2009 WL 4321319 (Okla.) (Appellate Brief)
Supreme Court of Oklahoma.

Darian Doornbos KEDY, Personal Representative of the Estate of Charles Foster Doornbos, Plaintiff/Appellee,

v.

Patricia K. Gilliland DOORNBOS, an Individual, Defendant/Appellant; and Harris Trust and Savings Bank, a Banking Institution; Smith Barney a Division of Citigroup Global Markets, Inc., a Corporation; Citigroup Global Markets, Inc., a Corporation; Smith Barney, Inc., a Corporation and Northwestern Mutual Life Insurance Company, an Insurance Corporation, Defendants.

No. 107,127.
July 27, 2009.

Washington County District Court Case-CJ-2005-753 Judge Curtis Delapp

Appellant Patricia K. Gilliland Doornbos' Brief In Chief Nature of Action-Permanent Injunction

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***1 SUMMARY OF THE RECORD**

A. Procedural History

1. On December 12, 2005, at an *ex parte*, no notice hearing, the district court granted a temporary restraining order, in favor of Darian Doombos Kedy, restraining Patsy Doombos, Harris Bank, and Smith Barney from taking any action in respect of the approximately $10.5 million Harris Bank stock investment account, the approximately $500,000 Smith Barney stock investment account, the approximately $2 million Forest Circle home in Sedona, Arizona (a former residence of Patsy and Foster Doornbos), and the Desert Holly home in Sedona, Arizona.

2. The petition in this case, as well as the temporary restraining order, were not filed until December 13, 2005. *See id.*

3. The *ex parte*, no notice hearing also included the companion case of *In the Matter of the Special Guardianship of Charles Foster Doornbos, an Incapacitated Person*, No. PG-05-134, wherein Darian sought appointment as special guardian for Foster. The district court made the appointment and granted Darian an order to transport Foster to Oklahoma.

4. Darian and her sisters flew to Arizona on a private jet paid for with Foster's money and secreted him onto the airplane, without complying with Arizona law on registration of judgments, notice to Patsy, or a judicial hearing.

5. The Oklahoma Supreme Court granted two writs of habeas corpus (so far as is known, a first for a civil case in Oklahoma) to Patsy, and Foster returned home to Sedona on January 20, 2006.

6. On January 18, 2006 the district court in the companion case said: “Had I known everything I now know, I would not, with all due respect, have issued the letters of special guardianship without notice if I had known everything that I now know...I have to remove the special ***2** guardianship in this case.” 1/18/06 Hearing before Judge Dreiling, *In the Matter of the Special Guardianship of Charles Foster Doornbos, an Incapacitated Person*, No. PG-05-134, attached as Appendix A at 465.

7. On January 18, 2006 Patsy's counsel asked permission for Foster to be able to go to Oklahoma City for the hearing in the Oklahoma Supreme Court on January 19, 2006. The district court denied permission, finding that given Foster's condition, making a trip to Oklahoma City would be “cruel and unusual punishment.” Appendix A at 469. In addition, there was an outstanding order prohibiting Foster from being taken outside Washington County without court permission.

8. In defiance of those orders, Darian and her counsel Alan Carlson took Foster to Oklahoma City on January 19, 2006 for examination by psychologist Russell Adams, for usage in this case now on appeal. 4/5/07 Tr. At 18-20.

9. Patsy removed this case to federal court on January 9, 2006. The federal court remanded the case on December 20, 2006. *See* United States District Court for the Northern District of Oklahoma, 06-CV-19-JHP.

10. A hearing on a preliminary injunction began on *March 12, 2007*, and proceeded intermittently until a preliminary injunction was entered on *November 5, 2007.*

11. Darian was required to post a bond of $150,000 on restrained assets worth more than $15,000,000.

12 The hearing on the permanent injunction was held *May 5-8, 2008.*

13. The matter remained under consideration following the hearing, until *April 27, 2009.*

14. Foster died on October 24, 2006.

B. Background Facts

***3** Foster and Patsy Doombos lived together as husband and wife beginning in 1989. (Pl.'s Ex. #7). In 1997 they filed a certificate in the Washington County courthouse declaring that for the past eight years they were common law husband and wife. (*Id.*) In August 1990, when oil was $13.30 a barrel, (Def. Ex 38), Foster created a revocable trust over his oil and gas properties only, giving all of the income to himself, with the right to alter or revoke, with his four daughters as beneficiaries after his death. (Pl.'s Ex.#6). Foster's physical health began to deteriorate in 2003. (4/2/07 Tr. At 163). Darian challenges three transfers of assets from Foster's name only to joint tenancy with Patsy: (1) a $10 million plus account of stocks and bonds at Harris Bank in Chicago ("Harris Account"); (2) an approximately $500,000 brokerage account at Smith Barney; (3) a $2 million home on Forest Circle Drive in Sedona, Arizona. (Pl.'s Amended Petition). Darian also challenges the joint tenancy purchase of a handicap equipped $2.1 million home on Desert Holly Road in Sedona to replace the Forest Circle home. (*Id.*) In 2000 Foster and Patsy purchased a Bartlesville residence in joint tenancy. (4/5/07 Tr. at 16-17). The Harris Account, the Smith Barney account, and the listed real estate were never in the Trust.

C. Foster's Deteriorating Physical Condition

1. In mid-2003, when Foster noticed some slurring of speech and chewing and swallowing difficulties, Darian made an appointment for Foster with a Bartlesville neurologist, Dr. Ownbey. (Tr. Vol I at 124). The diagnosis was Korsakoff's Psychosis, which is a memory deficiency occasioned by alcoholism(the brain autopsy showed the Korsakoff's Psychosis diagnosis to be in error). (Pl.'s Ex.# 66U at 2-7). Dr. Ownbey said he wanted to see Foster again when he quit drinking, because drinking can affect the results of the psychological testing heOwnbey did. (*Id.)*

2. Foster was an alcoholic. (9/7/07 at 106)

***4** 3. By October 2003 Foster had difficulty writing. When Dana wanted a check from Foster for $205,000 in October 2003 so she could buy a farm, she testified she wrote the check for Foster to sign because "he could hardly write at all." (Tr. Vol I, at 200-201).

4. Foster's gait also was affected by his disease, cortical-basal degeneration. His gait worsened over 2004 and 2005.

5. Foster's speech also was affected by his disease, and this also worsened over 2004 and 2005. (9/17/07 Tr. at 16).

6. Patsy told Darian in November 2005 that the Mayo Clinic diagnosed Foster with supranuclear palsy and that it was fatal. This conversation occurred during a phone call Darian recorded, which was admitted into evidence. (Pl.'s Ex. # 54).

D. Harris Bank and Smith Barney Accounts

1. Sometime in 2003 Foster told his Smith Barney broker, Maggie Depole, he wanted his account to be joint tenancy with Patsy. (Depole Depo. at 320-331). In October 2003 Foster bought 10,000 shares of Lexar stock with Depole, and 5,000 shares of Corning stock. (Depole Depo. Ex.# at 128). In November 2003 Foster bought 30,000 shares of Corning stock with Depole, (*Id.* at 132), and sold his Lexar stock at a $40,000 profit. (*Id.* at 13 1).

2. All of the Harris Account and all of the Smith Barney monthly statements were sent to the Trust's office in Bartlesville and seen by Darian before being sent to Foster in Sedona. (4/2/07 Tr. At 20, 4/5/07 Tr. At 12)

3. In November 2003 Harris Bank asked for an updated Investment Management account form. On the last page of the form appears: "If this is being executed by joint owners, please check the appropriate box." The next line down has a box with an

"x" in it, with the abutting notation ***5** "Joint Tenancy with Right of Survivorship." Foster signed the document in his own handwriting, and Patsy wrote "Charles F. (PKD) Doornbos by Patricia. *In December 2003 Jan Stone, Vice President of Harris Bank signed on behalf of Harris Bank under the heading "Accepted"* (Morley Depo. at 45-47). Foster's account manager, Jay Morley, with whom Foster had a 20 year relationship, testified that "we did not pick that up," (Morley Depo. at 51), referring to Ms. Stone's acceptance of the joint tenancy. *Morley testified that the documents Harris Bank wanted signed before the transfer was made official on their records were "form over substance."* (Morley Depo. at 62), and that the change to a joint account was made "based upon a conversation I had with Fos, that's why we changed it." (Morley Depo. at 92). Morley amplified this testimony when he said as to the formal change to joint account "It's because I had a conversation with Fos and so did Mr. Sullins. So we knew what he wanted to do." (Morley Depo. at 174).

4. In January 2004 Foster told Morley, his account manager with whom he had a 20 year relationship, (Morley Depo. at 176), to continue to hold 55% of the Harris Account in energy stocks, mostly Exxon Mobil (which had a $40.79 per share value on 1-31-04). (Pl. Ex. at 2004-0008). Sometime in 2004 Foster told Morley that he wanted the account to be joint tenancy with Patsy, saying "for my wife," and "I want this" when Morley verified whether Foster wanted the account to be in joint tenancy. (Morley Depo. at 59-60; 89-90; 138). Also that year, Morley spoke to Mr. Sullins, another Harris officer whom Foster told he wanted the account joint tenancy with Patsy. (Morley Depo. at 168-169; 172-173). Foster also told Mr. Sullins directly that he wanted to transfer the account into joint tenancy with Patsy. (Morley Depo. at 169-169; 172-173).

5. In May, 2004 the purchase of the Desert Holly home was closed, with title taken in Foster- ***6** Patsy joint tenancy. (Pl. Ex #2) At Harris Bank's suggestion, $1.7 million was borrowed from Harris Bank, and the remaining $400,000 of the purchase price came from a Wells Fargo account in Foster-Patsy joint tenancy. (Morley Depo. at 10-11). Foster told Morley he wanted to take out the loan. (Morley Depo. at 12-13; 102).

6. In June, 2004 Foster sold stock of a Virginia software company out of Smith Barney account and bought 5,600 shares of Leap Frog. (Morley Depo. Ex.# 3). In October, 2004 Foster sold the Leap Frog shares with Depole, and bought 27,000 shares of Sirius Radio through her. (Depole Depo. Ex.# I at 155). In December, 2004 Foster sold 13,500 shares of Sirius, bought 75,000 shares of Diamond Ranch Foods and bought 13,500 shares of Sirius. (Depole Depo. Ex # I at CGM1 0160). At 12-31-04 the Exxon Mobil shares Foster kept in the Harris Account were at $51 per share. (Pl. Ex. 32 p. 2004-0140). In January, 2005 Foster buys 20,000 shares of Aastrom Biosciences with Depole. (Depole Depo. Ex #l P. CGMI 0176). In June, July or August 2005 Depole called Patsy and asked if Foster wanted to sell his Corning shares. (Depole Depo. at 327-328; 153). Patsy asked Foster, across the room, and Depole heard Foster angrily "scream, 'No'." (Id.) *Depole "always believed he was competent."* (Depole Depo. at 76),_and said Foster made "good **financial** decisions on the stock." (Depole Depo. at 186). Ms. Depole has a degree in psychology and worked with brain-damaged children. (Depole Depo. at 332-333).

7. In March, 2005 Smith Barney sent an account document (to the Bartlesville office) saying the account was joint tenancy with Patsy. (Pl.'s Ex.# 40). Enclosed was a form for Foster to sign verifying the account was joint tenancy. Foster signed this form in front of a notary, who testified she did not question his competence or the act of signing. (Strohm Depo. at 18-21; Strohm Depo. Ex.# 1). Thereafter Smith Barney sent monthly account statements to the Bartlesville office, ***7** showing the account is Foster-Patsy joint tenancy.

8. In April, 2005 Foster signed a letter confirming that the Harris Account is joint tenancy with Patsy. (Morley Depo. Ex.# 17). His signature was witnessed by Serena Angelique, whom Darian did not depose.

9. *In April 2005 two account officers from Harris Bank (with 33 and 36 years experience) in Scottsdale visited in person with Foster and Patsy to try to talk them into moving the Harris Account to the Scottsdale office.* (Engebretsen Depo. at 24). *One of the officers, Jon Engebretsen, who had worked with Foster for 17 years. (Id.* at 8). *He worked with Foster first when Foster's mother died and Harris Scottsdale handled her estate. (Id.). Engebretsen and Foster had a cordial relationship, the two meeting periodically just to meet. (Id.* at 9). *Foster also had an account at Harris Scottsdale.* (Engebretson Depo. at 13). *In the April 2005 meeting, Engebretsen found Foster "not in any way mentally incapacitated." (Id.* at 28). *During the visit Foster asked questions*

about his brother, talked about his houses in Sedona, and about the possibility of moving the account to the Scottsdale office. Engebretsen was experienced with clients whom he felt needed special help with their ***financial*** *affairs. (Id.* at 25). *The two officers described the visit thus, in a letter: "From our perspective both [account officers] were convinced that although Foster had trouble communicating, there was nothing about Foster's mental capacity that would have us to conclude that he was in any way mentally incapacitated ...Foster was in good spirits and appeared well cared for" (Id.* at 28). *Foster was responsive to their conversation, and had the ability to communicate regarding the topics discussed. (Id.* at 29-30).

10. In August, 2005 and thereafter Harris Bank sent to the Bartlesville address the monthly statement, showing the account ($8.4 million) is Foster-Patsy joint tenancy. (Pl. Ex #32 at ***8** 2005-0065-66). In September Darian called Harris Bank twice (4/2/07 Tr. At 222) about the mechanics of getting $500,000 to Harris Bank to pay down the $1.7 million loan Harris made for the purchase of the Desert Holly home, and sent the $500,000 to Harris. (Morley Depo. at 66-68; Morley Depo. Ex.# 21). In September, 2005 Foster talked to Morley at Harris Bank and agreed to the sale of 15,800 shares of Exxon Mobil ($64 per share), with the $1 million proceeds used to further pay down the $1.7 million Harris loan on the Desert Holly purchase. (Morley Depo. at 72).

E. The Desert Holly Joint Tenancy Creation

1. Foster's physical deterioration included substantial right hand deformity, making it difficult for him to write. Linda Cory was Foster's physical therapist in 2004 and 2005. (8/3/07 Tr. at 15). Linda Cory's notes for 4-20-04 show Foster said he is going to be closing on the purchase of the Desert Holly home, he needs to sign the closing papers, and he wanted to practice his signature.

2. Linda Gory's notes,(Pl. Ex. #66-C, at 14-22) have the actual pages where Foster practiced writing.

3. Linda Cory could understand Foster in all of the 48 sessions she had with him in 2004 and the 11 sessions in 2005. (8/3/07 Tr. at 15-17).

4. Linda Cory testified Foster never exhibited any symptoms similar to those of patients who had head trauma or dementia, and that she had more than 10 years experience working with such persons. (8/3/07 Tr. at 57). She testified that throughout her working with Foster in 2004 and 2005 he had his mental faculties.

5. Foster signed the deed reflecting the joint tenancy, in front of Alison Geiger, the escrow closing agent.

***9** 6. This home was bought with the $1.7 million loan from Harris Bank which Foster told Morley he wanted to make, together with $400,000 from another joint account.

7. Linda Cory testified she had never seen such a loving relationship between an older couple as that between Foster and Patsy. (8/3/07 Tr. at 65).

F. The Forest Circle Joint Tenancy Creation

1. In March 2004 Foster executed a deed placing the Forest Circle home in joint tenancy.

2. The deed was notarized by Emily Bol, who testified she did not question Foster's competence.

3. Bol had been a notary for 15 years, was working as an escrow officer, and was a licensed realtor. Her typical work day involved real estate closings.

4. The Forest Circle home was to be sold, because it was not handicap equipped for Foster.

5. During the several years the home had been owned in Foster's name, more than $800,000 was spent from joint tenancy funds in repairs and remodeling. (8/3/07 Tr. at 171-172).

6. In 1998, just before yet another Sedona home bought by Foster was to be sold, Foster had the title changed to joint tenancy with Patsy. (4/5/07 Tr. at 16-17).

7. In 2000 Foster bought 1210 Dogwood Court in Bartlesville in joint tenancy with Patsy. (4/5/07 Tr. at 15).

G. Darian's (and the Other Daughters') Recognition of Foster's Financial Competence During the Same Period as the Transactions at Issue

1. In June, 2003 Darian arranged for Foster to see neurologist Dr. Ownbey in Bartlesville after Foster complained of spelling and slight speech difficulties. (4/2/07 Tr. at 163). Ownbey's report said Foster has Korsakoff's Psychosis but needed further testing after he quit drinking. (Pl.'s Ex.# 66U at 2-7). Darian had no concern about Foster's mental capacities such that she thought any steps needed to be taken because Foster could not take care of his personal and **financial** affairs. ***10** (4/2/07 Tr. at 207).

*2. Until December 2005 Darian never took any steps questioning Foster's competency in his **financial** affairs.*

3. In October, 2003 Darian was given a power of attorney over all of Foster's **financial** affairs, exercisable only in the event of his incapacity or incompetence. (Pl.'s Ex.# 16). *She never exercised that power of attorney.*

4. Darian received the Harris Bank letter asking Foster to confirm his prior instructions that Patsy could make distributions from the Harris Account to a Foster-Patsy joint tenancy account.

5. During 2004 Darian transferred $500000 to $700,000 to a Foster-Patsy joint tenancy account. During 2005 she transferred a little less than $500,000 to $700,000 to the same joint tenancy account, giving Patsy giving her equal access to the funds.

6. Darian, knowing Dr. Goldsmith was Foster's attending physician, (Pl.'s Ex. # 55) never contacted Dr. Goldsmith between August of 2003 and December of 2005 regarding any concerns about her father's health. (4/5/07 Tr. at 17).

7. Throughout 2004 Darian talked to Foster two to three times a week on business, and did so twice a week in 2005. (4/2/07 Tr. at 216).

8. In February, 2004 daughter Diane visited Foster in Sedona. Tom Brown, Foster's attorney who drafted the Trust and the powers of attorney executed in October, 2003, was with Diane, on a vacation trip. (4/2/07 Tr. at 132). In May, Tom Brown sent a letter to Harris Bank saying Foster has had a stroke and Patsy can sign any needed papers. (Morley Depo. at 22-23; Pl.'s Ex.# 39) *He also says Foster will tell you when the power of attorney is no longer needed.* (Pl.'s Ex. #39).

***11** 9. In July, 2004 daughter Dana visited Foster and Patsy in Sedona and was told “they”(Foster and Patsy) bought the Desert Holly home. (4/5/07 Tr. at 162). Dana called Darian and passed along that information. (4/2/07 Tr. at 189)

10. In October 2004, January 2005, April 2005 and June 2005, Darian sent Foster the Trust's quarterly working interest report. (4/5/07 Tr. at 7).

11. In November 2004 Darian arranged the change of the Arvest Bartlesville account in Foster's name to be Foster-Patsy joint tenancy.

12. In January 2005 Darian talked to Foster about sending money to the Foster-Patsy joint tenancy account in Arizona.

13. As noted above, in March 2005 and monthly thereafter Darian got the Smith Barney monthly statement showing the account as Foster-Patsy joint tenancy.

14. As noted above, in August 2005 and monthly thereafter Darian got the Harris Account statement showing the account as Foster-Patsy joint tenancy.

15. As noted above, in September 2005 Darian called Harris Bank twice about the mechanics of getting $500,000 transferred to Harris Bank to pay down on the loan used to buy the Desert Holly home which Dana told her was bought by both Foster and Patsy.

16. In February 2005 Darian and Diane visited Foster and Patsy in Sedona.

17. In mid-2005 Darian asked for Foster's consent to raise the salary of Darian, Dana and Diane (as Trust employees) from $110,000 each to $190,000 each. (4/5/07 Tr. at 14). Darian accepted Foster's competence by proceeding with his response of "yeah." (*Id.).*

18. In August of 2005 Foster directed patsy to send Sydney $15,000. (Tr. Vol I at 204-205). Patsy sent additional money to Sydney approximately five additional times, at Foster's direction, ***12** in 2004 and 2005. (Tr. Vol I at 206-207).

19. In September 2005 Dana asked Patsy to get Foster's permission for the Trust to pay the $24,375 cost of her son's drug rehabilitation treatment. (Tr. Vol. I at 201-202).

20. In September 2005 Dana spent a week with Foster and Patsy while her son was in drug rehab in Sedona.

21. In December 2005 Darian and Dana kidnaped Foster from his home in Sedona and flew him to Bartlesville on a private jet paid for with his own money. (8/3/07 Tr. at 62). This followed receipt of a December 7, 2005 notarized letter from Foster to Tom Brown asking that documents on the Trust be sent to an Arizona estate planning lawyer, followed by Darian hiring Tom Brown's law firm and obtaining a court order for Foster to be brought to Oklahoma, which order was obtained by Darian, Dana and Alan Carlson failing to tell Judge Dreiling about the letter from Foster.

22. In Bartlesville, after the kidnaping, Darian took Foster to **Elder** Care, and on the admission form she left blank the space to state any problems Foster had had *in the past few years* with "change in personality," "poor judgment," "episodes of severe confusion," "believing something that is obviously not true," and "vision or hearing loss." (Pl.'s Ex.# 66D at 10-17). In addition, she did not tell **Elder** Care that Foster had been diagnosed by the Mayo Clinic with supranuclear palsy and that it was fatal. (*Id.*)

23. During the more than one month Foster was in Bartlesville, Darian denied Patsy any phone contact, including over Christmas and New Year's Day.

24. After two writs of habeas corpus from this Court, Foster was released to go home to Arizona on January 20, 2006. (Dec. 20, 2005 Order, Case No. 102,903, Granting Writ of Habeas Corpus ***13** on Behalf of Charles Foster Doombos; January 20, 2006 Order for Release Instanter of Charles Foster Doornbos to Patricia K. Gilliland Doornbos, attached as Appendices B & C).

H. Foster's Attending Physician Had No Cognitive Concerns of Foster

1. Dr. Goldsmith was Foster's long-time personal physician in Sedona. (9/17/07 Tr. at 6-8).

2. In December, 2004, January 2005 and October 14, 2005 Dr. Goldsmith saw Foster and had no concerns about Foster's cognitive ability. (*Id.* at 18-19; 21 & 23). In January 2005 Dr. Goldsmith told Foster to quit smoking and Foster told him "in no

uncertain terms" he would not do so. (*Id.* at 20). During his October 14, 2005 Dr. Goldsmith, by listening carefully, understood what Foster said. (*Id.* at 23). Unlike Foster's treatment of the Mayo Clinic physicians in September 2005, Foster was fully cooperative with Dr. Goldsmith. (*Id.* at 26).

4. Dr. Goldsmith noted the autopsy report showed encephalopathy severe consistent with cortical-basal degeneration, and that this is primarily a movement disorder which starts on one side of the body and progresses gradually. (9/17/07 Tr. at 30-31). He also noted the autopsy indicated cerebellar atrophy, which is the part of the brain that controls balance, the ability to walk properly, and spatial perceptions. (*Id.* at 39-40).

5. Dr. Goldsmith observed that Patsy and Foster had a very good relationship and they always seemed supportive of each other. (*Id.* at 12).

I. Foster's Former Attending Physician Had No Cognitive Concerns

1. Dr. James Taylor, a Bartlesville physician, was Foster's doctor until retirement in 1995. He was Foster's physician for 20 years and close friend for 30 years. (8/2/07 Tr. At 60-62).

2. In October Dr. Taylor and his wife had dinner with Foster and Patsy. "[H]e was perfectly normal then. He could speak well, follow the conversation. I saw no abnormalities in him then." ***14** (8/2/07 Tr. At 62).

3. Dr. Taylor spoke to Foster 3-4 times in 2004. (8/2/07 Tr. at 62). His opinion of Foster's condition during those phone calls: "I could tell that he was normal at that time. He answered me appropriately and we had normal conversations." 8/2/07 Tr. At 63).

4. During 2005 when Dr. Taylor spoke with Foster by telephone. "Every time I talked with him he seemed perfectly normal." 3 or 4 per year. (8-2-07 Tr. at 62-63).

5. Dr. Taylor testified Foster wanted to take care of Patsy **financially** because of his love for her and the fact they had a good marriage. (8/2/07 at 76).

6. Dr. Taylor testified Foster did not exhibit any forms of dementia in the 2004 or 2005 phone calls, and that Foster was mentally competent to make his own decisions in 2004 and 2005.

J. The Evidence Showed Foster was Competent During the Transactions

1. *Darian presented no witness to describe the meaning of Foster's brain autopsy. Patsy presented testimony of Dr. C.T. Thompson about the meaning of the autopsy. Dr. Thompson testified the areas of Foster's brain that were heavily involved in memory and executive functions and ability to make decisions were all reasonably intact.* (Tr. Vol I at 251; Pl.'s Ex. *#86). This testimony stands unrefuted. Moreover, Darian's witness Dr. Lee admitted the problems identified in the brain autopsy did not affect his reasoning ability.* (Tr. Vol I at 77-78). Dr. Thompson is a board certified general surgeon, and the former chief of staff at St. Francis Hospital in Tulsa, Oklahoma's largest hospital. (9/18/07 Tr. at 103; Tr. Vol I at 223). Dr. Thompson has dealt extensively with competency issues: (a) he performed 35,000 to 40,000 surgical procedures, each of which required patient consent and thereby competent consent issues (9-18-07 Tr. at 103); and (b) he was in charge of competency issues for medical personnel at St. ***15** Francis for most of 25 years (*Id.).*

2. *Dr. Thompson testified that the gold standard in assessing an individual's competency is to assess whether the actions are reasonable and rational. This testimony stands unrefuted.* (9/18/07 Tr. at 113 & 125).

3. Foster drove himself until January 2005 when he had a parking lot fender bender and voluntarily gave up the keys to his car. (Tr. Vol I at 208-209). *Dr. Thompson's unrefuted testimony was that driving a car requires complex decision making.* (Tr. Vol. I at 241).

4. In September 2004 Foster was assessed by a physical therapy rehab therapist "to be [a] safe driver (cognitively, perceptually, physically).

5. In 2004 Foster saw his physical therapist, Linda Cory, 48 times, (8/3/07 Tr. at 15), never needing an appointment card, (id. at 16) driving himself, (*Id.* at 17), and showing up on time. (Id. at 151). They discussed Foster's life, politics, religion and sports. (*Id.* at 49-50) He saw her 11 times January-May 2005, (8/3/07 Tr. at 15), was understandable to her, and spoke in 4-5 word sentences. (*Id.* at 149). She had worked for ten years with person who were incompetent or had dementia and testified Foster had no such characteristics or symptoms. (*Id.* at 57).

6. In June 2004, Patsy's diary (stolen out of her house by Dana) says "the wonderful upside to this is his mind is still great." (Pl. Ex. #68).

7. Dana testified, *"We all need to accept what he wanted because he let that be known."*

8. Dr. Jeffus, an expert testifying for Patsy, gave unrefuted testimony that in determining **financial** competence, the psychologist must visit with the person's **financial** professionals to see what kinds of decisions the patient is making. (6-11-07 Tr. at 45-46). None of Darian's experts did so.

9. In February 2004 Foster wrote a check for $25,000 as a donation to Recovery Alternatives, an ***16** alcohol rehabilitation facility Foster went to in order to stop drinking (it worked).

K. Medical Testimony Supporting Competence

1. Darian presented Dr. Lee who saw Foster in September 2003. She admitted not being an expert on cortical-basal degenerative disease, (Tr. Vol I at 74), which the autopsy showed Foster had. (Pl.'s Ex.# 86).

2. Dr. Lee agreed "It would be inappropriate to conclude that there are specific links between cognitive impairment and the ability to make **financial** decisions." (Tr. Vol I at 89). She also agreed "Little empirical research has explored the relationship between psychometric test measures and actual every day functioning," and that "A standardized test performance measure should not be regarded as a proxy measure of **financial** competence," and *"There are no accepted objective standards of **financial** competence."* (Tr. Vol I at 90-91).

3. Dr. Lee testified the hippocampus plays a large role in memory, that the hippocampus is a sheet of neurons, and that the brain autopsy showed NO neuron loss, meaning the hippocampus was intact at time of death. (Tr. Vol I at 92).

4. None of Darian's three experts ever talked to Foster's **financial** advisers Depole or Morley, nor did they inquire about Foster's **financial** decision making.

5. None of Darian's experts testified that an opinion Foster was competent was unreasonable.

L. Foster's Affection for Patsy

1. Dr. Taylor testified Foster wanted to take care of Patsy **financially** because of his love for her and the fact they had a good marriage. This testimony is unrefuted.

2. Linda Cory testified she had never seen such a loving relationship between an older couple, as she saw with Patsy and Foster. This testimony is unrefuted.

***17 I. Darian Did Not Establish by Clear and Convincing Evidence that Foster was Incompetent to Manage His Financial Affairs, and the District Court Erred in the Finding of Incompetence**

There is a strong presumption of sanity under Oklahoma law. Proof of a sound and disposing mind is a "rational act rationally done." *In re Riddle's Estate,* 25 P.2d 763, 765 (Okla. 1933); *In re Taryian's Estate,* 246 P. 400, 402 (Okla. 1926). Advanced age and reduced mental processes will not invalidate a gift where the donor is competent to understand the nature and effect of the transaction. *McSpadden v. Mahoney,* 431 P.2d 432, 436 (Okla. 1967). Evidence sufficient to negate the presumption of competence must be proven by "clear, satisfactory, and convincing" evidence. *Burkes v. Estate of Burkes,* 945 P.2d 481, 483 (Okla. 1997).

No one who dealt with Foster in his **financial** affairs questioned his competence therein. None of the doctors Darian presented knew anything about his **financial** affairs, nor did they ever talk to Foster's **financial** advisers. Darian and her sisters never questioned Foster's **financial** competence, knowing full well of the transfers of the Harris Account and the Smith Barney account. Moreover, they relied on him concerning the Trust business (twice a week calls from Darian in 2004 and 2005 to discuss the oil and gas business) and to make **financial** decisions to their substantial benefit during the same time period they now complain he was **financially** incompetent. Darian transferred between $1 million and $1.4 million to Foster-Patsy joint accounts in 2004-2005. *These transfers were from the Trust. As of October, 2003 Darian was co-trustee.* (4/2/07 Tr. at 127-128). *As co-trustee, she had a fiduciary duty not to transfer money to a joint account unless she believes the direction to do so from Foster has been made through the exercise of* ***financial*** *competence.*

Darian's own expert, Dr. Ownbey, testified that is a reasonable thing to do for a man to leave ***18** half of his assets to his wife of 18 years if he's leaving the other half to his four daughters, and that it is reasonable to leave all of his estate to his wife and nothing to his daughters. (Tr. Vol I at 158-159). Then he said an opinion that Foster had the competence to make decisions with regard to the title to real estate in March and May of 2004 would be a reasonable opinion. (*Id.* at 171). He also testified that if your wife is your loving caregiver with all the problems Foster had it is not unreasonable to want to give a lot of your property to your loving caregiver. (Id.). This testimony was unrefuted, and severely contradicts the "final judgment" which said the joint tenancies were not reasonable or rational.

Moreover, Foster's desire to leave more to Patsy than he might have intended earlier must be considered in light of the value of the Trust which was left to the daughters, which, alone, vividly illustrates the reasonableness and rationality of what Foster did in creating the four joint tenancies at issue. In March 1999 when he made his will leaving Patsy a lot less than occurred through the joint tenancies, the price of oil was $13.30 a barrel. In December 2003 when Foster created the joint tenancy interest in the Harris Account, oil was at $31.10 a barrel. By March 26, 2004, the date of creation of the Forest Circle joint tenancy, oil was $35.73 a barrel. In April 2005 the price was $54.51 a barrel, causing the value of the trust to quadruple.

The district court's "final judgment" says the creation of the joint tenancies "were not reasonable, rational or competent actions" of Foster. *See* Final Judgment. Patsy was Foster's wife. As such she was a natural object of his bounty. *See Estate of Mowdy,* 1999 OK CIV APP 4, 12.

The final judgment" says "medical and psychological evidence presented in the forms of testimony and reports shows that Charles Foster Doornbos was not competent to create the ***19** joint tenancy interests with rights of survivorship." This is directly contradicted by Darian's own witness, Dr. Lee, who testified: "A standardized test performance measure should not be regarded as a proxy measure of **financial** competence," "Little empirical research has explored the relationship between psychometric test measures and actual everyday functioning," and "There are no accepted objective standards of **financial** competence." Moreover, the "final judgment," by eqating terst results and medical testimony with **financial** incompetence

is precisely what Dr. Lee said cannot be done: "It would be inappropriate to conclude that there are specific links between cognitive impairment and the ability to make **financial** decisions." (5/5/08 Tr. at 89).

The "final judgment" does not say what burden of proof was used. *In addition, the "final judgment" does not say when Foster became incompetent No one challenged his competence to change his Trust and to make powers of attorney in October 2003. Foster's creation of the joint tenancy on December 4, 2003 cannot, on the evidence, have been any less competent than his actions in October 2003. The "final judgment" completely ignores Darian's own expert's testimony that an opinion the four joint tenancies were reasonable acts of Foster is a reasonable opinion, as would be the case had he left Patsy everything. The "final judgment' ignores the enormous increase in the price of oil at the time of creation of the joint tenancies. The proof of the pudding as to Foster's **financial** competence is contained in the decisions he made and what various **financial** advisers thought. The 'final judgment" completely ignores this unrefined testimony, not least of which was the visit in April 2005 by two disinterested long-time **financial** advisors, one of whom had known Foster for 17 years. All found Foster to be competent. Dr. Ownbey, Darian's expert, testified it would have been highly relevant to know the* ***20** *views of a man (Morley) who worked with Foster for 20 years on a $7 million account, but he was not given that information. (5/5/07 Tr., at 159-160). None of Darian's experts got that information, despite the fact they could have been given a copy of Morley's deposition.*

The "final judgment" ignores the testimony of Foster's attending physician, Dr. Goldsmith, and his former attending physician and long-time friend, Dr. Taylor, both of whom were quite firm that Foster was competent. *Most curiously, the "final judgment" does not say when Foster was no longer competent, nor does it say what **financial** competence consists of. Oklahoma case law is clear that there can be all kinds of confusion and even poor decision making, but as long as the testator understands the nature and consequences of his acts at the time of their making, he has capacity. See In re Estate of Squire,* 2000 CIV APP 49 at ¶5. *The "final judgment" completely ignores the fact Foster drove his car until January 2005, thereby reflecting far more than minimal cognitive ability.*

The 'final judgment" completely ignores the fact Darian presented no medical testimony on the meaning of the brain autopsy performed on Foster. And the reason she did not do so is the findings of her three experts are not borne out by the autopsy. This fact alone does not permit Darian's expert testimony to meet even a preponderance standard, to say nothing of meeting her burden of establishing incompetence by clear and convincing evidence.

In short, the "final judgment" upends long-established Oklahoma law on what is required to show a person is incompetent. That law requires such a demonstration by clear and convincing evidence. There was no such clear and convincing evidence, and the "final judgment" does not say there was clear and convincing evidence of incompetence.

This court will no doubt hear much in Darian's response brief about the testimony of her three ***21** medical experts, Dr. Ownbey, Dr.Lee and Dr. Adams. Not one of Darian's medical experts based their opinions on the only true science there is about Foster's brain-his brain autopsy. Indeed, Dr. Ownbey testified, March 7, 2006, p. 131, that neuropsychological testing "kind of tells you maybe what areas of the brain are affected." As the brain autopsy showed, Dr. Ownbey's testing did not identify the areas of the brain affected.

As to Dr. Adams, he saw Foster in Oklahoma City on January 19, 2006, in violation of the district court order that to take him to Oklahoma City would be cruel and unusual punishment. Dr. Thompson said this about the Adams examination:

> ...there's testimony that [Foster] was given Robaxin and Lunesta. Lunesta is a hypnotic drug which very often reacts very very strangely, as do other drugs such as Ambien, in **elderly** sick people. Robaxin is a pretty powerful muscle relaxant. To take a sick man with advancing neurologic disease and attempt to administer a neuropsychologic examination makes a mockery out of a neuropsychologic exam because there's not any way that you can do that in any reasonable fashion." (9-18-07 Tr. at 115-116).

II. Foster and Patsy Created a Joint Tenancy in the Harris Account in December 2003, When They Executed the Harris Form, Stating that the Account Was to be a Joint Tenancy Account

In December 2003 Foster and Patsy executed two Harris Bank forms, stating that the Harris Account was joint tenancy between Foster and Patsy. Under Oklahoma law, this document created the joint tenancy interest, even though it was later before Harris Bank got all the paperwork it wanted to reflect the joint tenancy interest (moreover, Harris Bank signed and accepted the documents in December 2003). Title 60, § 74 says: "A joint interest is one owned by several persons in either real or personal property in equal shares, being a joint title created by a single instrument, will or transfer when expressly declared in the instrument...." In *Alexander v. Alexander*, 538 P.2d 200, 202 (Okla. 1975) the court said a joint tenancy estate or interest does ***22** not have to be proved by a gift or contract theory, but rather compliance with the statute creates the joint tenancy estate.

Under Oklahoma law, the intent is the paramount consideration in determining the creation of a joint tenancy. "[J]oint tenancies founded upon express, written declaration in a single instrument encompass the element of intent and leave no question as to creation of the relationship." *Raney v. Diehl*, 482 P.2d 585, 590 (Okla. 1971). Once Foster and Patsy signed the documents in December 2003 declaring the Harris Account a joint tenancy, all that remained were whatever ministerial acts Harris Bank later decided it wanted (having accepted the documents as signed by Foster and Patsy in December 2003). Oklahoma law recognizes the majority rule that where an insured has done all in his power to effect the change of a beneficiary and only ministerial acts remain to be performed, non-performance of ministerial acts is immaterial. *Bowser v. Bowser*. 211 P.2d 517, 519-20 (Okla. 1949).

The execution of the documents created a joint tenancy under gift theory, as well. Form is not exalted over substance. In *Green v. Comer*, 141 P.2d 258, this Court stated that courts look beyond what a bank may require for its own protection and look to whether the gift of a joint interest was intended. Here, the intent is manifest from the document itself. However, the evidence shows that twice in 2004 Foster told Harris Bank that he wanted the Harris Account joint tenancy with Patsy. Moreover, the Harris Account manager testified the forms the bank required to make the transfer meet its needs were "form over substance," and the bank made the change because of what Foster TOLD them.

Foster declared his intent, verbally and in writing, which is sufficient under Oklahoma law. In addition, Harris Bank accepted the joint tenancy declaration in December 2003.

***23** The joint tenancy interest was created in December 2003, and can only be defeated through fraud or undue influence.

III. Darian Did not Establish by Clear and Convincing Evidence that Patsy Exercised Undue Influence or Committed fraud

In order to prevail over the creation of the four joint tenancies at issue, Darian had to overcome the presumption of the joint tenancy by clear and convincing evidence. Oklahoma law strongly upholds a spouse's right to gift property in joint tenancy to his or her spouse. *See Chastain v. Posey*, 1983 OK 46, 665 P.2d 1179, 1182-83; *Fletcher v. Fletcher*, 206 Okla 481, 244 P.2d 827, 830 (Okla. 1952). Under Oklahoma law, there is a rebuttable presumption of a gift where title to separately held property is placed by one owner-spouse in both spouses' names as joint tenants. *See Chastain*, 665 P.2d at 1182-83. In the absence of clear and convincing evidence of fraud or undue influence, the presumption is made. *See Id.* In the dissolution of marriage context, it is reversible error for the trial court to ignore the operation of the presumption of an interspousal gift. *See Beale v. Beale*, 78 P.3d 973, 966, 2003 OK CIV APP 90, ¶12 (2003). The presumption applies regardless of whether the property is real or personal property. *Id.* Darian did not meet her burden in rebutting this presumption or in proving undue influence or fraud.

To begin with, Darian could not meet the standard for undue influence set forth by the Oklahoma Supreme Court. In *Canfield v. Canfield*, 31 P.2d 152, (Okla. 1943), this Court established the road map for assertions of undue influence by a wife over a husband, even if ALL of the property is left to the wife:

The influence of a wife is not undue...The silent influence of affection and respect, augmented by the tender and kindly attentions of a faithful spouse, cannot be regarded as in any sense undue...

If a wife by her industry and virtue, and by the assistance which she has rendered ***24** her husband, has gained such an ascendancy over the mind of her husband; if she has by her faithfulness and good qualities secured his respect and esteem, so that her wish is a law to him, such influence, though it result in procuring a will in her favor to the total exclusion of all the relatives of the husband, would not amount to undue influence...

There is an influence which a wife, by her virtues, her love, and her sacrifices, gains over her husband's affections and conduct, whereby he may be caused to make a will in her favor, which cannot be considered as and must not be taken for undue influence...

In 1999 the Court of Civil Appeals strongly reiterated the principles of *Canfield*, in *Estate of Mowdy*, 1999 OK CIV APP 4. In that case, the trial judge, Judge Gabbard, admitted a will to probate, rejecting contentions of undue influence. The Court of Civil Appeals tub-thumpingly affirmed:
Appellants, the children of Robert F. Mowdy, Deceased, appeal the trial court's order admitting Mowdy's will to probate. Appellee, step-mother of Appellants, is Mowdy's surviving spouse. Appellants contested the will on grounds of improper execution and attestation and undue influence by a person in a confidential relationship with their father. They alleged Appellee wrote the will and pressured Mowdy to execute it. They contended the will was contrary to Mowdy's previously expressed testamentary intentions, as well as to the antenuptial agreement he and Appellee signed prior to the marriage. The trial court ruled there was substantial compliance with the statutory requirements for execution of a will and that Appellants had failed, by clear and convincing evidence, to prove undue influence. The court admitted the will to probate, and this appeal followed...

Appellants contend the evidence proved that Appellee wrote Decedent's will, that she was with him when he executed it and that she destroyed his previous wills. They also contend the evidence showed Appellee was in a confidential relationship with Decedent, being his wife and former secretary, which raises a presumption of undue influence, requiring independent legal advice. They contend the burden of proof then shifted to Appellee. Because Appellee offered no evidence that Decedent received independent and disinterested advice before executing his will, they contend she failed to rebut the presumption.

It is well known that spouses exert influence over one another during a marriage and that a spouse is generally the natural object of a testator's bounty. In *Canfield v. Canfield*, 1934 OK -, 167 Okla. 590, 31 P.2d 152, 156, a case in which a decedent's third wife received his entire estate, undue influence was alleged by his ***25** children from his first two marriages. The Court quoted approvingly from *Underhill on Wills*, p. 211:

If a wife by her industry and virtue, and by the assistance which she has rendered her husband, has gained such an ascendancy over the mind of her husband; if she has by her faithfulness and good qualities secured his respect and esteem, so that her wish is a law to him, such influence, though it result in procuring a will in her favor to the total exclusion of all the relatives of the husband, would not amount to undue influence.

...We hold the evidence clearly supports the trial court's finding that Appellee did not exercise undue influence on Decedent. The trial court found he was the decision maker in the marriage as to **financial** decisions and running the household. The trial court also found no evidence that Decedent's age, health or stress impaired his faculties and that he remained focused until his death. The trial court also found a confidential relationship existed between Decedent and Appellee and that Appellee was the natural object of his bounty. The weight of the evidence clearly supports these findings. Although Decedent's children, Appellants herein, argue he was under great stress and infirm health, *we find no evidence that tile decisions he made with regard to his will were made under duress or because Appellee exerted undue influence over him. His affection for Appellee is shown by the evidence. Influence which arises from natural affection is insufficient to invalidate a will; it is only when the influence is wrongful and confuses the judgment and control of the testator that a court will find the will invalid.* See *Matter of Estate of Yoss*, 1997 OK CIV APP 65, 947 P.2d 607 (Cert. Denied 1997). “Influence secured through acts of kindness is

not wrongful, and therefore not undue." *Matter of Estate of Webb,* 1993 OK 75, ¶ 27, 863 P.2d 1116, 1121, citing *Canfield v. Canfield, supra,* 31 P.2d at 156.

Despite extensive closing argument front Patsy's counsel on what is required to show undue influence or fraud, including the requirements of Canfield, the "final judgment" completely ignores the law in Oklahoma.

The "final judgment" uses as proof of undue influence that Patsy offered no explanation of how a fraudulent Mayo Clinic report got sent to one of the daughters. *But the district court completely ignored the fact that Patsy told Darian the Mayo Clinic had found supranuclear* ***26** *palsy and that it was fatal. Thus. Patsy was not hiding the Mayo Clinic truth from the daughters.* The "final judgment" also says Patsy signed documents trying to copy Foster's handwriting, but ignores the fact she had a Power of Attorney for Foster if he was physically incapacitated, and that Foster's lawyer, Tom Brown, wrote a letter to Harris Bank saying Patsy could sign for Foster because of his physical incapacity.

Patsy cared intensely for Foster. In November of 2004 she took Foster to Mexico for experimental stem cell shots. (Patsy Depo. at174-175). In 2003 she insisted he go see Dr. Lee to determine if he had Alzheimer's, given Foster's family history. (Patsy Depo. at 27). She arranged acupuncture treatment for Foster in Houston. (9/14/07 Tr. at 82-83). She took Foster to the Mayo Clinic in Scottsdale in September 2005. (Patsy Depo. at 46-47).

The change of the Harris Account and Smith Barney account to joint tenancy was done in the full glare of the daughters, since Darian got the monthly account statements and then sent them on to Sedona. The change of the Forest Circle home to joint tenancy was public record at the time made. The same is for the *ab initio* purchase in joint tenancy of Desert Holly Drive. And, for Desert Holly Drive, Dana was told "they" purchased the home, (4/5/07 Tr. at 162), and promptly called Darian to tell her. (4/2/07 Tr. at 189). Foster told Depole at Smith Barney and told Morley and another officer at Harris Bank he wanted his accounts joint tenancy with Patsy. Foster bought the Bartlesville house in 2000 joint tenancy. Foster had vested joint tenancy in the Sedona home sold in 1998. (4/5/07 Tr. at 16-17). Darian arranged the transfer of the Arvest bank account in Bartlesville to joint tenancy in 2004. Darian sent between $1 and $1.4 million to joint tenancy accounts in 2004 and 2005. (4/2/07 Tr. at 217-218).

Darian's entire argument in these proceedings has assumed that the daughters had some kind of ***27** entitlement to the assets in question. Patsy was the wife who cared for him. *Foster established his Trust in 1990, and amended it to make Darian co-trustee in 2003. The only assets that were ever in the Trust were the oil and gas properties. Foster kept the Harris and Smith Barney accounts separate from the Trust, as well as all of his personal real estate. If he had wanted the daughters to have those assets, he could have put them in the Trust.*

Darian admitted that the only evidence of undue influence she can point to is the four transactions at issue. (4/2/07 Tr. at 214-215). *Nor did she point to any example of poor* ***financial*** *judgment on Foster's part during the times in question.* Patsy--and everyone else-knew Foster did only what he wanted to do. He was "very strong willed." (8/3/07 Tr. at 37). He was "very independent [and] he did what he wanted." (8/3/07 Tr. at 49). He adamantly refused to quit smoking in 2005. He drove his own car until January 2005 when he voluntarily quit after a parking lot fender bender. (9/18/07 Tr. at 46). Patsy was deferential to Foster about **financial** matters. Depole testified Patsy "always deferred to [Foster's] opinion." (Depole Depo. at 48). Depole also said Patsy "never asked for anything out of the account and never tried to make a decision without asking [Foster]." *Id.* at 48. Foster's Harris Account manager, Morley, testified that in May 2004 he began talking to Patsy about the capital gain implications of selling stock to pay down the $1.7 million, and she said, "I really don't understand all this. Let me have you talk to Fos." *Id.* at 11.

Thus, both the facts and the law show Darian failed to establish undue influence or fraud by clear and convincing evidence.

During closing argument, counsel for Darian misrepresented the law to the district court, stating that because of Foster's and Patsy's spousal relationship at the time of the transfers, the ***28** transfers were presumptively invalid, Vol. II at 7, thereby placing the clear and convincing burden of proof on Patsy. As we have seen above, Oklahoma law is to the contrary.

Darian also contends that because of Patsy's power of attorney she had a fiducial relationship which places the burden of proof on Patsy to show by clear and convincing evidence that she did not exercise undue influence. The argument fails for several reasons. First, the power of attorney was not a general power of attorney as it was exercisable only in the event of incapacity or incompetence. (Pl. Ex. #26, D. Ex. 13). Second, creation of the joint tenancy interest in the Harris Account was not accomplished by any use of the power of attorney. The same is true for the Smith Barney account. Thus, no fiducial relationship attached. Instead, Patsy was fully entitled to the protections accorded the wife under Oklahoma law when claims of undue influence are made, as discussed in Proposition Three. And, Foster discussed the joint tenancy of the Harris Account with two Harris officers and he discussed the joint tenancy of the Smith Barney account with Depole.

As to the joint tenancy on the Forest Circle home, Patsy executed a deed on behalf of Foster under the power of attorney. However, this deed was never operative and never filed. Instead, the next day Patsy went to the notary, with Foster, and the joint tenancy deed was executed in front of the notary. Bol depo at 19). The notary, an experienced real estate closer and real estate broker, had no problems with Foster's competency or the fact he signed the deed himself. (Bol Depo. at. 18-19). Accordingly, the creation of the joint tenancy did not occur through exercise of the power of attorney, and for the Forest Circle joint tenancy, Patsy was fully entitled to the undue influence protections of Oklahoma law for a wife. In addition, as noted above, over the years some $800,000 in joint tenancy funds were used to remodel and repair the Forest Circle home.

***29** As to the joint tenancy on the Desert Holly home, Foster executed the deed of purchase in joint tenancy. Patsy signed Foster's name on disclosure statements and other closing documents, none of which created the joint tenancy itself. This does not take Patsy outside her realm of wife for purposes of the burden of proof. Moreover, Foster had great difficulty writing, as reflected in Linda Cory's examples of Foster's writing which were introduced into evidence. It must be well noted here that the joint tenancy in the Forest Circle home was created in March 2004. It was in April 2004, when Foster began working with Linda Cory to improve his handwriting because, as her notes show Foster told her, he wanted to be able to sign the deed on the purchase of the Desert Holly house. As a more general matter, a person does not assume a fiduciary relationship if all the person is doing is implementing what the principal has done by creating the joint tenancy. Finally, and perhaps most importantly, whatever the paperwork was which created the joint tenancy, that paperwork only vested legal title--the funds for the purchase of the property were $400,000 out of joint funds in a bank account, and the remaining $1.7 million was from the JOINT Harris Account. Thus, Patsy had beneficial or equitable title because of the funds used to make the purchase. For all of these reasons, then, on the Desert Holly home Patsy also did not fall outside the protections afforded the wife on the subject of undue influence.

CONCLUSION: Foster's cognitive ability to drive his car until January 2005, which involves a great deal of complex cognitive functioning for a man who had almost no use of his right hand, the testimony of his **financial** advisers, and the sweeping testimony of the two men from Harris Sedona who came to see Foster in April 2005, together with the observations of Foster's attending physician, Dr. Goldsmith, who saw Foster right along throughout this period simply do not allow ***30** the conclusion that Foster was incompetent. Darian had to show that he was incompetent by clear and convincing evidence, and these facts alone demonstrate Darian did not satisfy her burden of proof.

For all of the reasons herein, the “final judgment” of the district court should be reversed and the case remanded with instructions to dismiss.

Appendix not available.

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