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SUPREME COURT OF MISSOURI

RICHARD E. IVIE, JIMMIE R. IVIE, LADONNA SMALL and **BERNARD IVIE,**	)	
Plaintiffs/Respondents,	)	
vs.	)	**Case 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 - 33RD Judicial Circuit
Honorable Benjamin F. Lewis, Special Judge

SUBSTITUTE BRIEF OF APPELLANTS ARNOLD L. SMITH AND SIDNEY SMITH

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APPELLANTS REQUEST ORAL ARGUMENT

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

TABLE OF CONTENTS

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

TABLE OF AUTHORITIES

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Constitutional Provisions

Statutes

Rules

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

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 e*n banc* issued its Opinion. 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. The Supreme Court pursuant to Mo. Const. Art. 5, §10 and Rule 83.09 has authority to both hear and decide all issues presented in this case.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

STATEMENT OF FACTS

A. Introduction.

Plaintiffs are the younger half-siblings of Patricia Parker Watson ("Patricia"), deceased. Patricia moved out of her family's house and into her grandparents' home in East Prairie, Missouri so she could attend high school. (Tr. 139). She subsequently moved to California and lived there most of her adult life. (Tr. 141). Patricia had three marriages while living in California and before marrying Defendant Arnold Smith ("Arnold"). Arnold was married for 34 years to Betty Smith. (Tr. 121). Sidney Smith was Arnold and Betty's son. Betty died from cancer on May 11, 1999. (Tr. 121). Patricia and Arnold married on February 20, 2002. (Tr. 22-23; Exhibit O, p. 614).

Charleston, Missouri attorney Reginald Young ("Young") began representing Patricia in 2000 in her Southeast Missouri legal matters while she was still living in California. (Tr. 271-72). He handled various legal matters for her including purchases of rental properties in East Prairie, Missouri, collecting rents on the rental properties, tenant issues and estate planning. (Tr. 272). He knew Patricia very well. (Tr. 271-72).

Patricia's half-siblings described her at trial as well-educated, very intelligent, strong-willed, confident, determined, headstrong and independent. (Tr. 179-180). Patricia was obsessed with and lived for her money and her property. (Tr. 148).

B. Patricia Parker Watson Trust Established - May 9, 2002.

At the direction of Patricia, Attorney Young drafted a trust instrument and Last Will and Testament for Patricia in 2002. (Tr. 274). Patricia as Grantor, initial Trustee and Beneficiary established the Patricia Parker Watson Revocable Trust ("Trust") and signed

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

a Last Will and Testament on May 9, 2002. (Tr. 274-75). The contingent beneficiaries of the Trust who would inherit the Trust property at Patricia's death were her half-siblings, the Plaintiffs in this suit. (Tr. 275). Arnold was not a beneficiary. (Tr. 275). Patricia and Arnold transferred their interests in Southeast Missouri rental properties to the Trust by Quit Claim Deeds in 2002. (Tr. 120).

In the early years of her marriage to Arnold, Patricia did not want her husband to share in her property upon her death. (Tr. 275). In 2002, Patricia had conversations with Plaintiff Bernard Ivie about leaving her half-siblings a lot of money. (Tr. 197). Shortly after moving back to Missouri, Patricia told Plaintiff Jimmie Ivie that she did not want Arnold to have anything at her death. (Tr. 162-63). Sometime in 2003 or 2004, Patricia told Richard Ivie that her Trust left everything to her half siblings. (Tr. 148-49).

Patricia and Arnold moved from California to Missouri in 2004. (Tr. 26). Patricia used funds from her Trust to purchase a home at 511 Laurelwood in Sikeston, Missouri on January 21, 2005. (Tr. 26). The Seller transferred the property to the Trust by General Warranty Deed dated January 21, 2005. (Tr. 120).

C. Patricia's Health - 2005.

Patricia had multiple medical conditions which included diabetes, high blood pressure, high cholesterol and low back pain. (Tr. 212; Plaintiffs' Exhibit 32, pp. 141-45, 404, 408). Patricia was evaluated by local physicians and by physicians at the Mayo Clinic in Jacksonville, Florida in 2005. (Tr. 215; Plaintiffs' Exhibit 32, pp. 54-160). The clinicians at the Mayo Clinic did not come to a consensus about Patricia's diagnosis. (Tr. 346; Plaintiffs' Exhibit 32, pp. 77-79, 93-98, 114-18). A neurologist believed that

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Patricia's word finding difficulties did not result from a degenerative dementia. (Tr. 346; Plaintiffs' Exhibit 32, pp. 114-18). He found her to be close to normal mentally. *Id.* He believed Patricia's memory problems might be caused by her use of Ambien. *Id.* A neuropsychologist believed Patricia had mild to moderate cognitive impairment consistent with a diagnosis of vascular dementia. *Id.* (Tr. 344-45; Plaintiffs' Exhibit 32, pp. 93-98). Patricia was not given a diagnosis of Alzheimer's disease. (Tr. 233-35, 346; Plaintiffs' Exhibit 32, pp. 77-79, 93-98, 114-18).

D. <u>January, 2007 to July 27, 2007 - First Amendment to Trust</u>.

On many occasions, almost weekly between January and June 2007, Patricia met with Attorney Young at his office in Charleston, MO to discuss legal and business matters. (Tr. 277-79).

Young met with Patricia and other persons at his office for two hours on July 10, 2007 regarding a financial durable power of attorney and a health care power of attorney. Arnold, one of the Ivie brothers and Ladonna also attended the meeting. (Tr. 276). There was tension among the participants during the meeting. Young believed Patricia's family was pressuring her. (Tr. 276-78). According to Young, Patricia struggled with the decision of whom to appoint as agents in the two powers of attorney. (Tr. 276-77).

At the end of the meeting, Patricia signed a financial Durable Power of Attorney naming Young as her primary agent and Arnold, Richard and Ladonna as successor co-agents. (Tr. 277). She further named Arnold as her primary agent for health care decisions, Ladonna as first successor agent and Richard as second successor agent. (Tr. 277). Ladonna did not voice any objections during the July 10, 2007 meeting with

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Young when Patricia signed the two Powers of Attorney. (Tr. 277). Ladonna admitted at trial that, on July 10, 2007, two and one-half weeks before she signed the key First Trust Amendment, Patricia knew who her family members were and what she owned. (Tr. 181). She was not out of her mind. (Tr. 181).

On July 12, 2007, Patricia initiated an additional telephone conference with Young concerning her estate planning. (Tr. 277-78). He then met with Patricia in person at his office the next day, on July 13, 2007, for about 50 minutes and gave her several estate planning options. (Tr. 278). They met again on July 17, 2007 for about 55 minutes. *Id.* Patricia conveyed distribution instructions to Young. *Id.* During the various conversations between July 10, 2007 and July 20, 2007, Patricia weighed the pros and cons of various distribution options. (Tr. 277-80). She ultimately told Young that she had decided to change her estate plan to favor her husband Arnold because he had been taking care of her, he would be with her and caring for her in the future and she did not want her half-brothers and sister involved in her business. (Tr. 281-83). Patricia seemed to be "put-out" with her half-siblings. (Tr. 281).

On July 20, 2007, Patricia consulted with Young by telephone for 10 minutes. (Tr. 278-81). Young often made hand-written notes of his meetings and telephone conferences with Patricia. (Tr. 278-81). Young's hand-written notes of his July 20, 2007 consultation with Patricia reflect that Patricia requested Young to draft an amendment to her Trust changing the dispositive provisions to leave $25,000 to each of her half-siblings (the Ivies and Small) and the balance to her husband, Arnold. (Tr. 282-83; Defendants' Exhibit O, p. 616).

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Each of the Plaintiffs had some form of retirement income. (Tr. 284). Each of the Plaintiffs owns his or her home. Patricia was concerned that, if she died before her husband, he would not have a place to live. (Tr. 279). She wanted Arnold to live in the home they were living in at her death until his remarriage, if any. (Tr. 279).

Young noticed nothing unusual about Patricia during any of the 19 office and telephone conferences he had with her from January 1 through July 20, 2007 that suggested that Patricia could not make legal decisions or that she was under any undue influence by Arnold. (Tr. 284, 293).

Because of Patricia's wishes for distribution of her assets and the expectation of Patricia's half-siblings that they would receive all of her assets at her death, Young recommended a no contest clause to Patricia. (Tr. 280). Patricia requested Young to include a no contest clause in the First Amendment to her Trust to deter the Plaintiffs from contesting Patricia's dispositive changes. *Id.* It was Patricia's intention that her half-siblings receive nothing from her estate if they contested her changes. (Tr. 280; Defendants' Exhibit C).

Following his telephone conference with Patricia on July 20, 2007, Young waited one week before meeting with Patricia in person for the signing of the First Amendment. (Tr. 282). Young reviewed the First Amendment with Patricia in detail on that date. (Tr. 283-85). He explained the ramifications of the First Amendment to Patricia. *Id.* Patricia understood that she was leaving most of her property to Arnold and not to her half siblings. *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Patricia signed the First Amendment to her Trust at Young's office on July 27, 2007 in the presence of Young and a notary public. (Tr. 283-84; Defendants' Exhibit C). In her First Amendment, Patricia directed that:

a. All of her personal property located in her residence and related outbuildings go to her husband, Arnold, if living and still married to Patricia at her death; if not, all personal property would go to Patricia's half-siblings or their lineal descendants;

b. $100,000 be split equally among Richard E. Ivie, Jimmie Ray Ivie, Bernard Ivie and Ladonna Small or their lineal descendants;

c. The residuary of her Trust Estate be distributed to Arnold or to the Plaintiffs if Arnold failed to survive Patricia;

d. Young would serve as first Successor Trustee of her Trust and her husband, Arnold, serve as second Successor Trustee; and

e. If any beneficiary should institute any type of legal action at law or in equity to contest or attack the validity of her Trust, Will or transfers or to change the terms of her Trust, Will or transfers then that person and his or her lineal descendants shall receive nothing and the share they would have otherwise received should be distributed as though the beneficiary predeceased Patricia without lineal descendants surviving Patricia.

(Defendants' Exhibit C). Patricia remained in control of her Trust property as Trustee. In addition to the Trust Amendment, Patricia signed a new Will with pour-over to Trust

provisions. (Defendants' Exhibit D). She designated Young as her Personal Representative and Arnold as her successor Personal Representative. *Id.*

On that same day, Patricia signed a new Durable Power of Attorney naming Young as her initial agent and Arnold as her successor agent. (Defendants' Exhibits E and F). Additionally, Patricia named Arnold as her agent for health care decisions and Young as successor health care agent. (Defendants' Exhibits E and F).

On July 27, 2007, Young believed that Patricia's mind was clear; she had no problems with her communication skills; she was not irrational; she was at peace with the division of her estate; and she was under no pressure or coercion to sign the First Amendment to the Trust. (Tr. 284). Arnold was not in the room while Young discussed the provisions of the First Amendment to the Trust with Patricia or when she signed the First Amendment on July 27, 2007. (Tr. 282).

After signing the First Amendment in July 2007, Patricia never at any time requested that Young revise or amend her Trust to provide an increased share for her half-siblings. (Tr. 292). She never expressed to anyone after that time -- as she had during the early years of her marriage -- that she wanted her half-siblings to receive all or most of the property. She never told anyone that she had made a mistake in signing the amended documents prepared by Young in 2007. (Tr. 292).

Arnold was not involved in the requesting, the preparing, the reviewing or the signing of the First Amendment. (Tr. 283-84). Arnold was never present when Patricia signed any of the estate planning documents prepared by Young or when Young reviewed the documents with Patricia prior to execution. (Tr. 283-84). Young had no

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

reason to believe that Arnold was trying to influence Patricia to do something she did not want to do. (Tr. 284). Young did not believe there was anything irrational about the changes requested by Patricia. (Tr. 284).

Young had prepared hundreds of estate plans during his more than 30 years of practicing law. (Tr. 269). He is experienced in determining a person's competency to sign estate planning documents. (Tr. 270-71). Young would never allow anyone to execute estate planning documents if they failed his competency review. (Tr. 271). Young would not have let Patricia sign the First Amendment if she had not understood what she was doing or what she was signing. (Tr. 292-93).

At or about the time of the First Amendment, Patricia and Plaintiff Ladonna Small talked about the fact that Patricia was considering amending her trust. (Tr. 182-83). Patricia and Plaintiff Bernard Ivie later talked about the fact that Patricia would be giving $25,000.00 to each of her siblings. (Tr. 199-200).

On July 30, 2007, Young notified Ladonna Small and Richard Ivie by letter that the July 10, 2007 Power of Attorney wherein they had been named as agents had been revoked. (Defendants' Exhibit S). On July 31, 2007, Young again met with Patricia and Arnold for a portion of a 35 minute time period to discuss other business. (Plaintiffs' Exhibit 33). On August 2, 2007, Young billed Patricia for client conferences and preparation of the First Amendment, new Will and Powers of Attorney. *Id.*

In August of 2007, Young had three conferences or telephone conferences with Patricia concerning other business. (Plaintiffs' Exhibit 33).

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

E. Patricia's Health During the Period Around the Signing of First Amendment - July 27, 2007.

Dr. Fred Uthoff, Patricia's regular internal medicine physician, made no mention of dementia during Patricia's visits with him in January, February, March, April or May of 2007, the months leading up to the execution of the First Amendment. (Plaintiffs' Exhibit 32, pp. 240, 242-44, 247, 250).

On June 19, 2007, six weeks before she signed the First Amendment, Patricia was admitted to Missouri Delta Medical Center for back and hip pain, nausea, vomiting and constipation. (Plaintiffs' Exhibit 32, pp. 1712-14). On admission to the hospital, the admitting nurse found Patricia to be oriented to person, place and time (alert and oriented x 3). (Plaintiffs' Exhibit 32, p. 1714). As part of a "Fall Risk Assessment," the admitting nurse determined that Patricia was not confused, disoriented, senile or irrational. (Plaintiffs' Exhibit 32, p. 1706). The nurse also found that Patricia was compliant and able to follow and understand instructions. (Plaintiffs' Exhibit 32, p. 1706).

The nurses' periodic evaluations of Patricia's mental status varied from time to time during the hospitalization. (Plaintiffs' Exhibit 32, pp. 1712-40). Both expert physicians who testified during the trial believed that Patricia's variable mental status was the result of delirium during the hospitalization. (Tr. 229-30, 347-49). Delirium is a state where, due to stress, a patient's mental status is temporarily diminished. (Tr. 349). The mental state usually improves when the issue or incident causing stress ends. (Tr. 349-50).

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Patricia was evaluated during the hospitalization by a neurologist, Dr. Riyadh Tellow, on June 25, 2007. (Plaintiffs' Exhibit 32, pp. 1608-09). He found her to be alert and oriented x 3. *Id.* Patricia knew who she was, where she was and the date. *Id.* Her speech was fluent and normal. *Id.* Dr. Tellow did not believe Patricia was depressed. *Id.*

Patricia was diagnosed with arthritis of the spine. (Plaintiffs' Exhibit 32, pp. 1608-09). Her constipation and nausea were treated. (Plaintiffs' Exhibit 32, p. 1615). Her disorientation decreased during the hospitalization after her medical problems improved. (Plaintiffs' Exhibit 32, p. 1615). The nurses consistently found Patricia to be alert and oriented x 3. (Plaintiffs' Exhibit 32, pp. 1745-59).

Patricia was discharged from the hospital on June 29, 2007, approximately one month before she signed the First Amendment. (Plaintiffs' Exhibit 32, p. 1615). When Patricia was seen in Dr. Uthoff's office (her regular physician) on July 12, 2007, he noted no new neurologic deficits. (Plaintiffs' Exhibit 32, pp. 236-37).

F. <u>Beneficiary Changes by Patricia</u>.

On October 25, 2007, Young wrote the OCTFCU (Orange County Teachers Federal Credit Union) advising that Patricia wanted to change the beneficiary of her OCTFCU IRA and requesting that forms be sent to Patricia to effectuate her desired changes. (Defendants' Exhibit U). Young also relayed to OCTFCU that all of Ms. Watson's non-IRA accounts should be titled in the name of her Trust. *Id.* If those non-IRA accounts were not in the name of the Trust, Young also requested forms to effectuate those changes. *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

On November 19, 2007, Patricia and Arnold consulted Young at his office. (Tr. 319). Patricia had concerns that her husband had been spending too much of her money. *Id.* Young reviewed every check and every deposit reflected in Patricia's bank statements and checkbooks in the presence of Patricia and Arnold and found no inconsistencies whatsoever. *Id.* He did not find any transfers or transactions that Arnold had done that Patricia did not already know about. *Id.* Attorney Young determined that Patricia's concerns were unfounded. *Id.*

On December 7, 2007, Patricia changed the Alliance Bank Account No. 1024892 from a trust account to an individual account in her sole name with a payable on death designation to her husband, Arnold, or her Trust as secondary POD beneficiary. (Plaintiffs' Exhibit 13).

On December 7, 2007, Patricia changed the Alliance Bank Money Market Account No. 4010949 from a trust money market account to an individual money market account in her sole name with a payable on death designation to her husband, Arnold, or her Trust as secondary POD beneficiary. (Plaintiffs' Exhibit 14).

On December 21, 2007, Patricia opened an account with Montgomery Bank, numbered 1766864, in her individual name with a payable on death designation to her husband, Arnold. Patricia was the only signatory on the account. (Plaintiffs' Exhibit 16). On December 28, 2007, Patricia changed her Montgomery Bank Account No. 1766864 to a joint account between her husband, Arnold, and herself. (Plaintiffs' Exhibit 16). She made no payable on death designations on that account. *Id.* Patricia and Arnold were the only signatories on the account. *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Plaintiffs presented no evidence during the trial of the circumstances of any of the account titling changes.

Patricia signed a letter written by Arnold to CALSTRS on January 7, 2008. (Plaintiffs' Exhibit 25). The letter requested forms for correction of beneficiary. Patricia's letter to CALSTRS dated January 7, 2008 is date stamped "January 8, 2008 AM 8:35 CALSTRS" evidencing receipt by CALSTRS on that date and at that time. (Plaintiffs' Exhibit 25). On January 24, 2008, Patricia, as Applicant, signed a Change of Option Beneficiary After Retirement form to designate her husband, Arnold, as the 100% beneficiary of her California State Teachers Retirement System (CALSTRS) monthly retirement benefits. *Id.* This form bounced back and forth between California and Missouri several times before being signed by Arnold Smith on July 24, 2008. *Id.* The effect of this form was to reduce Patricia's pension benefits while she was alive in order to allow for Arnold to receive some benefit after her death.

On January 12, 2008, Patricia signed a General Durable Power of Attorney naming her husband, Arnold, as her agent. (Plaintiffs' Exhibit 26). On January 14, 2008, Patricia changed the primary beneficiary of her US Bank IRA No. 652394532152 to her husband, Arnold. (Plaintiffs' Exhibit 17).

Patricia owned a 1997 Ford, VIN 1FALP6531VK106229, a 1987 Ford Pickup, VIN 1FTCR14T2HPA13591, a 2002 CARS Trailer, VIN 4HX11C08172C044781, a 2006 Cadillac, VIN 1G6DM57T760150668, and a 2002 Ford Van, VIN 1FTNS24L12HB80352, all in her individual name with a TOD designation to Arnold.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

(Plaintiffs' Exhibits 20-24). Plaintiffs presented no testimony of the circumstances of the titling of these assets.

G. <u>Second Amendment to Trust - July 2, 2008</u>.

On February 13, 2008, approximately six months after the First Trust Amendments, Patricia consulted with Young regarding further amendments to her trust documents. (Defendants' Exhibit O, p. 603). Young's hand-written notes from the February 13th meeting reflect that Patricia wanted to leave $5,000.00 to each of her half-siblings (as opposed to the $25,000.00 per half-sibling under the First Trust Amendment). *Id.* Young believed Patricia was mentally alert during the February 13, 2008 consultation. (Tr. 287). Patricia understood the changes she was requesting and the ramifications of those changes. *Id.*

Approximately one month after Patricia requested the additional changes to her estate planning documents, Young prepared a Second Amendment per Patricia's instructions and mailed it to Patricia on March 17, 2008. (Tr. 288). He waited this period of time to allow Patricia to think about and be certain of her decision to further reduce the Plaintiffs' shares in her estate. *Id.*

On or about March 31, 2008, Patricia consulted with Young and requested inclusion of language in the Second Amendment to her Trust to (1) ensure that Bernard Ivie's stepchild would inherit his share in the event Bernard predeceased Patricia, and (2) provide a distribution of $5,000 to Sidney B. Smith regardless of whether Arnold survived her. (Tr. 288; Defendants' Exhibit O, p. 602). Patricia was still certain that she

wanted to reduce the Plaintiffs' share in her estate from $25,000 each to $5,000 each. (Tr. 288).

On April 3, 2008, Young sent a revised proposed Second Amendment to Trust to Patricia for review. (Defendants' Exhibit W). Patricia was hospitalized on May 22, 2008 for treatment of pneumonia and weakness. (Plaintiffs' Exhibit 32, pp. 1404-06). During the hospitalization, a renal mass was discovered on Patricia's left kidney and was staged at grade II kidney cancer. (Plaintiffs' Exhibit 32, pp. 1403, 4092-94). Patricia was discharged to Clearview Nursing Center for rehabilitation on May 30, 2008. (Plaintiffs' Exhibit 32, p. 1403).

Patricia signed the Second Amendment to her Trust on June 7, 2008 without Young's assistance. (Tr. 288). The Second Amendment was signed by Patricia and witnessed by Arnold. *Id.* It was not notarized. (Tr. 288-89). The Second Amendment was not executed correctly. *Id.* Patricia advised Young by letter dated June 7, 2008 that she knew the Second Amendment was not executed properly and requested other arrangements to be made so that the changes would be effective. (Tr. 289).

Patricia was discharged to home from Clearview Nursing Center on July 2, 2008. (Plaintiffs' Exhibit 32, p. 4025). Patricia wanted to get the Second Amendment to her Trust signed. (Tr. 289). On that evening, Young met with Patricia at her home. (Tr. 289-90). Patricia met Young at the door. (Tr. 290). At that meeting, Patricia was under no duress, was relaxed and calm and did not appear to be under any pressure, coercion or undue influence. (Tr. 290-91). Young found Patricia to be alert and in good spirits. (Tr. 290). She was not upset in any way. *Id.* Young reviewed the Second Amendment with

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Patricia. (Tr. 290-91). They discussed the contents and effects of the Second Amendment. *Id.* Patricia signed the Second Amendment to her Trust at her home on July 2, 2008 in the presence of Young who also acted as notary. (Tr. 291). Arnold was not in the room when Patricia signed the Second Amendment. *Id.*

In Young's professional opinion, Patricia understood what she was doing and the effects of the document she was signing. (Tr. 291-93). He believed her to be oriented to time and place, to understand what she was signing and to be competent to sign the Second Amendment. *Id.* On July 2, 2008, Patricia knew who she was, who Young was and who her family members were. (Tr. 290). She even made a comment about one of her doctors, Dr. Killion. (Tr. 290). Young would not have let Patricia sign the Second Amendment if she had not understood what she was doing. (Tr. 292-93). Regardless of Patricia's illnesses between March and July, 2008, Young believed Patricia was competent based on his customary competency interview. (Tr. 290-93).

Young prepared a hand-written memo outlining his observations during the July 2, 2008 meeting with Patricia. (Tr. 291; Exhibit O, p. 563). He also had his note typed. (Tr. 291; Exhibit O, p. 561). Young had a heightened expectation that, after Patricia's death, Patricia's half-siblings would have questions about the Second Amendment because of Patricia's prior illnesses and the effects of the dispositive changes in the First and Second Amendments. (Tr. 291).

Patricia never told Young at any time after June of 2007 that the changes she made to her Trust benefitting Arnold were not what she wanted. (Tr. 292). Patricia never mentioned to Young that she wanted to increase the Plaintiffs' shares in her estate. (Tr.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

292). In Young's professional opinion, the First and Second Amendments and related documents accurately reflected Patricia's testamentary intent at the times those documents were signed. (Tr. 292-93). Young never got the idea that Arnold had imposed his will on Patricia and made her do something she did not want to do. (Tr. 291).

Except for Patricia Watson's Amendments to her Trust in 2007 and 2008 in this case, no estate planning documents prepared by Young during his 30 plus years as an attorney have ever been set aside for lack of testamentary capacity or undue influence. (Tr. 293).

H. Patricia's Health at Signing of Second Amendment - July 2, 2008.

There were entries in the home health records that show that Patricia was confused from time to time during the first half of 2008 (Plaintiffs' Exhibit 32, pp. 3409, 3435, 3495-96, 3515, 3549-50). However, other entries show her to be alert and clear in her thinking. In January 2008, the home health nurses found Patricia to be alert and very cooperative. (Plaintiffs' Exhibit 32, pp. 3511, 3515, 3521-22, 3527-28). Patricia had a coherent and logical line of verbal communication. *Id.* In March, April and May of 2008, the home health nurses found Patricia to be alert. (Plaintiffs' Exhibit 32, pp. 3301, 3329, 3349, 3435, 3437).

In May 2008, Patricia was admitted to Missouri Delta Medical Center with weakness, constipation and chronic back pain. (Plaintiffs' Exhibit 32, pp. 1404-06). When the nurses assessed Patricia, she was always aware of who she was. (Plaintiffs' Exhibit 32, pp. 1493, 1500, 1502, 1504, 1506-07, 1509, 1511, 1515, 1517, 1522, 1524, 1526, 1531, 1535). Occasionally, at night, Patricia was disoriented to the time of day or

her location. (Plaintiffs' Exhibit 32, pp. 1500, 1502, 1504, 1507, 1517, 1522, 1526). During the May 2008 hospitalization, cancer was discovered in Patricia's left kidney. (Plaintiffs' Exhibit 32, pp. 1403, 4092-94).

Patricia was admitted to Clearview Nursing Center on June 7, 2008. (Plaintiffs' Exhibit 32, p. 4020). The admitting nurse found her speech clear. (Plaintiffs' Exhibit 32, p. 4021). She answered questions readily. She was alert and oriented x 2. (Plaintiffs' Exhibit 32, p. 4069). Patricia was eager to begin occupational therapy and physical therapy in order to improve her strength so she could go home. (Plaintiffs' Exhibit 32, p. 4069). According to a social services assessment at Clearview on June 11, 2008, Patricia liked making her own decisions. (Plaintiffs' Exhibit 32, p. 4275). She became offended if anyone tried to make any decisions for her. *Id.* Her ability to make decisions was not severely impaired. *Id.*

On June 19, 2008, approximately two weeks before she signed the Second Amendment to the Trust, Dr. Linza Killion saw Patricia because of her diagnosis of kidney cancer. (Plaintiffs' Exhibit 32, pp. 4092-94). Dr. Killion is double board certified and fellowship trained and is a former faculty member at the Vanderbilt University Medical Center. *Id.* Dr. Killion found Patricia to be awake, alert, and oriented to person, place, time and event. He found her memory to be intact. *Id.* Her insight, judgment, mood, affect and intellectual function seemed normal. *Id.* Her attention span and concentration seemed normal. He found no apparent deficiencies in her fund of knowledge. *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Patricia was discharged from Clearview Nursing Center on July 2, 2008. (Plaintiffs' Exhibit 32, p. 4025). She was assessed to be alert and oriented x 2. She was oriented to her identity and her location. *Id.*

On July 6, 2008, Patricia's usual home health nurse was not on duty. (Plaintiffs' Exhibit 32, p. 2971). Patricia asked when her usual home health nurse, Heather, would be back. *Id.* Patricia knew Heather's name and was aware that Heather was not the nurse on duty that day. *Id.* On July 8, 2008, an occupational therapist found Patricia to be alert and oriented to person, place and time. (Plaintiffs' Exhibit 32, p. 3999). On July 13, 2008, Patricia's home health nurse found her to be oriented to person and place. (Plaintiffs' Exhibit 32, p. 2057). On July 26, 2008, the home health nurse found Patricia to be very happy and alert. (Plaintiffs' Exhibit 32, p. 2931). A physical therapist from Home Advantage provided therapy to Patricia on July 30, 2008. (Plaintiffs' Exhibit 32, p. 3950). The therapist found Patricia to be less confused. *Id.* Patricia enjoyed the physical therapy session. *Id.*

I. <u>Patricia's Cancer Treatment and Final Financial and Legal Affairs</u>.

In July of 2008, Patricia and Arnold were concerned about Patricia's cancer diagnosis and uncertain about her follow-up treatment and recovery period. (Tr. 101) Arnold obtained the Affidavit of Incapacity form on the internet. (Tr. 101-02). In late July and August of 2008, Patricia wanted to make certain that Arnold could take care of all of her financial affairs including paying bills and managing her rental properties. (Tr. 103-05). Patricia and Arnold decided to invoke the General Power of Attorney by obtaining Affidavits of Incapacity due to Patricia's impending cancer surgery and

uncertain followup treatment. (Tr. 101, 112). The purpose for obtaining the Affidavits of Incapacity was to establish that Patricia was ill and might not be able to manage her financial affairs for a while. (Tr. 112). There was no evidence presented at trial that any of the physicians who signed the Affidavits of Incapacity actually examined Patricia at the time an Affidavit was signed.

Although Patricia was sometimes confused in the later part of 2008, she was aware of significant events in her life. (Plaintiffs' Exhibit 32, pp. 2887-88). Patricia was aware of the cancer diagnosis and the plans for surgical removal of her kidney. *Id.* When the home health nurses visited Patricia in the days preceding surgery, Patricia was aware of the planned surgery and worried over the outcome. *Id.*

On August 20, 2008, Patricia's kidney was removed at St. Francis Medical Center in Cape Girardeau. (Plaintiffs' Exhibit 32, p. 2282). After her hospital discharge, Patricia was admitted to Clearview Nursing Center for rehabilitation. *Id.* On August 31, 2008, Patricia was noted to be alert and oriented to person, place and time, with periods of confusion. (Plaintiffs' Exhibit 32, p. 4074). Patricia was discharged from Clearview Nursing Center on September 2, 2008. (Plaintiffs' Exhibit 32, p. 4070). On the day of her discharge, the nurse found Patricia to be alert and oriented. *Id.*

On October 22, 2008, Patricia opened Focus Bank IRA No. 1003130 and named Arnold as the primary beneficiary. (Plaintiffs' Exhibit 18).

The home health nurses considered Patricia to be generally alert with "bouts of confusion" in the Fall of 2008. (Plaintiffs' Exhibit 32, pp. 3207, 3223, 3935). On November 16, 2008, a home health nurse noted that Patricia was sometimes confused as

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to the identity of people with her. (Plaintiffs' Exhibit 32, p. 3207). A few minutes later, Patricia would know who everyone was. *Id.* Patricia remained aware of events in her life. (Plaintiffs' Exhibit 32, pp. 3171, 3173, 3926). On November 28, 2008, Patricia's sister, Dorothy Miller, passed away. When the home health nurse visited Patricia on December 1 and 2, 2008, Patricia told the nurse she was upset over her sister's passing. *Id.*

Sikeston, Missouri attorney Clayton Vandivort ("Vandivort") met with Patricia and Arnold at their request on December 8, 2008. (Plaintiffs' Exhibit 44; SLF 42-43). Both Patricia and Arnold attended the meeting and both Patricia and Arnold requested that Vandivort file Patricia's Last Will and Testament with the Probate Court of Scott County, Missouri and record the Trust and First and Second Amendments to the Trust with the Recorder of Deeds of Scott County, Missouri and also prepare two Deeds to ensure Arnold received Patricia's real estate. (Plaintiffs' Exhibit 44; SLF 42-45).

On December 8, 2008, Patricia seemed a little frail physically to Vandivort and needed some assistance walking, but Vandivort noted nothing unusual about Patricia to suggest she had diminished mental capacity. (SLF 45-46). As an attorney, Vandivort has in excess of 35 years of experience of gauging whether someone is mentally competent to execute wills, trusts and deeds. (SLF 55-56). If a person obviously appears to not be competent, Vandivort would not either prepare the document or have the document executed. (SLF 56).

On December 8, 2008, Vandivort noticed nothing about Patricia to suggest she didn't know who she was, where she was or what she was doing. (SLF 56). Patricia knew she was requesting Vandivort to take actions relating to her estate planning. *Id.* Patricia

asked Vandivort to prepare the deeds that would vest title to certain real estate in Arnold upon her death. (SLF 56-57).

Patricia never suggested to Vandivort that Young had made changes to her estate planning documents that she did not want made. (SLF 57). Patricia never, in Vandivort's presence, suggested that she wanted her half-siblings to receive more of her estate than they would receive under the documents prepared by Young. (SLF 57-58).

On December 8, 2008, it appeared to Vandivort that Patricia knew who she was, that she owned certain property and that she was taking certain actions that would affect how that property would be distributed upon her death. (SLF 58-59). On December 8, 2008, Vandivort requested Patricia's original Trust, Will and Amendments from Young via letter. (Plaintiffs' Exhibit 44). On or about December 19, 2008, Young delivered Patricia's original Trust dated May 9, 2002, Will dated July 27, 2007, First Amendment to Trust dated July 27, 2007, and Second Amendment to Trust dated July 2, 2008 to Vandivort. (SLF 47). The deeds prepared by Vandivort were never signed. (SLF 51).

Patricia's ability to ambulate deteriorated. (Plaintiffs' Exhibit 32, p. 3061). She was scheduled to be admitted to Clearview Nursing Center in January, 2009 for more intensive physical therapy. *Id.* The home health nurses found Patricia to be pleasant. (*Id.* She was talking in complete sentences. *Id.* Patricia was aware of the plans to admit her to Clearview and the reason for the admission. *Id.* Patricia's condition deteriorated in the winter of 2009. She was found unresponsive in the nursing home on April 5, 2009. (Plaintiffs' Exhibit 32, pp. 591-92). Patricia developed aspiration pneumonia and passed away on April 10, 2009. (Plaintiffs' Exhibit 32, p. 590).

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Patricia made her own funeral arrangements years prior to her death. (Tr. 184).

J. **Medical Expert Testimony of Dr. Adam Jason Sky**.

Dr. Adam Sky is a St. Louis area psychiatrist with a large geriatrics practice. (Tr. 205, 208). He testified that, based upon his review of the medical records of Patricia, she did not have the necessary testamentary capacity to sign the First and Second Trust Amendments in 2007 and 2008. (Tr. 219, 227). Dr. Sky assigned July 1, 2007, as the date of her incapacity, without any explanation as to significance of that date. (Tr. 219) Dr. Sky initially scoffed at but ultimately embraced Dr. Randy Huss's (Defendants' expert) opinion that the incidents of confusion set forth in Patricia's medical records were the result of delirium which greatly improved when she returned home after hospitalizations and stays in medical facilities. (Tr. 228-30). Sky totally discounted the testimony of attorney Reginald Young. (Tr. 224-25).

K. **Medical Expert Testimony by Dr. Randall D. Huss**.

Dr. Huss is (1) a practicing medical doctor, (2) board certified in Family Practice, (3) qualified in Geriatric Medicine, (4) the Certified Medical Director of a Long Term Care Facility, (5) a former member and Chairman of the Missouri State Board of Healing Arts, and (6) has written in the areas of mental status and testamentary capacity. (Tr. 335-340).

Dr. Huss testified that Patricia possessed testamentary capacity on July 27, 2007. (Tr. 351-52). He based his conclusion on several factors including the testimony of Reginald Young who personally observed Patricia on that day. (Tr. 352-55). He also based it on the diagnoses of Drs. Uthoff and Tellow who found her to be suffering from

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

at most mild dementia. (Tr. 352-55). Dr. Huss also based his conclusion on his experience that capacity is dependent on the type of activity and what is involved. (Tr. 352-55). Given that Patricia had specialized help with the activity of amending her Trust and the task of choosing beneficiaries was specific, testamentary capacity was easily determined. (Tr. 352-55).

Dr. Huss concluded that it would be possible for Patricia, with her diagnosis, to have testamentary capacity to request and execute legal documents at some times and not be able to do so at other times. (Tr. 355-56). There is nothing about Young's deposition testimony relating to the First and Second Amendments that Dr. Huss found to be unbelievable or unlikely to be true. (Tr. 351).

Physicians who work with older people are familiar with the phenomenon of Delirium. (Tr. 348-51). Delirium is a condition of confusion in older people that is brought on by an illness, hospitalization, change in environment, frailty, worry and/or fright. (Tr. 348-51). The mental status of a person with Delirium fluctuates from time to time. (Tr. 348-51). Patricia Watson's medical records chart a textbook case of an older person with Delirium during some of her hospitalizations. (Tr. 348-51). Dr. Huss would have expected that Patricia would get better after she returned home because she returned to her "baseline," or familiar surroundings and comfort of home. (Tr. 348-51).

Dr. Huss testified that Patricia also had testamentary capacity on July 2, 2008. (Tr. 354-58). He based his conclusion on the testimony of Reginald Young, who personally observed her on that date. (Tr. 354-58). He also based his opinion on the medical records of Dr. Linza Killion and other providers. (Tr. 354-58). He stated that, once again, given

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

that making the changes was a specific task with which she had expert assistance, she easily could have achieved testamentary capacity, despite her health problems. (Tr. 354-58).

L. Observations and Testimony of the Family and Other Witnesses Regarding Capacity and Undue Influence.

After Patricia moved back to Missouri in 2004, Plaintiff Bernard Ivie saw her from once per month to every two months. (Tr. 188-89, 195). Patricia never said anything in Bernard's presence that was really obtuse and completely unrelated to reality. (Tr. 196). Bernard testified that Patricia specifically spoke with him about amending the Trust and providing gifts first in the amount of $25,000.00 and then $5,000.00 to each of her siblings as a result of the Amendments. (Tr. 199-202). At the time of this conversation, Patricia knew who Bernard was. (Tr. 200-02). Bernard shared this information with his siblings. Bernard does not have any information to indicate that Patricia's changes to her Trust were not what she wanted. (Tr. 203-04). Bernard never saw Arnold mistreat Patricia. If he had, he would have addressed it. (Tr. 197).

Arnold did not attempt to limit Ladonna's contact with Patricia in 2007 and 2008 when the Trust Amendments were made. (Tr. 181-82). In 2008, Ladonna saw Patricia about three times per week. (Tr. 182). There was never a time that Patricia did not recognize Ladonna. (SLF 46, lines 10-13). Although Ladonna saw Patricia three times per week, Ladonna did not take care of Patricia's medical needs. (Tr. 180-181). Arnold did. (Tr. 180). Patricia told Ladonna that she loved Arnold when Arnold was present and when he was not present. (Tr. 180). Patricia discussed her amendments to her Trust with

Ladonna. (Tr. 182-83). Ladonna did not try to talk Patricia out of amending her trust because she felt it was Patricia's business. (Tr. 183). When Ladonna questioned Arnold about how Patricia's accounts were being handled, Arnold did not withhold that information from Ladonna. (Tr. 183-84). Ladonna filed for guardianship in 2009 because she wanted to get control of Patricia. (Tr. 184).

Arnold never tried to interfere with visits between Richard Ivie and Patricia. (Tr. 148). Arnold took Patricia to see Richard in Portageville as often as three times per week. (Tr. 147-48). Richard never saw Arnold unduly influence Patricia to leave her property to Arnold. (Tr. 150). Richard never saw Arnold mistreat Patricia. (Tr. 150-51). Richard never saw Arnold manipulate Patricia. *Id.* When Patricia told Richard she wanted to send each of her siblings $25,000 while she was alive, he told her to keep it because he knew how she felt about her money. (Tr. 150). Richard does not have any information about what happened when the two amendments were signed or when the various accounts and other assets were retitled. (Tr. 151). Richard Ivie does not think it is improper for a wife to leave money to her husband at her death. *Id.*

Jimmie Ivie does not know of anyone who claims they have information that Arnold improperly influenced Patricia. (Tr. 166).

Patricia also discussed the changes she had made to her estate plan in the First and Second Trust Amendments with her good friend Delores Grindstaff, a retired nurse and wife of a minister. Patricia used her cell phone to call Delores every day. (Tr. 260). She told Delores that she was leaving her estate to Arnold and not to her half-siblings because he was her husband and her half-siblings were not leaving anything to her. (Tr. 259-60).

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Delores testified that she had several specific conversations with Patricia during which Patricia informed her that she was amending her Trust and making Arnold Smith the primary beneficiary. (Tr. 259-60). Patricia told Delores that she had spoken with her siblings and none of them were leaving anything to her in their wills. *Id.*

Rev. Larry Lane had the opportunity to visit with Patricia and Arnold at church, in Patricia and Arnold's home, in the hospital and in the nursing home. (Tr. 267). He considered Patricia and Arnold to be faithful church attenders. (Tr. 265-66). He observed that Arnold fulfilled every whim that Patricia had. (Tr. 266). Rev. Lane was amazed at what Arnold did for Patricia and observed that Arnold would bend over backwards to please Patricia. (Tr. 266).

Patricia never filed for divorce from Arnold. (Tr. 128, 180).

M. <u>Procedural History</u>.

Plaintiffs filed both a Petition to Discover Assets against Arnold Smith and a Trust Contest to set aside the First and Second Trust Amendments. (L.F. 112, 122 respectively). The proceedings were consolidated for trial before the Honorable Ben Lewis. (L.F. 133). The prior Judge, Hense Winchester, recused himself from the case due to this friendship and high regard for Reginald Young. The parties stipulated to the admission of the documentary evidence and both sides presented witnesses. (L.F. 101-109). Both the Plaintiffs and the Defendants submitted Proposed Findings of Fact and Conclusions of Law. (L.F. 205, 248). The Court entered its written Decision and Judgment in favor of Plaintiffs on July 17, 2012. (L.F. 280). The Court then entered its

First Amended Decision and Judgment on July 25, 2012 to correct certain typographical errors and other mistakes. (L.F. 314-45, 349-80).

Defendants timely filed a Notice of Appeal. (L.F. 381). The Court of Appeals, Southern District, following oral argument, issued its Opinion on November 20, 2013, affirming the Trial Court's judgment. On December 5, 2013, Defendants timely filed a Motion for Rehearing. On December 12, 2013, the Court of Appeals denied Defendants' Motion for Rehearing. Thereafter, Defendants timely filed an Application for Transfer to this Court on December 23, 2013. On February 4, 2014, this Court granted Defendants' Application for Transfer and Ordered the Cause Transferred from the Court of Appeals, Southern District.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

POINTS RELIED ON

I.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE FIRST AMENDMENT TO THE TRUST ON JULY 27, 2007 WAS THE RESULT OF UNDUE INFLUENCE BY RESPONDENT ARNOLD SMITH BECAUSE THERE WAS NO EVIDENCE THAT SMITH PLAYED ANY ROLE IN THE AMENDMENT IN THAT THE SETTLOR OF THE TRUST WAS REPRESENTED BY ABLE COUNSEL, REGINALD YOUNG, WHO KNEW THE SETTLOR WELL AND TESTIFIED AT LENGTH ABOUT THE AMENDMENT IN THAT THE COURT'S FINDINGS OF FACT RELATING TO COUNSEL'S TESTIMONY ARE MERELY RESTATEMENTS OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND ARE AGAINST THE WEIGHT OF THE EVIDENCE, ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE), AND TOTALLY MISCONSTRUE YOUNG'S TESTIMONY AND FURTHER UNDER MISSOURI LAW COURTS HAVE TRADITIONALLY NOT FOUND THE EXISTENCE OF UNDUE INFLUENCE RELATING TO CHANGES TO ESTATE PLANNING DOCUMENTS WHICH FAVOR A SPOUSE.

Hahn v. Tanksley, 317 S.W.3d 145, 154 (Mo.App. S.D. 2010)

Hammonds v. Hammonds, 297 S.W.2d 391 (Mo. 1957)

In Re Harp, 278 S.W.3d 681, 687 (Mo.App. S.D. 2008)

Morse v. Volz, 808 S.W.2d 424, 432 (Mo.App. W.D. 1991)

II.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE OF A LACK OF TESTAMENTARY CAPACITY SUFFICIENT TO VOID THE FIRST TRUST AMENDMENT DATED JULY 27, 2007 BECAUSE THE FINDINGS OF FACT ON THIS POINT WERE AGAINST THE WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) IN THAT ALL OF THE EVIDENCE RELATING TO THE EXECUTION OF THE FIRST TRUST AMENDMENT ON JULY 27, 2007 AND THE INTERACTIONS BETWEEN THE SETTLOR AND HER COUNSEL LEADING UP TO THE EXECUTION OF THE AMENDMENT ESTABLISHED THAT AT THOSE TIMES THE SETTLOR KNEW WHO SHE WAS, KNEW THE NATURE AND EXTENT OF HER PROPERTY AND KNEW THE NATURAL OBJECTS OF HER BOUNTY. THE ONLY EVIDENCE OF A LACK OF CAPACITY DURING THIS TIME WERE REFERENCES TO MEDICAL RECORDS FOR TREATMENT RECEIVED BY THE SETTLOR AT OTHER TIMES AND EVEN THOSE RECORDS DEMONSTRATE THAT THE SETTLOR'S CONFUSION WAS AT BEST INTERMITTENT AND PLAINTIFFS' EXPERT MEDICAL TESTIMONY WAS BASED ONLY ON A SELECTIVE READING OF THOSE RECORDS AND MISSOURI COURTS HAVE TRADITIONALLY REJECTED MEDICAL EVIDENCE OF THIS TYPE.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Creek v. Union National Bank, 266 S.W.2d 737, 747 (Mo. 1940)

Hahn v. Tanksley, 317 S.W.3d 145, 150-51, 154-55 (Mo.App. S.D. 2010)

Morse v. Volz, 808 S.W.2d 424, 430-31, 432 (Mo.App. W.D. 1991)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)

III.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE SECOND AMENDMENT TO THE TRUST ON JULY 2, 2008 WAS THE RESULT OF UNDUE INFLUENCE BY RESPONDENT SMITH BECAUSE THERE WAS NO EVIDENCE THAT SMITH PLAYED ANY ROLE IN THE REQUEST FOR OR PREPARATION OF THE AMENDMENT IN THAT THE SETTLOR OF THE TRUST WAS REPRESENTED BY ABLE COUNSEL REGINALD YOUNG WHO TESTIFIED AT LENGTH ABOUT THE LENGTHY INTERACTIONS WITH THE SETTLOR LEADING UP TO THE EXECUTION OF THE SECOND AMENDMENT AND THE COURT'S FINDING OF FACTS RELATING TO COUNSEL'S TESTIMONY ABOUT THE PREPARATION AND EXECUTION OF THE SECOND AMENDMENTS ARE MERELY RESTATEMENTS OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND ARE AGAINST THE WEIGHT OF THE EVIDENCE, ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) AND TOTALLY MISCONSTRUE YOUNG'S TESTIMONY AND, UNDER MISSOURI LAW, COURTS HAVE TRADITIONALLY NOT FOUND THE EXISTENCE OF

UNDUE INFLUENCE RELATIVE TO CHANGES TO ESTATE PLANNING WHICH FAVOR A SPOUSE.

Horn v. Owen, 171 S.W.2d 585, 592 (Mo. 1943)

Morse v. Volz, 808 S.W.2d 424, 430-31, 432 (Mo.App. W.D. 1991)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)

Needles v. Roberts, 879 S.W.2d 550, 555 (Mo.App. W.D. 1994)

IV.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE OF A LACK OF TESTAMENTARY CAPACITY SUFFICIENT TO VOID THE SECOND TRUST AMENDMENT DATED JULY 2, 2008 BECAUSE THE FINDINGS OF FACT OF THE COURT ON THIS POINT WERE AGAINST THE WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) IN THAT ON THE DAY OF EXECUTION OF THE SECOND TRUST AMENDMENT ON JULY 2, 2008, THE INTERACTIONS BETWEEN THE SETTLOR AND HER ABLE COUNSEL REGINALD YOUNG ESTABLISHED THAT AT THOSE TIMES AND AT ALL TIMES LEADING UP TO THE EXECUTION OF THE AMENDMENT THE SETTLOR HAD TESTAMENTARY CAPACITY AND KNEW WHO SHE WAS, KNEW THE NATURE AND EXTENT OF HER PROPERTY AND KNEW THE NATURAL OBJECTS OF HER BOUNTY. THE ONLY EVIDENCE OF A LACK OF CAPACITY DURING THE DAY OF EXECUTION OF THE SECOND TRUST

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

AMENDMENT ON JULY 2, 2008 WERE REFERENCES TO MEDICAL RECORDS FOR TREATMENT RECEIVED BY THE SETTLOR AT OTHER TIMES AND PLAINTIFFS' EXPERT MEDICAL TESTIMONY WAS BASED ONLY ON A SELECTIVE READING OF THOSE RECORDS AND MISSOURI COURTS HAVE TRADITIONALLY REJECTED MEDICAL EVIDENCE OF THIS TYPE.

Creek v. Union National Bank, 266 S.W.2d 737, 747 (Mo. 1940)

Hahn v. Tanksley, 317 S.W.3d 145, 150-51, 154 (Mo.App. S.D. 2010)

Morse v. Volz, 808 S.W.2d 424, 430-31, 432 (Mo.App. W.D. 1991)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)

V.

THE COURT ERRED IN FAILING TO FIND, AS A MATTER OF LAW, THAT THE PLAINTIFFS SHOULD RECEIVE NOTHING UNDER THE TRUST AS AMENDED BECAUSE THE PLAINTIFFS CONTESTED THE VALIDITY OF THE FIRST AND SECOND TRUST AMENDMENTS IN THAT THE TRUST AS AMENDED CONTAINED AN *IN TERROREM* CLAUSE WHICH DISQUALIFIED THE PLAINTIFFS FROM RECEIVING ANY OF THE PROCEEDS AND SUCH CLAUSES ARE ENFORCEABLE AS A MATTER OF LAW.

Tobias v. Korman, 141 S.W.3d 468, 477 (Mo.App. E.D. 2004)

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

VI.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR, COGENT AND CONVINCING EVIDENCE THAT SEVERAL CHANGES IN THE TITLING OF CERTAIN TRUST ACCOUNTS AND THE CHANGES IN BENEFICIARY DESIGNATIONS FOR OTHER ASSETS WAS THE RESULT OF UNDUE INFLUENCE AND LACK OF TESTAMENTARY CAPACITY ON THE PART OF PATRICIA WATSON AND IN ENTERING A LARGE MONEY JUDGMENT IN FAVOR OF THE ESTATE AND AGAINST ARNOLD SMITH BECAUSE PLAINTIFFS PRESENTED NO EVIDENCE OF THE CIRCUMSTANCES OF THE RETITLING OF THE ASSETS OR CHANGES IN BENEFICIARIES IN THAT THE FINDINGS BY THE COURT ON THOSE ISSUES WERE UNSUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) AND WERE AGAINST THE WEIGHT OF THE EVIDENCE AND AS A MATTER OF LAW, LACK OF TESTAMENTARY CAPACITY IS NOT A BASIS FOR SETTING ASIDE A NON-PROBATE TRANSFER UNDER MISSOURI LAW AND THE COURT FURTHER ERRED IN HOLDING THAT FOR THE ACCOUNTS, PROPERTY IN THE HOUSE AND VEHICLES THOSE ASSETS SHOULD BECOME PROPERTY OF THE ESTATE WHEN, IF ANYTHING, THEY SHOULD BE PROPERTY OF THE TRUST IN THAT PRIOR TO THE RETITLING ACTIONS WHICH ARE CHALLENGED HERE THEY WERE TRUST PROPERTY.

Creek v. Union National Bank, 266 S.W.2d 737, 747 (Mo. 1940)

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

In Re Goldschmidt, 215 S.W.3d 215, 224 (Mo.App. 2006)

Morse v. Volz, 808 S.W.2d 424, 430-31, 432 (Mo.App. W.D. 1991)

Treasurer of State-Custodian of Second Injury Fund v. Witte,

414 S.W.3d 455, 461 (Mo. banc 2013)

VII.

THE COURT ERRED 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 UNDUE INFLUENCE AND LACK OF TESTAMENTARY CAPACITY ON THE PART OF PATRICIA WATSON BECAUSE PLAINTIFFS PRESENTED NO EVIDENCE OF THE CIRCUMSTANCES OF THE CHANGE OF BENEFICIARY DESIGNATION IN THAT THE FINDINGS BY THE COURT ON THAT ISSUE WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) AND WERE WAS AGAINST THE WEIGHT OF THE EVIDENCE AND, AS A MATTER OF LAW, LACK OF TESTAMENTARY CAPACITY IS NOT A BASIS FOR SETTING ASIDE A NON-PROBATE TRANSFER UNDER MISSOURI LAW AND PLAINTIFFS WERE NOT DAMAGED BY THE BENEFICIARY CHANGE.

Hahn v. Tanksley, 317 S.W.3d 145, 150-51, 154 (Mo.App. S.D. 2010)

Morse v. Volz, 808 S.W.2d 424, 430-31, 432 (Mo.App. W.D. 1991)

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976)

Needles v. Roberts, 879 S.W.2d 550, 555 (Mo.App. W.D. 1994)

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

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ARGUMENT

Standard of Review

The standard of review for a judge tried case is set forth in *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). The Trial Court's judgment will be upheld unless there is no substantial evidence to support it, it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Id.*

This Court should clarify the standard of review when an appellate court reviews a decision in a bench-tried case that requires proof by "clear, cogent and convincing" evidence. It seems logical that more and better evidence should be required to affirm a judgment under *Murphy v. Carron* where, as here, the burden of proof in the trial court was higher than the usual preponderance of the evidence. At least one case has noted that substantial evidence means different things in different types of cases. As noted by the Court of Appeals for the Southern District, "As applied to our standard of review, substantial evidence as used in *Murphy* is equivalent to clear and convincing evidence when that measure of proof is used at trial." *In re Marriage of Cochran*, 340 S.W.3d 638, 644 (Mo.App. S.D. 2011) (*citing In re Adoption of W.B.L.*, 681 S.W.2d 452, 454 (Mo. banc 1984)). However, other reported cases ignore this distinction. Some appellate courts have deferred to the trial court as to whether the evidence was sufficient to meet the clear and convincing burden of proof. *See e.g. Woods ex rel. Woods v. Cory*, 192 S.W.3d 450, 459 (Mo.App. S.D. 2006)(only inquiry is whether substantial evidence supported the judgment, not whether the evidence itself was clear and convincing); *Ryterski v. Wilson*, 740 S.W.2d 374, 376 (Mo.App. S.D. 1987)(in a case requiring proof

by clear and convincing evidence, holding that "as the evidence of undue influence was in dispute, we ordinarily defer to the finding of the trial court").

By treating appellate review of the sufficiency of evidence the same way under *Murphy v. Carron* regardless of the quantum of proof required in the trial court, courts of appeals sometimes sidestep the issue of whether evidence presented at trial was actually adequate to meet the clear and convincing standard, and only evaluate the evidence under the vague substantial evidence standard.

Judge Stith, in her dissenting opinion in *In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 826-27 (Mo. banc 2011), recognized this issue and noted that appellate courts cannot disregard the clear and convincing standard of proof in determining whether the trial court court's judgment should be affirmed. She stated that "to affirm based on evidence that, at most, may be sufficient to meet a preponderance of the evidence standard . . . would render the applicable standard of review, as set forth in *Murphy v. Carron*, devoid of any meaningful content." *Id.* at 827. When a trial court's judgment must rest on clear and convincing evidence, there is no possibility of meaningful appellate review if the appellate court cannot evaluate whether the evidence upon which the trial court based its judgment was actually clear and convincing. In a case which requires proof by clear and convincing evidence, the standard of review must require the reviewing court to determine whether the evidence presented at trial was, in fact, "clear, cogent and convincing." Substantial evidence for purposes of *Murphy* must consider the quantum of evidence required in the trial court.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

This Court need look no further than the opinion of the Court of Appeals in the instant case for an example of this lack of meaningful review. The Court of Appeals failed to acknowledge or address whether there was "clear, cogent and convincing evidence" to support the trial court's judgment. In fact, the Court of Appeals only stated that "substantial evidence" demonstrated that Patricia Watson lacked testamentary capacity. *See* Court of Appeals Opinion, p. A 1. The Court of Appeals ignored Defendants' arguments regarding whether "clear, cogent and convincing" evidence supported the judgment and instead merely stated that "substantial evidence" supported it. To the extent that the Court of Appeals used the *Murphy* standard of review and looked to whether there was any evidence in the record to affirm the trial court, it improperly applied that standard. If the standard of review does not include some evaluation of whether the evidence supporting the judgment is "clear, cogent and convincing," and not merely just some quantum of evidence in the record that the trial court labeled "clear and convincing," the standard of review should be clarified or revised.

I.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE FIRST AMENDMENT TO THE TRUST ON JULY 27, 2007 WAS THE RESULT OF UNDUE INFLUENCE BY RESPONDENT ARNOLD SMITH BECAUSE THERE WAS NO EVIDENCE THAT SMITH PLAYED ANY ROLE IN THE AMENDMENT IN THAT THE SETTLOR OF THE TRUST WAS REPRESENTED BY ABLE COUNSEL,

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

REGINALD YOUNG, WHO KNEW THE SETTLOR WELL AND TESTIFIED AT LENGTH ABOUT THE AMENDMENT IN THAT THE COURT'S FINDINGS OF FACT RELATING TO COUNSEL'S TESTIMONY ARE MERELY RESTATEMENTS OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND ARE AGAINST THE WEIGHT OF THE EVIDENCE, ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE), AND TOTALLY MISCONSTRUE YOUNG'S TESTIMONY AND FURTHER UNDER MISSOURI LAW COURTS HAVE TRADITIONALLY NOT FOUND THE EXISTENCE OF UNDUE INFLUENCE RELATING TO CHANGES TO ESTATE PLANNING DOCUMENTS WHICH FAVOR A SPOUSE.

Plaintiffs had the burden to prove by clear, cogent and convincing evidence that the first Trust Amendment signed by Patricia Watson on July 27, 2007 was the result of undue influence by Arnold Smith. *See Sebree v. Rosen*, 349 S.W.2d 865, 872 (Mo. 1961). This Court must review the record to determine whether it contains "clear and convincing" evidence to support the judgment instead of merely substantial evidence. *See* Standard of Review discussion, *supra*. Given this high standard of proof, the Court's ruling invalidating the First Trust Amendment dated July 27, 2007 violates all sections of the *Murphy v. Carron* test: (1) there is no "clear, cogent and convincing" evidence to support it; (2) it is against the weight of the evidence, and (3) it improperly applies the law.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

This Court must keep in mind the high standard of proof for Petitioner's claim, "clear, cogent and convincing" as noted by this Court in *Pike v. Pike*, 605 S.W.2d 397, 401 (Mo. banc 1980) (undue influence in procuring a deed) and acknowledged by all three Courts of Appeals. *See In Re Harp*, 278 S.W.3d 681, 687 (Mo.App. S.D. 2008); *Estate of Stanley*, 655 S.W.2d 88, 91 (Mo.App. W.D. 1983); *Estate of Oden v. Oden*, 905 S.W.2d 914, 920 (Mo.App. E.D. 1995). "That phrase means that the court should be clearly convinced of the affirmative of the proposition to be proved." *Robertson v. Robertson*, 15 S.W.3d 407, 415 (Mo.App. S.D. 2000). The evidence must "instantly tilt the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *Id.*

The undue influence, in order to be sufficient to set aside a trust amendment, must be operative at the time of that amendment. *Creek v. Union National Bank*, 266 S.W.2d 737, 747 (Mo. 1940); *In Re Harp*, 278 S.W.3d at 687; and *Robertson*, 15 S.W.3d at 413.

Initially, the Trial Court's finding of undue influence by a spouse, who had been married to the Settlor of the Trust for over five years at the time of the First Amendment in July of 2007, is virtually unprecedented and is a misapplication of the law for *Murphy v. Carron* analysis. In *Morse v. Volz*, 808 S.W.2d 424, 432 (Mo.App. W.D. 1991), the Missouri Court of Appeals noted that it is natural for a spouse to leave his or her property to the other spouse. There is nothing unnatural about such a dispositive plan. *Id.* As noted by the Court,

> The wife of a testator, even the second wife, however, is a natural object of his bounty, and the testator has the right to dispose of his property to her by

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

> will – even to the exclusion of the nearest relative. It was the testimony of attorney Stover that the testator told him he had a son, John, who was married and had a daughter, Nancy. The testator left everything to his new wife, Inga, because, as the will expressed, John had no need of the estate.

Id. This quote from *Morse* is similar to the testimony of Attorney Young in the instant case. He testified that Patricia told him that she wanted to make sure that Arnold, who had and would be taking care of her as she grew older, was taken care of and that he had a place to live. (Tr. 279-83).

The Missouri Court of Appeals for the Western District also noted, similarly, in *Needles v. Roberts*, 879 S.W.2d 550, 555 (Mo.App. W.D. 1994) the difficulty of finding undue influence when property is left to a spouse. *Id.* at 544. Further, as noted in *Creek*, *supra*, "The law does not ban as undue the natural influence of affection or attachment or the desire to gratify the wishes of one beloved and trusted." *Creek v. Union National Bank*, 266 S.W.2d 737, 747, *citing Horn v. Owen*, 171 S.W.2d 585, 592 (Mo. 1943).

The Trial Court (echoing Plaintiffs' proposed judgment) turned this principle on its head, citing *Hammonds v. Hammonds*, 297 S.W.2d 391 (Mo. 1957), for the proposition that: "A spouse may be guilty of undue influence as to invalidate his wife's will." (A 48). However, in *Hammonds*, this Court found no undue influence by a spouse over her husband on facts somewhat similar to those here. *Id.* at 395-96. Further, the Court noted, "she [the spouse] may, however, urge and solicit her husband, perhaps importune him, to make a will in her favor and the fact that she procured the scrivener and was present when the will was executed do not support an inference of undue

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

influence." *Id.* at 394. This Court should note that Arnold is not even alleged to "procured" the scrivener or to have "urged" the Amendment. This Court in *Hammonds* specifically rejected evidence similar to that offered by Plaintiffs here, primarily alleged ill health. *Id.* Even if the facts were as Plaintiffs urged at trial, which is not the case, Missouri law does not support claims of undue influence against a spouse on those facts. For this reason alone, the Trial Court's finding of undue influence is a misapplication of Missouri law and requires reversal. *See also Hahn v. Tanksley*, 317 S.W.3d 145, 154 (Mo.App. S.D. 2010).

The Trial Court's findings regarding the First Amendment are also not supported by substantial evidence. "A 'not supported by the evidence challenge' is an assertion that the record lacks evidence 'which, if true, has probative force upon the issues and from which the trier of fact can reasonably decide the case." *River City Development Associates, LLC v. Accurate Disbursing Company, LLC*, 345 S.W.3d 867, 872 (Mo.App. E.D. 2011)(*quoting Williams v. Daus*, 114 S.W.3d 351, 359 (Mo.App. S.D. 2003)). A review of Plaintiffs' best evidence, giving it the benefit of all inferences, does not establish undue influence by clear, cogent and convincing evidence.

The entirety of Plaintiffs' evidence that Patricia was subject to undue influence can be summarized succinctly: (1) Dr. Sky testified that she lacked testamentary capacity and was subject to undue influence after July 1, 2007; (2) selected medical records showed that Patricia suffered from mild dementia and had moments of delirium or confusion prior to, though not within nearly one (1) month of the signing of the firs Amendment to the Trust; (3) Plaintiffs' testimony that on occasion Patricia was forgetful

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

or did not recognize people; and (4) Plaintiffs' testimony that Arnold Smith was controlling or coercive towards Patricia. This constitutes the entirety of the evidence in the record from which the Trial Court determined that Patricia was subjected to undue influence by Arnold Smith sufficient to set aside the trust amendment. All of this evidence was directly controverted by other testimony. Additionally, and most significantly, Plaintiffs' failed to offer any evidence as to Patricia's state of mind at the time that the trust amendment was signed. The evidence is uncontested that, other than perhaps giving Patricia a ride to Reginald Young's office, Arnold had no involvement in the multiple discussions between Patricia and Reginald Young relating to the Amendment and the nearly two hour meeting where the Amendment was reviewed and then ultimately signed.

Plaintiffs were required to prove, by "clear, cogent and convincing evidence," that Patricia was subject to undue influence at the time that the trust amendment was signed and that it was only due to this undue influence that the amendment was made. The Trial Court found, apparently, that Dr. Sky's testimony following the review of medical records, selected medical records prior to July 27, 2007, and the Plaintiffs' testimony about interactions with Patricia not close in time to the signing of the amendments "instantly tilt[ed] the scales in the affirmative when weighed against the evidence in opposition and the fact finder's mind is left with an abiding conviction that the evidence is true." *Robertson*, 15 S.W.3d at 415. The most the Plaintiffs proved is that, at the beginning of the marriage in 2002, Patricia did not want to leave her property to her new husband, Arnold, and she was allegedly "susceptible" to undue influence thereafter.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Plaintiffs offered no evidence about the manner in which the First Trust Amendment was conceived, prepared or executed. This evidence, alone, cannot constitute "clear, cogent and convincing evidence" sufficient to set aside the trust amendments.

Even if this Court somehow finds that this limited evidence constituted some amount of "clear, cogent and convincing evidence," the great weight of the evidence mandated the opposite conclusion.

> An 'against the weight of the evidence challenge presupposes the threshold issue of the existence of substantial evidence supporting a proposition necessary to sustain a judgment, but, nevertheless challenges the probative value of that evidence to induce belief in that proposition when viewed in the context of the entirety of the evidence before the trier of fact.'

River City Development Associates, LLC, 345 S.W.3d at 873. Defendants presented detailed evidence from Patricia's long-time attorney, Reginald Young, an experienced estate planning attorney who had prepared literally hundreds of estate plans, regarding the context of the First Amendment, the many meetings leading up to the execution of the new documents, the reasons for the Amendment, Patricia's state of mind during the meetings leading up to their execution and her state of mind when she signed the First Amendment. (Tr. 772-86).

Defendants suggest the Court examine the evidence regarding the Trust Amendment in the following way: (1) read Reginald Young's sworn testimony at trial (Tr. 268-333); (2) read the Proposed Findings of Fact submitted by Plaintiffs relating to the First Amendment (L.F. 205-241); and (3) read the Trial Court's Findings of Fact in

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

the Amended Judgment. (A 22-53). This process will demonstrate the absurdity of the Trial Court's findings on the crucial First Amendment. This Court will find both that Plaintiffs' Proposed Findings of Fact totally distort the testimony of Young and that the Trial Court unfortunately adopted those distortions virtually verbatim, an approach to judgment writing which Missouri courts have criticized. *See Neal v. Neal*, 281 S.W.3d 330, 337 (Mo.App. E.D. 2009) [the verbatim adoption of a proposed judgment order has been routinely criticized by Missouri courts *citing Nolte v. Wittmaier*, 977 S.W.2d 52, 57 (Mo.App. E.D. 1998)].

Any fair reading of Attorney Young's testimony establishes the following points which were totally uncontested at trial:

(1) Young knew Patricia and had represented her for at least seven years. (Tr. 272-73).

(2) Patricia was intelligent, well-educated and strong-willed. (Tr. 273).

(3) Patricia was very focused on financial matters. (Tr. 274).

(4) Patricia "wore the pants" in her relationship with Arnold. (Tr. 274).

(5) Patricia in 2002 did not want Arnold to inherit her property. (Tr. 274).

(6) There was a lengthy meeting attended by Patricia, Attorney Young, Smith, Ladonna Small and one of the Ivies on July 10, 2007. (Tr. 279). Various options were discussed at that meeting. No one objected to Patricia signing any documents at that time.

(7) Young thereafter in July had several phone calls and at least two lengthy in-person meetings with Patricia. They discussed the options available to divide the property between Smith and the Plaintiffs at the time of Patricia's death. (Tr. 278; Exhibit O, p. 616).

(8) Patricia had rational reasons for wanting to amend her estate planning documents after having been married to Arnold for five years. She had health problems and she wanted Arnold taken care of (Tr. 281),

(9) There were lengthy discussions between Young and Patricia about various dispositions of her property over two meetings in July of 2007. (Tr. 282).

(10) Arnold was not involved in the discussion of the options leading up to the preparation of the Trust Amendment. (Tr. 283).

(11) When the Trust Amendment was reviewed and signed on July 27, 2007, Arnold was never in the room. (Tr. 282).

(12) Patricia understood that, as a result of the Trust Amendment, she was leaving the bulk of her estate to Arnold Smith. (Tr. 283).

(13) Reginald Young believed that this was Patricia's decision and that she fully understood the consequences of her decision at that time. (Tr. 284).

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

(14) Patricia wanted the *in terrorem* clause included in the First Amendment. (Tr. 285).

Plaintiffs were required to show, by clear and convincing evidence, that Patricia was under undue influence at the time she signed the First Amendment on July 27, 2007. *Robertson*, 15 S.W.3d at 413. Only Young testified with direct knowledge of Patricia's condition at the only relevant time. The Trial Court cannot reach a decision without evidence to support its conclusion. For the Trial Court's conclusion to stand, there must be evidence in the record (and not merely some evidence, but "clear and convincing" evidence) that, at the time Patricia signed the First Amendment, in the presence of Young, she was acting under undue influence. No such evidence exists. The only evidence adduced, the testimony of Reginald Young, requires the opposite conclusion.

Having no answer to the devastating testimony by Patricia's long-time and experienced attorney Reginald Young, a highly respected member of the Southeast Missouri Bar, Plaintiffs initially (L.F. 220) and then the Court ultimately had to simply ignore most of his testimony and then, on the key issue, Patricia's state of mind and intentions on the day she signed the documents, July 27, 2007, simply found - - without any supporting evidence - - that Young must have been mistaken in his recollection and the documents must have been signed outside of his presence. (A 35-36). There was no evidence in the record that the documents were signed outside of Reginald Young's presence. Young testified that he reviewed the proposed changes with Patricia at the time she signed the First Amendment and she confirmed that it accomplished what she wanted. (Tr. 284). The document itself indicates it was signed before a notary. The Trial

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Court simply ignored the uncontradicted, direct evidence of Young. And in doing so, it somehow found that evidence unrelated to the signing of the document on July 27, 2007 "instantly tilt[ed] the scales" and left the Trial Court with "an abiding conviction that the evidence is true."

The Court's Findings of Fact Nos. 107-110 (A 35-36) are simply wrong. They adopt virtually verbatim the misstatements of Plaintiffs' proposed Findings of Fact. Plaintiffs totally misconstrued Young's testimony as the only way to reach their desired outcome in this case. Unfortunately, the Trial Court simply adopted Plaintiffs' incorrect Proposed Findings.

The Court should also compare Plaintiffs' proposed Finding No. 143 (L.F. 223-24) with the Court's purported explanation in Finding No. 134 (A 39) for why it chose not to give credence to Young's testimony. They are very similar. Further, they are pure spin. Finding 134(a) that Young must not have been present at the execution of the First Amendment is directly contradicted by the signed documents themselves and by Young's testimony. There is no evidence to support this convenient Finding. Finding 134(b) that Young's memory of the details of the execution of the First Amendment was not strong is false. Young had both good records and a clear memory of what happened. Findings 134(a-i), which basically state collectively that Young simply did not have knowledge of Patricia's underlying mental and physical problems, were totally unsupported by any evidence. Young knew Patricia for many years including earlier years when even the Plaintiffs' concede Patricia was competent. He knew her well. He had conducted a lot of business with her. With his wealth of information and his background with her, no one

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

was better able to judge Patricia's competency than Young, an experienced estate planning attorney.

The Trial Court never found any actual examples of undue influence by Arnold. It found at most the possibility that Patricia might have been susceptible to undue influence. From that, the Court extrapolated, without the existence of any evidence, to a finding of actual undue influence. Exemplary of this flawed reasoning is the statement by the Court, again reiterating essentially Plaintiffs' proposal: "since the [sic] Patricia was incapacitated and disabled to the extent that the court would have appointed a guardian and conservator for her at such time, it is also clear that she was unduly influenced by Arnie." (A 48).

This is truly an incredible statement. The jump from possible susceptibility to actual undue influence is a total *non sequitur*. The Court cited no specific instances or in fact any specific evidence of the alleged undue influence by Arnold. This leap in logic not only does not have the requisite amount of evidentiary support, but specifically violates the principles in the Missouri cases which have almost uniformly not found undue influence in cases involving gifts to spouses. *Morse*, *supra*; *Needles*, *supra*.

In addition, there was abundant additional evidence that Patricia knew exactly what she was doing and that the July 27 Amendment accurately reflected her intentions. This evidence came from the Plaintiffs themselves. Patricia told several of the Plaintiffs, specifically Plaintiffs Bernard, Richard Ivie and Ladonna Small, that she was going to and in fact had changed her estate plan. (Tr. 150, 182-83, 199-202). These admissions are devastating to Plaintiffs' position in this case. They demonstrate both that the

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

changes reflected Patricia's testamentary intent and that she understood exactly what she was doing when she signed the documents prepared by Young. She also told her friend, Deloris Grindstaff, that she had changed her plan to leave almost all of her property to Arnold Smith. (Tr. 259-60). There was no evidence, including any testimony from any of the Plaintiffs, that Patricia ever made any statements or even suggested that she would be leaving most of her property to them after July of 2007. (Tr. 148-49, 162-63, 197).

Simply put, there was no direct evidence adduced by the Plaintiffs (let alone clear and convincing evidence) of the circumstances at the time she signed the documents. The only direct evidence was provided by Reginald Young, whose testimony clearly established that Patricia was not under undue influence at the time she signed the First Amendment. The Trial Court based its conclusion on no evidence, and then compounded this error by utterly ignoring the only direct evidence in the record. Further, Missouri law frowns on undue influence claims relating to gifts to spouses. Accordingly, the Trial Court's judgment invalidating the First Amendment must be reversed.

II.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE OF A LACK OF TESTAMENTARY CAPACITY SUFFICIENT TO VOID THE FIRST TRUST AMENDMENT DATED JULY 27, 2007 BECAUSE THE FINDINGS OF FACT ON THIS POINT WERE AGAINST THE WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) IN THAT ALL OF THE EVIDENCE RELATING TO THE

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

EXECUTION OF THE FIRST TRUST AMENDMENT ON JULY 27, 2007 AND THE INTERACTIONS BETWEEN THE SETTLOR AND HER COUNSEL LEADING UP TO THE EXECUTION OF THE AMENDMENT ESTABLISHED THAT AT THOSE TIMES THE SETTLOR KNEW WHO SHE WAS, KNEW THE NATURE AND EXTENT OF HER PROPERTY AND KNEW THE NATURAL OBJECTS OF HER BOUNTY. THE ONLY EVIDENCE OF A LACK OF CAPACITY DURING THIS TIME WERE REFERENCES TO MEDICAL RECORDS FOR TREATMENT RECEIVED BY THE SETTLOR AT OTHER TIMES AND EVEN THOSE RECORDS DEMONSTRATE THAT THE SETTLOR'S CONFUSION WAS AT BEST INTERMITTENT AND PLAINTIFFS' EXPERT MEDICAL TESTIMONY WAS BASED ONLY ON A SELECTIVE READING OF THOSE RECORDS AND MISSOURI COURTS HAVE TRADITIONALLY REJECTED MEDICAL EVIDENCE OF THIS TYPE.

The Court also erred in finding that Patricia did not have testamentary capacity when she signed the first Trust Amendment on July 27, 2007. Review on this point is also governed by *Murphy v. Carron* as noted in the discussion of the standard of review, *supra*. Of note, any lack of capacity sufficient to set aside the Amendment must have existed at the time the documents were executed. *Creek*, 266 S.W.2d at 747. Defendants contend that there was not clear, cogent and convincing evidence to support the Trial Court's judgment and that the judgment was against the weight of the evidence.

The argument presented in this point, and in every remaining point, is very similar to that presented in the First Point. There was no "clear, cogent and convincing"

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

evidence in the record to support the Trial Court's findings on the days that the specific documents were signed. Further, the actual evidence in the record, the testimony of Reginald Young, contradicts the Trial Court's findings. Accordingly, the Trial Court's judgment on all of the disputed facts is neither supported by "clear and convincing" evidence nor by the weight of the evidence in the record.

Plaintiffs' evidence as to Patricia's incapacity is essentially identical to the evidence that the trust amendments were secured by undue influence. It consisted of non-treating expert testimony by Dr. Sky, select medical records, and observations by the Plaintiffs themselves which were not close in time to the actual signing of the amendments.[1] This evidence, alone, was apparently clear and convincing, even though the record is devoid of any evidence that Patricia lacked testamentary capacity at the time that the trust amendment was actually signed. In fact, the best evidence Plaintiffs put forth that Patricia ever lacked testamentary capacity was when she was hospitalized a month earlier, and not when she was at home or at Reginald Young's office, where she signed the amendment.

As discussed thoroughly above, this evidence, alone, does not constitute clear and convincing evidence that Patricia lacked testamentary capacity at the time that the amendment was signed. Plaintiffs needed some evidence of Patricia's state of mind at the signing of the trust amendment in order to meet the burden of clear and convincing evidence. There is no such evidence in the record. Conversely, the evidence in the

[1] Defendants will not recite the evidence again, as it is set forth thoroughly in Point I.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

record of Patricia's state of mind (disregarding for the moment all of Reginald Young's testimony) leads to the opposite conclusion.

The evidence closest to the signing of the First Amendment shows that Patricia was discharged from Missouri Delta Medical Center on June 29, 2007, approximately four (4) weeks before the first trust amendment was signed. (Plaintiff's Exhibit 32, p. 1615). During this hospital stay there are medical records which mention that Patricia may have suffered from a diminished mental state. (Plaintiffs' Exhibit 32, pp. 1712-40). Both experts testified that this was likely due to delirium from being in the hospital. (Tr. 229-30, 347-49). On July 12, 2007, Patricia followed up with Dr. Uthoff, her regular physician, who noted no new neurologic defects. (Plaintiffs' Exhibit 32, pp. 236-37). Accordingly, the medical evidence of her mental state closest to the signing of the First Amendment reveals that she may have suffered some delirium while hospitalized approximately one (1) month prior to the signing of the first amendment, but by July 12, 2007, she was back to normal.

The medical evidence conforms to the observations of Plaintiff Ladonna Small. Ladonna accompanied Patricia to see Reginald Young on July 10, 2007. (Tr. 276). Ladonna testified that Patricia was not out of her mind, knew who her family was, and what she owned on that date, seventeen days before she signed the first amendment. (Tr. 181). She also testified that at about the time that the first amendment was signed, Patricia told her that she was considering amending her trust. (Tr. 182-83).

If the evidence as to Patricia's state of mind from July 10, 2007, until July 27, 2007, was different, i.e. showed Patricia to be in a diminished state, perhaps Plaintiffs

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

could have met their burden of showing clear and convincing evidence of Patricia's incapacity. However, Plaintiffs' own testimony and the medical records for the month of July 2007 do not reveal that Patricia did not understand the ordinary affairs of life, the nature and extent of her property, know the persons who were the natural objects of the bounty, nor intelligently weigh and appreciate her natural obligations to those persons and know that she is giving her property to persons mentioned in the document. Further, and importantly, there is absolutely nothing unnatural or unusual about leaving the majority of one's estate to her husband.

Plaintiffs' are left, then, with only Dr. Sky's blanket testimony that Patricia became incompetent on July 1, 2007, prior to the signing of the first amendment. Apparently, then, regardless of what happened thereafter, Patricia could not ever be competent to sign another estate planning document, or any other legally enforceable document, again. The Trial Court, following Dr. Sky's lead, discounted completely the reality that a person can have both good days and bad days. According to this opinion, once one loses testamentary capacity (even without a judicial determination of incompetency) the ability to regain that capacity is also gone.

The only evidence of Patricia's state of mind on the day she signed the Trust Amendment was the testimony of Reginald Young. He testified as to her competency not only during that day but also during the numerous phone calls and meeting leading up to the signing of the new documents. (Tr. 281-82). Young had represented Patricia for in excess of seven years by that time. (Tr. 271-72). He knew her well. He believes she

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

understood her family structure, the nature and extent of her property, her various estate planning options, and the effects of the Amendments. (Tr. 277-81, 284, 293).

Plaintiffs presented no evidence relating to Patricia's competency or lack thereof on July 27 or during the phone conversations and meetings leading up to that date. Instead, they presented evidence only of Patricia's intentions five years earlier (at that time she did not want Arnold to inherit any of her property) (Tr. 275) and references to various entries in Patricia's medical records which showed confusion and developing dementia and the testimony of their expert Dr. Sky based entirely on a review of those records. (Tr. 344-46).

The Southern District Court in *Hahn v. Tanksley*, 317 S.W.3d 145, 155 (Mo.App. S.D. 2010), specifically discounted exactly the type of evidence the Plaintiffs purported to rely on to establish a lack of testamentary capacity. There, a person making gifts which family members later challenged had a history of health problems and there were references in her medical records to times when she was agitated and confused. *Id.* at 150. In rejecting the probative value of this type of indirect evidence, the Court noted that "instances of illness, imperfect memory, forgetfulness and physical and intellectual weakness associated with old age and mental confusion are generally not sufficient evidence to invalidate a deed." *Id.* at 154, quoting *Thurmon v. Ludy*, 914 S.W.2d 32, 34 (Mo.App. 1995).

Instead, the court in *Hahn* found probative exactly the type of evidence relating to the discussions between the drafting lawyer and the client that Defendants presented

here.[2] The court in *Morse v. Volz, supra*, also rejected the type of testimony offered by Plaintiffs' expert Dr. Sky here. There, the court rejected the testimony of a psychologist who had never treated or observed the testator but purported to contradict the testimony of witnesses, such as Attorney Young here, who had known the client for a long time and believed her to have testamentary capacity. 808 S.W.2d at 430-31.

The Trial Court completely ignored the only evidence in the record as to Patricia's condition on the only day that mattered: July 27, 2007. In doing so, it chose to rely on select medical records from other periods of time, on medical testimony from a physician who never personally treated Patricia, as well as the testimony of her half-siblings who, at best, testified that Patricia had moments of "confusion, forgetfulness, and intellectual

[2] "On March 16, 2005, Horman met with Jerry in the physical therapy room in the nursing home. Jerry said he wanted the Chaffee house and the farm deeded to daughters. Jerry and Horman discussed the deeds that he had prepared, and Jerry said that he wanted to sign the deeds. Prior to Jerry executing the deeds, Horman asked Jerry a series of questions to see if he was competent to proceed and understand what was transpiring. Horman asked Jerry about his marital status, the date, the day of the week, address, etc. Horman prepared a memorandum concerning his meeting with Jerry and the questions he was asked to answer. After Jerry answered a series of questions correctly, Horman formed an opinion that Jerry was competent to sign the deeds. Horman based his belief on Jerry's demeanor, the fact he knew Horman, and the fact that Jerry was oriented to person, place and time." *Hahn*, 317 S.W.3d at 150-51.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

weakness associated with old age." None of this evidence, the only evidence upon which the Trial Court could have based its judgment, is relevant or probative as to Patricia's testamentary capacity at the time she signed the First Amendment on July 27, 2007, let alone "clear and convincing." The only evidence in the record which is probative of her condition at that specific time and at that specific date is the testimony of Reginald Young. Somehow, the Trial Court was able to determine that indirect, after the fact examination of medical records from other time periods and testimony "instantly tilted the scales" and left it with an abiding belief that Reginald Young was wrong. The Trial Court's judgment is simply not supported by clear and convincing evidence or any substantial evidence and is against the weight of the evidence.

III.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE THAT THE SECOND AMENDMENT TO THE TRUST ON JULY 2, 2008 WAS THE RESULT OF UNDUE INFLUENCE BY RESPONDENT SMITH BECAUSE THERE WAS NO EVIDENCE THAT SMITH PLAYED ANY ROLE IN THE REQUEST FOR OR PREPARATION OF THE AMENDMENT IN THAT THE SETTLOR OF THE TRUST WAS REPRESENTED BY ABLE COUNSEL REGINALD YOUNG WHO TESTIFIED AT LENGTH ABOUT THE LENGTHY INTERACTIONS WITH THE SETTLOR LEADING UP TO THE EXECUTION OF THE SECOND AMENDMENT AND THE COURT'S FINDING OF FACTS RELATING TO COUNSEL'S TESTIMONY ABOUT THE PREPARATION AND EXECUTION OF THE

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

SECOND AMENDMENTS ARE MERELY RESTATEMENTS OF PLAINTIFFS' PROPOSED FINDINGS OF FACT AND ARE AGAINST THE WEIGHT OF THE EVIDENCE, ARE UNSUPPORTED BY ANY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) AND TOTALLY MISCONSTRUE YOUNG'S TESTIMONY AND, UNDER MISSOURI LAW, COURTS HAVE TRADITIONALLY NOT FOUND THE EXISTENCE OF UNDUE INFLUENCE RELATIVE TO CHANGES TO ESTATE PLANNING WHICH FAVOR A SPOUSE.

The Trial Court also found that the Second Trust Amendment signed on July 2, 2008 was a product of undue influence. The standard of review is the same as the points above. This Court should reverse the Trial Court's finding relating to the Second Amendment as not being supported by substantial clear, cogent and convincing evidence, as against the weight of the evidence, and as a misapplication of applicable law. *Murphy v. Carron, supra; Cochran, supra.*

Plaintiffs' evidence on this issue, just like the others, was limited only to the general testimony of Dr. Sky, medical records not sufficiently close in time to the signing of the amendment, and the testimony of Plaintiffs' themselves regarding Patricia's forgetfulness and Arnold's alleged coercion. None of this evidence, if just considered by itself, constitutes the clear, cogent, and convincing evidence necessary to set aside the second trust amendment.

The careful process for the analysis of, discussions about, and execution of the Second Amendment was even better documented by Young than for the First

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Amendment. Other than one document delivered to Young's office that may have been in Smith's handwriting, there was no evidence that Smith played any role in the various meetings and phone calls that began shortly after the first of the year in 2008 and culminated in the signing of the Second Trust Amendment at Patricia's home on July 2, 2008. (Tr. 287-91). Of note, not all of the changes to the Trust affected by the Second Amendment benefitted Arnold. Patricia also wanted to make sure that Bernard Ivie's adopted daughter would receive a share from the Trust if Bernard predeceased Patricia. (Tr. 288; Defendants' Exhibit O, p. 596).

Young's clear testimony regarding the preparation and execution of the Second Trust Amendment was supported by documentary evidence in his file and by a contemporaneous memorandum he prepared regarding the day Patricia signed those documents. (Tr. 289-91). Young's testimony established that he went to Patricia's home to meet with her to review the Second Amendment. (Tr. 289-90). She met him at the door. (Tr. 290). He discussed the Second Amendment with her outside the presence of Arnold. (Tr. 290-91). She was alert, knew who he was, knew who she was, knew what she wanted to do, and knew what the effects of the amendments would be. (Tr. 290-93). Young documented all of these observations first in a handwritten memorandum which he later had typed. (Tr. 291).

The Plaintiffs' attempts to deal with the devastating testimony of Reginald Young in their proposed Findings of Fact were just as specious as their gross distortions of his testimony relating to the First Amendment. The Court's Finding No. 123 (A 37) is virtually identical to Plaintiffs' proposed Finding No. 132 (L.F. 222). Neither accurately

reflect the evidence adduced. The actual evidence as set forth in Young's memorandum and his oral testimony, which is uncontradicted by any other testimony, is what really happened. Plaintiffs' proposal, which the Court essentially adopted, is not a recitation of evidence or even a true finding of fact.

The uncontested actual evidence was as follows: Young received a phone call from Patricia requesting additional changes to her Trust on February 13, 2008. (Tr. 286-87). Young prepared the proposed Second Trust Amendment in March and mailed it to Patricia. (Tr. 287). He made revisions she requested, including some that benefitted Bernard Ivie's stepdaughter. (Tr. 288). In June 2008, Patricia purported to execute the Second Amendment but she had written on the document that she wanted to include Bernard Ivie's stepdaughter as a beneficiary. (Tr. 288). On July 2, 2008, after the Second Amendment had again been revised, Young drove to Sikeston to see Patricia at her house on Laurelwood in Sikeston. (Tr. 290). Patricia answered the door. *Id.* She was on a walker. She was weak, "of course she knew me," she was smiling. *Id.* They went into the living room, sat on the couch and discussed the Second Amendment. *Id.* Patricia told Young about her kidney cancer diagnosis and talked about her physician Dr. Killion. *Id.* Patricia knew why Young was there and what they were going to do. *Id.* She knew who she was. *Id.* Young explained to Patricia how the Second Amendment changed the documents. "I felt like she understood." "She did not seem to be under any pressure." (Tr. 291). Arnold was asked to leave the room and Young went over the documents with Patricia again. (Tr. 291). "I asked her, 'Is Arnie forcing you to do this?' and her answer would be 'no.'" *Id.*

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Once again, there is simply no evidence in the record from which the Trial Court could have based its conclusion that Patricia was under undue influence at the time of the Second Amendment to the Trust. There is simply no evidence in the record which shows that Arnold Smith exerted any undue influence over Patricia on July 2, 2008, when the Second Amendment to the Trust was signed. Plaintiffs adduced no evidence of Patricia's susceptibility to undue influence on July 2, 2008. The only evidence they offered was the testimony of Dr. Sky after a review of selected medical records. Further, undue influence is nearly impossible to show when the gifts are between a husband and wife. *See Morse*, 808 S.W.2d at 432; *Needles*, 879 S.W.2d at 555; *Horn*, 171 S.W.2d at 592. The weight of the evidence (in fact, all of the evidence) favors a different result. The Trial Court simply disregarded all of the testimony of the experienced trust and estates lawyer who was actually physically present with Patricia at the time the Second Amendment to the Trust was signed. Clearly, the Trial Court erred in entering judgment for Plaintiffs invalidating the Second Amendment.

IV.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR AND CONVINCING EVIDENCE OF A LACK OF TESTAMENTARY CAPACITY SUFFICIENT TO VOID THE SECOND TRUST AMENDMENT DATED JULY 2, 2008 BECAUSE THE FINDINGS OF FACT OF THE COURT ON THIS POINT WERE AGAINST THE WEIGHT OF THE EVIDENCE AND WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) IN THAT ON THE DAY OF EXECUTION OF THE

SECOND TRUST AMENDMENT ON JULY 2, 2008, THE INTERACTIONS BETWEEN THE SETTLOR AND HER ABLE COUNSEL REGINALD YOUNG ESTABLISHED THAT AT THOSE TIMES AND AT ALL TIMES LEADING UP TO THE EXECUTION OF THE AMENDMENT THE SETTLOR HAD TESTAMENTARY CAPACITY AND KNEW WHO SHE WAS, KNEW THE NATURE AND EXTENT OF HER PROPERTY AND KNEW THE NATURAL OBJECTS OF HER BOUNTY. THE ONLY EVIDENCE OF A LACK OF CAPACITY DURING THE DAY OF EXECUTION OF THE SECOND TRUST AMENDMENT ON JULY 2, 2008 WERE REFERENCES TO MEDICAL RECORDS FOR TREATMENT RECEIVED BY THE SETTLOR AT OTHER TIMES AND PLAINTIFFS' EXPERT MEDICAL TESTIMONY WAS BASED ONLY ON A SELECTIVE READING OF THOSE RECORDS AND MISSOURI COURTS HAVE TRADITIONALLY REJECTED MEDICAL EVIDENCE OF THIS TYPE.

The argument supporting this Point, once again, is similar to Respondents' Point II as it relates to Patricia's competency at the time she signed the Second Amendment to the Trust as opposed to undue influence. Once again, the Trial Court's judgment on the issue of Patricia's capacity at the time of the execution of the Second Amendment is simply not supported by any evidence, much less clear, cogent and convincing evidence, the weight of all the evidence shows that she was competent to execute the documents, and the Court misapplied the law as it relates to competency. *Murphy v. Carron, supra; Cochran, supra; Creek, supra; Hahn, supra; Morse, supra.*

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

In order to reach the conclusion that Patricia was not competent to sign the Second Amendment to her Trust on July 2, 2008, the Trial Court had to rely on the after the fact testimony of Dr. Sky based on the examination of medical records. Dr. Sky was not present on July 2, 2008, to observe Patricia and determine whether she was competent to sign the Second Amendment. Further, Plaintiffs did not offer any evidence that, on July 2, 2008, Patricia was unable to understand the nature, value and extent of her property or the objects of her bounty. The only evidence offered by Plaintiffs is that Dr. Sky opined that as of July 1, 2007, Patricia was completely incapable of testamentary capacity thereafter. (Tr. 219). The problem with this evidence is that it says nothing specific about July 2, 2008, when the Second Amendment was signed. Even Dr. Sky admitted that the medical records after July 27, 2007, did not always show Patricia to have mental difficulties. (Tr. 238-242). There is simply no "clear and convincing" evidence in the record to support the Trial Court's conclusion that Patricia lacked testamentary capacity on July 2, 2008.

The great weight of the evidence, in fact, shows that Patricia did have testamentary capacity on July 2, 2008. As stated above, Reginald Young was the only person present when she signed the Second Amendment. On July 2, 2008, Young drove to Sikeston to see Patricia at her house on Laurelwood in Sikeston. (Tr. 290). Patricia answered the door. *Id.* She was on a walker. She was weak, "of course she knew me," she was smiling. *Id.* They went into the living room, sat on the couch and discussed the Second Amendment. *Id.* Patricia told Young about her kidney cancer diagnosis and talked about her physician Dr. Killion. *Id.* Patricia knew why Young was there and what

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they were going to do. *Id.* She knew who she was. *Id.* Young explained to Patricia how the Second Amendment changed the documents. "I felt like she understood." "She did not seem to be under any pressure." (Tr. 291).

In Young's professional opinion, Patricia understood what she was doing and the effects of the document she signed. (Tr. 291-93). He found her to be oriented to time and place, to understand what she was signing and to be competent to sign the Second Amendment. (Tr. 291-93). On July 2, 2008, Patricia knew who she was, who Young was and who her family members were. (Tr. 290). She even made a comment about one of her doctors, Dr. Killion. (Tr. 290). Young would not have let Patricia sign the Second Amendment if she had not understood what she was doing. (Tr. 292-93). Regardless of Patricia's illnesses between March and July, 2008, Young believed Patricia was competent based on his customary competency interview. (Tr. 290-93).

Additionally, Reginald Young prepared a contemporaneous handwritten memorandum of his observations of Patricia. Young suspected that the Plaintiffs would challenge any changes in Patricia's estate plan, and because of this suspicion, was highly cautious. (Tr. 291).

Finally, the Court's findings are contradicted in the sworn admissions of three of the four Plaintiffs that Patricia told them that she was changing her estate planning documents to leave more property to Arnold and less to them. (Tr. 150, 182-85, 199-202). These admissions by the Plaintiffs could not be more important. They establish both that the amended documents reflected her intent and that she fully understood what she was doing when she signed those documents.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

The Trial Court, once again, disregarded all of the direct evidence of Patricia's condition on July 2, 2008, in favor of the indirect and conclusory testimony of Dr. Sky. The weight of the evidence clearly favored the Respondents. Plaintiffs did not establish lack of capacity by clear, cogent and convincing evidence. Accordingly, the Trial Court's judgment should be reversed.[3]

V.

THE COURT ERRED IN FAILING TO FIND, AS A MATTER OF LAW, THAT THE PLAINTIFFS SHOULD RECEIVE NOTHING UNDER THE TRUST AS AMENDED BECAUSE THE PLAINTIFFS CONTESTED THE VALIDITY OF THE FIRST AND SECOND TRUST AMENDMENTS IN THAT THE TRUST AS

[3] Patricia's health had worsened between the signing of the first amendment and the second amendment. However, the Trial Court, and this Court are required to evaluate each amendment separately. This Court is free to disagree with the Trial Court that Patricia lacked capacity or suffered from undue influence at the time of the first amendment, based on the paucity of evidence that Patricia was suffering from a diminished mental state in July 2007. The Court could, at the same time, determine that the evidence as to Patricia's capacity at the time the second amendment was signed is more indicative of lack of testamentary capacity, and affirm the Trial Court's ruling on the second amendment. This would not be inconsistent nor implausible, but would necessarily result in the First Amendment, and the *in terrorem* clause, controlling the distribution of Patricia's property.

AMENDED CONTAINED AN *IN TERROREM* CLAUSE WHICH DISQUALIFIED THE PLAINTIFFS FROM RECEIVING ANY OF THE PROCEEDS AND SUCH CLAUSES ARE ENFORCEABLE AS A MATTER OF LAW.

The Trial Court erred in determining that both the First and Second Amendments to the Trust were invalid due to undue influence and lack of testamentary capacity. The Trust as amended contained an "*in terrorem*" clause. Accordingly, should this Court determine that Respondents' points on appeal are valid with respect to either the First or Second Trust Amendment, by operation of law, Plaintiffs are barred from receiving any distributions of Trust property.

The First Amendment to the Trust contains the following Article XV:

> If any beneficiary who is to receive a distribution from a Trust Estate created herein shall institute any type of legal action at law or in equity to contest or attack the validity of this Agreement or any Trust Estate created herein, or of the Grantor's last Will and Testament, or of any transfer to this Trust, or to change the terms of the this Agreement, Will or transfer, then that person and his or her lineal descendants shall receive nothing hereunder and the share that would have otherwise been distributed to said beneficiary shall be distributed as though said beneficiary predeceased the Grantor without lineal descendants that survived the Grantor.

(Exhibit C, p. 10). The Second Amendment to the Trust did not amend the "*in terrorem*" clause contained in the First Amendment.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

"*In terrorem*" clauses are enforceable "where it is clear that the trustor (or testator) intended that the conduct in question should result in the forfeiture of a beneficiary's interest under the trust (or will)." *Tobias v. Korman*, 141 S.W.3d 468, 477 (Mo.App. E.D. 2004). Article XV of the First Amendment to the Trust sets forth Patricia's intention that any beneficiary who challenged the validity of the Trust was to receive no distribution. Additionally, Reginald Young had a discussion with Patricia regarding the purpose of an "*in terrorem*" clause and the need for such a clause in the First Amendment due to the conflict between her half-siblings and her husband. (Tr. 279-28). Patricia agreed that the "*in terrorem*" clause was a good idea in order to help avoid the litigation that, unfortunately, ensued regardless. (Tr. 285)

Plaintiffs initiated this lawsuit to challenge the distributions to the Appellants under the terms of the Amendments to the Trust. (L.F. 18-28). Patricia intended to deny any beneficiary who filed such a suit the right to a distribution from the Trust. Accordingly, Plaintiffs' are barred from receiving any distribution from the Trust should this Court determine that Appellants' prior points on appeal relating to the First or Second Amendments merit the reversal of the Trial Court's judgment.

VI.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR, COGENT AND CONVINCING EVIDENCE THAT SEVERAL CHANGES IN THE TITLING OF CERTAIN TRUST ACCOUNTS AND THE CHANGES IN BENEFICIARY DESIGNATIONS FOR OTHER ASSETS WAS THE RESULT OF UNDUE INFLUENCE AND LACK OF TESTAMENTARY CAPACITY ON THE

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

PART OF PATRICIA WATSON AND IN ENTERING A LARGE MONEY JUDGMENT IN FAVOR OF THE ESTATE AND AGAINST ARNOLD SMITH BECAUSE PLAINTIFFS PRESENTED NO EVIDENCE OF THE CIRCUMSTANCES OF THE RETITLING OF THE ASSETS OR CHANGES IN BENEFICIARIES IN THAT THE FINDINGS BY THE COURT ON THOSE ISSUES WERE UNSUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) AND WERE AGAINST THE WEIGHT OF THE EVIDENCE AND AS A MATTER OF LAW, LACK OF TESTAMENTARY CAPACITY IS NOT A BASIS FOR SETTING ASIDE A NON-PROBATE TRANSFER UNDER MISSOURI LAW AND THE COURT FURTHER ERRED IN HOLDING THAT FOR THE ACCOUNTS, PROPERTY IN THE HOUSE AND VEHICLES THOSE ASSETS SHOULD BECOME PROPERTY OF THE ESTATE WHEN, IF ANYTHING, THEY SHOULD BE PROPERTY OF THE TRUST IN THAT PRIOR TO THE RETITLING ACTIONS WHICH ARE CHALLENGED HERE THEY WERE TRUST PROPERTY.

The standard of review for this point is the same as those above, *Murphy v. Carron*. The facts and circumstances in this point are similar to those set forth above. Plaintiffs contended that Patricia either lacked testamentary capacity or was under the undue influence of Arnold Smith when she executed the changes in the beneficiary designations for certain of her assets. They were required to show by clear, cogent and convincing evidence that, on the dates of the various transactions, Patricia was subject to undue influence and/or did not have testamentary capacity.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

The Trial Court had no evidence upon which it could base its conclusion that actions in retiling assets and the beneficiary designation changes were the result of lack of testamentary capacity or undue influence. The Plaintiffs were obligated to show, by clear and convincing evidence, that Patricia lacked capacity or was under undue influence at the time the beneficiary designations were changed. *Cochran, supra; Creek, supra.* Plaintiffs offer no such direct evidence. They presented no evidence of the circumstances of the changes in the beneficiaries or TOD provisions for the non-probate transfers. Plaintiffs rely solely on the after-the-fact testimony of Dr. Sky and the unrelated in time testimony of Patricia's half siblings regarding her mental state. The Court found no specific incidents of undue influence with respect to any of the non-probate assets.

Defendants also note that the beneficiary changes were consistent with Patricia's expressed intent of providing limited benefits to her half-siblings while providing increased benefits to her husband Arnold. She always maintained ownership and control of the assets. The only changes related to who would receive the property upon her death.

Reginald Young discussed the beneficiary changes and actually contacted the California Teachers Retirement system to help Patricia affect a change in the beneficiary of her IRA. (Tr. 285-86).

The Court need not even consider the evidentiary issues in relation to the beneficiary changes, however. Lack of mental capacity is not grounds for setting aside beneficiary designations under Section 461.054, RSMo. The Eastern District Court of Appeals interpreted this statute in *In Re Goldschmidt,* 215 S.W.3d 215, 224 (Mo.App.

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

2006). There, the court held that the Legislature provided only four methods of voiding a POD account: fraud, duress, undue influence and murder. *Id.* By rule of statutory interpretation, the Legislature specifically excluded mental capacity or any other grounds for voiding a designation. *Id.* Beneficiary designations are creatures of statute and are governed entirely by the terms of those statutes. *Id.* at 220. The Legislature could have chosen to offer mental capacity as grounds for overturning a beneficiary designation, but for whatever reason chose not to do so. *Id.*

The Legislature chose the grounds by which it is possible to set aside beneficiary designations when it drafted Section 461.054. The statute clearly states that there are only four grounds for voiding a beneficiary designation: fraud, duress, undue influence and murder. *See* Section 461.054.1. This Court is required to give effect to the statute as written by the Legislature. There is nothing ambiguous about this language. "If the language is unambiguous, this Court 'must give effect to the legislature's chosen language.'" *Treasurer of State-Custodian of Second Injury Fund v. Witte*, 414 S.W.3d 455, 461 (Mo. banc 2013). The Court will only resort to statutory construction where the language is ambiguous. *Id.* Further, the courts are not permitted to "change or add to a statute by supplying omitted words or phrases under the pretense of statutory construction, especially where the statute is not ambiguous." *Kelly v. Marvin's Midtown Chiropractic, LLC*, 351 S.W.3d 833, 837 (Mo.App. W.D. 2011). In order for the Trial Court to set aside the beneficiary designations on the grounds of lack of capacity, it was forced to add another ground for setting aside beneficiary designations to the plain

language of Section 461.054.1. On this basis, alone, this Court is required to reverse the Trial Court's judgment.

Plaintiffs contend that section 461.037 governs changes in beneficiary designations, not 461.054. However, section 461.037 deals with property subject to a beneficiary designation that is "lost, destroyed, damaged or involuntarily converted." There is no contention that the bank accounts were "lost, destroyed, damaged or involuntarily converted." In fact, the ownership of the accounts only changed from that of the Trust to Patricia individually. Arnold Smith never had an ownership interest in the accounts while Patricia was alive. Clearly, section 461.054, which deals with "revocations of a beneficiary designation" would apply to the changes from Patricia's siblings or the Trust, to Mr. Smith as TOD beneficiary, not section 461.037.

In summary, Missouri courts are hostile to undue influence claims as they relate to gifts to spouses, *Morse*, *supra* and *Needles*, *supra*, and lack of capacity is not a basis for invalidating beneficiary changes. *Goldschmidt, supra.*

The Trial Court's inclusion of the value of the non-probate assets owned by the Trust at the time the beneficiary changes were made was improper and the Judgment entered for the benefit of the estate was an error. In addition, any assets that were owned by the Trust should be the property of the Trust if the beneficiary changes are set aside. The Court should not have pulled these assets into the estate.

VII.

THE COURT ERRED IN FINDING THAT THERE WAS CLEAR, COGENT AND CONVINCING EVIDENCE THAT THE CHANGE OF

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

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BENEFICIARY DESIGNATION FOR THE CALSTRS RETIREMENT BENEFIT WAS THE RESULT OF UNDUE INFLUENCE AND LACK OF TESTAMENTARY CAPACITY ON THE PART OF PATRICIA WATSON BECAUSE PLAINTIFFS PRESENTED NO EVIDENCE OF THE CIRCUMSTANCES OF THE CHANGE OF BENEFICIARY DESIGNATION IN THAT THE FINDINGS BY THE COURT ON THAT ISSUE WERE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE (CLEAR, COGENT AND CONVINCING EVIDENCE) AND WERE WAS AGAINST THE WEIGHT OF THE EVIDENCE AND, AS A MATTER OF LAW, LACK OF TESTAMENTARY CAPACITY IS NOT A BASIS FOR SETTING ASIDE A NON-PROBATE TRANSFER UNDER MISSOURI LAW AND PLAINTIFFS WERE NOT DAMAGED BY THE BENEFICIARY CHANGE.

The standard of review for this point is the same as those above, *Murphy v. Carron*; see also *Cochran, supra.* Additionally, the arguments relating to the grounds for setting aside a beneficiary designation as discussed in Point VI apply equally to this Point. For brevity's sake, Defendants will not restate them here.

The sole Finding of Fact relevant to the CALSTRS Retirement Account was as follows:

> 190. Patricia lacked testamentary capacity, was incapacitated and disabled and was under the undue influence of Arnie at the time she executed the change of beneficiary form for her California State Teachers Retirement System ("CALSTRS") retirement account. Arnie's forgery of

Electronically Filed - SUPREME COURT OF MISSOURI - February 24, 2014 - 12:13 PM

> 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.

There was evidence before the Court of documents that went back and forth between Patricia and Arnold and the California pension authority. Contrary to Plaintiffs' Perry Mason moment arguments, Plaintiffs' Exhibit 25 specifically includes a CALSTRS received stamp indicating it was received in California in January 2008. Arnold was certainly involved in the activities relating to the pension but these actions were not "undue" as a matter of law. *Needles, supra; Hahn, supra;* and *Morse, supra.* Of note, the change of beneficiary of this asset to benefit Arnold did not harm the Plaintiffs. Their inclusion of this asset in this lawsuit is simply part of an attempt to deny him any benefits accruing from his wife's death. By opting to take slightly less money during her life from CALSTRS, Patricia made sure that Arnold would have the right to receive a pension benefit upon his spouse's death. See CALSTRS Overview, www.calstrs.com/calstrs-overview. The Plaintiffs herein were and are not entitled to receive the pension benefit and their mean spirited actions in sending a copy of the Trial Court's Judgment to California to deprive Arnold of the pension benefit in no way benefits them. The Plaintiffs did not and cannot show that they were damaged in any way by the change of beneficiary form relating to the CALSTRS pension. If anyone was affected by the change it was Patricia, who received slightly less during her lifetime with the understanding that Arnold would be able to receive a pension upon her death. There is no evidence of undue influence or lack of capacity in the change. It was reasoned and

reasonable. Further, undue influence claims are disfavored regarding gifts to spouses and lack of capacity is not a basis under Missouri law for setting aside a beneficiary change.

Apart from these issues, this Court should note that the change of beneficiary to benefit Arnold was consistent with the Trust Amendments. Patricia wanted Arnold to benefit from her property.

CONCLUSION

In conclusion, the Court should reverse the Trial Court's Amended Judgment e*n toto*. The Court should find that the First and Second Trust Amendments signed by Patricia were valid. The Court should hold that, since Plaintiffs chose to contest the inheritance they were to receive under the Trust as amended, they should take nothing under the Trust, either directly or indirectly through the estate. The pour-over will executed by Patricia provides that the property of the estate, if any, should be poured-over to be distributed under the Trust as amended.

The Court should also reverse the Judgment entered in favor of the Estate and against Arnold Smith and should assess court costs against the Plaintiffs.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with the limitations set forth in Rule 84.06(b) and contains 20,538 words as calculated pursuant to the requirements of Rule 84.06(b)(2).

Respectfully submitted,

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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 to the following attorneys of record on this 24th day of February, 2014 to:

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