2005 WL 6584414 (La.App. 2 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Second Circuit.

Charles Larry PLATT, Appellant,
v.
Robert HERNDON, Executor of the Succession of Jo Green Pardue, and First Baptist Church of Shreveport, Appellees.

No. 40,177-CA.
June 21, 2005.

On Appeal from the December 8, 2004 Judgment of the First Judicial District Court, Caddo Parish, Louisiana Honorable Scott J. Crichton, Presiding Judge Number: 482,806-B

Original Brief of First Baptist Church of Shreveport, Appellee

Roos & Frazier, L.L.P., 910 Pierremont Road, Suite 108, Shreveport, LA 71106, Telephone: (318) 868-1616, Facsimile: (318) 868-1784, John M. Frazier, Bar Roll Number 5837, Armand L. Roos, Bar Roll Number 11450, Attorneys for First Baptist Church of Shreveport; Jay Greenleaf, 333 Texas Street, Suite 2020, Shreveport, LA 71101, (318) 227-2021, Fax: (318) 425-5935, Bar Roll Number: 18234, Attorney for V. Robert Herdon, Executor.

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1 I. *STATEMENT OF THE CASE

Jo Green Pardue died XX/XX/2003, three months short of her 103 birthday. At the time of her death she left two purported wills. The first was an olographic will dated December 21, 1989 ("Will") (Church Ex. 1). In the Will, Mrs. Pardue named as her executor Mr. V. Robert Herndon, a dear friend with whom she taught Sunday School for over 30 years. Mrs. Pardue listed each of her bank accounts in the Will by name and account number. She identified all of her major assets, even attaching to the Will a hand-written inventory of her property setting forth her estimate of the value of each item. She named whom she wanted to serve as pallbearers and whom she wanted to serve as the real estate agent to sell her home. Several special bequests were made, including $2,000 to each of two Baptist churches in Texas near where she had grown up and $2,000 to each of two cemeteries in Texas where relatives were buried. Mrs. Pardue also identified several antiques and other pieces of property she wanted to be given to particular friends or relatives. Finally, she left the remainder of her estate to First Baptist Church in Shreveport (the "Church"), her church since 1924.

The second will was dated May 30, 2002, a date when Mrs. Pardue was 101 years old ("Platt Will") (Church Ex. 2; Stipulation, R. Vol. V, p. 1020). That document left Mrs. Pardue's entire estate to Charles Larry Platt, a 56 year old unemployed high school dropout who had held but one job (and that for only a few months) and who, in 1987, had been convicted of felony theft from an 84 year old man (Church Ex. 21). In addition, he had earlier taken advantage of Mrs. Pardue financially [1] (Church Ex. 12; Summary of Checks to Milton Platt, 30, 26 and 25 pages from end and of Ex. 12). The Platt Will named Mr. Platt as her

executor and named George Hayes as her attorney because, according to the Platt Will, "...he was familiar with her wishes." Mr. Hayes was an attorney who previously ***2** represented Mr. Platt's brother but had no relationship with Mrs. Pardue. Mrs. Pardue oddly signed her name as "Jo Green Pardue, Jr." to both the Platt Will and a general power of attorney in favor of Mr. Platt, executed at the same time (Church Ex. 4). [2]

After a four-day trial and hearing testimony from 30 witnesses, the district court made, among others, the following general observations and factual findings in its 15 page Assignment of Written Reasons For Judgment ("Written Reasons"):

"Mrs. Pardue taught English and Latin at Byrd High School during her 33 year tenure between 1925 and 1958. Mrs. Pardue was a faithful and active member of First Baptist Church of Shreveport for over 75 years (1925-date of death), where she taught Sunday School for 50 years. According to Virginia Dodd, Mrs. Pardue attended church 4 times per week. The church and its members were her family and she recognized that fact in her 1989 will. Robert Herndon, a member of First Baptist for more than 35 years and a deacon for most of that time, was also, in that sense, a member of her family. Mr. Platt was not a member of that church and, in fact, did not even attend the funeral for Mrs. Pardue held at First Baptist. She told numerous people that she intended to leave basically everything to First Baptist. She didn't tell anyone she intended to leave Platt anything, much less everything. Witnesses described her prior to 2001 as always well groomed, immaculate, well dressed and meticulous. In fact, her hairstyle didn't change for many years. She lived in a modest home on Leo Street in the Broadmoor area of Shreveport and made few, if any, changes to the house during her many years there. Before Mr. Platt acquired her car, a 1978 LTD, she had kept it 20 plus years. She had a history of being conservative and frugal. Accordingly to Tommy Thigpen, "her pennies were well counted...she pinched pennies". She was of the era of people who would not turn on window units unless the temperature was extremely hot and she was having company. She led a routine, methodical and disciplined life. From a common sense standpoint, it was probably a combination of good genes and a strong disciplined lifestyle which enabled her to live to be 102 years old, and it was probably the combination of these attributes which allowed this retired school teacher and widow to amass the monetary assets which form her estate. It would seem inconsistent that she would have knowingly, intelligently issued checks for large amounts of money to handymen during years 2000, 2001 and 2002, and it would seem inconsistent that she would pay $13,000.00 to anyone, such as Mr. Platt, to broker odd jobs around the house. It is significant that in her latter several years, her dress was disheveled, disorganized and inappropriate. Her hairstyle was no longer carefully done but was stringy and uncombed.

3** "It is also inconsistent with her routine, conservative, methodical nature to have been issuing multiple powers of attorney and multiple revocations. See (1) Herndon Power of Attorney 4/25/01; (2) First Platt Power of Attorney 5/30/02; (3) Revocation of Platt Power of Attorney 7/11/02; (4) Second Platt Power of Attorney 7/15/02; (5) Revocation of Platt Power of Attorney 8/5/02. At the very least, the issuance of 2 powers of attorney and 2 revocations present a suspicious picture and one that is inconsistent with a methodical, highly organized, disciplined woman, such as Mrs. Pardue before she suffered stage 5/6 dementia. In addition, the 1989 olographic will is detailed with numerous special bequests as, well as a list of pallbearers, which seems very consistent with her detailed and thoughtful approach to life. However, the 2002 notarial will represents such a radical departure from the 1989 olographic will as well as this methodical, routine life which Mrs. Pardue lived for over a century that it is, on its face, highly suspicious and totally inconsistent. It is from that perspective that a thorough analysis of the evidence must begin, and ***the analysis leads to one inescapable conclusion and that is that in 2002 Mr. Platt -just as he had done previously in 1988 and as written by the Second Circuit Court of Appeal - 'sought out the elderly victim and took advantage of the victim's obvious inabilities.' " (Emphasis added) [3]

See also the court's extensive oral reasons for judgment which echo and elaborate on the written opinion. [4] The district court also found as a matter of fact that "there was a significant and disturbing pattern of dementia which was manifested at least 15 months before the execution of the notarial will." The district court then utilized a six page, single spaced timeline, beginning 15 months before and ending five months after the Platt Will was executed, that documented this "disturbing pattern of dementia"

with specific references to the testimony of over 20 witnesses and numerous exhibits. The district court then found that the medical opinions "most compelling" and "most consistent with the majority of the testimony is *(sic)* that of Dr. David Henry, an expert in family medicine and geriatrics, [5] and Dr. Paul Ware, an expert in forensic psychiatry" [6] (Church Ex. 31). The district court, as a finding of fact, accepted the opinions of both Dr. Henry and Dr. Ware that "on ***4** May 30, 2002, Mrs. Pardue at least suffered from moderate dementia and did not possess testamentary capacity." [7] With respect to undue influence, the district court made a factual finding that, because of her dementia, Mrs. Pardue was "particularly susceptible and vulnerable to Mr. Platt" and that "Mr. Platt had a disposition consistent with taking advantage of senior citizens." In support of the latter finding, the district court cited not only Mr. Platt's prior criminal conviction (Church Ex. 21) but also the testimony of Mr. Platt's own expert psychiatrist, who described Mr. Platt as having a possible "antisocial personality disorder." [8] The district court went on to find that "the evidence is clear that one fear which Mrs. Pardue had was going to a nursing home" and, citing the testimony of Dr. Ware, noted that this fear is "powerful and perhaps the greatest fear of certain senior citizens," including Mrs. Pardue. [9] The court then found, as a matter of fact, based on the testimony of Mr. Platt himself, that, "by repeatedly addressing this subject with Mrs. Pardue, Mr. Platt seized upon Mrs. Pardue's fears and it was on the basis of that fear that Mrs. Pardue signed documents at George Hayes' office." [10] He further found that Mr. Platt's actions were "inconsistent with pure motive," and this all led the district court to the "inescapable conclusion" that Mr. Platt "sought out the elderly victim and took advantage of the victim's obvious inabilities." [11]

Finally, the district court explained why he was discrediting or not giving much weight to the testimony of several of the witnesses called by Mr. Platt. First and foremost discounted was George Hayes, the attorney who prepared and notarized the Platt Will dated May 30, 2002. The district court explained that it was placing "very little, if any weight, on George Hayes' testimony" because it ***5** was "to say the least problematic" that (1) Mr. Hayes had represented Mr. Platt's brother previously and after a very short meeting prepared both a will and power of attorney for a 101 year old lady whom he did not know; (2) Hayes never asked Mrs. Pardue about her assets, prior wills or special bequests; and (3) Hayes never asked her any questions that would have assisted him in evaluating her competency. The district court thought Mr. Hayes' conduct and testimony were "suspicious" and that his legal actions were "extremely inappropriate." [12]

The court placed little weight on the testimony of the other witnesses to the Platt Will because their contact with Mrs. Pardue was "very brief." Indeed, the witnesses to the Platt Will both testified that they went into Mr. Hayes' office only for the signing of the Platt Will and were with Mrs. Pardue for only five to ten minutes. [13] In discounting the testimony of Mrs. Pardue's financial advisor, Mr. Thigpen, [14] the court referred to the testimony of Mr. Platt's own expert witness, Dr. Sieden, who testified that, in his opinion, Mr. Thigpen was looking at Mrs. Pardue through "rose colored glasses." [15] Finally, the district court noted that it was not giving much weight to the testimony of Mr. Thigpen and Mr. Booth because their testimony was utterly contradicted by the testimony of numerous other witnesses who had known Mrs. Pardue over many years. [16]

Based on these findings, the district court held that the Platt Will was a nullity. It concluded that the Church proved by clear and convincing evidence that, on May 30, 2002, Mrs. Pardue lacked testamentary capacity, which the court defined as the ability to comprehend generally the nature and consequences of the ***6** disposition that was being made. Likewise, the district court determined that the Church had proven by clear and convincing evidence that a relationship of confidence existed between Mrs. Pardue and Mr. Platt and that "Platt exerted improper, undue influence over Mrs. Pardue, that so impaired Mrs. Pardue as to substitute the volition of Mr. Platt for the volition of Mrs. Pardue." [17]

II. ARGUMENT

As may be seen from a comparison of Mr. Platt's statement of the case and the district court's opinion, Mr. Platt has an entirely different view of the evidence presented at trial than did the district court. While Mr. Platt's statement of the case reads like a remake of the movie *Driving Miss Daisy*, the facts and the district court's opinion depicts a tragic story of a very old and very demented lady being victimized by an unemployed opportunist. Mr. Platt's argument on appeal in this case consists primarily of his disagreement with the trial court's factual findings as to Mrs. Pardue's lack of capacity and Mr. Platt's undue influence. The issues of testamentary capacity and undue influence are both intensely factual in nature [18] and the law is clear that these findings cannot be disturbed unless clearly wrong. [19] Even if Mr. Platt's view of the case was a permissible or reasonable view of the evidence presented at trial, which it is not, that cannot constitute reversible error. As the Supreme Court explained in *Stobart v. State of Louisiana, Dep't of Transp. and Dev.*, [20] "where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." Therefore, Mr. Platt's appeal on both grounds is without merit.

***7** The only other issue raised on appeal is Mr. Platt's argument that the district court erred in allowing Dr. Paul Ware to testify as an expert witness. This argument is without any legal support. The methodology used by Dr. Ware was the same methodology used by the other experts in the case and was the same methodology Dr. Ware utilized with approval in a number of other contested will cases in which Dr. Ware testified as an expert in forensic psychiatry. Furthermore, the case law specifically allows an expert in forensic psychiatry to testify in these types of cases.

A. ASSIGNMENT OF ERROR NUMBER ONE Mrs. Pardue Did Not Possess Testamentary Capacity on May 30, 2002

In brief, Mr. Platt argues that the critical issue is Mrs. Pardue's capacity at the moment in time she executed the Platt Will. Mr. Platt goes on to argue that, since the only witnesses to the execution of the Platt Will all testified that Mrs. Pardue appeared competent to them, the district court erred, as a matter of law, in ruling otherwise. In fact, Mr. Platt even argues that the district court erred in denying his motion for summary judgment on this issue. According to him, evidence of Mrs. Pardue's mental condition before and after the execution of the Platt Will is irrelevant, immaterial and, as a matter of law, cannot rebut the testimony of the witnesses to the execution of the Platt Will.

The Church and Mr. Herndon agree that the critical issue is Mrs. Pardue's mental capacity at the time the Platt Will was executed. Mr. Platt is mistaken, however, when he argues that the only relevant, probative and material evidence is that of the witnesses to the execution of the Platt Will. The law is not so narrow. Louisiana law requires the court to "consider the physical and mental condition of the testator not only at the time of execution, but also prior and subsequent thereto, since the actions, conduct and physical and mental condition of the testator before and after the execution of the will are of probative value in deciding testamentary ***8** capacity." [21] Such a rule makes sense because, if the evidence shows that a person consistently lacked capacity both before and after the execution of a will, that is very strong evidence that a person lacked capacity at the time the will was signed. For witnesses, there must be a frame of reference to assess a testator's capacity. That is why, this court, in *Hamiter I*, stated that, "[W]here a testator's insanity is shown to be habitual and constant there arises a presumption of insanity at the moment of the confection of the will." [22]

There are obvious reasons why there is no hard and fast rule that the witnesses to a will are *always* "of paramount importance" (Appellant's Brief, p. 20) as Mr. Platt argues. Witnesses to a will may not know the testator very well and may spend relatively little time with the testator. As result, even if the witnesses were honest and credible, they could be fooled by testator's ability to "mask" his disability. [23] Furthermore, the witnesses and notary might be biased because of a relationship to the potential legatee. Finally, the witnesses and notary might be in league with the potential legatee.

Because capacity to execute a will is an intensely factual inquiry, comment (f) to LSA-C.C. article 1477 expressly recognizes that *"each case is unique"* and "no quick litmus-paper test exists to apply to the evaluation of mental capacity in all cases."

As a result, there are cases, such as those cited by Mr. Platt, where the court placed a greater weight on the eyewitnesses to the execution of the will but there are also a number of cases, not cited by Mr. Platt, where the court completely discounted the testimony of the witnesses to the will. In cases where the court ***9** relied on the testimony of witnesses to the execution, the evidence supported doing so. For example, in *Succession of Deshotels*, [24] the lawyer who prepared and notarized the will had known Mrs. Deshotels, the testator, his entire life. He had performed legal work in the past for Mr. and Mrs. Deshotels. On three occasions prior to the execution, she discussed with them the fact that she wanted to favor her natural daughter over her adopted daughter and clearly stated the reasons. In *Succession of Chauffepied*, [25] the issue was the validity of a revocation of a will that excluded as legatees many members of Mrs. Chauffepied's family. The attorney who notarized the revocation was, at the time, working on a new will for Mrs. Chauffepied. She had told the attorney of several specific bequests she wished to make, naming relatives and the property she wished to give each. The revocation was handwritten and signed by Mrs. Chauffepied and, by declaring the revocation valid, she died intestate. The Court upheld the revocation because of the evidence, including conversations with other persons (who had known her for years) on the day the revocation was signed. In *Succession of Braud*, [26] the contested will was an olographic will and one of the witnesses to the signing of the will, was actually a legatee under a prior will who, against her own self interest, testified that Ms. Braud understood what she doing in executing a new will. Her testimony was, of course, given great weight by the court in upholding the will. In *Succession of Mack*, [27] the attorney who prepared and notarized the will had known the testator for many years and had prepared an earlier will for her. He had never even met the legatee and he questioned the testator about leaving her property to a non-family member. His testimony was given great weight.

***10** By contrast, in the cases where the will was declared invalid for lack of testamentary capacity, there were, as there are in this case, specific reasons why the court discounted the testimony of the notary and witnesses to the will. For example, in *Succession of Brantley, supra*, the attorney who notarized the will in question was the attorney for the sole legatee under the will. The attorney never questioned the testator outside of the beneficiary's presence, never inquired about her leaving her entire estate to the beneficiary, never tested her mental state and did not read the will out loud to her. In *Succession of Reynaud*, [28] the court discounted the testimony of the attorney/notary because at the time of the execution of the will, he did not have the benefit of the testator's medical history and did not know of the several instances of testator's delusions and irrational conduct. In *Hamiterl, supra*, this Court invalidated a will in which there was a bequest to a sitter who was a convicted felon and had taken advantage of the testator financially. In declaring that will null for lack of capacity, this Court not only discounted the testimony of the witnesses and attorney, but also the testimony of a psychiatrist who had had examined the testator *immediately* prior to execution of the will. Instead, this Court accepted the expert testimony of Dr. Ware that Justice Hamiter lacked capacity.

While each case is unique, certain lessons for this case may be drawn from the cited cases. Just as in those cases, the district court in this case had a number of very substantial reasons to discount the testimony of the notary and witnesses to the Platt Will. First, Dr. Sieden, the expert psychiatrist offered by Mr. Platt, stated that, in his evaluation of Mrs. Pardue's mental condition on May 30, 2002, he did not consider interviewing the witnesses to the Platt Will to be a "high priority" because they were only with her a few minutes. [29] Second, as the district court ***11** found, the Platt Will was suspicious on its face because it departed so dramatically from the Will that was executed when Mrs. Pardue was competent and understood what she was doing [30]

Third, the district court was correct in concluding that the actions of Mr. Hayes were "suspicious," [31] that his legal representation of Mrs. Pardue was "extremely inappropriate" [32] (Written Reasons, p. 12) and that his prior representation of Mr. Platt's brother was "problematic." [33] (Written Reasons, p. 12) As the district court found, Mr. Hayes did nothing that one would have expected a lawyer to do when being asked to prepare a will for anyone, much less a will for a 101 year old lady. Mr. Hayes never met with Mrs. Pardue outside of Mr. Platt's presence. He never asked her about prior wills. He never asked her about her assets. He never asked her about any special bequests. He never inquired about her family history. He never read the will out loud to her. In short, as found by the district court, he "never asked her any significant questions or any meaningful questions that would have assisted him in evaluating her competency." [34]

When viewed in light of his prior representation of Mr. Platt's brother and his subsequent actions, Mr. Hayes' conduct is even more suspicious and problematic. Mr. Hayes earlier represented Mr. Platt's brother in another succession proceeding in which Mr. Platt's brother received a bequest from an elderly gentlemen of the house in which he and Mr. Platt now live.[35] It was against the backdrop of this representation that Mr. Patt called Mr. Hayes to set up the meeting for Mrs. Pardue - the ostensible reason was so that Mr. Platt could obtain ***12** a power of attorney from Mrs. Pardue.[36] After Mr. Herndon learned of the Platt power of attorney from an employee of AmSouth Bank, he and Mr. Beard met with Mrs. Pardue. At that meeting, Mrs. Pardue executed a revocation of that Platt power of attorney on Thursday, July 11, 2002[37] (Church Ex. 5). When Mr. Hayes received from Mr. Beard a copy of that revocation, Mr. Hayes spoke with Mr. Platt and, without speaking with Mrs. Pardue, drafted a second power of attorney for Mrs. Pardue to sign in favor of Mr. Platt and a revocation of Mr. Herndon's power of attorney. On July 15th, the following Monday, Mr. Platt drove Mrs. Pardue back to Mr. Hayes' office, where she executed yet another power of attorney in favor of Mr. Platt(Church Ex. 7). Mr. Hayes did not recall the details of any discussion with Mrs. Pardue on that day.[38] When Mr. Platt took that power of attorney to AmSouth Bank, the bank's security officer, Charles Upchurch, and Mr. Hayes spoke and scheduled a meeting for the next day at Mrs. Pardue's house.[39] At that meeting, Mr. Hayes gave the impression that he was representing Mr. Platt, not Mrs. Pardue.[40] Even though Mr. Hayes and Mr. Platt admitted that Mrs. Pardue was confused at that meeting and did not even initially recognize Mr. Herndon, whom she had known for over 30 years, Mr. Hayes took no steps to verify Mrs. Pardue's competency.[41] At that meeting (and any other), neither Mr. Hayes nor Mr. Platt disclosed the existence of the Platt Will.[42] These acts and omissions understandably caused the district court to question their credibility and also left ***13** the impression that both Mr. Hayes and Mr. Platt were concealing the existence of the Platt Will.

Fourth, as the time-line in the district court's Written Opinion shows, there is overwhelming evidence of incapacity that totally contradict Mr. Hayes' testimony[43] (Church Ex. 16, 23, 25). In his brief, Mr. Platt ignores this evidence and, instead, cherry picks certain facts to support his view of the evidence. In doing so, Mr. Platt omits other directly relevant and contradictory evidence. For example, in his brief (at p. 8), Mr. Platt refers to the revocation of Mr. Platt's power of attorney described above and declares that “Mr. Beard testified unequivocally that at the time Mrs. Pardue executed the revocation in front of him as notary public he believed that she ‘had the requisite capacity to sign the revocation.’ ” The facts and the excerpt from Mr. Beard's testimony are quite different. As Mr. Beard explained, he prepared the revocation because Mrs. Pardue's bank said they would not deal with two agents. After explaining this to Mrs. Pardue, he asked her whom she wanted to be her agent. Mrs. Pardue pointed to Mr. Herndon and said, “I want him.” At that time he thought she was competent to sign the revocation, but testified very clearly that he realized he was wrong on this point the very next week when Mrs. Pardue signed the second power of attorney in favor of Mr. Platt. This recreated the precise problem that the revocation had sought to correct! Mr. Beard testified that, at that point, he realized Mrs. Pardue had not in fact understood what he was trying to explain to her or what she had signed.

Most importantly, Mr. Platt ignores virtually all of the evidence of Mrs. Pardue's incapacity both before and after the execution of the Platt Will on which the district court relied. This evidence came from people from all aspects of Mrs. ***14** Pardue's life - friends from church, friends from Delta Kappa Gamma, her hairdresser, her neighbors, her yard man, the security officer at the bank, and a social worker from the Department of Elderly Protective Services (“DEPS”). Many of these witnesses did not know each other and, when taken together, their testimony vividly showed, in the court's words, “a significant and disturbing pattern of dementia.”[44]

Mr. Platt nowhere addresses the significant decline in Mrs. Pardue's dress and hygiene. As noted by the district court, she was always known as being “well groomed, immaculate, well dressed and meticulous.” Beginning in 2001 that changed. She was unkempt and at times dressed entirely inappropriately. On several different occasions, she wore pants under her dress, two dresses or a housecoat over her dress. Her hygiene was so bad that an elderly neighbor, Era Loper, even volunteered to wash hair.

Mr. Platt also doesn't address her confusion and the fact that Mrs. Pardue began to get lost in the church that she had attended for over 75 years. He doesn't address the fact that she talked to people about her husband as though he were still alive even though he had been dead for over 30 years. He doesn't address the difficulty she had in managing her finances - how she mistook

a deposit ticket for check and wrote it out as if it were a check and how she let her bills go unpaid to the extent of having her telephone service cut off. All of this was totally out of character. He doesn't address the myriad payments made to Mr. Platt and others and her total inability to explain those checks when asked by Mr. Hemdon. He doesn't address her failure to recognize people such as her sister-in-law, yard man and even Mr. Herndon. He doesn't address the rationale or lack thereof for signing and revoking multiple powers of attorney. Mr. Platt does not address the ***15** executive function problems that she was having or her agnosia - the inability to recognize common objects. He does not consider the testimony of Annie Laurie Savage and her contemporaneous diary entry that Mrs. Pardue was so confused when Ms. Savage asked her for a key to the door, that Mrs. Pardue, unable to recognize common objects, handed her an ice pick, a knife and a comb instead. Mr. Platt does not acknowledge the testimony of Mike Mason, Mrs. Pardue's long-time yard man, that Mrs. Pardue was so confused that, when he asked Mrs. Pardue a for a check, she looked for the checkbook in the breadbox and the oven.

Mr. Platt does not address the testimony of Cara Lee Smith, a trained social worker and friend of Mrs. Pardue's of long duration, who testified that Mrs. Pardue was not “cognitively aware” and that she had to talk to Mrs. Pardue as if she were a child. He doesn't address the fact that when Mrs. Pardue was taken to Willis Knighton Pierremont Hospital in August of 2002, the nurse's notes showed that her “clothes were dirty and unkempt,” that her “personal hygiene was poor” and that she had been wearing the same clothes for a week! Mr. Platt ignores Mrs. Pardue's behavior at Montclair Assisted Living Facility, where she took things that were not hers, walked uninvited into other people's rooms and did not recognize close friends. He didn't address the fact that within a few weeks of being checked into Montclair, Mrs. Pardue's behavior was so erratic that Montclair required Mrs. Pardue to have sitters with her during waking hours to avoid problems with other residents. [45] These events, both before and after May 30, 2002, do not describe the dignified and precise lady her friends and students had known.

Mr. Platt also ignores the testimony of Robyn Smith, a social worker with DEPS who visited Mrs. Pardue on July 16, 2002, in response to a report made by Mr. Upchurch, the security officer at AmSouth Bank. Mr. Upchurch reported ***16** potential financial exploitation of Mrs. Pardue by Mr. Platt [46] (Church Ex. 16, 16A). During Mrs. Smith's interview and according to her notes from that interview, Mrs. Pardue told Mrs. Smith that it was 1980 - something, that she was born in 1981, that she did not know who the president was, that she did not know how her bills were getting paid, that, while there was some food in the refrigerator, she did not know how it got there, that she knew nothing about her finances, that she had family in Texas but couldn't remember their names and, that she knew nothing about signing any powers of attorney. When asked about Mr. Platt and Mr. Herndon, she couldn't even recall who they were. Mrs. Smith also administered a mental health status questionnaire test which Mrs. Pardue failed. On that day, Mrs. Smith's meeting with Mrs. Pardue lasted about two hours. The next day she went back to see Mrs. Pardue and Mrs. Pardue did not remember her from the day before [47] (Church Ex. 16, 16A). Based on her interview and assessment, Mrs. Smith noted that Mrs. Pardue suffered from “severe dementia” [48] (Church Ex. 16, 16A). After the July 17, 2002, meeting, Mrs. Smith met with the remainder of the DEPS staff and they concluded that Mrs. Pardue needed to be interdicted [49] (Church Ex. 16, 16A). Mrs. Smith closed her file only after Mrs. Pardue was moved into Montclair by Mr. Herndon and his wife, Mary Ann Herndon and was no longer susceptible to Mr. Platt's influence. Mrs. Smith also testified that, had she known of the Platt Will, she would not have closed her file. [50]

Mr. Platt also does not address the expert medical opinions offered at trial, except to attempt to exclude that of Dr. Ware. The Church's experts, Dr. Ware and Dr. Henry, both concluded that Mrs. Pardue suffered from stage 5 dementia, which ***17** is “moderately severe cognitive decline,” and early stage 6 dementia, which is “severe cognitive defects” [51] (Church Ex. 31). According to Dr. Henry, someone with stage 5 dementia “is not going to be able to make a conscious decision which they know the consequences of.” [52] Both Dr. Henry and Dr. Ware testified that it was highly unlikely in their professional medical opinions that Mrs. Pardue was able to understand the nature and consequences of executing the Platt Will on May 30, 2002. [53] Both experts also opined that Mrs. Pardue had significant memory deficits at the time of the execution of Platt Will.

The testimony of Mr. Platt's own expert witness, Dr. Sieden, was strikingly similar. He was of the opinion that Mrs. Pardue suffered from dementia beginning in 2000 and that by the summer of 2002 her dementia had progressed to the point where she

had significant and persistent memory deficits.[54] He further admitted that, based on Mrs. Smith's interview (six weeks after the Platt Will was executed), Mrs. Pardue did not have testamentary capacity at that point in time:

Q. Okay. So going back to on July 16, she didn't know anything about her assets, didn't know, according to Ms. Smith --
A. Okay.

Q. -- didn't know how her bills were getting paid, right?

A. Yes.

Q. And she didn't know -- she knew she had some relatives in Texas, but couldn't even remember who they were.

A. That's correct.

Q. So based on that information, would you - on the assessment that was done of her by Ms. Smith on that date, would you say that she had testamentary capacity?

A. At that moment in time, just based only on that information, I would say, no.[55]

***18** Dr. Sieden also testified that, in his opinion, on May 30, 2002, Mrs. Pardue was subject to being interdicted and had such significant memory problems that Mrs. Pardue probably didn't even remember her prior Will or the family members and friends to whom she had made special bequests in the Platt Will:
Q. Now, with respect to the testamentary capacity, the code article basically says you have to understand the nature and consequences of your act, correct?

A. Yes.

Q. Right? And part of the way the courts have defined

"understanding the consequences" is to understand those that should have been in your mind at the time that you make the disposition, correct?

A. Yes.

Q. Okay. Now, aren't the people that are listed in Exhibit 1, the 1989 will -- Robby Litton, all the Pardue's, all her sister-in-laws -- aren't those the people that should have been in her mind at the time that she is making this disposition on May 30?

A. It would be preferable if they were. We don't know if they were or not. Nobody asked.

Q. You are of the opinion that she didn't even remember them on May 30.

A. That's my opinion. Again, that is an opinion without data to base it on. I would be surprised if she remembered them based on the extent of her memory deficit.[56]

Q. And what do you understand went on as far as the confection of the will? Who was going to be the recipient of it?
A. That Mr. Hayes asked Ms. Pardue who she wanted to leave her estate to, and she point to do Mr. Platt.

Q. To Larry?

A. Yes.

Q. Because at the time, you don't think she remembered any of the other people mentioned in exhibit -- her prior will?

A. Probably not.

Q. As part of your psychological autopsy, did you come up with any basis why she would have wanted to rescind the bequest to the cemeteries and churches in Granger, Texas, other than that she didn't remember?

A. It was that she did not remember...and so it is my understanding that she did not remember the cemeteries that were mentioned or some of the other churches that were mentioned... [57]

Based on all the evidence which Mr. Platt chose not to discuss in brief, it is easy to understand the district court's finding that Mrs. Pardue did not have ***19** testamentary capacity. The evidence was clear and convincing that before, on and after May 30, 2002, Mrs. Pardue was not capable of understanding "in a general way the nature and extent of [her] property, and [her] relationship to the persons who were considered to be the natural objects of [her] bounty, and the consequences of the disposition that [she was] making." La. Civ. Code art. 1477 and comment (b) thereto. Therefore, the district court's finding that Mrs. Pardue lacked testamentary capacity to make the Platt Will was, to say the least, not clearly wrong.

B. ASSIGNMENT OF ERROR NUMBER TWO - Dr. Ware's Testimony was Properly Admitted

Three medical experts testified at the trial of this proceeding, Dr. Paul Ware, an expert in psychiatry, neurology and forensic psychiatry, Dr. David Henry, an expert in geriatric medicine, and Dr. George Sieden, an expert in forensic psychiatry. Because none of these three expert witnesses had the opportunity to evaluate Mrs. Pardue before she died, they each reviewed depositions, medical records, interviews with witnesses and other relevant information about her, and, based on this information, they applied their medical training to assess Mrs. Pardue's mental status at the time she executed the Platt Will. The only differences in their methods were that Dr. Sieden interviewed a few witnesses, including Mr. Platt, and Dr. Ware sat through the entire trial so he could hear and evaluate the testimony of each witness. [58]

Although all three experts performed essentially the same evaluation, Mr. Platt argues that Dr. Ware's testimony alone should be excluded because his methodology he used to reach his conclusions was not sufficiently reliable. Platt brief at 21. In support of his argument, Mr. Platt argues (at 22) that a "close analysis of Dr. Ware's 'technique' shows that it failed completely to follow a properly conducted 'psychological autopsy.' " This is a classic straw man ***20** argument because Mr. Platt has set up a false standard - the 'psychological autopsy' - and then argues that Dr. Ware failed to meet it. While there are literally hundreds of contested will cases in which courts have admitted expert opinion evidence from forensic psychiatrists, there is not one case where the court required the psychiatrist to have specifically performed something called a "psychological autopsy to allow permitted testimony." [59] Furthermore, Mr. Platt, in brief, never explains exactly what a "psychological autopsy" is, who exactly pronounced it as the only accepted methodology for a testamentary capacity case or how it differed materially from what Dr. Ware did in this case. At trial, Dr. Sieden explained a "psychological autopsy" by simply stating "what you do is, you obtain information from as many sources as possible, essentially doing a psychiatric evaluation without the benefit of being able to interview the person themselves." [60] Dr. Ware and Dr. Henry both testified that that is what they did in this case. [61]

Noticeably, Mr. Platt cites no case law in support of his argument that a posthumous mental assessment by a qualified forensic psychiatrist is inadmissible or violates *Daubert v Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), because none exists. Instead, each and every case addressing the issue holds exactly the opposite, [62] and there

are several Louisiana cases involving will contests that have expressly relied on Dr. Ware's expert ***21** opinion. In fact, this Court's decision in *Hamiter 1*, [63] which involved Dr. Ware's expert testimony regarding the posthumous mental assessment of Justice Hamiter, was cited by the South Dakota Supreme Court in *In re Dokken* when it rejected the same argument Mr. Platt is making here. [64]

C. ASSIGNMENT OF ERROR NUMBER THREE - Mr. Platt exercises undue influence on Mrs. Pardue

In brief, Mr. Platt argues, just as he did on testamentary capacity, that there is no direct evidence of undue influence and that the district court erred in ignoring the testimony of the witnesses and notary to the Platt Will, apparently arguing that there must be direct evidence of undue influence at the time of the making of the Platt Will. Again, Mr. Platt is wrong. Like testamentary capacity, undue influence is a question of fact and district court's factual finding cannot be disturbed on appeal absent manifest error. *Succession of Anderson, supra*. Furthermore, Comment (d) to Article 1479 makes it clear that that while "the influence must operative at the time of the execution of the...testament...obviously, it should not be necessary that the acts themselves be done at that time, or that the person exercising the pressure be present then." Comment (b) to article 1479 goes on to explain that, by its very nature, "the objective aspects of undue influence are generally veiled in secrecy and ***the proof of undue influence is either largely or entirely circumstantial."*** (emphasis added)

Because undue influence is usually veiled in secrecy and direct evidence is not usually available, courts generally look at four factors to determine whether a donation is subject to attack for undue influence. The four prongs of the test are: "(1) the testator had an unusual susceptibility to undue influence; (2) the person accused of using undue influence had the opportunity to exercise it; (3) the person accused of using undue influence had the disposition to influence; and (4) the ***22** resulting donation appears to be the product of undue influence. The presence of all four elements warrants a finding of undue influence and invalidation of the disposition." Comment, 67 Tul.L.Rev. 183, at p. 223 (Nov. 1992); See also, *Succession of Reeves*, 97-20 (La.App. 3 Cir. 10/29/97), 704 So.2d 252, writ granted, 98-C-0581, 805 So.2d 185 (La. 5/1/98). When a relationship of confidence is shown to exist, the burden of proof remains with the opponent to the will, but the burden of proof is lowered from a clear and convincing standard to a mere preponderance of evidence standard. [65] In this case, the district court's finding that a relation of confidence existed between Mrs. Pardue and Mr. Platt was not challenged on appeal by Mr. Platt. [66] Therefore, the burden of proving undue influence is by a preponderance of the evidence.

The district court correctly found that all four prongs of this test were satisfied not only by a preponderance of the evidence but by clear and convincing evidence. First, due to her dementia, all of the experts conceded that Mrs. Pardue was definitely susceptible to influence. Second, it is undisputed that Mr. Platt had the opportunity to exercise influence on Mrs. Pardue, who lived alone. Mr. Platt was alone with her often and he admitted that she confided to him her fears of going to a nursing home even though all of her long-time friends knew that was where she needed to be. Based on those fears, he told her that only if he had a power of attorney from her could he keep her at home. Mr. Platt then called an attorney he knew, he took her to that attorney's office, and he stayed there with her the entire time she met with the attorney. One can hardly imagine facts where the opportunity to influence could be greater. Third, Mr. Platt unquestionably had the ***23** disposition to influence senior citizens. Mr. Platt was an unemployed 56 year old high school dropout. He only remembers holding one job in his life and that was for a few months in the 1970s with Moon's Tree Service. His main source of income was social security disability payments and going door-to-door picking up odd jobs, such as raking leaves or cleaning gutters. He had a history of problems with the law, including a felony conviction relating to the theft from an 84 year old gentleman. [67] In denying his appeal as to an excessive sentence, this Court stated that Mr. Platt "sought out the elderly victim and took advantage of the victim's obvious inabilities."

Contrary to the argument in his brief, Mr. Platt's criminal conviction was hardly the only evidence of Mr. Platt's disposition to influence and take advantage of elderly people. Evidence was presented at trial that Mr. Platt had taken advantage of another elderly person, Dr. Katye Lee Posey, the former director of elementary education for Caddo Parish and a friend of Mrs. Pardue's. [68] And, as the district court noted in its opinion, Dr. Sieden testified that Mr. Platt had an antisocial personality, and

even he admitted that Mr; Platt had the disposition to influence Mrs. Pardue to obtain a power of attorney.[69] In light of Mr. Platt's (and Mr. Hayes') actions in having Mrs. Pardue execute a second power of attorney in Mr. Platt's favor immediately after she revoked Mr. Platt's first power of attorney, it is hard to deny this fact.[70] Dr. Sieden even went further and said that Mr. Platt was "a shifty character. It is easy to be suspicious of him,"[71]

***24** Dr. Sieden even admitted that Mr. Platt's motives were not "completely altruistic."[72] Mr. Platt testified that he was disabled and never performed any physical work for Mrs. Pardue. However, before Mr. Herndon totally took over Mrs. Pardue's finances, scores of checks were written to Mr. Platt totaling more than $13,000. Mr. Platt admitted that he filled out many of these checks out himself and further admitted that he may have signed Mrs. Pardue's name to some of them. These checks were strangely all for even amounts and most contain notations for work done on Mrs. Pardue's house or car. Mr. Platt claimed that all of this work was performed by others whom he paid with the proceeds of the checks after cashing the checks. He could produce no receipts, however, for any of the work. The checks made payable to him and Mr. Platt's claim that he did none of the work described in those checks obviously bothered the district court which said in its oral reasons for judgment, "It presents a disturbing picture. A lot of money paid for work of all sorts, no receipts to back up anything"[73] (Church Ex. 12 and 12A). When asked whether he believed Mr. Platt's explanation for all of the checks made out to him, even Dr. Sieden, Mr. Platt's own expert witness, said, "Not completely."[74]

Mike Mason, the yard man who had worked for Mrs. Pardue for seven years, testified that he had examined some of the work Mr. Platt had actually or supposedly done at Mrs. Pardue's house, and in his opinion he thought Mr. Platt was "ripping her off."[75] Charles Upchurch, the security director for AmSouth ***25** Bank who knew Mr. Platt from childhood, was so concerned about Mr. Platt's actions and motives that he reported what he believed to be Mr. Platt's financial exploitation of Mrs. Pardue to the DEPS.[76] Robin Smith, the DEPS investigator, called Mr. Platt the "perpetrator" and, based on her investigation, concluded that Mr. Upchurch's report of financial exploitation was "substantiated" (Church Ex. 16). Based on all of this evidence, the district court was justified in finding that Mr. Platt had the disposition to influence Mrs. Pardue.

Fourth, and finally, the last element, which is sometimes referred to as the "coveted result," is also obvious here. "The courts often will consider this prong satisfied when the disposition appears 'unnatural' on its face, that is, when it benefits persons other than the 'natural objects of the testator's bounty.' "[77] Here, the unnaturalness of the disposition is apparent not only on the face of the Platt Will but also by its contrast with the prior Will.

Mr. Platt cites several appellate court cases that he asserts support his position that the district court committed manifest error in finding that Mr. Platt unduly influenced Mrs. Pardue. None of the cases cited by Mr. Platt are factually similar to this case[78] and in most of the cases cited by Mr. Platt, the courts of appeal simply affirmed factual findings of no undue influence made by the district courts. ***26** The only relevance these cases have is that each stands for the proposition that the issue of undue influence is a question of fact for the district court to resolve and that those factual findings will not be disturbed on appeal unless plainly wrong.

Similarly, Mr. Platt cites *Succession of Lounsberry*, 2001-1664 (La.App. 3 Cir. 5/8/02), 824 So.2d 409, writ denied, 2002-2000 (La. 10/25/02), 827 So.2d 1163, which Mr. Platt claims is the only Louisiana case upholding a claim of undue influence, and criticizes the district court "because it did not even mention *Lounsberry* in its opinion, since the circumstances of this case are completely different from those presented in *Lounsberry*."[79] Mr. Platt is correct that the facts in *Lounsberry*, like all of the other cases cited except for *Hamiter 1*,[80] are not directly analogous to this case. However, *Lounsberry* is relevant for its legal analysis of the standard of review of a finding of undue influence on appeal. In that case, the testator left all of his property to one of three sons. The other two sons sought to have the will declared null for undue influence. At trial the court found there was conflicting evidence presented concerning testator's mental condition and whether the legatee's actions were done

to benefit the testator or unduly influence the testator. The district court found that the will was the result of undue influence. On appeal, the Third Circuit affirmed, holding:

***27** "Furthermore, we find no manifest error in the numerous factual findings incorporated in the trial court's findings. The trial court was presented with evidence that could have supported a view in Michael's favor. Again, strikingly different accounts of Sidney's mental health during the time between Pearl's death and the execution of the will in February 1999. The trial court even heard from Sidney's acquaintances that he would discuss the possibility of writing a new will. One witness testified that Sidney stated Michael was the only son on whom he could rely. Sidney's barber testified that Sidney regularly visited his shop following Pearl's death, that Sidney regularly complained about Errol, and that due to the complaints, he suggested to Sidney that the plaintiffs be disinherited. Gerald Hoffpauir, who described Sidney as his great-uncle, testified that Sidney told him he was upset with Errol and wanted to leave everything to Michael, but that Michael did not want it. Given this evidence favorable to Michael, the trial court made the clear decision to favor the version of events and the witnesses presented by the plaintiffs. The court did so after viewing and hearing from all three sons. We find no manifest error in the trial court's credibility determinations and no manifest error in the conclusion that the witness statements were of such a nature as to constitute clear and convincing evidence of undue influence."

Similarly, in this case, this Court is simply presented with two strikingly diffing views of the evidence. Mr. Platt's view of the evidence is that he was a helper to Mrs. Pardue, she was grateful to him, and as a result, she left her entire estate to him. The district court's view of the evidence was completely different. It concluded that, as a result of her stage 5-6 dementia, Mrs. Pardue was "particularly susceptible and vulnerable to Mr. Platt." It also concluded that Mr. Platt, who had a disposition to influence senior citizens, took advantage of her susceptibility and seized on Mrs. Pardue's fear of going to a nursing home. It found as a matter of fact that it was because of this fear and Mr. Platt's influence that Mrs. Pardue went to George Hayes' office and executed the Platt Will and power of attorney. Then Mr. Platt concealed the existence of the Platt Will until after Mrs. Pardue died. Again, it bears repeating that after hearing the witnesses and conducting a thorough review of all of the evidence, the district court was left with the "inescapable conclusion" that Mr. Platt, just as he had done previously sought out an elderly victim and took advantage of her obvious inabilities. As the district court stated in its Written Reasons, "[T]hat was written in the early 1980's ***28** by the Second Circuit Court of Appeal with respect to the other matter, and it is applicable here, too. Here we are in December of 2004, and I think that language is true one hundred percent, and it tells me a lot."

Just as in *Lounsberry* and *Hamiter I*, the district court's factual findings and credibility calls on this issue are correct, are not plainly wrong and therefore they should be affirmed.

D. ASSIGNMENT OF ERROR NUMBER FOUR - The Court's Denial of Mr. Platt's Motions for Partial Summary Judgment Was Correct

Above all else, the record vividly illustrates that this case involved a myriad of genuine issues of material fact (and questions of law). Judgment is singularly inappropriate for such a case.

III. CONCLUSION

This case required a fact-intensive inquiry. The district court carefully considered the evidence, weighed the credibility of the witnesses, and came to the inescapable conclusion that the Platt Will must be declared null because of Mrs. Pardue's lack of testamentary capacity and Mr. Platt's undue influence on her. The district court did its job and exhaustively considered the evidence. He made the required factual and credibility determinations. Therefore, the district court's decision should stand and this appeal should be denied.

Appendix not available.

Footnotes

1 R. Vol. VIII, pp. 1767, l.26-p. 1768, l. 17; p. 1783, ll. 8-30, pp. 1785, l.27-p. 1786, l. 6; pp. 1786, l. 25-p. 1788, l. 14; pp. 1788, l. 23 - p. 1794, l. 27

2 R. Vol. VIII, p. 1692, ll. 16-26; p. 1740, ll. 26-30; p. 1697, ll. 12-22; p. 1699, ll. 24-27; p. 1700, l. 3-22

3 R. Vol. V, pp. 1109-1110

4 R. Vol. XI, pp. 2354-2382, particularly pp. 2376, 1. ll -2381, l. 16

5 R. Vol. VI, pp. 1166, l. 20 - p. 1252, l. 13; Vol. X, p. 2321, l. 26 - p. 2338, l. 21

6 R. Vol. IX, pp. 1902, l. 1 -p. 2023, l. 29; R,Vol. X, pp. 2339, l. 9-p. 2348, l. 18)

7 R.Vol. V, pp. 1101-1107

8 R.Vol. X, pp. 2280, l. 26 - p. 2283, l. 9

9 R.Vol. IX, pp. 1970, ll. 9-27

10 R.Vol VIII, p. 1807, l. 7- 1808,1. 28

11 R.Vol. V. pp. 1107-1108

12 R.Vol. V, pp. 1108-1109); R.Vol. VIII, p. 1697, ll. 12-22; pp. 1699, l. 24 -p. 1700, l. 22; p. 1705, ll. 29-31; p. 1707, ll. 10-17; p. 1708, l. 5 - p. 1711, l. 6; p. 1714, l. 8 -p. 1720, l. 28; p. 1738, ll. 1-32; p. 1742, ll. 6-14

13 R.Vol. X, p. 2094, ll. 7-12; p. 2088, l. -p. 2094, l. 1; pp. 2102, l. 9 - p. 2105, l. 25

14 R.Vol. X, pp. 2106-2141

15 R.Vol. X, p. 2195, ll. 3-7

16 R.Vol. V, pp. 1108-1109; R.Vol. VIII, pp. 1581 - p. 1690, l. 26

17 R.Vol. V, pp. 1110-1111

18 Comment (f) to LSA C.C. Art. 1477; *Cupples v. Pruitt*, 32,786 (La.App. 2 Cir. 03/01/00), 754 So.2d 328, writ denied, 2000-0945 (La. 5/3/96), 672 So.2d 176; *Succession of Dowling*, 93-1902 (La.App. 4 Cir. 2/25/94), 633 So.2d 846

19 *Webb v. Webb*, 28, 411 (La.App. 2 Cir. 6/26/96), 677 So.2d 630; *Succession of Dodson*, 27, 969 (La.App. 2 Cir. 2/28/96), 669 So.2d 642

20 617 So.2d 880, 883 (La. 1993). See also *Succession of Russo*, 596 So.2d 365, 366 (La. App. 4 Cir. 1992)

21 *In re Succession of Brantley*, 99-2422 (La.App. 1 Cir. 11/3/00), 789 So.2d 1, 6, writ denied, 2001-0295 (La. 3/30/2001), 788 So.2d 1192. See also *Succession of Brown*, 251 So.2d 465, 467 (La.App. 1 Cir. 1971); *Succession of Kelly*, 305 So.2d 704, 705 (La.App. 2 Cir., 1974); *Succession of Hamiter*, 519 So.2d 341, 347 (La.App. 2 Cir.1988), writ denied, 521 So.2d 1170 (La. 1988) (“*Hamiter I*”)

22 By analogy, if a driver in a DUI case has a blood alcohol level over that creating a presumption of intoxication at 6 o'clock and also registered that result two hours later, it is safe to infer that he was intoxicated at 7 o'clock even if one or more witnesses testified that he “looked fine” at 7 o'clock.

23 As explained by Dr. Henry, “masking” is the term used to describe how Alzheimer patients divert other people's attention away from their inability to think and remember; R.Vol. 1185, l. 6 - p. 1186, l. 28; Vol. VI, p. 1249, l. 27 - p. 1250, l. 6; See also Vol. X, p. 2324, ll. 9-19

24 98-1467 (La.App. 3 Cir. 5/12/99), 735 So.2d 826

25 00-00472 (La. App. 3 Cir. 11/8/00), 775 So.2d 555

26 94-0668 (La.App. 4 Cir. 11/17/94), 646 So.2d 1168, writ denied, 95-0383 (La. 3/30/95), 651 So.2d 841

27 535 So.2d 461 (La.App. 4 Cir. 1988), writ denied, 539 So.2d 633 (La, 1989)

28 619 So.2d 628 (La.App. 3 Cir. 5/5/93)

29 R.Vol. X, p. 2244, l. 16 - p. 2246, l. 24

30 Comment, *Louisiana's New Law on Capacity to Make and Receive Donations: “Unduly Influenced” by the Common Law?*, 67 Tul. L. Rev. 183 at 223-224 (Nov. 1992)

31 R. Vol. XI, p. 2374, l. 20)

32 R.Vol. X, p. 2375, ll. 6-7

33 R.Vol. XI, p. 2373, l. 16

34 R.Vol. XI, p. 2374, ll. 9-12

35 R.Vol. VIII, p 1700, ll. 2-17; Vol. IX, p. 1836, l. 15 -p. 1837, l. 16

36 R.Vol. VIII, p. 1742, l. 19-p. 1746, l. 22; Vol. VIII, p. 1807, l. 7-p. 1810, l. 26

37 R.Vol. VII, p. 1556, l. 2-p. 1557, l. 19; p. 1387, l. 2-p. 1390, l.30

38 R.Vol. VII, p. 1390, l. 31 - p. 1393, l. 28; Vol. VIII, p. 1720, l. 29 - p. 1726, l. 30; p. 1730, ll. 10-19; Vol. IX, p. 1856, ll 14-21

39 R. Vol. VIII, p. 1726, ll. 8-10; p. 1731, ll. 10-16

40 R. Vol. VIII, p. 1586, ll.29-32

41 R. Vol. VIII, pp. 1728, l. 5 - p. 1729, l. 24; R.Vol. IX, p. 1858, l. 14-p. 1859, l. 9; See also R.Vol. VII, p. 1449, 11. 15-25

42 R.Vol. VIII, p. 1733, ll. 11-26; R.Vol. IX, p. 1860, ll. 1-4; p. 1861, l.24-p. 1862, l. 12; Vol. VI, p. 1291, ll-1726; Vol. IX, p. 1861, l. 24-p. 1862, l. 12

43 R.Vol, VIII, p. 1625, l. 3 - p. 1690, l. 32; R.Vol. IX, p. 1940, l. 9 - p. 2023, l. 28; R.Vol. IX, p, 2056, l. 1 - p. 2060, l. 29; p. 2068, l. 1 - p. 2072, l. 14; R.Vol. VI, p. 1197, l. 14 - p. 1363, l. 12; R.Vol. VII, p. 1368, l. 20 - p. 1575, l.4

44 R.Vol. XI, p. 2355, ll. 16-20; Written Reasons p. 5

45 R.Vol. VIII, p. 1589, l. 29 - p. 1591, l. 24; Vol. IX, p. 2052, ll. 22-30; p. 2058, ll.12-16; Vol. VI, p. 1356, l. 23 - p. 1357, l. 5

46 R. Vol. VII, p. 1447, l. 17-p. 1451, l.2; Vol. VI, p. 1265, l. 25-p. 1267, l.3

47 R. Vol. VI, p. 1210, l. 10-p. 1274, l.25; p. 1276, l.22-p. 1278, l. l; p. 1279, ll. 3-29; p. 1288, ll. 10-29

48 R. Vol. VI, p. 1315, ll. 25-30; p. 1288, ll. 2-7

49 R. Vol.VI, p. 1289, ll. 14-22

50 R. Vol. VI, p. 1295, l. 3 - p. 1296,1. 25

51 According to Dr. Ware, a stage 7 dementia patient is "virtually a nonresponsive patient who has very little appreciation or understanding of themselves or their whereabouts. They may say certain words and so forth, but in terms of really being able -- their cognitive dysfunction is so severe that it's almost nonexistent."; R. Vol. IX, p. 1942, l. 13 - p. 1943, l. 2; R. Vol. VI, p. 1209, ll. 3-10

52 R.Vol. VI, p. 1214, ll. 9-15; Vol. IX, p. 1981, ll. 1-20

53 R.Vol. VI, p. 1208, l. 30-p. 1213, l.4; Vol. IX, p. 1971, l. 16-p. 1972, l. 7

54 R.Vol. X, p. 2225, l. 24 - p. 2226, l. 10; p. 2290, ll. 17-22

55 R.Vol. X, p. 2292, l. 19 - p. 2293, l. 3

56 R.Vol. X, p. 2289, l. 24 - p. 2290, l. 22

57 R.Vol. X, p. 2307, l. 25 - p. 2308, l. 20

58 R.Vol. IX, p. 1926, l. 22 -p. 1927, l. 13

59 As Dr. Ware explained at trial, the term "psychological autopsy" usually refers to a posthumous assessment of reasons why someone committed suicide and he had never seen it used in a will case; R, Vol, IX, p. 1928, l. 9 - p. 1929, l. 26

60 R.Vol. X, p. 2184, ll. 10-14

61 R.Vol. IX, p. 1927, l. 14-p. 1930, l.3; Vol. VI, p. 1182, l. 20-p. 1183, l. 15; pp. 1188,1. 2-p. 1189, l. 30

62 *In re Dokken*, 604 N.W.2d 487 at 499 (S.D. 1/19/00) ("Courts have allowed forensic psychiatrists to testify as to the mental capacity of an individual. In some will contest cases medical testimony - usually that of a psychiatrist - is used to help determine a testator's capacity."); *Samaniego v. City of Kodiak*, 80 P.3d 216 at 220 (Ak. 11/14/03) ("A bare claim that psychiatric evidence is unreliable does not subject forensic psychiatry to a mini-trial in every case. We have repeatedly recognized the validity of independent psychological and psychiatric exams and forensic psychological and psychiatric exams in civil and criminal contexts."). See also, *US v. Salim*, 189 F.Supp.2d 93 at 101 (S.D. N.Y 3/11/02) (where in rejecting *Daubert* objection to expert fingerprinting testimony the court noted "Indeed, such reasoning could function to render numerous categories of expert evidence, such as psychiatric or medical forensic evidence which rest in some part upon that individual's skill and experience in analyzing data, unreliable. *Daubert* and its progeny simply do not mandate such a conclusion.").

63 *Infra*

64 See also *Succession of Lounsberry, infra*

65 La. Civ. Code art. 1483

66 If there was a question about the existence of such a relationship, it was answered on March 14, 2002, more than two weeks before the execution of the will in question, when Mrs. Pardue executed an "Affidavit" giving Mr. Platt authority to assist her with her finances. Courts have consistently held that this type of relationship is a "relationship of confidence" that will invoke the "suspicious circumstances" test in common law states or lower the burden of proof in Louisiana. E.g., *Cupples v Pruitt, supra*, ("Ms. Pruitt admittedly occupied a position of confidence with Mr. Brown through the power of attorney"); *Succession of Braud*, 94-0668 (La.App. 4 Cir. 11/17/94), 646 So.2d 1168

67 Church Ex. 21; The Court properly considered this as to the claim of undue influence. (Tr. pp. 2370, l. 27 - 2371, 1. 22). This evidence was admissible under LSA Code of Evidence, Article 404.B(1) and *Kirkland v Entergy New Orleans, Inc.*, 2002-2542 (La.App. 4 Cir. 1/17/01), 779 So.2d 42, 45

68 R.Vol. VI, p. 1351, l.20 - p. 1356, l. 8

69 R.Vol. X, p. 2301, ll. 12-13; p. 2280, l. 26 - p. 2283, l. 10

70 Mr. Platt argues in his brief (at 30-31) that "[t]here is no evidence that Larry Platt ever did anything with respect to Mrs. Pardue and her property other than that which she asked him to do to help her. He had her power of attorney for six weeks at a time when she was, according to the trial court, acting under his volition rather than hers, but took no steps to enrich himself or to misappropriate her property." This argument typifies Mr. Platt's myopic and one-sided view of the evidence presented at trial. In addition to all of the other evidence of financial exploitation, Mr. Plan himself testified that he took both the May 30 and the July 15 powers of attorney to bank but the bank refused to honor them. Thus, he tried to use the power of attorney but was not allowed to by the bank (R.Vol. IX, p, 1851, l, 27 - p. 1854, 1. 15). Mr. Platt had no explanation of why he even went to the bank in the first place. Mr. Platt claimed he got the powers of attorney to keep Mrs. Pardue out of a nursing home (R.Vol. VIII, p. 1802, 1. 3 - p. 1810, l. 15) If that was really the case, he had no reason to take the power of attorney to the bank.

71 R.Vol. X, p. 2301, ll. 19-25

72 R.Vol. X, p. 2278, ll. 15-18

73 R. Vol. XI, p. 2369, ll. 8-10

74 R.Vol. X, p. 2303, ll. 1-9

75 R.Vol.VII, p. 1377, ll. 1-32

76 R.Vol. VII, p. 1447, l. 17 -p. 1451, l. 2

77 Comment, *Louisiana's New Law on Capacity to Make and Receive Donations: "Unduly Influenced" by the Common Law?*, 67 Tul. L.Rev. 183, at 223-224 (Nov. 1992)

78 See, Succession of Gilbert, 37,047 (La.App. 2 Cir. 6/5/03), 850 So.2d 733 (court affirmed directed verdict finding no undue influence where the testator had no cognitive deficits and the evidence showed that legatee had been a long-time companion and caregiver and all the children, who were the complainants, lived out of town); *Succession of Anderson*, 26,947 (La.App,2 Cir.5/10/95), 656 So.2d 42, *writ denied*, 95-1789 (La.10/27/95), 662 So.2d 3 (court affirmed judgment upholding olographic will that left testator's estate to all nieces and nephews in equal shares, something that testator had told others she wanted to do); *Succession of Deshotels*, *supra* (court affirmed summary judgment dismissing claim of undue influence; testator left property to natural child whom he told others he wanted to favor); *Successions of Tanner*, 2004-0535 (La.App. 4 Cir. 1/26/05), 895 So.2d 584 (court of appeal affirmed summary judgment rejecting claim of undue influence by testator's attorney who received one of many bequests in a will prepared by another attorney); *Succession of Miller, 35-244* (La.App. 2 Cir. 12/7/01), 803 So.2d 1021, writ denied, 2002-0559 (La. 4/26/02), 814 So.2d 560) (court affirmed district court's dismissal of claim of undue influence by grandson where testator sought out attorney prior to illness and began process of change before grandson began caring for testator); *Succession of Cooper*, 36,490 (La.App. 2 Cir. 10/23/02), 830 So.2d 1087) (court affirmed involuntary dismissal of undue influence claim in case of where testator left property to wife instead of children); *Cupples v. Pruitt, supra* (court affirmed district's involuntary dismissal of undue influence where district court made a "credibility call" rejecting contention that legatee manipulated testator and accepting legatee's claim that she was trying to help testator and to honor his true wishes)

79 Mr. Platt is incorrect in his claim that *Lounsberry* is the only case that has upheld a claim of undue influence. In *Kraus v. Wheat*, 2003-0393 (La.App. 4 Cir. 9/3/03), 856 So.2d 45, writ denied, 2003-2729 (La. 12/19/03), 861 So.2d 569, affirmed, 2004-0671 (La.App. 4 Cir. 3/9/05), 897 So.2d 918, the Fourth Circuit upheld a claim of undue influence on an inter vivos donation. Also, in *Succession of Duboin*, 94-446 (La.App. 3 Cir. 11/2/94), 649 So.2d 617, the Third Circuit affirmed a judgment invalidating a will for both lack of testamentary capacity and undue influence. While the court did not have to reach the issue of undue influence, Justice Knoll, in a concurring opinion, noted that she would uphold the finding of undue influence as well. Furthermore, this court in *Hamiter 1* upheld a claim of undue influence based on the law as it existed at that time.

80 The clearest analogy to this case is this Court's opinion in *Hamiter 1, supra*. In that case (although a capacity case based on the law at the time), just as here, a convicted felon, Ms. Hayes, ingratiated herself to former Justice Dixon, and, just as Mr. Platt did to Mrs. Pardue, she exploited him financially. And, just as in this case, the Justice executed a new will that changed dramatically his plan from prior wills. The difference in the two cases, though, is that Judge Hamiter did not live alone, did not leave his entire estate to Ms. Hayes and there was much more evidence of Justice's Hamiter's competence at the time of the execution of the will. In fact, in that case, Justice Hamiter had been examined by a psychiatrist prior to executing the will and the psychiatrist testified that Justice Hamiter understood what he was doing and was competent. If the will in *Hamiter I* was declared invalid, the Platt Will must also be declared invalid.

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