

**SUPREME COURT OF MISSOURI**

**RICHARD E. IVIE, JIMMIE R. IVIE, )  
LADONNA SMALL and BERNARD IVIE, )**

**Plaintiffs/Respondent, )**

**vs. )**

**Appeal No. SC93872**

**ARNOLD L. SMITH and SIDNEY SMITH, )**

**Defendants/Appellants, )**

**REGINALD E. YOUNG, SUCCESSOR )  
TRUSTEE OF THE PATRICIA PARKER )  
WATSON TRUST DATED MAY 9, 2002, )  
and REGINALD E. YOUNG, PERSONAL )  
REPRESENTATIVE OF THE ESTATE OF )  
PATRICIA PARKER WATSON, )  
DECEASED, )**

**Defendants. )**

---

**Appeal from the Circuit Court of  
Scott County, Missouri – 33<sup>rd</sup> Judicial Circuit  
Honorable Benjamin F. Lewis, Special Judge**

---

**SUBSTITUTE BRIEF OF RESPONDENTS  
RICHARD E. IVIE, JIMMIE R. IVIE, LADONNA SMALL  
and BERNARD IVIE**

---

**For Respondents:  
Bruce A. Lawrence #31020  
R. Kye Lawrence #61874  
Lawrence & Lawrence, L.L.C.  
250 N. Kingshighway, P.O. Box 2001  
Sikeston, MO 63801  
Tel: 573-471-5554 Fax: 573- 471-9755  
Email: [blawrence@sikestonattys.com](mailto:blawrence@sikestonattys.com)  
[klawrence@sikestonattys.com](mailto:klawrence@sikestonattys.com)**

**RESPONDENTS REQUEST ORAL ARGUMENT**

**TABLE OF CONTENTS**

	<u>Page</u>
Table of Authorities .....	iii
Jurisdictional Statement.....	1
Statement of Facts.....	2
A.    Procedural History in Trial Court.....	2
B.    Background Information.....	3
C.    Testimony of Witnesses, Medical Records and Deposition Testimony.....	4
D.    Trust and Non Trust Assets.....	39
Argument.....	41
Standard of Review.....	41
Point I.    First Trust Amendment/Undue Influence.....	45
A.    Undue influence Burden of Proof.....	45
B.    Undue Influence Law.....	46
C.    Undue Influence Facts.....	50
D.    Undue Influence Defendants’ Arguments.....	62
Point II.    First Trust Amendment/Lack of Capacity.....	63
A.    Testamentary Capacity Burden of Proof.....	63
B.    Testamentary Capacity Law.....	64
C.    Testamentary Capacity Facts.....	66
D.    Testamentary Capacity Defendants’ Arguments.....	77
Point III.    Second Trust Amendment/Undue Influence.....	79
Point IV.    Second Trust Amendment/Lack of Capacity.....	80
Point V.    In Terrorem Clause.....	80

Point VI.	Titling of Accounts and Beneficiary Designations.....	81
A.	Testamentary Capacity Law.....	81
B.	Undue Influence Law.....	84
C.	Undue Influence and Testamentary Capacity Facts....	84
Point VII.	CALSTRS.....	85
	Conclusion.....	87
	Certificate of Compliance.....	88
	Certificate of Service.....	89

**TABLE OF AUTHORITIES**

<b><u>Case Citations</u></b>	<b><u>Page</u></b>
<i>Addington v. Texas</i> , 441 U.S. 418, 99 S.Ct 1804 L.Ed.2d 323 (1979).....	45
<i>Ambruster v. Sutton</i> , 362 Mo. 740, 244 S.W.2d 65 (1951).....	65
<i>Bacon v. Uhl</i> , 173 S.W.3d 390 (Mo.App. S.D. 2005).....	43
<i>Byrne v. Fulkerson</i> , 254 Mo. 97, 162 S.W.171 (1913) .....	65,
66,77,78,80	
<i>Chmieski v. City Products Corp.</i> , 660 S.W.2d 275.....	46
(Mo.App. W.D. 1983)	
<i>Christian Health Care of Springfield West Park, Inc. v. Little</i> , .....	43
145 S.W.3d 44 (Mo.App. S.D. 2004)	
<i>Coldwell v. Coldwell</i> , 228 S.W. 95 (Mo. 1921) .....	48
<i>Duvall v. Brenizer</i> , 818 S.W.2d 335 (Mo.App. W.D. 1991).....	49
<i>Estate of Gross v. Gross</i> , 840 S.W.2d 253 (Mo.App. E.D. 1992).....	47, 48
<i>Fix v. Fix</i> , 847 S.W. 2d 762 (Mo. banc 1993).....	82
<i>Gifford v. Geosling</i> , 951 S.W. 2d 641 (W.D. 1997).....	82
<i>Godsy v. Godsy</i> , 504 S.W.2d 209 (Mo.Ct.App. 1973).....	47,48,62,79
<i>Greeno v. State of Missouri</i> , 59 S.W. 3d 500 (Mo. banc 2001).....	41
<i>Grissum v. Reesman</i> , 505 S.W.2d 81 (Mo. 1974).....	46
<i>Hahn v. Hammerstein</i> , 272 Mo. 248, 198 S.W. 833 (1917).....	65
<i>Hahn v. Tanksley</i> , 317 S.W.3d 145 (Mo.App. S.D. 2010).....	43
<i>Hammonds v. Hammonds</i> , 297 S.W.2d 391 (Mo. 1957).....	49
<i>Hodges v. Hodges</i> , 692 S.W.2d 361 (Mo.App. S.D. 1985).....	49, 50
<i>In Interest of MJA</i> , 826 S.W.2d 890 (Mo.App. S.D. 1992).....	45,46

*In the Interest of P.L.O. and S.K.O.*, 131 S.W. 3d 782 (Mo. banc 2004).....41

*In re Adoption of C.M.B.R.*, 332 S.W. 3d 793 (Mo. banc 2011).....41,42

*In re Adoption of W.B.L.*, 681 S.W. 2d 452 (Mo. banc 1984).....41,42,63,78

*In re: Estate of Hague*, 894 S.W.2d 684 (Mo.App. W.D. 1995).....64

*In re: Goldschmidt*, 215 S.W. 3d 215 (Mo. App. E.D. 2006).....83

*In re Marriage of Cochran*, 340 S.W. 3d 638 (Mo. App. S.D.2011).....42

*Lee v. Hiler*, 141 S.W.3d 517 (Mo.App. S.D. 2004).....43,82

*Matthews v. Turner*, 581 S.W.2d 466 (Mo.App. S.D. 1979).....48

*Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976).....41,42,45,85

*Neal v. Neal*, 281 S.W.3d 330, 337 (Mo.App. E.D. 2009).....45

*Nolte v. Wittmaier*, 977 S.W.2d 52, 57 (Mo.App. E.D. 1998).....45

*Oden v. Oden*, 905 S.W. 2d 914 (Mo. App. E.D. 1995).....48

*Pazdernik v. Decker*, 652 S.W. 2d 319 (Mo. App. E.D. 1983).....82

*Peterein v. Peterin*, 48 S.W. 2d 809 (Mo. 1966).....82

*Pike v. Pike*, 609 S.W. 2d 397 (Mo.banc 1980).....49

*Proffer v. Proffer*, 342 Mo. 184, 114 S.W.2d 1035 (1938).....65

*Rhoades v. Chambers*, 759 S.W.2d 398 (Mo.App. S.D. 1988).....47, 49

*Salisbury v. Gardner*, 515 S.W.2d 881 (Mo.Ct.App 1974).....48

*State Highway Commission v. Eilers*, 406 S.W.2d 567 (Mo. 1966).....64

*Steller v. Steller*, 401 S.W.2d 473 (Mo. 1966).....48

*Strype v. Lewis*, 180 S.W.2d 688, 692 (Mo. 1944).....45

*Thompson v. Curators of University of Missouri*, 488 S.W.2d 617.....65  
(Mo. 1973)

*Williams v. Walls*, 964 S.W.2d 839 (Mo.App. E.D. 1992).....47

*Woods ex rel. Woods v. Cory, 192 S.W.3d 450 (Mo. App. S.D.2006)*.....42

*Wryterski v. Wilson, 740 S.W. 2d 374 (Mo. App. S.D. 1987)*.....42

**Statutes**

Section 456.4-406, R.S.Mo.....47

Section 456.6-601 R.S.Mo.....64

Section 461.001 R.S.Mo.....82

Section 461.009 R.S. Mo.....82

Section 461.012 R.S. Mo.....82

Section 461.037 R.S.Mo.....83

Section 461.054 R.S.Mo.....81,83,84

Section 473.087 R.S.Mo.....82

Section 474.310 R.S. Mo.....82

Section 474.320 R.S.Mo.....82

**Missouri Approved Instructions**

M.A.I. Section 15.01.....64

M.A.I. Section 15.03.....47

**Secondary Sources**

5 Missouri Practice Section 102 (3<sup>rd</sup> Addition).....65

5 Missouri Practice 1, Section 14.....82

Restatement (3d) of Property (Wills and Don. Trans.) §7.2 (2003).....82

The Testament, John Grisham, (Doubleday 1999).....79



## **JURISDICTIONAL STATEMENT**

This is an appeal from the First Amended final Judgment of the Honorable Benjamin F. Lewis, sitting as Special Judge in the Thirty-Third Judicial Circuit in Scott County, Missouri, ruling in favor of Plaintiffs Richard E. Ivie, Jimmie R. Ivie, LaDonna Small and Bernard Ivie and against Defendants Arnold Smith and Sidney Smith entered on July 26, 2012. On November 20, 2013, the Court of Appeals, Southern District *en banc* issued its Opinion Affirming the Trial Court's Judgment. On December 5, 2013, Appellants filed their Application for Transfer pursuant to Rules 83.04 and 83.05. On February 4, 2014, the Supreme Court granted transfer.

## STATEMENT OF FACTS

### **A. PROCEDURAL HISTORY IN TRIAL COURT**

Plaintiffs filed two lawsuits which were consolidated for trial. (*LF. 133*). The first lawsuit was pursuant to Plaintiffs' First Amended Petition to Contest Trust, To Set Aside Beneficiary Designations, and For Tortious Interference With Inheritance Expectancy. (*LF. 122-132*). In this lawsuit Plaintiffs claimed that at the relevant times the Decedent, Patricia Parker Watson, did not have testamentary capacity, was incapacitated and disabled, and was under the undue influence of Defendant, Arnold L. Smith. (*Id.*) Plaintiffs sought to set aside the First and Second Amendments to Watson's Trust and also set aside the re-titling of certain assets of Watson in favor of Smith. (*Id.*)

The second lawsuit was pursuant to Plaintiffs' First Amended Petition for Discovery of Assets filed in the Decedent's probate estate. (*LF 112-121*). In this lawsuit, Plaintiffs were requesting the court to set aside the same beneficiary designations and for the same reasons as claimed in the first lawsuit. (*Id.*) In the event the beneficiary designations were set aside, Plaintiffs requested the court to determine if the assets were part of the Decedent's probate estate. (*Id.*) If so, the assets would be transferred to the Decedent's trust pursuant to the Decedent's Pour-Over Will admitted to probate. (*Id.*)

The two lawsuits were consolidated pursuant to the court's order of July 21, 2011. (*LF. 133*).

On May 1 and 2, 2012, a bench trial was held in this case in the Circuit Court of Scott County, Missouri. (*LF. 349*). The Court received into evidence Plaintiffs' Ex. 1-56; Defendants' s Ex. A-GG; Deposition Testimony; and Testimony of Witnesses. (*Id.*)

The Court entered its Judgment including Findings of Fact and Conclusions of Law on July 17, 2012 (*LF. 280-311*). The Court then entered its First Amended Judgment including Findings of Fact and Conclusions of Law to correct certain clerical mistakes on July 26, 2012. (*LF. 314-345*).

**B. BACKGROUND INFORMATION**

Plaintiffs, Richard E. Ivie, Jimmie R. Ivie, LaDonna Small and Bernard Ivie, are the siblings of the Decedent, Patricia Parker Watson (hereinafter Decedent Watson). (*Tr. 137, 138, 153, 168*). On February 20, 2002, at age 70 Decedent Watson married Defendant, Arnold L. Smith (hereinafter Defendant Smith). (*Tr. 23*). Decedent Watson's only child was killed in approximately 1980. (*Tr. 142*). Defendant Sidney B. Smith is Defendant Smith's child. (*Tr. 22*). Defendant Reginald E. Young (hereinafter Attorney Young) prepared Decedent's Trust and Amendments, was the Trustee of Decedent Watson's Trust and the initial Personal Representative of her estate. (*Plaintiffs' Ex. 1; Plaintiffs' Ex. 43-8, p. RY564-574; Plaintiffs' Ex. 43-17, p. RY575-578*). Attorney Rice P. Burns was appointed as Administrator Ad Litem of Decedent's estate. (*LF. 415*). On 5/9/02 Decedent Watson executed her original Trust naming Attorney Young as Successor Trustee and Plaintiffs as residuary beneficiaries. (*Plaintiffs' Ex. 1*). Plaintiffs were also beneficiaries of Decedent's Non-Trust Assets. (*Plaintiffs' Ex. 13-25; Tr. 40-42; Tr. 49-51*). Decedent's total estate was approximately \$1,000,000.00. (*Tr. 294*). On 7/27/07 Decedent executed a purported First Amendment to her Trust reducing Plaintiffs' share to \$25,000.00 each and leaving the residuary to Defendant Smith. (*Plaintiffs' 43-8, RY 564-574*). On 7/2/08 Decedent executed a purported Second Amendment to her Trust

reducing Plaintiffs' share to \$5,000.00 each; leaving \$5,000.00 to Defendant Sidney B. Smith; and leaving the residuary to Defendant Smith. (*Plaintiffs' Ex. 43-17, p. RY 575-578*). Beginning in October 2007 and continuing through 2008 the titles to certain of Decedent Watson's assets were changed from the Trust or beneficiary designations to the Plaintiffs to beneficiary designations to Defendant Smith or joint with Defendant Smith. (*Plaintiffs' Ex. 13-25*). Decedent passed away on 4/10/09. (*Tr. 37*).

**C. TESTIMONY OF WITNESSES, MEDICAL RECORDS AND DEPOSITION**

**TESTIMONY**

**DEFENDANT ARNOLD L. SMITH TESTIMONY**

**BACKGROUND:**

1. Defendant Smith was born 2/20/41. (*Tr. 19*). He testified he had 2 years of college and about 16 certification credits. (*Tr. 20*). His major in college was insurance and his certification credits are in the fields of insurance, real estate and plumbing. (*Id.*) His occupations include insurance, real estate and plumbing. (*Id.*) He is familiar with insurance policies, the buying and selling of real estate, and real estate deeds. (*Tr. 21*).

2. Defendant Smith's previous wife passed away. (*Tr. 21*). He has one child, Defendant Sidney Smith. (*Tr. 22*).

3. Defendant Smith met Decedent Watson in about March 2001 and they were married 2/20/02. (*Tr. 21-23*). He was 60 and she was 70. (*Tr. 23*). He was living in a rented room, had minimal assets and minimal income. (*Tr. 22-23*). He did admit he did not report all of his income on his tax returns. (*Tr. 24-25*). At the time, Decedent

Watson had substantial income and approximately \$1,000,000.00 in assets. (*Tr. 26, 294*). They moved into Decedent Watson's home. (*Tr. 22*).

4. Defendant Smith and Decedent Watson lived in Watson's home in California until they moved back to Missouri in late 2004. (*Tr. 26*). On or about 1/21/05 Decedent Watson's Trust purchased the home at 511 Laurelwood, Sikeston, MO, and the parties moved in. (*Tr. 26; Plaintiffs' Ex. 7*).

**TRUST:**

5. Decedent Watson did not take Defendant Smith's last name when they married. (*Tr. 27*)

6. Decedent Watson executed her original trust on 5/9/02 approximately 3 months after the marriage. (*Plaintiffs' Ex. 1*). Although they were living in California at the time, the trust was prepared by a Missouri lawyer (Attorney Young) and signed in Missouri. (*Tr. 27-28*). The beneficiaries of the trust were the Plaintiffs, Decedent Watson's siblings, Richard Ivie, Jimmie Ivie, LaDonna Small and Bernard Ivie. (*Plaintiffs' Ex. 1; Tr. 27*). The trust specifically excluded Defendant Smith. (*Plaintiffs' Ex. 1*)

7. Decedent Watson owned real estate in Mississippi, New Madrid and Scott Counties, Missouri prior to the marriage. (*Tr. 28-29*). At the time the trust was executed, Decedent Watson and Defendant Smith signed Quit Claim Deeds on all the real estate to Decedent's trust. (*Tr. 28-29; Plaintiffs' Ex. 2-5*). On 7/3/02 Decedent Watson and

Defendant Smith sign a Quit Claim Deed on Decedent's home in California to Decedent's Trust. (*Plaintiffs' Ex. 43-6, p. RY194*).

8. Decedent Watson and Defendant Smith moved back to Missouri to be closer to Decedent's relatives. (*Tr. 35*). Smith had no connections in Missouri. (*Id.*)

9. Prior to moving back to Missouri, Decedent Watson sold her home in California for approximately \$500,000.00. (*Tr. 35-36*). The proceeds were put in her trust. (*Tr. 36*). The trust later purchased a home at 511 Laurelwood, Sikeston, Missouri. (*Tr. 36; Plaintiffs' Ex. 7*). The home was deeded to the trust. (*Id.*) Approximately \$100,000.00 of trust funds were used to purchase contents for the home. (*Tr. 38*).

10. Defendant Smith lived rent free in the home since Decedent Watson's death on 4/10/09 and was still living in the home at the time of trial. (*Tr. 37-38*).

#### **CHANGES IN ESTATE PLAN:**

11. On 7/27/07 the First Amendment to Decedent Watson's Trust was signed. (*Plaintiffs' Ex. 43-8, p. RY564-574; Tr. 40*). The First Amendment provided for \$100,000.00 to be divided equally among Decedent's siblings and the residuary to Defendant Smith. (*Plaintiffs' Ex. 43-8, p. RY564-574*).

12. On 12/7/07 the titles to the Alliance Bank checking account and Money Market account were changed from the trust to Decedent Watson individually with a POD direction to Defendant Smith. (*Plaintiffs' Ex. 46, 47; Tr. 40*).

13. On 12/21/07 the title to the Montgomery Bank savings account was changed from the trust to Decedent Watson's name individually with a POD to Defendant Smith. (*Plaintiffs' Ex. 46, 47; Tr. 40-41*).

14. On 1/12/08 Defendant Smith had Decedent Watson sign a financial power of attorney which he had downloaded off of the internet (*Tr. 104*). The power of attorney named Defendant Smith as Decedent's agent (*Plaintiffs' Ex. 26*). Attorney Young had been named as the agent under Decedent's prior financial power of attorney. (*Tr. 104-105*).

15. On 1/14/08 the beneficiary of the US Bank IRA was changed from the trust to Defendant Smith. (*Plaintiffs' Ex. 46, 47; Tr. 41*).

16. The first attempt to execute the Second Amendment by Decedent Watson was on 6/7/08 (*Plaintiffs' Ex. 27; Tr. 88-92*). Decedent Watson was in Clearview Nursing Home at the time and it was not signed properly. (*Plaintiffs' Ex. 31-4119*). Attempted changes to the Second Amendment were written in by Defendant Smith. (*Plaintiffs' Ex. 27; Tr. 88*). On the same date Defendant Smith sent a letter to Attorney Young still requesting the Second Amendment (*Plaintiffs' Ex. 28; Tr. 89-90*).

17. On 7/2/08 Decedent Watson signed the Second Amendment to her trust, which reduced the siblings' share of the trust to \$5,000.00 each. (*Plaintiffs' Ex. 43-17, p. RY 575-578*). Defendant Smith's son, Defendant Sidney Smith, was also added as \$5,000.00 beneficiary and treated equally with the siblings. (*Id.*)

18. The CALSTRS Retirement Change of Beneficiary Form was signed by Decedent Watson on 7/24/08. (*Plaintiffs' Ex. 46-7, p. 13 and 14; Tr. 99-100*). In that regard:

a. Defendant Smith filled out the Change of Beneficiary Form changing the beneficiary from the Plaintiffs' to Defendant Smith; (*Plaintiffs' Ex. 25; Tr. 98-99*).

b. Defendant Smith fraudulently changed the date of Decedent Watson's signature from 7/24/08 to 1/24/08. (*Plaintiffs' Ex. 25 and 46-7, p. 13 and 14; Tr. 99-103*). 7/24/08 was after the First Affidavit of Incapacity for Decedent was signed by Dr. Uthoff on 7/22/08, but 1/24/08 was prior to the Affidavit of Incapacity. (*Plaintiffs' Ex. 8, p. 1 and 2; Tr. 101-103*).

19. On 12/22/08 the Focus Bank IRA was opened naming Defendant Smith as beneficiary. (*Tr. 41-42; Plaintiffs' Ex. 46-5*). It had been transferred from the OCTFCU IRA which had named Decedent's siblings as beneficiaries until 12/29/07 when the beneficiary was changed to Defendant Smith. (*Id.*)

20. At the time all the bank accounts and IRAs were re-titled Decedent Watson was not able to drive and Defendant Smith took her to the banks. (*Plaintiffs' Ex. 31, p. 102; Tr. 190, 129, 144, 157, 171*).

21. In 12/08 the titles to all of Decedent Watson's vehicles were changed by adding Defendant Smith as a joint title holder or a TOD direction to Defendant Smith. (*Plaintiffs' Ex. 46-8; Plaintiffs' Ex. 46-9; Plaintiffs' Ex. 46-10; Plaintiffs' Ex. 46-11; Plaintiffs' Ex. 46-12; Tr. 42*).

#### **DEFENDANT SMITH AND THE MEDICAL RECORDS:**

22. Medical records indicating Decedent Watson had severe mental impairments beginning in 2003 and continuing until she passed away in 2009, were

introduced into evidence (*Plaintiffs' Ex. 31 Medical Records; Plaintiffs' Ex. 48 Chronological Summary of Medical Records*) and reviewed with Defendant Smith (*Tr. 56–113*). Many of the records indicated that the mental impairments had been reported by Defendant Smith himself. (*Plaintiffs' Ex. 31 p. 19; Plaintiffs' Ex. 31, p. 31; Plaintiffs' Ex. 31, p. 49; Plaintiffs' Ex. 31, p. 61; Plaintiffs' Ex. 31, p. 135; Tr. 62-65; Plaintiffs' Ex. 31, p. 135; Tr. 78-81*). Smith denied most of the medical record entries and any mental impairments whatsoever (*Tr. 56-113*) and testified that they were all “not correct ” and were a “pack of lies ” (*Tr. 86, 90, 91, 94*). See the medical records section.

### **MEDICAL RECORDS**

23. Decedent Watson has extensive medical records beginning in 2003 and continuing until she passed away on 4/10/09. The records reflect severe and extensive mental and physical impairments at the time of execution of the First Amendment, Second Amendment and Change of Titles to bank accounts, retirement accounts, and vehicles. (*Compare Plaintiffs' Ex. 48 – Chronological Summary of Ex. 31 Medical Records and Plaintiffs' Ex. 47 – Some Relevant Dates*). Some of the more pertinent records follow.

24. Decedent Watson thought Defendant Smith was trying to poison her beginning at least by 1/6/03 and continuing as late as 1/26/09. (*Plaintiffs' Ex. 31, p. 2, 7, 64 and 996*). *E.g.* On 1/6/2003 Decedent Watson told Dr. Salamat that she thought her husband was trying to poison her with rat poison. (*Plaintiffs' Ex. 31, p. 2*). On 6/27/2005 Decedent Watson told Dr. Bryant, “I think my husband is trying to poison me.”

(*Plaintiffs' Ex. 33, p. 7-9*). On 10/22/2007 Decedent Watson reported that “My teeth are falling out and I think I’m being poisoned.” *Plaintiffs' Ex. 33, p. 64*). On 1/26/2009 in a Missouri Delta Medical Center report Decedent Watson reported that people were trying to poison her. (*Plaintiffs' Ex. 33, P. 996*).

25. Decedent Watson began complaining about loss of vocabulary, was diagnosed with dementia and placed on Namenda which is indicated for moderate to severe dementia as early as 5/05. (*Plaintiffs' Ex. 31, p. 6*).

26. Decedent Watson received an extensive mental and physical examination at Mayo Clinic from approximately 10/19/05 thru 11/2/05. (*Plaintiffs' Ex. 31, p. 15-24*). The exam included a neuropsych consult by Dr. John A. Lucas. (*Plaintiffs' Ex. 31, p. 19*). In Dr. Lucas’ report he indicates **Defendant Smith reported Decedent Watson has word finding difficulties, problem remembering names, difficulty figuring out instructions, problems understanding bills, misplaces personal belongings, difficulty remembering things she is told, is not reliable in recalling recent events, is disorganized in her thinking, loses her train of thought, goes off topic in conversation and has difficulty handling the checkbook.** (*Id.*)(*Emphasis Added*).

27. Mayo Clinic Dr. Lucas diagnosed Decedent Watson on 10/31/05 with dementia. His final impression was “**Ms. Watson will require continued supervision and assistance with complex activities of daily living, including assistance with any medical, legal, or financial decision-making**”. (*Plaintiffs' Ex. 31, p. 21*) (*Emphasis Added*).

28. Decedent Watson's mental health continued to deteriorate after the Mayo Clinic exam. (*Plaintiffs' Ex. 31; Plaintiffs' Ex. 48 Chronological Summary of Medical Records*). She had *increasing* difficulty with her memory and mental impairments. (*Id.*)

29. On 3/24/06 Decedent Watson reported to Dr. Uthoff that she had one child who was alive and well. (*Plaintiffs' Ex. 31, p. 25*). Her only child, Paula, had been murdered back in 1980. (*Tr. 142*).

30. By 10/24/06 Decedent Watson required assistance with all of her daily living activities including cooking, bathing, cleaning, medications, etc. (*Plaintiffs' Ex. 31, p. 31*).

31. Decedent Watson was hospitalized in Missouri Delta Medical Center in June 2007. (*Plaintiffs' Ex. 31, p. 37*). The hospital records indicate that Decedent Watson was having increasing difficulty with her short term memory and was demented; (*Plaintiffs' Ex. 31, p. 40*); that she needed help with all of her daily living activities and medication; (*Plaintiffs' Ex. 31, p. 42*); that she was confused and oriented to self only (*Plaintiffs' Ex. 31, p. 44*); that she was confused/ disoriented/ senile/ irrational/ noncompliant (*Plaintiffs' Ex. 31, p. 46*); that a nurse attempted to orient her to time and place and received no verbal response (*Plaintiffs' Ex. 31, p. 48*); that she wanted to get back to teaching although she was retired and Defendant Smith suggested her dementia medicine be increased (*Plaintiffs' Ex. 31, p. 49*); that her dementia medication was increased (*Plaintiffs' Ex. 31, p. 50*).

32. Defendant Smith discharged Decedent Watson against medical advice on 6/29/07. (*Plaintiffs' Ex. 31, p. 58*). This was after the impression of Dr. Lucas at Mayo

Clinic in 2005 that Decedent needed help with medical decisions. (*Plaintiffs' Ex. 31, p. 21*).

33. A wheelchair was prescribed for Decedent Watson on 10/9/07. (*Plaintiffs' Ex. 31, p. 61*).

34. Decedent Watson was hospitalized again at Missouri Delta Medical Center in October 2007. (*Plaintiffs' Ex. 31, p. 63*). Upon admission she stated that "my teeth are falling out and I think I am being poisoned" (*Plaintiffs' Ex. 31, p. 64*); she was disoriented and agitated (*Plaintiffs' Ex. 31, p. 66*); she was confused/disoriented/senile/irrational/noncompliant and confused (*Plaintiffs' Ex. 31, p. 72*); and her *dementia* illness/Alzheimer's Type was confirmed again (*Plaintiffs' Ex. 31, p. 67*).

35. Decedent Watson started in-home care by Home Advantage by 11/11/07. (*Plaintiffs' Ex. 31, p. 75*).

36. **Defendant Smith filled out a Patient Assessment Form dated 1/3/08 in which he indicated Decedent Watson has problems with judgment (problems making decisions, bad financial decisions, problems with thinking, etc.); trouble learning how to use a tool, appliance or gadget (VCR, computer, microwave, remote control, etc.); forgets correct month or year; trouble handling complicated financial affairs (balancing checkbook, income taxes, paying bills, etc.); trouble remembering appointments; daily problems with thinking or memory.** (*Plaintiffs' Ex. 31, p. 135; Tr. 78-80*) (*Emphasis Added*).

37. Between 1/3/08 and the date of the execution of the Second Amendment on 7/2/08, there are extensive Home Advantage records documenting Decedent Watson's continued decline in mental health. (*Plaintiffs' Ex. 31, p. 138-439*). These include but are not limited to the following: 1/29/08 – Decedent was forgetful and confused and asked her husband several times “Am I still your wife? Are we married?” (*Plaintiffs' Ex. 31, p. 186*); 2/20/08 – Decedent reported Defendant Smith's family stealing from her (*Plaintiffs' Ex. 31, p. 193*); 3/24/08 – Decedent was confused and forgetful. (*Plaintiffs' Ex. 31, p. 313*). She and her husband had been in a fight and the police were called and came. (*Id.*) Defendant Smith reported that Decedent hid her cash and credit cards and was going to leave home but Defendant Smith stopped her (*Id.*) 3/26/08 – Decedent got turned around in her own home and could not find her own bathroom (*Plaintiffs' Ex. 31, p. 260*); 4/7/08 – Decedent Watson reported that she felt Defendant Smith was only with her due to her money (*Plaintiffs' Ex. 31, p. 316*); 4/10/08 – Decedent wanted her lawn hand pulled instead of mowed (*Plaintiffs' Ex. 31, p. 324*); 4/10/08 – Decedent Watson made statement that “her husband is taking control of everything”. (*Plaintiffs' Ex. 31, p. 324*). She was agitated and upset. (*Id.*); 5/2/08 – Decedent Watson stated that Defendant Smith “controls every aspect of my life”. (*Plaintiffs' Ex. 31, p. 384*); 6/5/08 – Decedent Watson was seeing a baby as she was looking at the ceiling and hearing voices. (*Plaintiffs' Ex. 31, p. 506*).

38. Decedent Watson was hospitalized again at Missouri Delta Medical Center in May of 2008. (*Plaintiffs' Ex. 31, p. 442-449*). The records indicate that during the

hospitalization Ms. Watson was continuously confused/disoriented /senile /irrational /noncompliant (*Plaintiffs' Ex. 31, p. 443, 445 and 447*).

39. On 5/27/08 Decedent Watson was confused/ disoriented/ senile/ irrational/ noncompliant. (*Plaintiffs' Ex. 31, p. 447*). On the same day, Defendant Smith requested a notary for possible changes to her trust. (*Plaintiffs' Ex. 31, p. 448*).

40. After discharge from the hospital Decedent Watson was a resident of the Clearview Nursing Home from approximately 6/7/08 thru 7/2/08, the date she signed the Second Amendment to her trust. (*Plaintiffs' Ex. 31, p. 465-548*). Some of the Clearview records are as follows: 6/10/08 – when nurse did finger stick, Decedent Watson asked “if her hand would grow back?” (*Plaintiffs' Ex. 31, p. 465*); 6/23/08 – *Confused to time and place.* (*Plaintiffs' Ex. 31, p. 489*). Aide overheard Decedent Watson state to Defendant Smith “Please don’t hit me. (*Id.*) I didn’t do anything. (*Id.*) Please don’t hit me.” (*Id.*) Social Services were notified. (*Id.*); 6/27/08 – Decedent Watson complained about Defendant Smith being in the room and stated that they could “get him out of there if they wanted to.” (*Plaintiffs' Ex. 31, p. 1107*). In addition Decedent stated she wanted a divorce from Defendant Smith. (*Id.*) 6/28/08 – Aides overheard Defendant Smith telling Decedent Watson “You have no business telling your medical history, telling any of our business to anybody.” (*Plaintiffs' Ex. 31, p. 497*). The aides states “He was jumping all over her.” (*Id.*) Decedent then just wanted to sit in a chair because she had to watch Defendant Smith. (*Id.*); Decedent Watson was discharged from the nursing home on 7/2/08 the same day she signed her Second Amendment (*Plaintiffs' Ex. 31, p. 505*).

41. Decedent's mental condition continued to decline after execution of the Second Amendment on 7/2/08 until her death on 4/9/10. (*Plaintiffs' Ex. 31; Plaintiffs' Ex. 48. See Chronological Summary of Medical Records.*)

### **AFFIDAVITS OF INCAPACITY**

42. Shortly after the Second Amendment to Decedent's trust was signed on 7/2/08, Defendant Smith began obtaining Affidavits of Incapacity from various of Decedent's doctors. (*Tr. 106*). He obtained five separate Affidavits of Incapacity executed by five of Decedent's treating doctors as follows: Dr. Uthoff on 7/22/08 (*Plaintiffs' Ex. 8*); Dr. Collier on 8/27/08 (*Plaintiffs' Ex. 9*); Dr. Haiderzad on 9/20/08 (*Plaintiffs' Ex. 10*); Dr. Meadows on 10/9/08 (*Plaintiffs' Ex. 11*); Dr. Sayeed on 2/19/08 (*Plaintiffs' Ex. 12*). All of these Affidavits were printed by Defendant Smith off the internet (*Tr. 107-112*). In each Affidavit, each doctor swore that Decedent Watson was by reason of advanced age, physical incapacity or mental weakness, incapable of managing her own estate; that she lacked the mental capacity to enter into binding agreements or make decisions on her own behalf; and she did not have the ability to understand that a contract was being made and its general nature. (*Id.*); (*Plaintiffs' Exhibits 8-12*).

### **PLAINTIFFS - SIBLINGS**

#### **Richard Ivie, Jimmie Ivie, LaDonna Small and Bernard Ivie Testimony**

#### **COLLECTIVE TESTIMONY:**

43. Richard Ivie, Jimmie Ivie, LaDonna Small and Bernard Ivie are Decedent Watson's half siblings. They had the same mother. (*Tr. 137; Tr. 153; Tr. 168; Tr. 187*).

44. Decedent Watson was the oldest born 12/29/30. (*Tr. 138*). Richard Ivie was next born 9/20/38. (*Tr. 137*). Jimmie Ivie was next born 11/3/42. (*Tr. 138*). LaDonna was next born 3/27/46. (*Tr. 168*). Bernard Ivie was the youngest born 2/23/52. (*Tr. 186*).

45. Decedent Watson had little or no contact with her natural father. She was raised with her natural mother and the siblings' father. (*Tr. 140*).

46. Decedent Watson lived in the family home until she was about 13 or 14 at which time she moved to East Prairie to go to high school. (*Tr. 138-139*). That was common at the time because of lack of busing. (*Tr. 139*). Once she graduated from high school she went to college in St. Louis and obtained a teaching degree. (*Tr. 140*). After graduation she moved back to Southeast Missouri and taught for a few years. (*Tr. 141*). She then moved to California. (*Id.*) She moved back from California to Missouri in late 2004. (*Tr. 143*).

47. Decedent Watson married Robert Midget right after high school. (*Tr. 142*). She was married to Midget for approximately 13 years and then they divorced. (*Id.*) She next married Paul Watson and was married to him about 4 years and then divorced. (*Tr. 142-143*). They had one daughter, Paula who was born 6/16/60 and died when she was about 20. (*Tr. 142*). Decedent Watson next married Raymond Palmer. (*Tr. 143*). She was with Raymond Palmer until he passed away. (*Tr. 143*). Decedent Watson met Defendant Smith shortly after Palmer died. (*Tr. 143*).

48. Although Decedent Watson moved out of the family home at a fairly young age all of her siblings had a close relationship with her. (*Tr. 140; Tr. 154-156; Tr. 169*;

*Tr. 187-188*). They visited her often when she was in high school, college, teaching in Southeast Missouri, lived in California and moved back to Missouri. (*Tr. 139-142; Tr. 154-156; 169-170; 186-188*). Richard and LaDonna both stayed with her while she was in St. Louis. (*Tr. 140-141; Tr. 169*). All the siblings visited her in California including going to the funeral of her daughter. (*Tr. 139-142; Tr. 154-156; 169-170; 186-188*). They talked to her on the telephone often when she was in California. (*Id.*) She was a second mother to Bernard since he was so much younger than her. (*Tr. 187*). She helped them financially. (*Tr. 155*). They all had a very close relationship. (*Tr. 139-142; Tr. 154-156; 169-170; 186-188*). She would come back from California to visit with them. (*Tr. 141*).

49. Prior to the time of execution of her First Amendment on 7/27/07 Decedent Watson needed help with all of her daily living activities including walking, bathing, dressing, picking out clothes, meal preparation, use of telephone, driving, getting in and out of car and up and down stairs. (*Tr. 144-147; Tr. 156-159; Tr. 171-173; Tr. 190-192*).

50. Prior to the time she executed her First Amendment, Decedent Watson had memory loss, problems finding words, problems finding names, problems figuring out instructions, needed help with bills and her checkbook, help remembering things, help finding personal belongings and couldn't carry on a conversation. (*Id.*)

51. Prior to the time she executed her First Amendment Decedent Watson could not take care of herself. (*Id.*)

52. Prior to execution of her First Amendment, Decedent Watson thought Defendant Smith was poisoning her, was afraid of Smith, and was mistreated by him. (*Plaintiffs' Ex. 31, p. 2, 7; Tr. 158-159; Tr. 191-192*).

53. Decedent Watson had always told the siblings she was leaving her entire estate to them. (*Tr. 144; 189.*)

54. None of the siblings were at any of the meetings where the First Amendment or Second Amendment were signed or titles to any assets were changed. (*Tr. 144; Tr. 162; Tr. 175-176; Tr. 189*).

55. Prior to the time she signed the First Amendment Decedent Watson advised the siblings on multiple occasions that she wanted a divorce from Defendant Smith. (*Tr. 147; Tr. 173-174*)

**ADDITIONAL TESTIMONY OF RICHARD IVIE:**

56. Richard Ivie was not at the 7/10/07 meeting with Attorney Young, Decedent Watson, Defendant Smith and LaDonna Small. Attorney Young's memory was not correct on this. (*Tr. 149; Tr. 297*).

**ADDITIONAL TESTIMONY OF JIMMIE IVIE:**

57. In approximately December 2007 when Decedent Watson and Defendant Smith were leaving Jimmie's home, Defendant Smith was trying to get her into the car and to get her in he put his foot on her side and shoved her over into the car. (*Tr. 157*).

**ADDITIONAL TESTIMONY OF LADONNA SMALL:**

58. LaDonna was at the 7/10/07 meeting with Attorney Young. Decedent Watson was confused that day. Richard was not there. (*Tr. 174-175*).

59. In late July or early August 2007 Decedent Watson requested LaDonna to come see Decedent about her money. LaDonna went to Decedent's and Defendant Smith's home. Decedent had her black bank file box out and "wanted me to see her money." Decedent asked Defendant Smith to go get breakfast. The file box had been sitting in the living room. After Defendant Smith left, Decedent went to get the file box and it was gone. Decedent became very upset. Decedent was very frantic and said "He has taken all of my money and left." Decedent thought her money was in the file box. When Defendant Smith returned home he told Ladonna, "LaDonna I want you to know this is my house and this is my wife and these are my bank files and I don't appreciate you coming over here and getting into my business." Defendant Smith had taken the file box with him. (*Tr. 176-178*).

**ADDITIONAL TESTIMONY OF BERNARD IVIE:**

60. In May 2007 at Bernard's wife's graduation for her doctorate, Decedent Watson did not recognize Bernard's children. (*Tr. 193*).

61. In the May of 2007 Decedent Watson did not recognize Bernard's family. (*Id.*)

**PLAINTIFFS' EXPERT**

**DR. ADAM JASON SKY**

**TESTIMONY**

62. Dr. Sky is a highly qualified and experienced geriatric psychiatrist (*Plaintiffs' Ex. 50, Curriculum Vitae of Adam Jason Sky, M.D.; Tr. 206-207*)

63. Dr. Sky's specialty is geriatric psychiatry. (*Tr. 205*).

64. Dr. Sky has a geriatric psychiatry practice. (*Tr. 206*). He sees patients in three settings: His office; St. Mary's Hospital where there is an in-patient geriatric psychiatry unit; and also in about 20 different long term facilities. (*Tr. 208*). Approximately 80% of his long-term facility patients have dementia. (*Tr. 208*). In his office about 40% of his patients have dementia. (*Tr. 209*). In the hospital, about 40% of his patients have dementia. (*Id.*) He has lectured extensively on the diagnosis and treatment of dementia. (*Tr. 207*). He teaches in connection with the diagnosis and treatment of dementia. (*Id.*)

65. Dr. Sky is highly educated, trained and experienced in regard to the diagnosis and treatment of dementia including vascular dementia and Alzheimer's Disease. (*Tr. 205-209; Plaintiffs' Ex. 50 (Curriculum Vitae of Dr. Adam Sky)*).

66. Dr. Sky has rarely hired himself out as an expert witness. (*Tr. 209*).

67. Prior to rendering his opinions, Dr. Sky reviewed Decedent Watson's medical records and the depositions of Defendant Smith, Attorney Young, Attorney Vandivort, and Plaintiffs Richard Ivie, Jimmie Ivie, LaDonna Small and Bernard Ivie. The majority of his focus was on the medical records and his opinions are based primary on the medical records. (*Tr. 210-211*).

68. Dr. Sky reviewed the definitions under Missouri Law for Testamentary Capacity; Incapacity and Disability under the guardianship code; Undue Influence and the "Clear and Convincing Evidence" burden of proof before forming and rendering his opinions. (*Tr. 214, 219, 222, 225-226*).

69. All of Dr. Sky's opinions are based on his education, training, experience and medical records as a whole. (*Tr. 205-209; Tr. 211, 215*).

70. Dr. Sky's opinion was that Decedent Watson had dementia of a mixed type consisting of vascular dementia and Alzheimer's Disease. (*Tr. 221*).

71. Dr. Sky's opinion was that Decedent Watson had moderate to severe dementia by the time she signed her First Amendment to her Trust on 7/27/07 and at all times thereafter. (*Tr. 216, 218, 219, 224*). Moderate dementia is indicated when the patient cannot take care of herself. (*Tr. 223-224*).

72. Dr. Sky's opinion was that Decedent Watson did not have testamentary capacity as of the date she signed the First Amendment to her Trust on 7/27/07 and at all times thereafter. (*Tr. 219, 227*)

73. Dr. Sky's opinion was that Decedent Watson did not have testamentary capacity when she changed titles to her bank accounts, changed beneficiaries to her retirement accounts, and transferred her vehicle titles, beginning in October 2007, and continuing through December 2008. (*Id.*)

74. Dr. Sky's opinion was that Decedent Watson did not have testamentary capacity when she signed the Second Amendment to her Trust on 7/2/08. (*Id.*)

75. Dr. Sky's opinion was that Decedent Watson was highly susceptible to undue influence when she signed the First Amendment to her Trust on 7/27/07 and at all times thereafter. (*Tr. 222*).

76. Dr. Sky's opinion was that Decedent Watson was highly susceptible to undue influence at the time she changed titles to her bank accounts, changed beneficiary

designations to her retirement accounts, and transferred her vehicle titles, beginning in October 2007 and continuing through December 2008. (*Id.*)

77. Dr. Sky's opinion was that Decedent Watson was highly susceptible to undue influence at the time she signed the Second Amendment to her Trust on 7/2/08. (*Id.*)

78. Dr. Sky's opinion was that Decedent Watson was disabled and incapacitated under the Guardianship and Conservatorship Code as of the date she executed the First Amendment to her Trust on 7/27/07 and all times thereafter. (*Tr.* 219-220).

79. Dr. Sky's opinion was that Decedent Watson was disabled and incapacitated under the Guardianship and Conservatorship Code at the time she changed the titles to her bank accounts, changed the beneficiary designations on her retirement accounts, and transferred her vehicle titles, beginning in October 2007 and continuing through December 2008. (*Id.*)

80. Dr. Sky's opinion was that Decedent Watson was disabled and incapacitated under the Guardianship and Conservatorship Code at the time she executed the Second Amendment to her Trust on 7/2/08. (*Id.*)

81. Dr. Sky's opinion was that even though Decedent Watson did not have testamentary capacity at some of the times she saw Attorney Young it was possible for her to conceal her mental impairments from Attorney Young. (*Tr.* 224-225). It was possible for Attorney Young to honestly believe that Decedent Watson had testamentary

capacity at the time she signed her First and Second Amendments and for her not to have testamentary capacity at such times. (*Id.*)

82. The medical records provided clear and convincing evidence to Dr. Sky of all of his opinions. (*Tr.* 225-227). Dr. Sky was 90% certain of all of his opinions. (*Tr.* 246). If he had had an opportunity to personally exam Decedent Watson he believed his opinions would be 98% certain. (*Id.*)

83. Dr. Sky did not have any reasonable doubt about any of his opinions. (*Tr.* 227).

84. All of Dr. Sky's opinions were based on more than a reasonable degree of medical certainty. (*Id.*)

#### **NIECE KAREN BAILEY TESTIMONY**

85. Karen is the City Treasurer for the City of Sikeston, Missouri. (*Tr.* 249).

86. Decedent Watson was Karen's cousin. Karen's mother was a sister to Decedent's natural father. However, she referred to her as an aunt because she was older. (*Tr.* 250).

87. Karen was not too close to Decedent Watson but saw her some after she moved back from California. (*Tr.* 250-251). Decedent Watson would come visit her at her office. (*Id.*)

88. Decedent Watson came to visit Karen at her office when she was on a walker but not in a wheelchair. (*Tr.* 251) She did not know exactly when. (*Id.*)

89. Decedent Watson told Karen that she did not know how he did it, but Defendant Smith got all her money into his name. (Tr. 252). She was distressed about it. (Tr. 252-253).

90. Karen told Decedent Watson to contact her attorney. She said she did and her attorney told her don't worry about it, that he is taking care of you. (Tr. 253).

91. Karen asked her if Defendant Smith was mean to her and she told her yes. (Id.)

### **ATTORNEY REGINALD E. YOUNG TESTIMONY**

#### **ORIGINAL TRUST AND ESTATE PLAN:**

92. Decedent was still living in California when she retained Attorney Young to prepare her original estate plan documents. (Tr. 274). Her original Trust was executed on 5/9/02 (*Plaintiffs' Ex. 1*).

93. At the time Decedent Watson signed her trust, she wanted control of her property. (Tr. 293-294). She wanted to transfer all of her assets into her trust so that as sole trustee she could deal with it without anybody else having to sign. (Tr. 294).

94. At the time Decedent Watson executed her original trust she wanted her four siblings, Plaintiffs, Richard Ivie, Jimmie Ivie, LaDonna Small and Bernard Ivie, to have everything including everything in the trust and everything outside the trust. (Tr. 294-295). Decedent Watson was very adamant about that. (Tr. 295).

#### **FIRST AMENDMENT TO TRUST:**

95. Decedent Watson signed the First Amendment to her trust on 7/27/07 (*Plaintiffs' Ex. 43-8, p. 563; Tr. 305*).

96. On 7/10/07 Attorney Young met with Decedent Watson, Defendant Smith and LaDonna Small at his office. (*Tr. 297*). The primary purpose of the meeting was to change Decedent Watson's Powers of Attorney. (*Tr. 298*). Decedent Watson was put out with Defendant Smith over something and was worried about Defendant Smith being in control. (*Tr. 297-298*). There was some statement of Decedent Watson feeling like Defendant Smith was out to get her. (*Tr. 298-299*).

97. The result of the 7/10/07 meeting was a change in Decedent Watson's financial power of attorney naming Attorney Young as first agent and LaDonna Small, Richard Ivie and Defendant Smith as successors; and a Health Care Power of Attorney naming as agents Defendant Smith first and the siblings second. (*Tr. 277*).

98. Decedent Watson did not change her original trust at the 7/10/07 meeting. (*Tr. 300*). It was still at that time how she wanted to have it. (*Id.*) Since Decedent Watson was upset with Defendant Smith as of 7/10/07, it did not seem likely she would be changing her trust to make him the primary beneficiary. (*Id.*)

99. On 7/12/07 Attorney Young had an approximate 5 min. telephone conference with Decedent Watson. (*Tr. 301*). By this time Decedent Watson was not able to use the telephone on her own. (*305*). The call would have been made by Defendant Smith. (*Id.*)

100. Attorney Young's next conference with Decedent Watson was on 7/13/07 (*Tr. 30; Plaintiffs' s 33 and 43-10*). Attorney Young had no notes in his file for that conference and he did not remember if Defendant Smith was at the meeting. (*Tr. 301, 303*). He could have been. (*Id.*) Decedent Watson was not driving by that time and

Defendant Smith would have driven her to the appointment. (*Plaintiffs' Ex. 31, p. 102*); *Tr. 129, 144, 157, 171, 190*). He would have been waiting for her to come out if he was not in the meeting. (*Tr. 301*).

101. Attorney Young's next meeting with Decedent Watson was on 7/16/07 or 7/17/07. (*Tr. 301-302*). Attorney Young's note is dated 7/16/07 and his time records indicate the conference was on 7/17/07 (*Plaintiffs' Ex. 33, 43-10 and 43-11; Tr. 301-32*). He did not remember if Defendant Smith was at the meeting. (*Tr. 301*). He could have been. (*Id.*) Decedent Watson was not driving by that time and Defendant Smith would have driven her to the appointment. (*Plaintiffs' Ex. 31, p. 102*); *Tr. 129, 144, 157, 171, 190*). He would have been waiting for her to come out if he was not in the meeting. (*Tr. 301*). Attorney Young's Note of 7/16/07 indicates that what was discussed was Decedent Watson leaving 20% of her estate to Defendant Smith if married and survived and the balance of the estate to Decedent Watson's siblings. (*Plaintiffs' Ex. 43-11; Tr. 302-303*). Keep Richard Ivie, LaDonna Small and Defendant Smith as Successor Trustees to Attorney Young. Put in clause about do not challenge. (*Id.*)

102. Attorney Young's next conference with Decedent Watson was on 7/20/07. (*Plaintiffs' Ex. 33 and 43-10*). *Plaintiffs' Ex. 43-12* is Attorney Young's note of that conference. (*Tr. 304*). The conference of 7/20/07 was for only about 10 minutes. (*Id.*) Attorney Young initially thought this was a telephone conference with Decedent Watson. (*Tr. 305*). If so, Defendant Smith would have called for Decedent Watson and Attorney Young would not have known what was going on at Decedent Watson's end of the line. (*Id.*) However, Attorney Young also had a note in his file dated 7/20/07. (*Plaintiffs' Ex.*

43-12). The note indicated Richard \$25,000.00; Jimmie \$25,000.00; Bernard \$25,000.00; and LaDonna \$25,000.00. (*Plaintiffs' Ex. 43-12; Tr. 306*). However, this was not Attorney Young's handwriting. (*Tr. 306*). The rest of the note was Attorney Young's handwriting. (*Id.*) Attorney Young testified that somebody gave him this piece of paper and then he made the additional notes to himself. (*Id.*) He did not know who gave him the note. (*Tr. 306-307*). It could have been Defendant Smith. (*Id.*) After reviewing the note, he was not sure if the conference was over the telephone or in person. (*Tr. 308*). The conference was only about 10 min. (*Tr. 304*). He did not know who the conference may have been with. (*Tr. 305-307*). He did not know how he got the information. (*Tr. 306-307*). He admitted that he had a large practice, many clients, stays very busy and things run together sometime. (*Tr. 309*). The conference was almost 5 years ago. (*Tr. 307*).

103. The 7/20/07 conference was the critical conference. (*Id.*) There was a huge change in the beneficiaries of Decedent Watson's Trust from leaving the residuary of approximately \$1,000,000.00 to Decedent's siblings in equal shares to leaving the residuary to Defendant Smith. (*Tr. 305*). This was only 10 days after the conference of 7/10/07 at which time Decedent Watson's trust was the way she wanted it, she was upset with Defendant Smith and it was unlikely she would be changing her trust to make Defendant Smith the primary beneficiary. (*Tr. 300*).

104. The First Amendment to Decedent's Trust was executed on 7/27/07. (*Plaintiffs' Ex. 43-8; Tr. 309*). There is no time entry on Attorney Young's statement for that date. (*Plaintiffs' Ex. 33*). Attorney Young did not sign, witness or notarize any

document that day. (*Tr. 315-316*) There is no piece of paper to show that Attorney Young was present when Decedent Watson signed. (*Tr. 309-317*).

105. Attorney Young initially testified that his statement of 8/2/07 (*Plaintiffs' Ex. 33*) was incorrect and that the second entry on 7/26/07 actually was a 7/27/07 conference at which time the First Amendment was signed. (*Tr. 309-310*). However, Attorney Young also testified that if a document was signed he normally put that on his statement. (*Tr. 316*). That testimony is consistent with his other statements. (*Plaintiffs' Ex. 33 Time Entries 7/10/07 and 7/31/07; and 8/8/07*). There was no reference to “signing” on the 7/26/07 time entry. (*Tr. Plaintiffs' Ex. 33*).

106. Attorney Young then changed his testimony and testified that he must not have billed for the conference for the execution of the First Amendment. (*Tr. 315, 317*).

107. Attorney Young does over 50 estate plans per year. (*Tr. 311*). It has been almost 5 years since the date of the execution of the First Amendment or approximately 250 estate plans ago. (*Id.*) The thing that helped Attorney Young the most in preparing for testimony was looking at his billing records. (*Id.*) The initial time entries are done at or about the time he actually does the action reflected in the bill. (*Tr. 3112*). He relies upon the bills in his business and believes them to be correct and uses them in the ordinary course of his law practice. (*Tr. 273*). He had to review his file, including billing, to refresh his memory for testimony. (*Tr. 312-313*). In his deposition he did not initially recall that Decedent Watson and Defendant Smith were married at the time of the execution of the original trust. (*Tr. 313*). After reviewing his file further he found a

marriage license and that fact is actually stated in the original trust. (*Id.*) Attorney Young admitted it was hard to remember what happened that long ago. (*Tr. 314*).

108. Attorney Young did not have a reliable memory in regard to the events leading up to the execution of the First Amendment or the execution of the First Amendment to the Trust. (*Tr. 294, 297; Tr. 300-317*).

**BANK ACCOUNT TITLES AND RETIREMENT ACCOUNT BENEFICIARIES:**

109. A list of Decedent's bank accounts with balances for various dates from 2/9/07 to 7/2/07 with Defendant Smith's handwriting and not Decedent Watson's handwriting was provided to Attorney Young. (*Plaintiffs' Ex. 43-13, p. RY619*).

110. On 10/25/07 Attorney Young had a conference with Decedent Watson and Defendant Smith (*Plaintiffs' Ex. 35 and 43-14; Tr. 318*). Defendant Smith was wanting to have himself named as beneficiary on the IRA accounts. (*Tr. 318*). Attorney Young did not feel like Decedent Watson was comfortable with the change or understood it completely. (*Tr. 318-319*). Attorney Young did not think it was done. (*Id.*)

111. On 11/19/07 Attorney Young had a conference with Decedent Watson (*Plaintiffs' Ex. 35 and 43-14; Tr. 319*). Decedent Watson wanted Attorney Young's help in reviewing her bank records and bank accounts to make sure that Defendant Smith was not spending more money than he should. (*Tr. 319*). When Decedent Watson first signed her trust back in 2002, she was very independent and never asked Attorney Young for help in reviewing her bank accounts. (*Id.*)

**SECOND AMENDMENT TO TRUST:**

112. Decedent Watson's Second Amendment to her Trust was signed on 7/2/08 (*Plaintiffs' Ex. 43-17, p. RY575-578*).

113. Attorney Young's statement of 5/27/08 (*Plaintiffs' Ex. 36; Plaintiffs' Ex. 43-18*) and 7/31/08 (*Plaintiffs' Ex. 37; Plaintiffs' Ex. 43-19*) are the two statements that involve Decedent Watson's Second Amendment. (*Plaintiffs' Ex. 36 and 37*).

114. The 2/13/08 conference was a telephone conference that only lasted about 10 minutes. (*Tr. 320*). Attorney Young's note in regard to that telephone conference is *Plaintiffs' Ex. 43-20. (Plaintiffs' Ex. 43, p. RY603.)* In that telephone conference Decedent Watson's siblings' shares were reduced from \$25,000.00 each to \$5,000.00 each. (*Id.*) At that time, Decedent Watson could not use the telephone and the telephone call would have been initiated by Defendant Smith. (*Tr. 321*). Attorney Young had no idea what was going on at Decedent Watson's end of the line. (*Id.*) Decedent Watson was under the care of Home Advantage at the time. (*Plaintiffs' Ex. 31, p. 195-249*).

115. Attorney Young's next conference with Decedent Watson was on 3/31/08. (*Plaintiffs' Ex. 36*). This was an approximate 5 min. telephone conference. (*Tr. 320*). At that time, Decedent Watson could not use the telephone and the telephone call would have been initiated by Defendant Smith. (*Tr. 321*). Attorney Young had no idea what was going on at Decedent Watson's end of the line. (*Id.*) In this telephone conference Defendant Smith's son, Defendant Sidney Smith, was made a \$5,000.00 beneficiary equal with Decedent Watson's siblings. (*Tr. 322*). Decedent Watson was under the care Home Advantage at the time. (*Plaintiffs' Ex. 31, p. 250-306* )

116. Attorney Young's next conference with Decedent Watson was on 6/18/08 (*Plaintiffs' Ex. 37 and 43-19*). This was also an approximate 5 minute telephone conference. (*Id.*) At that time, Decedent Watson could not use the telephone and the telephone call would have been initiated by Defendant Smith. (*Tr. 321*). Attorney Young had no idea what was going on at Decedent Watson's end of the line. (*Id.*) Attorney Young had no corresponding office note for that date. (*Id.*) Decedent Watson was in Clearview Nursing Home at the time. (*Plaintiffs' Ex. 31, p. 537-549.*)

117. From review of Attorney Young's statements, time and his testimony all conferences with Decedent Watson leading up to execution of the Second Amendment were short telephone conferences. (*Plaintiffs' Ex. 36 and 37; Tr. 320*).

118. An attempt to execute the Second Amendment was made on 6/7/08 (*Plaintiffs' Ex. 43-23, p. RY595-597; Tr. 321*). The attempted execution of the Second Amendment on 6/7/08 was while Decedent Watson was in the Clearview Nursing Home and was not properly signed. (*Plaintiffs' Ex. 43-23, p. RY595-597; Plaintiffs' Ex. 31, p. 4119; Tr. 321*). All changes to the attempted execution of Second Amendment were in Defendant Smith's handwriting. (*Tr. 321-322*).

119. On 6/7/08 a letter was sent to Attorney Young advising that Decedent Watson still wanted to execute a Second Amendment to her Trust. (*Plaintiffs' Ex. 28*) The entire letter was written by Defendant Smith. (*Tr. 90*).

120. The Second Amendment was executed on 7/2/08. (*Plaintiffs' Ex. 43-17, p. 575-578*). Decedent Watson was released from Clearview Nursing Home that same day. (*Plaintiffs' Ex. 31, p. 465-548; Plaintiffs' Ex. 31, p. 505.*) Attorney Young had to travel

from Charleston to Decedent Watson's home in Sikeston for her to execute the Second Amendment at her home. (*Tr.* 322-323). The travel time from Charleston to Sikeston is about 15-20 minutes. (*Id.*) There is additional approximate 10 min. travel time from the Sikeston City Limits to Decedent Watson's home. (*Id.*) Considering the round trip and Attorney Young only billed 1 hour for execution of the Second Amendment the time he spent with Decedent Watson was minimal. (*Id.*) Decedent Watson was having such substantial health problems at the time it caused Attorney Young to prepare a memo to his file. (*Tr.* 320-321). He testified he thought there could be an issue about her signing the Second Amendment because she had these health problems so he prepared a memo. (*Tr.* 291).

**ATTORNEY YOUNG'S INTERACTION WITH ATTORNEY VANDIVORT:**

121. Attorney Young represented Decedent Watson since approximately 2000. He thought he was doing all of her legal work. (*Tr.* 331). In 12/08 he received a letter from Attorney Vandivort dated 12/8/08 advising that Defendant Smith and Decedent Watson had come to see him and they wished to have her Will deposited with the Probate Court and her Trust and Amendments registered. (*Plaintiffs' Ex. 29, p. 1-2*). It also requested Attorney Young to send those documents to Attorney Vandivort. (*Id.*)

122. Attorney Young was surprised to get the letter from Attorney Vandivort. (*Tr.* 331). He thought it was probably something Defendant Smith was pushing to do. (*Tr.* 331-332). Attorney Young sent Attorney Vandivort the original documents. (*Plaintiffs' Ex. 29, p. 2; Tr.* 331)

123. Attorney Young would have advised against Attorney Vandivort's preparation of deeds from Decedent Watson's Trust to her individually and then Beneficiary Deeds from her to Defendant Smith. (*Tr.* 332).

**ADDITIONAL:**

124. Attorney Young would have also advised against Decedent Watson transferring the titles of her bank accounts from her trust to her individually with payable on death (POD) directions to Defendant Smith. (*Id.*)

125. Attorney Young felt like Defendant Smith was pressuring Decedent Watson to change the Powers of Attorney, change the bank account beneficiaries, change the IRA beneficiaries and in going to Attorney Vandivort, and was trying to protect his position. (*Tr.* 330-332).

126. Attorney Young agreed that before giving an opinion it is important to know all relevant facts. (*Tr.* 323). He also admitted that he had not reviewed any medical records of Decedent Watson before she executed her First Amendment or Second Amendment. (*Id.*)

127. After hearing of the mental problems Decedent Watson was having prior to execution of her First Amendment from her medical records Attorney Young agreed that the prudent thing to do would have been to get a doctor's opinion before Decedent Watson signed the First Amendment. (*Tr.* 329).

128. Decedent Watson's original trust executed on 5/9/02 drafted by Attorney Young provided that Decedent Watson's capacity was to be determined by a medical doctor. (*Plaintiffs' Ex. 1, p. 10; Tr.* 326).

129. Attorney Young agreed that he would prefer an opinion from a doctor whose highest expertise is geriatric psychiatry (Dr. Sky) rather than one whose highest expertise is nursing home litigation (Dr. Huss) in determining Decedent Watson's capacity. (*Tr.* 329-330).

130. Attorney Young's testimony in regard to Decedent Watson's capacity at the time she executed the First Amendment is not credible because of the following:

- a. Attorney Young's billing records and file and the estate plan documents executed that day do not reflect that Attorney Young was even present at the execution of the First Amendment. (*Plaintiffs' Ex. 33*).
- b. Attorney Young's memory of the details of the execution of the First Amendment were very poor. (*Tr.* 294-317).
- c. Attorney Young was not aware of and did not recognize all the many mental impairments that Decedent Watson had at such time as reflected in the medical records many of which were reported by Defendant Smith to the doctors and medical providers. If he had been aware of them he would have requested a medical opinion. (*Tr.* 323-329).
- d. Plaintiffs' expert Dr. Sky's testimony that Decedent Watson would have been able to conceal her mental impairments from Attorney Young was credible. (*Tr.* 224-225).

131. Attorney Young's testimony in regard to Decedent Watson's capacity at the time of execution of the Second Amendment was not credible for the following reasons:

a. The conferences of Attorney Young with Decedent Watson for the changes reflected in the Second Amendment were only three short telephone conferences that would have been initiated by Defendant Arnold Smith while Decedent Watson was under the care of Home Advantage or in Clearview Nursing Home. (*Plaintiffs' Ex. 31, p. 4119; Plaintiffs' Ex. 31, p. 195-315, 537-549; Plaintiffs' Ex. 48.*)

b. Attorney Young did not recognize the many and various mental problems Decedent Watson was having at the time as reflected in her medical records, many of which were reported by Defendant Smith to the doctors and medical providers. (*Tr. 323-326*)

c. Attorney Young spent minimal time with Decedent Watson at the time of the execution of the Second Amendment. (*Tr. 322-323*).

d. Attorney Young did recognize that Decedent Watson had some health problems and that caused him prepare a memo to his file. (*Tr. 320*).

e. Plaintiffs' expert Dr. Adam Sky's testimony that Decedent Watson could have concealed her mental impairments from Attorney Young is credible. (*Tr. 224-225*).

## **ATTORNEY CLAYTON VANDIVORT**

### **DEPOSITION TESTIMONY**

132. Attorney Vandivort met with Defendant Smith and Decedent Watson on 12/8/08. (*Plaintiffs' Ex. 44, p. CV15*). He had not done any prior work for her. (*Tr. 331-332*).

133. He was requested to obtain Decedent Watson's original Trust, Amendments and Will from Attorney Young. (*Plaintiffs' Ex. 29, p. 1; Plaintiffs' Ex. 44, p. CV13*). He was requested to deposit the Will and register the Trust. (*Id.*) He was also requested to prepare Quit Claim Deeds from Watson's Trust to Watson individually and then Beneficiary Deeds from Watson individually to Defendant Smith on all trust real estate. (*Plaintiffs' Ex. 44, p. CV3, CV4, CV1, and CV2*)

134. It was an unusual request to deposit a Will and register a Trust. (*Tr. 115-116*). So unusual that Attorney Vandivort had to do some research. (*Plaintiffs' Ex. 44, p. CV5-8; Tr. 115-116*). Defendant Smith was familiar with the statute and he was definite about wanting it done. (*Tr. 115-116*).

135. Attorney Vandivort's bill was to Defendant Smith. (*Plaintiffs' Ex. 44, p. CV15*).

136. Attorney Vandivort was an experienced estate planning attorney who had practiced in excess of 35 years, written many wills and trusts and similar documents, and prepared many deeds. (*SLF 55*). Attorney Vandivort did not recognize that Decedent Watson had any mental impairments on 12/8/08. (*SLF 46*). By that time, four of Decedent Watson's treating doctors had each signed an Affidavit of Incapacity. (*Plaintiffs' Ex. 8-11*). The medical records are clear that Decedent Watson did not have testamentary capacity at that time and was able to conceal that from Attorney Vandivort. (*Plaintiffs' Ex. 8-11; Plaintiffs' Ex. 31; Plaintiffs' Ex. 48 Chronological Summary of Medical Records*).

## DEFENDANTS' EXPERT

### RANDALL D. HUSS, M.D. TESTIMONY

137. Dr. Huss testified as an expert on behalf of Defendants. (*Tr.* 334).

138. Dr. Huss is a family practitioner. (*Tr.* 335, 362).

139. Dr. Huss has been previously retained as an expert 90-100 times. (*Tr.* 362-363). The vast majority of the time he testifies for the defense. (*Tr.* 363).

140. Dr. Huss' area of highest expertise is nursing home litigation. (*Tr.* 363-364).

141. Dr. Huss admitted that Decedent Watson was demented prior to the time she executed her First Amendment on 7/27/07. (*Tr.* 365-367, 369). Dr. Huss agreed with Dr. Sky that she probably had a mixed dementia related to vascular dementia and Alzheimer Disease. (*Tr.* 366).

142. Dr. Huss admitted that Decedent Watson's type of dementia was progressive. (*Id.*)

143. Dr. Huss agreed with the 10/31/05 impression and summary of Dr. Lucas of Mayo Clinic as follows:

"Ms. Watson will require continued supervision and assistance with complex activities of daily living, including assistance with any medical, legal, or financial decision-making" (*Plaintiffs' Ex. 31, p. 21; Tr.* 368).

144. Dr. Huss testified complex activities of daily living would include things like managing the day to day checkbook; getting to and from the store; getting adequate provisions of food; and fixing dinner. (*Tr.* 369).

145. Amending trusts and transferring titles to assets is included in legal and financial decision making. (*Tr. 371-372*).

146. Dr. Huss admitted that at the time of the Mayo Clinic exam Decedent Watson did not have testamentary capacity to download legal forms off the internet and prepare them by herself. (*Tr. 369-372*).

147. Dr. Huss agreed that there were times prior to 7/27/07, the date Decedent Watson executed the First Amendment to her Trust, that Decedent Watson did not have testamentary capacity. (*Tr. 372*).

148. Dr. Huss agreed that Decedent Watson's medical status was worse in July 2007 than it was in October 2005. (*Tr. 369*).

149. Dr. Huss admitted that Decedent Watson's mental status was worse in July 2008 than it was in July 2007. (*Tr. 373*).

150. Dr. Huss admitted that there were times between July 2007 and the date Decedent Watson executed her Second Amendment on 7/2/08 that Decedent Watson did not have testamentary capacity. (*Id.*)

151. Dr. Huss knew Plaintiffs' expert, Dr. Adam Jason Sky, and respected him as a fine geriatric psychiatrist. (*Tr. 373*).

152. Dr. Huss admitted that considering all of Decedent Watson's physical impairments and mental impairments she was more subject to the influence of other people than if she did not have those impairments. (*Tr. 384*).

153. Dr. Huss admitted that if Decedent Watson was also afraid of a person that would make her even more susceptible to the influence of the other person. (*Id.*)

### NEIGHBOR DELORES GRINDSTAFF

154. Defendants called Delores Grindstaff who was a neighbor. (*Tr. 259*).

155. Delores testified as follows on cross exam:

a. Decedent Watson told her that Defendant Smith made advances to her that she did not want. (*Tr. 261-262*).

b. Delores thought that Defendant Smith was not taking care of her. (*Tr. 263*).

c. Decedent Watson came to Delores' home and took all of her clothes off in her living room. (*Tr. 262-263*).

#### **D. TRUST AND NON-TRUST ASSETS**

156. The Trust assets total approximately \$628,232.24 which are described in *Ex. 45 – Summary of Patricia Parker Watson Trust Assets* (which includes \$44,000.00 due from Defendant Smith to the Trust for rent on the Laurelwood house).

157. The Non-Trust assets total approximately \$1,221,026.30 (including the CALSTRS Retirement) which are described in *Ex. 46 – Summary of Patricia Parker Watson Non-Trust Assets*.

158. Defendant Smith had possession of all non-trust assets and was receiving the CALSTRS Retirement. (*Tr. 38-45, 49-51*)

159. Defendant Smith testified that he had used Decedent Watson's non-trust assets to purchase a condominium in Nashville, TN; a home for his son, Defendant Sidney Smith in Nashville, TN; a boat; a Nissan 370 Z. (*Tr. 45*). He had also given one

of Decedent Watson's vehicles to Defendant, Sidney Smith, and one to a granddaughter. (*Tr. 51*).

160. Defendant Smith became engaged to Sally Doyle in 2009 after Decedent Watson died on 4/10/09 and purchased an engagement ring for Sally Doyle. Smith married Desaree Haber on 11/21/11 and bought her an engagement ring. (*Tr. 47*). Defendant Smith is still married to Desaree Haber. (*Id.*) Defendant Smith became engaged to Elsie Freeman in late 2011 or early 2012 and purchased an engagement ring for her. (*Tr. 47-48*).

161. Defendant Smith testified that he did not have any of the bank accounts or IRA's left. (*Tr. 45*). He was still receiving the CALSTRS Retirement. (*Tr. 49-50*).

## ARGUMENT

### STANDARD OF REVIEW

The Standard of Review in this court tried case is governed by *Murphy v. Carron*, 536 S.W. 2d 30 (Mo. banc 1976). The judgment must be affirmed unless it is not supported by substantial evidence, it is against the weight of the evidence, or it erroneously declares or applies the law. *Id.* At 32.

Defendants argue that the Standard of Review of a court tried case in which the Burden of Proof was clear, cogent and convincing needs clarification. However, the law is already clear. This court has specifically held that the *Murphy v. Carron* Standard of Review on appeal applies when the Burden of Proof for the trial court was clear, cogent and convincing. *In re Adoption of W.B.L.*, 681 S.W. 2d 452, 454 (Mo. banc 1984); *In re Adoption of C.M.B.R.*, 332 S.W. 3d 793, 815 (Mo. banc 2011); *In the Interest of P.L.O. and S.K.O.*, 131 S.W. 3d 782, 788-789 (Mo. banc 2004); *Greeno v. State of Missouri*, 59 S.W. 3d 500, 504 (Mo. banc 2001). All of the standard rules of review under *Murphy v. Carron* apply. The Appellate Court must defer to the trial court on factual issues because the trial court is in a better position not only to judge the credibility of witnesses and the persons directly, but also their sincerity and character and other trial intangibles which may not be completely revealed by the record. *In re Adoption of W.B.L. supra* at 455. As a trier of fact, the trial court has leave to believe or disbelieve all, part of, or none of the testimony of any witness." *Id.* The judgment will be reversed only if the Appellate Court is left with a firm belief that the trial court's judgment is wrong. *In re Adoption of C.M.B.R., supra* at 815. Conflicting evidence will be reviewed

in the light most favorable to the trial court's judgment. *Id.* The Appellate Courts will defer to the trial court's credibility assessments. *Id.* When the evidence poses two reasonable but different inferences, the Appellate Court is obligated to defer to the trial court's assessment of the evidence. *Id.*

The cases cited by Defendants, which are Southern District cases, are not inconsistent with the above. *In re Marriage of Cochran*, 340 S.W. 3d 638 (Mo. App. S.D.2011) at 644 followed *In re Adoption of W.B.L.*, *supra*. *Woods ex rel. Woods v. Cory*, 192 S.W.3d 450 (Mo. App. S.D.2006) followed *Murphy v. Carron* and then specifically held: "This court defers to the trial court's findings of fact, recognizing the superior ability of the trial court to judge the credibility of the witnesses...all evidence and permissible inferences favorable to the prevailing party are accepted as true; evidence and inferences to the contrary are disregarded...**This is so even in cases where the clear and convincing standard of proof is applicable.**" (*Emphasis added*). *Id.* at 458. The court further held: "We defer to the trial court's determination of witness credibility and recognize that the court is free to accept or reject all, part, or none of the testimony presented." *Id.* at 459. *Wryterski v. Wilson*, 740 S.W. 2d 374 (Mo. App. S.D. 1987) simply follows the law as set forth by this court in reviewing a court tried case under *Murphy v. Carron* and held that where evidence of undue influence was in dispute, it would defer to the finding of the trial court. It further stated "this court should exercise the power to set aside a judgment on the ground that it is against the weight of the evidence with caution and only when we have a firm belief that the decree of judgment is wrong." *Id.* at 376.

The Southern District has also held the following: The trial court's judgment is presumed correct, and Appellant bears the burden of proving it erroneous. *Hahn v. Tanksley*, 317 S.W.3d 145 (Mo.App. S.D. 2010). The evidence and all reasonable inferences are viewed in the light most favorable to the judgment and all contrary evidence and inferences are disregarded. *Bacon v. Uhl*, 173 S.W.3d 390, 396 (Mo.App. S.D. 2005). Credibility of the witnesses and the weight to be given to their testimony is for the trial court, which is free to believe none, part or all of the testimony of any witness. *Christian Health Care of Springfield West Park, Inc v. Little*, 145 S.W.3d 44, 48 (Mo.App. S.D. 2004). Appellate courts defer to the trial judge's superior opportunity to assess the witnesses' credibility. *Lee v. Hiler*, 141 S.W.3d 517, 520 (Mo.App. S.D. 2004). The trial judge is in a better position to judge the witnesses' sincerity, character and other trial intangibles which may not be completely revealed by the record. *Hahn v. Tanksley*, 317 S.W.3d 145, 153 (Mo.App. S.D. 2010). An appellate court exercises extreme caution in considering whether a judgment should be set aside on the ground that it is against the weight of the evidence and will do so only upon a firm belief that the judgment was wrong. *Id.*

Defendants' argument remarkably appears to be that the Southern District did not recognize the Burden of Proof at trial because it was not specifically stated that way in its opinion. Plaintiffs have absolute confidence that the Southern District understood exactly what the Burden of Proof in this type of case was before it was ever tried or brief. However, the Burden of Proof at trial was specifically pointed out to the Southern District by the following: The trial court's judgment at page 29; the Appellant's Brief at

pages 29, 30, 31, 32, 34, 35, 37, 38, 44, 49, 59, 62, among others; Respondents' Brief at pages 41, 59, 74, 75, 76, and 78 among others. The Southern District specifically held "the trial court's finding that Watson did not have testamentary capacity at the time she executed the First and Second Trust Amendments was supported by substantial evidence and was not against the weight of the evidence." *S.D. Opinion at page 11*. The Southern District follows with a lengthy analysis of the Standard of Review, the framework for presenting evidentiary challenges to a trial court's judgment, and why Defendants' arguments were defective. *Id at pages 11-14*.

Defendants rely almost entirely on the testimony of Attorney Young elicited on Defendants' direct examination. As indicated above, the trial court had the discretion to judge his credibility, decide the weight to be given to his testimony and was completely free to believe any part or none of his testimony. This Rule of Appellate Review alone destroys Defendants' position on appeal. As the Southern District noted "...Smith's arguments have no persuasive force because they completely ignore facts that were favorable to the trial court's finding... Without consideration of that evidence, Smith's argument is analytically useless and has no persuasive force." *S.D. Opinion at page 13*. Defendants have made the same arguments and the same mistake before this court.

Defendants also complain about the trial court's adoption of the Plaintiffs' proposed Findings of Fact, Conclusions of Law and Judgment. The trial court did adopt substantial portions of the Plaintiffs' proposed Findings of Fact, Conclusions of Law and Judgment, but not in its entirety. In any event, the court's have consistently held that the trial court's verbatim adoption of a party's Findings of Fact, Conclusions of Law and

Judgment is not per se erroneous. *Nolte v. Wittmaier*, 977 S.W. 2d 52, 57-58 (Mo. App. E.D. 1998); *Neal v. Neal*, 281 S.W. 3d 330, 337-338 (Mo. App. E.D. 2009).

The Southern District understood the Burden of Proof in this case. It reviewed the case under the longstanding *Murphy v. Carron* Standard of Review with all its applicable rules which Defendants correctly invited it to do. It clearly and correctly found that there was substantial evidence to support the trial court's judgment.

## I.

**The trial court did not commit error in finding that there was clear and convincing evidence that the First Amendment to the Decedent's Trust executed on July 27, 2007, was the result of undue influence by Defendant Arnold Smith.**

### A. UNDUE INFLUENCE BURDEN OF PROOF

Plaintiffs' burden of proof at trial was clear and convincing evidence. *Strype v. Lewis*, 180 S.W.2d 688, 692-93 (Mo. 1944). The "clear and convincing standard" is an intermediate standard between the usual civil law standard of "a preponderance of the evidence" and the criminal law standard of "beyond a reasonable doubt". *Addington v. Texas*, 441 U.S. 418, 425, 99 S.Ct. 1804, 1809 L. Ed.2d 323 (1979). For evidence to be clear and convincing it must instantly tilt the scales in the affirmative when weighed against the evidence in opposition and leave the fact finder's mind with an abiding conviction that the evidence is true. *In Interest of MJA*, 826 S.W.2d 890, 896 (Mo.App. S.D. 1992). However, "there need not be one single event that 'instantly tilts the scales'".

*Id.* The court must be clearly convinced, although this does not mean that there may not be contrary evidence. *Grissum v. Reesman*, 505 S.W.2d 81, 86 (Mo. 1974). Clear and convincing evidence may be circumstantial. *Chmielecki v. City Products Corp.*, 660 S.W.2d 275, 290 (Mo.App. W.D. 1983).

Plaintiffs' evidence of Defendant Smith's undue influence over Decedent Watson as detailed below was overwhelming. Plaintiffs' expert witness, Dr. Adam Jason Sky, is a highly qualified geriatric psychiatrist (*Plaintiffs' Ex. 50, Curriculum Vitae of Adam Jason Sky, M.D.; Tr. 205-207*) who is clearly not a "hired gun" (*Tr. 209*). Prior to rendering his opinions, Dr. Sky reviewed all of Decedent Watson's medical records (*Tr.210-211*). Dr. Sky also reviewed the definitions under Missouri law for testamentary capacity; incapacity and disability under Guardianship Code; undue influence; and the "clear and convincing evidence" burden of proof before forming and rendering his opinions. (*Tr. 214, 219, 222, 225-226*). Dr. Sky's opinion was that Decedent Watson was highly susceptible to undue influence at the time she signed the First Amendment to her trust on 7/27/07 and at all times thereafter. (*Tr.222*). Dr. Sky testified that the medical records provided clear and convincing evidence to him of all of his opinions (*Tr. 225-227*). Dr. Sky was 90% certain of all his opinions. (*Tr.246*). Dr. Sky did not have any reasonable doubt about any of his opinions. (*Tr.227*). The evidence contained in the medical records from independent witnesses, Defendant Smith's actions and admissions and Dr. Sky's opinions provide substantial evidence which met Plaintiffs' burden of proof.

**B. UNDUE INFLUENCE LAW**

A trust is void to the extent its creation was induced by fraud, duress or undue influence. *Mo. Ann. Stat. §456.4-406*. The Missouri Supreme Court has defined undue influence in M.A.I. 15.03 as follows:

*The phrase “undue influence” as used in this (these) instruction(s) means such influence as destroys the free choice of the person making the (will) (codicil) (contested part of the will).*

If there is a fiduciary or confidential relationship between the Decedent and the Defendant, the elements of undue influence are a confidential and fiduciary relationship; a substantial benefit to influencer; and facts from which the undue influence may be inferred. *Estate of Gross v. Gross*, 840 S.W.2d 253, 257 (Mo.App. E.D. 1992). The existence of a power of attorney executed by the Decedent to the Defendant establishes a fiduciary relationship even if the power of attorney is not utilized. *Williams v. Walls*, 964 S.W.2d 839, 846 (Mo.App. E.D. 1992). A confidential relationship also exists when one relies upon and trusts another in regard to handling property and business affairs, thereby creating some fiduciary obligation. *Godsy v. Godsy*, 504 S.W. 2d 209, 212 (Mo. Ct. App. 1973). The Decedent’s physical needs and mental condition are highly material in determining if there is a fiduciary relationship. *Id. at 213*. If there is no fiduciary relationship between the Decedent and Defendant, the elements of undue influence are a substantial benefit to the influencer and other facts and circumstances if they are sufficient to permit a reasonable inference of undue influence. *Rhoades v. Chambers*, 759 S.W.2d 398, 410-411(Mo.App. S.D. 1988).

In determining whether there are facts from which undue influence may be inferred, “courts have adopted a liberal attitude regarding the quantum of evidence necessary to establish that the fiduciary was actively concerned in some way which caused or contributed to cause the execution of the instrument.” *Estate of Gross v. Gross*, 840 S.W.2d 253, 258 (Mo.App. E.D. 1992); *Godsy, supra* at 213. The Plaintiff does not need to show that the beneficiary was actually present at the transaction. *Id.* The Plaintiff does not need to show by specific evidence that the Defendant’s influence was being exerted at the precise time of the execution of the instrument. *Steller v. Steller*, 401 S.W.2d 473, 478 (Mo. 1966). It is sufficient that undue influence be shown by circumstantial evidence. *Salisbury v. Gardner*, 515 S.W.2d 881, 886 (Mo. Ct. App. 1974). This is because Missouri courts have long recognized that “Undue influence is not proclaimed from the housetop, but is hidden like a candle beneath a bushel and concealed like fraud and deception, only appearing through carelessness and unguarded openings, but ever present and potential... How shall we detect its presence? Manifestly, this may best be done by that tribunal to which is afforded the opportunity of meeting the witnesses face to face and hearing them testify in any given case.” *Oden v. Oden*, 905 S.W. 2d 914, 919 (Mo. App. E.D. 1995)(quoting *Coldwell v. Coldwell* 228 S.W. 95, 102 (Mo. 1921)).

With respect to the element-facts that may reasonably infer undue influence-there is no rigid formula and the facts will vary from case to case. *Matthews v. Turner*, 581 S.W.2d 466, 472 (Mo.App.S.D.1979). However, there are several significant factors that the courts have recognized including the mental and physical condition of the decedent;

opportunity of the defendant to undue influence; unnatural dispositions of the decedent's property; a sudden change in dispositions from a prior document; the active involvement of the defendant in securing the attorney to prepare the documents or in securing execution of the documents; hostile feelings of the defendant toward the otherwise expected recipients; derogatory remarks of the defendant toward the plaintiffs; discouraging visits of plaintiffs by defendant; statements against interest by the defendant. *Rhoades, supra*. It is not necessary to prove that Decedent did not have testamentary capacity to prove that she was unduly influenced. *Duvall v. Brenizer* 818 S.W.2d. 332, 335 (Mo.App.W.D. 1991).

Missouri courts recognize that a spouse may be guilty of undue influence on his or her spouse. *Hammonds v. Hammonds*, 297 S.W.2d 391, 394 (Mo. 1957); *Pike v. Pike*, 609 S.W. 2d 397 (Mo.banc 1980); *Hodges v. Hodges*, 692 S.W.2d 361, 376 (Mo.App. S.D. 1985). In *Hodges*, the children of the decedent's first marriage contested the will of the decedent which left basically everything to the decedent's second wife. *Id. at 364*. Among other allegations, the children alleged the second wife unduly influenced the decedent to make the contested will. *Id. at 365*. The court held that the evidence of undue influence adduced by the contestants was sufficient to submit the issue to the jury. *Id. at 379*. It said that the law recognizes that a spouse may be guilty of undue influence as to invalidate his or her spouse's will. *Id. at 376*. (As a side note, it is interesting that the attorney for the defendant was David Blanton, a highly esteemed lawyer and one of the founding partners of the Blanton Law Firm, the firm that represents the Defendants in

this case, and who conceded that the law recognized that a spouse may be guilty of undue influence. *Id. at 376.*

**C. UNDUE INFLUENCE FACTS**

**OVERVIEW**

Decedent's mental health is one important factor in determining undue influence. In order not to restate the same evidence and for the court's convenience, the Respondents request this court to read Respondent's Argument in regard to Point II (*Pages 66-77 of Respondents' Substitute Brief*) concerning the Decedent's testamentary capacity which fully discusses the Decedent's mental health before proceeding further on this Point I on Undue Influence. It is clear that the Decedent's mental health was substantially impaired and she did not have testamentary capacity to execute the First Amendment on 7/27/07.

It is also clear that the Decedent's physical health was severely impaired at the time she executed the First Amendment on 7/27/07. Decedent Watson needed help with all of her daily living activities including walking, bathing, dressing, picking out clothes, meal preparation, use of telephone, driving, getting in and out of the car and up and down stairs (*Tr. 144-147; Tr. 156-159; Tr. 171-173; Tr. 190-192*); and cooking, bathing, cleaning, and medications. (*Plaintiffs' Ex. 31, p. 31*). She could not take care of herself. (*Tr. 144-147; Tr. 156-159; Tr. 171-173; Tr. 190-192*). The Decedent required a wheelchair by 10/9/07. (*Plaintiffs' Ex. 31, p. 61*).

Due to her extensive mental and physical problems, the Decedent relied on Defendant Smith in all phases of her life. Plaintiffs testified that prior to the time she

executed her First Amendment, Decedent Watson had memory loss, problems finding words, problems finding names, problems figuring out instructions, needed help with her bills and checkbook, help remembering things, help finding personal belonging, and could not carry on a conversation. (*Tr. 144-147; Tr. 156-159; Tr. 171-173; Tr. 190-192*).

Defendant Smith himself reported to Neuropsychiatrist Dr. John A. Lucas of Mayo Clinic during the October 19 thru November 2, 2005 mental and physical examination that the Decedent had word finding difficulties, problems remembering names, difficulty figuring out instructions, problems understanding bills, misplaced personal belongings, difficulty remembering things she was told, was not reliable in recalling recent events, was disorganized in her thinking, loses her train of thought, goes off topic in conversation and had difficulty handling the checkbook . (*Plaintiffs' Ex. 31, p. 19*). Dr. Lucas diagnosed Decedent Watson with dementia on 10/31/05 and his final impression was "Miss Watson will require continued supervision and assistance with complex activities of daily living, including assistance with any medical, legal, or financial decision making." (*Plaintiffs' Ex. 31, p. 21*). Decedent Watson's mental health continued to deteriorate after the Mayo Clinic exam. She had increasing difficulty with her memory and mental impairments. (*Plaintiffs' Ex. 31 – Medical Records; Plaintiffs' Ex. 48 – Chronological Summary of Medical Records*).

In addition, there is extensive evidence in the record that Decedent Watson feared Defendant Smith. *E.g.* Decedent Watson thought Defendant Smith was trying to poison her beginning at least by 1/6/03 and continuing as late as 1/26/09. (*Plaintiffs' Ex. 31, p. 2, 7, 64, 996*). *Also see the evidence below.*

Considering Decedent Watson's severely impaired mental and physical condition, her reliance on Defendant Smith and her fear of him, he had ample motive and opportunity to unduly influence her as he desired.

Defendant Smith's and Decedent Watson's statements and actions before and after the execution of the First Amendment on 7/27/07 show Defendant Smith's pattern of undue influence.

### **MEDICAL RECORDS**

Defendant Smith discharge Decedent Watson from the hospital against medical advice on 6/29/07. (*Plaintiffs' Ex. 31, p. 58*). This was after the opinion of Dr. Lucas at Mayo Clinic in 2005 that Decedent needed help with all medical decisions. (*Plaintiffs' Ex. 31, p. 21*).

On 1/29/08 Decedent was forgetful and confused and asked her husband several times, "Am I still your wife? Are we married?" (*Plaintiffs' Ex. 31, p. 186*). On 2/20/08 Decedent reported that Defendant Smith's family was stealing from her (*Plaintiffs' Ex. 31, p. 193*); at the same time, Decedent and Defendant Smith had been in a fight and the police were called. *Id.* Defendant Smith reported that Decedent Watson hid her cash and credit cards and was going to leave home but Defendant Smith stopped her. *Id.* On 4/7/08 Decedent Watson reported that she felt Defendant Smith was only with her due to her money. (*Plaintiffs' Ex. 31, p. 316*). On 4/10/08 Decedent Watson reported that "her husband is taking control of everything". (*Plaintiffs' Ex. 31, p. 324*). On 5/2/08 Decedent Watson stated that Defendant Smith "controls every aspect of my life." (*Plaintiffs' Ex. 31, p. 384*). On 5/27/08 Decedent Watson was hospitalized in Missouri

Delta Medical Center (*Plaintiffs' Ex. 31, p. 442 – 449*). On that date there is a report that she was confused/disoriented/senile/irrational/noncompliant. (*Plaintiffs' Ex. 31, p. 447*). On that very day, Defendant Smith requested a notary for possible changes to her Trust. (*Plaintiffs' Ex. 31, p. 448*).

After discharge from Missouri Delta Medical Center, Decedent Watson was a resident of the Clearview Nursing Home from approximately 6/7/08 thru 7/2/08, the date she signed the Second Amendment to her Trust. (*Plaintiffs' Ex. 31, p. 465-548*). On 6/23/08 an aide heard Decedent Watson tell Defendant Smith, “Please don’t hit me. I didn’t do anything. Please don’t hit me.” (*Plaintiffs' Ex. 31, p. 465*). On 6/27/08 Decedent Watson complained about Defendant Smith being in the room with her and stated that they could “get him out of here if they wanted to.” (*Plaintiffs' Ex. 31, p. 1107*). In addition Decedent stated she wanted a divorce from Defendant Smith. *Id.* On 6/28/08 aides overheard Defendant Smith telling Decedent Watson “you have no business telling your medical history, telling any of our business to anybody”. (*Plaintiffs' Ex. 31, p. 497*). The aides stated “he was jumping all over her.” *Id.* Decedent then just wanted to sit in a chair because she had to watch Defendant Smith. *Id.*

### **DEFENDANT SMITH**

Defendant Smith’s testimony was rangy and rambling. He said and did many incriminating things. Here are a few.

Many of the medical records indicated that the mental impairments of Decedent Watson had been reported by Defendant Smith himself. Smith denied most of the

medical records entries and any mental impairments whatsoever (*Tr. 56-113*) and testified they were all “not correct” and were a “pack of lies” (*Tr. 86, 90, 91, 94*).

On 1/12/08 Defendant Smith had Decedent Watson sign a financial power of attorney (*Tr. 104*). Defendant Smith printed the financial power of attorney off of the internet. (*Id.*) The power of attorney named Defendant Smith as Decedent’s agent. (*Ex. 26*). Attorney Young was named as the agent under Decedent’s prior existing financial power of attorney. (*Tr. 104-105*). The new power of attorney was signed after the Mayo Clinic diagnosis on 10/31/05 (*Plaintiffs’ Ex. 31, p. 19*) and after Defendant Smith filled out the Patient Assessment Form on 1/3/08. (*Plaintiffs’ Ex. 31, p. 135; Tr. 78-80*).

Shortly after the Second Amendment to Decedent’s trust was signed on 7/2/08, Defendant Smith began obtaining Affidavits of Incapacity from various of Decedent’s doctors (*Tr. 106*). He obtained five (5) separate Affidavits of Incapacity executed by five of Decedent’s treating doctors as follows: Dr. Uthoff on 7/22/08 (*Plaintiffs’ Ex. 8*); Dr. William Collier on 8/27/08 (*Plaintiffs’ Ex. 9*); Dr. Talie Haiderzad on 9/20/08 (*Plaintiffs’ Ex. 10*); Dr. Mark Meadows on 10/9/08 (*Plaintiffs’ Ex. 11*); Dr. Syed Sayeed on 2/19/09 (*Plaintiffs’ Ex. 12*). All of these Affidavits were printed by Defendant Smith off the internet. In each Affidavit, each doctor swore that Decedent Watson was by reason of advance age, physical incapacity or mental weakness, incapable of managing her own estate; that she lacked the mental capacity to enter into binding agreements or make decisions on her own behalf; and she did not have the ability to understand that a contract was being made and its general nature. (*Tr. 107-112*). Defendant Smith denied that the

reason for the Affidavits of Incapacity was to make sure that it was clear that Decedent Watson did not have testamentary capacity to amend her trust again. (*Tr. 112*).

The California State Teachers' Retirement System ("CALSTRS") Change of Beneficiary Form was signed by Decedent Watson on July 24, 2008. In that regard the trial court found:

- a. Arnie filled out the Change of Beneficiary Form terminating Plaintiffs as primary beneficiaries and designating himself as the one hundred percent beneficiary. This change also reduced the amount Patricia received from CALSTRS each month from \$6,054.00 to \$3,516.00 in exchange for paying a lifetime benefit to Arnie if he survived Patricia. (*Tr. 98; Plaintiffs' Ex. 25; Plaintiffs' Ex. 46-7 p. 13-14*).
- b. Arnie fraudulently changed the date of Patricia's signature from "7/24/08" to "1/24/08" on the copy of that form provided to Plaintiffs in discovery in this case. (*See Ex. 25 and 46-7*). This fraud was discovered when CALSTRS provided a copy of the form which they received from Arnie. (*Tr. 98-100; Plaintiffs' Ex. 25; Plaintiffs' Ex. 46-7, p. 13-14*).
- c. CALSTRS file stamped the change of beneficiary August 27, 2008. (*Plaintiffs' Ex. 46-7, p. 13*)
- d. The date of the change of beneficiary form is significant because July 24, 2008 was after Arnie obtained the first Affidavit of

Incapacity from Dr. Uthoff on July 22, 2008, but January 24, 2008 was prior to Arnie obtaining any of the affidavits of incapacity.

*(Plaintiffs' Ex. 8).*

- e. The fraud perpetrated by Arnie in altering the date on the change of beneficiary form is evidence of his consciousness of guilt and further damages his credibility. *(First Amended Judgment LF 353).*
- f. Arnie's forgery of the date on the copy of the change of beneficiary form provided to Plaintiffs in discovery was among the most blatant and egregious of his many disreputable efforts to secure Patricia's assets for himself. *(First Amended Judgment LF 372).*

Defendant Smith made the call to Attorney Vandivort's office to set up the appointment with him. *(Tr. 116).* He drove her to the appointment. *(Tr. 117).* Attorney Vandivort prepared a Quit Claim Deed from Decedent Watson's trust to her individually and a Beneficiary Deed from the Decedent to Defendant Smith. *(Tr. 117-118).* Defendant Smith had Decedent Watson sign those deeds but they were not in front of a notary. *(Id.)* This was in December of 2008 after four of the five Affidavits of Incapacity. *(Plaintiffs' Ex. 8 – 11).*

Defendant Smith has the propensity to shade the truth and dip into the collection plate. *E.g.* See his denial of the medical record entries *(Tr. 56-113)* and his admission of tax evasion. *(Tr. 24-25).*

## **PLAINTIFFS**

Plaintiffs testified that prior to the execution of the First Amendment, Decedent Watson thought Defendant Smith was poisoning her, was afraid of him and was mistreated by him. (*Plaintiffs' Ex. 31, p. 2, 7; Tr. 158-159; Tr. 191-192*). Prior to the time that she signed the First Amendment Decedent Watson told her siblings on multiple occasions that she wanted a divorce from Defendant Smith. (*Tr. 147; Tr. 173-174*). Plaintiff Jimmie Ivie testified that in approximately December of 2007 when Decedent Watson and Defendant Smith were leaving his home that Defendant Smith was trying to get her into the car and to get her in he put his foot on her side and shoved her into the car. (*Tr. 157*). In late July or early August 2007, Decedent Watson requested Plaintiff LaDonna Small to come to their home to see her about her money and bank files. Defendant Smith told LaDonna Small "LaDonna I want you to know this is my house and this is my wife and these are my bank files and I don't appreciate you coming over here and getting into my business." (*Tr.178*)

#### **KAREN BAILEY**

Decedent Watson's cousin, Karen Bailey, testified that Decedent came to visit her when Decedent was on a walker but not in a wheelchair. (*Tr. 251*). This would have been prior to October 2007. (*Plaintiffs' Ex. 31, p. 61*). Decedent Watson told Karen that she did not know how he did it, but Defendant Smith got all her money into his name. (*Tr. 252*). Decedent Watson was distressed about it. (*Tr. 252-253*). Karen told Decedent Watson to contact her attorney. Decedent said she did and her attorney told her not to worry about it, that he is taking care of you. (*Tr. 253*). Karen asked her if Defendant Smith was mean to her and she told her yes. (*Id.*)

### ATTORNEY YOUNG

The First Amendment to Decedent Watson's Trust was signed on 7/27/07. On 7/10/07 prior to execution of the First Amendment, Attorney Young met with Decedent Watson. At that meeting, there was statement of Decedent Watson feeling like Defendant Smith was out to get her. (*Tr.* 298-299). Since Decedent Watson was upset with Defendant Smith as of 7/10/07 it did not seem likely she would be changing her Trust to make him the primary beneficiary. (*Id.*) Prior to the time of the execution of the First Amendment on 7/27/07, Decedent Watson was not able to use a telephone on her own and any calls would have been made by Defendant Smith. (*Tr.* 305). The critical conference with Attorney Young in regard to the First Amendment was on 7/20/07. (*Tr.* 307). On that date there was a huge change in the beneficiaries of Decedent Watson's Trust from leaving the residuary of approximately \$1,000,000.00 to Plaintiffs, in equal shares, to leaving the residuary to Defendant Smith (*Tr.* 305). This was only ten days after the conference of 7/10/07 at which time Decedent Watson's Trust was the way she wanted it and was unlikely she would be changing her Trust to make Defendant Smith the primary beneficiary. (*Tr.* 300). The 7/20/07 conference was only for about ten minutes. (*Tr.* 304). If this was a telephone conference, Defendant Smith would have called for Decedent Watson and Attorney Young would not have known what was going on at Decedent Watson's end of the line. (*Tr.* 305). Attorney Young also had a note in his file dated 7/20/07 with the change of beneficiaries. (*Plaintiffs' Ex.* 43-12; *Tr.* 306). Attorney Young testified that somebody gave him this piece of paper, but he did not know who it was. (*Tr.* 306-307).

A list of Decedent's bank accounts with balances for various dates from 2/9/07 to 7/2/07 in Defendant Smith's handwriting and not Decedent Watson's handwriting was provided to Attorney Young. (*Plaintiffs' Ex. 43-13, p. RY619*). On 10/25/07 Attorney Young had a conference with Decedent Watson and Defendant Smith. (*Plaintiffs' Ex. 35 & 43-14; Tr. 318*). Defendant Smith wanted to have himself named as beneficiary on Decedent Watson's IRA account. (*Tr. 318*). Attorney Young did not feel like Decedent Watson was comfortable with the change or understood it completely. (*Tr. 318-319*). On 11/19/07 Attorney Young had a conference with Decedent Watson (*Plaintiffs' Ex. 35 & 43-14; Tr. 319*). Decedent Watson wanted Attorney Young's help in reviewing her bank records and bank accounts to make sure that Defendant Smith was not spending more money than he should. (*Tr. 319*).

The Second Amendment to Decedent Watson's Trust was executed on 7/2/08. (*Plaintiffs' Ex. 43-17, p. 575-578*). From review of Attorney Young's statements, time and his testimony the only conferences with Decedent Watson leading up to the execution of the Second Amendment were three short telephone conferences. (*See Plaintiffs' Statements of Fact paragraphs 115, 116 & 117; Plaintiffs' Ex. 36 & 37; Tr. 320*). During this period of time Defendant Smith made all calls and Attorney Young had no idea what was going on at Decedent's end of the telephone conference. (*Tr. 321*). An attempt to execute the Second Amendment was made on 6/7/08 (*Plaintiffs' Ex. 43-23, p. RY595-597; Tr. 321*) while Decedent Watson was in Clearview Nursing Home and was not properly signed. (*Plaintiffs' Ex. 43-23, p. RY595-597; Plaintiffs' Ex. 31, p. 4119; Tr.*

321). All changes to the attempted execution of the Second Amendment were in Defendant Smith's handwriting. (*Tr.* 321-322).

Attorney Young had represented Decedent Watson since approximately 2000. He thought he was doing all of her legal work. (*Tr.* 331). In December 2008 he received a letter from Attorney Vandivort dated 12/8/08 advising that Defendant Smith and Decedent Watson had come to see him and they wished to have her Will deposited with the Probate Court and her Trust and Amendments registered. (*Plaintiffs' Ex.* 29, p. 1-2). Attorney Young was surprised to get the letter from Attorney Vandivort. (*Tr.* 331). He thought it was probably something Defendant Smith was pushing to do. (*Tr.* 331-332). Attorney Vandivort also prepared deeds from Decedent Watson's Trust to Decedent Watson and then beneficiary deeds on the trust real estate from Decedent Watson to Defendant Smith. (*Tr.* 117-118). Defendant Smith had Decedent Watson sign these deeds at their home, but they were not signed in front of a notary. (*Id.*) Attorney Young would have advised against Attorney Vandivort's preparation of deeds from Decedent Watson's Trust to her individually and then Beneficiary Deeds from her to Defendant Smith. (*Tr.* 332). Attorney Young would have also advised against Decedent Watson transferring titles of her bank accounts from her Trust to her individually with payable on death directions to Defendant Smith. (*Id.*) Attorney Young felt like Defendant Smith was pressuring Decedent Watson to change the powers of attorney, change the bank account beneficiaries, change the IRA beneficiaries and go to Attorney Vandivort, and was trying to protect his position. (*Tr.* 330-332).

### **ATTORNEY VANDIVORT**

Attorney Vandivort testified it was an unusual request to deposit a Will and register a Trust. (*Tr. 115-116*). It was so unusual that Attorney Vandivort had to do some research to figure out how to do it. (*Plaintiffs' Ex. 44, p. CV5-8; Tr. 115-116*). Defendant Smith was familiar with the statute and he was definite about wanting it done. (*Tr. 115-116*). Attorney Vandivort's bill was to Defendant Smith. (*Plaintiffs' Ex. 44, p. CV15*).

### **DR. HUSS**

Defendants' expert, Dr. Huss, testified that considering all of Decedent Watson's physical impairments and mental impairments she was more susceptible to undue influence than if she did not have those impairments. (*Tr. 384*). Dr. Huss also admitted that if Decedent Watson was also afraid of a person that would make her even more susceptible to the undue influence of that person. (*Id.*) He also admitted that at the time of the Mayo Clinic exam in 2005 that Decedent Watson would not have had testamentary capacity to download legal forms off the internet and prepare them by herself. (*Tr. 369-372*).

### **DELORES GRINDSTAFF**

Defendants called Delores Grindstaff as witness who was a neighbor to Decedent Watson and Defendant Smith. (*Tr. 259*). Delores testified on cross exam that Decedent Watson told her that Defendant Smith made advances to her that she did not want (*Tr. 261-262*) and that Defendant Smith was not taking care of her. (*Tr. 263*).

**DR. SKY**

Plaintiffs' expert was Dr. Sky. See his testimony under the Burden of Proof Section.

**D. UNDUE INFLUENCE DEFENDANTS' ARGUMENTS**

The Defendants' arguments "boiled down" are Plaintiffs had to prove undue influence on the date and at the very time Decedent Watson signed the First Amendment to her trust. Their position is that the only evidence on that date was the testimony of Attorney Young. They argue no other evidence is relevant. If that were the law, there could never be a successful Will or Trust Contest if there was an attorney involved. No attorney would let a client sign if the attorney thought the client was being unduly influenced. That is not the law. The presence of the beneficiary or even the execution of his influence at the exact moment of execution need not be shown. *Godsy, supra at 213*. The exercise of undue influence is usually shown by circumstantial evidence. *Id.* Defendant Smith's power and control over Decedent Watson and his opportunity to influence her established a fiduciary relationship. *Id at 212*. Defendant Smith's undue influence over Decedent Watson at the time of the execution of the First Amendment is overwhelming and shown by a pattern of Decedent's and Defendant's statements, actions and activities both before and after the execution of the Amendment. In particular, the medical records (*Plaintiffs' Ex. 31 – Medical Records; Plaintiffs' Ex. 48 – Chronological Summary of Medical Records*) give independent, reliable and substantial evidence of Defendant Smith's undue influence.

Defendants' reliance on Attorney Young's direct testimony is misplaced. He had no knowledge of Decedent's extensive medical records at the time she signed the First Amendment to her trust. (*Tr.* 323). After hearing of Decedent Watson's mental impairments from her medical records, Attorney Young agreed that the prudent thing to do would have been to get a doctor's opinion before she executed the First Amendment to her trust. (*Tr.* 329). In any event, the trial court had the discretion to believe or disbelieve all, part of, or none of the testimony of any witness. *In re Adoption of W.B.L., supra at 455.*

On this appeal for lack of substantial evidence, Plaintiffs' best argument is the facts. *Compare Plaintiffs' Ex. 48-Chronological Summary of Medical Records with Plaintiffs' Ex. 47 – Plaintiffs' Summary of Some Relevant Dates.* The facts to be considered are the Plaintiffs' best case, not the Defendants' best case as argued by the Defendants.

## II.

**The Court did not commit error in finding that there was clear and convincing evidence that Decedent Watson lacked testamentary capacity to execute the First Amendment to her Trust on July 27, 2007.**

### A. **TESTAMENTARY CAPACITY BURDEN OF PROOF**

Plaintiffs' burden of proof for Decedent Watson's lack of testamentary capacity at trial was the same as their burden of proof for undue influence. Please review the burden of proof section under Point I (Undue Influence) including the testimony of Plaintiffs' expert, Dr. Sky.

In addition, Dr. Sky testified that Decedent Watson had moderate to severe dementia by the time she signed her First Amendment to her trust on 7/27/07 and at all times thereafter (*Tr. 216, 218, 219, 224*). Dr. Sky's opinion was that Decedent Watson did not have testamentary capacity as of the date she signed the First Amendment to her trust on 7/27/07 and at all times thereafter. (*Tr. 219, 227*). Dr. Sky's opinions alone provide substantial evidence which met Plaintiffs' burden of proof. *State Highway Commission v. Eilers, 406 S.W. 2d 567, 575 (Mo 1966)*.

**B. TESTAMENTARY CAPACITY LAW**

The Missouri Uniform Trust Code (MUTC) provides that the requisite capacity to make or amend a trust is the same as that required to make a will. *Mo. Ann. Stat. §456.6-601*. Testamentary capacity to make a will is defined in Missouri case law as the ability of the decedent to understand the ordinary affairs of her life; for the decedent to understand the nature and extent of her property; for the decedent to know the persons who are the natural objects of her bounty; and for the decedent to intelligently weigh and appreciate her natural obligations to those persons and know she is giving her property to those persons. *In re: Estate of Hague, 894 S.W.2d 684, 688 (Mo.App. W.D. 1995)*.

The Missouri Supreme Court has defined testamentary capacity in its Missouri Approved Instruction (*M.A.I. 15.01*) as follows:

*The phrase "sound and disposing mind and memory" as used in this (these) instruction(s) means that when a person signed his (Will) (Codicil) he:*

*First, was able to understand the ordinary affairs of life, and*

*Second, was able to understand the nature and extent of his property, and*

*Third, was able to know the persons who were the natural objects of his bounty, and*

*Fourth, could intelligently weigh and appreciate his natural obligations to those persons.*

Courts have said that it is well settled that evidence of incapacity before and after execution of the document is sufficient to raise a reasonable inference as to the decedent's mental capacity on the date of execution of the document. *Thompson v. Curators of University of Missouri*, 488 S.W.2d 617, 620 (Mo. 1973); *Proffer v. Proffer*, 342 Mo. 184, 195, 114 S.W.2d 1035, 1040 (1938). It is not required that proof of testamentary incapacity at the very moment the document was executed be made by eyewitnesses. *Id.* If the contestant can show that the testator was afflicted with a permanent progressive mental incapacity, there is a presumption that such a condition would continue. *Ambruster v. Sutton*, 362 Mo. 740, 757, 244 S.W.2d 65, 73 (1951); *Byrne v. Fulkerson*, 254 Mo. 97, 162 S.W. 171, 179 (1913). Evidence of the decedent's physical and mental conditions, use of medications, advanced age, dementia, loss of memory, and abnormal conduct are all relevant and admissible. *Id.* The entire presentation of evidence should be considered as a whole. *See 5 Missouri Practice §102 (3<sup>rd</sup> Addition)*; *Hahn v. Hammerstein*, 272 Mo. 248, 198 S.W. 833, 838 (1917) (*dissenting opinion*). The fact finder should not indulge in piece meal examination of the evidence, but should consider the evidence in its entirety. *Id.* *Byrne supra* was a Will contest being reviewed by the Missouri Supreme Court. The trial court had directed a verdict for the defendant proponents of the Will. The issue was the sufficiency of the evidence to

warrant the submission of the case to the jury. Stated another way, the issue was “whether there is evidence in the record which, if the jury chose to believe it, would support a verdict for the contestant.” *Id. at 178*. The court concluded that there was sufficient evidence to require the submission to the jury of the issue as to testamentary capacity. *Id.* As in the instance case, the principal insistence of the defendants’ proponents of the Will was that there was no direct evidence that on the day and at the hour the Will was signed by the decedent that she did not have testamentary capacity. The court stated: “It is undoubtedly true that the real question is as to the sanity of the testatrix at the time she signed the Will... (*omitting citation*); but it does not follow that the proof of testamentary capacity at that very moment must be made by eye witnesses on that occasion. Proof of insanity permanent (and here progressive) in its nature raises a presumption of continuity which it is incumbent upon proponents to rebut, and substantial evidence of mental unsoundness of that character with the evidence of proponents to the contrary generally ought to be sent to the jury so that they may resolve the conflict”. *Id.*

### **C. TESTAMENTARY CAPACITY FACTS**

#### **MEDICAL RECORDS**

Decedent Watson has over 4700 pages of medical records beginning in 2003 and continuing until she passed away on 4/10/09. The records reflect severe and extensive mental and physical impairments at the time of execution of the First Amendment, Second Amendment and Change of Titles to bank accounts, retirement accounts, and

vehicles. (See *Plaintiffs' Ex. 31 Medical Records*; See *Plaintiffs' Ex. 48 – Chronological Summary of Ex. 31 Medical Records*; and compare to *Ex. 47 – Some Relevant Dates*.)

Some of the more pertinent records follow.

Decedent Watson thought Defendant Smith was trying to poison her beginning at least by 1/6/03 and continuing as late as 1/26/09. (*Plaintiffs' Ex. 31, p. 2, 7, 64 and 996*).

Decedent Watson began complaining about loss of vocabulary, was diagnosed with dementia and placed on Namenda which is indicated for moderate to severe dementia as early as 5/05. (*Plaintiffs' Ex. 31, p. 6*).

Decedent Watson received an extensive mental and physical examination at Mayo Clinic from approximately 10/19/05 thru 11/2/05. (*Plaintiffs' Ex. 31, p. 15-24*). The exam included a neuropsych consult by Dr. John A. Lucas. (*Plaintiffs' Ex. 31, p. 19*). In Dr. Lucas' report he indicates **Defendant Smith reported Decedent Watson has word finding difficulties, problem remembering names, difficulty figuring out instructions, problems understanding bills, misplaces personal belongings, difficulty remembering things she is told, is not reliable in recalling recent events, is disorganized in her thinking, loses her train of thought, goes off topic in conversation and has difficulty handling the checkbook.** (*Id.*) (*Emphasis Added.*)

Mayo Clinic Psychiatrist Dr. Lucas diagnosed Decedent Watson on 10/31/05 with dementia. His final impression was **“Ms. Watson will require continued supervision and assistance with complex activities of daily living, including assistance with any medical, legal, or financial decision-making”**. (*Plaintiffs' Ex. 31, p. 21*) (*Emphasis Added*).

Decedent Watson's mental health continued to deteriorate after the Mayo Clinic exam. (*Plaintiffs' Ex. 31; Plaintiffs' Ex. 48 Chronological Summary of Medical Records*). She had increasing difficulty with her memory and mental impairments. (*Id.*)

On 3/24/06 Decedent Watson reported to Dr. Uthoff that she had one child who was alive and well. (*Plaintiffs' Ex. 31, p. 25*). Her only child, Paula, had been murdered back in 1980. (*Tr. 142*).

By 10/24/06 Decedent Watson required assistance with all of her daily living activities including cooking, bathing, cleaning, medications, etc. (*Plaintiffs' Ex. 31, p. 31*).

Decedent Watson was hospitalized in Missouri Delta Medical Center in June 2007. (*Plaintiffs' Ex. 31, p. 37*). The hospital records indicate that Decedent Watson was having increasing difficulty with her short term memory and was demented; (*Plaintiffs' Ex. 31, p. 40*); that she needed help with all of her daily living activities and medication; (*Plaintiffs' Ex. 31, p. 42*); that she was confused and oriented to self only (*Plaintiffs' Ex. 31, p. 44*); that she was confused/ disoriented/ senile/ irrational/ noncompliant (*Plaintiffs' Ex. 31, p. 46*); that a nurse attempted to orient her to time and place and received no verbal response (*Plaintiffs' Ex. 31, p. 48*); that she wanted to get back to teaching although she was retired and Defendant Smith suggested her dementia medicine be increased (*Plaintiffs' Ex. 31, p. 49*); that her dementia medication was increased (*Plaintiffs' Ex. 31, p. 50*).

Defendant Smith discharged Decedent Watson against medical advice on 6/29/07. (*Plaintiffs' Ex. 31, p. 58*). This was after the impression of Dr. Lucas at Mayo Clinic in 2005 that Decedent needed help with medical decisions. (*Plaintiffs' Ex. 31, p. 21*).

A wheelchair was prescribed for Decedent Watson on 10/9/07. (*Plaintiffs' Ex. 31, p. 61*).

Decedent Watson was hospitalized again at Missouri Delta Medical Center in October 2007. (*Plaintiffs' Ex. 31, p. 63*). Upon admission she stated that "my teeth are falling out and I think I am being poisoned" (*Plaintiffs' Ex. 31, p. 64*); she was disoriented and agitated (*Plaintiffs' Ex. 31, p. 66*); she was confused/disoriented/senile/irrational/noncompliant and confused (*Plaintiffs' Ex. 31, p. 72*); and her dementia illness/Alzheimer's Type was confirmed again (*Plaintiffs' Ex. 31, p. 67*).

Decedent Watson started in-home care by Home Advantage by 11/11/07. (*Plaintiffs' Ex. 31, p. 75*).

**Defendant Smith filled out a Patient Assessment Form dated 1/3/08 in which he indicated Decedent Watson has problems with judgment (problems making decisions, bad financial decisions, problems with thinking, etc.); trouble learning how to use a tool, appliance or gadget (VCR, computer, microwave, remote control, etc.); forgets correct month or year; trouble handling complicated financial affairs (balancing checkbook, income taxes, paying bills, etc.); trouble remembering appointments; daily problems with thinking or memory. (*Plaintiffs' Ex. 31, p. 135; Tr. 78-80*). (*Emphasis Added.*)**

Between 1/3/08 and the date of the execution of the Second Amendment on 7/2/08, there are extensive Home Advantage records documenting Decedent Watson's continued decline in mental health. (*Plaintiffs' Ex. 31, p. 138-439*). These include but are not limited to the following: 1/29/08 – Decedent was forgetful and confused and asked her husband several times “Am I still your wife? Are we married?” (*Plaintiffs' Ex. 31, p. 186*); 2/20/08 – Decedent reported Defendant Smith's family stealing from her (*Plaintiffs' Ex. 31, p. 193*); 3/24/08 – Decedent was confused and forgetful. (*Plaintiffs' Ex. 31, p. 313*). She and her husband had been in a fight and the police were called. *Id.* Defendant Smith reported that Decedent hid her cash and credit cards and was going to leave home but Defendant Smith stopped her *Id.* 3/26/08 – Decedent got turned around in her own home and could not find her own bathroom (*Plaintiffs' Ex. 31, p. 260*); 4/7/08 – Decedent Watson reported that she feels Defendant Smith is only with her due to her money (*Plaintiffs' Ex. 31, p. 316*); 4/10/08 – Decedent wanted her lawn hand pulled instead of mowed (*Plaintiffs' Ex. 31, p. 324*); 4/10/08 – Decedent Watson made statement that “her husband is taking control of everything”. (*Plaintiffs' Ex. 31, p. 324*). She was agitated and upset. (*Id.*); 5/2/08 – Decedent Watson stated that Defendant Smith “controls every aspect of my life”. (*Plaintiffs' Ex. 31, p. 384*); 6/5/08 – Decedent Watson was seeing a baby as she was looking at the ceiling and hearing voices. (*Plaintiffs' Ex. 31, p. 506*).

Decedent Watson was hospitalized again at Missouri Delta Medical Center in May of 2008. (*Plaintiffs' Ex. 31, p. 442-449*). The records indicate that during the

hospitalization Ms. Watson was continuously confused/disoriented/ senile/ irrational/ noncompliant (*Plaintiffs' Ex. 31, p. 443, 445 and 447*).

On 5/27/08 Decedent Watson was confused/ disoriented/ senile/ irrational/ noncompliant. (*Plaintiffs' Ex. 31, p. 447*). On the same day, Defendant Smith requested a notary for possible changes to her trust. (*Plaintiffs' Ex. 31, p. 448*).

After discharge from the hospital Decedent Watson was a resident of the Clearview Nursing Home from approximately 6/7/08 thru 7/2/08, the date she signed the Second Amendment to her trust. (*Plaintiffs' Ex. 31, p. 465-548*). Some of the Clearview records are as follows: 6/10/08 – when nurse did finger stick, Decedent Watson asked “if her hand would grow back?” (*Plaintiffs' Ex. 31, p. 465*); 6/23/08 – Confused to time and place. (*Plaintiffs' Ex. 31, p. 489*). Aide overheard Decedent Watson state to Defendant Smith, “Please don’t hit me. (*Id.*) I didn’t do anything. (*Id.*) Please don’t hit me.” (*Id.*) Social Services were notified. (*Id.*); 6/27/08 – Decedent Watson complained about Defendant Smith being in the room and stated that they could “get him out of there if they wanted to.” (*Plaintiffs' Ex. 31, p. 1107*). In addition Decedent stated she wanted a divorce from Defendant Smith. *Id.* 6/28/08 – Aides overheard Defendant Smith telling Decedent Watson “You have no business telling your medical history, telling any of our business to anybody.” (*Plaintiffs' Ex. 31, p. 497*). The aides states “He was jumping all over her.” (*Id.*) Decedent then just wanted to sit in a chair because she had to watch Defendant Smith (*Id.*); Decedent Watson was discharged from the nursing home on 7/2/08 the same day she signed her Second Amendment (*Plaintiffs' Ex. 31, p. 505*).

Decedent's mental condition continued to decline after execution of the Second Amendment on 7/2/08 until her death on 4/9/10. (*Plaintiffs' Ex. 31- Medical Records; Plaintiffs' Ex. 48 - Chronological Summary of Medical Records*). (*Id.*)

### **DEFENDANT SMITH AND THE MEDICAL RECORDS**

Extensive medical records indicating Decedent Watson had severe mental impairments beginning in 2003 and continuing until she passed away in 2009, were introduced into evidence (*Plaintiffs' Ex. 31 Medical Records; Plaintiffs' Ex. 48 Chronological Summary of Medical Records*) and reviewed with Defendant Smith (*Tr. 56–113*). Many of the records indicated that the mental impairments had been reported by Defendant Smith himself. Smith denied most of the medical record entries and any mental impairments whatsoever (*Tr. 56-113*) and testified that they were “not correct” and were a “pack of lies” (*Tr. 86, 90, 91, 94*). Any and all of his self serving statements are not credible. See the medical records section (*Plaintiffs' Ex. 31, p. 31; Plaintiffs' Ex. 31, p. 49; Plaintiffs' Ex. 31, p. 61; Plaintiffs' Ex. 31, p. 19; Tr. 62-65; Plaintiffs' Ex. 31, p. 135; Tr. 78-81*). The trial court found “Arnie repeatedly asserted that disinterested health care professionals had lied in the medical records about their observations of Patricia's dementia. Arnie's testimony was so blatantly mendacious and so flagrantly self-serving that it utterly destroyed what little credibility he might otherwise have had.” (*First Amended Judgment LF 353*).

### **PLAINTIFFS**

Decedent Watson's siblings, the Plaintiffs herein, collectively testified as follows: Prior to the time of execution of her First Amendment on 7/27/07 Decedent Watson needed help with all of her daily living activities including walking, bathing, dressing, picking out clothes, meal preparation, use of telephone, driving, getting in and out of car and up and down stairs. (*Tr. 144-147; Tr. 156-159; Tr. 171-173; Tr. 190-192*). Prior to the time she executed her First Amendment, Decedent Watson had memory loss, problems finding words, problems finding names, problems figuring out instructions, needed help with bills and her checkbook, help remembering things, help finding personal belongings, and couldn't carry on a conversation. (*Id.*) Prior to the time she executed her First Amendment Decedent Watson could not take care of herself. (*Id.*)

In addition, LaDonna Small testified that in late July or early August 2007 Decedent Watson requested LaDonna to come see Decedent about her money. LaDonna went to Decedent's and Defendant Smith's home. Decedent had her black bank file box out and "wanted me to see her money." Decedent thought her money was in the file box. (*Tr. 176-178*)

In addition, Respondent, Bernard Ivie testified that in May 2007 at Bernard's wife's graduation for her doctorate, Decedent Watson did not recognize Bernard's children. (*Tr. 193*).

### **DR. SKY**

Respondents' expert was Dr. Adam Jason Sky. Dr. Sky is a highly qualified and experienced geriatric psychiatrist (*Plaintiffs' Ex. 50, Curriculum Vitae of Adam Jason Sky, M.D.; Tr. 206-207*) Dr. Sky's specialty is geriatric psychiatry. (*Tr. 205*). Dr. Sky is

highly educated, trained and experienced in regard to the diagnosis and treatment of dementia including vascular dementia and Alzheimer's Disease. (*Tr. 205-209; Plaintiffs' Ex. 50 (Curriculum Vitae of Dr. Adam Sky)*).

Dr. Sky's opinion was that Decedent Watson had dementia of a mixed type consisting of vascular dementia and Alzheimer's Disease. (*Tr. 221*). Dr. Sky's opinion was that Decedent Watson had moderate to severe dementia by the time she signed her First Amendment to her Trust on 7/27/07 and at all times thereafter. (*Tr. 216, 218, 219, 224*). Moderate dementia is indicated when the patient cannot take care of herself. (*Tr. 223-224*). Dr. Sky's opinion was that Decedent Watson did not have testamentary capacity as of the date she signed the First Amendment to her Trust on 7/27/07 and at all times thereafter. (*Tr. 219, 227*) Dr. Sky's opinion was that Decedent Watson did not have testamentary capacity when she changed titles to her bank accounts, changed beneficiaries to her retirement accounts, and transferred her vehicle titles, beginning in October 2007, and continuing through December 2008. (*Id.*) Dr. Sky's opinion was that Decedent Watson did not have testamentary capacity when she signed the Second Amendment to her Trust on 7/2/08. (*Id.*) Dr. Sky's opinion was that even though Decedent Watson did not have testamentary capacity at the times she saw Attorney Young it was possible for her to conceal her mental impairments from Attorney Young. (*Tr. 224-225*). It was possible for Attorney Young to honestly believe that Decedent Watson had testamentary capacity at the time she signed her First and Second Amendments and for her not to have testamentary capacity at such times. (*Id.*)

The medical records provided clear and convincing evidence to Dr. Sky of all of his opinions. (*Tr.* 225-227). Dr. Sky was 90% certain of all of his opinions. (*Tr.* 246). If he had an opportunity to personally exam Decedent Watson he believed his opinions would be 98% certain. (*Id.*) Dr. Sky did not have any reasonable doubt about any of his opinions. (*Tr.* 227). All of Dr. Sky's opinions were based on more than a reasonable degree of medical certainty. (*Id.*)

### **ATTORNEY YOUNG**

Attorney Young agreed that before giving an opinion it is important to know all relevant facts. (*Tr.* 323). He also admitted that he had not reviewed any medical records of Decedent Watson before she executed her First Amendment or Second Amendment. (*Id.*) After hearing of the mental problems Decedent Watson was having prior to execution of her First Amendment from her medical records Attorney Young agreed that the prudent thing to do would have been to get a doctor's opinion before Decedent Watson signed the First Amendment. (*Tr.* 329). Decedent Watson's original trust executed on 5/9/02 drafted by Attorney Young provided that Decedent Watson's capacity was to be determined by a medical doctor. (*Plaintiffs' Ex. 1, p. 10; Tr.* 326). Attorney Young agreed that he would prefer an opinion from a doctor whose highest expertise is geriatric psychiatry (Dr. Sky) rather than one whose highest expertise is nursing home litigation (Dr. Huss) in determining Decedent Watson's capacity. (*Tr.* 329-330).

### **DR. HUSS**

Dr. Huss testified as an expert on behalf of Defendants. (*Tr.* 334). Dr. Huss is a family practitioner. (*Tr.* 335, 362). Dr. Huss has been previously retained as an expert

90-100 times. (*Tr.* 362-363). The vast majority of the time he testifies for the defense. (*Tr.* 363). Dr. Huss' area of highest expertise is nursing home litigation. (*Tr.* 363-364). Dr. Huss admitted that Decedent Watson was demented prior to the time she executed her First Amendment on 7/27/07. (*Tr.* 365-367, 369). Dr. Huss agreed with Dr. Sky that she probably had a mixed dementia related to vascular dementia and Alzheimer Disease. (*Tr.* 366). Dr. Huss admitted that Decedent Watson's type of dementia was progressive. (*Id.*) Decedent Watson was in Mayo Clinic from approximately 10/19/05 to 11/2/05 for an overall physical and mental exam. (*Plaintiffs' Ex. 31, p. 15-24*). Decedent Watson saw Dr. John A. Lucas for a neuropsych consultation on 10/31/05 (*Plaintiffs' Ex. 31, p. 19-22*). Dr. Huss agreed with Dr. Lucas' impression and summary as of 10/31/05 as follows: "Ms. Watson will require continued supervision and assistance with complex activities of daily living, including assistance with any medical, legal, or financial decision-making (*Plaintiffs' Ex. 31, p. 21*)."

Dr. Huss testified complex activities of daily living would include things like managing the day to day checkbook; getting to and from the store; getting adequate provisions of food; and fixing dinner. (*Tr.* 369). Amending trusts and transferring titles to assets is included in legal and financial decision making. (*Tr.* 371-372). Dr. Huss admitted that at the time of the Mayo Clinic exam Decedent Watson did not have testamentary capacity to download legal forms off the internet and prepare them by herself. (*Tr.* 369-372). Dr. Huss agreed that there were times prior to 7/27/07, the date Decedent Watson executed the First Amendment to her Trust, that Decedent Watson did not have testamentary capacity. (*Tr.* 372). Dr. Huss agreed that Decedent Watson's

medical status was worse in July 2007 than it was in October 2005. (*Tr. 369*). Dr. Huss admitted that Decedent Watson's mental status was worse in July 2008 than it was in July 2007. (*Tr. 373*). Dr. Huss admitted that there were times between July 2007 and the date Decedent Watson executed her Second Amendment on 7/2/08 that Decedent Watson did not have testamentary capacity. (*Id.*)

Dr. Huss knew Plaintiffs' expert, Dr. Adam Jason Sky, and respected him as a fine geriatric psychiatrist. (*Tr. 373*).

### **DELORES GRINDSTAFF**

Defendants called Delores Grindstaff who was a neighbor. (*Tr. 259*).

Delores testified on cross exam that Decedent Watson came to Delores' home and took all of her clothes off in her living room. (*Tr. 262-263*).

### **D. TESTAMENTARY CAPACITY DEFENDANTS' ARGUMENTS**

As with Point I in regard to undue influence, Defendants' argument is that Plaintiffs have to present direct evidence of testamentary incapacity on the date and at the very time Decedent Watson signed the First Amendment to her trust. As with undue influence, that is not the law. In *Byrne, supra*, the Defendants' principal insistence was that there was no direct evidence that on the day and at the hour the Will was signed the Testatrix was insane. (*Id. at 179*). It is true that the real question is as to the sanity of the Testatrix at the time she signed the Will. (*Id.*) But it does not follow that the proof of testamentary incapacity at that very moment must be made by eyewitnesses on that occasion. Proof of insanity permanent (and here progressive) in its nature raises a presumption of continuity which it is incumbent upon the proponents to rebut, and

substantial evidence of mental unsoundness of that character with the evidence of proponents to the contrary generally ought to be sent to the jury so that they may resolve the conflict. (*Id.*) Each case must be decided on its own facts. (*Id.*) Plaintiffs have clearly met their burden.

Defendants have summarized a small portion of the Plaintiffs' evidence and represented it as Plaintiffs' entire case. They then rely on the portions of Attorney Young's testimony that they choose to make the argument that the trial court's judgment is not supported by substantial evidence. As with Point I, Plaintiffs' best argument is the facts which are recited above. Also compare *Plaintiffs' Ex. 48 - Chronological Summary of Medical Records with Plaintiffs' Ex. 47 - Plaintiffs' Summary of Some Relevant Dates*. Also, as with Point I, Defendants' reliance on Attorney Young's direct testimony is misplaced. He had no knowledge of Decedent's extensive medical records at the time she signed the First Amendment to her trust. (*Tr.* 323). After hearing of Decedent Watson's mental impairments from her medical records, Attorney Young agreed that the prudent thing to do would have been to get a doctor's opinion before she executed the First Amendment. (*Tr.* 329). He would have preferred Dr. Sky's opinion to Dr. Huss' opinion. (*Tr.* 329-330). In addition, as the Court is fully aware, the trial court had the discretion to believe or disbelieve all, part, or none of Attorney Young's testimony. *In re Adoption of W.B.L., supra.*

The only time there will be absolute evidence of a Decedent's testamentary capacity or incapacity at the exact time of the execution of the Will or trust is in a John

Grisham novel and even then there may be some questions. (*John Grisham's The Testament, Doubleday 1999*).

### III.

**The trial court did not commit error in finding that there was clear and convincing evidence that the Second Amendment to the trust signed by Decedent Watson on July 2, 2008, was the result of undue influence by Defendant Smith.**

The trial court also found that the Second Amendment signed by Decedent Watson on July 2, 2008, was the product of the undue influence of Defendant Smith. The burden of proof and undue influence law is the same as discussed in Point I. Decedent Watson's mental health, physical health, reliance on Defendant Smith and fear of Defendant Smith is the same as that discussed in Point I. As with Defendant Smith's undue influence over Decedent Watson when she executed the First Amendment to her trust on July 27, 2007, Defendant Smith's and Decedent Watson's statements, actions and activities before and after the execution of the Second Amendment on July 2, 2008, declare Defendant Smith's pattern of undue influence. Plaintiffs' discussed Defendant Smith's undue influence over Decedent Watson in detail in Point I. and will not recite the same again here. However, Plaintiffs want to point out again that the presence of the beneficiary or even the execution of his influence at the exact moment of execution need not be shown, *Godsy, supra at 213*, and the exercise of undue influence is usually shown by circumstantial evidence. *Id.* There is no doubt that Plaintiffs have provided substantial evidence of Defendant Smith's undue influence over Decedent Watson at the time she executed her Second Amendment.

#### IV.

**The court did not commit error in finding that there was clear and convincing evidence that Decedent Watson lacked testamentary capacity at the time she executed the Second Amendment to her trust on July 2, 2008.**

The trial court also found that Decedent Watson did not have testamentary capacity when she signed the Second Amendment to her trust on July 2, 2008. The burden of proof and testamentary capacity law is the same as discussed in Point II. Decedent Watson's mental and physical health is the same as that discussed in Point II. As with the determination of Decedent Watson's testamentary capacity when she executed the First Amendment to her trust on July 27, 2007, her mental and physical health, statements, actions and activities before and after execution of the Second Amendment on July 2, 2008, have to be considered. *Byrne, supra*. The trial court's detailed Findings of Fact, the Respondents' Statement of Facts and Respondents' Argument in Point II prove beyond any doubt that Decedent Watson did not have testamentary capacity at the time she executed the Second Amendment to her trust.

#### V.

**The court did not commit error in failing to find, as a matter of law, that the Plaintiffs should receive nothing under the trust as amended under the in terrorem clause.**

The trial court was correct in determining that both the First and Second Amendments to the Decedent Watson's trust were invalid due to undue influence and

lack of testamentary capacity. Therefore, the “in terrorem” clause contained in the First Amendment was not valid or effective.

## VI.

**The court did not commit error in finding that there was clear, cogent and convincing evidence that changes in the titling of certain trust accounts and changes in beneficiary designations for other assets was the result of the undue influence of Defendant Smith over Decedent Watson and the lack of testamentary capacity of Decedent Watson at the time of the changes and in entering a large money judgment in favor of Decedent Watson’s estate against Defendant Smith.**

Plaintiffs proved at trial that Decedent Watson lacked testamentary capacity and was under the undue influence of Defendant Smith at the time she executed the changes in the beneficiary designations for certain of her assets. The burden of proof law for this Point is the same as that contained in Points I. and II.

### **A. TESTAMENTARY CAPACITY LAW**

If the Decedent did not have testamentary capacity at the time an asset was re-titled, such re-titling is void. This is common sense. The Southern District's opinion in this case contains an in depth analysis and sound opinion for its holding that lack of testamentary capacity is a basis for setting aside a non-probate transfer under §461.054. *See Opinion at pages 15-21.*

As the Southern District in this case so astutely pointed out, the non-probate transfers law did away with some of the formalities associated with wills and probate, but did not do away with the fundamental foundational requirement of testamentary capacity.

*See Opinion at pages 16-17, citing §461.001, 461.009, 473.087, 474.320 and 474.310.*

Although a will substitute need not be executed in compliance with the statutory formalities required for a will, such an arrangement is, to the extent appropriate, subject to substantive restrictions on testation and to rules of construction and other rules applicable to testamentary dispositions. *Restatement (3d) of Property (Wills and Don.Trans.) §7.2 (2003)*. Judge John A. Born, Jr., in *5 Mo. Practice Probate Law and Practice §14 (3d Ed. 1999)* states that although mental incapacity is not employed in the statute that it follows that if the owner was, in fact, without mental capacity to make a beneficiary designation at the time it was made, the result would be that the designation would be void and the beneficiary would be disqualified from taking.

In addition, under §461.012, non-probate transfers are a matter of agreement between the owner and transferring entity. That is, a beneficiary designation is a matter of contract. *See Opinion at page 18*. This court has held for many years that a person lacking mental capacity cannot enter into a valid contract. *e.g. Fix v. Fix, 847 S.W. 2d 762, 765 (Mo. banc 1993) (Mental capacity required to create a valid joint account)*.

This same rule applies to creation of trusts, *Lee v. Hiler, 141 S.W. 3d 517,523-525 (Mo. App. S.D.2004)*; *Deeds Peterein v. Peterein, 48 S.W. 2d 809, 813 (Mo. 1966)* and *Gifford v. Geosling, 951 S.W. 2d 641, 644 (W.D. 1997)*; and Powers of Attorney *Pazdernik v. Decker, 652 S.W. 2d 319,320 (Mo. App. E.D. 1983)*. If the Southern District in this case had held that testamentary capacity was not required to enter into a valid non-probate transfer agreement, that decision would have been in conflict with all other districts and the Supreme Court of this State.

The Appellants rely upon *In re: Goldschmidt*, 215 S.W. 3d 215 (Mo. App. E.D. 2006). The Southern District in this case held that to the extent *Goldschmidt*, *supra* holds that an owner does not have testamentary capacity to make a valid non-probate transfer it would not be followed. *See Opinion at page 20*.

In *Goldschmidt*, the Appellant contended that the trial court erred when it denied his motion to amend his petition adding nine (9) additional counts to assert previously dismissed and additional claims, one of which was mental incapacity. *Id. at 223*. The *Goldschmidt* court held that it would reverse the trial court's denial of the motion to amend a pleading only if the decision was clearly erroneous. It stated that a trial court does not err when it denies a motion to amend to assert a claim which has no merit. *Id. at 223-224*. The court went on to discuss that all the additional nine counts asserted, which were lumped together in one discussion, were not mentioned in §461.054.1. However, there was no evidence of incapacity in the case. There was no analysis of lack of testamentary capacity as being a basis for setting aside a non-probate transfer. That was clearly not the issue in the case.

To follow *Goldschmidt* would be contrary to one of the most basic tenants of legal jurisprudence. It is clear that testamentary capacity should be required to make a testamentary gift or enter into a contract.

Also, if it is a change in a beneficiary designation and not an original beneficiary designation *RSMO §461.037* applies. *See Author's Comment to §461.054*. *RSMO §461.037* provides that in the event property is subject to a beneficiary designation is involuntarily converted during the owner's lifetime, the beneficiary succeeds to any right

with respect to the involuntarily conversion which the owner would have had if the owner had survived.

**B. UNDUE INFLUENCE LAW**

A beneficiary designation or revocation of a beneficiary designation that is procured by fraud, duress, or undue influence is void. *Mo. Ann. Stat. §461.054.*

**C. UNDUE INFLUENCE AND TESTAMENTARY CAPACITY FACTS**

As with Points III and IV, Plaintiffs' have detailed Decedent Watson's lack of testamentary capacity and the undue influence over her of Defendant Smith at all relevant times in Points I and II, including at the time certain of her assets were retitled. *See the trial court's detailed Statement of Facts, the Plaintiffs' Statement of Facts, Plaintiffs' arguments in Points I and II; also compare Plaintiffs' Ex. 31 (Medical Records) and Ex. 48 (Chronological Summary of Medical Records) to Plaintiffs' Ex. 47 (Plaintiffs' Summary of Some Relevant Dates).*

However, Plaintiffs would like to point out a good example of Defendants' tactics on this appeal. In connection with this point of alleged error, Defendants stated at page 71 of their Brief "Reginald Young discussed the beneficiary changes and actually contacted the California Teachers' Retirement System to help Patricia effect a change in the beneficiary of her IRA. (*Tr. 285-86*)." However, Defendants fail to note Attorney Young's additional testimony. On 10/25/07 Attorney Young had a conference with Decedent Watson and Defendant Smith. (*Plaintiffs' Ex. 35 and 43-14; Tr. 318*). Defendant Smith wanted to have himself named as a beneficiary on Decedent Watson's IRA account. (*Tr. 318*). Attorney Young did not feel like Decedent Watson was

comfortable with the change or understood it completely. (*Tr.* 318-319). Attorney Young felt like Defendant Smith was pressuring Decedent Watson to change the IRA beneficiaries to protect his position. (*Tr.* 330-332). Defendants want this court to review only the evidence that is favorable to them and to disregard any contrary evidence. This is exactly the approach that the Southern District criticized. Under *Murphy v. Carron*, this Court should consider the Plaintiffs' best case to determine if the judgment is supported by substantial evidence.

The trial court's inclusion of the value of some of these assets in the probate estate was correct. However, even if it were not, since the Decedent's Last Will and Testament admitted to Probate was a pour over Will to her trust, even if Defendants are correct in this regard, any error would be harmless.

## VII.

**The court did not commit error in finding that there was clear, cogent and convincing evidence that the change of beneficiary designation for the CALSTRS Retirement benefit was the result of Defendant Smith's undue influence over Decedent Watson and Decedent Watson's lack of testamentary capacity at the time she executed the change.**

The burden of proof, testamentary capacity and undue influence law for the CALSTRS Retirement is the same as that discussed in Point VI. The CALSTRS Retirement is simply one of the assets of which the beneficiary designation was changed as discussed in Point VI. See the law and facts discussed above.

Defendants state that the trial court's sole finding of fact relevant to the CALSTRS Retirement was paragraph 190 of its Findings of Fact. In truth, virtually all of the trial court's Findings of Fact are relevant to Decedent Watson's testamentary capacity and Defendant Smith's undue influence over Decedent Watson and thus also relevant to the CALSTRS Retirement. In particular, Defendant Smith fraudulently changed the date of Decedent Watson's signature from 7/24/08 to 1/24/08 on the copy of the change of beneficiary form provided to Plaintiffs in discovery. (*See Plaintiffs' Ex. 25 and 46-7*). This fraud was discovered when CALSTRS provided a copy of the form which they received from Defendant Smith. (*Tr. 98-100; Plaintiffs' Ex. 25; Plaintiffs' Ex. 46-7, p. 13-14*). The court found the fraud perpetrated by Defendant Smith in altering the date of the change of the beneficiary form is evidence of his consciousness of guilt and further damages his credibility. (*First Amended Judgment LF 353*). Defendant Smith's forgery of the date on the copy of the change of beneficiary form provided to Plaintiffs in discovery was among the most blatant and egregious of his many disreputable efforts to secure Decedent Watson's assets for himself. (*First Amended Judgment LF 372*). Defendant Smith states in his brief that his fraudulent change of Decedent Watson's change of beneficiary form caused her to receive only "slightly less during her lifetime" which she otherwise would have received. In truth, the reduction to Decedent Watson of her lifetime benefit due to the change of beneficiary to Defendant Smith was from \$6,054.00 per month to \$3,516.00 per month for her life. (*Tr. 98; Plaintiffs' Ex. 25; Plaintiffs' Ex. 46-47, p. 13-14*). Defendant Smith is the one who is mean spirited and not the Plaintiffs.

**CONCLUSION**

Plaintiffs respectfully submit that the trial court's Judgment is supported by substantial evidence, is not against the weight of the evidence, does not erroneously declare the law, and does not erroneously apply the law, and, therefore, should be affirmed.

Lawrence & Lawrence, L.L.C.  
250 N. Kingshighway, P.O. Box 2001  
Sikeston, MO 63801  
(573) 471-5554 telephone  
(573) 471-9755 facsimile  
[blawrence@sikestonattys.com](mailto:blawrence@sikestonattys.com)  
[klawrence@sikestonattys.com](mailto:klawrence@sikestonattys.com)

/s/Bruce Lawrence

BY:

\_\_\_\_\_  
Bruce Lawrence #31020  
R. Kye Lawrence #61874

*Attorneys for Plaintiffs/Respondents*

**RULE 84 CERTIFICATE OF COMPLIANCE**

The undersigned counsel for Respondents certifies that this Substitute Brief complies with the limitations set forth in Rule 84.06(b) and contains 22,217 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

Lawrence & Lawrence, L.L.C.  
250 N. Kingshighway, P.O. Box 2001  
Sikeston, MO 63801  
(573) 471-5554 telephone  
(573) 471-9755 facsimile  
[blawrence@sikestonattys.com](mailto:blawrence@sikestonattys.com)  
[klawrence@sikestonattys.com](mailto:klawrence@sikestonattys.com)

/s/Bruce Lawrence

BY:

\_\_\_\_\_  
Bruce Lawrence #31020  
R. Kye Lawrence #61874

*Attorneys for Plaintiffs/Respondents*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet and served via the Missouri Supreme Court's eFiling system and two copies hand delivered to the following attorneys of record on this 13th day of March, 2014:

Mr. Joseph C. Blanton, Jr.  
Mr. Shaun D. Hanschen  
Blanton, Rice, Nickell, Cozean & Collins, L.L.C.  
219 South Kingshighway  
Sikeston, Missouri 63801  
Email: jblanton@blantonlaw.com  
Email: Shanschen@blantonlaw.com  
*Attorneys for Defendants/Appellants*

**Lawrence & Lawrence, L.L.C.**  
250 N. Kingshighway, P.O. Box 2001  
Sikeston, MO 63801  
(573) 471-5554 telephone  
(573) 471-9755 facsimile  
[blawrence@sikestonattys.com](mailto:blawrence@sikestonattys.com)  
[klawrence@sikestonattys.com](mailto:klawrence@sikestonattys.com)

BY: /s/Bruce Lawrence

\_\_\_\_\_  
Bruce Lawrence #31020  
R. Kye Lawrence #61874

*Attorneys for Plaintiffs/Respondents*