2013 WL 495704 (Ala.Civ.App.) (Appellate Brief)
Court of Civil Appeals of Alabama.

Mary John GARRETT BYRD, Appellant,
v.
Kitty DAWSON, Appellee.

No. 2111237.
January 3, 2013.

On Appeal from the Circuit Court of Montgomery County Case No.: CV-10-901630

Brief of Appellant, Mary John Garrett Byrd

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***ii** TABLE OF CONTENTS

***V** TABLE OF AUTHORITIES

Cases

*ii STATEMENT REGARDING ORAL ARGUMENT

Appellant, Mary John Garrett Byrd, does not believe that oral argument is necessary in this case. The issues raised on appeal are fully and adequately covered in this brief.

*iv STATEMENT OF JURISDICTION

Byrd timely appeals to this Court from a final order of the Montgomery County Circuit Court issued on July 11, 2012. On August 10, 2012, Byrd moved the trial court to alter, amend, or vacate its ruling, or, in the alternative, to order a new trial. Ala.R.Civ.P. 59(b). On August 30, 2012, the court denied the motion following a hearing. On September 17, 2012, Byrd filed her notice of appeal to this Court. The notice was filed within 42 days of the court's order denying the Rule 59 motion. Ala.R.App.R. 4(a) (1),(3). Thereafter, this Court transferred the appeal to the Alabama Supreme Court for lack of appellate jurisdiction. Ala. Code (1975) § 12-1-4. On October 9, 2012, the Supreme Court transferred this appeal back to this Court pursuant to Ala. Code (1975) § 12-2-7(6).

*1 STATEMENT OF THE CASE

On December 29, 2010, Dawson filed a complaint alleging several causes of action against Byrd based on the deed. (C. 16). The complaint alleged: (a) **abuse** of confidential relationship, (b) undue influence, (c) breach of fiduciary duty, (d) conversion, (e) fraud, (f) unjust enrichment, and (g) money had and received. (C. 28). On January 28, 2011, Byrd answered the complaint, denying all causes of action and alleging several affirmative defenses. (C. 30, 35-37).

The case was heard by bench trial on May 29-30, 2012. (R. 1-227). At the conclusion of Dawson's case, Dawson dismissed every claim in her complaint except the undue influence claim with respect to Byrd's procurement of the deed from her father. (R. 206). Byrd moved for directed verdict [1], arguing that Dawson had not met her burden of proving undue influence in order

to shift the burden of proof to Byrd. The court denied Byrd's motion, finding Dawson had met her burden of proof for the burden to shift. (R. 206-07).

***2** On July 9, 2012, Byrd filed her post-trial brief. (C. 144-56). Additionally, Byrd timely filed the following post-trial motions: motion for judgment as a matter of law, pursuant to Ala.R.Civ.P. 50, and renewed motion for a directed verdict. [2] (C. 157, 158). Dawson filed her post-trial brief the same day. (C. 159-207).

On July 11, 2012, the trial court entered an order invalidating the deed based on undue influence. (C. 208-10). In support of its order, the court made the following findings: (1) that a confidential relationship existed between Byrd and her father; (2) that Byrd exercised a "dominant and controlling influence" over her father; (3) that Byrd had Power of Attorney and "literally made every decision regarding her father"; and (4) that there was "no question that [Byrd] is an extremely dominating and controlling individual." (C. 210).

On August 10, 2012, the undersigned entered an appearance in this case as counsel for Byrd. (C. 215). That same day, Byrd also filed a motion to alter, amend, or vacate judgment or, in the alternative, motion for new ***3** trial pursuant to Ala.R.Civ.P. 59(a) (2). (C. 216-28). On August 28, 2012, Dawson filed her responsive motion in opposition. (229-38). On August 30, 2012, the court denied Byrd's Rule 59 motion following a hearing. (R(2). 1-16).

On September 17, 2012, Byrd filed her notice of appeal and docketing statement, incorrectly selecting this Court as the appellate court for this appeal. (C. 242-45).

On October 31, 2012, Byrd filed a motion to correct clerical an error in trial court's final order pursuant to Ala.R.Civ.P. 60(a). (R. 15). The motion sought the following two corrections in the court's final order: (1) that Garrett only possessed a one-half interest in the land in dispute, and the Court's final order incorrectly stated he conveyed the entire 175 acres to Byrd; and (2) that, in contrast to the court's inaccurate factual finding in its order, Byrd testified she "did not" suggest to her father that he deed his interest in the land to her. The court took no action on the motion.

***4 STATEMENT OF THE ISSUES**

1. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE PRESENTED BY DAWSON AT TRIAL WAS SUFFICIENT TO ESTABLISH A PRESUMPTION OF UNDUE INFLUENCE IN THE PROCUREMENT OF A WARRANTY DEED BY BYRD FROM HER FATHER?

2. ASSUMING, WITHOUT CONCEDING, THE EVIDENCE OFFERED BY DAWSON AT TRIAL WAS SUFFICIENT TO ESTABLISH A PRESUMPTION OF UNDUE INFLUENCE, WHETHER THE TRIAL COURT ERRED IN FINDING THAT BYRD FAILED TO MEET HER BURDEN OF PROVING THAT THE TRANSACTION WAS "FAIR, JUST, AND EQUITABLE IN EVERY RESPECT" SO AS TO OVERCOME THE PRESUMPTION OF UNDUE INFLUENCE?

***5 STATEMENT OF THE FACTS**

A. Introduction and Background

For more than 50 years, John A. and Katherine Garrett lived as husband and wife in a house off Butler Mill Road in Montgomery County. (R. 55). They had two daughters, who are parties to this appeal. Dawson was born first. (R. 155). Byrd was born ten years later. (R. 155).

Dawson married and had three children, who presently reside in separate homes surrounding the marital residence of John A. and Katherine Garrett. (R. 54-5). Dawson and her children received or acquired their properties from John A. and Katherine Garrett. (R. 54). Byrd married twice. (R. 155). She never had any children. However, she and her father were extremely close. (R. 155).

When John A. and Katherine Garrett executed their wills in 1993, the Garretts' Butler Mill Road property included their marital residence situated on approximately 15 acres (hereinafter "the house") and an adjoining 175-acre tract of pasture land that included a second house situated on that parcel. (hereinafter "the land"). "The land" is at the center of this dispute.

***6** On March 25, 1993, John A. Garrett ("Garrett") executed his will. (R. 32) (P.Ex. 3, pgs. 1-3)[3]. He devised to Dawson his one-half interest in "the land". (P.Ex. 3, pg. 2). He devised to Byrd a warehouse property located in Washington Park, Montgomery County.[4] (P.Ex. 3, pg. 2). He devised to both daughters, in equal shares, his undivided interest in a 24-acre parcel situated across the street from his residence. (P.Ex. 3, pg. 1). Garrett bequeathed all his personal property and the residuary of estate to his wife or daughters. (P.Ex. 3, pgs. 1-2).

On March 31, 1993, Katherine Garrett executed her will. (R. 32) (P.Ex. 2, pgs. 1-3). She devised her one-half interest in "the land" to Dawson. (P.Ex. 2, pg. 2). She devised her interest in "the house" to her husband, for life, with remainder in Byrd. (P.Ex. 2, pg. 1). She devised to both daughters, in equal shares, her undivided interest in the 24-acre parcel situated across the street from her marital residence. (P.Ex. 2, pg. 2). She bequeathed all her personal property and the residuary of ***7** her estate to her husband or her daughters. (P.Ex. 3, pg. 1-2),

Prior to Katherine Garrett's death, the Garretts' sold the 24-acre parcel located across the street from their marital residence. (R. 32).

Katherine Garrett died on January 27, 2001. Upon her death, Dawson inherited her mother's one-half interest in "the land". (R. 33). John A. Garrett retained the other one-half interest. (R. 31). Additionally, upon Katherine Garrett's death, John A. Garrett inherited a life estate in "the house", and Byrd received a remainder interest. (R. 165). Under the terms of Katherine Garrett's will, all of her personal property and the residue of her estate went to John A. Garrett.

Thus, upon Katherine Garrett's death, John A. Garrett possessed personal property that he and his wife had accumulated during their life; investments; cash in various bank accounts; life insurance policies; cattle; the warehouse property in Washington Park; and an undivided one-half interest in "the land."

***8 B. 1993-2006: From the execution of the Garrets' wills to John A. Garrett's decision to deed his interest in "the land" to Byrd.**

As John A. and Katherine Garrett got older in life, they trusted Byrd exclusively to make personal and business decisions on their behalf. Prior to her death in 2001, Katherine Garrett asked Byrd to manage the couple's **finances**, and Byrd did so. (R. 160). In 1997 and again in 2000, John A. Garrett executed Durable Powers of Attorney in favor of Byrd, giving her full power to act on his behalf. (R. 36) (P.Exs. 4B, 4A). At her father's request, Byrd began helping Garrett manage his personal and business affairs.

Prior to her death, Katherine Garrett told Byrd that after her death she wanted Byrd to look after Garrett, and Byrd promised her mother she would. (R. 156). Byrd fulfilled that promise when her mother died. (R. 156-59), (R. 69) (P.Ex. 29, Pgs. 7-9). She hired sitters to provide her father with constant care, because she did not want her father to be alone in the house, and because she believed that is what her mother would have wanted for him. (R. 156-57), (P.Ex. 29, Pgs. 7-8). She instructed the ***9** sitters to get him out of the house almost daily because she wanted to keep him physically active and his mind alert. (R. 195).

Garrett was always active in Rotary Club, so she joined Rotary and attended regular meetings with him. (R. 157), (P.Ex. 29, Pg. 8). She went to every doctor's visit he had. (R. 158). She took him shopping for groceries so he could have food to eat at home. (R. 157). She took him to his favorite restaurants and dined with him. (R. 158), (P.Ex. 29, Pg. 8). She arranged for him to go to football games at least once a year (R. 119). She organized his 100th birthday party and invited friends and family to celebrate the occasion with him. (R. 120) (See D.Ex. 7, photo of Garrett taken at his 100th birthday party.) In short, Byrd took care of her father and managed his affairs because no one else offered to do it, nor did anyone object, including Dawson. (R. 185).

Additionally, after the mother's death, Byrd continued to help Garrett manage his business affairs. On February 21, 2001, she sent letters to his **financial** advisors, informing them of her mother's death, and instructing them ***10** to forward to her any forms needed for making legal changes to Garrett's investment accounts. (R. 162-63, 64) (P.Exs.6,7). She further informed his advisors that Garrett had granted her Power of Attorney to make these changes. (R. 162-64).

On October 29, 2004, Garrett executed an executor's deed granting himself a life estate in “the house” and a remainder interest in Byrd. (R. 166). These provisions were consistent with Katherine Garrett's intent as stated in her will. Garrett recorded the deed on December 22, 2004. (R. 166) (P.Ex.11).

At some point between Katherine Garrett's death in 2001 and 2007, Garrett had at least two conversations with Byrd about possibly changing the terms of his will to give her his one-half interest in “the land”. On direct examination by Dawson's counsel, Byrd testified Garrett brought up the idea and she never suggested the idea to him. (R. 171-72, 194).

C. Garrett sought advice from his longtime financial advisor and from independent counsel before deciding to deed his half interest in the land to Byrd.

***11** Between his wife's death in 2001 and his own death in 2010, Garrett continued to meet with and seek **financial** advice from Steve Perry (R. 208) (D.Ex. 1, pg. 10, 15) [5], who had served as his **financial** advisor since the mid-1980s. (D.Ex. 1, pg. 10). Perry was still managing investments for Garrett at the time of Garrett's death. (D.Ex. 1, pg. 28). Throughout their relationship, Perry always met with Garrett personally or spoke with him directly regarding his income planning needs. (D.Ex. 1, pgs. 14-15).

In 1997, Perry moved from Alabama to Highlands, North Carolina, to open a new office. (D.Ex. 1, pg. 9). However, he continued to serve as Garrett's **financial** advisor, and he continued to speak directly with Garrett at least quarterly. (D.Ex. 1, pg. 15).

After Garrett's wife died in 2001, Perry suggested to Garrett that he hire an attorney to review his estate plan and “make sure everything was in order.” (D.Ex. 1, pg. 18). Additionally, during this period, Perry began serving as **financial** advisor and asset manager to Dawson and Byrd. (D.Ex. 1, pg. 12). At one point, both daughters had ***12** investment accounts with Perry's firm. (D.Ex. 1, pgs. 12-13).

Perry testified that, as Garrett approached the age of 100 (he turned 100 in 2009, the same year the deed was executed), he noticed that Garrett was becoming more physically feeble. (D.Ex. 1, pgs. 16-17). As Garrett's physical mobility declined, Perry would meet with Garrett and Byrd jointly to discuss Garrett's income planning needs. (D.Ex. 1, pgs. 16-17). A sitter would bring Garrett to meet with Perry, and Byrd was present at those meetings. (D.Ex. 1, pgs. 16-17).

Sometimes, Garrett would invite Perry over to his house to discuss Garrett's income planning needs. (D.Ex. 1, pgs. 16-17). When these meetings occurred, Garrett had sitters residing with him, and he was more confined to a wheelchair or walker. (D.Ex. 1, pgs. 16-17).

Perry testified that Garrett eventually told him that Byrd was going to be handling the payment of his bills and that Perry was to take instruction from her regarding Garrett's income needs. (D.Ex. 1, pg. 30). However, anytime Perry met with Garrett when

Mary John was present, Perry testified that Garrett was the main speaker; Byrd ***13** typically spoke only when Perry or Garrett asked her something. (R. 35-36).

During all of his meetings with Garrett, Perry always felt like Garrett was mentally competent. (D.Ex. 1, pgs. 17). Perry never noticed any significant change in Garrett's mental condition between the time he first met him and the time he died, stating that "[m]entally, [Garrett] remained pretty quick." (D.Ex. 1, pg. 30).

At some point during these meetings, (Perry could not recall an exact date), Garrett spoke with Perry about making changes to the distribution of his estate. (D.Ex. 1, pg. 18). Specifically, Garrett told Perry that he was considering changing the way the farm was split between his daughters, because Byrd had become his primary caretaker and the only time he saw Dawson was when she wanted money. (D.Ex. 1, pg. 19).

Perry recommended to Garrett that he consult an attorney to get advice on these changes. (D.Ex. 1, pg. 19). Perry recommended Garrett consult Attorney Barry Holt, who was also a Certified Public Accountant. (D.Ex. 1, pg. 20). Perry further told Garrett that he would attend any meeting ***14** with Holt or any other attorney that Garrett hired to discuss changes to his estate. (D.Ex. 1, pg. 19).

At trial, Holt testified that Garrett first became his client in 2007. (R. 209-10). Byrd called Holt and told him that Garrett's former attorney, Frank Hawthorne, had died and that Garrett needed a new attorney. (R. 209-10). Holt testified that Byrd wanted to hire him because he was a CPA and a lawyer. (R. 210). However, Holt testified that at all times he worked for Garrett, not Byrd. (R. 210).

Holt's first task as Garrett's attorney was to review Garrett's assets for tax and estate planning. (R. 211). Holt met personally with Garrett "eight to ten times" to discuss these needs. Steve Perry, Garrett's longtime **financial** advisor, was present for at least one of those meetings. (R. 211).

At these meetings, Holt questioned Garrett to determine his estate planning goals and whether he was satisfied with the way his estate was to be distributed. (R. 212). Holt reviewed Garrett's stock accounts and life insurance policies and asked Garrett if the beneficiaries were named correctly. Holt reviewed the deed to "the land," and ***15** Garrett had questions about the correctness of the deed. Based on Holt's recommendation, Garrett had "the land" surveyed. (R. 212).

Holt reviewed the 1993 wills executed by Garrett and his deceased wife. (R. 213). Holt noticed that all of their property was to be split evenly between their daughters with the exception of "the land" and the Washington Park warehouse property that had previously been sold. (R. 213).

In light of the changes to the Garretts' property since the execution of their 1993 wills, Holt asked Garrett if his will still reflected his present intent with regard to the distribution of his estate between his daughters. (R. 213). Garrett replied, "No." Garrett told Holt that the 1993 wills had previously defined a distribution scheme for their property, but circumstances had changed since then, and now Garrett wanted to be sure that his estate would be split equally among his daughters. (R. 213).

These discussions between Holt and Garrett took place over several meetings. (R. 214). At that time, Holt knew that Garrett was more than 97 years old. Holt knew that ***16** Garrett's present intentions were contrary to the terms of his 1993 will. Holt also knew that Byrd and Dawson did not get along. (R. 214).

To avoid future litigation between the sisters, Holt recommended that Garrett transfer his interest in "the land" by deed rather than by amending his 1993 will. (R. 215). Before the deed was executed, Holt met with Garrett in his office to discuss this transfer. (R. 215). The two were alone and their conversation was private. Byrd was present in the building, but in a back room and not in Holt's office with Garrett when this discussion took place. (R. 218). Because of Garrett's age, Holt testified that he

met with Garrett privately to make sure that Garrett was cognizant of what he was doing and that Garrett was certain about his intentions with respect to the transfer of his interest. (R. 215).

“Every time we spoke, [Garrett] was very cognizant of what was going on,” Holt testified. “There's no doubt in my mind [that transferring his interest in the land to Byrd is] what he wanted.” (R. 215).

***17** Holt recommended that Garrett hire attorney James E. “Sam” Johnston to prepare the deed, because Johnston was more familiar with property law. (R. 216). Garrett met with Johnston and decided to hire him. (R. 217).

D. Garrett made clear his intent to the deed his interest in “the land” to Byrd when he spoke to Perry, Holt, Garrett, Byrd, and Byrd's husband during meeting at Holt's office in February 2009.

In February 2009, a meeting was held at Barry Holt's office where Perry, Holt, Garrett, Byrd, and Byrd's husband were present. (R. 208)(D.Ex. 1, pg. 20). The parties discussed Garrett's income needs and Garrett's desire to make changes in the distribution of his estate, as defined by his will. At that meeting, Perry heard Garrett say that, because Byrd had been a good caretaker for him, he (Garrett) wanted to give Byrd some land that previously was designated for Dawson. (D.Ex. 1, pg. 22).

Perry testified that Garrett knew exactly what he was doing, and Garrett made his intentions clear to everyone present at that meeting. (D.Ex. 1, pgs. 21-22). During that meeting, Perry heard Barry Holt ask Garrett several times if Garrett was sure that he wanted to transfer his interest in “the land” to Byrd. (D.Ex. 1, pgs. 22). Perry ***18** testified that “[Garrett] turned and looked directly at [Holt] - turned to his right and looked directly at [Holt] and said yes. And if [Holt] asked him twice, he asked him six times.” (D.Ex. 1, pgs. 22, 35).

E. Garrett knowingly and voluntarily executed the deed.

On July 13, 2009, Garrett executed a warranty deed conveying to Byrd his one-half interest in the 175-acre tract that he owned jointly with Dawson. (R. 43). The document was notarized, and the Notary Public certified that Garrett had been “informed of the contents of the conveyance” and that he “voluntarily” executed the deed. The deed was recorded in Montgomery County Probate Court that same day. (P.Ex.1).

Perry testified that Garrett did not appear to be under duress at the time he signed the deed. (D.Ex. 1, pg. 24).

Holt testified that he believed Garrett was competent to conduct the transaction. (R. 217). He further testified that he and would not have assisted Garrett with the deed if he had thought otherwise.

F. Byrd voiced concerns about problems with the tax map after deed was filed.

***19** On October 10, 2009, Byrd sent a letter via fax to Holt and Johnston regarding the warranty deed. (R. 69) (P.Ex. 28). She informed them that the Montgomery County tax map listed her as owner of the entire 175-acre tract, as well as the 14.1 acre lot and house that she inherited through her mother's will. In the letter, Byrd wrote, “According to Scott Millican, mapper [with the Montgomery County Appraisal Department], this deed does not give [Dawson] any land - that was not [Garrett's] wishes, especially since [Dawson] has already gotten some of the land.” She asked for their help in getting the tax map error resolved. (P.Ex. 28).

G. Dawson filed suit.

On December 29, 2010, Dawson filed her complaint in the circuit court. (C. 16-29). In the complaint, Dawson alleged that subsequent to Garrett's death she discovered the warranty deed he executed in favor of Byrd. (C. 19).

In support of her undue influence claim, Dawson alleged that Byrd had a confidential relationship with her father; that during the time the deed was executed Garrett placed great trust and confidence in Byrd and Byrd exerted a controlling and dominant influence over her him; that Byrd ***20** exercised Power of Attorney over "all" of Garrett's affairs because Garrett was not competent to handle his own affairs; that Byrd controlled "everything" Garrett did; that Byrd decided which family and friends could visit with Garrett; that Byrd traded parent-child roles with Garrett, with her coming to serve as parent in the relationship and him serving as child; that she would have Garrett sign documents without explaining to him what he was signing; that Byrd took advantage of his trust and confidence in her by persuading and inducing him to execute the warranty deed in her favor; that this transaction was contrary to Garrett's intent; and that Garrett would not have executed the deed but for Byrd's controlling influence over him. (C. 20-23).

In support of her claim that Garrett lacked capacity to make the conveyance, Dawson alleged: that Garrett was 100 years old at the time of the conveyance and had been diagnosed with vascular dementia of a continuing and permanent nature prior to execution of the warranty deed; and that at the time of execution of the deed, Garrett was unable to understand the nature of his actions. (C. 23-24).

***21** In support of her fraud claim, Dawson alleged: that Byrd falsely represented to Garrett that he was signing something other than a deed that he conveyed his one-half interest in the land to her; that Byrd knowingly withheld these facts with the intent to deceive Garrett and induce him to execute the deed; that Garrett was unaware of Byrd's fraudulent misrepresentations to him and that he relied on her to the detriment of Dawson. (R. 24-25).

Finally, Dawson further alleged: that Byrd had misused her Power of Attorney to misappropriate Garrett's "money, stocks, and securities", wrongfully transferring these assets to herself; that Garrett was unaware of these alleged wrongful transfers and did not give his consent.

Byrd filed her answer on January 28, 2011. (C. 30). She denied every factual allegation that Dawson made to support the various counts of the complaint. (C. 31-35).

Following discovery, a bench trial was held over two days during May 29-30, 2012. (R. 1-228). At trial, Dawson presented testimony from seven witnesses who were familiar with Garrett and/or Byrd.

Testimony of Doug Cooper

***22** Cooper purchased his residence from Garrett (which was part of the 24-acre parcel sold before Katherine Garrett's death), and he lived across the street from Garrett for 15 years. (R. 17). Cooper rarely saw Garrett, perhaps a couple of times a year, during that time. (R. 18). Cooper knew Dawson, because she was his next-door neighbor. (R. 18). He met Byrd only once.

Garrett had a pond on his property, and Cooper fished in the pond three or four times during his 15 years of residing there. (R. 19). Prior to fishing in the pond, Cooper would always ask Garrett's permission, and Garrett always gave it. (R. 20).

Cooper recalled one occasion when, after receiving Garrett's permission, he began to fish in the pond, and he heard Byrd yelling for him to come to Garrett's front porch. (R. 23). Cooper testified that Byrd told him that he was trespassing in her pond. (R. 21). Garrett was sitting in a rocking chair. (R. 21). Cooper told Garrett to tell Byrd that he was not trespassing and that he had permission.

***23** Cooper testified that Byrd told him that he didn't have permission to come on the property. (R. 22). Cooper testified that, while he was on the porch, Garrett never spoke to him. Byrd did all the talking. (R. 22).

However, Cooper testified that every time he spoke with Garrett, he believed that Garrett had the capacity to decide who could fish in the pond. (R. 24-25).

Testimony of Kitty Dawson

Dawson described the relationship between her, Byrd, and their parents as "wonderful" twenty years ago. (R. 28). At that time, Dawson visited her parents often. Their families would gather at her parents' house for holiday celebrations. (R. 29). She and her parents attended church together, and she visited her parents almost daily. (R. 30). However, Dawson testified that her relationship with Byrd worsened during the past 20 years.

Dawson testified that in 1993, the same year her parents' wills were executed, her parents called her and Byrd together and discussed their plans for dividing their property. She recalled her parents stating that she was to get "the land" and Byrd was to get "the house". (R. 30).

***24** However, Dawson acknowledged that some of the real property devised in their parent's wills had been sold prior to their deaths, namely the 24-acre parcel located across the street from their parents' marital home and the Washington Park warehouse that had been intended for Byrd. (R. 34).

After her mother died in 2001, Dawson testified that her relationship with her father became "very strained." She testified that Byrd "took over" Garrett's house. (R. 35). She testified that Byrd decided which groceries would be purchased for Garrett's home. (R. 44). Byrd had power of attorney to act for Garrett. (R. 35-36). She managed his business affairs and wrote out his checks. (R. 38). Byrd hired and fired Garrett's sitters without consulting Dawson. (R. 37). She would have the sitters take Garrett places on occasions that Dawson believed was done in order to limit his contact with friends and family. (R. 39). Dawson testified that at one point Byrd refused to let Garrett attend church services. (R. 48).

However, Dawson acknowledged that no one, including Byrd, ever told her she could not pick Garrett up and take him to church. (R. 49). Additionally, Dawson testified ***25** that Byrd never prevented her from visiting with her father. In fact, Dawson testified that, between 2001 until his death in 2010, she visited Garrett two or three times a week. (R. 57). Dawson would visit Garrett when Byrd was at Garrett's residence (R. 46-47) and when she was not (R. 57). Dawson lived across the street from Garrett for 18 years. (R. 29). She acknowledged that she had the opportunity to see him anytime he was at home. (R. 58-59).

Furthermore, Dawson acknowledged that Byrd never told her that she was excluded from helping with the management of Garrett's affairs. (R. 38). Dawson further acknowledged that Byrd was right to hire the sitters for Garrett after her mother died, because Garrett needed someone to stay at the house with him. (R. 46). Finally, Dawson testified that the reason she did not get involved in helping with the care of her father was because Byrd would not "communicate" with her. (R. 59).

In 2009, the year the deed was executed, Garrett was 100 years old. (R. 43). Dawson testified that she was not consulted prior to Garrett conveying "the land" to Byrd. (R. 42). She believed the conveyance was contrary to her parents' intent, as expressed in their wills. (R. 42).

***26** Dawson alleged that Garrett's decision to deed the land to Byrd was the product of undue influence by Byrd. (R. 60). She testified that, by 2009, Byrd had become the dominant one in the father-child relationship (R. 47), and she controlled every aspect of Garrett's business and personal affairs. (R. 44).

Dawson testified that she did not believe Garrett was competent at the time of the conveyance, nor did she believe that he was competent to make such decisions during the past 10 years of his life. She testified that, mentally, Garrett had "good days" and "bad days", (R. 60-61), but he seemed not to recognize her sometimes when she visited him. (R. 65).

However, Dawson acknowledged that she believed Garrett was competent to make certain decisions for himself, just not "big decisions" concerning his business. (R. 64). She further acknowledged that, on his "good days," Garrett would have been competent to make decisions about his **finances**. (R. 60-61).

Finally, she acknowledged that if Garrett did not want to do something, his decision ruled. For instance, around ***27** the time that the deed was executed, Garrett, Dawson, and Byrd, all went down to the beach for a family reunion. When they returned, Garrett made it clear that he did not want to go back to the beach, and Byrd never forced him to return. (R. 64). Additionally, Dawson acknowledged that her daughter, Kitty Hite, borrowed $5,000 from Garrett in 2009 (the same year the deed was executed), and that Garrett made the decision to loan the money. Byrd was present when the decision was made, but she did not influence Garrett's decision to make the loan.

Testimony of Stephanie Belcher

Stephanie Belcher worked as Garrett's sitter from November 2009 (four months after Garrett executed the deed) until June 2010. (R. 70). Byrd hired her. (R. 71). Belcher considered Byrd to be her boss. (R. 78).

Belcher loved Garrett. She did not like Byrd. (R. 78). She testified that Byrd gave her instructions each day on what to do with Garrett. (R. 74). She testified that Byrd controlled Garrett's daily routine (R. 75-76), which included: sitting with Garrett and taking care of him, taking him grocery shopping, and running errands with him. ***28** (R. 72-73). Occasionally, Garrett seemed like he did not feel like going to a place that Byrd wanted him to go. However, Belcher testified that she had to take Garrett where Byrd wanted or Byrd would get “very angry” with her. (R. 73).

Belcher testified that if anyone visited Garret, Byrd wanted to know. (R. 76). She testified that Byrd instructed the sitters to keep records of who visited him. (R. 77). She testified that sometimes Byrd wanted the sitters to eavesdrop over conversations Garrett would have with a visitor, and Byrd wanted to know what was said.

If other family members tried to take Garrett somewhere, Byrd would get angry with Belcher and threaten to fire her if she allowed him to go. (R. 79-80).

Belcher testified that sometimes Garrett seemed like he did not recognized people he knew. (R. 89). However, Belcher acknowledged that Garrett always remembered her when she came to his house, but sometimes he would ask her for her name.

Belcher testified that Byrd would speak negatively about Dawson and her family. (R. 81-82). She testified ***29** that Byrd told her that she didn't get along with Dawson and her family because they were upset that Byrd controlled Garrett's checkbook. Belcher testified that she heard Byrd tell Garrett that Dawson didn't love him, and that Byrd was the only one who comes to see him. (R. 82).

Garrett broke his hip in April or May of 2010. On that day, Byrd had given the sitters instructions to take Garrett to town. Belcher left his room to use the restroom, and while she was gone, Garrett tried to stand and fell, breaking his hip. (R. 83-84).

While at the hospital, Belcher told Byrd she did not approve of the care Garrett was receiving from his nurses. (R. 84-85). Belcher testified that she called the hospital staff and complained. (R. 85). An administrator came to the room and spoke to Belcher about Garrett's care. (R. 85).

The next day, when Belcher came to work, Byrd was sitting in the hospital room with Garrett. (R. 85-86). She testified that Byrd demanded that Belcher apologize to her. (R. 86), accusing her of “going over [Byrd‘s] head” to ***30** complain about the nurses. Belcher refused to apologize, and Byrd fired her. (R. 87).

Testimony of Ladonte Haynes

Ladonte Haynes worked as a sitter for Garrett three days a week between 2002 and 2006.(R. 95). Dawson, Byrd, and Byrd's husband, Sim, interviewed her for the job. (R. 96). Byrd hired her.

Garrett was between the ages of 93 and 97 when Haynes worked for him. (R. 116). She believed Garrett was in good physical and mental health. (R. 117). He communicated well with her. (R. 117). He always knew Haynes and recognized her when he saw her. (R. 107). She testified that Garrett knew everyone who visited him, and she believed he was mentally capable of making his own decisions. (R. 107). Haynes also believed that Garrett needed the care of sitters, their companionship, and their help transporting him places. (R. 96).

Throughout her time with Garrett, Haynes rarely observed Byrd deal with Garrett's business affairs. (R. 98). She never witnessed any transactions that Byrd handled for Garrett. (R. 98-99).

***31** However, Haynes testified that, while she worked for Garrett, Byrd controlled his personal affairs. (R. 97). She gave the sitters instructions on how to care for him. She paid them. Byrd required the sitters to keep a record of his medications and daily routine. At some point, Byrd instructed the sitters to record who visited or called his house. She recalled two or three times that Garrett wanted to attend church, but Byrd had something else planned for him to do that day. (R. 101).

Haynes testified that she never witnessed Garrett and Byrd argue, rather Garrett went along with whatever Byrd wanted him to do. (R. 101). Garrett did not like getting out of the house. (R. 106-07). However, Haynes testified that she thought it was in his best interest for him to get out of the house and do things because it “kept his mind strong.” If Garrett was home all day, Haynes testified that he would just sit and watch TV.

Haynes testified that she believed Byrd did other things that were in Garrett's best interest, (R. 121) like taking him to Troy University football games (R. 119), and planning and hosting his 100th birthday party (R. 120); See (193) (D.Ex.7) (photo of Garrett at the birthday party).

***32** While Haynes had daily contact with Byrd regarding Garrett's care, she and Garrett had less contact with Dawson. Sometimes, Dawson would not visit for weeks. (R. 125). Furthermore, Dawson never asked the sitters to do anything for Garrett.

Haynes stopped working full-time for Garrett in 2006, but she resumed working for him, part-time, between 2009 and 2010. (R. 101-102). During this period, she heard Byrd tell Garrett that Dawson didn't care about him. Byrd also instructed Haynes not to allow Garrett to talk to one of his friends. (R. 103). Additionally, during this period, if someone called Garrett's home and Haynes did not recognize the caller, Byrd instructed Haynes to take a message for Garrett. Byrd gave Haynes instructions on how to grocery shop for Garrett. (R. 104). Byrd also oversaw the payment of his household bills.

However, Haynes testified that she never saw Byrd and Garrett disagree. (R. 105-06). Furthermore, Garrett rarely objected to what Byrd wanted them to day for the day. (R. 112). The one exception being if Garrett was out someplace and wanted to go home, he would tell Byrd that he was ready ***33** to go. She never saw Byrd disagree with Garrett about that.

Garrett spoke with Haynes about his plans for his property after his death. (R. 123). Haynes testified: “He always came off to me as a man who had his affairs in order. He would always say, well, [Byrd] gets the house. [Dawson] gets the land.”

Testimony of Jay Andrews

Jay Andrews testified that he began serving as pastor at Garrett's church, Snowdoun United Methodist Church, in 2008. (R. 128). Andrews testified that Garrett attended the church regularly, until his health declined. Dawson and her family also attended church there regularly. (R. 130). Byrd visited the church once after Garrett died.

When Garrett attended church, Andrews questioned his mental health. Andrews testified he had been the pastor there for more than year, and Garrett continued to thank him for visiting. (R. 129). Andrews believed Garrett did not remember him from week to week, and that he may have been suffering from senility brought on by old age.

***34** Andrews testified that Garrett had difficulty hearing others. His sitters had to help him walk at church.

Andrews became acquainted with Byrd while visiting Garrett at the hospital after he broke his hip. (R. 130). During those visits, Andrews observed Byrd and Garrett together on several occasions. (R. 131). Andrews described their relationship as that of a "mother and small child." (R. 132). Byrd would tell Garrett what he could and could not do.

Andrews testified that he also felt like Byrd interfered with his ability to contact Garrett, because he caught her throwing away contact cards he left in Garrett's room. (R. 133).

Testimony of Sam Dawson, Jr.

Sam Dawson, Jr., is Dawson's son and Garrett's grandson. (R. 134). He and Dawson's two daughters were Garrett's only grandchildren. (R. 136). Sam testified that he and Garrett were "very, very close."

He acknowledged that Byrd never prevented him from visiting Garrett. Sam testified that he visited Garrett ***35** often until his death in 2010, and Byrd never prevented him from making those visits. (R. 145).

Throughout Sam's life, Garrett bred and raised cattle on "the land". (R. 136). Sam began helping Garrett manage the cattle when he was 12 years old. (R. 135). Sam testified that, in the mid-1990s, Garrett lost the physical ability to manage the cattle, and Sam managed the cattle since that time. (R. 137).

Sam testified that, prior to Katherine Garrett's death in 2001, Garrett "pretty much" took care of his own business affairs. He testified that, after Katherine Garrett's death, Byrd got "heavily involved" in Garrett's business affairs. However, Sam was aware that Garrett had granted Byrd Power of Attorney to handle his affairs.

Sam testified that he believed Garrett's ability to take care of his business affairs began to diminish after Katherine Garrett's death. (R. 138). He further testified that he did not believe Garrett was mentally competent during the last four or five years of his life. The only example Sam gave was that Garrett had always taken an active role in the sale of his cattle, but during the last ***36** four or five years of his life, Garrett "could not remember" the market price of his cattle. (R. 138).

Sam testified that Byrd controlled Garrett's business and personal affairs during the last four or five years of his life. (R. 139). Sam testified that if Garrett did not want to do something that Byrd wanted him to do, Byrd would get "testy" with him, or "turn on the tears, make him feel sorry for her", or "she would give him the cold shoulder." (R. 143).

However, he acknowledged that he had total control of managing Garrett's farm and selling Garrett's cattle. (R. 140). Sam testified that, during the last ten years of Garrett's life, Garrett left it up to Sam to decide if and when cows should be sold and for what price. (R. 140-41, 151). If Sam needed to buy supplies for the farm, he would make those purchases by himself and the vendors would send Garrett the bill. (R. 141-42).

Sam testified that he did not think Garrett was capable of paying his bills during the last four or five years of his life. (R. 142). However, Sam acknowledged that Garrett most often collected the check personally when his cattle ***37** sold, having a sitter drive him. (R. 152). Occasionally, when Sam picked up the check, he would call Byrd and let her know the funds were ready for pickup. (R. 142).

Sam testified that by the end of Garrett's life, the role of parent-child between Byrd and Garrett had appeared to reverse, with Byrd acting like the parent and treating Garrett like her child. A few days before Garrett's death, Garrett was in the hospital, near death, and Sam testified that he eavesdropped on Byrd as she was crying and giving her emotional farewell. (R. 153). Sam testified that Byrd and her husband were alone with Garrett in his room when Sam overheard Byrd tell Garrett, "[Y]ou're just

like my little boy." Sam testified those words "made [his] blood run cold." He further testified that he believed Byrd had treated Garrett like a little boy for some time. (R. 154).

He testified that Garrett told him many times that, upon his death, Dawson was to inherit "the land" and Byrd was to inherit "the house." (R. 139).

However, Sam acknowledged that he did not want Byrd to possess any interest in "the land" because she could wind up owning an interest in his house, since Garrett never ***38** conveyed that property to him. (R. 151). Furthermore, Sam acknowledged that he benefited greatly from Garrett during Garrett's lifetime. For the last 20 years of Garrett's life, Sam lived in a house owned by Garrett and situated on "the land". (R. 135). He never paid rent. (R. 149). Garrett always paid his water bill. (R. 149). Garrett gave Sam a heifer in the mid-90s and allowed Sam to grow his herd on "the land". (R. 148). At the time of Garrett's death, when Sam and Byrd divided Garrett's cattle, Sam received about 20 head of cattle, including 12 cows, two bulls, and several calves, which he claimed was the increase of his one heifer. (R. 147).

Testimony of Mary John Garrett Byrd

Byrd testified that the first time her parents discussed giving her "the house" and Dawson the "the land" was in 1993, when they made these provisions in their wills. (R. 165).

She testified that during his lifetime Garrett sold the Washington Park warehouse property, which had been intended for her in his will. (R. 32)(P.Ex. 3, pg. 2), (R. 193). The money from that sale was placed in a separate bank ***39** account to pay for Garrett's living expenses. (R. 201). By the time of Garrett's death, those funds were depleted. (R. 201). She testified that Prior to Katherine Garrett's death, but after their wills were executed, the Garrett's' also sold off the 24-acre parcel located across the street from their house. (R. 32) (P.Ex. 3, pg. 1), (R. 32) (P.Ex. 2, pg. 2).

Byrd testified that, in 2006, Garrett brought up the idea about transferring his one-half interest in "the land" to her. (R. 172-73, 176-77). She never suggested this idea to him. (R. 172). At that time, he was 97 years old.

Byrd testified that these conversations took place while she, her husband, and Garrett would ride four-wheelers through "the land". (R. 171-72). She testified that Garrett discussed giving her his interest in "the land" on at least two separate occasions. (R. 171). She testified that at the time of these discussions, she was involved in all decisions regarding Garrett's business affairs. (R. 172). However, Garrett also was involved in every one of those decisions, and she never made a decision for him without his involvement. After these discussions, Byrd and Garrett consulted with Garrett's longtime ***40** **financial** advisor, Steve Perry, about transferring his interest to Byrd. (R. 172-73). Perry recommended they consult with attorney Barry Holt, and Perry contacted Holt to set up a meeting. (R. 172-73).

In 2007, Byrd and Garrett met with Holt and discussed transferring his interest to Byrd. (R. 172-73). After that meeting, Garrett hired attorney James E. "Sam" Johnston to have "the land" surveyed. (R. 173). Garrett also hired Holt, a Certified Public Accountant, to provide him with tax and estate planning services. (R. 174).

Johnston drafted the deed conveying Garrett's interest in "the land" to Byrd. (R. 175). Garrett paid Johnston's fee. Byrd wrote the check, and Garrett signed it. Generally, Garrett would have Byrd write his checks, and he would sign them.

Preparation of the deed took three years - from the date Garrett began discussing the land transfer with Byrd until the deed was prepared for Garrett's signature. (R. 176-77). Much of the delay was due to Holt and Johnston. (R. 177).

***41** On September 7, 2008, more than a year after Garrett had the land surveyed, Byrd wrote Johnston to inquire about the status of the deed. (R. 180) (P.Ex. 19, pg. 1). In the letter, Byrd emphasized that Garrett was 99 years old and that the deed

needed to be finalized soon. She informed Johnston that she wanted to avoid the "hassle, time, and expense that would be created by the Court System."

Byrd wrote a second letter to Johnston in October 2008, again inquiring about the status of the deed. (R. 186)(P.Ex. 20, pgs. 1-7). She wrote another letter to Steve Perry in March 2009, inquiring about continued delays with the deed. (R. 186) (P.Ex. 24, pg. 2).

At trial, Byrd testified that all her writings concerning the deed were written on behalf of her and Garrett. (R. 181). Garrett had input on all matters relevant to the deed, and she never did anything without his input. (R. 182).

Garrett signed the deed on July 13, 2009. (R. 43) (P.Ex. 1, pgs. 1-2). Byrd testified that at that time, and throughout the last ten years of his life, Garrett was mentally competent. (R. 197.) At that time, he also was ***42** physically active and remained so until he broke his hip in May 2010. (R. 190-91).

Byrd acknowledged that, at the time Garrett signed the deed, she controlled his personal and business affairs. (R. 185). She acknowledged that she hired sitters to care for Garrett, and she fired some of them because she disapproved of the level of care they provided him. (R. 178). Byrd also acknowledged that she required some of the sitters to log Garrett's daily activities. She testified that she wanted these events recorded in case his treating physician wanted to review them.

Byrd acknowledged that she had Power of Attorney to make decisions for Garrett. (R. 178). She testified that, prior to her mother's death, her parents granted her Power of Attorney to act for both of them. (R. 159-60). During that time, Byrd helped them manage their checkbook and pay their bills. After her mother died, and at Garret's request, she helped Garrett manage his bank and investment accounts. (R. 160, 162).

On Feb. 21, 2001, three weeks after her mother died, Byrd faxed a letter to Johnny Dunn, a relative who had ***43** managed some of Garrett's investment accounts. (R. 163) (P.Ex. 6, pgs. 1-3). Byrd informed Dunn that she had Power of Attorney to act for Garrett and to mail her any forms for making changes to Garrett's investment accounts. She faxed a similar letter to Garrett's other **financial** advisor, Steve Perry, that same day. (R. 164) (P.Ex. 7, pg. 1).

Byrd testified that she sent these letters to Garrett's investors at Garrett's request, because Garrett wanted all his investments transferred to one firm. (R. 162). She further testified that the reason she asked Dunn and Perry to send the forms to her address was because mail was getting lost at Garrett's house, which she attributed to mishandling by his sitters. (162-63) .

After Katherine Garrett died, Byrd continued to assist Garrett with paying his bills using his money in his bank accounts. At Katherine Garrett's death, Garrett had two bank accounts: one personal account and one account for his business, Cherokee Farms. (R. 164). Any income Garrett received was automatically deposited into these accounts. (R. 198). Occasionally, the account balances would run low ***44** and additional funds were needed to cover Garrett's bills that came due before his scheduled deposits arrived. Byrd testified that during those periods she and her husband would deposit their own money into Garrett's accounts to cover his expenses until his deposits cleared. (R. 198).

After Katherine Garrett died, Byrd opened a third account, a joint account, in her and Garrett's names. They used that account to operate the "Byrd's Nest," an antique store Byrd opened after her mother died. (R. 167, 168-69). While Byrd primarily owned and operated the business, she and Garrett were co-owners. (R. 168-69). She included Garrett in the venture because it gave him "some purpose in life." (R. 169). They attended auctions together to purchase pieces to sell in the store, and Garrett advised her on pricing items in the store. (R. 190).

Byrd acknowledged that, on one occasion, she wrote to Steve Perry, Garrett's **financial** advisor, asking him to cash out some of Garrett's investments, primarily to pay for Garrett's living expenses, but also to allow her and Garrett to buy "larger pieces of furniture" that could be sold for profit at the Byrd'ss Nest. (R. 168) (P.Ex. 17, pgs. 2-3). At Byrd's request, Perry put the

money into that ***45** account. (R. 167). However, Byrd testified that Garrett never made any significant investments in the Byrd's Nest. (R. 199). She opened the business with her own money. (R. 167, 169).

Furthermore, Byrd testified that every decision she made on behalf of her father was done "in his best interest." She testified that if Garrett ever truly disagreed with a decision that she or any other family member wanted to make on his behalf, his decision ruled. (R. 176).

Finally, Byrd testified that none of her family members, including Dawson, ever offered to assist with Garrett's affairs. Furthermore, none of them ever objected to her taking control of his affairs while he was alive. (R. 185). Although Garrett's other family members visited him periodically, she was the only one who cared for him on a daily basis. (R. 185).

STATEMENT OF THE STANDARD OF REVIEW

At the close of Dawson's case, Byrd moved for a directed verdict as to plaintiff's only remaining claim: undue influence. At the close of Byrd's case, Byrd renewed ***46** her motion for directed verdict (R. 158) and moved for judgment as a matter of law[1] (R. 157).

A motion for a "judgment as a matter of law" asserted in a bench trial is actually a motion for a judgment on partial findings by the trial court. *Loggins v. Robinson,* 738 So.2d 1268, 1270 (Ala.Civ.App. 1999); Ala.R.Civ.P. 50(c). In *Loggins,* this Court stated that the ore tenus standard of review applies to a judgment on partial findings by the trial court. 738 So.2d at 1271.

When ore tenus evidence is presented, a presumption of correctness exists as to the trial court's findings on issues of fact; its judgment based on these findings of fact will not be disturbed unless it is clearly erroneous, without supporting evidence, manifestly unjust, or against the great weight of the evidence. *J & M Bail Bonding Co. v. Hayes,* 748 So.2d 198 (Ala.1999).

However, when the trial court improperly applies the law to facts, no presumption of correctness exists as to the trial court's judgment. *Allstate Ins. Co. v. Skelton,* 675 So.2d 377 (Ala. 1996). "Questions of law are not ***47** subject to the ore tenus standard of review." *Reed v. Board of Trustees for Alabama State Univ.,* 778 So.2d 791, 793 n. 2 (Ala. 2000). A trial court's conclusions on legal issues carry no presumption of correctness on appeal. *Ex parte Cash,* 624 So.2d 576, 577 (Ala. 1993). This Court reviews the application of law to facts de novo. *Allstate,* 675 So.2d at 379 ("[W]here the facts before the trial court are essentially undisputed and the controversy involves questions of law for the court to consider, the [trial] court's judgment carries no presumption of correctness.").

In this case, the factual findings in the trial court's final order contained several errors, which are further detailed in the argument. As to these findings, Byrd contends that the court's errors are "clearly erroneous, without supporting evidence, manifestly unjust, and against the great weight of the evidence." Byrd concedes that the ore tenus rule applies to this court's review of these factual findings by the trial court.

However, as to the central issue of this appeal, whether the trial court erred in finding that the evidence presented at trial established that Byrd exercised undue influence over her father in the procurement of the deed, ***48** Byrd contends that the trial court misapplied the law, as defined in precedent cited herein, to the facts established at trial. Because Byrd asks this Court to apply the law to essentially undisputed facts, no presumption of correctness should exist as to the trial court's judgment, and this Court's review of the central issue on this appeal should be de novo.

SUMMARY OF THE ARGUMENT

This case is about a father's knowing, voluntary, and deliberate intent to change the terms of his will by making an inter vivos transfer of land by deed to his daughter. Dawson brought this action after the death of her father, Garrett, alleging that Garrett's intent to deed his one-half interest "the land" to her sister, Byrd, was the product of undue influence on Byrd's part.

Following a bench trial, the trial court entered an order invalidating the deed based on undue influence. In its order, the Court made the following findings: (1) that Byrd exercised a "dominant and controlling influence over her father"; (2) that Byrd had Power of Attorney and "literally made every decision regarding her father"; and ***49** (3) that there was "no question that the [Byrd] is an extremely dominating and controlling individual." (R. 210).

In support of its order, the trial court made several factual findings that were clearly in error and entirely unsupported by the evidence. Specifically, the court's order stated (1) that Byrd procured a deed acquiring the entire 175-acre tract from her father [6]; that Doug Cooper, Garrett's neighbor, testified that he had known Garrett since he was 16 year old [7]; and (3) that Byrd "went on to testify that she suggested to her father that he procure the a deed giving her the 175 acres of land." [8] Thus, these erroneous factual findings should not be considered as credible evidence to support the trial court's ultimate finding of undue influence.

As for the court's undue influence finding, the burden of proof on that issue rested at all times with Dawson. The evidence presented at trial did not support the court's finding of "dominance" by Byrd over Garrett, as that term ***50** has been defined in Alabama case law. Accordingly, the evidence did not support the court's finding that a legal presumption of undue influence existed in this case. Furthermore, the evidence did not support a finding of undue influence by Byrd over her father. Therefore, the trial court's ruling that the deed was invalid as the product of undue influence was in error, both in law and in fact, and is due to be reversed.

ARGUMENT

I. BECAUSE NO PRESUMPTION OF UNDUE INFLUENCE EXISTED IN THIS CASE, THE TRIAL COURT ERRED IN FINDING THAT THE EVIDENCE PRESENTED BY DAWSON AT TRIAL WAS SUFFICIENT TO ESTABLISH THAT BYRD EXERTED UNDUE INFLUENCE OVER HER FATHER IN THE PROCUREMENT OF THE DEED.

Alabama law recognizes two lines of cases when a presumption of undue influence arises.

In cases involving transfers in legal documents (such as wills) where the beneficiary acquires no benefit until the testator dies, the presumption of undue influence arises when three conditions are met: (1) a confidential relationship exists between a favored beneficiary and the testator; (2) the beneficiary exercises a dominant and controlling influence over the testator; and (3) there is undue activity in procuring the execution of the legal ***51** document that creates the benefit. See *Pruitt v. Pruitt*, 343 So.2d 495, 499 (Ala. 1976); *Ex parte Baker*, 709 So.2d 7, at 9 (Ala. 1997).

If the transfer is one by which the beneficiary receives an immediate benefit (such as upon execution of a deed), then the presumption arises when the first two above-listed elements are met: (1) a confidential relationship exists between the grantor and the grantee and (2) the grantee exercised a dominant and controlling influence over the grantor. See *Hayes v. Apperson*, 826 So.2d 798, 805 (Ala. 2002) (citing *Henderson*, 732 So.2d 295, 298-99 (Ala. 1999). [1]

In both lines of cases, however, the burden of proof is the same. See, e.g., *Furrow v. Helton*, 13 So.3d 350, 353 (Ala. 2008) (finding no distinction in the "principles governing the legal shifting of the burden" of proof in actions to set aside an inter vivos transfer or a will based on undue influence); see also, *Wilson v. Wehunt*, 631 So.2d 991, 992-94 (citing and quoting extensively from *Chandler v. Chandler*, 514 So.2d 1307 (Ala.1987), and *Keeble* ***52** *v. Underwood*, 193 Ala. 582, 69 So. 473 (1915), both of which involved will contests). That is, a complainant challenging a gift by will or deed on the basis of undue influence

bears the burden of proving such allegations. *Clifton v. Clifton*, 529 So. 2d 980, 982 (Ala. 1988) (citing *Kelly v. Donaldson*, 456 So.2d 30, 33 (Ala. 1984)).

Generally, what constitutes "undue influence" depends on the facts and circumstances of each case. *Orton v. Gay*, 285 Ala. 270, 275, 231 So.2d 305, 310 (Ala. 1970) (citing *Jones v. Boothe*, 270 Ala. 420, 119 So.2d 203 (Ala. 1960). "Undue influence is said to be a species of constructive fraud, and although difficult of direct proof, much latitude is allowed in the testimony." *Id.*

A. Because Dawson failed to meet her burden of proving "dominance," as that term has been defined in Alabama case law, the evidence in this case did not support the trial court's finding of undue influence, in law or in fact.

To avoid a conveyance by deed, the undue influence must proceed from some act of "dominance or coercion over the will of the grantor." *Id.* (citing *Fortune v. Boutwell*, 271 Ala. 592, 126 So.2d 116 (Ala. 1960)). That is, to constitute undue influence, it must be such as "to dominate the grantor's will and coerce his will to serve another's ***53** in the act of conveying." *Id.* (citing *Halman v. Bullard*, 261 Ala. 115, 73 So.2d 351 (Ala. 1954).

Furthermore, in actions to set aside a gift from parent to child on the basis of undue influence, the Alabama Supreme Court set out the burden of proof in *Chandler:*

"The relation of parent and child is per se a confidential one. The law presumes that the parent is the dominant spirit, but this presumption is not conclusive. 'Where it is made to appear by the proof that the child, and not the parent, is the dominant spirit, then the burden of proof is shifted to the former to establish the fairness of the transaction, and that it was not the result of undue influence.' *Dowe v. Farley*, 206 Ala. 421, 422, 90 So. 291, 292 (1921); *Tipton v. Tipton*, 249 Ala. 537, 539, 32 So.2d 32, 34 (1947). See, also, *Jones v. Boothe*, 270 Ala. 420, 119 So.2d 203 (1960); *Orton v. Gay*, 285 Ala. 270, 231 So.2d 305 (1970); *Wolfe v. Thompson*, 285 Ala. 745, 235 So.2d 878 (1970)....

"...

"... The party seeking to have the deed set aside need only show to the reasonable satisfaction of the court that the grantee was the dominant party in a confidential relationship with the grantor, whereupon the burden shifts to the grantee to show that the transaction was 'fair, just, and equitable in every respect.' *Brothers v. Moore*, [349 So.2d 1107, 1109 (Ala.1977)]."

Chandler, 514 So.2d at 1308.

In the instant case, Garrett, the grantor, was the father of Byrd, the grantee. Thus, their relationship was per se confidential. However, in order to establish a presumption of undue influence, Dawson was required to ***54** prove that Byrd exercised a "dominating and controlling influence" over her father in the procurement of the deed. See, *Hayes v. Apperson, supra.* While the presumption may be established where "it is made to appear by the proof" or when the court is "reasonably satisfied" that the child/grantee was the dominant party in her relationship with the parent/grantor, there must at least be some evidence that the child/grantee "dominated or coerced" the will of the parent/grantor to serve another's will in the act of conveying. See *Orton v. Gay, supra.*

In *Wilson v. Wehunt*, the Alabama Supreme Court defined the type of "dominance" that a complainant in action to set aside a deed from parent to child must establish in order to raise a presumption of undue influence:

"It is well settled that one alleging dominance of a child over a parent must prove that 'time and circumstances have reversed the order of nature, so that the dominion of the parent has not merely ceased, but has been displaced, by subservience to the child.' *Hawthorne v. Jenkins*, 182 Ala. 255, 260, 62 So. 505, 506 (1913) (emphasis in original). 'Subservient' is defined in The American Heritage Dictionary of the English Language (1969) as '[u]seful as a means or instrument; serving to promote some end...[; s]ubordinate in capacity or function.' Black's Law Dictionary 486 (6th ed. 1990) defines 'dominate' as '[t]o master, to rule, or to control.' Thus, for the burden of proof to shift, it is clear that our cases require proof of more than a reversal of

***55** the traditional roles of parent as care giver and child as care recipient; *they require proof that the parent's will has become subordinate to the will of the child.* It is also clear from our cases that the mere relationship of parent and child alone, even when coupled with some activity on the part of the child in securing the preparation of legal papers for the parent, is not sufficient to prove subservience on the part of the parent, so as to shift to the child the burden of proving an absence of undue influence."

Wilson v. Wehunt, 631 So.2d 991, 994 (Ala. 1994); See also *Keeble v. Underwood,* 193 Ala. 582, 586-87, 69 So. 473, 475 (1915) (Holding that, prima facie, the parent is the dominant spirit in the transaction, since gifts flow naturally from parent to child, and noting that "one of the foundations of the rule as to the presumption of undue influence is the theory that the donor is the weaker party.").

Thus, in the instant case, a legal presumption existed at the onset of trial that Garrett was the dominant party in his relationship with Byrd, which included the act of conveyance. See *Wilson v. Wehunt, supra.* To overcome that presumption, Dawson was required to prove that, when Garrett executed the deed, he did so because Byrd "dominated or coerced" his will; that Byrd was his master ***56** and he served her will, not his own. See *Orton v. Gay, supra.*

In *Wilson,* the Supreme Court cited a line of cases where the evidence was sufficient to establish a finding of "dominance" by a child over the parent in undue influence actions:
"*[S]ee Haginas v. Haginas,* 598 So.2d 1334 (Ala.1992) (involving an **elderly** woman, confined to a nursing home, who was pressured by her son over a period of several years to execute a deed, the son threatening to stop his visits if she did not sign); *Brothers v. Moore,* 349 So.2d 1107 (Ala.1977) (involving an **elderly** woman who could not read or write and whose son had taken over all of her business affairs); *Gosa v. Willis,* 341 So.2d 699 (Ala.1977) (involving an **elderly** couple who had exhibited signs of mental feebleness, had little education, and whose former son-in-law had duped them into believing that the conveyance of their property to him would resolve a "tax problem"); *Jackson v. Rodda,* 291 Ala. 569, 285 So.2d 77 (1973) (involving a man who had suffered a nervous breakdown after his wife was accidentally killed and whose daughter not only had looked after him and advised him in his personal affairs, but also had "insisted" that he convey his property to her and had promised to "do the right thing by the other children," and then refused to reconvey the property to her father at his request); *Orton v. Gay,* 285 Ala. 270, 231 So.2d 305 (1970) (involving an **elderly** woman who, shortly after the death of her husband, conveyed her real property and turned over significant holdings of personal property to her daughter, who clearly had manipulated her so as to obtain her property); and *Jones v. Boothe,* 270 Ala. 420, 119 So.2d 203 (1960) (involving an **elderly** couple who had conveyed their property to their daughter ***57** shortly before the death of the father, under circumstances clearly indicating that the daughter had secretly lied to and pressured the couple in an attempt to avoid the operation of the father's will)."

Wilson, 631 So.2d at 995.

In all of the above-cited cases, there was some evidence that the child "pressured" the parent to execute the deed (*Haginas*); or the grantee obtained the deed by deceiving an **elderly**, mentally weak, and uneducated grantor (*Gosa*); or the parent was mentally ill when the child "insisted" he sign the deed (*Jackson*); or the child "lied to" or "manipulated" the parent in order to obtain a benefit (*Orton, Jones*). The Court in *Wilson* also noted in the last four cases cited above, at least one of the grantors was alive at the time of the trial and testified directly with respect to the questions of dominance.

Furthermore, in all of the above-cited cases, in order to establish "dominance," the Supreme Court required more evidence than merely the child having managed the parent's **financial** affairs and directed the parent's daily activities at the time of the conveyance. That evidence alone would not have been sufficient to establish a presumption of undue influence.

***58** Likewise, in the instant case, Dawson sought to establish Byrd's "dominance" over Garrett through witnesses who testified that Byrd "controlled" his personal and business affairs at the time he executed deed. Byrd acknowledged that she assisted her father (at his request) in managing his father's business affairs. She further acknowledged that she directed his personal

activities (through his sitters) in order to keep him active and healthy. However, there was no evidence that Byrd manipulated or deceived her father in procuring the deed from him, nor was there any evidence that Byrd pressured Garrett or insisted that he sign the deed. Thus, evidence that Byrd "controlled" her father's **financial** and personal affairs at the time of conveyance, without more, is insufficient to establish that she dominated him in procuring the deed.

In *Wilson*, the Supreme Court made clear the type of activity that, as a matter of law, does not establish dominance. Because the facts of that case are so strikingly similar to this case, a discussion of *Wilson* is warranted.

***59** In *Wilson*, an **elderly** woman conveyed her small farm to her younger son by deed. 631 So.2d at 992. The children of her older son brought an action to cancel the deed, alleging undue influence by her younger son, and her lack of mental competency. After an ore tenus hearing, the trial court entered judgment for the older son's children.

The trial court determined, based on the evidence, that it was "reasonably satisfied" that, at the time surrounding execution of the deed, the younger son was the dominant party in a confidential relationship with his mother. Thus, the court shifted the burden to the younger son to prove that the transaction was "fair, just, and equitable in every respect." *Id.* (citing *Chandler*, 514 So.2d at 1307.).

Additionally, in *Wilson*, the court found that the mother had suffered intermittent periods of mental incompetency for an extended period prior to executing the deed. Thus, the court shifted the burden to the younger son to show that she executed the deed during a lucid interval. *Id.* at 993. Because the court was not satisfied that the younger son had carried his burden concerning these issues, it invalidated the deed.

***60** On appeal to the Alabama Supreme Court, the younger son argued that the trial court erred in the placing the burden on him to prove that the conveyance was free of undue influence. He argued that the plaintiff bore that burden and had failed to meet it. Additionally, the son argued that the trial court erred in placing the burden on him to prove that his mother was mentally competent to execute the deed Again, he argued that burden rested with the plaintiffs, and they had failed to meet their burden. The Supreme Court agreed with the son, holding that the burden of proof on these two matters rested at all times with the plaintiffs. The Court reversed the trial court and remanded the case. *Id.* at 996.

In reaching its decision, the Court noted the following facts: the mother was 78 years old at the time of the conveyance; testimony showed that the son lived near his mother for years and cared for her in many ways; the son provided her with **financial** assistance to help her maintain her farm; he opened his home to her, even though he had recently remarried; he assisted her in handling her affairs; and he provided transportation for her to various places and functions. *Id.* at 994.

***61** However, the Court concluded that "[n]one of this evidence suggests to us that Ms. Wilson was subordinate to the will of the defendant, so as to create a presumption that the defendant manipulated her in an attempt to obtain title to the farm."

Similarly, in the instant case, there was evidence that: Byrd assisted Garrett in paying his bills; that she and her husband provided him with **financial** assistance by supplementing his income while he waited for his monthly checks to deposit; that Byrd assisted Garrett in handling his affairs; that she provided transportation for him, by way of the sitters she hired to care for him.

As the Supreme Court noted in *Wilson*, this evidence does not suggest that Garrett was subordinate to Byrd's will, so as to create a presumption that the Byrd manipulated him in order to gain title to the land.

Additionally, in *Wilson*, the Court took notice of the facts that: the **elderly** grantor could read and write at the time of the conveyance; that she insisted on paying some of her bills herself, although the defendant assisted her in writing her checks; that the grantor's older son did not live near his mother and had not participated directly in ***62** her day-to-day care in Alabama; that the older son's periodic visits with his mother were short; that the mother had brought up the idea to her younger son of

deeding the farm to him; and that testimony showed the defendant arranged to have the deed prepared after his mother raised the idea to him at least twice. *Id.* at 994.

Similarly, in this case, the evidence showed: that Garrett could read and write at the time of the transaction; he signed all of his checks, although Byrd wrote his checks for him; he insisted on delivering some of those checks for payment; and he insisted on picking up checks made out to him whenever it was possible to do so.

Like the older brother in *Wilson,* Dawson, the older sister in this case, did not participate directly in Garrett's day-to-day care. However, unlike the older brother in Wilson, who lived in a different state than his mother, Dawson lived across the street from her father for 18 years. She lived closer to him than Byrd did.

Like the younger son in *Wilson,* there was evidence that Byrd, the younger sister in this case, was directly involved in Garrett's daily care: She attended Rotary with her father, an activity that he loved; she nursed him ***63** through surgeries, took him to buy his groceries and got him out of the house to keep him active and alert (R. 195); she hired nurses to provide him with constant company and care, because she did not want her father to be alone and because that was what her mother would have wanted (R. 157); she helped him manage his business affairs; she arranged for him to go to football games; and she organized his 100th birthday party (R. 120). Dawson never objected, nor did she try to help. (R. 185).

Furthermore, like the older brother in *Wilson,* Dawson's visits with her father were periodic, according to testimony from Garrett's sitter, a disinterested witness. (R. 125). Garrett's longtime **financial** advisor testified that Garrett told him that he rarely saw Dawson and the only time she visited him was when she wanted money.

Like the grantor in *Wilson,* Garrett suggested the idea of transferring his interest in the land to Byrd prior to executing the deed. Byrd testified that he brought the idea up to her at least twice. The trial court's finding that "Byrd testified that she suggested the idea" was clearly in error and unsupported by the evidence. There was no evidence that she ever suggested the idea to him. ***64** In fact, Byrd testified twice that Garrett came up with the idea, but she never suggested the idea to him. (R. 171-72, 194).

Additionally, like the younger son in *Wilson,* Byrd assisted Garrett in arranging to have the deed prepared, but only after Garrett had suggested the idea to her. She attended meetings between Garrett, his **financial** advisor, and the attorney who assisted with the deed. She arranged for Garrett to be transported to these meetings. She was present at the execution ceremony, and she recorded the deed.

Because the facts in *Wilson* are materially indistinguishable from this, and in light of the Supreme Court's explanation of "dominance" in *Wilson,* this Court should hold that the trial court erred when it concluded that Byrd "dominated" her father. *See also Thorn v. Taylor,* 679 So.2d 1120 (Ala.Civ.App. 1996) (finding facts that were "materially indistinguishable" from *Wilson* and reversing the trial court's ruling that grantee and his wife had "dominated" his father in procuring a deed from him.).

B. Additionally, Dawson failed to prove that Garrett was mentally incompetent to execute the deed, requiring the trial court to presume, as a matter of law, that Garrett was competent to execute the deed.

***65** In *Wilson,* the Supreme Court noted that, although the evidence showed the **elderly** grantor had intermittent periods of confusion and mental incompetence, it found no basis for the trial court's finding that the younger son dominated his mother. Likewise, there was testimony in this case that Garrett had intermittent periods of forgetfulness. However, the Court made clear in *Wilson* that such evidence, taken together with the other facts stated above, was not a basis for the trial court's finding that the younger son had dominated his mother.

In the instant case, Dawson initially claimed that Garrett was mentally incompetent to execute the deed, but she abandoned that claim at the conclusion of her case.[9] In its final decree, the trial court made no finding as to Dawson's mental competency claim. However, the court referred to the testimony of two interested witnesses, Dawson and her son, and a disinterested witness,

Garrett's pastor, who testified to his forgetfulness. As in *Wilson*, such evidence was not a basis for the trial court's finding ***66** that Byrd exercised a dominant and controlling influence over her father in procuring the deed from him.

On the contrary, there was overwhelming evidence of Garrett's mental competence from the period that he began discussing the transfer with Byrd until the date he executed the deed. At trial, Ladonte Haynes, who worked as Garrett's sitter around the time he executed the deed, testified that at that time Garrett was mentally capable of making his own decisions. (R. 107). She further testified: "[Garrett] always seemed to me as a man who had his affairs in order." (R. 123). In deposition, Steve Perry, Garrett's **financial** advisor for more than 20 years, testified that throughout their relationship Garrett remained "mentally sharp." Barry Holt, the attorney who assisted Garrett with the deed, testified that he believed Garrett was competent at the time of the transaction and would not have assisted him if he thought otherwise. Doug Cooper, Garrett's neighbor of 16 years, testified that Garrett always recognized him when he saw him and always recognized his voice when they spoke on the phone. Finally, Byrd testified that she believed her father was competent at all times.

***67** Dawson bore the burden of proving Garrett's mental incompetence at the time he executed the deed. Citing *Hardee v. Hardee*, 265 Ala. 669, 677, 93 So.2d 127, 134 (1956), the *Wilson* Court stated: "The presumption is that every person is sane and the burden of proof is upon the party attacking the conveyance to show the incapacity of the grantor at the very time of the transaction. *Halman v. Bullard*, 261 Ala. 115, 73 So.2d 351 [1954]." *Wilson*, 631 So.2d at 995. Dawson failed to meet her burden on this issue. In the absence of credible evidence to establish Garrett's mental incompetency, the trial court was required by law to presume that Garrett was competent to execute the deed. Thus, any factual finding by the trial court questioning Garrett's mental competence to execute the deed is in error, as a matter of law, requiring reversal of the court's finding of "dominance" and, therefore, undue influence.

II. ASSUMING, WITHOUT CONCEDING, THE EVIDENCE OFFERED BY DAWSON AT TRIAL WAS SUFFICIENT TO ESTABLISH A PRESUMPTION OF UNDUE INFLUENCE, THE TRIAL COURT ERRED IN FINDING THAT BYRD FAILED TO MEET HER BURDEN OF PROVING THAT THE TRANSACTION WAS "FAIR, JUST, AND EQUITABLE IN EVERY RESPECT" SO AS TO OVERCOME THE PRESUMPTION OF UNDUE INFLUENCE, BECAUSE BRYD PRESENTED OVERWHELLMING AND UNSIPUTED EVIDENCE THAT GARRETT ACTED KNOWINGLY, VOLUNTARILIY, AND WITHOUT DURESS IN EXECUTING THE DEED.

***68** Finally, in determining "dominance," the Alabama Supreme Court has noted that the question is not whether the grantor "knew what he was doing, had done, or proposed to do" at the time of the contested transaction; the central question is: how was the grantor's intention produced? *Terry v. Terry*, 336 So.2d 159, 162 (Ala.1976).

In the instant case, the overwhelming and undisputed evidence showed Garrett voluntarily executed the deed with the deliberate intent of changing the terms of his 1993 will, which had left his one-half interest in the land to Dawson. Before executing the deed Garrett sought independent advice from his longtime **financial** advisor and an attorney. During those meetings, and at the actual execution ceremony, Garrett told both of them - on several different occasions - that he wanted to give Byrd his interest in the land because she had been a good caregiver and his intent, as expressed in his will, had changed. (R. 208) (D.Ex. 1, pgs. 19, 21), (R. 213, 215).

In addition to failing to establish dominance, or Garrett's mental incompetence at the time he executed the deed, Dawson failed to present any evidence to refute the independent advice Garrett received prior to making this ***69** transfer. Because Dawson failed to sustain her burden of proving undue influence, the trial court erred in finding that Byrd exerted undue influence over father in procuring the deed from him. Accordingly, this Court should reverse the trial court's finding of undue influence.

CONCLUSION

Thus, in this case, there was no credible evidence to support the court's finding that Byrd "dominated or coerced" Garrett to serve her will, or the will of anyone else, in the actual act of conveyance. Furthermore, there was no evidence to refute the overwhelming evidence that Garrett was mentally competent at the time of execution, However, if this Court finds that credible evidence existed to support the trial court's finding of "dominance", thus creating a presumption of undue influence, Byrd met her burden of rebutting that presumption by presenting overwhelming evidence that Garrett acted knowingly and voluntarily when he executed the deed, and that he clearly intended to change the terms of his 1993 will by making the conveyance to Byrd. Accordingly, for any or all of the reasons stated above, this Court should reverse the trial court's finding of undue influence.

Footnotes

1 A motion for directed verdict, now known as "judgment as a matter of law," asserted in a bench trial is actually a motion for a judgment on partial findings by the trial court, pursuant to Ala.R.Civ.P. 52(c). *See Hinson v. Holt,* 776 So.2d 804 (Ala.Civ.App. 1998), cert. quashed, 776 So.2d 814 (Ala. 2000); *Loggins v. Robinson,* 738 So.2d 1268, 1270 (Ala.Civ.App. 1999); Ala.R.Civ.P. 50(c).

2 These motions are deemed a motion for a judgment on partial findings, pursuant to Ala.R.Civ.P. 52(c). *Supra* n.2.

3 Citations to plaintiff's exhibits will follow this format. Ala.R.App.P. 28(g)

4 Garrett devised by will to Byrd Lots 17, 18, and 19, Block 19, Plat of Greater Washington Park, Montgomery County, Alabama.

5 Citations to Defendant's exhibits will follow this format. Ala.R.App.P. 28(g).

1 Effective October 1, 1995, Ala.R.Civ.P. 50, was amended to rename "motions for directed verdict" and "motions for judgment notwithstanding the verdict" as "motions for judgment as a matter of law."

6 Garrett only possessed a one-half interest in the 175-acre tract. Dawson inherited the other half interest through her mother's will.

7 Cooper testified that he knew Garrett for 16 years. (R. 18). He did not testify that he had known Garrett since he was 16 years old.

8 The trial court's Court's order of July 11, 2012, incorrectly stated Byrd's trial testimony concerning Garrett's decision to deed his interest to her. Byrd testified that it was Garrett's idea to convey his half interest in the land to her. (R. 171-72, 194). She never suggested that idea to him. (R. 171-72).

1 This appeal is from a trial court order invaliding a deed based on undue influence. Thus, only the first two elements of undue influence were required.

9 At the conclusion of her case, Dawson's trial counsel informed the trial court she was dismissing all claims with the exception of the undue influence claim (R. 206). Likewise, in her trial brief, Dawson asked the court to enter judgment on the only remaining claim in the case: undue influence. (C. 159).

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