

STATE OF SOUTH CAROLINA  
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS  
ELEVENTH JUDICIAL CIRCUIT

2017-ES-32-0286  
2018-CP-32-0315

IN RE: The Estate of Leroy Fulmer

Mattie Lou Fulmer,  
Plaintiff,

vs.

Elizabeth S. Gainey, as PR, Elizabeth S.  
Gainey, Individually, and Dennis C. Gainey

Defendants.

ORDER

**RECEIVED**  
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SC Court of Appeals

INTRODUCTION

This matter comes before the Court upon Defendant Elizabeth S. Gainey’s (“Defendant” or “Mrs. Gainey”) Motions for Summary Judgment filed on August 15, 2019, and upon Mrs. Fulmer and Mrs. Gainey’s Motions for Rent filed on June 26, 2019 and August 15, 2019 respectively.<sup>1</sup> Mrs. Gainey, as Personal Representative,<sup>2</sup> brought a summary judgment action seeking to dismiss Plaintiff Mattie Lou Fulmer’s (“Plaintiff” or “Mrs. Fulmer”) complaint in its entirety. Mrs. Gainey, individually, brought a motion for Summary Judgment seeking a finding that Mrs. Fulmer and her daughter, Mrs. Gainey’s aunt, Lynn Tribble (“Ms. Tribble”) are liable to Mrs. Gainey for the tort of conversion related to funds removed by Mrs. Fulmer from a joint bank account she owned with her husband prior to her husband’s death. As set forth below, there exist

<sup>1</sup> Mrs. Gainey filed a Motion for Summary Judgment as Personal Representative and Individually and a second Motion for Summary Judgment as to Conversion just as Personal Representative. In the interest of efficiency and judicial economy, both Motions are addressed in this Order.

<sup>2</sup> On October 17, 2018, this Court removed Mrs. Gainey as Personal Representative of Leroy Fulmer’s Estate and appointed Carlos Gibbons to serve as Special Administrator. Eventually the Court agreed to reinstate Mrs. Gainey as Personal Representative along with Carlos Gibbons continuing to serve as Special Administrator.

numerous questions of fact such that summary judgment is not appropriate. For this reason, the Court denies both Motions for Summary Judgment.

### **FACTUAL BACKGROUND**

Leroy and Mattie Lou Fulmer (“the Fulmers”) were married for 58 years at the time of Mr. Fulmer’s death on February 15, 2017. On April 29, 2010 the Fulmers executed mirror image wills, which made one another full beneficiary of each other’s estate. On November 23, 2015, the Fulmers again executed mirror image wills leaving their entire estate to the survivor of the two of them and divided the remainder between their two daughters and granddaughters at the last survivor’s death. The terms of the November 2015 will are almost identical to the terms of the earlier will dated April 2010, whereby Mr. Fulmer left his entire estate to his wife, Mrs. Fulmer.

As both Leroy and Mattie Fulmer aged, they began experiencing more serious health problems. Their grand-daughter, Mrs. Gainey, became more involved in assisting them in various facets of life. Although, she had assisted the Fulmers in the past with their checks and other financial matters, in December 2015 the Fulmers asked Mrs. Gainey to formally assist them with their finances. In order to facilitate her assistance, the Fulmers included Mrs. Gainey as a signer on their bank accounts, CDs, and Safety Deposit Boxes. *See Affidavit of Elizabeth Gainey dated August 14, 2018.* The only reason Mrs. Gainey was listed on the Fulmer’s financial accounts was to manage their accounts. *See Affidavit of Elizabeth Gainey ¶¶ 6 and 9.* Mrs. Gainey described the arrangement as follows, “[Mr. Fulmer] and [Mrs. Fulmer] kept their checking account at South State Bank (then South Carolina Bank and Trust). In December of 2015 they added my name to the account so I could manage the account and pay bills.” *Id.* There was no intent at the time Mrs. Gainey was added to the bank accounts for her to receive money from those bank accounts. *See Elizabeth Gainey Deposition, pp. 50-51 ll. 23-2.* In fact, Mrs. Gainey described the purpose for

adding her to the Fulmers' bank accounts as a "safety precaution." *Id. at pp. 51, ll. 4-6.* However, Mrs. Gainey apparently transferred \$14,000 from the Fulmers safety deposit box and other sources,<sup>3</sup> to her own, private account.

In the Spring of 2016 Mr. Fulmer suffered from congestive heart failure as well as idiopathic pulmonary fibrosis, which is a lung disorder. *Id. at pp. 51-52, ll. 14-12.* Mrs. Fulmer also had health difficulties in the Spring of 2016 including a knee issue that caused her difficulty for years and ultimately required surgery. *Id. at 52-53, ll. 13-23, p. 54, ll. 3-10.* Throughout this time, Mrs. Gainey assisted the Fulmers with their doctors' appointments and medical needs. *Id. at 53, ll. 1-25.*

In May 2016, Mr. Fulmer's health had deteriorated to the point that he agreed to accept hospice care. During his May hospital stay, Mr. Fulmer named Mrs. Gainey as his health care power of attorney ("POA"). *See May 2, 2016 Power of Attorney.* Mr. Fulmer named Mrs. Gainey following a conversation with a palliative care worker who asked if he named a health care POA. Shortly thereafter, Mr. Fulmer returned to his home with a hospital bed set up in the den.<sup>4</sup> Upon return, Mr. Fulmer required assistance in every facet of his life, and was described by hospice as a "maximum assist." *See Debbie Sawyer Deposition, p. 20, ll. 8-20.*

On June 22, 2016, Mrs. Fulmer, being aware of a transfer of funds from the Fulmers' account to Mrs. Gainey's personal account, and of the continuously deteriorating relationship

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<sup>3</sup> The Court notes that Mrs. Gainey was unable to recall where she received a substantial amount of the \$14,000 from, however she does recall that between six and seven thousand dollars were transferred from the Fulmers' safety deposit box at First Citizens Bank.

<sup>4</sup> There are, not surprisingly, conflicting accounts over several of the encounters between the parties in this matter after Leroy Fulmer went into hospice. The parties have stipulated that videos exist detailing exchanges between the parties regarding Mr. Fulmer and the overall circumstances of this matter, however these videos have yet to be produced to the Court.

between the parties, transferred the remaining balance of the Fulmers' joint bank accounts into an account held solely in her name. *See Bank Statements.*

On June 30, 2016, Leroy Fulmer executed a new Durable POA ("DPOA"), naming Mrs. Gainey his POA, and naming Dennis Gainey as substitute POA. In doing so, he revoked his previous DPOA that named his wife as POA. *See Leroy Fulmer Durable Power of Attorney.* Later that day, Mr. Fulmer signed a Quitclaim deed which immediately granted him a life estate in his real property holdings, with full a remainder to Elizabeth Gainey. *See Quit-Claim Deed.* The real estate holdings conveyed included: (1) ½ undivided interest of 18 acres of land owned jointly with his wife and on which their marital home was located; (2) all interest in a 48 acre tract; (3) all interest in a 3.8 acre tract; and (4) all interest in a 0.13 acre tract. *Id.*

Thereafter, on October 14, 2016, Mr. Fulmer revoked his previous wills and executed a new last will and testament. While the real estate holdings were previously conveyed by Mr. Fulmer to Mrs. Gainey via Quitclaim deed, this updated Will designated Elizabeth Gainey as his estate's personal representative ("PR"), with Dennis Gainey designated as a substitute PR. *See October 2016 Will.* In addition, Mr. Fulmer altered the previously documented disposition of his estate by leaving personal and household effects to Mattie Fulmer (in absence of a memo stating otherwise), and a 1/3 interest in the residue of his estate. *Id.*

It appears that both the subject will and the June 2016 deeds and POAs, were drafted by Attorney Henrietta Gill at Dennis Gainey's request and direction. *Henrietta Gill Deposition, p. 65, ll. 8-10, p. 24 ll. 17-23.* When asked how she knew what to put in the DPOA and what to put in the deeds, Gill testified, "because Dennis told me." *Id. pp. 24-25, ll. 17-2.* Leroy Fulmer died on February 15, 2017: Four (4) months after executing the new will designating Elizabeth and Dennis Gainey as PR and Substitute PR respectively; and Six and a half months (6.5) after executing a

DPOA designating Elizabeth and Dennis Gainey as Agent and Substitute Agent; and while contemporaneously deeding his agent his real estate holding.

On February 24, 2017, Mrs. Gainey filed an Application for Informal Probate of Will and Appointment in probate court, and was appointed PR on March 2, 2017. On October 11, 2017, Plaintiff filed the instant action to set aside the October 2016 will as well as the June 2016 deeds or real estate due to undue influence, as well as other relief. This case was removed to circuit court by the request of the parties on January 23, 2018. Elizabeth Gainey, as PR and individually, brought a separate action on December 28, 2018 alleging claims for conversion and civil conspiracy.

#### **STANDARD OF REVIEW**

Summary judgment shall be rendered if the discovery “show[s] that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.” Rule 56(c), SCRPC. In ascertaining whether any triable issue of fact exists, the evidence and all inferences that can reasonably be drawn from the evidence must be viewed in the light most favorable to the nonmoving party. *Belton v. Cincinnati Ins. Co.*, 360 S.C. 575, 578 (2004). In order to withstand a motion for summary judgment in cases applying the preponderance of the evidence burden of proof, the non-moving party is only required to submit a mere scintilla of evidence. *Hancock v. Mid-South Mgmt Co., Inc.*, 381 S.C. 326, 330, 673 S.E.2d 801, 803 (2009). In cases requiring a heightened burden of proof, the non-moving party must submit more than a mere scintilla of evidence to withstand a motion for summary judgment. *Id.* at 330—31, 673 S.E.2d at 803.

For purposes of these Motions, the claim of undue influence requires a heightened burden of proof – requiring unmistakable and convincing evidence, such that there must be more than a

mere scintilla of evidence in order to defeat a motion for summary judgment. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 218, 578 S.E.2d 329, 334 (2003).

In this case there are multiple issues of material and disputed facts exist such that summary judgment is not proper. If the disputed issues are viewed in the non-moving party's favor, in this case Mrs. Fulmer and Ms. Tribble, at a minimum a triable issue exists and summary judgment is not appropriate.

### ANALYSIS

#### 1) *Undue Influence*

The focal issue to this dispute is whether Leroy Fulmer executed property deeds and a testamentary will as a result of undue influence. The parties' disagreement on this issue is stark.

In 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. *In re Estate of Cumbee*, 333 S.C. 664, 671, 511 S.E.2d 390, 394 (Ct. App. 1999). A mere showing of opportunity or motive does not create an issue of fact regarding undue influence. *Id.* The issue of undue influence should be resolved in the light of the proposition that a sane testator has the right to dispose of his property as he chooses. *Harris v. Berry*, 231 S.C. 201, 205, 98 S.E.2d 251, 253 (1957). The mere influence of affection and attachment, or the mere desire of gratifying the wishes of another, will not vitiate a testamentary act unless that act was the result of coercion or importunity beyond the testator's power to resist. *Id.* 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." *Macaulay v. Wachovia Bank of S.C., N.A.*, 351 S.C. 287, 299, 569 S.E.2d 371, 378 (Ct.App.2002); *In re Estate of Anderson*, 381 S.C. 568, 574, 674 S.E.2d 176, 179 (Ct. App. 2009).

A Will contest based on alleged undue influence is most often adjudicated on the basis of circumstantial evidence. *In re Last Will & Testament of Smoak*, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985). Our Supreme Court has recognized that “by the very nature of the case, the evidence of undue influence will be mainly circumstantial. It is not usually exercised openly so it can be directly proved.” *Byrd v. Byrd*, 279 S.C. 425, 427, 308 S.E.2d 788, 789 (1983). However, the circumstantial evidence must point unmistakably and convincingly to the fact that the mind of the maker was subject to that of some other person so the will is that of the latter and not of the former. *Id.*; *Cumbee*, 333 S.C. 664, 672, 511 S.E.2d 390, 394 (Ct. App. 1999).

Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship. *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). Whether a fiduciary relationship exists between two people is an equitable issue for the judge to decide. *Hendricks v. Clemson Univ.*, 353 S.C. 449, 458–59, 578 S.E.2d 711, 715 (2003). A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence. *Cumbee*, 333 S.C. at 672, 511 S.E.2d at 39 (Ct. App. 1999); *Regions Bank v. Schmauch*, 354 S.C. 648, 670, 582 S.E.2d 432, 444 (Ct.App.2003); *Redwend Ltd. P'ship v. Edwards*, 354 S.C. 459, 476, 581 S.E.2d 496, 505 (Ct.App.2003); *Moore v. Moore*, 360 S.C. 241, 250, 599 S.E.2d 467, 472 (Ct. App. 2004). Where contesters of a deed present evidence of a confidential relationship between a grantor and grantee a presumption of invalidity arises, shifting the burden of proof to the grantee to rebut it. *Howard v. Nasser*, 364 S.C. 279, 286-7, 613 S.E.2d 64, 67-8 (Ct. App. 2005); *Hudson v. Leopold*, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986); *Middleton v. Suber*, 300 S.C. 402, 405, 388 S.E.2d 639, 641 (1990). The presumption of

invalidity in deed cases also applies to will cases. *Nasser*, 364 S.C. 279, 287, 613 S.E.2d 64, 68 (Ct. App. 2005); *Dixon v. Dixon*, 362 S.C. 388, 398 n. 7, 608 S.E.2d 849, 854 n. 7 (2005).

In the case at hand, Plaintiffs seek to set aside both the operative will and quitclaim deed executed (4) and (6.5) months prior to Leroy Fulmer's death respectively. Here, Mrs. Gainey became Mr. Fulmer's durable power of attorney on June 30, 2016 establishing a fiduciary relationship. Both Elizabeth and Dennis Gainey (as POA and Substitute POA) obtained immediate benefit from the quitclaim deeds executed on the same day as the DPOA. Under *Nasser* (and various other cases) the quitclaim deed is presumed invalid due to the existence of the confidential or fiduciary relationship between Mrs. Gainey and Mr. Fulmer.

The same presumption would apply to the October 2016 Will, executed under the direction and dictation of the substitute POA and PR, Dennis Gainey, four months prior to Mr. Fulmer's death. Further, all of these events occurred under the shadow of asserted efforts to deny Mrs. Fulmer access to Mr. Fulmer, and even control his medical treatment to the concern of at least one nurse or social worker. These new iterations substantially altered the previously planned testamentary disposition to Mrs. Fulmer. The court notes that there is evidentiary support for arguments asserted by both parties regarding undue influence, but the court finds that there is more than a scintilla of evidence present in the light most favorable to the nonmoving party, and as such Defendant's Motion for Summary Judgment as to Undue Influence is denied.

## 2) *Conversion*

Mrs. Gainey, as Personal Representative, filed an action against Mrs. Fulmer and Ms. Tribble on December 28, 2018 alleging a cause of action for conversion and civil conspiracy. On August 15, 2019, Mrs. Gainey, as Personal Representative, filed a Motion for Summary Judgment only as to the conversion claim. With regards to the conversion claim, Mrs. Fulmer and Ms.

Tribble's initial argument against summary judgment of the conversion claim is that it is premature to decide this issue at this point, and the Court is inclined to agree.

If Mrs. Fulmer is successful in her claims to set aside Mr. Fulmer's 2016 Will as void, she will be the sole beneficiary of Mr. Fulmer's Estate based upon his November 23, 2015 Will. Thus, it becomes a moot issue as to whether or not the money should be replaced into Mr. Fulmer's Estate. In the interests of judicial economy, this issue is better left to the conclusion of the Undue Influence matter.

3) *Motions for Rent and Contribution*

Mrs. Fulmer filed a Motion for Rent on June 25, 2019 seeking payment of \$100 per month for the space on which the mobile homes are located, which is jointly owned by Mrs. Fulmer and Mrs. Gainey. Mrs. Gainey filed a countermotion seeking contribution for the joint property expenses and rent for the house on jointly owned property on August 15, 2019.

Much in line with the analysis of the Conversion claim, the Court believes this issue is not yet ripe for judgment, and accordingly in the interest of judicial economy, this issue is better left to the conclusion of the Undue Influence matter.

4) *Intentional Interference with an Inheritance*

Plaintiff brought a claim for Intentional Interference with an Inheritance, claiming that Defendant interfered with Plaintiff's valid expectancy of inheritance. Defendants argue that South Carolina does not recognize a cause of action for tortious interference with inheritance and cite *Malloy v. Thompson* for this position. However the *Malloy* decision is not so simple. In *Malloy*, the plaintiff brought a claim for intentional interference with an inheritance against Morgan Stanley. *Malloy v. Thompson*, 409, S.C. 557, 560, 762 S.E.2d 690 (2014). The circuit court denied Morgan Stanley's motion to dismiss the claim. *Id.* The Supreme Court found that Morgan Stanley

had not properly preserved an argument that South Carolina did not recognize a claim for tortious interference with an inheritance and thus upheld the circuit court's denial of Morgan Stanley's motion to dismiss this cause of action – thus allowing the intentional interference with an inheritance claim to continue. *Id.* The Supreme Court specifically noted, that because the claim that South Carolina did not recognize a tortious interference with an inheritance cause of action, the *Malloy* decision should not be read as, “either adopting or rejecting the tort of intentional interference with an inheritance.” *Id.* at 561.

Additionally, Defendants cite to *Douglas ex rel. Louthian v. Boyce* for further support that South Carolina does not recognize the tort of intentional interference with an inheritance. Defendants again misconstrue the holding. The Court in *Douglas* found that they “need not decide whether to recognize” the tort of intentional interference with inheritance; the Court did not acknowledge a refusal of the tort. *Douglas ex rel. Louthian v. Boyce*, 344 S.C. 5, 542 S.E.2d 715 (2001).

So, while it is true that there is no specific case where the South Carolina Supreme Court specifically recognizes the tort of intentional interference with an inheritance, in *Malloy* at least, the Supreme Court did not strike it down but allowed it to go forward.

Further, another appellate decision noted the existence of a claim for intentional interference with an inheritance claim, but did not comment further to indicate that such a claim is not valid in South Carolina. See *Fulmer v. Cain*, 380 S.C. 466, 471, 679 S.E.2d 652, 655 (2008) (Toal, C.J., concurring). In fact, to the contrary, the Supreme Court allowed the claim of intentional interference with an inheritance claim to proceed. *Id.*

More recently, the U.S. District Court of South Carolina provided a detailed analysis of this cause of action, and ultimately reached an opinion of how the State Supreme Court would

approach it. In citing S.C. Supreme Court Dicta, the Restatement of Torts, 774B, relevant treatises, and recent pronouncements of general rules and policies by the state's highest court, the District Court "predicts that the South Carolina Supreme Court would recognize the tort of intentional interference with inheritance." *Wellin v. Wellin*, 135 F. Supp. 3d 502, 516 (D.S.C. 2015).

In another significant point set forth in its analysis, the District Court found that the South Carolina Supreme Court would likely "restrict this tort to cases where the Plaintiff has no adequate remedy at probate." *Wellin v. Wellin*, 135 F. Supp. at 517. In explaining their reasoning the District Court provided:

Moreover, without this restriction, the tort would conflict with South Carolina's legislative preference for adjudicating estate-related claims in probate court as evidenced by S.C. Code Ann. § 62-1-302, which grants probate courts "exclusive original jurisdiction over all subject matter related to ... estates of decedents."

In light of these considerations, the court finds that South Carolina courts would not permit plaintiffs to bring a cause of action for intentional interference with inheritance where an adequate remedy exists at probate.

*Id.* at 518.

Thus, in conclusion, it cannot be said that South Carolina does not recognize a cause of action for tortious interference with inheritance. Rather, it appears that the Supreme Court has not been inclined to dismiss such a cause of action, and further, it appears the District Court finds the Court would adopt the cause of action.

The facts and allegations as described above, including Dennis Gainey's procurement of the legal documents from Mr. Fulmer and evidence of Dennis and Elizabeth Gainey's undue influence over Mr. Fulmer raise questions sufficient to survive a motion for summary judgment as to the claim for intentional interference with an inheritance.

However, this finding does not preclude this Court at the directed verdict stage from finding that an adequate remedy exists in the probate court, thereby negating the need to submit this cause of action to the factfinder.

5) *Breach of Fiduciary Duty*

The Plaintiff alleges a Breach of Fiduciary Duty arising out of the actions taken by Mrs. Gainey following her appointment as an authorized signer to the Fulmers' bank accounts and safety deposit boxes for the purposes of managing and paying the Fulmers' bills and expenses. Defendant argues that no fiduciary relationship existed where she was appointed as an alternate attorney-in-fact during the period when the alleged breach of fiduciary duty occurred.

“To establish a claim of breach of fiduciary duty, the plaintiff must prove (1) the existence of a fiduciary duty, (2) a breach of that duty owed to the plaintiff by the defendant, and (3) damages proximately resulting from the wrongful conduct of the defendant.” *RFT Mgmt, Co, v. Tinsley & Adams L.L.P.*, 399 S.C. 322, 335-36, 732 S.E.2d 166, 173 (2012).

There is evidence that Mrs. Gainey removed \$14,000 from the Fulmers' joint bank account and placed those funds into a private account in her name. This action, in conjunction with a deteriorating relationship between the parties, apparently caused a chain reaction whereby Mrs. Fulmer took steps to remove the remainder of the Fulmers' funds from Mrs. Gainey's reach by transferring \$241,366.77 from the joint account to her own account—which is itself the subject of the conversion claim *supra*. The Court is unpersuaded by Defendant's argument that because Defendant was appointed only as a secondary attorney-in-fact, no fiduciary relationship existed. According to the understanding of a fiduciary relationship outlined in *Cumbee, supra*, a fiduciary relationship was created when Mrs. Gainey was appointed as an authorized signer to the Fulmers' bank accounts. This appointment placed upon Mrs. Gainey a special confidence and put her in a

particular position of trust as to the Fulmers; Mrs. Gainey had access to the majority of funds through which the Fulmers depended on for their livelihood. Therefore, because this court finds that a fiduciary relationship existed, and further, that testimonial evidence from Mrs. Gainey's deposition shows the transfer of \$14,000 from of the Fulmers into the Defendant's private account, the Court concludes that there is more than a scintilla of evidence in opposition to Defendant's Motion for Summary Judgment, and therefore it is denied.

*6) Elective Share and Exempt Property Claim*

Plaintiff seeks a spousal elective share of the decedent's estate. Defendant argues that Plaintiff's petition for an elective share was filed outside of the timeframe set forth by statute.

"The surviving spouse has a right of election to take an elective share of one-third of the decedent's probate estate..." S.C. Code Ann. § 62-2-201(a). "[P]robate estate means the decedent's property passing under the decedent's will plus the decedent's property passing by intestacy, reduced by funeral and administration expenses and enforceable claims." S.C. Code Ann. § 62-2-202(a). The relevant portion of the Probate Code pertaining to timeliness of filing for an elective share provides:

The surviving spouse may elect to take an elective share in the probate estate by filing in the court and serving upon the personal representative, if any, a summons and petition for the elective share within the later of (1) eight months after the date of death, (2) six months after the informal or formal probate of the decedent's will, or (3) thirty days after a surviving spouse is served with a summons and petition to set aside an informal probate or to modify or vacate an order for formal probate of decedent's will.

S.C. Code Ann. § 62-2-205(a) (emphasis added).

Mr. Fulmer passed away on February 15, 2017. Mrs. Fulmer filed her claim for an elective share on October 27, 2017 and did not accept service until November 17, 2017. The latest possible point in this instance for Mrs. Fulmer to file a claim for an elective share would have been eight months following Mr. Fulmer's death. Because Mrs. Fulmer failed to file a claim for an elective

share within that timeframe Mrs. Fulmer has forfeited her right to such a claim.<sup>5</sup> Therefore, because Plaintiff filed for an elective share outside of the statutorily provided for timeframe, the Court grants Defendant's Motion for Summary Judgment as to this claim.

Plaintiff also seeks to exempt property up to \$25,000. Defendant argues Plaintiff's claim for exemption was untimely pursuant to S.C. Code Ann. § 62-2-402(b).

The relevant portion of the Probate Code pertaining to timeliness of filing a claim to exempt property provides:

The surviving spouse or the minor or dependent child, and the minor's guardian or conservator acting for him, as the case may be, may claim a share of exempt property as provided in this part by filing in the court and mailing or delivering to the personal representative, if any, a claim for such share within eight months after the date of death, or within six months after the probate of the decedent's will, whichever limitation last expires.

S.C. Code Ann. § 62-2-402(b).

As with the elective share claim, Mrs. Fulmer's claim to exempt property was not filed until October 27, 2017, more than eight months after Mr. Fulmer's death. Because Mrs. Fulmer filed her claim to exempt property outside of the statutorily provided for timeframe, the Court grants Defendant's Motion for Summary Judgment as to this cause of action.

#### 7) *Testamentary and Contractual Capacity*

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<sup>5</sup> The Court notes that due to the current status of the estate, the practical effect of granting summary judgment as to this cause of action is *de minimis*, regardless of the outcome of the actions for Undue Influence (pertaining to the deed) and Conversion. The language of the 2016 will, if it stands, has granted Mrs. Fulmer a right to 1/3 of the residuary. If the deed stands, then the property considered by it is not subject to Probate because it belongs to Mrs. Gainey, however if it does not stand, the property would revert to Mr. Fulmer's residuary—to which Mrs. Fulmer would be entitled a 1/3 share pursuant to the October 2016 will. Further, pursuant to *Vaughn v. Bernhardt*, because Mrs. Fulmer withdrew the balance of the joint account, there was no "sum on deposit" in the joint account when Mr. Fulmer passed away, and the presumption of survivorship does not apply to Mrs. Fulmer and the withdrawn funds must be paid to the estate. *Vaughn v. Bernhardt*, 345 S.C. 196, 547 S.E.2d 869 (2001). Thus, if Mrs. Gainey is successful on her Conversion claim, the funds withdrawn by Mrs. Fulmer must pass to Mr. Fulmer's estate, specifically to his residue, to which Mrs. Fulmer is entitled to 1/3 of pursuant to the terms of the October 2016 will. \* 1/3 of both the funds from the joint account and the property deeded to Mrs. Gainey, if available at all under the estate, would be made available through the residuary, to which Mrs. Fulmer has a share provided for, equivalent to that which would have been statutorily provided for by the elective share.

\*Mrs. Gainey's status as an agent on the account precludes her from having beneficial ownership of the joint account pursuant to S.C. Code Ann. §62-6-201(C).

Defendants argue that Mr. Fulmer understood the nature of his actions when Mr. Fulmer executed his latest will and deeds of real property, and thereby possessed the testamentary capacity required to effectuate them. Plaintiff argues that Mr. Fulmer's health had deteriorated to such a point that he did not possess testamentary capacity when the quitclaim deed executed as of June 2016 and the will executed as of October 2016 were effectuated, and therefore both documents should be invalidated.

As Mrs. Gill testified in her deposition, testamentary capacity and contractual capacity are two different things. *Henrietta Gill Deposition* p. 111, ll. 2-11. The degree of capacity needed to execute a will is less than that needed to execute a contract. *In re Estate of Weeks*, 329 S.C. 251, 264, 495 S.E.2d 454, 461 (St.App. 1997). Contractual capacity is a person's ability to reasonably understand the nature of the act and the effect it would have. *In re: Nightingale's Estate*, 182 S.C. 527, 542, 189 S.E.890, 896 (1937). A testator is deemed to have capacity to execute a will when he knows his estate, the objects of his affection and to whom he wished to give his property. *Hellams v. Ross*, 268 S.C. 284, 288, 233 S.E.2d 98, 100 (1977). In further opining on testamentary capacity, the South Carolina Court of Appeals determined in *Weeks* that the threshold further encapsulates the person's "capacity to know," and does not require any standard of reasonableness "on which to found his like or dislike." *Hairston v. McMillan*, 387 S.C. 439, 692 S.E.2d 549 (Ct. App. 2010). All that is required to challenge capacity is a scintilla of evidence showing a genuine issue. *Hancock*, 381 S.C. at 330, 673 S.E.2d at 803.

There is testimony evidence discussing Mr. Fulmer's medical condition causing air starvation. Dr. Bernardo testified that a patient suffering from air starvation would have difficulty focusing on other issues. There is testimony that Mr. Fulmer did not receive pain medication that may have decreased the impact of his air starvation.

Gill testified that when she went over the deeds with Mr. Fulmer on June 30, 2016, and “showed him what his assets were.” *Henrietta Gill Deposition* pp. 111-112, ll. 2-14. However, Gill admitted that in her time working with Mr. Fulmer, she never asked him to list his assets and in fact, Mr. Fulmer never came up with a list of assets on his own. *Id.*

Accordingly, because the court finds that there is a scintilla of evidence which points to Mr. Fulmer being unable to reasonably understand the object and effects of his deed, the Court finds that summary judgment is inappropriate, and therefore denies the Defendant’s Motion for Summary Judgment as to contractual capacity.

However, the court finds that Mr. Fulmer did possess the capacity to know his estate, the objects of his affection, and to whom he wished to bequeath his property, and therefore grants Defendant’s Motion for Summary Judgment as to testamentary capacity.

#### **CONCLUSION**

For the reasons set forth in this Proposed Order, the Defendant’s Motions for Summary Judgment is GRANTED as to the Elective Share, Exempt Property, and Testamentary Capacity causes of action, and DENIED as to the remainder.

**IT IS SO ORDERED.**

[ELECTRONIC SIGNATURE PAGE TO FOLLOW]



Lexington Common Pleas

**Case Caption:** Leroy Fulmer , plaintiff, et al VS Elizabeth S Gainey , defendant, et al  
**Case Number:** 2018CP3200315  
**Type:** Order/Summary Judgment

So Ordered

s/Walton J. McLeod, 2765