2015 WL 1500609 (Mo.App. E.D.) (Appellate Brief)
Missouri Court of Appeals, Eastern District.

Brittany FRAVELL, et al., Respondents,
v.
Dennis CANNON, Appellant.

No. ED 101032.
March 23, 2015.

Appeal from the Circuit Court of Lincoln County the Honorable David H. Ash, Associate Circuit Judge

Respondents' Brief

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*4 POINTS RELIED ON I.

The trial court did not abuse its discretion by denying Appellant's motion to excuse Juror Number 3 because Dennis' constitutional right to a fair and impartial jury was not violated in that Judge Ash performed a thorough inquiry into the matter, permitted counsel to question Juror Number 3, and determined that she unequivocally could fairly determine the case based on the facts presented by both sides.

Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189 (Mo. App. W.D. 2012)

Sapp v. Morrison Brothers Co., 295 S.W.3d 470 (Mo. App. W.D. 2009)

*5 II.

The trial court did not err in overruling Dennis' motions for directed verdict at the close of evidence and for judgment notwithstanding the verdict, and in submitting to the jury the issue of Hazel's testamentary capacity when she executed the March 29, 2010 Amendment to her Trust, just six weeks before her death, because there was substantial evidence that she was without sound mind.

Disbrow v. Boehmer, 711 S.W.2d 917 (Mo. App. E.D. 1986)

Proffer v. Proffer, 114 S.W.2d 1035 (Mo. 1938)

Powell v. Hickman, 793 S.W.2d 885 (Mo. App. W.D. 1990)

Sturm v. Routh, 373 S.W.2d 922 (Mo. 1964)

***6** III.

The trial court did not err in overruling Dennis' motions for directed verdict at the close of evidence and for judgment notwithstanding the verdict, and in submitting to the jury the issue of Hazel's testamentary capacity when she executed the October 20, 2009 Amendment to her Trust because there was substantial evidence that she was without sound mind.

Sturm v. Routh, 373 S.W.2d 922 (Mo. 1964)

Powell v. Hickman, 793 S.W.2d 885 (Mo. App. W.D. 1990)

Byars v. Buckley, 461 S.W.2d 817 (Mo. 1970)

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***7** IV.

The trial court did not err in overruling Dennis' motions for directed verdict at the close of evidence and for judgment notwithstanding the verdict, and in submitting to the jury the issue of Hazel's testamentary capacity when she executed the January 12, 2009 Amendment to her Trust because there was substantial evidence that she was without sound mind.

Sturm v. Routh, 373 S.W.2d 922 (Mo. 1964)

Powell v. Hickman, 793 S.W.2d 885 (Mo. App. W.D. 1990)

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***8** V.

The trial court did not err in denying Dennis' motions for directed verdict at the close of evidence and for judgment notwithstanding the verdict, and in submitting to the jury the issue of undue influence in the execution of the March 29, 2010 Amendment because Respondents presented substantial evidence of undue influence.

Carroll v. Knott, 637 S.W.2d 368 (Mo. App. E.D. 1982)

Disbrow v. Boehmer, 711 S.W.2d 917 (Mo. App. E.D. 1986)

***9** VI.

The trial court did not err in denying Dennis' motions for directed verdict at the close of evidence and for judgment notwithstanding the verdict, and in submitting to the jury the issue of undue influence in the execution of the October 20, 2009 Amendment because Respondents presented substantial evidence of undue influence.

Carroll v. Knott, 637 S.W.2d 368 (Mo. App. E.D. 1982)

Disbrow v. Boehmer, 711 S.W.2d 917 (Mo. App. E.D. 1986)

***10** VII

The trial court did not err in entering judgment declaring the January 12, 2009 Amendment void because it did have jurisdiction to adjudicate said amendment's validity in that Appellant did not properly preserve the issue of whether the trial court failed to join allegedly indispensible and necessary parties.

Rule 55.27(g)(2)

Stander v. Szabados, 407 S.W.3d 73 (Mo. App. W.D. 2013)

In re Marriage of Bottorff, 221 S.W.3d 482 (Mo. App. S.D. 2007)

***11** STATEMENT OF FACTS

I. INTRODUCTION AND SUMMARY.

Hazel Cannon died on May 11, 2010, at the age of 94, and at the time of her death, her estate was valued at $1,930,117.48. Tr. 472:17-21; 690:15-21. Hazel had two sons, Bruce and Dennis, whom she raised by herself after her husband passed away. Tr. 181:14-20. In approximately 1984, Hazel's son Dennis moved away from Lincoln County to Michigan and later to Texas, returning only two or three times a year. Tr. 273:2-14. In contrast, Bruce remained in Lincoln County and raised his family a few miles from Hazel, visiting his mother at least once a week, usually with his children. Tr. 177:22-178:3; 180:9-12; 231:7-10. In 1992, Hazel executed the Revocable Living Trust Agreement of Hazel M. Cannon which left her estate to her two sons, in equal parts. Ex. 1; Tr. 280:2-24. If either son predeceased Hazel, his share would pass to his descendants. Ex. 1; Tr. 280:2-24.

On November 5, 2008, Bruce died in a car accident and his death devastated Hazel. Ex. 17, at 32:9-14; Tr. 291:12-292:1. At Bruce's funeral Hazel appeared “very, very, frail,” “not as sharp mentally,” “spacey,” and “vulnerable”. Ex. 17, at 10:5-13; 14:24-16:5; 42:23-43:11. However, just two days after Bruce's funeral, Dennis and his wife, Barb, took Hazel to meet with Hazel's **financial** planner, Gary Sheller, to discuss changing Hazel's estate plan. Tr. 283:11-284:15. Over the next year and a half, Hazel's estate plan was amended three times, all with Dennis' involvement. The first amendment dated January 12, 2009, significantly reduced the amount that Bruce's children were to receive, and substantially increased Dennis' share. Ex. 3. The second amendment dated ***12** October 20, 2009, eliminated Bruce's children's inheritance and made Dennis the sole beneficiary. Ex. 4. The third amendment was executed on March 29, 2010, a month and a half prior to Hazel's death on May 11, 2010. Ex. 5. This final amendment made the Trust irrevocable, purportedly to qualify Hazel for Medicaid benefits when she reached 99 years of age. Ex. 5; Tr. 426:19-23; 431:12-15.

Bruce's children challenged these three amendments in the underlying lawsuit. LF 1, at 22, 24. On October 4, 2013, a Lincoln County jury found that these three amendments were not amendments to the Revocable Living Trust Agreement of Hazel M. Cannon. Id., at 191-93. This appeal follows.

II. BACKGROUND.

Hazel Cannon's husband died at a young age, leaving her alone to raise two young sons, Bruce and Dennis, in Lincoln County, Missouri. Tr. 181:14-20. Hazel overcame such hardships, while also managing their farm and eventually working for the Department of Agriculture. Tr. 181:18-21. Hazel gained considerable wealth and eventually owned several hundred acres of property. Tr. 309:9-14. In 1992, she created a Trust to prevent anyone from taking advantage of her when she got older. Ex. 1; Tr. 374:10-22. Don Buretta, a neighbor and friend of Hazel for over ten years, described her as proud of being self-sufficient, and claimed she was never the type of person who would look for public aid. Tr. 728:23-729:4.

Hazel's sons reached adulthood, and Dennis moved away to Michigan, only returning two or three times a year. Tr. 273:2-14. Dennis' two sons, Brock and Brady, sometimes came with him on his visits, but not often. Tr. 271:25-272:1; 273:10-14; ***13** 273:18-20. Between 2000 and 2008, Brock and Brady only visited Hazel two or three times. Tr. 273:18-23.

Bruce remained in Lincoln County and raised his family a few miles away from Hazel. Tr. 177:22-178:3. Bruce married Princess Colbert, and they had two children: Brittany and Taylor. Tr. 179:4-6; 179:12-180:1. After Bruce and Princess were married, they lived together in a trailer on one of Hazel's properties. Tr. 314:6-20. During this time, there was a dilapidated farm house on the property, which Hazel eventually repaired and renovated. Tr. 314:21-315:16. Once the repairs were complete, Bruce and Princess made an agreement with Hazel that they would live in the house and continue to renovate it. Tr. 318:3-13. In exchange, they would be reimbursed for the money they invested in the house, or else they would receive it in Hazel's Trust. Tr. 318:3-13. As a result of this agreement, Bruce and Princess raised their children in the house, which happened to be the same house where Hazel herself was born. Tr. 176:12-177:22.

Bruce visited his mother at least once a week, and usually brought Brittany or Taylor with him. Tr. 180:9-12; 231:7-10. During his visits, Bruce would help Hazel with anything she needed, such as driving her to doctor appointments, getting groceries, and helping with miscellaneous tasks. Tr. 182:21-183:11. Princess and their children were also involved in caring for Hazel. Ex. 17 at 33:19-34:1.

Hazel usually saw Brittany and Taylor twice a week because they went with her to church every Sunday and visited her with their dad. Tr. 180:9-17; 231:3-10. Hazel often talked about Brittany and Taylor to her friends and neighbors, and kept pictures of them on her back porch where she would entertain company. Ex. 17, at 21:10-22. Gail Wright, ***14** Hazel's friend and neighbor for over twenty-five years, noted that Hazel never said anything bad about her grandchildren. Ex. 17, at 22:2-6. Hazel was also close with Princess, and went to Princess' family parties for holidays. Tr. 182:7-13; 319:18-320:5.

In 2006, Brittany joined the Air National Guard. Tr. 178:4-9. However, she was still close to home, and attended Lindenwood University in 2008. Tr. 187:21-23. Despite being both in the military and a fulltime student, she called Hazel a couple times per week, and tried to visit once a week. Tr. 188:17-22. In 2008, Taylor was also a student at Lindenwood University, but lived at home for his first semester before moving to the St. Charles campus. Tr. 229:24-230:22. While Taylor was in college, he went home to visit Hazel at least once a month, and called her once a week. Tr. 232:3-9.

On November 5, 2008, ten days after Brittany's wedding, Bruce died in a car accident. Tr. 183:12-19. Taylor was 18 years old and Brittany was about 21. Tr. 228, 176. His funeral was on November 9, 2008. Tr. 184:16-18. Hazel was devastated over Bruce's death. Ex. 17, at 32:9-14; Tr. 291:12-292:1. She was 92 years old when he died, and the loss of a child was too much for her to bear, as she repeatedly lamented that she should have died instead. Tr. 185:14-23. Hazel was so distraught at Bruce's funeral that she failed to recognize Stacy Poertner, an old family friend whom she used to see weekly and on holidays. Tr. 156:6-157:5; 157:17-25; 159:9-25.

Poertner noticed a sharp change in Hazel's personality at the funeral. Tr. 160:5-23. Gail Wright attended Bruce's funeral as well, and also noticed a difference in Hazel. Ex. 17, at 9:24-10:13; 14:24-16:5; 42:23-43:11. Hazel was “very, very, frail,” “not as sharp mentally,” “spacey,” “vulnerable,” and repeatedly lamented that she did not know what ***15** she would do without Bruce. Ex. 17, at 10:5-13; 14:24-16:5; 42:23-43:11. Hazel also appeared to have forgotten that Wright had moved away years before, and asked if Wright would ever be in her old house again. Ex. 17, at 32:15-33:6.

After Bruce's funeral, Poertner saw Dennis in the foyer of the building. Tr. 160:24-161:22. Dennis and his wife Barb had returned to Lincoln County for Bruce's funeral, but they did not stay to see Bruce's wife or children. Tr. 184:24-185:13. When Poertner saw Dennis, he was pacing around the foyer by himself, and seemed agitated, nervous, and unhappy. Tr. 162:4-9. Dennis complained that he did not like Bruce and wanted Princess out of the house. Tr. 162:10-19. He said that he did not know Bruce's kids. Tr. 164:2-6. He swore that the land and the property belonged to him, and that Princess had to leave. Tr. 163:6-25.

III. The First Amendment.

On November 11, 2008, two days after Bruce's funeral, Dennis and Barb took Hazel to meet with Gary Sheller, Hazel's **financial** advisor, to discuss changing Hazel's estate plan. Tr. 283:11-284:15. Hazel's estate plan was reflected within her 1992 Revocable Living Trust Agreement, which divided her assets evenly between Bruce and Dennis, with each brother's share to be distributed in equal shares to his children in the event that he predeceased Hazel. Ex. 1; Tr. 280:2-24. Although Hazel amended her Trust in 2003, the amendment maintained the equal distribution between her sons' families. LF1, at 45-46; Tr. 281:3-282:4. At the time, Hazel's estate consisted of twenty-one acres of farmland in the Missouri bottoms, a two hundred and sixty acre farm on Chantilly Road, her house on Chantilly Road, a one hundred and four acre farm, the house Bruce ***16** and Princess had been living in, as well as CDs and bonds valued at approximately $400,000. Tr. 274:17-276:25.

At the November 11, 2008 meeting, Dennis expressed his personal concerns to Sheller. Tr. 384:17-385:16. Dennis called Sheller the next day and discussed amending Hazel's Trust to remove a time limit on selling her real estate, and to change the percentages of the distributions for each grandchild. Tr. 385:17-386:3. Specifically, Dennis wanted each grandchild to only receive 12.5% of the proceeds from Hazel's real estate, and a smaller portion of her cash. Tr. 386:1-3. Despite being Hazel's **financial** advisor, and not an attorney, Sheller spent over six hours working on the amendment to her estate plan. Tr. 393:12-23; 412:18-22. Ed Grewach, Hazel's actual attorney, spent little more than one hour working on the amendment. [1] Tr. 393:12-25; 412:13-17.

On January 12, 2009, Dennis and Barb took Hazel to Sheller's office and watched her sign a trust amendment. Tr. 289:2-8. The amendment mirrored Dennis' suggestions to Sheller. Ex. 3, at 2; Tr. 385:17-386:3. Each grandchild received 12.5% of the proceeds from Hazel's real estate, while Dennis received the other 50%. Ex. 3, at 2. Dennis received 90% of Hazel's cash assets, while each grandchild only received 2.5%. Ex. 3, at 2.

Hazel never explained why, only two months after Bruce's death, she suddenly wanted to reduce Bruce's children's share of her estate. Tr. 290:16-23. In addition, neither Dennis nor Sheller ever asked Hazel why she wanted to reduce Taylor and ***17** Brittany's distributions. Tr. 391:17-392:9; 290:10-291:6. Sheller claimed he normally did not ask clients why they would want to make **financial** changes, and Dennis stated that he “didn't think about it.” Tr. 391:24-392:1; 290:10-291:6. Further, Grewach said he drafted the amendment, but admitted that he was not present at its execution and never met with Hazel to discuss it. Tr. 407:25-408:1; 408:8-9; 408:22-23. Rather, he testified that he only spoke with her once over the phone. Tr. 408:12-18. During that conversation, he did not ask why she wanted to reduce her grandchildren's shares. Tr. 408:19-21. Grewach admitted that he did not know the size of Hazel's estate, and did not take any steps to ensure that Hazel was aware that the amendment would drastically reduce Taylor and Brittany's share of her estate. Tr. 411:12-19.

During this time, Hazel remained overcome with grief from Bruce's death. Tr. 185:14-23; 291:12-292:1. Her memory decreased, and she began to repeat herself more frequently and forget things more often. Tr. 185:24-186:19; 232:11-21. She became more confused, and had to write down everything she did each day to prevent repeating herself. Tr. 323:8-12; 213:17-214:8. Her personality changed, and she stopped caring about things. Tr. 373:2-10. While for nearly two decades she went to church with her grandchildren on Sunday, she suddenly had no desire to go. Tr. 186:8-16. Although she used to spend the holidays with Princess' family, she did not attend Thanksgiving or Christmas following Bruce's death, despite pleas from Brittany to go. Tr. 186:22-187:12. Brittany testified that Hazel stopped attending nearly all family functions. Tr. 216:20-22. Additionally, Hazel started forgetting that Bruce had died, and would claim to hear him talking to her. Tr. 373:2-10.

***18** After Bruce's death, Hazel also lost her former independent nature, and she began deferring to Dennis for decisions. Tr. 225:12-226:9. This resulted in two disputes with Brittany and Taylor. Tr. 277:3-278:19. The first dispute concerned the house that Princess lived in. Tr. 277:23-25. In November, 2008, just weeks after Bruce's death, Princess went to visit Hazel in order to comfort her and provide company. Tr. 323:25-324:12. Hazel told Princess that as long as she kept paying rent, Princess could live in the house for the rest of her life. Tr. 325:1-9. However, around February, 2009, Hazel no longer guaranteed that Princess

could continue living in the house, but instead indicated that she had to check with Dennis and Sheller first. Tr. 325:10-326:10; 327:4-10.

In late May/early June, 2009, Princess called Dennis about the changes in Hazel's personality. Tr. 327:25-328:19. Princess told Dennis that Hazel was having problems and kept talking about Bruce.[2] Tr. 378:9-16. Dennis responded by informing Princess that she would not receive any money from Hazel's Trust, and that he did not want Princess going to Hazel for money. Tr. 329:3-12. He told Princess that she would not be compensated for any money she put into the house. Tr. 329:18-21. This conversation occurred while Princess and Brittany were on their way to see Hazel. Tr. 329:22-25. Once Princess and Brittany arrived, Dennis called Hazel and spoke to her over speaker phone, directing Hazel not to speak with Princess. Tr. 330:3-20. After Dennis hung up, Princess asked Hazel about their previous agreement concerning the improvements. Tr. 330:24-331:10. ***19** Hazel responded that Dennis and Sheller told her that she did not owe Princess any money for the improvements. Tr. 331:11-15.

During this conversation, Brittany suggested that if Princess moved out of the house, Brittany and her family could move in and rent it from Hazel for the same amount. Tr. 194:2-195:2. At this time, Brittany was married and had a daughter, Hailee. Tr. 193:15-22. Hazel liked the idea because it meant that Hailee, her great-granddaughter, would be raised in the same house that both Hazel and Brittany grew up in. Tr. 195:3-11. Once Taylor heard about Brittany's plan, he spoke with Hazel about it, and Hazel told him that she was happy that the house would stay in the family and Brittany could raise her children there. Tr. 236:18-237:4. Taylor also discussed Brittany's rent, and Hazel responded that Brittany would pay the same amount that Princess had paid. Tr. 237:5-15.

Once Princess moved out of the house in July, 2009, Brittany and her husband met with Hazel and agreed to pay $450 per month in rent, the same that Princess and Bruce had paid. Tr. 196:23-197:21. A few weeks later, Brittany again met with Hazel, but this time Dennis and Barb were present. Tr. 197:22-198:11. Dennis informed Brittany that he and Sheller agreed that she could rent the house for $1,200 per month. Tr. 198:12-23. Both before and during this meeting, Hazel never said anything to Brittany about paying $1,200 per month. Tr. 198:21-199:1.

Because Brittany was a fulltime student, she could not afford to pay $1,200 per month. Tr. 199:2-6. Thus, she rented another house, but was still within a few miles from Hazel and continued to regularly visit. Tr. 199:7-14.

***20** Afterwards, Taylor called Dennis and asked why he was preventing Brittany from living in their home. Tr. 237:16-238:24. Dennis said it was not their home anymore, and that he and Brittany no longer had anything to do with it. Tr. 239:2-6. Taylor met with Hazel after this conversation and asked why Dennis would not allow Brittany to move in. Tr. 239:22-240:7. Hazel did not answer his question, but instead told him a story about a pet skunk that Bruce had as a child. Tr. 240:7-15.

The second dispute involved Bruce's guns. Tr. 233:12-236:17. In late May/early June, 2009, Hazel informed Princess that Dennis wanted Bruce's guns back. Tr. 337:25-338:12. Bruce had two hunting guns that were originally purchased by his father, but Bruce had kept them in his gun cabinet for roughly twenty-two years. Tr. 233:12-234:8; 335:10-17. Bruce took care of the guns, and he and Taylor would shoot them once a year. Tr. 234:9-15.

Prior to Bruce's death, Hazel never asked Taylor about the guns. Tr. 234:16-19. However, in the summer of 2009, Hazel asked about them. Tr. 234:20-235:8. Taylor expressed that he was taking great care of them and that they had personal significance to him because they had belonged to his father. Tr. 234:20-235:8. During this conversation, Hazel never said that she wanted them back. Tr. 235:9-13. Later in the summer, Taylor visited Hazel and she again asked about the guns, and said that Dennis wanted to know if he was going to return them. Tr. 235:9-23. Both conversations ended in the exact same manner, with Hazel telling Taylor that “as long as you take care of them, then it's not a big deal.” Tr. 235:23-236:1. Hazel eventually had a third conversation with Taylor. Tr. 236:4-14. Taylor testified: “[all three conversations went] the exact same way. It was just ***21** like she completely forgot that the previous conversations happened because she would say it in the same way. She would use the same manner of speaking and we would come to the same conclusion at the very end.” Tr. 236:6-12. Dennis testified that he

wanted the guns returned, and that he did not think about any sentimental meaning they may have had to Taylor. Tr. 301:9-302:8. These two issues were the only known “disputes” that Hazel had with Brittany and Taylor after Bruce's death. Tr. 278:9-19.

During the summer of 2009, Princess regularly visited Hazel, and she noticed that Hazel continued to change. Tr. 334:1-21. Hazel wavered more on her decisions, and had to check with Dennis on everything. Tr. 334:1-21. Prior to Bruce's death, Hazel was never known to waiver on decisions, nor did she ever check with Dennis. Tr. 334:1-21. After Princess moved out in July, 2009, there was an issue with the water bill. Tr. 339:24-340:15. Princess told Hazel to have the water company turn the water off at the home, and Hazel agreed. Tr. 339:24-340:15. However, the water company turned the water back on. 340:11-15. When Princess asked why, Hazel was confused about the situation. Tr. 340:16-341:16. Hazel asked why Princess did not pay for the water. Tr. 341:11-14. Hazel had forgotten that Princess no longer lived there. Tr. 341:11-16.

In September, 2009, Dennis told Princess to remove all of her property from the house, or he would throw it away. Tr. 376:7-21. When Princess moved out of the house, she left some personal property behind, which Hazel allowed. Tr. 338:17-339:15. During this time period Princess had an attorney, Patrick Flynn, helping her with Bruce's estate, and her concerns regarding reimbursement for the improvements. Tr. 361:2-362:8. After Princess received Dennis' call, she had Flynn write a letter stating that removing her ***22** property would constitute trespass. Tr. 361:2-362:8. Flynn advised Princess to no longer visit Hazel's house regularly. Tr. 341:20-24.

Jim Beck was hired to represent Hazel in this dispute, and he scheduled a meeting with Flynn on September 30, 2009. Tr. 439:18-25; 445:16-446:16. Flynn proposed a settlement agreement, which Jim Beck agreed to discuss with Hazel. Tr. 446:22-447:8. He scheduled a meeting with Hazel on October 20, 2009. Tr. 447:5-12. Dennis, however, sent Jim Beck a memo of his own thoughts regarding the proposed settlement:

“Our suggestion for Hazel to Mr. Beck and Mr. Sheller is to consider a settlement that the garage be paid off and that is it. No cash going to Princess Cannon. She had no problem with living in the house and not paying any rent and therefore she's not deserving of any cash settlement.”

Ex. 7, at 1105; Tr. 448:13-449:1. Dennis also called Jim Beck and reemphasized his position. Tr. 449:2-8.

In October, 2009, Princess went to Hazel's house because Hazel's hearing aids died. Tr. 343:1-24. After Princess fixed them, Hazel asked her to sit down and chat. Tr. 343:25-344:5. During their conversation, Hazel asked Princess why she had not visited. Tr. 344:3-9. Princess reminded Hazel that she no longer lived in the house, and that her attorney advised her to no longer visit, all of which Hazel had forgotten. Tr. 344:10-22. Hazel also told Princess that she would never amend her Trust. Tr. 344:23-345:7.

On October 20, 2009, Jim Beck met with Hazel and suggested a monetary proposal to settle the dispute with Princess. Tr. 449:9-450:5. Hazel, however, was unable to make a decision. Tr. 450:6-8. Instead, she said that she had to speak with Dennis. Tr. ***23** 450:9-12. The following day, Dennis called Jim Beck and spoke with him for an hour and a half about the settlement, emphasizing that Princess should not receive any money. Tr. 452:16-453:10. Afterwards, Jim Beck informed Flynn that Hazel needed to discuss the settlement offer with Dennis before she could reach a decision. Tr. 453:13-454:5; Ex. 7, at 1102. Jim Beck never had any subsequent communications with Hazel, but instead was directed solely by Dennis. Tr. 455:1-14.

IV. THE SECOND AMENDMENT

On September 18, 2009, Dennis sent an e-mail to Sheller discussing further amendments to Hazel's estate plan:

My mother told Barb last night that she has requested that Brittany and Taylor be delisted from her Trust. I suggested that all four grandkids be removed from the Trust in order to avoid some future grievance. My mother agreed. I will inform her of this message and that she needs to follow up with this request.

Ex. 7, at 516; Tr. 293:24-294:20.

In addition, Dennis called Hazel to tell her to amend her estate plan and remove the four grandchildren. Tr. 295:10-296:9. Dennis was unable to explain any rationale regarding how removing Brittany and Taylor would avoid a future grievance. Tr. 296:16-297:5. The e-mail became the terms of the October 20, 2009 Amendment to Hazel's Trust, which disinherited Brittany and Taylor. Tr. 297:7-297:12; 398:1-5; Ex.4. The amendment also made Dennis the sole beneficiary of Hazel's Trust. Tr. 300:19-301:8; Ex. 4.

***24** On October 19, 2009, Dennis called Sheller and had a twenty minute conversation. Tr. 399:6-13. On October 20, 2009, Dennis again called Sheller and had a thirty minute conversation. Tr. 399:14-16. That same day, Sheller, who is not an attorney, revised the language of the new amendment after speaking with Grewach. Tr. 399:20-400:6; 412:18-22. Grewach, Hazel's actual attorney, testified that he drafted the document and was unaware of Sheller's claims of draftsmanship. Tr. 409:2-20. Grewach was aware that it disinherited Bruce's children. Tr. 409:24-410:1. Grewach also admitted that Hazel never said anything derogatory about Taylor and Brittany. Tr. 600:9-11.

Grewach never met with Hazel regarding the amendment. Tr. 409:21-23. He was not present when Hazel signed it. Tr. 410:6-7. Grewach testified that he spoke with Hazel once about the amendment, but admitted he had no written record of that phone call. Tr. 605:23-606:6. Grewach's bill indicates he spent less than an hour working on the amendment. Tr. 411:20-412:17; Ex. 7.

In contrast, Sheller billed over twenty-two hours working on the October 20, 2009 amendment. Tr. 402:13-23. Within his records, however, he could only produce one notation concerning a single conversation with Hazel regarding the amendment. Tr. 524:22-525:18. In addition, he had no records, nor could he provide any example, of Hazel's relationship with Brittany and Taylor deteriorating in any way. Tr. 527:9-528:3.

The first time Hazel saw the October 20, 2009 Amendment was on the day she signed it. Tr. 401:24-402:1. Her lawyer, Grewach, was not present to read it. Tr. 402:2-4. There was no notary present, as Sheller had his daughter notarize it afterwards. Tr. 400:14-401:7. Only Sheller and Jim Beck were present. Tr. 400:9-13. Jim Beck, however, ***25** was there regarding the property dispute between Hazel and Princess, and was unaware what Hazel was signing. Tr. 449:9-17; 450:21-451:22. Hazel never asked Jim Beck anything about the documents she was signing. Tr. 452:9-15. Afterwards, Sheller called Dennis to inform him that Hazel signed the amendment, and he answered Dennis' questions regarding it. Tr. 403:16-21. Sheller also scheduled a meeting with Dennis, Barb, and Jim Beck. Tr. 403:16-21.

After this meeting occurred, Dennis fired Jim Beck, as well as Sheller, Hazel's **financial** advisor for decades. Tr. 303:2-15; 405:4-11. Sheller wrote in a memo to his attorney that: “After one of the last conversations between the four of us, Dennis took over the process from his mother and fired Jim Beck as attorney and apparently fired me as well.” Ex. 17, at 513. Dennis claimed he never fired anyone, but admitted he was upset that Jim Beck did not keep him informed regarding Hazel's lawsuit. Tr. 303:6-304:6. In addition, the following November, 2009, Hazel's Missouri bottoms farm property was sold for $70,000 and Dennis received the money. Tr. 302:9-18. Dennis and Barb were present with Hazel at the closing. Tr. 302:19-23.

On November 18, 2009, Hazel visited her doctor, Dr. Baxter. Tr. 551:24-552:6. Hazel was frail and had difficulty taking care of her house. Tr. 551:24-552:6. Although it had been a year since Bruce's death, she was still dealing with grief. Tr. 552:13-15; 562:23-563:3. Dr. Baxter noted that Hazel's grief had physically aged her, and affected her facial appearance, skin and demeanor. Tr. 567:6-568:7. As a result, she had a long and earnest discussion with Hazel about her mood. Tr. 568:24-569:6. Dr. Baxter also noted that Hazel had kyphosis (similar to hunched back, related to osteoporosis), and ***26** wrote under “Review of Symptoms” that Hazel experienced weight loss, joint pain, chronic fatigue, edema (swelling) in her lower legs, constipation, arthralgia (joint pain), as well as abnormal anxiety and depression. Tr. 563:4-564:17. Under “Active Problems” Dr. Baxter wrote that Hazel suffered from abnormality of gait, psoriasis, sensory neural hearing loss, mild chronic kidney disease, senile osteoporosis, malaise, fatigue, congestive heart failure, hyperextension heart disease, hypothyroidism, frail, and malnutrition. Tr. 564:18-567:2.

In December, 2009, prior to being fired by Dennis, Jim Beck tried to call Hazel regarding the settlement agreement with Princess, but was unable to reach her. Tr. 455:20-456:5; Ex. 7, at 1101. Dennis directed him not to respond to Flynn. Tr. 455:20-456:17. On January 8, 2010, Flynn sent Jim Beck a letter stating that the deadline to respond to the settlement offer was January 14, 2010. Tr. 456:18-457:7; Ex. 7, at 1099. Jim Beck forwarded the letter to Hazel. Tr. 457:8-20. However, on January 19, 2010, Jim Beck received a voicemail from Dennis informing him to never contact Hazel again. Tr. 457:21-458:1.

In January, 2010, Taylor visited Hazel while he was on break from college. Tr. 242:22-243:7. Hazel mentioned the dispute with Princess, but did not seem upset and changed the subject when Taylor indicated he was uncomfortable talking about it. Tr. 243:8-15. Taylor noticed, however, that Hazel was still sad and cried often while he was there. Tr. 243:20-25. She was also convinced that she was a burden on Taylor and Brittany. Tr. 243:24-25. Further, she continued to write down everything she did throughout the day. Tr. 244:1-5.

***27** In February, 2010, Princess filed a lawsuit against Hazel regarding the house. Tr. 345:8-13. Prior to filing, Princess spoke with Hazel numerous times about the dispute. Tr. 345:14-17. Hazel told her that Dennis and Sheller did not think she was entitled to anything. Tr. 345:18-22. Hazel told her to file a lawsuit and let the lawyers handle it so that their friendship would be preserved. Tr. 345:23-346:3.

V. THE THIRD AMENDMENT.

In February, 2010, Dennis contacted attorney Rudy Beck regarding the litigation with Hazel and Princess; however, he eventually retained Rudy Beck to do further estate planning for Hazel. Tr. 304:7-305:5; 305:14-306:2; 420:2-6. On February 7, 2010, Rudy Beck sent Dennis a reminder that they had a meeting scheduled, and asked Dennis to fill out a questionnaire regarding the facts involved. Tr. 423:19-424:3; Ex. 9, at 1008. On February 9, 2010, Dennis met with Rudy Beck in person to discuss asset protection planning for Hazel. Tr. 418:3-419:13. Rudy Beck was aware that Hazel's estate was worth more than one million dollars. Tr. 420:24-421:13. Afterwards, Rudy Beck scheduled another meeting with Dennis. Tr. 421:22-422:19.

Rudy Beck did not send any correspondence to Hazel and admitted he never sent her an engagement letter. Tr. 659:25-660:2; 655:4-7. He never met privately with Hazel at any time.[3] Tr. 306:23-24; 654:23-655:3.

***28** On February 26, 2010, Rudy Beck met with Hazel, Dennis and Barb. Tr. 424:23-425:6. They discussed asset protection planning, in which Hazel would give away her assets in order to qualify for Medicaid benefits. Tr. 425:7-19; 426:7-14. It would take five years for her to qualify for Medicaid. Tr. 426:19-23. Hazel was 94 years old at the time. Tr. 426:1-427:1. Following this meeting, on March 22, 2010, Dennis called Rudy Beck to discuss a new durable power of attorney over Hazel, and new trust documents. Tr. 427:2-24; Ex. 9, at 1004.

On March 29, 2010, Rudy Beck sent Dennis a letter outlining the steps necessary to complete the new estate plan for Hazel. Tr. 428:4-9; Ex. 9, at 1001. He also enclosed a draft of Hazel's new trust amendment for Dennis to review. Tr. 428:10-20; Ex. 9, at 1001. The amendment maintained Dennis as the sole beneficiary of Hazel's Trust property, named him sole trustee, and rendered her trust irrevocable. Tr. 429:5-15; 431:2-15. Rudy Beck prepared documents granting Dennis **Financial** Power of Attorney over Hazel's assets, as well as Durable Power of Attorney over her healthcare. Tr. 431:16-432:13; Ex. 9 at 1040-54. Rudy Beck never provided drafts to Hazel for review, and the first time she saw the documents was the day they were signed. Tr. 432:16-24.

On March 29, 2010, Brittany visited Hazel. Tr. 205:9-16. When she entered Hazel's house, she saw Dennis and Barb with Hazel as they were preparing to leave. Tr. 205:17-20. Dennis told Brittany she needed to go because they were in a hurry to meet with a lawyer. Tr. 205:21-206:1. Hazel, however, did not say she was in a hurry or that she was seeing a lawyer, but rather said “hi” and asked how Brittany's daughter was. Tr. 206:2-10. Dennis continued to insist that they were in a hurry, so Brittany

left, although ***29** Hazel told her to come back. Tr. 206:11-17. Dennis followed Brittany out and said that he did not want her coming by Hazel's house ever again. Tr. 206:18-24.

After Brittany left, Dennis and Barb brought Hazel to execute the March 29, 2010 Amendment to her Trust, and were present when she signed it. Tr. 305:24-306:22; Ex. 5. Hazel never saw the amendment prior to signing, nor was she ever provided with an outline explaining the amendment's significance. Tr. 432:20-24. Hazel also signed the new power of attorney documents. Ex. 9, at 1040-48. Following the amendment's execution, Dennis signed a check from Hazel's bank account to pay Rudy Beck's $5,000 legal fee. Tr. 691:4-12; Ex. 20.

On April 15, 2010, Hazel was admitted to the Lincoln County Medical Center due to back pain. Tr. 470:10-14. In her medical records, the attending physician noted under "Psychological" that she was suffering from "mild anxiety/depression." Tr. 471:17-19; Ex. 13, at 859. Under "Neurological" the attending physician wrote: "Poor memory for the past three to four months. Has had some mild disorientation lately." Tr. 471:20-21; Ex. 13, at 859. Under "Physical examination," he wrote: "frail 92-year-old white female, alert, memory is somewhat poor, forgets that she is in the hospital." Tr. 471:22-25; Ex. 13, at 859. Under "Assessment" he wrote: "Mild dementia, apparently noted only in the past three to four months." Tr. 472:9-10; Ex. 13, at 860. Finally, the attending physician noted several other physical ailments affecting Hazel, such as back pain, degenerative disc disease, a urinary tract infection, hypertension and hypothyroidism. Tr. 470:13-472:11; Ex. 13 at 858-860. Dennis did not let Brittany or Taylor know that their grandmother was in the hospital. Tr. 310:5-12.

***30** In April, 2010, following the hospital visit, Dennis placed Hazel in a nursing home. Tr. 309:23-310:4. Dennis did not inform Brittany or Taylor. Tr. 310:13-16. Dennis instructed the nursing home personnel that they could only reveal Hazel's information to Dennis or his two sons, but they could "not give any information to Princess Cannon, Brittany Fravell, [Brittany's husband], [or] Taylor Cannon." Tr. 310:19-311:17; Ex. 14, at 111. Dennis testified that he intended to prevent Brittany and Taylor from visiting Hazel. Tr. 311:18-20.

Brittany eventually learned that Hazel was in the nursing home, but had trouble contacting Hazel by phone. Tr. 207:9-208:4. As a result, she visited Hazel. Tr. 208:3-4. In early May, 2010, Brittany used her only annual leave from military drills and drove two hours to see Hazel. Tr. 208:5-15. Brittany brought her daughter Hailee. Tr. 208:24-209:3. Hazel forgot Hailee's name. Tr. 223:16-22. Brittany asked Hazel if she and Taylor had been disinherited and Hazel responded that she had no knowledge of that. Tr. 209:3-9.

While Brittany was visiting Hazel, Dennis and Barb entered. Tr. 209:10-11. Upon seeing Brittany, Dennis went to the nurse's station to ask why Brittany was allowed in. Tr. 209:14-16. He spoke loudly with the nurses outside of Hazel's door, and reiterated that Brittany was not supposed to see Hazel. Tr. 209:17-25. Brittany felt uncomfortable, so she kissed Hazel goodbye and left. Tr. 210:1-4.

Hazel died on May 11, 2010, at the age of 94. Tr. 472:17-21; Ex. 11. The death certificate listed the underlying cause of death as: "Anorexia, cachexia, osteoporosis, ***31** severe dementia. Significant condition, hypothyroidism." Tr. 472:22-24. Her total estate was valued at $1,930,117.48. Tr. 690:15-21.

VI. THE LAWSUIT, TRIAL & VERDICT.

On August 26, 2010, Respondents Brittany Fravell and Taylor Cannon filed their Petition to Set Aside Trust Amendments in the Circuit Court of Lincoln County seeking to invalidate the January 12, 2009, October 20, 2009 and March 29, 2010 amendments. LF 1, at 14. This matter was tried before a jury between October 1, 2013 and October 4, 2013. Id., at 9-10. At the beginning of the second day of trial, Juror Number 3 asked to bring something to the Court's attention. Tr. 261:1-10. She was the trustee of her brother's estate, and had experienced an emotional reaction after the first day of evidence. Tr. 261:11-23. Although she was troubled by the evidence presented, she reiterated that she was happy to remain on as a juror. Tr. 261:24. After she brought this to the trial court's attention she had the following exchange with Judge Ash:

THE COURT: You have to judge this case on what you hear --

JUROR NUMBER 3: True.

THE COURT: -- here, and it may be that, you know, Mrs. Cannon decided she wanted to, you know, for some reason -

JUROR NUMBER 3: Yeah. I could hear something -

THE COURT: I don't know. Maybe, you know, an argument with one of the -- a discussion of who had got the guns. I don't know.

JUROR NUMBER 3: Right. I don't know the other side yet.

Tr. 261:25-262:12.

***32** Judge Ash asked Juror Number 3 if she was able to hear the case without deciding solely based on her own personal issue, she again noted that although the case was "very emotional" for her, she would try because she was a "very fair person" and "educated." Tr. 262:16-25. She emphasized that she would do her job as a juror and be "as fair as I can," but that she wanted to bring the issue to the trial court's attention. Tr. 263:1-8.

Judge Ash gave Defense Counsel an opportunity to question Juror Number 3. Tr. 263:10-18. The following transpired:

MR. KNIGHT: You say you'll be as fair as you can be but it sounds to me like, because of your experiences and because of your family situation with you being a trustee, that it may be difficult for you to judge this without considering the facts and circumstances of your own family; is that correct?

JUROR NUMBER 3: I can divorce myself from it while I'm in here, but I just felt like it was only fair to tell you guys that I am in a situation that someday I could be here. I can't imagine, but I don't know.

Tr. 263:14-24.

Juror Number 3 again reiterated that: "I am happy to be here. I will do everything and I will listen to everything and I will judge it the right way, but I just wanted you to know that I do have a lot of emotion and stuff involved in this." Tr. 263:25-264:6. The Court concluded:

THE COURT: Well, I think the question is do you think you could set aside your situation and judge just this situation on what you hear?

***33** JUROR NUMBER 3: I think so. I can't tell you a hundred percent because I haven't heard the other side.

Tr. 264:7-11.

Respondents' and Appellant's Counsel were then given an opportunity to voice their arguments regarding whether Juror Number 3 should remain. Tr. 264:21-23. After discussion, Judge Ash noted that Juror Number 3's situation was distinguishable since her family had not had any disputes regarding her brother's trust. Tr. 266:23-267:1. The court also noted Juror Number 3's statement that she had not heard all of the evidence. Tr. 267:11-12. Judge Ash concluded that she was fit to serve. Tr. 267:14-16.

On October 4, 2013, eleven out of twelve jurors found in favor of Respondents and invalidated the January 12, 2009, October 20, 2009 and March 29, 2010 Amendments to Hazel's Trust. LF 1, at 191-93.

***34 ARGUMENT**

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING APPELLANT'S MOTION TO EXCUSE JUROR NUMBER 3 BECAUSE DENNIS' CONSTITUTIONAL RIGHT TO A FAIR AND IMPARTIAL JURY WAS NOT VIOLATED IN THAT JUDGE ASH PERFORMED A THOROUGH INQUIRY INTO THE MATTER, PERMITTED COUNSEL TO QUESTION JUROR NUMBER 3, AND DETERMINED THAT SHE UNEQUIVOCALLY COULD FAIRLY DETERMINE THE CASE BASED ON THE FACTS PRESENTED BY BOTH SIDES.

A. STANDARD OF REVIEW.

"The trial court is in the best position to determine whether a juror will be able to effectively discharge her duties." Lester v. Sayles, 850 S.W.2d 858, 870 (Mo. banc 1993). As a result, "the substitution of an alternate juror for a regular juror during trial is a matter entrusted to the discretion of the trial court." State v. Naucke, 829 S.W.2d 445, 461 (Mo. banc 1992). Therefore, the trial court's ruling regarding substitution of a juror will be upheld upon review, unless the ruling is "clearly against the evidence and is a clear abuse of discretion." Joy v. Morrison, 254 S.W.3d 885, 888 (Mo. banc 2008). "An abuse of discretion occurs where the trial court's ruling is 'clearly against the logic of the circumstances and is so arbitrary and unreasonable as to shock the sense of justice and indicate a lack of careful consideration."' Rupard v. Prica, 412 S.W.3d 343, 345 (Mo. App. W.D. 2013) (citing Khoury v. ConAgra Foods, Inc., 368 S.W.3d 189, 195 (Mo. App. W.D. 2012)).

***35** In determining whether a juror has a possible bias, trial court judges have the benefit of being able to "eyeball" the juror and personally assess her credibility. See Khoury, 368 S.W.3d at 201. Appellate courts, in contrast, are constricted to the "cold transcript" of the proceedings. Id. For this reason, appellate courts afford considerable discretion to trial courts in "'close calls' relating to the 'possibility' of juror bias or other issues relating to the ability of a juror to effectively discharge her duties." Id.

B. JUDGE ASH PROPERLY EXERCISED HIS DISCRETION IN REFUSING TO STRIKE JUROR NUMBER 3.

Sapp v. Morrison Brothers Co. is factually analogous to the instant matter. 295 S.W.3d 470 (Mo. App. W.D. 2009). In Sapp, the appellant argued that the trial court committed reversible error by refusing to strike a juror for cause when she indicated that she had a possible bias. Id. at 480. Specifically, the court asked if her beliefs concerning restricting litigation would affect her view of the case, and she stated: "... I would have to hear all the details of the case to give that answer... Do I have preconceived ideas about those kinds cases [sic]? Yes. Do I know that her case is any way similar to those. No. I would have to hear details to make that decision." Id. (emphasis in original). Also, she indicated that she believed in caps on non-economic damages, but clarified: "Honestly, I don't have any... preconceived amount. I would have to hear everything to come up with that." Id. (emphasis in original). Finally, when asked if she would be negatively predisposed to the appellant because of her view on capping punitive damages, she stated that she would be, but only "without any other information." Id. (emphasis in original).

***36** In Sapp, the court held that the trial judge did not abuse his discretion by refusing to strike the juror for possible bias because he engaged in a "careful, juror-specific, and fact-intensive assessment" of the juror. Id. at 482. The court relied on a Missouri Supreme Court case establishing that, "[a] venireperson's qualifications as a prospective juror are not determined by an answer to a single question, but by the entire examination." Id. at 480 (citing Joy v. Morrison, 254 S.W.3d 885, 888 (Mo. banc 2008) (emphasis added)). Following Joy, the court examined the trial judge's analysis and the juror's responses throughout the entire examination. Id. The court found that the juror's statements indicated that she would render her decision based on the evidence presented at trial and the law applicable to the case. Id. The court also distinguished the matter from cases in which jurors indicated that they did not think they could render a fair verdict. Id. Finally, although the juror conceded that she had opinions regarding the case, the court found that her answers indicated that she "unequivocally agreed" to view the evidence fairly and follow the applicable law. Id.

In the present matter, Judge Ash, as well as counsel for both Appellant and Respondents, similarly conducted a thorough and fact-specific analysis to assess whether Juror Number 3 had any possible bias. Tr. 261:6-267:16. By examining her responses to the entire examination, Judge Ash correctly exercised his discretion by finding that she did not possess a possible bias against the Appellant.

First, like the juror in Sapp, Juror Number 3's responses indicated that she could render her decision based on the facts presented and the applicable law. This is apparent through the following exchange:
***37** MR. KNIGHT: You say you'll be as fair as you can be but it sounds to me like, because of your experiences and because of your family situation with you being a trustee, that it may be difficult for you to judge this without considering the facts and circumstances of your own family; is that correct?

JUROR NUMBER 3: I can divorce myself from it while I'm in here, but I just felt like it was only fair to tell you guys that I am in a situation that someday I could be here. I can't imagine, but I don't know. Tr. 263:14-24 (emphasis added).

By stating "I can divorce myself from it while I'm here," Juror Number 3 unequivocally clarified that she could judge the case from the evidence presented, and not based on her circumstances as her brother's trustee. Further, in response to Judge Ash's question whether she could decide the case on solely the evidence presented, she responded: "I'm in that same sort of situation. But like I said, I'm a very fair person. I'm educated. I mean, I'm happy to sit here and listen to it and I will be as fair as I can be." Tr. 262:16-263:2 (emphasis added). Therefore, by examining her responses throughout the entire examination, it is clear that she was able to judge the case fairly based on the facts presented and the applicable law.

Second, Juror Number 3 never indicated that she did not believe she could render a fair verdict. Rather, she stated that she would be "happy" to continue on as a juror, and that "I will do everything and I will listen to everything and I will judge it the right way, but I just wanted you to know that I do have a lot of emotion and stuff involved in this." Tr. 263:25-264:4 (emphasis added). As a result, like in Sapp, this situation is ***38** distinguishable from cases in which jurors indicated that they did not believe they could render a fair verdict. Here, Juror Number 3 unequivocally clarified that if she remained as a juror, she would judge the case fairly.

Finally, like the juror in Sapp, Juror Number 3 also had concerns regarding the issues involved, but indicated that she could judge the case fairly because she had not heard the other side. In Sapp, the juror responded that although she had views concerning litigation and damages, she would have to hear both sides of the evidence before she made up her mind regarding the case. See Sapp, 295 S.W.3d at 481 ("... I would have to hear all the details of the case to give that answer... I would have to hear details to make that decision... I don't have any... preconceived amount. I would have to hear everything to come up with that.") (emphasis in original). Here, Juror Number 3 gave nearly identical responses regarding her ability to judge the case on the evidence presented rather than on her own views:
THE COURT: You have to judge this case on what you hear --

JUROR NUMBER: True.

THE COURT: -- here, and it may be that, you know, Mrs. Cannon decided she wanted to, you know, for some reason -

JUROR NUMBER 3: Yeah. I could hear something -

THE COURT: I don't know. Maybe, you know, an argument with one of the -- a discussion of who had got the guns. I don't know.

JUROR NUMBER 3: Right. I don't know the other side yet. Tr. 261:25-262:12 (emphasis added).

***39** In addition, the trial court concluded its questioning by asking:
THE COURT: Well, I think the question is do you think you could set aside your situation and judge just this situation on what you hear?

JUROR NUMBER 3: I think so. I can't tell you a hundred percent because I haven't heard the other side. Tr. 264:7-11 (emphasis added).

Juror Number 3's responses indicated that she was withholding judgment from the case until she heard all of the evidence. Therefore, as in Sapp, the question concerning a possible bias was adequately resolved because Juror Number 3 indicated that she could fairly decide the case based on the evidence presented by both parties.

C. THE CASES CITED BY APPELLANT DO NOT SUPPORT APPELLANT'S POSITION.

In his brief, Appellant cites State v. Houston to support his argument that "similar responses" were found by Missouri courts as insufficient to rehabilitate jurors evidencing a possible bias. App. Brief at 50. However, the responses made by the juror in Houston are distinguishable from the present case. In Houston, a criminal case, the juror was asked if his involvement in a drug awareness group would affect his ability to judge the case. 803 S.W.2d 195, 196-197 (Mo. App. W.D. 1991). The juror responded: "... I truthfully can't say. I really don't know how it would affect me." Id. at 197. The juror's response in Houston indicated that he did not know if he could be fair or impartial in the case. In contrast, Juror Number 3 unequivocally stated that she was willing to "listen to [the evidence] and... be as fair as I can be." Tr. 262:24-263:2. Further, Juror Number 3 promised that she could "divorce herself" from any personal issue and was willing to ***40** listen to the evidence in order to "judge it the right way." Tr. 263:19-264:4. Therefore, unlike the juror in Houston, Juror Number 3 did not doubt her ability to render a fair decision.

In addition, the cases relied upon by Appellant are factually distinguishable because they involve instances in which a juror had a personal relationship with a party or witness. App. Brief at 47-50; see Hudson v. Behring, 261 S.W.3d 621, 623-624 (Mo. App. E.D. 2008) (during recess in trial, juror told defendant's daughter, "if you see [the defendant] later, tell him I love him to death."); Houston, 803 S.W.2d at 196 (juror knew two of the witnesses testifying on behalf of the state); Brusatti, 745 S.W.2d at 211 (juror was cousins with one of the state's principal witnesses, and she had heard bad things about his reputation). Here, there is no information to suggest that Juror Number 3 has any relation to either party in the case, or any of the witnesses involved.

Appellant claims that Hudson v. Behring is "directly on point" in this matter. App. Brief at 47. Hudson, however, is distinguishable for several reasons.

First, as discussed above, the juror in Hudson approached the defendant's daughter during recess in trial and said: "If you see your dad later, tell him I love him to death." Hudson, 261 S.W.3d at 624. The juror had a personal relationship with the defendant, and his comment indicated that he possessed a strong bias in favor of the defendant based on this relationship. Id. at 624-25. Here, Juror Number 3 has no personal relationship with Dennis, Brittany, or Taylor. Tr. 261:6-264:20. Therefore, there was no risk that she would render her opinion based on her own personal relationship with one of the parties.

***41** Second, the juror's comment in Hudson was made off the record and away from the court, and was not disclosed by the party to whom it was made and whom it favored. See Hudson, 261 S.W.3d at 624-25. These facts undoubtedly contributed to the trial court's belief that there was a "real possibility of bias." Id. Here, in contrast, Juror Number 3 brought the fact that she was the trustee of her brother's estate directly to the trial court's attention. Tr. 261:1-10. Juror Number 3 acted fairly and prudently, and did not attempt to hide any preconceived motive.

Third, the trial court in Hudson did not conduct an inquiry into the juror's possible bias after it learned about the remark. Hudson, 261 S.W.3d at 624. In contrast, Judge Ash thoroughly questioned Juror Number 3 about any possible bias, permitted both parties' counsel to question her, and then discussed the matter with both lawyers outside the presence of the jury. Tr. 261:6-264:17.

Finally, Appellant cites Hudson to hold that if a juror's statement "clearly shows a possible bias, [then the juror's] explanation... would not overcome the possibility of bias indicated by his statement." Hudson, 261 S.W.3d at 624-25. However, the court in Hudson was citing Dodson By and Through Dodson v. Robertson to support this holding. Id. Like Hudson, in Dodson several of the jurors were personally acquainted with the defendant. See Dodson By and Through Dodson v. Robertson, 710 S.W.2d 292, 295 (Mo. App. S.D. 1986). Therefore, in both Hudson and Dodson, questioning the jurors could not have established whether they were impartial, because the underlying possible bias (their personal relationship with the defendant) could not be overcome. Again, this is distinguishable from the instant case because Juror Number 3 was not acquainted with ***42** any of the parties, and, therefore, a thorough examination by the trial court could reasonably reveal whether she had a possible bias.

D. CONCLUSION.

For the foregoing reasons, Point I should be denied because Judge Ash correctly exercised his judicial discretion in ruling that Juror Number 3 could fairly determine the case based on the facts presented.

***43 II. THE TRIAL COURT DID NOT ERR IN OVERRULING DENNIS' MOTIONS FOR DIRECTED VERDICT AT THE CLOSE OF EVIDENCE AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN SUBMITTING TO THE JURY THE ISSUE OF HAZEL'S TESTAMENTARY CAPACITY WHEN SHE EXECUTED THE MARCH 29, 2010 AMENDMENT TO HER TRUST BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT SHE WAS WITHOUT SOUND MIND.**

A. STANDARD OF REVIEW.

In determining whether a plaintiff established substantial evidence that permitted the trial judge to submit the issue of testamentary capacity to the jury, the court must accept all of the plaintiff's evidence as true. [4] Byars v. Buckley, 461 S.W.2d 817, 819 (Mo. 1970). In addition, the court must disregard all of the defendant's evidence, unless it aids the plaintiff's case. Id. Further, the court must find all reasonable inferences that may be drawn from the whole evidence in the plaintiff's favor. Id. at 819-20 (emphasis added). Finally, if reasonable minds could differ regarding whether the testatrix had testamentary capacity, then the Court must find that the trial judge correctly denied the motions for directed verdict and judgment notwithstanding the verdict. See Lasky v. Union Elec. Co., 936 S.W.2d 797, 801 (Mo. 1997).

***44** In addition, when there is "... a verdict and judgment rejecting the will, [then] the evidence is necessarily viewed favorable to the finding." Powell v. Hickman, 793 S.W.2d 885, 890 (Mo. App. W.D. 1990). As a result, the "weight and credibility of the evidence" is viewed favorable to the jury's verdict. Id. Finally, the Missouri Supreme Court has reiterated that testamentary capacity is largely a factual issue, and that "the circuit court is in the best position to decide precisely when a person has testamentary capacity, and this Court defers to its findings." Ivie v. Smith, 439 S.W.3d 189, 201-202 (Mo. 2014).

B. STANDARD FOR TESTAMENTARY CAPACITY.

An individual has testamentary capacity if she is over 18 years of age and has "sound mind." Ivie, 439 S.W.3d at 200. An individual has "sound mind" if she: (1) understands the ordinary affairs of life; (2) understands the nature and extent of her property; (3) knows the persons who are the natural objects of her bounty; and (4) understands that executing the instrument is giving property to the persons in the manner specified within the instrument. Id. A will or trust, or any amendments, are void if the individual lacked sound mind. Id.

In analyzing whether a testatrix had sound mind, courts can examine evidence that occurred either before or after the execution of the document, as long as it is "not too remote" and "the evidence indicates the unsoundness existed at the time the will or trust was made." Id. at 201 (citing Smith v. Fitzjohn, 188 S.W.2d 832, 833 (Mo. Banc 1954)). Courts have found that evidence of unsound mind spanning several months, as well as years, before the document's execution was not "too remote" to consider. See, e.g., Ivie, 439 S.W.3d at 202 (examined evidence indicating that testator lacked sound mind from ***45** July, 2007, through July, 2008); Sturm v. Routh, 373 S.W.2d 922, 928-930 (Mo. 1964) (examined evidence from March, 1959, through November, 1959, as well as noted an "abundance of testimony that from 1954 until his death [1961] testator's condition became progressively worse."); Disbrow v. Boehmer, 711 S.W.2d 917, 924-25 (Mo. App. E.D. 1986) (examined specific facts from around April, 1978 to March, 1979, as well as medical records from 1974 to 1979).

Finally, Missouri courts have established that, "[a]lthough sickness, old age, and mere eccentricities are insufficient to nullify a will on the ground of mental incapacity, each may be taken into consideration with other facts in determining testamentary capacity." Disbrow, 711 S.W.2d at 924 (citing Proffer v. Proffer, 114 S.W.2d 1035, 1040 (Mo. 1938)).

C. THERE WAS SUBSTANTIAL EVIDENCE THAT HAZEL LACKED TESTAMENTARY CAPACITY WHEN SHE EXECUTED THE MARCH 29, 2010 AMENDMENT.

Appellant contends that Respondents failed to adduce substantial evidence that Hazel lacked testamentary capacity at the time she executed the March 29, 2010 Amendment. Significantly, however, this amendment was executed just six weeks before her death, and purported to qualify her for Medicaid at age 99. Ex. 5.

Respondents presented substantial evidence of Hazel's testamentary incapacity when she executed the March 29, 2010 Amendment by establishing that: (1) she did not understand the ordinary affairs of life; (2) she did not understand the nature and extent of her property; (3) she failed to recognize the natural objects of her bounty and did not ***46** understand that she was giving her property to the persons mentioned in the amendment in the manner stated; and (4) she suffered from a weakened mental capacity due to her poor physical health and Dennis' control over her.

1. Hazel Did Not Understand the Ordinary Affairs of Life.

In Disbrow v. Boehmer, the Missouri Court of Appeals found that there was substantial evidence that the testatrix was unable to understand the ordinary affairs of life when she amended her will because there were several instances indicating that her memory was failing and that she was confused. 711 S.W.2d at 924. Specifically, the testatrix called her daughter the wrong name, phoned in the middle of the night, lost her keys while roaming the hallway, burnt herself while cooking, and forgot to take her medicine. Id. In addition, "the testatrix told a social worker that her son was married for twelve years when he was married for thirty-three." Id.

Here, like in Disbrow, there is substantial evidence that Hazel was having memory problems and was confused when she executed the final Amendment to her Trust on March 29, 2010, approximately six weeks before she died. First, there is a reasonable inference that Hazel was confused on the day she signed the amendment based on Brittany's testimony of what occurred when she visited Hazel's house. Tr. 205:9-16. Dennis directed Brittany out of the house when she arrived and claimed they were in a hurry to meet with a lawyer; however, Hazel said nothing about going to a lawyer, or ***47** even about being in a hurry.[5] Tr. 205:17-206:10. Rather, she asked Brittany how Hailee was, and told her to come back as Dennis followed Brittany out. Tr. 206:2-24. This testimony indicates that Hazel was unaware that she was in a hurry, or that she was seeing a lawyer. It logically follows that if Hazel knew she was on her way to execute an irrevocable trust that disinherited Brittany, she would not have been so pleasant.

Also, within a few weeks after executing the document, Hazel was admitted to the Lincoln County Medical Center. Tr. 470:10-14. While there, the attending physician noted that Hazel suffered from poor memory and disorientation, and that Hazel

forgot that she was in the hospital. Tr. 471:20-25; Ex. 13, at 859. The attending physician also noted that Hazel had been suffering from mild dementia for the past three to four months. [6] Tr. 472:9-10; Ex. 13, at 860. Thus, Hazel was confused and suffering from poor memory when she amended her trust in 2010.

***48** Finally, when Brittany visited Hazel in the nursing home in early May, 2010, Hazel forgot the name of Brittany's daughter, which she had never forgotten before. [7] Tr. 223:16-22. Also, during this visit Hazel told Brittany that she had "no knowledge" of disinheriting Brittany or Taylor from her Trust. Tr. 209:6-9. There is a reasonable inference that Hazel had "no knowledge" of disinheriting Brittany and Taylor because she experienced repeated instances of confusion and poor memory around this time.

2. Hazel Did Not Understand The Nature And Extent Of Her Property.

Evidence that a testatrix made irrational **financial** decisions is a relevant factor indicating that she did not understand the nature and extent of her property. See Proffer v. Proffer, 114 S.W.2d 1035, 1042 (Mo. 1938). In Proffer, the testator had been regarded as "shrewd, industrious... hard working... [and] as honest as anyone ever could be..." Proffer, 114 S.W.2d at 1038. However, his mental capacity slowly changed after he ***49** suffered from typhoid fever in 1926, and by 1930 he had lost his former business judgment and his former character. Id. at 1037-1038. The Court found that there was substantial evidence of unsound mind because the record indicated that the testator "was unable to understand that he paid for a load of wood... traded an $18 note for a $2 pig; and that he paid $95 for a $15 mule." Id. at 1042.

Similarly, the facts surrounding the March 29, 2010 Amendment indicate that Hazel did not understand the nature and extent of her property because of her irrational **financial** decision to surrender all of her assets in order to receive Medicaid benefits. Prior to signing the amendment, Dennis had Hazel meet with Rudy Beck to discuss Medicaid planning, in which she would surrender all of her assets in order to qualify for Medicaid. Tr. 426:7-14. This is an objectively irrational **financial** decision because Hazel had nearly $2 million in assets at that time. Tr. 690:15-21. As a result, she did not require any public assistance to cover her expenses. In addition, she was 94 years old, and under the plan she would not receive any Medicaid benefits until she was 99. Tr. 426:1-427:1. Furthermore, Hazel had poor health, as evidenced by her hospitalization nearly two weeks after the amendment and her death less than two months after the amendment. Tr. 470:10-472:10; 472:17-21; Ex. 11; Ex. 13, at 859-60. Therefore, like the testator in Proffer who paid $95 for a mule worth $15, Hazel surrendering $2 million in assets to receive Medicaid when she was 99 made no rational **financial** sense.

Hazel applying for Medicaid planning was a change in her character, similar to the testator in Proffer who lost his former character. She worked hard to save money throughout her life, and was proud of being independent and self-sufficient. Tr. 728:23- ***50** 729:4. Don Buretta, Hazel's neighbor who visited her at least once a month for the past ten years of her life, stated that Hazel was "absolutely not" the type of person who would ever look for a "government handout." Tr. 728:23-729:4. Therefore, Hazel's Medicaid planning was not only an objectively irrational **financial** decision, but was also a subjectively irrational decision based on her former self-sufficient character.

In addition, evidence that a testatrix depended on another to manage her **financial** affairs is another relevant factor indicating that the testatrix did not understand the nature and extent of her property. See Disbrow, 711 S.W.2d at 924-925. In Disbrow, the testatrix's son had all of his mother's bank statements and dividends mailed directly to him. Id. at 925. He also paid his mother's bills. Id. The Court found that this evidence indicated that there was substantial evidence that the testatrix did not understand the nature and extent of her property. Id. at 924.

There is substantial evidence that Hazel depended on Dennis to manage her **financial** affairs, especially since he was made Hazel's **financial** durable power of attorney on March 29, 2010. Tr. 431:16-432:4; Ex. 9 at 1040-48. Furthermore, after Rudy Beck drafted the March 29, 2010 Amendment to Hazel's Trust, Dennis wrote and signed a check from Hazel's bank account for Rudy Beck's $5,000 legal fee. Tr. 691:4-12. In addition, Dennis maintained all of the correspondence with Rudy Beck concerning the amendment. Tr. 659:25-660:2.

Therefore, similar to the testatrix in Disbrow, Hazel's reliance on Dennis to manage her **financial** affairs is evidence of her inability to understand the nature and extent of her property.

***51 3. Hazel Failed to Recognize the Natural Objects Of Her Bounty.**

In Everly v. Everly, the Missouri Supreme Court addressed the issue of whether an "unnatural or an unjust disposition" was a factor that courts could examine to determine if a testator lacked testamentary capacity. 249 S.W. 88, 91 (Mo. 1923). The Court found:

> The question of mental capacity involves whether the testator's mind was in such condition that he recognized his obligation to the objects of his bounty and their relation to him. Undoubtedly a very unjust disposition of his property, a disposition which would disinherit a deserving child, would be some indication of failure to understand his obligation to the child.

Id. The Court also cited previous case law that "... a harsh and unnatural disposition by the will in question is a circumstance which tends to discredit the maker's testamentary capacity." [8] Id.

Here, the March 29, 2010 Amendment ensured that the October 20, 2009 Amendment disinheriting Brittany and Taylor from Hazel's Trust was irrevocable. Ex.5; Ex. 4. Brittany and Taylor were Bruce's children, and Hazel grieved Bruce's death for nearly two years. Tr. 552:13-15; 562:23-563:3; 243:20-25. In addition, Brittany and Taylor regularly visited Hazel throughout their entire lives, and Hazel bragged about them to her friends. Tr. 180:13-14; 231:3-6; Ex. 17, at 21:10-22. Finally, prior to the 2009 and 2010 amendments to her Trust, Hazel had an estate plan in effect for over ***52** fifteen years that distributed her estate evenly between her sons, Bruce and Dennis, or to their descendants. LF1 at 33; Tr. 280:2-24; LF1 at 45-46; Tr. 281:3-282:4.

It cannot reasonably be disputed that the March 29, 2010 Amendment was an unnatural and unjust disposition because it irrevocably disinherited Brittany and Taylor, with whom Hazel shared a close relationship throughout their entire lives.

4. Hazel Suffered From a Weakened Mental Capacity.

In Powell v. Hickman, the court examined whether there was substantial evidence to submit the issue of testamentary capacity to the jury. 793 S.W.2d 885, 889 (Mo. App. W.D. 1990). The Court's analysis focused heavily on the testatrix's deteriorating physical health in the months prior to, and after executing her will. Id. at 887, 890-91. Specifically, over a four month period her heart and kidney condition worsened, she lost weight, and became inactive. Id. She also became confused and disoriented. Id. Although she remembered who she was, she forgot she was in the hospital. Id. at 891. The Court found, "[c]onsidering this [standard of review], and the evidence, the trial court correctly submitted the issue of testamentary capacity to the jury." Id.

Like the testatrix in *Powell*, Hazel suffered from poor physical health in the months surrounding the March 29, 2010 Amendment to her Trust. Within a month after she executed the document, Hazel was admitted to the Lincoln County Medical Center. Tr. 470:10-14. The attending physician noted that she was "frail," and wrote under her "Assessment" that she had back pain, degenerative disc disease, a urinary tract infection, ***53** hypertension and hypothyroidism. Tr. 470:13-472:11; Ex. 13 at 858-860. [9] In addition, as discussed above, the attending physician noted that Hazel suffered from poor memory, disorientation, forgot she was in the hospital, and suffered from mild dementia for the past three to four months. Tr. 471:20-472:10 21; Ex. 13, at 859-860. Therefore, Hazel's poor physical health is another factor indicating that she did not possess sound mind.

Appellant mistakenly claims that Glover v. Bruce establishes that medical records are inadequate to prove lack of testamentary capacity if they are not joined with testimony from the attending physician. [10] App. Brief at 60. In Glover, the contested will was

executed on May 1, 1950, and the contestants relied primarily on evidence of the testatrix's medical records and health condition on June 25, 1950. See Glover v. Bruce, 265 S.W.2d 346, 347-351 (Mo. 1954). The Court first noted that the contestants did not present any testimony or facts indicating that the testatrix lacked sound mind. Id. at 352. The Court then examined the medical evidence and stated:

***54** While proof of the existence of such diseases on June 25, 1950, might sustain an inference as to their existence at some period prior thereto, there was no evidence that they did exist to any specified extent on May 1, 1950, or to any particular effect, or so as to render testatrix incompetent to make a will on that date and no inference to that effect could reasonably be drawn from contestant's evidence.

Id. at 353.

As a result, Glover did not hold that medical records without testimony cannot establish testamentary incapacity, but rather that medical records alone are insufficient. Here, Hazel's medical records from April, 2010 are in addition to the other substantial evidence presented, which established that she did not have testamentary capacity on March 29, 2010.

Moreover, in Sturm v. Routh, the Missouri Supreme Court found evidence that an individual possessed significant influence over a testator is a relevant factor indicating "the weakened condition of [the] testator's mind." 373 S.W.2d 922, 929 (Mo. 1964). In Sturm, the testator's daughter Frances contested his 1959 will amendment that disinherited Frances' family and left the entire estate to the testator's other daughter, Mary. Id. at 924. Mary did not speak with the testator from 1954 through 1959. Id. Frances, however, visited him nearly every day. Id. at 926. In 1959, Mary began seeing the testator again, but prevented Frances from visiting him. Id. at 924. In addition, Mary lied to the testator that Frances' husband stole money from the testator's company, which resulted in Frances and her husband being discharged from the board of directors. ***55** Id. at 926. Further, Mary convinced the testator to fire his old attorney and hire Mary's friend to write his will amendment. Id. at 928. Finally, Mary was elected to the board of directors of the testator's company. Id. As a result, the Court clarified that, "[w]e think those events tend to show that testator was in a weakened condition." Id.

Facts that concerned the Missouri Supreme Court in Sturm are present here. Prior to Bruce's death, Dennis only visited Hazel a few times per year. Tr. 273:2-14. In contrast, Brittany and Taylor visited Hazel once or twice a week for nearly their entire lives. Tr. 180:13-14; 231:3-6. Once Dennis re-entered Hazel's life, he actively prevented Brittany and Taylor from visiting their grandmother. For example, he did not notify them when Hazel was in the hospital, he moved Hazel to a nursing home without informing them, and he directed the nursing home staff to not allow Brittany or Taylor to see Hazel. Tr. Tr. 310:5-16; 311:18-20.

Furthermore, Dennis fired Hazel's advisors Sheller and Jim Beck, and replaced them with Rudy Beck, an attorney of his chosing. Tr. 303:2-15; Ex. 17, at 513; Tr. 303:6-304:6; 457:21-458:1; 304:7-10; 659:25-660:2.

Finally, as in Sturm, Dennis profited from re-entering Hazel's life to the detriment of his brother's children. After Bruce's death, Dennis was involved in three separate amendments to Hazel's Trust, all of which reduced, and eventually eliminated any interest Bruce's children had in her estate. Ex. 3; Ex. 4; Ex. 5. In addition, the amendments ensured that Dennis was the sole beneficiary and trustee over all of Hazel's real and personal property. Ex. 4; Ex. 5.

***56** Appellant argues that a parent conferring with her child does not indicate unsound mind, and cites Hannah v. Hannah in support. App. Brief at 58. In *Hannah*, the testator relied on his son for advice, but the Court found that merely relying on advice did not indicate testamentary incapacity, nor were there any facts that the son had any undue influence over the testator. 461 S.W.2d 854, 856-57 (Mo. 1971). Here, in contrast, there was substantial evidence that Dennis exerted undue influence over Hazel. [11] Dennis did not merely give Hazel advice, he made decisions for her. For example, regarding the March 29, 2010 Amendment, Dennis procured Rudy Beck to draft the amendment, Dennis handled the correspondence, Dennis provided the information for the amendment, Dennis reviewed the amendment, and Dennis paid Rudy Beck from Hazel's bank account. Tr.

304:7-10; 423:19-424:3; Ex. 9, at 1008; Tr. 428:4-20; Ex. 9, at 1001; 91:4-12. Hazel never corresponded with Rudy Beck, never spoke with him alone, and never saw the amendment prior to signing it. Tr. 424:4-6; 654:23-655:3; 306:23-24; 432:20-24.

C. CONCLUSION.

Based on the foregoing, there was substantial evidence that Hazel was without sound mind when she executed the March 29, 2010 Amendment to her Trust.

***57 III. THE TRIAL COURT DID NOT ERR IN OVERRULING DENNIS' MOTIONS FOR DIRECTED VERDICT AT THE CLOSE OF EVIDENCE AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN SUBMITTING TO THE JURY THE ISSUE OF HAZEL'S TESTAMENTARY CAPACITY WHEN SHE EXECUTED THE OCTOBER 20, 2009 AMENDMENT TO HER TRUST BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT SHE WAS WITHOUT SOUND MIND.**

A. STANDARD OF REVIEW.

Respondents adopt and incorporate by reference their statement of law relating to the applicable standard of review to determine substantial evidence of testamentary capacity as stated in Point II. Respondents reiterate that under the standard of review, this Court must disregard all of the Appellant's evidence and must grant all reasonable inferences that can be drawn from the whole evidence in Respondents' favor. See Byars, 461 S.W.2d at 819-20.

B. THERE WAS SUBSTANTIAL EVIDENCE THAT HAZEL LACKED TESTAMENTARY CAPACITY WHEN SHE EXECUTED THE OCTOBER 20, 2009 AMENDMENT.

Appellant contends that Respondents failed to adduce substantial evidence that Hazel lacked testamentary capacity at the time she executed the October 20, 2009 Amendment to her Trust; however, this amendment completely disinherited Brittany and Taylor, and made Dennis the sole beneficiary of Hazel's estate. Ex. 4.

***58** Respondents presented substantial evidence of Hazel's testamentary incapacity when she executed the October 20, 2009 Amendment by establishing that: (1) she did not understand the ordinary affairs of life; (2) she did not understand the nature and extent of her property; (3) she failed to recognize the natural objects of her bounty and did not understand that she was giving her property to the persons mentioned in the amendment in the manner stated; and (4) Hazel suffered from a weakened mental capacity due to her depression, weak physical condition, and Dennis' control over her.

1. Hazel Did Not Understand The Ordinary Affairs Of Life.

Courts have found that evidence of a testatrix's confusion and poor memory are relevant to assess whether she understood the ordinary affairs of life. See, e.g., Sturm, 373 S.W.2d at 929-930; Powell, 793 S.W.2d at 890-891; Byars, 461 S.W.2d at 819-829. In Sturm, the Court found it “significant” that the testator made statements about his estate plan that were inconsistent with his will and forgot how many children his daughter had. Sturm, 373 S.W.2d at 929. In Powell, the Court noted the testatrix “got confused at times and forgot recent events... She couldn't always remember what she had eaten the meal before, or what she had done the day before.” Powell, 793 S.W.2d at 890. Finally, in Byars, the Court found that the testator was “mentally confused” because he had wandered into the wrong bathroom, had difficulty subtracting numbers, and forgot how much a tenant owed him. Byars, 461 S.W.2d at 819.

Like the testators in Sturm, Powell, and Byars, there was substantial evidence that Hazel was mentally confused when she executed the October 20, 2009 Amendment. First, on September 18, 2009, Dennis sent an e-mail to Sheller that stated:

> ***59** My mother told Barb last night that she has requested that Brittany and Taylor be delisted from her Trust. I suggested that all four grandkids be removed from the Trust in order to avoid some future grievance. My mother agreed. I will inform her of this message and that she needs to follow up with this request. Ex. 7, at 516; Tr. 293:24-294:20 (emphasis added).

Viewing this evidence in the light most favorable to the Respondents indicates that Hazel agreed to disinherit Brittany and Taylor in order to avoid a future trust contest. Such logic is objectively ludicrous. No rational person would believe that devising her grandchildren's million dollar inheritance to an estranged uncle would prevent a future trust contest. [12] Agreeing to such a nonsensical proposal indicates that Hazel did not understand the ordinary affairs of life.

Further, in October, 2009, Hazel forgot that Princess moved out of the house. Tr. 344:10-22. When Princess went to check on Hazel after her hearing aids died, Hazel asked her why she had not visited recently. Tr. 344:5-9. Princess had to remind Hazel that she moved out of the house, and that her attorney had advised her not to visit because of the dispute over the house. Tr. 344:10-22.

In addition, similar to the testator in Sturm, Hazel made statements inconsistent with her estate plan because she told Princess that she would never amend her trust, ***60** despite the fact that at this point she had already made the January, 2009 Amendment and allegedly was planning on executing the October 20, 2009 Amendment. Tr. 345:1-7.

Also, there is a reasonable inference from the evidence presented that Hazel did not understand either the rent or guns dispute with Brittany and Taylor. Regarding the rent dispute, testimony indicated that Hazel twice agreed with Brittany over the rent. Tr. 196:23-197:21. However, after Dennis informed Brittany that the rent would be nearly three times the agreed amount, Taylor asked Hazel why Dennis was doing this, but Hazel was unable to respond. Tr. 240:10-15. The trial court could reasonably infer that Hazel, who prior to Bruce's death had always spoken her mind, could not explain the rent increase to Taylor because she did not understand. [13] Tr. 231:11-19. Further, regarding the guns dispute, Hazel had the same conversation with Taylor about the guns three times. Tr. 236:6-12. Taylor testified that it was as if she forgot that they had already discussed the issue. Tr. 236:6-12.

Moreover, there is evidence that Hazel could not remember daily events. Specifically, after Bruce died in November, 2008, Hazel began continually writing down everything she did so that she did not repeat herself. Tr. 213:17-214:8. When Taylor visited Hazel in January, 2010, he noticed that she continued to do this. Tr. 244:1-5.

***61 2. Hazel Did Not Understand The Nature And Extent of Her Property.**

Evidence that a testatrix was confused regarding the amount of property she owned, as well as evidence that another individual managed the testatrix's **financial** affairs are relevant factors indicating that the testatrix did not have sound mind. See Disbrow, 711 S.W.2d at 924-925. In Disbrow, the Court found that there was substantial evidence that the testatrix did not understand the nature and extent of her property because she failed to report more than half of her income on her tax returns, and because her son (the alleged undue influencer) had her bank statements and dividends mailed directly to his house, and paid her bills. Id. at 924-925.

Here, the issue between Hazel and Princess regarding the water bill indicated that Hazel did not understand the extent of her own property. After Princess moved out, she informed Hazel that she was no longer going to pay the water bill, and Hazel agreed to turn the water off. Tr. 339:24-340:14. However, the water company eventually turned the water back on. Tr. 341:1-16. When Princess called Hazel about this, Hazel asked why Princess did not pay it. Tr. 341:1-16. Like the testatrix in Disbrow, Hazel did not comprehend the extent of her own property. She still believed the house was Princess' responsibility.

Also, like the son in Disbrow who handled all of the testatrix's **financial** correspondence, the evidence showed that Dennis managed nearly all of Hazel's legal communications regarding her property. Dennis submitted the proposed language for the October 20, 2009 Amendment to Sheller. Ex. 7, at 516; Tr. 293:24-294:20. Further, ***62** Sheller's records reflect several conversations with Dennis regarding the amendment. Tr. 399:4-16. Sheller only had one notation in his records of ever speaking with Hazel regarding the amendment, and admitted that Hazel never saw the amendment prior to signing it.[14] Tr. 524:22-525:18; 401:24-402:1. Finally, Dennis handled nearly all of the correspondence and decisions regarding the settlement proposal with Princess, and ultimately fired Jim Beck. Tr. 450:9-12; 455:1-14; 457:21-458:1.

3. Hazel Failed to Recognize the Natural Objects Of Her Bounty.

In *Everly v. Everly*, the Missouri Supreme Court found that an "unnatural or an unjust disposition" was a relevant factor that courts could examine in determining whether the testator lacked testamentary capacity. 249 S.W. 88, 91 (Mo. 1923) ("...a harsh and unnatural disposition by the will in question, is a circumstance which tends to discredit the maker's testamentary capacity.").

Here, the October 20, 2009 Amendment completely disinherited Brittany and Taylor from Hazel's Trust. Ex. 4. They were Bruce's children, and Hazel grieved Bruce's death until she died. Tr. 552:13-15; 562:23-563:3; 243:20-25. In addition, they regularly visited Hazel throughout their entire lives, and Hazel often bragged about them to her friends. Tr. 180:13-14; 231:3-6; Ex. 17, at 21:10-22. Furthermore, during her alleged discussion with Grewach to amend her trust, Hazel never made any negative comments ***63** about them. Tr. 599:12-600:11. Sheller also testified that he had no records or examples of Hazel's relationship with Brittany or Taylor deteriorating in any way. Tr. 527:9-528:3. Finally, prior to the amendments at issue, Hazel's estate plan for over fifteen years had distributed her assets evenly between her sons or their descendants. LF1 at 33; Tr. 280:2-24; LF1, at 45-46; Tr. 281:3-282:4.[15]

4. Hazel Suffered from a Weakened Mental Capacity.

Courts have found that evidence indicating that the testatrix was depressed is also relevant in determining whether she possessed testamentary capacity. See, e.g., Byars, 461 S.W.2d at 819 (noting that the evidence indicated the testator "was often quite depressed..."); see also Sturm, 373 S.W.2d at 930. In Sturm, the Court noted that, "[i]t should be mentioned that testator was extremely depressed during the last few years of his life and would often cry, for no apparent reason, which of course indicates an abnormal mental state." 373 S.W.2d at 930.

Here, there was substantial evidence that Hazel was depressed due to Bruce's death. On November 18, 2009, Hazel's doctor, Dr. Baxter, noted that Hazel was still ***64** grieving Bruce's death nearly one year after his passing. Tr. 552:13-15; 562:23-563:3. Dr. Baxter had originally noted the extent of Hazel's depression in May, 2009, which evidently had not changed. Tr. 569:12-570:12. In addition, Dr. Baxter found that there was a physical change in Hazel because of her depression, which affected her facial appearance, skin, and demeanor. Tr. 567:6-11. As a result, Dr. Baxter had to discuss Hazel's mood with her at length, indicating that Hazel's depression was still greatly impacting her life. Tr. 567:25-569:7. Further, Princess testified that she became concerned with Hazel's depression in May, 2009. Tr. 378:9-16. Taylor visited Hazel in January, 2010, and noted that she was sad and cried often. Tr. 243:20-25.

In addition, Missouri courts have found, "[a]lthough sickness, old age, and mere eccentricities are insufficient to nullify a will on the ground of mental incapacity, each may be taken into consideration with other facts in determining testamentary capacity." Disbrow, 711 S.W.2d at 924; see also Powell, 793 S.W.2d at 890-891 (examining testatrix's deteriorating physical condition and ultimately finding she lacked sound mind). Here, there is substantial evidence that Hazel was physically weak when she executed the amendment.

At Hazel's November 18, 2009 doctor's appointment, Dr. Baxter noted that she had kyphosis (similar to hunched back), and wrote that Hazel had weight loss, joint pain, chronic fatigue, edema (swelling) in her lower legs, constipation, arthralgia (joint

pain), as well as abnormal anxiety and depression. Tr. 563:4-564:17. Under "Active Problems" Dr. Baxter noted abnormality of gait, psoriasis, sensory neural hearing loss, mild chronic ***65** kidney disease, senile osteoporosis, malaise, fatigue, congestive heart failure, hyperextension heart disease, hypothyroidism, frail, and malnutrition. Tr. 564:18-567:2.

Finally, In Sturm, the Missouri Supreme Court found that evidence indicating that an individual possessed significant influence over a testator is a relevant factor indicating "the weakened condition of [the] testator's mind." 373 S.W.2d at 929. Here, there is substantial evidence that Dennis had significant control over Hazel at the time of the October 20, 2009 Amendment to her Trust.

Dennis initiated the amendment by contacting Sheller to draft an amendment disinheriting Brittany and Taylor. Ex. 7, at 516; Tr. 293:24-294:20. Dennis managed the amendment process by remaining in contact with Sheller, while Sheller only allegedly spoke with Hazel once regarding the amendment. Tr. 399:4-13; 399:14-16; 524:22-525:18. Finally, after Hazel executed the amendment, Dennis fired Sheller and Hazel's attorney, Jim Beck, who was handling the property dispute with Princess. Tr. 303:2-15; 405:4-11.

Hazel never met with her attorney, Grewach, regarding this amendment disinheriting Brittany and Taylor. Tr. 409:21-410:1. There is no credible evidence that Hazel even spoke with him about it. Tr. 605:23-606:6. Hazel did not ask to review the amendment before signing it. Tr. 401:24-402:1. Nor did she request that her attorney be present when she read and signed it. Tr. 402:2-4. There was no notary present, as Sheller brought it back to his office for his daughter to notarize. Tr. 400:14-401:7. Jim Beck was present at the time for another matter, and could have offered a reasonable opinion ***66** regarding the document. Tr. 400:9-13. However, Hazel never asked him to review it, nor did Jim Beck have any idea what Sheller was having Hazel sign. [16] Tr. 450:21-452:15.

Appellant cites to Hannah v. Hannah to argue that Hazel relying on Dennis is not evidence of incapacity. App. Brief at 67. Again, Hannah is factually distinguishable because, in that case, there was no evidence of undue influence by the son over the testator. See Hannah, 461 S.W.2d at 857. Here, there is significant evidence that Dennis exercised undue influence over Hazel. [17] Further, as discussed above, Dennis managed and made decisions regarding the October 20, 2009 Amendment, and did not merely provide advice. Indeed, his email of September 18, 2009 became the amendment. Ex. 7, at 516.

C. CONCLUSION.

Based on the foregoing, there was substantial evidence that Hazel lacked testamentary capacity when she executed the October 20, 2009 Amendment to her Trust.

***67 IV. THE TRIAL COURT DID NOT ERR IN OVERRULING DENNIS' MOTIONS FOR DIRECTED VERDICT AT THE CLOSE OF EVIDENCE AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN SUBMITTING TO THE JURY THE ISSUE OF HAZEL'S TESTAMENTARY CAPACITY WHEN SHE EXECUTED THE JANUARY 12, 2009 AMENDMENT TO HER TRUST BECAUSE THERE WAS SUBSTANTIAL EVIDENCE THAT SHE WAS WITHOUT SOUND MIND.**

A. STANDARD OF REVIEW.

Respondents adopt and incorporate by reference their statement of law relating to the applicable standard of review to determine substantial evidence of testamentary capacity as stated in Point II. Respondents reiterate that under the standard of review, this Court must disregard all of Appellant's evidence and must grant all reasonable inferences that can be drawn from the whole evidence in Respondents' favor. See Byars, 461 S.W.2d at 819-20.

B. THERE WAS SUBSTANTIAL EVIDENCE THAT HAZEL LACKED TESTAMENTARY CAPACITY WHEN SHE EXECUTED THE JANUARY 12, 2009 AMENDMENT TO HER TRUST.

Appellant contends that Respondents failed to adduce substantial evidence that Hazel lacked testamentary capacity when she executed the January 12, 2009 Amendment to her Trust; however, this amendment was executed two months after Bruce's death, and it significantly increased Dennis' share of Hazel's estate at the expense of Bruce's children. Ex. 3.

***68** Respondents presented substantial evidence that Hazel lacked testamentary capacity when she executed the January 12, 2009 Amendment by establishing that: (1) she did not understand the ordinary affairs of her life; (2) she did not understand the nature and extent of her property; (3) she did not know the persons who were the natural objects of the bounty or understand that she was giving her property to the persons mentioned in said amendment to her trust in the manner stated; and (4) she suffered from a weakened mental capacity due to her depression over Bruce's death and Dennis' control over her.

1. Hazel Did Not Understand the Ordinary Affairs of Life.

Courts have found that evidence that a testatrix was confused or had poor memory is relevant in assessing whether she understood the ordinary affairs of life. See, e.g., Sturm, 373 S.W.2d at 929-930; Powell, 793 S.W.2d at 890-891; Byars, 461 S.W.2d at 819-829. Further, Missouri Courts have found that "[t]estimony from family, social, and business relations with an opportunity to observe conduct, habits, and mental peculiarities is entitled to great weight." Estate of Helmich v. O'Toole, 731 S.W.2d 474, 478 (Mo. App. E.D. 1987) (court relied on testimony from decedent's family and friends to find that she did not have sufficient mental capacity to sign a deed). Here, there was substantial evidence presented by Hazel's friends and family that after Bruce's death, she became confused and her memory suffered.

For example, Stacy Poertner and Gail Wright testified that Hazel was confused and forgetful at Bruce's funeral. Poertner grew up on a farm neighboring Hazel's, and when she was younger she saw Hazel on a weekly basis. Tr. 156:12-157:5. As an adult, ***69** she continued to see Hazel on holidays. Tr. 157:17-25. Significantly, at Bruce's funeral, Poertner spoke with Hazel, but Hazel failed to recognize her. Tr. 159:9-25. In fact, even after Poertner explained who she was, Poertner testified that "I didn't really feel that she really knew." Tr. 159:9-25.

Wright also attended Bruce's funeral, and also noticed Hazel's confusion and poor memory. Ex. 17, at 8:5-16; 9:24-25. Wright was Hazel's friend and neighbor for over twenty-five years, and remembered Hazel as being "very alert" and "very sharp" even in her old age. Ex. 17, at 7:21-8:16; 14:6-22. Yet, at Bruce's funeral, she testified that Hazel was "very, very, frail," "not as sharp mentally," "spacey," "vulnerable," and lamented that she did not know what she would do without Bruce. Ex. 17, at 10:5-13; 14:24-16:5; 43:8-11. Hazel also appeared to have forgotten that Wright moved away years prior, and asked if Wright would ever be in her old house again. Ex. 17, at 32:22-33:4.

Hazel's condition did not improve after the funeral. Brittany testified that Hazel began to repeat herself more often. Tr. 185:14-186:4. Taylor also testified that Hazel began repeating herself, which she did not normally do prior to Bruce's death. Tr. 232:11-19. Taylor further testified that Hazel began continually writing everything down that she did during the day, to prevent repeating herself. Tr. 213:17-214:8. Finally, Princess testified that Hazel was more confused following Bruce's death, and that she would sometimes forget that Bruce had died and claimed to hear him talk to her. Tr. 323:5-12; 373:1-8.

2. Hazel Did Not Understand The Nature And Extent Of Her Property.

***70** Evidence that another individual managed the **financial** affairs of the testatrix is a relevant factor in assessing whether the testatrix understood the nature and extent of her property. Disbrow, 711 S.W.2d at 925.

Here, the evidence shows that Dennis managed the entire January 12, 2009 Amendment. Two days after Bruce's funeral, Dennis took Hazel to meet with Sheller regarding the amendment. 283:11-284:15. Sheller's notes indicate that Dennis expressed his own views regarding the amendment. Tr. 385:9-16. Dennis also called Sheller the following day to suggest changes. Tr. 385:23-386:3. Specifically, he wanted Brittany and Taylor to receive 12.5% of the proceeds from Hazel's real estate, while granting 25% to his children and 50% to himself. Tr. 386:1-3. He also wanted 90% of Hazel's cash assets, while granting Taylor and Brittany each 2.5%. Tr. 386:1-3. Dennis' proposed changes ultimately became the January 12, 2009 Amendment. Ex. 3, at 2. Finally, Dennis brought Hazel to Sheller's office and watched her sign it. Tr. 289:2-8.

3. Hazel Failed to Recognize the Natural Objects Of Her Bounty.

In Everly, the Missouri Supreme Court found that an "unnatural or an unjust disposition" was a relevant factor that courts could examine in determining whether the testator lacked testamentary capacity. 249 S.W. 88, 91 (Mo. 1923) ("...a harsh and unnatural disposition by the will in question, is a circumstance which tends to discredit the maker's testamentary capacity.") (citing Meier v. Buchter, 94 S.W. 888 (Mo. 1906)). Here, the January 12, 2009 Amendment to Hazel's Trust is particularly "unnatural" and "unjust" based on the circumstances surrounding its creation and execution.

***71** Dennis and Hazel met with Sheller regarding the January 12, 2009 Amendment just two days after Bruce's funeral. Tr. 283:11-284:15. It is undeniable that Hazel was severely impacted by Bruce's death, as even Dennis admitted that she was "devastated." Tr. 291:12-292:1. In addition, the evidence indicated that Hazel was close with Brittany and Taylor, who regularly visited her twice a week for their entire lives. Tr. 180:13-14; 231:3-6. Further, Hazel often spoke warmly about Brittany and Taylor to her friends, and never had a bad thing to say about them. Ex. 17, at 21:10-22:6. While Appellant speculates that the disputes involving the rent and the guns affected Hazel's relationship with her grandchildren, neither of these had occurred by January 12, 2009. Tr. 325:14-326:10; 327:4-10; 234:20-25. Therefore, it seems "unjust," "harsh," and "unnatural" that Hazel, devastated by Bruce's death, went to meet with her **financial** advisor two days after Bruce's funeral in order to leave more money to Dennis at the expense of Bruce's children.

Moreover, there was no evidence presented regarding why Hazel wanted this amendment. Tr. 290:16-23. Both Hazel's **financial** advisor, Sheller, and her lawyer, Grewach, testified that they never asked Hazel why she wanted to significantly reduce Brittany and Taylor's shares of her estate shortly after the death of their father, nor did Hazel ever provide them with a reason why. Tr. 391:22-393:2; 408:19-21. In fact, Grewach never met with her to discuss this amendment, never took any measures to ensure that Hazel understood the significance of the amendment, and was not present at its execution. Tr. 408:8-23; 411:12-19. Even Dennis himself could not provide a reason ***72** why Hazel wanted to reduce her grandchildren's shares, and claimed that he "didn't think about it." Tr. 289:14-291:6.

Finally, prior to the January 12, 2009 Amendment, Hazel's estate plan was detailed in her 1992 trust, which equally distributed her assets between Bruce and Dennis, or their descendants. Ex. 1; Tr. 280:2-24. Although Hazel amended her Trust in 2003, the amendment maintained the same equal distribution. LF1, at 45-46; Tr. 281:3-282:4. As a result, it appears unnatural and unjust that Hazel wanted to change her estate plan of seventeen years immediately after Bruce's death, in order to reduce Bruce's children's shares. See Byars, 461 S.W.2d at 818-820 (court noted that the testator left his adopted daughter substantial benefits in first two wills, but only a minimal amount in the contested will; court went on to find that there was sufficient evidence of lack of testamentary capacity).

4. Hazel Suffered from a Weakened Mental Capacity.

Courts have found that evidence that the testatrix was depressed is also relevant is determining testamentary capacity. See, e.g., Byars, 461 S.W.2d at 819; Sturm, 373 S.W.2d at 930. Here, the evidence presented at trial unquestionably indicates that Hazel was suffering from severe depression and grief following the death of Bruce.

As a 92 year old woman, Hazel undoubtedly never imagined surviving her child, and she repeatedly lamented that she should have died instead of Bruce. Tr. 185:14-23. In addition, Hazel began shutting herself off from friends and family, and became indifferent. Tr. 373:8. While she used to attend church with Brittany every Sunday, she could no longer get herself to go following Bruce's death. Tr. 186:8-16. Hazel was also ***73** unable to go to Princess' family's Thanksgiving or Christmas parties after Bruce's death. Tr. 186:24-187:12. Brittany testified that she did not remember Hazel attending any family functions after Bruce died. Tr. 216:20-22.

Moreover, In Sturm, the Missouri Supreme Court found that evidence of an individual possessing significant influence over a testator is a relevant factor indicating "the weakened condition of [the] testator's mind." 373 S.W.2d at 929. Here, there is substantial evidence that Dennis possessed significant control over Hazel, whose mental condition was weakened from her grieving the sudden loss of Bruce, and that Dennis **exploited** this control to effectuate the January 12, 2009 Amendment to Hazel's Trust.

Historically, Hazel had been a strong-willed and independent woman. Tr. 181: 14-15; 231:11-16. However, she was devastated by Bruce's death and was overcome with grief. Ex. 17, at 32:9-14; Tr. 291:12-292:1. On November 11, 2008, two days after Bruce's funeral, Dennis took Hazel to meet with Sheller to reduce Brittany and Taylor's inheritance. Tr. 283:11-284:15. Afterwards, Dennis communicated with Sheller outside of Hazel's presence regarding the exact changes he wanted in the amendment. Tr. 385:23-386:3. The amendment reflected those suggestions exactly. Ex. 3, at 2. Dennis also brought Hazel to sign the amendment. Tr. 289:2-8. Hazel never met with her attorney regarding the amendment, never had her attorney read the amendment, and did not have her attorney present when she signed it. Tr. 408:8-23; 411:12-19.

C. CONCLUSION.

Based on the foregoing, there was substantial evidence that Hazel lacked testamentary capacity when she executed the January 12, 2009 Amendment to her Trust.

***74 V. THE TRIAL COURT DID NOT ERR IN DENYING DENNIS' MOTIONS FOR DIRECTED VERDICT AT THE CLOSE OF EVIDENCE AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN SUBMITTING TO THE JURY THE ISSUE OF UNDUE INFLUENCE IN THE EXECUTION OF THE MARCH 29, 2010 AMENDMENT BECAUSE RESPONDENTS PRESENTED SUBSTANTIAL EVIDENCE OF UNDUE INFLUENCE.**

A. STANDARD OF REVIEW.

Upon review, the Court does not determine whether there was undue influence, but rather examines "...whether or not the evidence, viewed favorably to the contestant, establishes facts from which the jury could have reasonably inferred undue influence." Matthews v. Turner, 581 S.W.2d 466, 472 (Mo. App. S.D. 1979).

Under Missouri law, a plaintiff establishes a presumption of undue influence if the evidence presented shows: "(1) that a confidential or fiduciary relationship existed between the testatrix and beneficiary; (2) that the fiduciary has been given a substantial bequest by the will; and (3) that the fiduciary was active in procuring the execution of the will." Simmons v. Inman, 471 S.W.2d 203, 206 (Mo. 1971). "When supported by probative evidence, the presumption makes a prima facie case which does not disappear upon the introduction of rebutting evidence and raises an issue for the jury." Carroll v. Knott, 637 S.W.2d 368, 370 (Mo. App. E.D. 1982).

***75 B. RESPONDENTS PRESENTED SUBSTANTIAL EVIDENCE AT TRIAL THAT THE MARCH 29, 2010 AMENDMENT WAS EXECUTED DUE TO THE UNDUE INFLUENCE OF APPELLANT.**

1. There Is A Presumption of Undue Influence Regarding the March 29, 2010 Amendment.

There was substantial evidence at trial that established a presumption of undue influence at the time Hazel executed the March 29, 2010 amendment. This was the third and final amendment to Hazel's trust, which was executed shortly before she moved into a nursing home and less than two months before her death.

First, Dennis was in a confidential relationship with Hazel at that time because she previously relied on him for her decisions and she appointed him as her durable power of attorney. Tr. 303:2-15; 405:4-11; 305:24-306:16; see also Disbrow, 711 S.W.2d at 925 (court found relying on others to handle property or business affairs creates confidential relationship). Second, Dennis substantially benefited from the March 29, 2010 Amendment because he received Hazel's entire estate worth nearly $2 million. Ex. 5; Tr. 690:15-21. Finally, Dennis actively procured the March 29, 2010 Amendment by hiring Rudy Beck to prepare the documents, managing all of the correspondence, reviewing the draft prior to its execution, and bringing Hazel to Rudy Beck's office to sign it. Tr. 304:7-10; 421:22-422:19; 424:4-6; 428:4-20; Ex. 9, at 1001; 205:21-206:1; 306:14-22. Despite the presence of rebuttal evidence, the trial court had to submit the issue to the jury. See Carroll, 637 S.W.2d at 370.

***76** The only element of the presumption that Appellant challenges is whether Dennis substantially benefited from the March 29, 2010 Amendment. App. Brief at 74-75. Appellant claims that since Dennis was also the sole beneficiary under the October 20, 2009 Amendment, he did not receive a substantial benefit under the March 29, 2010 Amendment. App. Brief at 74. Appellant's argument is devoid of merit. First, Dennis received Hazel's nearly $2 million estate under the amendment. Ex. 5; Tr. 690:15-21. Thus, it is illogical to claim he "clearly obtained no pecuniary benefit." App. Brief at 74.

Moreover, Appellant's argument offends the principles of equity inherent in these actions. Respondents' evidence proved that Dennis exercised undue influence to effectuate all three amendments to Hazel's Trust. LF1 at 22-24. Dennis acquired all of Hazel's estate under the October 20, 2009 Amendment, and then procured the March 29, 2010 Amendment in an attempt to ensure that his devise was irrevocable. According to Appellant's argument, although Dennis unduly influenced Hazel to receive her entire estate under the October 20, 2009 Amendment, he can escape the presumption of undue influence for the March 29, 2010 Amendment simply because he remained the sole beneficiary. Simply put, since he was already receiving everything, he did not gain any substantial benefit by furthering the same bequest. Under this twisted logic, a wrongdoer could unduly influence a testatrix to grant her entire estate to him, but then avoid the presumption of undue influence by having her amend the Trust an additional time with the same distribution scheme. Such a result would encourage fraud and the manipulation of those, like Hazel, who are vulnerable to undue influence.

***77** Both cases cited by Appellant are easily distinguishable. App. Brief at 74-75. In Baker, the court found that Mr. Baker did not substantially benefit from the challenged 1942 will because he received the same disposition that he would have received under the testatrix's previous will. See Baker v. Spears, 210 S.W.2d 13, 19 (Mo. 1948). Of utmost importance, however, is the fact that the contestants did not claim that Baker unduly influenced the previous will. Id. at 16. Similarly, in Hammonds, the previous will was not challenged for undue influence, and was not even presented into evidence. Hammonds v. Hammonds, 297 S.W.2d 391, 395 (Mo. 1957). The present case is obviously different.

2. There was Substantial Evidence of Undue Influence Even in the Absence of A Presumption.

Even without the benefit of the presumption, Respondents presented substantial evidence of undue influence. Courts examine several other factors to determine whether undue influence was exerted, such as:

> (1) the mental and physical condition of the testator; (2) evidence of power and opportunity to influence the testator by the beneficiary; (3) whether the will makes an unnatural disposition of property; (4) whether the bequest constitutes a change from a former will; (5) the hostile feelings of the beneficiary toward an expected recipient; (6) remarks of the beneficiary derogatory of the contestant; and (7) actions of the beneficiary in discouraging visits by others.

See Disbrow, 711 S.W. at 925.

Here, Hazel was in a weakened mental and physical condition, as evidenced by records concerning her hospitalization a few weeks after executing the amendment and ***78** her death shortly thereafter. Tr. 470:10-14. Dennis' influence over Hazel is clear in that he hired, corresponded with, and paid the attorney that drafted the amendment. Tr. 304:7-10; 421:22-422:19; 428:4-20; 306:14-22. In addition, the amendment made an unnatural disposition by disinheriting Brittany and Taylor, which was a drastic change from Hazel's prior estate plan. Ex. 5; LF1 at 33; Tr. 280:2-24. Dennis also expressed hostile feelings towards Brittany when he escorted her out of Hazel's house when she arrived on March 29, 2010 and told her never to return. Tr. 205:21-206:1. Finally, and significantly, Dennis prevented Brittany and Taylor from visiting Hazel by instructing the nursing home not to allow them to see her and complaining to the staff when Brittany visited Hazel with her daughter. Tr. 310:19-311:17; Ex. 14, at 111.

C. CONCLUSION.

For the foregoing reasons, there was substantial evidence that Dennis unduly influenced the March 29, 2010 Amendment and the trial court properly submitted the issue to the jury.

***79 VI. THE TRIAL COURT DID NOT ERR IN DENYING DENNIS' MOTIONS FOR DIRECTED VERDICT AT THE CLOSE OF EVIDENCE AND FOR JUDGMENT NOTWITHSTANDING THE VERDICT, AND IN SUBMITTING TO THE JURY THE ISSUE OF UNDUE INFLUENCE IN THE EXECUTION OF THE OCTOBER 20, 2009 AMENDMENT BECAUSE RESPONDENTS PRESENTED SUBSTANTIAL EVIDENCE OF UNDUE INFLUENCE. A. STANDARD OF REVIEW.**

Respondents adopt and incorporate by reference their statement of law relating to the applicable standard of review to determine substantial evidence of undue influence as stated in Point V.

B. RESPONDENTS PRESENTED SUBSTANTIAL EVIDENCE AT TRIAL THAT THE OCTOBER 20, 2009 AMENDMENT WAS EXECUTED DUE TO THE UNDUE INFLUENCE OF APPELLANT.

1. There Is A Presumption of Undue Influence regarding the October 20, 2009 Amendment.

The evidence presented at trial established a presumption of undue influence with respect to the October 20, 2009 Amendment, which was the amendment making Dennis the sole heir to Hazel's estate. First, Dennis was in a confidential relationship with Hazel because she relied on him to make property and business decisions for her. Tr. 334:1-21; see also Wilhoit v. Fite, 341 S.W.2d 806, 813-14 (Mo. 1960). For example, when Jim Beck presented Hazel with Princess' settlement offer, Hazel could not make a decision, ***80** and deferred to Dennis. Tr. 450:6-12; 455:1-14. Dennis fired both of Hazel's advisors, Jim Beck and Sheller. Ex. 17 at 513. Dennis effectively prepared the October 20, 2009 Amendment, as the evidence indicates that there was only one conversation between Sheller and Hazel prior to executing the document, and Sheller only corresponded with Dennis throughout the process. Tr. 524:22-525:18; 293:24-294:20; 399:4-13; 399:14-16; 403:16-21.

Second, Dennis received a substantial benefit from the October 20, 2009 Amendment because it named him the sole beneficiary of Hazel's entire estate. Ex. 4.

Finally, Dennis was active in procuring the amendment because he made the arrangements involving its preparation and execution. See Disbrow, 711 S.W. at 926. He initiated the October 20, 2009 Amendment via e-mail to Sheller stating:

> My mother told Barb last night that she has requested that Brittany and Taylor be delisted from her Trust. I suggested that all four grandkids be removed from the Trust in order to avoid some future grievance. My mother agreed. I will inform her of this message and that she needs to follow up with this request.

Ex. 7, at 516; Tr. 293:24-294:20.

He also called Hazel and told her to remove Brittany and Taylor from her Trust. Tr. 295:13-296:9. In addition, he spoke with Sheller the night before the amendment's execution, as well as the morning of. Tr. 399:4-16. After Hazel signed the document, Sheller called Dennis to inform him that the amendment was executed, and to answer his questions. Tr. 403:16-21. Thus, the evidence established a presumption of undue ***81** influence, and the trial court properly submitted the matter to the jury. See Carroll, 637 S.W.2d at 370.

2. There was Substantial Evidence of Undue Influence Even in the Absence of A Presumption.

As stated in Point V, in the absence of a presumption of undue influence, courts examine several other factors to determine whether undue influence was exerted, such as:

> (1) the mental and physical condition of the testator; (2) evidence of power and opportunity to influence the testator by the beneficiary; (3) whether the will makes an unnatural disposition of property; (4) whether the bequest constitutes a change from a former will; (5) the hostile feelings of the beneficiary toward an expected recipient; (6) remarks of the beneficiary derogatory of the contestant; and (7) actions of the beneficiary in discouraging visits by others.

See Disbrow, 711 S.W. at 925.

These factors are present in the instant case. For example, Hazel had a weakened mental and physical condition when she executed the October 20, 2009 Amendment, as evidenced by her severe depression following Bruce's death and her poor health. Tr. 552:13-15; 562:23-563:3; 564:4-567:2. In addition, the amendment constituted a drastic change from Hazel's former estate plan, as it completely disinherited Bruce's children. Ex. 4. Further, Dennis exhibited hostile feelings towards Taylor by demanding that he return Bruce's guns. Tr. 301:9-302:8. Dennis also stated that Taylor and Brittany's childhood home did not belong to them anymore, and that they had no interest in it. Tr. ***82** 239:1-6. Finally, he raised the rent to prevent Brittany from moving in to her old home which prevented her from being close to Hazel. Tr. 197:22-199:1.

C. CONCLUSION.

For the foregoing reasons, there was substantial evidence presented indicating that Dennis unduly influenced the October 20, 2009 Amendment and the trial court properly submitted the issue to the jury. [18]

***83 VII. THE TRIAL COURT DID NOT ERR IN ENTERING JUDGMENT DECLARING THE JANUARY 12, 2009 AMENDMENT VOID BECAUSE IT DID HAVE JURISDICTION TO ADJUDICATE SAID AMENDMENT'S VALIDITY IN THAT APPELLANT DID NOT PROPERLY PRESERVE THE ISSUE OF WHETHER THE TRIAL COURT FAILED TO JOIN ALLEGEDLY INDISPENSIBLE AND NECESSARY PARTIES.**

A. APPELLANT FAILED TO PRESERVE THIS ISSUE FOR APPEAL BY RAISING THIS ISSUE ON APPEAL FOR THE FIRST TIME.

Rule 55.27(g)(2) states:

A defense of... failure to join a party indispensable under Rule 52.04... may be made in any pleading permitted or ordered under Rule 55.01 or by motion for judgment on the pleadings.

Id. Prior to January 1, 2012, Rule 55.27(g)(2) stated that a defense of failure to join a necessary and indispensable party could be raised: "... by motion for judgment on the pleadings... or on appeal." See Stander v. Szabados, 407 S.W.3d 73, 81 (Mo. App. W.D. 2013) (emphasis in original). Effective January 1, 2012, however, the Missouri Supreme Court removed that language, indicating that parties can no longer raise this defense for the first time on appeal. Id.

In addition, on August 16, 2013, the Missouri Supreme Court issued an en banc order revising the Missouri Approved Jury Instructions in order to reflect this new rule. See Mo. Sup. Ct. Order dated August 16, 2013, re: Revisions to MAI-Civil. As a result of this order, page LXI of the Missouri Approved Jury Instructions now states:

> ***84** CAUTION: MALPRACTICE ALERT. Amendments to Rules 55.27(g)(2)... require that allegations of error (including sufficiency or deficiency of pleadings) be presented to and expressly decided by the trial court in order to preserve those issues for appellate review. Such issues may no longer be raised for the first time on appeal and must be raised in a post-trial motion (and possibly earlier if so required by the rules). THIS IS A MAJOR CHANGE IN THE MISSOURI PROCEDURAL REQUIREMENTS FOR PRESERVATION OF ERROR ON APPEAL.

Missouri Approved Jury Instructions, at LXI (7th ed.) (emphasis in original).

Appellant admits that the issue of whether Brock and Brady were necessary and indispensible parties was not preserved on appeal. App. Brief at 88. Appellant argues, however, that since the case was originally filed in 2010, it would constitute an "injustice" for the Appellant to have to abide by the Missouri Rules of Civil Procedure. LF 1; App. Brief at 88. Appellant cites to Tipton v. Joseph-Tipton to support his claim. App. Brief at 88. However, the facts of Tipton do not support Appellant's position.

In Tipton, Rule 78.07(c) went into effect during the 30 day period in which the trial court retained control over its judgment, thus the mother/appellant only had days to discover the rule and file a motion to amend the judgment in order to preserve the issue on appeal. Id. at 693-694. In addition, the Court noted that the trial court was on notice of the issue, but ignored the mother's post-trial motion. Id. at 694. Therefore, the Court found that an "injustice" would occur by applying the rule to the pending proceeding, and therefore permitted the issue on appeal.

The present matter is easily distinguished from Tipton. In the present case, Rule 55.27(g)(2) had been in effect for nearly two years prior to October, 2013, Appellant's deadline to file a proper pleading or motion. LF 9. Thus, Appellant had ample time to ***85** meet the Rule's requirements. As such, unlike Tipton where the appellant had only a matter of days, it is not an injustice to hold Dennis accountable to the Rule. See In re Marriage of Bottorff, 221 S.W.3d 482, 486 (Mo. App. S.D. 2007) (court found no injustice occurred when significant amounts of litigation, as well as the trial itself, occurred after the effective date of the new rule).

Moreover, it would be an injustice to Respondents to allow Appellant to raise this issue for the first time on appeal. Appellant gave neither the Respondents, nor the Circuit Court, any notice or opportunity to rectify this alleged error. See In re Marriage of Bottorff, 221 S.W.3d at 486 (court found no injustice occurred under Rule 41.06 when neither party gave the trial court prior notice of its failure to rely on the statutory factor, but raised the issue for the first time on appeal).

Finally, the language of Rule 41.06 requires newly enacted Missouri Civil Procedure Rules to apply to current proceedings, unless it "would not be feasible or would work injustice." Rule 41.06. (emphasis added). It is clearly feasible that two years was sufficient time for Appellant to file a pleading or motion alleging that Respondents failed to join a necessary party. In addition,

applying the current version of Rule 55.27(g)(2) to this proceeding does not impose an "injustice" because, in effect, Appellant represented any interest that his children would have had by defending the validity of the Trust Amendments.

B. CONCLUSION.

For the foregoing reasons, this Court should find that Appellant failed to properly preserve this issue for appeal or, in the alternative, that Appellant's children were not ***86** necessary parties as their interests were represented at the trial of this matter by Appellant.

For the reasons stated herein, the judgment should be affirmed.

Footnotes

1 Grewach denied that Sheller worked with him on the amendment. Tr. 407:25-408:7.

2 Hazel saw her doctor in May, 2009, who also noted that Hazel was having difficulty dealing with Bruce's death. Tr. 569:12-570:13.

3 Both acts are clear violations of the procedures for members of the National Academy of **Elder** Law Lawyers, of which Rudy Beck is an alleged member. Tr. 655:8-658:15.

4 The same standard of review applies to determine if a trial court correctly rejected a motion for directed verdict or a motion notwithstanding the verdict. See Ellison v. Fry, 437 S.W.3d 762, 768 (Mo. 2014).

5 Significantly, the Missouri Supreme Court clarified that testamentary capacity does not have to only be present on the date of the Trust's execution, otherwise "...a person who has successfully concealed his or her exertion of power over the victim would need only to hide him or her from others on the date of execution." Ivie, 439 S.W.3d at 202. Here, a jury could reasonably infer that this is exactly what Dennis was doing on March 29, 2010, when he ensured that Brittany did not get a chance to visit with Hazel before he took Hazel to sign the amendment.

6 In his brief, Appellant repeatedly relies on evidence that Appellant submitted at trial to support his claim. App. Brief at 60, 62. Appellant misunderstands the standard of review, as the Court must reject all evidence presented by Appellant unless it supports Respondents' case. Byars, 461 S.W.2d at 819-20.

7 In *Sturm v. Routh*, the Missouri Supreme Court found substantial evidence that the testator lacked sound mind, noting that he forgot the number of children his daughter had. 373 S.W.2d at 929. The Court found this fact was especially relevant because the testator and his daughter had lived in the same small town for years. Id. Here, Brittany and Hailee lived in Lincoln County a few miles from Hazel's house their entire lives, and visited Hazel regularly. Tr. 199:7-14.

8 This factor is still considered by courts in assessing testamentary capacity See, e.g., Milum v. Marsh ex rel. Lacey, 53 S.W.3d 234, 239 (Mo. App. S.D. 2001).

9 Hazel died nearly two months after the March 29, 2010 Amendment, and "Cachexia" was listed as a cause of death on her death certificate. Tr. 472:2-24; Ex. 11. According to Merriam-Webster's Medical Dictionary, Cachexia is "general physical wasting and malnutrition usually associated with chronic disease." Merriam-Webster's Online Dictionary, available at http://www.merriam-webster.com/dictionary/cachexia.

10 Appellant also cites Dolan v. Higman, however that case is distinguishable because it involved a conservatorship, and did not address testamentary capacity. See Dolan v. Higman, 228 S.W.3d 588 (Mo. App. W.D. 2007).

11 For full examination, see Points V and VI.

12 Indeed, it begs for the opposite conclusion and effect. Notably, Dennis himself was unable to provide a rationale for how disinheritance would avoid a trust contest. Tr. 296:16-297:5.

13 In Sturm v. Routh, the Court noted that the testator's daughter was unable to "get through to him" during two conversations regarding why testator fired her husband, which allegedly occurred due to the undue influence of her other sister. Sturm, 373 S.W.2d at 926. Id.

14 Hazel's attorney, Grewach, also claimed to have spoken with Hazel prior to the amendment; however, his billings and file did not reflect that such a conversation ever occurred. Tr. 410:2-14; 605:23-606:6.

15 In Byars, the Missouri Supreme Court noted that the testator had always "had a feeling of love and admiration" for his adopted daughter, who received a substantial benefit from his first two wills, yet was left a miniscule disposition in the contested will. 461 S.W.2d at 818-819. The Court found that this, as well as the other evidence presented, indicated that there was substantial evidence to present the issue of testamentary capacity to the jury. Id. at 820.

16 There is a reasonable inference that Hazel did not take these precautions because she did not understand the significance of what she was signing. See Byars, 461 S.W.2d at 819.

17 For a full examination, see Points V and VI.

18 Significantly, Appellant does not challenge the sufficiency of the evidence concerning Dennis' undue influence in connection with the earliest amendment to Hazel's Trust dated January 12, 2009.

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