

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 NESHOPA COUNTY, MISSISSIPPI

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellant 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 possible disqualifications or recusals:

Honorable John C. Love, Jr., Chancery Judge

Honorable James A. Williams, Appellant's Attorney

Juanita Sharp Anderson Allen Pope, Appellant

Honorable Wade White, Appellees' Attorney

Honorable Terry L. Jordon, Appellees' Attorney

Cathy White and Judy O'Berry, Appellees

Honorable Steve Settlemyres, Defendant Williamson's Trial
Attorney

Teresa Williamson , Trial Defendant

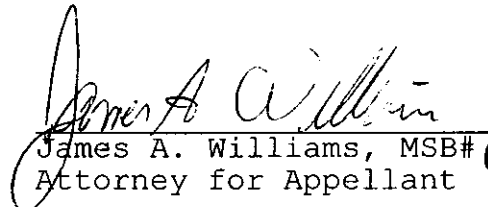

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BRIEF OF APPELLANT

STATEMENT OF 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 Proceedings Below

Earsel Pope died on March 29, 2004, and left a will naming his Wife, Juanita(Patsy) Pope as his sole beneficiary. On May 12, 2004, his two daughters, Judy O'Berry and Cathy White, filed a Caveat against the Will(C P 5, RE18)naming the third daughter, Teresa Williamson and Patsy as interested parties. On June 3, 2004, these two daughters then filed Petitions for Injunctive Relief, etc. against Teresa and Patsy.(See RE 20. for one against Teresa) alleging inter vivos gifts and undue influence by both as being exercised against Earsel to gain assets. A jury trial was held October 16, 17 and 18th, 2006 in the Chancery Court of Neshoba County, Mississippi before Honorable Chancellor John Love. Teresa had joined her two sisters as another Contestant. A verdict was returned for the daughters that the will was not the will of Earsel.(See Verdict RE 41) A Judgment conforming to the Verdict was entered on November 3, 2006(RE 12-13), CP 449-450) A Motion for J. N. O. V.(Re 29-30, CP451-452) on November 14th was filed by Patsy and denied on December 28, 2006(CP 463, RE 14). This appeal followed.

Testimony , Evidence and Exhibits

The Proponents of the Will, Patsy Pope, to prove the Will, first called Susan Alford, one of two secretaries of Philadelphia Attorney Robert Thomas, who knew the circumstances of how the Will came to be drawn up and witnessed.(T57) She and Heather Irby and another secretary Lisa Nowell were present when Earsel Pope came in and asked her and Heather to witness his Will. Earsel was very quiet and they watched him read over it and then he asked them to witness it.(T58) On Cross, she testified Earsel came in

one day for the appointment with Attorney Thomas and then another he came in to sign the Will. His wife Patsy was with him the first day. She could not remember if Patsy was there the second visit. The first day, Patsy went in with Earsel to the attorney's private office.(T60) She didn't remember who she talked to on the phone, but thought it was Patsy. The signing day, if Patsy was there she would not have come up to the window to see Earsel sign, because it wasn't big enough for two people. She could have heard everything from the sitting area.. She didn't remember asking any competency questions to Earsel the day of the signing, just talk about the weather, his health and the will signing. She remembered that Earsel wrote the check to pay for the Will. She would have remembered if his Wife had written the check. (T61-63)

Heather Irby, the other secretary then testified(T65) She didn't remember who made the appointment. Earsel didn't specifically ask her to witness his will. Patsy was there the day of the appointment, but she could not remember if Patsy was there the day of the signing.(T67) The Will was introduced as Proponent's Exhibit 1.(T67) She didn't engage in competency conversation, just about the signing of the Will, but "he appeared to be in a good state of mind." (T68) The Proponent rested at T 70 and a motion to reject the Will for failure to request witness was overruled.(T71-72)

The Contestants then put on their case for Undue Influence and called Mrs. Juanita(Patsy) Pope as an adverse witness.(T 73) Earsel asked her to marry him, not the reverse, and they sat no particular date but had discussed it for a long time. They got married on October 9, 2003. She didn't remember an engagement day.(T74) They had dated a couple of months before the October marriage day. She denied she was a paid sitter, but acknowledge a \$100.00 check about September 18, 2003, given her by Teresa, saying they had dated for two months, been to the mountains, been out to eat in Meridian. She said she stayed out at his trailer two months before he asked her to marry him. As to whether she was his girlfriend on September 18th, she said they were real close.(T77) As to sitter, she said Teresa asked her to stay one day while she went to the doctor and she took Earsel out to eat in Meridian. She said they were just friends on September 18th.

They were seeing each other off and on but by September 2003, she was staying out at the trailer with Earsel. "We were living together". (T78) When she took the money, she knew she would spend it on Earsel. she was not a paid sitter but did receive money from Teresa twice. because Teresa said her father would be mad if she didn't.

She saw a hospice nurse two times, and then they only came to put pills in the med planner. Mr. White showed her nurses notes for October 8 and she denied that she or Earsel identified Patsy as a sitter to the nurse(Ms Phillips below). She described Earsel as the most wonderful person she ever met. her best friend. They got married on the same week as their birthdays.(T82) She denied Earsel was "sick", but admitted he had Leukemia, explaining that when she took him back to Doctor Clay for his check-up(apparently October 20, 2003, see below at Phillips), the doctor took him off of the medicine that was just maintaining him and put him on something that he gives patients to get better because he was looking so much better and had gained a little weight and had good color.(T83) She admitted Earsel was a diabetic but said his sugar could be controlled by food without insulin. His shoulders were bad and he had a stroke on one side, but she walked him to get him better.(T84)

She didn't know of Earsel's assets when she married him and only learned of the "\$200,000.00 bank account" much later. He had a bank account and she had one. She learned a few weeks after the marriage of the \$63,000.00 account(at Sebastopol) (T86) Earsel wanted to move the account. He was able to drive, but she didn't want him to. It hurt his shoulders. Earsel took large amounts of medicine. He did use a lift chair, but not a cane or walker. He took 21 pills a day. She explained that the immediate decision came up because Teresa said everybody in town was talking about them shacking up, which upset Earsel very, very much and that's when they decided to get married.(T90) He had proposed a few days before and had gone to her mothers, Kate Williamson, across the field and asked for Patsy's had inmarriage.(T91) They went to get the blood tests on October 1 because they knew they were going to get married.

It was Earsel's idea to make the Will. She didn't recall if she was married on the

9th and called Attorney Thomas' office on the 10th. Earsel asked her to call Thomas' office. She explained: "He said he wanted to get Teresa's name off the power of attorney and just her in the will and I thought he was going up there to put all three of them in the will. I didn't know." (T92) She drove Earsel to Thomas' office, because his arms hurt when he drove. It could have been they went in on Monday, after getting married on the Thursday before. (T93)

She went in with Earsel because Thomas was her Attorney and a friend of hers. When they went into Thomas' private office, Earsel wasn't saying anything. She was just talking with Robert, something about Texas. She asked him if it was the same as in Texas that everybody had to be in the Will to make it legal. All the children. (T94) She wanted to make sure they didn't have to go up there again. She asked the question because "I didn't want all this to happen." She wasn't concerned with the content of the Will. She went to the Lobby when the Will was made, because it wasn't any of her business. (T95) Thomas did not ask her to leave, but he said if she would feel better she could leave. On the 13th, when they returned for Earsel to sign, he wasn't taking any Lortab, no medicine to affect his thinking. She locked the Will up at her place, not the double wide because there were too many people coming in and out doing construction on the double wide. (T96) Earsel told her to put the Will somewhere safe. Just a few weeks later, she learned she was the only one in the Will and she protested. Earsel said it was his right. (T97)

As to a "\$200,000.00 bank account, she said she learned of that after Earsel's death, after she had hired Attorney Williams in the Will contest, however, she did know of the annuity a few weeks after the marriage, when Terrell Flint came out and Earsel withdrew \$50,000.00. She denied she had appeared at the Bank in January 2004 with Earsel to get the New York Life Annuity cashed nor to pick up the \$200,000.00 a few days later. (T99)

Earsel spent money on her, first a two carat diamond bracelet and then a Crown Victoria for Christmas. Earsel then bought a 2003 Ford F-150 pickup saying she would need it later, it had a chair lift. (T100) Earsel wouldn't let her put him in her Will nor

change her bank accounts, because he said there would be a court battle from his children.(T101) She already had the appointment with Psychologist Kenneth Schneider(see below) and Earsel went along to get mentally evaluated to protect the Will.(T102) She offered to take Earsel to see his grandchildren and offered to leave him and then return to pick him up. She admitted she made a \$5,000.00 withdrawal from their joint account the day Earsel passed on March 29, 2004.(T106)

The Contestants then called Citizens Bank of Philadelphia loan officer, Stanley Salter,(T107) who testified to an early January 2003 visit by Earsel and Patsy about cashing in the \$202,000.00 Annuity check from New York Life. He went the check off for collection and Earsel asked him when would it be before the funds came back. Salter encouraged Earsel to think about taking that much cash. He had known Earsel all his life.(T109) Earsel called Salter back almost a week to the day. The check was not back, but it came back a day or so later and Earsel came up there or called Salter and he wanted large bills. The bank didn't normally keep that much cash on hand and he said "Mr. Pope. I'm going to have to order -- I'm gong to have to order that cash money from the Federal Reserve". It may have been two or three weeks before we actually handed him the money. When he came to retrieve the money, his mother in law, Katie Williamson, was with him. Salter turned over the counting to Linda King(see below) and Sandra Curtis. (T110) On Cross, Salter was quizzed on dates of the visits and admitted the money might have been wired into Citizens from Fleet Bank and not actually sent by check.(T114-116) He said he didn't have any reason to believe that Mr. Pope didn't understand the delays: he knew Mr. Pope's family.(T118)

During the first visit where Salter saw Patsy Pope, she didn't not talk a lot. Mr. Pope did most of the talking.(T120)

On Re-direct(T120), when asked did Patsy make any statement supporting Earsel's request for \$202,000.00 cash, Salter said: "Well, the best I can answer the questions was this. I started encouraging him not to cash the check. The reason I did is because I knew he and all three of his daughters and -- you know, long time family friends: and there was

no response at any time by either one, you know, that they wanted to do anything other than cash the check; and I was instructed not to say anything to anybody else about the fact that they were going to cash the check. Mr. Pope informed me that it was his money; and, of course, I said, 'Yes, Sir.' Of course, you know, because of privacy laws, we couldn't say anything to anybody else."(T121)

For the Contestants, Linda King testified(T122), that she met Earsel and his mother in law, Kate Williamson, and they both insisted on cash. When she helped Mr. Pope out to the truck , she saw Patsy Pope in the truck and she helped place the sack of money between Earsel's legs after he got in the truck. Both Earsel and Kate were equally insistent they wanted cash.(T124)

The Contestants then called Katie Williamson(T129-131) who testified that if anyone else testified that Patsy was with her they day Earsel got the \$202,000.00, they would be lying.

Contestants then called Clay Williamson(T132), Teresa's husband and Patsy Pope's brother, son of Katie Williamson, who said Patsy "used to be his sister", who then described Earsel's health conditions, problems driving, falling, staying sick all the time until he and Teresa started taking care of him. He had heart problems and they did almost everything for him, preparing his meals and cleaning him up when he had an accident of bowels.(T133) They lived with him first at River Road, their home, and then moved with him out to the double wide with him, and moved out the day he married Patsy. Patsy sat with Earsel, when he and Teresa needed a day off of went out of town. Probably a month passed from when they first said they were getting married until they got married. They acted just like friends. As to his relationship with his three daughters, "well, like I said, me and Teresa lived with him; and he didn't want his other two daughters around."(T135)

After the marriage, his and Teresa's relationship was non existent because Earsel wanted them to live with him, but they went back home to River Road.(T135) Earsel told them he was getting married and Patsy wasn't there. He didn't know if Patsy knew of Earsel's assets, but he knew of them all.(T136) Clay kept Earsel's books straight. He and

Teresa had Attorney Robert Thomas draw up their Wills and had him go over Earsel's will, about a year before Earsel died in March 2004. They carried Earsel's Will up there along with Mr. Pope and asked Thomas about it.(T137) He had the opinion that his sister, Patsy married Earsel for his money because she knew he was dying, had Leukemia. However, when asked, he said Earsel was in pretty good shape at the time of the marriage.(T138) Earsel told them that Patsy had asked him to marry her. He told them he was getting married and wanted Clay and Teresa to stand up for him, but they didn't because Teresa would not.

Earsel would not take the Lorcet, never over twice a day; some days, not at all. Clay said Earsel would have good days and bad days and he didn't know if it was the medicine causing it or what.(T140) On good days he could remember and talk about current events, but on bad days it was about things 40 or 50 years ago. Sometimes he would go for two or three weeks without having a bad day. As to how he was when he got married, Clay said: "He got real mean there toward the end. I don't know what was causing it." This was after he got married. He explained how when they were moving out, he wouldn't want something to be taken; that wasn't in his nature. Asked whether he was a pretty quiet person. Clay said he talked a lot, but never to offend anyone.(T141) Katie would have known of Earsel's assets because she and Teresa talked.(T143)

Contestants called Cathy White(T144) who testified her mother, Earlene, her dad's first wife passed March 2, 2001 and her dad was very depressed, wishing every day he could have gone or could be with her. He was 73 then when Earlene died. Right after the death, Cathy and Judy took turns staying with their dad at night at his house on Will Avenue. Judy was a retired nurse and she had more time. Then Teresa and Clay moved in with Earsel "and at a alter date sold his house and moved in with them at their house."(T145)

Though he had Leukemia, his blood count was doing fairly well when she and Judy were taking turns taking care of him. His shoulders were gone from barbering and he took Cortisone shots, but had no strength even to pull his shirt on. He was dependent

on others. She didn't really remember who put him on Hospice care. "He was on hospice, I guess, after Mother died and he started having so much heart problems to my recollection now; and that's when he started having a nurse come out." (T146) She didn't believe he was competent to know to take his medicine regularly. He was about the same condition as he was when he was around her and Judy as he was when he made his will in October 2003. He was always depressed. (T147)

She was angry when she heard about the Will. 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) She said he was vulnerable, didn't want to hurt anybody's feelings, a tender hearted, giving person. Whoever he was with, that was who he wanted to please. Asked whether Earsel took medications for mental problems, again, Cathy said he took medicine for depression. She said he was susceptible to undue influence, explaining (T150) when they were working on the double wide before he got married, he didn't want the sun porch, it was too expensive and she said he should say so, but he let it be built and paid for it anyway.

Asked about being at a meeting where there was Terrell Flint and withdrawing money from the New York Life annuity, she explained, Earsel and Patsy were married on a Thursday she thought and on Monday she was out at the trailer just to see them. Terrell was there and her daddy was withdrawing \$50,000.00 from the annuity to buy a new truck though he had enough in his checking account to buy a new truck. She testified: "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)

She continued saying Earsel's response was that he knew and she said to put them

all in there with Juanita(Patsy) and he told her "well, we'll change that." Cathy said she looked at Terrell and asked him did he have the paper work and he said he did. It was in the car and he'd have to go get it. Attorney White then interrupted Cathy, pointing out to her that they were talking about the will, saying "I want to know did you ever talk to him about changing the will that he made for Mrs. Pope." She answered she did and Attorney White then said: "I will get to the financial thing again." Cathy White then recounted again staying focused on the Will, but did add that in that same conversation they 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. Attorney White then asked on that Monday during the discussion with Flint had Earsel changed the Annuity to reflect Patsy as half owner. She knew because her Daddy told her as he sat in the recliner with Terrell Flint standing in the dining room. Cathy attempted to change the Annuity that day and Juanita objected and told Flint not to go get the paper work to make the change. Her dad told her he would fix it back to include his daughters in the estate.(T153)

Cathy testified when she visited with her Dad at Patsy's apartment, there was always another person there, either Patsy, Katie or another Williamson child, Vickie. She thought that Patsy had used massaging and inappropriate sitting for a woman, to influence her dad and had slept with him before marriage. She was sure her dad's dependancy was used to influence him in making the will, but she knew of no specific examples of people influence her dad about the time of making the will.(T155) (See Sister's Petition to recover assets from Teresa alleging undue influence. at RE 20-28)

Contestants then called Earsel's, 74 year old sister Marie Lovern(T156) who could only testify that she felt like Earsel wasn't "just right" all the time.

Contestants called Judy O'Berry(T159) who in response to the questions as to what was Earsel's mental condition during the 21 months she was his care giver, testified

her dad was not a leader, but one to go along with what others initiated. Again asked as to mental problems being caused by his physical problems, she recounted his physical ailments and said he was extremely depressed, telling her often that he had no reason to live after Earlene had died. Asked whether he was mentally capable of taking his own medicine, Judy said he was if he could remember.(T160) As to visits at Patsy's apartment after the marriage and freedom of relationship with their dad, Judy said there was always another around and one time, she was on the phone with him and he said he had to hang up because they were coming in. (T162) After the marriage, he told her his greatest regret was selling his home and not having a home to go to. She recounted how she and Cathy had waited a few weeks after their dad's death to ask about the estate and Patsy didn't have time, because she was cleaning out a freezer but told them "now that he was dead, it was hers, all hers."(T163)

Sandy Boatner testified for the contestants(T166), having been an LPN since 1984 and had worked for Hospice Direct who provided hospice care to Earsel. Boatner had Earsel under her care from September 2002 through about March 2003.(T171, 180). Her nurse's and a doctor's notes were introduced over objection(T169-170) to hearsay therein of information not for medical diagnosis and treatment, as Contestant's Exhibit 1. Objection was sustained at T 170 that a doctor had said Earsel had only six months to live, a terminal condition being a prerequisite to hospice care. Attorney White directed her attention to a chest pain complaint on March 1, 2003 and she explained that hospice could not treat chest pain at home, "even though in hospice they are supposed to be read to abstain from any other treatment. They are supposed to be ready to stay home and die, but we have to do what the family wants to do."(T173) She was directed to Earsel's passing a kidney stone on 2/03/03 and to 1/06/03 when Doctor Fairchild prescribed Colanpine for anxiety. On 12/23/02, Earsel had had chest pain during the night. Objection was overruled(T174) that Earsel was declining physically and emotionally. Nurse Boatner made similar notes many times. She was directed to a note on 12/16/02, where Earsel had many bruises where he had fallen. She listed his medications at the time

as Plavix, a blood thinner, insulin, potassium, Lorcet for pain, Zoloft for anxiety and rest. He was using Coreg for his heart along with Lasix. Periactin was for appetite. He didn't eat enough to sustain him, Boatner said and they gave him a Resource Supplement.(T175) She read a note dated 11/25/02, that a family member, later on cross revealed to have been his daughter Teresa Williamson, saying "I'm not going to leave him by himself any more." While Boatner didn't have Teresa as saying this, she was the care giver there along with her husband Clay Williamson. Earsel was staying with them in a nice mobile home out on Highway 16 East of Philadelphia a distance behind the home where Patsy Pope lived with Teresa's mother in law Katie Williamson.(T177) Boatner filled a med planner for seven days but Earsel had to have Teresa make sure he took his medicine. On cross Boatner said Earsel was not usually found alone when she visited. Each time nearly he was depressed and recalling his wife's dying. Teresa told Boatner that Earsel would not eat enough for supper, but she could not tie his drop in sugar to 47 to that lack of enough supper.(T178) Earsel complained of pain almost every visit. Teresa administered the Lorcet separate from the med-planner. Earsel also complained about how cold the air conditioner was. (T179-80) Boatner admitted hospice was for the dying and Earsel knew he was dying. She said most people are afraid when dying. She wasn't Earsel's nurse when hospice care was discontinued.(T182) On re-direct, Boatner said they had prayer at every visit and her relationship with Earsel was good.(T182)

Christy Phillips was the hospice nurse for Earsel, seeing him for the first time on July 10, 2003 with her last visit in October 2003 and her nurse's notes were introduced as Contestants' Exhibit 2.(T186) She was aware he had married. She looked at her note dated October 8 and noted "Wita" Earsel's name for "Juanita Pope" was present as a "sitter," which Phillips said Earsel called her. (T187-188) He did not call Patsy as his "lovely bride". He was using a cane and she gave him a B-12 shot for the Leukemia. While Attorney White asked Phillips did Earsel take medicine for mental illness, her answer was that he took medicine for depression. She further responded that he took Clonopine for seizures or for anxiety and Exelon, which is a medication used to treat

Alzheimer's or dementia and he was taking that medication about October 13th or 14th.(T189) She added he also took Zoloft as an anti-depressant and Reminyl to treat Alzheimer's or dementia and Lortab for pain. Asked whether when Patsy Pope was there was he dependent upon her for care, Phillips said Earsel was first dependent on Teresa and then Patsy. He had fallen shortly after she began seeing him in July and had to go to the E. R. He fell on July 13, 2003. (T191)

On cross(T191), Phillips was not aware that the combination of other drugs he was taking would cause mental confusion. She admitted that dementia was significantly different from Alzheimers. She did admit that Clonopine was anxiety and seizures which have to do with mental operations.(T192) At 193-194, Phillips was questioned about the physicians' note entry in her notes of her visit on October 20, 2003: "Discharge patient from hospice due to use of chemo-medication," Phillips said that chemotherapy was inconsistent with the "death watch" nature of hospice. Confronted with oncologist Dr. Clay's progress note of October 20, 2003 that Earsel "is stable and actually looks constitutionally and nonspecifically better than he did last month -- that he seems stronger. He doesn't have any lymphadenopathy or hepatosplenomegaly", objection was made by Attorney White as to hearsay and overruled because the question was did Phillips find any of those symptoms that day. Phillips read her note reflecting Earsel was generalized weakness, pale skin color and had fallen on October 13. She admitted she did note that Earsel was alert and oriented times three which meant he was aware of person places and things.(T 195) Before her entry of Patsy Pope as a "sitter" on October 8th, Phillips had seen her with Earsel at the trailer before. On redirect(T197), Phillips discounted the entry of "oriented times 3".

Terrell Flint, prior representative of New York Life testified(T199) that Earsel Pope had an annuity with New York Life and he had known Earsel all his life. After Earsel's marriage to Patsy Pope, Flint visited Earsel twice. First time was the Monday after Earsel and Patsy got married. He could not say it was October 13th, but he did go to Earsel's house, ostensibly the double wide trailer he lived in with Teresa and Clay

Williamson. The withdrawal was for \$50,000.00. The next time was when Earsel called Flint to withdraw all the annuity balance. He said he had to explain to Earsel that he had to have a letter from a doctor that Earsel was terminally ill. While he was there, the Contestant, Cathy White came in.(T201) Flint though Cathy just showed up. Flint said that Cathy asked her daddy to please reconsider, and then she turned to Patsy Pope and asked her to see her point that it's not fair for the new Mrs. Pope to get all the money and leave the daughters out completely, but Patsy said she was going to abide by her husband's wishes. Flint didn't stay after this because he saw it was going to be a heated family argument.(T202) Flint did have time, as an insurance salesmen, to ask Patsy if he could help them invest it somewhere else and Patsy said she was going to put the money somewhere where it couldn't be found.(T203)

On Cross(T202) Flint established that the second meeting occurred in the double wide trailer, the one Earsel lived in with Teresa and Clay until shortly after the marriage. Both meeting were by request of Earsel to Terrell Flint.(T203) When Flint first started dealing with Earsel he was living alone at 308(?) Will Avenue in Philadelphia. Flint cleared up a mis-stated date by saying he started working with New York Life in 1997 through 2000.(T204) But Flint said Earsel was widowed when the business occurred, and apparently the first Mrs. Pope, "Earlene" had passed in 2001. Earsel had all his money in a bank account and the annuity started with an investment of \$250,000.00. Flint could not remember if the second withdrawal was about December 18, 2003. Flint then testified about the \$50,000.00 withdrawal, the first withdrawal, saying(T205) that he contacted New York Life about Mr. Pope's wishes; they generated paperwork which he took to Earsel. They completed it, sent it back in and a check came for \$50,000.00 to Mr. Pope. He would have taken the check out to Earsel.

Flint's attention was then turned to the time Cathy White came when he was there. it occurred in a brand new double-wide trailer. They were living in the double wide when Cathy came in on them. He said the withdrawal of the final \$200,000.00 or such occurred at the double wide. When shown a written document from New York Life to "Mr. E. R.

Pope", dated December 18, 2003, Flint acknowledged that was where Earsel withdrew all the balance from the annuity. Asked again was this at the double wide(T206), Flint reiterated it was at the double wide, but then added that Earsel and Patsy did move into a house(Katie Williamson's) just before you get to the mobile home. The mobile home had burned down.(T207) Flint persisted that the withdrawal that Cathy White was at occurred at the double wide. Despite being advised by Patsy's counsel that the double wide was totally destroyed by fire approximately October 13 or 14th, 2003, Flint persisted that Cathy White was at the final withdrawal. She came in near the end of the business. He didn't know if it was when he brought the check or when the withdrawal paperwork was being filled out and signed. Regardless it was at the mobile home, the double wide.(T207)

Flint then was shown a withdrawal document dated October 21, 2003, but denied that was when Cathy came in, persisting she came in when the final amount, nearly \$200,000.00 was being withdrawn.(T208) Flint explained that he had no paperwork to review and had testified by drawing upon his memory.(T207) Finally Flint remembered one meeting at the home, after the double wide had burned and concluded he didn't really remember what house he delivered the final withdrawal to. He said he just knew when Cathy White came into the argument. The 10/21/03 letter from New York Life was made evidence as Proponents' Exhibit 3 and the New York letter of 12/18/03 was admitted as Proponent's Exhibit 4.(T209-210)

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." Cathy White came after Flint had concluded his business, so he left before Cathy's pleading ended. Asked whether Cathy had come on some other business and just learned this unexpectedly, Flint said: "She -- She seemed to be there for one reason. She didn't -- She didn't sit down to chit-chat and comment any small talk, no." Though Flint had just before said this was about the will, now he said it wasn't about the will, but the annuity.(T211) When confronted with this at T211, Flint explained he knew nothing about the Will, this was about the annuity. He further denied this was about the \$50,000.00 withdrawal at the double wide, but was the December closing of the annuity, where Mrs. Cathy White appeared and protested. (T212)

On Re-direct, Flint agreed he went to "Mr. Pope's house" at his request. Flint agreed that Mrs. Patsy(Juanita) Pope was there, but he denied that she(Patsy) made demands for the money or that she made requests for the money. He said Mr. Pope, Earsel, requested the money. He could not say whether Patsy dictated where the money would be spent. Asked about Patsy's statement about putting the money somewhere, Flint recounted that again. Flint then agreed he and Attorney Wade White were dear friends but White had not asked him to lie, Flint adding that he would not commit perjury.(T214)

The Contestants called Carolyn Denton, a good friend, especially of Teresa but also of the other two daughters of Earsel.(T 214) Per Teresa's request, when she and Clay would be away, at the doctors or such, and when they went to see Teresa's folks in North Carolina and get apples(T 217), Carolyn would call and check in on Earsel, who had Patsy staying watching over him. She said he fed himself and could manage his drink.(T216) She sat with him about two or three times and the last time was mid summer 2003. During the week Teresa and Clay were in North Carolina, Teresa had said Patsy would be sitting with Earsel, but Carolyn should check on him.(T217) The North Carolina trip was "two, three, four weeks" before Earsel married Patsy. She was aware the two

were dating because Patsy told her over the phone, maybe two weeks to a month before they got married. She recounted to Carolyn how a woman could get a man to do anything she wanted. Earsel told her about how they had first tried to get a Justice Court Judge to marry them, but they were at a convention, had then driven to Meridian, but returned to Philadelphia and had the funeral home director, a preacher marry them. Earsel said this would start gossip.(T219)

After the marriage, Earsel's relationship with Teresa and Clay changed. There was friction in the house They decided since he had married, they would just move back home. When Teresa first heard of the marriage, she and Clay left for a few days.(T220) She described Earsel as changing. She said the girls all agreed, first where there mother was concerned until she dad and where their dad was concerned "until this started." She described Earsel as like a trance. "He wouldn't make strong decision, or, you know, just go ahead and say, 'Well, I'm going to do this,' or something(T221) without -- you know, you could tell there was a change."(T222)

On Cross by Patsy's Attorney, Carolyn said Teresa, Clay and Earsel had first moved behind Patsy and her mother, Katie Williamson, early in the Summer and were moving out the day of the marriage. She explained that Teresa bought Earsel's new truck from him because he said he couldn't drive any more and he sold the truck to them. She said Teresa kept plenty of food for Earsel, but he was addicted to corn dogs and pot pies.(T223) She explained he would not eat at some times, but when he felt better he would eat more the next day. She agreed Mr. Pope was an "independent man". He was a truthful man, an hones one. He like books and newspapers. He was very intelligent.(T224) Carolyn said Teresa offered the truck back to Earsel, after he got married. She said that Teresa did not say the double wide was hers, but that Earsel had told her it was Teresa's. At his death, it was to be Teresa's for her care taking. He told her he bought it in his and her name alone. Teresa told Carolyn she had a delayed power of Attorney from her dad.

About two or three weeks after Earsel and Patsy had moved out of the double

wide, this after Teresa and Clay had moved out of they day Earsel and Patsy got married, the double wide burned.(T226) Asked about whether Teresa had told Earsel and Patsy the town was talking about them being shacked up and they should get married. Carolyn said the only time they could have been shacked up was when Clay and Teresa went to North Carolina , *visited relatives and got the apples.*(T227-228)

The Contestants called Teresa Jean Williamson(T230) who testified Earsel had lived with he and Clay for over a year. His appetite was a problem at times. If he got a little depressed or upset or felt like he had not pleased someone, he got a little disturbed.(T232) She actually slept with her father because she was afraid of his getting up during the night to go to the bathroom and falling. He had fallen several times. She said Patsy sat with her father after Katie Williamson suggested it. She said Patsy sat with her dad at Will avenue about twice and she paid Patsy on a couple of occasions She became suspicious that something was developing between them, when one night Patsy was rubbing her dads shoulders with lotion for the pain and soreness. When here dad told her he was getting married, he had her promise not to tell Cathy and Judy. The day they got married, she chastised Patsy for driving him to Meridian but not taking his heart medicine. Teresa had confided in Katie Williamson that her Dad had received a lot of money from selling his home. Katie was taken aback that Earsel had that much money.(T238-239) Asked whether he was a strong willed person, she explained that he tried to be strong for her mother but at the end he was a giving person. He was afraid of being alone. He had good and bad days and would be confused and repeat himself. He would not take the pain pills often. He was very depressed about Earlene's death. The good and bad days were both mental and physical, but he was excited about building onto the double wide. (T242) Family conflict and being told her dad didn't want to see her kept her away from him after the marriage to Patsy.

On Cross, Teresa testified(T243) that when he told her he was getting married, she told him to go and tell his mother in law, Katie, and that he knew he would have to divide and take care of her as a child's part. (T244) She explained about the truck she had

bought from Earsel, saying she offered it back if they would buy insurance, tag, etc., but they refused and Patsy made Earsel pull his money out and buy a new truck.(T245) Asked whether she had used Earsel's money to buy the truck from Earsel, she said everybody wanted his money and she could have got his money a long time ago.(T246) She said that Earsel had hired the crews working at the trailer on the sun porch and such.(T249)

She agreed that if Dr. Clay said Earsel had improved at the October 20th doctor visit, then he had .(T 251)

When asked about a pleading signed by her sisters to recover gifts from Earsel to her, objection to relevancy was sustained.(T253) The two sisters' Petition to recover assets from Teresa on the ground of undue influence is at RE 20-28.

Teresa acknowledged a Bill of Sale from Earsel dated July 25, 2003, which gave her all his property(T255), and same was admitted as Proponent's Exhibit 5. (RE 46) Asked about the power of Attorney, she described it as "delayed" and said she didn't know if she had a copy, but was sure her Attorney, Mr. (Robert) Thomas did. He was the one that had suggested it.(T255) She was not aware that Earsel had signed a Revocation of that Power of Attorney on October 16, 2003 that had been given on May 20th, 2003. She admitted she had accepted that Power of Attorney.(T255)

Contestants Rested. (T259)

Proponent's Case:

Doctor Kenneth Schneider, a psychologist, testified first for Patsy Pope (T260-285)(Note: Dr. Schneider's testimony is included in Record Excerpts at RE 49-74,) to give his evaluation of Earsel's mental competency at the time of his 90 minute office visit/mental evaluation in Meridian on February 13, 2004. He learned from Earsel that Earsel feared a will contest, feared his daughters would upset his wishes and gave lucid reasons he had excluded his children from his will. He admitted he had been treating

Patsy since 2001 and was cross examined about a letter in the form of what counsel opposite couched as a "character reference" that said Patsy would not be materialistically acquisitive as to have persuaded Earsel to give her all his Estate. He was thoroughly cross examined by counsel opposite both as to the length of the evaluation and his fee of \$2000.00 for a day of testimony.

After Dr. Schneider, the Proponent Patsy Pope called adverse Earsel's daughter Mrs. Judy O'Berry(T286) Within days of their mother, Earlene's death, Earsel gave each of the three daughters approximately \$62,000.00. Earlene and Earsel had bought the Will Avenue home about a year before Earlene's death.(T286) She didn't visit with her dad at Patsy's home, after the marriage after she said that Cathy wasn't allowed to visit. As a condition for her to visit, Cathy had to be allowed to visit and that happened and then they began to visit weekly. She explained how Earsel did complain of the air conditioning at her house and she closed the vent and got her dad an Afghan for his legs. Earsel's sugar dropped several times he lived with her for some 21 months and she would feed him and watch him until his sugar became normal. He ate well.(T288-89) She didn't go to Attorney Robert Thomas' office when Cathy met there with Earsel and Patsy, she saying to get Teresa's name off a future power of attorney.(T289) When Earsel gave them the \$62,000.00, Earsel gave the reason as being to avoid inheritance taxes that would kick in at \$500,000.00. She persuaded him not to give them each \$100,000.00 but the \$62,000.00 so the rest he could invest, drawing interest to pay for his medication and other needs. She was shocked when she learned her dad had married Patsy Pope, because all he ever talked about was his dying and going to be with Earlene.(T290) On Direct by Attorney White, Judy told of how Earsel wanted her on the New York Life annuity and a duty to divide with her two sisters, reminding her the will already divided equally every thing else he owned.(T291) At T 292-293, Judy said her dad was taking an appetite enhancer. She remarked and disagreed with the hospice nurses about him being on "seizure medicine". (T 292) On Recross she said her dad would not eat only occasionally when he was depressed, but she could talk him into going and getting something.

Attorney Robert Thomas testified(T 294)(Re 75-84, T 294-303) Earsel, whom he'd known all his(Robert's) life came in with his new wife, Patsy. 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 knew 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 Settlemires, 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.

Barbara Hitt, Patsy's sister, testified(T304), since she lived nearby when Earsel, Clay and Teresa moved near Katie Williamson, that Patsy fed Earsel good food, not just pot pies and corn dogs and that she came to know Earsel better when he moved in Patsy's apartment at the end of Katie's house. Earsel read the paper, kept up with current events and was "sharp as a tack". She re-counted at T. 308 a time when Earsel stopped talking to her and just started crying asking "Why do my daughters have to be like this?" This

didn't surprise her as far as Teresa was, because she been around her a lot, what married to her brother Clay and had heard Teresa once say she'd lie about anything if it would get her what she wanted and get her out of trouble.(T. 308) This was said before and after the marriage. He was a gentle, kind and wonderful person. In the summer of 2005 she heard from her mother, Katie, that she and Earsel had gone to the Bank and got the \$202,000.00. Patsy was in the truck as they drove from attorney Williams office. Earsel became a close friend of her nephew, Barry Williamson, and all the grand children like Earsel. Patsy and Earsel expressed fear of the consequences of Earsel giving his estate to Patsy.(T311) Teresa told Earsel he wasn't her daddy and Patsy would not sleep a night in the double wide. Earsel told that the children would fight over his money after he was gone and give Patsy hell after he was gone. He said this not long before he went to the hospital and later died in March, 2004. She believed, this on Cross(T314), that if Patsy had the money, she would have told Barbara. She was told that Earsel asked Patsy to marry him and then walked to Katies's house and asked her.

Katie Williamson testified(T317) that at the hospital, Earsel woke up and saw Cathy had said he wasn't going home with her. That was the same day he would not take his medicine and Patsy got him to take it. She confirmed Earsel had asked her could he marry Patsy. She cautioned him against it, but he told her he was old enough to marry who he wanted to. She recalled a time Cathy came over after they were at Patsy's apartment and was screaming and talking loud and using profanity. Earsel was crying. Teresa called him bad names all the time. (T320) They discussed the money after Earsel passed away but didn't know where it was. They knew about it after she told Patsy and Barbara in the truck coming back from Attorney Williams' office. At T. 324. she had answered the phone as Teresa was leaving with a load from the double wide when she and Clay moved out, right after the marriage, and heard Teresa wanting \$50,000.00 to get off Earsel's back and Earsel said: "I don't have \$50,000.00 to give you." Earsel said as they were coming back from getting the Annuity cashed, that he would pile the money up and burn it. He had given his kids their inheritance and they didn't do anything but throw it

away.(T326)

On cross(T329-334) could not remember who was in a discussion after Earsel's death about the annuity money. King and the other lady helped Earsel to the truck, but Earsel carried the money. Patsy wasn't there, but in Meridian for some reason.(T331)

Juanita(Patsy) Pope testified(T334-371), she didn't go to the Bank, either time and contradicted the Terrell Flint testimony about taking the cash from the annuity and secreting it. She recounted how Cathy was there at the late October withdrawal of the \$50,000.00, beating her fists against the table(T 336) Teresa and Clay had left him at the double wide and she went out there and he was cooking a pot pie, complaining that was all he could fix and Patsy started cooking for him.(T338) His children and grand children were always welcome after the married. He had her burn the pictures of his children right after Christmas. He wanted to withdraw the balance from the Sebastopol Bank and close the account with Teresa's name on it. She explained the trip to the Mountains with Earsel and his family, saying Teresa told her that if she didn't go, her dad wouldn't go. She said she married Earsel because she loved him. Earsel was embarrassed by what Teresa said the town was talking about, them being shacked up and not married. She explained the will visit to Attorney Thomas' office as she being concerned not to leave anybody out. She denied he ever introduced her to Phillips as a "sitter." Earsel loved all the kids at Katie's house She identified the three photos, introduced as Exhibit 6 of Earsel at Christmas. (T351) She denied the seduction lotioining of Earsel. She denied he was always depressed though at night he would talk about Earlene being gone. She denied the woman having power statement testified to by Carolyn Denton. She admitted it was her idea to go to Dr. Schneider's office.

On Cross(T362), she admitted she delivered Earsel to Thomas' office and other parts already testified to, except the implication of the Texas law on children being left out. She explained that she just wanted it to be legal.(T364)

SUMMARY OF ARGUMENT

Patsy contends that the daughters failed to prove by clear and convincing evidence that there was a fiduciary relationship to generate a presumption of undue influence. There was no credible consistent evidence that Earsel wasn't a totally independent man when it came to how he wanted to handle his property and assets. She further argues that she met her burden of proof that the will was not the result of undue influence, again, all evidence pointing to a full explanation of why Earsel gave her all his assets and of his independent nature both before and after the Will. The Chancellor erred in not granting a Judgment Notwithstanding the Verdict.

ARGUMENT AND BRIEF

PROPOSITION

The Jury Verdict was Contrary to the Overwhelming Weight of the Evidence and Contrary to Law and the Court erred in Not Granting a Judgment Notwithstanding the Verdict. .

Legal Principles

In *Murray v. Laird*, 446 So.2d 575, (Miss.1984), this Court, as quoted in *Mullins v. Ratcliff*, *infra* at 1193, described a three prong test on whether a Will was procured by undue influence::

When the circumstances give rise to a presumption of undue influence, the burden of going forward with the proof shifts to the grantee/beneficiary to prove by clear and convincing evidence:

- (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) a competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.

Record Facts

The Trial testimony shows conclusively that Patsy acted in good faith. this is proven against the back drop of Earsel's entire relationship with his daughters and the circumstances of his life before the marriage and after. There is no doubt whatsoever that Earsel knew the consequences of his actions. He had full knowledge of his actions. Teresa

had already taken him through the ropes on his finances and assets. She was combative to the end with money her goal. There is finally no doubt that Attorney Robert Thomas was disconnected from Patsy, in fact he was more connected to Earsel's own family members and that he was totally devoted to Earsel's interest.

The abstract of the trial testimony is tedious, but the law teaches that each case is to be determined on its own facts, its own set of circumstances. See **Jamison et al. v. Jamison et al.**, 96 Miss. 288, 51 So. 130 As said below in **Mullins v. Ratcliff**, "Undue influence is a practical, non-technical conception, a common sense notion of human behavior."

From all the evidence, what may be most substantial is the fundamental improvement in Earsel's health once he and Patsy married. A change so great that on October 20, 2004, 11 days after the marriage, maybe some 3 months since the courtship began, Dr. Clay, Earsel's oncologist, took him off maintenance medicine and re-started chemo-therapy. The Hospice death watch ended as ordered by Dr. Fairchild when nurse Phillips reported the chemo medicine from Earsel and Patsy's refrigerator. We have a clear record here that Hospice was a system of prayers, waiting for death, preparing for it and thus all the depression testimony by the daughters and the hospice nurses was quite to be expected.

Strangely about the questions from their own counsel about mental weakness of Earsel, all answered that Earsel was depressed, not mentally weak or confused where he could not exercise his will. The Contestants didn't try to prove "lack of capacity." Dr. Schneider dispatched the one entry of "confusion" in the hospice nurse notes, saying it was an unusual entry and should have been explained. Further as to mental weakness, the Contestants were not able to prove satisfactorily that Earsel was under the influence of the pain medicine, Lortab or Lorcet. Clay proved that. Strangely the Hospice nurses always talked that Earsel complained of pain, but if it was true that he wanted to always please whom he was around, then such complaints were for the nurses who were there to ease him on to his maker. Strangely again, Judy O'Berry was surprised that her dad was

on "seizure medicine".(T292)

As to evidence of determinedness and mental strength, we first see it at Attorney Thomas's office, this followed in just a few days, October 16th, with a revocation of the power of attorney, and a visit with Cathy White, with Patsy present arguing about the Will. Next we see Cathy, or maybe Judy, at the double wide, shortly before it burned, where there is an argument when Terrell Flint is there about the will and about withdrawing the \$50,000.00 from the Annuity. All times Earsel was strong. Flint testified that Earsel had made the decision himself, though he cried at Cathy's actions, he stayed decisive.(T214) Yes he was nice, but he didn't change anything. Next, we see him in January at Stanley Salter's office, where all the directions and insistence came from Earsel. In February 2004, Earsel is at Dr. Schneider's office, further trying to protect his independent decision, first to marry, next to change his will, change the Sebastopol account, revoke the power of attorney, etc. etc. etc. Cathy testified at T 150, her dad was a stubborn man. Carolyn Denton, on cross testified Earsel was an "independent man", truthful, honest and used his mind reading.(T224) Here the good faith of Patsy is evidenced by how the relationship began, how it was beneficial to Earsel, especially his health and mental well-being, how it met a need for love not received from his children. Patsy and Earsel went into the marriage with full knowledge of the consequences of wrath and jealousy it would cause in the children. There was no secrecy of the marriage, there was none associated with the Will. Earsel had already been to Attorney Thomas office at the behest of Teresa, who had used the time he lived with her both at River Road and later at the double wide, to gain title and access to her father's estate. In July, 2003, Teresa had obtained a Bill of Sale to all Earsel's worldly goods. She was on the Citizens Bank account at the Sebastopol Branch. Earsel closed it immediately upon the marriage. He didn't just go to Attorney Thomas to do a will, but to terminate and revoke the Power of Attorney. Teresa herself admitted that everybody was out to get Earsel's money. Her sisters had accused Teresa of undue influence in the Petition to retake assets she had obtained from him. See Record Excerpts pages 20-28. Strangely, though Cathy signed

that petition, swore to it, she could remember no specific instances of anyone taking undue influence over her father.(T155). She was protecting the inconsistency of accusing Teresa of undue influence and then Patsy. She didn't want the jury to know this charge of undue influence against Teresa since it would dilute the charges against Patsy.

Striking, Cathy could not remember(T146) how her father came to be on hospice, but she never had opposed it, it appearing such hospice care may have started when Earsel had Teresa and Clay come to stay with him at his own house at Will Avenue, which somehow Earsel sold and then moved in with Teresa at their River Road house. Recall Sandy Boatner said she had started hospice care for Earsel in October 2002 or such. Teresa testified on cross(T251) that if Dr. Clay said Earsel had improved 11 days after the marriage, then he had.

Execution of the Will

From the nature and length of Earsel's relationship with Attorney Thomas, we see there is no point to be made from the fact that Thomas was also Patsy's attorney. What was good about Earsel going back to Thomas, was that Thomas new of his health, even said he looked better, knew of his relationship with his daughters. He got a taste of it first hand again when Cathy came in a few days later. Critically here as to the execution of the Will, recall the wild scene at the double wide, the day of the marriage, when, after Teresa learned they had gotten marriage, she packed her stuff out of the trailer, apparently demanded another \$50,000.00 from her Dad, said he wasn't her father. That action, as much of the circumstance, that the marriage had occurred, surely, and most proven by common sense, is why the immediate efforts by Earsel to change his Will. He certainly needed to get the Teresa Power of Attorney revoked. He had to get Teresa from control by her being a joint holder of his \$62,000.00 account at Sebastopol. The Will visit has to be put in context. These circumstances show Earsel was acting on his own, knew the extent of his bounty and was changing beneficiaries. There was no influence from Patsy, she was just caught up in the circumstances and his Wife.

In **Mullins v. Ratcliff**, 515 So.2d 1183, at 1191-92)(Miss.,1987), Justice Robertson

also addressed succinctly the prong of “independent advice and consent” writing:

As stated above, we declare that “independent consent and action” is the appropriate third prong of the test. We are led to this view by our historical review of this state's common law and, as well, by common sense. The three prongs of Murray, as hereby modified, are quite useful in determining whether a grantee such as Mary has proven the negative: the absence of undue influence. These prongs should not be understood as entirely separate and independent requirements that ought 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 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.FN1 omitted.(writer’s emphasis.)

Murray (446 So.2d 575 (Miss.1984)), recognizes these premises.

We note four statements made by the Court in **Murray v. Laird**.

Counsel asks for guidelines from this Court; however, this Court cannot set forth guides that fit all situations. Of necessity, each case must be determined individually on its merits.

* * *

However, from case decisions some affirmative and positive factors emerge that may be considered as significant to overcome the inference of the presumption.

* * *

The Court recognizes that prior disclosure of a donation is not a prerequisite to its validity; but the disclosure of intent made prior to execution of an instrument helps dilute the undue influence presumption.

* * *

Even after all testimony relating to these named factors is received, it is still to the trier of fact to judge the credibility of the witnesses and the worth of their testimony.

Murray, 446 So.2d at 578-79.

In **Mullins v. Ratcliff**, 515 So.2d 1183, at 1191-92)(Miss.,1987), Justice Robertson

also wrote:

A confidential relationship such as would impose the duties of a fiduciary does not have to be a legal one, but may be moral, domestic or personal. **Murray v. Laird**, 446 So.2d 575, 578 (Miss.1984); **Hendricks v. James**, 421 So.2d 1031(Miss. 1982) ; **Bourn v. Bourn**, 163 Miss. 71, 140 So. 518 (1932). The relationship arises when a dominant, overmastering influence controls over a dependent person or trust justifiably reposed. **Hendricks**, 421 So.2d at 1041; **McDowell v. Pennington**, 394 So.2d 323 (Miss.1981); **Croft v. Alder**, 237 Miss. 713, 115 So.2d 683 (1959).

Justice Robertson went on to cite **Gillis v. Smith**, 114 Miss. 665, 676, 75 So. 451, 453 (1917). for the legal rule imposed upon the Contestants here that “clear and convincing evidence(is) necessary to show conveyance procured by undue influence”.

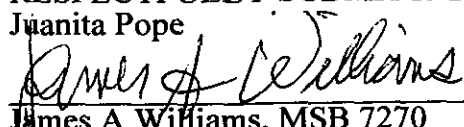
The record is clear that Earsel Pope wasn't dominated by his Wife. That he chose her over his daughters is that he chose life over death. What kept the daughters from being a part of the assets was that they had already received \$62,000.00 each, just a year or so back. Teresa had wanted and gotten more. Earsel was tired of being used as a banker. He fell in love. His health improved. He got off insulin and went to eating good food.

CONCLUSION

After reading Record and reviewing and studying the applicable principles of law, the Court is urged to conclude that the case should be reversed and rendered or remanded for a new trial.

RESPECTFULLY SUBMITTED,
Juanita Pope

BY:


James A Williams, MSB 7270
Attorney for Appellant

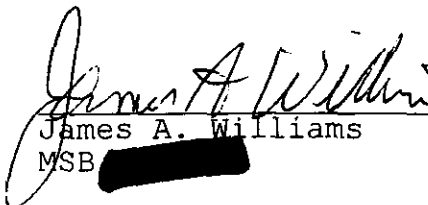

CERTIFICATE OF SERVICE

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

Done this the 10th day of August, 2007.


James A. Williams
MSB 

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, JUDY O'BERRY and TERESA WILLIAMSON

APPELLEES

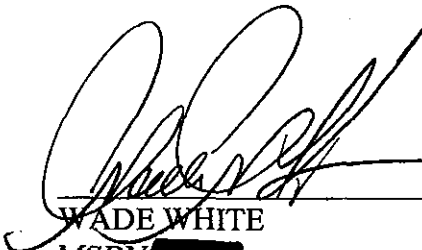
AMENDED CERTIFICATE OF SERVICE

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 the following, at their normal business addresses:

Honorable John Clark Love
Chancellor, Presiding
Post Office Box 537
Kosciusko, MS 39090

Honorable James Williams
Post Office Box 5002
Meridian, MS 39302

This the 12th day of October, 2007.


WADE WHITE
MSBN [REDACTED]


STEVEN D. SETTLEMIRE
MSBN [REDACTED]