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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2006-CA-00373

BRANDI M. MCMAHAN — APPELLANT

VS.

MONA WEBB, Conservator for AMY M. MALLETTE — APPELLEE

BRIEF FOR APPELLEE

On Appeal from the Chancery Court of Jackson County, Mississippi

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VS. — NO. 2006-TS-00373

MONA WEBB, Conservator for AMY M. MALLETTE — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of records certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

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BRIEF OF THE APPELLEE

STATEMENT OF THE ISSUES

I. **THE CHANCELLOR'S FINDING THAT AMY WAS MENTALLY INCOMPETENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS BASED ON THE CORRECT LEGAL STANDARD AND WAS NOT MANIFESTLY WRONG; THUS, THE CHANCELLOR DID NOT ABUSE HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED, AND THIS COURT SIIOULD AFFIRM THE JUDGMENT OF THE CHANCERY COURT.**

II. **THE CHANCELLOR'S FINDING THAT THE CONSIDERATION FOR THE LAND WAS INADEQUATE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS BASED ON THE CORRECT LEGAL STANDARD AND WAS NOT MANIFESTLY WRONG; THUS, THE CHANCELLOR DID NOT ABUSE HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED, AND THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE CHANCERY COURT.**

III. **THE CHANCELLOR WAS NOT MANIFESTLY WRONG AND DID NOT ABUSE HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED.**

STATEMENT OF THE CASE

Amy Mallette and Brandi McMahan, sisters, are the daughters of the Thomas "Tommy" Mallette, who died testate on March 18, 2001. T. 24, 29. Established at trial by undisputed expert testimony is the fact that Amy, though she is in her twenties, has the mental faculties of a seventh grader, and likely always will. T. 375-91. Amy's I.Q., as established by professional testing, is 74, which places her in the fourth percentile; i.e., of one hundred people, Amy's mental capacity places her among the bottom four people out of the hundred. T. 375-81. According to the undisputed expert testimony at trial, this places Amy in the category of borderline mental retardation. T. 379. Amy failed the third grade, and her difficulties only increased; by seventh grade, she was having severe difficulties with every

scholastic subject. T. 342-44. Amy got pregnant when she was fifteen and soon dropped out of school entirely. T. 254-55, 345. Shortly after leaving school, she was diagnosed with Hodgkins Disease and underwent cancer treatment. She never went back to school, though she tried several times to pass the GED exam. T. 278.

Amy and Tommy were always close, though Tommy and Brandi became estranged during the divorce of Tommy Mallette and Paulette Mallette, Brandi's and Amy's mother (which dragged on for approximately six years). T. 55-60. In fact, prior to his death, Tommy paid all of Amy's bills and allowed her and her children to live on the property that is the subject of this lawsuit (roughly ninety-eight acres in Jackson County, Mississippi) ("the subject property"), in a trailer he paid for. T. 338-71. Tommy even employed Amy at his trucking company, giving her salary and "extra money." T. 349. Needless to say, Tommy always had a soft spot for Amy.

Unbeknownst to either Brandi or Amy, Tommy had, prior to his death, executed a deed giving Amy – and not Brandi – full title to the subject property. T. 123-24. The property's value was, according to Brandi's testimony at trial, estimated to be between $3,000 and $6,000 per acre (or between $270,000 and $540,000 total). T. 99. Upon Tommy's death in March of 2001, the children learned of the conveyance of the property from Tommy to Amy. T. 24, 122. Upon learning of this, Brandi had a warranty deed drafted which would convey the subject property from Amy to Amy and Brandi as tenants in common. T. 81. Brandi then took the deed to Amy to sign, conveying her a half interest in the property. T. 31-32, 44. Brandi admitted that she gave Amy *nothing whatsoever* in return for such conveyance. T. 95-96. Though the transcript of the much of Amy's testimony was apparently destroyed by Hurricane Katrina, the Chancellor also references in her findings of fact that Amy testified

that no one explained the deed to her and that she did not understand what she was signing. The undisputed expert testimony of Dr. Stoudenmire, a clinical psychologist whose expertise was stipulated to by counsel for the Appellant (T. 373), was that Amy lacked the mental competency to execute the documents she was signing. T. 375-91. The nature of Amy's extreme mental deficiencies are such that they do not wax and wane such as those of a person with Allzheimer's; her mental capacity remains constant so that "moments of lucidity" simply do not occur. T. 375-91. In fact, a conservatorship was set up for Amy, and Mona Webb, Amy's conservator, testified at trial as to Amy's childlike mental state. T. 413-22. Mona Webb also testified that she tried to help Amy pass the GED (which Amy has failed three times and never passed), but that Amy simply seemed unable to comprehend English and math. T. 420-21. Denise Parker, the administrator for the trust department for the bank that handled the trusts set up for Brandi and Amy in Tommy's will, also testified that she had concerns regarding Amy's competency to handle her own affairs, and that she did not believe that Amy understood the nature even of her trust. T. 202, 204. Ms. Parker testified that dealing with Amy was "kind of like dealing with a kid." T. 204.

Testimony clearly revealed that Amy and Brandi not only did not have a "loving and affectionate" relationship, but that they were just on "speaking" terms. T. 263, 362-63. Though she attempted to change her testimony at trial and state that her daughters were "loving," Paulette Mallette admitted under cross-examination that she had testified under oath in her deposition that "[Brandi and Amy] have never been loving, but they were civil to each other." T. 263. Paulette Mallette described the family as "dysfunctional," and that hitting, fighting, drinking and cursing was "normal." T. 259. In fact, the only reason Amy and Brandi are even cordial to each other is because of their children. T. 264.

Because of the foregoing, and after full consideration of all of the evidence and testimony adduced at trial, the Chancellor found that Amy was not mentally competent to understand the ramifications of her actions when she signed the deed prepared by Brandi. In addition, the Chancellor found that there was insufficient consideration for the conveyance, as testimony revealed that Brandi and Amy certainly did not have a "loving" or "affectionate" relationship. Accordingly, the Chancellor set aside the warranty deed.

SUMMARY OF ARGUMENT

The Chancellor's judgment setting aside the warranty deed was clearly supported by an abundance of evidence, including *undisputed* expert testimony. There is no feasible argument of manifest error, nor did she apply an erroneous legal standard. Hence, the chancellor's discretion was not abused and her judgment must be upheld. *Wright v. Roberts*, 797 So. 2d 992 (¶14) (Miss. 2001).

In order to set aside a deed in Mississippi, it must be shown by clear and convincing evidence that the grantor lacked the mental capacity at the moment of execution to understand the legal consequences of her actions. *In re Conservatorship of Moran*, 821 So. 2d 903, 906 (¶11) (Miss. Ct. App. 2002). Clearly, there is no time at which Amy, whose mental deficiencies render her incapable of "lucid intervals,"[1] could possibly have understood the legal consequences of signing the warranty deed prepared by Brandi. This is true with regard to the moment of execution, as well as at any time before or after (or even twenty years from now). The unrebutted expert testimony at trial, which the Chancellor accorded appropriate weight in conjunction with all of the other testimony and evidence

[1] *See Whitworth v. Kines*, 604 So. 2d 225, 228 (Miss. 1992) ("This Court recognizes that mental incapacity or insanity, 'is not always permanent, and a person may have lucid moments or intervals when that person possesses necessary capacity to convey property'") (citations omitted). Clearly, the type of mental deficiency suffered by

before her, established that Amy, with an I.Q. of 74, was borderline mentally retarded and simply incapable of the level of competence necessary to comprehend the nature and portent of an instrument such as the one at issue in this case. As there is no manifest error present, and the Chancellor's decision was clearly supported by substantial evidence, this Court should not disturb the findings of fact of the Chancellor and substitute its judgment for hers. *See Owen v. Owen*, 798 So. 2d 394, 397-98 (¶10) (Miss. 2001) ("This [C]ourt will not substitute its judgment for that of the chancellor 'even if it disagree[s] with the lower court on the finding of fact and might . . . [arrive] at a different conclusion'") (citation omitted).

Further, the Chancellor found that there was insufficient consideration for the subject transaction. While "love and affection" may constitute sufficient consideration under Mississippi law,[2] the Chancellor found that the relationship between Amy and Brandi certainly was neither loving nor affectionate. There is no dispute that there was no financial consideration; Brandi fully admitted at trial that no consideration was paid to Amy for executing the deed. The Appellant did not present at trial any other evidence as to alternate theories of consideration.

The Chancellor did not abuse her discretion; because her decision was based on substantial evidence, she applied the correct legal standard and she was not manifestly wrong, the judgment of the lower court should be upheld in its entirety.

ARGUMENT

STANDARD OF REVIEW

The Mississippi Supreme Court does not disturb the factual findings of a chancellor unless they are manifestly wrong, clearly erroneous, or if an erroneous legal standard was

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Amy is not the intermittent type referred to by this Court in *Whitworth*, but is one that she suffers every day, all day, year after year.

applied. *Wright*, 797 So. 2d at 997 (¶14). So long as a chancellor's decision was supported by substantial, credible evidence, her decision will not be disturbed. *Id.* The Court does not substitute its own judgment for that of the lower court, even if it disagrees with the chancellor's findings of fact or might have come to a different conclusion. *Owen*, 798 So. 2d at 397-98 (¶10) (citations omitted).

I. THE CHANCELLOR'S FINDING THAT AMY WAS MENTALLY INCOMPETENT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS BASED ON THE CORRECT LEGAL STANDARD AND WAS NOT MANIFESTLY WRONG; THUS, THE CHANCELLOR DID NOT ABUSE HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED, AND THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE CHANCERY COURT.

In order to set aside a deed in Mississippi, it must be shown by clear and convincing evidence that the grantor lacked the mental capacity at the moment of execution to understand the legal consequences of her actions. *Moran*, 821 So. 2d at 906 (¶11). The opinions cited by the Appellant, including *Moran*, are simply not on point with the competency issues involved in the present case. Both *Moran* and *McGowan* involved "wax and wane" mental conditions, such as Allzheimer's, in which the person suffering from the alleged incapacity phased in and out of competency, or had "lucid intervals." That simply is not the situation with Amy. Amy *always* has an I.Q. of 74; this remains unrebutted. Her I.Q. does not miraculously leap up or down twenty points depending on the day of the week. It is the same today as it was when she signed the warranty deed, and will be the same twenty years from now. Dr. Stoudenmire, whose expertise in clinical psychology Appellant's counsel stipulated to, opined in terms of reasonable psychological probability that Amy is borderline mentally retarded, and will likely function at the level of a seventh-grader for the rest of her life. Again, this was unrebutted expert testimony. Lay witnesses, including Mona

[2] *See Holmes v. O'Bryant*, 741 So. 2d 366, 370 (¶19) (Miss. Ct. App. 1999).

Webb and Denise Parker, also provided testimony as to Amy's childlike intelligence level and behavior. The evidence was clear, convincing and substantial that Amy could not, at the time she signed it, understand the legal ramifications of signing the warranty deed that Brandi had prepared, brought to her and convinced her to sign. Accordingly, the Chancellor's decision as to Amy's incompetence at the time she signed the warranty deed clearly must be upheld under the standards set forth by this Court.

II. THE CHANCELLOR'S FINDING THAT THE CONSIDERATION FOR THE LAND WAS INADEQUATE WAS SUPPORTED BY SUBSTANTIAL EVIDENCE, WAS BASED ON THE CORRECT LEGAL STANDARD AND WAS NOT MANIFESTLY WRONG; THUS, THE CHANCELLOR DID NOT ABUSE HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED, AND THIS COURT SHOULD AFFIRM THE JUDGMENT OF THE CHANCERY COURT.

This Court has also held that even where a grantor is found *not* to be completely mentally incompetent, a "weakness of intellect" may be enough to set aside a deed when coupled with another factor, such as inadequate consideration or the existence of a confidential relationship. *See Moran*, 821 So. 2d at 906 (¶15). The Chancellor in the case at bar did indeed find that even if Amy were not completely incompetent (which the Chancellor found that she was), and suffered only from "weakness of intellect," the consideration suggested by the Appellant (love and affection)[3] was insufficient, as substantial evidence supported the fact that Amy and Brandi did *not* have a loving and affectionate relationship. Even immediately after their father's death, they still only were described as being "on speaking terms." Paulette Mallette testified as to the dysfunctionality of the family, and clearly stated in her deposition (despite her attempts to rehabilitate her testimony at trial) that Amy and Brandi were never loving towards one another, but were merely "civil." But for their children, they would not even be cordial to one another today. In any event, any sparse

[3] *See Holmes*, 741 So. 2d at 370 (¶19) (holding that love and affection may constitute valid consideration).

familial ties certainly did not constitute consideration for Amy to deed to Brandi, for apparently nothing, a half interest in ninety-eight acres worth of property which Brandi opined was worth $3,000 - $6,000 an acre. Certainly no financial consideration existed, as Brandi admitted fully at trial. While Brandi did loan Amy money at one point until such time as Amy's trust matured, she made sure it was secured by a promissory note which undisputed testimony establishes was an entirely separate transaction than the attempted conveyance of the subject property. In fact, Brandi left the amount line blank on the note, which created a potentially huge liability to Amy. The Chancellor reviewed all of the evidence and testimony (much of the testimony conflicted) before her, and as finder of fact, gave it the appropriate weight. In so doing, she held that no consideration existed. The Appellant put on no evidence of other alternative theories of consideration at trial, and the Court correctly found that none existed. Accordingly, the Appellant's argument is without merit, as the Chancellor's decision as to this issue was supported by substantial evidence, was not manifestly wrong and did not apply an erroneous legal standard. This Court accordingly must affirm this aspect of the lower court's findings.

III. THE CHANCELLOR WAS NOT MANIFESTLY WRONG AND DID NOT ABUSE HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED.

This issue is actually just a rehash of Issue II, and completely lacks merit. In Mississippi, there are essentially three ways to establish mental incapacity to execute a deed: (1) establish that the grantor suffered from a total lack of capacity to execute the deed (i.e., did not understand the legal consequences of her action); (2) a general "weakness of intellect" coupled with *either* (a) inadequate consideration ***or*** (b) a confidential relationship; or (3) establish that the grantor suffered from permanent insanity up to and after the date of execution. *See Smith v. Smith*, 574 So. 2d 644, 653-54 (Miss. 1990). The Appellant attempts

to mislead this Court as to the applicable methods of determining mental incapacity to execute a deed by asserting that there *must* be a confidential relationship in order for this Court to scrutinize a deed; however *Smith* unequivocally states that the Appellant's assertion is merely *one* of the methods utilized by this Court.

While it is perplexing that the Appellant argues first that there was a "loving and affectionate" relationship, but subsequently flips 180 degrees to argue that Amy and Brandi had no confidential relationship, the evidence and testimony at trial, viewed in its entirety and allowing the Chancellor the appropriate deference as finder of fact, reveals that the Chancellor's decision was correct and must be upheld. The Chancellor in the case at bar clearly found, after hearing and weighing all testimony and evidence and applying the correct legal standards, that at least *two* of the three methods utilized by this Court to determine incapacity were applicable to Amy Mallette at the time she executed the subject warranty deed, which was drafted by a lawyer hired by Brandi and brought to Amy by Brandi. Because the Chancellor's did not abuse her discretion, and because her decision was supported by substantial evidence, was not manifestly wrong and did not apply an incorrect legal standard, the Appellee respectfully requests that this Court affirm the decision of the lower court in its entirety.

CONCLUSION

There was no error by the chancellor in this action. There was clear and convincing evidence at trial that Amy lacked the mental capacity at the moment of the execution of the warranty deed to understand the legal consequences of her actions. Unrebutted expert testimony opined that Amy is borderline mentally retarded, and will likely function at the level of a seventh-grader for the rest of her life. Lay testimony supported this finding. Thus,

the Chancellor's decision as to Amy's incompetence at the time she signed the warranty deed clearly must be upheld under the standards set forth by this Court. Even if Amy had been found *not* to be completely mentally incompetent, a "weakness of intellect" would be enough to set aside the deed when coupled with another factor, such as inadequate consideration or the existence of a confidential relationship between she and Brandi. The Chancellor sub judice did, indeed, find that even if Amy were not completely incompetent (which the Chancellor found that she was), but suffered only from "weakness of intellect," the consideration suggested by the Appellant (love and affection) was insufficient in this particular case, as substantial evidence supported the fact that Amy and Brandi did *not* have a loving and affectionate relationship, and were barely on speaking terms. The Chancellor in the case at bar clearly found, after hearing and weighing all testimony and evidence and applying the correct legal standards, that at least *two* of the three methods utilized by this Court to determine incapacity were applicable to Amy Mallette at the time she executed the subject warranty deed. Because the Chancellor's did not abuse her discretion, and because her decision was supported by substantial evidence, was not manifestly wrong and did not apply an incorrect legal standard, the Appellee respectfully requests that this Court affirm the decision of the lower court in its entirety.

Respectfully submitted,
MONA WEBB, Conservator for Amy Mallette

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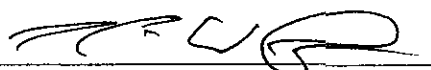
BY: 
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CERTIFICATE OF FILING AND SERVICE

I, KRISTOPHER W. CARTER, of the law firm of DENHAM LAW FIRM. do hereby certify that I have mailed this day, first-class postage prepaid, a true and correct copy of the Brief for Appellee to the following at their usual mailing address:

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