2014 WL 1923241 (Ala.Civ.App.) (Appellate Brief)
Court of Civil Appeals of Alabama.

Kelly Johnson BARNETT, Appellant,
v.
Jane Johnson MASHBURN and Neal Johnson, Appellees.

No. 2130239.
April 4, 2014.

On Appeal from the Circuit Court of Marshall County, Alabama
Civil Action No.: CV 2011-144.00

Brief of Appellees

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*i STATEMENT REGARDING ORAL ARGUMENT

Appellees do not request oral argument in that they believe the facts and legal arguments are adequately presented in the briefs and record and that the decisional process would not be significantly aided by oral argument, especially in light of the additional costs such argument would entail.

*1 STATEMENT OF THE CASE

Appellant Kelly Johnson Barnett ("Contestant"), seeks to overturn the ruling of Circuit Judge Tim Riley of Marshall County entered on November 26, 2013 granting a Motion for Summary Judgment filed by Appellees Jane Johnson Mashburn and Neal Johnson ("Proponents"). [1] C-302.

In sum, this is a will contest case in which Contestant Kelly Barnett has contested the last will and testament of her grandmother, Gladys Junkins Johnson, which was offered to probate by her two living children, Neal Johnson and Jane Johnson Mashburn. C-13. [2]

Contestant contested the will for every reason a will can generally be contested: improper execution, undue influence, and lack of testamentary capacity. C-15. After ***2** extensive discovery and Contestant changing counsel, the Court took up Proponents' Motion for Summary Judgment which was supported by their narrative summary of evidence, evidentiary submissions and brief. C-84. In said submissions, the Proponents established that among other things: 1) the 2005 will was properly executed and in the appropriate form, 2) the 2005 will was not a result of undue influence from the Proponents but rather was a freewill expression of the testator, and, 3) that the testator had testamentary capacity at the time of execution of the 2005 will. C-131.

In their Motion for Summary Judgment, Proponents offered admissible evidence which included the 2005 Last Will and Testament of Gladys Johnson which was properly executed with all the required formalities and otherwise in accordance with Ala. Code §43-8-130 through 134. C-140; C-189; C-197.

Proponents also presented evidence to show that there was no undue influence involved in Ms. Gladys Johnson's drafting of her will on June 9, 2005, but rather it was her own choice to have her long time attorney draft a new will ***3** for her following the death of one of her children. In addition to the testimony from the Proponents, they offered evidence by way of the testimony of one of the witnesses to the execution of the will Bridgette Tilley, Ms. Johnson's attorney, Barry Jones, her pastor Dr. Paul Murphy, as well as her nephew, Probate Judge Bobby Junkins. Additionally, this same evidence also established that Ms. Gladys Johnson had testamentary capacity at the time of the execution of the 2005 will. C-197; C-189; C-203; C-205. Proponents also submitted the depositions of Contestant and her sister Kasey Dunkin [3], both of whom when questioned could submit no evidence regarding Ms. Gladys Johnson's mental condition on June 9, 2005. C-156; C-176.

In response thereto, Contestant filed various “evidence” which included several unauthenticated medical, telephone and bank records. CS-65; CS-198; CS-201. In accordance with the Rules of Civil Procedure and this ***4** Court's ruling in *Ex parte Sec. of Veterans Affairs*, 92 So. 3d 771 (Ala. 2012), the Proponents filed a Motion to Strike much of the evidence which was unauthenticated and otherwise not appropriate to be considered in response to the Summary Judgment. C-293. In response thereto (and after the time-period required under Ala. R. Civ. P. 56(c) (2)), Contestant attempted to correct her Evidentiary Submissions by filing some cover letter “certifications”, however, they still were not in conformity with Ala. R. Civ. P. 56 (e). C-296. [4]

While the trial court did not specifically exclude said evidence, it still found, as Proponents had submitted, that Contestant did not have substantial evidence to support any of her claims. C-302.

Contestant's response to Summary Judgment contained no evidence to directly dispute the evidence offered by Proponents but instead attempted to imply that by following ***5** the patchwork of “facts” that she had cobbled together, a jury could infer that in fact Ms. Gladys Johnson did not execute her will as all of the direct evidence showed. CS-22.

She also relies on the Testator's poor physical condition and the Proponents' assistance of their **elderly** mother with her everyday life to support the inference that a jury could find mental incapacity and undue influence. CS-10; CS-41.

Circuit Judge Tim Riley found that there was no genuine issue of any material fact as to any of Contestant's claims and that Proponents were entitled to summary judgment. He ordered the 2005 Will admitted to probate and transferred the case back to the Probate Court in order to accomplish the same. C-302.

Contestant timely filed her appeal to the Supreme Court which transferred this case to the Court of Civil Appeals. C-307; C-374. Both the trial court and this Court have properly failed to stay this case as requested by Contestant and the 2005 Will has been admitted to probate and the probating of the decedents Estate has continued as ***6** ordered. CS-19; C-302. Upon Contestant's motion, the record on appeal was supplemented to include her response to the summary judgment which had apparently been misfiled as several Notice of Discovery filings. CS-18.

Additionally, as indicated in their Evidentiary Submissions to the Court below (which were admitted by Contestant), the original 2005 Will was surrendered to the Probate Court prior to the Contestant transferring the matter to the Circuit Court. Said original will was, pursuant to a standing order in Marshall County, a part of the electronic file in Circuit Court but maintained by the Probate Court. Thus it was a part of the record before Judge Riley at the time of his decision, however, the electronic version submitted to this Court did not clearly show the notary seal and thus the trial court, on proper motion of the Proponents, supplemented the record on appeal to include a scan of the original indicating plainly the notary seal which was not clearly evident in the other electronic copies. C-132; CS-341; CS-322; CSS-5; CSS-6 through CSS-9.

***7 STATEMENT OF THE ISSUES** [5]

1. Did the trial court err in granting summary judgment to the Proponents by determining that Contestant failed to present substantial evidence to support her claim that the Decedent's 2005 will was not duly executed?

2. Did the trial court err in granting summary judgment to the Proponents by determining that Contestant failed to present substantial evidence to support her claim that the Decedent's 2005 will was procured through undue influence exercised upon the Decedent by the Proponents?

3. Did the trial court err in granting summary judgment to the Proponents by determining that Contestant failed to present substantial evidence to support her claim that ***8** the Decedent lacked testamentary capacity on June 9, 2005, when she executed the 2005 will?

***9 STATEMENT OF THE FACTS**

Proponents wish that they could agree with Contestant's rendition of the facts, however, since Contestant has chosen to include both unsubstantiated statements and her own “spin” on the facts [6], Proponents are required to make a clear statement of the facts herein to assist the Court in its examination of this matter.

The decedent, Ms. Gladys Junkins Johnson, passed away on February 2, 2011. C-144. At the time of her death, the decedent had two living children, Proponents Jane Johnson Hamm Mashburn and Neal Johnson (hereinafter “Proponents”), and another son that had passed, Roy Wayne Johnson. Roy Wayne Johnson had two children, the decedent's ***10** granddaughters, Contestant Kelly Johnson Barnett and her sister Kasey Johnson Dunkin. Testator's husband, Roy D. Johnson had passed away many years earlier. C-144.

Although Contestant alleged in her Complaint that there was a 1978 will that she believed expressed the “true desires” of the decedent, that will has never been produced and no testimony provided regarding it. C-14. However, during the discovery

process the parties did learn that prior to her death, Ms. Gladys Johnson had executed a will in 2003 (very similar to her 2005 Will) which basically divided her estate between her three children. CS-44.

Sometime in or around 2003, all three children began helping their mother with driving to appointments, repairs around the house and other various things as asked. There was not one of them that primarily performed these duties, rather they were shared. C-165; C-166. However, in 2003, while Roy Wayne Johnson was still living, their mother did appoint her daughter, Proponent Jane Mashburn as her Power of Attorney. CS-53.

***11** Ms. Gladys Johnson's son, Roy Wayne Johnson died in January 2005. Ms. Johnson was upset, much like any mother losing a child would be. CS-171.

Ms. Gladys Johnson decided to update her will and power of attorney and contacted her attorney, Barry Jones, who had drafted her prior will. She contacted her two living children to have them both take her to the lawyer's office for the appointment she had made, but they were not allowed to stay in the room while the will was executed, although they did observe her read the will and drafts that were brought to her. C-144; C-186; CS-177. Attorney Barry Jones expressly stated that he prepared the June 9, 2005 Last Will and Testament for Gladys Johnson. C-191. However, Jones went on to testify that he did not specifically recall the appointment or any of the particulars of it. But regardless, he still believed it was executed in his office. C-195. The unauthenticated phone records which Contestant presented, per Contestant showed calls confirming the appointment a few days prior to June 9, 2005 as did the office calendar for Barry Jones law office. CS-65; CS-63.

***12** The 2005 will divided the decedent's bank stock (worth approximately $210,000 at that time) between the Proponents and Contestant and her sister Kasey Dunkin. C-140. This would have amounted to approximately $35,000 to the Contestant at the time of drafting. CS-173. Other than that, the 2005 Will was very similar to the 2003 will other than the bequests which were equally divided between her three children were changed to be equally divided between her two living children. C-140; CS-44.

The 2005 Will was a “self proving” will and was duly executed, witnessed and notarized by Corie Darling, Bridgett Tilley and Crystal Garner. The original of said will was surrendered to the Probate Court of Marshall County and was a part of the court's file at all times relevant to this contest. C-132; CS-341; CSS-5; CSS-6 through CSS-9.

Corie Darling, Bridgett Tilley and Crystal Garner were all employees of Barry Jones law office on June 9, 2005 and would serve as witnesses and notaries on wills drafted by Barry Jones. CS-143; CS-144; CS-148.

Ms. Gladys Johnson appeared to all persons she came into contact with at this time to be of sound mind and had no ***13** indication of mental disease or defect on and around June 9, 2005 when her 2005 will was executed. C-205; C-197; C-190; C-191; C-193; C-195.

Sometime after the execution of the 2005 will (apparently on March 9, 2006 per the bank record), Proponent Mashburn drove her mother to the bank to put the original of the will in the safe deposit box where it remained until after her death. CS-159; CS-198.

In 2006, Proponent Mashburn *renewed* several CDs which were jointly held with Proponents and Ms. Gladys Johnson. C-291. These CDs had been jointly held since they were opened in the 1990s. C-292. During the time frame 2005 until her death in 2011 Proponents also withdrew approximately $80,000 from a jointly-held account with their mother to provide for her care and pay her sitters. CS-203 through CS-295; CS-202.

Although Ms. Gladys Johnson suffered from essential tremors and a few other physical health conditions, she continued to perform the normal functions of life including grocery shopping until 2007 and her weekly hair appointments. CS-163; CS-166; CS-167. However, she did begin having sitters sit with her to assist with some of her tasks but not ***14** before July or August 2005. CS-167; CS-169. Until this time frame, she had performed almost all of her own life tasks including her own cooking, medicine intake and balancing her checkbook. CS-168; CS-170. She continued to read for pleasure until around 2010. CS-172.

While the unauthenticated medical records of Dr. Young show Ms. Johnson suffering from what he describes as “situational anxiety/depression” on July 18, 2005, it was showing an onset of approximately 10 days earlier and does not indicate any effect on her overall mental condition or testamentary capacity. Furthermore, the next full workup indicated in the doctor's records on November 9, 2005, shows her “alert and oriented x 4”. CS-317; CS-320.

Contestant did not go to see her very much at all following Roy Wayne's death. In fact, Contestant and her sister went so few times that Proponents both contacted them to ask them to please visit their grandmother more often. C-144; C-163; C-186.

Contestant has been living in a home owned by the decedent since 2000 pursuant to an agreement with the decedent in which Contestant was to pay the taxes and ***15** insurance, which she did not pay. C-177; C-178; C-185. Per Contestant and her sister, all of Ms. Gladys' heirs lived in fear of being written out of her will if they did anything wrong. C-154; C-164.

Ms. Gladys Johnson died on February 2, 2011. C-144. Proponents surrendered the original 2005 Will to the Probate Court of Marshall County on May 4, 2011 and Petitioned for Admission of said will to probate. C-132; CSS-6 through CSS-9. The Contestant's will contest was filed on June 16, 2011. C-13.

*16 SUMMARY OF THE ARGUMENT

The Order entered by Circuit Judge Tim Riley granting summary judgment as to all claims should be upheld.

Simply put, Proponents properly submitted more than prima facie evidence to show that there was no genuine issue of material fact as to any of the Contestant's stated reasons for contesting the Last Will and Testament of Gladys Johnson. Therefore, the burden shifted to Contestant to offer substantial evidence to refute the same and Contestant failed to present admissible substantial evidence to create a genuine issue of material fact. As such, Judge Tim Riley properly granted summary judgment in favor of Proponents as to Contestant's claims of improper execution, lack of testamentary capacity and undue influence.

*17 ARGUMENT

The trial court, for the reasons contained herein, properly granted Proponents' Motion for Summary Judgment on the claims of the Contestant. Contestant failed to create a genuine issue of material fact to overcome Proponents' prima facie evidence that the will was properly executed, that the Decedent had not been unduly influenced, and that the Decedent had testamentary capacity.

I. THE TRIAL COURT CORRECTLY FOUND THAT THE 2005 WILL WAS PROPERLY EXECUTED AND THAT THERE WAS NO SUBSTANTIAL EVIDENCE TO SHOW OTHERWISE.

The Trial Court was correct in its ruling that the Contestant failed to offer substantial evidence to create a genuine issue of material fact as to the issue of the execution of the June 9, 2005 Last Will and Testament of Gladys Junkins Johnson (herein the “2005 Will”).

A. The 2005 Will was Self-proved and Required No Further Evidence To Shift the Burden of Proof.

Proponents submitted the 2005 will which was a “self-proved” will pursuant to Ala. Code §43-8-132. C-132; CSS-6 through CSS-9. As indicated in section (c) of that statute:

> ***18** If the will is self-proved, as provided in this section, compliance with signature requirements for execution is conclusively presumed, other requirements of execution are presumed subject to rebuttal without the testimony of any witness, and the will shall be probated without further proof, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

Ala. Code 1975 § 43-8-132 (c).

Thus, once "a prima facie showing is made that the will is valid, by offering testimony showing the execution of the will by the testator and the attestation of the will by the witnesses" (which is present here both by the self-proving will and the testimony presented) then the contestant must come forward with evidence indicating the testator did not sign the will or other evidence to exclude the will. *Burns v. Marshall*, 767 So.2d 347, 351 (Ala. 2000).

B. Contestant Failed to Present Clear and Convincing Evidence To Impeach the Conclusive Determination.

The Supreme Court went on to state in *Burns v. Marshall* that:

> [T]he certificate of a notary unless and until impeached is conclusive of the facts therein stated which the officer is by law ***19** authorized to state and to impeach it the evidence should be clear and convincing, reaching a high degree of certainty, leaving in the mind no fair, just doubts.

Id. at 351 (citing *Jordan v. Conservation & Land Co.*, 273 Ala. 99, 134 So.2d 777 (1961)).

Contestant in this case did not offer any "clear and convincing, reaching a high degree of certainty" evidence to suggest that the will was a forgery or not witnessed as indicated. Instead, Contestant resorts to a multi-pronged attempt at arguing several inferences that she believes could be deduced from the evidence offered. Most of the Contestant's arguments would require the trier of fact to infer what she believes from other inferences of fact.

Basically the Contestant desires an inference that the will was not executed by Ms. Gladys Johnson and argues that belief could be found based on the inference from certain facts including for example, that Attorney Jones doesn't specifically recall the execution of the 2005 Will, or that phone records show some calls to Attorney Jones office but not what Contestant expected. Brief of Appellant at 26-31. Contestant cites numerous times in her statement of facts which form the basis of her argument that the "record is ***20** completely devoid of evidence" to support the Proponents' position. [7] Contestant's position appears to be that Attorney Jones inability to specifically recall the will execution creates a genuine issue of fact, even though Attorney Jones stated that he still believes he drafted the 2005 Will and it was executed in his office. CS-145. This position includes actually arguing (although no alternative possibility is provided) that the Testator didn't have an appointment with Attorney Jones, that Proponents were not present for the appointment, and the will-drafting appointment did not happen at Attorney Jones law office. Brief of Appellant at 11-13. Contestant asserts these positions in spite of the plain and simple evidence and testimony presented by Proponents and despite having no testimony to even suggest otherwise! C-144; C-186; CS-177; C-191; C-195; CS-65; CS-63; C-132; CS-341; CSS-6 through ***21** CSS-9. This is especially disturbing when you see Attorney Jones so plainly answer the Contestant's question regarding whether he prepared the 2005 Will in his deposition:

BY MR. WALKER:
Q. Attorney Jones, directing your attention to Exhibit Numeral 2 [the 2005 Will], document entitled, Last Will and Testament, my question is, did you or anyone affiliated with your office prepare the entire document entitled, Last Will and Testament, which purports to be that of Gladys Johnson, and it's dated June 9th of 2005?

A. Yes.

Q. You prepared the entire will, or someone in your office?

A. Yes.

Q. Who did it, you or someone in your office?

A. I don't type. So someone else in my office would have typed it.

Q. Did you instruct the individual on what provisions to place in that particular document, Exhibit 2?

A. Yes.

CS-145. Thus, it would appear that Contestant desires to seize upon the fact that Attorney Jones doesn't remember the particulars of this one will execution in ***22** the hopes it can become an inference that the 2005 Will in fact was not duly executed.

As stated in *Pirtle v. Tucker*, 960 So. 2d 620, 628 (Ala. 2006) "[A]n inference cannot be derived from another inference. An inference must be based on a known or proved fact." *Id.* quoting *Malone Freight Lines, Inc. v. McCardle*, 277 Ala. 100, 167 So.2d 274 (1964).

Contestant failed to offer substantial evidence that the will was forged and has offered no evidence (and otherwise waived any argument regardless) that the will was not in the proper form or otherwise admissible on its face. As such, the trial court's granting of summary judgment as to the improper execution was appropriate.

II. THE TRIAL COURT CORRECTLY FOUND THAT THE CONTESTANT FAILED TO PRESENT SUBSTANTIAL EVIDENCE TO PROVE THAT THE 2005 WILL WAS A PRODUCT OF UNDUE INFLUENCE BY THE PROPONENTS.

Contestant properly admits that she has the burden of proving undue influence with substantial evidence. Brief of Appellee at 36. *Furrow v. Helton*, 13 So.3d. 350, 353 (Ala. 2008). In order to do so, Contestant must carry a heavy burden and present evidence to establish:
***23** (1) A confidential relationship between a favored beneficiary and testator;

(2) That the influence of or for the beneficiary was dominant and controlling in that relationship;

(3) Undue activity on the part of the dominant party in procuring the execution of the will.

Furrow v. Helton, 13 So.3d 354 (Ala. 2008) (quoting Clifton v. Clifton, 529 So.2d 980, 983 (Ala. 1988) citation to other cases omitted).

A. On June 9, 2005, Gladys Johnson was the Dominant Spirit in Parent/Child Relationship.

Contestant correctly states that a parent/child relationship is confidential. However, Contestant fails to acknowledge the high burden she must overcome since "the law presumes that the parent is the dominant spirit". *Chandler v. Chandler*, 514 So. 2d 1307, 1308 (Ala. 1987). The Alabama Supreme Court in, *Furrow v. Helton*, 13 So. 3d 350, 356 (Ala. 2008) stated:
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 ***24** ceased, but has been *displaced*, by subservience to the child.'

Id. citing *Hawthorne v. Jenkins*, 62 So. 505 (Ala. 1913) emphasis original.

Contestant has not offered substantial evidence that on June 9, 2005, that the order of nature was reversed so that Gladys Johnson's will and dominion was displaced by her childrens'.

Although the Proponents assisted their **elderly** mother with different physical needs, it was in no way a dominant or controlling environment. C-145. On or about June 9, 2005, Ms. Gladys Johnson was still handling her own **financial** affairs and balancing her own checkbook as well as controlling her own medication. CS-168; CS-170. The Proponents did not "control" her **financial** or personal affairs, but rather only assisted her in some tasks as she requested. CS-166. Furthermore, the Proponents did not "wrongfully profit" from decedent during the time leading up to her death. The Contestant incorrectly concludes that the **renewal** of the certificates of deposit in 2006 directly benefited the Proponents by "providing them with rights of survivorship". Brief of Appellant at 17. As Proponent ***25** Mashburn explained several times to Contestant during her deposition, the certificates of deposit (which were jointly held with rights of survivorship - just like the bank account) were not ***purchased*** in 2006, rather they were ***renewed.*** The CDs were actually purchased in the 1990s and they remained jointly held since then. CS-173; CS-182 through 184; C-291; C-292; CS-202.

None of Contestant's proffered evidence relates to June 9, 2005 and regardless, it does not amount to substantial evidence to overcome the presumption (and additional evidence presented) that Ms. Gladys, as the parent, was the dominant spirit in their relationship. [8]

***26** The facts in *Boshell v. Lay*, 596 So. 2d 581 (Ala. 1992) are very similar to the facts in this case. Like the grantee/beneficiary in *Boshell*, Jane Mashburn and Neal Johnson cared for their **elderly** mother in several different ways as requested. In determining there was no undue influence, the *Boshell* Court said:

> The fact that Stella Louise [proponent] may have won the affection of her parents, who in turn executed deeds to her, does not mean that she obtained the deeds by undue influence. It is even permissible for the grantee to anticipate a reward for his kindness. Further we note that courts must be extremely careful not to interfere with the right of free disposal of property and not to defeat the uncoerced wishes of the owner. For all that appears, the father and mother originally planned to divide the family farm amongst all of their children, but, in their later years, simply changed their minds.

Id. at 584-585, (Internal citations omitted.) Unlike in *Boshell v. Lay* (which still wasn't enough) Contestant herein admits that the Proponents did not keep her and her sister from seeing the decedent, rather both Proponents ***27** actually tried to get her to go see her and her sister's grandmother more. C-144; C-163; C-186. [9]

The testimony of Bridgett Tilley, who was present and witnessed the 2005 Will as well as Mr. Jones' deposition testimony both indicate that there was no undue influence observed. Furthermore, other witnesses including Gladys Johnson's pastor and her nephew, Etowah County Probate Judge Junkins, both indicate that they never observed any undue influence by any party. C-197; C-191; C-196; C-203; C-207.

The law does not preclude a child from caring for their physically ailing parent, even if that caring might influence their parent to change their will (of which there is no evidence presented here). In another will contest, *Smith v. Smith*, 482 So 2d. 1161 (Ala. 1985), the Supreme Court overruled the Monroe County Circuit Court in finding that, although a nephew cared for his aunt and took care of her **finances** in her later years, influence from sympathy ***28** and affection is not undue. *Id.*, at 1161-1162. As in this case, "Although there might have been an opportunity for Ray [proponent nephew] to attempt to destroy Zadie's free will, there was no proof that he actually influenced her, or even made an attempt to influence her." *Id.* at 1163.

There is not substantial evidence in this case that the Proponents or anyone else was dominant or controlling of Gladys Junkins Johnson. Furthermore (as discussed in detail below), as in *Boshell* and *Smith*, the third element is not met. "The contestants have not presented any evidence tending to show that the [proponent] destroyed the free will of the [testator] and substituted his wishes for [the decedent]." *Smith v. Smith*, 482 So 2d. 1164 (Ala. 1985).

This is especially so, considering the degree of control which must be shown by a contestant to establish "undue" influence:

> Undue influence, must be such as, in some measure, destroys the free agency of the testator, and prevents the exercise of that discretion which the law requires a party should possess as essential to a valid testamentary disposition of his property... And it must be kept in mind that not all influence is undue; any influence resulting from sympathy and affection only is not disfavored. See ***29** *Abrams v. Abrams*, 225 Ala. 622, 144 So. 828 (1932).

Id. at 1163 (quoting, in the first paragraph noted, *Locke v. Sparks*, 263 Ala. 137, 140, 81 So.2d 670, 673 (1955)).The Pattern Jury Instructions are also clear that a contestant has a heavy burden to prove undue influence:

> The word "undue" is very important because the law does not condemn all influence. Mere persuasion or argument addressed to the judgment or affections of the testator in which there is no fraud or deceit does not constitute "undue" influence. A will is not invalid because the testator was influenced by affection, gratitude, family or personal relationships or ordinary advice or argument, because they do not deprive the testator of his own free will.

Alabama Pattern Jury Instructions No. 38.09 (excerpt). Contestant has offered no evidence to show that the Proponents subjected the testator to improper influence through fraud or deceit. The mere fact that a beneficiary had the opportunity to improperly influence a testator "is not enough to warrant a finding of undue influence." *Smith v. Smith*, 482 So 2d. 1163 (Ala. 1985). [10]

***30** The Alabama Supreme Court, in *Wilson v. Wehunt*, 631 So.2d 991, 995 (Ala. 1994), examined examples of cases where dominance and undue influence have been found. "In the first case cited, *Haginas v. Haginas*, 598 So. 2d 1334 (Ala. 1992), the grantor was coerced into executing the deed by repeated threats on the part of her son that he would not visit her in the nursing home if she did not cooperate with him, and in the second case, *Brothers v. Moore*, 349 So. 2d 1107 (Ala. 1977), the evidence indicated that the grantor was illiterate, in addition to being totally dependent on her son to handle her business affairs." *Wilson* at 995. And like the court in *Wilson*, "These cases, we think, are materially distinguishable from the present case." *Id.*

B. Contestant Failed To Present Crucial Substantial Evidence Of An Active Interference By Proponents In Procuring The 2005 Will.

The Alabama Supreme Court in *McGee v. McGee*, 91 So.3d 659 (Ala. 2012) found that proof of active interference in the procuring and execution of the will is so crucial that ***31** without it, there was no need to even consider the first two elements of an undue-influence claim. *McGee* stated that it still must be shown that there was 'active interference in procuring the execution of the will.' 'This activity must be in procuring the execution of the will and more than activity and interest referable to a compliance with or obedience to the voluntary and untrammeled directions of the testat[rix]. *Id.* at 664 (emphasis original, internal citations omitted).

In *McGee v. McGee*, the Alabama Supreme Court has held that:

> Evidence proving that there was undue activity [on the part of the named beneficiary] in procuring the execution of the will is crucial to the determination of the existence of undue influence.

McGee v. McGee, 91 So.3d 659, 664 (Ala. 2012) citing *Wall v. Hodges*, 465 So.2d 359, 363 (Ala. 1984), emphasis original. The Contestant offers no evidence of any type of interference by the Proponents in the procuring of the execution of the will. The only fact related to the actual procurement of the will that Contestant relies on was that ***32** one of the Proponents drove their mother to her attorney's office to procure the 2005 Will. Brief of Appellant at 46. Interestingly enough, Contestant does not see this fact as being a problem when Proponent Mashburn drove her mother to Attorney Jones office to execute the 2003 will. *Id.* at 45.Regardless, the only evidence is that the Proponents were only complying with the request of their mother to drive her (and attend) her appointment at her longtime attorney's office. This one fact has been examined numerous times and found to not be substantial evidence of an active interference. See *Furrow v. Helton*, supra; *Wilson v. Wehunt*, supra; *Murphy v. Motherway*, 66 So. 3d 770, 779 (Ala. Civ. App. 2010).

C. Contestant's Purported Post-Execution Evidence is Insufficient.

Having no evidence of an active interference in the procurement of the 2005 Will, Contestant instead attempts to show alleged actions by the Proponents *after* the execution of the will, to present evidence through which a jury could infer an exercise of undue influence. Even if each of the "facts" stated by the Contestant were true, it still would not amount to substantial evidence of an active ***33** interference in the procurement of the will. See e.g. *McGee v. McGee*, 91 So. 3d at 665, ("evidence indicating that the testratrix has a post-execution discussion with a named beneficiary and gave him the will with instructions to 'put it away for safekeeping' does not constitute evidence of under influence in execution of the will" (emphasis original)). However, out of an abundance of caution, each of the stated "facts" which are misinterpretations or misstatements of the record will be detailed below:

Contestant alleges that the proponents admitted to "concealing" the 2005 Will from Contestant, citing CS-117. Brief of Appellant at 44. This is a misstatement of fact. Proponent Johnson does state that she never mentioned the fact that her mother had drafted a will to Contestant or her sister but further states that she knew of no reason to do so. There was no testimony that anyone had asked about a will or that she had actively concealed it. CS-173. It would appear that Proponent Johnson's nondisclosure of her mother's business would also follow her mother's desire in these type matters as Contestant has admitted:
***34** Q. Do you recall Ms. Gladys saying anything about a Will at any time?

A. No, she didn't like talking about things like that.

C-165. Thus it would appear that Contestant expected Proponents to inform her and her sister about the fact that their grandmother had updated her will, even though she herself would not have talked to them about these type of things. Contestant has not pointed this Court to any premise of law requiring disclosure of contents of a testator's will to any third party (by someone other than the testator, nonetheless) and Proponents are likewise unaware of any. Interestingly, the case cited by Contestant to support the premise that concealment of the will was conduct "constituting substantial evidence of undue activity in the procurement or execution of the will", *McGee v. McGee* as well as *Reed v. Shipp*, 308 So. 2d 705 (Ala. 1975) indicated in the quote, both found that the proponents had ***not*** actively interfered with the execution of the will such as to allow a claim of undue influence. It would appear that "concealing the making of the will" is on a list of several items which, in *Reed v. Shipp* was ***35** listed as an answer to the question of "what type of activity is needed in the procurement or execution of the will (to constitute undue influence)?" Reed v. Shipp, 308 So.2d at 708 (Ala. 1975). However, it does not appear that by itself (or even with other post-execution activities) such activity, even if presumed true, it would be sufficient to establish substantial evidence of an "active interference in the procurement of the will".

Despite Contestants allegations, even viewed in a light most favorable, Proponents did not "deny" knowledge of the decedent's 2003 will as represented by Contestant. Both Proponents answered an interrogatory requesting the identity of any other wills or powers of attorney that were executed with an appropriate objection and included the following in their answer "Further, I believe that my mother had made other wills before her last one, but we have not located any." CS-189; CS-194. This was

a true statement when made and is still true. However, upon hearing attorney Jones testify about her mother making another will in 2003, Proponent Mashburn remembered that she actually had taken her mother to his office for that ***36** visit but never actually saw the contents of the will (or had possession of it) and volunteered that information in her deposition. CS-174. Thus, she did not "deny" knowledge of another will, she actually originally testified that she believed there was another will but she didn't have it. She then provided further details when she heard additional facts concerning the execution of the 2003 Will, which prompted her more specific memory of the situation. It was not inconsistent or a "denial" as Contestant misstates.

Contestant next attempts to show several "facts" that she asserts are akin to *Ex Part Helms,* 873 So.2d 1139 (Ala. 2003) which also are substantial misstatements and are otherwise distinguishable. As discussed at page 24 above, the Proponents did not "obtain" joint ownership of the certificates of deposit in 2006, they were simply renewed in their same ownership form that they had been since the 1990s. Likewise, the Proponents had been jointly owners of the safe deposit box with their mother since at least 1997 and joint owners of the bank account since well before 2005. CS-198; C-292. Contestant's citation to the record ***37** establishing the "fact" that Proponents failed to produce documentation establishing funds were utilized is incorrect. Brief of Appellant at 46 (citing CS-198, 199 as proof of same). Contestant has offered no evidence that the funds were used for anything other than the care of the decedent. Regardless, as indicated above, the funds that were used were from a jointly held account that had been established many, many years prior. C-292. There is no evidence or even inference that can be made otherwise.

Lastly, Contestant actually is correct that the Proponents denied they had physical custody of the original 2005 Will until they retrieved it from the safe deposit box. Appellant's Brief at 46. It was a denial because it was the truth! Likewise, Proponent Mashburn taking her mother to put the will in the safe deposit box "after" she executed it was also true. Proponent did not say how long after it was executed that it was done, she was attempting to answer counsel's question when she was cut off and he never went back or presented her with the safe deposit box entry form to review. Thus Contestant's evidence only establishes that Proponent Mashburn did carry her mother to ***38** the safe deposit box to put the will in after it was executed. CS-159, CS-160, CS-179.

D. Contestants in Other Published Cases Possessing More Evidence than is Present Here have still been Deemed to be Insufficient.

While Contestant attempts to show these facts analogous to *Ex Parte Helms,* 873 So.2d 1139 (Ala. 2003), as indicated above they are actually quite distinguishable. However, they are more closely akin to the facts of the case which distinguished *Ex Parte Helms,* that being *Furrow v. Helton,* 13 So. 3d 350 (Ala. 2008). In Furrow v. Helton, the Supreme Court reversed and remanded a jury verdict rendered for a Contestant on a claim of undue influence. In *Furrow v. Helton,* just as in this case, the testator had three children, one who had predeceased her leaving two children (one of whom contested the will). In slightly more than two weeks following the death of her child (less time than occurred here), the *Furrow* testator executed a new will changing it from an even split between her children with a per stirpes provision for the surviving grandchildren, to a division solely between her two living children. The best evidence the contestant in *Furrow* could present was that ***39** the testator was "feeble, hallucinating, and vulnerable" around the time she executed the will. *Id.* at 354. The testator's relatives would drive her places, help her with her bath, bring her meals and write checks on her behalf. The Proponent had driven the testator to her attorney's office and was allegedly present when it was executed. Likewise, witnesses testified that the testator did not exhibit any signs of mental slowness and appeared to be of sound mind, understanding the objects of her bounty at the time she executed her will.

Based on these facts (including a few other additional, negative facts for the *Furrow* proponent, including some evidence of medication for Alzheimer's being taken), the Court found that there was no substantial evidence presented through which the case should have been submitted to a jury. These facts were much more substantial than are present here, in which the Contestant herself has admitted that she does not know of a single person who has any evidence of the Proponents exercising any influence on the testator! C-180.

***40** Thus, the evidence Contestant purports to offer, even when offered in the light most favorable to Contestant, still does not establish substantial evidence that Proponents, in any way, had an active interference in the procurement of the will. Missing this crucial element, even if Contestant proved the other two elements, her claim of undue influence could not go to a jury. *Furrow v. Helton,* supra.; *McGee v. McGee,* supra.; *Wall v. Hodges,* 465 So. 2d 359 (Ala. 1984).

III. SUMMARY JUDGMENT WAS PROPERLY GRANTED BECAUSE CONTESTANTS HAVE OFFERED NO PROOF THAT GLADYS JUNKINS JOHNSON LACKED TESTAMENTARY CAPACITY ON JUNE 9, 2005.

Contestant does not allege (and could not substantiate if she did allege) that decedent suffered from permanent incompetence. In fact, she admits that from January 2005 to the "end of 2005" her grandmother had moments in which she would have had testamentary capacity. CS-175. In this string of questions, she admits that her grandmother 1) knew who she was (even though she didn't visit her often at all), 2) knew what she owned and didn't own and 3) was able to make decisions concerning what she wanted to do ***41** (including giving Contestant $100). CS-175. Thus at best, Contestant's argument is that the decedent had mental incompetence of a temporary nature, although there was no diagnosis of disease of mental defect.

A. Contestant Offered No Evidence of Lack of Testamentary Capacity.

Although Contestant spends almost seven pages of her argument dissecting the Proponents evidence regarding Ms. Gladys Johnson's testamentary capacity, she offers not a single shred of evidence to show that on June 9, 2005, Ms. Gladys Johnson lacked testamentary capacity. Ms. Gladys' physical health before or after the execution is not enough (See e.g. *Betz v. Lovell,* 197 Ala. 239, 240, 72 So. 500 (Ala. 1916)), especially in light of her anxiety and depression improving with medication per Dr. Young's records (CS-319; CS-320), nor is the allegation from Contestant's sister of the decedent being unable to understand questions regarding her crossword puzzle because she fell asleep. *Barnes v. Willis,* 497 So.2d 90 (Ala. 1986) .

***42** Contestant has not proven that Gladys Johnson had a lack of testamentary capacity at any time before her death, much less on the only day that would matter for the purposes of a will contest. In fact, she has not offered any testimony by any witnesses to show her alleged "lack of capacity". A close examination of the evidence, even viewed in a light most favorable to Contestant, shows that Ms. Gladys was competent some of the time in June 2005. CS-175. Based on that fact, and the fact that the Contestant cannot show any evidence of Ms. Gladys Johnson's mental capacity on June 9, 2005, summary judgment as to the issue of testamentary capacity was appropriate.

B. Although There Is No Requirement For Proponents To Show A Reason Why Testator May Have Made Change To Will, Ample Evidence Suggests The Same.

Although the Proponents do not have to show or explain the reason why the testator might have made her testamentary decisions, based on Contestant's allegations, some citation is necessary. First, Contestant admitted that everyone lived in fear of being written out of Ms. Gladys' will. C-164. Contestant did not regularly visit ***43** with her grandmother in the last years of her life, and admits to having to be shamed (by Proponents) into visiting when she did. C-180; C-186. Not to mention the fact that Contestant had not held up her end of the oral agreement that she had concerning living in the testator's rental house. C-C-173. Of course, just as in *Furrow v. Helton,* a change of a will following the death of a child and beneficiary is not "radical" as Contestant states but is rather logical. Especially when you consider that, at the time, Contestant and her sister were included to receive a considerable sum. CS-173; C-140. Thus, if there were a requirement to show why the testator changed her will (which there is not), there is ample evidence to infer why she may have made the changes.

C. Contestant Failed to Prove That Testator Lacked Testamentary Capacity at the Time the Will was Executed.

The burden of proving lack of testamentary capacity is on the Contestant. *Koonce,* 402 So.2d at 944. If Contestant is claiming that the testator suffered from temporary or intermittent insanity, it must be shown that the testator lacked testamentary capacity **at the time the will was *44 executed.** *Koonce v. Mims,* 402 So.2d 942, 944 (Ala. 1981) . Contestant has failed to offer any evidence related to the Testator's mental capacity on June 9, 2005 and instead tries to show "the decedent's unhealthy physical and mental condition before and immediately after" the execution. Brief of Appellant at 49. In light of the testimony establishing testamentary capacity at the very time of execution, even assuming her "evidence" as true it does not amount to substantial evidence to allow the case to go to a jury.

Wilson v. Wehunt, supra, was an action filed in Marshall County Circuit Court to cancel a deed based on mental incompetence of the grantor. [11] The Supreme Court reversed and remanded the case based on Circuit Judge *45 Jetton's unfounded decision that the burden of proof was upon the grantee to prove competence. *Wilson v. Wehunt,* 631 So. 2d 996 (Ala. 1994). The Court said:

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The trial court's finding that Ms. Wilson had suffered from intermittent or temporary periods of incompetency before she executed the deed to the defendant is amply supported by the evidence. However, the trial court erred when, based on this finding, it shifted the burden of proof to the defendant. Proof that a person, before executing a deed, had mental incompetence occurring at intervals or had mental incompetence of a temporary character creates no legal presumption that the incompetence continued up to and existed at the moment of the execution of the deed. The burden of proof in cases such as this one, where it is shown that the grantor's mental incompetence was not permanent, is on the party attacking the conveyance to show a lack of mental competence **"at the very time of the transaction."**

Id. quoting *Hall v. Britton,* 216 Ala. 267, 113 So. 239. (Ala. 1927) (emphasis added).

Alabama law provides the presumption that a person contains the requisite mental capacity to execute a will unless the same is disproved by substantial evidence. *46 *Koonce v. Mims,* 402 So.2d 942, 944 (Ala. 1981) . Regardless, even without said presumption, the testimony concerning Ms. Gladys Johnson's mental capacity is overwhelming. Judge Bobby Junkins, a 31 year Probate Judge and nephew of the Testator indicated in his affidavit that he had no concerns with Ms. Gladys Junkins Johnson's mental capacity at the time of the execution of the Will and that he believed she did understand the objects of her bounty and what made up her estate. C-205. Similarly, the other affidavits submitted bear this same fact out as well. C-145; C-197; C-203; *Ex parte Baker,* 709 So.2d 7 (Ala. 1997), explains what testamentary capacity requires:
Testamentary capacity requires that the testator possess "mind and memory sufficient to recall and remember the property she was about to bequeath, and the objects of her bounty, and the disposition which she wished to make-to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other."

Id. at 10 (citing *Bolan v. Bolan,* 611 So.2d 1051, 1057 (Ala. 1993), and *Fletcher v. DeLoach,* 360 So.2d 316, 318 (Ala.1978)).

*47 The above stated testimony, including Contestant's own admission, establishes all the required elements of testamentary capacity. "The law presumes that every person of legal age has the capacity to make a will... The burden of proving the lack of the requisite capacity is cast upon the party who contests the validity of a will." *Koonce v. Mims,* 402 So.2d 942, 944 (Ala. 1981) (numerous citations omitted) (holding that a will was still valid and the will's proponents were entitled to a directed verdict despite a doctor's testimony that the testator was "not as clear mentally" on the day in question; "not as clear mentally" being insufficient to create even a scintilla of evidence of lack of capacity). See also, *Ex parte Baker,* 709 So.2d 7, 10 (Ala. 1998) (affirming a directed verdict on the issue of testamentary capacity where no one testified that the testator's mental state was unsound, even though the contestant cited incidents of lapse of memory, the Court reasoning that "the lapses in memory cited by [contestant] were mere isolated events that are far too common in the general population to support a finding of a lack of testamentary capacity").

***48** Again, in light of the presumption in favor of Ms. Johnson's competency, bolstered by all the evidence submitted in this case, the contestant has completely failed to meet her burden to prove by substantial evidence that **on June 9, 2005,** Gladys Junkins Johnson lacked testamentary capacity.

CONCLUSION

Based on the above recited facts and law, this Court should affirm the opinion of the trial court finding that no genuine issue of material fact exists as to the claims of improper execution, undue influence or lack of testamentary capacity and that the Proponents are entitled to summary judgment.

Footnotes

1 In accordance with Ala. R. App. P. 28(f), for purposes of this brief, Appellees Neal Johnson and Jane Johnson Mashburn shall be referred to as "Proponents", unless there is a need to list them individually, and Appellant Kelly Barnett shall be referred to as the "Contestant".

2 In accordance with Ala. R. App. P. 29(g) and in following with Appellants designation, references to the clerk's record are preceded by the letter "C", references to the supplemental clerk's record are preceded by the letters "CS" and references to the second supplemental clerk's record are preceded by the letters "CSS".

3 Although Dunkin was not named by Contestant as a party, she had previously submitted information to indicate she was not in agreement with the 2005 Will or Proponents serving as Executors and was added by Proponents as a necessary party, although she is not a party to this appeal.

4 Although Proponents believe consideration of the inadmissible evidence would still not amount to substantial evidence, Proponents still stand on their opposition to these documents being included as evidence for consideration on summary judgment and as in *Ex Parte Sec. of Veterans Affairs,* 92 So.3d 771 (Ala. 2012) moves to strike the same.

5 While the undersigned counsel normally leaves it to the Appellant to determine the issues before this Court on its appeal, based on the Appellant's arguments in its brief, it appears that the issues can be more properly narrowed since there was no argument that the Proponents failed to present their prima facie case. (See *Pirtle v. Tucker,* 960 So.2d 620, 623 (Ala. 2006)). Rather Contestant continually argues that Contestant did present "substantial evidence" to support her claims. See for example Brief of Appellant at 22 ("Appellant's evidence established..."), 24 ("Appellant presented substantial evidence...") and 25 ("Appellant asserts substantial evidence is presented..."). As such, the issues chosen by Appellant are more properly stated herein.

6 For specific example, Contestant states in her brief repeatedly that Roy Wayne was her primary caregiver prior to his death in January 2005. Brief of Appellant at 2. This assertion is unfounded and directly contradictory to the evidence in the record. See CS-165, CS-53. Also, Contestants statement as fact that one month before she drafted her 2005 will that the decedent was "very confused and disoriented" is not supported by the evidence. Brief of Appeallant at 10. Even through Ms. Dunkin's testimony went from fanciful to plain unbelievable, even she didn't state that. Regardless, the medical records offered by Contestant disprove her unsubstantiated "beliefs". CS-315 to CS-320.

7 To restate Contestant's position, she feels that the record is devoid of evidence to support the facts and statements presented by the Proponents. Sadly, she mistakenly puts the burden of proof on Proponents and even still does not understand that under A.R.Civ. P Rule 56, the statements presented by Proponents are evidence, especially in light of her failure to present any evidence otherwise.

8 It should be noted that Contestant incorrectly suggests that certain events she feels are related to this matter on Page 41 of her brief occurred on or before June 9, 2005. Proponent Mashburn indicated that her mother continued to write checks *through* 2005 (C-168) and the employment of the sitters did not begin until August 2005 (C-169). While she did assist with medicines, it wasn't until *July* 2005 (C-165). Prior to that time, Proponents would visit with their mother once or twice a week (C-165) but, for example, their mother continued to do her own shopping until 2007 (C-166). As such, none of the suggested influence, even if taken as true, would have any effect on a June 9, 2005 will.

9 Contestant's own argument and "evidence" offers additional support for Proponents on this fact. Per Contestant, she was visiting with her grandmother "daily in 2005". Brief of Appellant at 50.

10 The court in *Smith* found no undue influence or lack of testamentary capacity even when the testator, after executing the questioned will, denied that she had in fact left everything to the proponent. *Smith v. Smith,* 482 So 2d. 1163-1164 (Ala. 1985). That was much more evidence than the Contestant has here, and it still wasn't enough.

11 As this Court is aware, the requisite mental capacity for conveying a deed would be "contractual capacity" which is much greater than the mere "testamentary capacity" required for the execution of a will. (Compare contractual capacity in, *Lloyd v. Jordan*, 544 So.2d 957, 958 (Ala.1989) with the lesser standard of proving existence of testamentary capacity, found in *Ex parte Baker*, 709 So.2d 7 (Ala. 1997), below).

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