favor of the will is made out, and that, as a general rule, the burden is then on the contestants to prove undue influence, incapacity or other basis of invalidation, and such burden remains upon the contestants throughout (emphasis added)”. *In Re Last Will and Testament of Smoak*, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985); *Byrd v. Byrd*, 279 S.C. 425, 426-427, 308 S.E.2d 788, 789 (1983). A court may not “by judicial construction make a will for the decedent that he has not made for himself.” *Guaranty Bank & Trust Co. v. Byrd*, 287 S.C. 96, 99, 337 S.E.2d 231, 233 (Ct.App.1985). Because the will contest is not before the court now, the Court must deem that the Will is *prima facie* valid now.

4. Additional Considerations.

In addition to the fact that the Will must be deemed *prima facie* valid, the Court finds the Petitioner has not met her burden of showing the necessity for a Special Administrator. This Court does not find it necessary to appoint a Special Representative to preserve the Estate or insure its proper administration as per S.C. Code Ann. § 62-3-614(b) or that under these facts (and the fact the Estate is near completion), appointment of a Special Representative would promote speed and efficiency in the administration of this Estate, which is the purpose of the Probate Code. S.C. Code Ann. § 62-1-102(b)(3).

As to the allegations in the Petition which Petitioner did not advance at the hearing, or present any testimony or argument concerning, the Court considers them abandoned and rejects them as proper grounds to terminate Respondent's appointment.

CONCLUSION

For the reasons hereinabove set forth, this court finds the *status quo* should be maintained as it is in the best interest of the Estate that Petitioner shall remain the Personal Representative of the Estate. There is no need for the appointment of a Special Administrator for the reasons set forth above.

AND IT IS SO ORDERED.

The Honorable Irvin G. Condon
Probate Judge

_____, 2015
Charleston, South Carolina

STATE OF SOUTH CAROLINA)
 :
 COUNTY OF CHARLESTON)

IN THE PROBATE COURT
 Case No.: 2014-ES-10-202-2

IN RE: ESTATE OF HELEN B. GUNNELLS)

Cathy G. Harkness,
 Petitioner,
 v.
 Glenn A. Gunnells, individually and as
 Personal Representative of the Estate of
 Helen B. Gunnells,
 Respondent.

ORDER VOIDING THE LAST WILL
 & TESTAMENT DATED JULY 3, 2013
 AND ADMITTING THE LAST WILL
 & TESTAMENT DATED
 NOVEMBER 7, 2006 TO PROBATE

Trial Dates: March 1st – 3rd, 2016
Presiding Judge: Irvin G. Condon
Petitioner: Cathy G. Harkness
Petitioner's Attorneys: Donald H. Howe, Esq., Julie C. Jackson-Bailey,
 Esq., and Michelle J. Weil, Esq.
Respondent: Glenn A. Gunnells
Respondent's Attorneys: Alexis M. Wimberly, Esq. and Robert B.
 Varnado, Esq.
Court Reporters: Trisha Rarick and Judy W. Galuppo
 Magna Legal Services

THIS MATTER came before the Court on Petition filed by Petitioner, Cathy G. Harkness, alleging that Respondent, Glenn A. Gunnells, exercised undue influence over his mother, Helen B. Gunnells (the "Testatrix"), when she executed a Last Will & Testament on July 3, 2013 that left her entire estate to the Respondent. The July 3, 2013 Will revoked a former Last Will and Testament dated November 7, 2006, by which the Testatrix devised her estate to her husband if he survived her, and then to her three (3) children in equal shares.

Present at the trial was Petitioner, along with her attorneys, Donald H. Howe, Esq., Julie C. Jackson-Bailey, Esq., and Michelle J. Weil, Esq. Respondent was also present, along with his

attorneys, Alexis M. Wimberly, Esq. and Robert B. Varnado, Esq. The Court heard opening and closing arguments and testimony from several witnesses. Based on the file, the exhibits entered into evidence during the trial, the testimony, and the arguments presented by counsel, the Court finds by clear and convincing evidence that the Testatrix was under undue influence when she made and executed the July 3, 2013 Will.

FACTS

The Testatrix, Helen B. Gunnells and her husband, Aiken Arden Gunnells, were married for many years. There were three (3) children born of their union, namely: Cathy G. Harkness, Belinda G. Davis, and Glenn A. Gunnells. In approximately April of 2012, Mr. Arden Gunnells was diagnosed with cancer. In approximately March of 2013, the Respondent moved in to Helen and Arden Gunnells' home to help care for them. Mr. Arden Gunnells died on June 8, 2013.

On July 3, 2013, the Testatrix executed the Will, which is the subject of this action. The lawyer who prepared the July 3, 2013 Will was Susanne Klok, Esq. Attorney Klok was Respondent's attorney, having served as his closing attorney in connection with the sale of his home on June 7, 2013 (only 22 days prior to the execution of the Will in dispute). The testimony revealed that the Testatrix only met with Attorney Klok on the one (1) occasion on July 3, 2013. The Respondent made the appointment with Attorney Klok, and he drove the Testatrix to and from the appointment. The Respondent left the building while Attorney Klok met with the Testatrix for approximately one and one-half (1½) to three (3) hours in total. The Testatrix also saw her primary care physician, Dr. Rhonda Chanson, on July 3, 2013, within a short time of her appointment with Attorney Klok.

The Respondent continued to live with his mother until she died on February 7, 2014.

SUMMARY OF THE DISPUTE

Petitioner contends that she had an active and loving relationship with her parents for many years, but this changed after Respondent moved in with them. Respondent began asserting more and more control over their parents, but most especially over the Testatrix after the death of her husband, Mr. Arden Gunnells. Petitioner alleges that Respondent told her not to call or visit her mother and that if she did, he would have her arrested for harassment. According to Petitioner, her mother remained isolated and controlled by Respondent thereafter, including her act of changing her will on July 3, 2013.

Respondent alleges that he cared for his mother, but did not exercise control over her. He contends that both parents became disenchanted with their daughters because they failed to help during their final illnesses and declines. He points out that Belinda Davis moved to Hawaii for a substantial period of time and returned to Charleston only a week before Mr. Arden Gunnells died. According to Respondent, the Testatrix resented the girls' lack of care and concern, so she changed/executed the July 3, 2013 Will of her own free will.

THE EVIDENCE PRESENTED

Petitioner's first witness was the Testatrix's brother, Jack Brantley. 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).

Mr. Brantley testified that he and his sister had a very close relationship throughout their lives. They visited several times each year and talked often/several times weekly. Mr. Brantley said he experienced a noticeable change in the openness and substance of communication he had

with his sister after her husband died and while Respondent was caring for her. (Tr. Vol. I, p. 18, lines 2-11; p. 41, lines 8-21; p. 45, lines 12-13). Because of his concern, he made himself available to be contacted by the Department of Social Services ("DSS") when Petitioner expressed to him she was consulting DSS about her concerns for her mother. This assertion was confirmed by his email dated July 22, 2013 (Petitioner's Exhibit 2).

Mr. Brantley confirmed that from his perspective, Petitioner and Ms. Davis both had good relationships with their parents, especially Cathy. (Tr. Vol. I, p. 24, lines 4-23). He identified Petitioner as being particularly active in the care of her parents over the years. He also testified about the following factors that were relevant to the Court's analysis of the overall dispute:

1) After Arden Gunnells died, Mr. Brantley noticed that his sister "...was very hesitant to talk to me", which was a dramatic change in the way that they had formerly communicated. (Tr. Vol. I, p. 18, lines 8-9).

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

3) That he (Mr. Brantley) spoke to Respondent Glenn Gunnells about Cathy and Belinda visiting and helping Testatrix and that Respondent made it clear (on more than one occasion), "he didn't want them there." (Tr. Vol. I, p. 38, line 17).

4) Sometime after Mr. Arden Gunnells' death, he spoke to the Testatrix by phone and suggested she call Petitioner about a surgery that the Petitioner had on her leg to remove a cancerous growth. The Testatrix's response was, "I'll ask Glenn." (Tr. Vol. I, p. 41, lines 5-7).

5) Shortly after Mr. Arden Gunnells' cancer diagnosis, Mr. Brantley spoke with Respondent about the demands of caring for his parents. Mr. Brantley pointed out to the

Respondent that he would have the help of his sisters. Respondent's response was "that will never happen." (Tr. Vol. I, p. 27, lines 18-19).

6) Mr. Brantley directly contradicted Respondent's assertion that Mr. Brantley heard the Testatrix discuss changing her Will because of her disappointment with the care and affection shown by the girls. (Tr. Vol. I, p. 46, lines 18-22).

7) Mr. Brantley was familiar with the contents of Testatrix's earlier Will which divided the estate equally among the 3 children but was never aware of the July 3, 2013 Will until after his sister died. (Tr. Vol. I, p. 23, lines 1-4; p. 47, lines 18-22).

Petitioner's second witness Helen Carroll appeared by way of video deposition. Helen Carroll was one of the Testatrix's best friends and knew her for over forty (40) years. They spent lots of time together over the years, communicated often, and had a very close relationship. The nature of this relationship was confirmed by the Respondent.

Ms. Carroll confirmed that Petitioner had an active and close relationship with her mother for many years. Most importantly, Ms. Carroll's testimony concerned a visit she had with the Testatrix sometime after Mr. Arden Gunnells passed away. According to Ms. Carroll, she dropped by unannounced to visit the Testatrix, and the Respondent was not home. Ms. Carroll testified that during this visit without the Respondent's presence, the Testatrix confirmed that she had changed her Will, but that she had not wanted to do so. The Testatrix confided in Ms. Carroll that the Respondent made her change her Will. Helen said to Ms. Carroll, "I had no choice." (D. p. 18, lines 8-25). Ms. Carroll also testified that when Respondent returned home, the Testatrix "clammed up." (D. p. 20, lines 1-2).

Contrary to Respondent's testimony, Ms. Carroll testified that she was never left alone with the Testatrix to visit except for the one unannounced visit when the Respondent was not

home. She also related that she stopped visiting because she felt that her reception had become “cold” and unwelcoming, which contradicted Respondent’s assertion that Ms. Carroll stopped visiting the Testatrix because of her own health concerns and inability to drive. (Tr. Vol. III, p. 20, lines 1-11). It also contradicted his testimony on direct examination about what good terms he and Ms. Carroll were on. (Tr. Vol. II, p. 119, lines 7-11).

Lastly, Ms. Carroll testified that she knew Glenn to have an alcohol problem because she noticed that he would “slur his words” when talking. (D. p. 30, lines 17-23).

Petitioner next offered excerpts from the deposition of the Respondent, Glenn A. Gunnells. The excerpts confirmed that he had a “confidential relationship” with the Testatrix; that he agreed that Helen Carroll was a very close, personal friend of the Testatrix; and that he had been living on social security disability payments since the year 2000.

Petitioner’s third witness was the Testatrix’s oldest child, Belinda G. Davis. Ms. Davis is a high school graduate. She has worked in her former husband’s construction business, at the Medical University of South Carolina for the head of neurosurgery department, and as an assistant to the North Charleston Mayors, Bobby Kinard and Keith Summey for 13 years. (Tr. Vol. I, p. 55, lines 1-3; p. 57, lines 1-17).

Ms. Davis testified that all of the siblings had generally good relationships with their parents throughout the years. Once her father was diagnosed with cancer in the spring of 2012, all three children worked as a “team” to help with various needs of the parents. (Tr. Vol. I, p. 59, lines 6-16). She stated that the Petitioner was living in Myrtle Beach at the time of the cancer diagnosis, but that Petitioner quickly moved back to Charleston to help with her parents. (Tr. Vol. I, p. 60, lines 4-21). Petitioner also sold her car, a Corvette, and purchased another vehicle that was easier for her mother to get in and out of.

Ms. Davis described her brother, the Respondent, as a "control freak," an alcoholic, substance abuser, and a "user of people." She produced an email from Respondent authored in May of 2012, which was introduced as Petitioner's Exhibit 4 which stated: "Let it be known nothing will be signed or initialized 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." According to Ms. Davis, this email originated when she tried to add her name and Petitioner's name to a visitation and information access list at the hospital where her father was receiving chemotherapy. (Tr. Vol. I, p. 66, lines 1-17; p. 67, lines 1-17).

(Respondent later testified the email was for both Petitioner and Ms. Davis to advise them to stay out of the parents' financial affairs and not to do anything without his input because he had power of attorney. Of note, and contrary to his assertion, is that the email is addressed solely to Belinda.)

Ms. Davis testified that of the three children, the Petitioner had generally been the most active in terms of helping their parents over the years. For example, she stated that Petitioner had painted the house, often took their mother to the doctor, cooked, cleaned, bought groceries, etc. (Tr. Vol. I, p. 62, lines 3-17).

Ms. Davis herself had not been as active in her parents' lives and, indeed, left Charleston in October of 2012 to live with her son and daughter-in-law in Hawaii upon the birth of their first child. Ms. Davis provided day care to the newborn so her daughter-in-law could continue working as a schoolteacher. She returned to Charleston approximately one week before the children's father passed away. Ms. Davis related that while at the airport in Hawaii about to return to Charleston, she got a call from Petitioner saying she thought "something was going on" because she could not reach the Respondent or her parents. Ms. Davis called "Uncle Jack"

Brantley and discovered the children's father, Mr. Arden Gunnells, was in the hospital. (Tr. Vol. I, p. 64, lines 1-18; p. 65, lines 1-6). Respondent later testified that their father was in the hospital for approximately two (2) weeks prior to his death. (Tr. Vol. II, p. 165, lines 21-23). As such, Mr. Arden Gunnells was in the hospital for approximately one (1) week without either of his daughters being notified.

On June 26, 2013, Belinda Davis went by her mother's home to pick up her father's death certificate. The Respondent had told her it would be taped on the front of the house, which it was. Ms. Davis nevertheless knocked and rang the doorbell in an attempt to see her mother. At first, a home health nurse answered saying she could not come in. She attempted to push past the home health nurse, but Respondent intervened and she was denied entry. There is some dispute about how physical Respondent's intervention was, but all involved heard him threaten to call the police. (Tr. Vol. I, p. 68, lines 1-16; p. 69, lines 1-22).

Soon thereafter Petitioner and Ms. Davis sought guidance from the Charleston County Probate Court, DSS, and a local attorney regarding their mother's care. (Tr. Vol. I, p. 70, lines 8-17; p. 71, lines 4-17). Petitioner also sought help from Legal Aid. No legal actions were filed, however, primarily because of cost. (Tr. Vol. I, p. 71, lines 21-25).

Petitioner, Cathy G. Harkness, testified that she had a long and loving relationship with both her parents until this was thwarted by her brother, Glenn. She confirmed Ms. Davis' testimony that she quickly moved back to Charleston from Myrtle Beach, South Carolina when she heard that Mr. Arden Gunnells had been diagnosed with cancer, and that she sold her Corvette to better accommodate her mother when she took her to various doctors. (Tr. Vol. I, p. 102, lines 7-22).

Petitioner detailed a variety of projects she had performed for her parents over the years. She was clearly familiar with her mother's physicians. She also detailed several trips she took her mother and Helen Carroll on. (Tr. Vol. I, p. 97, lines 1-14; p. 98, lines 1-15; p. 101, lines 1-6).

Like Ms. Davis, the Petitioner asserted that she and Ms. Davis focused more on the care of their mother while Respondent helped transport Mr. Arden Gunnells to his chemotherapy appointments. However, things took a dramatic turn on June 11, 2013 when Respondent told the Petitioner not to call or visit their mother anymore and that he would have her arrested for "harassment" if she attempted contact. (Tr. Vol. I, p. 107, lines 9-12).

Petitioner confirmed Ms. Davis' testimony regarding the incident at the Gunnells' home on June 26, 2013. She was present for the incident, but she was in the car and was not an active participant. After the confrontation, she and Ms. Davis accompanied each other to the Probate Court, DSS, and a local attorney's office to discuss what could be done to gain access to their mother. As stated previously, Petitioner also sought help from Legal Aid. (Tr. Vol. I, p. 108, lines 9-24).

In June 2013, Petitioner made several attempts to have returned to her a variety of personal items that had been at her mother's home. Apparently unsuccessful, she wrote a letter on June 27, 2013 threatening legal action. In July 2013, Jack Brantley tried to mediate a peaceful exchange with the Petitioner and the Respondent. However, this attempt failed, and Petitioner was forced to file a claim and delivery action in Small Claims Court. She ultimately prevailed on this action. (Tr. Vol. I, p. 114).

On cross-examination, Respondent's attorneys introduced two (2) letters written by the Petitioner. The first was a letter dated 2010 to her father. The second was a birthday card

(undated, but written approximately on or about October 8, 2013) to her mother. (Tr. Vol. I, p. 133, lines 4-5).

The letter to her father evidences a rift about an incident in which their father called the Petitioner a “disgrace.” Petitioner responded with a long list of accusations about Respondent. While the evidence shows there was certainly a rift of sorts between the Petitioner and her father, there is nothing to suggest that it was anything but a temporary blow up. The letter was written in 2010, approximately two and one-half (2½) years before the death of Mr. Arden Gunnells. There is no other evidence of bad blood between Petitioner and Mr. Arden Gunnells until his death. Significantly, Mr. Arden Gunnells never changed his Last Will & Testament to exclude the Petitioner, and there was no evidence offered that he ever even considered doing so over the next two and one-half to three (2½-3) years before his death.

Read as a whole, Petitioner’s letter to her mother reflects her desire to reach out and renew contact with her mother. This letter, coupled with the contacts made to the Probate Court, DSS, and the local attorney, pointedly contradict Respondent’s assertion that the Petitioner essentially abandoned her mother.

With the testimony of Cathy Harkness, the Petitioner rests her case.

Although the Respondent testified last on rebuttal, the Court will begin with evaluating his testimony. Respondent went through the eighth grade, but dropped out in the ninth. He later obtained his GED and attended some courses at Trident Technical College. He has worked as a heavy equipment operator and also as a car salesman, but he began receiving social security disability benefits in approximately the year 2000. He testified that he receives approximately \$1,350-\$1,500 per month on disability, depending on whether or not prescription insurance is deducted. (Tr. Vol. II, p. 97, line 5; p. 99, lines 1-22).

Respondent's position is that the Petitioner and Ms. Davis essentially deserted their parents and refused to provide aid despite Respondent's request for help. (Tr. Vol. II, p. 133, lines 20-24; p. 153, lines 16-25). According to Respondent, this status was well-known within the family and openly discussed as a motive for their mother wanting to change her Will. He identified Jack Brantley as one of the people present for such discussion. Mr. Brantley would certainly seem to be a natural choice because of his close relationship with his sister, Helen Gunnells. Mr. Brantley, however, did not testify that any such discussion ever took place. Respondent identified other potential witnesses to that or similar discussions, but no one testified to that fact. On cross-examination, Respondent admitted he had no emails, notes, etc., in which he requested help from either sister.

Respondent acknowledged that Susanne Klok had been his closing attorney on June 6, 2013, and that Attorney Klok had no relationship with Helen Gunnells prior to the Testatrix changing her Will. Notably, at his deposition Respondent testified that the Testatrix met with Attorney Klok two (2) or three (3) times for thirty to forty (30-40) minutes each time prior to executing the new Will. Yet at trial, after Attorney Klok testified that she only met with Helen Gunnells one (1) time, Respondent changed his testimony to be in accordance with Attorney Klok. He confirmed that he made the appointment for his mother and drove her to and from the appointment. He waited outside the building while discussions about the new Will took place.

Respondent denied limiting access to his mother, and to the contrary, stated he asked other family members to encourage his sisters to step up and help. Although identified by Respondent, Mr. Brantley denied any such conversation. The only conversation along similar lines, according to Mr. Brantley, was when Mr. Brantley suggested the girls would be resources for help and Glenn responded, "that will never happen."

On the whole, it is undeniable that on those facts subject to corroboration or verification, Respondent's assertions fall short. The following examples are illustrative:

1) Respondent testified at his deposition that he took his mother to Susanne Klok two (2) or three (3) times for thirty to forty (30-40) minutes each time prior to the Testatrix executing the new Will. However, Attorney Klok testified there was only one (1) visit for two to three (2-3) hours. At trial, Respondent changed his testimony in accordance with Attorney Klok's testimony.

2) Respondent specifically testified that he asked Jack Brantley to ask the Petitioner and Ms. Davis for help with their mother. Mr. Brantley denied that conversation. Petitioner's Exhibit 2 generated on July 22, 2013 (well before this dispute) by Mr. Brantley contradicts Respondent's assertion as well.

3) Although currently still pending before this Court is a ruling on the Petition for Removal of the Respondent as Personal Representative. Petitioner has shown that the Respondent has breached his fiduciary duty as Personal Representative in as much as the Inventory and Appraisement was not adequately prepared; proceeds from estate "yard sales" were pocketed by the Respondent, and as such, are unaccounted for; Respondent sold the Gunnells' home and used the proceeds for his own benefit after this action to void the Will was filed; and he did not pay the creditors' claims in a timely manner as required by the statute. (Tr. Vol. II, p. 165, lines 1-12). In short, he has not administered the estate in an honest and forthright manner.

4) Respondent apparently told Dr. Rhonda Chanson he was having a hard time getting his mother in for appointments because of his "ongoing work schedule" when he was, in fact, out of work on full disability and had been since 2000. (Tr. Vol. II, p. 99, lines 10-25).

5) Additionally troubling is Respondent's failure to provide prescribed medications as directed to his mother, particularly Remeron, which was to improve Helen Gunnells' dementia. It appears this medication was not properly administered for the last several months of Mrs. Gunnells life. If the Testatrix was "weak minded", her ability to change or alter the Will, had she so desired, would have been hampered.

Although Respondent brought forward a number of witnesses to theoretically support his version of the facts, all of these witnesses knew the Testatrix only on a professional basis for a limited amount of time. Most notably, two (2) of the witnesses, Susanne Klok and her paralegal, Annmarie Voytko, only had contact with the Testatrix for a couple of hours. Respondent called two (2) home healthcare workers. One of the healthcare workers did not meet the Testatrix until five (5) months after the Will was changed. The healthcare workers confirmed that from their perspective, Glenn was an engaged and effective caregiver. They also confirmed that the Testatrix expressed resentment towards her daughters for failing to be available or help during her husband's final days. Jill Susan Costa testified about the confrontation with Ms. Davis in June 2013 when she tried to visit and Sharon Lee Wechter testified that the Testatrix expressed resentment in December 2013 about the Petitioner suing her. Lastly, the deposition of Dr. Rhonda Chanson was introduced without objection. Dr. Chanson became Helen Gunnells primary care physician in July 2012. Ms. Davis accompanied her to that first visit. Dr. Chanson saw the Testatrix on July 3, 2013, the same day she executed the disputed Will. While Dr. Chanson opined that the Testatrix was competent, she also described her as "visibly upset," "crying," and "distracted." (D. p. 35, lines 12-24). This visit would have been within hours of the execution of the Will. She had no opinion as to whether the Testatrix was emotionally stable enough to consummate the Will on July 3, 2013. (D. p. 25, lines 21: "...I have no knowledge of

that”; p. 38, lines 1-4). Under cross-examination, she confirmed that a prescription for potassium was never filled (D. p. 57, line 14 - p. 59, line 3) and that there was a long delay between the first time she prescribed Remeron, a drug for dementia, and when it was ultimately filled (D. p. 48, lines 9-12; p. 50, line 14 – p.54, line 2; p. 61, lines 6-10).

DISCUSSION

Generally, when the formal execution of a Will is admitted or proved a *prima facie* case in favor of the Will is made out. Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982). The burden is on the contestant to prove undue influence by clear and convincing evidence. Havird v. Schissell, 166 S.E.2d 801, 804 (S.C. 1969). To prove undue influence, the contestant must show that the person’s influence over the testatrix must have been so great that it prevented the testatrix’s free judgment and choice. In re Estate of Anderson, 674 S.E.2d 176, 179 (S.C. Ct. App. 1976).

Courts often look to see if any of the following circumstances apply when deciding whether a testatrix was unduly influenced at the time her Will was executed: (1) an unjust distribution made to a beneficiary; (2) motive and opportunity by the beneficiary to influence the testatrix; (3) a confidential or fiduciary relationship between the testatrix and the beneficiary; and (4) the susceptibility of the testatrix to be unduly influenced. See e.g., Dixon v. Dixon, 608 S.E.2d 849 (S.C. 2005); Russell v. Wachovia Bank, N.A., 578 S.E.2d 329 (S.C. 2003); Hairston v. McMillan, 692 S.E.2d 549 (S.C. Ct. App. 2010); Howard v. Nasser, 613 S.E.2d 64 (S.C. Ct. App. 2005). However, when determining whether the testatrix was unduly influenced, all circumstantial evidence, meaning all circumstances surrounding the execution of the Will that indicate it is as though the Will was the product of another person rather than the product of the testatrix, is the critical component of evaluation. Howard, 613 S.E.2d at 67. In cases where

allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time or before the Will's execution. See Moorer v. Bull, 212 S.C. 146, 46 S.E.2d 681 (1948); Byrd v. Byrd, 279 S.C. 425, 308 S.E.2d 788 (1983). The existence of a fiduciary relationship between a testatrix and beneficiary raises a presumption of undue influence. Howard, 613 S.E.2d at 68-69.

The Petitioner asserts that the Respondent unduly influenced the Testatrix to leave her estate to him. She bases this allegation on the facts set out above. The circumstantial evidence in this case shows that the Respondent unduly influenced the Testatrix in the execution of the July 3, 2013 Will. It is undisputed that an unjust distribution was made to the Respondent, which is evidenced by Respondent receiving the entire estate in contrast to Testatrix's previous Will leaving her estate to her three (3) children in equal shares. There was ample motive and opportunity for the Respondent to unduly influence his mother. Respondent has a very limited income and money undoubtedly provides a motive. Further, the evidence shows that Respondent was living with Testatrix and made himself the sole caretaker of the Testatrix, which provided him ample opportunity to unduly influence his mother. Various instances were identified where the other children and friends of the Testatrix were not permitted to speak to her on the telephone or to be alone with her in the home. Similar to Byrd, the Testatrix's conversations were monitored by the Respondent and he prevented her from seeing family members and friends; the Respondent controlled the Testatrix's finances; and instrumented the making of the new Will. Id. The evidence further shows there was both a confidential and fiduciary relationship between the Respondent and the Testatrix, which raises the presumption of undue influence. Respondent was not only his mother's Power of Attorney, he also had a fiduciary relationship with his mother, as evidenced by his living in the home, handling her affairs, and having his name added

to his mother's bank account. Finally, the Testatrix was susceptible to influence as she was isolated and completely reliant on Respondent based upon his refusal to allow her other children to assist in her care or her finances. Further, Respondent took her to change her Will days after her husband died and the evidence shows that the Testatrix was physically and mentally distraught immediately prior to the execution of the new Will.

Although the evidence shows the Respondent was not physically present in the room with the Testatrix and Attorney Klok during the execution of the new Will, the circumstances surrounding the execution clearly indicate the Will was the product of the Respondent and that the Testatrix felt that she "had no choice" but to execute a new Will. The new Will was not sealed when the Testatrix left the attorney's office and the Respondent had unfettered access to this Will after its execution. Further, the Testatrix was not provided with an opportunity to change the July 3, 2013 Will after its execution. The undisputed evidence shows that she was reliant on the Respondent for everything, including her transportation.

CONCLUSION

Based on the file, the exhibits entered into evidence during the trial, the testimony, and the arguments presented by counsel, the Court finds by clear and convincing evidence that the Testatrix was under undue influence when she made and executed the July 3, 2013 Will, and it is therefore invalid.

Based upon the foregoing, it is now, hereby:

ORDERED, ADJUDGED, AND DECREED that the evidence in this case is sufficient to prove that Helen B. Gunnells' Last Will & Testament dated July 3, 2013 was the product of

undue influence exerted upon the Testatrix by the Respondent, Glenn A. Gunnells; and it is further

ORDERED, ADJUDGED, AND DECREED that the Last Will & Testament dated July 3, 2013 is null and void; and it is further

ORDERED, ADJUDGED, AND DECREED that Helen B. Gunnells' Last Will & Testament dated November 7, 2006 is of full force and effect; and it is further

ORDERED, ADJUDGED, AND DECREED that Glenn A. Gunnells has ten (10) days from his receipt of this Order to contest this Order by notifying the Court in writing, with proper filings, indicating his intent to appeal.

AND IT IS SO ORDERED!

IRVIN G. CONDON
Judge of Probate
County of Charleston

This ____ day of _____, 2016
Charleston, South Carolina.

STATE OF SOUTH CAROLINA)

IN THE PROBATE COURT

COUNTY OF CHARLESTON)

CASE NO.: 2014-ES-10-202-2

IN THE MATTER OF:)

HELEN B. GUNNELLS)

CATHY G. HARKNESS,)

Petitioner,)

CERTIFICATE OF SERVICE

vs.)

GLENN A. GUNNELLS, individually and)

as Personal Representative of the Estate of)

Helen B. Gunnells,)

Respondent.)

I, the undersigned, do hereby certify that on the 19 day of April 2016, I served a copy of the Petitioner's Proposed Order to Respondent by United States mail with the appropriate postage affixed thereto and addressed to the following:

Rob Varnado, Esquire
Alexis Wimberly, Esquire
Brown & Varnado, LLC
P. O. Box 1127
Mt. Pleasant, SC 29465

LAW OFFICES OF DONALD H. HOWE, LLC
818 Wappoo Road
Post Office Box 31324
Charleston, SC 29417
Phone: 843-225-2523
FAX: 843-225-2698
donaldhowelaw@gmail.com

By: Donald H. Howe
Donald H. Howe

STATE OF SOUTH CAROLINA)
)
COUNTY OF CHARLESTON)
)
IN RE: ESTATE OF HELEN B. GUNNELLS)
)
Cathy G. Harkness,)
)
Petitioner,)
)
v.)
Glenn A. Gunnells, individually and as)
Personal Representative of the Estate of)
Helen B. Gunnells,)
)
Respondent.)
_____)

IN THE PROBATE COURT
Case No.: 2014-ES-10-202-2

ORDER VOIDING THE LAST WILL
& TESTAMENT DATED JULY 3, 2013
AND ADMITTING THE LAST WILL
& TESTAMENT DATED
NOVEMBER 7, 2006 TO PROBATE

Trial Dates: March 1st – 3rd, 2016
Presiding Judge: Irvin G. Condon
Petitioner: Cathy G. Harkness
Petitioner's Attorneys: Donald H. Howe, Esq., Julie C. Jackson-Bailey,
Esq., and Michelle J. Weil, Esq.
Respondent: Glenn A. Gunnells
Respondent's Attorneys: Alexis M. Wimberly, Esq. and Robert B.
Varnado, Esq.
Court Reporters: Trisha Rarick and Judy W. Galuppo
Magna Legal Services

THIS MATTER came before the Court on Petition filed by Petitioner, Cathy G. Harkness, alleging that Respondent, Glenn A. Gunnells, exercised undue influence over his mother, Helen B. Gunnells (the "Testatrix"), when she executed a Last Will & Testament on July 3, 2013 that left her entire estate to the Respondent. The July 3, 2013 Will revoked a former Last Will and Testament dated November 7, 2006, by which the Testatrix devised her estate to her husband if he survived her, and then to her three (3) children in equal shares.

Present at the trial was Petitioner, along with her attorneys, Donald H. Howe, Esq., Julie C. Jackson-Bailey, Esq., and Michelle J. Weil, Esq. Respondent was also present, along with his

attorneys, Alexis M. Wimberly, Esq. and Robert B. Varnado, Esq. The Court heard opening and closing arguments and testimony from several witnesses. Based on the file, the exhibits entered into evidence during the trial, the testimony, and the arguments presented by counsel, the Court finds by clear and convincing evidence that the Testatrix was under undue influence when she made and executed the July 3, 2013 Will.

FACTS

The Testatrix, Helen B. Gunnells and her husband, Aiken Arden Gunnells, were married for many years. There were three (3) children born of their union, namely: Cathy G. Harkness, Belinda G. Davis, and Glenn A. Gunnells. In approximately April of 2012, Mr. Arden Gunnells was diagnosed with cancer. In approximately March of 2013, the Respondent moved in to Helen and Arden Gunnells' home to help care for them. Mr. Arden Gunnells died on June 8, 2013.

On July 3, 2013, the Testatrix executed the Will, which is the subject of this action. The lawyer who prepared the July 3, 2013 Will was Susanne Klok, Esq. Attorney Klok was Respondent's attorney, having served as his closing attorney in connection with the sale of his home on June 7, 2013 (only 22 days prior to the execution of the Will in dispute). The testimony revealed that the Testatrix only met with Attorney Klok on the one (1) occasion on July 3, 2013. The Respondent made the appointment with Attorney Klok, and he drove the Testatrix to and from the appointment. The Respondent left the building while Attorney Klok met with the Testatrix for approximately one and one-half (1½) to three (3) hours in total. The Testatrix also saw her primary care physician, Dr. Rhonda Chanson, on July 3, 2013, within a short time of her appointment with Attorney Klok.

The Respondent continued to live with his mother until she died on February 7, 2014.

SUMMARY OF THE DISPUTE

Petitioner contends that she had an active and loving relationship with her parents for many years, but this changed after Respondent moved in with them. Respondent began asserting more and more control over their parents, but most especially over the Testatrix after the death of her husband, Mr. Arden Gunnells. Petitioner alleges that Respondent told her not to call or visit her mother and that if she did, he would have her arrested for harassment. According to Petitioner, her mother remained isolated and controlled by Respondent thereafter, including her act of changing her will on July 3, 2013.

Respondent alleges that he cared for his mother, but did not exercise control over her. He contends that both parents became disenchanted with their daughters because they failed to help during their final illnesses and declines. He points out that Belinda Davis moved to Hawaii for a substantial period of time and returned to Charleston only a week before Mr. Arden Gunnells died. According to Respondent, the Testatrix resented the girls' lack of care and concern, so she changed/executed the July 3, 2013 Will of her own free will.

THE EVIDENCE PRESENTED

Petitioner's first witness was the Testatrix's brother, Jack Brantley. 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).

Mr. Brantley testified that he and his sister had a very close relationship throughout their lives. They visited several times each year and talked often/several times weekly. Mr. Brantley said he experienced a noticeable change in the openness and substance of communication he had

with his sister after her husband died and while Respondent was caring for her. (Tr. Vol. I, p. 18, lines 2-11; p. 41, lines 8-21; p. 45, lines 12-13). Because of his concern, he made himself available to be contacted by the Department of Social Services ("DSS") when Petitioner expressed to him she was consulting DSS about her concerns for her mother. This assertion was confirmed by his email dated July 22, 2013 (Petitioner's Exhibit 2).

Mr. Brantley confirmed that from his perspective, Petitioner and Ms. Davis both had good relationships with their parents, especially Cathy. (Tr. Vol. I, p. 24, lines 4-23). He identified Petitioner as being particularly active in the care of her parents over the years. He also testified about the following factors that were relevant to the Court's analysis of the overall dispute:

1) After Arden Gunnells died, Mr. Brantley noticed that his sister "...was very hesitant to talk to me", which was a dramatic change in the way that they had formerly communicated. (Tr. Vol. I, p. 18, lines 8-9).

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

3) That he (Mr. Brantley) spoke to Respondent Glenn Gunnells about Cathy and Belinda visiting and helping Testatrix and that Respondent made it clear (on more than one occasion), "he didn't want them there." (Tr. Vol. I, p. 38, line 17).

4) Sometime after Mr. Arden Gunnells' death, he spoke to the Testatrix by phone and suggested she call Petitioner about a surgery that the Petitioner had on her leg to remove a cancerous growth. The Testatrix's response was, "I'll ask Glenn." (Tr. Vol. I, p. 41, lines 5-7).

5) Shortly after Mr. Arden Gunnells' cancer diagnosis, Mr. Brantley spoke with Respondent about the demands of caring for his parents. Mr. Brantley pointed out to the

Respondent that he would have the help of his sisters. Respondent's response was "that will never happen." (Tr. Vol. I, p. 27, lines 18-19).

6) Mr. Brantley directly contradicted Respondent's assertion that Mr. Brantley heard the Testatrix discuss changing her Will because of her disappointment with the care and affection shown by the girls. (Tr. Vol. I, p. 46, lines 18-22).

7) Mr. Brantley was familiar with the contents of Testatrix's earlier Will which divided the estate equally among the 3 children but was never aware of the July 3, 2013 Will until after his sister died. (Tr. Vol. I, p. 23, lines 1-4; p. 47, lines 18-22).

Petitioner's second witness Helen Carroll appeared by way of video deposition. Helen Carroll was one of the Testatrix's best friends and knew her for over forty (40) years. They spent lots of time together over the years, communicated often, and had a very close relationship. The nature of this relationship was confirmed by the Respondent.

Ms. Carroll confirmed that Petitioner had an active and close relationship with her mother for many years. Most importantly, Ms. Carroll's testimony concerned a visit she had with the Testatrix sometime after Mr. Arden Gunnells passed away. According to Ms. Carroll, she dropped by unannounced to visit the Testatrix, and the Respondent was not home. Ms. Carroll testified that during this visit without the Respondent's presence, the Testatrix confirmed that she had changed her Will, but that she had not wanted to do so. The Testatrix confided in Ms. Carroll that the Respondent made her change her Will. Helen said to Ms. Carroll, "I had no choice." (D. p. 18, lines 8-25). Ms. Carroll also testified that when Respondent returned home, the Testatrix "clammed up." (D. p. 20, lines 1-2).

Contrary to Respondent's testimony, Ms. Carroll testified that she was never left alone with the Testatrix to visit except for the one unannounced visit when the Respondent was not

home. She also related that she stopped visiting because she felt that her reception had become "cold" and unwelcoming, which contradicted Respondent's assertion that Ms. Carroll stopped visiting the Testatrix because of her own health concerns and inability to drive. (Tr. Vol. III, p. 20, lines 1-11). It also contradicted his testimony on direct examination about what good terms he and Ms. Carroll were on. (Tr. Vol. II, p. 119, lines 7-11).

Lastly, Ms. Carroll testified that she knew Glenn to have an alcohol problem because she noticed that he would "slur his words" when talking. (D. p. 30, lines 17-23).

Petitioner next offered excerpts from the deposition of the Respondent, Glenn A. Gunnells. The excerpts confirmed that he had a "confidential relationship" with the Testatrix; that he agreed that Helen Carroll was a very close, personal friend of the Testatrix; and that he had been living on social security disability payments since the year 2000.

Petitioner's third witness was the Testatrix's oldest child, Belinda G. Davis. Ms. Davis is a high school graduate. She has worked in her former husband's construction business, at the Medical University of South Carolina for the head of neurosurgery department, and as an assistant to the North Charleston Mayors, Bobby Kinard and Keith Summey for 13 years. (Tr. Vol. I, p. 55, lines 1-3; p. 57, lines 1-17).

Ms. Davis testified that all of the siblings had generally good relationships with their parents throughout the years. Once her father was diagnosed with cancer in the spring of 2012, all three children worked as a "team" to help with various needs of the parents. (Tr. Vol. I, p. 59, lines 6-16). She stated that the Petitioner was living in Myrtle Beach at the time of the cancer diagnosis, but that Petitioner quickly moved back to Charleston to help with her parents. (Tr. Vol. I, p. 60, lines 4-21). Petitioner also sold her car, a Corvette, and purchased another vehicle that was easier for her mother to get in and out of.

Ms. Davis described her brother, the Respondent, as a "control freak," an alcoholic, substance abuser, and a "user of people." She produced an email from Respondent authored in May of 2012, which was introduced as Petitioner's Exhibit 4 which stated: "Let it be known nothing will be signed or initialized 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." According to Ms. Davis, this email originated when she tried to add her name and Petitioner's name to a visitation and information access list at the hospital where her father was receiving chemotherapy. (Tr. Vol. I, p. 66, lines 1-17; p. 67, lines 1-17).

(Respondent later testified the email was for both Petitioner and Ms. Davis to advise them to stay out of the parents' financial affairs and not to do anything without his input because he had power of attorney. Of note, and contrary to his assertion, is that the email is addressed solely to Belinda.)

Ms. Davis testified that of the three children, the Petitioner had generally been the most active in terms of helping their parents over the years. For example, she stated that Petitioner had painted the house, often took their mother to the doctor, cooked, cleaned, bought groceries, etc. (Tr. Vol. I, p. 62, lines 3-17).

Ms. Davis herself had not been as active in her parents' lives and, indeed, left Charleston in October of 2012 to live with her son and daughter-in-law in Hawaii upon the birth of their first child. Ms. Davis provided day care to the newborn so her daughter-in-law could continue working as a schoolteacher. She returned to Charleston approximately one week before the children's father passed away. Ms. Davis related that while at the airport in Hawaii about to return to Charleston, she got a call from Petitioner saying she thought "something was going on" because she could not reach the Respondent or her parents. Ms. Davis called "Uncle Jack"

Brantley and discovered the children's father, Mr. Arden Gunnells, was in the hospital. (Tr. Vol. I, p. 64, lines 1-18; p. 65, lines 1-6). Respondent later testified that their father was in the hospital for approximately two (2) weeks prior to his death. (Tr. Vol. II, p. 165, lines 21-23). As such, Mr. Arden Gunnells was in the hospital for approximately one (1) week without either of his daughters being notified.

On June 26, 2013, Belinda Davis went by her mother's home to pick up her father's death certificate. The Respondent had told her it would be taped on the front of the house, which it was. Ms. Davis nevertheless knocked and rang the doorbell in an attempt to see her mother. At first, a home health nurse answered saying she could not come in. She attempted to push past the home health nurse, but Respondent intervened and she was denied entry. There is some dispute about how physical Respondent's intervention was, but all involved heard him threaten to call the police. (Tr. Vol. I, p. 68, lines 1-16; p. 69, lines 1-22).

Soon thereafter Petitioner and Ms. Davis sought guidance from the Charleston County Probate Court, DSS, and a local attorney regarding their mother's care. (Tr. Vol. I, p. 70, lines 8-17; p. 71, lines 4-17). Petitioner also sought help from Legal Aid. No legal actions were filed, however, primarily because of cost. (Tr. Vol. I, p. 71, lines 21-25).

Petitioner, Cathy G. Harkness, testified that she had a long and loving relationship with both her parents until this was thwarted by her brother, Glenn. She confirmed Ms. Davis' testimony that she quickly moved back to Charleston from Myrtle Beach, South Carolina when she heard that Mr. Arden Gunnells had been diagnosed with cancer, and that she sold her Corvette to better accommodate her mother when she took her to various doctors. (Tr. Vol. I, p. 102, lines 7-22).

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Petitioner detailed a variety of projects she had performed for her parents over the years.

She was clearly familiar with her mother's physicians. She also detailed several trips she took her mother and Helen Carroll on. (Tr. Vol. I, p. 97, lines 1-14; p. 98, lines 1-15; p. 101, lines 1-6).

Like Ms. Davis, the Petitioner asserted that she and Ms. Davis focused more on the care of their mother while Respondent helped transport Mr. Arden Gunnells to his chemotherapy appointments. However, things took a dramatic turn on June 11, 2013 when Respondent told the Petitioner not to call or visit their mother anymore and that he would have her arrested for "harassment" if she attempted contact. (Tr. Vol. I, p. 107, lines 9-12).

Petitioner confirmed Ms. Davis' testimony regarding the incident at the Gunnells' home on June 26, 2013. She was present for the incident, but she was in the car and was not an active participant. After the confrontation, she and Ms. Davis accompanied each other to the Probate Court, DSS, and a local attorney's office to discuss what could be done to gain access to their mother. As stated previously, Petitioner also sought help from Legal Aid. (Tr. Vol. I, p. 108, lines 9-24).

In June 2013, Petitioner made several attempts to have returned to her a variety of personal items that had been at her mother's home. Apparently unsuccessful, she wrote a letter on June 27, 2013 threatening legal action. In July 2013, Jack Brantley tried to mediate a peaceful exchange with the Petitioner and the Respondent. However, this attempt failed, and Petitioner was forced to file a claim and delivery action in Small Claims Court. She ultimately prevailed on this action. (Tr. Vol. I, p. 114).

On cross-examination, Respondent's attorneys introduced two (2) letters written by the Petitioner. The first was a letter dated 2010 to her father. The second was a birthday card

Handwritten signature/initials

(undated, but written approximately on or about October 8, 2013) to her mother. (Tr. Vol. I, p. 133, lines 4-5).

The letter to her father evidences a rift about an incident in which their father called the Petitioner a "disgrace." Petitioner responded with a long list of accusations about Respondent. While the evidence shows there was certainly a rift of sorts between the Petitioner and her father, there is nothing to suggest that it was anything but a temporary blow up. The letter was written in 2010, approximately two and one-half (2½) years before the death of Mr. Arden Gunnells. There is no other evidence of bad blood between Petitioner and Mr. Arden Gunnells until his death. Significantly, Mr. Arden Gunnells never changed his Last Will & Testament to exclude the Petitioner, and there was no evidence offered that he ever even considered doing so over the next two and one-half to three (2½-3) years before his death.

Read as a whole, Petitioner's letter to her mother reflects her desire to reach out and renew contact with her mother. This letter, coupled with the contacts made to the Probate Court, DSS, and the local attorney, pointedly contradict Respondent's assertion that the Petitioner essentially abandoned her mother.

With the testimony of Cathy Harkness, the Petitioner rests her case.

Although the Respondent testified last on rebuttal, the Court will begin with evaluating his testimony. Respondent went through the eighth grade, but dropped out in the ninth. He later obtained his GED and attended some courses at Trident Technical College. He has worked as a heavy equipment operator and also as a car salesman, but he began receiving social security disability benefits in approximately the year 2000. He testified that he receives approximately \$1,350-\$1,500 per month on disability, depending on whether or not prescription insurance is deducted. (Tr. Vol. II, p. 97, line 5; p. 99, lines 1-22).

Respondent's position is that the Petitioner and Ms. Davis essentially deserted their parents and refused to provide aid despite Respondent's request for help. (Tr. Vol. II, p. 133, lines 20-24; p. 153, lines 16-25). According to Respondent, this status was well-known within the family and openly discussed as a motive for their mother wanting to change her Will. He identified Jack Brantley as one of the people present for such discussion. Mr. Brantley would certainly seem to be a natural choice because of his close relationship with his sister, Helen Gunnells. Mr. Brantley, however, did not testify that any such discussion ever took place. Respondent identified other potential witnesses to that or similar discussions, but no one testified to that fact. On cross-examination, Respondent admitted he had no emails, notes, etc., in which he requested help from either sister.

Respondent acknowledged that Susanne Klok had been his closing attorney on June 6, 2013, and that Attorney Klok had no relationship with Helen Gunnells prior to the Testatrix changing her Will. Notably, at his deposition Respondent testified that the Testatrix met with Attorney Klok two (2) or three (3) times for thirty to forty (30-40) minutes each time prior to executing the new Will. Yet at trial, after Attorney Klok testified that she only met with Helen Gunnells one (1) time, Respondent changed his testimony to be in accordance with Attorney Klok. He confirmed that he made the appointment for his mother and drove her to and from the appointment. He waited outside the building while discussions about the new Will took place.

Respondent denied limiting access to his mother, and to the contrary, stated he asked other family members to encourage his sisters to step up and help. Although identified by Respondent, Mr. Brantley denied any such conversation. The only conversation along similar lines, according to Mr. Brantley, was when Mr. Brantley suggested the girls would be resources for help and Glenn responded, "that will never happen."



On the whole, it is undeniable that on those facts subject to corroboration or verification, Respondent's assertions fall short. The following examples are illustrative:

1) Respondent testified at his deposition that he took his mother to Susanne Klok two (2) or three (3) times for thirty to forty (30-40) minutes each time prior to the Testatrix executing the new Will. However, Attorney Klok testified there was only one (1) visit for two to three (2-3) hours. At trial, Respondent changed his testimony in accordance with Attorney Klok's testimony.

2) Respondent specifically testified that he asked Jack Brantley to ask the Petitioner and Ms. Davis for help with their mother. Mr. Brantley denied that conversation. Petitioner's Exhibit 2 generated on July 22, 2013 (well before this dispute) by Mr. Brantley contradicts Respondent's assertion as well.

3) Although currently still pending before this Court is a ruling on the Petition for Removal of the Respondent as Personal Representative, Petitioner has shown that the Respondent has breached his fiduciary duty as Personal Representative in as much as the Inventory and Appraisement was not adequately prepared; proceeds from estate "yard sales" were pocketed by the Respondent, and as such, are unaccounted for; Respondent sold the Gunnells' home and used the proceeds for his own benefit after this action to void the Will was filed; and he did not pay the creditors' claims in a timely manner as required by the statute. (Tr. Vol. II, p. 165, lines 1-12). In short, he has not administered the estate in an honest and forthright manner.

4) Respondent apparently told Dr. Rhonda Chanson he was having a hard time getting his mother in for appointments because of his "ongoing work schedule" when he was, in fact, out of work on full disability and had been since 2000. (Tr. Vol. II, p. 99, lines 10-25).

5) Additionally troubling is Respondent's failure to provide prescribed medications as directed to his mother, particularly Remeron, which was to improve Helen Gunnells' dementia. It appears this medication was not properly administered for the last several months of Mrs. Gunnells life. If the Testatrix was "weak minded", her ability to change or alter the Will, had she so desired, would have been hampered.

Although Respondent brought forward a number of witnesses to theoretically support his version of the facts, all of these witnesses knew the Testatrix only on a professional basis for a limited amount of time. Most notably, two (2) of the witnesses, Susanne Klok and her paralegal, Annmarie Voytko, only had contact with the Testatrix for a couple of hours. Respondent called two (2) home healthcare workers. One of the healthcare workers did not meet the Testatrix until five (5) months after the Will was changed. The healthcare workers confirmed that from their perspective, Glenn was an engaged and effective caregiver. They also confirmed that the Testatrix expressed resentment towards her daughters for failing to be available or help during her husband's final days. Jill Susan Costa testified about the confrontation with Ms. Davis in June 2013 when she tried to visit and Sharon Lee Wechter testified that the Testatrix expressed resentment in December 2013 about the Petitioner suing her. Lastly, the deposition of Dr. Rhonda Chanson was introduced without objection. Dr. Chanson became Helen Gunnells primary care physician in July 2012. Ms. Davis accompanied her to that first visit. Dr. Chanson saw the Testatrix on July 3, 2013, the same day she executed the disputed Will. While Dr. Chanson opined that the Testatrix was competent, she also described her as "visibly upset," "crying," and "distraught." (D. p. 35, lines 12-24). This visit would have been within hours of the execution of the Will. She had no opinion as to whether the Testatrix was emotionally stable enough to consummate the Will on July 3, 2013. (D. p. 25, lines 21: "...I have no knowledge of

that"; p. 38, lines 1-4). Under cross-examination, she confirmed that a prescription for potassium was never filled (D. p. 57, line 14 - p. 59, line 3) and that there was a long delay between the first time she prescribed Remeron, a drug for dementia, and when it was ultimately filled (D. p. 48, lines 9-12; p. 50, line 14 - p. 54, line 2; p. 61, lines 6-10).

DISCUSSION

Generally, when the formal execution of a Will is admitted or proved a *prima facie* case in favor of the Will is made out. Calhoun v. Calhoun, 277 S.C. 527, 290 S.E.2d 415 (1982). The burden is on the contestant to prove undue influence by clear and convincing evidence. Havird v. Schissell, 166 S.E.2d 801, 804 (S.C. 1969). To prove undue influence, the contestant must show that the person's influence over the testatrix must have been so great that it prevented the testatrix's free judgment and choice. In re Estate of Anderson, 674 S.E.2d 176, 179 (S.C. Ct. App. 1976).

Courts often look to see if any of the following circumstances apply when deciding whether a testatrix was unduly influenced at the time her Will was executed: (1) an unjust distribution made to a beneficiary; (2) motive and opportunity by the beneficiary to influence the testatrix; (3) a confidential or fiduciary relationship between the testatrix and the beneficiary; and (4) the susceptibility of the testatrix to be unduly influenced. See e.g., Dixon v. Dixon, 608 S.E.2d 849 (S.C. 2005); Russell v. Wachovia Bank, N.A., 578 S.E.2d 329 (S.C. 2003); Hairston v. McMillan, 692 S.E.2d 549 (S.C. Ct. App. 2010); Howard v. Nasser, 613 S.E.2d 64 (S.C. Ct. App. 2005). However, when determining whether the testatrix was unduly influenced, all circumstantial evidence, meaning all circumstances surrounding the execution of the Will that indicate it is as though the Will was the product of another person rather than the product of the testatrix, is the critical component of evaluation. Howard, 613 S.E.2d at 67. In cases where

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allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time or before the Will's execution. See Moorer v. Bull, 212 S.C. 146, 46 S.E.2d 681 (1948); Byrd v. Byrd, 279 S.C. 425, 308 S.E.2d 788 (1983). The existence of a fiduciary relationship between a testatrix and beneficiary raises a presumption of undue influence. Howard, 613 S.E.2d at 68-69.

The Petitioner asserts that the Respondent unduly influenced the Testatrix to leave her estate to him. She bases this allegation on the facts set out above. The circumstantial evidence in this case shows that the Respondent unduly influenced the Testatrix in the execution of the July 3, 2013 Will. It is undisputed that an unjust distribution was made to the Respondent, which is evidenced by Respondent receiving the entire estate in contrast to Testatrix's previous Will leaving her estate to her three (3) children in equal shares. There was ample motive and opportunity for the Respondent to unduly influence his mother. Respondent has a very limited income and money undoubtedly provides a motive. Further, the evidence shows that Respondent was living with Testatrix and made himself the sole caretaker of the Testatrix, which provided him ample opportunity to unduly influence his mother. Various instances were identified where the other children and friends of the Testatrix were not permitted to speak to her on the telephone or to be alone with her in the home. Similar to Byrd, the Testatrix's conversations were monitored by the Respondent and he prevented her from seeing family members and friends; the Respondent controlled the Testatrix's finances; and instrumented the making of the new Will. Id. The evidence further shows there was both a confidential and fiduciary relationship between the Respondent and the Testatrix, which raises the presumption of undue influence. Respondent was not only his mother's Power of Attorney, he also had a fiduciary relationship with his mother, as evidenced by his living in the home, handling her affairs, and having his name added

to his mother's bank account. Finally, the Testatrix was susceptible to influence as she was isolated and completely reliant on Respondent based upon his refusal to allow her other children to assist in her care or her finances. Further, Respondent took her to change her Will days after her husband died and the evidence shows that the Testatrix was physically and mentally distraught immediately prior to the execution of the new Will.

Although the evidence shows the Respondent was not physically present in the room with the Testatrix and Attorney Klok during the execution of the new Will, the circumstances surrounding the execution clearly indicate the Will was the product of the Respondent and that the Testatrix felt that she "had no choice" but to execute a new Will. The new Will was not sealed when the Testatrix left the attorney's office and the Respondent had unfettered access to this Will after its execution. Further, the Testatrix was not provided with an opportunity to change the July 3, 2013 Will after its execution. The undisputed evidence shows that she was reliant on the Respondent for everything, including her transportation.

CONCLUSION

Based on the file, the exhibits entered into evidence during the trial, the testimony, and the arguments presented by counsel, the Court finds by clear and convincing evidence that the Testatrix was under undue influence when she made and executed the July 3, 2013 Will, and it is therefore invalid.

Based upon the foregoing, it is now, hereby:

ORDERED, ADJUDGED, AND DECREED that the evidence in this case is sufficient to prove that Helen B. Gunnells' Last Will & Testament dated July 3, 2013 was the product of undue influence exerted upon the Testatrix by the Respondent, Glenn A. Gunnells; and it is further

ORDERED, ADJUDGED, AND DECREED that the Last Will & Testament dated July

3, 2013 is null and void; and it is further

ORDERED, ADJUDGED, AND DECREED that Helen B. Gunnells' Last Will &

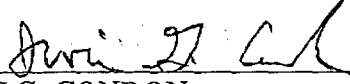
Testament dated November 7, 2006 is of full force and effect; and it is further

ORDERED, ADJUDGED, AND DECREED that Glenn A. Gunnells has ten (10) days

from his receipt of this Order to contest this Order by notifying the Court in writing, with proper

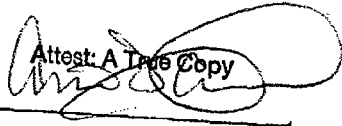
filings, indicating his intent to appeal.

AND IT IS SO ORDERED!



IRVIN G. CONDON
Judge of Probate
County of Charleston

This 12th day of May, 2016 
Charleston, South Carolina.



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

STATE OF SOUTH CAROLINA

) IN THE PROBATE COURT

COUNTY OF CHARLESTON

) CASE NUMBER 2014-ES-10-2022

) IN THE MATTER OF:

) THE ESTATE OF HELEN B.
) GUNNELLS

) ORDER DENYING MOTION TO ALTER,
) AMEND, and/or RECONSIDER

) Cathy G. Harkness,

) Petitioner,

) -VS.-

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

) Respondent.
)

THIS MATTER comes before the Court by way of a Motion to Alter, Amend and/or Reconsider filed by Respondent Glenn A. Gunnells, by and through his counsel, Alexis M. Wimberly, Esq. The Motion was filed on June 2, 2016, in response to this Court's Order dated May 12, 2016, voiding the Last Will and Testament of Decedent and Testatrix Helen B. Gunnells dated July 3, 2013. Upon consideration of the pleadings, the file, and the record, Respondent's Motion to Alter, Amend and/or Reconsider is respectfully denied.

Respondent's Motion contends that this Court made reversible error by improperly applying South Carolina law. In particular, Respondent alleges that the Court inadequately expresses controlling authority and improperly adopts and applies a "four circumstances test." Respondent further alleges that the Court committed reversible error by "ignoring" testimony supporting his position, accepting other evidence favorable to Petitioner, and otherwise making improper or unsupported findings of fact. The Court now considers these arguments.

In the first instance, Respondent argues that the Court failed to consider the full body of South Carolina jurisprudence and improperly adopts what Respondent deems a "four circumstances test." The Court does not dispute Respondent's recitation of the elements of undue influence (however, those passages of Respondent's Motion that examine testamentary capacity are largely irrelevant, as this was not the basis for the Court's ruling). Resp't's Mot. 1-5. However, Respondent's assessment of the "four circumstances test" mischaracterizes the Court's evaluation of certain factors long considered relevant in establishing the existence of undue influence. Id. at 5-8.

At the outset, Respondent faults the Court for applying a "test" not recognized by South Carolina case law. More particularly, Respondent alleges that by considering the dispositions made under the contested Will, Respondent's motive and opportunity to exert undue influence, the existence of a confidential or fiduciary relationship, and the testator's susceptibility to such influence, the Court adopted a "four circumstances test" not previously contemplated by South Carolina courts. The Order, however, does not have the intent or effect of adopting an exclusive, formulaic four-pronged "test" that can be rigidly and systematically applied to establish the existence or non-existence of undue influence. To the contrary, the Court recites a handful of the conditions often considered relevant in determining, in light of the facts and circumstances of each case, whether a testamentary instrument may be the product of unlawful coercion. Indeed, contrary to Respondent's assertion, the Order explicitly affirms that the Court is evaluating "all circumstantial evidence" rather than producing an exclusive list of determinative factors. Order 14. This Court's Order merely identifies four circumstances that may be pertinent to such an inquiry; it does not adopt a "four circumstances test."

Respondent then seeks to establish that none of the factors or circumstances referenced by the Court in its so-called "test" has any basis in South Carolina jurisprudence. Resp't's Mot. 6-8. This contention is without merit. First, Respondent asserts that the distribution of property under the

contested testamentary instrument has no bearing on an inquiry as to undue influence, and that such a consideration directly conflicts with established law. Id. at 6. Admittedly, the Respondent is correct in affirming a testator's right to dispose of her property in her own discretion. Id. South Carolina law has long upheld the principle that a testator's will may direct her property "according to the testator's pleasure and in [her] absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed." Wilson v. Dallas, 403 S.C. 411, 445, 743 S.E.2d 746, 765 (2013). This is not to say, however, that the dispositions made by an allegedly invalid Will are wholly irrelevant in considering whether the testator may have been unlawfully forced or coerced into disinheriting certain persons, for whom she expressed fondness and affection, in favor of the influencer. See In re Last Will and Testament of Smoak, 286 S.C. 419, 422, 334 S.E.2d 806, 808 (1985) (noting that "the one who is alleged to have exerted undue influence normally gains if the Will is sustained"); Howard v. Nasser, 364 S.C. 279, 289-90, 613 S.E.2d 64, 69 (Ct. App. 2005) (referencing the existence of an "unnatural disposition making the person charged with the undue influence chief beneficiary" and considering significant changes in disposition as relevant in supporting a claim of undue influence); In re Estate of Cumbee, 333 S.C. 664, 673, 511 S.E.2d 390, 395 (Ct. App. 1999) (considering that the contested instrument made dispositions drastically different from those in prior wills and contrary to the testator's expressed intentions); Hembree v. Estate of Hembree, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993) (noting that the consistency between the dispositions made in a contested instrument and a will executed nearly ten years earlier tended to indicate that the testator "recognized who his loved ones were and to whom he wished the majority of his estate to go"). In its May 12, 2016 Order, this Court noted that the contested Will dated July 3, 2013, deviates considerably from the Decedent's earlier Will by devising her entire estate to the alleged influencer rather than equally among her three children, and took testimony that the Decedent had maintained a

generally positive relationship with Petitioner prior to Respondent's interference. The Court agrees that these findings, taken alone, would fall well short of sufficient to support a finding of undue influence. However, Respondent contends that considering the history and context of the Decedent's testamentary scheme is at odds with settled law, even as one of many elements or circumstances tending to establish undue influence. This contention is rejected.

Second, Respondent argues that "[t]he second circumstance ['motive and opportunity'] is simply non-dispositive in and of itself." Resp't's Mot. 6. The Court agrees. However, the existence or non-existence of a particular fact or circumstance need not be singularly dispositive of an entire legal issue in order to be properly considered.

Respondent then charges that this Court made an error of law by considering the Testator's susceptibility to influence, claiming that South Carolina courts have not recognized this factor in undue influence cases for some seventy years. Id. To the contrary, our Courts frequently consider whether a testator's mental health or disposition may have rendered her more or less vulnerable to such influence. See Byrd v. Byrd, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983) ("[T]he evidence establishes the testator was infirm . . . and, consequently, particularly susceptible to influence"); Smith v. Whetstone, 209 S.C. 78, 90, 39 S.E.2d 127, 132 (1946) ("The testator was a man of strongly marked characteristics, of sound mind and determined will, abundantly able to protect himself, which should not be overlooked in a case of this kind."); In re Estate of Anderson, 381 S.C. 568, 575, 674 S.E.2d 176, 180 (Ct. App. 2009) (upholding will and noting testimony that Mrs. Anderson was "the one giving orders and not likely to be influenced by anyone else"); Smoak, 286 S.C. at 426; 334 S.E.2d at 810 (affirming the validity of will and recognizing that "the testator was an intelligent, strong-willed man"); see also Bullard v. Crawley, 294 S.C. 276, 280, 363 S.E.2d 897, 899 (1987) (noting that the grantor was known to be an "independent, strong-willed . . . outspoken person" in declining to set aside a deed for undue

influence); Resp't's Mot. 16 (noting testimony that the Testatrix in this action was "strong willed, independent, intelligent and opinionated"). This inquiry is entirely independent of an examination of the testator's testamentary capacity, and does not require the same analysis or findings of fact. This Court's Order of May 12, 2016, finds that Mrs. Gunnells was isolated, dependent, and emotionally distraught when she executed the July 3, 2013 Will, and concludes that these circumstances rendered her particularly susceptible to unlawful coercion and manipulation. Our cases instruct that undue influence exists when the will of the testator is overcome by another. Russell v. Wachovia Bank, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). The relative strength or malleability of the testator's will is necessarily relevant to that analysis.

Finally, Respondent admits that the existence of a confidential or fiduciary relationship has direct bearing under South Carolina law, but nevertheless protests that the Court did not specifically state or apply the appropriate burden of proof. Resp't's Mot. 8. Once again, Respondent's position is directly undermined by the language of the Order itself, which expressly notes that the Petitioner bears the burden of establishing undue influence by clear and convincing evidence and ultimately concludes that she has. Order 14, 16. The contestant of a will bears the burden of proving the existence of undue influence by clear, unmistakable and convincing evidence. Dallas, 403 S.C. at 437, 743 S.E.2d at 760. "Although there is a presumption of undue influence in the making of a will involving fiduciaries, the ultimate burden always remains with the proponent." Id. (citing Gordon v. Busbee, 397 S.C. 119, 723 S.E.2d 822 (Ct. App. 2012)). This Court concluded that a confidential, fiduciary relationship existed between the Testatrix and the Respondent, a conclusion amply supported by the record. Respondent failed to rebut the presumption created by this relationship, and this Court found clear and convincing evidence that the Testatrix's July 3, 2013 Will was the product of undue influence. This does not constitute improper allocation of the burden of proof.

Additional contentions raised by Respondent's Motion mischaracterize this Court's Order and underlying reasoning. The Motion faults the Court for considering evidence of events taking place after the testamentary act, and in the same breath concedes that such events are probative as to whether the Testatrix had an opportunity to later revoke or change her Will. Resp't's Mot. 14-15. "[E]ven if a contestant does establish an inference of undue influence, the unhampered opportunity of the testator to change the will after the operation of undue influence destroys this conclusion." Hembree v. Estate of Hembree, 311 S.C. 192, 197, 428 S.E.2d 3, 5 (Ct. App. 1993). Certainly, circumstances and events affecting the Testatrix following the execution of the 2013 Will until her death in February of 2014 are pertinent to that analysis. Respondent further complains that the Court erred by failing to find that the Testatrix was competent to execute a Will. Resp't's Mot. 18-20. In fact, the Court made no finding of incompetence or lack of capacity; Respondent's objections are misplaced.

Respondent's other objections primarily relate to the Court's evaluation of various testimony and evidence presented in the case. Respondent contends, for example, that the Court "fail[ed] to consider" the testimony of attorney Suzanne Klok and her paralegal. Resp't's Mot. 8-9. To the contrary, this Court's Order expressly acknowledges and contemplates the testimony of Attorney Klok and Ms. Voytko. Order 13. In addition, Respondent not only concludes that the Court erred by failing to consider evidence that he was not in the room when the instrument was executed, but also that the Court erred again by considering all other circumstances surrounding the visit. Resp't's Mot. 12-14. Respondent asks the Court to isolate as "conclusive" a single detail regarding execution of the Will, to the exclusion of all other circumstances leading up to and immediately following the visit to Attorney Klok's office. The Court can identify no controlling law indicating that an examination of the events surrounding the drawing and execution of a contested document must be limited solely to whether the alleged influencer was physically present when the testatrix put pen to paper and signed her name.

Respondent's remaining objections allege, in sum, that the Court gave inadequate weight to evidence favorable to him and erroneously accepted testimony offered by Petitioner. For instance, Respondent purports that there is "no evidence" that anyone was prohibited or restricted from visiting the Testatrix, or that her medication was not properly administered. Resp't's Mot. 15-18, 22-23. Here, the record speaks for itself; Respondent simply objects to the Court's evaluation of the testimony received. See Pet'r's Mem. In Opp'n to Mot. to Recons. 2-4. Other purported grounds for reconsideration fault the Court for "accepting" or "being persuaded" by testimony and inferences unfavorable to Respondent. To this, the Court can only restate that in view and upon consideration of all evidence and testimony properly presented, it nevertheless concluded that the July 3, 2013 Will was the product of undue influence.

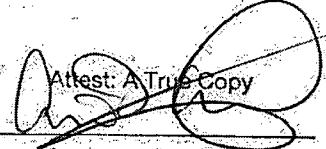
Based upon the foregoing, it is hereby

ORDERED, ADJUDGED AND DECREED that Respondent Glenn A. Gunnells' Motion to Alter, Amend and/or Reconsider filed June 2, 2016, is respectfully **denied**.

IT IS SO ORDERED.


Irvin G. Condon
Judge of Probate, Charleston County

This the 7th day of August, 2016. 
Charleston, South Carolina


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

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Appellant,

v.

Cathy G. Harkness,

Respondent.

IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
2016-CP-10-4566

**ORDER AFFIRMING PROBATE
COURT ORDERS OF MAY 12, 2016
AND AUGUST 25, 2016
2014-ES-10-00202-2**

FACTUAL / PROCEDURAL BACKGROUND

This matter came before this Court on March 3, 2017 on Appellant Glenn Gunnells' appeal from the Orders of the Honorable Irvin G. Condon, dated May 12, 2016 and August 25, 2016 in the probate action 2014-ES-10-00202-2. The May 12, 2016 probate court order held that the July 3, 2013 will was a product of undue influence and therefore null and void. R. at 49-50. The May order also held that the November 7, 2006 will is of full force and effect. R. at 50. The probate court's August 25, 2016 Order denied Appellant Glenn Gunnells' Motion to Alter, Amend, and/or Reconsider the May 12, 2016 order. R. at 57.

The Testatrix, Helen B. Gunnells, and her husband, Aiken Arden Gunnells, were married for many years and had three children: Cathy G. Harkness (Respondent), Belinda G. Davis, and Glenn A. Gunnells (Appellant). R. at 35. In April 2012, Mr. Aiken Gunnells was diagnosed with cancer and in approximately March 2013, Mr. Glenn Gunnells moved into his parents' home to help care for them. Id. On June 8, 2013, Mr. Arden Gunnells died. On July 3, 2013, the Testatrix executed a Will that revoked an earlier Will that was executed on November 7, 2006. R. at 34. The 2006 Will devised the Testatrix's entire estate to her husband if he survived her, and then to

her three children in equal shares. Id. The 2013 Will devised the entire estate to Mr. Glenn Gunnells. R. at 48.

STANDARD OF REVIEW

Appeals from the probate court are governed by the South Carolina Probate Code which provides that “a final order, sentence, or decree of a probate court” may be appealed to the circuit court. S.C. Code Ann. § 62-1-308 (Supp. 2016). The circuit court sitting as an appellate court “shall hear and determine the appeal according to the rules of law[,]” and “[t]he hearing must be strictly on appeal and no new evidence may be presented.” Id. § 62-1-308(i). “As used in this statute, the phrase ‘according to the rules of law’ means according to the rules governing appeals.” In re Howard, 315 S.C. 356, 360; 434 S.E.2d 254, 256 (1993). Absent a statute or court rule, “expressly prescribing a different standard of review, the circuit court must apply the same standard that this Court or the Court of Appeals would apply were the appeal taken directly to either of them.” Id. at 361; 434 S.E.2d at 257. “If the proceeding in the probate court is in the nature of an action at law, the circuit court may not disturb the probate court’s findings of fact unless a review of the record discloses there is no evidence to support them.” Id. “The standard of review at law is the same whether the facts are found by a jury or the judge sitting without a jury.” Id. An appeal “in a contest as to the validity of a will is in the nature of a case at law rather than in equity” Harris v. Berry, 231 S.C. 201, 205; 98 S.E.2d 251, 253 (1957).

Furthermore, Rule 61 of the South Carolina Rules of Civil Procedure provides that:

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Rule 61, SCRCP. The Supreme Court of South Carolina has explained that “[t]he admission or exclusion of evidence is within the sound discretion of the trial court and the trial court’s decision will not be disturbed on appeal absent an abuse of discretion.” Conner v. City of Forest Acres, 363 S.C. 460, 467; 611 S.E.2d 905, 908 (2005). “An abuse of discretion occurs when the ruling is based on an error of law or a factual conclusion without evidentiary support.” Id. “To warrant reversal based on the admission or exclusion of evidence, the appellant must prove both the error of the ruling and the resulting prejudice, i.e., there is a reasonable probability the jury’s verdict was influenced by the wrongly admitted or excluded evidence.” Id.

Finally, our appellate courts have held that in reviewing a verdict “the jury does not have to believe uncontradicted testimony” because “[t]he fact that testimony is not contradicted directly does not render it undisputed.” Vinson v. Hartley, 324 S.C. 389, 409-410; 477 S.E.2d 715, 725-26 (Ct. App. 1996). It remains in the jury’s province to determine “the inherent probability of the testimony and the credibility of the witness or the interests of the witness in the result of the litigation.” Id. at 410. Furthermore, “[i]f there is any evidence to sustain the factual findings implicit in the jury’s verdict, this court must affirm.” Id. (quoting Hobgood v. Pennington, 300 S.C. 309, 313; 387 S.E.2d 690, 692 (Ct. App. 1989)).

DISCUSSION

I. Undue Influence

South Carolina Probate Code provides that “[p]roponents of a will have the burden of establishing prima facie proof of due execution in all cases” and “[c]ontestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity.” S.C. Code Ann. § 62-3-407 (Supp. 2016). Additionally, “[p]arties have the



ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.” Id.

“[I]n order to void a will on the ground of undue influence, the undue influence must destroy free agency and prevent the maker's exercise of judgment and free choice.” Wilson v. Dallas, 403 S.C. 411, 437; 743 S.E.2d 746, 760 (2013) (quoting In re Est. of Cumbee, 333 S.C. 664, 671; 511 S.E.2d 390, 394 (Ct. App. 1999) (internal quotations omitted)). “The influence necessary to void a will must amount to force and coercion.” Id. “A mere showing of opportunity or motive does not create an issue of fact regarding undue influence.” Id. “In cases where allegations of undue influence have been successful, there has been evidence of threats, force, restricted visitation, or an existing fiduciary relationship at the time of or before the will's execution.” Id. “Although there is a presumption of undue influence in the making of a will involving fiduciaries, the ultimate burden always remains with the proponent.” Id. Furthermore, South Carolina's Supreme Court has recognized

that by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so that it can be directly proved. However, the circumstances must point unmistakably and convincingly to the fact that the mind of the testator was subjected to that of some other person so that the will is that of the latter and not of the former.

Calhoun v. Calhoun, 277 S.C. 527, 530; 290 S.E.2d 415, 417 (1982) (citing Havird v. Schissell, 252 S.C. 404; 166 S.E.2d 801 (1969)).

II. Issues On Appeal¹

- (1) Whether the trial court by errors of law in its analysis of controlling authority erred in determining whether Testatrix's Will was the product of undue influence?

No. This Court finds that the probate court correctly stated, analyzed, and applied the controlling law of the State of South Carolina.

- (2) Whether the trial court erred in finding that Testatrix's Will was the product of undue influence under the application of a "circumstances test" where such findings do not require Petitioner to meet her high burden of proof?

No. As discussed above, "by the very nature of the case, the evidence of undue influence will be mainly circumstantial." Calhoun at 530; 290 S.E.2d at 417. While the probate court's May 12, 2016 Order does enumerate four circumstances that have been considered in determining whether a will was a product of undue influence, the probate court specifically states that "when determining whether the testatrix was unduly influenced, all circumstantial evidence, meaning all circumstances surrounding the execution of the Will that indicate it is as though the Will was the product of another person rather than the product of the testatrix, is the critical component of evaluation." R. at 47 (citing Howard v. Nasser, 364 S.C. 279; 613 S.E.2d 64 (Ct. App. 2005)). Additionally, the order indicates that circumstances involving threats, force, and restricted visitation have been found to evince undue influence. R. at 48. Furthermore, the probate court stated that its May 12, 2016 Order "does not have the intent or effect of adopting an exclusive, formulaic four-pronged 'test'" but rather "recites a handful of the conditions often considered relevant in determining . . . whether a testamentary instrument may be the product of unlawful coercion." R. at 52. Applying the facts to the law, the probate court found, among other circumstances, that a fiduciary relationship existed between the appellant and testatrix; that on some occasions appellant prevented testatrix from talking on the phone or having friends visit; that appellant was living with

¹ Appellant's Statement of the Issues on Appeal (filed Oct. 11, 2016).

the testatrix, was the sole caretaker, controlled testatrix's finances, and was testatrix's power of attorney. R. at 48. Therefore, this Court finds that the probate court did not apply a "circumstances test," nor did its analysis alter the contestant's burden of proof.

- (3) Whether the trial court erred in finding that Testatrix's Will was the product of undue influence in the face of uncontroverted evidence and testimony from Testatrix's attorney and her paralegal to the contrary, who were the only witnesses to the testamentary act itself?

No. The probate judge, sitting without a jury as fact-finder, is not required to believe uncontroverted testimony because it remains in the fact-finder's province to weigh the credibility and interests of a witness. Furthermore, the circuit court cannot disturb the probate court's findings of fact unless there is no evidence to support them. As discussed supra Part II. (2), this Court finds there is evidence supporting the probate court's findings of fact.

- (4) Whether the trial court erred in considering facts and testimony of events that occurred in time after the testamentary act as probative of a finding that Testatrix's Will was the product of undue influence?

No. See supra Part II. (2). However, the probate court is correct in acknowledging that "circumstances and events affecting the Testatrix following the execution of the 2013 Will until her death in February 2014" are probative of whether the testatrix had an "unhampered opportunity . . . to change the will after the operation of undue influence" which would rebut the presumption of undue influence in the making of a will involving fiduciaries. R. at 56.

- (5) Whether the trial court relied on irrelevant facts and/or made factual findings not reasonably supported in the record in making its determination that Testatrix's Will was the product of undue influence?

No. This Court finds that the probate court's orders are supported by the evidence and testimony admitted during trial and therefore this Court cannot disturb the probate court's findings of fact.



- (6) Whether the trial court erred in finding the Testatrix's Will was the product of undue influence when there was no showing of threats, force, or restricted visitation?

No. See supra Part II. (2).

- (7) Whether the trial court erred by giving great weight to the Petitioner's misstated and misrepresented testimony of Testatrix's physician Dr. Rhonda Chanson, when the medical conclusions found by the probate court are not reasonably supported in the record?

No. See supra Part II. (3).

- (8) Whether the trial court erred in admitting and giving great weight to unsubstantiated, unsupported, and unauthenticated medical records from one of Testatrix's pharmacies?

No. See supra Part II. (3).

- (9) Whether the trial court erred in accepting the testimony of Ms. Helen Carroll regarding Testatrix's statement "I had no choice" when Ms. Carroll testified several times she did not remember ever having a conversation with Testatrix about a will, nor knew the circumstances of the statement from which she read?

No. See supra Part II. (3).

- (10) Whether the trial court erred in disregarding the testimony of two (2) independent home health physical therapists who provided treatment to Testatrix at the end of her life and whom Testatrix confided her thoughts regarding her daughters?

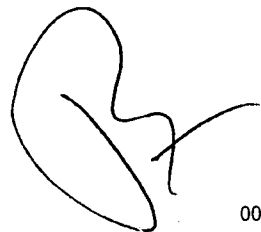
No. See supra Part II. (3).

- (11) Whether the trial court erred in giving great weight to Petitioner's testimony that she sought DSS, Probate Court and/or Legal Aid with no evidence, independent witness or supporting testimony to prove the same?

No. See supra Part II. (3).

- (12) Whether the trial court's order denying the Motion to Reconsider addressed any of the legal and factual errors of the probate court's original order?

This Court does not find any legal or factual errors contained in the Probate Court's May 12, 2016 Order.

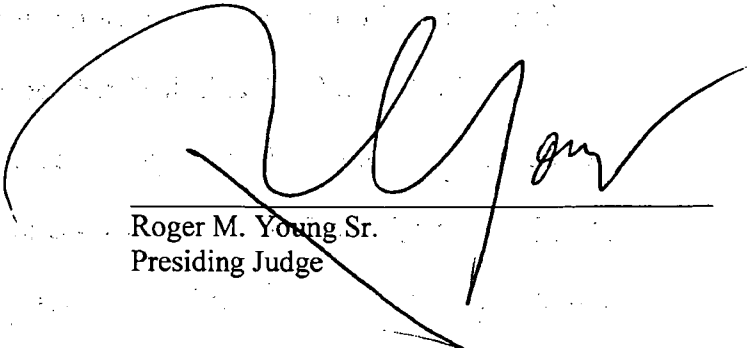


CONCLUSION

IT IS THEREFORE ORDERED that the Probate Court Orders of May 12, 2016 and August 25, 2016 are hereby AFFIRMED.

IT IS SO ORDERED!

April 7, 2017
Charleston, South Carolina



Roger M. Young Sr.
Presiding Judge

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF: Charleston

)
FILE

PROOF OF DELIVERY

IN THE MATTER OF:

Helen B Gunnells

2014 JUL 28 PM 2:54

CASE NUMBER

2014 ES10-00202-2

(Decedent)

PROBATE COURT
CHARLESTON COUNTY

On the 28 day of July, 2014, I mailed or delivered the following document(s):

Opposing the will to Judge Mothers' will dated 7-3-2013, written

statements of Helen B Gunnells: NIKEN A Gunnells copy of original will, SC General
Durable Power of Attorney of Helen B Gunnells, Mothers death cert., dad's insurance information
☒ A copy of which is attached hereto and incorporated herein, or Probate Court inventory + appraisement +
☒ The original of which is on file with the Court. Application for Informal Appointment

Delivery was accomplished by the following method (check appropriate box):

☐ personal delivery	☐ ordinary first-class mail
☒ certified mail	☐ registered mail
☐ commercial delivery	☐ electronic message (Article 7, Trust matters only)

to each of the following persons at the address shown:

NAME	ADDRESS
<u>Glenn A. Gunnells</u>	<u>1931 Capri Dr, Charleston SC 29407</u>
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

SWORN to before me this 28th day of July, 2014

Maury A Hollenbush
Notary Public for South Carolina
My Commission Expires: 12/31/14

Signature: [Signature]
Print Name: Cathy G Harkness

Address: 2255 Lamb St
Charleston SC 29407

Telephone (Work): _____
(Home): _____
(Cell): 843-830-5018
E-mail: cg.hark@Yahoo.com
Relationship to Decedent/Estate: daughter

FILE

STATE OF SOUTH CAROLINA

2014 JUL 28 PM 2:54

IN THE PROBATE COURT

COUNTY OF

Charleston

Cathy G. Harkness

PROBATE COURT
CHARLESTON COUNTY

SUMMONS

Petitioner,

vs.

CASE NO. 2014-ES-10-00202-2

Glenn A Gunnells

Respondent(s).

TO THE RESPONDENT(S) ABOVE-NAMED:

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

Charleston

, South Carolina

Dated:

July 28, 2014

Cathy G. Harkness

Petitioner/Attorney for Petitioner

Address:

2255 Lamb Sr

Charleston, SC

29414

SCCA 401PC (9/11)

STATE OF SOUTH CAROLINA) July 28th, 2014

COUNTY OF CHARLESTON) 2014 JUL 28 PM 2:54

IN THE MATTER OF CHARLESTON COUNTY PROBATE COURT) IN THE PROBATE COURT
OPPOSING THE WILL
DATED JULY 3rd, 2013

HELEN B. GUNNELLS)
(Decedent) Case # 2014-ES-10-202-2)

2014 ES10-00202-2

Dear Honorable Judge,

I am opposing the probate of the will of my mothers Helen B. Gunnells dated July 3rd, 2013. My brother, Glenn A. Gunnells, the Personal Representative has submitted the will.

The reason I challenge this will, I have evidence it was "Coerced" by my brother and "was not" of my mother's free will.

I am asking the Court to declare the entire will of my mother, Helen B. Gunnells, to be invalid based on evidence listed below and to grant me a court date. Also, I have attached statements from my family and friends that I will present in effort to disprove the validity of the current will.

Following are points for your consideration that I intend to use as proof that my mother signed the most recent will under duress and while in a state of emotional instability.

1. UNDUE INFLUENCE

a) That my brother, Glenn A. Gunnells, exercised psychological and

mental control over my mother for his own profit.

b) That Glenn would be placing her in a nursing home if she refused to sign a new will he had drawn up earlier and was signed 7-3-2013 less than a month after her husband's, my father's death.

c) That Glenn pressured and exerted his own desires on my mother who was extremely vulnerable since my father had died only months earlier on 6-8-2013.

d) Glenn controlled mothers conversations, who she could talk too, who she could have over and forbidden my sister & I to visit with threats of calling the police.

2. DURESS

a) That my brother, Glenn A. Gunnells, overpowered my mother in more ways than one.

b) Mother expressed to her lifelong friend that she had no choices.

c) That Glenn refused to take mother to her own sister's funeral.

d) Both my sister and I have heard Glenn tell mother to "shut up" on numerous occasions.

3. FRAUD, DECEIT and PERSUASION

a) That my brother, Glenn A. Gunnells, deliberately intended to mislead close family members.

b) That Glenn gave false information to my mother concerning my sister and I who were named in the original wills.

4. PHYSICAL and NUTRITIONAL NEGLECT

a) That my brother, Glenn A. Gunnells, stated that his mother had chest pains for a couple of weeks before being taken to her doctor. That Glenn told her to put two (2) aspirins under her tongue and lie down.

b) Mother was skin and bones on her deathbed.

5. EMBELLISHED

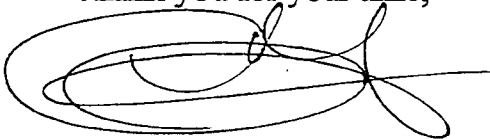
a) For his own benefit.

If my father wanted their wills changed, they would have done so at the same time and while he was still living. My father insisted their will stand and the estate be divided equally among us siblings.

Glenn had an estate sale of my father's personal possessions two (2) weeks after he died. Then 1½ weeks after my mother died, Glenn sold most of mother's expensive items, china, jewelry, silver, furniture and vehicle. The home was placed up for sale 2 weeks after mother died for \$498,000.00 but was pulled from MLS shortly but now on the market again. Glenn is moving this week-end, August 1st, 2014.

I am "Pleading" with the court to expedite me a court date to have this entire will declared invalid and changed back to the original wills.

Thank you for your time,

A handwritten signature in black ink, appearing to read 'Cathy Gunnells Harkness', enclosed within a large, loopy oval scribble.

Cathy Gunnells Harkness
2255 Lamb St.
Charleston, SC 29414
(H) 509-3038 (C) 843-830-5018

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF CHARLESTON SEP 15 PM 4:37

ANSWER TO OPPOSITION TO WILL

IN THE MATTER OF

HELEN B. GUNNELLS
(Decedent)

CASE NO.: 2014-ES-10-202-2

Respondent, Glenn A. Gunnells, Individually and as Personal Representative of the Estate of Helen B. Gunnells, in answer to the Opposition of the Petition and as a Counterclaim, alleges and states as follows:

FOR A FIRST DEFENSE

1. Each and every allegation which is not hereinafter specifically admitted, modified or explained is hereby denied.
2. Respondent admits that Glenn A. Gunnells is the Personal Representative and has submitted the will to probate.
3. Respondent denies that the will of Helen B. Gunnells is invalid.
4. Respondent denies the allegations that Glenn A. Gunnells "coerced" Helen B. Gunnells and that her will "was not" of her free will.
5. Respondent denies the will is invalid based on the "evidence" listed in the opposition to the will filed by Petitioner, Cathy Gunnells Harkness.
6. Respondent denies the Petitioner attached any statements from family and friends that she purports to have in order to disprove the validity of the will, no such documents were attached to the papers served upon Respondent. Respondent denies these allegations and demands strict proof thereof.

7. Respondent denies the allegations that Helen B. Gunnells signed her most current will under duress and while in a state of emotional instability, and demands strict proof thereof.

8. Respondent affirmatively alleges that Helen B. Gunnells had the requisite legal capacity to instruct her attorney as to whom she wanted to inherit the assets of her estate, whom she wanted to serve as Personal Representative of her estate and to properly execute his Last Will and Testament after reviewing the document to make certain it complied with her instructions to her attorney.

**FOR A DEFENSE TO PETITIONER'S
FIRST CAUSE OF ACTION
(Undue Influence)**

9. In response to Paragraph 1 of the Opposition to the will, Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if again set forth verbatim herein.

10. Respondent denies the allegations of Paragraphs 1(a), 1(b), 1(c), and 1(d) of the Opposition to the will and demands strict proof thereof.

11. In response to Paragraphs 1(a), 1(b), 1(c), and 1(d), Respondent admits that the Decedent Helen B. Gunnells, who was his mother, trusted Respondent to carry out the duties of Personal Representative of her Estate, which is why she appointed Respondent Personal Representative in her Last Will and Testament and not the Petitioner.

12. Respondent denies the allegations contained in Paragraphs 1(a), 1(b), 1(c), and 1(d) of the Opposition to the will as he did not induce Helen B. Gunnells to execute any documents and had no discussions with Helen B. Gunnells prior to, or at the time of the execution of her Last Will and Testament, regarding changing her will other than requesting Respondent to drive her to her attorney's office.

13. Respondent affirmatively alleges that his mother informed him that she wanted to change her will and informed him of the contents of her Last Will and Testament and her decision to name him as personal representative after the document had been prepared by an attorney of her choice and Helen B. Gunnells had signed the document.

14. Respondent affirmatively alleges that his mother controlled who she spoke to, who she would have over to visit, not Respondent.

15. Respondent affirmatively alleges that he had no intention of placing his mother in nursing home and they did not have any conversations where they ever discussed placing his mother in a nursing home.

16. Respondent affirmatively alleges that his mother informed him that she did not want to have any contact with Petitioner due to Petitioner's behavior before and after the death of her husband.

17. Respondent affirmatively alleges that Petitioner sued their mother two weeks after their father died on June 8, 2013.

18. Respondent denies that the Petitioner is entitled to the relief requested, i.e. an expedited court date to have the entire will declared invalid and changed back to the previous will.

**FOR A DEFENSE TO PETITIONER'S
SECOND CAUSE OF ACTION
(Duress)**

19. In response to Paragraph 2 of the Opposition to the will, Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if again set forth verbatim herein.

20. Respondent denies the allegations of Paragraphs 2(a), 2(b), 2(c); and 2(d) of the Opposition to the will and demands strict proof thereof.

21. Respondent affirmatively alleges that his mother informed him that she did not want to have any contact with Petitioner due to Petitioner's behavior before and after the death of her husband.

22. Respondent affirmatively alleges that Petitioner sued their mother two weeks after their father died on June 8, 2013.

23. Respondent denies that the Petitioner is entitled to the relief requested, i.e. an expedited court date to have the entire will declared invalid and changed back to the previous will.

**FOR A DEFENSE TO PETITIONER'S
THIRD CAUSE OF ACTION
(Fraud, Deceit and Persuasion)**

24. In response to Paragraph 3 of the Opposition to the will, Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if again set forth verbatim herein.

25. Respondent denies the allegations of Paragraphs 3(a) and 3(b) of the Opposition to the will and demands strict proof thereof.

26. Respondent affirmatively alleges that his mother decided independently to cut out his sisters from her will due to their behavior and actions.

**FOR A DEFENSE TO PETITIONER'S
FOURTH CAUSE OF ACTION
(Physical and Nutritional Neglect)**

27. In response to Paragraph 4 of the Opposition to the will, Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if again set forth verbatim herein.

28. Respondent denies the allegations of Paragraphs 4(a) and 4(b) of the Opposition to the will and demands strict proof thereof.

29. Respondent affirmatively alleges that Helen B. Gunnells never complained of chest pains and was regularly under her doctor's care as well as home health professionals.

30. Respondent affirmatively alleges that on or about December, 2013, he called 911 the same day his mother fell in the kitchen and bruised her side. Respondent affirmatively alleges the 911 operator told him to have his mother put two (2) aspirins under her tongue while waiting for the EMT professionals to arrive, which he did.

31. Respondent affirmatively alleges that Helen B. Gunnells was losing weight before she died so her doctor prescribed medication to stimulate her appetite but did not believe she was malnourished. Respondent affirmatively alleges that his mother was not "skin and bones on her deathbed."

**FOR DEFENSE TO PETITIONER'S
FIFTH CAUSE OF ACTION
(Embellished)**

32. In response to Paragraph 5 of the Opposition to the will, Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if again set forth verbatim herein.

33. Respondent denies the allegations of Paragraph 5(a) of the Opposition to the will and demands strict proof thereof. Respondent is unable to respond further to Paragraph 5(a) to the extent the paragraph is incomplete and his unable to formulate a further response.

34. Respondent denies allegations that his father insisted their wills stand and the estate be divided equally among the siblings and demands strict proof thereof.

35. Respondent affirmatively alleges that he never had an estate sale of his father's possessions. At his mother's direction, Respondent gave away to family members or donated certain possessions of his father after his father died.

36. Respondent affirmatively alleges that he did not have an estate of his mother's items but had a yard sale of household items approximately two months after the death of his mother.

37. Respondent affirmatively alleges that he put his mother's house up for sale on August 30, 2014 for \$524,888.00 for the first time.

**FOR A SECOND DEFENSE
(Failure to State a Claim)**

38. Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if again set forth verbatim herein.

39. Respondent moves for an Order dismissing Petitioner's Opposition to the will on the grounds that the Opposition has failed to allege facts sufficient to constitute any cause of action against the Respondent.

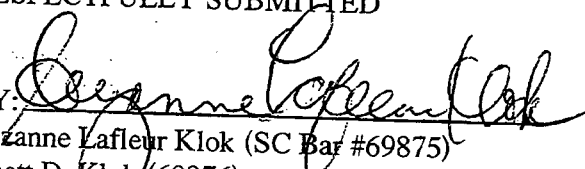
WHEREFORE, Respondent prays that this Honorable Court issue an Order:

- (a) Dismissing Petitioner's claims;
- (b) Retaining its proper jurisdiction over this matter;

- (c) Declaring that Helen B. Gunnells had the requisite legal capacity to execute her Last Will and Testament, that it was properly executed and is legally valid and binding;
- (d) Declaring that Respondent's appointment as Personal Representative of the Estate of Helen B. Gunnells is valid, that her actions as Personal Representative are valid; and
- (e) For such other and further relief as this Court deems just and proper.

Dated: September 15, 2014
Mount Pleasant, South Carolina

RESPECTFULLY SUBMITTED

BY: 
Suzanne Lafleur Klok (SC Bar #69875)
Rhett D. Klok (69876)
Klok Law Firm, LLC
Attorney for Personal Representative of the
Estate of Helen B. Gunnells
1002 Anna Knapp Blvd., Suite 103
Mount Pleasant, South Carolina 29464
(843) 216-8860 (tel.)
(843) 375-9028 (fax)
sklok@kloklaw.com

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

IN THE MATTER OF

HELEN B. GUNNELLS
(Decedent)

FILED IN THE PROBATE COURT

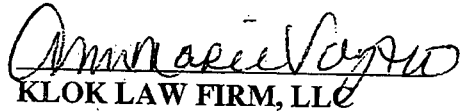
2014 SEP 15 PM 4:37

PROBATE COURT
CHARLESTON COUNTY
CERTIFICATE OF SERVICE

CASE NO.: 2014-ES-10-202-2

The undersigned hereby certifies that she served this **ANSWER TO OPPOSITION TO WILL** filed in the above captioned case, by United States Mail, postage pre-paid, on this 15th day of September, 2014, on the Petitioner in the above captioned matter:

Cathy G. Harkness
2255 Lamb Street
Charleston, SC 29407


KLOK LAW FIRM, LLC

Annmarie Voytko
Paralegal to Attorneys
Rhett D. Klok (SC Bar # 69876)
Suzanne Lafleur Klok (SC Bar #69875)
1002 Anna Knapp Blvd., Ste. 103
Mt. Pleasant, SC 29464
(843) 216 8860 (Office)
(843) 375 9028 (Fax)

Dated September 15, 2014
Mt. Pleasant, South Carolina

STATE OF SOUTH CAROLINA) IN THE PROBATE COURT
COUNTY OF CHARLESTON)
15 APR 16 PM 10:08 CASE NO.: 2014-ES-10-202-2

IN THE MATTER OF:
HELEN B. GUNNELLS

PROBATE COURT
CHARLESTON COUNTY

CATHY G. HARKNESS,
Petitioner,

**AMENDED PETITION OPPOSING
THE WILL DATED JULY 3, 2013**

vs.

GLENN A. GUNNELLS, individually and
as Personal Representative of the Estate of
Helen B. Gunnells,
Respondent.

The Petitioner above named, complaining of the Respondent above named, hereby amends her Petition Opposing the Will Dated July 3, 2013, filed on July 28, 2014, and alleges and shows as follows:

1. Petitioner is an interested person in the Estate of Helen B. Gunnells as the daughter and potential devisee of the Decedent, Helen B. Gunnells, pursuant to S.C. Code Ann. Section 62-1-201(23).
2. Petitioner was a devisee of the Estate of Helen B. Gunnells by virtue of a Will dated November 7, 2006 executed by Helen B. Gunnells.
3. Petitioner was allegedly disinherited by virtue of a later Will dated July 3, 2013 executed by Helen B. Gunnells.
4. Petitioner believes and alleges that the Will of Helen B. Gunnells dated July 3, 2013 was the product of undue influence and not truly desired by Helen B. Gunnells, her decisions therein having been made at the direction of Glenn A. Gunnells in that:

- a) Helen B. Gunnells made an unjust distribution to Glenn A. Gunnells in the Will dated July 3, 2013;
- b) Glenn A. Gunnells had motive and opportunity to influence Helen B. Gunnells;
- c) by virtue of a previously executed Power of Attorney, a confidential or fiduciary relationship existed between Helen B. Gunnells and Glenn A. Gunnells at the time of the execution of Will dated July 3, 2013 and at relevant times before and after July 3, 2013; and
- d) Helen B. Gunnells had the susceptibility to be unduly influenced by Glenn A. Gunnells.

5. Petitioner further believes and alleges that the Will of Helen B. Gunnells dated July 3, 2013 was the product of duress and not truly desired by Helen B. Gunnells.

6. Petitioner is informed and alleges that after the execution of the July 3, 2013 document Glenn A. Gunnells continued to exercise control and undue influence on the decisions of Helen B. Gunnells, including her desire to change or revoke the Will dated July 3, 2013.

7. Petitioner is informed and alleges that by virtue of the coercion and undue influence that Glenn A. Gunnells exercised over Helen B. Gunnells, and as a direct result thereof, the Will dated July 3, 2013 should be null and void and the Estate of Helen B. Gunnells should be governed by the Will dated November 7, 2006 that was previously in effect.

WHEREFORE, having fully set forth her Petition, the Petitioner prays that this Honorable Court inquire into the matters set forth herein as follows:

- A. That this Court finds that the Will dated July 3, 2013 is a product of undue influence and therefore null and void;

- B. That this Court finds, in the alternative, that the Will dated July 3, 2013 is a product of duress and therefore null and void;
- C. That this Court finds that the Will dated November 7, 2006 is valid and of full force and effect;
- D. For such other and further relief as this Court may deem just and proper.



DONALD H. HOWE, ESQUIRE
818 Wappoo Road
P.O. Box 31324
Charleston, South Carolina 29417
Office: (843) 225-2523
Fax: (843) 225-2698
Email: donaldhowelaw@gmail.com

MICHELLE J. WEIL, ESQUIRE
JULIE C. JACKSON-BAILEY, ESQUIRE
1 Carriage Lane, Bldg. H, 2nd Floor
Charleston, South Carolina
Office: (843) 619-3709
Fax: (843) 614-3902
Email: info@baileyweil.com
ATTORNEYS FOR PETITIONER

Charleston, SC
April __, 2015.

Charleston, South Carolina
Office: (843) 619-3709
Fax: (843) 614-3902
Email: info@baileyweil.com
ATTORNEYS FOR PETITIONER

Charleston, SC
April 16, 2015.

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF CHARLESTON

15 MAY 22

Case No. 2014-ES-10-202-2

Cathy G. Harkness,

PROBATE COURT
CHARLESTON COUNTY

Petitioner,

v.

ANSWER TO AMENDED PETITION

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

Respondents.

In the Matter of:
Estate of Helen B. Gunnells

Respondent, Glenn A. Gunnells, individually and as Personal Representative of the Estate of Helen B. Gunnells ("Respondent"), responding to the Amended Petition of the Petitioner above-named, alleges and states as follows:

FOR A FIRST DEFENSE

1. Respondent denies each and every allegation of the Petition which is not hereinafter specifically admitted, modified or explained.
2. Paragraph 1 of the Amended Petition states conclusions of law to which no response is required. To the extent a response is required, denied.
3. Answering Paragraph 2 of the Amended Petition, Respondent craves reference to the terms of the enumerated Will dated November 7, 2006, and denies any allegations which are inconsistent therewith.
4. Answering Paragraph 3 of the Amended Petition, Respondent craves reference to the terms of the enumerated Will dated July 3, 2013, and denies any allegations which are inconsistent therewith.

5. Respondent denies all of the allegations in Paragraph 4 of the Petition and denies all allegations contained in subparts (a) through (d) of Paragraph 4 and demands strict proof thereof.

6. Respondent denies the allegations in Paragraphs 5-7 of the Petition and demands strict proof thereof.

7. The WHEREFORE paragraph of Petition is denied.

8. Paragraphs A, B, C and D of the Amended Petition states conclusions of law and prayers for relief to which no response is required. To the extent a response is required, denied.

FOR AN ADDITIONAL DEFENSE
(Failure to State a Claim)

9. Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if fully repeated verbatim.

10. The Amended Petition fails to state facts sufficient to constitute a cause of action and the Petition should be dismissed pursuant to the provisions of SCRCP Rule 12(b)(6).

FOR AN ADDITIONAL DEFENSE
(S.C. Code Ann. § 15-36-10)

11. Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if fully repeated verbatim.

12. Respondent pleads the possible application of the South Carolina Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10.

FOR AN ADDITIONAL DEFENSE
(Reservation/Non-Waiver)

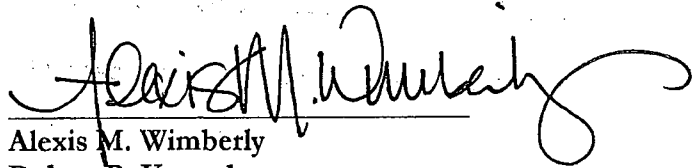
13. Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if fully repeated verbatim.

14. Respondent specifically reserves any additional defenses including affirmative defenses, as may be available or revealed to it during the course of its investigation and/or discovery in the case, and as are consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Petition for Removal, this Respondent prays that the Petition be dismissed against him and for such other relief as the Court may deem just and proper.

Respectfully Submitted,

BROWN & VARNADO, LLC



Alexis M. Wimberly

Robert B. Varnado

John G. Brown, II

103 Church Street

Mount Pleasant, South Carolina 29464

P: (843) 737-7300

F: (843) 654-5109

awimberly@brown-varnado.com

rvarnado@brown-varnado.com

jbrown@brown-varnado.com

Attorneys for Respondents

May 21, 2015

Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA IN THE PROBATE COURT

COUNTY OF CHARLESTON 5 APR 16 PM 1:06 CASE NO.: 2014-ES-10-202-2

IN THE MATTER OF:
HELEN B. GUNNELLS

CATHY G. HARKNESS,
Petitioner,

vs.

GLENN A. GUNNELLS, individually and
as Personal Representative of the Estate of
Helen B. Gunnells,
Respondent.

**PETITION FOR REMOVAL OF
PERSONAL REPRESENTATIVE
AND APPOINTMENT OF A
SPECIAL ADMINISTRATOR**

The Petitioner above named, complaining of the Respondent above named, alleges and shows as follows:

1. Petitioner is an interested person in the Estate of Helen B. Gunnells as the daughter and an heir of the Decedent, Helen B. Gunnells, pursuant to S.C. Code Ann. Section 62-1-201(23).

2. Petitioner seeks removal of Glenn A. Gunnells as the Personal Representative of the Estate of Helen B. Gunnells, pursuant to S.C. Code Ann. Section 62-3-611.

3. Petitioner is informed and alleges that cause for removal exists because it would be in the best interests of the Estate.

4. Petitioner is informed and believes that the Estate of Helen B. Gunnells may have claims against Glenn A. Gunnells, individually, for causes of action including but not limited to the following:

- a) failure to provide and administer medications as prescribed after having undertaken the care of the Decedent, Helen B. Gunnells; and

b) breach of the fiduciary duty that Glenn A. Gunnells owed to Helen B.

Gunnells by virtue of a Power of Attorney which she had given to him.

5. Petitioner is informed and believes that Glenn A. Gunnells as Personal Representative cannot effectively represent the Estate of Helen B. Gunnells in an investigation of and potential action against himself.

6. Due to the potential action against the Respondent, the Petitioner is informed and believes that there exists a cause for concern that the Estate will not be properly or effectively preserved by the Respondent, and Petitioner requests an Order for the removal of Glenn A. Gunnells as Personal Representative of the Estate.

7. Petitioner further seeks the appointment of a Special Administrator pursuant to S.C. Code Ann. Section 62-3-614 to ensure proper preservation of the Estate and to secure the Estate's proper administration.

WHEREFORE, having fully set forth her Petition, the Petitioner prays that this Honorable Court inquire into the matters set forth herein as follows:

- A. That this Court finds that the Respondent, Glenn A. Gunnells, should be removed as the Personal Representative of the Estate of Helen B. Gunnells;
- B. That this Court finds that a Special Administrator be appointed to administer the Estate;
- C. For such other and further relief as this Court may deem just and proper.



DONALD H. HOWE, ESQUIRE
818 Wappoo Road
P.O. Box 31324
Charleston, South Carolina 29417
Office: (843) 225-2523
Fax: (843) 225-2698

Email: donaldhowelaw@gmail.com

MICHELLE J. WEIL, ESQUIRE
JULIE C. JACKSON-BAILEY, ESQUIRE
1 Carriage Lane, Bldg. H, 2nd Floor
Charleston, South Carolina
Office: (843) 619-3709
Fax: (843) 614-3902
Email: info@baileyweil.com
ATTORNEYS FOR PETITIONER

Charleston, SC
April 16, 2015.

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF CHARLESTON

15 MAY 22

Case No. 2014-ES-10-202-2

Cathy G. Harkness,

Petitioner,

v.

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

Respondents.

In the Matter of:

Estate of Helen B. Gunnells

ANSWER TO PETITION FOR
REMOVAL OF PERSONAL
REPRESENTATIVE AND
APPOINTMENT OF SPECIAL
ADMINISTRATOR

Respondent, Glenn A. Gunnells, individually and as Personal Representative of the Estate of Helen B. Gunnells ("Respondent"), responding to the Petitioner's Answer to Petition for Removal of Personal Representative and Appointment of Special Administrator, alleges and states as follows:

FOR A FIRST DEFENSE

1. Respondent denies each and every allegation of the Petition which is not hereinafter specifically admitted, modified or explained.
2. Paragraph 1 of the Petition for Removal states conclusions of law to which no response is required. To the extent a response is required, denied.
3. Paragraph 2 of the Petition for Removal states conclusions of law and prayer for relief to which no response is required. To the extent a response is required, denied.
4. Respondent denies Paragraph 3 of the Petition for Removal and demands strict proof thereof.
5. Respondent denies all of the allegations in Paragraph 4 of the Petition and denies all allegations contained in subparts (a) and (b) of Paragraph 4 and demands strict proof thereof.

6. Respondent denies Paragraph 5 of the Petition for Removal and demands strict proof thereof.

7. Paragraph 6 of the Petition for Removal states conclusions of law and prayers for relief to which no response is required. To the extent a response is required, denied.

8. Paragraph 7 of the Petition for Removal states conclusions of law and prayers for relief to which no response is required. To the extent a response is required, denied.

9. The WHEREFORE paragraph of Petition for Removal is denied.

10. Paragraphs A, B, and C of the Petition for Removal states conclusions of law and prayers for relief to which no response is required. To the extent a response is required, denied.

FOR AN ADDITIONAL DEFENSE
(Failure to State a Claim)

11. Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if fully repeated verbatim.

12. The Petition for Removal fails to state facts sufficient to constitute a cause of action and the Petition should be dismissed pursuant to the provisions of SCRPC Rule 12(b)(6).

FOR AN ADDITIONAL DEFENSE
(S.C. Code Ann. § 15-36-10)

13. Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if fully repeated verbatim.

14. Respondent pleads the possible application of the South Carolina Frivolous Proceedings Act, S.C. Code Ann. § 15-36-10.

FOR AN ADDITIONAL DEFENSE
(Reservation/Non-Waiver)

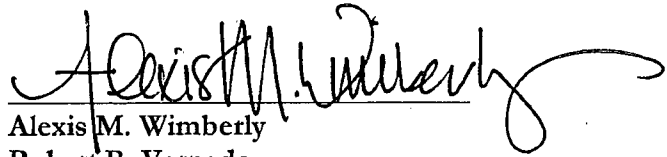
15. Respondent realleges and incorporates his responses to the allegations of the preceding paragraphs as if fully repeated verbatim.

16. Respondent specifically reserves any additional defenses including affirmative defenses, as may be available or revealed to it during the course of its investigation and/or discovery in the case, and as are consistent with the South Carolina Rules of Civil Procedure.

WHEREFORE, having fully answered the Petition for Removal, this Respondent prays that the Petition be dismissed against him and for such other relief as the Court may deem just and proper.

Respectfully Submitted,

BROWN & VARNADO, LLC



Alexis M. Wimberly

Robert B. Varnado

John G. Brown, II

103 Church Street

Mount Pleasant, South Carolina 29464

P: (843) 737-7300

F: (843) 654-5109

awimberly@brown-varnado.com

rvarnado@brown-varnado.com

jbrown@brown-varnado.com

Attorneys for Respondents

May 21, 2015

Mount Pleasant, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

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

Appellant,

v.

Cathy G. Harkness,

Respondent.

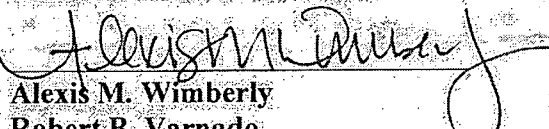
IN THE COURT OF COMMON PLEAS
NINTH JUDICIAL CIRCUIT
Case No. 2016-CP-10-

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

YOU WILL PLEASE TAKE NOTICE that the Appellant, Glenn A. Gunnells, individually and as Personal Representative of the Estate of Helen B. Gunnells, by and through his undersigned counse, pursuant to S.C. Code Ann. § 62-1-308, intends to appeal to the Charleston County Court of Common Pleas the Orders of the Honorable Judge Irvin G. Condon, dated May 12, 2016 and August 25, 2016. Copies of the Orders are attached hereto, and incorporated by reference, as if fully restated herein.

Respectfully Submitted,

BROWN & VARNADO, LLC


Alexis M. Wimberly

Robert B. Varnado

103 Ronnie Boals Blvd. (29464)

P.O. Box 1127

Mount Pleasant, South Carolina 29465

P: (843) 737-7300

F: (843) 654-5109

awimberly@brown-varnado.com

rvarnado@brown-varnado.com

Attorneys for Appellant

August 26, 2016

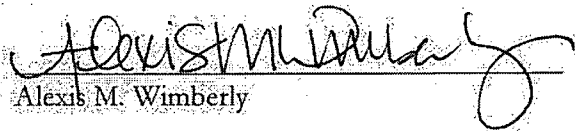
Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within *Notice of Intent to Appeal to Circuit Court* upon all parties in this matter by electronic mail and by depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed as follows:

Donald H. Howe, Esquire
Law Offices of Donald H. Howe, LLC
P.O. Box 31324
Charleston, South Carolina 29417

Julie Jackson Bailey, Esquire
Michelle Weil, Esquire
Bailey & Weil, LLC
1 Carriage Lane, Bldg H, 2nd Floor
Charleston, South Carolina 29407


Alexis M. Wimberly

August 26, 2016
Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

RECEIVED

MAY 11 2017

SC Court of Appeals

CASE NO. 2016-CP-10-4566

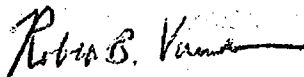
Glenn Gunnells, Individually and as the Personal Representative
of the Estate of Helen B. Gunnells.....Appellant.

v.

Cathy G. Harkness Respondent.

NOTICE OF APPEAL

Glenn Gunnells appeals: (I) the *Order Affirming Probate Court Orders of May 12, 2016 and August 25, 2016* of the Honorable Roger M. Young, Sr. dated April 7, 2017 [filed April 11, 2017, of which written notice was received by Appellant on April 17, 2017] attached herewith as Exhibit "A"; (II) the *Order Denying Motion to Alter, Amend, and/or Reconsider* of August 25, 2016 attached herewith as Exhibit "B"; and (III) the *Order Voiding the Last Will & Testament Dated July 3, 2013 and Admitting the Last Will & Testament Dated November 7, 2006* of May 12, 2016 attached as Exhibit "C".



Robert B. Varnado SC Bar #0007085
Alexis M. Wimberly SC Bar #101611
BROWN & VARNADO LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

May 10, 2017
Mt. Pleasant, South Carolina

Other Counsel of Record:

Donald H. Howe, Esquire
Law Offices of Donald H. Howe, LLC
P.O. Box 31324
Charleston, South Carolina 29417

Julie Jackson Bailey, Esquire
Michelle Weil, Esquire
Bailey & Weil, LLC
1 Carriage Lane, Bldg H, 2nd Floor
Charleston, South Carolina 29407

Attorneys for Respondent

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

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

CASE NO. 2016-CP-10-4566

RECEIVED

MAY 11 2017

SC Court of Appeals

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

v.

Cathy G. Harkness Respondent

PROOF OF SERVICE

The undersigned attorney hereby certifies that a true copy of the Appellant's *Notice of Appeal* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

Donald H. Howe, Esquire
Law Offices of Donald H. Howe, LLC
P.O. Box 31324
Charleston, South Carolina 29417

Julie Jackson Bailey, Esquire
Michelle Weil, Esquire
Bailey & Weil, LLC
1 Carriage Lane, Bldg H, 2nd Floor
Charleston, South Carolina 29407

STATE OF SOUTH CAROLINA

COUNTY OF CHARLESTON

Cathy G. Harkness,

Petitioner,

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

Respondent.

In the Matter of:
Estate of Helen B. Gunnells

IN THE PROBATE COURT

CASE NO.: 2014-ES-10-2022

**NOTICE OF MOTION AND MOTION
TO ALTER, AMEND and/or
RECONSIDER**

TO: THE HON. IRVIN G. CONDON, CHARLESTON COUNTY PROBATE JUDGE and
DONALD H. HOWE, ESQ., JULIA C. JACKSON-BAILEY, ESQ. and MICHELLE J.
WEIL, ESQ., ATTORNEYS FOR PETITIONER:

PLEASE TAKE NOTICE that the Respondent Glenn A. Gunnells ("Respondent"), by and through his undersigned attorneys and pursuant to Rule 59(e) of the South Carolina Rules of Civil Procedure, will move before the Honorable Irvin G. Condon, Charleston County Probate Judge on the tenth day of service hereof, at the Charleston County Courthouse, 100 Broad Street, Charleston, South Carolina 29401 or at such other time, date and place as counsel may be heard, seeking to Alter, Amend and/or Reconsider the Order of May 12, 2016 ("Order") [mailed May 16, 2016 and received by the undersigned May 19, 2016], based on the following grounds.

1. *Incomplete Inclusion and Analysis of Governing Law*

The Order inadequately states and applies controlling authority on the exercise of undue influence. [Order p. 14]. While none of the case law contained in the Order is invalid [see Section 2 below], however, taken as a whole – it is incomplete and improperly applied to the facts of this case. [Id.]. The Court should adopt and apply the more complete exemplification of the applicable authority set forth in the Petitioner's Proposed Order [Pet. Prop. Or. pp. 4-6]. When the full body

of South Carolina statutory and case authority is examined along with the evidence presented at trial, it becomes clear that the Petitioner did not meet her high burden of proof.

The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization; it encompasses the right to make it according to the testator's pleasure and in her absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed. *Wilson v. Dallas*, 403 S.C. 411, 445, 743 S.E.2d 746, 765 (2013); *In re Last Will and Testament of Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 811 (1985) (citation omitted). "It is elementary that the statutory right of a competent person to dispose of her property as she wishes may not be thwarted by disappointed relatives or by one who thinks the Testatrix used bad judgment or was misled." *Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 775 (1976). When the formal execution of a will is admitted or proved, a *prima facie* case in favor of the will is made out, and the burden is then on the contestants to prove undue influence, incapacity or other basis of invalidation. *Calhoun v. Calhoun*, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982).

If a party alleges incompetence by a Testatrix, the party asserting it bears the burden of proving incapacity at the time of the transaction by a preponderance of the evidence. The test of whether a testator had the capacity to make a will is whether he knew (1) his estate, (2) the objects of his affections, and (3) to whom he wished to give his property. The legal test for determining whether or not a person has sufficient mental capacity to dispose of his property by will does not include the proviso that he must have a reasonable basis on which to found his like or dislike of the natural objects of his bounty. Further, the capacity to know or understand, rather than the actual knowledge or understanding, is sufficient. *Hairston v. McMillan*, 387 S.C. 439, 445, 692 S.E.2d 549, 552 (Ct. App. 2010) (internal citations and punctuation omitted). A person may execute a

valid will, even if he or she is not competent to transact ordinary, everyday affairs; ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity, though it seems to be quite generally but mistakenly supposed, outside the ranks of the legal profession, that a capacity to transact important business is the criterion of fitness to make a valid will. *Id.*, 387 S.C. at 446, 692 S.E.2d at 552.

In will contest litigation that alleges undue influence, the South Carolina Probate Code states that: “[the Petitioner] will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity.” See S.C. Code Ann. § 62-3-407. (“Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof.”); *Calhoun*, *supra*, 277 S.C. at 530, 290 S.E.2d at 417. (“The contestants continue to bear the burden of proof throughout the will contest”); *Smith v. Whetstone*, 209 S.C. 78, 84, 39 S.E.2d 127, 129 (1946) (stating in case where a will is formally executed, the burden of proof is on the contestant to prove undue influence “and this burden remains on him to the end”).

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 her to do things which are against her free will, and that she would not have done if she had been left to her own judgment and volition. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003); *Last Will and Testament of Smoak v. Smoak*, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985). A contestant must show that the influence was brought directly to bear upon the testamentary act. *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010).

Undue influence must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes.

of another, for that would be a very strong ground in support of a testamentary act; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear. *Calhoun v. Calhoun*, 277 S.C. 527, 532, 290 S.E.2d 415, 418 (1982); see also *Wilson*, supra, 403 S.C. 411, 437, 743 S.E.2d 746, 760 (2013) (holding “[t]he influence necessary to void a will must amount to force and coercion.”). The mere existence of influence is not enough to void a will as all influences are not unlawful. *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993); *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946).

A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized.” *Smoak*, supra, 286 S.C. at 424, 334 S.E.2d at 809; *Russell*, supra, 353 S.C. at 217, 578 S.E.2d at 333. Undue influence must be shown by unmistakable and convincing evidence. *Id.* The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf. *Id.* Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker. *Id.*

Undue influence may be proven by circumstantial evidence. However, that evidence must be of a substantial nature. *Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 775 (1976). Even if a contestant does establish an inference of undue influence, the unhampered opportunity of the testator to change the will after the operation of undue influence destroys this conclusion. *Hembree v. Estate of Hembree*, 311 S.C. 192, 196-97, 428 S.E.2d 3, 5 (Ct. App. 1993).

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. *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127

(1946), as quoted in *Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390 (Ct. App. 1999); *Russell*, *supra*, 353 S.C. at 217, 578 S.E.2d at 333-34.

Respondent asserts that if the full body of controlling authority was applied – as outlined above – then the Court would never have been able to find for the Petitioner, as more fully described below. For this reason, the Court should alter, amend or reconsider its Order in a manner consistent with the prevailing case law.

2. *Adoption and Application of “Four Circumstances Test” Is an Error of Law Where It Does Not Require Petitioner Meet Her Burden of Proof.*

The Petitioner urged the Court to adopt a “four circumstances test” to apply to the instant case, which the Court did in its Order.

“Courts often look to see if any of the following circumstances apply when deciding whether a testatrix was unduly influenced at the time her Will was executed: (1) an unjust distribution made to a beneficiary; (2) a motive and opportunity by the beneficiary to influence the testatrix; (3) a confidential or fiduciary relationship between the testatrix and beneficiary and (4) the susceptibility of the testatrix to be unduly influenced.”

[Order p. 14].

However, none of the cases cited by Petitioner actually establish this “four circumstances test”: *Dixon v. Dixon*, 362 S.C. 388, 398-399, 608 S.E.2d 849, 854 (2005); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003); *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010); *Howard v. Nasser*, 364 S.C. 279, 288, 613 S.E.2d 64, 68-69 (Ct. App. 2005). [Order p. 14]. This “test” cannot be found in any other recent, reported South Carolina cases. *E.g.*, *Wilson v. Dallas*, 403 S.C. 411, 445, 743 S.E.2d 746, 765 (2013); *In re Estate of Anderson*, 381 S.C. 568, 574, 674 S.E.2d 176, 179-180 (Ct. App. 2009). In any event, such a “test” is erroneous because it directly conflicts with South Carolina statutory authority and current case law.

The first circumstance ["an unjust distribution"] cannot be found at all in a search of South Carolina jurisprudence; it actually conflicts with settled law. In *Wilson v. Dallas*, it was held that "[t]he right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization, and it encompasses the right to make it according to the testator's pleasure and in his absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed." 403 S.C. at 445, 743 S.E.2d at 765. In *In re Last Will & Testament of Smoak*, the Supreme Court held that the fact a testator is more fond of certain children over others proves nothing – "[a] testator may make an unjust or unreasonable distribution of his estate if he wishes and may discriminate against and exclude members of his own family who normally might be objects of his affection." 286 S.C. at 425-26, 334 S.E.2d at 810; *see also Calhoun*, 277 S.C. at 531, 290 S.E.2d at 418 (1982) (citing a 1839 case for the proposition that "we have held that a disposition of property, though ever so capricious or unreasonable, will not be voided on that ground alone."); *see also Means v. Means*, 36 S.C.L. (5 Strob.) 167 (1850).

The second circumstance ["motive and opportunity"] is simply non-dispositive in and of itself. "A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized." *Smoak*, supra, at 424, 334 S.E.2d at 809; *Russell*, supra, 353 S.C. at 217, 578 S.E.2d at 333; *Mock v. Dowling*, supra, 266 S.C. at 277, 222 S.E.2d at 774 (1976).

The same holds true for the fourth circumstance ["susceptibility"] which has not been part of our undue influence jurisprudence since the 1946 opinion in *Page v. Lewis*, 209 S.C. 212, 238-239, 39 S.C. 787, 789 (1946) and is not mentioned in as a factor in reported South Carolina cases in the ensuing seventy years. *See e.g., Wilson v. Dallas*, 403 S.C. 411, 445, 743 S.E.2d 746, 765

(2013). Even if it were a factor (which it isn't), *Page* still requires proof that the testator's susceptibility was acted on. *Id.*

Only the third showing ["a confidential or fiduciary relationship"] has direct bearing under current South Carolina undue influence authority. *Bullard v. Crawley*, 294 S.C. 276, 280-281, 363 S.E.2d 897, 900 (1987). However, in *Howard v. Nasser*, 364 S.C. 279, 288, 613 S.E.2d 64, 68-69 (Ct. App. 2005), the Court of Appeals made it clear that the presence of a confidential or fiduciary relationship does not relieve the petitioner of the ultimate burden of proof – it simply requires the respondent to put up rebuttal evidence:

"The existence of a fiduciary relationship between a testator and beneficiary raises a presumption of undue influence. If evidence of such a relationship is presented, the proponents of the will must offer rebuttal evidence. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will."

See also, *Hairston*, supra, 387 S.C. at 446, 692 S.E.2d at 553 (Ct. App. 2010); *Bullard*, supra, 294 S.C. at 280-281, 363 S.E.2d at 900. In a similar vein, it has been held that "[a]lthough there is a presumption of undue influence in the making of a will involving fiduciaries, the ultimate burden always remains with the proponent." *Wilson v. Dallas*, supra, 403 S.C. at 445, 743 S.E.2d at 765; *Calhoun v. Calhoun*, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982).

Rather than any test, the consistent theme throughout South Carolina undue influence jurisprudence is that the burden of proof is on the contestant to show undue influence – the kind of influence which destroys the testator's free agency and prevents the maker's exercise of judgment and free choice. *Wilson*, supra. Said another way: "[c]ircumstances must unmistakably and convincingly point to the substitution of another's will for that of the testator." *Hembree*, supra, 311 S.C. at 196-97, 428 S.E.2d at 5. Or stated yet another way: "the party seeking to challenge

a will on the basis of undue influence must present evidence which 'unmistakenly and convincingly shows the party's will was overborne by the defendant or someone acting on his behalf.'" *Estate of Anderson*, supra, 381 S.C. at 574, 674 S.E.2d at 179-180.

Nowhere in the Order promulgated by Petitioner does the Court establish or discuss the high burden of proof required of the Petitioner. Nowhere in the Order does the Court find that Petitioner showed by clear, unmistakable and convincing evidence that there was "[t]he kind of mental coercion which destroys the free agency of the creator and constrains [her] to do things which are against [her] free will, and that [she] would not have done if [she] had been left to [her] own judgment and volition. *Russell*, supra, 353 S.C. at 217, 578 S.E.2d at 333. In fact, the Order fails to weigh the testimony of the witnesses at all, merely cherry-picking certain bits of evidence and certain snippets favorable to the Petitioner while ignoring and glossing over any contradictory evidence or testimony.

Having failed to state the correct burden of proof or to make findings and conclusions consistent therewith (including the finding that the Respondent met his obligation to provide rebuttal evidence), the Court has committed reversible error. Consequently, the Court's adoption and application of the "four circumstances test" – adopted on pages 15 and 16 of the Order – effectively relieves the Petitioner of meeting her high burden of proof under South Carolina law to show clear, mistaken and convincing evidence that the Testatrix's free agency, free choice and free will was overcome by Respondent. The Court's adoption of this "test" which is not recognized by South Carolina law is grounds for the Court to alter, amend or reconsider its Order.

3. *The Court Erred by Ignoring the Uncontroverted Testimony of the Attorney Who Drafted the New Will and her Paralegal.*

The Court committed reversible error by failing to consider the substantive testimony of the only two witnesses who were present at the time the Testatrix performed the testamentary act:

attorney Suzanne Klok and her paralegal Annie Voytko (formerly Annie Walton). The Court neither expressly rejected their testimony nor found these witnesses to be lacking in credibility. The Court simply ignored their testimony. Testimony from drafting attorneys has consistently been found to be probative in all other recent, reported cases in South Carolina.

It is well-settled that in a will contest based on undue influence, the contestant must show that the influence was brought directly to bear upon the testamentary act. *Russell v. Wachovia Bank*, 353 S.C. 208, 219, 578 S.E.2d 329, 335 (2003); *Mock v. Dowling*, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976); *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010); *see also Wilson v. Dallas*, 403 S.C. 411, 337, 743 S.E.2d 746, 760 (2013) (holding that in a will contest case, facts are irrelevant “if they have no bearing on the execution of [testator’s] testamentary documents” and “shed no light on whether the [testator’s] will was somehow overcome at the time he signed the documents finalizing his estate plan”). Accordingly, the Court should have given great weight to the testimony of Ms. Klok and Ms. Voytko, but simply chose to ignore them as if they had not testified. It is instructive to review their testimony.

Ms. Klok substantiated the original copy of the New Will for the Court. [Tr. Vol. II at 65].

The Testatrix met with Ms. Klok and her legal assistant Ms. Voytko on July 3, 2013 for about three (3) hours. [Id. at 58]. She was adamant about having the New Will done that day. [Id.]. She

brought the Old Will to the meeting with Ms. Klok, knowing that she wanted to change her disposition. [Id. at 60]. Ms. Klok satisfied herself that Mrs. Gunnells was competent to make a new testamentary disposition. [Id. at 62]. “[T]hroughout our discussions, she was very frail physically but mentally she seemed to know what she wanted. She was pretty clear. Very adamant about it.” [Id.]. While Respondent drove Testatrix to her appointment at the Klok Law Firm, he was not present in the conference room at any time during any discussion or drafting of the New

Will. [Id. pp. 59-60]. Ms. Klok's testified that her policy is not to allow anyone who comes with the client into the conference room during her interviews except her staff; in fact, she directed that the Respondent be outside the building throughout the meeting so that he could not possibly overhear the discussions – a decision the Respondent respectfully complied with. [Id. at 60-61].

On the day she met with Ms. Klok, the Testatrix was very upset with her two daughters, she did not wish to be around them and she was adamant about wanting to leave her estate to Respondent. [Id. at 61-62]. "She seemed very, very sure, and that's one thing that struck me that I still remember." [Id. at 70]. Ms. Klok said that had she ever felt the Testatrix was unsure, she would never have finished the Will that day. [Id.]. Ms. Klok remembered that Mrs. Gunnells glowed when she talked about Respondent – "It was very sweet. She was very, very loving about Glenn. It was really in contrast to how she spoke about her daughters, that for them they were more -- it was disappointment, I think, with the daughters. But she was very, very happy that Glenn was taking care of her. And you know, she said she couldn't get out and interact as much as she did if it wasn't for Glenn. And that he really was just, you know, wonderful of all the things he did. And took great care of her." [Id. at 63].

Ms. Klok explained to Mrs. Gunnells that changing her will was her decision and no one else's; Ms. Klok then asked the Testatrix if she felt any force or pressure from any of her children in any way to change her will, to which she replied no. [Id. at 68-69]. Mrs. Gunnells – while alone with Ms. Klok and Ms. Voytko – thoroughly explained her reasoning and rationale for executing a New Will. It was not because she necessarily wanted to give Respondent the entire estate, it was more so that she did NOT want to give anything to her daughters – "she told me her rationale for it wasn't related to how great Glenn was and she loved him, but it was more how she was disappointed with her daughters." [Id. at 72]. Ms. Klok remembered that the Testatrix was very

worried about her daughter, the Petitioner, causing problems for Respondent once she found out about the New Will. [Id. at 62].

Ms. Klok's paralegal, Annmarie "Annie" Voytko (formerly Annie Walton) corroborated Ms. Klok's testimony. [Tr. Vol. II at 86]. Respondent left the building when she and Ms. Klok met with the Testatrix for several hours. [Id. at 88-89]. As to the Testatrix's competency, Ms. Voytko testified that "her body was frail but her mind was fine" and that she "was with it." [Id. at 89-90]. She agreed that the Decedent was "disappointed with her daughters" but was very grateful to Respondent because "he was always there for her." [Id. at 90-91]. In her judgment, there were no "red flags" at all about her relationship with Respondent but the Decedent did say that her daughters "would be furious" about the New Will. [Id. at 91-92]. Ms. Voytko witnessed the New Will. [Id. at 93].

For decades, reported decisions in South Carolina have given great weight to the testimony of the attorney who drafted the challenged testamentary document. *See, e.g., Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 216, 578 S.E.2d 329, 333 (2003); *Calhoun v. Calhoun*, 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982); *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010); *In re Estate of Anderson*, 381 S.C. 568, 575, 674 S.E.2d 176, 180 (Ct. App. 2009); *Howard v. Nasser*, 364 S.C. 279, 284, 613 S.E.2d 64, 66 (Ct. App. 2005); *Hembree v. Estate of Hembree*, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993); *Cf. Estate of Cumbee*, 333 S.C. 664, 5673, 11 S.E.2d 390, 294 (Ct. App. 1999) (finding undue influence where, *inter alia*, Testatrix did not meet with lawyer nor did she read the will). In fact, in *Hairston*, the drafting attorney's testimony was considered so significant that it outweighed that of a testifying medical expert who had not examined the Decedent. 387 S.C. at 446, 692 S.E.2d at 553. By completely failing to

address Klok's testimony, the Court substantially deviates from what has been considered probative and compelling evidence by the Supreme Court and Court of Appeals of South Carolina.

By ignoring the legal testimony, the Court has turned undue influence jurisprudence on its head. It is uncontroverted that Ms. Klok is a licensed, reputable and competent attorney who has practiced law in the Charleston area for over twenty years – and in the field of wills and estate planning since 2009. The Petitioner offered no testimony that put into question Ms. Klok's qualifications or professionalism in any manner, nor any expert testimony that Ms. Klok failed: (1) to adequately discharge her duty to the Testatrix; (2) was governed by any conflict of interest; or (3) deviated from the acceptable standard of care for probate attorneys. Yet if the Court's Order becomes the new standard for undue influence litigation, all this formerly probative and compelling testimony is deemed irrelevant.

Why did the Court ignore Ms. Klok? Because in the Proposed Order submitted by Petitioner, Ms. Klok's testimony undermined their entire theory of her case and, therefore, was intentionally omitted. The Court should correct this error and, in doing so, alter, amend and reverse its Order by giving credit to a competent, professional and unchallenged attorney who practices within this very Probate Court.

4. *The Court Erred by Not Finding Probative that Respondent Was Not Present During the Testamentary Act.*

For almost the same reason the Court erred by ignoring uncontroverted legal testimony, it also erred when it failed to find that Respondent's exclusion from the attorney conferences and signing of the New Will was conclusive evidence that Respondent did not exert undue influence on the testamentary act.

It is uncontroverted that Respondent was not inside Ms. Klok's office when Testatrix signed the New Will on July 3, 2013. The Court makes this finding twice. [Order at 2, 16]. This

sort of evidence has always been deemed probative, if not conclusive, in our Courts. *See e.g. Estate of Anderson*, supra, 381 S.C. at 575, 674 S.E.2d at 180; *Calhoun*, supra, 277 S.C. at 533, 290 S.E.2d at 419 (1982); *Russell*, supra, 353 S.C. at 216, 578 S.E.2d at 333 (2003), *but compare Estate of Cumbee*, 333 S.C. 664, 673, 11 S.E.2d 390, 294 (Ct. App. 1999) (finding undue influence where, *inter alia*, Testatrix did not meet with lawyer).

Respondent submits that under these facts the Testatrix – meeting alone with a licensed, competent and experienced attorney (who took the care to have her paralegal be present for the substantive meeting with the Testatrix) – could not exert undue influence on the testamentary act when he was not present when that act took place. *Mock v. Dowling*, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976). The Court commits reversible error when it does not give this uncontroverted fact the weight and probative value it demands. Accordingly, the Court should alter, amend and reverse its Order on this ground.

5. The Court Erred by Being Swayed by Irrelevant Factors Connected with the Visit to Ms. Klok's Office.

Not only did the Court ignore the probative testimony of Ms. Klok and Ms. Voytko when it signed Petitioner's Proposed Order, or the fact that Respondent was not present during the testamentary act, it focused on irrelevant factors instead.

For example, the Court seemed to find probative that Respondent drove the Testatrix to Ms. Klok's office. [Order at 2]. However, in *Calhoun v. Calhoun*, our Supreme Court did not find the fact the beneficiary drove the testator to the lawyer's office probative (as in the case at bar). 277 S.C. at 532, 290 S.E.2d at 419 (1982). Neither, apparently, did the Court of Appeals in *Hembree*, supra, 311 S.C. at 195, 428 S.E.2d at 4 (Ct. App. 1993).

The Order also suggests that there was some improper, prior attorney-client relationship between Respondent and Ms. Klok. It should be pointed out that Ms. Klok was the closing attorney

for the property Respondent was selling (Tr. Vol. II p. 83) and in conformity with South Carolina practice, she would have been selected by the Buyer's attorney. Even if the Court discounts the Respondent's testimony that the Testatrix wanted a female attorney rather than return to the firm where she had the Powers of Attorney drawn (Id. at 132), in *Smoak*, supra, the Supreme Court found nothing untoward that the beneficiary took the testatrix to his personal attorney. 286 S.C. at 422, 334 S.E.2d at 808.

Respondent submits that the lack of a prior relationship between the Testatrix and Ms. Klok [Order p. 11] is irrelevant as is the length of time Ms. Klok and the Testatrix met [Order pp. 2, 11] – in light of the Testatrix's unquestioned competency. Following *Hembree*, supra, 311 S.C. at 195, 428 S.E.2d at 4, the fact that the Will was "unsealed" when Testatrix left Ms. Klok's office, and the Respondent had access to it [Order p. 16], is likewise irrelevant.

Bluntly, the Court is simply wrong when it adopts Petitioner's proposed language that the "circumstances surrounding the execution clearly indicate the Will was the product of the Respondent and that the Testatrix 'felt she had no choice' but to execute a New Will." Nothing could be further from the truth, nor does this statement reflect a finding that Petitioner has met her high burden of proof.

6. *The Court Erred by Finding Undue Influence Based on Events After the Testamentary Act.*

The Order clearly establishes that the Testatrix went to change her will on July 3, 2013 – less than a month after the death of her late husband on June 8, 2013. [Order p. 2, 16]. Findings of fact for alleged acts of undue influence after July 3, 2013 should not be permitted to serve as a basis for finding influence at the time of the testamentary act. At best, such evidence could only go to whether the Testatrix had unfettered opportunity to change her Will later. *Hembree*, supra, 311 S.C. at 196-97, 428 S.E.2d at 5 (Ct. App. 1993). To the extent the Court relies on the testimony

of Mr. Brantley, Ms. Carroll or Dr. Chanson for events which occurred after July 3, 2013 to support a finding of undue influence, this is erroneous and the Court should reverse itself accordingly.

7. *The Petitioner Failed to Make Any Showing of Threats, Force or Restricted Visitation.*

It has been held repeatedly that “[g]enerally, 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*, *supra*, 353 S.C. at 217, 578 S.E.2d at 333; *Hembree*, *supra*, 311 S.C. at 196, 428 S.E.2d at 5. While the Petitioner and her sister claimed that Respondent “threatened” them with “calling the police” – there was absolutely no testimony or evidence that Respondent used threats or force on the Testatrix – which is the person to whom the threat/force would have to be made on in order for it to be probative. *See Hairston*, *supra*, 387 S.C. at 447, 692 S.E.2d at 549 (“[f]urthermore, Hairston presented no evidence of threats or force wielded against Decedent.”).

The Order states that on the date of the execution of the New Will, Mrs. Gunnells was “visibly upset,” “crying,” and “distraught.” [Order at 13]. However, the deposition of Dr. Chanson paints a different picture. Dr. Chanson makes it clear that these emotions were experienced over a period of time and were result of Testatrix’s husband’s recent death – not anything to do with Respondent. [Chanson Depo. pp. 25, 26, 35]. It should be noted that during the two years that Dr. Chanson treated Testatrix, Respondent was never in the room for any of her examinations – which lasted anywhere from 30 to 50 minutes. [Chanson Depo. pp. 13, 18]. Dr. Chanson opined that Mrs. Gunnells’ behavior was appropriate and she did not seem fearful. [Id. at 18]. Dr. Chanson did not see anything in Testatrix’s demeanor that was concerning or that would lead her to believe Respondent was exercising any negative influence over Testatrix. [Chanson Depo. at 17-20].

Likewise, there was no testimony or evidence of restricted visitation. The Testatrix's brother, Mr. Brantley, testified that Testatrix did not speak as freely when Respondent was around, however, Brantley did in fact speak to her outside Respondent's presence. [Tr. Vol. I at 40-41, 45]. Moreover, he visited his sister in Charleston after her husband's death and while Respondent was living with his mother: "I probably visited at least three or four times a year, sometimes more often, according to what was going on, and we talked on the telephone at least two, three, four times a week. And if I didn't call her, she would call me." [Id. at 14, 13-17, 19]. Respondent would also bring her to visit Mr. Brantley in Waynesboro, Georgia. [Id. 15]. Thus, his testimony failed to reveal that her free will was destroyed. It further shows Respondent was not isolating Decedent from her brother.

Mr. Brantley felt his sister was strong willed, independent, intelligent and opinionated – a Southern lady – and remained that way even after her husband's death. [Id. at 45-46]. This is consistent with the testimony of daughter Belinda Davis, who agreed that her mother was intelligent, opinionated and a Southern lady. [Id. at 83]. Mr. Brantley testified Testatrix never wanted to be in a nursing home [Id. at 27] – which, in light of her health and her advanced age, required a live-in healthcare provider. He testified he was bothered by his niece's threat to file a lawsuit and that it probably bothered Testatrix too. [Id. at 44-45]. The fact she never discussed her New Will with her brother is not dispositive. [Id. at 46].

On direct examination, Testatrix's "friend," Ms. Carroll, testified that after her husband's death, Testatrix lost interest in talking on the telephone but that Ms. Carroll would often visit with Testatrix in her home. [Carroll Depo. at 10-11]. She recounted several visits and telephone calls, yet she had very little recollection of the conversations. [See, generally Carroll Depo.]. She confirmed daughter Belinda Davis was never really around. [Id. at 30]. Testatrix even told her

attorney, Ms. Klok, that she wouldn't be able get out and interact as much as she did if it wasn't for Respondent. [Tr. Vol. II at 63].

Ms. Carroll further testified that in the last few months of her husband's life, Testatrix changed; however, she admitted that may have been because her husband was dying. [Carroll Depo. at 33]. Ms. Carroll saw her friend the week prior to her passing at her home. [Id. at 34]. Ms. Carroll never voiced her concerns to Testatrix about Respondent and Testatrix never spoke to Ms. Carroll about any mistreatment, threats, force or any concerns she had about Respondent. [Id. at 35]. Even though their telephone contact fell off, Ms. Carroll continued to visit Testatrix after her husband's death – including when Respondent was not there. [Id. at 10, 12-13, 35]. Respondent never kept Ms. Carroll away from his mother nor did he ever instruct her to leave when she visited Testatrix. [Id. at 35]. Ms. Carroll left on her own accord when she visited one time and Testatrix didn't wish to talk anymore. [Id. at 20].

The daughters' testimony fails to show any restriction of visitation. Ms. Belinda Davis was self-admittedly absent – moving to Hawaii right after her father was diagnosed with cancer. [Tr. Vol I at 78-79]. She conceded that she had the opportunity to talk to her mother after her father's death – but she understood her mother did not wish to speak to her and chose not to visit either. [Id. at 68, 83, 87]. It was clear from all of the testimony that Ms. Davis did not talk to her mother much at all, including during the month of July when the New Will was executed. [Id. at 82, 85].

Petitioners' own testimony is indicative that she made a choice to stay away. Only 19 days after her father's death, Petitioner admits that she wrote a letter to her mother threatening legal action to recover personal property. [Respondent's Ex. 4]. In October 2013, Petitioner wrote her mother yet another letter. [Respondent's Ex. 5]. In this letter, Petitioner commends her mother for being happy, content and being able to sleep at night. [Id.] “[I]t seems you are happy and satisfied

with your choices you have made.” [Id.]. Furthermore, Petitioner states that she has no desire to visit her mother at her Residence. [Id.]. Petitioner offered no compelling testimony she was excluded from visiting her mother prior to the date of the New Will.

Accordingly, the most the Petitioner proved was that leading up to and after her husband’s death, Testatrix was sad and sometimes did not want to speak on the phone or have long visits with friends. An emotion that Dr. Chanson said was completely expected and normal – “most marked thing would have occurred after her husband died and appropriately so. She was very depressed about that. That is one of the most significant losses a person can undergo, secondary to the loss of a child. And it is not uncommon that people will have a difficult time with that. And she was no different.” [Chanson Depo. at 15].

There is no evidence or testimony to support the finding in the Order that states “other children and friends of the Testatrix were not permitted to speak to her on the phone or to be alone with her in the home.” [Order, p. 15]. Based on the foregoing, the Court should reverse its Order. *See Hairston, supra*, 387 S.C. at 447, 692 S.E.2d at 549 (no restriction of visitation on the whole).

8: *The Court Erred by Not Finding the Testatrix Was Competent to Execute a Will and Petitioner Misstated the Testimony of Dr. Chanson.*

The reasonable good health of a testator is considered probative in an undue influence case. *First Citizens Bank v. Inman*, 296 S.C. 8, 370 S.E.2d 99 (1988). Moreover, in case after case, the South Carolina appellate courts have found probative the testimony of the treating physician that the decedent was competent. *See, e.g., Calhoun, supra*, at 431; *Smoak, supra*, at 426. Thus, the Court should have included the uncontroverted findings of Dr. Chanson.

It is uncontroverted that Dr. Chanson is a licensed, reputable and competent physician who has practiced medicine in Charleston since 2000 in the area of internal medicine. [Chanson Depo. pp. 6-7]. She is a graduate of Furman University, obtained a Ph.D. from the University of South

Carolina and received her medical training at the Medical University of South Carolina, the Bethesda (Md.) Naval Hospital (internship) and the Portsmouth (Va.) Naval Hospital (residency in internal medicine). [Id.]. The Petitioner offered no testimony that questioned Dr. Chanson's qualifications in any manner, nor any counter medical expert. It should be noted that Belinda Davis testified it was on her suggestion that Testatrix began to see Dr. Chanson [Tr. Vol. I at 61], which Dr. Chanson corroborated. [Chanson Depo. at 11-12, 16].

The Order relied heavily on Dr. Chanson's assertion that she cannot say whether or not Testatrix was "unduly influenced." [Order, pp. 13-14]. However, Dr. Chanson clearly stated in her deposition that she could not come to opine on that issue because she had no idea what the term meant, and therefore can have no opinion either way. [Id. at 18, 38]. Notwithstanding the foregoing, Dr. Chanson noted that Testatrix routinely carried on intelligent conversations during her office visits. [Id. at 19]. Dr. Chanson further explained that that Testatrix always knew exactly who she was and who her family and children were, she had a firm understanding of her surroundings and nothing seemed to suggest that she could not make her own decisions. [Id. at 19, 22].

The Testatrix never missed an appointment with Dr. Chanson. [Id. at 17]. Office visits would usually last between 30 and 50 minutes. [Id. at 13]. Furthermore, Respondent was never in the room when Dr. Chanson was examining/treating Testatrix – he would wait in the lobby until she needed to speak to him. [Id. at 18, 27-29]. Dr. Chanson opined that Respondent seemed very attentive towards his mother; after the examinations, he asked appropriate questions about Decedent's health and he would often call the office to ask questions about medications. [Id. at 17]. "He seemed to be giving appropriate care to his mother," she said [Id.].

Dr. Chanson also noted that Testatrix was distraught and very depressed after her husband's passing; however, she added, it is not uncommon for people to have a difficult time after the loss of a spouse, and Testatrix was no different. [Id. at 15, 20, 25]. Significantly, Dr. Chanson saw Testatrix for an appointment on the same day as Testatrix executed the New Will. and had no testimony that Testatrix was not of sound mind, albeit depressed at the recent loss of her husband. [Id. at 24-25, 3-38]. Dr. Chanson also corroborated a letter she wrote August 6, 2013 – a month after execution of the New Will – that the Decedent “seems competent to make her own decisions.” [Id. at 22].

Dr. Chanson did not see anything in Testatrix's demeanor that was concerning to her or that would lead her to believe Respondent was exercising any negative influence over Testatrix. [Chanson Depo. at 17-20]. “Her behavior seemed appropriate in our offices. She didn't seem to be fearful. I always examined her, and he was not in the room, so I didn't see anything that would be concerning,” she testified. [Id. at 18]. Dr. Chanson also said that Testatrix “knew who she was – and who her – who her family, children were. She carried on intelligent conversations at our office visits.” [Id. at 19]. She testified there was nothing “out of the context” concerning whether Respondent exercised influence over Decedent. [Id. at 20]. She said that the Testatrix followed her directions. [Id.].

Dr. Chanson testified to all these opinions to a reasonable degree of medical certainty and most probably. [Id. at 25-26]. She is an unbiased witness with no reason to favor or discredit one party or the other. She always spent time alone with the Decedent, yet reported no findings of abuse, neglect, force, coercion or domination of Decedent by Respondent.

9. The Court Erred by Accepting the Testimony of Ms. Carroll that Testatrix "Had No Choice."

In signing Petitioner's Proposed Order, the Court accepted the testimony of Ms. Carroll that the Testatrix had said she had "no choice" in signing the New Will. [Order at 16]. This testimony provides no context for why the Testatrix allegedly had "no choice" – what if it was because her daughters' conduct left her no choice? In any event, this testimony should never have been admitted.

The "no choice" testimony came about from Petitioner's counsel asking Ms. Carroll to testify regarding a letter she had allegedly signed, but which she had no knowledge regarding how it was drafted, who drafted it, when she signed it or under what circumstances she signed it other than Petitioner was there at the time. [Carroll Depo. at 24-28]. It was thus excluded from evidence by the court because of the same, and for hearsay, lack of personal knowledge and lack of authentication. Rules 802, 602 and 901 SCRE.

Reading from the letter in her deposition, Ms. Carroll said that the Testatrix told her that she did not want to change her will but Respondent told her she had to. [Carroll Depo. at 18]. However, before she read from the letter, Ms. Carroll testified on direct examination she did not remember any conversation with the Testatrix concerning a will ("Q: Okay. Did [Testatrix] ever talk to you about signing a will or something like that? A: No. Q: Never came – A: No.") [Carroll Depo. at 15]. Similarly, on cross-examination after she read the letter, Ms. Carroll did not remember discussing the will with the Testatrix, either. ("Q: So earlier, Mr. Howe had to remind you about . . . a conversation you had about the will with Mrs. Gunnells. Do you remember that conversation? A: No. I don't.") [Carroll Depo at 35-36]. She could not remember what the Testatrix told her about Respondent. [Id. at 35]. Likewise, it was only after Mrs. Carroll read from the letter that she testified specifically that Respondent kept Testatrix from speaking to her brother

and sister – which she had not testified to previously on direct examination. [Tr. 19, 22]. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. SCRE 602.

It should be noted that Ms. Carroll, a 92-year-old ailing woman, admitted to an extremely close, personal relationship to the Petitioner. She testified that the Petitioner “was like a daughter to her” and she would do anything the Petitioner asked her to do; she even talked to the Petitioner every day. [Carroll Depo. at 28-29, 37]. Yet, curiously, Petitioner did not talk to Ms. Carroll at all between the time Arden Gunnells died and Testatrix died [Id. at 37-38] – which could suggest that Petitioner was cultivating a lonely, elderly woman more for her anticipated testimony than deep friendship.

Ms. Carroll’s testimony should not have been given weight and, in fact, should have been excluded for lack of personal knowledge.

10. *The Court Erred by Including Unsupported Findings that Respondent Abused His Mother’s Prescription Medication.*

In Petitioner’s Proposed Order, the Court makes an incredible finding of fact that Respondent withheld medication from his late mother. [Order p. 14]. In fact, this exact theory was discounted by Testatrix’s primary care physician, Dr. Chanson. (“Q: So were you aware of . . . mismanagement of care of mismanagement of medication? A: I was not . . . I did not see anything that would have been concerning.”). [Chanson Depo. at 18]. Furthermore, Testatrix, during her 30-50-minute visits with Dr. Chanson never mentioned anything of the sort to her or anything else that would have been concerning to Dr. Chanson. [Id.]

In fact, Petitioner failed to illicit any testimony from any witness that any medication was ever withheld. Petitioner failed to call in an independent medical professional, including Testatrix’s pharmacist, to support this outrageous contention. This is pure conjecture and

speculation on behalf of the Petitioner. To the extent Petitioner points out to prescription dates, etc., it is circumstantial evidence not of a substantial nature. *Mock*, 266 S.C. at 278, 222 S.E.2d at 775 (1976).

Testatrix's physical therapist, Ms. Leigh Wechter recounted: "[Respondent] appeared genuinely concerned about Mrs. Gunnells, and would take care to prepare her meals, fix her medications and make recommended safety changes to her home to protect her from falls. [Respondent] worked to ensure Mrs. Gunnells had caregivers in the home to assist her with her personal care, as well as provided (sic) her with transportation and assistance with all of her medical appointments." [Respondent's Ex. 6]. "[Respondent] made sure that she took her medications." [Tr. Vol. II at 16]. Testatrix's other physical therapist, Ms. Jill Costa, recounted: "Every visit, I got to see how devoted he was to his mother, in which he made sure she had the best possible care." [Respondent's Ex. 7].

Petitioner has failed to present any evidence, let alone unmistakable and convincing evidence, that Respondent withheld medication from his mother. If there were any true merit to this contention, then Petitioner would have been able to adduce medical testimony to support it. Having failed to do so, the Court should not credence such baseless speculation.

11. The Court Erred by Being Persuaded by Inconsistencies in Respondent's Testimony.

Any inconsistencies in the Respondent's testimony, detailed at some length by the Petitioner's Proposed Order signed by the Court [Order at 12-13] are not substantive and do not prove the Petitioner's case in any way.

12. *Repeated Allusions to Petitioner Seeking DSS, Probate Court, Legal Aid Help Should Be Excluded.*

The repeated references to Petitioner seeking assistance from DSS, Probate Court and/or Legal Aid were never proven, when they easily could have been, and do not prove the Petitioner's case in any way.

13. *The Court Erred by Discounting the Therapist Testimony.*

Two home health physical therapists were called to testify. Both recounted how devoted Respondent was to his mother and her care. Furthermore, both therapists recounted conversations Testatrix had with them regarding her disappointed feelings towards her daughters. [Tr. Vol. II at 11, 29-30]. The fact the Court did not find this testimony as probative, along with the testimony of Ms. Klok and Ms. Voytko (confirming Testatrix's feelings about her daughters) is reversible error.

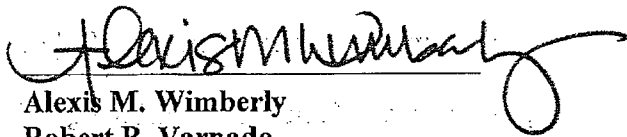
CONCLUSION

In this matter, the Testatrix was very clear and adamant about what she wanted in her New Will. [Tr. Vol. II at 62]. Notably, Testatrix met with her attorney for several hours where she made it absolutely clear what she wanted to do and why she wanted to do it. [Id.]. She was quick, rational and precise when answering questions about her family, her property and its disposition. [Id.]. The record is devoid of any evidence that Respondent interfered prior to or at the time of the testamentary act. Respondent did not dictate the will; he was not present when its proposed contents were discussed; nor was he present when the will was executed. The circumstances surrounding the drafting and execution of this document fall far short of a showing of undue influence. On the contrary, they indicate that the New Will was the product of the free and unfettered act of the Testatrix – who all the witnesses conceded was competent, independent, free-willed and knew her own mind.

The Petitioner failed to meet her high burden of proof – unmistakable and convincing evidence of undue influence. Even if the Court is persuaded there was *some* evidence of influence, it never rose to the kind of mental coercion which destroys the free agency of the creator and constrains her to do things which are against her free will, and that she would not have done if she had been left to her own judgment and volition. There is simply no clear, convincing and unmistakable evidence that Respondent took over the free will of the Testatrix. There is no evidence of threat, force, coercion, fear or restricted visitation. There is simply no evidence to support the conclusion in this Court's Order.

Unfortunately, the Order – prepared by Petitioner – is guided by multiple errors of law and fact. Accordingly, the Court should reverse itself and find that the July 3, 2013 Will is valid and in full force and effect as it was not the product of undue influence.

BROWN & VARNADO, LLC



Alexis M. Wimberly

Robert B. Varnado

103 Church Street

Mount Pleasant, South Carolina 29464

P: (843) 737-7300

F: (843) 654-5109

awimberly@brown-varnado.com

rvarnado@brown-varnado.com

Attorneys for Respondent

May 31, 2016

Mount Pleasant, South Carolina

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the within *Notice of Motion and Motion to Reconsider* upon all parties in this matter by depositing a true copy of the same in the U.S. mail, proper postage prepaid, addressed as follows:

Donald H. Howe, Esquire
Law Offices of Donald H. Howe, LLC
P.O. Box 31324
Charleston, South Carolina 29417

Julie Jackson Bailey, Esquire
Michelle Weil, Esquire
Bailey & Weil, LLC
1 Carriage Lane, Bldg H, 2nd Floor
Charleston SC 29407



Alexis M. Wimberly

May 31, 2016
Mount Pleasant, South Carolina

IN THE PROBATE COURT

CASE NO.: 2014-ES-10-2022

IN THE MATTER OF:

ESTATE OF HELEN B. GUNNELLS

CATHY G. HARKNESS,

Petitioner,

vs.

GLENN A. GUNNELLS, individually and
as Personal Representative of the Estate of
Helen B. Gunnells,

Respondent.

MEMORANDUM IN OPPOSITION TO MOTION TO RECONSIDER

TO: THE HONORABLE IRVIN G. CONDON, CHARLESTON COUNTY PROBATE
JUDGE and ROBERT B. VARNADO and ALEXIS M. WIMBERLY, Attorneys for
Petitioner

Respondent seeks reconsideration of this Court's Order of May 12, 2016 based on alleged errors of law and factual conclusions. Petitioner submits the following in response to Respondent's Motion to Reconsider.

I. The Court Did Not Adopt a “Four Circumstances Test” as Alleged by Respondent.

Respondent states that “The Petitioner urged the Court to adopt a “four circumstances test” to apply to the instant case, which the Court did in its Order” (Respondent’s Motion, page 5). This is simply incorrect. The Court never embraced a “four circumstances test.” The Court clearly followed a totality of circumstances approach. Four aspects of this totality of circumstances approach were noted by the Probate Judge because they espoused valid judicial precedent in South Carolina courts. It was certainly proper to consider, among other things,

factors that are logical and previously identified as valid by higher courts. Thus, the four circumstances specifically identified were properly considered. To suggest that these factors were a rigid and exclusive approach, however, is a mischaracterization.

A review of the Order itself supports this. The Court's Order states "Courts often look..." (emphasis added) at certain circumstances. In the very next sentence, the Order states further than "all circumstances surrounding the execution of the Will..." should be considered by the Court. (Order, p.14). To transform the words "often look" into a narrow, exclusive and definitive legal test is extremely tortured and inconsistent with both the letter and spirit of the Order.

Respondent therefore believes the Court applied a proper legal analysis with due regard to established legal precedent and no error of law was committed.

II. Respondent Attaches As Errors of Law Various Factual Conclusions of the Court.

Having mischaracterized the Court's legal analysis, Respondent goes down a laundry list of assertions that "there was no evidence that..." when, indeed there was ample evidence in each instance. Petitioner will not attempt to dissect each assertion as the Court generally cites page and line of the transcript in most instances. A couple of poignant examples worth noting are, however, as follows:

- (a) "The daughter's testimony fails to show restriction of visitation."
(Motion, p.17).

Cathy Harkness testified that Glenn threatened to call the police if she contacted her mother. (Tr. Vol. I, p.107, lines 9-12). Belinda Davis, Cathy Harkness, Glenn Gunnells and one of the home health nurses all testified about Glenn pushing Belinda out of the house when she tried to visit Helen Gunnells and threatened to call the police if she did not leave. (Tr. Vol. I,

p.68, lines 1-22). The birthday card sent by Harkness to her mother evidenced an attempt by Harkness to reconnect with her mother because of restricted visitation. (Tr. Vol. II, p. 168, lines 11-16). The consult with the probate court, DSS and an attorney are also indicative of restricted access. (Tr. Vol. I, p.108, lines 9-24).

While Respondent may disagree with the weight of the evidence – a matter entirely in the purview of the Court – it is simply disingenuous to state there is “no evidence.”

- (b) “...the Court makes an incredible finding that Respondent abused his mother’s prescription medications.” (Motion, p.22).

First of all, the Court never made a finding that Glenn Gunnells “abused” any medication. The finding was that the medication was not “properly administered.” (Order, p.13). Secondly, under the heading quoted above, Respondent also states “Petitioner failed to elicit any testimony from any witness that any medication was ever withheld.” (Motion, p.22).

Consider, however, the following on Dr. Chanson’s cross-examination:

- 1) “She never received the potassium prescription.” (D. p.6, lines 9-10).
- 2) A prescription for Tiazac was last filled on July 23, 2013 and Mrs. Gunnells was supposed to take one per day. She received 90 pills on July 23, 2013 and it was 200 days before she died on February 7, 2014. There were 3 refills associated with the original prescription, none of which were filled, so she clearly never got enough to be compliant with medical advice (Tr. Vol. II, p.66-68).
- 3) The administration of the drug Remeron was thoroughly reviewed on cross-examination. Dr. Chanson’s note of December 16th clearly reflected that Mrs. Gunnells was supposed to be taking Remeron but it was not clear that she was (D. p.48) and that Dr. Chanson “strongly recommend that she restart her Remeron” which obviously assumes it had

been discontinued. (D. p.49, lines 16-24). To justify why Mrs. Gunnells was not taking the Remeron, Glenn Gunnells told Dr. Chanson that the pharmacy wasn't filling the prescription as e-prescribed. To get around the e-prescription failure Glenn described, Dr. Chanson went to the trouble to hand-write the prescription. (D. p.53, line 14 – p.54, line 2). The pharmacy record demonstrated, however, that despite the fact that Glenn was stating the pharmacy would not fill the prescription as of January 2, 2014, he in fact got a prescription for Remeron filled on December 21, 2013 (D. p.55, lines 4-24 and Exhibit 1). Why he misled Dr. Chanson in this regard was never explained. Suffice it to say, all of the information about the Remeron not being administered properly came from Glenn Gunnells himself. Having documented the evidence himself, it is truly ironic his lawyers now take the position that no evidence exists.

All of the above directly supports the Court's finding that "medication was not properly administered." It is of note that Respondent again mischaracterizes the Order (by saying it found that Gunnells "abused" medications) then holds up the mischaracterization as an error of law.

Lastly, and perhaps most reflective of the lack of merit of Respondent's plea to reconsider, is Respondent's assertion that the inconsistencies in Glenn Gunnell's testimony "are not substantive and do not prove the Petitioner's case in any way." (Respondent's Motion, p. 23).

Glenn Gunnells was a party to the suit and was shown to have lied under oath about the number of times he took his mother to Attorney Klok to prepare the Will. In his deposition, he said he took her 2 or 3 times. (Vol. II, p.155, line 13 – p.157, line 16). At trial, Klok said there was only one visit. (Vol. II, p.75, lines 5-6). Also, Gunnells said he complained to Jack Brantley that Cathy and Belinda were not helping with their mother. Brantley, a retired Lt. Col., flatly denied Glenn's assertion. (Tr. Vol. I, p.38, line 17).

To characterize these contradictions as "not substantive" is disingenuous and indeed, undermines the credibility of Respondent's entire request to reconsider. What could be more substantive to the credibility of Glenn Gunnells in general and to the case in particular than his claim as to the number of times Helen Gunnells met with the lawyer to prepare the Will? Likewise, Glenn's theory as to why his mother disinherited Cathy and Belinda was that they deserted her. He attempted to support his "desertion theory" by testifying that he discussed this with Jack Brantley, his mother's youngest brother, to whom she was very close. It would have been natural and expected for Glenn to discuss Cathy's absence with "Uncle Jack" if it had been true and so Glenn testified he did discuss it with Brantley. Brantley appeared at trial and flatly denied any such conversation. Apparently, Respondent Gunnells just never planned on Brantley, who was 83 at the time of trial, to travel from Waynesboro, Georgia to testify at trial. Respondent cannot deny that Glenn Gunnells' testimony was totally contradicted by a person of impeccable honor and integrity. Instead, Respondent seeks to deflect the exposed misstatement by calling it "not substantive." Nothing could be further from the truth.

CONCLUSION

Petitioner believes that the Court applied the law correctly and that its conclusions were amply supported by the evidence in each and every instance. Petitioner therefore requests that the Motion to Reconsider be denied.

LAW OFFICES OF DONALD H. HOWE, LLC
818 Wappoo Road
Post Office Box 31324
Charleston, SC 29417
Phone: 843-225-2523
FAX: 843-225-2698
donaldhowelaw@gmail.com

By: Donald H. Howe
Donald H. Howe

BAILEY & WEIL, LLC
1 Carriage Lane, Bldg. H, 2nd Floor
Charleston, SC 29407
Phone: 843-619-3709
Fax: 843-614-3902

Dated: Aug 12, 2016

By: Julie C. Jackson-Bailey & M.J. Weil
Julie C. Jackson-Bailey
Michelle J. Weil

STATE OF SOUTH CAROLINA

IN THE PROBATE COURT

COUNTY OF CHARLESTON

CASE NO.: 2014-ES-10-2022

IN THE MATTER OF:
HELEN B. GUNNELLS

CATHY G. HARKNESS,

Petitioner,

CERTIFICATE OF SERVICE

vs.

GLENN A. GUNNELLS, individually and
as Personal Representative of the Estate of
Helen B. Gunnells,

Respondent.

I, the undersigned, do hereby certify that on the 12 day of August 2016, I served a copy of the Petitioner's Memorandum in Opposition to Motion to Reconsider by electronic mail addressed to the following:

Rob Varnado, Esquire
Alexis Wimberly, Esquire
Brown & Varnado, LLC
P. O. Box 1127
Mt. Pleasant, SC 29465

LAW OFFICES OF DONALD H. HOWE, LLC
818 Wappoo Road
Post Office Box 31324
Charleston, SC 29417
Phone: 843-225-2523
FAX: 843-225-2698
donaldhowelaw@gmail.com

By



Donald H. Howe

THE STATE OF SOUTH CAROLINA

In the Court of Common Pleas
for the Ninth Judicial Circuit

APPEAL FROM CHARLESTON COUNTY PROBATE COURT

The Hon. Irvin G. Condon, Probate Court Judge

Case No. 2016-CP-10-4566

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

Appellant,

vs.

Cathy G. Harkness,

Respondent.

INITIAL BRIEF OF APPELLANT

Robert B. Varnado
Alexis M. Wimberly
BROWN & VARNADO, LLC
P.O. Box 1127
Mount Pleasant, South Carolina 29465
(843) 737-7300
Attorneys for Appellant

BY

JULIE J. ARMSTRONG
CLERK OF COURT

2016 DEC -5 PM 3:59

FILED

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INTRODUCTION

Should this Court affirm the Probate Court's decision in this matter, it will turn South Carolina undue influence jurisprudence on its head because it will be affirming a finding of undue influence where (1) there is no evidence of threats, force, or restricted visitation prior to the testamentary act; (2) every witness testified that Testatrix was of sound mind, independent and opinionated until the day she died; (3) the testimony of the drafting attorney that the Testatrix wanted to change her Will for a very specific purpose – to punish her daughters – is simply overlooked; (4) there is unrefuted testimony of the drafting attorney and her paralegal that there was no undue influence, Testatrix knew exactly why she wanted a New Will and was adamant about the same; (5) there was testimony from four independent witnesses that Testatrix confided in – where she spoke freely and openly – outside the presence of Appellant – about her disappointment with her daughters; and (6) there was testimony from five independent witnesses confirming Appellant was an appropriate and dutiful caregiver; and (7) the Probate Court relied on evidence that occurred well-beyond the date of the testamentary act to retroactively make a finding of undue influence at the time of the New Will.

None of foregoing supports a finding of undue influence. When all the evidence is viewed, it becomes clear that the Probate Court was guided by errors of law and that the Respondent did not meet her high burden of showing undue influence at the time of the testamentary act.

STATEMENT OF THE CASE

Helen Beatrice Gunnells ("Decedent" or "Testatrix") died testate on February 7, 2014 in Charleston County, South Carolina. Decedent was the widow of the late Aiken Arden Gunnells. They were married for many years and resided at 1931 Capri Drive, Charleston, South Carolina ("Residence"). They had three (3) adult children: Appellant, Glenn Gunnells ("Appellant"), Respondent, Cathy Harkness ("Respondent"), along with Ms. Belinda Davis ("Ms. Davis"), who was not a party to these proceedings but was present and testified at trial.

Testatrix executed a prior will on November 7, 2006 ("Old Will"), in which she left everything to her husband. [Tr. Vol. 2, p. 60]. However, in the event her husband predeceased Testatrix, everything would pass to her children in equal shares. [Old Will].

On January 21, 2011, Decedent and Arden Gunnells executed General Durable Power of Attorneys appointing Appellant as their attorney-in-fact. These documents were prepared by Weeks & Irvine of Charleston, South Carolina. [POAs].

In the Spring of 2012, Arden Gunnells was diagnosed with cancer. Soon thereafter, at his parent's request, Appellant moved into the Residence to care for his ailing parents. [Tr. Vol. II, p. 114-115]. In doing so, Appellant sold his own home. [Id.]. Arden Gunnells died June 8, 2013. [Tr. Vol. I at 64].

On June 27, 2013, shortly after her father's death, Respondent wrote her mother a letter threatening to sue her for personal property items at the Residence. [Ex. 3].

Less than a month after her husband's death, Decedent executed a new Last Will and Testament on July 3, 2013. ("New Will"). [New Will]. This document was prepared by Suzanne Klok, Esq. of The Klok Law Firm, Mt. Pleasant ("Attorney Klok" or "Ms.

Klok"). [Tr. Vol. II, p. 57]. The New Will appointed Appellant as the Decedent's Personal Representative and designated him as the sole beneficiary of the Decedent's Estate. [New Will]. Testatrix changed her Will because "she was really upset with her two daughters . . . she was unhappy with the way that they were – you know, she just didn't want to be around them. There were some fights, I believe, over her husband's property, and she was very unhappy with the two daughters." [Tr. Vol. II, p. 61].

Ultimately, Respondent followed through on her prior threat and filed an Affidavit and Complaint in Claim and Delivery against the Testatrix on July 19, 2013, in which Respondent claimed she was entitled to certain personal property items that remained at the Residence after her father's death. [Claim & Delivery]. The matter proceeded to a hearing on August 23, 2013 resulting in a judgment for Respondent as the Testatrix did not appear.

Testatrix died February 4, 2014. Appellant began administration of the Estate on February 25, 2014 as evidenced by the Application for Informal Probate of Will of Helen B. Gunnells and Information to Heirs and Devisees, both completed and filed with the Probate Court. [Probate Filings].

On July 28, 2014, Respondent filed a Petition seeking to set aside the New Will alleging causes of action for undue influence and duress against Appellant. [7.28.2014 Petition]. She filed an Amended Petition thereto on April 16, 2015. [4.16.2015 Amended Petition].

Respondent also filed a separate Petition against Appellant on April 16, 2015 seeking to remove him as Personal Representative of the Estate. [4.16.2015 Petition for

Removal]. A hearing on the removal Petition was conducted August 19, 2015. The Court has held that matter under abeyance pending final disposition of the instant Will Contest.

This matter came to a bench trial before the Honorable Irvin G. Condon of the Charleston County Probate Court on March 1-3, 2016. By Order dated May 12, 2016, Judge Condon found for the Respondent. [5.12.2016 Order]. Specifically, the Court found there was “clear and convincing” evidence that the Testatrix was “under undue influence when she made and executed the July 3, 2013 Will” and the New Will was found to be invalid. This Order was received by Appellant’s counsel on May 19, 2016.

On May 31, 2016, Appellant’s counsel filed and served his Motion to Alter, Amend and/or Reconsider upon opposing counsel and the Probate Court. [5.31.2016 MTR]. On August 25, 2016, Judge Condon denied Appellants Motion. [8.25.2016 Order]. The August 25, 2016 Order was electronically mailed to all counsel of record. On August 26, 2016, Appellant served the Notice of Appeal on Respondent. [NOA].

STANDARD OF REVIEW

An action to set aside a will is an action at law. *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.” *Id.* Under the Probate Code, a circuit court hearing an appeal from the probate court must apply the same rules of law as an appellate court would apply on appeal. S.C. Code Ann. § 62-1-308(d); *In re Estate of Cumbee*, 333 S.C. 664, 670-71, 511 S.E.2d 390, 393 (Ct. App. 1999).

STATEMENT OF ISSUES ON APPEAL

- I. WHETHER THE PROBATE COURT ERRED IN FINDING THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE IN THE FACE OF UNCONTROVERTED EVIDENCE AND TESTIMONY FROM TESTATRIX'S ATTORNEY AND HER PARALEGAL TO THE CONTRARY, WHO WERE THE ONLY WITNESSES TO THE TESTAMENTARY ACT ITSELF?
- II. WHETHER THE PROBATE COURT ERRED IN CONSIDERING FACTS AND TESTIMONY OF EVENTS THAT OCCURRED IN TIME AFTER THE TESTAMENTARY ACT AND AFTER THE DEATH OF THE TESTATRIX AS PROBATIVE OF A FINDING THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE?
- III. WHETHER THE PROBATE COURT RELIED ON IRRELEVANT FACTS AND/OR MADE FACTUAL FINDINGS NOT REASONABLY SUPPORTED IN THE RECORD IN MAKING ITS DETERMINATION THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE?
- IV. WHETHER THE PROBATE COURT ERRED IN FINDING THE TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE WHEN THERE WAS NO SHOWING OF THREATS, FORCE OR RESTRICTED VISITATION?
- V. WHETHER PROBATE COURT ERRED BY GIVING GREAT WEIGHT TO THE RESPONDENT'S MISSTATED AND MISREPRESENTED TESTIMONY OF TESTATRIX'S PHYSICIAN DR. RHONDA CHANSON, WHEN THE MEDICAL CONCLUSIONS FOUND BY THE PROBATE COURT ARE NOT REASONABLY SUPPORTED IN THE RECORD?
- VI. WHETHER THE PROBATE COURT ERRED IN ADMITTING AND GIVING GREAT WEIGHT TO UNSUBSTANTIATED, UNSUPPORTED AND UNAUTHENTICATED MEDICAL RECORDS FROM ONE OF TESTATRIX'S PHARMACIES?
- VII. WHETHER THE PROBATE COURT ERRED IN ACCEPTING THE TESTIMONY OF MS. HELEN CARROLL REGARDING TESTATRIX'S STATEMENT "I HAD NO CHOICE" WHEN MS. CARROLL TESTIFIED SEVERAL TIMES SHE DID NOT REMEMBER EVER HAVING A CONVERSATION WITH TESTATRIX ABOUT A NEW WILL, NOR KNEW THE CIRCUMSTANCES OF THE STATEMENT FROM WHICH SHE READ?

- VIII. WHETHER THE PROBATE COURT ERRED IN DISREGARDING THE TESTIMONY OF TESTATRIX'S TWO (2) HOME HEALTH PHYSICAL THERAPISTS, IN WHOM SHE CONFIDED?
- IX. WHETHER THE PROBATE COURT ERRED IN GIVING GREAT WEIGHT TO RESPONDENT'S TESTIMONY THAT SHE SOUGHT DSS, PROBATE COURT AND/OR LEGAL AID WITH NO EVIDENCE, INDEPENDENT WITNESS OR SUPPORTING TESTIMONY TO PROVE THE SAME?
- X. WHETHER THE PROBATE COURT'S ORDER DENYING THE MOTION TO RECONSIDER ADDRESSED ANY OF THE LEGAL AND FACTUAL ERRORS OF THE PROBATE COURT'S ORIGINAL ORDER? WHETHER THE PROBATE COURT BY ERRORS OF LAW IN ITS ANALYSIS OF CONTROLLING AUTHORITY ERRED IN DETERMINING WHETHER TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE?
- XI. WHETHER THE PROBATE COURT BY ERRORS OF LAW IN ITS ANALYSIS OF CONTROLLING AUTHORITY ERRED IN DETERMINING WHETHER TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE?
- XII. WHETHER THE PROBATE COURT ERRED IN FINDING THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE UNDER THE APPLICATION OF A "FOUR CIRCUMSTANCES TEST" WHERE SUCH FINDINGS DO NOT REQUIRE RESPONDENT TO MEET HER HIGH BURDEN OF PROOF?

SUMMARY OF THE LAW OF UNDUE INFLUENCE

The right to make a will directing the ultimate disposition of one's property is one of the basic rights known to our civilization; it encompasses the right to make it to the testatrix's pleasure and in her absolute discretion, whether judiciously or capriciously, justly or unjustly, subject only to the restraints upon the power of disposition that the law has imposed. *Wilson v. Dallas*, 403 S.C. 411, 445, 743 S.E.2d 746, 765 (2013); *In re Last Will and Testament of Smoak*, 286 S.C. 419, 427, 334 S.E.2d 806, 811 (1985) (citation omitted).

"It is elementary that the statutory right of a competent person to dispose of her property as she wishes may not be thwarted by disappointed relatives or by one who thinks the Testatrix used bad judgment or was misled." *Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 775 (1976).

In will contest litigation that alleges undue influence, the South Carolina Probate Code states that: "[the Respondent] will have the burden of establishing undue influence." See S.C. Code Ann. § 62-3-407. ("Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."); *Calhoun v. Calhoun*, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982) ("The contestants continue to bear the burden of proof throughout the will contest"); *Smith v. Whetstone*, 209 S.C. 78, 84, 39 S.E.2d 127, 129 (1946) (stating in case where a will is formally executed, the burden of proof is on the contestant to prove undue influence "and this burden remains on him to the end").

Undue influence may be proved by circumstantial evidence, but the circumstances relied on to show it must be such as taken together point **un-mistakenly and convincingly** to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter and not of the former. *Howard v. Nasser*, 364 S.C. 279, 286, 613 S.E.2d 64, 67 (Ct. App. 2005) (emphasis added); *Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 775 (1976) ("Undue influence may be proven by circumstantial evidence. However, that evidence must be of a substantial nature.")

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 her to do things which are against her free will, and that she would not have done if she had been

left to her own judgment and volition. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003); *Smoak*, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985).

Undue influence must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another, for that would be a very strong ground in support of a testamentary act; by importunity which could not be resisted; that it was done merely for the sake of peace; so, that the motive was tantamount to force and fear. *Calhoun v. Calhoun*, 277 S.C. 527, 532, 290 S.E.2d 415, 418 (1982); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003) (“The evidence must show that the free will of the testator was taken over by someone acting on testator's behalf. Undue influence is demonstrated where the will of the influencer is substituted for the will of the maker.”)

The mere existence of influence is not enough to void a will as all influences are not unlawful. *Hembree v. Estate of Hembree*, 311 S.C. 192, 196, 428 S.E.2d 3, 5 (Ct. App. 1993); *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946). “A mere showing of opportunity and even a showing of motive to exercise undue influence does not justify a submission of that issue to a jury, unless there is additional evidence that such influence was actually utilized.” *Smoak, supra*, at 424, 334 S.E.2d at 809; *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003).

Where the testator has an unhampered opportunity to revoke a will or codicil after 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. *Smith v. Whetstone*, 209 S.C. 78, 39 S.E.2d 127 (1946), as quoted in *Estate of Cumbee*, 333 S.C. 664, 511 S.E.2d 390

(Ct.App.1999); *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333-34 (2003).

ARGUMENT

When the full body of South Carolina statutory and case authority is examined along with the evidence presented at trial, it becomes clear that the Respondent did not meet her high burden of proof. [5.12.2016 Order, p. 14; 8.25.16 Order, p. 5].

I. THE PROBATE COURT ERRED IN FINDING THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE IN THE FACE OF UNCONTROVERTED EVIDENCE AND TESTIMONY FROM TESTATRIX'S ATTORNEY AND HER PARALEGAL – WHO WERE THE ONLY WITNESSES TO THE TESTAMENTARY ACT – TO THE CONTRARY.

The Probate Judge, in denying the motion to reconsider, affirmatively stated that he had examined “all circumstantial evidence” in this case. [8.25.16 Order, p. 2; 5.12.2016 Order, p. 14]. The Probate Judge also went on to say that he “expressly acknowledges and contemplates the testimony of Attorney Klok and [her paralegal] Ms. Voytko. [8.25.16 Order, p. 4; 5.12.2016 Order, p. 13].

But when one refers to the original Order, the only time the Probate Judge discusses the attorney and paralegal, he merely says “Attorney Klok testified there was only one (1) visit for two to three (2-3) hours” and that the attorney “only had contact with the Testatrix for a couple of hours” [5.12.2016 Order, p. 13]. That is the sum-total of the Probate Court’s analysis regarding Klok and Voytko. In other words, the Probate Judge pulled and isolated one fact [the duration of the visit to the attorney’s office] and then failed to analyze the

substance of the testimony of the only two witnesses who were present at the time the execution of the New Will.¹

It should be noted that in both Orders, the Probate Court never rejected the testimony of Klok or Voytko. [8.25.16 Order, p. 4; 5.12.2016 Order, p. 13]. He never made a finding that their testimony lacked credibility. [Id.] He never ruled that Klok violated her obligations as an attorney or acted in any way inappropriately. [Id.] Respondent offered no rebuttal testimony or witnesses that showed Attorney Klok mishandled the execution of the New Will, or violated her professional duties. Contrary to his assertion that he fully acknowledged and contemplated the testimony of Klok and Voytko, the Probate Judge treats them as though they didn't testify at all – contrary to how other Courts have treated the testimony of the drafting attorney.

Since the testimony of the drafting attorney has consistently been found to be probative in all other recent, reported “undue influence” cases in South Carolina this should amount to reversible error.

It should be noted that these witnesses had direct evidence. Attorney Klok substantiated the original copy of the New Will for the Court. [Tr. Vol. II, p. 65]. She said Testatrix met with her and her legal assistant Ms. Voytko on July 3, 2013 for about three (3) hours. [Id. at 58]. Ms. Gunnells was adamant about having the New Will done that day. [Id.]. She brought the Old Will to the meeting with Attorney Klok, knowing that she wanted to change her disposition. [Id. at 60]. Attorney Klok satisfied herself that Mrs. Gunnells

¹ In doing so, the Probate Court isolates as conclusive a single detail regarding the execution of the Will, “to the exclusion of all other circumstances leading up to and immediately following the visit to Attorney Klok’s office” – which he chides the undersigned for doing (incorrectly) in the Motion to Reconsider. [8.25.16 Order, p. 6].

was competent to make a new testamentary disposition. [Id. at 62]. "[T]hroughout our discussions, she was very frail physically but mentally she seemed to know what she wanted. She was pretty clear. Very adamant about it." [Id.].

While Respondent drove Testatrix to her appointment at the Klok Law Firm, he was not present in the conference room at any time during any discussion or drafting of the New Will. [Id. pp. 59-60]. Klok testified that her policy is not to allow anyone who comes with the client into the conference room during her interviews and no one else enters except her staff; in fact, she directed that the Respondent be outside the building throughout the meeting so that he could not possibly overhear the discussions – a decision the Respondent respectfully complied with. [Id. at 60-61].

On the day she met with Klok, Testatrix was very upset with her two daughters, she did not wish to be around them and she was adamant about wanting to leave her Estate to Respondent. [Id. at 61-62]. "She seemed very, very sure, and that's one thing that struck me that I still remember." [Id. at 70]. Klok said that had she ever felt the Testatrix was unsure, she would never have finished the Will that day. [Id.]. Klok remembered that Mrs. Gunnells glowed when she talked about Respondent – "It was very sweet. She was very, very loving about Glenn. It was really in contrast to how she spoke about her daughters, that for them they were more -- it was disappointment, I think, with the daughters. But she was very, very happy that Glenn was taking care of her. And you know, she said she couldn't get out and interact as much as she did if it wasn't for Glenn. And that he really was just, you know, wonderful of all the things he did. And took great care of her." [Id. at 63]. Klok explained to the Testatrix that changing her will was her decision and no one

else's; Klok then asked the Testatrix if she felt any force or pressure from any of her children in any way to change her will, to which she replied "no." [Id. at 68-69].

Testatrix – while alone and confiding with Klok and Voytko – thoroughly explained her reasoning and rationale for executing the New Will. It was not because she necessarily wanted to give Respondent the entire estate, it was more so that she did not want to give anything to her daughters – “she told me her rationale for it wasn't related to how great Glenn was and she loved him, but it was more how she was disappointed with her daughters.” [Id. at 72]. Klok remembered that the Testatrix was very worried about her daughter, the Respondent, causing problems once she found out about the New Will. [Id. at 62].

Voytko corroborated Klok's testimony: she testified that Testatrix (1) met alone with Klok and Voytko while Respondent waited outside; (2) was of sound mind; (3) was very disappointed with her daughters; and (4) was grateful for her son. [Id. at 86-91]. In her judgment, there were no “red flags” [Id. at 91-92]. Voytko witnessed the New Will. [Id. at 93].

For decades, reported decisions in South Carolina have given great weight to the testimony of the attorney who drafted the challenged testamentary document. *See, e.g., Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 216, 578 S.E.2d 329, 333 (2003); *Calhoun v. Calhoun*, 277 S.C. 527, 531, 290 S.E.2d 415, 418 (1982); *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010); *In re Estate of Anderson*, 381 S.C. 568, 575, 674 S.E.2d 176, 180 (Ct. App. 2009); *Howard v. Nasser*, 364 S.C. 279, 284, 613 S.E.2d 64, 66 (Ct. App. 2005); *Hembree v. Estate of Hembree*, 311 S.C. 192, 195, 428 S.E.2d 3, 4 (Ct. App. 1993); *Cf. Estate of Cumbee*, 333 S.C. 664, 673, 11 S.E.2d 390, 294

(Ct. App. 1999) (finding undue influence where, *inter alia*, Testatrix did not meet with lawyer nor did she read the will). In fact, in *Hairston*, the drafting attorney's testimony was considered so significant that it outweighed that of a testifying medical expert who had not examined the Decedent. 387 S.C. at 446, 692 S.E.2d at 553.

It is well-settled that in a will contest based on undue influence, the contestant must show that the influence was brought directly to bear upon the testamentary act. *Russell v. Wachovia Bank*, 353 S.C. 208, 219, 578 S.E.2d 329, 335 (2003); *Mock v. Dowling*, 266 S.C. 274, 277, 222 S.E.2d 773, 774 (1976); *Hairston v. McMillian*, 387 S.C. 439, 446, 692 S.E.2d 549, 553 (Ct. App. 2010); *see also Wilson v. Dallas*, 403 S.C. 411, 337, 743 S.E.2d 746, 760 (2013) (holding that in a will contest case, facts are irrelevant "if they have no bearing on the execution of [testator's] testamentary documents" and "shed no light on whether the [testator's] will was somehow overcome at the time he signed the documents finalizing his estate plan"). In *Calhoun v. Calhoun*, the Supreme Court found probative the fact that "the record is devoid of any evidence the [Appellant] interfered with the making of the will." 277 S.C. 527, 533, 290 S.E.2d 415, 419 (1982).

Accordingly, the Probate Court committed reversible error when it adopted the Respondent's proposed order (identical to the 5.12.2016 Order) with absolutely no mention of the substance of Klok and Voytko's testimony, then later affirmed that the Court balanced all the evidence. That simply did not happen; it is the elephant in the room. By electing to ignore the drafting attorney's testimony – almost as if she didn't interview the Decedent at the time of the New Will nor testified at trial – the Probate Court has substantially deviated from what has been considered probative and compelling evidence by the higher courts in South Carolina.

By overlooking the testimony of the legal professionals, the Probate Court has essentially turned undue influence jurisprudence on its head. It is uncontroverted that Klok is a licensed, reputable and competent attorney who has practiced law in the Charleston area for over twenty years in the field of Wills and Estate Planning. Respondent offered no rebuttal testimony that put into question Klok's qualifications or professionalism in any manner; nor any expert testimony that Klok failed: (1) to adequately discharge her duty to the Testatrix; (2) was governed by some conflict of interest; or (3) deviated from the acceptable standard of care for probate attorneys. Yet if the Probate Court's Order becomes the new standard for undue influence litigation, all this formerly probative and compelling testimony is deemed irrelevant. Respondent offered no testimony that Klok in any way deviated from the standard of care for an attorney practicing in the area of Wills and Estates.

Additionally, the only factors the Court relied upon concerning "all other circumstances leading up to and immediately following the visit to Attorney Klok's office" were irrelevant and/or non-dispositive under current jurisprudence.

For example, the Court seemed to find probative that Appellant drove the Testatrix to Klok's office. [5.12.2016 Order, p. 2]. However, in *Calhoun v. Calhoun*, our Supreme Court did not find the fact the beneficiary drove the testator to the lawyer's office was at all probative. 277 S.C. at 532, 290 S.E.2d at 419 (1982). Neither, apparently, did the Court of Appeals in *Hembree, supra*, 311 S.C. at 195, 428 S.E.2d at 4 (Ct. App. 1993).

Next, the original Order found that "Respondent acknowledged that Susanne Klok had been his closing attorney on June 6, 2013 and that Attorney Klok had no relationship with Helen Gunnells prior to the Testatrix changing her Will" [5.12.2016 Order, p. 11] –

as if to suggest some improper collusion between Appellant and Klok. This suggestion is risible. Klok was the closing attorney for the property Appellant was selling (Tr. Vol. II, p. 83) and in conformity with South Carolina practice, she would have been selected by the buyer's attorney – i.e. not the Appellant. Even if this Court discounts the Appellant's testimony that the Testatrix wanted a female attorney rather than return to the firm where she had her Power of Attorney drawn (Id. at 132), in *Smoak, supra*, the Supreme Court found nothing untoward that the beneficiary took the testatrix to his personal attorney. 286 S.C. at 422, 334 S.E.2d at 808.

While seeming to suggest the one visit with a new lawyer for 2-3 hours is somehow dispositive [5.12.2016 Order pp. 2, 11], it is not. As Klok stated in her testimony, most times her elderly clients do not want to have multiple meetings. [Tr. Vol. II p. 58]. She schedules and tailors her meetings for each individual client. [Id.]. Furthermore, the meeting was a long one – about three hours. [Id.]. The facts in *Smoak*, for example, show only one meeting with the lawyer. The number of visits simply is not dispositive – it's what transpired during the attorney meeting that makes the difference.

Following *Hembree, supra*, the fact that the Will was “unsealed” when Testatrix left Klok's office, and the Respondent had access to it [5.12.2016 Order, p. 16], is likewise irrelevant.

Bluntly, the Probate Court is simply wrong when it states the “circumstances surrounding the execution clearly indicate the Will was the product of the Respondent and that the Testatrix ‘felt she had no choice’ but to execute a New Will.” Respondent failed to present any relevant and compelling evidence to support the same. As such, the Probate Court should be reversed.

II. THE PROBATE COURT ERRED IN CONSIDERING FACTS AND TESTIMONY OF EVENTS THAT OCCURRED IN TIME AFTER THE TESTAMENTARY ACT AND AFTER TESTATRIX'S DEATH AS PROBATIVE OF A FINDING THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE.

The 5.12.2016 Order clearly establishes that the Testatrix went to change her Will on July 3, 2013 — less than a month after the death of her late husband on June 8, 2013.

[5.12.2016 Order p. 2, 16]. Findings of fact for alleged acts of undue influence after July 3, 2013 — including after Testatrix's death — should not be permitted to serve as a basis for finding influence *at the time of the testamentary act*. At best, such evidence could only go to whether the Testatrix had unfettered opportunity to change her will. *Hembree, supra*, 311 S.C. at 196-97, 428 S.E.2d at 5 (Ct. App. 1993).

The Probate Judge seems to acknowledge this in the second Order [8.25.16 Order, p. 6] but never goes back and corrects the erroneous finding of undue influence at the time of the testamentary event based on facts which occurred long thereafter.

With regards to whether Testatrix had the “unfettered opportunity” to change her will, there was no testimony or evidence presented that Testatrix, after executing the New Will (1) wanted to change her Will; (2) tried to change her Will (3) was denied access to an attorney to change her Will; likewise, the Probate Judge made zero finding in either Order to that effect — despite suggesting that such evidence might be pertinent in the second Order. [8.25.16 Order, p. 6]. In reality, what happened here is that the Probate Judge executed the Respondent's proposed order — which is silent on the opportunity to change the Will. None of the Probate Court's findings of post-Will events goes to this issue.

It is a red herring to cover the original Order's clear use of post-testamentary events to improperly support a pre-testamentary finding of undue influence. In any event,

Respondent failed to show by unmistakable and convincing evidence that there was any undue influence exerted by Appellant – either before or after the testamentary act.

The Court also relied heavily on Appellant's alleged maladministration of the Estate in concluding the New Will was the product of undue influence. [5.12.2016 Order, p. 12] ("In short, he has not administered the Estate in an honest and forthright manner.") This, however, is completely irrelevant and improper for the same reason. Events that allegedly occurred after the Testatrix's death in the opening and administration of the Estate have no bearing on whether she was unduly influenced during her life.

III. THE PROBATE COURT RELIED ON IRRELEVANT FACTS AND/OR MADE FACTUAL FINDINGS NOT REASONABLY SUPPORTED IN THE RECORD IN MAKING ITS DETERMINATION THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE.

The Probate Court states that the Testatrix changed her Will "but had not wanted to do so." [5.12.2016 Order, p. 5]. This is not supported by the record. The only possible evidence to support such a finding was that Testatrix allegedly told her friend, Mrs. Carroll, "I had no choice." [Carroll Depo. at 18].

First, Ms. Carroll could not remember the actual conversation with Testatrix ever taking place – showing she lacked the personal knowledge required of a witness. [Id. at 35-36]. ("Q: Okay. Did [Testatrix] ever talk to you about signing a will or something like that? A: No. Q: Never came – A: No.") [Carroll Depo. at 15]. Similarly, on cross-examination after she read the letter, Ms. Carroll did not remember discussing the will with the Testatrix, either. ("Q: So earlier, Mr. Howe had to remind you about . . . a conversation you had about the will with Mrs. Gunnells. Do you remember that conversation? A: No. I don't.") [Carroll Depo at 35-36].

Second, the meaning behind this statement could be many things – “no choice” because her daughters had abandoned her, “no choice” because her daughters could not be trusted, “no choice” because it was the right thing to do to remove them from the New Will? In *Smoak*, the Testator told one of his daughters, “[t]here’s nothing you can do. It’s just too late. There’s no time.” The *Smoak* Court found that even if it believed the testator was speaking about the Will, the conclusion that the Will was the product of undue influence was simply not warranted. *Smoak*, 286 S.C. at 425, 334 S.E.2d at 810 (1985). Here, similarly, Ms. Carroll testified that Testatrix told her, “I had no choice.” Following *Smoak*, even if the Probate Court believed this statement was about the New Will, the conclusion that the New Will was the product of undue influence is simply not warranted. *Id.* The Probate Court failed to take any such questions into consideration, and as such, committed reversible error for relying on Ms. Carroll’s testimony.

The Probate Court noted “Ms. Carroll testified that she knew Glenn to have an alcohol problem because she noticed he would ‘slur his words’ when talking.” [5.12.2016 Order, p. 6]. This is a single sentence in the 5.12.2016 Order that is irrelevant and supports nothing in the Court’s findings. It is wholly irrelevant to the matter at hand. Further, Ms. Carroll testified that she never saw Appellant drinking and it was Respondent who voiced these concerns to her. [Carroll Depo. at 31-32]. As such, by considering rumors over the testimony of unbiased witnesses, the Probate Court committed reversible error.

The Probate Court weight to Respondent’s assertion that she visited with DSS, the Probate Court, independent legal counsel and Legal Aid – with the only evidence of such being a business card to DSS and Respondent’s testimony. Respondent presented no independent witnesses or testimony to support the same. The Probate Court failed to

consider that nothing came from these visits. No legal action was ever taken. No one from DSS ever intervened. Nothing ever happened after these alleged meetings.

The Probate Court gives weight to Respondent selling her Corvette to better accommodate her mother when taking her to doctors' visits. [5.12.2016 Order, pp. 6, 8]. Yet, in the same breath, the Probate Court seems to punish Appellant for selling his house to be a live-in care-taker for his parents. It should be noted that Respondent traded in her Corvette for a Lexus SUV – not an unsightly conversion van or wheelchair accessible shuttle. [Tr. Vol. I, p. 102].

Furthermore, the Probate Court gives weight to the testimony that Mr. Brantley knew about the contents of the Old Will, but not the New Will. [5.12.2016 Order, p. 5]. The Probate Court does not explain how this is relevant or probative in its ultimate finding of undue influence. It, along with the other irrelevant and immaterial evidence scattered throughout the 5.12.2016 Order do not support the Probate Court's finding that the New Will was the product of undue influence.

The Probate Court mentions a time when Ms. Davis attempted to enter the house when Ms. Costa and Testatrix were in the middle of a physical therapy session. [5.12.2016 Order, p. 8]. The Probate Court gives weight to Ms. Davis' and Respondent's testimony but does not take into consideration the testimony of Ms. Costa (an independent and unbiased witness) – who was there caring for Testatrix. Ms. Costa testified "Ms. Gunnells did not want to see [Ms. Davis], she was upset." [Tr. Vol. II, p. 23]. But when Ms. Costa attempted to tell Ms. Davis the same, "she pushed into the door and pushed me out of the way." [Id.] The Court gives great weight to Respondent's testimony on the matter. However, Respondent was in the car during this entire encounter.

Finally, and most importantly, the Probate Court ignored another elephant in the room – the fact that Respondent sued her mother almost immediately after her father’s death and that her other daughter, Ms. Davis, was largely absent during the latter part of her life. Respondent sued her mother for personal items in the Residence she believed rightfully belonged to her – including two candlesticks from Tuesday Morning. [Tr. Vol. 1, p. 113]. The Probate Court failed to take these very probative uncontroverted facts and circumstances into consideration at all in its finding that the New Will was the product of undue influence.

The Probate Court committed reversible error when it found the following unsubstantiated evidence probative: (1) rumors about Appellant’s drinking; (2) Respondent’s selling her Corvette in exchange for a Lexus SUV; (3) Ms. Carroll’s testimony regarding a conversation she cannot remember; and; (4) DSS and Probate Court visits over uncontroverted testimony and evidence showing: (a) Respondent sued her mother almost immediately after her father’s death; (b) Ms. Davis was an absent child; (c) No follow up was ever done by DSS or other legal services; (d) Appellant had met Attorney Klok on one other previous occasion; (e) An independent witness confirmed Testatrix did not want to interact with her daughters.

IV. THE PROBATE COURT ERRED IN FINDING THE TESTATRIX’S WILL WAS THE PRODUCT OF UNDUE INFLUENCE WHEN THERE WAS NO SHOWING OF THREATS, FORCE OR RESTRICTED VISITATION

It has been held repeatedly that “[g]enerally, 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, supra*, 353 S.C. at 217, 578 S.E.2d at 333; *Hembree, supra*, 311 S.C. at 196, 428 S.E.2d at 5. Even when a fiduciary

relationship exists, the Courts still analyze whether there were threats, force and/or restricted visitation. *See. e.g., Hairston*, 387 S.C. at 447-448, 692 S.E.2d at 553.

While the Respondent and her sister claimed that Appellant “threatened” *them* with “calling the police” (which is rebutted by independent witness testimony from Ms. Costa) – there was absolutely no testimony or evidence that Appellant used threats or force on the Testatrix – which is the person to whom the threat/force would have to be made on in order for it to be probative. *See Hairston, supra*, 387 S.C. at 447, 692 S.E.2d at 549.

The 5.12.2016 Order states that after the execution of the New Will, Mrs. Gunnells was “visibly upset,” “crying,” and “distraught” in the doctor’s office. [5.12.2016 Order at 13]. Dr. Chanson (her treating physician) never tied these emotions to the execution of her New Will. In fact, Dr. Chanson who testified to these emotions – makes it clear that these were experienced over a period of time and were result of Testatrix’s husband’s recent death – not anything to do her New Will. [Chanson Depo. pp. 25, 26, 35]. It should be noted that during the two years that Dr. Chanson treated Testatrix, Appellant was never in the room for any of her examinations – which lasted anywhere from 30 to 50 minutes. [Id. pp. 13, 18]. Dr. Chanson opined that Testatrix’s behavior was appropriate and she did not seem fearful – she saw nothing in Testatrix’s demeanor that was concerning or that would lead her to believe Appellant was exercising any influence over Testatrix. [Id. at 17-20].

Likewise, there was no testimony or evidence of restricted visitation. Quite the opposing. Attorney Klok testified that Testatrix told her that if it weren’t for Appellant, she would not be able to get out and interact as much – visits to the senior center, doctor’s appointments, visit family, etc. [Tr. Vo. II at 63]. Moreover, Testatrix’s brother – Jack Brantley – visited his sister in Charleston after her husband’s death and while Appellant

was living with his mother: "I probably visited at least three or four times a year, sometimes more often, according to what was going on, and we talked on the telephone at least two, three, four times a week. And if I didn't call her, she would call me." [Id. at 14, 13-17, 19]. He further testified that spoke to her outside Appellant's presence. [Tr. Vol. I at 40-41, 45]. Appellant would also bring his mother to visit Mr. Brantley in Waynesboro, Georgia. [Id. 15].

On direct examination, Testatrix's "friend," Helen Carroll, testified that after her husband's death, Testatrix lost interest in talking on the telephone but that they would visit at Testatrix's home. [Carroll Depo. at 10-11]. She recounted several visits and telephone calls, yet she had very little recollection of the conversations. [See, generally Carroll Depo.]. She confirmed daughter Belinda Davis was an absent child. [Id. at 30].

Ms. Carroll further testified that in the last few months of her husband's life, Testatrix changed but that was probably because her husband was dying. [Carroll Depo. at 33]. Testatrix never spoke about any mistreatment, threats, force or any concerns she had about Appellant. [Id. at 35]. Ms. Carroll continued to visit Testatrix after her husband's death—including when Appellant was not there. [Id. at 10, 12-13, 35]. In fact, Ms. Carroll visited Testatrix at her home up until the last week of her life. [Id. at 34]. Appellant never kept Ms. Carroll away from his mother nor did he ever instruct her to leave when she visited Testatrix. [Id. at 35].

The Testatrix's daughters' testimony fails to show any restriction of visitation. Ms. Belinda Davis was self-admittedly absent — moving to Hawaii right after her father was diagnosed with cancer. [Tr. Vol I at 78-79]. She conceded that she had the opportunity to talk to her mother after her father's death — but she chose not to. [Id. at 68, 83, 87]. It was

that Ms. Davis did not talk to her mother much at all, including during the month of July when the New Will was executed. [Id. at 82, 85].

Respondent's own testimony is indicative that she made a choice to stay away. Only 19 days after her father's death, Respondent admits that she wrote a letter to her mother threatening legal action to recover personal property. [Ex. 4]. In October 2013, she wrote her mother yet another letter. [Ex. 5]. In this letter, Respondent sarcastically commends her mother for being happy, content and being able to sleep at night. [Id.]. "[I]t seems you are happy and satisfied with your choices you have made." [Id.]. She also states that she has no desire to visit her mother at her Residence. [Id.].

Accordingly, the most Respondent proved was that leading up to and after her husband's death, Testatrix was sad and sometimes did not want to speak on the phone or have long visits with friends. An emotion that Dr. Chanson said, and common sense would dictate, was completely expected and normal – "most marked thing would have occurred after her husband died and appropriately so. She was very depressed about that. That is one of the most significant losses a person can undergo, secondary to the loss of a child. And it is not uncommon that people will have a difficult time with that. And she was no different." [Chanson Depo. at 15].

Short of cherry-picking snippets of testimony while ignoring admissions and concessions from **the same witnesses**, there is simply no real evidence or testimony to support the finding in the Probate Court's 5.12.2016 Order that states "other children and friends of the Testatrix were not permitted to speak to her on the phone or to be alone with her in the home." [5.12.2016 Order, p. 15]. Again – **these are the Respondent's own witnesses** who can provide no evidence of physical force, neglect or restricted visitation as

to the Testatrix at the time of the testamentary act. It would set South Carolina authority on its head to find undue influence in the absence of these critical factors.

As such, the Probate Court committed reversible error when it made this finding and finding that there was evidence of treats, force and restricted visitation when no evidence was submitted to support the same.

V. THE PROBATE COURT ERRED BY GIVING GREAT WEIGHT TO THE RESPONDENT'S MISSTATED AND MISREPRESENTED TESTIMONY OF TESTATRIX'S PHYSICIAN DR. RHONDA CHANSON, WHEN THE MEDICAL CONCLUSIONS FOUND BY THE PROBATE COURT ARE NOT REASONABLY SUPPORTED IN THE RECORD.

The reasonable good health of a testator is considered probative in an undue influence case. *First Citizens Bank v. Inman*, 296 S.C. 8, 370 S.E.2d 99 (1988). Moreover, in case after case, the South Carolina appellate courts have found probative the testimony of the treating physician that the decedent was competent. *See, e.g., Calhoun, supra*, at 431; *Smoak, supra*, at 426. Thus, the Probate Court committed reversible error when it failed to consider all the testimony of Dr. Chanson – which constitutes her full opinion – rather than allowing the Respondent to cherry-pick a statement here or there.

It is uncontroverted that Dr. Chanson is a licensed, reputable and competent physician who has practiced internal medicine in Charleston since 2000. [Chanson Depo. pp. 6-7]. The Respondent offered no testimony that questioned Dr. Chanson's qualifications in any manner, nor any counter medical expert. It should be noted that Belinda Davis testified it was on her suggestion that Testatrix began to see Dr. Chanson [Tr. Vol. I at 61], which Dr. Chanson corroborated. [Chanson Depo. at 11-12, 16].

The Probate Court relied heavily on Dr. Chanson's assertion that she cannot say whether Testatrix was "unduly influenced." [5.12.2016 Order, pp. 13-14]. What the

Probate Court failed to consider, however, is Dr. Chanson's own testimony that the reason she was unable to opine on that issue because she had no idea what the term "undue influence" meant. [Id. at 18, 38]. Notwithstanding the foregoing, Dr. Chanson noted that Testatrix routinely carried on intelligent conversations during her office visits, she knew exactly who she was and who her family and children were, she had a firm understanding of her surroundings and she made her own decisions. [Id. at 19, 22].

The Testatrix never missed an appointment with Dr. Chanson. [Id. at 17]. Office visits would usually last between 30 and 50 minutes. [Id. at 13]. Furthermore, Appellant was never in the room when Dr. Chanson was examining/treating Testatrix—he would wait in the lobby until she needed to speak to him. [Id. at 18, 27-29]. Dr. Chanson opined that Appellant seemed very attentive towards his mother; he asked appropriate questions about Decedent's health and he would often call the office to ask questions about medications. [Id. at 17]. "He seemed to be giving appropriate care to his mother." [Id.].

Significantly, Dr. Chanson saw Testatrix for an appointment on the same day as Testatrix executed the New Will and believed she was of mind, albeit depressed at the recent loss of her husband. [Id. at 24-25, 3-38]. Dr. Chanson believed that Testatrix was competent to make her own decisions. [Id. at 22].

Dr. Chanson did not see anything in Testatrix's demeanor that was concerning or that would lead her to believe Appellant was influencing Testatrix. [Chanson Depo. at 17-20]. "Her behavior seemed appropriate in our offices. She didn't seem to be fearful. I always examined her, and he was not in the room, so I didn't see anything that would be concerning," she testified. [Id. at 18].

Dr. Chanson testified to all these opinions to a reasonable degree of medical certainty most probably. [Id. at 25-26]. She is an unbiased witness with no reason to favor or discredit one party or the other. She always spent time alone with the Decedent, yet reported no findings of abuse, neglect, force, coercion or domination of Decedent by Appellant. Concerning the medical findings, the Probate Judge said the record speaks for itself. [8.25.16 Order, p. 7]. That would be true if the Probate Judge considered her whole testimony. He did not. Rather, while gleaned one statement, the Probate Court ignored Dr. Chanson's full testimony without weighing her complete opinion or discerning the context around the statements – including snippets of testimony about Testatrix's medication, discussed more fully in Section VIII below.

VI. THE PROBATE COURT ERRED IN ADMITTING AND GIVING GREAT WEIGHT TO UNSUBSTANTIATED, UNSUPPORTED AND UNAUTHENTICATED MEDICAL RECORDS FROM ONE OF TESTATRIX'S PHARMACIES.

The Probate Court makes an incredible finding of fact that Appellant withheld medication from Testatrix. [5.12.2016 Order, p. 14]. In fact, this exact theory was discounted by Dr. Chanson. ("Q: So were you aware of . . . mismanagement of care of mismanagement of medication? A: I was not . . . I did not see anything that would have been concerning."). [Chanson Depo. at 18]. Furthermore, Testatrix, during her long visits with Dr. Chanson, never mentioned anything of the sort to her or anything else that would have been concerning to Dr. Chanson. [Id.]. Once again, it should be noted that the Probate Judge says the record speaks for itself. [8.25.16 Order, p. 7] – which is only true when all Dr. Chanson's testimony is considered.

Respondent failed to illicit *any testimony* from *any witness* that any medication was ever withheld. She failed to call in an independent medical professional, including Testatrix's pharmacist(s), to support this outrageous contention. This is pure conjecture and speculation on behalf of the Respondent and should never have been considered by the Probate Court.

Ms. Leigh Wechter – Testatrix's physical therapist – recounted: “[Appellant] appeared genuinely concerned about Mrs. Gunnells, and would take care to prepare her meals, fix her medications and make recommended safety changes to her home to protect her from falls. [Appellant] worked to ensure Mrs. Gunnells had caregivers in the home to assist her with her personal care, as well as provided (sic) her with transportation and assistance with all of her medical appointments.” [Ex. 6]. “[Appellant] made sure that she took her medications.” [Tr. Vol. II at 16]. Testatrix's other physical therapist, Ms. Jill Costa, recounted: “Every visit, I got to see how devoted he was to his mother, in which he made sure she had the best possible care.” [Ex. 7].

Respondent has failed to present any evidence, let alone unmistakable and convincing evidence, that Appellant withheld medication from his mother. If there were any true merit to this contention, then Respondent would have been able to elicit the same from Dr. Chanson or another medical professional to support it. As such, the court committed reversible error when it considered this unsupported conjecture in finding the New Will was the product of undue influence.

VII. THE PROBATE COURT ERRED IN ACCEPTING THE TESTIMONY OF MS. HELEN CARROLL REGARDING TESTATRIX'S STATEMENT "I HAD NO CHOICE" WHEN MS. CARROLL TESTIFIED SEVERAL TIMES SHE DID NOT REMEMBER EVER HAVING A CONVERSATION WITH TESTATRIX ABOUT A NEW WILL, NOR KNEW THE CIRCUMSTANCES OF THE STATEMENT FROM WHICH SHE READ.

The Probate Court accepted the testimony of Ms. Carroll that the Testatrix said she had "no choice" in signing the New Will. [5.12.2016 Order at 16]. This testimony provides no context for why the Testatrix allegedly had "no choice" – what if it was because her daughters' conduct left her no choice? In any event, this testimony should never have been admitted or considered by the Probate Court.

The "no choice" testimony came about from Respondent's counsel asking Ms. Carroll to testify regarding a letter she had allegedly signed, but which she had no knowledge regarding how it was drafted, who drafted it, when it was drafted, when she signed it, or the circumstances under which she signed it. [Carroll Depo. at 24-28]. The Probate Court correctly excluded this letter from evidence because of the same, yet still considered the testimony elicited from it.

Reading from the letter in her deposition, Ms. Carroll said that the Testatrix told her that she did not want to change her will but Appellant told her she had to. [Carroll Depo. at 18]. However, before she read from the letter, Ms. Carroll testified on direct examination she did not remember any conversation with the Testatrix concerning a will ("Q: Okay. Did [Testatrix] ever talk to you about signing a will or something like that? A: No. Q: Never came – A: No.") [Carroll Depo. at 15]. Similarly, on cross-examination after she read the letter, Ms. Carroll did not remember discussing the will with the Testatrix, either. ("Q: So earlier, Mr. Howe had to remind you about . . . a conversation you had about

the will with Mrs. Gunnells. Do you remember that conversation? A: No. I don't.") [Carroll Depo at 35-36].

It was only after Ms. Carroll read from the letter that she testified specifically that Appellant kept Testatrix from speaking to her brother and sister – which she had not testified to previously on direct examination. [Tr. 19, 22]. A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. SCORE 602.

It should be noted that Ms. Carroll, a 92-year-old ailing woman, admitted to an extremely close, personal relationship to the Respondent. She testified that the Respondent “was like a daughter to her” and she would do anything the Respondent asked her to do; she even talked to the Respondent every day. [Carroll Depo. at 28-29, 37]. Yet, curiously, Respondent did not talk to Ms. Carroll at all between the time Arden Gunnells died and Testatrix died [Id. at 37-38] – which could suggest that Respondent was cultivating a lonely, elderly woman more for her anticipated testimony than deep friendship.

Despite all of this, the Court admits the testimony of Ms. Carroll. Which should have been excluded for lack of personal knowledge. SCORE 602. As such, the Probate Court committed reversible error when it gave great weight to the same.

VIII. THE PROBATE COURT ERRED IN DISREGARDING THE TESTIMONY OF TESTATRIX’S TWO (2) HOME HEALTH PHYSICAL THERAPISTS, IN WHOM SHE CONFIDED.

Testatrix had several home healthcare nurses and physical therapists that were prescribed by Dr. Chanson. [Id. at 22]. Two of the physical therapists who were closest to Testatrix – Leigh Wechter and Jill Costa – testified at trial.

Ms. Wechter performed physical therapy for Testatrix through Roper St. Francis Home Healthcare. [Tr. Vol. II, p. 9]. She practiced as a physical therapist for almost thirty (30) years. [Id. at 8]. Ms. Wechter treated Testatrix for roughly two (2) months – from December 2013 to January 2014 – two (2) to three (3) times per week. Each session would last roughly 45 minutes. [Id. at 9]. It is uncontroverted that Ms. Wechter is a reputable and competent physical therapist.

Throughout her visits to the home, Ms. Wechter became close with Testatrix – often talking about her family life while they walked outside. [Id.]. Testatrix would tell her about Appellant being a good son and how she was upset with her daughters – “she would become emotional and would say that she only trusted Glenn when it came to her children.” [Id. and Appellant’s Exhibit 6]. She testified that Appellant was “very accommodating” and would usually talk to Ms. Wechter about the sessions to see how his mom was doing. [Id. at 10].

Ms. Costa performed physical therapy for Testatrix also through Roper St. Francis Home Healthcare. [03.02.2016 Tr. at 9]. Ms. Costa first treated Testatrix in 2009 then again in 2013. [Id. at 19]. Ms. Costa would also see Testatrix two (2) to three (3) times per week. [Id. at 21-22]. It is uncontroverted that Ms. Costa is a reputable and competent physical therapist.

Ms. Costa had many opportunities to be around Appellant and Testatrix and at no time did she ever believe that Appellant was controlling Testatrix. [Id. at 25]. Testatrix confided in Ms. Costa that she was very upset with her daughters because of their absence and their attitude. [Id. at 29-30].

Ms. Costa happened to be at the Residence on time when Ms. Davis stopped by – “Ms. Gunnells did not want to see her, she was upset,” she testified. [Id. at 23]. However, Ms. Davis did not take no for an answer and pushed her way through the door. [Id.].

Like Dr. Chanson, both Ms. Wechter and Ms. Costa are independent witnesses with no discernible biases and no reason to favor one party over the other. They spent time alone with the Testatrix outside the Appellant’s presence. They noticed that the Testatrix was upset and dissatisfied with her daughters. She never exhibited signs that she was deprived of her free will. Their testimony was extremely probative as it showed there was no ongoing mental coercion by Appellant which destroyed the Decedent’s free agency and/or constrained her to do things which were against her free will. *Last Will and Testament of Smoak v. Smoak*, 286 S.C. 419, 334 S.E.2d 806 (1985). Rather, their testimony substantiated Appellant’s position that Testatrix was upset with her daughters. Their testimony offered a reasonable explanation as to why she Testatrix executed the New Will.

It is clear from the uncontroverted testimony of physical therapists that the reason Testatrix executed a New Will was not because of undue influence, but rather the Testatrix’s disappointment in the dramatic and unpredictable behavior of her daughters. However, the Probate Court does not address the testimony of these witnesses nor its reasons for not considering it. As such, the Probate Court committed reversible error when it failed to take this independent unbiased testimony into account when finding the New Will was the product of undue influence.

IX. THE PROBATE COURT ERRED IN GIVING GREAT WEIGHT TO RESPONDENT'S TESTIMONY THAT SHE SOUGHT DSS, PROBATE COURT AND/OR LEGAL AID WITH NO EVIDENCE, INDEPENDENT WITNESS OR SUPPORTING TESTIMONY TO PROVE THE SAME

The Probate Court gave great weight to the Respondent's testimony that she sought assistance from DSS, Charleston County Probate Court, independent legal counsel and Legal Aid. [5.12.2016 Order, pp. 4, 8, 9, 10].

First, the only proof of these "visits" is one single DSS business card. There is no other proof of visits to the Probate Court, visits to legal counsel or legal aid. Respondent could have easily called a representative from any of these places to trial to testify regarding the same.

Second, a visit to legal counsel, legal aid, the Probate Court and DSS with no further follow-up or, most notably, no further legal action should have been more probative to the Probate Court than the visits themselves. Had some independent third party found there to be actual evidence of abuse and/or neglect, surely there would have been follow-up and/or legal action to remedy the same. However, there was none.

Third, the Probate Court found that "No legal actions were filed, however, primarily because of cost." [5.12.2016 Order at 8]. This is unfounded as the Probate Court is well aware there are cost-efficient and zero-cost methods of obtaining legal aid, especially for purported abuse and neglect matters. Furthermore, Respondent testified she sought the advice of one attorney – Robert Polk – but he was "too expensive" and that she tried for "probably a week" to obtain counsel. [Tr. Vol. 1, p. 70]. Surely, if she thought her mother was in as dire straits as she described at trial, one would assume she may have elicited the expertise of one of the 2,000 plus members of the Charleston County Bar Association.

Fourth, if the abuse and neglect was to such an extent that Respondent and her friends testified to at trial, arguably, no amount of money would have been too much to “save” her mother. Ms. Davis testified that the reasoning for not following up with legal counsel was because of “the expense, and I had to go back to Hawaii.” [Tr. Vol. 1, p. 71-72]. Essentially, the daughters were heated after the interaction where Ms. Costa told Ms. Davis Testatrix didn’t want to see her, but after a week or so, they calmed down and decided they needed to move on with their lives.

Fifth, it should be noted that none of Testatrix’s medical professionals – the people who saw her on a regular basis and had independent one-on-one access to her – ever felt the need or even the inkling to report abuse and/or neglect that Respondent alleges against Appellant.

The pieces don’t add up to the court’s finding that visits to counsel, DSS, etc. are probative in its finding that the New Will was the product of undue influence. As such, the Probate Court committed reversible error in finding the same.

X. THE PROBATE COURT’S ORDER DENYING THE MOTION TO RECONSIDER DID NOT ADDRESS ANY OF THE LEGAL AND FACTUAL ERRORS OF THE PROBATE COURT’S ORIGINAL ORDER

On May 31, 2016, Appellant submitted his Motion to Alter, Amend and/or Reconsider the Probate Court’s 5.12.2016 Order. [5.31.2016 MTR]. Despite Appellant’s request for a hearing, the Court issued its decision in an Order on August 26, 2016. [8.26.2016 Order]. The Motion was denied.

The bulk of the 8.26.2016 Order discusses the correct application of the law in South Carolina with regards to undue influence and agrees with Appellant’s recitation in his Motion to Reconsider. However, the Order does not address the legal and factual errors of

the Probate Court's 5.12.2016 Order. Particularly, the Order is silent on much of the above-argued witness testimony – in particular, the weight and credibility of the witnesses presented and the lack of evidence and testimony to support the Respondent's allegations.

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. [8.26.2016 Order, p. 7].

This is simply not sufficient in a case where so much testimony and evidence presented rebutted any presumption of undue influence.

XI. THE PROBATE COURT ERRED IN FINDING THAT TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE UNDER THE APPLICATION OF A "FOUR CIRCUMSTANCES TEST" WHERE SUCH FINDINGS DO NOT REQUIRE RESPONDENT TO MEET HER HIGH BURDEN OF PROOF.

In the original Order, the Probate Court looked at four circumstances in finding the New Will was the product of undue influence, which it explained in the Second Order was not meant to be exhaustive of formulaic. To the extent the Court still relies on the first and second prongs, Appellant believes they do not accurately reflect South Carolina law as cited by the Probate Court. [5.31.2016 MTR]. As to susceptibility, the Probate Court did point out recent authority where it came up, but the overwhelming weight of all the testimony (including from the Testatrix's brother and daughter) was that the Testatrix was a formidable woman who knew her own mind and was not susceptible to undue influence.

XII. THE PROBATE COURT BY ERRORS OF LAW IN ITS ANALYSIS OF CONTROLLING AUTHORITY ERRED IN DETERMINING WHETHER TESTATRIX'S WILL WAS THE PRODUCT OF UNDUE INFLUENCE.

In previous cases, the Supreme Court of South Carolina found undue influence claims did not exist even though the evidence was more egregious and pervasive than in the present action. In *Russell v. Wachovia Bank, N.A.*, Testator's son and daughter brought

an action to set aside testator's will for undue influence and the court entered summary judgment in favor of the will's proponents. The contestants presented the following evidence: (1) at times, the testator did not know what state he was in and "doubled up" on his medication; (2) the other beneficiaries in the will were disrespectful and frequently yelled at the testator about money; (3) the proponents monitored his telephone, told him how to dress, and would not let the testator adjust his thermostat; (4) the other beneficiaries spent large sums of the testator's money, had unfettered access to his office, and lived in his house; (5) the proponents had frequent contact with the testator's attorney; and (6) testimony from two doctors indicated that the testator may have been susceptible to undue influence. *Id.* 353 S.C. at 215, 578 S.E.2d at 333. While unattractive, such conduct and demeanor did not amount to undue influence nor did it rise to the level of unmistakable and convincing evidence that they utilized their relationship to substitute their will for his. *Id.* In affirming the grant of summary judgment, the court found the testator remained the ultimate decision maker.

In this matter, the Testatrix, while physically infirm, was not mentally infirm – she was very clear and adamant about what she wanted in her New Will. [Tr. Vol II, p. 62]. Notably, Testatrix met with her attorney for several hours where she made it absolutely clear what she wanted to do and why she wanted to do it. [Id.]. Attorney Klok testified that she was quick, rational and precise when answering questions about her family, her property and its disposition. [Id.]

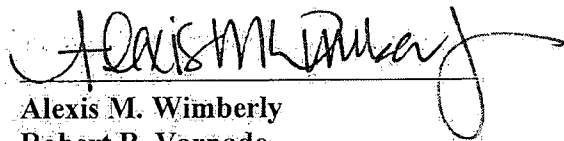
The record is devoid of any evidence that Appellant interfered with the making of the New Will. Appellant did not dictate the will; he was not present when its proposed contents were discussed; nor was he present when the Will was executed. The

circumstances surrounding the drafting and execution of the New Will indicate that it was the product of the free and unfettered act of the Testatrix – who all the witnesses conceded was competent, independent and was of sound mind. *See Mock v. Dowling*, 266 S.C. 274, 278, 222 S.E.2d 773, 774 (1976).

CONCLUSION

Appellant respectfully requests that this Honorable Court find that the Probate Court's 5.12.2016 Order is guided by multiple errors of law and fact. Accordingly, this Honorable Court should reverse the Probate Court's holding and find that the July 3, 2013 Will ("New Will") was not the product of undue influence, is valid and is in full force and effect.

BROWN & VARNADO, LLC



Alexis M. Wimberly

Robert B. Varnado

103 Church Street

Mount Pleasant, South Carolina 29464

P: (843) 737-7300

F: (843) 654-5109

awimberly@brown-varnado.com

rvarnado@brown-varnado.com

Attorneys for Appellant

December 5, 2016

Mount Pleasant, South Carolina

THE STATE OF SOUTH CAROLINA

In the Court of Common Pleas
for the Ninth Judicial Circuit

APPEAL FROM CHARLESTON COUNTY PROBATE COURT

The Hon. Irvin G. Condon, Probate Court Judge

Case No. 2016-CP-10-4566

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

Appellant,

vs.

Cathy G. Harkness,

Respondent.

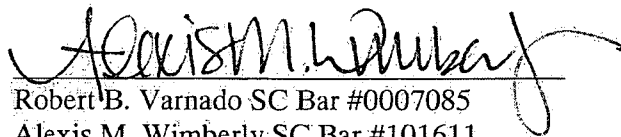
CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that a true copy of the *Appellant's Initial Brief* in the above referenced case has been served upon counsel of record by mailing a copy in an envelope properly addressed with postage prepaid on this date to the following:

Donald H. Howe, Esquire
Law Offices of Donald H. Howe, LLC
P.O. Box 31324
Charleston, South Carolina 29417

Julie Jackson Bailey, Esquire
Michelle Weil, Esquire
Bailey & Weil, LLC
1 Carriage Lane, Bldg H, 2nd Floor
Charleston, South Carolina 29407

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JULIE J. ANGSTROM
CLERK OF COURT
BY _____



Robert B. Varnado SC Bar #0007085

Alexis M. Wimberly SC Bar #101611

BROWN & VARNADO LLC

P.O. Box 1127

Mount Pleasant, South Carolina 29465

(843) 737-7300

Attorneys for Appellant

December 5, 2016

Mt. Pleasant, South Carolina

1 STATE OF SOUTH CAROLINA)
2) Court of Common Pleas
3 COUNTY OF CHARLESTON) Case No. 2016-CP-10-04566
4)
5 GLENN A. GUNNELLS, et al,)
6)
7 Plaintiff,)
8 vs.) Transcript of Record
9)
10 CATHY G. HARKNESS,)
11)
12 Defendant.) DATE: March 3, 2017
13)
14)
15)
16)
17)
18)
19)
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25)

B E F O R E:

THE HONORABLE ROGER M. YOUNG, SR.

A P P E A R A N C E:

ALEXIS MILLS WIMBERLY
Attorney for the Plaintiff

DONALD HIGGINS HOWE
Attorney for the Defendant

Karen V. Andersen, RMR, CRR
Circuit Court Reporter

1 THE COURT: Appeal from the probate court, huh?

2 MS. WIMBERLY: Yes, Your Honor.

3 THE COURT: I just didn't think this day would get
4 any better.

5 Okay. Who is the appellant?

6 MS. WIMBERLY: I am here on behalf of the appellant,
7 Your Honor. My name is Alexis Wimberly. And I'm an
8 associate of Brown & Varnado in Mount Pleasant.

9 THE COURT: Okay.

10 MS. WIMBERLY: Your Honor, this is an appeal from
11 the probate court regarding a will contest. As a bit of
12 backstory, the testatrix was married to her husband for over
13 50 years. They executed -- and they have three children,
14 Belinda Davis being the oldest. She's not a party to this
15 lawsuit, but she was a witness at trial in this matter.

16 Ms. Harkness is the middle child. She's the
17 respondent in this matter.

18 And my client is Mr. Glenn Gunnells. He's the
19 youngest child and he's the appellant in this matter.

20 The testatrix and her husband executed "I love you"
21 wills in 2006, which left everything to each other. In 2011,
22 they appointed my client, Mr. Glenn Gunnells, as their power
23 of attorney; both of them did.

24 In 2013, I believe it's June 8th, 2013, the husband
25 passed away. About 25 days later, Mrs. Gunnells, the elder,

1 she executed a will leaving all of her estate to my client,
2 the appellant, Mr. Gunnells.

3 And that's kind of what brought us -- and then a
4 suit was filed for undue influence. And that's what brought
5 us to trial in May of last year in front of Judge Condon.

6 Judge Condon found against my client, seeing that
7 there was evidence of undue influence. And we have appealed
8 that order.

9 With regards to that, she drew an affirming order.
10 We believe that it would turn South Carolina jurisprudence on
11 undue influence on its head for many reasons, which I have
12 outlined in our brief. There's about 12 reasons in there.
13 But I will try to be brief today and point out three reasons
14 we believe that that decision should be reversed.

15 The first and foremost reason is that Judge Condon
16 failed to take into consideration the testimony of the
17 drafting attorney and her paralegal, who were present at the
18 time of the execution of the will. The appellant wasn't in
19 the room. The respondent wasn't in the room. It was just
20 the attorney and her paralegal. They met for three hours on
21 one day. And their testimony consisted of why the testatrix
22 wanted to change her will. It consisted of that she had the
23 capacity to change her will, that she knew exactly what she
24 was doing, and why she wanted to do that. And that's
25 outlined in our brief.

1 But, basically, the reason was that it wasn't that
2 she wanted to give her estate to my client; it was because
3 she didn't want to give her estate to the respondent or to
4 the eldest sister, because my client was the caretaker at the
5 end of her life. And it doesn't take a rocket scientist to
6 know that if somebody is taking care of you at the end of
7 your life and everybody else is absent, you want to give them
8 a reward.

9 And the order is silent on anything that happened in
10 the office on that day. And under *Russell v. Wilson*, that's
11 one of the biggest portions of what a court looks at when it
12 determines if somebody was unduly influenced. The execution
13 is one of the biggest things. The attorney is in the best
14 position to know the capacity of the testatrix, as well as
15 why she wanted to change her will.

16 And it should be noted that the original will
17 actually gave everything to her husband. It didn't give
18 anything to the children. So she wasn't changing it in terms
19 of leaving it to -- it was basically the same will. It was
20 just giving everything to another person.

21 So in saying that, that's the biggest thing that the
22 court ignored in the testimony, without finding any kind of
23 credibility findings about the attorney or the paralegal.

24 THE COURT: Who was the lawyer?

25 MS. WIMBERLY: It was Susan Klok out of Mount

1 Pleasant.

2 THE COURT: Okay.

3 MS. WIMBERLY: The court actually found that she was
4 a credible witness. It didn't make any findings saying that
5 she didn't do her job right or she didn't ask the right
6 questions. The court even had asked her questions about what
7 was asked that day.

8 That testimony is actually backed up by her
9 physician, which is my second point, that the court
10 mischaracterized the testimony of the treating physician.
11 She was deposed de bene esse. So her testimony came in
12 without the court being able to see her. But it's very clear
13 when you read the entire deposition that the doctor -- this
14 is her primary care physician who she saw on a monthly basis,
15 the testatrix, that my client, Mr. Gunnells, was her primary
16 caretaker, would bring her to every appointment. She would
17 meet with the testatrix by herself in Dr. Chanson's office.
18 That's the doctor's name. She thought she was a very
19 independent, strong woman, strong-willed, knew what she
20 wanted to do. While she was ailing physically, she was
21 mentally sharp.

22 Her husband did die, like I said, 25 days before the
23 new will was executed. And there is evidence in the record
24 that shows that she was distraught at that time. But
25 Dr. Chanson opined that when you lose a spouse that you have

1 for 50 years, of course, you are going to be distraught. And
2 respondent relies heavily on that in their proposed order,
3 which the judge basically signed. So it was their order.

4 But with regards to that, there's also some
5 evidence -- or not evidence. There was no evidence,
6 actually, of misadministration of prescription drugs. This
7 is a strong accusation that required serious proof. And we
8 brought the attorney, her paralegal, the doctor, as well as
9 two physical therapists that all said, you know what, she was
10 of sound mind, she knew what she was doing, full capacity to
11 execute a will. And she was upset with her daughters. We
12 had many independent witnesses that said that.

13 There's no prescription drug, there was no records
14 entered into evidence, there was no independent doctor that
15 came in and said, you know what, he could have done things
16 better. Even Dr. Chanson, her primary care physician, said
17 he did a great job, he was a wonderful caretaker, I never saw
18 anything that was out of the ordinary.

19 So to come to that conclusion just -- we just don't
20 understand it. Doesn't make any sense with regard to the
21 facts that are put up in this case, especially the testimony
22 of Dr. Chanson that says the complete opposite.

23 And then finally, Your Honor, we submit to you that
24 the court used the wrong burden of proof. There was the 25
25 days from the death of the husband to the execution of the

1 new will. And that is really where the trial kind of turned.
2 That was it. And that's where the judge found that there was
3 undue influence in that time period.

4 There's seven months after that time period that the
5 testatrix lived, had an unhampered opportunity to change her
6 will. She was by herself with the primary care physician.
7 She was by herself with the home healthcare nurses. She was
8 by herself with her brother. She was by herself with her
9 best friend. She could have asked for help or to cry for
10 help during that time.

11 And the courts have found, I believe it's in
12 Hairston v. McMillan, that if you have the unhampered
13 opportunity to change your will, especially if you are alone
14 with a family member or friend, then the court cannot find
15 undue influence.

16 And what the Court did in this instance was use some
17 testimony from that time period after the will was executed
18 in order to find undue influence on the date of the
19 execution, which we feel is completely wrong.

20 And the court actually never stated the burden of
21 proof, which is in every single piece of law in this state,
22 which is unmistakable and convincing evidence that rises to
23 the level of undue influence. The court was silent on that
24 burden. And we ask you reverse the probate court's decision.

25 Thank you, Your Honor.

1 THE COURT: Mr. Howe.

2 MR. HOWE: May it please the Court. Donald Howe.

3 First of all, in reviewing a probate matter at this
4 point, the standard is, basically, was there any evidence to
5 support the probate judge's decisions. And I've got the
6 cases just to hand up quickly. You probably are familiar
7 with them.

8 And first one is case of Cumbee, second page
9 standard of review: An action to contest a will is an action
10 at law. And the court may not disturb the probate judge's
11 findings of fact unless a review of the record discloses
12 there is no evidence to support them.

13 That same standard is echoed in the next case, which
14 is *Townes Associates v. City of Greenville*. At the top of
15 page 2, it's exact same language, basically.

16 The next case, which I think is important, is *Graham*
17 *v. Whitaker*, which is 321 S.E. 2nd 40, 282 S.C. 393, a 1984
18 case, in which on page 2, sort of, I guess, firming up the
19 perspective I am submitting for the Court. The case notes:
20 We are not at liberty to pass upon the veracity of the
21 witnesses and determine this case according to what we think
22 is the weight of the evidence.

23 And what they've really argued all along is, they've
24 disagreed with the weight of the evidence that the probate
25 judge gave to certain evidence. And I will go over some of

1 that with you in a minute. But that is the standard of
2 review perspective the Court has to take.

3 As an aside, just total aside, *Graham v. Whitaker*
4 states *Gibbs v. Atlantic Coast Rail Line*, which is my dad's
5 case in 1952, I heard about all my life. He's still bailing
6 me out.

7 In this case there were, as in any probate case,
8 this was a hard disputed case. There were witnesses on both
9 sides. There was testimony for two days. And while they had
10 some on their side, we had plenty on our side. And I will go
11 over a couple of pieces with you in just a second.

12 The order itself, the initial order, is 17 pages
13 long. It dissects and weighs all of the evidence in this
14 case very -- I don't want to say succinctly, very
15 exhaustively. And, in fact, in that order -- hang on a
16 second. The court specifically -- this is page 11, the order
17 on page 44 of the transcript of record, specifically goes
18 into what this attorney said and what she knew. And talks
19 all about the things she said the court ignored. And, in
20 fact -- well, let me give you some background.

21 This attorney, Ms. Klok, was her client's lawyer.
22 The husband dies in June. And on July 3rd, 25 days later, he
23 takes his mom to his lawyer. First time she's ever met him;
24 no contact. The original lawyer was Brady Hair. He's done
25 the will. Met with both people. Done everything. The will

1 was fine for years.

2 The husband dies after a long and close
3 relationship. And 25 days later, she's in her son's lawyer's
4 office. And this lady has never met the client before in her
5 life, but she walks out a couple hours later with a new will,
6 leaving everything to the son.

7 And the court talks about the fact that this lawyer
8 did the best she could under those circumstances, but that's
9 not the only thing that is relevant in the case. And, in
10 fact, that same point was brought up in a motion to amend.
11 And if I can find it, the probate court specifically
12 addressed the same issues she just raised to you.

13 Respondent's other objections -- this is page 56 of
14 the record -- respondent's other objections primarily relate
15 to the court's evaluation of various testimony and evidence
16 presented in the case. Respondent contends, for example,
17 that the court failed to consider the testimony of attorney
18 Susan Klok and her paralegal. To the contrary, this court's
19 order expressly acknowledges and contemplates the testimony
20 of Attorney Klok.

21 And at the bottom -- and I will skip down sort of.
22 The court addresses that point: This court can identify no
23 controlling law indicating that an examination of the events
24 surrounding the drawing and execution of a contested document
25 must be limited solely to whether the undue influencer was

1 physically present when the testatrix put pen on paper and
2 signed her name.

3 So what happened at the attorney's office was
4 evidence. It was relevant evidence. But it's looked at in
5 the whole context of all of the evidence. And if any of that
6 evidence supports my client at this point, we are supposed to
7 win on appeal.

8 So let me go through a couple of highlights. As I
9 said, this is a two-day trial. But there are a couple of
10 highlights I think that will be instructive for Your Honor.

11 The first highlight -- and if you don't mind, I will
12 pass these up, because I know that it's a huge record and I'm
13 trying to move through as best as I can. Page 660 from the
14 transcript of record, this is the testimony of a lady named
15 Helen Carroll. Helen Carroll was the decedent's -- one of
16 her best friends. They were bosom buddies. They had met in
17 church. They had known each other for 40 years. Ms. Carroll
18 testified that her relationship had changed after
19 Mr. Gunnells, the appellant, moved in with his parents.

20 And specifically on page 18, started at line H,
21 she's looking at his earlier statement:

22 Does that, meaning the statement, help refresh your
23 memory about whether she, talking about Ms. Gunnells, talked
24 to you about a will?

25 Yeah.

1 Okay. What did she tell you about a will?

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

4 Had to do what now?

5 Sign a new will.

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

7 She didn't want to.

8 QUESTION: Okay. And your statement says Helen had
9 no choice. Is that her talking to you?

10 Yeah. Uh-huh.

11 So I guess if I'm looking for a keystone of
12 evidence, here's this lady's best friend, who describes -- a
13 little bit of background. She said after Glenn moved in to
14 take care of his mom, that he would never leave her home and
15 she never really saw Ms. Gunnells without Glenn there.

16 So her attitude was different. She talked
17 different. Didn't seem like she wanted to say much with him
18 around. She happened to come by one day and Glenn was not
19 there. And at that point, that's when she gave this
20 statement. So it was very convincing evidence.

21 And this was a video deposition. This was a much
22 older lady. And in this instance, the judge had great
23 opportunity to see the witness, evaluate her testimony, and
24 give it the weight that he thought was appropriate. And I
25 think, in terms of sort of being a smoking gun, this was

1 probably it.

2 The next thing that I will hand you, Judge, and Ms.
3 Wimberly went over, that's just sort of a timeline that helps
4 you go through stuff. And the main point of that is, is that
5 the regular wills had been in place for quite some time. And
6 when the husband died, that was June 8th. And the new will
7 with the new lawyer was on July the 3rd.

8 It was undisputed that Ms. Klok only saw her this
9 one time. It was strictly a professional visit. It was
10 limited for the purpose of the will, that Glenn drove her
11 there and that Glenn drove her home.

12 Glenn Gunnells, the appellant, his basic position
13 was that -- well, before I get to there, one of the other
14 things, credibility being a big factor in these kinds of
15 cases, it was apparent at trial -- I will hand up the next
16 page, which is pages 433 and 4. This is Mr. Glenn Gunnells's
17 testimony at trial.

18 And he had contended in his deposition very clearly,
19 when I asked him under oath, I said:

20 How did your mom -- how many times did your mom go
21 see this lawyer before she signed the will?

22 And he said: Oh, you know, two or three times. I
23 drove her there two or three times.

24 How long did she meet?

25 Oh, 30 to 45 minutes each time.

1 And lawyer looked at him and said, I met with her
2 once on that one day. He just got caught lying. And it's a
3 big lie.

4 Talking to my clerk, I said, on a 1 to 10 scale,
5 that's a 9.8, if not higher. This guy just didn't have any
6 credibility, Judge. This is one of those cases that went
7 back and forth and back and forth. And I know you've seen
8 them. I used to have them in the public defender's office.
9 The case is going very good until your client takes the
10 stand. And then all of a sudden, everything sort of
11 collapses.

12 And this was not the only thing that he got caught
13 being just totally false about. And in the judge's original
14 order, he goes down a number of things where Mr. Gunnells was
15 not candid with the court and got caught.

16 In response to a couple of the other pieces, the
17 primary care physician, Dr. Rhonda Chanson, on this same day,
18 July the 3rd, when the will was signed with the lawyer, she
19 went to see her doctor. I will hand you now pages 596 and 7,
20 8 and 9. And although the lawyer described this lady, who
21 she didn't know from Adam, as being fine and communicative
22 and all that stuff, on the same day, she goes to her primary
23 care physician. And her primary care physician describes her
24 as crying, upset, distraught, visibly upset I think were the
25 words, and distraught.

1 So you have somebody that didn't know her from Adam
2 giving one impression. And somebody who knows her well and
3 said, the only thing I talked to her that day was the passing
4 of her husband, she was falling apart.

5 So there was very good evidence of the fact that
6 this lady had some frailness going on and some highly -- this
7 was a highly emotional time for her.

8 Mr. Gunnells's position, his story in this, was that
9 the reason his mom was so mad at Kathy and her sister was
10 that they had virtually abandoned her. I asked him at page
11 431:

12 Your position is that Kathy and Linda just didn't
13 show any love to your mom or daddy, did they?

14 That's right.

15 And that was for, like, a seven-year period,
16 basically, before they died?

17 That's right.

18 And you begged people for help, trying to get them
19 to help you?

20 ANSWER: I wouldn't say begged, but I pleaded.

21 Over to 432: Okay. So you pleaded, and one of
22 those people was Jack Brantley?

23 ANSWER: I mentioned it to Jack. That was what the
24 situation was; and I could use their help.

25 I will just hand that, just so you've got in front

1 of you.

2 Jack Brantley was Ms. Gunnells's brother for whom
3 she was extremely close. He testified that he talked to --
4 they visit several times a year. He talked to her three
5 times or four times a week. He also testified that his
6 relationship with the sister had changed dramatically after
7 Glenn moved in. And in response to that sort of cry for help
8 from Glenn, he specifically testified:

9 Did you ever talk to Glenn -- this is on page 158 --
10 about trying to get help from the girls?

11 I think I did a couple of times.

12 QUESTION: All right. What was his position on
13 that?

14 He just didn't want them over there.

15 Okay. Did he ever approach you saying, I want help
16 from them; I need some help?

17 ANSWER: No, he didn't want them there.

18 QUESTION: Was he equivocal about it or was he
19 pretty definite?

20 He was definite.

21 Mr. Brantley was a particularly impressive fellow.
22 He was in his 80s. He was retired lieutenant colonel in the
23 Army. He had been in the county -- city administrator for
24 Waynesboro, Georgia for 23 years. And although he was in his
25 80s, he was still on the election committee. And that was

1 just one. There were numerous times that he not just
2 disagreed, but just completely contradicted what Glenn said.

3 Ms. Harkness herself testified that after the father
4 died, this is on page 227, she said she would try to call her
5 mother, and Glenn would answer the phone and hang up the
6 phone. And this is a quote:

7 On June 11th, he called me up after my father was
8 buried and told me I am no longer able to call mother, I am
9 not allowed to go over and see my mother or he would have me
10 arrested for harassment.

11 The same person that he alleged had abandoned the
12 mother and not helped the mother presented evidence and
13 testimony that she was so concerned about her lack of
14 evidence that she went to the probate court and spoke to
15 someone there, that she followed up with DSS and legal aid,
16 and then went to an attorney, Robert Poke, because they each
17 said it wasn't quite their area. And he had just charged her
18 so much money that she couldn't afford to do anything about
19 it.

20 One of the pieces of evidence, this is an e-mail,
21 this was Petitioner's No. 2 at trial, this is Uncle Jack,
22 Mr. Brantley, writing Kathy in the middle of this time that
23 she's supposedly abandoned her mom at the end of the
24 seven-year period, saying:

25 I'm available for DSS. Here's my number.

1 And I don't know why it says basically at the
2 bottom, they are not taking your help.

3 Almost done, Judge.

4 Belinda, the sister, talked about the fact that when
5 the father got cancer about a year before then, year and a
6 half, that Ms. Harkness was actually living in Myrtle Beach.
7 She moved back to Charleston, got an apartment not far from
8 her parents' house so that she could help care for them. And
9 she had a sports car. She had a Corvette. That was before
10 she had the cane, Judge. She had a Corvette. She sold the
11 Corvette and got a different vehicle so she could take them
12 back and forth to the doctor. Yet, Mr. Glenn Gunnells's
13 position was that she didn't care about her parents and she
14 basically deserted her.

15 Another piece of evidence, last two, was a birthday
16 card that Kathy wrote to her mom in the middle of this
17 saying, basically: I would like to get back together with
18 you. I miss the mom I used to have. I don't want to bother
19 you and Glenn.

20 And then last, but maybe not least, this was a
21 little bit different issue, but it did show a lot about
22 Mr. Gunnells. When the daddy had been in cancer treatment,
23 Mr. Gunnells, according to his sister Belinda, was a control
24 freak and an alcoholic. And he wrote them:

25 Nothing can be done without my signature based on

1 what I say, because I'm basically the power of attorney.

2 Those are just some of the highlights, Judge. If
3 you look through the judge's order, the judge goes through
4 these pieces of evidence thoroughly on both sides. They were
5 raised on the motion to reconsider -- let me look quickly
6 through my notes. The issue about the prescriptions was a
7 fairly minor issue. It did go to show that she was taking
8 Alzheimer's medicine during the time. It was undisputed at
9 trial that this lady was completely dependent on Glenn. Even
10 Glenn admitted that.

11 He had moved into the house. He's a very strange
12 guy. Had cameras all over the yard. His bed was in the
13 living room. He had some reason, because he had a dog that
14 had seizures. But he basically took over the house. Had
15 cameras all around it. And wouldn't let anybody come and
16 hardly see this lady.

17 Her prescriptions, the doctor did say seemed like he
18 was keeping pretty good care of her from that standpoint.
19 But when I went through the prescription records and some of
20 her notes, it became clear that a couple of the medicines,
21 one I remember was just some potassium, but she had in her
22 notes that the potassium was never given out, never filled.

23 And there was a particular drug called Remeron. And
24 if you look at the doctor's deposition, there was several
25 months at which this very important Alzheimer's medicine

1 didn't seem to be able to be picked up from the drug store
2 and given to this lady.

3 One small other fact, this is just Glenn at his
4 best, the doctor had in her notes that Glenn said he was
5 sorry he hadn't been able to get his mom there quite as much,
6 but his work obligations has kept him from doing that. This
7 is a guy who is on total disability for 20 years. Okay? And
8 that was, of course, his motive. He couldn't make a living;
9 hadn't made a living in 40 years. He needed the money.

10 And he sold -- again, every time you turn around,
11 there's another factor. Even when he puts in the first will,
12 he runs, sells the parents' house. My client is then pro se.
13 She files an action saying there's going to be a dispute
14 about the will. And he goes and takes all the money and buys
15 a house in his own name.

16 And one of the judge's reasons for not believing him
17 is his mismanagement of the estate.

18 So if we go back to the very basis from where we
19 started, I've got to show that there's some evidence. The
20 pieces and parts that I've shown you, particularly basically
21 the eyewitness account or the account of her best friend, I
22 think is enough by itself. But if you go back and look at
23 the order itself, it goes through all those things.

24 This idea that somehow the wrong burden of proof was
25 applied, I don't think that's true. The judge was very

1 specific with clear and convincing evidence. It's the same
2 idea that the judge -- this particular issue that they
3 applied the wrong burden of proof was not raised in the
4 motion to reconsider.

5 If you look at the motion to reconsider, the issue
6 that they raised in the motion to reconsider was the judge
7 pointed out precedent in four different areas, the fact that
8 there was a fiduciary relationship -- won't remember them
9 all. But there was lack of access. There was some weak
10 mindedness and things. And they said, oh, you used a
11 four-prong test. And there is no four-prong test in South
12 Carolina.

13 And the judge in the motion to reconsideration said,
14 I didn't use a four-prong test. I noted that there were four
15 substantial precedents among all of the other evidence that I
16 looked at, but I certainly did look at those four things, but
17 there was never any challenge about the burden of proof. And
18 the burden of proof is clear and convincing. And that is
19 what the judge says in the judge's order.

20 So, again, a hard-fought case. The weight of the
21 evidence went our way. Judge Condon has been the probate
22 judge for a number of years. He's more than mindful of the
23 burden of proof that I had from Ms. Harkness. He took that
24 in mind when he wrote 17 pages worth of evidence review and
25 the final order.

1 And based on that, we think that we should win this
2 appeal. Thank you very much.

3 THE COURT: All right. Do you want to respond to
4 anything?

5 MS. WIMBERLY: Yes, please, Your Honor. Mr. Howe
6 has a way of saying, because B happened after A, A must have
7 caused B. And that sounds great. And, honestly, if I was
8 listening to the facts as he just described them, I would be
9 like, wow, she's in a pickle, I can't believe she brought
10 this appeal.

11 That's not what happened at all. And that's not the
12 evidence that was presented.

13 What he has done is said, just because Glenn moved
14 in and he was a weird dude, sure, we will give him that, and
15 kept his bed downstairs, therefore, there's undue influence.
16 That's just not the case. I will go through a couple of
17 things that he says.

18 He says the order dissects exhaustively what the
19 attorney and her paralegal testified to. It absolutely does
20 not. There's not one word about what was said to the
21 attorney or the paralegal. All that is said about that
22 meeting that day is that Glenn drove his mother to that
23 appointment.

24 With regards to whether or not that was his
25 attorney, as we all know in real estate transactions, the

1 buyer picks the attorney. It was the buyer's attorney. And
2 Mr. Gunnells was the seller of the house. So it was not his
3 attorney. He gave his mother the choice of going to the
4 previous attorney that had drafted the previous will or this
5 new attorney. And she said, you know what, I want to go to
6 this new attorney because she's a woman and I feel like I can
7 talk to her.

8 Let's see. With regards to the 25 days in between
9 the death of the husband and the new will, respondent
10 actually sued her mother. She sued her mother in magistrate
11 court to get belongings at the house that she claimed that
12 belonged to her. They were miscellaneous nicknacks that were
13 at the home. And, honestly, that's more probative of why she
14 changed her will.

15 Also, there was another incident during that time
16 where the older sister barged into the house uninvited, and
17 the mother asked her to leave. So that goes more to why she
18 might have wanted to change her will rather than the other
19 evidence that was put up.

20 So this is all in my brief. I didn't know we were
21 going to rehash all the facts. So I apologize.

22 With regards to Helen Carroll, we did her deposition
23 via video. And I actually did the direct examination of her.
24 And she never remembered a conversation regarding the will;
25 never remembered talking to her best friend about the

1 contents of the will; couldn't tell me a single conversation
2 that she had with her about the will. But when Mr. Howe
3 started talking to her about the will, she had to have her
4 memory refreshed.

5 Now, this letter was actually kept out. This piece
6 of paper that refreshed her memory was actually kept out of
7 trial because it was so questionable. Ms. Carroll never
8 remembers writing it, signing it, who was there, who
9 witnessed it. She doesn't remember any of that. And when I
10 asked again on my redirect about the conversation to
11 understand more of what happened, she had forgotten again
12 about that conversation.

13 She also testified that she was best friends with
14 the respondent and she would do anything for her and she
15 trusted her more than anything in the world. So I will just
16 leave it at that.

17 Also, something else, we are going to go into
18 credibility of my witness. Ms. Harkness is very litigious,
19 has sued people over 12 times just in Charleston County and
20 couldn't remember on the stand how many times she's been
21 married or divorced.

22 We just believe this was a dysfunctional family,
23 extremely dysfunctional. And it equates to the facts in
24 *Russell v. Wilson* pretty spot on, where the court found this
25 family is extremely dysfunctional. We are going to look at

1 the professionals and see what they said about this. And
2 while it might be unattractive what the kids did to the
3 father and mother, we are going to trust the professionals on
4 this one, particularly the attorney drafting the will. And
5 that's what we think should have happened here.

6 There's a lot of bickering back and forth between
7 the brothers and sisters, had been their whole lives. And
8 what we really need to look at is the professionals'
9 testimony that said that, you know what, she wanted to change
10 her will because there was too much drama, to be quite
11 honest. And she was fed up and she was done. And when she
12 was sued by one daughter and assaulted by another, she was
13 done.

14 And with regards to Jack Brantley, the brother who
15 lives in Georgia, once again, he lives in Georgia. He wasn't
16 around for any of this. He was the one that, unfortunately,
17 was fielding phone calls from everybody about this bickering.
18 He did little to help their case, honestly. And my client
19 did have a discussion with him. And it is in the record
20 about him wanting help from his sisters. He actually wrote a
21 letter to his sisters asking for help with his parents.

22 And with regards to Ms. Harkness selling her
23 Corvette, while we might feel sorry for her, she got a Lexus
24 SUV instead. So I don't think anybody is at a loss there.
25 Birthday card actually says that she didn't want to come to

1 the house anymore.

2 And the eldest daughter actually lived in Hawaii.

3 And she just wasn't present. And she admitted at trial that

4 she just didn't get along with her parents and she just

5 didn't really want to be around. And there's actually

6 evidence in Ms. Harkness's letter that says, I don't want to

7 be around either anymore, mom; sounds like you made up your

8 mind.

9 With regard to the prescription drugs, they are

10 highly questionable. The record, they actually weren't

11 admitted at trial and weren't even submitted at trial.

12 And once again, we rely on Dr. Chanson's deposition,

13 her professional testimony was that she did not see anything

14 wrong with the care that was given. She thought it was

15 actually very adequate care.

16 My client did say that he was on disability, but he

17 testified also that he has odd jobs every so often. Taking

18 care of somebody and doing odd jobs is a full-time job. But

19 he never missed an appointment. Dr. Chanson did testify to

20 that.

21 Let's see. With regard to any kind of -- there was

22 actually a hearing. There's a separate petition for the

23 misadministration of the estate. And that hearing was

24 actually held in August, two years ago. We find that that

25 should never have been considered by the court. And that's

1 also in our appeal.

2 We find undue influence on the day of July 3rd,
3 2013, because this all happened after the death of the
4 testatrix. And so it could not relate back to that date.
5 And, furthermore, there's been no ruling on that petition.
6 It has been held in abeyance until this is figured out.

7 So I appreciate it and just ask that you consider
8 all of the evidence. I understand it is a very large record,
9 about 1,000 pages, including our brief, and look at all of it
10 as the probate court should have and find that there was no
11 evidence to support undue influence in this circumstance.
12 Thank you.

13 THE COURT: Okay. Well, I will read through the
14 lower court's order and the record and the briefs and let you
15 know what I decide.

16 MR. HOWE: Thank you, Your Honor.

17 MS. WIMBERLY: Thank you, Your Honor.

18 (Whereupon, proceedings are adjourned.)
19
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21
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23
24
25

1 CERTIFICATE OF REPORTER

2
3 I, Karen V. Andersen, Registered Merit Reporter,
4 Certified Realtime Reporter for the State of South Carolina
5 at Large, do hereby certify that the foregoing transcript is
6 a true, accurate and complete Transcript of Record of the
7 proceedings.

8 I further certify that I am neither related to nor
9 counsel for any party to the cause pending or interested in
10 the events thereof.

11
12
13
14
15 
16 Karen V. Andersen
 Registered Merit Reporter
 Certified Realtime Reporter

VOLUME I
IN THE PROBATE COURT
FOR THE STATE OF SOUTH CAROLINA
CHARLESTON COUNTY

IN THE MATTER OF:
HELEN B. GUNNELLS,

CATHY G. HARKNESS,

Petitioner,

vs. CASE NO. 2014-ES-10-0202

GLENN A. GUNNELLS, Individually
and as Personal Representative
of the Estate of HELEN B.
GUNNELLS,
Respondent.

BEFORE: THE HONORABLE IRVIN G. CONDON
DATE: March 1, 2016
TIME: 9:15 A.M.
LOCATION: CHARLESTON COUNTY PROBATE COURT
100 Broad Street
Room 3D
Charleston, South Carolina

REPORTED BY: TRISHA RARICK
MAGNA LEGAL SERVICES
(866) 624-6221
WWW.MagnaLS.com

A P P E A R A N C E S

ON BEHALF OF THE PETITIONER:

LAW OFFICES OF DONALD H. HOWE, LLC
 BY: DONALD H. HOWE
 818 Wappoo Road
 Charleston, SC 29407
 843.225.2523
 donaldhowelaw@gmail.com

BAILEY & WEIL, LLC
 BY: JULIE C. JACKSON-BAILEY
 MICHELLE J. WEIL
 1 Carriage Lane
 Building H
 Second Floor
 Charleston, SC 29407
 843.619.3709
 jjacksonbailey@baileyweil.com
 mweil@baileyweil.com

ON BEHALF OF THE RESPONDENT:

BROWN & VARNADO, LLC
 BY: ALEXIS M. WIMBERLY
 ROBERT VARNADO
 103 Church Street
 Mount Pleasant, SC 29464
 843.737.7300
 awimberly@brown-varnado.com

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1 THE COURT: Good morning. My name is
2 Irvin Condon, your probate judge of Charleston
3 County, along with our law clerk, Kevin Cale.
4 We're here on the Estate of Helen B. Gunnells,
5 Charleston County probate case number
6 2014-ES-10-2002 on a Will contest.

7 And I guess before we get started, we did
8 get the original Will from the records center,
9 if the parties want to mark that as an exhibit
10 or how do you want to handle that? Normally,
11 we just keep a copy in the file, but we could
12 keep the original up at our records center.
13 But we have got that here, and then I met with
14 counsel in chambers, and I think both -- the
15 plan is to invoke the dead-man statute, but,
16 basically, indicates that the person can't
17 testify about what a deceased person said, if
18 they have an interest in the estate. So my
19 understanding is both sides are invoking that
20 rule.

21 MR. HOWE: That's correct.

22 THE COURT: All right. Thank you.
23 Generally, in a Will contest, as I mentioned to
24 counsel, is that the respondent actually goes
25 first and puts the Will into play. The Will is

1 I know itself a proven Will. So that would put
2 the Will into evidence, and then the burden
3 would shift to the petitioner or the
4 contestants of the Will. All right. I don't
5 know if there's any opening statement or
6 anything else.

7 MS. WIMBERLY: I'd like to move the Will
8 into evidence.

9 MR. HOWE: No objection.

10 THE COURT: Okay. And I'm not sure
11 what -- I guess that would be Respondent's
12 Number 1.

13 (Respondent's Deposition Exhibit No.
14 1 was marked for identification.)

15 MS. WIMBERLY: Do you want her to mark it?

16 THE COURT: Yeah. That would be nice. I
17 guess -- I don't know if there's any opening
18 statement, or if you want to just proceed right
19 to the --

20 MR. HOWE: I have a very brief, just to
21 tell you who the players are, more than
22 anything else. In particular, I think I told
23 you in the back, one of our witnesses is a
24 little out of order, and so I think if I just
25 sort of name some of the names and pieces and

1 parts, it'll go a little easier.

2 May it please the Court, as you know, this
3 is a Will dispute involving the deceased Helen
4 Gunnells. Ms. Gunnells' husband was named
5 Arden Gunnells, and they had three children,
6 Belinda, who's the oldest, Cathy, next, and
7 then Glenn. I have a timeline -- do you have
8 any problem with him having that so he can look
9 at that -- that I'll hand up hopefully in a
10 minute? But basically, in the relevant -- most
11 relevant parts of the dispute that will be
12 before you, Arden is diagnosed with cancer
13 in -- let me get my dates straight, around
14 April of 2012. He and Helen together, been
15 together forever basically, and then, Arden
16 dies -- well, let me back up.

17 I think the evidence will show that all
18 the kids were sort of chipping in for a time.
19 There might be some dispute about that, but
20 different people were doing different things at
21 that point.

22 In around March -- April, maybe March of
23 2013, Glenn, who is the respondent, moves in to
24 help take care of his parents. He moves into
25 their house. Arden passes away on June the

1 8th, 2013, and then on July 3, 2013, which is
2 25 days later, Helen changes her Will and
3 executes the Will that's been put into
4 evidence. She does that with a lawyer named
5 Susan Klok, K-L-O-K, who she was introduced to
6 through her son, Glenn. Ms. Gunnells passes
7 away on February the 7th, 2014.

8 So I think those are the players, and
9 those are I guess a skeleton outline of some of
10 the dates that have involved that will
11 hopefully make some of this make sense. It's a
12 case of undue influence. We're aware it's a
13 high burden. We do believe that we have
14 compelling evidence in that regard.

15 I think you'll see that Ms. Gunnells lost
16 a lot of contact with a lot of people close to
17 her in her life, that that was a result of
18 influence by her son, and we believe that at
19 the end of this case, you'll rule for us, sir.

20 And so I think that just those basic facts
21 will help you understand the testimony.

22 THE COURT: All right. Thank you, Mr.
23 Howe. Counsel?

24 MS. WIMBERLY: Good morning, Your Honor.
25 My name is Alexis Wimberly. We've met before,

1 and this is Rob Varnado. And this is my
2 client, Mr. Glenn Gunnells.

3 THE COURT: Good morning.

4 MS. WIMBERLY: Obviously, Rob and I are
5 here on behalf of Mr. Gunnells this morning on
6 this undue influence and duress case that has
7 been alleged against him with regards to his
8 mother, Ms. Helen Gunnells. We do not contest
9 this timeline that Mr. Howe has given to us, if
10 you would like a copy. We only ask that at the
11 end of trial, if any of this is not proven, it
12 be redacted for your review.

13 MR. HOWE: That's fine.

14 THE COURT: Okay. Thank you.

15 MS. WIMBERLY: With regards to the
16 witnesses that are being called today, we have
17 been told by Mr. Howe that Mr. Brantley will be
18 called first. There will be a video deposition
19 of Ms. Helen Carroll, who was a friend of Ms.
20 Gunnells. I'm sorry, Mr. Brantley I believe is
21 the uncle of Ms. Cathy Harkness and Mr. Glenn
22 Gunnells.

23 Along with them, there will be testimony
24 tendered from a Ms. Belinda Davis, who is also
25 a child of Ms. Helen Gunnells. We would

1 contest that all of these witnesses are
2 emotionally involved. They are related to the
3 decedent, as well as to both the petitioner and
4 respondent.

5 We will present evidence from
6 professionals, two home healthcare nurses who
7 treated Mrs. Gunnells around the time of her
8 passing, as well as leading up to her passing,
9 from about 2010 to about 2013. We will also
10 present the attorney who drafted the Will, the
11 Will that is in contest today that has been
12 marked as Respondent's Exhibit 1. She will
13 testify that Mrs. Gunnells was of sound mind.
14 She knew exactly what she was doing on the date
15 that she executed the Will. There were
16 meetings leading up to the execution of the
17 Will where she knew exactly what she wanted to
18 do with her estate.

19 Her paralegal will also be present. She
20 was also present in the room at the time of the
21 execution of the Will. She will back up the
22 attorney's testimony, Ms. Klok, and Ms. Boytko,
23 B-O-Y-T-K-O, is the paralegal.

24 Furthermore, we have the deposition de
25 bene esse of Dr. Rhonda Chanson. She was Ms.

1 Helen Gunnells' primary care physician for
2 about two years leading up to her death. She
3 will testify that every time she saw Ms.
4 Gunnells, she was of sound mind, including the
5 day that the Will was executed. She saw her
6 that morning, including the day before her
7 death. She saw her that day as well.

8 So in conclusion, Your Honor, we believe
9 that our testimony will show that everyone
10 surrounding Ms. Gunnells, including her son,
11 including these professionals, saw Ms.
12 Gunnells, saw that she was of sound mind, saw
13 that she knew exactly what she wanted to do
14 with her estate, and that was to leave it to
15 Mr. Gunnells, because of the treatment or
16 otherwise lack of treatment, lack of
17 visitation, lack of care that was showed by her
18 other two daughters, and we ask that at the end
19 of the trial, you find in favor of my client,
20 Mr. Glenn Gunnells.

21 THE COURT: All right. Thank you,
22 counsel. Mr. Howe?

23 MR. HOWE: Yes, sir. We call Mr. Frank
24 Brantley.

25 THE COURT: Good morning.

1 THE WITNESS: Good morning.

2 THE COURT: Take your time.

3 THOMAS JACKSON BRANTLEY,

4 having been first duly sworn, was examined and testified as
5 follows:

6 THE WITNESS: I do.

7 THE COURT: Thank you. Please be seated,
8 and if you could, please state your full name
9 for the record.

10 THE WITNESS: It's Thomas Jackson
11 Brantley.

12 THE COURT: Brantley, okay. Mr. Brantley,
13 good morning. If you could answer questions of
14 counsel, Mr. Howe.

15 EXAMINATION

16 BY MR. HOWE:
17 Q Good morning, Mr. Brantley. I'll stand
18 right here, and that way, if you could project your
19 voice so that I could hear it. The judge should be
20 able to hear it, but he'll give you a waive or a nod
21 or something if you go a little too low. Fair
22 enough?

23 A Good.

24 Q Okay. You just gave us your full name.
25 How old are you, Mr. Brantley?

1 A Eighty-three.

2 Q And are you married?

3 A Yes.

4 Q Where do you live?

5 A Waynesboro, Georgia.

6 Q How long have you lived in Waynesboro?

7 A About 33 years.

8 Q And you're retired, I assume, mostly

9 retired?

10 A I am.

11 Q Okay. And what did you do? Tell me about

12 your work background history.

13 A I retired from the Army. I was a

14 financing and accounting officer in the Army. I

15 retired as a lieutenant colonel, retired and went to

16 Waynesboro. I got a job there. I was the City

17 Administrator for 23 years there also before I

18 retired.

19 Q Okay. And I understand you're still on

20 the board of elections over there?

21 A Yes. We're holding an election today.

22 Q Right, right. We're going to try to get

23 you out of here so that you can close the poles

24 effectively.

25 A Yeah.

1 Q Okay. When did you retire as the City
2 Administrator?

3 A Oh, goodness.

4 Q Approximately.

5 A '85, something like that.

6 Q Okay. All right. How were you related to
7 Ms. Helen Gunnells?

8 A That was my sister.

9 Q And tell me a little about the family
10 structure, who was older, who was younger, where you
11 were and what the pecking order was.

12 A There was six of us. There were three
13 boys -- three men and three ladies. As we were
14 often referred to, I was the baby boy and she was
15 the baby girl.

16 Q Okay.

17 A That's sort of hard to say when you're 83
18 years old, but --

19 Q But it will follow -- I'm the baby in my
20 family, and I can assure you it followed me forever.
21 How did you get along -- how was the relationship
22 with Helen growing up and of the rest of your
23 siblings, but especially Helen?

24 A We had a good time together. We always
25 did. It was a very close family. We had family

1 gatherings and Thanksgiving and Christmas and other
2 times too. It was a big family, so --

3 Q Okay. And did you keep up with each other
4 through the years?

5 A Oh, yes, yes.

6 Q And did you keep up with each other, let's
7 say, generally, through the -- as she and Arden were
8 older and becoming infirmed and all that kind of
9 stuff?

10 A Oh, yes.

11 Q How often would you talk to her or see
12 her? What kind of contact did you have?

13 A I probably visited at least three or four
14 times a year, sometimes more often, according to
15 what was going on, and we talked on the telephone at
16 least two, three, four times a week. And if I
17 didn't call her, she would call me. We were very
18 close together, so --

19 Q And did she visit you?

20 A Oh, yes.

21 Q How would she get over to Waynesboro?

22 A She would be brought over by someone, you
23 know, usually.

24 Q And who would that be? Would that include
25 Glenn?

1 A Glenn would, yes, would bring her
2 sometimes, or meet us halfway. Cathy had done the
3 same thing.

4 Q Okay.

5 A When Arden was in better health, used to
6 come and spend the night.

7 Q And were you close to Arden as well?

8 A Oh, yes. Yeah.

9 Q Tell me a little bit about your sister,
10 Helen. What was she like, and what made her a good
11 sister?

12 A Well, she was -- we just -- we had a good
13 time together. We were always -- it was a fun time
14 when we were together. All of the family was --
15 there was no -- no bickering between the family. It
16 was always just a great time. We tried to get
17 together as many times as possible, and people often
18 commented about how close our family was in
19 comparison to other -- of the others.

20 Q Okay. And do you remember when Arden
21 discovered that he had cancer?

22 A Yes. I do.

23 Q And in fact, I think you were actually
24 with him pretty close to that?

25 A Yes. As a matter of fact, when he went to

1 talk about the cancer and the meditation (sic), or I
2 guess the type of procedure they would use to cure
3 that, we went to the doctor with him, Glenn and I,
4 and I think Belinda was there that time, when the
5 doctor explained that this was a -- it was a -- a
6 really test drug. They had used it in Germany and
7 in France. You know, it had been used -- it was
8 just being used in the United States as a matter of
9 fact.

10 And when we went there, they
11 explained -- he explained -- the doctor explained
12 all of that to us and explained, you know -- well,
13 you know, he had to sign a certificate that he was
14 willing to take that type of treatment. And at that
15 time, it sounded -- I mean it -- it was a quite a
16 shock to the family that this, you know, that -- I
17 think it was called squamous, a small cell squamous
18 cancer, lung cancer, and I went -- we finished
19 discussing this, and I think Glenn and Belinda
20 stayed in the office there.

21 And I asked the doctor if I could see
22 him in the hall, and I went out in the hall with
23 him. And I asked him, well, how -- just what
24 timeframe are we talking about, you know, that --
25 for this thing to end? And he said, well, probably

1 a year. It could be more, according to how well the
2 procedures and the medicine worked on him so --

3 Q Okay. I believe he ended up dying a
4 little after -- about a year after?

5 A He did, yes. That's right.

6 Q All right. Did you continue to keep up
7 with Helen and Arden all through that time?

8 A Oh, yes.

9 Q Did you visit?

10 A Oh, yes.

11 Q All right. And do you remember that there
12 was a point at which Glenn moved in with his
13 parents?

14 A Yes.

15 Q Okay. And that was I think March, April
16 2013, somewhere in there. Does that seem about
17 right to you?

18 A I believe that's about right.

19 Q Okay. Now, Arden died on June the 8th of
20 2013?

21 A Uh-huh.

22 Q Did you come over for the funeral?

23 A Yes.

24 Q Okay. How was Helen doing?

25 A She was very upset, of course, you know,

1 very distressed, you know.

2 Q And tell me how your relationship with
3 Helen progressed after Arden died.

4 A As I said, we talked quite frequently
5 during the time that he was alive, and then after he
6 died, I would call, and she would call me, not --
7 she didn't call as often. And I would call, and she
8 was very hesitant to talk to me when Glenn was
9 around. As a matter of fact, I was asking about her
10 health and how things were going, and she would
11 always say, let me let you talk to Glenn.

12 MS. WIMBERLY: Objection, hearsay.

13 THE WITNESS: Wait a minute. What did I
14 say wrong?

15 THE COURT: No. You're fine. Just wait
16 for the next question. Sustain the objection.

17 MR. HOWE: Okay. All right.

18 BY MR. HOWE:

19 Q Well, let's go back to a little bit more
20 general. Okay? And that is that just how did your
21 relationship and your ability to communicate with
22 her progress after that time?

23 A We still talked.

24 Q Okay.

25 A I think she did not -- my feeling was that

1 she did not talk as freely to me as she did in -- in
2 the previous days. She -- I don't think she was
3 trying to hide anything necessarily, but she just
4 wasn't as open and didn't want to -- it seemed like
5 she didn't want to talk about too much that was
6 going on down there.

7 I would question her, and she
8 would -- she would sort of, well, let's go back to
9 the weather or let's talk about something else, you
10 know. I didn't understand that because we had
11 always been very open with each other, and that was
12 a sort of a strange feeling, you know. It wasn't as
13 a -- I guess the conversations weren't as close and
14 as frequently as we had had before.

15 Q Okay. Were you able to visit her at all
16 after that?

17 A Yes. A few times. And even with my
18 sister, my other sister, my oldest sister, Evelyn,
19 and we would go down. And we -- it was still a good
20 time together as a family, you know.

21 Q Okay.

22 A But we -- that came to be further and
23 further apart, because my sister, Evelyn, was the
24 oldest sister and was having some medical problems
25 of her own, some physical problems, and we weren't

1 able to visit.

2 Q How did the house change, configuration of
3 the house change when you came and did these later
4 visits? Just -- let me get it straight. After
5 Arden's death, Glenn's still there and you're
6 visiting at some point. What was the setup like to
7 live there?

8 A Well, Glenn had moved in, and Glenn had
9 made the living room into his bedroom downstairs.
10 There were two bedrooms upstairs, and that's the
11 bedrooms we'd use -- the visitors used when they
12 came there. But when we came back before, he had
13 set up his bedroom downstairs where the living room
14 was, and the rest of house was as it was before, so
15 --

16 Q And did you notice that he had added any
17 equipment or any changes there in the house?

18 A Yes. As a matter of fact, one of the
19 things he showed me, and I was very interested in
20 this, that he had set up a video system where he
21 could observe different parts of the property, you
22 know, the front yard, the back yard, the side yards
23 and all of that. I was very interested in that
24 because I was in the process of all -- about doing
25 the same thing at my house, and he told me the name

1 of it and even the company that I could order it
2 from. The rest of the thing, you know, televisions
3 were all in place and nothing else had changed much.

4 Q Okay. Were you also -- did you keep in
5 contact with Cathy and Belinda at that time?

6 A Yes.

7 Q What was your understanding during that
8 time of, I guess, Cathy's situation in terms of her
9 mother?

10 A Oh, I can't remember the date of when it
11 was that we had visited down there, and Arden -- we
12 had just finished dinner. And he had gone back to
13 the -- he could hear us. He was in the den, and we
14 were talking about things, and the Will came up as a
15 matter of fact. And Helen had already told me about
16 the Will, that, you know, how it was being divided,
17 and I asked her then, I said, well, how is -- what
18 about the Will --

19 MS. WIMBERLY: Objection hearsay.

20 THE COURT: Sustain. Just wait for the --

21 A Okay. May I just say I saw the Will. The
22 Will was given to me, and I saw the Will because I
23 said, well, okay. She said, well, let me just show
24 it to you.

25 MS. WIMBERLY: Objection. Hearsay.

1 MR. HOWE: Showing it to him is not
2 hearsay.

3 THE COURT: Okay. Your objection is?

4 MS. WIMBERLY: Your Honor, my objection is
5 hearsay. Anything that was said by Ms.

6 Gunnells is hearsay, and then anything that was
7 said actually by this witness is also hearsay.

8 So the conversation in general is hearsay.

9 THE WITNESS: The fact that I saw the
10 Will?

11 THE COURT: Wait a minute.

12 THE WITNESS: I'm sorry.

13 THE COURT: Just testify to what you saw.

14 THE WITNESS: I'm sorry.

15 MS. WIMBERLY: Also -- never mind.

16 THE COURT: Does that help?

17 MS. WIMBERLY: I'm confused about which
18 Will also.

19 THE COURT: Okay.

20 BY MR. HOWE:

21 Q This is Arden still alive?

22 A This is the only Will I knew. It was
23 Arden's Will.

24 Q Okay. And --

25 A And that was shown to me, and it was said

1 it was being split three ways.

2 Q All right. And was that also Helen's Will
3 as well?

4 A Yes.

5 Q Okay. And did you have any
6 conversations -- well, let me back up a little bit.
7 Tell me a little bit -- let's talk about the girls
8 for a minute. What was Cathy's relationship with
9 her mother like?

10 A Well --

11 MS. WIMBERLY: Objection, Your Honor,
12 speculation.

13 THE COURT: Okay. Well, let's see what he
14 can testify to. Okay?

15 MR. HOWE: Okay.

16 THE COURT: I think I'm going to allow the
17 question. Go ahead.

18 BY MR. HOWE:

19 Q Well, let's just back up, and let me make
20 sure I lay the foundation as we say. All right.
21 You stayed in close touch with your sisters you've
22 testified?

23 A Yes.

24 Q Did you also stay in touch with Cathy at
25 times?

1 A Yes.

2 Q Okay. And you would see your sister?

3 A Yes.

4 Q And over the years, would Cathy be there?

5 A At one time, I think she -- Cathy was
6 there, and this had been way back. She was there
7 about seven years taking care of her mother, and,
8 actually, Arden too. Arden was in much better
9 health at that time, but she was there all the time.

10 She would take her to her hair dresser, to
11 appointments to get groceries or anything else.

12 Q Okay.

13 A She was there taking care of her.

14 Q All right. And when you were in their
15 presence, did they seem to get along?

16 A Oh, sure, yeah.

17 Q Okay. And had a good time together?

18 A Yes.

19 Q Okay. And how about Belinda?

20 A I didn't see Belinda that much. She -- I
21 think -- I don't remember what all she was doing,
22 whether she was working or babysitting or what, but
23 she was in and out, but not as much as Cathy was.

24 Q Okay. Well, before Arden died, did you
25 talk with Glenn about, I guess, the aspects of

1 caring for his mother in some extent?

2 A Yes. As a matter of fact, it was the
3 first time that I visited Arden when he was taking a
4 treatment. I think I was down there for two
5 treatments, the initial consultation with the doctor
6 and then a treatment later on. And after that first
7 consultation with the doctor, and we had gone home,
8 I went back -- I was in the back yard with Glenn,
9 and was talking to him about the timeframe of
10 Arden's life. And I asked -- I told him, I said,
11 well, what --

12 MS. WIMBERLY: Objection, hearsay.

13 THE COURT: Okay.

14 MR. HOWE: He's a party.

15 MS. WIMBERLY: Your Honor, the witness is
16 testifying to something that he said.

17 THE WITNESS: Something that who said?

18 MS. WIMBERLY: That is hearsay.

19 THE COURT: Sustain the objection.

20 MR. HOWE: Glenn's a party.

21 MS. WIMBERLY: Your Honor --

22 THE COURT: Okay. Go ahead. Let me hear
23 you.

24 MS. WIMBERLY: Your Honor, the witness is
25 testifying to something the witness said. That

1 is hearsay.

2 MR. HOWE: That's never hearsay.

3 MS. WIMBERLY: It is, Your Honor.

4 THE COURT: Mr. Howe, you're saying it's
5 not hearsay.

6 MR. HOWE: If I said something, that's not
7 hearsay.

8 MS. WIMBERLY: Your Honor, there's no
9 exception for a witness saying something that
10 is hearsay. He is using it to prove a truth of
11 the matter asserted that he said that to Mr.
12 Gunnells. If he wants to elicit testimony
13 about what Mr. Gunnells said, that's not
14 hearsay, because it's admission by party
15 opponent. There's no exception. It is
16 hearsay.

17 THE COURT: Okay.

18 MR. HOWE: With that theory, there would
19 never be a conversation in court.

20 THE COURT: Okay. Overrule it. I'll
21 allow the question.

22 BY MR. HOWE:

23 Q All right. Tell me about your
24 conversation:

25 A We were in the back yard, and we were

1 talking about the situation with Arden, what would
2 happen when Arden left, and Glenn says that would be
3 a problem. And he says, as far as I'm concerned,
4 the thing that I would have to do because I would
5 not be able to take care of her, I'd have to put her
6 in a nursing home.

7 And I explained to him that in my
8 discussion with my sister, that is one thing she
9 never wanted to do. She never wanted to be in a
10 nursing home, and that was our conversation at that
11 point at that time, so --

12 Q What, if anything, did he say about Cathy
13 and Belinda's participation or --

14 A Oh, yeah. And I said, there would be no
15 problem with this because there's two sisters that
16 can help with this and can be over here with them
17 and with her and take care of her. And I think the
18 situation -- the comment was, well, that will never
19 happen, so --

20 Q Okay. So we're going to fast forward
21 again. So, now, it's Arden has passed away. Glenn
22 is living with his mom. You had some visits; is
23 that correct?

24 A Uh-huh, yes. Not as many.

25 Q Did you ever see Cathy or Belinda over

1 there?
2 A I think Cathy one time over there, you
3 know.

4 Q And did you discuss with Glenn their
5 availability to help him?

6 A Well, I think I discussed that more with
7 Helen, but I hadn't mentioned that. And he said
8 that before that that would never work with them,
9 and when I would -- I said, Helen, you know, you
10 need to talk to Cathy specifically, because Cathy I
11 think was more available. And she says, that will
12 not work, because Cathy and Glenn don't get along,
13 so --

14 Q You had one specific conversation that we
15 have talked about where Cathy had had a little bit
16 of surgery on her leg for --

17 A Oh, yeah.

18 Q --cancer?

19 A Yes.

20 Q Tell us about that.

21 A Yeah. Cathy had a serious problem with
22 her leg at the time and it had gotten worse and
23 worse, and at the time that I had come down to
24 visit, I had told Helen, I said, let me call -- let
25 me call Cathy and come over. I said, you need to

1 see her anyhow, because she's got a very bad leg
2 that is causing some serious problems. And she
3 says, that won't work. She says, that still won't
4 work because she and Glenn don't get along. And I
5 said, that's no problem. I'll just call on my way
6 out then.

7 Q And did you talk to her about the
8 possibility of her even just calling Cathy?

9 A Yes.

10 Q And what was her response?

11 A She would not call her.

12 Q Why did she say she -- what was her answer
13 about that?

14 MS. WIMBERLY: Objection, Your Honor.

15 Hearsay.

16 THE COURT: Mr. Howe?

17 MR. HOWE: Yeah. She's a deceased. He
18 doesn't have any interest in the case, and it
19 goes to her intent and her mental state, which
20 is the crux of this case.

21 MS. WIMBERLY: Your Honor, that's not a
22 hearsay exception. It's blatant hearsay,
23 exactly what the decedent said to Mr. Brantley.

24 THE COURT: All right. Well, I'm going
25 to -- anything else, Mr. Howe?

1 MR. HOWE: Well, I mean, it's -- I mean
2 the thing about the statement is I don't know
3 that it proves a certain fact other than state
4 of mind, and if it's state of mind, then it's
5 an exception to the hearsay rule.

6 THE WITNESS: Well --

7 THE COURT: Wait a minute. Ms. Wimberly,
8 anything else?

9 MS. WIMBERLY: No, Your Honor. I just
10 renew my objection. It's being used to prove
11 the truth of the matter asserted, and it is
12 hearsay.

13 THE COURT: Okay. He's indicating it's
14 state of mind.

15 MS. WIMBERLY: What exception is that?
16 It's not an exception.

17 MR. HOWE: Mode of state of mind, reason
18 for reasonable belief. I don't remember which
19 number.

20 THE COURT: I'll try to -- I'm sure this
21 is going to come up again. What else are we
22 going to have, probably a number of rulings
23 like this? It's going to go back and forth.
24 Okay. I don't know if you-all have got any
25 information -- any briefs on this or anything

1 on these different -- you've got a number of
2 family members that are wanting to testify. I
3 think it's how close can they get, whether it's
4 a dead-man statute --

5 MR. HOWE: He'll be the only family member
6 I think that testifies about -- well, Ms.
7 Carroll, obviously, testifies about her
8 discussions with the deceased. She also has no
9 interest in the case.

10 THE COURT: All right. Well, why don't we
11 get back to the specific question you were
12 asking, and then --

13 MR. HOWE: Okay. I have to think about
14 it.

15 BY MR. HOWE: I'll ask you a few questions.

16 Q You talked to your sister about Cathy's
17 problem with her leg?

18 A Yes.

19 Q Correct? This topic came up about having
20 Cathy over. She said that wouldn't work. Did you
21 then ask her, why don't you just give her a call --

22 A Uh-huh.

23 Q -- then --

24 A Yes.

25 Q -- or suggest some other way; is that

1 correct?

2 A Yes.

3 Q Okay. And what did she tell you?

4 A She said, she -- Glenn did not like --

5 MS. WIMBERLY: Your Honor.

6 THE COURT: Okay. This is Cathy.

7 testifying or this is Helen testifying?

8 MS. WIMBERLY: This is Helen, the

9 decedent.

10 THE COURT: Okay. Well, earlier, you
11 didn't object when there was a conversation I
12 guess concerning going into a nursing home.

13 MS. WIMBERLY: I'm just trying to move the
14 case along, but, you know, I have to preserve
15 my objections, especially when it goes to
16 something where there is no exception.

17 THE COURT: Okay. Well, I guess what I'm
18 saying is he testified earlier about his
19 conversation with his sister, Helen, about
20 going into a nursing home and what her comment
21 was to him.

22 MS. WIMBERLY: Correct, Your Honor.

23 THE COURT: Okay. And there was no
24 objection at that time.

25 MS. WIMBERLY: I didn't think it was

1 relevant, or --

2 THE COURT: Okay.

3 MS. WIMBERLY: -- I didn't think it really

4 mattered, but I object now because there's

5 absolutely no exception to this hearsay that's

6 being offered. And I do anticipate we will

7 elicit hearsay from our witnesses as well, but

8 I have planned either exceptions to the rule or

9 that it's not hearsay. It's going to prove

10 something else.

11 THE COURT: Okay.

12 MS. WIMBERLY: I'll respect any ruling

13 just to move this along.

14 THE COURT: Okay. I'm going to allow the

15 question.

16 BY MR. HOWE:

17 Q Okay. So what did she tell you?

18 A She said -- she said that Glenn did not

19 like for her to talk to Cathy.

20 Q You got in -- there was, apparently, a
21 controversy about Cathy getting some furniture back.

22 Do you remember that?

23 A Yes -- yeah.

24 Q And did you kind of mediate that or try to
25 mediate that a little bit?

1 A Yeah. I just said, let's get it settled.

2 You know, if it belongs to Cathy and you agree to

3 this, let's get it over with.

4 Q Okay. And you talked to Glenn about that?

5 A I think so, yeah.

6 Q Okay. And --

7 A That was on the telephone I believe it

8 was, yeah.

9 Q All right.

10 A But that was because Glenn had -- I

11 believe that was when Glenn had called me about

12 something else, about some silver that he had that

13 he was trying to sell.

14 Q Okay.

15 A And then when he asked me about -- well,

16 he was asking me if I wanted to buy the silver that

17 he had that he was going to sell it, and then he

18 told me about the garage sale he was going to have.

19 And I had just said, let's get that over as quickly

20 as possible.

21 Q Okay. I want to hand you a document. Do

22 you recognize that?

23 A I have lost one eye from macular

24 degeneration. So I have to change glasses.

25 THE COURT: Take your time.

1 A Yes. I think this is an e-mail I sent to
2 Cathy.

3 BY MR. HOWE:

4 Q Okay. And why don't you just read it for
5 us.

6 A Okay. I said, hi, Cathy. Hope all is
7 going well with you today. It was good to hear from
8 you but sorry that you are having trouble getting
9 some of your property back. I talked to Helen and
10 Glenn this past Monday. That was July the 12th.
11 Helen gave the phone to Glenn to explain to me what
12 was going on with the property, and after some
13 discussion, he told me that he would have the
14 property ready for you to pick up on Friday, July
15 the 12th, 2013.

16 And I encouraged Glenn to do just
17 that and get this over with, because it seems so
18 simple to do and would prevent any more controversy
19 with him and Helen. Hopefully, this can all be
20 resolved with no disturbances or embarrassment to
21 Helen and in the community, thinking about
22 neighbors. Take care, and hope you can get this
23 taken care of quickly and amicably.

24 Q Okay. And to I guess put this in
25 chronology, this is July of 2013, correct?

1 A Yes.

2 Q And so this would be shortly after Arden
3 died?

4 A Yes.

5 Q Okay. Glenn's still living with his mom?

6 A Yes.

7 Q And she's still living?

8 A Yes.

9 MR. HOWE: Okay. Your Honor, I'd like to
10 move that into evidence.

11 THE COURT: Ms. Wimberly, any objection?

12 MS. WIMBERLY: No objection.

13 THE COURT: Okay. Petitioner Exhibit

14 Number 1 admitted into evidence without

15 objection.

16 (Petitioner Deposition Exhibit No. 1

17 was marked for identification.)

18 BY MR. HOWE:

19 Q I'm going to hand you another one. It's a
20 little harder to read.

21 A Good grief. Okay.

22 Q Do you recognize that?

23 A Oh, yes. That was another e-mail.

24 Q Okay. And who wrote the e-mail?

25 A I did.

1 Q And who did you write it to?

2 A To Cathy.

3 Q Okay. What is the date on this?

4 A Monday, July the 22nd, 2013.

5 Q All right. Would you read that for us?

6 A Cathy, I sent you an e-mail last night,
7 but it would not go from my iPad. I guess you do
8 not have an iPhone, or something else was wrong. It
9 is perfectly okay for you to give my phone number to
10 DSS. It is 706-554-7866. I was surprised, again,
11 yesterday. I received another call from Helen.

12 This was a second one on two consecutive days. She
13 still does not talk to me about things like she did
14 when Arden was living, but only nondescript things,
15 for example, the weather and how are you doing
16 health wise, etcetera.

17 I am still concerned that you and
18 Linda are not going over and providing some
19 oversight on her health situation and lending some
20 help. Glenn should be thankful for you both to help
21 out and so should Helen. Hope things go well and
22 will talk to you later, Jack.

23 MR. HOWE: Okay. Your Honor, we'd like to
24 move this into evidence as Exhibit 2.

25 THE COURT: Ms. Wimberly, any objection?

1 MS. WIMBERLY: No. Your Honor, it's

2 cumulative, and it's also hearsay but --

3 THE COURT: Petitioner's Exhibit Number 2

4 admitted into evidence without objection.

5 (Petitioner's Deposition Exhibit No.

6 2 was marked for identification.)

7 BY MR. HOWE:

8 Q One of the things that comes up in here is

9 that, I'm concerned that Linda -- that you and Linda

10 are not going over and providing some oversight on

11 the health situation.

12 A Uh-huh.

13 Q Did you talk to Glenn about that?

14 A I think I did a couple of times.

15 Q All right. And what was his position on

16 that?

17 A He just didn't want them over there.

18 Q Okay. Did he ever approach you saying I

19 want help from them? I need help from them?

20 A No. He didn't want them there.

21 Q Was there any -- was he equivocal about

22 that, or was he pretty definite?

23 A Definite.

24 Q I'm going to hand you another document and

25 ask you who wrote that.

1 A This is mine. I sent it to Cathy.

2 Q Okay. And what's the date on this? I can
3 point to it and help you find it right in here.

4 A Oh, here it is, February the 26th, 2014.

5 Q So this would have been shortly after your
6 sister passed away?

7 A That's right.

8 Q Okay. And who is it addressed to?

9 A I addressed it to, To Whom it May Concern.

10 Q Okay. And have you reviewed this again
11 prior to court?

12 A Oh, yes.

13 Q And did we find a couple of small --

14 A Something --

15 Q -- mistakes in it that you would like to
16 fix?

17 A Yeah.

18 Q What were the -- I guess the things you
19 needed to fix in it in terms of what you felt
20 comfortable?

21 A The date Arden died I think might be
22 wrong.

23 Q Okay. It said July 2013. It should be
24 June?

25 A Yeah.

1 Q Okay. And what else about maybe Glenn's
2 time moving in?

3 A Yeah. I think that was. I don't see it
4 right now. I'll have to find it.

5 Q Okay. Why don't we read through it, and
6 if we come to it, you can tell us what you want.

7 A Okay. I just said, to Whom It May
8 Concern, my sister, Helen, was independent and
9 opinionated but loving person. She was intelligent,
10 and at one time, owned and managed her own business.
11 Soon after the diagnosis of her husband's, Arden's,
12 illness, it was necessary for them to depend
13 somewhat on the assistance of their children. At
14 one time, Cathy was their main helper with household
15 chores and personal requirements.

16 Q Shortly after Arden died in
17 July 2013, I think that's the wrong date, their son,
18 Glenn, moved into their home. And after his death,
19 I began to notice a change in Helen's communication
20 with me. We always call each other at least once a
21 week, but after Arden's death, I called more often,
22 two or three times a week.

23 Q If she didn't hear from me, she would
24 call me. When she called, it was when Glenn was
25 either outside or doing errands. Some of the

1 conversations troubled me. For instance, during the
2 time Cathy had surgery on her leg to remove a
3 cancer, I often suggested that she should call her
4 daughter and ask how she was doing. Helen's
5 response was always, I'll ask Glenn. And after I
6 insisted, she would say, I'll ask Glenn and again
7 think about it.

8 Other concerned conversations were
9 any time I'd ask about how things were going, she
10 would give the phone to Glenn to answer any
11 questions or any comments. For some reason, she
12 seemed reluctant to respond to my comments or
13 questions if Glenn were present.

14 When she called me, always when Glenn
15 was not there, she would conclude the conversation
16 when he came into the room. I commented about this
17 to my wife and told her I thought something was not
18 right. Helen won't talk to me as freely and warmly
19 as she had in the past. Helen, a formerly loving
20 and caring sister has suddenly become quite distant
21 to her baby brother.

22 Q You okay? You want a little water?

23 A I beg your pardon?

24 Q Would you like some water?

25 A Oh, I have it here. Thank you.

1 MR. HOWE: Okay. Hang on for a second.

2 Your Honor, that's all the questions I have,

3 and Ms. Harkness just needs to run to the

4 restroom. We can keep going. Okay?

5 THE COURT: Okay. Or we can take a break,

6 whatever you'd like to do.

7 MR. HOWE: Well, can we take a two-minute

8 break then?

9 THE COURT: Yeah.

10 (Off-the-record discussion.)

11 THE COURT: I just meant to move that last

12 statement into evidence and I didn't do that,

13 as Number 3.

14 MS. WIMBERLY: I'd like to note my

15 objection that it's cumulative. It's

16 self-serving and it's hearsay.

17 THE COURT: Your objection is noted. It's

18 allowed into evidence as Petitioner's Exhibit

19 Number 3.

20 (Petitioner's Deposition Exhibit No.

21 3 was marked for identification.)

22 MR. HOWE: That's all I have at this time.

23 THE COURT: Okay. Mr. Brantley, you okay?

24 THE WITNESS: Yes, sir.

25 MR. VARNADO: Your Honor, may it please

1 the Court.

2 THE COURT: Yes.

3 EXAMINATION

4 BY MR. VARNADO:

5 Q Colonel Brantley, can you hear me?

6 A Yes.

7 Q I'm Rob Varnado, and I'm one of Glenn's
8 attorneys.

9 A Okay.

10 Q And I do -- just want to ask you a few
11 questions, sir.

12 A Sure.

13 Q So if for any reason you can't hear me,
14 just please let me know.

15 A Okay.

16 Q I do have a cough drop in the mouth. I'm
17 fighting a cold. So if it sounds a little funny or
18 it doesn't come out right, just ask me to reask it.
19 Colonel, you did speak with your sister after
20 Arden's death, correct?

21 A Yes.

22 Q And you had multiple conversations with
23 her, correct?

24 A Yes.

25 Q Were you aware that Cathy Harkness had

1 sued her mother in court here in Charleston County?

2 Did you know anything about that?

3 A That was a suit about property, was it?

4 Q Yeah. A lawsuit.

5 A Just vaguely.

6 Q Did you know about it at the time, or was

7 it something you learned about it since?

8 A At the time, I didn't know.

9 Q No one told you at the time?

10 A I was -- I may have known. It didn't seem
11 that much of a problem, because it was just trying
12 to exchange property. So it didn't seem much of an
13 importance to me.

14 Q A lawsuit from a daughter against a
15 mother?

16 A Well, that bothered me.

17 Q Okay. And I just want to make sure I
18 understood you, sir. You're not sure if you knew it
19 at the time, but if you know, that you've learned it
20 since or you might have known it at the time?

21 A I might have known it at the time, but I
22 think it was afterwards that I found that out.

23 Q And you would agree that would bother you,
24 right?

25 A Yes.

1 Q And you would agree, it probably would
2 bother your late sister, correct?

3 A Yes.

4 Q Okay. And you would agree that it would
5 probably cause tension in the family, correct?

6 A I would think so.

7 Q And you said earlier -- when Mr. Howe
8 began your examination, you talked about right after
9 Arden died, the late Ms. Gunnells, she wasn't being
10 hidden from you? She wasn't hiding? She would talk
11 to you on the phone, correct?

12 A Yes. She would talk to me on the phone,
13 but it wasn't as openly as it had been before.

14 Q Okay. This is immediately following the
15 death of her husband?

16 A Yes.

17 Q And how many years were they married, sir,
18 roughly?

19 A I don't know.

20 Q Okay.

21 A Long time.

22 Q Long time. Okay. From cancer, correct?
23 You said that she was an independent woman?

24 A Absolutely.

25 Q And she was opinionated?

1 A Yes.. As we all are..

2 Q And she was intelligent?

3 A Yes..

4 Q And she was a southern lady. I think we
5 can all agree on that?

6 A Yes.

7 Q Correct?

8 A Yes.

9 Q And sometimes, southern ladies won't tell
10 you things that they don't want you to hear,
11 correct?

12 A Right. I think she talked to me more
13 openly than she did to anybody else in the family.

14 Q Yes, sir. I appreciate that. And,
15 Colonel, you weren't in Charleston at the time she
16 did the new Will, correct?

17 A No.

18 Q Do you even know the date of the new Will?

19 A No... I didn't even know there was one.

20 Q Okay. So she didn't talk to you about
21 that?

22 A No.

23 Q Okay. And at the time, even though she
24 wasn't, in your opinion, as open with you, she was
25 still intelligent. She was still lucid. She

1 knew -- she would speak to you, correct?

2 A Yes.

3 MR. VARNADO: Colonel, that's all the
4 questions I have now. Thank you, sir.

5 THE WITNESS: All right.

6 THE COURT: Thank you, Counsel.

7 MR. HOWE: I have no further questions.
8 Witness can be excused?

9 THE COURT: Can the witness be excused?

10 MR. VARNADO: Absolutely.

11 THE COURT: Thank you, Mr. Brantley, and
12 safe travels back to Georgia, and, hopefully,
13 it's not too late a night for you.

14 (Off-the-record discussion.)

15 MR. HOWE: So, Your Honor, at this time,
16 I'm going to be, I guess, calling or using the
17 video deposition we took of a lady named Helen
18 Carroll, a friend of Ms. Gunnells, if I could
19 get this working.

20 THE COURT: Okay. It's Carroll -- you
21 spell her name, what --

22 MR. HOWE: It's C-A-R-R-O-L-L, two Rs and
23 two Ls.

24 THE COURT: Okay. Counsel have some
25 objections?

1 MS. WIMBERLY: Yes. I have a few
2 objections. First of all, there is a letter
3 that is used in this deposition testimony not
4 necessarily to refresh her recollection, but
5 it's -- the bulk of the testimony is based on
6 this one letter. And in the deposition, I --
7 after Mr. Howe had an opportunity to depose the
8 witness, he -- I had the opportunity to ask her
9 about the contents of this letter and how this
10 letter came to be, and the deponent said she
11 did not know how this letter came to be. She
12 did not know who wrote it. She does not
13 remember when she signed it, who was present
14 when she signed it, and it's signed by two
15 people. It's signed by Ms. Helen Carroll, who
16 is the deponent, as well as a Polly Davis. And
17 Ms. Carroll said she had no clue who Ms. Polly
18 Davis was. She doesn't know why she would sign
19 it.

20 Furthermore, Your Honor, I know that
21 you're probably sick of me saying this, there
22 are hearsay statements throughout this
23 document, and Ms. Carroll throughout her
24 deposition, I understand that she's a little
25 bit older, but a lot of things that are written

1 in this deposition, she did not testify to as
2 her personal knowledge, but -- or in this
3 letter. She did not testify as her personal
4 knowledge, but testified to it after seeing the
5 documents. So I have a lot of problems with
6 document, A, with --

7 THE COURT: But it is a document signed by
8 her?

9 MS. WIMBERLY: It is, Your Honor, but she
10 said she doesn't remember who was present when
11 she signed it, who brought her the document,
12 how it was prepared. So this document is -- I
13 would move to keep it out of evidence and away
14 from Your Honor.

15 THE COURT: Okay.

16 MR. HOWE: Well, it's a statement that she
17 looked at and signed. She affirms the truth of
18 it, as I remember in the deposition, and uses
19 it to refresh her recollection, and I think her
20 concerns about it go to weight, not to the
21 admissibility. You know, there are -- fair
22 fight of our lawyers to say what about this,
23 what about this, but I don't think it reaches
24 to the point of making it inadmissible.

25 THE COURT: Okay.

1 MR. HOWE: And I guess you'll probably
2 have to see it to get -- sort of know the
3 context of it. I know you're at somewhat of a
4 disadvantage, but she's an older lady. She
5 affirms everything that's in it, as I
6 recollect.

7 THE COURT: Okay. And I guess -- well,
8 it's signed by her. My understanding, it's a
9 statement. Somebody else may have prepared it
10 and gave it to her is what you're saying?

11 MS. WIMBERLY: Yes. Your Honor, it was --

12 THE COURT: And I'm sure you asked your
13 question on all of that?

14 MS. WIMBERLY: Yes, Your Honor. And I
15 would ask that this document not be tendered
16 into evidence, that you watch the deposition
17 and --

18 THE COURT: Okay. Any issue on I guess
19 the testimony surrounding her testifying to the
20 document, or is it just the document that
21 you're objecting to?

22 MS. WIMBERLY: Your Honor, it's a document
23 I am objecting to. Also, I noted my objections
24 on the record in the deposition to how Mr. Howe
25 used the document in the deposition. Like I

1 said earlier, a lot of her testimony was not
2 based on her personal knowledge, but it was
3 based on looking at the document and saying,
4 oh, that's what the document says.

5 THE COURT: Okay. And I'm not sure -- Mr.
6 Howe is probably going to argue, it's
7 refreshing her --

8 MR. HOWE: Correct. Because she -- you
9 know, the other lady was a witness who was
10 there that saw her sign it. That's all it was.

11 THE COURT: Okay. I guess we probably
12 need to watch it and then go from there. Is
13 that fair enough, or do you want to cut and
14 splice but I --

15 MS. WIMBERLY: That's fine, Your Honor.
16 We can watch it, but I just wanted to note my
17 objection on the record.

18 THE COURT: Okay. If you want to push it
19 against the wall. I can see it, just so
20 everybody else can see it.

21 (Video deposition of Ms. Helen
22 Carroll is being played)

23 (There was a pause in the proceeding)

24 THE COURT: So where do we stand? We have
25 got your next witness..

1 MR. HOWE: We just want to talk about --
2 yeah. I've got a next witness and maybe a
3 couple of deposition excerpts. That will
4 probably take us through a little after 12.
5 Maybe we'll break for lunch and then start with
6 Ms. Harkness.

7 THE COURT: Does that sound good?

8 MR. HOWE: Our guess is that it will
9 probably go long enough that he will want to
10 start his cross in the morning. That's okay
11 with me, and then we'll -- it sort of depended
12 on how the time runs. I'm okay with that if
13 that's how it works. That's our best guess.

14 MR. VARNADO: That's right, Your Honor. I
15 was probably going to do our cross-examination,
16 and Ms. Wimberly will do the directs tomorrow
17 morning. So we'll need to make a matter on
18 motion then at the end of this case.

19 THE COURT: Okay. All right.

20 MR. HOWE: Okay. So at this time, we call
21 Ms. Belinda Davis.

22 THE COURT: Ms. Davis, good morning. How
23 are you?

24 THE WITNESS: Good morning.

25

1 BELINDA DAVIS,
2 having been first duly sworn, was examined and testified as
3 follows:

4 THE WITNESS: I swear.

5 THE COURT: Thank you. Please be seated.

6 THE WITNESS: Yes, sir.

7 THE COURT: And if you could please state
8 your name for the record...

9 THE WITNESS: Belinda Davis.

10 THE COURT: Okay. Ms. Davis, you may
11 answer questions of counsel, Mr. Howe.

12 THE WITNESS: Yes, sir.

13 EXAMINATION

14 BY MR. HOWE:

15 Q Yes, ma'am. How old are you?

16 A I'm 65.

17 Q And where do you live?

18 A Charleston.

19 Q And how long have you lived in Charleston?

20 A Forever.

21 Q Okay. And you are Glenn and Cathy's
22 sister, correct?

23 A Correct.

24 Q And tell us a little how that sets up
25 age-wise and stage-wise. What's the pecking order

1 there?

2 A I'm 65, Cathy is almost five years younger
3 than I am, and Glenn is seven years younger.

4 Q Okay. And what area of Charleston did you
5 grow up in?

6 A We started out in North Charleston.

7 Q Okay.

8 A And then moved to West Ashley.

9 Q All right. Where did you go to high
10 school?

11 A Saint Andrews Parish.

12 Q Did you graduate?

13 A Graduated in 1968.

14 Q What did you do after that?

15 A I married a high school sweetheart.

16 Q Okay. And tell me a little bit about your
17 work background. Well, do you have children?

18 A I have two children, a son that was born
19 in '74, and a daughter that was born in '78.

20 Q Okay. And grandchildren?

21 A I have. By the daughter, three. By the
22 son, one, and one on the way.

23 Q Okay. Full house?

24 A Yes.

25 Q Tell me a little bit about your work

1 career and some of the things you have done work
2 wise.

3 A Basically, I helped my husband, helping
4 him go through school and also working with his
5 father's company.

6 Q And what was your husband's name?

7 A His name was Frank O. Davis, Jr.

8 Q And what the business he was in?

9 A Davis & Doscher Construction.

10 Q What kind of construction did they do?

11 A Sub-grading, paving, sub-paving.

12 Q How long did you do that?

13 A He was doing that for a long time. As far
14 as me helping out financially, he was going to the
15 college -- Baptist College and also working part
16 time with his dad at the same time. I went to work
17 for the Medical University in 1974. We were married
18 in '69, so that timeframe.

19 Q Okay. So '69 to '74, you were doing
20 family business?

21 A And little -- and some smaller businesses
22 but --

23 Q Okay.

24 A Basically.

25 Q And then you went to MUSC?

1 A I went to MUSC.

2 Q What did you do there?

3 A I was the administrative assistant to the
4 division chairman of neurological surgery.

5 Q And who was that?

6 A Phanor Perot.

7 Q That's P-E-R-O-T?

8 A P-E-R-O-T.

9 Q Okay. And how do you spell the first name
10 for the court reporter?

11 A P-H-A-N-O-R, L, Perot, P-E-R-O-T, Jr.

12 Q Got it.

13 A M.D., Ph.D.

14 Q I guess you've typed that up a few times?

15 A Just a few, yes. Just a few.

16 Q How long did you do that?

17 A I-- about 10 years.

18 Q Okay.

19 A And then after that, I started Sandpiper

20 Meetings & Conventions, and then that was a

21 corporate meeting, planning, event management

22 company. So I had some travel in and out, and also

23 with the neurosurgery department too. After that --

24 Q That met a --

25 A I'm sorry?

1 Q That had sort of an interruption you were
2 telling me about. What kind of messed that business
3 up? You were telling me Hugo came through.

4 A Oh, Hugo kissed me. That's what happened.
5 I moved my office down to the city of Charleston.

6 Q Right.

7 A And then Hugo came along and did a nice
8 little number on everything.

9 Q Not a lot of conventions after that?

10 A No. In fact, my next chapter of
11 employment, per se, was a friend of mine helped out
12 of Chicago, where I was on the road working with
13 Lexus on the east coast and managing their ride and
14 drives. And then I got a full-time job with the
15 City of North Charleston, and I worked under two
16 mayors, Mayor Bobby Kinard and Major Summey. So I
17 was there for 13 years.

18 Q Okay. So Arden and Helen, one marriage,
19 right? They were married for a long time, right?

20 A Long time, yes.

21 Q Okay. And three children of you, right?

22 A Correct.

23 Q That you've gone over. How did Cathy and
24 Glenn get along?

25 A They didn't.

1 Q Okay. And was that longstanding?

2 A Pretty much.

3 Q Okay. How did you and Glenn get along?

4 A We got along fine for the most part.

5 Q Okay. And what did Glenn do for a living?

6 A He was a used car salesman.

7 Q Okay. And did it come a time when he
8 stopped working?

9 A Yes.

10 Q And do you remember about when that was?

11 A I suspect it was probably around 1999,
12 when I -- he had a heart attack and went on
13 disability.

14 Q And has he worked anywhere since then that
15 you're aware of?

16 A I don't know.

17 Q Okay.

18 A I couldn't tell you.

19 Q All right. Do you remember when your
20 father was diagnosed with cancer back in the spring
21 of 2012?

22 A Yes.

23 Q Okay. Where were you living at that time?

24 A Charleston.

25 Q And what do you remember I guess about

1 that time in terms of how he was doing and what
2 participation you had in his care?

3 A In his care. Well, we all helped Dad and
4 Mom. If I can kind of back it up a little bit.

5 Q Okay. Sure.

6 A We all really put our time -- if you want
7 to say it that way, put our time in helping with Mom
8 and Dad, taking them to appointments, doctors'
9 appointments, grocery, nothing that a family
10 wouldn't do for each other.

11 Q Okay.

12 A When Dad was diagnosed, he was ill before
13 that, Glenn sort of took over the responsibility of
14 taking him to the doctors, and then Cathy and I were
15 working with Mom. And then that kind of all fell
16 apart.

17 Q Okay. Did you ever make any trips down to
18 the cancer place?

19 A Yes. I did.

20 Q All right.

21 A He was at Bon Secours West Ashley in the
22 chemo section, in the cancer building.

23 Q Okay.

24 A And I visited several times there, because
25 Mom really shouldn't have been left alone. So Cathy

1 would go and stay with Mom, and I was in a financial
2 bind. So my closest spot was to go see him when he
3 was under treatment.

4 Q Okay. Where was Cathy living at the time
5 that the family discovered -- or your dad discovered
6 he had cancer?

7 A She was in Myrtle Beach.

8 Q Okay. And what did she do when you-all
9 found out about his diagnosis?

10 A She moved.

11 Q Okay.

12 A She came back to Charleston and rented a
13 place close to Mom and Dad.

14 Q Okay. And what kind of car was she
15 driving at that time?

16 A A Corvette.

17 Q And what did she do with that?

18 A She sold it.

19 Q Why was that?

20 A To help accommodate transporting Mother
21 and Dad.

22 Q All right. One of the witnesses in this
23 case is a lady named Dr. Chanson.

24 A Right.

25 Q You're familiar with her?

1 A Very familiar.

2 Q And tell us about how your mom -- and she
3 ended up seeing your mom?

4 A Correct.

5 Q Okay. Tell us how that sort of evolved.

6 A Dr. Rieder suggested that we take her to
7 be referred to Dr. Chanson, because Dr. Rieder's
8 wife was also a patient. It was also closer to
9 where they lived in Capri Isles. Prior to that, we
10 went to Kim Davis Seagle in Mount Pleasant, and that
11 was -- she saw my doctor and Dad did too.

12 Q Okay. So you and your dad and your mom
13 all saw Kim Davis Seagle?

14 A Yeah. Basically, yes.

15 Q Okay.

16 A Buy we wanted somewhere closer since Dad
17 was getting sicker, and so I moved, and Mom, to
18 Dr. Chanson's office.

19 Q Okay. And did you help make all those
20 arrangements?

21 A I initially took her to see Dr. Chanson,
22 and when Dad asked -- when he was really getting
23 unsettled -- he was unsettled in his health, I took
24 her to Dr. Chanson to give an exam to find out what
25 was wrong, what needed to be done. This is upon

1 Dad's request and Mom's, that the girls would take
2 care of Mom, and Glenn would help with Dad.

3 Q Okay. So let's back up just a little bit.
4 What was Cathy's relationship with your parents
5 overall during that time?

6 A Constant.

7 Q Okay.

8 A She helped quite a bit, took up a lot of
9 slack that I know I couldn't do, because I was
10 raising my family and traveling out of town. And my
11 job would -- could last till 2:00 in the morning or
12 different varying hours.

13 Q Did she do certain things around the house
14 that you remember?

15 A Whatever she could find. She painted.
16 She cleaned. She cooked. She took Mom to the
17 doctors' offices and helped there, groceries.

18 Q Okay. And so how would you describe --
19 I -- you kind of said it, but how would you describe
20 the duties and how did that break down after your
21 dad was sick? All three were --

22 A Well, what Dad wanted was for Cathy and I
23 to take care of Mom, taking her to her doctor
24 appointments, which was fine, and we had those all
25 set up.

1 Q Okay.

2 A And Glenn would take Dad, and that's when

3 I would go see Dad at the chemo, when he was having

4 --

5 Q How long would he be there? I guess

6 that's a fair question.

7 A A long time, hours.

8 Q Okay. So it wasn't just sneak in and

9 sneak back out?

10 A No. Wouldn't just sneak in. In fact, I

11 think Glenn, when I was there once, Glenn had

12 dropped him off and was running errands and so --

13 and by the time he got back, hours may have been

14 gone.

15 Q Okay. All right. So apparently, around

16 October of 2012, you left the Charleston area, for a

17 bit; is that correct?

18 A I did.

19 Q Okay. And why was that?

20 A My son was married. They had their first

21 born, and I went over there to make sure that my

22 daughter didn't lose her third grade teaching job to

23 stay with the youngest grandchild, who was three

24 months old when I went over there.

25 Q So you did the childcare?

1 A I did the childcare.

2 Q She went back to work?

3 A I went back to work.

4 Q Okay. And how long did you stay over in
5 Hawaii?

6 A Initially, it was six months. I came
7 back -- I was flying back -- I was on the tarmac --
8 it was that Sunday or that Monday before Dad died.

9 Q Okay. And I believe your father passed
10 away June 8th?

11 A June 8th.

12 Q And about how long before his death did
13 you get back?

14 A Like that Monday or Tuesday.

15 Q Okay. So how long before -- is that -- as
16 I understand, is that about a week before he died or
17 somewhere in there?

18 A Yes. About a week before he died.

19 Q Okay. Hold on one second. When you got
20 home, where was your father?

21 A He was in the ICU at Bon Secours.

22 Q Okay. And had you been made aware of --

23 A Not by Glenn.

24 Q Okay. How did you find out?

25 A I was on the tarmac, and I received a

1 phone call from Cathy saying that something was not
2 right. She couldn't get ahold of Mom or Glenn, and
3 I called Uncle Jack, who was here earlier under
4 deposition. And because he could -- he had the
5 avenue with Glenn. He would talk to -- Glenn would
6 talk to him.

7 So I said, please find out what's
8 going on, because I'm on my way home now. And I
9 told -- actually, part of that conversation with
10 Uncle Jack was that I had already talked with Glenn
11 the Wednesday before, and that I had heard that
12 Daddy was -- Daddy's health was failing.

13 And I asked if he literally was on
14 his death bed, and the next I hear is him in the
15 background saying to Mother -- or saying in a loud
16 voice, she wants to know if he's on -- if he's dead
17 yet.

18 Q And when you got to Charleston, were you
19 able to go see your father?

20 A I went immediately.

21 Q Okay. Let me hand you a document.

22 A Sure. Oh, yes.

23 Q Okay. Do you recognize what that is?

24 A Yes. I do.

25 Q And who wrote it?

1 A It came from Glenn.

2 Q Okay. And who was it addressed to?

3 A Me.

4 Q And did you receive it?

5 A I did.

6 Q And about when?

7 A May something, I think.

8 Q Of what year?

9 A Of -- before Dad died.

10 Q Okay. Well, this is -- was it when he was
11 in cancer treatment or --

12 A Cancer, yes.

13 Q So that would be 2012?

14 A Yes, sir.

15 Q Okay. Well, why don't you go ahead and
16 read the document.

17 A Okay. Let it be known nothing will be
18 signed or initialized till I look at it, exclamation
19 point three times. Let it be written so let it be
20 done, two exclamation points. All has been done and
21 notified, several exclamation points.

22 Q And so what was the context of that, and
23 why did you get that from him?

24 A That -- when I went to see Dad in
25 chemotherapy, I went up front to make sure that -- I

1 asked Dad, I said, who's on the list to come and
2 visit, we get -- receive information and went up to.
3 Daddy says, I don't know. I think Glenn -- you
4 know, Momma and -- so I went up to the front, and I
5 said, well, I'm going to see if Cathy and I can --
6 are on the list.

7 So I went up front, and I asked him
8 about the Will also. Do you know if -- because when
9 you --

10 Q Don't go into all of that right now.

11 A Okay. So I went up front and added our
12 names.

13 Q Okay.

14 A And this was a response.

15 Q Okay. And what was he trying to get
16 across to you?

17 A I guess that he had control.

18 Q And --

19 A He was -- he was telling me nothing was
20 going to be passed or made on their behalf without
21 going through him.

22 Q Okay. Was that directed then to just
23 putting the names on the --

24 A That was. That came after putting the
25 names on the -- having to receive information --

1 clearance to go see Mom -- to Dad, excuse me.

2 Q Okay. Switching times a little bit. So
3 you go to Hawaii in October of 2012. You come back
4 very beginning of June 2013?

5 A Right.

6 Q And then your father passes away?

7 A Correct.

8 Q Did you have any contact -- don't go into
9 what anybody said, but did you have contact with
10 your mother after that?

11 A The funeral.

12 Q Okay. And --

13 A She was distant.

14 Q Okay.

15 A Upset.

16 Q And did you make any attempts to have
17 contact with her later?

18 A Yes.

19 Q Okay. All right.

20 A That was --

21 Q Tell me a little bit about that incident.

22 A That was to go get the death certificates
23 for Dad, and I called Glenn. And actually, Cathy
24 was with me, to go get the death certificates so I
25 had filed Dad's will.

1 Q Right. You were the PR for your dad?

2 A Yes.

3 Q Okay.

4 A And I thought for Mom's.

5 Q Okay.

6 A So he said -- so he said, they would be
7 hanging on the door in a plastic bag, and I thought
8 that was rather funny. So I pulled up, went to the
9 door and got the two or three death certificates,
10 knocked on the door, rang the doorbell. Usually,
11 the door -- you know, was trying to go in to see
12 Mom. And then literally, the door just peaked open,
13 and there was this woman I had never seen before.

14 And I said, I'm Belinda -- Linda or
15 Belinda. I came to see Mom. She said, I'm sorry.
16 You can't come see your mother. I'm giving her
17 physical therapy. I said, what? I said, I can't
18 come and see my mom? I can always come and see my
19 mom. So I literally pushed my way in, and the next
20 thing I know, Glenn is coming through the hall, and
21 he's pushing me back, saying, call the police. So
22 apparently, I wasn't welcome.

23 Q Okay. Where was Cathy?

24 A She was in the car.

25 Q Okay. I'm assuming you-all both talked

1 about -- without going into any detail, but you-all
2 talked about the incident and what --

3 A Correct, yes.

4 Q Did you try to do anything to try to
5 figure out how to fix that unwelcomeness?

6 A Yes.

7 Q Okay. Tell the Court what you did.

8 A We took -- I had to take the death
9 certificate to probate, which we did, and then we
10 went down to Susan Curran. She was guardian --
11 she's part of the probate system, because we felt
12 like Mom needed some other care or some -- her care
13 to be checked on. We also went to DSS, based on
14 that advice.

15 Q Uh-huh.

16 A And then later on, we also went to an
17 attorney, Robert Polk, but he was too expensive.

18 Q Okay. And about over how long a period
19 were those three visits, do you remember?

20 A Well, it was probably a week, two weeks.

21 Q Okay.

22 A Maybe. A week for the funeral and then
23 maybe two weeks at the most.

24 Q Okay. And --

25 A Because they had to be received. They

1 weren't ordered.

2 Q I'm sorry?

3 A The death certificates.

4 Q Right, right. Okay. But I'm talking
5 about how long -- let's say how long after this
6 incident did you go to see -- well, the probate, you
7 were on your way there apparently, right?

8 A Yes. And then we immediately went
9 downstairs to see Susan, Ms. Curran.

10 Q Right. And then later, you-all went to
11 see some people at DSS?

12 A Correct.

13 Q And how long later was that?

14 A How many -- in the week.

15 Q Okay. And how about Mr. Polk?

16 A Probably about the same amount of time,
17 there for a week later.

18 Q Okay.

19 A We tried to do it as soon as we could get
20 the arrangements made.

21 Q All right. And I guess did you end up
22 hiring Mr. Polk?

23 A No.

24 Q And why was that?

25 A One was the expense, and I had to go back

1 to Hawaii.

2 Q Okay. And why were you going back there?

3 A Because school was starting again.

4 Q Okay.

5 A And so my daughter-in-law would not get
6 fired.

7 Q So you were going to do the childcare
8 while she went back to work?

9 A Exactly, childcare.

10 Q When was the next time that you saw your
11 mom?

12 A In the emergency room, the day she died.

13 Q Okay. And that was?

14 A February 7th.

15 Q And when did you move back to Charleston?

16 A Around the first or second week of
17 December.

18 Q Okay. One second. Did Glenn ever ask you
19 for any help in caring for your mother after your
20 dad died?

21 A No.

22 Q Okay. And when did he -- you said a
23 certain thing that you brought up with me before
24 when she passed away and was in the hospital, what
25 did he tell you?

1 MR. VARNADO: Your Honor, I'm going to
2 object. I'm going to be doing the
3 cross-examination. I'm going to object to
4 relevancy. We're here on a Will context.

5 MR. HOWE: It's about the Will.

6 BY MR. HOWE:

7 Q What did Glenn tell you about the Will?
8 What did he say? Did he say anything about the
9 Will?

10 A That -- you're talking about when she was
11 in the emergency room?

12 Q Yeah. Or later in the hospital room, I
13 think as she was passing away.

14 A There -- I knew mom had DNR.

15 Q Okay. I'm not talking about that. Did he
16 make any reference to her new Will?

17 A No.

18 Q Okay. What about -- what can you tell me
19 about Glenn in terms of, I guess, character
20 personality and that kind of stuff? What are the
21 things you think the Courts need to know about?

22 A Controlling.

23 MR. VARNADO: Your Honor, I mean, now he's
24 asking for character. I don't think that's in
25 evidence, and I don't think -- that's

1 objectionable.

2 THE COURT: Overruled. I'm going to allow
3 the question. I think character --

4 MR. VARNADO: I should have let her do
5 that one.

6 BY MR. HOWE:

7 Q So what would be the things you think His
8 Honor should know, I guess, about your brother?

9 A I think control freak, drug and alcohol
10 abuser, a user of people, conniving.

11 MR. HOWE: That's all the questions I
12 have. Thank you very much.

13 THE COURT: Thank you, Mr. Howell.

14 Mr. Varnado?

15 MR. VARNADO: Thank you, Your Honor. May
16 it please the Court.

17 EXAMINATION

18 BY MR. VARNADO:

19 Q Ms. Davis, I've got to ask you a little
20 bit about the timeline, please, and a little bit
21 about --

22 MR. VARNADO: Your Honor, Mr. Howe wants
23 to move in this piece of evidence, which he
24 should do, and I'm going to object to
25 strenuously.

1 THE COURT: Okay. Which is the --

2 MR. HOWE: The e-mail she received from
3 Glenn about the let nothing be done.

4 THE COURT: Okay. And your objection?

5 MR. VARNADO: Relevance, completely
6 irrelevant, hearsay, out-of-court statement
7 offered in court for the truth of matter.

8 THE COURT: Overruled.

9 (Petitioner's Deposition Exhibit No.
10 4 was marked for identification.)

11 BY MR. VARNADO:

12 Q I'm going to hand it to you, ma'am.

13 A Yes, sir.

14 MR. VARNADO: Okay. Now, Your Honor, do
15 you have the timeline? Was that entered into
16 evidence too, Your Honor?

17 MS. WIMBERLY: The timeline is not
18 officially in.

19 MR. VARNADO: Okay.

20 BY MR. VARNADO:

21 Q Are your reading glasses on?

22 A Yes, sir. I do. Thank you.

23 Q All right. Ms. Davis --

24 A Yes, sir.

25 Q -- the Will that you were the personal

1 representative of, my understanding was that was
2 in -- executed in 2006. Is that roughly your
3 knowledge?

4 A Right.

5 Q Okay. And you were the personal
6 representative, and you also have a one-third
7 interest in the estate, should the Court deny the
8 current Will. Is that your understanding?

9 A Correct.

10 Q Okay. And you would be the personal
11 representative, or maybe you've disclaimed the PR
12 part of it. Can you tell me what you --

13 A I had -- this is -- the Will was made --
14 can I go back to that?

15 Q Sure.

16 A Okay. The Will was -- that was my
17 Christmas gift to Mom, Dad, Glenn and me.

18 Q And Cathy?

19 A No. Didn't do Cathy's.

20 Q I see. I got it. I understand. Who did
21 that Will?

22 A Brady Hair.

23 Q Brady Hair. Okay. Who you knew from
24 North Charleston?

25 A Correct.

1 Q All right. Now, you moved to Hawaii in,
2 according to this timeline that Mr. Howe prepared,
3 in October of '12, and you explained to the Court
4 that was to provide assistance to your daughter and
5 your grandchild?

6 A Yes.

7 Q Grandchildren?

8 A Correct.

9 Q Right. So what I don't understand is this
10 e-mail that's been marked into evidence as Number 4,
11 that's in May of '12. So can you explain to Judge
12 Condon what you and Glenn are discoursing about
13 or -- discoursing about, is that the right word?
14 Having a conversation about in May of '12?

15 A I learned through others that he had power
16 of attorney.

17 Q Okay. And that angered you?

18 A It -- well, it made me upset. Of course,
19 it did.

20 Q You were angry that --

21 A No. I was upset.

22 Q Okay. I'm sorry. You were upset that
23 Arden Gunnells and Helen Gunnells had given power of
24 attorney to Glenn?

25 A Yes. We had a conversation about that.

1 Q Okay. And where are the other e-mails
2 that you sent back to him? There's just this one
3 e-mail from him to you. Do you have e-mails that
4 you sent back to him?
5 A He sent me an e-mail, and you should have
6 it regarding birthdate.
7 Q As far as I know, that's the only e-mail
8 from --
9 A This, I did not -- yes. This, regarding
10 the POA or whatever you want to call it, this is the
11 only e-mail.
12 Q You didn't send an e-mail back to him?
13 A Not that I recollect or --
14 Q Okay.
15 A -- or remember.
16 Q So he was the power of attorney for your
17 late parents in -- starting in sometime in 2012, and
18 that upset you?
19 A Apparently, it happened in 2011.
20 Q Okay. And you -- I meant to say you found
21 out in '12, and that upset you?
22 A Yes. I did.
23 Q Okay. When did you go back to Hawaii?
24 A October of 2012.
25 Q I'm sorry... I jumped ahead, and please

1 forgive me. Like I said, I'm fighting a cold, doing
2 my best.

3 A Okay.

4 Q You come home. You're at home in time for
5 --

6 A A week before.

7 Q -- to be there when your father passes,
8 and you stay for the funeral, correct? You're there
9 for the funeral?

10 A Yes.

11 Q And then you stay for how many more weeks
12 before you return to Hawaii?

13 A About six weeks.

14 Q About six weeks? Where were you staying
15 at the time?

16 A My house.

17 MR. VARNADO: Okay. May I have the
18 Court's indulgence for one moment?

19 THE COURT: Yeah. Take your time.

20 BY MR. VARNADO:

21 Q All right. You returned to Hawaii. How
22 long were you in Hawaii for that second time period,
23 ma'am?

24 A I left on July the 26th, and I returned --
25 I don't remember the -- July 26th I remember because

1 that was when my ex-husband and I were married. So
2 don't ask me why it was a trigger. I returned back
3 the first week or second week of December of that
4 year-- October of that year.

5 Q Okay. Just to make sure I understand,
6 what year --

7 A 2013, I was back, December.

8 Q Okay.

9 A Right here.

10 Q All right.

11 A You want me to write that for you?

12 Q Yeah. That's probably a good idea.

13 THE WITNESS: Is that okay with you?

14 MR. HOWE: Sure.

15 A So I went back --

16 BY MR. VARNADO: --

17 Q You can do it up here, either way.

18 A 7-26.

19 Q Returned to Hawaii?

20 THE COURT: Then, we haven't marked it as

21 an exhibit. Do you want to mark it for

22 identification at least, or do you want to mark

23 it as an exhibit?

24 MR. HOWE: I'd like to go ahead and mark

25 it as an exhibit.

1 MS. WIMBERLY: I would like for
2 identification only, just because some of the
3 things on the exhibit haven't been
4 authenticated.

5 THE COURT: Okay. So it would be Number 5
6 for the petitioner?

7 MR. HOWE: Yes, sir.

8 THE COURT: We'll mark that as Petitioner

9 --
10 (Petitioner's Deposition Exhibit No.

11 5 was marked for identification.)

12 A: Early -- first week, second week. I'm not
13 sure of the date of the return. Let's just put the
14 first two weeks.

15 BY MR. VARNADO:

16 Q: Can you just put your initials by that,
17 ma'am? Thank you so much.

18 THE COURT: And then after she finishes
19 that, we'll have the court reporter just mark
20 it for identification, as Number 5 for
21 identification.

22 THE WITNESS: Can you read it?

23 BY MR. VARNADO:

24 Q: Yes, ma'am.

25 A: Okay.

1 Q During that time you were in Charleston,
2 you had the -- you did talk to your mother on the
3 telephone?

4 A I talked to my mother while I was in
5 Hawaii, and Dad.

6 Q Okay.

7 A Constantly.

8 Q Okay.

9 A When I came -- are you talking about when
10 I came back home in December?

11 Q Right.

12 A I talked to Mom.

13 Q Your mother was understandably grieving
14 after the death of your father? You would agree
15 with me, correct?

16 A Of course, she was.

17 Q Okay. Have there been any other deaths in
18 the family around that same time period?

19 A Aunt Evelyn.

20 Q Who is her sister?

21 A That was her oldest sister.

22 Q When did your Aunt Evelyn, her sister
23 pass?

24 A Oh, I do not remember that, when she
25 passed.

1 Q Was it around the same --

2 A I would have -- I'd have to look back. It
3 was that year. I don't know. I don't remember.

4 Q You were in the room earlier when I asked
5 your Uncle Jack, Colonel, your mother was a southern
6 lady. She was very much a southern lady?

7 A Yeah. She was a lady.

8 Q Okay. And did you agree with him to say
9 that she was intelligent? Would you agree with
10 that?

11 A Yes.

12 Q That she had an opinions? She was
13 opinionated in a good way?

14 A I think we all are, yes.

15 Q I think you-all are too. In that month
16 after -- that time period following your father's
17 death and between the time you returned to Hawaii,
18 how many times did you talk to your mother roughly?

19 A I don't recollect talking to her that much
20 at all.

21 Q All right.

22 A I was understood the under -- I was with
23 the understanding that she didn't want to talk to
24 me, see me or hear from me.

25 Q All right. Did you know that your sister,

1 Cathy, had brought a lawsuit against your mother?

2 A I was aware of that, to get her goods
3 back.

4 Q Okay. And you agreed with that lawsuit?

5 A That was the way that was -- Cathy wanted
6 her furniture and her goods back, so, yes.

7 Q So you agree that it was a good and proper
8 thing for Cathy to file a lawsuit against your
9 mother?

10 A That was the only way that it could be
11 exercised, and it would not have been done any other
12 way because Glenn -- all of my goods are still --
13 were still in the house, and those were all sold off
14 and not given back, or thrown away or whatever. So
15 to answer your question, if that was the way to --
16 for her to get her goods back, yes.

17 Q You testified about Glenn being an abuser
18 of alcohol and a drug user.

19 A Yep.

20 Q Are you an abuser of alcohol?

21 A I was.

22 Q Are you a drug user or were you a --

23 A I was.

24 Q Did you allow your social life to keep you
25 from seeing your mother and father before they

1 passed away?

2 A No.

3 Q So if Cathy had written a letter to your
4 late father saying that you allowed your social life
5 to keep you away, you would disagree with that?

6 A I guess I would. My social -- my social
7 life was basically my business, if that's what she's
8 talking about. You know --

9 Q Did she ever accuse you of stealing
10 checks?

11 A No.

12 Q Okay. So you didn't talk to your mother
13 during that month of July 2013 pretty much?

14 A Uh-huh.

15 Q But you would concede that she was
16 still -- she had her whits about her? She knew who
17 she was, right?

18 A I would not know. I know that she had
19 changed in her demeanor and in her attitudes toward
20 me and Cathy.

21 Q Okay.

22 A After Dad's death and before.

23 MR. VARNADO: That's all I have, Your
24 Honor.

25 THE COURT: Thank you, Mr. Varnado. Mr.

1 Howe?

2 MR. HOWE: No more questions.

3 THE COURT: Okay...Can I ask one question

4 just for the --

5 MR. HOWE: Sure.

6 EXAMINATION

7 BY THE COURT:

8 Q You came back from Hawaii I guess December
9 of 2013?

10 A Yes, sir.

11 Q Okay. And then the next time you saw your
12 mother was?

13 A February.

14 Q February?

15 A Yes, sir.

16 Q You didn't see her for Christmas 2013?

17 A No.. I -- she was -- not that I didn't

18 want to, and I did talk to her in December, because

19 we always had Christmas and holidays together. My

20 daughter went over with her grandchildren -- with my

21 grandchildren, but it was going to be too upsetting

22 for all of us.

23 Q Okay. But it's your understanding that

24 the reason you didn't go over there was she didn't

25 want to see you, or was it because of some other

1 reason?

2 A. I think it was a combination.

3 Q. Okay. A combination of what?

4 A. Not -- everything. It was upsetting and
5 just being over there and having -- upsetting would
6 be knowing that Glenn's there and being in control.
7 It would have -- I'm just not sure if I could have
8 withheld. I hadn't seen Mom in a long time, and
9 everything was still fresh for me, and I'm sure it
10 was still fresh for her.

11 THE COURT: Okay. Let me ask counsel if
12 they have got any follow-up questions with what
13 the Court's asked.

14 MR. VARNADO: No, Your Honor.

15 THE COURT: Okay.

16 MR. HOWE: I don't think I have anything
17 else.

18 THE COURT: Okay. Thank you. You may
19 step down. Thank you. Would you-all like to
20 break for lunch and come back in an hour?

21 (Off-the-record discussion.)

22 MR. HOWE: Before I forget, I'd like to
23 move the deposition in evidence in case -- the
24 transcript.

25 MS. WIMBERLY: Okay. And I believe the

1 exhibit's attached to that, and you'll have to
2 let --

3 MR. HOWE: Right. Subject to all --

4 THE COURT: Okay. I understand. Any
5 other argument on the attachment or the
6 document?

7 MR. VARNADO: Your Honor, you wouldn't let
8 that statement come in by itself, and she
9 clearly had it in front of her. She used it to
10 refresh her recollection. So she had it. You
11 heard from her. I think that's all you need is
12 the testimony -- is her testimony, not that
13 statement.

14 MR. HOWE: My position is that the
15 evidence is that she looked at the statement I
16 believe it was in April, that she didn't have
17 anything that she wanted changed. She looked
18 at it before the deposition. She made a couple
19 of small changes on some words that were
20 misspelled, but didn't want to make any other
21 changes.

22 I asked her if the statement was still
23 true and correct on the record in the
24 deposition, and she said, no. So she basically
25 adopts and ratifies the statement, and they

1 have some room for cross-examination, but
2 that -- those things all in a row get it in,
3 because she ratified this and said, I adopt
4 this as part of my -- in essence, said, I adopt
5 this as part of my deposition today. It's true
6 and correct. I've looked at it a number of
7 times. There's nothing I want to change.

8 MR. VARNADO: Your Honor, if Mr. Howe had
9 a raft of statements and we had a raft of
10 statements and we were like, Your Honor, we
11 want to -- and we object to each other's
12 statements, they wouldn't come in. They're
13 clearly hearsay. He took the time to depose
14 her. He did a de bene esse deposition. He
15 played the video. You heard the video. That's
16 all the testimony that he needs. She testified
17 to what she testified to. The statement is an
18 out-of-court statement offered in court for the
19 truth of the matter. So I would respectfully
20 request that you --

21 THE COURT: Okay. I'll take them under
22 advisement and let you know when we start back.

23 (There was a pause in the proceeding)

24 THE COURT: Just to remind you, I'll need
25 to go at 2:30.

1 MR. HOWE: Right, right. I think we'll be
2 fine. Just bookkeeping, I wanted to make sure
3 that -- let's check with the court reporter
4 that the transcript of Helen Carroll's
5 deposition was at least part of the record. It
6 doesn't need to be in evidence because we
7 played the tape, but I want to make sure it's
8 part of the record.

9 (Petitioner's Deposition Exhibit No.
10 6 was marked for identification.)

11 THE COURT: Counsel on the other side, any
12 issues with that? I guess it's --

13 MS. WIMBERLY: No, Your Honor. Obviously,
14 no objection to the deposition but I object to
15 that exhibit.

16 MR. HOWE: Yeah.

17 THE COURT: I've got my experts working on
18 that.

19 MR. HOWE: Okay. Then, at this time, what
20 I would propose to do is I'm going to publish
21 some excerpts from Glenn Gunnells' deposition,
22 and I've provided copies. I have got another
23 highlighted copy for you. But I'll read them
24 to you. They're pretty brief. It should take
25 about two minutes.

1 THE COURT: All right. That's fine.

2 MS. WIMBERLY: Your Honor, and I also have
3 a couple of extra lines to add regarding
4 completeness, just to make sure that we get the
5 full picture. So I guess do you want me to
6 consult with Mr. Howe?

7 MR. HOWE: Yeah. Just tell me what they
8 are.

9 MS. WIMBERLY: Okay. Page 30, lines 4
10 through 25. It's not in yours. Here it is.

11 (Off-the-record discussion.)

12 THE COURT: I guess he's here if you want
13 to call him.

14 MS. WIMBERLY: No. He's not here.

15 MR. VARNADO: I understand the confusion,
16 Judge. They're actually talking about a
17 different family number who's not here to
18 testify.

19 THE COURT: Okay. Another Gunnells.
20 Okay.

21 MR. HOWE: I think I can do it. They'll
22 correct me if I'm wrong.

23 THE COURT: Okay.

24 MR. HOWE: I'm going to go ahead and say
25 the pages and stuff as I go. So this is

1 excerpts from the deposition of Glenn Gunnells,
2 and we're starting at page 5, line 21. Are you
3 working anywhere? Answer, retired disability.
4 Question, all right. And when did you retire
5 and go on disability status? Answer, year
6 2000. Question, all right. What's the nature
7 of your disability? Answer, congestive heart
8 failure. It's on page 6.
9 And on page 12 beginning line 3, all
10 right. The disability that you're out on, is
11 that Social Security disability? Answer,
12 that's true. What do you get a month on that
13 now? That's line 6 and skipping down to 10, it
14 answers \$1,138. And then line 21, that's been
15 since 2000? Answer, that's right.
16 Then 24, page 24, line 20, question, all
17 right. So even before you moved in, you were
18 at your parents' house all the time? Answer,
19 that's right. Question, were they driving?
20 Answer, they could drive. Well, no, not at
21 that time when I moved in, no.
22 On to page 25, all right. So certainly
23 when you moved in, they weren't? Answer,
24 right. And so they relied on you to get them
25 around? Answer, that's right.

1 Question, did you help them with the
2 business affairs and help paying the bills and
3 that kind of? Answer, I did. Question, they
4 relied on you to help with that? Answer,
5 that's right.

6 Now, if I get it right, 30 is what I have
7 the objection. And then I'll skip to 32, line
8 5. It's mom's brother? Right. He's the one
9 that lives in Waynesboro. Question,
10 Waynesboro, Georgia? All right. Any bad blood
11 between you two? No. No reason for him to
12 tell me anything that's not true, it is? No.

13 Okay... Well, while we're on people, how
14 about Helen Carroll? Who is she? That was one
15 of Mom's friends. Okay. Good friend? Answer,
16 yes. Question, best friend? Answer, I'd say
17 so. Question, okay. Answer, one of them. Mom
18 had a lot of best friend. Okay. Who else
19 would have fallen in that category? As far as
20 friends? Question, yes, sir. A regular would
21 be my aunt. Who is that? Ms. DeHay.

22 Question, sorry? How do you say that? DeHay.
23 Dehay? DeHay, D-E-H-A-Y. Okay. Got it.

24 What's her first name? That was Mildred.

25 Where does she come from? North Charleston.

1 Is she still alive? Yes. All right. Answer,
2 95, 96 and still drives. Question, I hope for
3 that. We all do.
4 Did she come and see your mom during the
5 time you were there? Answer, yes. How about
6 Ms. Carroll? She did, but she started slacking
7 off because of her health. Okay. According to
8 my mother.
9 Then, page 41, line 18, did you ever try
10 to approach a family member during any of this
11 time saying that you needed help, and you, with
12 Cathy and Belinda, would be more help? Yeah.
13 I approached all of them. Question, all right.
14 Who did you talk to? I'm sorry, go ahead.
15 Answer, Mom's Brother, Jack.
16 Question, so you talked to Jack, and you
17 said, boy, I wish Cathy and Belinda would help
18 me? Yes. Terry, I think that was -- and Terry
19 was kind of meant, but all right. Then that's
20 all. Anything else?
21 MS. WIMBERLY: Well, with that one,
22 there's also 4 through 7 I believe need to be
23 read in too.
24 MR. HOWE: Okay. Terry. Okay. Who else?
25 My aunt. Which one? Aunt Mildred. Okay.

1 So those are the pieces of his deposition
2 that I proffer at this time -- offer at this
3 time, and now, we'd call Ms. Cathy Harkness.

4 THE COURT: Good afternoon. Watch your
5 step there. Take your time.

6 CATHY HARKNESS,
7 having been first duly sworn, was examined and testified as
8 follows:

9 THE WITNESS: I do.

10 THE COURT: Thank you. Please be seated.

11 Ms. Harkness, would you state your full name
12 for the record?

13 THE WITNESS: Cathy, with an C, G.
14 Harkness, H-A-R-K-N-E-S-S.

15 THE COURT: Thank you. You can answer
16 questions of counsel. Mr. Howe?

17 MR. HOWE: Thank you, Your Honor.

18 EXAMINATION

19 BY MR. HOWE: . . .

20 Q Ms. Harkness, how old are you now?

21 A Sixty-one.

22 Q And you are the middle child in the
23 family, correct?

24 A Yes.

25 Q And how much older are you than Glenn?

1 A Three -- three years.

2 Q Okay. Where do you live?

3 A West Ashley.

4 Q And tell me a little bit about your
5 background, work wise and growing up in Charleston,
6 what you did.

7 A Work wise, I'll go from '95, I was a
8 private detective for 16 years for Family Court.
9 Opened up a couple of sports bars in '95. In '93, I
10 work for Albert Farah with Farah Beauty School as
11 their administrator at both schools, for the one on
12 Meeting Street and up in Goose Creek.

13 In 2014, I was working two jobs,
14 Lowe's and BI-Lo, and in August, I became full time
15 for Lowe's, until I got injured.

16 Q Okay. And briefly, the nature of your
17 injury is?

18 A The back and neck and hip.

19 Q Back, neck and hip. And you're in the
20 process of still trying to recover from all of that?

21 A That's correct.

22 Q Okay. Where -- I think Belinda said
23 you-all started in North Charleston growing up and
24 then moved over to West Ashley?

25 A In Sandhurst.

1 Q Okay.

2 A And then Mom and Dad built a home in Capri
3 Island on the Stono River.

4 Q All right. Do you remember roughly when
5 that was? Everybody's gone out of the house at that
6 point or --

7 A It was like an empty nest, yes. Oh,
8 goodness.

9 Q That's good.

10 A In their early 70s.

11 Q All right. And that's the house that they
12 were still in when they passed away?

13 A That's correct.

14 Q All right. Tell me a little bit about
15 your relationship with your parents and what kind of
16 things you did with them over the years, and that
17 kind of stuff.

18 A Well, actually, they became my best
19 friends. Mother, when I was a private detective, I
20 would take her and Ms. Helen Carroll on out-of-state
21 jobs. Around town, we'd go shopping. We'd go out
22 to eat. I have painted the inside of Mother and
23 Daddy's home. I've wallpapered the inside of their
24 home, tiled the kitchen back splash, wall papered
25 the bathroom downstairs. The outside exterior, I

1 painted three times, except for the end gable was my
2 son and my ex-husband at the time. I couldn't reach
3 it. I would take Mother and Ms. Helen and
4 Dad to meet their vestibule in church functions.
5 Any time they had family, I'd go clean their house,
6 help prepare their food. I would serve. When they
7 finished eating, I would clear the table. I for 13
8 years spent my time at my mother and daddy's house.
9 I was there numerous times before they even got up.
10 I would stay and help them. I would wash their
11 clothes. Mother really wasn't that able. She
12 really started getting disabled early with her back
13 and her knees. And that's when I primarily devoted
14 my time on spending with them.

15 Q Okay. Before she got disabled, apparently
16 Helen Carroll was one of her friends?

17 A Yes.

18 Q And did you get to be friends with Ms.
19 Carroll as well?

20 A Yes.

21 Q And did you-all -- I guess all three
22 enjoyed each other's company?

23 A We were the Three Musketeers, as they
24 called us.

1 Q Okay. And did you-all ever take any trips
2 together?

3 A Yes. We did. We went to Biloxi.

4 Q Mississippi?

5 A Yes.

6 Q Okay.

7 A Havelock by Cherry Point, Clements.

8 Q Where is Clements?

9 A Clements is up past -- past Columbia by
10 Clemson, up around there.

11 Q All right.

12 A A lot of areas just around town, Myrtle
13 Beach. Anytime I had a case out of town, they were
14 with me, and then at times, I would drop them off at
15 eating places while I had to take care of my
16 business.

17 Q Okay. So you would be doing your work,
18 and they would be out playing. And then you-all
19 would play when you had the time?

20 A That's right, yes.

21 Q Okay. And did you get to be close to Ms.
22 Carroll as well over that time?

23 A I had Momma one and Momma two. It was
24 Helen one and Helen two.

25 Q Okay. You mentioned that your mom's

1 health started getting a little worse. Did you ever
2 go to any doctors with her?

3 A Numerous of doctors.

4 Q Which ones do you remember having taken
5 your mom to?

6 A Dr. Hay.

7 Q What --

8 A Which is on Wesley Drive.

9 Q What kind of doctor was he?

10 A Orthopedic.

11 Q Okay.

12 A The ENT, I forgot his name, over here
13 behind Lowe's West Ashley. I have taken her to
14 Dr. Chanson a few times, numerous of times to the ER
15 at Saint Francis Hospital. Dr. Ulmer at the time
16 was her doctor. That's all I can remember.

17 Q Okay. How about for her back? Did you
18 see somebody for --

19 A Oh, that was Dr. Rawl.

20 Q Okay.

21 A And then Dr. Poletti.

22 Q Okay. And before this -- all of this --
23 let's just call it the dispute that we have been
24 talking about, how often would you see your parents?
25 How often would you talk to your mom?

1 A I was there every day.

2 Q Okay.

3 A Every day. As far as phone calls, I know
4 I was the first one to call. I would call them at
5 lunchtime, and I also called them before I went to
6 bed at night to make sure they were okay.

7 Q All right. Do you remember when your dad
8 was diagnosed with cancer?

9 A Yes, sir.

10 Q Where were you living at the time?

11 A I had just moved to Myrtle beach. I was
12 there maybe three weeks at that time.

13 Q Okay. And how did you happen to move up
14 there?

15 A Going through a divorce and decided I
16 needed a change.

17 Q All right. And what did you do when you
18 found out your dad was sick?

19 A The next day, I turned around and came
20 back.

21 Q Okay. And what did -- you moved back to
22 Charleston?

23 A I was back and forth for three weeks --
24 excuse me, three times a week, to help do my part
25 until I found a house.

1 Q Okay.

2 A For rent.

3 Q All right. And where was that house?

4 A Parkdale.

5 Q How far was that from your folks?

6 A Maybe five minutes.

7 Q All right. What kind of car were you

8 driving at that time?

9 A A Corvette.

10 Q What did you do with the car?

11 A I had to sell it.

12 Q All right. Why did you sell it?

13 A Glenn refused for me to use my parents'

14 van to take my mother to her doctor appointments.

15 My mother could not get in and out of my Corvette.

16 So I made sure that I bought a proper car.

17 Q Okay. And what did you get?

18 A A Lexus SUV.

19 Q All right.

20 A To put her wheel chair in the back.

21 Q And that seemed to work?

22 A Yes.

23 Q Okay. So sort of timeline wise, stick

24 with me here if I do this right. So it's April of

25 2012. Your dad's diagnosed, and you move back to

1 Charleston. It's then, as we skip forward, it's
2 around March of the next year when Glenn moves in?

3 A That was April.

4 Q Okay. April. And what was the purpose of
5 him moving in at that time?

6 A He sold his house at the Ponderosa.

7 Q Okay. And what was your contact with your
8 parents like from the time of your dad was found to
9 be sick, and up until the time Glenn moved in?

10 A Oh, God. I was there every day. I was
11 helping. I was there in the mornings before Dad and
12 Mom actually got out of bed. I cooked. I cleaned.
13 Actually, we all did our part at the beginning.
14 Belinda did her part. Glenn did his part. I did
15 mine. I was primarily the cleaner, the clean-up
16 crew, the bed sheets, the soiled pants. I was the
17 clean-up crew.

18 Q Okay.

19 A Until September came around.

20 Q Well, so let's go to -- so he moves in in
21 April; is that correct?

22 A Yes.

23 Q All right. And how did -- once he moved
24 in, did anything change much at that point?

25 A Yes. My mother -- well, Daddy was

1 primarily in the hospital during that time when
2 Glenn moved in. Mother became very distant. She
3 got -- she did not want to talk to me like she did
4 before. I mean we laughed, we cut up, and all of a
5 sudden, that was cut off.

6 When I would call, she wouldn't
7 answer the phone. I would have to go over. She was
8 reluctant on opening the door. I had to use my key.
9 Next thing I know, Glenn changed the locks on the
10 house. I did not have a key to the house any
11 longer. I was instructed at that point I was no
12 longer welcomed in that house unless he was there.

13 Q And by who?

14 A Glenn.

15 Q Okay. And where was this in terms of when
16 your dad died?

17 A Right when he moved in.

18 Q Okay. And were you able to continue some
19 contact then?

20 A With?

21 Q With your parents.

22 A I would go to the hospital and see my
23 father. Glenn started changing different codes so
24 that we could not -- Belinda and I could not call
25 the hospital to talk to the nurse.

1 Q Okay.

2 MS. WIMBERLY: Your Honor, I'm going to
3 object to that. Lack of personal knowledge,
4 and that's speculation.

5 THE COURT: On which part?

6 MS. WIMBERLY: Whether or not she knew
7 that Mr. Gunnells was changing codes to
8 hospital codes, that's speculation.

9 THE COURT: Okay. Mr. Howe?

10 MR. HOWE: Yeah. I'll just refrain a
11 little bit.

12 BY MR. HOWE:

13 Q When your dad was in the hospital, were
14 their times when you could call and check?

15 A That's correct.

16 Q Okay. And how would you call and check?
17 What was the procedure?

18 A You would call the local number, and you
19 would press in a code, and then the nurses would get
20 on the phone. And they could give you updates on
21 their patients.

22 Q Okay. And that was based on the code?

23 A That's correct.

24 Q And then so what happened?

25 A After the code did not work, you could not

1 speak to any of the nurses --

2 Q Okay.

3 A -- in regards to dad. I would ask them

4 why. I'm the daughter, and they said that Mr.

5 Gunnells --

6 MS. WIMBERLY: Objection, hearsay.

7 BY MR. HOWE:

8 Q But it just changed?

9 A It changed. That's correct.

10 Q So as I understand it, your dad actually
11 went in the hospital for about a week or so before
12 he died. Does that sound about right?

13 A No. He was there longer than that.

14 Q Okay. How long was he there?

15 A Approximately three weeks.

16 Q Okay. How did you find out he was in the
17 hospital?

18 A My Uncle Jack.

19 Q And once he passed away, did your mom stay
20 with -- continue to stay with Glenn?

21 A Glenn continued to live with my mom.

22 Q Your mom. Okay. And that's at the same
23 address on Capri Island?

24 A That's correct.

25 Q All right. And did you make any attempts

1 to continue contact with your mother?

2 A I tried. Glenn would get on the phone.

3 He would laugh and hang up.

4 Q Okay.

5 A In return, I would call and ask to speak

6 to mother. He could say, that's not happening, and

7 he hung up the phone on me.

8 Q Okay.

9 A On June 11th, he called me up after my

10 father was buried, told me that I am no longer to

11 call Mother. I'm not allowed to go over to see my

12 mother, or he would have me arrested for harassment.

13 Q Okay. And as we had heard, Belinda had

14 come home around this time and had been there for

15 the funeral; is that correct?

16 A Yes.

17 Q And were you present on the time that she

18 went by to pick up the death certificate?

19 A Yes.

20 Q Okay. And tell me what you remember --

21 did you get out of the car? As I understand, you

22 sort of stayed in the car?

23 A I wouldn't get out of that car. He

24 followed through with everything that he ever

25 threatened.

1 Q Okay. And what did you see from the car?

2 What could you see?

3 A I saw Belinda finally go in. I heard a
4 lot of yelling and screaming, and I did see Belinda
5 use her right shoulder to enter the house. The next
6 thing I knew, it was like a flash, Glenn had Belinda
7 pinned up against where the storm door and the door
8 was. He had her pinned against that wall.

9 Q Did you take any steps after all of this
10 to try to figure out how to have better contact with
11 your mom, or have some kind of access?

12 A The only access I had was through Uncle
13 Jack and to the preacher in our family, Terry.

14 Q Okay.

15 A They're the only two that actually kept me
16 informed, or if I would hear something, have Uncle
17 Jack call to see what was going on with Mother. I
18 went to Legal Aid. I went upstairs, talked with
19 Susan. I met with her twice, and Belinda was with
20 me. DSS --

21 Q And Susan in what area was that?

22 A It's up around the probate up here. She's
23 right next to the marriage license. You walk down
24 the hall, second room on the left.

25 Q All right.

1 A I went to Legal Aid downtown. They said
2 that this case was --

3 MS. WIMBERLY: Objection, hearsay.

4 MR. HOWE: That's fine.

5 A I went to -- took Belinda, we sent to see
6 Robert Polk.

7 BY MR. HOWE:

8 Q Okay. And did you make arrangements to
9 hire Mr. Polk to do anything?

10 A I couldn't. He wanted 25,000 --

11 Q Okay.

12 A -- as a retainer.

13 Q Okay. And did you see any -- go any other
14 places?

15 A Yes. I went to DSS and saw Mr. Blair and
16 Ms. Gibbs.

17 Q Okay.

18 A And Belinda went with me with that as
19 well.

20 Q I'm going to hand you a copy of this.

21 MS. WIMBERLY: Your Honor, this is
22 extremely irrelevant. I'm going to object to
23 this coming into evidence or being testified
24 about. She said she went to DSS. I objected
25 on hearsay with any conversation she had with

1 anybody. These are simply business cards from
2 DSS. I don't understand the relevance of this.

3 MR. HOWE: Relevance is that a lot of
4 people say -- might say, I had a hard time
5 getting in contact. To go to DSS shows it's --

6 as my mom used to say, it's not what you say.

7 It's what you do. And she went to DSS, and she
8 talked to workers down there and they gave her

9 cards as part of that. And that's all I'm

10 saying is these are the people she talked to,

11 and this is how they identified them.

12 THE WITNESS: We spoke with --

13 THE COURT: Okay. Wait a minute.

14. MS. WIMBERLY: It's cumulative. She's

15 [redacted] already testified that she went down to DSS and

16 ... talked to people there. I don't understand how

17 the business card would need to come in as

18 evidence. It's cumulative. It's not relevant.

19 " ...She's already testified to it. "

20 THE COURT: All right. Let's just --

21 we'll just mark it for identification as what

22 Number 7?

23 BY MR. HOWE: Now, I want to ask you, did you

24. Q. All right. Do you remember the names of
25. the ladies that you saw?

1 A Yes. Ms. Blair and Ms. Gibbs.

2 Q Okay.

3 (Petitioner's Deposition Exhibit No.
4 7 was marked for identification.)

5 BY MR. HOWE:

6 Q When was the next time that you saw your
7 mother?

8 A The last time I saw my mother?

9 Q From the time that Glenn said you're not
10 welcome anymore, what was that date? Do you
11 remember?

12 A That was January 11th, 2013, after my
13 father died.

14 Q Right. When was the next time that you
15 actually were able to see your mother?

16 A On February the 6th, when my mother was in
17 the hospital on her death bed.

18 Q Okay. There's been a mention of a lawsuit
19 that you filed.

20 A Yes, sir.

21 Q Tell me -- just tell us what the suit was
22 and how it came about, and what the deal was.

23 A Over the many years -- over years, I, as
24 all of us have, loaned our parents different items.
25 I put my name on everything I loaned and the date it

1 was brought over there, and the reason being is
2 because I did not trust Glenn. I would never know
3 where my stuff went, because things from Mother and
4 Daddy's house was always missing.

5 Q Okay. And at some point, did you make a
6 request to try to get some of your things back?

7 A I went through Uncle Jack and Terry. They
8 made about three -- I want to say three or four
9 different attempts of arrangements through Mother
10 and through Glenn confirming for me to go pick up my
11 items. Each time that I went, Glenn would come out
12 of the front door, stand with his hands crossed and
13 start laughing and shaking his head. I made 14
14 attempts through Mother, Uncle Jack, and Terry, 14
15 attempts. I wanted to sue Glenn.

16 Q Well, let's -- so those attempts -- and
17 what happened? Did you ever get any of your stuff
18 back from those attempts?

19 A No, sir.

20 Q All right. Would you actually go by the
21 house and have a date set?

22 A Yes. I'd go by the house when the dates
23 were set and the time, and there wouldn't be a thing
24 out in that driveway, nothing, except for Glenn out
25 the front door laughing.

1 Q Okay. All right. So what did you do at
2 that point?

3 A I went and talked to the magistrate, Judge
4 Steinberg.

5 Q What was your intent?

6 A To sue Glenn.

7 Q Okay.

8 A For me to get in the house to get my
9 things.

10 Q Okay. And what kind of things were they?
11 I mean, what was --

12 A Living room, white couch, the white chair,
13 an oak jewelry box, riding lawnmower, four stainless
14 steel tables that were outside and on the dock.
15 Pictures, candle sticks that I bought from Tuesday
16 Morning, washer and dryer. Let me think what else.
17 That's --

18 Q Okay.

19 A -- a good start.

20 Q And you mention that you had -- that had
21 been marked -- each of these would have been marked
22 and had your name on it?

23 A That is correct, yes.

24 Q And do you remember about when you went
25 down to the magistrate's office?

1 A It was the latter part of July. I went to
2 the magistrate's office to get some advice on how I
3 could get my things back.

4 Q And what did you end up doing?

5 A Actually, I had to sue my mother. That
6 was per the judge. She said since it was Mother's
7 house, it was belongings that I had loaned my
8 parents, that I would have to take my mother to
9 court to get claim and delivery for my items.

10 Q Okay.

11 A In the process, while we were in court,
12 which was September, I was awarded -- as long as
13 everything was identifiable. When the -- as the
14 judge instructed, to have police -- sheriffs there,
15 as they were. They identified each item that came
16 out of that house that had my name on it and the
17 date.

18 Q Okay. And you picked and they made
19 arrangements for that. So you didn't really have
20 any contact with your mom, even at that visit or
21 anything?

22 A No. But Glenn did come out the door
23 yelling, your ex-husband said to tell you hello.
24 Your ex-husband said to tell you hello. And that's
25 when the two deputies went up there and talked to

1 Glenn.

2 Q Okay. What is it that you're asking Judge
3 Condon to do in this case?

4 A Revoke the Will back to the original Will.

5 Q Okay.

6 A Can I go back to one of your statements
7 that you asked me earlier?

8 Q Sure.

9 A Judge Condon, at first, I was there every
10 day, just like Belinda. We all did our part. When
11 September came along, I started not being over there
12 every day. There was no sense. Glenn didn't want
13 to -- to go there, there was no sense in both of us
14 being there. I started going every other day.

15 My mother, I still bathed my mother
16 three days a week. I still washed her belongings.
17 I have cleaned her bottom, but there was no sense
18 after September with me being there every day. I
19 tried to work out with Glenn, you take a day off.
20 I'll come. That way, you get a break. I get a
21 break. He refused. You will not come to this house
22 unless I am here, and I did address that to Mother
23 and Dad.

24 Q Okay.

25 A And --

1 Q All right. And so let's go back to
2 that -- the last question. Thank you. So your
3 request to the Court in this case is for what?

4 A To revoke the Will back to the original
5 Will.

6 MR. HOWE: Okay. Your Honor, that's all
7 the questions I have at this time. So I think
8 based on what we had talked about, we'll do the
9 cross tomorrow, because it'll probably take a
10 little time.

11 MR. VARNADO: Well, I mean, Your Honor,
12 we'd like a short break, but I mean we're
13 mindful that we've got a day tomorrow too, and
14 that you have a short afternoon tomorrow. So
15 can we have a short recess, and then see if we
16 can get in as much as we can get in? I thought
17 we'd be going an hour.

18 THE COURT: Okay. We can continue on
19 right now, or do you need a little break?

20 MR. VARNADO: I do need a little break.
21 I'm sorry.

22 THE COURT: Okay. All right.

23 MR. VARNADO: Maybe we can finish before
24 2:30.

25 THE COURT: Okay. All right. We'll take

1 a five-minute break and then -- is that enough
2 time?

3 MR. VARNADO: That's perfect.

4 THE COURT: Okay. Five-minute break.

5 (There was a pause in the
6 proceedings)

7 THE COURT: Counsel ready?

8 MR. VARNADO: Yes, sir.

9 EXAMINATION

10 BY MR. VARNADO:

11 Q Ms. Harkness, you don't like your brother,
12 do you?

13 A Why would you ask something like that?

14 Q Do you like your brother?

15 A We're family.

16 Q You don't like your brother?

17 A I don't like what he has done.

18 Q Okay. You're jealous of him and his
19 relationship with your parents before they passed
20 away?

21 A I believe it's a reversal role in that,
22 sir.

23 Q Glenn never kicked you out of the house.
24 Your father kicked you out of the house?

25 A That is untrue.

1 Q There was a blow-up between you and your
2 father. At the time, you were giving your dad a
3 haircut and a workman came to the door seeking to be
4 paid, and there was an altercation. And you were
5 angry at Glenn. Isn't that true?

6 A He called me an M-F bitch.

7 Q Okay. So there was an altercation, and
8 that was some time, what, in 2010, isn't that right,
9 roughly, or 2011?

10 A That was his altercation, yes.

11 Q You actually were so angry at Glenn that
12 you wanted to physically attack him; is that
13 correct?

14 A I don't know where you're getting your
15 information. No. It was not that way.

16 Q But there were curse words exchanged. Is
17 that what your testimony is?

18 A Only on Glenn's part.

19 Q And your father called you a disgrace?

20 A When I was walking out of the house, I
21 called Glenn --

22 Q You called Glenn what?

23 A An SOB.

24 Q So there were curse words exchanged
25 between you and your brother, Mr. Gunnells?

1 A When I was walking out of the house, I
2 called him an SOB.

3 Q And your father said that you were a
4 disgrace; is that correct?

5 A That's what -- I was a disgrace, because I
6 used a curse word in front of my mother.

7 MR. VARNADO: Your Honor, I'm going to
8 mark for identification as Respondent's Number
9 2. I'm going to hand this to the witness with
10 your permission.

11 THE COURT: Yes.

12 THE WITNESS: What happened to the rest of
13 this?

14 BY MR. VARNADO:

15 Q Ms. Harkness, that's a relatively long
16 letter, and that's a letter that I got from you in
17 discovery.

18 A Okay. I see it. Yes, sir.

19 Q Okay. And will you identify that? Is
20 that a letter that you wrote to your father?

21 A Oh, no. Wait a minute, yes. But there
22 was another paper that goes with this that Glenn
23 wrote me that I gave to you.

24 Q Sorry. I don't have a copy of that
25 letter, but I was just going --

1 A Yes, sir. I hand delivered that to your
2 office to you and Alex, sitting in your conference
3 room. His letter to me was stapled to this. This
4 is not all that document together.

5 Q This is a letter that you wrote, Ms.
6 Harkness, correct? This is in your handwriting?

7 A This part is.

8 Q Okay. That's what I'm going to ask you
9 about, Ms. Harkness.

10 A That's all right.

11 Q Okay. And can you look through this? Is
12 this all your handwriting, this --

13 A Yes.

14 Q -- lengthy letter?

15 A Yes.

16 Q Okay. So you say, Dad and Mom, I still
17 cannot believe, Dad, that you called me a disgrace
18 to you and Mom, and to your household. Me, unlike
19 your daughter and your son, I am not an alcoholic or
20 a drug user. That's how it begins; is that correct?

21 A Yes.

22 Q And then it goes on page after page, in
23 which you air some of your grievances against your
24 brother and your sister, Belinda; is that correct?

25 A I don't know. I don't know what page

1 you're on.

2 Q Well, we can just go through page by page
3 if you'd like.

4 A Would you like for me to read the whole
5 thing out loud?

6 Q I don't know if the Court needs to hear
7 that, but we can go --

8 A Well, I think he needs to hear all of this
9 instead of bits and pieces.

10 Q This is a little argumentative. I'm just
11 going to ask you questions, if that's okay, Ms.
12 Harkness, and then you can -- your lawyer can ask
13 you questions about it on a redirect.

14 A Okay.

15 Q Okay. So on the third page --

16 A Okay.

17 Q -- in this paragraph, where was the other
18 two, one always laid up drunk, while the other was
19 so wrapped --

20 A I'm not on that page. I'm not on it, sir.
21 Look, this is one, two. This is the third page, and
22 this is not the page that you have.

23 Q Okay.

24 A This is the third page, see?

25 MR. HOWE: I think it should be four.

1 A That's the fourth page.

2 BY MR. VARNADO:

3 Q I stand corrected, and I apologize for not
4 doing it, because I didn't consider this page to be
5 just the Dad read this all, but okay. So now we're
6 on the fourth page of document. Where was the other
7 two? So that's what you wrote. So one was laid up
8 drunk, while the other was so wrapped up in her
9 social life, and you never complained. So that's
10 what believed your sister and your brother had not
11 helped at all?

12 A That was 2010.

13 Q Okay. And then at the bottom of that
14 page, I didn't understand that. What did you write
15 that your father had said?

16 A You want me to read this part?

17 Q Sure.

18 A As you call me your Little Nigger. That's
19 what my dad called me.

20 Q What was -- on the next page, what's going
21 on here?

22 A I am not a lesbian, nor gay. Being queer,
23 gay, and having sex with another man is just not
24 right. Your standards, but I am your disgrace.

25 Q Who are you talking about there?

1 A Glenn, and, again, we're looking at year
2 2010.

3 Q Okay. And then if you can just flip
4 through, I just want to -- for the next page,
5 your -- the one that has a number sign and 2.

6 A Number 2?

7 Q Right.

8 A Okay.

9 Q And then you said, you allowed a drunk and
10 a queer who didn't live in your house to file a
11 police report because you couldn't. Is that --
12 you're talking about Glenn there too?

13 A Well, on number 2, it says, you allowed
14 Glenn to sign a police report on me, Tracy and Chad,
15 a drunk, someone who has always -- someone who has
16 stolen from, and forged and stole checks from you.
17 You allowed a drunk, a queer, who didn't live in
18 your house, to file a police report because you
19 couldn't.

20 Q Would you like for me to read line 3?

21 Q No, ma'am.

22 A Okay.

23 Q If you could flip forward, again, this is
24 not numbered. So it's difficult for me to remember
25 which page but --

1 A Okay.

2 Q If you could just flip forward a few
3 pages, ma'am. I'll tell you when to stop. Okay.
4 So you're on page -- the page that begins again.

5 A All right.

6 Q In that third paragraph, on that page, you
7 say, you accused Glenn of dishonesty in that third
8 paragraph, but Glenn moves in with you, and you
9 allow him to disrespect others, and I don't
10 understand.

11 A Actually, Glenn had I think teeth surgery,
12 and he moved in with Mom and Dad for a few weeks
13 back in 2010. But it says, but Glenn moves in with
14 you-all, and you allow him to disrespect others. I
15 don't understand.

16 Q And what was the paragraph before that,
17 all of these years of Glenn and Belinda's sibling
18 rivalry?

19 A Right. Well, it says, again, you believe
20 Glenn. I was not wrong. You just believed what you
21 wanted. All these years of Glenn and Belinda
22 sibling rivalry, watching them and listening, I have
23 never been out of line in your house.

24 Q Okay. Then the next page, please, ma'am?

25 A Next page? Okay.

1 Q If you would start at the top.

2 A Pardon?

3 Q If you would please start at the top.

4 A 12-24-10, Christmas Eve, I brought over
5 your and Mother's Christmas gifts. You told me I
6 was a disgrace to you and Mother and to your
7 household. You looked me right in the eye and
8 called me a disgrace. I asked you, did you call
9 Glenn a disgrace? You held your head down, never
10 said a word and walked away.

11 I have allowed you, Mother to
12 continuous hurt me, accuse me of theft, but lied to,
13 but put third in line, be addressed, oh, this is the
14 other daughter and allow others to plot with you.
15 The look in your eyes when you call me a disgrace, a
16 look I will never forget. I do not believe you need
17 to re-evaluate who is a disgrace. I am not a
18 disgrace.

19 I stood my ground with Glenn in your
20 home. I called it as it is. Your son started it,
21 whether you wanted to believe it or not. It doesn't
22 matter anymore.

23 Q Okay. That's --

24 A And another thing, the nerve of your son
25 to send me a letter --

1 Q That's all we need at this point.

2 THE COURT: Ms. Harkness, stop. Wait for
3 the next question. Your attorney can bring it
4 back up.

5 THE WITNESS: I'm sorry.

6 BY MR. VARNADO:

7 Q You still believe all of that today?

8 A Believe?

9 Q What's in the letter.

10 A Why do you tell me I do? I believe it
11 today.

12 Q Didn't you? You do, correct?

13 A That's not a question. That's a statement
14 to me. I don't --

15 Q You still believe all these things even
16 today. You're very passionate about it.

17 A My father is passed. So I don't believe
18 this about my father.

19 MR. VARNADO: Your Honor, at this time,
20 I'd like to move this into evidence as an
21 exhibit.

22 THE COURT: Mr. Howe, any objections?

23 MR. HOWE: Objection. I'd have to look at
24 it a little bit more, but I think it goes in
25 the line of irrelevant stuff so he can

1 cross-examine, but I'll object.

2 MR. VARNADO: It's a written statement by
3 a party opponent that goes directly into this
4 whole --

5 MR. HOWE: About a fight with her father.

6 THE COURT: Okay.

7 MR. HOWE: When we're talking about her
8 mother's Will.

9 THE WITNESS: Well, where was the
10 attachment that went with this from Glenn?

11 THE COURT: Wait, wait, wait. I'm sorry,
12 just wait a second.

13 MR. VARNADO: All I would say, Your Honor,
14 is Mr. Howe wanted to bring in Glenn's
15 reputation, and he asked Ms. Davis about that.
16 So I think that this is an admission by a party
17 opponent. It goes right at the heart of what's
18 really going on here, and it's necessary to our
19 case to prove that a lot of -- there's a lot
20 more going on here than just a Will contest. I
21 would respectfully request that you admit it,
22 and we got it from her. She admits to giving
23 it to me, so --

24 THE COURT: Mr. Howe, anything else?

25 MR. HOWE: No, sir.

1 THE COURT: Okay. The documented is
2 admitted.

3 MR. VARNADO: Thank you, Your Honor.

4 THE COURT: Exhibit Number 2 I believe?

5 (Respondent's Deposition Exhibit No.
6 2 was marked for identification.)

7 MR. VARNADO: Yes, sir. And I'm going to
8 mark for identification Respondent's 3.

9 (Respondent's Deposition Exhibit No.
10 3 was marked for identification.)

11 BY MR. VARNADO:

12 Q So this is the letter you sent to your
13 mother on June 27, 2013; is that correct?

14 A Yes.

15 Q And is this the letter that you sent on
16 that day?

17 A That's correct.

18 Q And it's signed by you, correct?

19 A Yes.

20 Q All right. I'm going to ask you to flip
21 it over, and does it look correct? Is it what you
22 wrote?

23 A Yes.

24 Q Okay. On the last page --

25 A Okay.

1 Q -- you say you will not accept a phone
2 call from Glenn.

3 A That is correct.

4 Q Okay. And you're threatening -- you're
5 saying on that last page, look what it has done to
6 us, Mom. It's boiling down to legally. So you're
7 threatening a lawsuit at this time, correct? Is
8 that correct?

9 A Yes.

10 Q What day did your father pass away again?

11 A My father passed away on June 8th.

12 Q Okay. So 19 days later, you're
13 threatening your mom with a lawsuit, correct?

14 A I wanted to -- under the supervision of
15 the judge on how to get my items back. I wanted to
16 sue Glenn. But since it was my mother's house, and
17 I loaned the items to her, this was the only way for
18 me to get them back so Glenn would not sell my
19 items, as he did too in his estate sale.

20 MR. VARNADO: I'd like to move this into
21 evidence, Your Honor. This is 3.

22 THE COURT: Respondent's Exhibit Number 3
23 admitted without objection.

24 MR. VARNADO: Mark this as -- for
25 identification as 4.

1
2 (Respondent's Deposition Exhibit No.
3 4 was marked for identification.)

4 BY MR. VARNADO:

5 Q Do you mind if I look at it with you,
6 ma'am? Is this the magistrate's court complaint
7 that you filed?

8 A I can't see that far.

9 Q Sure.

10 A That's correct.

11 Q Is part of that document your handwriting,
12 ma'am?

13 A That is correct.

14 Q So this is the lawsuit that you instituted
15 against your mother, correct?

16 A That should have been my brother, yes.

17 Q But you wanted to sue your brother, but
18 you sued your mother instead, correct?

19 A That's what the judge said how it had to
20 be for me to get my items back, since she was the
21 owner of the house --

22 Q Okay.

23 A -- and I loaned my items to her.

24 Q This is your contention, and -- when you
25 filled out this affidavit and complaint and claim

1 and delivery, correct?

2 A That's correct.

3 Q And you had it served on your mother,
4 correct?

5 A Glenn signed for it.

6 MR. VARNADO: Okay. I'd like to move this
7 into evidence, Your Honor?

8 THE COURT: See no objection. Respondent
9 Exhibit Number 4 admitted without objection.

10 BY MR. VARNADO:

11 Q And you testified earlier that you were
12 staying away from the house at this point. You
13 weren't going over to talk with your mom, right?

14 A I wasn't allowed to by Glenn calling me
15 and telling me if I called or stepped foot on that
16 property, he would have me arrested for harassment.

17 Q Okay. And you don't have any letter.
18 That's just your testimony to that fact, correct?
19 You don't have a letter from him? You don't have
20 anything in writing that says that, right?

21 A He wouldn't put it in writing anyway.

22 Q And neither did you, correct? You didn't
23 put it in writing either?

24 A No.

25 Q There's no letter that says that. It's

1 just your testimony here today, correct?

2 A Under oath as being the truth, that's
3 correct.

4 Q Okay. But you did communicate with your
5 mother, didn't you?

6 A Not after that date, no.

7 Q You didn't communicate with her at all
8 after that day?

9 A I wasn't allowed. On June 11th --

10 Q Of what year?

11 A -- of 2013, right after my father died,
12 when I received that phone call from Glenn.

13 MR. VARNADO: Can we mark this as Number
14 5, please?

15 (Respondent's Deposition Exhibit No.
16 5 was marked for identification.)

17 BY MR. VARNADO:

18 Q Isn't this a birthday letter you wrote
19 your mom?

20 A I didn't have any communication. I sent
21 her a letter. You asked me if I spoke to her. I
22 mailed.

23 Q No, ma'am. I said, did you communicate
24 with her at all, and you said no.

25 A I still haven't communicated. I sent her

1 a birthday letter.

2 Q You communicated to her with a birthday
3 letter, correct?

4 A Yes. Well, yes. I sent her a birthday
5 letter, yes.

6 Q All right. And you kept a copy of it, and
7 you gave it to us in discovery, correct?

8 A I don't remember this letter.

9 Q You don't remember this letter? It came
10 with the other pile.

11 A Well, you didn't remember the one that I
12 gave you. I don't remember.

13 Q I have no idea what you're talking about.
14 another letter, but I didn't put it into evidence.
15 That's for you and your lawyer to decide. But let
16 me ask you this on the second page. You say, quote,
17 I have no desire to go in your or Glenn's house.
18 You wrote that?

19 A Okay.

20 Q Those are your words, correct? I have no
21 desire to go in your or Glenn's house.

22 A That's what I said.

23 Q Okay.

24 A But I do have the desire to be with Mom. I
25 used to know. You left that part.

1 Q You stopped wanting to help out at the
2 house. It's true, isn't it?

3 A Actually, that's incorrect. You got
4 misinformed.

5 Q The locks never were changed on the house?

6 A I don't believe that you have a key to try
7 to get into my mother's house during that time.

8 Q I don't believe that you have any evidence
9 of that either.

10 A I'm sorry, sir.

11 Q But here's the thing, Ms. Harkness, you
12 weren't at the lawyer's office when the new Will was
13 signed, were you?

14 A No. I wasn't.

15 Q And you weren't at the doctor's
16 appointment with Dr. Chanson that day, were you?

17 A No. I wasn't.

18 Q And you heard your own sister testify that
19 she had been the one who recommended Dr. Chanson.
20 So it's not Glenn, right?

21 A What, going to Dr. Chanson?

22 Q Yeah. You don't have a problem with Dr.
23 Chanson?

24 A I don't have a problem with my mother
25 going to any doctor --

1 Q Okay.

2 A -- that will help her.

3 Q And you have no problem with Dr. Chanson?

4 A Not the slightest bit. No, sir.

5 Q Okay. Because she's a medical
6 professional, right?

7 A I understand that, yes.

8 Q She was your mother's primary care
9 physician, correct?

10 A That's correct.

11 Q You would agree with me that she was in a
12 better position to judge your mother's mental status
13 at the time that she wrote the new Will than you.
14 Wouldn't you agree with that?

15 A No. I do not.

16 Q How would that be? Because she saw your
17 mother on the day of the Will and you didn't.

18 A No, sir. That is not why.

19 Q Okay.

20 A I've known my mother for 61 years. My --

21 Q Your mother --

22 MR. HOWE: She gets to finish her answer.

23 MR. VARNADO: You need to address it to
24 the judge, not me.

25 MR. HOWE: Well, I'd like for my client to

1 be able to finish her answer.

2 THE COURT: I agree. Let her finish.

3 A Yes. I have known my mother for 61 years,
4 sir. Dr. Chanson maybe once every three months gets
5 to see my mother, stated in her reports maybe a
6 20-minute, 30-minute, at the most a 40-minute visit,
7 and within 15 minutes, she met with Glenn. I know
8 my mother. I know Glenn. You have probably had
9 maybe a ten-hour visit with Glenn. My sister, we
10 all cannot be wrong on how my mother changed. We
11 can't be wrong.

12 Q She was grieving from the death of your
13 father?

14 A There was a lot more than that, according
15 to Ms. Helen's statement.

16 Q And do we have a physician who will come
17 in to testify to that?

18 A I don't know, sir. I'm not the one that's
19 calling the witnesses.

20 Q But your lawyer is.

21 A Okay.

22 Q Do we have Dr. Terry Graham, who is the
23 family friend? Is he coming in?

24 A Who?

25 Q Dr. Terry Graham. You know who he is.

1 A No. I do not know who that man is.

2 Q I'm sorry. Dr. Terry Gunnells. I
3 apologize.

4 A Thank you. Actually, he's my first
5 cousin.

6 Q Okay.

7 A Okay?

8 Q He's not coming in to testify?

9 A It was in his -- for Glenn. I didn't --
10 so what are you asking me?

11 Q I'm asking you, you weren't there at the
12 lawyer's office, and you weren't there at the
13 doctor's office the day she signed the second Will.
14 That's all I'm asking.

15 A Okay. Are you asking me that? You were
16 not there. I was not there. None of us were there.

17 Q You don't like your brother. That's
18 pretty clear.

19 A I don't understand why you keep saying
20 that, sir. I keep telling you I don't like what he
21 did with my mother and to my sister, and myself. He
22 deprived us from helping with my mother. He
23 deprived us for helping her go through her death and
24 grieving spell. I resent him for depriving me for
25 the help of my parents. That's what I resent. I

1 don't resent Glenn for being my brother. I resent
2 him for taking away something that should have been
3 a part of my life.

4 Q And this is how you're going to get him
5 back, right? You're going to challenge the Will.

6 A Sir, I believe right is right and wrong is
7 wrong.

8 Q This is what you're doing to get him back?
9 You going to challenge the Will, correct?

10 A No, sir. I'm not doing this to get him
11 back. I believe that's an improper statement that
12 you're making toward me, because you don't know me
13 well enough to say that I'm doing something and
14 trying to get revenge on Glenn. I'm trying to do
15 what's right for my sister and myself. We helped my
16 mother and my father, if not more than Glenn.
17 Glenn stayed out for almost 20 years
18 on a drunken stupor that put my sister and myself
19 there taking care of my parents.

20 Q In that letter that I marked earlier, the
21 one you wrote to your dad, you were angry at them
22 both. They were both gone. It was only you that
23 helped, only you were the one who helped?

24 A Again, sir, you did not put in the
25 evidence so Judge Condon can see the letter that

1 Glenn wrote me that led to that letter. You left
2 that part out, sir.

3 Q Then put it in, ma'am.

4 A I gave it to --

5 Q I don't have to.

6 MR. VARNADO: May I have a minute to
7 confer with my --

8 THE COURT: Sure. Take your time.

9 MR. VARNADO: Your Honor, we're mindful
10 that it's time. So if I could just have 20
11 more seconds to consult with the boss here.

12 THE COURT: Sure.

13 MR. VARNADO: That's all, Your Honor.

14 THE COURT: Okay. Thank you. Mr. Howe,
15 you may have some redirect. You want to take
16 it up in the morning?

17 MR. HOWE: Yeah. That would be great.

18 (Adjourned at 2:28 p.m.)
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

I, TRISHA G. RARICK, Court Reporter and Notary Public in and for the State of South Carolina at large, do hereby certify that I correctly reported the within-entitled matter and that the foregoing is a full, true and correct transcription of my shorthand notes of the testimony and/or other oral proceedings had in the said matter.

I further certify that I am neither related to nor counsel for any party to the cause pending or interested in the events thereof.

Witness my hand, I have hereunto affixed my seal this ____ day of _____, 2016, at Charleston, Charleston County, South Carolina.

TRISHA G. RARICK

Court Reporter

My Commission Expires

APRIL 9, 2019

STATE OF SOUTH CAROLINA) PROBATE COURT
COUNTY OF CHARLESTON) CASE NO.: 2014-ES-10-0202
IN RE: THE ESTATE OF
HELEN B. GUNNELLS

VOLUME II

BEFORE JUDGE IRVIN G. CONDON

Date Taken: Wednesday, March, 2nd, 2016

Time Taken: 9:20 A.M.

Location: Judicial Center

100 Broad Street, 3rd Floor,

Courtroom 3D

Charleston, South Carolina 29401

Reported By: Judy W. Galuppo, Court Reporter

Job No.: 234712

MAGNA LEGAL SERVICES

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

2 Appearances for the Petitioners

3 By: Donald H. Howe, Esquire

4 LAW OFFICE OF DONALD H. HOWE

5 818 Wappoo Road

6 Charleston, South Carolina 29407

7 843.225.2523

8 donaldhowelaw@gmail.com

9 Appearances for the Respondent

10 By: Robert Varnado, Esquire

11 By: Alexis A. Wimberly, Esquire

12 BROWN & VARNADO

13 103 Church Street

14 Mount Pleasant, South Carolina 29464

15 843.737.7300

16 awimberly@brown-varnado.com

17

18

19

20

21

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1
2 THE COURT: Good morning again. My name
3 is Irvin Condon, the Probate Judge for Charleston
4 County, along with my law clerk Kevin Cale. And we
5 are here for the second date of our trial. Counsel,
6 where have we left off?

7 MR. HOWE: It would be my intent at this
8 time to put Ms. Harkness back on the stand for some
9 redirect, however, since the respondent has
10 scheduled the physical therapists, we're going to
11 let them go out of order, if you're fine with that?

12 THE COURT: Counsel's fine with that?

13 MS. WIMBERLY: Yes, Your Honor.

14 (At this time there is an off-the-record
15 conversation.)

16 THE COURT: Ms. Wimberly, your witness.

17 MS. WIMBERLY: Yes. Respondent calls
18 Ms. Lee Wechter.

19 (At this time, the witness, Sharon Lee Wechter,
20 is called to the witness stand.)

21 THE COURT: Before you sit down, please
22 place your left hand on the bible and raise your
23 right hand.

24

25

1. _____

2 Whereupon, Sharon Lee Wechter, having been
3 first duly sworn, testifies as follows:

4

5 THE COURT: Good morning again, can you
6 please state your full name for the record..

7 A Sharon Lee Wechter. W-E-C-H-T-E-R.

8 THE COURT: Thank you.. Answer questions
9 of Counsel, Ms. Wimberly..

10 DIRECT EXAMINATION

11 BY MS. WIMBERLY

12 Q Hi, Ms. Wechter. Thank you for being
13 here this morning. Can you please tell us a little
14 bit about your professional history.

15 A: I'm a registered physical therapist. I
16 have a Bachelor of Science in physical therapy.

17 Q Where did you achieve that Bachelor's in
18 physical therapy?

19 A Here at Charleston, MUSC.

20 Q How long have you been working there?

21 A I work at Roper St. Francis Healthcare.

22 Q Before working at Roper St. Francis, did
23 you work anywhere else?

24 A I did. I've been a physical therapist
25 since 1986, so almost 30 years.

1 Q You understand why we're here today?

2 A I do.

3 Q And you understand that Ms. Helen
4 Gunnells passed and her will is being contested?

5 A Yes.

6 Q How do you know Ms. Gunnells?

7 A I did physical therapy in her home
8 through Roper St. Francis Home Healthcare.

9 Q How long did you do that?

10 A I believe I treated her from
11 December 2013 through January 2014, roughly two
12 months, but I don't remember exactly.

13 Q And I'll represent that she passed in
14 January 2014, so you treated her right at the end
15 there; is that correct?

16 A That's correct.

17 Q And what type of things would you do to
18 Ms. Gunnells, how often would you go to her home?

19 A I believe I saw her two to three times a
20 week. Probably started off three times a week and
21 tapered down to two. And we did gait training and
22 therapeutic exercise for strengthening.

23 Q And how long were you there? You said
24 two to three times a week. How long would each
25 session last?

1 A I would usually be in the home around 45
2 minutes, roughly.

3 Q And when you were at the home, did you
4 ever have the occasion to see my client, Glenn
5 Gunnells?

6 A Yes, he was there when I was there.

7 Q Did you have interaction with
8 Mr. Gunnells?

9 A Yes. Glenn was very accommodating and
10 would usually open the door to let me in. He would
11 usually talk with me at the end of the session to
12 see how it went and how his mom was doing.

13 Q While you were there, was Ms. Gunnells
14 always in the room with you, or was sometimes he
15 absent from the room?

16 A Sometimes he was there or sometimes
17 absent he was absent. He might have gone to run
18 errands or be out in the yard, but sometimes he was
19 there.

20 Q Did you ever have the occasion to talk
21 to Ms. Gunnells about her family life?

22 A A lot of times, or sometimes when we
23 were walking outside, usually, she would sometimes
24 bring up family stuff, yes.

25 Q And did any of those conversations come

1 to mind today?

2 A Well, she always talked about what a
3 good her caregiver Glenn was and what a good son he
4 was, I should say. She wouldn't use the word
5 "caregiver." But she always talked about Glenn and
6 being a good son. And a couple of instances I
7 remember her getting upset and tearful, overly
8 emotional because of issues that were going on in
9 the family with her daughters, and she didn't, you
10 know, talk a lot about that. And I would usually
11 try to redirect her to what we were doing, which was
12 the therapy, but...

13 Q With regards to those conversations
14 about her daughters, do you remember in particular
15 anyone that stood out to you?

16 A Just really one that I remember, when we
17 were walking through the kitchen and the dining room
18 to go out towards the front door, she talked about
19 the furniture. If I remember right, it was in the
20 dining room area. She mentioned that her daughter
21 wanted to take that furniture away. That's the one
22 thing I can remember, and she was upset about that.

23 Q During your visits with Ms. Gunnells,
24 did you have occasion to meet Ms. Cathy Harkness who
25 is sitting here?

1 A No.

2 Q And did you ever have occasion to meet
3 with Belinda Davis who is sitting in the back?

4 A No, I did not.

5 Q Do you remember Ms. Gunnells talking
6 about them by name?

7 A She did sometimes talk about them by
8 name, but I don't remember specifically who she was
9 speaking about.

10 Q Ms. Wechter, do you remember writing a
11 letter with regards to this case?

12 A I do. I do.

13 MS. WIMBERLY: Your Honor, at this time
14 I'd like to mark for identification only
15 Respondent's 6.

16 THE COURT: Yes. Thank you.

17 (Respondent's Exhibit No. 6 is marked for
18 identification.)

19 BY MS. WIMBERLY

20 Q Ms. Wechter, I have handed you what is
21 marked for identification purposes only as
22 Respondent's 6. Do you recognize that?

23 A I do.

24 Q What do you recognize it as?

25 A The letter I wrote for Glenn when he

1 asked me to to help support his case.

2 Q And is everything in here truthful?

3 A Yes.

4 MS. WIMBERLY: At this time, Your Honor,
5 I move Respondent's 6 into evidence?

6 MR. HOWE: No objection.

7 THE COURT: Move without objection, move
8 in Respondent's No. 6.

9 (Respondent's Exhibit No. 6 is moved into
10 evidence.)

11 MS. WIMBERLY: That's all the question I
12 have right now. Thank you.

13 CROSS-EXAMINATION

14 BY MR. HOWE

15 Q Good morning. My name is Donald Howe.
16 I just have a couple of questions for you.

17 A Okay.

18 Q So your entire connection was over about
19 two months?

20 A Right.

21 Q And it was strictly professional?

22 A Yes.

23 Q Okay. And in fact, when family issues
24 came up, I think you said you steered away from the
25 details?

1 A Mostly because she would get upset and
2 emotional, and you know, sure...

3 Q Right. And you were there to help her
4 to learn to walk and to get exercise?

5 A Right.

6 Q You weren't there to sort out family
7 issues?

8 A Yes.

9 Q But you steered away from it, because
10 it, in fact, interfered with what you were trying to
11 do?

12 A Possibly.

13 Q She's getting upset, she's --

14 A Possibly.

15 Q Is there any other reason?

16 A Say again.

17 Q But you did steer her away from it?

18 A Well, I would usually listen, you know,
19 while we walked, because it took 20 minutes outside
20 walking outside down the street and back, so I would
21 listen.

22 Q But you never said, let's get into the
23 details of your family issues?

24 A No, I didn't ask details.

25 Q Did she have -- what kind of problems

1 was she having? What were you helping her with?

2 You said something about gait. What does that mean,
3 as opposed to just saying walk?

4 A That's okay. She had an unsteady gait.
5 She had a lot of falls in the past and she was weak
6 and deconditioned from other medical issues, which I
7 specifically don't remember the specific medical
8 diagnoses. So we were there to get her balanced
9 better, to help strengthen her with her walking and
10 help her with her endurance, teach her home
11 exercises to do to help keep her strong.

12 Q So if he she was to take a walk around
13 the yard, would you actually be there with her?

14 A If I was there, absolutely.

15 Q Would she have her hands on her so she
16 wouldn't fall, that kind of stuff?

17 A If she was in the yard. They had a
18 grassy backyard. Definitely she would -- yeah.

19 Q She would need a little help there
20 because it's not as easy as --

21 A No, in the home she was able to walk a
22 bit, if I remember right.

23 Q All right. She certainly wasn't driving
24 or anything like that?

25 A Oh, no.

1 MR. HOWE: That's all I have, Your
2 Honor.

3 THE COURT: Thank you, Mr. Howe.

4 MS. WIMBERLY: Just briefly, Your Honor.

5 THE COURT: Sure.

6 REDIRECT EXAMINATION

7 BY MS. WIMBERLY:

8 Q Ms. Wechter, with regards to
9 Ms. Gunnells' condition when you were there, do you
10 remember if she had her mental acuity about her, if
11 she knew who she was?

12 A She did.

13 Q And earlier you testified that she was
14 weak and ailing. Do you remember, was she taking
15 any medications?

16 A She was definitely taking medicines; I
17 don't remember what, but yes.

18 Q Did you help administer those
19 medications?

20 A No, I did not.

21 Q Do you remember who did?

22 A Usually Glenn made sure that she took
23 her medications.

24 MS. WIMBERLY: Thank you. No further
25 questions, Your Honor.

1 MR. HOWE: Nothing further.

2 THE COURT: Thank you. Ms. Wechter, you
3 can step down. Thank you.

4 (At this time, the witness, Sharon Lee Wechter,
5 is excused from the witness stand.)

6 THE COURT: Counsel, you wish to
7 continue?

8 MS. WIMBERLY: Yes, Your Honor.
9 Respondent's call Ms. Jill Costa.

10 (At this time, the witness, Jill Susan Costa,
11 is called to the witness stand.)

12 THE COURT: Good morning. How are you?

13 A. Good morning.

14

15 Whereupon, Jill Susan Costa, having been
16 first duly sworn, testifies as follows:

17

18 THE COURT: Thank you. Please be
19 seated. And if you could state your full name for
20 the record.

21 A. Jill Susan Costa.

22 Q. Can you spell that last name for us?

23 A. C-O-S-T-A.

24 THE COURT: Thank you. Please answer
25 questions of Counsel.

1 DIRECT EXAMINATION

2 BY MS. WIMBERLY

3 Q Ms. Costa, thank you for being here
4 today. Would you give us the benefit of your
5 educational history?

6 A I got my Master's of Science in
7 Rehabilitative Science for Physical Therapy from the
8 Medical University of South Carolina. And I got A
9 Bachelor's degree from Hofstra University in Long
10 Island, New York.

11 Q What is your occupation?

12 A I'm a physical therapist in home health
13 with Roper St. Francis Home Health.

14 Q How long have you been working there?

15 A I started there in June of 2009.

16 Q Previous to working at Roper, did you
17 work anywhere else?

18 A I did. I had about three other physical
19 therapy jobs. Do you want me to name all of them?
20 I worked at Trident Sports Medicine in outpatient
21 clinic in North Charleston. And then before that I
22 worked in two clinics up in New York.

23 Q And you understand that we are here
24 today with regards to a Ms. Helen Gunnells?

25 A Yes.

1 Q So you know who that is?

2 A Yes, I do.

3 Q How do you know her?

4 A She actually was -- when I first started
5 in home health in 2009, she was one of the first
6 patients that I saw while I was being trained where
7 you follow with another therapist. So she was one
8 of the first people and one of the first families
9 that I met. And then I worked with her on and off
10 over the years.

11 Q So you, as well as Ms. Wechter, worked
12 with her as a physical therapist over the years; is
13 that correct?

14 A That's correct.

15 Q Do you remember about what time you
16 started working with Ms. Gunnells, what year?

17 A 2009, because I started in June and I
18 was trained -- the first three months you follow
19 another therapist, and she was one of the patients I
20 saw during those first three months. I don't know
21 more specific than that.

22 Q When is the last time that you treated
23 Ms. Gunnells?

24 A I believe it was in 2013. I referenced
25 it in a letter, but I believe it was 2013.

1 Q Okay.

2 MS. WIMBERLY: So let's go ahead -- Your
3 Honor, we'll mark Exhibit 7 for identification
4 purposes only.

5 THE COURT: Okay. Go ahead.

6 (Respondent's Exhibit No. 7 is marked for
7 identification.)

8 BY MS. WIMBERLY

9 Q Ms. Costa, do you recognize what I just
10 handed to you?

11 A Yes, ma'am.

12 Q What do you recognize it as?

13 A It was a letter that I wrote back in
14 November of 2014 on Glenn's behalf.

15 Q And does this refresh your recollection
16 as to the last time that you saw Ms. Gunnells?

17 A Yes, it does.

18 Q When was that?

19 A Well, it was during 2013. This mentions
20 a specific date in June of that year. So I'm -- the
21 end of June, so probably June, July. I don't
22 remember specifically, but that time of 2013,
23 including that visit.

24 Q All right. And with regards to your
25 treatment of Ms. Gunnells, what type of things would

1 you do with her?

2 A Well, I did see her for different
3 episodes throughout -- from 2009 to 2013. And you
4 know, it was gait training. I remember one of the
5 first times I saw her possibly in 2009, I believe
6 there was a hip or a pelvic fracture. I remember
7 practicing walking, practicing going up and down the
8 stairs, that was a big thing at that time, getting
9 her strength to go back up to the stairs to her
10 bedroom. Strengthening exercises, balance
11 exercises. I remember standing at the kitchen doing
12 exercises. And then each time I saw her on separate
13 occasions it was going to involve usually gait
14 training or what we call transfer training, sitting
15 up from a chair and then exercises for strength and
16 balance.

17 Q About how often would you see
18 Ms. Gunnells a week?

19 A Without looking at my charts, usually we
20 see somebody two or three times a week. Each
21 instance might have been a little different, but we
22 usually do two or three times a week.

23 Q And you wouldn't be there at the same
24 time as somebody like Ms. Wechter, correct?

25 A Not another physical therapist. If

1. there was another, whether there was maybe a nurse
2. or maybe an aid, we might have overlapped, but not
3. another physical therapist.

4. Q Did you have the occasion to see anybody
5. else in the home that was there for health reasons
6. for Ms. Gunnells?

7. A I'm sorry. I don't understand the
8. question.

9. Q It was kind of a weird question.

10. Was anybody else ever in the home with
11. Ms. Gunnells when you were there treating her?

12. A I mean, like Glenn was present. And
13. then like I said, there might have been an occasion
14. where another -- like I remember once there was an
15. occupational therapist that was present, but it was
16. either -- and then initially it was Mr. Gunnells was
17. always there, and Glenn was there, and that was
18. probably -- oh, and then one other visit time there
19. was -- one of the sisters was there.

20. Q Do you remember which sister that is?

21. A That's Miss Linda.

22. Q And do you mind explaining to us what
23. happened on that occasion?

24. A It was -- it was June 24th, and I was
25. doing a visit and I was in the living room with

1 Ms. Gunnells and Glenn and there was a knock on the
2 door. And I guess they knew by looking at the car
3 it was Linda. Ms. Gunnells did not want to see her,
4 she was upset. So I went to the front door. I
5 figured if I just explained we were in the middle of
6 a treatment session and didn't want to be disturbed.
7 And when I opened the door and I explained it, she
8 pushed into the door and pushed me out of the way.
9 So I called Glenn to come and help me,
10 and we just kind of tried to prevent her from coming
11 in. And I believe Ms. Gunnells actually kind of
12 walked around and Miss Linda left when we said we
13 were going to call the cops, yeah.

14 Q Do you remember Glenn ever shoving
15 Miss Linda up against the wall?

16 A No, I don't. I know that those stairs
17 were to his left, so he was I think bracing himself
18 with the stair trying to prevent her from coming
19 passed. And I think at this point I got scared and
20 was behind him and trying to help prevent her from
21 getting further into the house, but I do not
22 remember him pushing her against a wall at all.

23 Q Did you have ever have any other
24 occasion to meet Ms. Belinda Davis?

25 A I don't believe so.

1 Q Did you have other occasion to meet
2 Ms. Cathy Harkness who's sitting right here?

3 A I don't believe so.

4 Q All right. From your treatment from
5 2009 to 2013, did Ms. Gunnells -- did she know who
6 she was? Did she know who her children were?

7 A Yes.

8 Q Did anything change with regards to her
9 mental acuity?

10 A No. And the last time that I saw her,
11 it was right after her husband had passed. And
12 actually I believe I had to delay my evaluation
13 because I believe that he had passed and there was a
14 funeral. So the only change was, she was tearful.
15 But she always knew who she was, and you know, that
16 was -- that hadn't changed. Just sad.

17 Q What, if anything, do you remember about
18 with your interactions with Glenn?

19 A Well, as I said before, she was one of
20 my first patients, so initially when he wasn't
21 living there, I always just remember he would always
22 come over every day. He's cooking dinner for his
23 parents. He would always come in and show us what
24 he bought on sale at the grocery store. I just kind
25 of remember that. And then as I kept seeing her on

1 and off through the years, and then when he moved
2 in -- I mean, he was there, as Ms. Wechter had said,
3 you know, he'd let us in. He'd sit there. Usually
4 for my treatments he was present during the
5 treatment. And then, you know, he always -- he
6 would just -- anything that we made, any kind of
7 recommendations he just followed through, made sure
8 she got up, made sure she moved around, made sure
9 she did her exercises.

10 Q Did you ever believe Mr. Gunnells to be
11 controlling of Ms. Gunnells?

12 A No.

13 MS. WIMBERLY: And at this time, Your
14 Honor, we move Respondent's Exhibit 7 into evidence.

15 MR. HOWE: No objection.

16 THE COURT: Move without objection
17 Respondent's Exhibit No. 7.

18 (Respondent's Exhibit No. 7 is moved into
19 evidence.)

20 CROSS-EXAMINATION

21 BY MR. HOWE

22 Q So your time here from 2009 to 2013,
23 that would be various stints?

24 A Yes.

25 Q That was not a constant?

1 A No, no, it was very -- yes.

2 Q Would your schedule be a little like the
3 other lady, you might be around 45 minutes a visit,
4 something like that?

5 A Yes, usually it's anywhere between --
6 yeah, around 30, 45 is a good average. Anywhere
7 from 30 minutes to an hour. It just depends on what
8 we're doing that day.

9 Q Okay. So 30 to an hour would be the
10 wide general?

11 A Yes.

12 Q Two to three times a week?

13 A Yes.

14 Q For how many weeks would you see her at
15 a time?

16 A Oh, I honestly don't remember
17 specifically.

18 Q You didn't bring any records with you?

19 A I didn't bring any records. Most cases
20 it's about four weeks, six weeks, somewhere around
21 there. But I really couldn't tell you specifically
22 without my records.

23 Q So let's say, how many four to six
24 week's times over that four years do you think?

25 A I don't know specifically. To the best

1 of my recollection, I would say at least three,
2 because I remember the first, I remember the last,
3 and I remember --

4 Q Seemed like there was another one?

5 A And I do know for certain there was
6 another one because I actually had a student with me
7 at one point, so I know at least three.

8 Q Okay. And as with the other young lady,
9 your relationship was a professional relationship?

10 A Yes.

11 Q You were there for a specific purpose?

12 A Right.

13 Q Y'all didn't socialize? I mean as in
14 you didn't have supper with her?

15 A Right, right. Oh, no, no.

16 Q You never went on trips with her?

17 A No, no.

18 Q Never spent any family time with her
19 brother Jack with her?

20 A No.

21 Q Or her friend Helen Carroll, did you
22 ever meet Ms. Carroll?

23 A No.

24 Q And while you were there, Glenn was
25 there?

1 A Yes.

2 Q While you were there, you're kind of in
3 charge, it's physical therapy time, right?

4 A Yes.

5 Q And you're the physical therapist?

6 A Yeah, uh-huh.

7 Q And this incident with Ms. Davis, I
8 guess the core of it was that she wanted to see her
9 mom?

10 A Uh-huh.

11 Q And even from the beginning, I guess
12 even 2009, '10-ish she was having trouble with
13 walking?

14 A Well, the first time I saw her I believe
15 it was a result of a pelvic fracture or some kind of
16 fracture, so there was an injury, an issue.

17 Q An acute problem?

18 A Yes.

19 Q Okay.

20 A And then she got better.

21 Q Right.

22 A So it wasn't continuous. It was -- they
23 were separate incidents.

24 Q When you came back, was it continuing
25 with -- what kind of problem was it?

1 A You know, I don't actually remember
2 specifically what it was. It was most likely
3 another diagnosis. I just, without my charts, I
4 can't remember specifically.

5 Q Okay. And do you ever meeting
6 Ms. Harkness sitting over there at the end of this
7 table?

8 A I don't believe that we've ever met.

9 Q Are you sure one way or the other?

10 A I really don't remember.

11 Q Okay.

12 MR. HOWE: That's all the questions I
13 have.

14 THE COURT: Okay. Ms. Wimberly?

15 MS. WIMBERLY: Just briefly, Your Honor.

16 REDIRECT EXAMINATION

17 BY MS. WIMBERLY

18 Q Mr. Howe asked you if you communicated
19 with Ms. Gunnells often.

20 A Yes.

21 Q And with regards to that, I'll direct
22 your attention back to your letter. You said,
23 "Ms. Gunnells shared with me how upset she was with
24 her daughters." Do you remember Ms. Gunnells ever
25 mentioning that to you?

1 A Yes, it was -- again, this was right
2 after her husband passed away, and she was very
3 upset with they weren't there, they hadn't visited
4 while he was sick. And that she said, and I had
5 written, that they were being mean to Glenn.

6 Q So you did actually have the occasion to
7 speak with her?

8 A Yeah. I believed he was asking if it
9 was more social. And while it wasn't a social
10 visit, but while we were treating, you do talk and
11 you listen a lot. And like I had mentioned, she was
12 sad, so she talked and I listened.

13 Q Just a moment.

14 MS. WIMBERLY: We're done.

15 THE COURT: All right. Thank you.

16 RE CROSS EXAMINATION

17 BY MR. HOWE:

18 Q Did she ever tell you how they were mean
19 to Glenn, did she go into any detail with that?

20 A I don't recall at this point. I'm
21 sorry.

22 Q That's what I figured. Thank you.

23 THE COURT: Ms. Costa, thank you. You
24 may be excused.

25 (At this time, the witness, Jill Susan Costa,

1 is excused from the witness stand.)

2 MS. WIMBERLY: Your Honor, at this time
3 I believe Mr. Howe would like to redirect
4 Ms. Harkness.

5 MR. HOWE: Yes.

6 THE COURT: Ms. Harkness.

7 (At this time, the witness, Cathy Harkness, is
8 recalled to the witness stand.)

9 THE COURT: Ms. Harkness, you are still
10 under oath.

11 REDIRECT EXAMINATION

12 BY MR. HOWE

13 Q Ms. Gunnells, as the Judge reminded you,
14 you're still under oath. It's just like you hadn't
15 left the stand since yesterday, okay?

16 A Okay.

17 Q When did you first hear that your mom
18 had somehow perhaps had changed her will?

19 A On my mother's death bed.

20 Q Okay. And tell me about that. What
21 happened?

22 A It was February the 6th, they took us
23 out of the room to take the ventilator out. When we
24 got to come back into the room, Glenn, maybe four
25 minutes while we were in there, as he started to

1 leave, he says, "You're going to be surprised what's
2 in the new will. I have everything." And he left.

3 Q And what was your next, I guess, contact
4 to find out anything about that?

5 A That's when I started going through all
6 the resources, Robert Polk, Legal Aid.

7 Q And that was way before. I'm talking
8 about -- I said, when did you next find out that the
9 will had been changed?

10 A Oh, I went to Probate.

11 Q All right. There was a letter, a long
12 letter that you had written to your dad in 2010.

13 A Yes.

14 Q I guess, what was the purpose of that
15 letter?

16 A Glenn left a few words. I got upset. I
17 said one bad word of a SOB, calling him. That's
18 when my father was a little upset because I
19 disrespected, using a curse word in front of my
20 mother. And in return, I thought I needed to write
21 a letter to justify. And I guess at that point, in
22 my letter is when I brought out all the bad things
23 that Glenn did and he would not forgive me for using
24 one bad curse word as a SOB in front of my mother.

25 Q Okay. Did you ultimately get back

1 together with your father?

2 A Yes, mother and dad.

3 Q Okay. Tell me between let's say 2010,
4 whenever that letter was, and 2012, when your dad
5 found out he had cancer, what were some of the
6 contacts that you had with him, things that you did?

7 A Well, Mother and Dad came to Rick and my
8 wedding. They came to our house twice a week to
9 eat, because we lived on the water as they did.

10 Q When you said "ours," is that you and
11 your husband Rick?

12 A That's correct.

13 Q And that was your husband at the time?

14 A That's right.

15 Q Okay.

16 A We had the family -- Boeing -- let me
17 see how to say this. Boeing had family day. Rick
18 and I went in the motor home and picked up Father
19 and we took him out to Boeing. We spent the whole
20 day at Boeing.

21 Q And was Rick working at Boeing?

22 A Yes, he was on the flight line.

23 Q This was a Boeing family day?

24 A Yes.

25 Q And y'all included your dad in that?

1 A Yes.. Mother didn't feel like she could
2 sit that long in a wheelchair to go with us.

3 Q And then I think you said you had supper
4 fairly regularly with them?

5 A Yes. In between that as well, I would
6 pick mother up and take her to the mall just to get
7 her out of the house.

8 Q What would y'all do at the mall?

9 A Just push her around. She'd go through
10 Belk's, wanted to see what was new. She never
11 really actually got to go out. So we had a girl day
12 at the mall.

13 Q Okay. Now I'm going to hand you what
14 we've marked and I think has been admitted as
15 Petitioner's Exhibit No. 1. That's an email from
16 who to who?

17 A That was to me from Uncle Jack.

18 Q And what's the date on that?

19 A I don't see a date.

20 Q Okay. What date does it reference?

21 What is it about and what was the dates that it
22 covered?

23 A For July 12th, 2013, that was a date
24 that Uncle Jack and Glenn arranged for me to pick up
25 my items.

1 Q And those items being the things that
2 you had given your mom?

3 A That's correct.

4 Q Or given -- loaned your mom?

5 A Correct. I understand? Yes.

6 Q And sort of the deal was that you were
7 going to be able to pick it up on what day?

8 A Here he has on Friday.

9 Q And the date of that is?

10 A July 12th, 2013.

11 Q And were you able to pick it up?

12 A No.

13 Q Okay. And then you filed this claim and
14 delivery on what day?

15 A February the -- wait a minute. That's
16 when it expired. July 15th, 2013.

17 Q So just a couple days later?

18 A That's correct.

19 Q Because that had fallen through?

20 A Yes.

21 Q Now I want to hand you what had been
22 marked as Respondent's 5. Can you tell us what that
23 is again?

24 A That was the birthday letter that I
25 wrote to mother.

1 Q When was your mother's birthday?

2 A October 1st.

3 Q So that would have been in October of
4 2013?

5 A Correct.

6 Q And let me ask you to read -- I'm sorry.

7 I should have brought another copy -- for the

8 record, I guess that last paragraph before the

9 closing.

10 A "Choices we make in our life, right or
11 wrong, are ones we live with each day; some we can
12 never fix and others are a phone call away."

13 Q Okay. And what were you telling her
14 about that?

15 A My mother could call me at any time.

16 Q And did she have your number?

17 A Yes.

18 Q Okay. And I think the rest sort of
19 speaks for itself, so...

20 Q Did you ever see or were you aware or
21 did Glenn ever assert in front of you that he had
22 power of attorney?

23 A On two occasions that I can remember,
24 yes.

25 Q Okay. And tell us about those

1 occasions.

2 A The first occasion was at St. Francis
3 Hospital when my dad was having his chemo treatment.
4 I was sitting there, as I've done at sometime.
5 Glenn comes in and tells me I'm not supposed to be
6 there. He pulls out of his back pocket and waves a
7 piece of paper and goes up to the nurse's desk and
8 tells them that he's got power of attorney and I'm
9 not supposed to be there.

10 Q Okay. What happened after that?

11 A I stayed with my father through the rest
12 of his chemo.

13 Q Okay.

14 A The second one was the day when my
15 father, we were at the funeral home. And Belinda
16 and I were already there. We were sitting on the
17 left. Glenn comes in and naturally was talking to
18 the --

19 Q Let me back up. This is -- who's
20 funeral?

21 A My father's.

22 Q So this would have been in June?

23 A Yes.

24 Q Go ahead.

25 A We were sitting there, Belinda and I,

1 and Glenn comes in, and he tells him that we're not
2 supposed to be there. He brings out his piece of
3 paper again and he starts with, "I have power of
4 attorney."

5 At that point, I made a comment and I
6 said, "Dad's passed. Power of attorney no longer is
7 in effect." The funeral directors went with what
8 Belinda and I wanted to put in exhibits, also of
9 photos. And that was his second event when he
10 started with his power of attorney papers.

11 Q Okay. There was a phrase in the big
12 letter. Let me just let you read that last sentence
13 on that page.

14 A "As you called me, Your Little Nigger."

15 Q Okay. What is that term and how did
16 that come out? What was the deal on that?

17 A Daddy had, along with a bunch of his
18 little church buddies, on Leeds Avenue by South
19 Carolina Electric and Gas under the power lines and
20 to the left -- I was always out there helping every
21 one of them.

22 Q What did he have out there?

23 A I apologize. A vegetable garden.

24 Q A vegetable garden?

25 A Yes, an acre vegetable garden. Each one

1 of those little church members had an acre or
2 smaller, and they would raise vegetables and give to
3 the church for when they had their functions. And
4 then each -- when they had their own little gardens,
5 would take home and share with their families and
6 friends. And I would help Dad.

7 Q How often did you do that?

8 A Ever since he had the garden, I would
9 help him go out and use his tiller, plant, pick,
10 replant, pick, and then he would loan me off to his
11 other little church buddies.

12 Q And that's how that name came up?

13 A That and "The Little Migrant Worker."

14 Q And little migrant worker was the other
15 one?

16 A That's correct.

17 Q Over how long of a period did you do
18 that?

19 A For probably three years and during the
20 summer when I could, which was primarily every day,
21 and when he would do his fall garden.

22 Q Okay.

23 MR. HOWE: That's all the questions I
24 have.

25 THE COURT: Thank you, Mr. Howe.

1 Ms. Wimberly?

2 MS. WIMBERLY: It's Rob's witness.

3 THE COURT: Okay.

4 RE CROSS-EXAMINATION

5 BY MR. VARNADO:

6 Q Ms. Harkness, you're saying that Glenn
7 at the funeral for your father told you to leave the
8 funeral, that's your testimony?

9 A I did not say he told me to leave the
10 funeral.

11 Q What did he tell you at the funeral?
12 You said he pulled out the power of attorney. And
13 what did he tell you?

14 A We're not supposed to say anything or we
15 cannot provide pictures, he's got power of attorney.

16 Q So you're saying at the funeral you're
17 sitting there and he --

18 A At the funeral home, yes.

19 Q At the funeral home, he came up with the
20 power of attorney, and he told you you couldn't do
21 anything?

22 A That's correct. And my sister was there
23 as well.

24 Q But she didn't testify to that
25 yesterday?

1 A I don't know if it was asked or not.

2 Q How many times have you been married?

3 A Probably four?

4 Q Probably? Or you're sure? Four or

5 five?

6 A Four, and two annulments.

7 Q Four, but two were --

8 A Excuse me. Excuse me. Four.

9 Q Of which two were annulled? Or there
10 were two additional --

11 A One annulment.

12 Q I'm sorry. You got to let me finish.

13 You said you were married four times,
14 and you said there were two annulments?

15 A One annulment. I corrected myself. One
16 annulment.

17 Q Okay. So there have been five
18 marriages, four divorces and one annulment?

19 A Yes.

20 Q How many times have you been a plaintiff
21 in a lawsuit, Ms. Harkness, in Charleston County?

22 A At this time, I don't remember.

23 Q Would it be more than 10?

24 A I would not think so.

25 Q Would it be more than five?

1 A I wouldn't -- I don't think so.

2 Q What would --

3 A I think there was -- even if one, that I
4 can remember.

5 Q Okay. If I -- the Clerk of Court is in
6 this building.

7 A I understand.

8 Q And if we were able to go and do a
9 record search, I'm curious what names would you have
10 used if you were the plaintiff in a lawsuit? What
11 were your married names, just so I know?

12 A Jordan, Lanahan and Morris and Harkness.

13 Q Okay. And you think that you didn't
14 file multiple lawsuits, you only remember one
15 lawsuit?

16 A I don't recall, no I do not.

17 Q You don't recall?

18 A Except for this one. I do not recall,
19 okay.

20 Q Okay.

21 A Oh, yes, at this time I do. K-Mart. I
22 got injured at K-Mart. The doors, revolving doors,
23 as I was going through, the doors malfunctioned.
24 And that was back in 2008, I believe. Yes, there
25 was that one, K-Mart.

1 MR. VARNADO: May I have one moment,
2 Your Honor?

3 THE COURT: Sure. Take your time.

4 (At this time there is an off-the-record
5 conversation between Respondent's counsel.)

6 BY MR. VARNADO

7 Q Ms. Harkness, Mr. Howe asked you about
8 that letter you wrote to your father, and you went
9 back into that a little just a moment ago. Do you
10 recall that?

11 A Yes.

12 Q Okay. And you said that the
13 relationship repaired with your father and your
14 mother after that?

15 A Yes. We were a normal -- they came to
16 my wedding. They come over and eat. We went to
17 Boeing.

18 Q But you never came back to the house?

19 A Why wouldn't I come back to the house?

20 Q You never came back to visit the house?

21 A Who's saying that?

22 Q I'm asking you.

23 A I just said yes, I would go back to the
24 house also.

25 Q And yet, when we look at Exhibit 5 --

1 A That was 2010.

2 MR. VARNADO: May I approach, Your
3 Honor?

4 THE COURT: Yes.

5 MR. VARNADO: Thank you, sir.

6 BY MR. VARNADO

7 Q Exhibit 5, I believe Mr. Howe had gotten
8 the witness to say this was written for a birthday
9 in '13. Do you remember that, ma'am?

10 A Yes, I do. That's on June 11th is when
11 Glenn told me I was no longer allowed at the house
12 or to call or he would have me arrested.

13 Q And you said you were happy not to go
14 back to the house in that letter?

15 A Let me read you one statement in here.

16 "I have no desire to go back in your
17 house, or Glenn's house, but I do have the desire to
18 be with the mom I used to know."

19 And that was 10/1/2013.

20 MS. WIMBERLY: Your honor, we're having
21 technical difficulties.

22 BY MR. VARNADO

23 Q All right. Carefully. You said one of
24 your married names was Lanahan; is that correct?

25 A That's correct.

1 Q L-A-N-A-H-A-N; is that right?

2 A Correct.

3 MR. VARNADO: Let me have one more
4 second, Your Honor. Let me try this one more time.

5 THE COURT: Take your time.

6 (At this time there is an off-the-record
7 conversation between Mr. Varnado and Ms. Wimberly.)

8 BY MR. VARNADO

9 Q Now, Ms. Harkness, I'm going to show you
10 my phone, and I'm going to represent to you that
11 I've looked up the name Cathy Lanahan. Did you have
12 a middle name? Or what's your middle initial,
13 please, ma'am?

14 A A.

15 Q Okay. Did you ever use the middle
16 initial G?

17 A Yes, Cathy Gunnells.

18 Q Okay. And I see one, two, three, four,
19 five, six times when you were a plaintiff.

20 A But actually that's wrong. There was
21 '91. There was '94. That's two. '05 is three.
22 And '06 is four.

23 Q So those are four times that you were a
24 litigant in a lawsuit as Ms. Lanahan, right?

25 A I guess I don't remember what they were.

1 Q Okay. Then I'm going to navigate back
2 on my phone.

3 A Okay.

4 Q Was Morris a name that you also used?

5 A That's what I told you, correct.

6 Q Forgive me. Again, there's Cathy Morris
7 and Cathy G. Morris, would that have been you?

8 A That's right.

9 Q How many cases were there?

10 A Can you pull back the dates, pull back
11 the date.

12 Q File dates right here?

13 A Well, I'd like to see the dates on how
14 many.

15 Q Okay.

16 A And I do not remember what they were.

17 There's one, two, three. I believe there are six,
18 and I believe that was with the bar that I owned.

19 Q Oh, they were lawsuits about the bar?

20 A I took -- with the bar I owned, I sold
21 my -- well, the bar, the Dog House Sports Bar to the
22 lady down the street. In return, she took over
23 possession. She canceled her check. I had to take
24 her to court and return -- oh, then she took the ice
25 maker which put the ice maker people taking me to

1 court to get their ice maker back. That's what
2 that's about.

3 Q Okay. And the other five, do you
4 remember those?

5 A The other five? Those were all related.
6 It should be a continuous back and forth.

7 Q Well, they all have different numbers.

8 A Sir, I'm not sure. If you would like to
9 pull them up so I can see what they are, I would be
10 happy to...

11 Q Okay. Sitting here today, you just
12 don't remember, you know, from -- there's ones from
13 2013, 2002, 2001, 2006, 2009?

14 A The one in 2013 should be this one.

15 Q I would hope not, because it says it's
16 disposed. Could be disposed. I would be happy with
17 that.

18 THE COURT: It may not be on that site
19 being that this is Probate Court.

20 BY MR. VARNADO

21 Q Did you ever borrow money from your mom
22 and dad?

23 A I borrowed in 2005, \$6,000. I turned
24 around and sold the business six months later and
25 gave dad \$6,500. We went to the bank, I gave him

1 cash money, he was with me, and there should be a
2 deposit in his account of \$6,500 that I borrowed for
3 six months.

4 Q Did you ever borrow any other money?

5 A I didn't borrow it. My dad walked in
6 and he accidentally hit my dog, my dachshund,
7 fractured his back. He had to have surgery, I
8 believe that was \$1,900. I gave him 600, and then
9 it took me almost six months to repay him the rest.

10 MR. VARNADO: May I have one more
11 second, Judge?

12 THE COURT: Sure. Take your time.

13 MR. VARNADO: That's all.

14 THE COURT: All right. Thank you.
15 You may step down. Thank you.

16 (At this time, the witness, Cathy Harkness, is
17 excused from the witness stand.)

18 THE COURT: Anything else?

19 MR. HOWE: Petitioner rests at this
20 point with our part of the case.

21 MOTIONS.

22 MS. WIMBERLY: Your Honor, at this point
23 the Respondent's move to dismiss the case under Rule
24 41 V of the Rules of Civil Procedure. The burden is
25 very high in this case. It's unmistakable and

1 convincing evidence to show undue influence. Here
2 we've gotten testimony of two very emotional sisters
3 who have a stake in the game as well as one uncle
4 who was not around and said that he actually spoke
5 to his sister more after the death of Mr. Gunnells.

6 All you have here is very emotional
7 testimony regarding a disfavor for my client,
8 Mr. Glenn Gunnells, but nothing that rises to
9 unmistaking (sic) and convincing evidence that
10 Ms. Gunnells was unduly influenced to change her
11 will on July 3rd, 2013.

12 Neither of the two daughters saw
13 Ms. Gunnells on that date around that time. There
14 has been no testimony as to her sound mind -- or as
15 to her unsound mind. There has been testimony that
16 you've heard today that she was of sound mind, that
17 she knew who she was, she knew who her children
18 were. She knew exactly what she was doing. She
19 was upset with her daughters because they did not
20 care for Mr. Gunnells prior to his death. And that
21 is why she ultimately decided to change her will.
22 Not because of anything my client did.

23 THE COURT: Mr. Howe?

24 MR. HOWE: If it please The Court, just
25 a quick rundown. But for undue influence cases,

1 courts look at basically four things. They look at
2 an unjust distribution made to the beneficiary. And
3 obviously when we have three kids, and it's been for
4 three kids, and then it goes to one, it probably
5 falls in that category.

6 Motive and opportunity by the
7 beneficiary to influence the testator, we have shown
8 that Glenn Gunnells, that the -- excuse me, the
9 lawyer involved was Glenn's lawyer from the closing,
10 and that she was living with Glenn at the time.

11 Confidential or fiduciary relationship
12 between the testator and beneficiary, that's clear.
13 She couldn't drive. He was handling the bills, he
14 was handling the money. She couldn't -- even the
15 physical therapy people said, you know, she was
16 relying on Glenn.

17 Susceptibility to be unduly influenced,
18 that would fall into the fact that she was infirmed,
19 that she relied on him totally. And I think that
20 sort of handles that part.

21 To be successful, we need to show
22 evidence of threats. Well, threatened Cathy that if
23 she came by to see her own mother they'd have her
24 arrested.

25 Evidence of force, pushed Belinda out

1 physically.

2 Evidence of restricted visitation, all
3 over.

4 Evidence of a fiduciary relationship at
5 the time or before, and even he in the excerpts we
6 read went into that.

7 Having gone through all of that, the
8 core, the one piece that, you know, at this point is
9 her best friend, Helen Carroll said under oath, "She
10 told me, 'I signed a will. I had no choice, I
11 didn't want to, but I had to.'"

12 That sort of takes care of that as a
13 practical matter. Others pretty much window
14 dressing to show that that splash -- excuse me. Of
15 that statement ripples with all the other holdings
16 of the cases. But we have direct evidence out of
17 the decedent's mouth saying, I did sign a will, I
18 didn't want to, I had no choice. That should take
19 care of it right there. Thanks.

20 MS. WIMBERLY: Your Honor, actually that
21 was never said in Ms. Helen Carroll's deposition
22 testimony. So that is -- has not been said. She
23 never said she didn't have a choice.

24 Also, with regards to all of the
25 testimony that you heard, it's all based --

1 basically, there's no independent witnesses. It's
2 only what the two sisters have said, and it's what
3 Glenn said to them. That they haven't called a
4 single medical doctor, they haven't called a single
5 independent witness that says, yes, I saw that.
6 Ms. Davis never even testified to being shoved out
7 the door. And that was actually testimony of
8 Ms. Harkness. We've heard the home healthcare
9 worker today said that that wasn't the case at all.
10 She's independent, she has no stake in this game.
11 She told you what happened like it was.
12 So therefore, Your Honor -- just one
13 moment. And with regards to Ms. Carroll's
14 testimony, that is -- you have the transcript. But
15 as you saw when Mr. Howe asked her questions, she
16 knew the answers, she could easily answer. But when
17 I asked her questions, it was, "I don't remember, I
18 don't remember, I don't remember." I actually asked
19 her: Do you remember having the discussion about
20 the will? And Ms. Carroll's said I don't remember.
21 Therefore, I don't think that that
22 testimony should be very probative.
23 Your Honor, this is all based on
24 innuendo and res ipso loquitur, they're saying just
25 because she changed it was all because of my client.

1 It's a high burden, and they haven't met it.

2 THE COURT: Thank you...

3 MR. HOWE: I'm going to just read you
4 from the transcript so we'll get this straight.

5 I handed her her statement.

6 "Okay, does that help refresh your
7 memory about whether she talked to you about her
8 will?"

9 Answer, "Yeah."

10 "Okay." And what did she tell you about
11 her will?"

12 "She said that" -- and this is page 18,
13 I'm sorry. "She said that -- she didn't say too
14 much, but she said that Glenn told her she had to."

15 "Had to do what now?"

16 "Sign a new will."

17 Question, "Okay. And how did she seem
18 to feel about it?"

19 Answer, "She didn't want to."

20 Question, "Okay. And your statement
21 says, 'Helen, I have no choice.'" Is that her
22 talking to you?

23 "Yeah, uh-huh."

24 So "I had no choice," I don't know how
25 to be more clear than that.

1 MS. WIMBERLY: And then I asked her,
2 page 35, at the bottom at line 24, "So earlier
3 Mr. Howe had to remind you about what it looks like,
4 a conversation you had about the will with
5 Ms. Gunnells. Do you remember that conversation?"

6 Answer, "No, I don't."

7 THE COURT: Thank you. I'm going to
8 deny the motion at this time. And tell me if you
9 want to take a break or if you want to have other
10 witnesses.

11 MS. WIMBERLY: Yes, Your Honor. We have
12 witnesses coming at 10:30. So if we can break until
13 then, that'll be great.

14 THE COURT: We'll break until then.

15 (At this time there is a brief break in the
16 deposition.)

17 MS. WIMBERLY: We have deposition of
18 Dr. Benton that was de bene esse. So I want to know
19 if it would-- we were just talking about whether or
20 not to read it in. If you just want to read it?

21 THE COURT: I'll just read it. You want
22 the entire deposition in?

23 MS. WIMBERLY: Yes.

24 THE COURT: Yeah, I can just read that.

25 MS. WIMBERLY: Well, I guess I'll hand

1 that up now then.

2 THE COURT: Okay.

3 (Respondent's Exhibit No. 8 is moved into
4 evidence.)

5 THE COURT: For the record, the full
6 name of the doctor?

7 A Dr. Rhonda Chanson, R-H-O-N-D-A,
8 C-H-A-N-S-O-N.

9 (At this time there is a brief break in the
10 deposition.)

11 MS. WIMBERLY: We are ready to proceed?

12 THE COURT: Thank you. Is that your
13 first witness?

14 MS. WIMBERLY: Yes, Your Honor,
15 Ms. Suzanne Klok.

16 (At this time, the witness, Suzanne Klok, is
17 called to the witness stand.)

18 - - - - -

19 THE COURT: Good morning. How are you
20 doing?

21 - - - - -

22 Whereupon, Suzanne Klok, having been first
23 duly sworn, testifies as follows:

24 - - - - -

25 THE COURT: Thank you. Please be

1 seated. And I'll have you state your full name for
2 the record.

3 A Suzanne LaFleur Klok.

4 THE COURT: Okay. For the record, can
5 you spell your middle and last name?

6 A My middle name is my maiden name,
7 Lafleur, L-A-F-L-E-U-R. My last name is Klok,
8 K-L-O-K.

9 THE COURT: If you'll answer questions
10 of Counsel, Ms. Wimberly.

11 MS. WIMBERLY: Thank you.

12 DIRECT EXAMINATION

13 BY MS. WIMBERLY

14 Q All right. Ms. Klok, thank you for
15 being here today. What is your occupation?

16 A I'm an attorney in Mount Pleasant.

17 Q How long have you been working as an
18 attorney?

19 A For 20 years.

20 Q What is your main practice area?

21 A It's changed over time. You know, when
22 I first started practicing I was briefly a tax
23 attorney for about nine months. Then I went into
24 plaintiff's work. I did that for probably over 10
25 years. But since 2009 my husband and I opened our

1 own law firm. We're a general practice. We do a
2 lot of different things. But primarily I focus
3 on -- I do some family law, I like to try to keep it
4 non-contested because I'm not a big fan of the court
5 room, so pardon me today. Just I did it for a lot
6 of years and I was ready to move on to something
7 different. I do real estate transaction work, I do
8 wills, I do simple estates and estates up to a
9 million dollars.

10 Q And prior to opening your own practice,
11 what firm did you work with?

12 A I worked with Motley Rice, and before
13 that it was Ness Motley.

14 Q And you understand why we are here
15 today?

16 A Yes. It's my understanding there's a
17 contest about the will for Helen Gunnells. I first
18 started -- Glenn came to me, I think, and I helped
19 him answer some pro se documents that were filed.
20 But I did tell him at the time he needed to find
21 another attorney because I felt there could be a
22 conflict if there is some issue about the will since
23 I drafted the will for Ms. Gunnells.

24 Q Okay. And let me direct your attention
25 back to you drafting the will for Ms. Gunnells.

1 A Okay.

2 Q About how many times did you meet with
3 Ms. Gunnells prior to drafting her will?

4 A I only met with her the day that we
5 drafted. And for drafting wills and having somewhat
6 elderly clients that I do, sometimes I go to their
7 house, or wherever they're -- if they're in assisted
8 living, or kind of those independent living centers,
9 or they come to my office. And a lot of times
10 because they are physically frail but not mentally
11 frail, they don't want to have multiple meetings.
12 So it really depends upon the individual client.

13 In this case with Ms. Gunnells, she came
14 on July 3rd, I looked at my records before coming
15 here today, because it was the day before the 4th in
16 2013, and we met, and it was a long meeting, though.
17 She was there probably for about three hours.

18 Q Do you remember that meeting?

19 A Yes. Actually I remember it very well
20 because it was a long meeting. Because as we
21 started going through things I asked her when she
22 wanted to execute. She wanted to do it that day,
23 and I said okay. So we -- I ended up drafting the
24 documents while she was there.

25 Q Who all was present at that meeting?

1 A My legal assistant, Annie Voytko.

2 Q Is she here today?

3 A Well, she did drop me off and she is
4 coming. She's parking the car.

5 Q Other than yourself and Annie, was
6 anybody present in the room while you were talking
7 to Ms. Gunnells and drafting the will?

8 A No. Our policy is that if someone
9 brings an elderly client or anyone with them, that
10 we ask them -- we meet in the conference room. But
11 we also ask them to leave the building, because
12 we're on Anna Knapp, 202 Anna Knapp, and our
13 conference room is in the front of the building.
14 But if someone sits outside in the lobby part, they
15 could theoretically hear, you know, if you were too
16 loud. So I always ask anyone who comes with the
17 person who is executing the will if they would leave
18 the building. And we did ask Glenn to leave.

19 Q So Mr. Gunnells, my client, who is in
20 the courtroom today, he was present with his mother,
21 Ms. Gunnells, that day?

22 A Yes, he dropped her off. And then --
23 oh, he came in. He sat down at the table and I
24 explained that he couldn't stay. Nothing against
25 him. But this needed to be Helen's decision. And

1 we asked him to leave -- you know, not to stay in
2 the room, just leave the building. And he did.

3 Q Was Mr. Gunnells okay with that?

4 A Yeah, he was fine. He said -- I don't
5 know if he brought the dogs or not, but he said
6 he'll just go out in the parking lot in the car with
7 the dogs.

8 Q Did he remain outside the entire time?

9 A As far as I know. I mean, I was in the
10 conference room so I couldn't come out. You know, I
11 was going out, going to make changes, or you know,
12 to the will, if I had a typo or something like that,
13 or sending Annie out. So we were back and forth and
14 we didn't see him.

15 Q Were you aware that there was a prior
16 will prior to this will that you drafted that was
17 executed in 2006?

18 A Yes, I was. I believe Helen brought
19 that to the meeting. She took it, yes.

20 Q And you were drafting a new will for
21 her. What changed between the will from 2006 to the
22 will of 2013?

23 A Well, we talked about the will. And her
24 husband had died and she said -- and they basically,
25 I interpreted it as they had "I love you" wills.

1 where they left everything to each other. And then
2 if they weren't survived then by their children,
3 that's my recollection, and -- but she wanted to
4 change that.

5 Q What specifically did she want to change
6 about that 2006 will?

7 A Well, she told me -- well, first, her
8 husband had passed away. And I said, well, you
9 don't have to do anything just because he passed
10 away, the will still works. But she said she didn't
11 want to keep it the same, that she wanted to give
12 everything to Glenn.

13 Q Do you remember discussing with her the
14 ramifications of leaving everything to one child?

15 A Yes, I did actually. And that's why I
16 think our meeting took so long, is because she was
17 really upset with her two daughters, Cathy and maybe
18 Belinda. And that she was unhappy with the way that
19 they were -- you know, she just didn't want to be
20 around them. There were some fights, I believe,
21 over her husband's property, and she was very
22 unhappy with the two daughters.

23 Q In your opinion, was Ms. Gunnells of
24 sound mind the day that she met with you to draft
25 her will?

1 A In my opinion. Now, it's not a medical
2 opinion. But we sit down and we chat. I asked
3 her -- you know, she knew what the date was. I
4 asked her who the president was, she said Obama. We
5 talked about things in general. And also when --
6 and Annie talked to her, too. So like if I went in
7 to go do something, I would just have either one of
8 us there, and if there was anything that we think
9 seems a little off, you know, either mentally or
10 that person might not really know what they want to
11 do, you know, then I would stop the meeting. But
12 throughout our discussion she was very frail
13 physically, but mentally, she seemed to know what
14 she wanted. She was pretty clear, very adamant
15 about it.

16 Actually I remember her saying that she
17 was very worried about Cathy causing problems for
18 Glenn after she died once she found out that the
19 will had been changed. And I did tell her she
20 didn't have to tell anybody what the will was, you
21 know prior to her death. She didn't have to tell
22 the girls if she didn't want to, or even Glenn. And
23 she knew that.

24 Q With regards to Glenn, did she speak at
25 all about her relationship with him?

1 A Yeah, she actually glowed when she
2 talked about him. It was very sweet. She was very,
3 very loving about Glenn. It was really in contrast
4 to how she spoke about her daughters, that for them
5 they were more -- it was disappointment, I think,
6 with the daughters. But she was very, very happy
7 that Glenn was taking care of her. And you know,
8 she said she couldn't get out and interact as much
9 as she did if it wasn't for Glenn. And that he
10 really was just, you know, wonderful of all the
11 things he did. And took great care of her.

12 Q So she said that Glenn actually took her
13 out to interact with other people?

14 A Yes. I don't really remember the --
15 well, she said -- the specifics, she said something
16 about like I think the senior center. And that, you
17 know, Glenn would, you know, take her. And he
18 brings her to her doctors' appointments and just
19 brought her around, where she wouldn't be able to
20 get out and do things if it wasn't for him.

21 Q Other than -- I think you said earlier
22 that Cathy might be upset about the will. Did she
23 express any other feelings about how her children
24 would react to this new will?

25 A Well, she definitely thought they

1 would -- I think she said they would cause a lot of
2 problems for Glenn. They thought they would cause
3 him a lot of trouble.

4 Q Have you ever had the occasion to meet
5 Ms. Cathy Harkness who is sitting right here in
6 black?

7 A Yes, I did once only after Helen had
8 passed, and I believe that Ms. Gunnells had filed
9 the papers and served the papers. I think she was
10 trying to see if we could come to some sort of --
11 you know, trying to figure out what was going on and
12 what to do to some kind of settlement, or if there
13 was a way to work things out. And then she came to
14 the office and asked, and we met. I don't remember
15 the date. And it was also dealing with some
16 discovery that had been issued. But we didn't
17 really get anywhere. We just spoke in general
18 terms. I think she said what she wanted to settle
19 on the estate and that was pretty much it.

20 Q Have you ever had the opportunity to
21 meet Ms. Belinda Davis who's sitting in the back in
22 the red?

23 A No. I don't think so, no. She does not
24 look familiar.

25 Q I'm recalling from evidence, I believe

1 it is Respondent's 1 which is the will.

2 Ms. Klok, I've just handed you what has

3 already been entered into evidence as Respondent's

4 1. Do you recognize that?

5 A Yes, I do.

6 Q What do you recognize that as?

7 A That this is the will that I drafted for

8 Helen Gunnells.

9 Q Are all the pages correct and in order?

10 A Yes.

11 Q With regards to wills, as you draft

12 wills on a regular basis, would you call this a

13 fairly standard will?

14 A Absolutely. This is the most standard.

15 It took very little time to actually draft this

16 because we spent so much of our time talking about

17 what she wanted and was she sure that's what she

18 wanted, kind of going over those sort of things that

19 it didn't take -- this is definitely the standard,

20 very standard will.

21 Q Did you go over each page with

22 Ms. Gunnells?

23 A Yes, I did. We went through every

24 section. Because even though we talk about things

25 generally, you know, about what she wants, we have

1 to explain how that translates to what is said on
2 the paper. So we went through, and that also took
3 time going through it since she was signing it that
4 day and not taking it away to look at and come back.

5 Q All right. I'll take that from you.

6 And then -- so you said you went over
7 each page. Is that indicated with these signatures
8 on the bottom?

9 A Yes, those initials. One is mine, one
10 is Annie and then one is Helen's. Now, I don't
11 always initial the wills, but I think because she
12 came in this day, that day to do it, and she had
13 expressed concern, and actually I didn't remember
14 that until I saw my initials. And I normally don't
15 initial the wills. But I believe I did that because
16 of her concerns about the will being -- you know,
17 problems with maybe one of the girls contesting it.

18 Q Okay. Thanks.

19 MS. WIMBERLY: Putting it back in
20 evidence, Your Honor. One moment, please.

21 THE COURT: Go ahead.

22 (At this time there is an off-the-record
23 conversation between Ms. Wimberly and Mr. Varnado.)

24 BY MS. WIMBERLY:

25 Q Ms. Klok, just a few more questions.

1 What kind of protocols do you have? I
2 know you spoke about it a little bit earlier with
3 some of your elderly clients.

4 A Well, generally, I have them come in and
5 have an initial meeting and we talk about the things
6 that they want, what their goals are. And then, you
7 know, talk about pricing and then set an
8 appointment -- you know, and take information down
9 and set up an appointment and come back later, for
10 them to come back and execute the wills in about,
11 you know, three weeks. But if they don't have a
12 deadline, then we do that.

13 But when I'm sitting down there either
14 the same day, or later, I really try to make sure
15 for all of my elderly clients at least -- I'm not a
16 doctor, but just to make sure that they're "with
17 it," you know. You know, that kind of layman's
18 test, if they know the year, the date, who the
19 president is, kind of what things generally are. I
20 don't go into specific politics, but just kind of
21 what's going on. I ask them about their life, their
22 kids, if they have any, their family. Kind of where
23 they're living, what they're doing, you know, how
24 their health is. You just kind of -- you just have
25 a real conversation that doesn't come across as an

1 interrogation, just so I get a sense of who they are
2 and what they want to accomplish.

3 And then if they come out and say what
4 they want, then that makes it really easy. But even
5 when they do that, I still talk to them if they say,
6 you know, they want to cut out a particular person.
7 Then I ask them why they want to do that. And you
8 know, like I say, there can be problems.

9 Q Did you follow this protocol that you
10 just spoke about in this case?

11 A Yes.

12 Q How did you follow those protocols?

13 A Well, when Helen came in it was that
14 day she was -- Glenn made the appointment, he
15 called. So we set up a block of time in the
16 conference room, I believe it was most of the
17 morning, but I can't really recall how long it was.
18 So we came in, we met Helen, said hi to Glenn. We
19 asked Glenn to leave because he couldn't stay. Sat
20 down and told Helen that whatever she wanted to do
21 was her decision and no one else's. And that just
22 because someone was living with her or brought her
23 there or any of her kids, she should not feel
24 pressured. That no one needed to know what the will
25 said until after she died, if she felt she'd be

1 pressured before she passed away. That was very
2 standard, we talked about that. And I asked her if
3 she felt any pressure from any of her kids in any
4 way to change her will. And she said no. And we
5 really just tried to make sure that's what she
6 wanted.

7 We did discuss -- she wanted to get it
8 done that day, and I made sure she -- that she
9 wanted to get it done that day. And she said yes.
10 Because, I think, you know, physical problems, she
11 didn't want to mess with having to come back to her
12 attorney's office to execute it. And I made sure
13 that she said that that's what she wanted.

14 Q And with regards to some of these
15 elderly clients, what kind of red flags are you
16 looking for that would alert you maybe to their
17 incompetency?

18 A Well, one thing I look for is if they
19 don't really kind of know what's going on. Like if
20 we're engaging in conversation, it's a two-way
21 street. So if I say something and they respond in a
22 way that makes me feel like they're understanding
23 the conversation, and if they don't, or if they kind
24 of gaze off or are not very engaged, then that's a
25 flag to me that there's a problem. And I've had

1 clients who have had that. And I've not done their
2 wills at that time because, you know, if they're
3 drifting, I like to call it, I'm not really sure
4 they know that's what they want. But we've had
5 clients who -- and it really has less to do with age
6 and more to do with capacity or the mental capacity.
7 I've had clients who were very frail physically and
8 in their 90s and I mean sharp as a tack. And then
9 I've had others who are younger, you know, in their
10 70s in better health, and just kind of didn't know
11 what was going on very well.

12 Q Did you get any feeling on the day that
13 Ms. Gunnells came in that she was unsure about the
14 disposition of her will?

15 A No. Actually she seemed very, very
16 sure, and that's one thing that struck me that I
17 still remember.

18 Q What would you have done if you had felt
19 that she was unsure?

20 A Well, I would have told her, you know,
21 in a nice way that I really couldn't finish it that
22 day and that she should take some time to think
23 about it, because you know, that was a big decision
24 to cut someone out of the will.

25 I error on the side of safety, you know,

1 in the sense is, if it's more inclusive, that's
2 great. But if it becomes less inclusive, then if I
3 see any hint of a hesitation, I those people to take
4 more time to think about it.

5 I do remember telling Helen, and I do
6 tell everyone, I said, though she made that will
7 that day, that day that we met, I said, you can
8 always change it. I said, you don't have to wait.
9 I mean, if you decide next week that that's not what
10 you want to do, just call me and we can change it.

11 Q Did Ms. Gunnells ever call you to change
12 the will?

13 A No, she did not.

14 MS. WIMBERLY: One moment, Your Honor.
15 (At this time there is an off-the-record
16 conversation between Ms. Wimberly and Mr. Varnado.)

17 BY MS. WIMBERLY

18 Q Were there any red flags -- I know we
19 spoke about competency earlier, but any red flags
20 with regards to undue influence? Anything that you
21 saw that maybe you remember in regards to that?

22 A Well, you know, I remember from -- I'm
23 not there outside of our meeting, so I can't really
24 speak to what happens outside of our meeting. But I
25 do know when I asked her if she -- because she

1 really raved about Glenn a lot. And I said, you
2 know, just because Glenn's so great doesn't mean
3 that you need to give him everything. I said, just
4 because he's helping you doesn't mean you have to
5 feel like you have to give it all to him.
6 And she said actually that wasn't the
7 reason, it was more she didn't want to give it to
8 her daughters. And so that to me where, you know, I
9 might have said, oh, maybe there was some undue
10 influence of -- all she talked about was how great
11 he was. You know, this is me just speculating in my
12 mind at the time. But when she told me her
13 rationale for it wasn't related to how great Glenn
14 was and she loved him, but it was more how she was
15 disappointed with her daughters.

16 MS. WIMBERLY: Your Honor, I have no
17 further questions.

18 THE COURT: Thank you. Mr. Howe.

19 CROSS-EXAMINATION.

20 BY MR. HOWE:

21 Q Ms. Klok, my name is Donald Howe. I
22 just have a few things. Your initial contact with
23 the Gunnells family was really through Glenn,
24 correct?

25 A Yes, that's correct.

1 Q You had done a closing on his house?

2 A That is correct.

3 Q And that was not long before this?

4 A Yeah. It was the same year, within a
5 couple of months. I'm not really sure of the date.
6 I didn't look at that before coming.

7 Q And you didn't bring your file with you?

8 A No.

9 Q I think that's it. You tell me?

10 A Yeah. I mean this looks like one that I
11 do, yes.

12 Q What was the date on it?

13 A This was June 7th, 2013.

14 Q So a little less than 30 days?

15 A Yes.

16 Q Okay. And Glenn called and made the
17 meeting, set up the appointment?

18 A Yes. He called and he said that he
19 wanted -- his mom wanted to redo her will and he
20 knew through the closing that I also do wills. And
21 I said okay.

22 Q And he drove her there?

23 A Yes.

24 Q And she was frail?

25 A Yes.

1 Q And frail enough physically to concern
2 you?

3 A Not concern me, just that I remarked on
4 it. She was physically frail.

5 Q It was noticeable?

6 A Right, it was noticeable.

7 Q You also helped Glenn with some of the
8 probate process?

9 A Yes, after his mom passed away.

10 Q Right. And you were also aware of a
11 lawsuit that was filed later that contested the
12 will?

13 A Yes. It was confusing. I was -- yes.

14 If I can say --

15 Q I'm just saying. You've got the suit --
16 that's when you said I may have a conflict?

17 A Right, exactly. I said, I may have a
18 conflict because I wasn't quite sure what they were
19 asking, but I knew it looked like there could be a
20 problem.

21 Q Right. And so as long as -- and I'm
22 sort of thinking it out with you -- as long as
23 you're just helping with administerial things in the
24 estate, no problem.

25 A Right.

1 Q When the petition comes up challenging
2 the will, that's where you've got to step back a
3 little?

4 A Exactly.

5 Q So you saw her one time?

6 A Yes.

7 Q Strictly professional?

8 A Yes.

9 Q Limited purposes for this will?

10 A Yes.

11 Q The meeting was at your office?

12 A Yes.

13 Q Glenn brought her?

14 A Yes.

15 Q Glenn took her home?

16 A Yes.

17 Q Did you give her a copy of the will?

18 A Yes. I mean, I gave her the original.

19 We don't keep the -- I mean, we have a copy at our
20 office, we don't keep the original.

21 Q Right. Did not follow your normal
22 protocol of several weeks?

23 A No, that's not correct. I have
24 different protocols. I have often sometimes clients
25 also want to do it the same day, and I also do that,

1 but I have a different set of protocols when they
2 want to do it the same day.

3 Q But you saw her one time?

4 A Yes.

5 Q Do you remember if it was morning or
6 afternoon?

7 A I want to say it was midday. I know it
8 would have had to be -- that's not true. I think it
9 was in the morning, but I really don't recall. I
10 don't want to say. Actually, I don't know.

11 Q That's fine. Let me hand you -- do you
12 recognize what that is?

13 MS. WIMBERLY: Your Honor, I'm going to
14 object to this. This is irrelevant. We are here
15 for the will contest. The PR of the estate, it's
16 already been fully tried by Your Honor. So any
17 questions about the administration of the estate is
18 completely irrelevant. We're here for the will
19 contest.

20 THE COURT: Irrelevance.

21 MR. HOWE: Whether it tells the truth,
22 it's a notarized document, it's false.

23 MS. WIMBERLY: That's, well then, lack
24 of personal knowledge, because this was a document
25 that was prepared by Mr. Gunnells and not Ms. Klok.

1 THE COURT: Let me hear the questions
2 and let's go from there.

3 MR. HOWE: I think it's part of The
4 Court's file, and I'm going to ask The Court to look
5 at its entire file. It's already been introduced or
6 made part of the record by Mr. Gunnells as to what
7 he filed.

8 THE COURT: Okay.

9 BY MR. HOWE

10 Q Okay. Tell me what the document is.

11 A Well, it says it's Inventory and
12 Appraisement.

13 Q Tell me briefly, I know we know it, but
14 for the record, what's an inventory and
15 appraisement?

16 A It just says what the value of the
17 property of the estate, reporting that to the Court.

18 Q And it has different categories for
19 different kinds of property?

20 A Yes.

21 Q Okay. And if the decedent had had a
22 bank account open at the time of her death, it
23 should have been reported?

24 MS. WIMBERLY: Objection, relevance, and
25 also lack of personal knowledge and speculation. I

1 mean, there's so many things that are wrong with
2 this line of questioning.

3 BY MR. HOWE

4 Q I'll ask it a little bit different.

5 You're a lawyer, you do probate law?

6 A Yes, I don't do a lot of probate
7 administration, I do a lot of execution of wills and
8 estate planning, but I do some probate
9 administration.

10 Q Okay. And look at Schedule C, what does
11 it say?

12 A It says, "List all bank accounts owned
13 by the decedent alone or as tenants in common,
14 checking, savings, CD, money market, brokerage, en
15 dowment (sic), bonus, cash award, final paycheck,
16 cash on hand, notes payable to descendants, survival
17 action proceeds. If none, so state. List such
18 account, institution last two digits if jointly
19 owned with rights of survivorship you may list in
20 Schedule E."

21 Q So if there had been a bank account, it
22 should have been put on that?

23 A Well, Schedule E is optional. So if it
24 was a bank account that was payable on death.

25 THE COURT: I think you were confused by

1 the question. He was asking about the Schedule C.

2 A Yeah, on --

3 Q On Schedule C, she could have had a bank
4 account in her name?

5 A In her own name, only in her name, yes,
6 it should be there.

7 Q Okay. And look at F, that's personal
8 property, right?

9 A Yes.

10 Q It says, "Personal property including
11 household goods and furnishings, vehicles."
12 Correct?

13 A Yes.

14 Q So if she had some, it should have been
15 listed, shouldn't it?

16 A Yes.

17 Q Who -- do you recognize the person, the
18 name of the person who notarized this?

19 A Yes, it's Annmarie Voytko, who is my
20 paralegal.

21 Q Okay. And this was actually sent to the
22 Probate Court by your office, wasn't it?

23 A Yeah, I think Glenn came by and he
24 already had it filled out and Annie notarized it and
25 then we sent it in.

1 Q Okay. Thank you. Now, the personal
2 representative of the estate, their job is to
3 protect the assets of the estate, right?

4 MS. WIMBERLY: Your Honor, relevance. I
5 don't understand why we're talking about this.

6 THE COURT: Mr. Howe, that came up in
7 the earlier hearing.

8 MR. HOWE: Yeah. I think it's relevant
9 here.

10 THE COURT: Okay.

11 MS. WIMBERLY: But it really isn't, Your
12 Honor. What we need to stick to is a certain
13 timeframe, and also it's an improper witness to get
14 this evidence in through. If Mr. Howe wants to
15 impeach my witness, he can do it all day. But this
16 is -- not through Ms. Klok.

17 THE COURT: Your client's firm completed
18 the document. Let me see where the question goes
19 and then we'll go from there.

20 MR. HOWE: The relevance is this. This
21 fella had a fiduciary relationship with the momma,
22 okay? He had a fiduciary relationship with the
23 court when he took on the personal representative.
24 We know he didn't pay any attention, or I believe
25 that she will show or set up the fact that he didn't

1 follow fiduciary relationship with the court.

2 Because when he sold the house, according to his own
3 testimony, he put all the money in his personal
4 account, knowing that there was a lawsuit pending.
5 That shows a pattern of behavior.

6 THE COURT: Okay.

7 MS. WIMBERLY: We've already talked
8 about all that in the previous hearing, Your Honor.
9 That goes to something completely different than
10 what we're here about today. What has been asserted
11 is undue influence. It's nothing about what
12 Mr. Gunnells did or did not do after the
13 administration of the estate.

14 THE COURT: I'm going to allow the
15 question, just continue and we'll see where it goes.

16 BY MR. HOWE

17 Q Personal representative has a duty to
18 the estate?

19 A Yes.

20 Q They're not there for themselves,
21 they're there for the estate?

22 A That's correct.

23 Q Okay. And part of that duty is to
24 preserve the assets for the estate until the court
25 decides what happens to the assets?

1 A That's correct.

2 Q You got a copy of a lawsuit that said
3 this will was going to be contested?

4 A Yes.

5 Q You got it from Mr. Gunnells?

6 A I don't exactly remember, but I did
7 receive it, yes.

8 Q Okay. And do you remember about -- that
9 was in August; do you remember that?

10 A Vaguely. I mean, I can't give you the
11 dates. But if you say I got it, I mean, I'm sure I
12 got it.

13 Q I want you to assume for a minute that
14 the case was filed in August.

15 A Okay.

16 Q Okay? That the house which is reflected
17 as the sole asset in the inventory and appraisement
18 that you filed, okay, was sold in December?

19 A Yes.

20 Q Was he free to spend that money on
21 whatever he wanted?

22 A Well, I was not representing him. I
23 mean, I conflicted out.

24 Q I understand. I'm asking you, is it
25 your opinion as a lawyer who practices in the

1 probate court, do you believe that he was doing his
2 fiduciary duty if he took the money from the sale of
3 the house knowing that there was a lawsuit disputing
4 the will and putting it in his personal account?

5 A In my opinion, the proper thing to do
6 would be to put it in an estate account.

7 Q Fair enough. You certainly never told
8 him it was okay to do that?

9 A No. He did not ask me, nor did I tell
10 him that.

11 Q Hang on one second.

12 Was it my understanding that it was at
13 the closing that Glenn asked you if you did wills?

14 A You know, throughout the process. The
15 closing isn't just one day, you know, we gather
16 documents, we talk, and it just came up, what else
17 do you do? We're just chatting.

18 Q So that was at the closing involving
19 his...?

20 A It was either at the closing or before
21 the closing -- at, during, you know, in that
22 process. That's how I met Glenn, was through his
23 closing of the property.

24 Q Thanks.

25 MS. WIMBERLY: Thank you, Ms. Klok. I

1 don't have any more questions for you.

2 THE COURT: I have a question for you.

3 Did you do any other estate planning documents, or

4 was it just -- did you do a healthcare power of

5 attorney or living will?

6 THE WITNESS: It was just the will. She

7 told me she had her other documents. I mean, I know

8 she had a power of attorney. I don't recall -- I

9 didn't look at my file before I left. I don't know

10 if I did a living will or a healthcare power of

11 attorney. I just don't remember. With those, I do

12 at no cost because you can get the forms off the

13 Internet. So if the client doesn't have it, then we

14 do it.

15 THE COURT: Okay. And did you -- I

16 guess when you gave her the will, some attorneys put

17 it like in a sealed envelope. Or did you give it

18 loose? What's your customary practice?

19 THE WITNESS: Generally we do -- we have

20 blue backs and we put it in there and then we put in

21 an envelope and give it to the client.

22 THE COURT: Not in a sealed envelope?

23 THE WITNESS: No sealant, no.

24 THE COURT: Okay. And I guess you

25 didn't have time to do like an estate analysis,

1 checklist of what she owned and how it was owned?

2 THE WITNESS: No. She just -- and I
3 explained to her, you know, because she was doing
4 kind of a global will of just -- she wanted to give
5 everything. And I said, you know, what does that
6 entail? Generally we talked about her house and I
7 guess checking accounts and things like that, and
8 whatever she owned. I do believe I provided her
9 with a blank sheet where you could write out if you
10 wanted to give particular personal items to
11 individuals, you could sign and date and fill that
12 in. And that was blank with her name preprinted.
13 And I give several copies in case they want to tear
14 it up and want to do a different one, or you know,
15 whatever, throughout time.

16 THE COURT: And I believe I saw in the
17 file somewhere that there was a doctor statement.
18 Did you engage a doctor at all to check her
19 capacity?

20 THE WITNESS: No, I did not.

21 THE COURT: Let me ask counsel if they
22 have any other questions for this witness?

23 MS. WIMBERLY: No, Your Honor.

24 MR. HOWE: Nothing, Your Honor.

25 THE COURT: Thank you.