IN THE SUPREME COURT OF MISSISSIPPI

2008 - CA - 01425

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

BRIEF OF APPELLANTS

Oral Argument Requested

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vs.

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Certificate of Interested Persons

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court or the Judges of the Court of Appeals may evaluate possible disqualification or accusal:

Plaintiffs/Appellants:

Ronnie E. Noblin
Henry Clay Noblin, Jr.
Thomas C. Noblin
Robbie Noblin
Nell Noblin
Diane Boykin
Joyce Miller

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Defendants/Appellees:

Sammy J. Burgess
Sheila C. McDill

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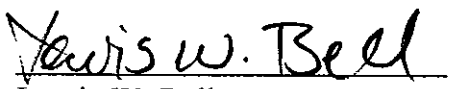
Respectfully submitted,



Lewis W. Bell

Statement Regarding Oral Argument

The law governing the presumption of undue influence and testamentary capacity is well established. The record, however, confuses the legal sufficiency of much of the proffered evidence, making it likely that oral argument would assist the Court.

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Statement Of The Issues

The issue is *devisavit vel non*.

1. Whether as a matter of law there was a fiduciary and confidential relationship between the proponents (Sammy and Sheila) and the decedent (Bob Noblin).

2. Whether as a matter of law Sammy and Sheila are presumed to have unduly influenced Bob Noblin.

3. Whether as a matter of law Sammy and Sheila failed to establish a case by clear and convincing evidence on which a jury could reasonably base a finding to overcome the presumption.

4. Alternatively, whether the court below erred in (a) instructing the jury that the existence or not of a confidential relationship was a disputed question of fact, and/or in (b) peremptorily instructing the jury that Bob Noblin possessed the requisite testamentary capacity.

Statement Of The Case

1. *Nature Of The Case.*

This is a will contest. The decedent, Robert H. (Bob) Noblin, was a resident of Scott County who died of cancer during the very early morning of October 3, 2003, leaving no close family. His wife had predeceased him and he had no children.

The proponents of a purported will in which they are the sole devisees and legatees (beneficiaries) are Sammy Burgess and Sheila McDill, grown children from an earlier marriage of Bob Noblin's deceased wife. Bob Noblin never adopted Sammy and Sheila but their connection and involvement with him established a classic example of what the law recognizes as a confidential relationship.

Contestants, Ronnie E. Noblin and others, are heirs at law of Bob Noblin who receive the full estate by intestate succession and nothing under the purported will.

Bob Noblin had long been aware of the result of dying intestate, particularly that heirs at law would inherit the "family farm." (Tr. 239-40, 279). There is no evidence in the record that he ever made a will or even considered making a will, before purportedly doing so only a few hours before death. The "will"-related events during the final hours of Bob Noblin's life were instigated and implemented

by Sammy and Sheila. These included: selecting and contacting a lawyer (Tr. 160-61); arranging for indirect telephone contact between the lawyer and the dying Bob Noblin (with Sammy in the room with Bob Noblin and conveniently serving as the intermediary)(Tr. 161-62); transporting the quickly prepared document from the lawyer's office to the hospital (Tr. 166, 182); finding witnesses (Tr. 166-67)(even when several nurses declined to undertake that responsibility with all of its implications)(Tr. 108); obtaining signatures; and maintaining control and custody of the "executed" document. (Tr. 398). Sammy and Sheila's confidential relationship with Bob Noblin coupled with their "take charge" involvement with every material circumstance surrounding his alleged dying bequests to them of everything he possessed created a presumption of undue influence. The record is devoid of facts sufficient to overcome that presumption.

2. *Course Of The Proceedings.*

Sammy and Sheila chose Smith County Chancery rather than Scott County Chancery as the forum to commence probate proceedings. (R. 6, RE tab 1). When the heirs at law asked for a jury trial on their challenge to the validity of the proffered "will," the Chancellor invoked his local practice and transferred the contest to Smith County Circuit for jury trial. (R. 83).

At the close of the evidence there was no issue of material fact requiring resolution by the jury. The trial judge should have peremptorily instructed the jury

to find for the contestants. There was no will, because:

- The relationship between Bob Noblin and Sammy and Sheila was shown to be a fiduciary one and one of confidentiality.

- Sammy and Sheila were shown to have been actively involved in the preparation and execution of the "will."

- Because of the confidential relationship and because of their active involvement in the procurement of the "will," undue influence on the part of Sammy and Sheila is presumed.

- Sammy and Sheila failed to make a case by clear and convincing evidence on which the jury could reasonably base a finding to overcome the presumption.

- The tendered document, having been unduly influenced, is invalid.

- This is true whether or not Bob Noblin possessed the requisite testamentary capacity when he signed the presumptively invalid document.

3. *Disposition In The Court Below.*

The court below denied contestants' request for a peremptory instruction. (R. 423). That was error.

The court below submitted to the jury whether from the evidence there was a fiduciary and confidential relationship between the decedent and the

beneficiaries. (R. 396-97). That was error.*

The court below also submitted to the jury whether from clear and convincing evidence the beneficiaries had overcome the presumption of undue influence. (R. 396-97). That also was error.*

The court below withheld from the jury and peremptorily decided the question of testamentary capacity. (R. 421). That, too, was error.*

The jury, faced with confusing and erroneous instructions, found for the proponents. (R. 435). Whether the verdict was based on misunderstanding the confidential relationship or misunderstanding the presumption of undue influence, or both, is unknown. The extent to which the verdict resulted from the peremptory instruction on testamentary capacity is also unknown.

The court below entered judgment for the proponents. (R. 440, RE tab 2). Contestants' motion for judgment notwithstanding the verdict and for a new trial was denied. (R. 452, RE tab 2). This appeal followed.

4. *Statement Of The Facts.*

Bob Noblin grew up and worked "Noblin land" his whole life in the rural Homewood Community in Scott County, Mississippi along with and among other

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*Review of these errors on this appeal is necessary only if the court should decline to reverse and render.

Noblins, his blood relatives, some of whom are the appellants in this case. The Homewood Community was settled by Noblins in the 1830s, and Noblins have owned and lived on land in the Homewood Community continuously since the area was settled. (Tr. 239, 279). Noblin land descended from one generation to another. Bob Noblin received his land from his parents. (Tr. 240). The Noblin appellants (hereinafter "the Noblins") are the uncle and first cousins of Bob Noblin. Bob Noblin's first cousins got title to their lands from their parents, who were Noblin's aunts and uncles. (Tr. 240-41).

Bob Noblin's primary job until he retired was an inspector for the U.S. Department of Agriculture at poultry processing facilities in Forest. (Tr. 277). Through that work he met and married Frances Burgess (Tr. 383) when he was approximately 48 years old in 1982. (Tr. 151). That was his one and only marriage. When Frances married Noblin, she had two adult children, appellees Sammy Burgess and Sheila McDill. In addition to his job as a U.S.D.A. inspector, Noblin ran a cattle farm on 500 acres of Noblin land he owned in the Homewood Community. (Tr. 234-36, 179). He also owned land in Smith County. (Tr. 277-78). Frances died in 1994. (Tr. 151). Noblin never had any children (Tr. 241) and never adopted Sammy and Sheila. Noblin was 69 years old when he died at 12:10 am on October 3, 2003. (Tr. 234). Noblin lived his entire life without a will until October 2, 2003, when he was within hours of his death.

Noblin knew how to manage his own finances. He managed his own finances without help from Sammy or Sheila. (Tr. 157-58, 179). He operated a successful cattle farm. He had an individual retirement account and certificates of deposit in which Sammy and Sheila were listed as surviving beneficiaries. These certificates of deposit were paid out to Sammy and Sheila on October 24, 2003. (Exh. P-12 & P-13, Tr. 315, 317).

In 2001, seven years after Noblin's wife died, Sammy divorced his wife and to save money moved in with Noblin, who was living in the home his deceased wife Frances owned in Forest. (Tr. 388).

On September 23, 2003, Sammy took Noblin to see Sammy's doctor, Dr. John Paul Lee, in Forest because Noblin had been having physical problems. (Tr. 390). Sammy then took Noblin to be admitted to Lackey Memorial Hospital in Forest on September 24, 2003. (Tr. 391-92). Sammy and Sheila cared for Bob Noblin while he was in the hospital in Forest. (Tr. 156). Bob Noblin was diagnosed with widespread metastatic liver and pancreatic cancer and was dying. (Tr. 194, 283).

On September 29, 2003 Sammy drove Bob Noblin from the hospital in Forest to the Baptist Hospital in Jackson because Noblin was unable to drive. (Tr. 158-59). Noblin was throwing up when he and Sammy arrived at the hospital. (Tr. 393). Appellant Diane Boykin, who was Noblin's first cousin and who saw Noblin for the last time in the hospital in Forest, testified that Noblin said he was

not going to Jackson for treatment. (Tr. 293). Sammy testified that Noblin decided to go to Jackson. (Tr. 392). When Noblin arrived at Baptist Hospital, he was gravely ill. His condition worsened every day. (Tr. 213). On September 29, 2003, Noblin was placed in the oncology unit in room 5106-A at Baptist Hospital. Bob Noblin never left room 5106-A.

From September 29, 2003 to 12:10 am, October 3, 2003, Sammy or Sheila or both were with Bob Noblin continuously during the day and took turns spending the night with him. (Tr. 394-95). Noblin was dependent on them for care, personal needs and hygiene. (Tr. 170, 177, 403). Soon after his arrival at Baptist Hospital, doctors determined that Noblin had no treatment options other than controlling his pain with medication. (Tr. 201-02). On October 1st, plans were being made to transfer Noblin to a hospice facility. (Tr. 195).

Bob Noblin's illness and/or the medications he was taking affected his mind. On September 30th he told a nurse he was waiting on his wife to bring him clothes. (Exh. C-2, R. 217). His wife had been dead for nine years. (Tr. 402). Noblin ate almost nothing during the four days he was in Baptist Hospital. (Tr. 197). According to Sheila, on October 1st and October 2nd (the day the "will" was signed) Noblin had nothing to eat. (Tr. 176). Doctor and nurse notes on October 1st describe Noblin as: hallucinating and hearing voices (Exh. C-2, R. 220); very lethargic (decreased level of consciousness) and not participating in conversations with nurses. (Exh. C-2, R. 180).

On October 2nd, the day he signed the "will," Dr. Shumaker, Noblin's treating oncologist at Baptist Hospital, noted in his chart that he was lethargic, his eyes were more yellow from jaundice and he was not eating. (Exh. C-2, R. 181; Tr. 200-01). Noblin was given Demerol intravenously for pain that day. (Exh. C-2, R. 237).

On October 1st, Sammy called life-long friend Todd Sorey on his cell phone from Noblin's hospital room. Only Bob Noblin and Sammy were present. (Tr. 160-62). Sorey is an attorney who grew up and has lived in the Homewood Community. He knew Sammy, Bob Noblin and the Noblin appellants. (Tr. 119-22). According to Sammy, he called Sorey because Bob Noblin wanted Sorey to prepare a will for him. (Tr. 124). Sorey told Sammy to make an appointment for Bob Noblin to come see him. *Id.* Only then did Sammy tell Sorey that Bob Noblin was hospitalized and too ill to come to him. *Id.* In the telephone call, Sammy told Sorey that Bob Noblin wanted to leave all of his estate to Sammy and Sheila. (Tr. 126-27). Sammy said he relayed Sorey's questions about the content of the will to Bob Noblin, and Sorey said he heard Bob Noblin's responses over the phone. (Tr. 125-26). Sorey gave Bob Noblin no legal advise, either directly or indirectly. Sorey prepared Bob Noblin's one and one-quarter page "will," and Sheila picked it up at Sorey's office the next day, October 2nd, and took it to the hospital to be signed. (Tr. 424). Bob Noblin never saw, met with, called or spoke directly to Sorey. (Tr. 124, 128, 137, 140). Sorey, who had been out of law

school a year (Tr. 120), had never done any legal work for Bob Noblin (Tr. 141) and had not seen him in six to eight months. (Tr. 122). Sorey knew Noblin's blood relatives, the Noblins, because he grew up and has lived in the Homewood Community where the Noblins have their land. (Tr. 129).

When Sheila arrived at the hospital with the "will," Sammy asked a nurse to help him get witnesses and a notary. (Tr. 166-67). Several nurses refused to be witnesses. (Tr. 108). Nurses Callum and Thornton agreed to witness the "will," and hospital employee Gail Young notarized it. ("Will," Exh. P-1). Sammy and Sheila were in the room with Bob Noblin when the "will" was signed. (Tr. 424). Sammy and Sheila called Callum to testify at trial. Callum did not remember taking care of Bob Noblin in the hospital, but said she "probably did at some point during his care." (Tr. 88). She testified that she read the "will" and talked to Noblin and concluded that the "will" contained what Noblin wanted done. (Tr. 91). Callum twice said however that she could not remember any specifics of her conversation with Noblin. (Tr. 99, 103). She did not remember whether she asked Sammy and Sheila if they were Noblin's only relatives. (Tr. 104). She thought Sammy and Sheila were Bob Noblin's natural son and daughter, which was reinforced when she read the will's reference to them as his son and daughter. (Exh. P-1; Tr. 105-107). Gail Young did not remember Noblin or anything else that happened in Noblin's hospital room on October 2rd other than witnessing and notarizing signatures. (Tr. 116). Dr. Shumaker, who saw Bob Noblin every day

he was in Baptist Hospital, testified that she could not say that he had or did not have testamentary capacity. (Tr. 230).

Bob Noblin signed the "will" the afternoon of October 2nd, sometime between 12:00 pm and 3:00 pm. (Tr. 109). By approximately 7:00 pm that night, Bob Noblin was very near death. (Tr. 183). Sheila decided to allow a "Do Not Resuscitate" order to be given. (Tr. 183-84). Bob Noblin died at 12:10 am on October 3, 2003. (Tr. 204-05).

Summary of the Argument

During Bob Noblin's last hours, hospitalized and medicated and dying of cancer, the adult children of his deceased wife and with whom he had a close and confidential relationship, instigated the process of his making a deathbed will, participating in every detail. Their actions, suspicious in the eyes of the law, created the presumption they had become Bob Noblin's sole beneficiaries due to undue influence.

Clear and convincing evidence opposing the presumption, from sources apart from the beneficiaries themselves and the lawyer selected and instructed by them, is required to create a jury question as to the will's validity. Otherwise, the will is a nullity as a matter of law. The Court must conclude no such evidence exists because none was offered at trial.

Other than themselves (who between them kept constant watch over the testator) and their chosen lawyer (who never offered Bob Noblin advice or even saw him), whose testimony cannot suffice to negative the presumption, the beneficiaries relied at trial on the testimony of a nurse whom they had asked to witness the signing of the will. She opined on testamentary capacity, albeit without foundation, but had no knowledge whatever of what had taken place in private between the beneficiaries and the testator. She offered not a word of testimony sufficient to rebut the already existing presumption. Thus, at the close

of the evidence, there being no jury issue, the trial court should have peremptorily instructed the jury to find for the contestants (heirs at law).*

This result is mandated by a long and unwaivering line of cases, including *Croft v. Alder*, 237 Miss. 713, 115 So.2d 683 (Miss. 1959), and *In re Estate of Holmes*, 961 So.2d 674 (Miss. 2007).

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*The trial court gave the jury erroneous and prejudicial instructions so that, in any event, the verdict below cannot stand.

Argument

The ultimate single issue in any will contest is *devisavit vel non* or "will or no will." Weems, *Wills and Administration of Estates in Mississippi*, § 8-1 (1988). Long established common sense principles of law mandate the answer to that inquiry in this case: there is no will.

The relationship between Bob Noblin and Sammy and Sheila was a fiduciary one and one of confidentiality. When, in blatant violation of the restraints and obligations inherent in such a relationship, they actively involved themselves in the preparation and signing of the will, it is presumed they unduly influenced the testator. The presumption of undue influence can be overcome only with clear and convincing evidence. Sammy and Sheila did not come close to meeting that standard. The presumption of law stands and is dispositive of this case.

I. The Court Must Reverse And Render For The Noblins Because The "Will" Was The Product Of Undue Influence.

A. A confidential relationship in fact existed between Bob Noblin and Sammy and Sheila.

The law on confidential relationships is well established in this State. A close relationship becomes a confidential or fiduciary relationship when (i) one party becomes dependent by reason of age or illness or otherwise and reposes trust

in the other party, and (ii) the party in whom trust is reposed is in position to have and exercise influence over the first party. *See, e.g., In Re Estate of Holmes*, 961 So.2d 674, 680 (Miss. 2007); *Murray v. Laird*, 446 So.2d 575, 578 (Miss. 1984); *Croft v. Alder*, 237 Miss. 713, 115 So.2d 683 (1959).

The existence of such a relationship between a testator and a beneficiary is particularly significant.[1] "[T]he law watches with the greatest jealousy transactions between persons in confidential relations." *Croft*, 115 So.2d at 687. Our jurisprudence is replete with instances where the Court has determined as a matter of law that such a relationship in fact existed between a testator and a beneficiary. One example is *Croft v. Alder* where the confidential relationship was held to exist between a testator (in very poor physical condition and health, and hospitalized when the will was signed) and a nephew/beneficiary (who during the testator's final months made frequent trips to visit the testator and to assist in his business and personal affairs). Another finding such a relationship to exist is *Holmes* where the granddaughter/beneficiary maintained a close relationship with the elderly testatrix, holding a power of attorney and handling her mail.

In this case, the Noblins proved the existence of a confidential relationship between Sammy and Sheila and Bob Noblin by overwhelming proof.

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[1]The relationship extends also to gifts, contracts and conveyances.

Sammy and Sheila had a close relationship with Bob Noblin. Sammy and Sheila and their friends who testified for them testified that Sammy and Sheila were very close to Bob Noblin, and that Bob Noblin actually treated them like a son and daughter. (Tr. 384, 421). Sammy lived with Bob Noblin from and after 2001. (Tr.157).

Sammy and Sheila were with Bob Noblin continuously from September 24th to October 3, 2003. Sammy took Bob Noblin to Sammy's doctor in Forest when he complained of physical problems. (Tr. 390). Sammy then took him to be admitted to the hospital in Forest. (Tr. 391-92). Sammy and Sheila took care of him while he was there. (Tr. 156). Sammy drove Bob Noblin from the hospital in Forest to Baptist Hospital in Jackson on September 29, 2003 because Noblin could not drive. (Tr. 158-59). Either Sammy or Sheila or both were with Bob Noblin continuously at the Baptist Hospital on September 29, 30, October 1, 2 and until 12:10 am October 3rd when Bob Noblin died. They took turns spending the night with him in the hospital. (Tr. 394-95).

Bob Noblin was dependent upon and trusted Sammy and Sheila; he was physically and mentally weak, and he was about to die. Upon arrival at Baptist Hospital, Bob Noblin was gravely ill. According to Dr. Grace Shumaker, Bob Noblin's oncologist, he had widespread, metastatic liver and pancreatic cancer and his condition worsened every day. (Tr. 194, 213). By October 1st, two days after his arrival at Baptist Hospital, a decision was made to stop treatment and

move him to a hospice facility. (Tr. 195). He was hospitalized for a week prior to his death, and in that week ate very little food. (Tr. 197). According to Sheila, Bob Noblin had nothing to eat on October 1st and 2nd. (Tr. 176). Bob Noblin was on pain medication off and on during the three days he lived at Baptist Hospital. Sammy testified that Bob Noblin was dependent on him and Sheila in the hospital for his care, personal needs and hygiene. (Tr. 170, 177, 403). Sammy and Sheila provided most of the information about Bob Noblin to his doctors and nurses. (Tr. 184-85). Bob Noblin's medical records, which were admitted into evidence, include the following about Bob Noblin's physical and mental condition. On September 30, 2003, the day after Bob Noblin was admitted and two days before he signed the "will," he was disoriented because he told his nurses that "he was waiting for his wife to bring him some clothes." (Exh. C-2, R. 217). His wife had been dead for nine years. (Tr. 402). On October 1, 2003, the day before the "will" was signed, nurses notes state that Bob Noblin was hallucinating and hearing voices, as reported by his "daughter" Sheila. (Exh. C-2, R. 220). Also on October 1, 2003, nurses noted that Bob Noblin was "very lethargic and non-participative." (Exh. C-2, R. 180). Dr. Shumaker testified that lethargic means decreased level of consciousness, and non-participative means he was not participating in the conversation his nurse was attempting to have with him. (Tr. 199).

The morning of October 2, 2003, the day the "will" was signed, Dr. Shumaker noted in Bob Noblin's chart that he was lethargic, his eyes were more

yellow from jaundice, and that he was not eating. (Exh. C-2, R. 181). Nurses' notes the afternoon of October 2nd show that at 2:00 pm, within the 1:00 pm to 3:00 pm window when Bob Noblin signed the "will," he complained of pain and was given Demerol intravenously. (Exh. C-2, R. 237).

The conclusive proof at trial of a confidential relationship was not lost on the trial judge who at one point stated on the record that the fact that there was a confidential relationship was "undisputed." (Tr. 433-34).[2]

B. Sammy and Sheila were actively involved with the preparation and execution of the "will."

The fact that beneficiaries occupy, with respect to the testator, a fiduciary or confidential relationship demands "close judicial scrutiny" but does not in and of itself raise a presumption of undue influence. But the presumption is raised and comes to the forefront when the beneficiaries are "actively concerned in some way with the preparation or execution" of the will. Put another way, the law categorizes as "suspicious circumstance" when, in addition to the confidential relation, beneficiaries take part "or participate in the preparation or procuring of the will." *Croft*, 115 So.2d at 686.

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[2]Later, in confused and erroneous rulings on proffered instructions, the trial court denied an instruction peremptorily confirming the confidential relationship and, instead, deferred to the jury to define the relationship. That was reversible error and is discussed in alternate point II, *infra*.

Sammy called an attorney to make a will for Bob Noblin.

Sammy testified that before Bob Noblin became sick in September 2003, he did nothing to help with Bob Noblin's business affairs. (Tr. 157-58). Sammy testified that on October 1st he called his lifelong friend, attorney Todd Sorey, in Forest on his cell phone from the hospital to ask that Sorey prepare Bob Noblin's will. Sammy was alone with Noblin in the hospital room during the call. (Tr. 160-62). Noblin did not talk to Sorey. (Tr. 162). Sorey grew up with Sammy and has always known him. (Tr. 123). Sorey had never done any legal work for Bob Noblin. (Tr. 141). When Sammy called Sorey on October 1st, Sorey had not even seen Bob Noblin in six to eight months. (Tr. 122).

Sammy actively involved himself with the content of the "will."

When Sammy called attorney Sorey on October 1st, he told Sorey that Bob Noblin wanted him to write a will leaving Bob Noblin's property to Sammy and Sheila. (Tr. 135). When Sammy called Sorey, he did not at first tell Sorey that Bob Noblin was in the hospital and was about to die. When Sorey told Sammy to make an appointment for Bob Noblin to meet with him about the will, only then did Sammy tell Sorey that Bob Noblin was in the hospital. (Tr. 124). Bob Noblin never wrote, called, met with, saw or even talked directly to Sorey. (Tr. 124, 128, 137, 140). All of the instructions to Sorey for the preparation and content of Bob Noblin's will came from Sammy.

Sammy and Sheila were involved in getting the "will" executed.

Sorey prepared the "will" as instructed by Sammy in the October 1st phone call. Sorey left Bob Noblin's will at his office the next day, October 2nd, to be picked up. Sheila picked up Bob Noblin's will at Sorey's office as instructed by Sammy and brought it to the hospital. (Tr. 166, 182). Sammy asked a nurse to help him get witnesses and a notary. (Tr. 166-67). Several nurses were asked to witness the will but refused. (Tr. 108). Sammy and Sheila were in the room with Bob Noblin when the "will" was signed. (Tr. 428). The "will" was signed the afternoon of October 2rd, sometime before 3:00 pm. (Tr. 109). None of the Noblins, who were Bob Noblin's blood relatives and who would have inherited his real property in Scott and Smith counties under the laws of descent and distribution, were present or were told about the "will" or its signing.

Sheila took possession of the executed "will."

After the "will" was signed by Bob Noblin on October 2, 2003, Sheila took possession of it and kept it. (Tr. 398).

Common sense teaches that persons who stand to gain all of a dying man's property should remain disconnected from the will process and leave involvement to persons devoted to the testator's interest and not their own. Even nonlawyers know instinctively that a will procured with the active involvement of those named

as beneficiaries could not possibly be "free from the taint of undue influence." See the discussion in *Croft*, 115 So.2d at 686-688. Yet, from start to finish, Sammy and Sheila were not only actively involved, they influenced everything having to do with the preparation, content, execution and possession of Bob Noblin's "will."

C. Undue influence on the part of Sammy and Sheila is presumed.

The reasons for the presumption of undue influence are obvious. Fiduciaries are in every instance obliged to look out for the interest of their confidant as opposed to themselves. A heightened duty is demanded when fiduciaries know they are caretakers for a dying and probably frightened person who is relying upon them for solace, care and comfort and, at the same time, hope or expect to be beneficiaries of that person's deathbed will.

Thus it is that, under the law, the will at issue on this appeal is *prima facie* void. The existence of confidential relations coupled with the active involvement of the beneficiaries creates the "presumption of invalidity." "[T]he law . . . will not permit [the resulting will] to stand, unless the circumstances show the most abundant good faith on the part of the beneficiaries . . . unless the [beneficiaries] show by 'clearest proof' that they took no advantage [of their influence] over the testator, and the [testator's] act was a result of his own volition and upon the fullest deliberation." *Croft*, 115 So.2d at 687.

Judicial appreciation of the "universally recognized" fact "that he who seeks to use undue influence does so in privacy," making it seldom possible to develop direct proof of undue influence, is a major reason for the presumption under circumstances such as those here. *See, e.g., In re Estate of Smith*, 827 So.2d 673, 676 (Miss. 2002), *citing Croft*. The presumption, underscored by the above rationale, has existed in this State for a least one hundred years, *see Jamison v. Jamison*, 96 Miss. 288, 298, 51 So. 130, 131 (1909), and "is the general rule in practically all jurisdictions." *Croft*, 115 So.2d at 686.

D. There is no clear and convincing evidence to rebut the presumption.

The presumption of undue influence with which Sammy and Sheila are confronted is not some abstract principle that a trial court and jury may easily brush aside. The presumption can be overcome by, and only by, *clear and convincing evidence*:

> that weight of proof which produces in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established, evidence so *clear*, *direct* and *weighty* and *convincing* as to enable the factfinder to come to *a clear conviction*, without hesitancy, of the truth of the precise facts of the case.

Johnson v. Bay City South Mortgage Company, 928 So. 2d 888, 892 (Miss. App. 2005) (emphasis added), citing *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 960 (5th Cir. 1995).

> "[C]lear and convincing evidence is such a high standard that even the overwhelming weight of the evidence does not rise to the same level."

Id.

This Court has outlined precisely what proponents/beneficiaries have to prove-- not perfunctorily or superficially-- but by clear and convincing evidence:

a) Good faith on their own part;

b) Testator's full knowledge and deliberation of his actions and their consequences; and

c) That the testator exhibited independent consent and action (with the "best way to prove this [being] by advice of a competent person disconnected from the [beneficiaries] and devoted solely to the testator's interest.").

See Mullins v. Ratcliff, 515 So.2d 1183, 1193 (Miss. 1987); *see also Murray*, *Holmes* and *Smith.*

Sammy and Sheila failed to prove any of these three elements by clear and convincing evidence.

1. Sammy and Sheila failed to prove that they acted in good faith by clear and convincing evidence.

The important factors in determining whether Sammy and Sheila proved by clear and convincing evidence that they acted in good faith are:

- Who initiated seeking preparation of a will
- Where the will was executed and in whose presence

- The consideration paid for the will and who paid for it
- The secrecy or openness of the will's execution

Murray, 446 So.2d 575, 578 (Miss. 1984); *In re Estate of Pope*, 2008 WL 2097593 at 5 (Miss. App. 2008). Sammy called the attorney to prepare the will on his cell phone from the hospital. Sammy told the attorney how Bob Noblin wanted to dispose of his property. Sammy was the filter and go between for Bob Noblin and Sorey for initiating the will and its content. Sheila picked up Bob Noblin's will the next day and brought it to the hospital. Sammy initiated getting witnesses and a notary for the "will." Sammy and Sheila were the only ones "close to" Bob Noblin present when the "will" was signed in Bob Noblin's hospital room at Baptist Hospital in Jackson. Sammy and Sheila attempted to vouch for their own good faith by saying they were doing what Bob Noblin asked them to do: that Bob Noblin told them he wanted a will, wanted to leave them everything, and wanted them to call Sorey. This testimony cannot suffice to rebut the already existing presumption, else any beneficiary so situated could tender his or her self-serving testimony and make the presumption effectively meaningless. This Court has plainly found "the testimony of the proponents or interested parties is not sufficient to rebut the presumption of undue influence." *Holmes*, 961 So.2d at 681, *citing Pallatin v. Jones*, 638 So.2d 493, 494 (Miss. 1994), and *In re Estate of Smith*, 827 So.2d 673, 680 (Miss. 2002)("evidence to rebut the presumption must come from another source" other than proponents and the attorney who drafted the will).

The consideration Sorey expected for drafting the will was to come from the estate, *i.e.* from Sammy and Sheila as the sole beneficiaries. Sorey put a clause in the will that all debts of the estate would be paid first. (Tr. at 139). True, Sorey also testified it was his intention to bill Bob Noblin but that after-the-fact "intention" was never expressed to Bob Noblin. (Tr. at 138-39).

2. Sammy and Sheila failed to prove by clear and convincing evidence that the "will" leaving everything to them was made with Bob Noblin's full knowledge and deliberation of his actions and their consequences.

"Full knowledge and deliberation of his actions and their consequences" means, among other things, the testator must have given thoughtful deliberation to:

- his total assets and their general value.
- who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect that prior will or natural distribution.
- who was being excluded or included by the proposed will.
- the extent of his dependency upon the proposed beneficiaries and how susceptible he was to their influence.

Holmes, 961 So.2d at 684-87.

On these essential elements of any case to rebut the presumption of undue influence, the record is bare indeed. These fundamentals are nowhere to be found in the record, not even in the testimony of Corely Callum, the Baptist Hospital

nurse/subscribing witness who was called to testify on the question of testamentary capacity.[3]

3. Sammy and Sheila failed to prove through any uninterested witness that Bob Noblin exhibited independent consent and action or had genuine advice from a competent person who was not connected to him.

It has been shown above that Mississippi law leaves no doubt as to the threefold scope of clear and convincing rebuttal evidence demanded of persons who are presumed to have unduly influenced a will. Here, Sammy and Sheila fall short on every count. First, they offered no independent probative evidence of good faith on their part. Second, they offered no evidence at all addressing Bob Noblin's knowledge and deliberations concerning the asserted will and its consequences. Third, they offered no clear and convincing evidence that Bob Noblin exhibited independent consent and action. *Murray*, 446 So.2d at 579. *See also In re Estate of Pope*, *supra,* at 5-6; *Holmes*, 961 So.2d at 684-85.

This Court has repeatedly emphasized that probative evidence, if there is any, that the testator exhibited independent consent and action can only come from disinterested sources. It cannot come from Sammy and Sheila. It cannot come from Sorey. It will be shown below it did not come from Corely Callum. Consequently, there are no disinterested witnesses from whose testimony the Court

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[3]Ms. Callum's testimony is detailed later in this Brief.

"can conclude that [the will] represented the true, untampered, genuine interest of" Bob Noblin.[4]

The testimony of Corely Callum, Baptist Hospital employee nurse/subscribing witness, does not provide Sammy and Sheila with clear and convincing evidence that could arguably rebut the presumption. She was a nurse in the oncology unit at Baptist Hospital. She does not remember whether she treated Bob Noblin or not, but said:

> I don't recall any specific time that I took care of him, but I'm sure that I probably did at some point during his care.

(Tr. 88). Callum was asked to be a witness to the will after several other nurses refused. (Tr. 108). When she got to Bob Noblin's room that afternoon, Sammy and Sheila were there in Bob Noblin's hospital room with the "will," ready for it to be signed. (Tr. 89). The "will" was signed the afternoon of October 2nd, sometime before 3:00 pm. (Tr. 109). A fair reading of Callum's testimony shows the following and nothing more:

- Callum had a conversation with Bob Noblin. She said he verified that he knew what he was doing and what was taking place.

---

[4]Bob Noblin's oncologist, Dr. Grace Shumaker, testified at trial. Although she saw Bob Noblin every day he was at Baptist Hospital, she could not or would not say he had testamentary capacity. (Tr. 230). Proponents also called Gail Young, who notarized the "will." She did not remember Bob Noblin or anything about the events of that day other than the witnesses' signatures. (Tr. 116). Nurse Lynn Thornton, the other witness to the "will," was not called by Sammy and Sheila.

- She read the one and one-quarter page "will."
- Callum said Bob Noblin did not appear to be under the influence of any drugs.
- She believed Bob Noblin knew what he was doing and what he left them.
- She satisfied herself that she was doing what Bob Noblin wanted done.

(Tr. 91, 99, 104).

She made her judgment (conclusions) based on questions she asked Bob Noblin. But she could not recall a single one of those questions.

By her own admission, Callum did not remember the specifics of her conversation with Bob Noblin. (Tr. 99 & 103). She did not recall asking Sammy and Sheila if they were Bob Noblin's only relatives. (Tr. 104). Callum assumed Sammy and Sheila were Bob Noblin's natural son and daughter, which was reinforced when she read the reference in the "will" to Sammy and Sheila as Noblin's son and daughter. (Exh. P-1; Tr. 105-107).

Testimony from this witness that Bob Noblin "knew what he was doing" could arguably be probative of testamentary capacity. It has, however, no probative value on the key issue of undue influence. It is without foundation. The witness had no knowledge of the underlying facts, *i.e.* the "antecedent agencies," by which the "will" was formulated. She had no way to know anything about the prior actions of Sammy and Sheila leading up to the execution of the document,

actions carried out in private and actions presumed by law to constitute undue influence.

In *Croft v. Alder*, Justice Ethridge clearly highlights the practical reality that a subscribing witness would seldom have any knowledge of the "antecedent agencies" by which the writing was procured including, specifically, any preceding actions or activities by the beneficiaries. The result is that the courts expect subscribing witnesses to attest the execution of a document and testify as to the testamentary capacity of the testator– but not "to testify as to the antecedent agencies by which the execution of the paper was secured." *Croft*, 115 So.2d at 689.

Consistent with the realities of what Callum could be expected to know or perhaps have an opinion about, as contrasted with events to which she was in no way privy, no one asked her at trial about facts relating to proof required to overcome the presumption of undue influence: for example, whether Bob Noblin was aware of this total assets and their value; whether he understood who his natural heirs were and that this "will" disinherited them; the extent of his dependence upon Sammy and Sheila and his susceptibility to influence from them; and whether he had the benefit of any independent advice.

The exact same analysis applies to Todd Sorey. His testimony cannot affect the issue of undue influence because he is interested. In addition, however, nothing he has to say can "suffice to rebut the already existing presumption

[because] he naturally would have had no knowledge of any precedent activities by" Sammy and Sheila. *Croft*, 115 So.2d at 689. By way of illustration: Sorey did not know what had occurred between Sammy and Bob Noblin before Sammy called him or, indeed, whether Bob Noblin had engaged in, or even been in position to engage in, full independent deliberation or, further, whether Bob Noblin ever had any opportunity to obtain independent advice. (Tr. 144).[5]

The lawyer who drafted the disputed will in *Croft*, described in the opinion as "able and respected," did so at the beneficiary's request but– to his credit– went to the hospital where the document was signed in his presence.[6] Even so his testimony– as a matter of law– did not "negative the presumption of undue influence resulting from 'antecedent agencies' and prior actions by the principal beneficiary who was in the confidential relation." *Id.*

---

[5]Actually, Sorey knew any client– particularly one in Bob Noblin's condition– is due professional advice from a lawyer taking on the responsibility of drafting a will. Sorey either should have declined to write the will or, at a minimum, should have met face to face with Bob Noblin:

Q. Why would you have gone over there to talk with Mr. Bob?

A. I guess just so that I could see that this is what he wanted to do and potentially keep us from being here today.

(Tr. 128-29.). Sorey's "practice" when preparing a will for an elderly person who comes to his office with a beneficiary is to have the beneficiary leave to enable the lawyer to talk to and advise the testator alone and independently. (Tr. 132).

[6]Which, respectfully, Todd Sorey should have done, or decline Sammy's invitation to act as a mere scrivener.

Croft does not stand alone in disallowing the arranged-for lawyer to bolster his actions by opining on undue influence. In *Smith*, 827 So.2d at 684, videotaping the signing and the testator acknowledgment of who his relatives were and why he did not want them to take anything under the will did not change the rule totally discounting the lawyer's testimony. The Court emphasized there was no proof the testator received advice from an independent source disconnected with the beneficiary. To the same effect is the *Pope* case from the Court of Appeals where the attorney selected by the beneficiary, unlike Mr. Sorey, met alone with the testator but never provided him with independent advice.

There is, effectively, no evidence entitled to consideration that would serve to undermine the presumption– certainly no clear and convincing evidence. Therefore, there is no will.

II. Alternatively, The Court Must Reverse And Remand Because The Noblins Were Materially Prejudiced by Erroneous Instructions.

A. The existence of the confidential relationship is not disputed, and making it a jury question was reversible error.

The trial court erred in submitting to the jury the question of whether a confidential relationship existed because there was no evidence to the contrary. During argument on renewal of directed verdict motions after both sides rested, the trial court remarked on the record to the effect that existence of a confidential

relationship was "undisputed," *i.e.*, that the evidence "fits squarely within the definition of confidential relationship." (Tr. at 433-34). The Noblins subsequently offered jury instruction C-9, which said:

> The Court instructs the jury that you shall find that a confidential relationship existed between the testator, Robert Noblin, and the proponents, Sammy Burgess and Sheila McDill.

(R. 424). The trial court refused to give this instruction (Tr. 444-45), and instead instructed the jury that it should decide whether a confidential relationship existed. (R. 396-97).

The verdict returned for Sammy and Sheila was a general one. (R. 435). There is no way to know whether the jury decided the case on the erroneous premise– in contradiction of undisputed evidence– that a confidential relationship did not exist. There is no way to know whether the jury even reached the proposition submitted by the court that Sammy and Sheila could overcome the presumption of undue influence only by clear and convincing evidence. Therefore, the failure to instruct the jury that a confidential relationship existed as a matter of law was a prejudicial error.

B. Testamentary capacity was a jury issue, and its peremptory disposition by the trial court was reversible error.

The trial court directed a verdict for Sammy and Sheila on Bob Noblin's testamentary capacity (Tr. 433) and so instructed the jury. (R. 421). The standard of review for a directed verdict is familiar:

> Our standard of review for a directed verdict is clear. This court will consider the evidence in the light most favorable to the non movement, giving that party... the benefit of all favorable inferences that may be reasonably drawn from the evidence. We must decide if the facts so considered point so overwhelmingly in favor of the movant that reasonable jurors could not have arrived at a contrary verdict. Thus, if reasonable jurors could not have arrived at a different verdict, the grant of a directed verdict must be affirmed on appeal. On the other hand, if there is substantial evidence, that is, evidence of such quality and weight that reasonable and fair-minded jurors in the exercise of impartial judgment might have reached different conclusions, we cannot affirm the grant of a directed verdict.

Forbes v. General Motors Corp., 935 So.2d 869, 872 (Miss. 2006). Where there are conflicts in the record over the testator's mental capacity, the jury should be entitled to weigh that evidence and the credibility of accounts of the testator's mental state.

As this court has stated on many occasions, a determination of testamentary capacity is based on three factors:

> 1) Did the testator have the ability at the time of the will to understand and appreciate the effects of his act?
>
> 2) Did the testator have the ability at the time of the will to understand the natural objects or persons to receive his bounty

and their relation to him?

3) Was the testator capable of determining at the time of the will what disposition he desired to make of his property?

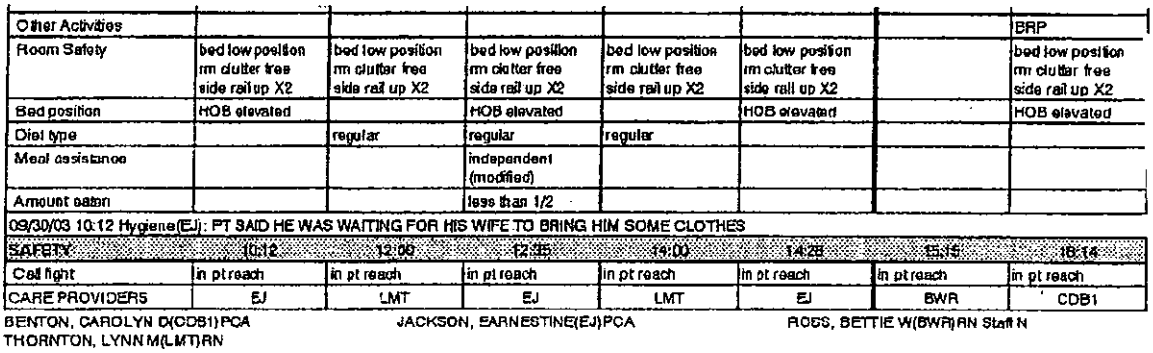
Holmes, 961 So.2d 674, 679 (Miss. 2007).

The proponents of the will meet their *prima facie* burden of proof by the offering and receipt of the will into evidence and the record of probate. The burden shifts to the contestants to overcome the *prima facie* case, but the burden of proof remains with the proponents to show by a preponderance of the evidence that the testator had capacity. *Holmes*, 961 So.2d at 679-80.

Bob Noblin died on October 3, 2003 at 12:10 am, less than ten hours after he signed the purported will. He had terminal, widespread, metastatic liver cancer. He was hospitalized for a week prior to his death, and in that week ate very little food. According to Sheila, the day Sammy called Sorey and the next day when he signed the will, Bob Noblin had had nothing to eat. (Tr. 176). Noblin was on pain medication off and on during the three days he lived at the Baptist Hospital in Jackson. He was confined to his room and his bed. Noblin's medical records, which were admitted into evidence, show the following about Bob Noblin's physical and mental condition.

On September 30, 2003, the day after Noblin was admitted and two days before he signed the purported will, he was disoriented because he told his nurses (not Callum) that "he was waiting for his wife to bring him some clothes." Bob

Noblin's wife had been dead for nine years.



Other Activities							BRP
Room Safety	bed low position rm clutter free side rail up X2	bed low position rm clutter free side rail up X2	bed low position rm clutter free side rail up X2	bed low position rm clutter free side rail up X2	bed low position rm clutter free side rail up X2		bed low position rm clutter free side rail up X2
Bed position	HOB elevated		HOB elevated		HOB elevated		HOB elevated
Diet type		regular	regular	regular			
Meal assistance			independent (modified)				
Amount eaten			less than 1/2				

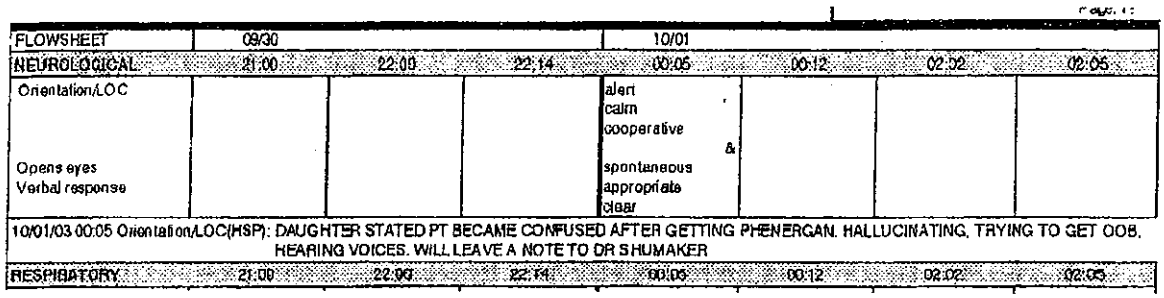
09/30/03 10:12 Hygiene(EJ): PT SAID HE WAS WAITING FOR HIS WIFE TO BRING HIM SOME CLOTHES

SAFETY	10:12	12:00	12:35	14:00	14:28	15:15	16:14
Call light	in pt reach	in pt reach	in pt reach	in pt reach	in pt reach	in pt reach	in pt reach
CARE PROVIDERS	EJ	LMT	EJ	LMT	EJ	BWR	CDB1

BENTON, CAROLYN D(CDB1)PCA JACKSON, EARNESTINE(EJ)PCA ROSS, BETTIE W(BWR)RN Staff N
THORNTON, LYNN M(LMT)RN

(Exh. C-2, R. 217).

On October 1, 2003, the day before the purported will was executed, Bob Noblin was hallucinating and hearing voices, according to "daughter" appellee Sheila:



FLOWSHEET	09/30			10/01			
NEUROLOGICAL	21:00	22:00	22:14	00:05	00:12	02:02	02:05
Orientation/LOC				alert calm cooperative			
Opens eyes Verbal response				& spontaneous appropriate			
				clear			

10/01/03 00:05 Orientation/LOC(HSP): DAUGHTER STATED PT BECAME CONFUSED AFTER GETTING PHENERGAN. HALLUCINATING, TRYING TO GET OOB, HEARING VOICES. WILL LEAVE A NOTE TO DR SHUMAKER

RESPIRATORY	21:00	22:00	22:14	00:05	00:12	02:02	02:05

(Exh. C-2, R. 220). At trial, Sheila did not remember any hallucinations. (Tr. 425). During argument at trial on appellees/proponents' motion for a directed verdict on Bob Noblin's capacity, the court remarked that "the testimony about the hallucinations concern me." (Tr. 307). Also on October 1, 2003, nurses (not Callum) noted that Noblin was "very lethargic and non-participative."

Date	NOTE PROGRESS OF CASE, COMPLICATIONS, CONSULTATIONS, CHANGE IN DIAGNOSIS, CONDITION ON DISCHARGE, INSTRUCTIONS TO PATIENT
	Brief Note
10/1/03	64 y/o WM c Hx HTN recently — seen for consult - metastatic
@1150	transferred from Dr. John C. Lee — Adeno CA ? primary
(GI)	+ Holiday Tremonde Hospital
	2° to metastatic lesions noted on CT/US. Then (+ ⊕ LFT's & jaundice)
	Pt. is very lethargic & nonparticipative currently
	Info obtained from pts. step-daughter.
	Wt loss ≈ 40# since 1/03 → diarrhea
	+ ↑ fatigue reported over last 8-9 months.

(Exh. C-2, R. 180). At trial, Bob Noblin's treating oncologist, Dr. Grace Shumaker, testified that lethargic means "decreased level of consciousness," and that non-participative means he was not participating in the conversation his nurse was attempting to have with him. (Tr. 199). Also on that date, the nurses (not Callum) noted that Sammy and Sheila understood there was "little hope of survival."

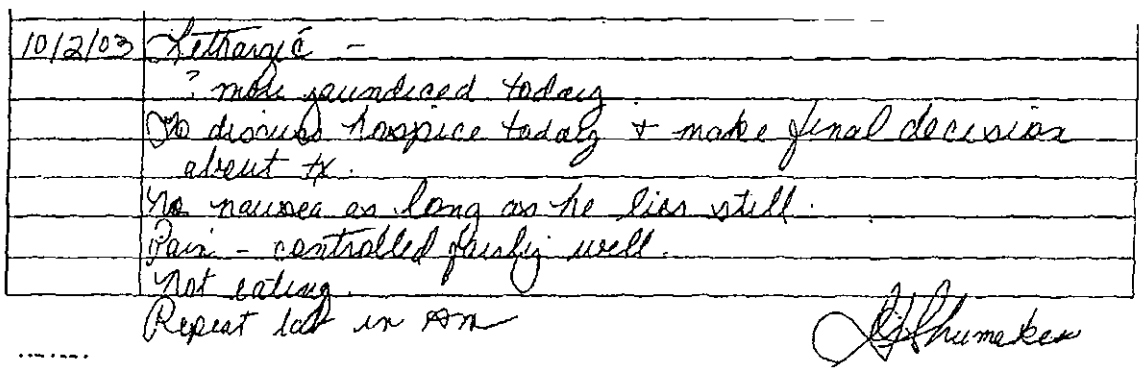
Plan: Family wishes to speak c Dr Shumaker re: treatment options prior to making decision on colonoscopy. They understand there is little hope of survival (as previously discussed c M.D.) & do not want to put him thru a procedure if there is little or no benefit long term. They understand tx is usually based on 1° site of tumor.

MD1094

[redacted] PROGRESS NOTES [redacted]

(Exh. C-2, R. 180).

On October 2nd, the day Bob Noblin signed the purported will, there were several entries in his medical records that bring into question his mental capacity. Dr. Shumaker saw Bob Noblin that day and wrote in his charts that he was "lethargic," "more jaundiced today" (meaning his eyes were more yellow), that his pain was controlled "fairly well" and that he was "not eating."



(Exh. C-2, R. 181). Sheila testified that Noblin had nothing to eat on October 1st or 2nd. (Tr. 176). Corroborating Dr. Shumaker's observations, nurses' (not Callum's) notes the morning of October 2, 2003 stated that Noblin was "very lethargic." (Exh. C-2, R. 237). The same record shows that at 2:00 pm, within the noon to 3:00 pm window when Bob Noblin signed the "will," he complained of pain and was given Demerol intravenously:

BAPTIST MEDICAL CENTER

NOBLIN,ROBERT H
SHUMAKER,GRACE G 426-78-6681
0327200154 09/29/03 05/27/34
M 69Y
0-10-19-68-80

24 HOUR NURSING RECORD

DATE 10.2.03

POST-OP DAY # _____ (If Applicable)

TIME	NURSE'S NOTES	TIME	NURSE'S NOTES
0945	Pt in bed sleeping. Easily aroused very lethargic. IV infusing @ left site. No S/S infiltration. Pitting edema Rt. Family @ BS. no C/O's.		
1400	Pt. C/O generalized pain unable to rate. Gave 15 mg Demerol IVP.		
1430	Pt resting - easily aroused. No apparent distress.		

(Exh. C-2, R. 237).

Finally, Bob Noblin's October 2nd "signature" and date on the purported will compared to his signature on an admission record on September 29th shows he was so sick and weak that he could not write legibly. The jury should have been permitted to consider whether his signature and date on October 2nd indicated a lack of mental capacity.

Bob Noblin's signature when he was admitted to Baptist Hospital on September 29, 2003:

I hereby state that no guarantees have been made to me concerning the results of this test; that I have fully and completely read this document; that I fully understand same and that all blanks and spaces have been filled in prior to my signing.

Patient Signature

Relationship to Patient

Witness Signature | 9.25-03 Date | 3:30 A.M./P.M. Time

(Exh. C-2, R. 154).

Bob Noblin's signature three days later, on October 2, 2003:

IN WITNESS WHEREOF, I have executed the foregoing Will at Jackson, Mississippi, on this the 2 day of October, 2003.

Robert H. Noblin

(Exh. P-1).

All of these documents and the testimony of Dr. Shumaker create a substantial question of fact about Bob Noblin's mental capacity. Considering this evidence in the light most favorable to the Noblins and giving them all favorable inferences, there is evidence in this record that could have led jurors to a different conclusion about Bob Noblin's capacity to execute a will on October 3, 2003. Certainly, the jury should have been permitted to weigh and consider this evidence

against the conclusory, non-factual testimony and credibility of Sammy and Sheila's only uninterested witness, nurse Callum. Callum's conclusory testimony that Bob Noblin had testamentary capacity lacks foundation and is not probative. She remembered no specifics about her conversation with Bob Noblin that day. (Tr. 99, 103).

Attorney Sorey's testimony about Bob Noblin's testamentary capacity came from a single phone call with Sammy in Bob Noblin's hospital room. Sorey asked a couple of questions, which Sammy repeated to Bob Noblin. Sorey claims he heard Bob Noblin speak in response to the questions Sammy asked. His only testimony was that he asked Sammy to ask Bob Noblin how he wanted to leave his property. According to Sorey, Sammy asked Bob Noblin that question and Noblin "basically said he wanted to leave to Sammy and Sheila." (Tr. 126-27). Sorey asked Sammy to ask Bob Noblin who Sammy and Sheila were and the response was, they are my son and daughter. (Tr. 127). Sorey has no idea whether Bob Noblin had testamentary capacity or not. There is a difference between saying Bob Noblin wanted to leave everything to Sammy and Sheila and whether Bob Noblin had testamentary capacity. As with Callum, Sorey gave no factual testimony probative of whether Bob Noblin understood and appreciated what he was doing; that he understood to whom he was leaving his entire estate and their relation to him; and whether he was capable of determining what disposition he wanted to make of his property.

Whether the entries in Bob Noblin's medical records and the testimony of Dr. Shumaker the day of October 3, 2003 are more persuasive than nurse Callum's testimony is not the issue. The issue is whether that evidence, giving the Noblins the benefit of all reasonable inferences, could have led jurors to reach a different conclusion about Bob Noblin's testamentary capacity. The Noblins submit that it is and that the trial judge erred in granting a directed verdict against them on this issue. For these reasons, and if the Court does not reverse and render for the Noblins on the issue of undue influence, the case should be reversed and remanded for a new trial.

Conclusion

Beneficiaries named in a will subsequently invalidated by law can be expected to argue that the result conflicts with and unfairly ignores the mutual affection between themselves and the testator and his desire to demonstrate appreciation for their care and comfort. That is a jury argument, long discarded in law and equity in will contests and analogous controversies.

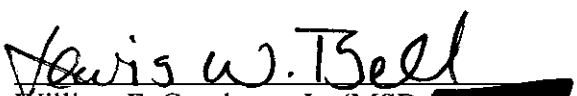
The problem inherent in their protestation is that they chose to inject themselves into the procurement of the will, creating suspicion and the presumption of undue influence. That the burden to overcome is heavy– as illustrated by the proponents' inability here to make out a jury case– affords no

basis for genuine complaint.

Courts everywhere hold that those who presumptively abuse their position of trust must abide by the consequences. This case is no different. The will is presumptively the product of undue influence, and it is the province and duty of the Court to not let it stand. *See* the reasoned discussion of fiduciary relation in 2 Pomeroy, *Equity Jurisprudence* (4th Ed.), found in *Croft v. Alder* at 687.

The judgment below should be reversed and rendered. Alternatively, the judgment should be reversed and the case remanded for a new trial.

Respectfully submitted,



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ATTORNEYS FOR APPELLANTS

Dated: April 28, 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 28th day of April 2009.

Lewis W. Bell

Lewis W. Bell