NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1638

IN THE MATTER OF THE SUCCESSION OF GENEVA GINN HIMEL

VERSUS

MARY TODD, CYNTHIA GAULT, AND MARTHA COOPER, TESTAMENTARY EXECUTRIX

Judgment Rendered: JUL 17 2012

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On Appeal from the Twenty-First Judicial District Court
In and for the Parish of Tangipahoa
Trial Court Number 2009-030479

The Honorable W. Ray Chutz, Judge

* * * * * * * *

Charles A. Schutte, Jr.
Baton Rouge, Louisiana

Plaintiffs/Appellants
Mary Todd, Cynthia Gault, and Martha Cooper, Testamentary Executrix

Duncan S. Kemp, III
Hammond, Louisiana

Counsel for Plaintiff/Appellee
Herman Dennis Himel, III

* * * * * * * * * * *

BEFORE: GAIDRY, McDONALD, AND HUGHES JJ.

Hughes, J., dissents with reasons.

GAIDRY, J.

This is an appeal of a judgment declaring a will null and void. For the reasons that follow, we deny the motion to dismiss the appeal and affirm the trial court's judgment.

FACTS AND PROCEDURAL HISTORY

On December 23, 2009 this suit was instituted by the filing of a "Petition to File and Execute Statutory Testament" by Martha Himel Cooper, who alleged she was a co-executor with Mary Frances Himel Todd. The petition alleged that the decedent, Geneva Ginn Himel ("Mrs. Himel") died on December 6, 2009, domiciled in Tangipahoa Parish, leaving a statutory will, executed in accordance with LSA-C.C. art. 1577 on February 16, 2001, and a codicil, executed on June 28, 2004. The statutory will and codicil were also alleged to be self-proving pursuant to LSA-C.C.P. art. 2891. On January 4, 2010 the trial court ordered the February 16, 2001 will and June 28, 2004 codicil be "filed and executed in accordance with their terms."

The affidavit of death and heirship, filed with the December 23, 2009 petition, indicated that Mrs. Himel was married to Herman Dennis Himel, Jr. ("Mr. Himel"), who predeceased her, and that four surviving children were born of the marriage: Herman Dennis Himel, III ("Dennis"), Martha Himel Cooper ("Martha"), Cynthia Elaine Himel Gault ("Cynthia"), and Mary Frances Himel Todd ("Mary").[1] The children all were above the age of twenty-three and were competent.

In conjunction with the petition, Martha and Mary filed a separate petition seeking to be appointed co-executrixes, being so named in Mrs.

[1] For ease of discussion, we will refer to the parties herein by their first names. We note that Dennis was referred at various times in the trial court record as "Denny," and Cynthia was also referred to as "Elaine."

Himel's will, and asserting that the will dispensed with the posting of security. An order was issued by the trial court on January 4, 2010 confirming Martha and Mary as co-executrixes of Mrs. Himel's succession, without the posting of security.

Mrs. Himel's February 16, 2001 will specially bequeathed to each of her four children between seventeen and twenty-one items of movable property, each, consisting of items of china, crystal, silverware, serving pieces, and/or jewelry. She further bequeathed all her remaining property, less and except the individual bequests, to her residuary estate, which she stated consisted of "movable, immovable, corporeal, incorporeal, community or separate property," and she specifically bequeathed her residuary estate to Martha, Cynthia, and Mary only. Martha and Mary were named co-executrixes, and they were relieved of the necessity of furnishing bond or security.

Mrs. Himel's June 28, 2004 codicil stated her intent to delete her prior special bequest, as stated in her February 16, 2001 will, to Dennis, and to "remove" Dennis "entirely from [her] will." Mrs. Himel, in her codicil, then bequeathed the items of movable property, previously bequeathed to Dennis, "to be evenly divided between [her] three daughters."

On February 19, 2010 Dennis filed a "Petition to Annul Probate," naming as defendants[2] Martha, Cynthia, and Mary, and asserting that at the time of the execution of the February 16, 2001 will and the June 28, 2004 codicil Mrs. Himel lacked the capacity to execute these documents, that the

[2] Louisiana Code of Civil Procedural Article 2931 provides: "A probated testament may be annulled only by a direct action brought in the succession proceeding against the legatees, the residuary heir, if any, and the executor, if he has not been discharged. The action shall be tried as a summary proceeding." Further, Comment (b) to Article 2931 states: "The action to annul the probated testament is a new suit, requiring citation and service on all defendants, who have the same delay for answering as in any other ordinary proceeding. The requirement that the action be brought in the succession proceeding permits the judge who probated the testament to try the nullity action." Thus, Dennis is the "plaintiff" in the action to annul the filed and executed will and his sisters are the "defendants."

documents were procured by fraud and duress, and were the products of undue influence by the defendants that so impaired the volition of the testatrix so as to substitute the will of the defendants for the will of the testatrix. Dennis requested that the trial court declare the will and codicil null and void.

Thereafter, on November 12, 2010, Nita R. Gorell, a former attorney for Mrs. Himel (not the attorney before whom Mrs. Himel executed the February 16, 2001 will and the June 28, 2004 codicil) filed a motion to file a will previously executed before her, on May 11, 2000, into the trial court record; it was so ordered by the trial court on November 17, 2010. In the prior May 11, 2000 will, excepting certain personal belongings to be addressed in a codicil (which does not appear in the record), Mrs. Himel left her estate, in equal shares, to all four of her children.

Following a January 4-5, 2011 hearing on the petition to annul, judgment was rendered on February 22, 2011, and signed on May 2, 2011, declaring the February 16, 2001 will and June 28, 2004 codicil to the will of Geneva G. Himel, previously probated by the trial court, "null and void." The judgment was designated final and appealable, with the trial court citing no just reason to delay an appeal, in accordance with LSA-C.C.P. art. 1915(B)(1).

The defendants (Mrs. Himel's daughters) have appealed this judgment and urge the following assignments of error on appeal: (1) the trial court failed to follow the law by requiring the defendants to prove why Mrs. Himel excluded Dennis from the will and codicil; (2) the trial court erred in determining that the circumstances and Dennis's conduct did not justify the execution of the will and codicil; (3) the trial court erred in determining that

there was reliable medical evidence that Mrs. Himel executed the will and codicil due to undue influence by the defendants; and (4) the trial court erred because there is no evidence that the defendants conveyed any false or misleading information to unduly or improperly influence Mrs. Himel and cause her to execute the will and codicil.

Dennis has filed a motion to dismiss his sisters' appeal, asserting the trial court granted them a suspensive appeal, without the posting of an appeal bond, contrary to the requirement of LSA-C.C.P. art. 2124.[3]

LAW AND ANALYSIS

Motion to Dismiss Appeal

We first address Dennis's contention that his sisters' appeal should be dismissed for failure of the trial court to require, and failure of his sisters to post, a suspensive appeal bond. Dennis suggests to this court that since his sisters asserted to the trial court, in their motion for appeal, that they were not required to post a suspensive appeal bond under LSA-C.C.P. art. 2124,[4]

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[3] The motion to dismiss the appeal was referred to this panel for disposition by the January 30, 2012 order of this court.

[4] Article 2124 provides:

> A. No security is required for a devolutive appeal.
>
> B. The security to be furnished for a suspensive appeal is determined in accordance with the following rules:
>
> (1) When the judgment is for a sum of money, the amount of the security shall be equal to the amount of the judgment, including the interest allowed by the judgment to the date the security is furnished, exclusive of the costs.
> (a) However, in all cases, except litigation related to the Tobacco Master Settlement Agreement, or any litigation where the state is a judgment creditor, where the amount of the judgment exceeds one hundred fifty million dollars, the trial court, upon motion and after a hearing, may, in the exercise of its broad discretion, fix the security in an amount sufficient to protect the rights of the judgment creditor while at the same time preserving the favored status of appeals in Louisiana.
> (b) The time for taking the suspensive appeal under Article 2123 shall be interrupted for judgments pursuant to Article 2124(B)(1)(a) until the trial court fixes the amount of the security and commences anew on the date the security is fixed.
>
> (2) When the judgment distributes a fund in custodia legis, only security sufficient to secure the payment of costs is required.
>
> (3) In all other cases, the security shall be fixed by the trial court at an amount sufficient to assure the satisfaction of the judgment, together with damages for the delay resulting from the suspension of the execution.

as the judgment granted only declaratory relief, that the error of the trial court in failing to require a bond is imputable to them, and therefore LSA-C.C.P. art. 2161[5] authorizes the dismissal of their appeal. In support of his argument, Dennis further cites *Bonvillian v. Lawyers Title Insurance Corporation*, 264 So.2d 238 (La. App. 4 Cir.), writ denied, 262 La. 1175, 266 So.2d 450 (1972), and *Geisenheimer Realty Company v. Board of Commissioners of Port of New Orleans*, 204 So.2d 628 (La. App. 4 Cir. 1967), as holding that the timely furnishing of an appeal bond is an indispensable prerequisite to divest the trial court of jurisdiction and for appellate jurisdiction to attach, and that the failure to post the required security within the delay allowed is not just a simple error, irregularity, or defect within the purview of Article 2161, but rather strikes at the heart of this court's jurisdictional right to hear the appeal and thus is governed by LSA-C.C.P. art. 2162; and is a fundamental defect that can be made the basis for a valid motion to dismiss at any time.

C. Where the party seeking to appeal from a judgment for a sum of money is aggrieved by the amount of the security fixed by the trial court, the party so aggrieved may seek supervisory writs to review the appropriateness of the determination of the trial court in fixing the security. The application for supervisory writ shall be heard by the court of appeal on a priority basis. The time for taking a suspensive appeal under Article 2123 shall be interrupted until the appellate court acts on the supervisory writs to review the determination of the trial court in fixing the security and commences anew on the date the action is taken.

D. For good cause shown, the trial judge in the case of the appeal of a money judgment to be secured by a surety bond may fix the amount of the security at an amount not to exceed one hundred fifty percent of the amount of the judgment, including the interest allowed by the judgment to the date the security is furnished, exclusive of the costs.

E. A suspensive appeal bond shall provide, in substance, that it is furnished as security that the appellant will prosecute his appeal, that any judgment against him will be paid or satisfied from the proceeds of the sale of his property, or that otherwise the surety is liable for the amount of the judgment.

[5] Article 2161 provides:

An appeal shall not be dismissed because the trial record is missing, incomplete or in error no matter who is responsible, and the court may remand the case either for retrial or for correction of the record. An appeal shall not be dismissed because of any other irregularity, error or defect unless it is imputable to the appellant. Except as provided in Article 2162, a motion to dismiss an appeal because of any irregularity, error, or defect which is imputable to the appellant must be filed within three days, exclusive of holidays, of the return day or the date on which the record on appeal is lodged in the appellate court, whichever is later.

The appellants oppose the motion to dismiss, contending that the jurisprudence cited by Dennis applied a pre-1977-amendment version of Article 2124, which required a bond even for a devolutive appeal, and is therefore inapplicable to this case. Further, the appellants point out that the judgment appealed was interlocutory, not final (appealed only pursuant to a LSA-C.C.P. art. 1915(B) designation), and was therefore not subject to an Article 2124 requirement for an appeal bond for the suspensive appeal of a "final" judgment. Further, the appellants assert that Dennis was required to contest the failure of the trial court to require a suspensive appeal bond in the trial court.

We agree with the appellants insofar as they assert the cases cited by Dennis do not interpret the *current* law. Article 2124 was amended by 1977 La. Acts, No. 176, § 1, effective January 1, 1978, and substituted the current Paragraph (A) language providing that "[n]o security is required for a devolutive appeal," for the prior language that had read: "The security to be furnished for a devolutive appeal shall be fixed by the trial court at an amount sufficient to secure the payment of costs." Thus, we agree with the appellants that even if the trial court's grant of a suspensive appeal to them, without bond, was improper, the appeal can nevertheless be maintained as a devolutive appeal. We conclude that since our decision in this case is rendered today, the issue with respect to whether a bond should now be required to maintain the appeal as suspensive is moot. Therefore, we deny the motion to dismiss the appeal on this basis.

Validity of Will and Codicil

A donation *inter vivos* or *mortis causa* shall be declared null upon 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. LSA-C.C. art. 1479. A person who challenges a donation because of fraud, duress, or undue influence, must prove it by ***clear and convincing evidence***. 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. LSA-C.C. art. 1483.

In the instant case, those alleged to have asserted the undue influence were related by consanguinity or blood (the decedent's daughters), therefore, the ***clear and convincing*** standard of proof applies. Proof by clear and convincing evidence is a more difficult and rigorous standard than proof by a mere preponderance of the evidence. See LSA-C.C. art. 1483, 1991 Revision Comment (b). 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 *In re Succession of Fisher*, 2006-2493, p. 9 (La. App. 1 Cir. 9/19/07), 970 So.2d 1048, 1054; *In re Succession of Crawford*, 2004-0977, p. 8 (La. App. 1 Cir. 9/23/05), 923 So.2d 642, 647, writ denied, 2005-2407 (La. 4/17/06), 926 So.2d 511), though it is less burdensome than the "beyond a reasonable doubt" standard of a criminal prosecution (see *Renter v. Willis-Knighton Medical Center*, 28,589, p. 7 (La. App. 2 Cir. 8/23/96), 679 So.2d 603, 607 (citing *Mitchell v.*

AT&T, 27,290 (La. App. 2 Cir. 8/28/95), 660 So.2d 204, writ denied, 95-2474 (La. 12/15/95), 664 So.2d 456).[6]

Article 1479 describes the kind of influence that would cause the invalidity of a gift or disposition. Physical coercion and duress clearly fall within the proscription of the article. The more subtle influences, such as creating resentment toward a natural object of a testator's bounty by false statements, may constitute the kind of influence that is reprobated by Article 1479, but will still call for evaluation by the trier-of-fact. Since the ways of influencing another person are infinite, the definition given in Article 1479 is used in an attempt to place a limit on the kind of influence that is deemed offensive. Mere advice, or persuasion, or kindness and assistance, should not constitute influence that would destroy the free agency of a donor and substitute someone else's volition for his own. LSA-C.C. art. 1479, 1991 Revision Comment (b).

Article 1479 intentionally defines the influence as being that of the donee or some other person. It seems obvious that the influence has to be exercised with the object of procuring a particular gift or bequest. While the influence may be exerted by the donee himself, the Article covers the situation where the donee takes no part in the activities (and may even be ignorant of them), so long as some person does exercise control over the donor, presumably one who is interested in the fortunes of the donee. LSA-C.C. art. 1479, 1991 Revision Comment (c). It is implicit in Article 1479

[6] The clear and convincing standard of proof is imposed when strong policy considerations are also involved, as when testamentary capacity is disputed. The supreme court has explained the rationale behind this more stringent burden of proof, as follows:

> To wrest a man's property from the person to whom he has given it, and to divert it to others from whom he has desired to withhold it, is a most violent injustice, amounting to nothing less than post-mortem robbery, which no court should sanction, unless thoroughly satisfied ... that the testator was legally incapable of making a will.

Succession of Lyons, 452 So.2d 1161, 1165 (La. 1984).

that the influence must be operative at the time of the execution of the *inter vivos* donation or testament. Obviously, it should not be necessary that the acts themselves be done at that time, or that the person exercising the pressure be present then. LSA-C.C. art. 1479, 1991 Revision Comment (d). Clearly, a court should distinguish between a willful deception by a donee or successor as to the character or contents of the instrument (or as to certain facts that are material to the disposition), and an innocent misrepresentation, which would not invalidate a gift or testamentary disposition. There is no intent to create a right to challenge donations based on mistake alone. LSA-C.C. art. 1479, 1991 Revision Comment (e).

In finding Mrs. Himel's will and codicil invalid, the trial issued the following written reasons on February 22, 2011:

> After careful consideration of all evidence, testimony, arguments of counsel, and all applicable law the court now issues the following reasons for judgment. The instant proceeding is a petition filed by Herman Dennis Himel, III, to annul the probate of a statutory will executed by his mother, Geneva Ginn Himel, and a subsequent codicil on the grounds of incapacity of the testator and undue influence under LSA[-]C.C. art[.] 1479.
>
> Evidence introduced into these proceedings indicates Mrs. Geneva Himel prepared two wills and a codicil. The first will was a statutory will prepared by Nita Gorrell on May 11, 2000. That will basically indicated the desire of Mrs. Himel was for her children (Dennis Himel, III, Martha Cooper, Mary Todd and Cynthia Gault) to share equally her estate. The second will was prepared by Douglas Curet on February 16, 2001. That will basically reduced the bequest to Dennis Himel to only a few movable objects, with the bulk of Mrs. Himel's estate being equally divided among her three daughters. The Codicil was executed before Douglas Curet on June 28, 2004, and effectively served to disinherit Dennis Himel.
>
> It is apparent from the evidence introduced that Mrs. Himel was legally competent when each of the two wills and codicil were executed. Therefore this court declines to invalidate either will or the codicil on the basis of incompetency of the testatrix. The second alleged basis for invalidation is undue influence under [LSA-C.C. art.] 1479.

> A donation *inter vivos* or *mortis causa* shall be declared null upon 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.

[Louisiana] Civil Code[, Article] 1483 sets forth the standard for the burden of proof.

> A person who challenges a donation because of fraud, duress, or undue influence, must prove it by clear and convincing evidence. 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.

From the evidence it is clear that on May 11, 2000, Mrs. Himel's intent was to treat all her children equally. It is also clear that by February 16, 2001, Mrs. Himel's donative intent had begun to change. The challenged testament cannot be set aside unless this court finds by clear and convincing evidence Mrs. Himel's second will and codicil were the products of influence that so impaired her volition so as to substitute the volition of another in place of her own. Dennis Himel contends his sisters isolated his mother from him and poisoned her against him. Dr. Alan Coe, Mrs. Himel's treating physician, diagnosed Mrs. Himel as a paranoid schizophrenic. As such, Dr. Coe opined Mrs. Himel would be very suspicious and susceptible of suggestion that someone was trying to harm her.

Dennis Himel received a letter dated March 30, 2000, from an attorney retained by Mrs. Himel advising Dennis to refrain from contacting Mrs. Himel. However on April 8, 2000, Mrs. Himel contacted Dennis and invited him and his wife to her home. During that visit a fight ensued between Mary Todd, Mrs. Himel's daughter, and Dennis Himel and his wife. Two days later Mrs. Himel called her son and advised it would be best if he did not visit her until the succession of his father was settled. However, approximately one month later, on May 11, 2000, Mrs. Himel executed a will, which basically divided her estate equally between all her children. On Mother's [D]ay Denny Himel sent his mother a fruit basket, the next day he found the basket thrown in the back of his truck. He contacted the owner of the shop and requested him to prepare another fruit basket and deliver it to his mother, who accepted it very appreciatively. A few days later that basket was found thrown in the back of his pickup truck. These actions suggest to this

> court Mrs. Himel was very "conflicted;" torn between choosing sides in a brewing legal battle being waged between her daughters and her son. This opinion is supported by the findings made by Dr. Coe as stated in his deposition. "And she didn't, certainly she didn't want the fighting, but I think that she, I'll speculate, but I would say that she was probably coerced." (Dr. Alan Coe's deposition, p 42, line 20). Referring to a session on October 3, 2000, Dr. Coe states, "This is certainly a quote: ['] I [Mrs. Himel] took the girl[s'] side, didn't want to...[.'] Dr. Coe further stated that by November 6, 2004, he was not even sure if Mrs. Himel could understand the meaning of taking an oath. When all the evidence is taken as a whole it is clear to this court, there existed obvious animosity between the sisters, Martha Cooper, Mary Todd and Cynthia Gault and their brother, Dennis Himel. When asked to explain the basis of Mrs. Himel's change of donative intent towards her son Dennis, various reasons were suggested: improper handling of Mr. H.D. Himel's succession; conversion of Mrs. Himel's personal bank account; closing of the Ponchatoula auto parts store; the failure of Dennis to carry out the wishes of his father by buying out the family interest in the auto parts stores. This court is in agreement with the argument advanced by counsel [for] Dennis Himel in his post trial memorandum that there exist[s] little or no evidence to support the reasons advanced by the sisters as to why Mrs. Himel decided to change her May 11, 2000 will. The focus of this court's inquiry as to the cause of Mrs. Himel's decision to change her will is limited solely to whether undue influence was exerted by one or more of her daughters. It is apparent that influence was always exerted. After carefully considering all the evidence it is clear to this court the plaintiff, Dennis Himel has satisfied by clear and convincing evidence the changes in Mrs. Himel's February 16, 2001 will and June 28, 2004 codicil was due to excessive influence by her daughters sufficient to substitute their volition for that of Mrs. Himel. Accordingly the February 16, 2001 will and the June 28, 2004 codicil should be set aside as nullities.

The standard for appellate review of factual determinations by the trial court is the manifest error-clearly wrong standard. *In re Succession of Greer*, 2008-118, p. 6 (La. App. 3 Cir. 6/5/08), 987 So.2d 305, 309. Under the manifest error standard, the reviewing court is to assess not whether the fact-finder's decision was right, but rather, whether the decision was a reasonable one in light of the record. *Henderson v. Nissan Motor Corp.*, 2003-606 (La. 2/6/04) 869 So.2d 62, 69. The trial court's conclusions, based on a live

presentation of testimony and a personal observation of the respondent, are entitled to great weight. See *In the Matter of L.M.S.*, 476 So.2d 934, 937 (La. App. 2 Cir. 1985). In evaluating a trial court's ruling based on a "clear and convincing" standard of proof, an appellate court must balance the facts militating against such proof against the facts militating in favor of such proof and determine if the ruling of the trial court is clearly wrong. See *State v. Johnson*, 458 So.2d 937, 943, 944 (La. App. 1 Cir. 1984).

In the instant case, the trial court applied the correct standard of proof. In doing so, the court weighed evidence presented by the plaintiff (attempting to establish that the defendants placed their own volition in the place of Mrs. Himel's) against evidence presented by the defendants (attempting to establish that Mrs. Himel executed her will under her own volition).

Specifically, the court noted that Mrs. Himel's physician, Dr. Alan Coe, had diagnosed her as a paranoid schizophrenic, making her susceptible to suggestion. Dr. Coe in fact testified that he suspected that such an influence was exerted on Mr. Himel. Despite a letter received by Dennis from Mrs. Himel's attorney advising him not to contact her, she soon after invited him to her home for dinner. At that dinner, an altercation arose between Dennis and his sister Mary. After that incident, Mrs. Himel advised Dennis to not visit her. She then executed her first will, which divided her estate equally among all her children, Dennis included. The court cited the two attempts by Dennis to send his mother two flower baskets for Mother's Day, one of which was witnessed as being accepted "very appreciatively" by Mrs. Himel, only for Dennis to find both baskets thrown into the back of his pickup truck. The court opined that this evidence as a whole displayed

obvious animosity between Dennis and his sisters, but not between Dennis and his mother.

The court then evaluated the evidence put forth by the defendants to establish that Mrs. Himel excluded Dennis from her will on her own volition. Specifically the court noted that the defendants claimed Dennis mishandled the succession of their father, that he misappropriated funds from their mother's personal bank account, and that he mishandled the family businesses. It was the opinion of the trial court that the evidence supporting the plaintiff's argument clearly outweighed the evidence supporting the defendants' opposing argument. The defendants claim an error was made by the court in requiring them to put forth evidence to prove why Mrs. Himel excluded Dennis from the will. The defendants were not required to submit any evidence, as the burden rested on the plaintiff to prove his case. LSA-C.C. art. 1483. However, once the plaintiff did present evidence sufficient to carry his burden of proof, the defendants had the opportunity to present whatever evidence they might have had to disprove the plaintiff's evidence. It was the opinion of the trial court, based on the evidence presented, that it was highly probable that the volition of the defendants was put in place of Mrs. Himel's own volition when the 2001 will was executed, and that the existence of this circumstance was more probable than its nonexistence. See *In re Succession of Fisher*, 970 So.2d at 1054. The trial court's judgment is not clearly wrong and should not be disturbed by this appeal.

CONCLUSION

For the reasons assigned, the judgment of the trial court, declaring the will the February 16, 2001 will and June 28, 2004 codicil of Geneva Ginn

Himel null and void is affirmed. All costs of this appeal are assessed to the defendants/appellants, Mary Todd, Cynthia Gault, and Martha Cooper.

MOTION TO DISMISS APPEAL DENIED; JUDGMENT AFFIRMED.

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2011 CA 1638

IN THE MATTER OF THE SUCCESSION OF GENEVA GINN HIMEL

VERSUS

MARY TODD, CYNTHIA GAULT, AND MARTHA COOPER, TESTAMENTARY EXECUTRIX

HUGHES, J., dissenting.

I respectfully dissent. I do not believe the clear and convincing standard of proof has been met. The history of disagreement and litigation regarding the handling of the succession of Mr. Himel is as likely a motive as any "undue influence," which is not a civilian concept. The higher burden of proof should be required to protect the will of the testator.