IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

2008 - CA - 01425 - COA

RONNIE E. NOBLIN, HENRY C. NOBLIN, JR.,
THOMAS C. NOBLIN, ROBBIE NOBLIN,
NELL NOBLIN JOHNSON, DIANE BOYKIN,
and JOYCE MILLER — PLAINTIFFS-APPELLANTS

vs.

SAMMY J. BURGESS and
SHEILA MCDILL — DEFENDANTS-APPELLEES

Appeal from the Circuit Court of Smith County, Mississippi

REPLY BRIEF OF APPELLANTS

Oral Argument Requested

Eugene C. Tullos (MSB [redacted]
P. O. Box 74
Raleigh, Mississippi 39153
(601) 782-4242

G. David Garner (MSB [redacted]
P. O. Box 789
Raleigh, Mississippi 39153
(601) 782-9090

William F. Goodman, Jr. (MSB [redacted]
Lewis W. Bell (MSB [redacted]
WATKINS & EAGER PLLC
P.O. Box 650
Jackson, Mississippi 39205
(601) 965-1900

ATTORNEYS FOR APPELLANTS

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Sammy and Sheila concede in their Brief that, under the law, they are presumed to have unduly influenced the making of the deathbed will. They concede the presumption stands absent clear and convincing evidence to the contrary. Their argument that the record contains evidence sufficient for a jury to be clearly convinced of the absence of undue influence is an exercise in futility – they are able to refer only to testimony which has no probative value whatever, i.e. testimony clearly insufficient to create a jury question. Their Brief does not even address the cases that foreclose the very type of testimony they urge.

Sammy and Sheila affirmatively and correctly confirm in their Brief that the relationship they shared with Bob Noblin was one classified in law as confidential. Thus their Brief supports the contestants' alternative position that it was reversible error for the trial court to have refused to so instruct the jury.

Whether the decedent Bob Noblin arguably lacked testamentary capacity is another alternative issue on this appeal. In an effort to justify the erroneous peremptory ruling below adjudicating testamentary capacity, Sammy and Sheila are forced to misapprehend the law applicable in the circumstance where undue influence is presumed.

I. Sammy and Sheila Agree They Are Presumed To Have Unduly Influenced The Making Of The Deathbed Will.

The original Brief Of Appellants relies upon the established and controlling law that the presumption of undue influence arises when (i) there exists a confidential

relation between a testator and beneficiaries under a will, and (ii) there also exists suspicious circumstances such as the beneficiaries who benefit by the will taking part or participating in the preparation or procuring of the will or assisting in its execution (*see* pages 14 et seq.). That rule of law which underlies the resolution of this lawsuit was recognized and applied by our Supreme Court as early as 1858 in *Meek v. Perry*, 36 Miss. 190, involving a will by a ward leaving a substantial amount of her property to her guardian; it was analyzed and found applicable in *Croft v. Alder*, 237 Miss. 713, 115 So. 2d 683, 686-688 (1959), in the context of a confidential relation between testator and beneficiary analogous to the relationship in this case; and it has been expressly reaffirmed in multiple other reported cases including *In re Estate of Holmes*, 961 So. 2d 674, 680 (Miss. 2007).

Sammy and Sheila's acknowledgment of this rule of law is scant. It appears in the first full paragraph on page 18 of their Brief. They do not dispute or challenge Mississippi's settled rule on presumption of undue influence or its applicability to this case. However, they carefully avoid discussion or even acknowledgment of the public policy underlying the rule. Citation or mention of *Croft v. Alder*, a leading case, is nowhere to be found in the Brief Of Appellees.[1] The reason Sammy and Sheila choose to avoid mention of *Croft v. Alder* and its progeny is that those cases not only

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[1] In Weems, *Wills and Administration of Estates in Mississippi*, § 8-18 (1988), *Croft v. Alder*, which Sammy and Sheila ignore, is identified as the leading precedent formulating the "confidential relationship doctrine applicable to wills contested on the grounds of undue influence."

set forth the circumstances that give rise to the presumption of undue influence, they make plain what type of proof, and from whom, it takes to successfully overcome the presumption. As will be discussed later in this reply, those cases doom Sammy and Sheila's plea that they offered proof at trial sufficient in law to overcome the presumption.

A. Sammy and Sheila agree that a confidential relationship existed between Bob Noblin and themselves.

The original Brief Of Appellants explains that a confidential relationship in fact existed between Bob Noblin and Sammy and Sheila (*see* pages 14-18). Not only do Sammy and Sheila agree, their detailed characterization of their "21 year 'very close' relationship" with Bob Noblin, especially his trust and confidence in them being "just like [trust and confidence in one's own] son and daughter," is made the focal point of their Brief:

- Bob Noblin referred to Sammy and Sheila as his son and daughter.
- Bob Noblin and Sammy and Sheila enjoyed time together.
- Bob Noblin and Sammy and Sheila spent holidays together.
- The three planned and worked together on many projects.
- Sammy and Sheila were named as beneficiaries on certain of Bob Noblin's IRA accounts and bank certificates of

deposit.

- Their respective houses were close to each other. Sammy moved in with Bob Noblin in 2001.

- Bob Noblin's relationship with Sammy and Sheila was liken to a father. Bob Noblin had "Father" carved in stone above his name on his tombstone [as a] testament to his relationship with Sammy and Sheila.

(Brief Of Appellees ("Br.") at 2-3, 25-26)

Sammy and Sheila emphasize in their Brief Bob Noblin's dependence upon them during his last illness:

- On September 23, 2003, Sammy drove Bob Noblin to see Dr. Lee in Forest.

- Later, Dr. Lee advised Sammy to take Bob Noblin to Lackey Hospital in Forest.

- On September 29, 2003, Sammy drove Bob Noblin to Baptist Hospital in Jackson.

- Sammy filled out the hospital admission forms for Bob Noblin. Bob Noblin's signature on the admission forms could well have been written by Sammy.

- On October 1, 2003, Sammy and Sheila spoke with people from hospice.[2]

(Br. at 3, 13)

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[2] According to Sheila, she and Sammy rotated the nights that Bob Noblin was in Baptist Hospital but both were usually at the Hospital in the daytime. They discouraged the idea of Bob Noblin undergoing a colonoscopy. (Tr. at 423, 426) A few hours before his death, she informed hospital staff "we" do not want any resuscitation or "artificial means [of] life support." (Tr. at 183)

In their Brief, Sammy and Sheila make no bones about the fact their relationship with Bob Noblin was "confidential or fiduciary." (Br. at 18) They highlight the relationship because it gives them the jury-type argument that a will naming individuals close as "family" as sole beneficiaries should be deemed natural. This argument would have some merit in law had not Sammy and Sheila – whom Bob Noblin trusted and upon whom he was dependent in his final hours and over whom they could easily take advantage – undertaken the lead role in the procurement of a will naming them as beneficiaries to the exclusion of all others.

B. Sammy and Sheila do not dispute that they actively participated in the procurement of the will.

The original Brief Of Appellants explains that Sammy and Sheila were not merely actively involved in the procurement of the will but, moreover, that, from start to finish, they instigated and carried out every step relating to its preparation, its content, its execution and its custody (*see* pages 18-21). Sammy and Sheila tacitly agree. They stipulate they are "shouldered with the burden of proving by the clear and convincing evidence that they did not exert undue influence on" Bob Noblin (*see* Br. at 18). Their recognition of the presumption and the burden it places upon them as beneficiaries carried with it, of course, recognition that the presumption arose in the first place because of what they did to arrange for a will at a time when Bob Noblin both trusted and was dependent upon them.

There is obvious reason why Sammy and Sheila say as little as possible about

their role in promoting the will. Their unashamed behavior is precisely the kind of beneficiaries' behavior forbidden by the *Croft v. Alder* line of cases. There is no way for them to put an acceptable spin on what they did. The law discounts entirely their self-serving claim the will was Bob Noblin's idea (Br. at 4).

Instead, Sammy and Sheila try to find some equity on their side by lashing out at Bob Noblin's heirs at law (Br. at 22-26). Whether the contestants, or any of them, are saints or sinners is not the issue. Any self-aggrandizing rationalization by Sammy and Sheila that they earned entitlement not just to certain of Bob Noblin's IRA accounts and bank certificates of deposit but to everything he owned is not the issue. This will contest revolves around the undeniable fact that the will at issue is by law presumptively invalid. Purely and simply, all else aside, the law presumes the will is void because the beneficiaries acted to their own advantage while in a position of domination and influence.

II. There Is No Evidence Sufficient In Law To Rebut The Presumption Of Undue Influence.

The public policy underlying the presumption of undue influence is grounded in common sense understanding of human behavior.[3] It insists upon strict application and strict enforcement of the presumption under circumstances such as those here.

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[3] *See, e.g.*, the seminal case of *Meek v. Perry*, 36 Miss. at 256 (the presumption comes from "doctrine of common sense and of sound justice") and *Mullins v. Ratcliff*, 515 So. 2d 1183, 1194 (Miss. 1987) ("Undue influence is a practical, non-technical conception, a common sense notion of human behavior.").

The same common sense teaches that what constitutes clear and convincing evidence sufficient to rebut the presumption is not left to a jury's whim. Evidence capable of jury consideration must fulfill very specific factual criteria and must come from, and only from, sources that are unquestionably both informed and reliable.

The original Brief Of Appellants explains the Court has always taken the common sense view that evidence to rebut the presumption cannot come from interested persons such as the proponents themselves (such as Sammy and Sheila), or the lawyer who drafted the will (such as Sorey) (*see* pages 24-26, 29-31).

In their Brief, Sammy and Sheila do not dispute that settled law dictates that any analysis of whether there is an overall trial record of clear and convincing evidence sufficient for a jury to disclaim undue influence must be conducted without regard to what any of the three of them said. They do not dispute contestants' showing in the original Brief Of Appellants that their testimony and that of Sorey did not count. They presumably accept by silence the decisive holdings in *Croft v. Alder*, *In re Estate of Holmes*, and *In re Estate of Smith*, 827 So. 2d 673 (Miss. 2002), relied upon throughout the original Brief Of Appellants. They declined to try to suggest any basis that would make their testimony or that of Sorey materially useful in this case. It is fair to conclude there is unanimity on this appeal that because the actions of Sammy, Sheila and Sorey triggered the presumption in the first instance, the law does not permit them to self-servingly rebut it by quoting alleged conversation with Bob

Noblin or otherwise.

The constraints of the law, however, do not keep Sammy and Sheila from pretending it to be otherwise. Unfazed by settled law and apparently untroubled by lack of candor, Sammy and Sheila go right ahead in their Brief and rely on their own self-serving testimony and that of Sorey.

For example, the Brief contends that "[Bob Noblin] wanted Todd [Sorey] to draw up a will." (Br. at 4, 19) The only support for that contention is testimony from Sammy and Sheila themselves.[4] The assertion on page 19 "It is not disputed that Sammy called Todd on [Bob Noblin's] behalf," with Bob Noblin being deceased, illustrates why Sammy and Sheila's own protestations are not only not "clear and convincing," they are not at all probative. Actually, what is undisputed is that there is no evidence from any disinterested source that Bob Noblin initiated the idea of calling any lawyer regarding a will.

For another example, the Brief contends that "[Sorey] prepared the will according to [Bob Noblin's] wishes." (Br. at 4, 19) The cited support for that contention is Sorey himself. (Tr. 125-129) Again, this assertion, with Bob Noblin being deceased, illustrates why this lawyer cannot himself be a source of "clear and

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[4] The Brief references only Tr. 394-395 and 423 without identification of the sources. One has to go to the Transcript to verify the referenced testimony was from Sammy and Sheila, respectively.

convincing evidence" or even of probative testimony.[5] Every Transcript reference on page 19 is to the testimony of either Sammy or Sheila or Sorey.

The original Brief Of Appellants also explains the unreliability of conclusory testimony from the subscribing witness/nurse Callum, based on a few minutes in the hospital room and lacking any foundation of "any precedent activities by" Sammy and Sheila (*see* pages 27-30). Sammy and Sheila are once more silent and provide no authority from which to argue otherwise. Yet once again they go right ahead and cite the subscribing witness for the broad conclusion "[Bob Noblin] understood what he was doing." (Br. at 20)[6]

In their Brief, Sammy and Sheila pay lip service to their burden to prove by clear and convincing evidence from disinterested sources (1) good faith on their own part, (2) Bob Noblin's full knowledge and deliberation of his actions and their consequences, and (3) that Bob Noblin exhibited independent consent and action. (Br. at 18 et seq.) Having no disinterested proof, they proceed to cite primarily the same legally discounted and, therefore, unconvincing testimony from themselves and from Sorey. (Br. at 19, 21)[7] Without explanation, Sammy and Sheila argue that

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[5] Respectfully, had Sorey done his homework he would have known from the outset he and Sammy were creating a presumptively invalid will.

[6] Ms. Callum also testified that "he was doing what he wanted to do" based on "questions that I asked him;" but she could not remember the questions. (Tr. at 91)

[7] Their Brief is replete with misrepresentations of the record. One illustration out of many is found on page 21 where they cite Tr. 161 (Sammy) and 178 (Sheila) as proof Bob

certain contestants misunderstood some of the details of Bob Noblin's real estate holdings as somehow tantamount to proof that Bob Noblin himself on his deathbed understood who constituted his natural inheritors. (Br. at 23)

The original Brief Of Appellants succinctly explains Sammy and Sheila's failure to prove by clear and convincing evidence either that they acted in good faith or that Bob Noblin possessed full knowledge and deliberation of his actions and their consequences or that he exhibited independent consent and action (*see* pages 23-31). Sammy and Sheila are unable to credibly deny that explanation.

III. Sammy And Sheila Fail to Contradict That The Jury Was Wrongly Instructed.

Prejudicial erroneous rulings below on instructions do not have to be addressed here if the Court concurs there was unrefuted undue influence.

Confidential Relationship. One thing everyone in this case agrees on is that the relationship between Sammy and Sheila and Bob Noblin was one of closeness, confidence, reliance and dependence. This leaves Sammy and Sheila with virtually nothing of substance to say in response to the error below when the trial court refused

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Noblin "remained in complete control of his finances, including all of his bank accounts and payment of all of his bills." Yet, those pages reflect no such testimony. Another illustration is found on page 22 where they assert that "Nurse Callum's testimony supports" the conclusion "[T]he record is clear that Bob understood what property he owned and their estimated value." Yet, no Transcript page is referenced because there is no such testimony. Still another misrepresentation is found on page 23 where they state as fact, with no record citation, "there was absolutely no way Bob would have allowed his heirs, especially those contestants, to inherit 'Bob Noblin land.'"

to grant tendered Instruction C-9 that would have peremptorily instructed the jury there was a confidential relationship between testator and beneficiaries. (R. 444-45) What we find in the Brief Of Appellees on that point, therefore, is a rather rambling mostly abstract discussion of the general topic of jury instructions, pointing to instructions not at issue on this appeal, designed to direct attention away from the error in refusing to grant Instruction C-9. (Br. at 13 et seq.)

The effect of the refusal was that it was left to the jury to decide whether or not the confidential relationship existed and, *only if such was found to exist*, to then proceed to decide whether Sammy and Sheila acted in good faith and whether Bob Noblin acted with full knowledge and deliberation and showed independent consent and action. (Instruction P-6 at R. 396-97) The jury was free to wrongly conclude there was no such relationship and thus to never reach the issue of whether the presumption was overcome by clear and convincing evidence. Sammy and Sheila's statement that Instructions P-6, C-8 and C-15 as a group left the jury with "no choice but to determine [whether there was undue influence]" is bewildering.[8]

Unable to argue that the existence of a confidential relationship was a disputed issue of fact, Sammy and Sheila try to bolster Instruction P-6 as "*important* from the standpoint that it instructs the jury on the issue of confidential relationship and the presumption of undue influence. . . ." (Emphasis added.) (Br. at 15) Citing *In re*

[8] C-8 and C-15 have no applicability whatever unless or until the jury finds in the first instance there was indeed a confidential relationship. (R. 416, 420)

Estate of Pigg, 877 So. 2d 406 (Miss. App. 2003), not an undue influence case, they engage in a confusing discussion of the burden of proof, concluding somehow that if a peremptory instruction had been given on confidential relationship that would have "increased [their] existing burden of proof." (Br. at 15-16). Respectfully, all of this is nonsensical. What is *important* is that refusing the peremptory instruction and empowering the jury to decide a highly significant and uncontested element of the case was unquestionably wrong. Although perhaps it could have been more clearly articulated, the motion for new trial argues the uncontested proof of confidential relationship and preserves the point for appeal.

Testamentary Capacity. Complaining of the trial court's peremptory finding of testamentary capacity, the original Brief Of Appellants outlines in detail facts disclosed in the hospital records concerning Bob Noblin's end-of-life medical condition and arguably making testamentary capacity a fact issue (*see* pages 33-40). Sammy and Sheila respond that the testimony of the subscribing witness/nurse Callum is so compelling that a rational jury could only have agreed with her conclusion. (Br. at 12) They argue for unprecedented weight to be afforded the conclusions of a witness who cannot remember any of the conversation during her brief encounter with Bob Noblin.

What is entirely overlooked is that Bob Noblin signed the document at a time when he was presumptively influenced. Sammy and Sheila rely on *Estate of Pigg*, a

case involving a challenge of testamentary capacity but with no plea or proof of confidential relationship. They also cite *Hayward v. Hayward*, 299 So. 2d 207, 208 (Miss. 1974), but "there was not a syllable of proof [of undue influence]" in that case where the Court emphasized:

> This view [possession of mental capacity] is strengthened by the admitted fact that no undue influence whatever was brought to bear upon him in connection with the will and thus it must be considered that the will reflects the testator's own wishes.

299 So. 2d at 210.

It is difficult, if possible, to imagine a set of facts where testamentary capacity is affirmed as a matter of law (on testimony akin to that provided by Ms. Callum) while, simultaneously, the testator is presumptively unduly influenced. The very essence of undue influence is to preclude free and untainted action. In *Meek v. Perry*, the Court observed the concession in that case "on all sides" that

> [w]here 'undue influence' is established, as operating on the mind of the testator, and influencing the exercise of free volition . . . in legal contemplation, *it destroys testamentary capacity*.

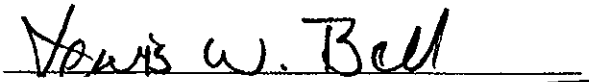
36 Miss. at 244 (emphasis added).

Conclusion

Sammy and Sheila's Brief offers no genuine refutation of the conclusion that the judgment below should be reversed and rendered or, in the alternative and at a

minimum, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,



William F. Goodman, Jr. (MSB #[redacted]
Lewis W. Bell (MSB [redacted]
WATKINS & EAGER PLLC
P.O. Box 650
Jackson, Mississippi 39205
(601) 965-1900

Eugene C. Tullos (MSB [redacted]
P. O. Box 74
Raleigh, Mississippi 39153
(601) 782-4242

G. David Garner (MSB [redacted]
P. O. Box 789
Raleigh, Mississippi 39153
(601) 782-9090

ATTORNEYS FOR APPELLANTS

Dated: September 14, 2009

Certificate of Service

The undersigned counsel of record for the appellants certifies that a true and correct copy of this pleading was served via United States mail, postage prepaid, to the following:

Honorable Robert G. Evans
Circuit Judge
P.O. Box 545
Raleigh, Mississippi 39153

Mark K. Tullos
P.O. 505
Raleigh, Mississippi 39153

This the 14th day of September, 2009.

Lewis W. Bell