THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM KERSHAW COUNTY
Court of Common Pleas

Robert E. Hood, Circuit Court Judge

Case No. 2018-CP-28-00726

Appellate Case No. 2020-000063

In the Matter of:
Almeter B. Robinson
(Decedent)

Laverne Robinson, Appellant,

v.

Willene Brooks, Mary Greene, Ronnie Robinson, Almeter P. Harrison, Herbert Robinson, James Robinson, Leroy Robinson, and Martha Aiken, Defendants,

Of Whom Mary Greene, Ronnie Robinson, Almeter P. Harrison, Leroy Robinson, and Martha Aiken are the Respondents.

FINAL BRIEF OF APPELLANT

BAXLEY, PRATT & WELLS, P.A.
John W. Wells, SC Bar 6019
Attorney for the Appellant
Three The Common at Lugoff
Post Office Box 10
Lugoff, South Carolina 29078
(803) 438-4200 Office
(803) 438-5090 Fax
jwells@baxleywells.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

COURT RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

I. WHERE THE TESTATOR HAS GRANTED A POWER OF ATTORNEY TO THE PROPONENT OF A WILL, DOES THE RESULTING PRESUMPTION OF UNDUE INFLUENCE IMPOSE UPON THE PROPONENT OF THE WILL THE BURDEN OF GOING FORWARD TO PRESENT EVIDENCE, OR THE BURDEN OF PROOF?

II. DID THE PROBATE JUDGE IMPOSE THE BURDEN OF PROOF UPON THE APPELLANT ON THE ISSUE OF UNDUE INFLUENCE?

III. DID THE PROBATE JUDGE COMMIT AN ERROR OF LAW BY IMPOSING THE BURDEN OF PROOF ON THE PROPONENT OF THE WILL ON THE ISSUE OF UNDUE INFLUENCE?

STATEMENT OF THE CASE

This is an appeal from a Petition filed in the Probate Court for Kershaw County on August 14, 2017, seeking to admit a copy of a will executed by Almeter Robinson on February 3, 2015, and have the Appellant appointed as Personal Representative in accordance with the will. An Answer was filed on behalf of Respondents Mary Greene, Ronnie Robinson, Almeter P. Harrison, Leroy Robinson and Martha Aiken asserting that the February 3, 2015, will had been revoked, that it was executed when the decedent lack capacity or was under undue influence by the Appellant. The Answer was filed on September 15, 2017.

After the Answer was filed, but before the case was tried, the Appellant discovered and filed the original will. Also, after the Answer was filed but before the case was tried, the Respondent Martha Aiken relieved her attorney of record Moultrie B. Burns, Jr. and retained Leonard R. Jordan, Jr. to represent her in this matter.

Almeter B. Robinson died a resident of Kershaw County on February 25, 2017. At the time of her death, Almeter Robinson had no spouse, and the Appellant and the Respondents were her surviving children. Respondent Herbert Robinson died after the case was filed, but before the

trial.

The case was tried before the Honorable Debra B. Branham on July 9, 2018. Her Order dated August 10, 2018, ruled that the February 3, 2015 will was properly executed according to §62-2-502; that insufficient evidence of lack of capacity by the testator to execute the will was presented; and that the February 3, 2015 will was invalid because of undue influence over the testator exerted by the Appellant. (R. p. 1-6)

The Appellant filed and served his Notice of Intent to Appeal to Circuit Court on August 17, 2018. The Appeal was heard by the Honorable Robert E. Hood on September 23, 2019. The Honorable Robert E. Hood issued his Order Affirming the Probate Court Order on October 3, 2019. The Appellant filed a Motion to Alter or Amend a Judgment under Rule 59(e) SCRCP on October 8, 2019. The Honorable Robert E. Hood issued his Amended Order Affirming Probate Court Order on January 2, 2020. The Appellant filed his Notice of Appeal on January 14, 2020. The Appellant timely ordered a transcript of the September 23, 2019 appeal hearing which was delivered to Appellant's counsel on December 18, 2020.

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 a proceeding in the Probate Court is in the nature of an action at law, review by the Circuit Court and this Court extends merely to the correction of errors of law. Bob Jones Univ. v. Strandell 344 S.C. 224, 543 S.E. 2d 251 (2001).

FACTS

Almeter B. Robinson was born April 25, 1928. Her husband and the father of the Appellant and the Respondents died around 1980. She had ten (10) children one of whom,

Freddie, died in the 1990's without heirs other than his brothers and sisters who are the named parties in this action. Herbert Robinson who is a named party in default in this action died several months before the case was tried.

Almeter B. Robinson lived most of her life on three (3) tracts of land in close proximity to each other that were inherited from her mother and father, a ten (10) acre unimproved tract, an eight (8) acre unimproved tract and a four (4) acre tract sometimes referred to as a five (5) acre tract, on which stood the house in which she lived. Beginning in 1977, Almeter Robinson executed a series of deeds conveying the three (3) tracts to various children as trustees. As to the four (4) acre tract with the house on it, it was deeded to Respondent Martha Aiken as Trustee, and a trust agreement was executed naming Almeter Robinson and her deceased husband as beneficiaries of the trust for their lives and providing a scheme for the distribution of the four (4) acre tract upon the death of the last surviving beneficiary. As to the ten (10) acre tract and the eight (8) acre tract, no trust agreement stating the terms of the trusts on those tracts has been produced by any of the trustees.

It is apparent that Almeter B. Robinson believed that she was entitled to control the distribution of all three tracts because all three tracts are distributed between the Appellant and the Respondents in the February 3, 2015, will, as well as in prior wills she executed in 1994 and in 2009.

In 2014, the Appellant moved from Maryland into the home of his mother on the four (4) acre tract to act as a caregiver. The Appellant was the only one of her children who was willing and able to provide twenty-four (24) hour care for her in her own home. Respondent Mary Green had taken her mother into her home for a period of time, and other Respondents had provided other services for their mother, but the Appellant was the only one willing to move in with her

and provide care in her home.

On August 22, 2014, Almeter B. Robinson executed a durable power of attorney appointing the Appellant as agent. On February 3, 2015, Almeter B. Robinson executed the Last Will and Testament that is the subject of this action. The February 3, 2015 will was prepared by attorney Deborah Butcher. Attorney Butcher talked to Mrs. Robinson out of the presence of the Appellant before preparing the will (R. p. 38, lines 18-23) When Mrs. Robinson returned to execute the will Attorney Butcher read the will to her. (R. p. 39, lines 1-10) Attorney Butcher saw no signs of undue influence (R. p. 40, lines 1-14) R. p. 41, lines 3-8)

The February 3, 2015 will appointed the Appellant as Personal Representative. It distributed the lands and the home of the Testator more or less evenly between the Appellant and the Respondents except for Mary Green who was left out of the distribution. The residuary of the estate went to the Appellant, but the bulk of the value in the estate was in the land, the distribution of which did not favor the Appellant. Almeter B. Robinson died on February 25, 2017.

ARGUMENTS

I. WHERE THE TESTATOR HAS GRANTED A POWER OF ATTORNEY TO THE PROPONENT OF A WILL, DOES THE RESULTING PRESUMPTION OF UNDUE INFLUENCE IMPOSE UPON THE PROPONENT OF THE WILL THE BURDEN OF GOING FORWARD TO PRESENT EVIDENCE, OR THE BURDEN OF PROOF?

Section 62-3-407 S.C. Code of Laws Ann. clearly states, "Contestants of a will have the burden of establishing undue influence, fraud, duress, mistake, revocation, or lack of testamentary intent or capacity. Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof." The General Assembly did not carve out an exception in cases where the testator has granted a power of attorney, though it could have

done so. The exception to the rule that the contestant of the will bears the burden of proof was created by the Court of Appeals in Howard v. Nasser 364 S.C. 279, 613 S.E.2d 64 (2005), which held that a presumption of undue influence in the execution of a will is directed against the proponent of a will if the decedent had created a fiduciary relationship between he and the proponent by granting the proponent a power of attorney.

Prior to Nasser, South Carolina common law in contested deed cases provided that a presumption of undue influence arises if the contestants of the validity of a deed present evidence of an existing fiduciary relationships between grantor and grantee. Middleton v. Suber 300 S.C. 402, 388 S.E.2d 639 (1990). There was no conflict between the statutory law and common law because the burden of proof in deed cases was not controlled by §62-3-407 S.C. Code of Laws Ann. In Nasser, the Court of Appeals cited another deed case, Dixon v. Dixon 362 S.C. 388, 608 S.E.2d, 849 (2005), in which the Supreme Court relied on the principles of undue influence issue in will cases to decide the undue influence issue in a deed case. The Nasser Court then relied on precedent from other jurisdictions citied in the Dixon Case as follows:

"In reaching its decision, the court utilized the principals of undue influence applicable to contested will cases. The Court relied on precedent from other jurisdictions which has found that the analysis is the same regardless of whether the underlying document sought to be set aside on the grounds that the Plaintiff was unduly influenced is a will or a deed." Howard v. Nasser supra, emphasis added.

The problem with relying on South Carolina deed cases and the case of law of other jurisdictions on presumptions and the burden of proof in undue influence cases is that South Carolina has a statute controlling the burden of proof in will cases that does not apply to deed cases, while other jurisdictions do not. The analysis of undue influence in deed cases may be the same as in will cases in other states, but in South Carolina §62-3-407 S.C. Code of Laws Ann. sets the analysis in will cases apart from deed cases by assigning the burden of proof to the

contestant of the will throughout the trial.

To resolve the conflict between the presumption of undue influence arising from the grant of a power of attorney, and the clear language of §62-3-407 S.C. Code of Laws Ann., the Court then cities the following language from Comment of Restatement (Third) of Property: Wills and Other Donative Transfers §8.3

"A presumption of undue influence arises if the alleged wrong doer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, on a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only of the proponent does not come forward with evidence to rebut the presumption." Howard v. Nasser supra. Emphasis added.

In addition, Rule 301 S.C.R.E. states as follows:

"In all civil actions and proceeding not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

In summary, the presumption of undue influence arising from the grant of a power of attorney shifts to the proponent of a will the burden of going forward to present evidence to rebut the presumption but does not shift the burden of proof. This crucial distinction between the burden of proof and the burden of going forward was important enough to require its own Section in the South Carolina Rules of Evidence

II. DID THE PROBATE JUDGE IMPOSE THE BURDEN OF PROOF UPON THE APPELLANT ON THE ISSUE OF UNDUE INFLUENCE?

The Honorable Probate Judge of Kershaw County is not a lawyer. In the trial of this case, she was presented with a delicate legal issue that has confounded jurist for ages, the difference between the burden of proof and the burden of going forward with evidence. Judges generally

know that a presumption shifts a burden from one party to another, but which burden is it? Is it the burden of proof or the burden of going forward to present evidence? Without legal training, the Probate Judge had a fifty-fifty chance of picking the correct burden under Rule 301 S.C.R.E. Unfortunately, she picked the wrong one.

We know that the Probate Judge imposed the burden of proof on the Appellant proponent of the will because she says that she did. On page 4 of the August 10, 2018 Order (R. p. 4), she states:

> "This circumstance is very important for the Court to look at because if a confidential or Fiduciary Relationship between the Testator and the Beneficiary exist, the burden of proof rebutting undue influence falls on the beneficiary." (R. p. 4), emphasis added.
>
> "Argument was made on behalf of the Plaintiff that the burden of proof was met to rebut undue influence by the testimony of the Attorney Butcher wherein she testified that she did not believe that the decedent was under any undue influence of the Plaintiff beneficiary." August 10, 2018 Order pg. 4, (R. p. 4), emphasis added.

The language in the August 10, 2018 Order could not be clearer. The Probate Judge found that the August 22, 2014, Power of Attorney created a fiduciary relationship between the testator and the Appellant creating a presumption of undue influence in the execution of the February 3, 2015 will, and she shifted the burden of proof on the issue of undue influence to the Appellant.

III. DID THE PROBATE JUDGE COMMIT AN ERROR OF LAW BY IMPOSING THE BURDEN OF PROOF ON THE PROPONENT OF THE WILL ON THE ISSUE OF UNDUE INFLUENCE?

When the Probate Judge imposed the burden of proof on the proponent of the will, the Appellant herein, she violated the clear language in §62-3-407 S.C. Code of Laws Ann. imposing the burden of proof on the contestant of the will. She violated the clear language of Howard V. Nasser supra. "The effect of the presumption is to shift to the proponent the burden of going

forward with evidence, not the burden of persuasion." Finally, she violated the clear language of Rule 301 S.C.R.E.

> "In all civil actions and proceeding not otherwise provided for by statute or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast."

The error of law was prejudicial to the Appellant. The Appellant met his burden of going forward to present evidence by presenting the testimony of attorney Deborah Butcher who prepared the will and supervised its execution. She testified to the absence of undue influence as follows:

1.	Q:	Okay. Now, did you see any evidence of undue
2.		influence exerted by the relative that was with
3.		her?
4.	A:	No.
5.	Q:	Were you sensitive to that?
6.	A:	Yes. Matter of fact we -- sometimes people
7.		will say, I want to make sure I did this all
8.		right. I'm actually taking one that's going on
9.		now.
10.	Q:	Did you see the person that was with her
11.		threaten her in any way?
12.	A:	No. She was very comfortable. That's one
13.		thing I do look for, is how comfortable
14.		they are with whoever brings them in.
		(R. p. 40, lines 1-14)
3.	Q:	Did you see the person that was with Mrs.
4.		Robinson do anything that would destroy her
5.		free agency in the execution of that will?
6.	A:	No.
7.	Q:	Now, did Almeter Robinson sign the will?
8.	A:	Yes.
		(R. p. 41, lines 3-8)

Once the Appellant presented the above testimony of Deborah Butcher, the Appellant had met his burden to produce evidence rebutting the presumption of undue influence. The Appellant had done exactly what Rule 301 S.C.R.E requires, he had presented evidence in the form of

sworn testimony by a member of the South Carolina Bar to rebut a presumption of undue influence. To affirm the Probate Court Order, this Court must take the position that the sworn testimony of a member of the bar is not evidence. The Butcher testimony may not be strong enough to satisfy a burden of proof, but it does not have to be. The burden of proof of undue influence is on the Respondent from beginning to end. The Butcher testimony satisfies the burden of going forward to present evidence, and the presumption of undue influence arising from the grant of the power of attorney vanishes. See Coleman v. Palmetto State Life Ins. Co 241 S.C. 384, 128 S.E. 2d. 699 (1962)

> "If it is true that where death by violent injury has occurred, there is a presumption against suicide, but this is a presumption of law and not of fact. When evidence as to the fact of suicide is introduced, the presumption vanishes and the question must be decided upon the evidence." emphasis added.

In both orders affirming the Probate Judge's August 10, 2018 Order, the Circuit Court largely ignored the burden shifting error of law argued by the Appellant, and instead focused on circumstantial evidence of undue influence in the trial transcript supporting the Respondent's position, as if the issue on appeal was the sufficiency of the evidence. This is not a sufficiency of the evidence appeal. Had the Probate Judge imposed the burden of proof on the Respondents, they might have satisfied the burden of proof of undue influence. We will never know because she committed an error of law by imposing the burden of proof on the Appellant. We cannot go back and reconstruct what the outcome would have been had the Probate Judge assigned the burden of proof to the correct party.

In criminal cases, presumptions that shift the burden of proof to the Defendant have long been held to be unconstitutional, and to constitute reversible error. State v. Neva 300 S.C. 450, 388 S.E.2d 791 (1990) State v. Key 282 S.C. 413, 319 S.E.2d 338 (1984) In civil cases, burden

shifting errors of law have also resulted in the reversal of the trial court. See Middleton v. Suber 300 S.C. 402, 388 S.E.2d 639 (S.Ct. 1990)

The Probate Judge's decision in this case was controlled by an error of law, and should be reversed.

CONCLUSION

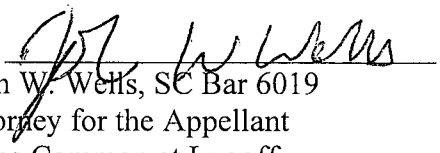
In a case tried in Probate Court without a jury, the Probate Judge becomes the trier of fact. As the trier of fact, she must weigh the evidence according to law imposing the burden of proof upon the correct party. The party having the burden of proof on the issue of undue influence must produce a higher quantum of evidence on that issue than the other party. In this case, evidence was produced by the Appellant through the testimony of Attorney Butcher that the execution of the will was free of any undue influence. The Respondents produced their own testimony that the Appellant exerted undue influence over the testator. The Probate Judge imposed the burden of proof incorrectly on the Appellant requiring him to produce a higher quantum of proof than the Respondents which higher quantum of evidence he failed to satisfy.

Because this action is one at law, neither the Circuit Court nor this Court can go back and weigh the evidence in the record to determine if the Respondents would have prevailed anyway if the Probate Judge had applied the burden of proof correctly. The October 3, 2019 Order Affirming Probate Court Order and the January 2, 2020, Amended Order Affirming Probate Court Order by the Circuit Court essentially do exactly that. Under the appropriate standard of review, this Court is limited to correcting errors of law, and the shifting of the burden of proof to the proponent of a will in violation of §62-3-407 S.C. Code of Laws Ann. is reversible error of law.

Respectfully submitted,

March 16, 2021

BAXLEY, PRATT & WELLS, P.A.

By: 

John W. Wells, SC Bar 6019
Attorney for the Appellant
3 The Common at Lugoff
Post Office Box 10
Lugoff, South Carolina 29078
(803) 438-4200 Office
(803) 438-5090 Fax
jwells@baxleywells.com