

IN THE SUPREME COURT OF MISSISSIPPI

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

JUANITA SHARP ANDERSON ALLEN POPE

APPELLANT

VS.

NUMBER 2007-CA-00199

CATHY WHITE and JUDY O'BERRY

APPELLEES

APPEAL  
FROM  
THE CHANCERY COURT OF NESHOBIA COUNTY, MISSISSIPPI

REPLY BRIEF FOR APPELLANT

James A. Williams  
MSB # [REDACTED]  
Post Office Box 5002  
Meridian, Mississippi 39302-5002  
Telephone: (601) 693-3881  
Attorney for Appellant

## Table of Contents

Table of Authorities	ii
Reply Brief	1
I. Reply to Appellees' Recounting the Record Testimony.	1
<i>No Secrecy of the Marriage/Known by All Several Weeks Before</i>	1
<i>No Immediate Post marriage Control by Patsy of Earsel's Assets.</i>	2
<i>No Secrecy Associated with the Will</i>	4
<i>Earsel Pope's Health</i>	5
II. Reply to Legal Authorities.	5
Conclusion	10
Certificate of Service	
Certificate of Mailing	

## Table of Authorities

<b>Croft v. Alder, 237 Miss. 713, 115 So.2d 683(1959)</b>	<b>8</b>
<b>Dean v. Cavanaugh, 920 So. 2d 528(Miss. App. 2006)</b>	<b>7</b>
<b>Harris v. Sellers,446 So. 2d 1012(Miss. 1984)</b>	<b>8</b>
<b>Howell v. May, --- So.2d ----, 2007 WL 1747120, Miss.App., June 19, 2007</b>	<b>7</b>
<b>(NO. 2005-CA-02259-COA)</b>	
<b>McCaffrey, Will of , v. Fortenberry, 592 So.2d 52 (Miss. 1991)</b>	<b>5</b>
<b>McDowell v. Pennington, 394 So.2d 323 (Miss.1981)</b>	<b>8</b>
<b>Miner v. Bertasi, 530 So.2d 168 (Miss.,1988)</b>	<b>7</b>
<b>Mullins v. Ratcliff, 515 So.2d 1183(Miss.1987)</b>	<b>9</b>
<b>Murray v. Laird, 446 So.2d 575(Miss.1984)</b>	<b>6, 7, 8</b>
<b>Pigg, In re Estate of, 877 So.2d 406(Miss.App.,2003)</b>	<b>9</b>
<b>Rogers v. Pleasant, 729 So. 2d 192 (Miss. 1998)</b>	<b>8</b>
<b>Sandlin, Estate of , v. Sandlin, 790 So.2d 850(Miss.App.,2001</b>	<b>9</b>

## REPLY BRIEF OF APPELLANT

### ***1. Reply to Appellees' Recounting the Record Testimony.***

First, please be informed that the written version of the Contestants/Appellees' Brief at page 18 at the bottom is in the middle of the Proponent's witness Barbara Hitt and stops in the middle of a sentence and then opens on page 19 with the Section entitled "Summary of Argument". Therefore the Proponent's case having Kate Williamson testify(T317-333), Juanita "Patsy" Pope(T334-371) and the Appellees' treatment of this testimony is not served on undersigned. Undersigned makes this statement because the page numbering of the Appellees' brief appears to be done manually and the Court may be viewing the Computer Disc version of the Appellees' Brief that covers this testimony and it is submitted that the Record itself in this regard, as the Court usually does, should be viewed for comparison with any Computer Disc version that has pages after page 18 that contain the testimony above identified.

### ***No Secrecy of the Marriage/Known by All Several Weeks Before***

In their Summary of Argument, Appellees' Brief., p. 19, they misrepresent the Record saying Earsel Pope and Patsy "suddenly...married". At p. 23 of their Brief they write: "It is undisputed that noone knew of the marriage until after it had taken place." The direct testimony of Clay Williamson, husband of the Contestant Teresa and brother to Patsy, sets it straight that the marriage was no secret; it had been known by at least Clay and Teresa for a month or so. Clay, Teresa and Earsel were living together in his double wide near the Clay and Patsy's mother(Katie's ) house, where Patsy lived in one end. Clay at T. 34 explains that "when they said they were getting married, we went out to New Mexico and stayed three or four days." At T 135, when asked when he first learned Earsel and Patsy were getting married, Clay testified(T135). "Well, they were going to get married the first time, but something came up about her divorce to the other husband, so they had to wait." He explained it was about a month later that they got married. Parenthetically, Clay, when asked, said he never had any suspicions about his sister, Patsy's, intentions.(T136 Additionally, now, since we are at this part of the Record, Clay said it was Earsel, alone without Patsy present, who told him and Contestant Teresa that they were getting married. At T. 139, Clay further explains that Earsel's revelation without

Patsy present of his marriage to her, came up in the context that Earsel had asked Teresa and Clay "to stand up for him at the wedding." Clay didn't because Teresa would not allow it. As to the exact day of the wedding and knowledge of the marriage, Clay testified at T. 139 that when they came back from getting married, Earsel introduced Patsy as "the new Mrs. Pope."

The Appellees at page 25 of their Brief mis-state that the \$50,000.00 Annuity withdrawal occurred on the date that EArseel and Patsy first went to Attorney Thomas' office to discuss the new Will's contents. The Will was executed October 14, 2003. The Withdrawal is referenced in Proponent's Exhibit 3, "communication from New York Life, which is dated October 21, 2003. Cathy White. is protesting the Will at EArseel and Patsy's home the same time that Terrell Flint(all discussed more below), is there for the \$50,000.00 withdrawal.

***No Immediate Post marriage Control by Patsy of Earsel's Assets.***

At page 23 of Appellees' Brief they distort the time frame between the Terrell Flint, New York Life's agent, who did not come immediately after the marriage for the liquidation of the some \$202,000.00 New York Annuity, but came about December 18, 2003.(Flint, T. 205-206 , Proponent's Exhibit 4, New York Life Letter regarding the \$202,000.00 withdrawal) There was a withdrawal from the Annuity of \$50,00.00 on October 13, 2003, shortly after the marriage, but, by good circumstance for proof purposes Patsy respectfully submits, Earsel's daughter Cathy White was out there to visit them. this maybe on a Monday after the marriage on Thursday. She testified at T. 151-152: "Well, I didn't question him because, again, Daddy didn't like anybody interfering in his business. you know; but, anyway, Daddy showed me the will; and. I. of course, objected to that like anybody would, I think. And I asked him, I said, 'Daddy, you can word your will anyway you want to do it. Any way you want to put in your will, you can do. That's your will.' I said. 'Why leave Teresa, Judy, and me totally out of it?'" I said, 'Don't put your trust in one person.'"(T151) At T 150, Cathy White had testified she was angry when she heard about the Will. Terrell Flint testified (T202) there was a heated family argument. Asked again about Earsel's mental state at the Monday of making the Will, Cathy wife said: "Again, he was just all - he was depressed. He was just -- Daddy was kind of a stubborn man. He was a private man, you know. about his affairs and all."(T150) Cathy testified that in the same conversation about

the Will, they(Earsel and Patsy) were talking about getting Earsel's truck back from Teresa that he had signed the title to. She testified: "they didn't know how to go about getting it back. And I said, 'well, I'll go with you and do what I can.'"(T152) They also wanted Teresa off the power of Attorney. What Proponent submits involves any finances right after the marriage, is Earsel regaining control of his bank accounts(not the Annuity) and personal property that were under the control of Teresa. Parenthetically, there is testimony at this point from Cathy that Earsel had changed ownership of the Annuity to make Patsy half-owner, however the December 18th liquidation of the Annuity and the eventual large check that was cashed by Vice President Salter at the Citizens Bank of Philadelphia contradicts this testimony; i.e. Patsy's name is nowhere on these liquidation instructions or negotiable instrument. Terrell Flint characterized Cathy's visit as not one for "chit-chat", but immediately to cutting the daughters out of his assets.

It must be noted that Terrell Flint, on cross, persisted in what probably is mistaken belief that Cathy White was at the final withdrawal and liquidation of the Annuity about December 18, 2003. If the jury believed Cathy was there, then there is more evidence that Earsel Pope was a very wilful man in his financial affairs, once he decided to marry Patsy, a decision that persisted over a month after it was published to at least Teresa and Clay, if not all his daughters, until the marriage and at all times thereafter. . His wilfulness is shown by his return from the marriage ceremony to announce "the new Mrs. Pope". He went to change his Will and immediately it became known to the Contestants, who even testified Earsel was a strong willed person about his affairs.

Terrell Flint then cleared up why Cathy White was protesting: "The protest was over having them taken completely out of the will and having his new wife the full beneficiary."(T210) Flint testified Cathy pleaded with her father to please not take the daughters completely off the will; saying she may have suggested splitting it up with the new bride. Asked what Mr. Pope's response was, Flint said "Mr. Pope was obviously shaken up. He was very emotional. I think he -- I think he cried a bit. He -- He just got sullen and quiet after -- after they knew that he had made his decision." He couldn't recall whether Earsel explained that he had already given them money and now he needed the rest for himself.(T210) . Cathy wasn't

threatening to her father. "It was pleading with her father not to give their entire -- all of her father's inheritance -- all of their inheritance to their new mother-in-law." On re-direct by Contestants' attorney, Flint testified it was Mr. Pope demanding the money at the December liquidation of the Annuity.

***No Secrecy Associated with the Will***

We see from the Record recounted just above that the Will was not kept secret. Note again Cathy says her father showed her the Will at the mid-October 2003 visit, only either days or just a week or so after it was executed.

Right after the marriage, according to Patsy, Earsel began resuming control of his assets. He told her to call Attorney Robert Thomas, for two reasons, to get Teresa off a Power of Attorney dated May 20, 2003, which was effected through a Revocation of that Power of Attorney on October 16, 2003. Teresa had even gotten a "Bill of Sale" from her father Earsel, to all his personal property evidenced by Proponent's Exhibit 5, though mind you it does appear to give Earsel a life estate use of such.

The testimony of Attorney Thomas is recounted again. (See Appellant's Record Excerpts at RE 75-84.. Transcript pages 294-303. In particular it shows knowledge of the Will by the daughters, opposition to it and Earsel's steadfastness in that regard. Thus it reflects that the Will was not subject to undue influence.

Attorney Robert Thomas testified he had known Earsel all his(Robert's) . The appointment was October 13, 2003, maybe a Monday. He wanted to revoke the Power of Attorney he had given Teresa, which Thomas had prepared and he wanted a Will. Patsy started talking about Texas law and "what could be done with regard to children and that sort of thing in Mississippi". Robert excused her and she went outside. Earsel continued to tell Robert what he wanted. The revocation was signed on October 16th. Robert knew Earsel was a sick man, had cancer but he new what he was doing and was able to tell Robert what he wanted. Robert then had an appointment with Cathy White on October 16 and maybe even Judy was there. They wanted a copy of the Will, but he said they could only get Mr. Pope to let them see it. ***Three days later, Earsel came in on October 21st and one of the daughters came in with Earsel and***

*Patsy. The discussion was the will.* The conversation got combative and he told them to stop, he wasn't going to be a part of that and he walked out, telling them if they needed to change any thing he would be available(T297-298).

On Cross by Attorney Settlemyres, Attorney Thomas said he had drafted the Power of attorney for Teresa and for Earsel and talked with Earsel on that occasion. *He said Earsel looked better in October than he had in May, maybe because in May, he'd just come from some hospital treatment.* He wasn't surprised to learn Earsel had married a younger woman, but probably surprised because of his physical condition.(T301) He contradicted Patsy's earlier testimony that she had left his private office and went to the lobby of her own accord. *As to who became combative, Robert testified that it was Earsel and his daughter, but they all three chimed in.*

#### *Earsel Pope's Health*

The Record Testimony does not prove Earsel was so sick that he did not know his affairs. All lay witnesses seemed to allow that Earsel was not out of his mind, but in fact was quite stubborn. One daughter didn't even know he was on hospice care, seemed to think just a nurse was visiting. Teresa proclaimed her father improved immediately after the marriage(and despite it might be said of all the challenges made to his decisions on using his money) when she testified that if Dr. Clay said Earsel had improved at the October 20, 2003 doctor visit, then he had .(T 251) . Hospice Nurse Phillips thus on October 20th, discontinued hospice care because Dr. Clay had put Earsel back on chemotherapy, a treatment inconsistent with the "death watch" nature of hospice care.

## **II. Reply to Legal Authorities.**

In *Will of McCaffrey v. Fortenberry*, 592 So.2d 52, 61 (Miss. 1991), advanced in Appellees' Brief at 20 as defining facts where undue confidential relationship exists, the Court determined the presumption was rebutted. There the Court had a case of an attorney, also the son-in-law of deceased, acting as Executor and attorney for the estate and the confidential



relationship was clearly established and so found by the Chancellor, but important for the Pope case is the Court's discussion of the three pronged test for overcoming by clear and convincing evidence the presumption of undue influence arising from the confidential relationship. At p. 60-61 the Court quoted and discussed the burden as follows on those three facts:

- (1) Good faith on the part of the grantee/beneficiary;
- (2) Grantor's full knowledge and deliberation of his actions and their consequences; and
- (3) Advice of (a) competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest. *Murray v. Laird*, 446 So.2d 575, 578 (Miss.1984).

The third prong of the Murray test was modified in *Mullins v. Ratcliff*.

The independent advice prong of Murray has been read too strictly. Considering the heavy burden placed upon one seeking to overcome the presumption of undue influence, we find it necessary to redefine the third prong of the Murray test. This we do to the end that the power our law vests in property owners to make bona fide inter vivos gifts not be practically thwarted by often impossible evidentiary encumbrances. We declare that the appropriate third prong of the test is a requirement that the grantee/beneficiary prove by clear and convincing evidence that the grantor/testator exhibited independent consent and action.

\*61 *Mullins v. Ratcliff*, 515 So.2d 1183, 1193 (Miss.1987); see also *Marsalis v. Lehmann*, 566 So.2d 217, 219 (Miss.1990).

We see that the Court is regardful that the burden of proof not actually result in just the opposite of the Court's interest, i.e. that the deceased's wishes will be thwarted by the law. As to the Third Prong, the Court explained:

This second prong of the test is designed to insure that the one who was allegedly "unduly influenced" gave thoughtful deliberation to all considerations before acting. *Murray*, 446 So.2d (575) at 579(Miss.1984)

There is no doubt from the testimony that Earsel gave "thoughtful deliberation to all considerations before acting". He knew what Teresa had done. Upon the marriage he immediately wanted it undone. Naturally the attorney to undo it was Robert Thomas. He'd been there before, at the behest of Teresa to check out his other Will, which apparently so benefitted her that she didn't need it changed but added the Power of Attorney on May 20, 2003. Earsel remembered the Power of Attorney. As to deliberation and the marriage. Earsel revealed his plans at least a month before the marriage. As to deliberation evidenced by any secrecy surrounding the Will, there was none. Earsel stood ready to defend his Will and did so. He

showed it to Cathy when she came out shortly after the marriage. She went to Thomas' office on October 16th demanding a copy, but Thomas could not give her one. On October 21st, Earsel and Cathy along with Patsy returned to Attorney Thomas and the arguments were heated. Apparently, on October 20th, Cathy had been at Earsel and Patsy's house for the sole purpose of discussing the will and again, Earsel stood fast. Much as the testimony describing Ms McCaffrey "Further, she was described as a strong-minded and independent person. Fortenberry stated at trial that Mrs. McCaffrey was not the type of person who could be unduly influenced, and the record substantiates this, albeit a self-serving statement."Id. p. 61

In discussing the Third Prong of **Murray**, "independent consent and action", the Court at p. 61, elaborated on its meaning:

Moreover, Fortenberry aptly notes that *Costello v. Hall*, 506 So.2d 293, 298 (Miss.1987), instructs that even when a confidential relationship is found to exist, the beneficiary must have used that relationship for his personal gain or to thwart the intent of the testator. *Costello*, 506 So.2d at 298 (citing *Croft v. Alder*, 237 Miss. 713, 723, 115 So.2d 683, 688 (1959)). See *Matter of Will of Adams*, 529 So.2d 611, 615 (Miss.1988) (there must be abuse of relationship); *Sacco v. Gordon*, 515 So.2d 906, 909 (Miss.1987) (citing *Costello* with approval; required finding of overreaching or bad faith by beneficiary); see also *Matter of Will of Wasson*, 562 So.2d 74, 79 (Miss.1990) (beneficiary must have used relationship for personal gain or derailed intent of testator).

The Appellees also cite **Miner v. Bertasi**, 530 So.2d 168, 171 (Miss.,1988), on confidential relationship where the presumption was rebutted and the case affirmed. There again is language favorable to Patsy, this time on the fact that Attorney Thomas had represented her, where the Court explains the Third Prong of **Murray**, saying:

In *Mullins v. Ratcliff*, 515 So.2d 1183, 1193 (Miss.1987), the Court redefined the third prong in *Murray*, holding that the "grantee/beneficiary [must] prove by clear and convincing evidence that the grantor/testator exhibited independent consent and action," *though not necessarily independent advice*.(writer's emphasis.)

Appellees' Brief at page 24 under their section entitled "Testator's full knowledge and deliberation of his actions and the consequences", cites the concept of participation by the beneficiary. here Patsy, arousing suspicious circumstances that negates independent action. Despite the fact that the rules of decision prohibit citation to **Howell v. May**, --- So.2d ----, 2007 WL 1747120, Miss.App., June 19, 2007 (NO. 2005-CA-02259-COA), before it is finally submitted to publication, Appellees did. However the internal reference to **Dean v. Cavanaugh**,

920 So. 2d 528, 537(Miss. App. 2006), which was quoting from Justice Prather's thorough discussion of the concept of undue influence in will contest set forth in **Harris v. Sellers**, 446 So. 2d 1012, 1015(Miss. 1984), deserves some attention. The actual quote from **Harris** is a quote from **Murray**, who cites **Croft v. Alder**, 237 Miss. 713, 115 So.2d 683(1959), **McDowell v. Pennington**, 394 So.2d 323 (Miss.1981), which returns us to the Murray factors.

Appellees, at p. 24, also list the five factors as to "testator's knowledge and deliberation", citing **Rogers v. Pleasant**, 729 So. 2d 192 (Miss. 1998), where the Court affirmed by concluding the undue influence presumption had been overcome. Much as here it was undisputed in **Rogers**, that Earsel wanted to change his will, this because he wanted to get Teresa out of the picture. Recall he had asked Teresa and Clay to stand up for them at the wedding. . Teresa vetoed this. Recall when Teresa learned they were getting married, she and Clay went out of state. took a trip to New Mexico. Earsel wanted Teresa and Clay to continue to live with him and Patsy at the trailer. Earsel wasn't just calling Attorney Thomas for a new Will, he was wanting to revoke the May 23, 2003 Power of Attorney he had made to Teresa. **Rogers** also discusses at 194 the factors of **Murray**, 446 So.2d 575 at 579(Miss.1984)

There are four factors to be considered in determining Little's knowledge and deliberation at the time the will was executed. They are: (1) Little's awareness of her total assets and their general value, (2) an understanding by Little of the persons who would be the natural inheritors of her bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect the prior will or natural distribution, (3) whether non-relative beneficiaries would be excluded or included, and (4) knowledge of who controls Little's finances and business and by what method, and if controlled by another, how dependent was Little on him and how susceptible to his influence. **Murray**, 446 So.2d at 579.

Much is made by the Court in **Rogers** in this regard that Little managed her accounts with A. G. Edwards. Here likewise did Earsel manage his account with Terrell Flint. Note that the conversations as to decision is made directly between Flint and Earsel, except for the rejection of Flint's desire to have the \$202,000.00 re-invested somehow, which he says, but Patsy disputes, that she said she would hide it. Just as Little knew her the natural objects of her bounty, so did Earsel, he primarily justifying his leaving them out of the will because they each had already received some \$62,000.00, after their mother's death.

Likewise, as here with Earsel, the **Rogers** court pointed out the fact that Littie was described as “strong willed.”

Patsy turns for a moment to another case cited by the Appellees, **In re Estate of Pigg**, 877 So.2d 406, 411 (Miss.App.,2003), as to the quantum of proof required of contestants on undue influence. There was no presumption from confidential relationship, but the court did described what undue influence was, as follows:

¶ 24. A will is said to be the product of undue influence when an adviser has been so importunate as to subdue the testator's will and free agency. *Longtin v. Witcher*, 352 So.2d 808, 811 (Miss.1977). Such may be accomplished through a variety of methods, such as advice, arguments, or persuasion. *Id.* However, not all influence exerted is undue. The influence must have been so overwhelming that the resulting instrument reflected the will of the adviser rather than the testator. *Greenlee v. Mitchell*, 607 So.2d 97, 105 (Miss.1992).

Appellees also cited **Estate of Sandlin v. Sandlin**, 790 So.2d 850 (Miss.App.,2001) for the principle of the presumption shifting a clear and convincing burden of no undue influence upon the Proponent. In **Sandlin**, the Court upheld the chancellor's finding that the presumption had been overcome. However, the Court at 854, again reiterated the caveat of **Mullins v. Ratcliff**, 515 So.2d 1183, 1194 (Miss.1987) :

These prongs should not be understood as entirely separate and independent requirements that ought to be rigidly exacted in every case. Undue influence is a practical, non-technical conception, a common sense notion of human behavior. As helpful as *Murray* may be to identify factors that ought to be considered, common sense counsels against rigid, inflexible multi-part tests, particularly as the parties our law saddles with proof of the negatives are laymen, not legal technicians. Better that the scope of equitable principles be imperfectly defined than that justice be overborne by the weight of artificial rules.

### Conclusion

In summary, the contestants only rely upon the presumption because Earsel sought out Attorney Robert Thomas to regain control of his affairs from Teresa. While presenting evidence of dependency, they all admit, Earsel was a stubborn and independent man. There absolutely is no evidence of undue influence, but on the way to trying to persuade the Jury that the Will was suspect, the Contestants, in fact proved the absence of undue influence and, combined with the testimony of Patsy and others, that Earsel acted independently to make his Will excluding his daughters. There was no secrecy of the marriage, no failure of Earsel to know his financial

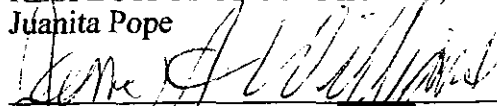

affairs and want to manage them, once he had the breakup with his daughter Teresa over the marriage. The fact that he loved Patsy and she loved him is shown by the improvement of his help and getting off Hospice. The Fact of the Will as being absent from undue influence is shown conclusively by his defense against the immediate attacks on it, i.e. the argumentative visits by Cathy White.

The trial record justifies this Honorable Court to reverse the jury verdict and see to it that the Last Will of Earsel Pope is enforced.

RESPECTFULLY SUBMITTED,

Juanita Pope

BY:

  
James A Williams, MSB   
Attorney for Appellant

**CERTIFICATE OF SERVICE**

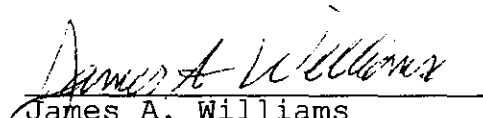

I, the undersigned James A. Williams, counsel for the Appellant, Juanita Sharp Anderson Pope, in the above styled and numbered cause, do hereby certify that a true and correct copy of the above and foregoing Brief of Appellant has been mailed by United States Mail, postage prepaid to the following:

Honorable Edward C. Fenwick  
Chancery Judge  
230 W. Washington St.  
Kosciusko, MS 39090-0673

Honorable Wade White  
Honorable Terry L. Jordan  
Attorneys for Appellees  
Post Office Drawer 459  
Philadelphia, Mississippi 39350

Hon. Steven D. Settlemires  
Attorney for Appellee Williamson  
410 E. Beacon Street  
Philadelphia, Mississippi 39350

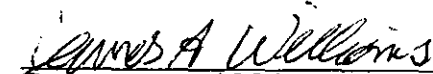
Done this the 28th day of November, 2007.

  
James A. Williams  
MSB # 

**CERTIFICATE OF MAILING**

I, the undersigned, Attorney for Appellant hereby certify, that I have actually mailed this date the Original and three copies of the Reply Brief of the Appellant.

This the 28th day of November, 2007.

  
James A. Williams  
Attorney at Law