

IN THE SUPREME COURT OF MISSISSIPPI

COPY

In the Matter of the Estate of Earsel Rayburn Pope, Deceased

JUANITA SHARP ANDERSON ALLEN POPE

APPELLANT

vs.

Number 2007-CA-00199

CATHY WHITE, JUDY O'BERRY and TERESA WILLIAMSON

APPELLEES

APPEAL FROM THE CHANCERY COURT OF NESHOPA COUNTY, MISSISSIPPI
HONORABLE JOHN CLARK LOVE, CHANCELLOR, PRESIDING

BRIEF OF APPELLEE

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Certificate of Interested Persons

The undersigned counsel of record for Appellee certifies the following listed persons have an interest in the outcome of the case. This representation is made in order that the Judges of this Honorable Court may evaluate the possible disqualifications or recusals:

Honorable John Clark Love, Jr., Chancery Court Judge for the Sixth Chancery Court District;

Honorable Edward A. Prisock, Chancery Court Judge for the Sixth Chancery Court District;

Juanita Sharp Anderson Allen Pope, Appellant;

Honorable James A. Williams, Counsel for Appellant;

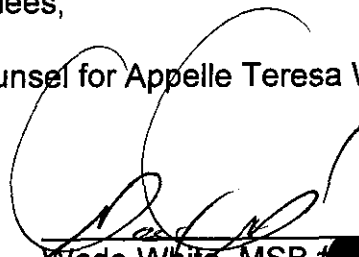
Honorable Wade White, Counsel for Appellees Cathy White and Judy O'Berry;

Honorable Terry L. Jordan, Counsel for Appellees Cathy White and Judy O'Berry;

Cathy White and Judy O'Berry, Appellees;

Honorable Steven D. Settlemyres, Counsel for Appellee Teresa Williamson;

Teresa Williamson, Appellee


Wade White, MSB [REDACTED]
Attorney for Appellees, Cathy White
and Judy O'Berry



Steve Settlemyres, MSB [REDACTED]
Attorney for Appellee, Teresa
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STATEMENT OF APPELLANT'S ISSUE

Whether the Jury Verdict was contrary to the overwhelming weight of the evidence and contrary to law and therefore Court erred in not granting a Judgment Notwithstanding the Verdict.

STATEMENT OF THE CASE

Course of Proceeding Below

Earsel Pope (hereinafter referred to as "Mr. Pope") departed this life on March 29, 2004 as a resident citizen of Neshoba County Mississippi. Mr. Pope was married to Juanita Sharp Anderson Allen Pope, hereinafter referred to as "Pasty" and in the transcript and record she may also be referred to a "Juanita". Mr. Pope, also, had three (3) natural children, Cathy White (hereinafter referred to as "Cathy"), Judy O'Berry (hereinafter referred to as "Judy") and Teresa Williamson (hereinafter referred to as "Teresa") and all of whom may be collectively referred to as "children" or "daughters".

The Tuesday after marrying Patsy on Thursday at a local funeral home, Mr. Pope executed a document (hereinafter referred to as "will") that Patsy purported to be the Last Will and Testament of Earsel Pope, dated October 14, 2003. (R. 35). After Mr. Pope's death, Cathy and Judy filed a Petition for Appointment of Administratrix and for Letters of Administratrix and a Caveat Against the Probate in Common Form. (R. 1 R. 5). Also, Cathy and Judy filed Petitions for Injunctive Relief, Request for Accounting or for the Posting of Bond against Patsy and Teresa. (R. 8). Further, the document purported to be the last will and testament of Earsel Pope was filed in a Submission of Will for Probate and then a Petition to Contest Will was filed by Cathy and Judy, with Teresa later joining. (R. 32 R. 53). Thereafter, the Court appointed a Temporary Administrator, Honorable Kiley Kirk of Louisville, Mississippi. (R. 102). A jury trial was held on the issue of *devisavit vel non* commencing October 16, 2007 and ending October 18, 2007, with the same being set by Order Setting Cause for Trial. (R. 264). A Jury Verdict was returned in favor of the Contestants, the children, declaring the

document not to be the valid Last Will and Testament of Earsel Rayburn Pope. (R. 443). A Judgment conforming to the Verdict was entered on November 3, 2006 and a Motion for Judgment Notwithstanding Verdict of Jury was filed by Patsey on November 14, 2006. (R. 449 R. 451). The aforementioned Motion for Judgment Notwithstanding Verdict of Jury was denied on December 28, 2006. (R. 463). A Notice of Appeal dealt with herein was filed by Patsy on January 26, 2007. (R. 464).

Testimony, Evidence and Exhibits

Proponent's Prima Facie Case:

The Proponent, Patsy, offered the testimony of Susan Alford and Heather Irby, both legal assistants of the law firm of Alford, Thomas and Kilgore. Their testimony related to the circumstances in which the will was drawn and executed and, also, the making and scheduling of the appointment to make and execute the will. (T. 57-90).

Susan Alford recognized the will sought to be probated by Patsy. (R. 35). Mrs. Alford was an attesting witness to will along with Mrs. Heather Irby. Mrs. Alford also responded in the affirmative to the question of whether Mr. Pope appeared to be competent and understand what he was doing. As to Mr. Pope's specific demeanor when was in the office to execute the will, Mrs. Alford stated he was "very quiet." According to Mrs. Alford , Patsy came to the law office when the contents of the will were discussed with Mr. Robert Thomas. (T. 58). Also according to Mrs. Alford, when Mr. Pope was signing the will, if Patsy did come with him to the office, Patsy would have had to been only a few feet away from Mr. Pope when he was signing the will and within hearing distance of Mr. Pope and the attesting witnesses. (T. 61).

Heather Irby, another attesting witness to the will sought to be probated by Patsy

and a legal assistant at Alford, Thomas and Kilgore, also testified that Patsy was with Mr. Pope in the law office the initial time Mr. Pope was to meet with Mr. Robert Thomas to discuss the terms of the will. (T. 65). After the testimony of Mrs. Alford and Mrs. Heather Irby, the Proponent rested her prima facie case as to the probate of the will. (T. 70).

Contestant's Case in Chief:

Contestants presented their case in chief by first calling Patsy Pope as an adverse witness. (T. 73). Patsy testified as to being married four (4) times. (T. 73-74). Patsy could not remember the date the Earsel offered his hand in marriage nor could she remember the date she accepted his offer to marry him. (T. 74). According to Patsy she and Earsel began their courtship approximately two (2) months prior to their marriage on October 9, 2003, but could not identify a specific date in which the courtship began. (T. 75). Patsy further testified that she was never a paid sitter for Mr. Pope. Upon being presented with a cancelled check, she admitted that she was a sitter for Mr. Pope and that the check was compensating her for her services. (T. 76). Nevertheless, Patsy then testified, just moments after testifying she was a paid sitter, that she was not a paid sitter. Then Patsy admitted she had taken money from Teresa twice, but at this point would not provide testimony as to whether or not this money was to compensate her for sitting services. Patsy stated that she took the second payment that Teresa paid her and bought clothes for Mr. Pope. Patsy continued to give conflicting testimony as to whether or not she was a paid care giver for Mr. Pope. (T. 75-79).

Patsy further testified that Mr. Pope was under the care of hospices nurses prior

to their marriage, at time of their marriage, the few days after the marriage when the will was made. (T. 81). Patsy was questioned about a hospice nurse visiting Mr. Pope the day before his marriage to Patsy and the nurses' notes identifying Patsy as his "sitter". (T. 82-83).

As to Mr. Pope's health at or about the time the will was made and the time he was under her care, Patsy testified that Mr. Pope "wasn't sick, despite later testifying that he had leukemia. (T. 83). According to Patsy, Mr. Pope could administer his own insulin for his diabetes, but instead that she monitored its administration. (T. 83-84). She further testified that his diabetic condition could be monitored "without giving him insulin if you cooked right." (T. 83). When asked about Mr. Pope's heart, Patsy replied that Mr. Pope said "he loved her. I guess it come from the heart." Apparently misunderstanding the question, Patsy then stated that she knew he had stints in his heart, but that "stints are not uncommon." (T. 84).

As to Mr. Pope's transportation, Patsy did most of the driving. She said that driving made Mr. Pope's shoulders hurt. (T. 88). When asked about the medicine that was administered to Mr. Pope in September of 2003 and October of 2003, Patsy admitted that Mr. Pope was administered a large amount of medicine, particular twenty-one (21) pills at one time. (T. 88-89). She, however, stated that Mr. Pope was capable of administering his own medicine but the hospice nurse would come to his home to fill a container denoting the days of the week for each medicine. (T. 89-90).

Patsy stated that she and Mr. Pope had discussed getting married the week before the Thursday in which the marriage occurred at the Stephens Funeral Home. Patsy did testify that there was no particular reason that she and Mr. Pope got married

on October 9, 2007. (T. 90). However, when asked why they married the very day the three (3) day waiting period for the issuance of marriage licenses had expired, she said it was Mr. Pope's idea to get married. (T. 91).

As to Patsy's involvement in the making of the will, she admitted that she called to schedule the appointment with Mr. Robert Thomas, but guessed that Mr. Pope had asked her to do it. (T. 92). Patsy said that after making the appointment with Mr. Robert Thomas and after a conversation with Mr. Pope, she was under the impression that Mr. Pope was going to make a will with her name in it and with the three (3) daughters in it. (T. 93).

Patsy drove Mr. Pope to Mr. Robert Thomas' law office in Philadelphia and she, also, went into the law office with Mr. Pope. (T. 93). Patsy stated that she wanted to go into Mr. Thomas' office with Mr. Pope because Mr. Thomas was her lawyer. (T. 94). Patsy and Mr. Thomas had some discussion, but according to her it was about nothing legal. Notwithstanding the previous testimony, Patsy then stated that she asked if Mississippi's laws were like Louisiana and Texas. Patsy would never specifically state what she asked Mr. Thomas, but stated she thought "everybody had to be in the will." (T. 94). Despite asking such a questions to Mr. Thomas, Patsy stated that she did not become aware that she was the sole benefactor of Mr. Pope's will until approximately two (2) weeks after the will was made. (T. 97). Patsy said that after her conversation with Mr. Thomas and once Mr. Pope and Mr. Thomas began discussing the substance of the will, she voluntarily left the office and went into the lobby because it was not her business. (T. 95). When asked if Mr. Thomas had asked her to leave, Patsy replied "no". (T. 96). Later, Mr. Thomas stated that he asked Patsy to leave the room while

Mr. Pope and he discussed the matters of the will further. (T. 296). Once the will was made, Patsy testified that she kept the will in her house because too many people came in and out of his home. (T. 96).

Examination of Patsy then led to a matter involving a New York Life Savings Annuity in the amount of \$202,448.92 which was liquidated into cash. Patsy testified that she had no knowledge of the existence of that account until after she had retained counsel in the will contest. (T. 98). That testimony is in direct conflict the testimony of Stanley Salter, Vice President of The Citizens Bank of Philadelphia, and Linda King, a teller at the Citizens Bank of Philadelphia. (T. 107-129). Mr. Salter testified that Patsy came into his office at the Citizens Bank of Philadelphia, with Mr. Pope, wanting to cash a New York Life Annuity check in excess of \$200,000.00. (T. 108). Mr. Salter was unable to cash such a large check that day and, therefore, asked them to come back another day. (T. 109). Further, Mr. Salter testified that he had never seen a cash withdrawal in such a large amount despite working in banking institutes since 1979 (T. 108-109). Again contrary to Patsy's testimony, Mrs. Linda of The Citizens Bank testified she counted funds for the check cashed by Mr. Pope and retrieved by Mr. Pope and Mrs. Kate Williamson, Patsy's mother, when they came back the second time to the bank. (T. 122). Mrs. Linda King testified that Patsy was in fact not in the bank with Mr. Pope and her mother when the money was counted and retrieved. According to Mrs. King, however, when she toted the money outside to Mr. Pope's vehicle, Patsy was waiting in the truck. (T. 123). Mrs. King said she toted the cash money out in a large bag and the she was sure that Patsy knew what was in the bag. (T. 124). Mr. Williams, attorney for Patsy, asked Mr. Salters and Mrs. King several questions related

to the individuals with Mr. Pope at both visits and what procedures the bank uses to cash such a check. (T. 111-120 T. 124-129)

Kate Williamson, the mother of the Patsy, was called to the stand to testify adversely by the Contestants and examined by Wade White, Attorney for two of the contestants, Cathy and Judy. (T. 129). Ms. Williamson recounted her visit to The Citizens Bank with Mr. Pope to retrieve the funds from the cashed New York Life Annuity. (T. 130-132). Mrs. Williams declared that she went with Mr. Pope, but that Patsy did not go to the bank with either her or Mr. Pope. Mrs. Williamson further declared the Patsy did not have any knowledge of the transaction at The Citizens Bank of Philadelphia. (T. 131).

Clay Williamson was called to testify and examined by Steve Settlemyres, an attorney for one of the Contestants, Teresa. (T. 132). Clay testified that he is married to Teresa, Mr. Pope's daughter, that he is also the brother to Patsy, and that his mother is Mrs. Kate Williamson. (T. 132). Clay recited that he and his wife had cared for Mr. Pope in the past and that Mr. Pope had lived with he and Teresa during that time. (T. 133). According to Clay, Mr. Pope had difficulty driving and with falling and, therefore, he required more care. (T. 133). Clay observed that Mr. Pope had heart problems, kidney stones, leukemia and "was sickly". (T. 133). As to general care for Mr. Pope, Clay stated that Mr. Pope had to have someone prepare his meals and clean him up when he accidents, being when he was unable to make it to the bathroom. (T. 133-134). Clay described the relationship between Mr. Pope, his three daughters and Patsy. (T. 135). Clay declared that Patsy, also known as Juanita, married "the old man just to take his money " and "that she knew he was dying." (T. 138). When Patsy was

sitting with Mr. Pope, Clay said his financial books were located in a kitchen drawer and that Patsy would very easily have access to the information. (T. 142). At the time Mr. Pope and Patsy got married, Mr. Pope used a cane and a wheelchair to get around and that he was taking Lorcet 10 for pain. (T. 140). Further, Clay testified as to Mr. Pope's changing mental state. (T. 140-141).

Mrs. Cathy White, a Contestant and daughter to Mr. Pope, was called to testify and examined by Wade White, her attorney and also the attorney for her sister, Judy. (T. 144). Cathy recounted her mother, Earline, being married to Mr. Pope for 53 to 54 years and that her mother had only recently died before her father married Patsy. (T. 144). According to Cathy, her father was in a very emotional state after the death of her mother. (T. 144-145). Cathy further described her father as vulnerable. (T. 150). She testified further that her father was on hospice care because he was terminally ill with Leukemia, in addition to being severely diabetic and having heart conditions. (T. 146). Cathy discussed the hospice nurses coming to Mr. Pope's home to fill his medicine box up, discuss his ailments and take his blood pressure. (T. 146-147). Furthermore, she stated that her father was unable to remember to administer himself his own medicine and that he was dependent on others to administer his medicine to him. She further recounted that Mr. Pope was always depressed since the death of his first wife. (T. 147). Cathy told that she and her sisters help her mother and father their entire lives to accumulate their wealth and that she thought the family should be able to have an interest in it. (T. 148).

Further, Cathy testified that she was not allowed to see her father after he married Patsy, who is also known as Juanita. (T. 151). After the marriage, Cathy

described an event where Mr. Pope met with his financial adviser to remove approximately \$50,00.00 to purchase a new truck. (T. 151). Examination of Cathy by the Proponents of the will was reserved by for rebuttal purposes. (T. 156).

Mrs. Marie Lovern was called to testify by the Contestants and examined by Wade White, Attorney for the Contestants. Marie Lovern is the 74 year old sister to Mr. Pope. (T 156) She testified that about Mr. Pope's mental and physical health. (T. 157). Ms. Lovern was not cross-examined. (T. 158).

Mrs. Judy O'Berry was called to testify on behalf of the Contestants and was examined by Wade White, Attorney for Contestants. Judy recounted that she cared for Mr. Pope for approximately twenty-one (21) months. She stated that her father was not the leader of the family, but instead her mother was the leader. (T. 159). Judy detailed Mr. Pope's ailments and his dependency on a care giver. (T. 160). For instance, she stated that Mr. Pope could give himself his own insulin shot, but that he could not see well enough draw his own insulin up. (T. 160). Similar to Cathy, Judy stated that she, too, was not allowed to visit her father after his marriage to Patsy. (T. 161). After Mr. Pope's death, Judy called Patsy and asked if they needed to meet to address his assets, to which Patsy replied that "it was all hers, all hers." (T. 163).

The Contestants next called Mrs. Sandy Boatner to testify and Wade White examined Mrs. Boatner. Mrs. Boatner identified herself as an employee with Hospice Direct and having held such employment for the past four years. She declared that she is a licensed nurse in the state of Mississippi and has been such since 1984. (T. 166). She testified that she had the opportunity to assess her patient's mental and physical health and that Mr. Pope was a patient of hers. (T. 167). After Mrs. Boatner was

handed her medical records relevant to her treatment of Mr. Pope, she identified them as her own. (T. 167). These items were made Contestant's Exhibit 1, but were not found by Appellee's Counsel in the bound Record of this matter for purposes of this Appeal. (T. 170). Mrs. Boatner indicated that Mr. Pope was diagnosed with a terminal illness and that he was at the end stage of his terminal illness. Mrs. Boatner's duties were to "assess Mr. Pope's physical status, confer with the doctor what his needs were, assess his pain and his mental status..." (T. 170). She performed such tasks for Mr. Pope for approximately three or four months. (T. 171). Mrs. Boatner detailed Mr. Pope's poor health, particularly noting dates she noted in her records where he was declining physically and emotionally, always crying, possessed bruises and cuts where he had fallen. (T. 173-174). Mr. Pope even had to have prescription medicine so he would eat. (T. 175). Mr. James Williams, Attorney for the Proponent, cross-examined Mr. Boatner regarding who she observed caring for Mr. Pope and his physical condition. (T. 178-182).

Next, the Contestants called Mrs. Christy Phillips to testify with Wade White examining Mrs. Phillips. Mrs. Phillips explained that she was a registered nurse, employed by Hospice Direct, and the nurse for Mr. Pope between July of 2003 and October of 2003. (T. 183-187). Mrs. Phillips specifically discussed that on October 8, 2003 she paid Mr. Pope a visit to his home. (T. 187). Similar to her notes from that date, she recalled that Mr. Pope had identified Patsy as his sitter and identified Patsy in the courtroom as the lady identified by Mr. Pope as his sitter. (T. 187-188). Mr. Pope and Patsy were married the next day on October 9, 2003. (T. 74). Mrs. Phillips described Mr. Pope's many ailments. (T. 188-189). Particularly, Mrs. Phillips

expounded on the fact that Mr. Pope was on Exelon on October 13 and October 14, a medicine used to treat Alzheimers disease. (T. 189). Mrs. Phillips further testified that Mr. Pope was dependent upon people for his care. (T. 191). On cross examination of Mrs. Phillips, Mr. James Williams questioned her regarding the medicine in which Mr. Pope was taking at the time he made his will and his reason he was released from hospice care. (T. 192-193).

Mr. Terrell Flint was called to testify on behalf of the Contestants and was examined by Wade White, Attorney for Contestants. Mr. Flint was that financial advisor for Mr. Pope and particularly met with Mr. Pope to remove cash out his New York Life Annuity Account on Monday October 13, 2003. (T. 199-200). Further, when Mr. Flint asked Patsy if he could assist her in investing Mr. Pope's money, she replied "no, that she was going to put the money somewhere it couldn't be found." (T. 203). Mr. James Williams cross examined Mr. Flint. (T. 203-214).

Mrs. Carolyn Denton was called to testify on behalf of the Contestants and was examined by Steve Settlemires, Attorney for one of the Contestants. (T. 214). Carolyn was a friend to the family and sat for Mr. Pope when Teresa was unable to be with him. (T. 215-216). She particularly testified that she had sat with Mr. Pope approximately "two, three, four weeks" before he and Patsy married because Teresa and Clay were out of town. (T. 219). Mrs. Denton testified that there existed "friction" in the house with Teresa and Clay. (T. 220).

Teresa Williamson was called by the Contestants and was examined by Steve Settlemires and then cross-examined by Mr. James Williams. (T. 230-259). Teresa initially began caring for Mr. Pope on a full time basis after he fell and used is Medifast

alert someone of his fall. (T. 231). At that point, Mr. Pope came to live with Teresa and her husband. (T. 231). Teresa cooked for Mr. Pope but she had trouble getting him to eat because he was depressed. (T. 232). She said that shortly after her mother's death, she, her sisters and Mr. Pope were all having difficult times. (T. 233). Teresa would hire people to care for Mr. Pope at times that should could not be there and Kate Williams, Patsy's mother recommended to Teresa that Patsy should sit for Mr. Pope. (T 233-234) It was at this time that Teresa believes that she called Patsy to sit with Mr. Pope. (T 234) She recalled that Patsy sat with Mr. Pope "maybe twice, could have been a time or two more, but at least twice." (T. 234). The amount of money that Patsy was paid depended on the amount of time that she stayed with Mr. Pope. (T. 234). During the time that Patsy was paid to sit for Mr. Pope, Teresa did not think that Mr. Pope and Patsy were dating. (T. 235). Patsy even furnished her own engagement ring from one of her prior marriages. However, Patsy did let Mr. Pope pick which one. (T. 237). Teresa agreed with the previous testimony of the hospice nurses regarding the extensive care that Mr. Pope required. (T. 238).

On Cross examination by Mr. James Williams, Attorney for the Proponent, Teresa discussed how she became upset when Mr. Pope married Pasty. (T. 246) . She was questioned about an incident where she got angry with her father because she did not want Patsy spending the night with Mr. Pope. (T. 250-251).

After the testimony of Teresa Jean Williamson, the Contestants rested.

Proponent's Rebuttal:

In rebuttal, the Proponent called Dr. Kenneth Schneider to testify and he was examined by Mr. James Williams, Attorney for the Proponent. Dr. Schneider is a

psychologist, having practiced for twenty-one (21) years and has testified in Court many times. Dr. Schneider recalled seeing Mr. Pope on February 13, 2004 for approximately ninety minutes. (T. 260). Mr. Pope was there with his wife, Patsy, but most of his interview with Mr. Pope was after Patsy left the room. (T. 260). The substance of there discussion was Mr. Pope's fear that his children would "attempt to revoke his will and reverse his intentions." (T. 261). Dr. Schneider declared that Mr. Pope had asked him to evaluate his competency so he could offer testimony. Specifically, Dr. Schneider stated that Mr. Pope said "should you find me to be competent, I hope that you would be able to testify because that's the only voice I will have on that day." Tests were given to him to determine competency, probably lasting approximately 30 minutes. (T. 261).

According to Dr. Schneider, Mr. Pope "passed with a completely normal profile a mental status examination which involves mathematical skill, memory tests..." (T. 261-262).

Also in the evaluation according the Dr. Schneider, Mr. Pope gave "very lucid reasons that were heartfelt to him why he made a decision to exclude his children from his estate." (T. 262). Explaining that he had already given his children money, though not preferring to tell Dr. Schneider exactly how much. Mr. Pope, according to Dr.

Schneider, stated that "his children had never shown him respect and never shown him the love that he felt daughters should show their father." (T. 262). Dr. Schneider, stating "as my report indicates" Mr. Pope "had determined that they were greedy and that they sought to take advantage of him, and he cited examples..." (T. 262). In describing his evaluation of Mr. Pope, Dr. Schneider he stated "while remaining objective, of course, as a psychologist, I-I was touched by this man's struggle to have one last thing go his way, one last thing." (T. 263). Dr. Schneider continue to state that

Mr. Pope was hurt because his children had rejected his decision to "marry the woman he was in love with and that their rejection of that, especially under the conditions that existed where he had so little will—or possibility to exert his will available...." (T. 264). After describing his bond with Mr. Pope produced from his evaluation, Dr. Schneider reviewed the hospice notes regarding Mr. Pope. (T. 265-266).

Wade White, Attorney for two of the Contestants, cross examined Dr. Schneider. According to Dr. Schneider, it was Patsy that was his patient. (T. 267). Dr. Schneider only saw Mr. Pope one time. (T. 267). When asked about the patient file or record referred to in describing Mr. Pope, Dr. Schneider testified that he did not bring one. Furthermore, he stated that he never takes a file out of his office—it would be considered unethical. (T. 268). Dr. Schneider testified that he can never break the client privilege either. Wade White then handing him a letter he had written and placed in the file of Patsy Pope and subsequently given to her. (T. 270). Dr. Schneider read the letter in open court which described Patsy Pope as a "woman of dignity, compassion and high moral rectitude", "distinctively nonmaterialistic" and not "capable of manipulating another for selfish gain." Also read by Dr. Schneider from that same letter of his read in open court was the following, "My occasion to talk to Mr. Pope provided me with his confirmation of the same." (T. 270 E. 430). Again this letter was in the patient file of Patsy and given to Patsy, despite Dr. Schneider previously testifying he would never break the client privilege. Further, Dr. Schneider testified that he did not have a release to disclose what was said in his occasion to meet with Mr. Pope, but a "verbal understanding" with Mr. Pope. (T. 271). Dr. Schneider was asked to explain why described so well the attributes of Patsy and why he felt so compelled to do so. (T.

272). Dr. Schneider testified that Mr. White's questioning of Patsy's involvement in any financial transactions was an attempt to "draw this Court's attention away from my evaluation of Mr. Pope" despite the clear difference from his assessment of Patsy and the previous testimony. (T. 274). Dr. Schneider was unaware if Mr. Pope or someone else scheduled Mr. Pope's appointment. (T. 275). Dr. Schneider admitted that Mr. Pope Neurontin and Clonopin was taking when he evaluated him in February of 2004. (T. 278). Further, Dr. Schneider admitted that the hospice notes indicated he was confused and then oriented. (T. 278-279). When asked how many times in his many years of experience has he evaluated someone because the person knew there would be will contest, Dr. Schneider finally stated that "this case is unique". (T. 280). In response to his evasive answer, the following question was asked: "How many times has a gentleman come in with the sole purpose of finding himself competent for a will he made out to a second wife?". (T. 281). Once again, Dr. Schneider stated "unique." But when asked further to describe "unique", Dr. Schneider stated "unique means one". (T. 281). When asked what was Mr. Pope's mental state at the time he made his will on October 13, 2003, Dr. Schneider stated he had knowledge of his state of mind at that time. (T. 281). When asked about how much he was paid to testify, and with the Court having to then instruct him to answer, Dr. Schneider testified that he was paid \$2,000.00. Nonetheless, on redirect Dr. Schneider testified that he makes \$2,000.00 a day. (T. 284).

Next, the Proponent called Judy O'Berry adversely and was cross examined by Mr. James Williams, Attorney for the Proponent. (T. 286). She was asked extensively about any money that was given to her siblings in the past by Mr. Pope. (T. 289). She

was further asked extensively about Mr. Pope's eating habits. (T. 286-294).

Mr. Robert Thomas was then called to testify on behalf of the Proponent and was examined by Mr. James Williams, Attorney for the Proponent. (T. 294). Mr. Thomas testified that he had drawn up a power of attorney for Mr. Pope to the benefit of Teresa Williamson in May of 2003. (T. 294). Mr. Thomas also testified about meeting with Mr. Pope regarding the making of will and that his new wife came in with him. Mr. Thomas stated that Mr. Pope wanted to revoke the power of attorney previously given to Teresa and to make a new will. (T. 296). Mr. Thomas also declared on direct examination that Patsy started asking some questions about the law. Particularly, she inquired "what could be done with regard to children". (T. 296). After Patsy asked her question regarding disinherit children, Mr. Thomas asked her to leave the room. (T. 296). Mr. Thomas also testified that Mr. Pope's daughters were upset about Mr. Pope making a will with Patsy being the sole benefactor and met with him about it wanting it undone. (T. 297).

On cross examination of Mr. Thomas by Steve Settlemyres, Attorney for one of the Contestants, Mr. Thomas stated that on the day Patsy came in with Mr. Pope to have the will made, she did not ask that a will be made for her making Mr. Pope the sole beneficiary of her estate. (T. 299-300).

Mrs. Barbara Hitt was called by the Proponent to testify and was examined by Mr. James Williams. (T. 303). Mrs. Hitt is the sister to Patsy. (T. 304). Mrs. Hitt testified that the Teresa only fed Mr. Pope "pot pies and corn dogs", but that her sister, Patsy would cook him "vegetables and stuff he needed". (T. 306). She further testified that she personally knew Mr. Pope and spent time with him. (T. 307). Further, she

SUMMARY OF THE ARGUMENT

Patsy, the Proponent, was a caregiver and sitter for Mr. Pope when suddenly they married. Only days later Patsy made an appointment with her attorney, drove the Mr. Pope to the attorney's office, and accompanied him into the private office of the attorney where she participated a new will being drafted leaving everything to her.

The testimony presented to the jury allowed any reasonable juror to conclude that a confidential relationship existed between the Patsy and Mr. Pope, the Decedent. Further, the Contestants met their burden of proving by testimony that the Patsy had been actively concerned in some way with the preparation or execution of the will. Croft v. Alder, 115 So. 2d 683 (Miss. 1988).

The burden then shifted to the Proponent, Patsy, to overcome the presumption of undue influence which arises in the context of a confidential relationship. Estate of Sandlin v. Sandlin, 790 So. 2d 850 (Miss. Ct. App. 2001). Patsy failed to meet her burden of proof by not proving by clear and convincing evidence acted in good faith: that the decedent had full knowledge and deliberation of his actions and their correspondence and independent consent and action on the part of the testator. Murray v. Laird, 446 So. 2d 575 (Miss. 1984); Mullins v. Ratcliff, 515 So. 2d 1183 (Miss. 1987).

The jury heard three days of testimony from fourteen (14) witnesses and had the opportunity to observe their demeanor. The jury was properly instructed by the Learned Chancellor, John C. Love as to the applicable law. After deliberation a verdict was returned for the contestants which was wholly supported by the testimony.

The Learned Chancellor correctly denied the proponents Motion for a Judgement Notwithstanding the Verdict.

The jury verdict and the ruling of the Learned Chancellor should be affirmed.

ARGUMENT

ISSUE NO. 1

The Jury Verdict was supported by the overwhelming weight of the evidence and not contrary to law.

The proponent of the Will, Juanita Sharp Anderson Allen Pope (Patsy) requested the will contest in the instant case be tried before a jury. Now the Proponent is aggrieved by the jury's opinion, a case of be careful what you ask for, you may receive it.

The Proponent's Brief does not deny that a confidential relationship existed between the Proponent and Mr. Pope. Clearly Mr. Pope and Patsy had a confidential relationship due to their marriage and the assertions of Patsy that she took care of Mr. Pope. Mr. Pope was of advanced age, poor health and terminally ill as testified to by numerous witnesses in the three (3) day trial.

"Whenever there is a relationship between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationships as fiduciary in character." Hendricks v. James, 421 So. 2d 1031 (Miss. 1982).

A confidential relationship exists when there is "'overmastering influence' on one side or 'weakness, dependence or trust' on the other." Will of McCoffrey v. Fortenberry, 592 So. 2d 52 (Miss. 1991); Miner v. Bertasi, 530 So. 2d 168 (Miss. 1988).

These undisputed facts clearly meet the requirements set forth in a plethora of cases dealing with confidential relationships.

Factors to be considered in determining the existence of a confidential relationship include

- 1) whether one person has to be taken care of by others;
- 2) whether one person maintains a close relationship with another;
- 3) whether one person is provided transportation and has their medical care provided for by another;
- 4) whether one person maintain joint accounts with another;
- 5) whether one is physically or mentally weak;
- 6) whether one is of advanced age or poor health; and
- 7) whether there exists a power of attorney between the one and another.

Wills and Administration of Estates, 3rd Edition, Robert A. Weems §8.18 citing In Re Estate of Dabney, 740 So. 2d 915, 919 (Miss. 1999); Estate of Sandlin v. Sandlin, 790 So. 2d 850 (Miss. Ct. App. 2001).

"Those contesting a will need not present sufficient evidence to prove undue influence. The contestants, however, must at least raise sufficient question to cause jurors to conclude that the proponents failed to prove that the will was free of improper influence." In re Matter of the Estate of Pigg, 877 So. 2d 406, 412 (Miss. Ct. App. 2003).

Once the presumption of undue influence arises, the burden of proof is upon the proponent of the will to overcome the resulting presumption by clear and convincing evidence. Estate of Sandlin v. Sandlin, 790 So. 2d 850 (Miss. Ct. App. 2001).

The Proponent argues that the presumption of undue influence (which arose as a consequence of the confidential relationship) was overcome by the Proponent acting in good faith. Clearly the burden is on the Proponent to overcome the presumption by clear and convincing a.) proof of good faith on the part of the beneficiary, b.) testator's full knowledge and deliberations of his or her actions and c). their consequences and the testator's exhibition of independent consent and action. Murray v. Laird, 446 So. 2d 575, 578 (Miss. 1984); Mullins v. Ratcliff, 515 So. 2d 1183, 1193 (Miss. 1987); Miner v. Bertasi, 530 So. 2d 168 (Miss. 1998); In Re Estate of Harris, 539 So. 2d 1040 (Miss. 1989); Angle v. Estate of Angle, 519 So. 2d 883 (Miss. 1988).

a. **good faith**

As to the first factor delineated in Murray, factors used in determining whether the proponent/beneficiary exhibited good faith are:

- 1) who sought the preparation of the will;
- 2) where the will was executed and who was present;
- 3) the attorney's fee and who paid it; and
- 4) the secrecy or openness of the execution of the will.

In re Last Will and Testament and Estate of Smith, 722 So. 2d 606 (Miss. 1998);
Rogers v. Pleasant, 729 So. 2d 192 (Miss. 1998);

At the hearing, testimony was given by the Honorable Robert Thomas, the attorney that prepared the will, and his able secretaries, Susan Alford and Heather Irby. The testimony of Ms. Alford was that Patsy (the proponent) had called to make the initial appointment with the attorney only days after they were married, apparently on Monday after they married on Thursday. (T. 93) Mr. Thomas was the decedent's and the proponent's attorney. Further, the proponent drove the decedent to the law office and accompanied him into the office of Mr. Thomas. (T. 93) She then proceeded to ask Mr. Thomas what the law in Mississippi was and she testified that Mr. Thomas was a friend of hers. (T. 93 and T. 296) In fact, she testified she was doing the talking in Mr. Thomas's office and Earsel (the decedent) was not saying anything as pertaining to disinheriting children because she had heard that in Texas such could not be done. (T. 94) Mr. Thomas had to ask her to wait in the lobby area so that he could speak with the decedent. (T. 296) Clearly, the proponent was very active in the procurement/preparation of the will and had significant influence as to the contents of said will.

On the date of the execution of the will, once again Patsy, the Proponent transported the Mr. Pop to the law office of Mr. Thomas and accompanied him inside. (T 346) Patsy was within a couple of feet of the decedent during the entire visit and apparently heard each word spoken between the secretaries and the decedent. (T. 61)

The secretary could not remember to whom the original of the Will was given. However, Patsy testified she locked the will up at her place after the execution. (T. 96).

Other doubts were cast upon the Proponent's good faith by an incident which occurred just after the execution of the will which left everything to Patsy. Terrell Flint, a New York Life agent, went to the home of decedent regarding an annuity. Patsy testified she had no knowledge of such account. Terrell Flint, an uninterested third party, testified he advised Mr. Pope, the Decedent), to reinvest the money, but Patsy stated she would put the money somewhere nobody would ever find it." (T. 203).

Patsy undertook a calculated course of conduct to influence the Decedent. It is undisputed that she was paid to sit with decedent only a couple of weeks before the marriage. (T. 75). Patsy claimed they dated, however, this was disputed by all three (3) children of the Decedent. It is undisputed that no one knew of the marriage until after it had taken place. Then days later a new will was executed leaving Patsy everything and the children nothing. Later, she took the decedent to her regular psychologist, Dr. Kenneth Schneider for an evaluation, Dr. Schneider's only one of this nature. (T. 281). Dr. Schneider spoke of his good friend E.R. Pope but could not remember Mr. Pope's first name. (T. 268).

Under these facts any reasonable juror would or could conclude that the Proponent was not acting in good faith and that the will executed by the Decedent was due to the undue influence of the Proponent. The Proponent set out on a cool and calculating course of conduct before the marriage, and after the marriage, including an active roll in the preparation of the decedent's will, the cashing out of his annuity and putting it "somewhere no one will ever find it". (T 203).

The proponent did not make a showing of "good faith" by clear and convincing

evidence as required by the precedent stated above.

b. **testator's full knowledge and deliberation of his actions and the consequences**

Factors to be considered in determining testator's knowledge and deliberation are

- 1) his awareness of his or her total assets and their general value;
- 2) his understanding of the persons who would be his natural heirs under the laws of descent and distribution or under a prior will, and of how the subject will would legally affect the prior will or natural distribution;
- 3) his or her understanding of whether non-relative beneficiaries would be included or excluded;
- 4) his knowledge of who controlled his finances and the method used; and
- 5) his dependence upon and susceptibility to the influence of the person who controlled his finances.

In re Last Will and Testament and Estate of Smith, 722 So. 2d 606 (Miss. 1998);

Rogers v. Pleasant, 729 So. 2d 192 (Miss. 1998).

"The participation of the beneficiary/grantee, or someone closely related to the beneficiary arouses suspicious circumstances that negate independent action." Howell v. May, 2005-CA-02259-COA (Miss. Ct. App. 2007) (citing Dean v. Cavanaugh, 920 So. 2d 528, 537 (Miss. Ct. App. 2006)) (quoting Harris v. Sellers, 446 So. 2d 1012, 1015 (Miss. 1984)).

The decedent was under the care of Hospice at the time of the execution of the will. Among other things he was afflicted with Leukemia and was taking Clonipine for anxiety, Exelon for Alzheimer/dementia, Zoloft as an anti-depressant, Reminal for Alzheimer/dementia and Lortab for pain. (T. 189). He was considered "terminal" hence the home Hospice care.

The decedent's financial affairs had previously been handled by his daughter, Teresa Williamson until the marriage to Patsy. Teresa told her father she was through with him and moved out. (T. 220). After his marriage, Patsy immediately stepped in to

manage Mr. Pope's financial affairs as evidenced by her statement to the New York Life agent, Terrell Flint that she would put the money somewhere no one would ever find it. In fact, shortly after the marriage a withdrawal of \$50,000.00 was made, actually with it being on the day Mr. Pope, Patsy and Mr. Thomas met to discuss the contents of the will, followed by another of suspicious withdrawal of over \$200,000.00.

The Proponent did not offer clear and convincing evidence that Mr. Pope acted with knowledge and deliberation when he executed the will. Mr. Pope was described by Teresa Williamson as having good and bad days, mentally and physically and would be confused and repeat himself. (T. 242). Carolyn Denton testified Earsel acted as if being in a trance. (T. 221). Sandy Boatner, an L.P.N. for the hospice, testified Earsel was declining physically and mentally. (T. 174). She further stated that nearly each time she visited Earsel was depressed, and complained of pain almost every visit. (T. 178). Christy Phillips, a hospice nurse noted on her visit of October 8, 2003, just one (1) day before the marriage, Patsy, a "sitter" was present and that hospice was a death watch. (T. 193-195). Mr. Pope's 74 year old sister Marie Lovern testified that Earsel wasn't "just right" all the time. (T. 156). Cathy White, Earsel's daughter testified that as of the date of making the will that [Mr. Pope] was vulnerable, didn't want to hurt anybody...whoever he was with he wanted to please and that he was susceptible to undue influence. (T. 150).

Earsel did not control his own money and the proponents have failed to establish the other elements by clear and convincing evidence.

c. **advice of competent person, disconnected from the grantee and wholly devoted to the grantor's interest**

While Honorable Robert Thomas is a very competent attorney to render legal advice, Patsy testified they are good friends and he is also her lawyer. Certainly, this is not proof that Mr. Thomas was disconnected from the grantee, Patsy. Mr. Thomas testified

he asked her to leave and wait in the lobby because she was doing all the talking. Patsy said she was seeking advice on a matter in Texas at the same time, which shows there was not independent action on the part of Mr. Pope. Patsy could have waited outside in the car. Patsy could have waited in the lobby. Patsy didn't have to make the call to set up the appointment. Patsy didn't have to be within two (2) or three (3) feet of Mr. Pope when he executed the will. Patsy didn't have to inquire of Mr. Thomas as to the status of the law in Mississippi as pertains to disinherit children. However, she chose to do all these. No person or attorney could have been devoted wholly to Mr. Pope's interest because of the meddling of Patsy.

Patsy abused her relationship with Mr. Pope by asserting dominance over him and also by substituting her intent for that of Mr. Pope.

ISSUE NO. 2

Whether the Chancellor erred by Overruling the Proponent's Motion for Judgement Notwithstanding the Verdict

"When the trial court has denied a motion for judgement notwithstanding the verdict, we have held: We consider the evidence in the light most favorable to the appellee, giving that party the benefit of all favorable inferences that may reasonably be drawn from the evidence. If the facts so considered point so overwhelmingly in favor of the appellant that reasonable men could not have arrived at a contrary verdict, we are required to reverse and render. On the other hand, if there is substantial evidence in support of the verdict, that is, evidence of such quality and weight that reasonable and fair mind jurors in the exercise of impartial judgement might have reached different conclusions, affirmance is required." In re Will of Smith, 722 So. 2d at 613 (Miss. 1998) quoting Fitzner Pontiac-Buick-Cadillac, Inc. v. Smith, 523 So. 2d 324, 326 (Miss. 1998).

"It was within the province of the jury to determine what weight to give to the witnesses' testimony." *Id.* at 613, (Miss. 1998).

In the case at bar, twelve (12) reasonable jurors were selected without objection from either side. Likewise, no appeal has been taken as to any instructions given the jury. As the facts and arguments *inter alia* demonstrate, there were contradicting statements and testimony from both sides. The issue was one for a jury. The jury was present to observe the actions, demeanor and testimony of the witnesses of a three (3) day trial.

The Learned Chancellor, John C. Love, was correct in his ruling that the jury verdict should not be overturned.

The jury was properly instructed on the matters of confidential relationships and undue influence, including which party carried the burden. The Proponent made no objection at trial nor now as to these instructions. The issues presented at trial and in the appeal are questions of fact for the jury. The jury weighed the facts, observed the witnesses and made their decision.

CONCLUSION

The jury heard three days of testimony fourteen (14) witnesses and had the opportunity to observe their demeanor. The jury was properly instructed by the Learned Chancellor, John C. Love as to the applicable law. After deliberation a verdict was returned for the contestants which was wholly supported by the testimony.

The Learned Chancellor correctly denied the proponents Motion for a Judgement Notwithstanding the Verdict.

The jury verdict and the ruling of the Learned Chancellor should be affirmed.

RESPECTFULLY SUBMITTED, this the 12th day of October, 2007.

CATHY WHITE & JUDY O'BERRY, APPELLEES

BY: 

WADE WHITE

TERESA WILLIAMSON, APPELLEE

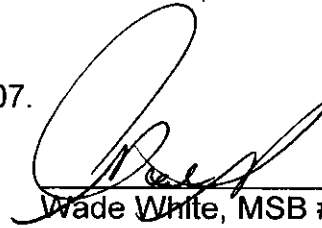
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STEVE SETTLEMIRES

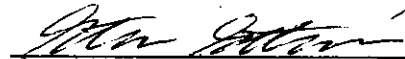
CERTIFICATE OF SERVICE

We, Wade White and Steve Settlemires, Counsel for Appellees, in the above styled and numbered cause, do hereby certify that a true and correct copy of the above and foregoing Brief of Appellee has been mailed by Standard United States Mail, postage prepaid to James Williams , Post Office Box 5002, Meridian, Mississippi 39302.

Done this the 12th day of October, 2007.



Wade White, MSB # [REDACTED]



Steve Settlemires, MSB # [REDACTED]