

2010 WL 5858319 (Okla.) (Appellate Brief)  
Supreme Court of Oklahoma.

Hilda HARRIS, as Administratrix of the Estate of Wilson Harris, Deceased, Plaintiff/Appellant,

v.

Elois MILES, Defendant/Appellee.

No. 108,303.

December 13, 2010.

Appeal from District Court of Choctaw County CJ-2008-51 Honorable  
Judge James R. Wolfe Rescission of Transfer Made Under Undue Influence

**Appellant's Brief-in-Chief**

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## \*1 INTRODUCTION AND ISSUES PRESENTED

Two years prior to his death, Mr. Wilson Harris--a 96-year-old disabled veteran living off of Social Security, veterans' benefits, and payday loans-- transferred \$10,589 to Defendant Elois Miles. The check that accomplished this transfer--apparently signed by Mr. Harris, but in all other respects drafted solely by Ms. Miles--left the **elderly** man with a total of 75 cents in his bank account. Subsequently, Mr. Harris sold his pickup truck, his only remaining meaningful asset, and turned over most of the proceeds to Ms. Miles. Each of these transfers took place while Ms. Miles was serving as Mr. Harris' caretaker and managing his financial affairs.

At trial, Ms. Miles admitted that she received in excess of \$12,000 from Mr. Harris; however, she argued that transfers had constituted valid *inter vivos* gifts. In support of this contention, she offered nothing but her own self-serving testimony that the transfers had been free from fraud or undue influence.

After a brief hearing, the District Court entered judgment in favor of the Defendant. In doing so, however, the court asserted that the *Plaintiff* had failed to prove that the transfers were invalid. Accordingly, this appeal presents the following issues:

- 1. Whether, in a case involving a confidential or fiduciary relationship, the District Court improperly allocated the burden of proof regarding the propriety of the transfer;**
- 2. Whether the clear weight of the evidence supports a finding that Mr. Harris had both the intent and the legal capacity to make a gift of his entire life's savings to the Defendant.**

## \*2 SUMMARY OF THE RECORD

### I. Background

For much of his adult life, Wilson Harris--a disabled veteran with several medical issues--lived alone at his home in Hugo, Oklahoma. Tr. at 30. At the age of 95, however, Mr. Harris had a serious and disorienting medical scare, which resulted in a

trip to the hospital emergency room. Tr. at 70, 104-05, 115. Although the doctors found little wrong with him other than his existing conditions and extreme age, this event--coupled with general concerns about his age and health--prompted Mr. Harris to leave his home and move to Kansas City, Missouri, to live with his daughter, Emma Lee Carey. Tr. at 69-70, 104-06.

Shortly after arriving in Kansas City, Mr. Harris requested that his daughter make arrangements to sell his home in Hugo. Tr. at 70. She did so, ultimately assisting her father in procuring a buyer and executing the contract for sale. Tr. at 71. She used the proceeds from the sale, approximately \$19,000, to pay Mr. Harris' outstanding loans and expenses; the remainder was deposited in a checking account for his future use. Tr. at 74-75, 90.

Mr. Harris lived with his daughter from January 2005 until June 2005, when he informed her that he was homesick and wished to return to Hugo. Tr. at 76-77. She acquiesced, and subsequently helped him apply for an apartment at "13th Place," a public housing facility there. Tr. at 77. The Housing Authority informed them that nothing was immediately available at 13th Place, but that a vacancy was expected soon. Tr. at 77. Accordingly, Mr. Harris remained in Kansas City with his daughter for several more days. Tr. at 77.

One day while his daughter was away at work, however, Mr. Harris packed his belongings into his truck, slipped out of the house, and set out on his own for Hugo. Tr. at 77-78, 97-98, 106. Ms. Carey discovered that he was missing later that evening. Tr. at 77-78. Fearing that her father--an **elderly** man who did not see well and was not in the habit of driving \*3 long distances--would get lost or hurt, she contacted the police. Tr. at 78, 88. Her concern was well-founded: The highway patrol located Mr. Harris several hours later, in Sawyer, Oklahoma. Tr. at 78-79. Mr. Harris then was taken to stay a few days with Defendant's brother, until a spot at the Hugo housing facility became available. Tr. at 30, 62.

In mid-June 2005, Mr. Harris was moved into an apartment at 13th Place. Tr. at 97-98. Wishing to stay in Hugo but unable to care for himself without help, he soon became substantially dependant on the Defendant, Ms. Elois Miles.

Ms. Miles, who lived in the nearby town of Paris, Texas, was Mr. Harris' step-daughter. Tr. at 35, 64. In the month of June, 2005, Ms. Miles regularly traveled to Hugo to assist Mr. Harris with his day-to-day activities. Although he had a home health nurse who took care of his cooking and cleaning, Tr. at 34, Mr. Harris depended on Ms. Miles to take him to his various doctors' appointments, Tr. at 28-29, 54; pick up his medications, Tr. at 32; arrange for his move, Tr. at 31; handle all of his paperwork, Tr. at 31; and, notably, manage his financial affairs, Tr. at 37-38, 40-41, 49. Mr. Harris trusted Ms. Miles, had confidence in her, and believed that she would never do him wrong. Tr. at 33, 54, 81.

During the time that she was serving in this role, Ms. Miles also had access to Mr. Harris' checkbook. Tr. at 36-38, 49. She knew exactly how much money was in Mr. Harris' bank account because, as she testified, she was "the one who would write the checks for him if he need[ed] something," and she would "keep up with the balance." Tr. at 36. And in the final two weeks of June, Ms. Miles indeed used Mr. Harris' checkbook to draft several checks, purportedly on his behalf. Tr. at 49-50. Notably, however, each of these checks--*signed by Mr. Harris, but in all other respects drafted solely by Ms. Miles*--were made out either to Ms. Miles' relatives or to Ms. Miles herself. Tr. at 34, 49-52.

\*4 The first checks written by Ms. Miles were made out to her brother, in amounts totaling approximately \$900. Tr. at 50. A few days later, however, Ms. Miles wrote a check to herself-- in a far greater amount. This check--drawn from Mr. Harris' bank account, dated June 29, 2005, and paid to the order of Ms. Miles--was written in the amount of **\$10,589**. Tr. at 50-52. Once Ms. Miles cashed the check, Mr. Harris--a 96-year-old disabled veteran living on his own in public housing--was left with a total of 75 **cents** in his account. Tr. at 36, 59-60.

After Ms. Miles emptied his bank account, Mr. Harris was left effectively penniless. Ms. Miles did not use the money she received from Mr. Harris to pay for his expenses or his care;<sup>1</sup> rather, she spent the money on her own daughter's education and on "personal things." Tr. at 40. For the final years of his life, Mr. Harris was forced to live off of Social Security and veterans' benefits, loans from local payday loan companies, and assistance from his three biological daughters. Tr. at 60, 76, 80-81, 94,

123-24. Although Ms. Miles knew that her checks had “cleaned out his account” and that Mr. Harris had no other bank accounts, savings, or assets to live on, Tr. at 36, she never informed any of Mr. Harris's children (or his other step-children) about the money she had received. Tr. at 38, 48-49, 61-63.

In February 2007, at the age of 97, Mr. Harris sold his last significant asset--his pickup truck--for \$2,500. Tr. at 45, 66. Ms. Miles' uncle helped Mr. Harris procure a buyer and complete the sale. Tr. at 67, 162. The uncle took \$500 as compensation for his efforts; the remainder of the proceeds, \$2,000, went to Ms. Miles. Tr. at 45.

Mr. Harris passed away in July 2007, at the age of 98. Tr. at 27, 73. It was not until after his death, however, that his daughters discovered that his bank account had been entirely depleted, and that he had allegedly transferred his entire life's savings--more than \$12,000--to \*5 Ms. Miles. Tr. at 80, 81-82. Adding insult to injury, after attending their father's funeral, Mr. Harris' daughters returned to 13th Place to find that his few remaining possessions-- including a three-piece bedroom set, stereo, dining table, towels, and a pistol--had disappeared from his apartment. Tr. at 67, 84-85, 127-28.

## II. The Proceedings Below

Plaintiff Hilda Harris, in her capacity as Administratrix of Mr. Harris' estate, subsequently brought suit against Ms. Miles in the District Court of Choctaw County. R. 1. She asserted claims of conversion, rescission, and quantum meruit/unjust enrichment. R. 2-3.

In her Answer, Ms. Miles admitted that she took approximately \$12,000 and a pistol from Mr. Harris; however, she submitted that the money and the pistol had constituted valid *inter vivos* gifts. R.7, ¶¶ 8-10. She denied ever receiving the bedroom set, stereo, or any of the other personal property that had gone missing during the funeral. *Id.*

A bench trial was held on September 15, 2009. The Plaintiff first called Ms. Miles to testify regarding the circumstances of the transfers. Tr. at 25-63. Ms. Miles admitted that she had received a \$10,589 check and \$2,000 in cash<sup>2</sup> from Mr. Harris; however, she alleged that he had given her the money as a gift. Tr. at 34-36, 44. She testified that Mr. Harris had transferred all of his money to her, rather than to any of his children, grandchildren, or other step-children, because “they hadn't seen him in two years,” and “he didn't want them to have anything.” Tr. at 38. According to Ms. Miles, Mr. Harris had asked her to write the checks on his behalf because he could no longer write very well. Tr. at 46.

The Plaintiff then offered the testimony of each of Mr. Harris' three daughters, who recounted the events leading up to their father's illness, the sale of his home, and his moves to Kansas City and 13th Place. Each daughter testified that she had communicated regularly with \*6 Mr. Harris, and that at the time of the transfers to Ms. Miles, he was having difficulty remembering things, understanding and managing his finances, and otherwise caring for himself. Tr. at 86-87, 122-23, 125-26, 132, 143, 146. They also noted that their father was “easily influenced” by certain individuals, including Ms. Miles. Tr. at 125-26, 143.

Testimony about Mr. Harris' lack of faculties was not limited to his daughters. Lloyd Pearl, Mr. Harris' former neighbor and good friend from church, similarly testified that he had regularly visited Mr. Harris during the relevant time period, and that he had noticed a marked decrease in his ability to understand and comprehend matters. Tr. at 102-03. Mr. Pearl described Mr. Harris as “out of it” and “slow.” Tr. at 104, 106. He also recounted incidents of inexplicable behavior, such as when Mr. Harris drove off and was found by the police. Tr. at 106-08, 117.

After asserting that Mr. Harris' transfers had been valid gifts, the Defendant's case consisted largely of evidence regarding Mr. Harris' competency. Ms. Miles proffered testimony from various witnesses, including Mr. Harris' pastor and the pastor's wife, Defense Counsel's secretary, and various relatives of the Defendant. These individuals testified that, in the unspecified times that they had encountered Mr. Harris, they did not notice any mental defects. Tr. at 153-58, 173-74. The Defendant also offered the testimony of one of Mr. Harris' physicians, who stated that nothing in her chart indicated a diagnosis of dementia or other

mental illness. Tr. at 171. Other than her own statements regarding the circumstances of the transfers, however, Ms. Miles offered no testimony to corroborate her gift theory.

Ms. Miles did, however, offer evidence to dispute the allegations that she had stolen Mr. Harris' remaining personal property while his daughters were away at his funeral. Her sister testified that she, not Ms. Miles, had taken the bedroom set, table, and stereo out of Mr. Harris' \*7 apartment, though she claimed that the furniture actually had belonged to her and the stereo had belonged to her brother. Tr. at 165-67. Ms. Miles admitted to having received the stereo<sup>3</sup> (she claimed it had been a gift from her brother, Tr. at 67), and the pistol (she alleged that Mr. Harris had given it to her prior to his death, R.7); the rest of the property apparently remains with Ms. Miles' sister and has not been in Ms. Miles' possession. Tr. at 67-68, 165.

On April 12, 2010, the District Court issued its order, finding in favor of the Defendant on all counts. R.19. In doing so, the court noted “specifically” that “the Plaintiff failed to prove,” *inter alia*, that Ms. Miles had procured her alleged \$10,000 and \$2,000 gifts through fraud, duress, or undue influence. R.19.

On May 12, 2010, Ms. Harris timely filed this appeal.

## **ARGUMENT AND AUTHORITIES**

### **I. The District Court Erred When It Placed Upon the Plaintiff the Burden of Proving the Validity (or Invalidity) of the Alleged Gifts**

The District Court found in favor of the Defendant because, in its view, “*the Plaintiff failed to prove*” that the transfers from Mr. Harris to Ms. Miles had not, in fact, been valid *inter vivos* gifts. R.19 (emphasis added). Where a fiduciary or confidential relationship exists between the grantor and grantee, however, a presumption of invalidity arises, and the *grantee* bears the burden of establishing that the alleged gifts were not, in fact, the subject of fraud or undue influence. Because the District Court improperly placed the burden of proof on the Plaintiff in this matter, its judgment must be reversed.

#### **\*8 A. Standard of Review**

Whether the court improperly allocated the burden of proof at trial presents a question of law, which this Court must review *de novo*. *Norrod v. Norrod*, 2007 OK CIV APP 65, ¶ 10, 165 P.3d 366, 368; *State ex rel McGehee v. 1987 Oldsmobile Cutlass*, 1993 OK CIV APP 177, ¶ 12, 867 P.2d 1354, 1356-57; *see also Shorter v. Tulsa Used Equip. & Indus. Engine Servs.*, 2006 OK 72, ¶ 6, 148 P.3d 864, 868.

#### **B. A Presumption of Invalidity Arises Where a Confidential or Fiduciary Relationship Exists Between the Grantor and Grantee**

In an action contesting the validity of a gift, the burden of establishing fraud or undue influence typically rests with the plaintiff. *Cummings v. Garriss*, 1961 OK 85, ¶¶ 0, 11, 362 P.2d 1106. Under Oklahoma law, however, if the alleged gift is made “to one in a dominant position, such as a fiduciary or one in a relation of trust and confidence,” then a “*presumption of invalidity*” arises. *Id.* (emphasis added); *see also In the Matter of the Estate of Carano*, 1994 OK 15, ¶ 33, 868 P.2d 699; *Gray v. Gray*, 1969 OK 125, ¶¶ 24-25, 459 P.2d 181; *Roberts v. Humphreys*, 1960 OK 222, ¶¶ 17-18, 356 P.2d 370; *Owens v. Musselman*, 1942 OK 52, ¶¶ 13-15, 121 P.2d 998, 1000 (all noting this presumption). It is well established that, in such circumstances, even “slight evidence” from which the court could infer coercion “will suffice to shift the burden” of proof, and “require the *beneficiary* to show affirmatively that the transaction was fair and free from undue influence.” *Cummings*, 1961 OK 85, ¶ 11 (emphasis added); *see also Carano*, 1994 OK 15, ¶ 35 n.20 (“When the legal presumption of undue influence has arisen by showing confidential relations, whether in dispositions of property *inter vivos* or by will, the burden of proof is upon the party seeking to take the benefit of such disposition to rebut the presumption ....” (quoting *White v. Palmer*, 1971 OK 149, ¶ 28,

498 P.2d 1401); *Moore v. Moore*, 1934 OK 103, ¶ 0, 29 P.2d 961 (“Where the parties stand in the relationship of trust and \*9 confidence, and the party in whom the confidence is reposed obtains an apparent advantage over the other in a transaction between them, such transaction is presumed to be void, and the burden of proof is upon the party who seeks to support it to show by clear proof that he has taken no advantage of his influence and that the transaction is fair and conscionable.”); *Clinton v. Miller*, 1919 OK 266, ¶4, 186 P. 932 (noting that “transactions between persons occupying fiduciary and confidential relations to each other in which the stronger or superior party obtains advantage over the other should not be upheld, and that in actions involving validity of such transactions the burden of proof is cast on the superior party to establish the perfect fairness of the transaction and that the consideration was adequate”).

### C. In this Case, a Confidential Relationship Existed Sufficient To Impose the Presumption of Invalidity

For the presumption of invalidity to attach, the plaintiff must establish that the alleged donor and donee enjoyed a confidential or fiduciary relationship. This fiduciary or confidential relationship need not be a formal one, however. *Cummings*, 1961 OK 85, ¶ 11. Rather, the presumption applies “in every case where there has been confidence reposed which invests the person trusted with an advantage in treating with the person so confiding.” *Id.* (internal quotes omitted); see also *Lewis v. Schafer*, 1933 OK 203, ¶¶ 11-14, 20 P.2d 1048, 1050.

There is no question that Mr. Harris and Ms. Miles enjoyed a confidential relationship at the time of the transfers. After he returned from his daughter's home in Kansas City, Mr. Harris was substantially dependent upon Ms. Miles for assistance with a number of basic day-to-day tasks, including taking him to the doctor, picking up his medications, handling his paperwork, and--importantly--managing his finances. *Cf.*, e.g., *LaDoux v. Bohn*, 1966 OK 223, 420 P.2d 501 (finding confidential relationship sufficient to establish presumption of undue influence where the plaintiff was **elderly** and in a “weakened condition, both mentally and physically,” and \*10 she “relied, and depended, upon defendant” and “trusted defendant ... implicitly”). As Ms. Miles conceded at trial, Mr. Harris “had confidence” in her, and “believed whatever [she] said was true.” Tr. at 54; see also Tr. at 81; 126, 143-44.

Moreover, the Supreme Court has noted that, by drafting an instrument of assignment or transfer, the drafter necessarily “place[s] himself in a fiduciary position” with respect to the transferee. *Carano*, 1994 OK 15, ¶ 37 & n.17. The record here establishes--and the Defendant does not dispute-- that Ms. Miles drafted the \$10,589 check on Mr. Harris' behalf, and that Mr. Harris merely signed his name to the instrument. See Tr. at 34, 49-52.

These facts, coupled with the evidence that Ms. Miles kept up with the balance of Mr. Harris' account and otherwise managed his financial affairs during the relevant period, Tr. at 49-52, clearly establish that Ms. Miles enjoyed both a confidential and fiduciary relationship with Mr. Harris. Accordingly, the District Court was required to apply the presumption of invalidity here. See, e.g., *In the Matter of the Estate of Carano*, 1994 OK 15, ¶ 33, 868 P.2d 699; *Gray v. Gray*, 1969 OK 125, ¶¶ 24-25, 459 P.2d 181; *Cummings v. Garriss*, 1961 OK 85, ¶¶ 0, 11, 362 P.2d 1106.

### D. The District Court's Failure To Apply this Presumption and Shift the Burden to the Defendant Was Prejudicial and Requires Reversal

In this case, however, the District Court found in favor of the Defendant in whole or in part because “*the Plaintiff* failed to prove” that Mr. Harris “lacked the legal capacity to give valid consent,” or “gave his alleged consent by mistake,” “while under duress,” or because of “fraud, undue influence, or over-reaching” by the Defendant. R.19 (emphasis added) (incorporating by reference R.3). The District Court's misallocation of the burden of proof here requires reversal.

\*11 As explained above, the Plaintiff in this case introduced substantial evidence to show that the alleged gift was procured by fraud or undue influence. First and foremost, the \$10,589 check and the subsequent \$2000 transfer left Mr. Harris penniless--forcing him to seek assistance from the government, payday loan companies, and his daughters until the end of his life. *Cf.*



*Carano*, 1994 OK 15, ¶ 40 (finding significant that the gift “impoverish [ed] the donor”). The record also indicates that Ms. Miles hid the transfers from Mr. Harris' children, grandchildren, and other step-children until after his death. Tr. at 38, 48-49, 61-63; cf. *Anderson v. Davis*, 1952 OK 193, ¶ 19, 256 P.2d 1099, 1103 (noting the “high secrecy” of the parties' transactions).

Moreover, the evidence regarding Mr. Harris' mental competence at the time of the transfers was--to state it charitably to the Defendant--at least disputed. Ms. Miles presented testimony from various community members, including Mr. Harris' pastor, the pastor's wife, and Defense Counsel's secretary, who stated that, in their brief interactions with Mr. Harris at unspecified times, he had seemed mentally competent. See Tr. at 153-58, 173-74. Ms. Miles also introduced testimony from one of Mr. Harris' many physicians, who stated that there was no notation of dementia or other mental illness in his chart. Tr. at 171. The Plaintiff, by contrast, presented testimony from Mr. Harris' three daughters and his close friend and neighbor, each of whom testified that, at the time of the transfers, Mr. Harris was often slow, forgetful, prone to erratic behavior, and unable to understand his financial affairs. See Tr. at 86-87, 102-08, 117, 122-23, 125-26, 132, 143, 146.

This is not, therefore, a case where the evidence in support of the judgment was so compelling that the trial court's improper allocation of the burden of proof was harmless. “This Court is not obliged to accept the trial court's findings if they are irretrievably tainted by legal error.” \*12 *State ex rel McGehee v. 1987 Oldsmobile Cutlass*, 1993 OK CIV APP 177, ¶ 12, 867 P.2d 1354, 1357. Where, as here, the evidence was conflicting and the trial court's error as to the burden of proof was thus prejudicial, reversal is required. *Id.* (citing *Martin v. Pribil*, 1939 OK 472, ¶¶ 9-10, 95 P.2d 853, 855; *Eagle-Picher Mining & Smelting Co. v. Layton*, 1938 OK 222, ¶¶ 21-22, 77 P.2d 1137, 1140).

## **II. The District Court's Finding that the Alleged Inter Vivos Gifts Were Proper and Without Fraud or Undue Influence Is Contrary to the Clear Weight of the Evidence**

‘Even assuming, *arguendo*, that the District Court properly allocated the burden of proof, its judgment nevertheless should be reversed on the ground that its decision was contrary to the clear weight of the evidence.

### **A. Standard of Review**

In cases involving equitable issues such as “questions of competency,” “capacity to donate or devise,” and “undue influence,” the Oklahoma Supreme Court has held that “the reviewing court's duty is to examine the entire record and weight the evidence.” *In the Matter of the Estate of Carano*, 1994 OK 15, ¶¶ 13, 23, 868 P.2d 699. Although a trial court's findings of fact generally will not be disturbed on appeal unless they are “clearly against the weight of the evidence,” *id.*, this standard is not an invitation for this Court merely to rubber-stamp the lower court's judgment. Rather, as the Supreme Court has explained, in cases involving allegations of undue influence, the reviewing court “must really weigh the evidence, in the highest and most conscientious sense of that term, with firm resolution to do justice in the instant case.” *Anderson v. Davis*, 1952 OK 193, ¶ 10, 256 P.2d 1099, 1102; see also *Gray v. Gray*, 1969 OK 125, ¶ 24, 459 P.2d 181 (“re-examin[ing] this record carefully and at length”).

### **B. The Defendant Failed To Sustain Her Burden To Rebut the Presumption of Invalidity in this Case**

To establish a valid *inter vivos* gift, the alleged donee must prove the following elements: “(1) a competent donor, (2) freedom of will on the part of the donor, (3) donative intent to make \*13 the gift, (4) a donee capable of accepting the gift, and (5) delivery by the donor and acceptance by the donee.” *In the Matter of the Estate of Estes*, 1999 OK 59, ¶ 29, 983 P.2d 438. To establish such a gift after the alleged donor's death, moreover, the evidence must go beyond a mere preponderance: it “must be clear, explicit, and convincing as to every element.” *Id.* at ¶ 30. Ms. Miles has utterly failed to satisfy this burden here.

*First:* Other than her own self-serving testimony, Ms. Miles failed to introduce *any* evidence--much less clear, explicit, and convincing evidence-- that Mr. Harris transferred his entire life savings to her under his own volition, without fraud or undue influence.

As explained above, the fact that Ms. Miles' enjoyed a confidential relationship with Mr. Harris created a presumption that his alleged gift was procured by fraud or undue influence. To rebut this presumption, a defendant typically is required to show either that the confidential relationship had ended, or "that the grantor had the benefit of competent and independent advice of some disinterested third person." *Carano*, 1994 OK 15, ¶ 35 & n.20 (noting that "[a] primary consideration" in such cases "is whether the donor had the benefit of independent advice before making the gift"). Ms. Miles, however, offered no such evidence. To the contrary: despite the fact that Mr. Harris had a lawyer in town whom he trusted, Tr. at 95, there was nothing to indicate that Mr. Harris consulted him about the transfers. *Cf. id.* at ¶ 39 (noting that, although the grantor "had an attorney who was familiar with the subject of the assignment, this attorney was not consulted or informed"). Moreover, Ms. Miles herself admitted that she had declined to tell Mr. Harris' daughters or his other step-children about the alleged gift. Tr. at 38, 48-49, 61-63.

Indeed, in an effort to overcome the presumption of invalidity, Ms. Miles offered nothing but her own statements to that effect--despite claiming at trial that both her brother and her \*14 husband had witnessed the transfers. Tr. at 38. Tellingly, Ms. Miles' husband did not testify at trial, and although Ms. Miles' brother did take the witness stand, he addressed only the issue of Mr. Harris' general competency--he was never asked to confirm Ms. Miles' assertions as to the validity of the transfers he supposedly witnessed. *See* Tr. at 159-60. Where, as here, "the only evidence of donative intent" is the recipient's "self-serving statements" that the alleged donor "wanted her and her heirs to have the property," the alleged donee has failed to satisfy her burden of proof. *Estes*, 1999 OK 59, ¶ 31.

*Second:* The clear weight of the evidence indicates that Mr. Harris was not legally competent to make the alleged gift.

To satisfy her burden of demonstrating that Mr. Harris was competent to make the alleged gift, the Defendant proffered testimony from various witnesses, including Mr. Harris' pastor, the pastor's wife, Defense Counsel's secretary, and various relatives of the Defendant. These individuals each testified that, in the times that they encountered Mr. Harris, they had not noticed any mental defects. Tr. at 153-58, 173-74. Yet these witnesses testified only about brief, passing interactions with Mr. Harris at unspecified times, and they were unable to speak to his capacity at the specific time of the transfers. *See, e.g.*, Tr. at 153 ("I don't have no recollection of what times it was."); Tr. at 155-56 ("Whenever he came, he was mentally competent to me ... I don't remember the years, but just the duration that he was at our church."); Tr. at 167 ("He was always in his right mind when I was around."). Moreover, none of these witnesses were able to testify regarding Mr. Harris' competency in understanding financial matters.

Ms. Miles also called one of Mr. Harris' numerous physicians to testify. Although she stated that nothing in her chart indicated a diagnosis of *dementia* or other problems, she also noted that she had been treating him for other issues, and that he "certainly" could have had \*15 mental problems of which she was not aware. Tr. at 171. Such a statement is far from testimony that she found him competent--and is hardly sufficient to satisfy the Defendant's burden to show that Mr. Harris was competent to make the alleged gift.

By contrast, other evidence presented at trial strongly suggested that Mr. Harris was in fact incompetent, particularly with respect to financial matters. Each of Mr. Harris' three daughters testified that their father was unable to understand or manage his own financial affairs during the relevant time period, noting that he would often overpay or underpay his bills, and that he tended to "get it all mixed up." Tr. at 122, 132. They testified that Mr. Harris would quickly forget conversations, particularly those about financial matters, Tr. at 86-87, 122-23, 125, 143, 146, and that he was "easily influenced" by certain individuals, including Ms. Miles. Tr. at 125-26, 143.

Testimony about Mr. Harris' lack of facilities was not limited to his daughters. Lloyd Pearl, Mr. Harris' neighbor in Hugo, testified that he had regularly visited Mr. Harris in the last ten years of his life, and that he similarly had noticed a marked decrease in his ability to understand and comprehend matters during the relevant time period. Tr. at 102-03. Mr. Pearl described Mr. Harris as "out of it" and "slow." Tr. at 104, 106. He also testified about specific incidents of strange and erratic behavior around the time of the transfers, such as when Mr. Harris had driven off and been found by the police. Tr. at 106-08.



Even the Defendant's own testimony indicated that Mr. Harris was less than competent to make the alleged gift. Indeed, according to Ms. Miles, the reason that Mr. Harris gave all of his money to her, rather than to any of his children or grandchildren, was that "they hadn't seen him in two years," and he "he didn't want them to have anything." Tr. at 38; *see also* Tr. at 61 ("he was angry with his kids because after [sic] they hadn't called him in two years"). The record \*16 indicates, however, that Ms. Miles wrote the \$10,589 check mere weeks after Mr. Harris returned to Hugo from Kansas City, where he had spent several months living with his daughter. If Mr. Harris had in fact made such a statement as the justification for his extraordinary gift, then Ms. Miles should certainly have questioned his competency.<sup>4</sup>

In *Roberts v. Humphreys*, 1960 OK 222, 356 P.2d 370, the Supreme Court reversed a finding of the trial court that a gift had not been procured by fraud or undue influence, and was otherwise proper. The Court acknowledged that the defendant had introduced some evidence that the gift had been voluntary, and that "the trial court chose to believe [the defendant's] testimony to the general effect that she did not exercise duress." *Id.* at ¶ 14. Nevertheless, the Supreme Court held that a "presumption of fraud" had arisen by virtue of the parties' confidential relationship, and that the defendant had "wholly failed to sustain the burden cast upon" her to rebut this presumption. *Id.* at ¶¶ 17, 20. Accordingly, after examining the weight of the evidence, the Court reversed the judgment of the trial court, rendered judgment in favor of the plaintiff, and cancelled the deed in controversy. *Id.*; *see also* *Anderson*, 1952 OK 193, ¶¶ 32-33 (reversing the judgment of the District Court, after "carefully consider[ing] the entire record," because the defendant had failed to present sufficient evidence rebutting the presumption of undue influence).

Here, too, the trial court apparently credited Ms. Miles' testimony that Mr. Harris had given her the entire contents of his bank account knowingly and voluntarily, without fraud or \*17 undue influence. Under Oklahoma law, however, a plaintiff's own self-serving testimony is insufficient, standing alone, to overcome a presumption of fraud and undue influence. *See, e.g., Estes*, 1999 OK 59, ¶ 31. Accordingly, Ms. Miles failed to satisfy her burden of showing--by clear and convincing evidence--that the presumption is inapplicable. The judgment in her favor therefore should be reversed, and entered instead in favor of the Plaintiff.

### CONCLUSION

For the foregoing reasons, Plaintiff/Appellant respectfully requests that this Court reverse the judgment of the District Court. Alternatively, Plaintiff/Appellant respectfully requests that this Court vacate the trial court's judgment and remand for a new trial using the appropriate burden of proof.

#### Footnotes

- 1 Indeed, the record is entirely devoid of evidence as to whether--once she had received the entire contents of his bank account--Ms. Miles provided Mr. Harris with any further care at all.
- 2 The pistol was not discussed at trial.
- 3 This admission at trial contradicts the statements made in Ms. Miles' Answer, where she expressly "denie[d] that she received a stereo, a table or towels ...." R.7, ¶ 10.
- 4 Perhaps recognizing the insufficiency of the evidence presented to rebut the presumption of invalidity, Defendant's counsel attempted to supplement the record in his Response to the Petition in Error. Resp. at 3. He stated, for the first time, that he knew Mr. Harris had "wanted to leave nothing to his children" because Mr. Harris had "stated this numerous times to his attorney, Vester Songer [defense counsel in this case]." *Id.* Not only is this improper testimony by the defense counsel acting as a witness, it is also testimony that was never proffered to the District Court. Accordingly, its submission in this appeal is wholly improper.