STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal From Charleston County
Court Of Common Pleas

Honorable Roger M. Young, Sr.
Circuit Court Judge

APPELLATE CASE NO. 2017-001131

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

v.

Cathy G. Harkness.....Respondent

RETURN TO APPELLANT'S PETITION FOR REHEARING and MOTION FOR EN BANC REVIEW

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CATHY G. HARKNESS

Respondent respectfully submits the following in response to Appellant's Petition for Rehearing or, in the alternative, an En Banc Review of this matter.

STANDARD OF REVIEW

In an action at law such as this one, tried by the Probate Court, the Appellate Court cannot disturb the Probate Court's finding of facts unless there is no evidence in the record to support them. In re Estate of Cumbee, 333 S.C. 664, 670, 511 S.E.2d 390, 393 (Ct. App. 1999).

In its written opinion, the Court of Appeals therefore sets out many facts in the record that supported the decision of the Probate Court. In the various Arguments below, Appellant denies the existence of the facts cited by both the Probate Court and Court of Appeals to make his request for rehearing and en banc review.

Respondent's Reply to Appellant's Argument 1

Appellant contends that the only relevant evidence was that of the lawyer and paralegal whose sole contact with Testatrix was a single office visit. "The case should have been over when Klok [the lawyer] and Voytko testified." (Petition, p. 4). He cites no legal authority supporting this position, however.

Of note is that on page 4 of the Petition, Appellant footnotes this contention as follows: "Reported decisions in South Carolina have given great weight to the testimony of the attorney who drafted the challenged testamentary document…" The term "great weight" is not, however, the same as "conclusive weight." Appellant argues that the testimony of the lawyer is conclusive. As noted by the Probate Court "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." (R. p. 56).

This case has been through two levels of appeal since the Probate Court pointed out that Appellant's legal assertion is unsupported by any legal authority. Appellant has yet to find a single case in support of the legal standard he proposes.

The reason is obvious, particularly in a case like this one, where the lawyer only meets the client one time. Limited exposure in a single setting may not provide the lawyer the same level of understanding that evidence of the broader context does. Such is the case in this matter. A number of specifics of the "broader context" will be addressed below. Suffice it to say, the testimony of the lawyer and her paralegal should not be conclusive evidence as to the Testatrix's intent. This conclusion would be counter to existing South Carolina law and unsupported by the law of every other jurisdiction (as evidenced by Appellant's inability to cite a single case in support of this argument).

Respondent's Reply to Appellant's Argument 2

Appellant next challenges a number of factual findings. Appellant knows that "any evidence" in support of these factual findings means the ruling must be upheld. Appellant therefore repeatedly asserts there is no evidence of various matters in clear contradiction to the record.

A. Wrong Facts . "Glenn never cut off visitation or communication." (Petition, p. 7). This assertion is just not true. Consider the following:

1) Cathy Harkness testified that when she called to speak to her mother, Glenn would laugh and hang the phone up. Further, "On June 11, he called me up after my father was

buried, told me I am no longer to call mother, or he would have me arrested for harassment (R. p. 306, lines 9-12).. Jack Brantley (Testatrix's brother) testified about asking Testatrix to call Cathy Harkness to see how she was doing to which Testatrix replied "I'll ask Glenn." (R. p. 240, line 5). Glenn physically barred his sister Belinda and threatened to call the police when she came to visit her mother. (R. p. 268, lines 20-21/R. p. 307, lines 3-9).

Appellant's contention that there is "no evidence" that Glenn cut off visitation or communication is just not correct. Respondent would submit that the very fact Appellant has asserted this patently false claim is an indication of how weak Appellant's argument is, i.e. Appellant is forced to deny the existence of facts in the record to conjure up a "basis" for his argument.

B. Irrelevant Facts. Here the Appellant cherry picks three specific facts that he argues should have been given no weight as a matter of law.

The first example is the fact that Glenn installed security cameras all over the house and yard of Testatrix's home. Clearly, this action is relevant to the amount of control he was exercising over Testatrix. The weight of this relevant evidence was in the discretion of the probate judge.

The second example is that Glenn failed to notify his sisters that his father was "on death's door" in the hospital and that when they found out, he sent them a bizarre email trying to establish his control over their ability to visit: LET IT BE KNOWN, NOTHING WILL BE SIGNED [or] INITIALIZE[D] TILL I LOOK AT IT!!! SO LET IT BE WRITTEN SO LET IT BE DONE!! ALL [H]AS BEEN [D]ONE AND NOTIFIED!!!!!!!!!!! (R. p. 265, lines 17-21).

Clearly, if Glenn is the type of person who would attempt to control access to his father, he was also likely to do so with his mother. The relevance is plain. The weight is up to the probate court.

Next, Appellant tries to say that there was no relevance to the time Glenn physically pushed his sister, Belinda, out of the front door and threatened to call the police when she attempted to visit her mother. Glenn's explanation is that a physical therapy session was in progress. Whether Glenn's explanation was sufficient to justify his response and, in particular, the intensity and aggressiveness of the response (the assault and threat to call the police) is a classic example of the independent fact finder's role in weighing evidence. Appellant seems to believe that just because he comes up with an explanation, the Court is bound to accept his explanation to the exclusion of all other evidence. This opinion is simply not the law. The Appellate Court is "not at liberty to pass upon the veracity of the witness" and determine how it thinks the evidence should have been weighed by the trial court. Graham v. Whitaker, 282 S.C. 393 at 398, 321 S.E.2d 40 at 41 (S.C. 1984)

C. Take Place Well Outside the Testamentary Act. Under this heading, Appellant first states (wrongly) "Respondent failed to illicit any testimony from any witness that medication was ever withheld."

Consider the following (much of which is set out in footnote 6 of the decision of the Court of Appeals).

a. "She never received the potassium prescription." (R. p. 649, lines 9-10).

b. There were several months that the doctor's notes reflected Testatrix was not getting the Remeron prescribed (R. p. 636, lines 9-19). This fact is highly relevant because

Remeron is for dementia and its absence would enhance Testatrix's dementia and therefore decrease her desire and/or ability to change her Will.

D. The Only Two Witnesses to the Testamentary Act. Here again, Appellant argues that the testimony of Klok and Voytko are both exclusive and conclusive. This opinion is simply not the law (as argued above).

Respondent's Reply to Appellant's Argument 3

Appellant cherry picks a set of statements from Dr. Chanson's direct testimony and then states "That's the full testimony of Dr. Chanson." Appellant ignores the cross-examination of Dr. Chanson in which the following testimony was illicited:

1) The drug potassium was never given as prescribed. (R. p. 649, lines 9-10).

2) There were long and inordinate delays in the administering of the dementia drug, Remeron. (R. p. 636-640).

3) Glenn, to excuse his delays in getting his mother to her appointments, told Dr. Chanson "it's difficult for her son to bring her into the office frequently because of his ongoing work schedule and other responsibilities." (R. p. 637, lines 3-7). This representation was a clear falsehood because Glenn was on disability and thus had no "ongoing work schedule."

Appellant further states it was error for the Court to consider that (in addition to the above) Testatrix was "visibly upset", "crying" and "distraught" at her doctor's visit on July 3, 2013 – the same day she signed the contested Will. (R. p. 623, lines 9-24). It is of note that Appellant gives no basis as to why this was error except that Appellant believes his facts outweigh the relevance of Testatrix's degree of emotional turmoil at the doctor's office. "It is the duty of the trier of fact to evaluate witness testimony and assign to it such weight as he

determines." Estate of Hicks, 327 S.E.2d 345, 284 S.C. 462 (S.C. 1985). Appellant's assertion is without merit.

Next, the Appellant contends that the trial court never made any finding about the weight or credibility of the witnesses. Nothing could be further from the truth. As to the Appellant Gunnells himself, the trial court detailed a number of things that made his testimony incredible, the most egregious (Respondent submits) was his false testimony that he had taken Testatrix to lawyer Klok for two or three visits of 30-40 minutes each prior to the appointment in which she signed this Will. This testimony was completely and blatantly untrue. Respondent refers this Honorable Court to pages 45 and 46 of the Transcript of Record to consider the care in which the trial court examined the testimony of Appellant and obviously concluded that he was untruthful (including "In short, he has not administered the estate in an honest or forthright manner.") (R. p. 45, Item 3).

In the last paragraph of Argument 3, Appellant seems to shift gears and argue that just because he contends Testatrix was in reasonably good health and competent at the time of the execution of the Will, then it is not possible that she could have been subject to undue influence. This opinion is not the law and Appellant has cited no authority in support of this position at any time during this lengthy appellate process.

Respondent's Reply to Appellant's Argument 4

In this argument, Appellant contends that the testimony of Helen Carroll, the long-time best friend of Testatrix, should be ignored. Again, this is just a matter of the weight of the evidence and is clearly in the purview of the finder of fact.

Appellant then asserts that the trial and probate courts gave enormous and, indeed, exclusive weight to the testimony of Ms. Carroll: "That is the circumstances which

unmistakenly and convincingly point to the substitution of another person's "will" for the Testatrix?" (Petition, p. 13). Neither the Probate Court nor Appeals Court has ruled that the testimony of Ms. Carroll solely and conclusively carried such weight. To the contrary, her testimony carried some weight in the context of many other facts which as a whole provided sufficient evidence to support the finding of the probate court under the applicable standard of review. The sum total of these facts set out in the findings of the Probate Court clearly constitute a reasonable factual basis to uphold the ruling.

Respondent's Reply to Appellant's Argument 5

The essence of Argument 5 is that "The probate court simply states that "the record speaks for itself" but gives no legal or factual basis for its conclusion."

First of all, the initial Order of the Probate Court is 17 pages long and the Order Denying Motion to Alter or Amend is 7 pages long. To suggest that the Probate Court failed to review the facts or law is not only misleading but plainly untrue. Secondly, the specific quotation "the record speaks for itself" arises only when the Probate Court is narrowly focused on its response to Appellant's specific assertion that there was "no evidence that anyone was prohibited or restricted from visiting Testatrix." To that point, the Court specifically referenced (R. p.57) several pages of Harkness' Memorandum in Opposition to the Motion to Reconsider in which numerous specific instances of testimony flatly contradicted Appellant Gunnells' contention. To that extent, the record did indeed speak for itself in the particulars referenced by the Court. These pages are found on 124-126 of the Transcript of Record and essentially address the incorrect assertions of no evidence of interference with visitation or mismanagement of prescriptions.

Respondent's Reply to Appellant's Argument 6

It is difficult to discern what the Appellant's point is here. On the one hand, Appellant states that the Probate Court was incorrect in considering evidence of the first "2 prongs" of 4 items of precedence the Court relied on to some extent. Appellant does not discuss why these "prongs" are inappropriate, he just says they "do not accurately reflect South Carolina law." The prongs include 1) an unjust distribution made to a beneficiary and 2) motive and opportunity to influence the Testatrix. Ample cases are supplied in support of these factors and never have been overruled. Appellant's assertion that they do not reflect South Carolina law is simply without merit. See Howard v. Nasser, 364 S.C. 279, 289-90, 613 S.E.2d 64, 69 (Ct. App. 2005) and Byrd v. Byrd, 279 S.C. 425, at 427, 308 S.E.2d 788 at 789 (1983).

Respondent's Reply to Appellant's Argument 7

In this argument, Appellant tries to suggest that because a probate judge ruled against undue influence in Russell v. Wachovia Bank, N.A., 353 S.C.208, 216, 578 S.E.2d 329,333 (2003), then another probate judge must rule with Appellant in this case.

Every case must stand on its own merits and the specific facts presented at trial. The question before this Court was not how much it sounded like the Russell case but whether the particular facts pointed to undue influence. It may be of note that the decedent in Russell was Donald Russell, former Governor of South Carolina and Chief Judge of the 4th Circuit Court of Appeals. Obviously, equating his intellectual depth to that of Helen Gunnells is on its face a false equivalency. Respondent also again 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. This point has been addressed previously. As for Argument 7, suffice it to say that to attempt to equate the case of Helen

Gunnells and her family with that of Donald Russell and his family is just another attempt by Appellant to grasp at straws that do not exist.

Respondent's Reply to Appellant's En Banc Review Request

The essence of Appellant's request for en banc review is that the Probate Judge "blatantly disregard[ed] probative facts." (Petition, p. 17). Respondent would point out that the original Order of the Probate Judge discusses the facts in detail as does the Probate Judge's Denial of the Motion to Alter or Amend Judgment. The Court of Appeals sets out many of these facts and clearly demonstrates that there was substantial evidence from many witnesses to support the factual determination of the Probate Court. The Probate Court never blatantly ignored any facts, it just found that Appellant's version of those facts was refuted and proven to the standard required.

CONCLUSION

Lastly, Respondent submits there is no need for a reconsideration or en banc review. The law is clear and the facts (although Appellant denies they exist) have been thoroughly noted and set out in the decision of the Court of Appeals. For the reasons outlined above, Respondent prays that the Petition for Rehearing and Motion for En Banc Review be denied and that the judgment of the Probate Court be affirmed.

Respectfully submitted,

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CATHY G. HARKNESS

June 17, 2020
Charleston, South Carolina

STATE OF SOUTH CAROLINA
In The Court Of Appeals

Appeal From Charleston County
Court Of Common Pleas

Honorable Roger M. Young, Sr.
Circuit Court Judge

APPELLATE CASE NO. 2017-001131

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

v.

Cathy G. Harkness.....Respondent

CERTIFICATE OF SERVICE

I certify that I have served the Appellant with the Return to Appellant's Petition For Rehearing and Motion for En Banc Review of the Respondent by electronic mail addressed to the following:

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Result OK: Communication OK, S-OK: Stop Communication, PW-OFF: Power Switch OFF, TEL: RX from TEL, NG: Other Error, CONT: Continue, NO ANS: No Answer, Refuse: Receipt Refused, Busy: Busy, M-Full:Memory Full, LOVR:Receiving length Over, POVR:Receiving page Over, FIL:File Error, DC:Decode Error, MDN:MDN Response Error, DSN:DSN Response Error, PRINT:Compulsory Memory Document Print, DEL:Compulsory Memory Document Delete, SEND:Compulsory Memory Document Send.

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FAX COVER SHEET

DATE: **June 17, 2020**

DELIVER TO: V. Claire Allen, Deputy Clerk
SC Court of Appeals

FAX NUMBER: **803-734-1839**

FROM: **Donald H. Howe**

OPERATOR: **Greta B. Howe**

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

NO. OF PAGES: **14, including the cover sheet.**

COMMENTS:

LAW OFFICES OF DONALD H. HOWE, LLC

Attorneys at Law

June 17, 2020

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V. Claire Allen, Deputy Clerk
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Columbia, SC 29201

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

Dear Ms. Allen:

Please find attached Respondent's Return to Appellant's Petition For Rehearing and Motion For En Banc Review along with Proof of Service in the above matter. By copy of this letter to Mr. Rob Varnado, I am serving the Appellant with copies of the same. Please let me know if, for any reason, a copy of this filing should be sent to the Court by mail.

With kindest regards, I am

Yours sincerely,

Donald H. Howe

DHH/gbh
Enclosure
cc: Robert B. Varnado, Esquire
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