THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Leroy J. Howard and John Nasser, Appellants,

v.

JoAnn Nasser, Joey Nasser, Christina Nasser, Ashley Nasser, Leander Nasser, Mary Kaye Barki and Debbie Coggins, Defendants, of whom JoAnn Nasser is, Respondent.

Appeal From Greenville County
Charles B. Simmons, Jr., Acting Circuit Court Judge

Opinion No. 3986
Heard December 8, 2004 – Filed May 2, 2005

REVERSED AND REMANDED

Ben G. Leaphart, of Greenville, for Appellants.

William Wallace Culp, III, of Greenville, for Respondent.

BEATTY, J.: In this will contest case, Leroy J. Howard and John Nasser (collectively Appellants) appeal the circuit court's order granting summary judgment for JoAnn Nasser (Respondent), surviving spouse of the decedent Leroy Nasser (Nasser) and personal representative of his estate.

Appellants argue the will was invalid because it was the product of undue influence by Respondent. We reverse and remand.

FACTS

Leroy Howard and John Nasser, the decedent's nephews, brought an action to contest an April 10, 2000 will of Nasser. The will was properly executed and was admitted to probate. Nasser's surviving spouse and second wife, Respondent, was appointed as personal representative of his estate. The will left nothing to either Leroy Howard or John Nasser. Instead, Nasser gave $10,000 to each of his great nieces and the remainder of his estate to Respondent. Additionally, Nasser gave Respondent a power of attorney in October of 1999, specifically revoking a previous power of attorney in favor of Leroy Howard.

Nasser had executed two prior wills. The first will, executed on July 30, 1985, left everything to his first wife and appointed Leroy Howard as his personal representative. After Nasser's first wife died, he executed another will, dated May 19, 1995, that left $50,000 to John Nasser and the residue to Leroy Howard. Leroy Howard was also appointed personal representative of Nasser's estate.

In August of 1998, Nasser was injured in a fall while in Roanoke, Virginia. Leroy Howard drove Nasser back to Greenville, where he was admitted to the St. Francis Hospital System and released in September of 1998. While recovering from his fall, Nasser met Respondent, who was employed as a housekeeper at the hospital. Respondent obtained a divorce from her first husband, from whom she had been separated for approximately ten years, in April of 1999. On May 24, 1999, Respondent and Nasser were married. The will giving rise to this litigation was executed on April 10, 2000. Nasser died as a result of pancreatic cancer and cirrhosis on May 19, 2000.

Appellants filed a petition in probate court, alleging causes of action for undue influence, lack of capacity, fraud, and tortious interference with an expectancy to inherit. Respondent moved for summary judgment on all

duress, mistake, revocation, or lack of testamentary intent or capacity."). In analyzing this code section, our supreme court has explained:

> When the formal execution of a will is admitted or proved, a prima facie case in favor of the will is made out, and the burden is then on the contestants to prove undue influence, incapacity or other basis of invalidation. The contestants continue to bear the burden of proof throughout the will contest. In determining whether the contestants sustained such burden, the evidence has to be viewed in the light most favorable to the contestants.

Calhoun v. Calhoun, 277 S.C. 527, 530, 290 S.E.2d 415, 417 (1982).

"Undue influence may be proved by circumstantial evidence, but the circumstances relied on to show it must be such as taken together point unmistakenly and convincingly to the fact that the mind of the testator was subjected to that of some other person, so that the will is that of the latter and not of the former." Havird v. Schissell, 252 S.C. 404, 410-11, 166 S.E.2d 801, 804 (1969) (citations omitted); In re Last Will and Testament of Smoak, 286 S.C. 419, 424, 334 S.E.2d 806, 809 (1985) ("A will contest based on alleged undue influence is most often adjudicated on the basis of circumstantial evidence.").

"Generally, in cases where a will has been set aside for undue influence, there has been evidence either of threats, force, and/or restricted visitation, or of an existing fiduciary relationship." Russell v. Wachovia Bank, N.A., 353 S.C. 208, 217, 578 S.E.2d 329, 333 (2003). "'A confidential or fiduciary relationship exists when one imposes a special confidence in another, so that the latter, in equity and good conscience, is bound to act in good faith and with due regard to the interest of the one imposing the confidence.'" In re Estate of Cumbee, 333 S.C. at 672, 511 S.E.2d at 394 (quoting Brown v. Pearson, 326 S.C. 409, 422, 483 S.E.2d 477, 484 (Ct. App. 1997)).

Both parties acknowledge that in contested deed cases a presumption of invalidity arises if the contestants of the deed present evidence that a confidential or fiduciary relationship existed between the grantor and the grantee. See Middleton v. Suber, 300 S.C. 402, 405, 388 S.E.2d 639, 641

(1990) (recognizing that where a "confidential relationship" exists between a grantor and a grantee, the deed is presumed invalid and the burden is upon the grantee to establish the absence of undue influence); Bullard v. Crawley, 294 S.C. 276, 280-81, 363 S.E.2d 897, 900 (1987) ("Undue influence in the procurement of a deed may be shown in two ways. The party challenging the deed may show the existence of a confidential relationship between the grantor and the grantee. Once a confidential relationship is shown, the deed is presumed invalid. The burden then shifts to the grantee to affirmatively show the absence of undue influence."); Hudson v. Leopold, 288 S.C. 194, 196, 341 S.E.2d 137, 138 (1986)("A fiduciary relationship between the grantor and grantee may give rise to a presumption of undue influence, thus shifting the burden of proof to the grantee to rebut the presumption.").

However, because the instant case involves a will, the central question in this appeal is whether this presumption, which affects the burden of proof, is applicable in the context of a contested will. The parties have not presented nor has our research revealed any case law providing definitive guidance on this issue. However, a recent case of our supreme court appears to implicitly recognize that the presumption of invalidity in deed cases applies to will cases. Dixon v. Dixon, 362 S.C. 388, 608 S.E.2d 849 (2005).

In Dixon, Mother, who was elderly, conveyed her property to Son. At the same time the deed was executed, Mother signed an agreement prepared by Son whereby he agreed to care for Mother and maintain her residence. Following a confrontation approximately three years later, Mother asked Son to leave her home, changed the locks on the home, and requested that Son re-convey the title to the property to her. When Son refused, Mother filed an action to set aside the deed. Mother claimed undue influence as one of her grounds challenging the deed. Specifically, she asserted that because she and Son were in a confidential relationship, Son had the burden of proving that he did not unduly influence her and he failed to meet that burden. As a threshold matter, our supreme court found a confidential relationship existed between the parties. The court ultimately concluded that Son proved that he did not unduly influence Mother. In reaching this decision, the court utilized the principles of undue influence applicable in contested will cases. The court relied on precedent from other jurisdictions which has found that "the analysis is the same regardless of whether the underlying document sought to

be set aside on the grounds that the plaintiff was unduly influenced is a will or a deed." Dixon, 362 S.C. at 398 n.7, 608 S.E.2d at 854 n.7. Based on these cases, the court recognized "[m]ost of our jurisprudence on the issue of undue influence involves a contestant seeking to set aside a will, rather than a deed . . ., nonetheless, we find no reason why this discrepancy should change our analysis." Id.

In addition to Dixon, we find secondary authority supports the application of the presumption to contested will cases. Concerning this issue, the Restatement of Property provides in relevant part:

> A presumption of undue influence arises if the alleged wrongdoer was in a confidential relationship with the donor and there were suspicious circumstances surrounding the preparation, formulation, or execution of the donative transfer, whether the transfer was by gift, trust, will, will substitute, or a donative transfer of any other type. The effect of the presumption is to shift to the proponent the burden of going forward with the evidence, not the burden of persuasion. The presumption justifies a judgment for the contestant as a matter of law only if the proponent does not come forward with evidence to rebut the presumption.

Restatement (Third) of Property: Wills and Other Donative Transfers § 8.3 cmt. f (2003) (emphasis added).

We interpret the foregoing to mean that if the contestants of a duly executed will provide evidence that a confidential/fiduciary relationship existed sufficient to raise the presumption, the proponents of the will must offer evidence in rebuttal. We emphasize that although the proponents of the will must present evidence in rebuttal, they do not have to affirmatively disprove the existence of undue influence. Instead, the contestants of the will still retain the ultimate burden of proof to invalidate the will. See S.C. Code Ann. § 62-3-407 (Supp. 2004) ("Parties have the ultimate burden of persuasion as to matters with respect to which they have the initial burden of proof."); Calhoun, 277 S.C. at 530, 290 S.E.2d at 417 ("The contestants continue to bear the burden of proof throughout the will contest."); Smith v.

have any of his money; and (5) Respondent denied she used Nasser's power of attorney, restricted his family visits, or monitored his telephone conversations.

Because there exists a conflict in the evidence, thus creating a genuine issue of material fact, we find the circuit court improperly granted summary judgment in favor of Respondent. See Byrd v. Byrd, 279 S.C. 425, 431, 308 S.E.2d 788, 791-92 (1983) (finding in will contest case that issue of undue influence was properly submitted to the jury where: testator was physically and mentally infirm prior to and contemporaneous with the execution of the will; son, who was the principal beneficiary of the will and in a confidential/fiduciary relationship with testator, threatened to place testator in a nursing home and attempted to restrict visits between testator and his other children; and the will was executed less than six months prior to testator's death); Moorer, 212 S.C. at 149, 46 S.E.2d at 681-82 (holding issue of undue influence in contested will case was properly submitted to the jury where there was evidence that testator's son was in a confidential/fiduciary relationship with his mother, mother was in fear of him, and he indicated an intention to procure for himself her estate).

Again, we emphasize that the burden of proof as to undue influence remains on Appellants throughout the will contest. In reversing the circuit court, we offer no opinion regarding Appellants' success on the merits. We merely find that Appellants offered sufficient evidence to survive summary judgment.

Accordingly, the decision of the circuit court is

REVERSED AND REMANDED.

HUFF, J. and CURETON, A.J.