

Sarah continued living with Mary until her death, June 16, 2001, from a massive heart attack. (Fred Aff. ¶ 2, Sarah Death Certificate). On March 5, 2001, Sarah made her last will and testament, which eliminated the Plaintiff, Fred Smith (“Fred”), her son. (Lafin Dep. At 1, Mary Dep. At 2).

After the April 1999 stroke, Sarah experienced mild dementia for about four weeks. (Sarah Med. R.). She was unable to take care of herself for some weeks after her release. The stroke also left her unable to drive, so she became dependant on Mary for transportation until her death. Sarah also suffered from the physical inability to perform the simplest of everyday tasks including paying bills; therefore, she was dependant on Mary to pay her bills on time. Mary also assisted Sarah in investments by giving recommendations, accompanying her to the investment broker, and helping Sarah choose a bank Certificate of Deposit (CD). Sarah and Mary owed the house in which they lived by a joint tenancy. Sarah paid 80% of the house payment. (Mary Dep. at 2).

Before the new will and testament was created, Sarah asked Mary if James Laflin (“Laflin”) was a good attorney. Sarah initially learned of the attorney from a newspaper article he wrote regarding estate planning. Laflin had previously worked for the company that Mary’s husband, Frank Lewis, owned. Frank owned 1/3 of the company. Mary told Sarah that Frank’s partners were pleased with Laflin’s work. Sarah then asked Mary to make her an appointment with Laflin. Since Mary’s husband had worked with Laflin before, Sarah thought she might get a quicker appointment. (Mary Dep. at 2). Sarah called Laflin’s office and made the appointment for her mother. (Mary Dep. at 2, Laflin

Dep. at 1).

Before the appointment, Sarah told Mary that Fred would be removed from the will. Mary did not know why Fred would be eliminated as a beneficiary, nor did she ask her mother. (Mary Dep. at 2). Mary drove Sarah to Laflin's office and introduced Sarah to Laflin. Mary stayed in the office with Sarah and Laflin during the entire meeting. At one point in the meeting, Sarah asked Mary who should be the personal representative, because Mary's son would be the contingent beneficiary if Mary died. Mary also drove Sarah back to Laflin's the day she signed the new will. (Mary Dep. at 2, Laflin Dep. at 1). The new will and testament was signed on March 5, 2001. (Laflin Dep. at 1).

According to Laflin, Sarah did not seem to be physically disabled. During that first visit in which Mary was present, Sarah told Laflin that she wanted to leave everything to Mary and discussed the provisions of the new will. On March 5, 2001, Mary again drove Sarah to Laflin's office. Laflin met with Sarah alone while she looked over her new will and testament, which was prepared and ready to be signed. She was alone with Laflin for about ten or fifteen minutes. Sarah agreed that the will was prepared as she had asked at their previous meeting, and she signed the new will and testament. The two witnesses for the new will were individuals from Laflin's office. According to Laflin, he did ask Sarah why she wanted to leave Mary everything. Sarah told him that she did not want to talk about it. (Laflin Dep. at 1).

Sarah had a previous will dated June 1, 1995, which was prepared by a different attorney.

(Sarah Will of 7/1/95). The previous will left the estate equally to both Fred and Mary. (Laflin Dep. at 1, Sarah Will of 7/1/95). According to Fred, he and his mother had a good relationship. He talked with her frequently by phone and visited her at least three times a year. Fred was surprised that he had been removed from her will and has no idea why she would have done so. (Fred Aff. ¶ 3, 4).

Fred filed a petition contesting the new will and testament of March 5, 2001. Discovery has been completed, and Fred is now filing for summary judgment based upon the facts regarding undue influence. He asks for the will of March 5, 2001 to be found as void.

ARGUMENT

I. THE MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED, BECAUSE THE DEFENDANT EXERTED UNDUE INFLUENCE OVER SARAH SMITH.

Undue influence is found under a two-prong test in which both elements must be found: (1) the existence of a confidential relationship between the will's maker and another party and (2) the other party assisted in the making of the will. A rebuttable presumption then arises. The other side then can prevail over the presumption by showing: (1) the confidential relationship between the will's maker and the other party "has been severed before the critical events in controversy or (2) independent and competent advice about the will was actually given to the will's maker," *In re Estate of Maheras*, 1995 OK 40, ¶8, 897 P.2d 268, 272. There are five factors that the court considers when applying the test for undue influence: (1) "whether the person charged with undue influence was not a natural object of the maker's bounty; (2) whether the stronger party was a trusted or confidential advisor or agent of the will maker; (3) whether he/she was present and/or

active in the procurement or preparation of the will; (4) whether the will's maker was of advanced age or impaired faculties; and (5) whether independent and disinterested advice regarding the testamentary disposition was given to its maker." *Id.* Based on the facts obtained from discovery, the two-prong test for finding undue influence is satisfied and the defendant cannot prevail with a rebuttable presumption.

A. **A confidential relationship existed between Sarah Smith and the Defendant.**

The Oklahoma Supreme Court has defined a confidential relationship as "a fiduciary relationship and exists whenever trust and confidence are placed by one person in the integrity and fidelity of another," *Maheras*, 1995 OK at ¶8, 897 P.2d at 272. When determining whether a confidential relationship does exist, the court looks to the five factors previously mentioned. The relevant factors are then applied, in this case: (1) "whether the person charged with undue influence was not a natural object of the maker's bounty; (2) whether the stronger party was a trusted or confidential advisor or agent of the will maker; (3) whether the will's maker was of advanced age or impaired faculties," *Id.*

The first factor regarding whether the person who exerts the undue influence is a natural object of the maker's bounty is clearly established in this case. Relationships with family members typically fall into this category. See *In re Estate of Yoss*, 1997 OK CIV APP 65, ¶9, 947 P.2d 607, 609-10. The relationship in *Yoss* was between two sisters. The court found that the family relationship would obviously make the sister a natural object. In the present case there is also a family relationship—mother and daughter. The Defendant, being the testator's daughter, can clearly be found to be a natural object to her mother's

bounty, as would the Defendant's husband.

The second factor is whether that same person was a trusted or confidential advisor or agent of the testator. In mother and daughter relationships trust and confidence are typical elements. However, the confidential relation in this type of relationship "is a question of fact to be established by the evidence," *In re Estate of Mowdy*, 1999 OK CIV APP 4, ¶6, 973 P.2d 345, 348; *In re Estate of Beal*, 1989 OK 23, ¶15, 769 P.2d 150, 154-5. The main focus of the evidence is the circumstances surrounding the relationship. The Oklahoma Supreme Court has found that when a testator is living with the one who is exerting undue influence and that same person has an increasing role in the testator's affairs, there is trust and confidence. See *In re Estate of Gerard*, 1995 OK 144, ¶24, 911 P.2d 266, 269. In *Gerard*, the testator was living with a couple whom later were named in his last will and testament as the controlling party of his entire trust after his death. The husband and wife were not family members; however, they had a major role in his personal affairs including his medical care. The court found that since the couple had an increasing role in the testator's affairs and the testator had been living with the couple for an extended period of time until his death, there was trust and confidence in the relationship. In this case, the testator, Sarah Smith, was living with the Defendant from May 8, 1999 to June 16, 2001. During this time the Defendant cared for her mother physically, helped her mother pay her bills, and even gave advice concerning her mother's investments and other financial concerns. (Mary Dep. at 2, Smith Death Certificate). Since the testator, Sarah Smith lived with the Defendant for an extended period of two years until her death and the Defendant had an increasing role in her mother's medical and financial affairs,

trust and confidence can be established as elements in this relationship; therefore, the Defendant was a trusted and confidential advisor.

The third factor considers the age of the testator, as well as, the testator's impaired faculties. The previous factors clearly state the relevancy to the issue—whether there was a confidential relationship. This factor helps the court to verify whether the influential party was the “stronger” party, and whether the testator would have been easily persuaded or very trusting due to health or age. Oklahoma courts have considered the age of the testator as a relevant factor in undue influence cases. In *Maheras*, the court found that since the testator was 89 years old at the time of her last will and testament, the one exerting undue influence was the stronger party. *Maheras*, 1995 OK at ¶8, 897 P.2d at 270-1. In *Gerard*, the testator was of advanced age and suffered from a terminal disease at the time of his last will and testament; therefore the court found that the couple exerting undue influence was the stronger party. *Gerard*, 1995 OK at ¶28, 911 P.2d at 271. In this case, the testator, Sarah Smith, was of an advanced age. Although the facts do not state her age, it is clear that she must have been elderly; because, her children are not young, the Plaintiff is 47 years old, and the Defendant has a son. (Mary Dep. at 2, Fred Aff. ¶1). Therefore, the Defendant was the stronger party.

The testator's health problems are also elements in establishing whether the testator would be easily influenced or very trusting. In *Gerard*, the testator suffered from a weakening disease. The court found that because the testator was suffering from a disease, which impaired him physically and mentally, the testator was in a position of

being easily influence and very trusting. *Id.* In this case, the testator, Sarah Smith, was suffering from heart problems. She had suffered from a serious stroke on April 15, 1999. (Sarah Med. R.). She needed physical assistance for a period of time after the stroke, and was no longer able to drive. (Mary Dep. at 2). Therefore, the testator, Sarah Smith, would have been trusting and easily influenced by the Defendant. Since, Sarah Smith was of advanced age and suffered from major impairing health problems, she was most likely influenced by a stronger party, in this case her daughter, the Defendant.

The facts clearly show that Smith did trust her daughter, and confided in her often. Smith was also elderly and had health problems. All three factors can be established, and the court can easily find that there was a confidential relationship between the Defendant and her mother, Sarah Smith.

B. The Defendant did assist in the preparation of Sarah Smith's will.

The second prong to the undue influence test is whether “the other party assisted in the making of the will.” *Maheras*, 1995 OK at ¶8, 897 P.2d at 272. As in the first prong of the undue influence test, the courts look to the five factors for guidance. The relevant factor relating to the second prong of the test would be factor: (3) “whether he/she was present and/or active in the procurement or preparation of the will.” *Maheras*, 1995 OK at ¶8, 897 P.2d at 272.

The third factor of whether she was present and/or active in the procurement or preparation of the will can clearly be established. This factor as stated includes an “and/or” between “present” and “active”; therefore, to establish this factor, the Defendant

must have either been present or active or both. In *Gerard*, the wife of the couple exerting undue influence contacted the attorney whom was making the changes for the last will and testament, dictated the changes to the attorney, and was present when the testator signed his last will and testament. The court found that the wife was present and actively involved in the preparation of the testator's last will and testament. *Gerard*, 1995 OK at ¶7,8, 911 P.2d at 268-9. In *Beal*, the one exerting undue influence drove the testator to the attorney's office and supplied the name for the contingent beneficiary. The court found that just driving the testator would not give rise to the presumption of undue influence; however, participating in the decisions regarding the contents of the last will and testament would. *Beal*, 1989 OK at ¶18, 769 P.2d at 156. In this case, the Defendant drove the testator, Sarah Smith, to Laflin's office both visits, and she was present during the entire meeting with Laflin while Smith discussed the changes she wanted made to her will. The Defendant also participated in the preparation of the will, when she supplied a name for the personal representative. (Mary Dep. at 2, Laflin Dep. at 1). The Defendant was also aware of the proposed will changes before the signing of the last will and testament, and she made the appointment for her mother. (Mary Dep. at 2). If the Defendant had just drove her mother to the attorney's office, there would be no presumption of undue influence because that is not considered present; however, the Defendant was present during the meeting regarding will changes and participated by naming the personal representative. Therefore, the Defendant was both present and active in the preparation of the testator's, Sarah Smith, last will and testament.

C. **The Defendant's relationship with Sarah Smith was not severed before the making of the will.**

After the two-prong test of establishing whether the Defendant had undue influence over the testator, there becomes a rebuttable presumption in which the Defendant can overcome the presumption of undue influence. In order to prevail, the Defendant must first show that: (1) the confidential relationship between the will's maker and the other party "has been severed before the critical events in controversy," *Maheras*, 1995 OK at ¶8, 897 P.2d at 272. In *Gerard*, the testator lived with couple and was dependant on them until his death; therefore, the court found no severance before the will was made. *Gerard*, 1995 OK at ¶27, 911 P.2d at 272. In this case, the testator, Sarah Smith, relied on the Defendant and lived with her until her death on June 16, 2001 (Mary Dep. at 2, Sarah Death Certificate). There is also no evidence that would even suggest that their relationship was severed before the will. Therefore, the relationship between the Defendant and the testator, Sarah Smith, was not severed before the making of the will.

D. Sarah Smith did not receive actual independent and competent advice.

The Defendant also has the burden to prove that the testator had (2) "independent and competent advice about the will was actually given to the will's maker," *Maheras*, 1995 OK at ¶8, 897 P.2d at 272. Many of the Oklahoma cases regarding undue influence did not contain evidence of independent advisory. In *Gerard*, however, since the attorney had a previous relationship with the couple exerting undue influence, there was no independent advice found due to the fact that the attorney was not completely disassociated from the questionable events. *Gerard*, 1995 OK at ¶28, 911 P.2d at 272-3. The "independent advisor" in this case would be Laflin. However, Laflin was not an independent advisor, because Defendant's husband had used Laflin before as an attorney. The advice was also not independent, due to the fat that the Defendant was in the room

when the will was made. Smith did spend fifteen minutes alone with Laflin, but there is nothing in the evidence to show that she was given advises. She looked over the will and signed it. (Mary Dep. at 2, Laflin Dep. at 1). Therefore, the testator, Sarah Smith, did not receive independent advice.

CONCLUSION

The Motion for Summary Judgment should be granted in favor of the Plaintiff, because of the undue influence that was exerted on Sarah Smith by the Defendant. Also, the Defendant could not satisfy the rebuttable presumption in order to overcome the presumption of undue influence. Therefore, the Plaintiff asks that Sarah Smith's last will and testament dated March 5, 2001 of Sarah Smith's be declared as void.

Respectfully submitted,

Dated this _____ day of May 2012.

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CERTIFICATE OF MAILING

I, Amy Mangum, attorney for the plaintiff, Fred Smith, certify that I have sent a complete and accurate copy of this Motion for Summary Judgment and Brief in Support Thereof by placing the copy in the United States Mail, sufficient postage affixed, to the following address:

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Dated this _____ day of May 2012.

AMY E. MANGUM