2013 WL 956842 (La.App. 3 Cir.) (Appellate Brief)
Court of Appeal of Louisiana, Third Circuit.

SUCCESSION OF MARY GUSTAVIA LEDET,
Succession of Mary LEDET.

Nos. CA 13-50, CA 13-51.
February 22, 2013.

On Appeal from the Sixteenth Judicial District Court, Parish of St. Martin,
Suit Numbers 14571 C/W 14636, the Honorable Gerard B. Wattigny, Presiding
A Civil Proceeding

Appellant's Original Brief

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*1 STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article V, Section 10, of the Louisiana Constitution of 1974, as amended.

*2 STATEMENT OF THE CASE

This matter came before the District Court on the motion of Appellee, Vincent Alexander ("Alexander"), who sought to invalidate two authentic acts: (1) that certain Last Will and Testament executed by Mary Ledet ("Mary") on January 12, 2009, whereby she bequeathed to her cousin and Appellant herein, Gloria Amos ("Gloria"), all of her property (the "Will") **CA 13-51 C/W 13-50 Exhibit, 32;** and (2) that certain Act of Donation executed by Mary and Gloria on March 31, 2009, whereby she donated to Gloria her residence and the lots upon which is was situated, but reserving for herself the usufruct for the remainder of her life (the "Donation") **CA 13-51 C/W 13-50 Exhibit, 20.** In support of same, Alexander contended that Gloria used undue influence and fraud to induce Mary to execute the Will and the Donation. Additionally, Alexander contended that the Will was altered, and thus, should be declared invalid. Finally, Alexander sought to remove Gloria as Administratix of Mary's Estate and for an accounting. **CA 13-51 C/W 13-50 TR, 48.**

Mary was born on XX/XX/1929 to her parents, Joseph Alexander and Clothilde Castille. **CA 13-51 C/W 13-50 Exhibit, 48.** Mary was a very strong woman, who did only what she wanted to do, and was not influenced by others. **CA 13-51 C/W CA 13-50; TR 447, 11. 8-12.** At 78 years of age, Mary was a longtime widower and had lived alone at her residence in Breaux

Bridge for some time; she liked to handle all of her own **financial** affairs. **CA 13-51 C/W CA 13-50 Exhibit, 48; TR 278, 11. 10-14.** Mary had no children but she did have six half siblings, one of which is Alexander. **CA 13-51 C/W 13-50 Exhibit, 16.**

Mary and Alexander shared the same father, Joseph Alexander. Mary and Alexander were very close, for a long time up until 2008. **CA 13-51 C/W 13-50; TR 353, 11. 27-28.** Mary took care of Alexander for a long time and treated him like a son but became very upset with him starting in 2008 when she felt that he ***3** abandoned her while she was at St. Martin Hospital. **CA 13-51 C/W 13-50; TR 478, 11. 15-18.**

Appellant, Gloria, and Mary shared a personal relationship for many years. Gloria came to know Mary, on a personal basis, through Gloria's mother-in-law, Agnes Amos ("Agnes"). **CA 13-51 C/W CA 13-50; TR 219, 11. 21-24.** Gloria cared for Agnes for approximately fifteen years, during which time Agnes and Mary were co-workers and best friends. **CA 13-51 C/W CA 13-50; TR 220, 11. 8-9; 255, 11. 3-8.** During this time, Gloria became to know Mary very well, and spoke to and visited with her on a regular basis, which consisted of "hundreds" of times. **CA 13-51 C/W CA 13-50; TR 258, 11. 26-32.**

Although contested at trial, Gloria shared a famial relationship with Mary as well. Gloria's mother, Mary Eve Alexander's father by adoption, Felton Alexander, and Mary's father, Joseph Alexander, were brothers. **CA 13-51 C/W 13-50; TR 423-424, 437; 418, 11. 23-30; 422.** As a child Gloria lived across the street from Joseph Alexander, **CA 13-51 C/W CA 13-50; TR 427, 11. 19-26.** Gloria's mother cared for Joseph Alexander prior to his death; he lived with Gloria and her family for some time when Gloria was a youth; and, as a youth, Gloria took vacations with him to Astroworld and to visit other family in Houston, Texas. **CA 13-51 C/W CA 13-50; TR 263, 11.10-13; 427, 11. 25-30.**

Moreover, Gloria is also related to Mary on Mary's mother side of the family. Gloria's grandmother, Mary Rose Castille, and Mary's mother, Clothilde Castille, were cousins. **CA 13-51 C/W CA 13-50; TR 259, 11. 28-31; 424, 11. 27-28; 442.**

In the latter part of 2008, Mary was admitted to St. Martin Hospital for health issues. Unfortunately, Mary had to stay at St. Martin Hospital for three to four months because her doctor, Dr. Debra Durnham, would not release her to go home alone, and Mary had not found anyone to stay at her home with her. **CA 13- *4 51 C/W CA 13-50; TR 456, 11. 16-32; 460, 11. 6-25.** During this time, Gloria's daughter, Latayra Alexander ("Latayra"), worked at St. Martin Hospital, served as Mary's nurse, and became very close to her cousin, Mary. **CA 13-51 C/W CA 13-50; TR 454, 11. 27-29; 455, 11. 23-29.** While at St. Martin Hospital, Mary told Latarya that Dr. Durham would not release her to live at home without someone there to take care of her. CA 13-51 CA 13-50; TR 456,11.19-32. Mary told Latarya that she did not want to have people in her house that she did not know; she wanted family to live with her at her house. **CA 13-51 C/C/W CA 13-50; TR 457,11.15-16.** After Mary told Latarya that she did not have anyone to take care of her, Latarya went and talked to Mary's sister, Jan Alexander ("Jan"), who also worked at St. Martin Hospital at that time, and asked Jan if she could help Mary. **CA 13-51 C/W CA 13-50; TR 456,11. 32; 457,11.1-2; 457,11. 24-32; 458,11.1-6.** Jan told Latarya that she could not help out her sister, and that she did not want anything to do with it. **CA 13-51 C/W CA 13-50; TR 457, 11. 2-3; 458, 11. 2-6.** Latarya asked Jan why she did not want to have anything to do with it, and Jan told her that she did not want to deal with Alexander. **CA 13-51 C/W CA 13-50; TR 458,11. 7-17.** Alexander refused to care for Mary at her home too. **CA 13-51 C/W 13-50; TR 386,11. 21-24; Exhibit, 15.**

Mary told Latarya that she did not have money, but she would give Latarya her home and stuff if Latarya would move in with her and take care of her at her home. **CA 13-51 C/W CA 13-50; TR 461, 11. 18-23.** Prior to this time, Mary had made the same offer to her cousin, Martha Alexander ("Martha"), but Martha turned down the offer. **CA 13-51 C/W CA 13-50; TR 446, 11. 18-24.** Martha offered Mary to live with her at Martha's house, but Mary refused because she wanted to go home. **CA 13-51 C/W CA 13-50; TR 446, 11. 23-28.**

Latarya felt bad for Mary and wanted to help but could not do it herself, so, she asked her mom, Gloria, for help because of her history of caring for people. ***5 CA 13-51 C/W CA 13-50; TR 459, 11. 3-14.** Gloria asked her other daughter, Crystal Amos ("Crystal"), if she could help out Crystal said she could move in with Mary, which would afford Mary a caretaker every night. **CA 13-51 C/W 13-50; TR 263, 11. 27-32.** And, Latayra agreed to quit her job at St. Martin Hospital so that she, with

the help of Gloria, could take care of Mary during the day, thus giving Mary full-time care. **CA 13-51 C/W CA 13-50; TR 460, 11. 31-32; 461, 11. 7-17.** Gloria discussed this arrangement with her daughters, Dr. Durham and Mary; they all agreed to same; and Dr. Durham released Mary to return home with Gloria in December of 2008 given the arrangements made. **CA 13-51 C/W CA 13-50; TR 263, 11. 24-32.**

Alexander was very upset with this arrangement. Alexander owns a Home Health Agency, and he wanted his Agency to provide caretakers to Mary. **CA 13-51 C/W 13-50;** Exhibit, 15. In order to do this; however, he needed Mary to be placed in a Sniff Unit for up to 100 days in furtherance of satisfying requirements that would allow his Agency to furnish such care. **CA 13-51 C/W 13-50; TR 373, 11. 23-26;** Exhibit, 15. Despite Mary telling Alexander that she did not want to go to the Sniff Unit for any amount of time, Alexander, in December of 2008, via his Power of Attorney for Mary, filled out an application for same. **CA 13-51 C/W 13-; Exhibit, 15.** Unhappy with Alexander, Mary then decided that she wanted to give Gloria a power of attorney so Gloria, rather than Alexander, could assist her with things, and asked Gloria if she knew someone who could prepare this agreement for her. **CA 13-51 C/W 13-50; TR 273, 11. 7-13.** At Mary's request, Gloria called Norman Landry ("Norman") to set an appointment for Mary **CA 13-51 C/W CA 13-50; TR 319, 11. 25-27.** Mary then went to Norman's office to discuss the power of attorney **CA 13-51 C/W CA 13-50; TR 319, II. 28-30.** Thereafter, on December 17, 2008, Mary executed a power of attorney in favor of Gloria. **CA 13-51 C/W CA 13-50; TR 317,11.1-5.**

***6** Given Alexanders increasing and harassing conduct, Mary also decided to leave her property to Gloria, rather than Latarya or Crystal, since she felt Gloria would be better suited to deal with Alexander. **CA 13-51 C/W CA 13-50; TR 464,11.13-27.** Mary told Latarya that she did not want Alexander to have what she has and that she was hurt by all that was going on because she raised Alexander as a son and it hurt her that when she was really sick he was not there for her when she needed him and she didn't understand why. **CA 13-51 C/W CA 13-50; TR 464,11. 24-27.** Alexander never visited Mary in the 3-4 month span at St. Martin Hospital, at least while Latarya was on duty, and Alexander was trying to put Mary in a Sniff Unit against her wishes. **CA 13-51 C/W CA 13-50; TR 458,11. 25-29.** Alexander did not visit Mary on her 79th birthday, XX/XX/2008, as well. **CA 13-51 C/W 13-50; TR 475, 11. 31-32.** Regardless, Mary had a pleasant birthday with Gloria, Latarya and family, as shown in the attached photographs. **CA 13-51 C/W 13-50; Exhibit, 3.**

Mary then requested that Norman prepare a Last Will and Testament for her. **CA 13-51 C/W CA 13-50; TR 324, 11. 14-32; 325, 11. 1-3.** And, on January 12, 2009, after meeting with Norman and discussing the terms of her Will, Mary executed the Will, whereby Mary bequeathed her property to "her cousin, Gloria Jean Amos". **CA 13-51 C/W CA 13-50; TR 333,11. 29-3; and CA 13-51 C/W 13-50 Exhibit, 32.**

After Alexander found out about the Will, in February of 2009, he contacted Howard Alexander ("Howard"), an investigator with the Louisiana Office of **Elderly** Affairs ("**Elderly** Affairs"), and asked him, informally, to check on Mary, claiming that Gloria was neglecting Mary and that Mary did not have capacity to make her own decisions. **CA 13-51 C/ CA 13-50; TR 304; 11. 25-30; 305,11. 1-2.** At or around February 17, 2009, Howard met with Mary and spoke to Gloria, ***7** but did not find any wrong doing. **CA 13-51 C/W CA 13-50; TR 314,11. 22-26; CA 13-51 C/W 13-50; TR 373,11. 23-26; Exhibit, 15.**

Next, on or about March 6, 2009, Alexander filed a formal complaint with **Elderly** Affairs alleging that Mary was being mistreated by Gloria and her daughters. **CA 13-51 C/W 13-50; TR 493,11. 28-31.** In response to same, Howard was appointed to investigate the allegations. **CA 13-51 C/W 13-50; TR 292,11.30-31.** Following his investigation, Howard concluded that Mary had full capacity; there were no signs of abuse, neglect or undue influence; and that she was happy with, and wanted to maintain, the care/living arrangement with Gloria and Gloria's daughters. **CA 13-51 C/W 13-50; TR 305,11.1-11; 307,11. 4-10.**

Unhappy with this finding, Alexander then filed a complaint with **Elderly** Affairs against Howard, alleging a conflict of interest, and demanding another investigation. **CA 13-51 C/W 13-50; TR 309,11. 20-26.**

In the meantime, Alexander forced, via his Power of Attorney of Mary, an "OPC " order to have Mary evaluated at Genesis Behavioral Hospital ("Genesis"), because he felt she was making bad decisions. **CA 13-51 C/W CA 13-50; TR 371, 11. 30-32.**

And, on March 11, 2009, Alexander and deputy police officer for went to Mary's house to execute the "OPC" Order. **CA 13-51 C/W CA 13-50; TR 399,11.5-15; 400, 11. 13-15.** This was the first time Alexander came to Mary's house following her discharge from St. Martin Hospital. **CA 13-51 C/W CA 13-50; TR 467,11.10-13.** Mary asked Alexander what was going on but Alexander would not answer her or even look at her. **CA 13-51 C/W CA 13-50; TR 467, 11. 17-19.** Alexander told the police officer to get Latarya out of the house and to take Mary out and the police officer grabbed Mary underneath her arms and brought her to the police car. **CA 13-51 C/W CA 13-50; TR 467, 11. 20-23.** Mary kept asking Alexander, "Why you doing this to me, Vincent? Why?", but Alexander never answered. **CA 13-51 C/W CA 13-50; TR 467, 11. 23-25.** Alexander then put a ***8** padlock on the fence at Mary's house. **CA 13-51 C/W CA 13-50; TR 467,11.29-30.** After her evaluation by Genesis, Mary was found to be of sound mind, and as per Mary's request, she was released and returned home under the care of Gloria and her daughters. **CA 13-51 C/W 13-50; TR 495,11.1-4; 497,11.22-25.**

After Alexander had Mary forced by police, against her will, to Genesis, Mary realized Alexander would never leave her alone, and never leave Gloria alone, and decided to donate her house and land to Gloria. **CA 13-51 C/W CA 13-50; TR 276, 11. 6-14.** Thereafter, on March 31, 2009, Mary went to Norman's office and entered into the Donation with Gloria. **CA 13-51 C/W 13-50; TR 334, 11. 22-32.** After discussing with Norman her problems with Alexander, and pursuant to Norman's advice, on the same day she also revoked her Power of Attorney in favor of Alexander. **CA 13-51 C/W 13-50; TR 338, 11. 1-8.**

On that same day, Rena Derousselle of **Elderly** Affairs commenced her investigation as requested by Alexander. This investigation also resulted with no findings of neglect or abuse on behalf of Gloria or her daughters. Sick and tired, Mary died on April 14, 2009. **CA 13-51 C/W CA 13-50; Exhibit, 48.**

After handling all of the funeral arrangements, and after being advised that she needed a succession to deal with Mary's checking account, Gloria contacted an attorney, Joslyn Alex. **CA 13-51 C/W CA 13-50; TR 270, 11. 15-20.** Ms. Alex, on or about May 27, 2009, filed a Petition for Appointment as Administratrix on behalf of Gloria commencing the matter entitled *"In Re: Succession of Mary Gustavia Ledet,"* Probate No. 14571, before the 16th Judicial District Court. **CA 13-51 C/W CA 13-50; TR, 4.** Thereafter, Gloria was appointed Administratrix of the Succession of Mary, and Letters of Administration were issued her upon her posting bond on June 28, 2009. **CA 13-51 C/W CA 13-50; TR, 14.**

Thereafter, on or about September 9, 2009, a Petition to Open and Administer Testate Succession and for Appointment of Administrator was filed on ***9** behalf of Alexander commencing the matter entitled *"In Re: Succession of Mary Ledet,"* Probate No. 14636, before this Court. **CA 13-51 C/W 13-50; TR, 16.** On or about September 11, 2009, Letters of Administration were signed and issued to Alexander. **CA 13-51 C/W 13-50; TR, 16.**

Thereafter, on or about October 25, 2010, under Probate No. 14571, Alexander filed his "Answer to Petition for Appointment as Administratrix, Motion for Removal of Administratrix, Appointment of New Administrator, to Invalidate Transfer and for Accounting" whereby he sought to have Gloria removed as administrator to Mary's estate, Gloria return property to the estate, an accounting, and himself appointed administrator of Mary's succession. **CA 13-51 C/W 13-50; Exhibit, 16.**

It then became apparent to Gloria that the Succession of Mary, opened on behalf of Gloria, was incorrectly filed by prior counsel as an intestate matter despite Gloria having provided the Will to her prior counsel. In an effort to correct the prior pleadings, undersigned counsel on behalf of Gloria s filed (i) a Motion to Probate the Last Will and Testament of Mary Gustavia Ledet and (ii) a Motion to Consolidate the two pending succession proceedings. **CA 13-51 C/W 13-50; TR, 28.**

Following the consolidation of the succession filed under Probate No. 14571 and Probate No. 14636 on November 19, 2010, Alexander, on or about August 5, 2011, filed an Amended Petition for Removal of Administratrix, Appointment of New Administrator, To Invalidate Transfer and for Accounting, wherein he amended his allegations against Gloria and moved for the invalidation of the Will and Donation due to Gloria's alleged fraud and undue influence over Mary.

This matter was tried on January 31, 2012 and February 6, 2012. **CA 13-51 C/W CA 13-50; TR, 106.** At the conclusion of the trial, the District Court allowed for counsel to submit post-trial briefs. On February 15, 2012, Alexander filed a ***10** Post-Trial Memorandum. Thereafter, on March 7, 2012, Amos submitted a Post-Trial Memorandum. And, on March 15, Alexander filed a Reply Brief. Thereafter, the District Court took the matter under advisement. On April 17, 2012, the District Court filed its Reasons for Judgment. **CA 13-51 C/W CA 13-50; TR, 106.** In the reasons for Judgment, the District Court made the following findings:

1. Mary desired to enter into a transaction with Gloria wherein Gloria's daughters would care for Mary in Mary's residence until Mary died, and Mary would not be placed in a nursing home; and in exchange, Mary agreed to leave everything she owned to Gloria. And, there was absolutely no testimony in the case that the foregoing was not the cause for the Will, Donation and power of attorney between Mary and Gloria. **CA 13-51 C/W CA 13-50; TR, 106.**

2. The cause for Mary giving all of her property to Gloria was the obligation of Gloria not to place Mary in a nursing home, and to care for her in her residence until she died. Because the condition was not part of the Will, the Will is null. **CA 13-51 C/W CA 13-50; TR, 106.**

3. The cause for the Donation from Mary to transfer all of her property to Gloria was the required obligation of Gloria not to place Mary in a nursing home. Gloria did not have this cause placed in the Donation when she instructed Norman to prepare it. Accordingly, the Donation is null and void for lack of cause. **CA 13-51 C/W CA 13-50; TR, 106.**

4. Gloria, by fraud, actions by silence, and by manipulation of lying, exercised psychological domination of Mary to the extend that Mary could not help but do what Gloria wished. **CA 13-51 C/W CA 13-50; TR, 106.**

5. Gloria exercised undue influence of Mary to such extent that the wishes of Gloria were satisfied rather than the wishes of Mary. Therefore, the Will and the Donation are null. **CA 13-51 C/W CA 13-50; TR, 106.**

6. The Court does not find that Gloria sustained the burden of proof that she was related to Mary by infinity. **CA 13-51 C/W CA 13-50; TR, 106.**

Subsequently, by Judgment dated June 1, 2012, the District Court ruled that after considering the evidence at trial and consistent with the Reasons for Judgment dated April 17, 2012, that: the Will is null and void; the Donation is null and void; Gloria is removed as Administratrix of the Succession of Mary; and that the estate of Mary is now an intestate succession. It is from this judgment that Gloria appeals.

***11 ISSUES PRESENTED**

I. Whether it was legal error for the District Court to rule that the Will is null for failure of cause.

II. Whether it was legal error for the District Court to rule that the Will was null because the Will did not contain the condition or cause for which Mary made it.

III. Whether the District Court erred in ruling that Mary's “cause” for making the Will was not satisfied.

IV. Whether it was legal error for the District Court to rule that the Donation is null for lack of cause or because the “cause” was omitted from the Donation.

V. Whether the District Court erred in ruling that the “cause” for the Donation was not satisfied.

VI. Whether it was legal error for the District Court to allow the introduction of hearsay as evidence and relying on same in rendering its decision.

VII. Whether the District Court erred in ruling that by clear and convincing evidence or by a preponderance of the evidence that Gloria exercised undue influence over Mary to cause Mary to make the Will.

VIII. Whether the District Court erred in ruling that by clear and convincing evidence or by a preponderance of the evidence Gloria exercised undue influence over Mary to cause Mary to enter the Donation.

IX. Whether the District Court erred in ruling that by clear and convincing evidence or by a preponderance of the evidence Gloria induced Mary, by fraud, to make the Will.

X. Whether the District Court erred in ruling that by clear and convincing evidence or by a preponderance of the evidence Gloria induced Mary, by fraud, to enter into the Donation.

XI. Whether the District Court erred in finding that Gloria did not sustain her burden of proof that she was related to Mary by blood or afffinity.

XII. Whether the District Court erred in removing Gloria as Administratrix of Mary's estate.

***12 ASSIGNMENTS OF ERROR**

I. The District Court committed legal error to the extent it ruled that the Will is null for failure of cause.

II. The District Court committed legal error by ruling that the Will was null because the Will did not contain the condition or cause for which Mary made it.

III. The District Court erred in ruling that Mary's “cause” for making the Will was not satisfied.

IV. The District Court committed legal error when it ruled that the Donation is null for lack of cause or because the “cause” was omitted from the Donation.

V. The District Court erred in ruling that the “cause” for the Donation was not satisfied.

VI. The District Court committed legal error by allowing the introduction of hearsay as evidence, and relying on same in rendering its decision.

VII. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria exercised undue influence over Mary to cause Mary to make the Will.

VIII. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria exercised undue influence over Mary to cause Mary to enter the Donation.

IX. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria induced Mary, by fraud, to make the Will.

X. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria induced Mary, by fraud, to enter into the Donation.

XI. The District Court erred in finding that Gloria did not sustain her burden of proof that she was related to Mary by blood or afffinity.

***13 LAW AND ARGUMENT**

Standard of review

With respect to Assignments of Error Nos. 1, 2, 4, and 6, the District Court's rulings present only questions of law; accordingly, the appropriate standard of review is de novo. *Citgo Petroleum Corp. v. Frantz*, 03-88, p. 3-4 (La.App. 3 Cir. 6/4/03), 847 So.2d 734, 736, *writ denied*, 03-1911 (La.10/31/03), 857 So.2d 484.

Furthermore, under the de novo standard of review, the appellate court assigns no special weight to the trial court and, instead, conducts a de novo review of questions of law and renders judgment on the record. *Roberts v. Hartford Fire Ins. Co.*, 05-1178 (La.App. 3 Cir. 4/5/06), 926 So.2d 121, writ denied, 06-1056 (La. 6/23/06), 930 So.2d 984. It is well-settled that a Court of Appeal may not set aside a trial court's or a jury's finding of fact in the absence of "manifest error" or unless it is "clearly wrong." *Petrie v. Michetti*, 10-122 (La.App. 5 Cir. 1/11/11), 59 So. 3d 430, 436-37; (citing *Evans v. Lungrin*, 97-0541 (La. 2/6/98), 708 So.2d 731, 735) (citing *Rosell v. ESCO*, 549 So.2d 840, 844 (La. 1989)). However, where one or more trial court legal errors interdict the fact finding process, the manifest error standard is no longer applicable, and if the record is otherwise complete, the appellate court should make its own independent de novo review of the record and determine whether the plaintiff has borne his or her burden of proof. *Id.* at 437 (citing *Evans*, 708 So.2d at 735). A legal error occurs when a trial court applies incorrect principles of law and such errors are prejudicial. *Id.* (citing *Lasha v. Olin Corp.*, 625 So.2d 1002. 1006 (La. 1993)). Legal errors are prejudicial when they materially affect the outcome and deprive a party of substantial rights. *Id.*

And, with respect to Assignments of Error Nos. 3, 5 and 7-10, the appropriate standard for review is whether the District Court committed "manifest error." *Succession of Deshotel*, 2009-37 (La. App. 3 Cir. 5/6/09), 10 So. 3d 873, 873, 882.

***14 1. The District Court committed legal error to the extent it ruled that the Will is null for failure of cause.**

The District Court adjudged the Will null and void. In its Reasons for Judgment the District Court made a finding that it was established that Mary desired to enter into a transaction with Gloria wherein Gloria's two daughters would care for Mary in Mary's residence until Mary died, and Mary would not be placed in a nursing home at any time but would reside in her residence while being cared for by Gloria's daughters. In exchange, Mary agreed to leave everything she owned to Gloria. And, there was absolutely no testimony in the case that the foregoing was not the "cause" for the Will. Accordingly, the District Court concluded that the cause for Mary giving all of her property to Gloria was for the obligation of Gloria not to place Mary in a nursing home, but to care for her in her residence until she died. That condition is not part of the Will and it was the cause for Mary making the Will. Accordingly, the Will is Null.

The law is clear that "cause" is the reason why a party obligates himself, and that no obligation can exist without a lawful cause. See La. C.C. arts. 1966-67. These requirements are categorically met in this case as to for the agreement between Mary and Gloria, and same is not in dispute. This oral agreement was consummated and resulted in the Will. Mary's "cause" for this agreement, was Gloria's agreement to care for Mary in her residence until her death and not put Mary in a nursing home. Mary's "cause" for making the Will was unquestionably satisfied, as Gloria and her daughters cared for Mary, in Mary's residence until Mary's death, and Mary was not placed in a nursing home.

It seems, however, that the District Court confuses the oral agreement between Mary and Gloria, which resulted in the Will, with the Will itself, as it appears that the District Court ruled that the Will is invalid because it does not contain the "cause" for Mary making the Will.

***15** The Will, however, is a donation mortis causa. A donation mortis causa is an act to take effect at the death of the donor by which he disposes of the whole or part of his property and it remains revocable during donor's lifetime. See La. C.C. art. 1469. A donation mortis causa is not a contract between two or more parties for which a lawful cause is required for validity. Mary could have unilaterally revoked her Will at any time prior to her death, and thus, eliminate any obligation on her part to leave any property to Gloria. Accordingly, the Will cannot be declared null for lack of cause. Therefore, to the extent that the District Court ruled that the Will is null for failure of cause, it was legal error.

2. The District Court committed legal error by ruling that the Will was invalid because the Will did not contain the condition or cause for which Mary made it.

In support of its ruling that the Will is null, the District Court reasoned that because the condition or cause for Mary leaving her property to Gloria via the Will was not expressly written in the Will, the Will is invalid. This ruling is also clearly contrary to law. There is no law that requires that a testament expressly provide therein the reason for which the testator makes any disposition mortis causa of any kind to any legatee. In fact, Louisiana law provides that an obligation may be valid even if the cause is not expressed, and, even if the expression of a cause in a contractual obligation is untrue, the obligation is still effective if a valid cause can be shown. See La. C.C. arts. 1969-1970.

Accordingly, even if this Court finds that the Will itself was the "contract" between Mary and Gloria, the "cause" of Mary's obligation to leave her property to Gloria need not be stated in the Will. Moreover, the "cause" for Mary leaving her property, via her Will, to Gloria was satisfied. Thus, it was an error of law for the District Court to rule the Will null due because the "cause" for Mary making the Will was not expressed in the Will.

***16 3. The District Court erred in ruling that Mary's "cause" for making the Will was not satisfied.**

The "cause" for Mary making the Will was satisfied. It is not contested that following the agreement reached between Mary and Gloria, Gloria's daughters cared for Mary, in Mary's home, until she died, and that Mary was not placed in a nursing home. Accordingly, Gloria satisfied her obligations to Mary under their oral agreement, and the District Court was manifestly erroneous to the extent it ruled that the Will is null for Gloria's failure to satisfy the condition or "cause" for Mary to leave her property to Gloria.

4. The District Court committed legal error when it ruled that the Donation is null for lack of cause or because the "cause" was omitted from the Donation.

The District Court adjudged the Donation null and void. In its Reasons for Judgment the District Court made a finding that it was established that Mary desired to enter into a transaction with Gloria wherein Gloria's two daughters would care for Mary in Mary's residence until Mary died, and Mary would not be placed in a nursing home at any time but would reside in her residence while being cared for by Gloria's daughters. In exchange, Mary agreed to leave everything she owned to Gloria. And, there was absolutely no testimony in the case that the foregoing was not the "cause" for the Donation. Accordingly, the District Court concluded that the cause for the Donation from Mary was to transfer all of her property to Gloria with the required obligation of Gloria not to place Mary in a nursing home. Gloria did not have this cause placed in the Donation when she instructed Norman Landry to prepare it. Accordingly, the Donation is null for lack of cause.

As provided above, under Louisiana law obligations may be valid even if the cause is not expressed, and, even if the expression of a cause in a contractual ***17** obligation is untrue, the obligation is still effective if a valid cause can be shown. See La. C.C. arts. 1969-1970.

In the Donation, the "cause" or consideration provided is the following: (a) "the love and Affection she [Mary] bears for her cousin, Gloria Jean Amos...; and (b) "as an additional consideration to this act, donor herein reserves a usufruct of the herein donated property for as long as she shall live".

The District Court found, however, that after taking into account parole evidence, the "cause" for Mary entering into the Donation was Gloria's agreement not to put Mary in a nursing home. It makes no difference, however, because both the "cause" expressly provided for in the Donation and the "cause" of the Donation as adjudged by the District Court were uncategorically satisfied by Gloria.

The evidence at trial unequivocally showed and it is not contested that following the Donation, Mary resided at her residence until her death, and at no time did Gloria restrain Mary from occupying her residence. Thus, Mary's usufruct for life was satisfied. And, the evidence at trial unequivocally showed and it is not contested that following the Donation Mary did not go to a nursing home. Thus, the true "cause" for Mary entering the Donation, as determined by the District Court, was satisfied. Accordingly, the District Court committed legal error to the extent it ruled otherwise.

See also *Blossman v. Olsen,* 365 So.2d 545 (La. App. 1 Cir, 1978), where the transfer of property by deceased before death, without payment of cash consideration, was made in order to induce transferee to live with decedent, and where both parties intended that a transfer take place, transfer was not pure simulation, and was not null as such, but was a disguised donation and the transfer was upheld; see also, *Sauce v. Williams,* 434 So.2d 613 (La. App. 3 Cir, 6/29/1983); see also, *Landry v. Landry,* 3 So. 728 (La. 1888).

***18 5. The District Court erred to the extent it ruled that the "cause" for the Donation was not satisfied.**

Gloria incorporates by reference the law and argument cited under Paragraphs 2, 3 and 4 hereinabove. In light of same, the District Court was manifestly erroneous to the extent it ruled that the "cause" for Mary entering into the Donation was not satisfied.

6. The District Court committed legal error by allowing the introduction of hearsay as evidence, and relying on same in rendering its decision.

At the trial of this matter, counsel for Alexander attempted to introduce into evidence a certified copy an investigative report of the State of Louisiana, Governs Office of **Elderly** Affairs, **Elderly** Protective Services Report ("**Elderly** Affairs Report") concerning the investigation such office made respecting Gloria's treatment of Mary. Counsel for Gloria objected to the introduction thereof, as such report constituted hearsay. And, the Court correctly denied the introduction of such evidence into the record.

Counsel for Alexander, however, attempted to read portions of the **Elderly** Affairs Report into the record and ask questions to Howard concerning statements allegedly made by Mary and Gloria to Rena Derouselle, as shown in the **Elderly** Affairs Report. Again, counsel for Gloria objected, and advised the Court that Rena Derouselle was initially listed as a witness of Alexander; Alexander could have called her as a witness, but he chose not to do so; and, since counsel for Gloria could not cross examine Rena Derouselle concerning statements allegedly made by Gloria or by Mary to her, it would be prejudicial to Gloria, and thus should be excluded. **CA 13-51 C/W CA 13-50; TR 298, 11. 7-19.** Counsel for Gloria again objected to the introduction of any statements in such report concerning what Mary allegedly told to Rena Derouselle; however, the District Court overruled this objection and allowed the introduction of statements allegedly given by Mary and Gloria, as shown in the records. **CA 13-51 C/W CA 13-50; TR *19 299-301.**

The following are excerpts from the **Elderly** Affairs Report, or from the District Judge's reading of same into the record, as applicable:

"Case manager received a call from Gloria Amos concerning a will for client Mary Ledet. Case Manager knew that client had a will. But when Case Manager Rena talked to client, her reply was, there was no will. Gloria told case manager that both her and Mary lied to Case Manager Rena because they thought she was taking up for [Alexander]. Case Manager told Gloria that she needed to tell the truth to Rena so she could get everything straight. Gloria told Case Manager that there's a will and also and Act of Donation which was done for the house, and Mary's first Power of Attorney to Vincent was revoked. Case Manager told Gloria that Rena was going to look at this information, and client agreed that she wanted it that way. Then Rena will finish up with the case. Case Manager warned Gloria that they must tell the truth at all times; the state is there to protect Mary. Mary made it clear that she doesn't want Vincent in her personal business or **financial** affairs. Gloria was called to Rena to discuss the will and any other documents that Mary signed. **CA 13-51 C/W CA 13-50; TR 296, 11. 31-32; 297,11. 1-13.**

"All right. So, at this point, Mary Ledet tells Rena Derouselle that Mary needed to make a *change* in her will. It's supposed to read, she leaves her homestead to Gloria Amos - Ames - I guess it's supposed to be Amos; it looks like Ames, or maybe it's Amos - for her care only if she cared for her in the home. She is not to be placed in a nursing home." **CA 13-51 C/W CA 13-50; TR 302,11. 9-15.**

The District Court, in its Reasons for Judgment, relied heavily on the foregoing hearsay, in support of its reasons for finding that Gloria and Norman are not creditable, and in support of its ruling that Gloria committed fraud and executed undue influence over Mary. In fact, the District Court actually found that Mary told Rena Derouselle the Will was inaccurate, rather than simply that, "Mary needed to make a change" to the Will, as provided for in the report. Although the record clearly reflects that Gloria testified that she was not in the room when Rena Derouselle spoke to Mary about the Will, in its Reasons for Judgment, the District Court states, "Gloria Amos admitted that when the State Investigative Officer from **Elderly** Affairs obtained the Last Will and Testament of Mary Ledet and read the testament to Mary Ledet, that Mary Ledet insisted that the Last Will and Testament ***20** was not accurate...". **CA 13-51 C/W CA 13-50; TR, 106; 227, 11. 27-32.** Moreover, contrary to Gloria's testimony, the District Court found that Gloria said that Mary was "emphatic" the Will needed to have the nursing home condition in the Will. **CA 13-51 C/W CA 13-50; TR, 106.** And, contrary to Gloria's testimony, the District Court stated that Gloria admitted to lying to the investigators by telling her that Mary did not have a Will. **CA 13-51 C/W CA 13-50; TR 113; 120; 227, 11. 27-32.** Also, the District Court expressly stated:
"When the Investigators for the State **Elderly** Abuse Office read the will which Norman Landry had prepared for Mary Ledet, Mary Ledet emphatically stated that the will was not correct because it did not provide the condition 'only if not placed in a nursing home'. Therefore, the testimony of Norman Landry is directly contradicted by Mary Ledet that Norman Landry explained the will to her and that she was satisfied with the terms of the will. **CA 13-51 C/W CA 13-50; TR 122.**

Under the Louisiana Code of Evidence, the impressions of Rena Derouselle, and the comments allegedly made by Gloria and Mary to Rena Derouselle, as shown in the **Elderly** Affairs Report, are hearsay and should not be considered by District Court in its ruling. The record reflects that the District Court relied heavily on such hearsay, to the prejudice of Gloria. Accordingly, the District Court committed legal error in considering this hearsay. Further, in light of the foregoing all such evidence should be excluded from consideration of this matter on appeal, and this Court should conduct a *de novo* review of all of the District Court's findings.

7. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria exercised undue influence over Mary to cause Mary to make the Will.

8. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria exercised undue influence over Mary to cause Mary to enter the Donation.

***21** Given the substantially similar evidence and law supporting Assignments of Error Nos. 7 and 8, and for the sake of brevity, I have addressed both hereunder.

The District Court did not rule that the true "cause" for Mary entering into the Will or Donation was agreed to by Mary in error, and only because Gloria unduly influenced her to agree to same. In its Reasons for Judgment, the District Court states that Gloria exercised undue influence over Mary to such an extent that Gloria's wishes, rather than Mary's wishes, were satisfied; however, it cites absolutely no evidence of actions or statements by or on behalf of Gloria towards Mary in support thereof. **CA 13-51 C/W CA 13-50; TR 128.** Rather, the District Court offers only the following contentions or events to support its ruling that Gloria unduly influenced Mary to make the Will and Donation: (1) demonizing Alexander; (2) the fact that the condition "only if not placed in a nursing home" is not included in the Will; (3) the fact that Mary granted a power of attorney in favor of Gloria; (4) Mary revoked her power of attorney in favor of Alexander; and (5) the fact that the Donation occurred. **CA 13-51 C/W CA 13-50; TR 127-128.**

On the other hand, the District Court ruled that the cause for Mary giving all of her property to Gloria via her Will was Gloria's obligations to not place Mary in a nursing home, and to care for Mary in her residence until she died. As per the evidence and law presented under Paragraph 2 hereinabove, there was no requirement for the "cause" to be expressly stated in the Will.

Moreover, even if the evidence supported that Gloria influenced Mary to remove the condition of "only if not put in a nursing home" from her Will, which Gloria strongly denies, the Will should still be upheld. As pointed out in Paragraph 3 hereinabove this "cause" was undeniably satisfied by Gloria, as Mary lived in her home until she died under the care of Gloria and her daughters. The failure of the inclusion of the condition of "only if not put in a nursing home" would only become relevant if Gloria actually put Mary in a nursing home prior to her death, ***22** in violation of Mary's true "cause" for making the Will.

The District Court ruled that the sole cause for Mary giving her house and land to Gloria via the Donation was Gloria's obligation to not place Mary in a nursing home. As per the evidence and law presented under Paragraph 4 hereinabove, the fact that this "cause" was not expressly stated in the Donation is of no consequence, since the real cause was ascertained through parole evidence, and this "cause" was undeniably satisfied. Again, the exclusion of the condition "only if not put in a nursing home" from the Donation would only become relevant if Gloria placed Mary in a nursing home following the Donation, which, of course, did not occur.

Notwithstanding the foregoing, and in the abundance of auction, I will present the following in further support of the absolute lack of any evidence of undue influence over Mary by or on behalf of Gloria.

Louisiana Civil Code articles 1479 and 1483 provide the controlling law regarding nullity of donations *inter vivos* or *mortis* causa due to undue influence. Article 1479 of the Louisiana Civil Code explicitly requires "proof that it is the product of influence by the donee or another person that so impaired the volition of the donor as to substitute the volition of the donee or other person for the volition of the donor." See La. C.C. art. 1479; see also *Succession of Jack Berman*, 2005-0641 (La. App. 4 Cir. 7/26/06) 937 So. 2d 437, at 440. Moreover, the influence has to be, "of such a nature that it destroys the free agency of the donor." See La. C.C. art. 1479, comment (b). Mere advice, or persuasion, or kindness or assistance will not do. Id. Finally, under Article 1479, not only must the donee substitute the volition of the donee for that of the donor, but such influence must be operative at the time of the execution of the inter vivos donation or testament. See comment (d) La. C.C. art. 1479; see also *Berman*, *supra* at 440.

***23** Aside from the statutory definition, undue influence is generally understood to mean "the exercise of psychological domination over a person to the extent that the person cannot help but do what the dominating party wishes." See *Cupples v. Pruitt*, 32,786 (La. App. 2 Cir. 3/1/00), 754 So. 2d. 328, 335 (citing Laurie D. Clark comment, Louisiana's New Law on Capacity to Make and Receive Donations: "Unduly Influenced" by the Common Law?, 67 TUL.L.Rev. 183, 221 (1992), and authorities therein).

Under La. C.C. art. 1483, a person, who challenges a donation because of undue influence must prove it by clear and convincing evidence. To prove a matter by "clear and convincing evidence" means to demonstrate that the existence of a disputed fact

is highly probable, that is, much more probable than its nonexistence. See La. Civ. Code art. 1483, comment (b), citations omitted. However, if at the time the donation was made or the testament executed, a relationship of confidence existed between the donor and the wrongdoer and the wrongdoer was not then related to the donor by affinity, consanguinity or adoption, the person who challenges the donation need only prove the fraud, duress or undue influence by a preponderance of the evidence. See La. C.C. art. 1483.

In *Cupples v. Pruitt*, supra, Charles Cupples, a residuary legatee under John Brown's prior will, moved to set aside an inter vivos donation and subsequent will of Mr. Brown due to the undue influence of Tracy Pruitt, a second cousin of Mr. Brown's deceased wife and the residuary legatee of Mr. Brown's new will. On July 31, 1995, Mr. Brown executed a will leaving Ms. Pruitt certain property and leaving Mr. Cupples the residual cash, moveable and securities. Then, on September 18, 1996, Mr. Brown executed a new will leaving everything to Ms. Pruitt. Mr. Brown died three months later in December, 1996.

At trial, Mr. Brown's treating physician testified that as of September, 1996 Mr. Brown was not mentally competent, and evidence was presented that Mr. ***24** Brown could not keep his eyes open long enough to read the September 18, 1996 will, but showed his approval by nodding when the will was read aloud. In addition, evidence was given that just prior to Mr. Brown's execution of the September 18, 1996 will, Ms. Pruitt isolated Mr. Brown from others, Mr. Brown was unusually susceptible to influence, and that years ago Mr. Brown told Mr. Cupples that Ms. Pruitt had talked him out of everything he owned.

Despite this evidence, the Court ruled that there was no undue influence upon Mr. Brown by or on behalf of Ms. Pruitt. *Id.* at 336. The Court applied the clear and convincing standard due to Ms. Pruitt's relation to Mr. Brown and relied heavily on the fact that the witnesses present at the execution of the September 18, 1996 will testified that Mr. Brown, despite his deplorable condition, indicated that he embodied his true wishes by leaving his property to Ms. Pruitt and that under the circumstances Ms. Pruitt's involvement in executing the notarial will was “mere advice and assistance,” and insufficient to supplant Mr. Brown's will. *Id.* Further, the Court felt no undue influence was shown because Ms. Pruitt did not exercise “psychological domination” over Mr. Brown. *Id.*

In *Succession of Braud*, supra, Evangeline Vavrick, the executrix named by the testator, Norma Braud, in a prior will moved to invalidate Ms. Braud's later will for undue influence by the executrix and sole legatee under the new will, Thelma Bodenheimer. On October 30, 1992 Ms. Braud executed a statutory will naming Ms. Vavrick as executrix of her will, and leaving her property to various cousins and to the Catholic Church. On April 20, 1993, Ms. Braud executed an olographic will, whereby she left all of her property to Ms. Bodenheimer. Ms. Braud died three months later on July 19, 1993.

The evidence presented at trial was that Ms. Braud became fearful that Ms. Vavrick and her cousins desired to place her in a nursing home; became thoroughly disaffected with them; and rewrote her will removing them as executor and ***25** legatees. *Id.* at 1169. The evidence also showed that at the time Ms. Braud executed her will on April 20, 1993 she suffered from depression, confusion, forgetfulness and dementia and was on plenty of medications. However, all of the witnesses present at the time Ms. Braud executed her will on April 20, 1993 testified that Ms. Braud initiated the writing of the will on her own, wrote it in her own hand and indicated that she knew what she was doing. Ms. Vavrick alleged that Ms. Braud was totally dependent upon Ms. Bodenheimer during the last months of her life, and she presented evidence that Ms. Bodenheimer wrote numerous checks on Ms. Braud's account during the last months of her life; Ms. Bodenheimer had access to Ms. Braud's certificates of deposit and safety deposit box and removed large sums of money from those sources during the last months of Ms. Braud's life; and Ms. Bodenheimer actually wrote check to herself out of Ms. Braud's account. After considering the evidence, the Court ruled that Ms. Vavrick failed to prove even by preponderance of evidence that Ms. Bodenheimer exercised undue influence over Ms. Braud. *Id.* at 1172-1173. The Court noted Ms. Braud kept a close watch over her affairs and decisions concerning her property. Id. at 1170. The Court found that it is no consequence that in her previous wills Ms. Braud had relatively consistent legatees, and that her April 20, 1993 will was Ms. Braud's first will that differed greatly from her previously expressed wishes, to leave her property to her cousins and the church. The Court felt that Ms. Braud simply changed her mind because she came to believe that her cousins were more interested in her money than in her well being, and that Ms. Vavrick and her cousins were conspiring to place her in a nursing home, a destination she greatly feared. *Id.* at 1171.

In *Succession of Gilbert*, 37,047 (La. App. 2 Cir. 6/5/03) 850 So. 2d 733, Darylynn Ware moved to nullify her mother, Yvonne Gilbert's will, alleging undue influence by Hobart Woodruff. At trial, the evidence showed that Mr. Woodruff ***26** was Ms. Gilbert's caretaker and friend but was not related to her; in June, 2000 Ms. Gilbert was diagnosed with serious medical conditions and Mr. Woodruff began to take more responsibility for the care of her around that time; Ms. Gilbert gave Mr. Woodruff power of attorney to act on her behalf on June 12, 2000; on June 16, 2000, Ms. Gilbert executed a will that named Mr. Woodruff as her executor and left him, upon her death, her house, personal property and all of her mineral and royalty interest, with the remainder of her estate going to her three adult children; and that Ms. Gilbert died three months later on October 12, 2000. *Id.* at 734.

At trial, Ms. Ware testified that Mr. Woodruff lived with Ms. Gilbert and had unfettered access to her home which affected the drafting of her will; Mr. Woodruff convinced Ms. Gilbert to change her prescribed dosage of medication or refuse medical treatment; Mr. Woodruff convinced Ms. Gilbert that her family did not care for her and that he was the only person keeping her out of a nursing home; and that Mr. Woodruff's influence had advanced to such a degree that Ms. Gilbert could not speak with her children without Mr. Woodruff listening on the phone. In addition, a friend of Ms. Gilbert of 30 years testified that Mr. Woodruff told him that his assistance was the only reason Ms. Gilbert was never placed in a nursing home; and that Ms. Gilbert had left everything to him and that Ms. Gilbert's children were not going to take anything away from, including the house. Also, a former daughter-in-law of Ms. Gilbert testified that Mr. Woodruff exercised control and power over Ms. Gilbert, that Mr. Woodruff monitored and supervised all of her telephone calls, and that Ms. Gilbert was afraid of Mr. Woodruff. All three witnesses testified further that Mr. Woodruff influenced and threatened Ms. Gilbert by regularly informing her that her family did not love her and he was the only person keeping her out of a nursing home. Ms. Gilbert's home health nurse testified that she saw decedent on June 12, 2000, and although Ms. Gilbert was a ***27** little confused, disoriented and weak she did not observe any isolation, alleged captivity or undue influence. And, the attorney who prepared Ms. Gilbert's will testified that at the time she executed the will she did not lack the capacity to sign.

At the conclusion of plaintiff's case, the Court ruled on directed verdict that Ms. Ware failed to show undue influence, even by preponderance of evidence, because the witnesses *did not express first hand knowledge* of any undue influence by Mr. Woodruff at the time Ms. Gilbert executed the will. *Id.* at 735. Moreover, the evidence did not demonstrate that Ms. Gilbert's free agency was destroyed and that Mr. Woodruff's volition was substituted for that of her own in executing the will. *Id.* at 737. The Second Circuit upheld the trial court's decision.

In *Succession of Tanner*, 2002-1570 (La. App. 4 Cir. 2/5/03) 836 So. 2d 1280, the Fourth Circuit affirmed the District Court's summary judgment dismissing plaintiff's suit to nullify testamentary bequest of his uncle for undue influence, under the circumstances where the testator executed a new will 13 days prior to his death whereby he half of his estate valued at $500,000 to an attorney who prepared, but did not notarize such will. The Court found that plaintiff's assertions of defendant's lack of blood relation or close personal relationship with testator, and the fact that testator was spendthrift and had deep emotional ties to Masonic organizations, did not support plaintiff assertion of undue influence by defendant. *Id.* at 1284. The Fourth Circuit ruled that **plaintiff's beliefs were based purely on conjecture, not evidence, and given that plaintiff expressed no first-hand knowledge of the occurrences, nor did he establish any specific instances that can be linked to the allegations of undue influence, summary judgment was appropriate.** *Id.* at 1285.

Finally, the following Third Circuit case is almost identical to the case at bar. In *Succession of Polk*, 2006-366 (La. App. 3 Cir. 9/27/2006), 940 So. 2d 895, this Court was presented with the following circumstances. Juliette Polk, a widow ***28** with no surviving children, died on December 3, 2008. *Id.* at 896. Approximately seven weeks prior, on October 16, 2002, she executed a will leaving her entire estate to Ms. Depass, who considered herself to be Ms. Polk's niece by marriage (Ms. Depass' father was married to Ms. Polk's sister, but Ms. Depass was born after that marriage to Francine Wallace. However, Ms. Depass lived with Ms. Polk's sister for some time). *Id.* at 897 On the same day, Ms. Polk revoked an earlier will and power of attorney in favor of her niece, Ms. York. *Id.*

Thereafter, Ms. York moved to annul the testament on the grounds of lack of testamentary capacity of Ms. Polk, undue influence by Ms. Depass, and Ms. Polk's inability to read. In response, Ms. Depass filed for summary judgment, which was granted by the District Court, and Ms. York filed an appeal of same with this Court. At the summary judgment hearing, Ms. Depass testified that she contacted an attorney to arrange for the preparation of Ms. Polk's will, at Ms. Polk's request, because Ms. Polk was concerned with her **financial** affairs that were previously handled by Ms. York, and she had not been able to reach her. *Id.* at 898. Several family friends said that Ms. Polk expressed displeasure with how Ms. York was handling her affairs, and that she felt that Ms. York had abandoned her after Ms. Polk she went to the nursing home. *Id.* Mr. Schwing, Ms. Polk's attorney/notary for her will, averred that he met with Ms. Polk twice; once to discuss her will, and a second time to read and sign. *Id.* at 899. It was his opinion that Ms. Polk appeared lucid and was empathic about what she wanted in her will. *Id.*

On the other hand, Ms. York contended that Ms. Depass committed fraud or unduly influenced Ms. Polk to enter the will and offered that medical records showed that Ms. Depass represented to the nursing home that she was Ms. Polk's niece, Ms. Polk was transported to the bank a few times so Ms. Depass' testimony about Ms. Polk not being able to get her money was questionable, and that Dr. Sagera had prescribed Ms. Polk medications for dementia and delusions. *Id.*

***29** After its *de novo* review, this Court found that with respect to Ms. York's claims of fraud and undue influence, she had not presented any evidence that she would be able to meet even the lesser standard of preponderance of the evidence. Further, Ms. Depass was justifiable in thinking herself to be Ms. Polk's niece; and her actions in contacting Mr. Schwing and arranging payment for the will amounted only to "kindness and assistance", especially given Ms. Polk's displeasure with Ms. York. Accordingly, summary judgment was appropriate. *Id.*

A. Application of Law to Evidence

At trial, Alexander failed to provide any first-hand account or evidence of undue influence through the testimony of any witnesses. Alexander's sole "evidence" of alleged undue influence was his own uncorroborated. And, as shown through his own testimony and evidence, and the testimony of others at trial, Alexander wholly lacks credibility.

i. There is no evidence before this Court to support undue influence by Gloria or others on her behalf operative over Mary at the time she executed the Will or Donation.

It is uncontroverted that Norman, Elaine Landry, Leoni Trahan and Gloria were the only people in the same building as Mary when she executed the Will and the Donation.

Testimony of Norman: As of trial, he was a Notary Public licensed in the State of Louisiana, and had been for over 40 years. CA 13-51 C/W CA 13-50; TR 316, 11. 15-19. Mary executed the Will on January 12, 2009 before him and witnesses, Elaine Landry and Leoni Trahan, in his office at his home in Breaux Bridge, Louisiana. CA 13-51 C/W CA 13-50; TR 334,11. 15-21. He prepared the Will at the request of Mary, not Gloria CA 13-51 C/W CA 13-50; TR 325, 11. 1-3; and that at his meeting with Mary on January 12, 2009, Mary and he discussed the terms of the Will for approximately thirty minutes prior to her executing same, CA 13-51 C/W CA 13-50; TR 333, 11. 29-21; he read the Will out loud, in its entirety, ***30** to Mary, before she signed it; and she indicated to him that she fully understood it CA 13-51 C/W CA 13-50; TR 327; 11. 27-31; 328, 11. 1-3; 334, 11.10-11; Gloria was never in the same room as Mary at the time that Mary and he discussed the terms of the Will or when Mary executed the Will CA 13-51 C/W CA 13-50; TR 333, 11. 32; 334, 11. 1-2; and Mary told him that Gloria was her cousin so he indicated same in the Will. CA 13-51 C/W CA 13-50; TR 335, 11. 17-31. It was his opinion that when Mary executed the Will on January 12, 2009, she was competent, able to communicate, and fully aware of the import of her actions, CA 13-51 C/W CA 13-50; TR 334, 11. 3-9; that Mary was acting under her own volition and not under any influence of Gloria or any other person; and that the Will reflected Mary's true wishes regarding the disposition of her property at her death. CA 13-51 C/W CA 13-50; TR 334,11. 22-30.

Mary executed the Donation on March 31, 2009 before him and witnesses, Elaine Landry and Leoni Trahan, in the office at his home located in Breaux Bridge. **CA 13-51 C/W CA 13-50; TR 326, 11. 1-9; 334, 11. 15-32; 335, 11. 1-2.** He read the entirety of the Donation to Mary prior to her executing same **CA 13-51 C/W CA 13-50;** TR 336, 11. 3-5; and that at no time while he was discussing the Donation with Mary or when Mary executed the Donation was Gloria present in his office. **CA 13-51 C/W CA 13-50;** TR 325, 11. 9-11. It is his opinion that when Mary executed the Donation she was of sound mind, competent, able to communicate and was fully aware of the import of her actions **CA 13-51 C/W CA 13-50; TR 336, II. 6-29;** Mary was acting under her own volition and not under any influence of Gloria or any other person, and that the Donation reflected Mary's wishes regarding the disposition of her property. **CA 13-51 C/W CA 13-50; TR 336,11. 13-27.**

***31 ii. There is no independent third party testimony, or testimony from Gloria or Latarya, before this Court to support undue influence by Gloria or others on her behalf over Mary at any time.**

None of Alexander's witnesses testified as to any undue influence by Gloria or others on her behalf over Mary. In fact, the testimony at trial and summarized hereunder shows quite the contrary.

Testimony of Howard: Mary told Howard that she didn't want Alexander to have her property **CA 13-51 C/W CA 13-50; TR 296, 11. 19-20;** Mary wanted someone to take care of her in her house until she died, and whoever would take care of her she would leave the house and property to that person. **CA 13-51 C/W CA 13-50; TR 296, 11. 22-26.** After visiting with Mary, alone, on various occasions, he concluded Gloria was taking good care of Mary **CA 13-51 C/W CA 13-50; TR 305, 11. 16-21;** and that Mary desired that Gloria and her daughters care for her at her home. **CA 13-51 C/W CA 13-50; TR 308, 11. 19.** After speaking to Dr. Durham, who advised him that Mary had the full capacity to make her own decisions **CA 13-51 C/W CA 13-50; TR 305,11. 6-7,** and receiving the report from Genesis Behavioral Hospital ("Genesis"), it was his opinion that Mary had full capacity to make her own decisions and there was no neglect or abuse on the part of Gloria or her daughters.

Mary did not appear scared of Gloria or her daughters **CA 13-51 C/W CA 13-50; TR 305, 11. 18-21.** It was his opinion further, that Mary was not being influenced by, or otherwise lied to by Gloria or her daughters, and Gloria and her daughters were not doing anything contrary to Mary's best interest. **CA 13-51 C/W CA 13-50; TR 307, 11. 7-19.** Mary told him that Gloria and her daughters were taking care of her and that she was leaving her house and stuff to them. **CA 13-51 C/W CA 13-50; TR 308 11. 15-20.** He told Alexander that Mary told him that it was her wishes that the house and property go to Gloria and her children for taking care of her prior to being taken off the case. **CA 13-51 C/W CA 13-50; TR *32 309, 11. 1-6; 309, 11. 13-31.** Mary made it adamantly clear that she did not like Vincent. She didn't want Vincent to have anything to do with her personal business or property. **CA 13-51 C/W CA 13-50; TR 297, 11. 11-13; 311,11. 17-19.**

Testimony of Martha Alexander: Martha Alexander is Mary's cousin. She visited Mary on several occasions during her stay at St. Martin Hospital, and thereafter at Mary's home. **CA 13-51 C/W CA 13-50; TR 444, 11. 12-15.** Prior thereto, Mary asked Martha to move in with Mary and care for Mary at Mary's home, and, in exchange, Mary would leave her house and property to Martha; however, Martha turned down this offer. **CA 13-51 C/W CA 13-50; TR 443, 11. 18-26.** Mary told Martha that she loved Latarya, **CA 13-51 C/W CA 13-50; TR 445, 11.20-25.** She testified further that Mary was a very strong woman, who did only what she wanted; Mary was not easily influenced by others; and that it was her opinion that Mary was acting on her own volition at all times and not under the influence of Gloria or Gloria's daughters. **CA 13-51 C/W CA 13-50; TR 447, 11.6-12.**

Testimony of Rachel Leon: She was working at Genesis while Mary was evaluated there commencing on March 11, 2009; she was able to visit with Mary on various occasions, and it was her opinion that Mary had a very warm and appropriate relationship with Gloria and Latayra. **CA 13-51 C/W CA 13-50; TR 494, 11. 12-17.** She attended a meeting at Genesis with Alexander, Mary's brother (Nelson Wiltz), Mary, a social worker at Genesis, namely, Kelly Sheffler, Gloria and one of Gloria's daughter's; at that meeting Mary told Kelly Sheffler and her that she did not want Alexander to be allowed to visit her or contact her for the remainder of her stay at Genesis **CA 13-51 C/W CA 13-50; TR 497, 11. 7-9;** and that she wanted to be discharged to return home to be cared for by Gloria and Gloria's daughters. **CA 13-51 C/W CA 13-50; TR 500, 11. 10-12.** It was her opinion that Mary was: lucid, able to verbalize her desires clearly, and was making ***33** her own decisions without any influence

from Gloria or Gloria's daughters. **CA 13-51 C/W CA 13-50; TR 500, 11. 22-23.** She never witnessed Gloria or her daughters attempting to influence Mary and she felt that Mary did not fear Gloria or her daughters, and quite to the contrary, she felt Mary liked them very much. **CA 13-51 C/W CA 13-50; TR 497, 11. 22-25.** She knew of her own personal knowledge that Dr. Gad, the psychiatrist designated to determine whether Mary was of sound mind and able to make decisions of her own volition, determined that Mary was of sound mind, was acting under her own volition, and gave approval for her to return home under the care of Gloria and her daughters as requested by Mary. **CA 13-51 C/W CA 13-50; TR 506, 18-32; 507, 11. 1-4.**

Testimony of Latayra Alexander: For pertinent testimony, please refer to pages 3-6 hereinabove.

Testimony of Gloria Amos: Gloria provided uncontroverted testimony that she did not handle any **financial** affairs for Mary, and that Mary handled her own **financial** matters. **CA 13-51 C/W CA 13-50; TR 278, 11. 10-14.** Mary told her not to tell anyone about Mary's business, especially Alexander, and if Alexander wanted to know Mary's business he could ask her himself. **CA 13-51 C/W CA 13-50 TR 228, 11. 12-13;Exhibit, 15.** Mary was very upset with Alexander when he had her dragged from her house and brought to Genesis on March 11, 2009 and that she was even angry with Gloria because she thought Gloria allowed Alexander to do this. **CA 13-51 C/W CA 13-50; TR 275, 11. 1-12.**

iii. Alexander has shown no evidence of acts of specific influence by Gloria or others on her behalf over Mary at any time; further his testimony concerning alleged influence by Gloria over Mary is circumstantial and not corroborated by any other person; and his testimony is not credible.

Alexander offered no testimony to support his claim that Mary was unduly influenced or defrauded by Gloria or others to induce her to execute the Will or the Donation. In fact, Alexander admitted that he had no witness to testify that Gloria ***34** even influenced Mary in any way. **CA 13-51 C/W CA 13-50; TR 401, 11. 24-25; 402, 11. 1-7.** Sadly, at the eleventh hour of trial and only after Rachel Leon was released as a witness, Alexander testified for the first time that he secretly recorded the meeting that occurred at Genesis, and that at that meeting Gloria allegedly stated that Alexander planned to put Mary in a nursing home. **CA 13-51 C/W CA 13-50; TR 508, 11. 15-20.** Interestingly, counsel for Plaintiff never asked Rachel Leon or Gloria, who were both present at this meeting, if such a statement was ever made, which, if confirmed by either, would have corroborated Alexander's testimony, but he chose not to do so. And, if confirmed, this alleged tape could have been submitted into evidence to impeach Gloria's testimony. Finally, testimony at trial revealed that Mary and Alexander's brother, Nelson Wiltz, who lives in Breaux Bridge, was at this meeting at Genesis. **CA 13-51 C/W CA 13-50; TR 277, 11. 8-12.** If Alexander's statement was true, certainly Alexander could have called his brother as a witness to corroborate his testimony, yet Alexander chose not to do so.

Moreover, as evidenced on Alexander's secretly recorded telephone conversation with Gloria on February 18, 2009, Alexander was in fact trying to remove Mary from her home and place her in a Sniff Unit for up to one hundred (100) days, even though and Alexander that Mary did not want that. **CA 13-51 C/W CA 13-50;** Exhibit, 15. The following excerpts, of this secretly recorded conversation, show same hereinbelow **CA 13-51 C/W CA 13-50; Exhibit, 15:**
ALEXANDER: But - she didn't want to go to the adult daycare.

ALEXANDER: We'll get her admitted to the Sniff Unit where she needs to be.

ALEXANDER: What we're going to do is we're going to get her in - she's not gonna have control of herself.

ALEXANDER: But we know her. And we want to do what's best for her and what's best for her is to put her at that Sniff Unit. She can't do. It's just like a baby that can't take care of themselves, so we have to take control of the baby. So ***35** what we want to do is take control of her, so we can do what's best for her, because she's not gonna do what's best for her.

GLORIA: But? Spoke to her about herself. *You need to talk to her. She's telling us to do different.*

ALEXANDER: *Exactly.* That's why I'm telling you that we want to take control of her.

GLORIA: Vincent, I understand that.

ALEXANDER: *She wants to go this way, but we want her to go that way.*

GLORIA: And that's understandable. But why y'all can't get her to do what y'all want her to do? I'm gonna tell her that.

GLORIA: *She's saying, "No. I don't want to do this. I don't want to do that."* But why don't y'all -- well, let me tell you what she do wants. *She do want to be home* - Can you even send her there and then send different people home to kind of be with her at her house? You can do that.

ALEXANDER: You know, that way - and then when ***they discharge her, they said that they'll keep her there 100 days***...But the process - if she would listen to me, ***since last year I was trying to get her into the program. She didn't want, because you can't make her understand that it's not nursing home.***

Accordingly, even if this Court believes that Gloria did tell Mary that Alexander was trying to put her in an institution, which Gloria vehemently denies, it would have been the truth and *for 100 days!* And, even assuming same, Alexander offered no evidence to even suggest that Gloria used this information to influence Mary in any way, much less to enter into the Will or Donation.

Finally, Alexander's testimony is not very believable. Alexander's own evidence, the transcript of his previous conversation with Gloria on February 18, 2009, impeaches his previous testimony that he never contacted Howard to check on Mary prior to the institution of his formal complaint with the Office of **Elderly** Affairs on March 9, 2009 **CA 13-51 C/W CA 13-50; Exhibit, 15.** Further, it confirms that he knows that Gloria is related to Mary. In the taped conversation, Alexander makes no objection to Gloria referring to herself as Mary's cousin over and over again, as Gloria tells Alexander, "...we related on your daddy' side and ***36** related on my grandmother's side;" "But we knew who our grandfather was and we knew what my grandmother say, who our grandfather was. That was my mama's daddy;" and "... looked at Durham. *I look at you (Vincent Alexander), I said, "No, sir." I say "I'm her cousin* and that's all was said."). **CA 13-51 C/W CA 13-50; Exhibit, 15.**

Apparently, Alexander only had a problem with Gloria representing herself as Mary's niece, but had no problem with Gloria referring to herself as Mary's cousin. When questioned at trial, Alexander simply stated there was no need to contest Gloria's statements that she was Mary (and Alexander's) cousin at that time. **CA 13-51 C/W CA 13-50; TR 381, 11. 4-17.** Further, the fact that Alexander bailed Elijah out of jail for favorable testimony clearly taints his testimony. **CA 13-51 C/W CA 13-50; TR 200, 11. 16-18.** Moreover, Alexander has several fraudulent or incorrect representations in his Succession pleadings. Finally, the fact that Alexander's testimony is in so many ways contrary to independent third party witnesses who have no stake in this outcome, like Howard, Rachel Leon, Martha and Tammy Washington, this obviously calls the veracity thereof into question.

This statement is simply absurd. Clearly Plaintiff lied on the stand by denying any relationship between Gloria and Mary to further his own interest.

9. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria induced Mary, by fraud, to make the Will.

10. The District Court erred to the extent it ruled that by clear and convincing evidence or by a preponderance of the evidence Gloria induced Mary, by fraud, to enter into the Donation.

For the reasons set forth in the Assignment of Errors Nos. 7 and 8, I have addressed Assignment of Errors Nos. 9 and 10, together, hereinbelow.

In its Reasons for Judgment the District Court concluded that, Gloria, by fraud, actions by silence, by failing to tell Norman in preparing the Will to include therein the Mary willed her property to Gloria only if she would not be placed in a ***37** nursing home. **CA 13-51 C/W CA 13-50; TR 117-118.** And, Gloria committed fraud by deliberately not giving the instruction to Norman, in preparing the Donation, that the gift therein should be subject to the specific condition that Mary not be placed in a nursing home. **CA 13-51 C/W CA 13-50; TR 118.** Additionally, the District Court found that Gloria was fraudulent through nondisclosure where disclosure was required and lying in order to obtain the property of Mary through her misrepresentations to investigators, Alexander and the Genesis people. **CA 13-51 C/W CA 13-50; REASONS FOR JUDGMENT 116.**

Under La. C.C. art. 1478, a donation *inter vivos* or *mortis* causa shall be declared null and void upon proof that it is a product of fraud. The standard of proof is the same as for proving undue influence, previously identified and set forth in La. C.C. arts 1483. In order to succeed on an action for fraud against a party to a contract, three elements must be proved: (1) a misrepresentation, suppression, or omission of true information; (2) the intent to obtain an unjust advantage or to cause damage or inconvenience to another; and (3) the error induced by a fraudulent act must relate to a circumstance substantially influencing the victim's consent to the contract. *Sepulvado v. Porcell*, 2012-271 (La. App. 3 Cir. 10/3/2012) 99 So.3d 1129. Where fraud is committed by silence or inaction, however, there must be duty to speak. *Greene v. Gulf Coast Bank*, 580 So.2d 712 (La. App. 3 Cir. 1991), *writ granted* 585 So.2d 554, reversed on other grounds 593 So.2d 630, *rehearing denied.*

In, *Rose v. Johnson*, 2006-518 (La. App. 3 Cir. 9/27/2006) 940 So. 2d 181, this Court was called upon to address a case with like circumstances. Here, the plaintiff moved to nullify a donation to his nephew for fraud, alleging that he mistakenly signed the donation thinking it was a copy of a cash sale. The plaintiff also averred that his nephew intended to defraud him by not telling the notary that ***38** the plaintiff had a wife and children at the time of execution of the donation, and the notary did not explain the donation to Plaintiff word for word. Under these circumstances, this Court found that the evidence was insufficient to find the donation was procured by fraud.

In further support, please see the discussion on *Succession of Polk, supra*, under Paragraph 8 hereinabove, where this Court upheld the validity of a will where fraud was alleged by mover.

For sake of brevity, I hereby adopt by reference, as if copied, in extenso, the law and evidence set forth under Paragraph 7 and 8 hereinabove. In addition to same and in light of statutes and cases set forth under these Paragraphs 9 and 10, the District Court erred by finding that Gloria committed fraud upon Mary, so as to make her to make the Will and enter into the Donation, against her will. For the same reasons, law and evidence set forth in Paragraphs 1 through 5 hereinabove, the District Court found that it was Mary's true intentions to give all of her property to Gloria in exchange for Gloria's obligations not to place Mary in a nursing home and to care for Mary at her residence until she died. Again, this cause for the Will and Donation was undoubtedly satisfied. Moreover, the District Court erred for the following reasons, to-wit:

● Gloria had no duty to tell Norman what needed to be put in Mary's Will. Had Mary directed Norman of the content that should be put in her Will, she would be in violation of La. C.C. art. 1479 for undue influence. Interestingly, the District Court finds that a fraud was committed by the sole legatee of a will by failing to tell the preparer of such will what the testator wants to be included in such will. This conclusion simply falls outside the scope of reason.

● The Donation is an act by which Mary gave property to Gloria. As per the uncontroverted testimony of Gloria and Norman, the only two individuals who had any knowledge concerning the preparation of the Donation was Norman and Mary, ***39** and that Gloria's sole connection with same was contacting Norman to prepare the Donation and executing the Donation. Moreover, Norman went over the Donation with Mary, in full; Mary directed Norman on the terms that should be in the Donation; and Mary gave her consent to the terms of the Donation, as written. It is a bit of a stretch to require Gloria to tell Norman and Mary what should be included in a donation from Mary to Gloria.

● As per the testimony previously presented, Alexander was well aware of the arrangements between Gloria and Mary. Moreover, when Alexander asked Mary concerning any agreements between Gloria and Mary, as directed by Mary Gloria told

Alexander that he needed to talk to Mary. **CA 13-51 C/W CA 13-50; Exhibit 3.** Accordingly, Gloria was just doing as she was told by Mary with respect to Mary's affairs.

● Also, as per the evidence previously presented, Gloria never told Rena Derouselle that there was no will. In fact, Gloria told Rena Derouselle, "it's whatever, what Mary says". **CA 13-51 C/W CA 13-50;** TR 2247, 11. 27-32. However, after Rena Derouselle left Mary's residence, Gloria told Mary that she needed to tell Rena Derouselle the truth, and if she wouldn't tell her, she would. And, the following day Gloria told Rena Derouselle about the Will and the Donation. **CA 13-51 C/W CA 13-50; TR 229,11. 1-15.**

In light of the foregoing, and the other portions of this brief cited herein, it is clear that the District Court erred to the extent it ruled that the Will and Donation were consummated through fraud by Gloria and upon Mary.

11. The District Court erred in finding that Gloria did not sustain her burden of proof that she was related to Mary by blood or affinity.

Gloria incorporates the evidence previously cited hereinabove, and in particular, the testimony of Norman, Gloria, Tammy Washington, Martha, Mary Alexander, the face of the Will and Donation itself, the secretly recorded taped ***40** conversation between Gloria and Alexander on February 18, 2009, as in copied in extenso. In light of the foregoing, it is clear that Gloria was related to Mary by blood and affinity. Accordingly, the District Court erred in ruling to the contrary.

12. In light of the Assignments of Error Nos. 1-11, the District Court erred in removing Gloria as Administratrix of Mary's estate.

Because the Will is valid and should not be nullified for fraud or undue influence, Alexander is not an heir of the estate of Mary and thus his prayer to be appointed administrator of the estate and/or for an accounting are rendered moot. Moreover, Alexander's only testimony at trial concerning any inappropriate handling of assets of Mary's estate assets comes through the testimony of Elijah Roberts, a proven liar, who Alexander bailed out of jail on November 10, 2009 in exchange for his written statement against Gloria that he wrote in Alexander's office two days later; and who by his written statement dated and signed on May 5, 2010 admitted that the statement he wrote on November 12, 2009 was wholly false; Alexander coached him to write such statement; and that he only did same because he was angry at his wife and Alexander bailed him out of jail. Accordingly, the District Court erred in removing Gloria as Administratrix of Mary's estate.

CONCLUSION

WHEREFORE, Appellant, Gloria Jean Amos, for the reasons set forth hereinabove, respectfully prays that this Honorable Court reverse the District Court's Judgment dated June 1, 2012 in all respects.

Appendix not available.

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