2006-CA-00373 SCT

CERTIFICATE OF INTERESTED PERSONS[1]

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

1. Mona Webb, Conservator of Amy Mallette, Appellee/Cross Appellant;
2. Amy Mallette, Appellee/Cross Appellant;
3. Earl Denham, Denham Law Firm, attorney for Appellee/Cross Appellant;
4. Wendy Hollingsworth, attorney of record for Appellee/Cross Appellant;
5. Chancellor Jaye Bradley, Pascagoula, Mississippi;
6. Brandi McMahan, Appellant/Cross Appellee;
7. Richard B. Tubertini and Holly Trudell, Phelps Dunbar, LLP, Gulfport, Mississippi, attorneys for Appellant/Cross Appellee;
8. Arthur Carlisle, attorney of record for Appellant/Cross Appellee in the lower court.

Holly Trudell

HOLLY TRUDELL
Counsel of Record for Appellant/Cross Appellee

[1] Merchants & Marine Bank, who were originally named defendants in this matter, has confirmed that they have no interest in the property. C.P. 137-138; R.E. 56-57

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2. Whether the Chancellor made findings of fact without substantial evidence, applied the wrong legal standard, was manifestly wrong in finding that there was inadequate consideration for the land and abused her discretion in setting aside the deed.

3. Whether the Chancellor was manifestly wrong and abused her discretion in setting aside the deed, where there was no evidence of a confidential relationship between Amy and Brandi.

STATEMENT OF THE CASE

I. Course of proceedings

On July 17, 2002, the Appellant/Cross Appellee, Brandi McMahan ("Brandi"), filed her Complaint to Partite Real Properties, seeking to partition the property she owned jointly with her sister, Appellee/Cross Appellant, Amy Mallette ("Amy"), pursuant to a warranty deed executed by Amy, on June 12, 2001, conveying the property to Amy and Brandi as tenants in common. C.P. 1-7. Amy answered the Complaint on April 7, 2003, asserting that mental incapacity rendered her unable to understand the nature and quality of her act when she executed the conveyance. C.P. 9-19. Additionally, Amy asserted a counterclaim, alleging that Brandi fraudulently induced Amy to transfer a one half interest in the property to Brandi. C.P. 12-14. On May 5, 2003, Brandi replied to Amy's counterclaim denying the assertions therein. C.P. 20-23. Trial of this matter was held on July 5, 6, 7 and 8, 2005.

The court rendered a Judgment on February 9, 2006, setting aside the warranty deed. C.P. 139-141; R.E. 13-14. In her Findings of Fact and Conclusion of Law, filed on December

29, 2005, the Chancellor found that Amy had met her burden of proof that she lacked the capacity at the time of the conveyance to execute a deed to the subject property. C.P. 134-135; R.E. 32-33. The Chancellor also found that Amy's allegation of fraud was not proven and denied Amy the right to recover attorney's fees from Brandi. C.P. 135; R.E. 33.

Amy filed a Motion to Alter or Amend Judgment ("Motion") on February 21, 2006, seeking to have the court reconsider its finding on the issue of fraud. C.P. 144-146. Brandi's Notice of Appeal was filed on February 22, 2006, C.P. 147-149, and held in abeyance pending resolution of Amy's Motion. Brandi's response to Amy's Motion was filed on March 3, 2006. C.P. 150-152. The lower court entered its Order Denying Motion to Alter or Amend Judgment on June 15, 2006. C.P. 199.[1]

Brandi appeals from the Chancellor's, February 9, 2006 Final Judgment, finding that Amy had met her burden of proof that she lacked the capacity at the time of the conveyance to execute a deed to the subject property. C.P. 139-141; R.E. 13-15.

II. Statement of facts.

Brandi McMahan and Amy Mallette are sisters. T. 24. Thomas Mallette ("Tommy") was their father. T. 24. He died on March 18, 2001. T. 29. Before he died, Tommy deeded the subject property to Amy, without her knowledge. C.P. 123; R.E. 21. Brandi did not learn of the conveyance until Tommy's funeral. C.P. 124, R.E. 22. After Tommy's death, Amy, on June 12, 2001, deeded the property to herself and Brandy. C.P.125; R.E. 23.

Additionally, Tommy left a trust fund for his daughters, the first pay out of which was due when the sisters' attained age 25. C.P. 124; R.E. 22. Brandi turned 25 on May 26, 2002, so

[1] Part of the direct examination, and all of the cross examination, of Amy Mallette was lost as a result of Hurricane Katrina. T. 342. Brandi attempted, through various motions and other proceedings in the lower court, to obtain this testimony and complete the record. However, due to the prohibitive costs of these uphill efforts, Brandi ultimately elected to proceed without Amy's complete testimony. R.E. 79-84.

immediately received the first pay out upon Tommy's death. T. 66-67. Amy was born on March 27, 1978. T. 311. Therefore, Amy had just over two years to wait until the first pay out from her father's trust. C.P. 124; R.E. 22. Brandi agreed to lend Amy money until the trust matured, at which time Amy would repay the money lent. T. 33; C.P. 124; R.E. 22. This agreement was immortalized in a promissory note, R.E. 37, in which the amount was left blank, because there was no certain dollar amount agreed upon as Brandi was just going to lend Amy money on an "as needed" basis. T. 34. The Chancellor found that the promissory note was a separate document and a separate transaction from the warranty deed, C.P. 126; R.E. 24, both of which were executed on June 12, 2001. R.E. 35-36; 37.

According to the Chancellor, Dr. Stoudenmire, Amy's expert, testified that "Amy lacked the required mental capacity at the moment she executed the deed to understand the ramifications of her actions," C.P. 131, R.E. 29. In fact, Dr. Stoudenmire stated that his opinions offered with "reasonable psychological probability" in "this type of competency" case related to Amy's "[c]ompentency [sic] to *manage funds as opposed to mental compentency* [sic]," T. 363-64 (emphasis added), and that, rather than suffering from mental incompetency, Amy suffered from a "weakness of intellect." T. 370. Dr. Stoudenmire determined that Amy's I.Q. score placed her in the fourth percentile, with around 12 million other people nationally. T. 372-73. He opined that many people operating at a junior high school level are very successful and that I.Q. itself, although a "pretty important factor" was "by no means not [sic] the only factor" in determining a person's ability to enter into contracts. T. 372-73.

Dr. Stoudenmire stated, in his psychological evaluation of Amy, that "in fact, [Amy's] academic skills are closer to the average range that they are to the retardation range," R.E. 45, and Amy's pre-GED testing results demonstrated that she had mastered most of the skills necessary to obtain her GED. R.E. 40. Also, according to Paulette Mallette ("Paulette"), the

girls' mother and Tommy's ex-wife, Amy's father, Tommy, attained only a 6th or 7th grade education, yet built up a successful trucking business, at the height of which he operated 198 trucks and owned a home valued at $350,000-400,000. T. 229.

Lance McMahan ("Lance"), Brandi's husband, testified that he had no reason to believe Amy was incompetent on the day the deed was signed. T. 161. Denise Parker, the trust officer for Hancock Bank, where Amy signed an investment objective relating to her father's trust, on May 25, 2001, about three weeks before she executed the warranty deed, testified that Amy did not appear to be incompetent; otherwise, she would not have let Amy sign the documents. T. 178; 175; R.E. 52-53. The only articulated problem Ms. Parker subsequently observed with Amy were financial, budgeting problems. T. 178. Paulette, the sisters' mother, testified that, growing up, both Amy and Brandi were spoiled and were given whatever money they wanted. T. 212.

Gary Prach, the deputy clerk who notarized the deed, did not remember Amy at all, had no specific memory of notarizing the deed and had no opinion about the "psychological confidence" of Amy to sign the deed. T. 302-03. When Mona Webb first met Amy in the Spring of 2000, over a year before the deed was executed, and before Mona took over as Amy's conservator, she did not suggest Amy get help because "there was no need to." T. 390; 393. Cherrie Miles "("Cherrie"), Amy's and Brandi's cousin, who had known Amy "for as long as [she] c[ould] remember," and who had constant contact, growing up, with both Amy and Brandi, testified that she did not think Amy was incompetent and that Amy had no problems looking after herself and her children T. 275-76.

Although the Chancellor found that the girls' parents' "divorce was stressful and caused the sisters to become estranged because Amy sided with her father and Brandi sided with her mother," C.P. 120, R.E. 18, and although Amy contended that she was a "daddy's girl" who

never got along with her sister or mother, T. 312-315, in fact the evidence showed that, at least around the time the warranty deed was signed, the girls were close.

Cherrie, the sisters' cousin, testified that the girls had been going through a rough time, but she believed that Amy's decision to transfer land to her sister represented a peace offering. T. 288. Indeed, during the relevant time period, starting on May 26, 2001, Brandi paid many of Amy's bills, and lent her money, which Amy agreed to repay once her trust matured. T. 81; 99; R.E. 50-51. Additionally, according to Brandi, during the relevant time period, the girls often went gambling together. T. 98. Furthermore, Amy testified that, at the time of their father's funeral, she and Brandi were on speaking terms. T. 335-36. Also, Amy stated that she visited Brandi in Hattiesburg while Brandi was in labor with her daughter, T. 332, who was born on July 27, 2001, T. 24. Moreover, the court found that, "around the same time period that the Warranty Deed and Promissory Note were executed between the sisters," Amy agreed to include Brandi's unborn child in their father's trust and an Order for Instruction to Trustee was entered on August 3, 2001, authorizing this. C.P. 128; R.E. 26; 54-55.

Brandi testified that she did not pay Amy any financial consideration for the land as the land was a gift from Amy who, in several conversations, told Brandi that their father would have wanted Brandi to have half the land. T. 33; 72; 101. According to Brandi, one of these conversation was on the day of their father's funeral. T. 30. Brandi testified there were several conversations after that, and Amy agreed that Brandi should draw the papers up. T. 30.

Lance testified that he was a witness to the conversation on the day of Tommy's funeral, when Amy told Brandi that she intended to split the land with Brandi, because "Daddy would have wanted us to have it that way." T. 133. According to Paulette, the girls' mother, Amy told her over five times that her father wanted her to split the land with Brandi. T. 221. Cherrie, the girls' cousin, who grew up with them, testified that Amy told her, sometime between Christmas

of 2000 and June of 2001, that she was going to sign some of the land over to Brandi, that she, Amy, felt that that was what was right and was what her dad would want her to do. T.273-74. Cherrie also stated that Amy told her she was going to give Brandi the land and that, as a completely separate transaction, Brandi was going to lend Amy some money. T. 293. Dr. Stoudenmire testified that Amy told him she thought that "either she would get the land back, or that any money from the sale of the land would be divided equally between the two of them." T. 367.

Amy testified that she understood Brandi wanted the one-half interest in the land to serve as collateral for the loans and that Brandi promised to convey the land back to her after repayment of the loans. C.P. 125, R.E. 23. The only witness the Chancellor found to corroborate this testimony was Ronald Seymour, Tommy's CPA, who testified, by deposition, that Brandi told him her motivation for having her name put on the deed was to put her in a better position in regard to the monies she advanced to Amy. C.P. 126-27 , R.E. 25; 63. However, Mr. Seymour further testified that he did not realize there was also a promissory note and that Brandi may have been referring to that instrument, not the warranty deed. R.E. 65; 66. Additionally, Mr. Seymour testified that he had known Amy since she was a "very small child" and that he questioned her honesty, because Amy had admitted to embezzling funds from her father's business, but that he had no reason to question Brandi's honesty or integrity. R.E. 68; 70-71.

Although the Chancellor made no findings in this regard, the record shows that there was no confidential relationship between Brandi and Amy. Prior to the signing of the deed, Brandi had never done any cooking or cleaning for Amy, or looked after her, or shopped for her, or gone to the grocery store for her, or paid her bills, or had a joint account with her, or power of attorney

over Amy. T. 39. Brandi did not have to drive Amy to the doctor or clothe or feed Amy's children. T. 40. Paulette testified that Amy never depended on Brandi to do anything. T. 222.

SUMMARY OF ARGUMENT

The Chancellor's setting aside of the warranty deed was manifestly wrong, unsupported by substantial evidence, based on an erroneous legal standard, and constituted an abuse of discretion.

It is presumed that the grantor of a properly executed deed was mentally competent at the time of its execution. *In the Matter of the Conservatorship of Moran*, 821 So.2d 903 (¶ 11) (Miss. 2002). This presumption can be rebutted only by a Plaintiff showing, by clear and convincing evidence that, at the moment of execution, the grantor lacked the required mental capacity or was permanently insane. *Id.* Although the Chancellor found that Dr. Stoudenmire, Amy's expert, testified that Amy lacked the required mental capacity at the moment she executed the deed, C.P. 132; R.E. 30, in fact, Dr. Stoudenmire testified only to Amy's competency to manage funds as opposed to mental competency. T. 363-64. Furthermore, the court arrived at its own unsupported conclusion that Amy could never experience a lucid interval, applying an erroneous legal standard. C.P. 134; R.E. 32.

As the Chancellor relied solely on Dr. Stoudenmire's testimony and her own erroneous legal standard to determine that "Amy did not possess the mental capability to understand the legal documents she executed", C.P. 134, R.E. 32, the Chancellor's setting aside of the deed from Amy to Amy and Brandi was unsupported by substantial evidence, was manifestly wrong and an abuse of discretion.

In fact, Dr. Stoudenmire testified that Amy suffered from a "weakness of intellect." T. 370. However, it is only when "such a weakness [is] coupled with some other factor, such as

grossly inadequate consideration or the existence of a confidential relationship, [that it] may lead to setting aside a deed." *Moran*, 821 So.2d at (¶ 15).

"Under Mississippi law, love and affection are considered consideration . . . whether that motive be love, affection, gratitude, partiality prejudice, or even a whim or caprice." *Holmes v. O'Bryant*, 741 So.2d 366 (¶ 19) (Miss. 1999). The Chancellor found that the "testimony during this trial does not show a relationship between the sisters that would establish a loving and affectionate relationship," and thus there was inadequate consideration for the transfer of half the land. C.P. 134-35; R.E. 32-22. However, there is, in fact, no evidence in the record "as reasonable minds might accept as adequate to support [the Chancellor's] conclusion," *In re Conservatorship of McGowen*, 752 So.2d at (¶ 11), that, at the time the warranty deed was signed, the girls were not affectionate or loving towards each other. On the contrary, the undisputed testimony showed that, specifically around the same time the warranty deed was signed, on June 12, 2001, the sisters were close. For example, before June 12, 2001, beginning on May 26, 2001, R.E. 50-51, Brandi agreed to lend Amy money, to be repaid when Amy's trust fund matured, C.P. 126; R.E. 24, and, after June 12, 2001, Amy not only visited Brandi in hospital in Hattiesburg while Brandi was in labor with her daughter, who was born on July 27, 2001, T.24; 332, but Amy also agreed to have Brandi's unborn child added to their father's trust, as reflected in the Chancery Court of Harrison County's Order for Instruction to Trustee entered on August 3, 2001. T. 186-87; R.E. 54-55. Moreover, the Chancellor applied an erroneous legal standard by failing to consider the other bases of adequate consideration for transfer of land, namely "gratitude, partiality prejudice, or even a whim or caprice." *Holmes*, 741 So.2d at (¶ 19).

Thus, the Chancellor was manifestly wrong in finding there was inadequate consideration for the warranty deed and abused her discretion in setting it aside.

Furthermore, although the Chancellor did not even make a determination as to whether or not there was a confidential relationship between Brandi and Amy, "[b]efore the court will scrutinize a facially valid inter vivos deed, a confidential relationship *must* be shown." *Holmes v. O'Bryant*, 741 So.2d at (¶ 20) (emphasis added). The testimony indisputably showed that, at the time the deed was executed, there was no confidential relationship, and that Amy could manage her own affairs, with the possible exception of not being able to budget her money appropriately, which was not surprising giving the fact that, according to Paulette, their mother, growing up, both Amy and Brandi were spoiled and given whatever money they wanted. T. 212.

Thus, the Chancellor was manifestly wrong and abused her discretion when she set aside the warranty deed from Amy to Amy and Brandy. Therefore, this Court must reverse and render, reinstating the deed set aside by the Chancellor in her Final Judgment entered on February 9, 2006 and remand to the lower court for the sole purpose of partitioning the subject property.

ARGUMENT

STANDARD OF REVIEW

> Upon review of a chancellor's opinion, when it is supported by substantial evidence and where the chancellor has not abused her discretion, was not manifestly wrong, clearly erroneous, or applied an erroneous legal standard, [the Court] will not disturb her opinion.

Pratt v. Pratt, 2006-CA-00206-COA (¶ 10) (Miss. 2007) (internal citations omitted).

> The established standard of review requires that "[w]henever there is substantial evidence in the record to support the chancellor's findings of fact, those findings must be affirmed." The supreme court has clarified that substantial evidence is "more than a 'mere scintilla' " and may be characterized as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion."

McGowen, 752 So.2d at (¶ 11).

I. THE CHANCELLOR'S FINDING THAT AMY WAS MENTALLY INCOMPETENT WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR WAS BASED ON AN ERRONEOUS LEGAL STANDARD AND WAS MANIFESTLY WRONG; THUS THE CHANCELLOR ABUSED HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED, AND THIS COURT SHOULD REVERSE AND RENDER, SETTING ASIDE THE JUDGMENT OF THE CHANCERY COURT AND REINSTATING THE DEED, AND REMAND TO THE TRIAL COURT FOR THE SOLE PURPOSE OF PARTITIONING THE PROPERTY

The Mississippi Supreme Court has declared, "We do not lightly disturb the efficacy of an otherwise valid deed." *In the Matter of the Estate of Lane*, 930 So.2d 421 (¶ 20) (Miss. 2006), citing *Anderson v. Burt*, 507 So.2d 32, 36 (Miss. 1987).

> A properly executed deed carries with it a presumption that the grantor was *mentally competent* at the time of execution. To show otherwise requires *clear and convincing evidence.* It is not enough to show that at the time of the conveyance the grantor was suffering from a general mental weakness or condition; mental incapacity and insanity are not always permanent and a grantor may experience a lucid interval when he would possess the mental capacity to understand the legal consequences of his action . . . *[i]t must be shown that, at the moment of execution, the grantor lacked the required mental capacity or was permanently insane.*

Moran, 821 So.2d 903 (¶ 11) (citations omitted) (emphasis added).

In *Moran*, the medical expert had examined Moran twice - in February and December of 1997 - before and after the deed was executed on October 17, 1997, and found him on both occasions to be confused and agitated. *Id.* at (¶ 12). However, because there was no testimony from the doctor, or from anyone else, to establish that Moran was mentally incompetent on the date he executed the deed, but there was evidence that Moran appeared competent at the time the deed was executed, the lower court found there was insufficient evidence of mental incapacity, and the Court of Appeals affirmed. *Id.* at (¶¶ 12,13).

The Court of Appeals reached the same conclusion in *McGowen*. *McGowen*, 752 So.2d 1078. In 1995, Anne and Clarence McGowen signed eleven warranty deeds, leaving the grantees names blank, until they had one of their children fill in the grantees' names in

December 1995, pursuant to the McGowens instructions. *Id.* at (¶¶ 3,4). The deeds were recorded and delivered to the children. *Id.* at (¶ 4). Mr. McGowen then brought suit to set aside the warranty deeds, stating he did not remember signing them and alleging deceit, tricky and subterfuge. *Id.* at (¶ 5). Four of the children reconveyed the property to the McGowens. *Id.* at (¶ 6). The McGowens prepared eleven new warranty deeds, each reserving a life estate, and two of their children, Kay and Kecie, drove them to the notary public's office where the deeds were notarized. *Id.* at (¶¶ 6,7). Due to Mrs. McGowen's ill heath, she was at that time living with her daughter, Anne. *McGowen*, 752 So.2d at (¶ 7). Mr. McGowen again disputed this second set of deeds; by the time of trial, Mr. McGowen was suffering from Alzheimer's and was under a Conservatorship. *Id.* at (¶ 6).

The *McGowen* court summed up the law in Mississippi when determining if someone is mentally incompetent at the time an instrument is signed:

> With respect to cases in which competency is an issue, "[t]he same capacity is required to execute a valid deed as is required for making a will." *A plaintiff asserting lack of capacity to execute a deed bears the burden of proving lack of capacity by clear and convincing evidence.* Moreover, *the grantor's mental capacity must be evaluated as of the specific time that the grantor executed the deed* rather than in regard to the grantor's general physical or mental condition. Mississippi courts recognize that, in spite of a general mental condition, a grantor may experience a lucid interval during which the grantor is competent to execute a deed.

McGowen, 752 So.2d at (¶ 12) (internal citations omitted) (emphasis added).

Two experts testified for Mr. McGowen. Dr. Deal, a psychiatrist, testified that Mr. McGowen was "likely" incompetent at the time he signed the deeds, but "acknowledged this assertion was speculative because he was not actually present to observe [McGowen] at the time in question." *Id.* at (¶ 13). Dr. Stoudenmire,[2] who twice conducted intellectual, academic and mental abilities testing on Mr. McGowen in August of 1996, "felt confident" that Mr.

[2] The same expert who testified on Amy's behalf in the case *sub judice*.

McGowen's poor memory existed on May 1996 when the second set of warranty deeds were signed. *Id.* However, the Court of Appeals found that the testimony of the two expert witnesses was not sufficient to set the deeds aside because neither of the experts was able to evaluate the mental competency of Mr. McGowen a the time he executed the deeds; whereas other witnesses, who were present at the time Mr. McGowen executed the deeds, confirmed he was mentally competent. *McGowen*, 752 So.2d at (¶¶ 14,16,17,18).

The case at bar mirrors *Moran* and *McGowen* in that no one testified that they observed Amy to be mentally incompetent on the date the deed was executed. In fact, unlike *Moran* and *McGowen*, no one testified that Amy was mentally incompetent at all. Indeed, the Chancellor found that Amy, despite the fact she asserted in her answer to Brandi's Complaint that she "did not understand the nature and quality of her act when she executed the conveyance," T. 10, in fact "*understood* that Brandi wanted the one-half interest in the land to serve as collateral for the loans," C.P. 125; R.E. 23 (emphasis added). Thus, according to the Chancellor, Amy did understand at least what she thought the nature and quality of her act was when she executed the conveyance.

Additionally, although Denise Parker, the Trust Officer with Hancock Bank, who advised both Amy and Brandi with regard to the investment of the trust fund monies left to them by their father, testified that she believed Amy had more than financial problems, T. 179, she failed to articulate any specific problems other than budgeting. T. 178.

More importantly, Dr. Stoudenmire, Amy's only expert witness, did not find that Amy was mentally incompetent. In fact, Dr. Stoudenmire specifically testified that his expert opinion related to Amy's "competency to manage funds as opposed to mental incompetency," and, on that basis, he believed it was probable that Amy was not competent to manage funds on the day she signed the warranty deed and promissory note. T. 363-64. Moreover, Dr. Stoudenmire was

unable to conclude that Amy did not know what she was doing when she executed the warranty deed, stating, ""It's not an either or question in terms of whether she knew entirely or didn't know anything; it's more in between; but I felt like that she doesn't know very much about financial matters." T. 375.

The Chancellor correctly concluded that "the deciding factor in this case is whether Amy had the mental capacity to understand the ramifications of her actions in signing the Deed." C.P. 133; R.E. 31. Additionally, the Chancellor correctly opined that "it is possible that Amy was simply being generous and shared the land with her sister as a gift." C.P. 132; R.E. 30. However, the Chancellor was manifestly wrong when she held:

> Upon consideration of the undisputed expert testimony it is obvious that Amy did not possess the mental capability to understand the legal documents she executed. Further, Amy did not experience a "lucid interval" at the time the deed and blank promissory note were executed. Amy's mental condition is not the same as an Alzheimer's patient or one suffering from mental illness. One in her situation does not experience lucid intervals and would never have a period of time when she would be capable of understanding the complexity of these type legal transactions.

C.P. 134; R.E. 32.

In regard to Dr. Stoudenmire's testimony, this finding was manifestly wrong; furthermore, the Chancellor applied an erroneous legal standard and abused her discretion when she determined *sua sponte* that Amy could never be lucid.

Indeed, even if Dr. Stoudenmire had testified that Amy was mentally incompetent, or if there had been any evidence to support such a conclusion, Amy has not met the clear and convincing burden of evidence to have the deed overturned. Dr. Stoudenmire was not with Amy on the day she signed the deed and, as *McGowen* shows, even if Dr. Stoudenmire's testimony rose to the level of being able to say he "felt confident" that Amy was not mentally competent on the day she signed the deed, the fact that Dr. Stoudenmire was not there makes it impossible for

him to render any opinion. Thus, Dr. Stoundenmire's testimony cannot meet the requisite clear and convincing standard especially when Brandi, Lance, and the Deputy Clerk, Gary Prach, who notarized the deed, were all present when Amy signed the deed and none of them observed that she was exhibiting signs of mental incompetence at that time.

In sum, Amy failed to show, by clear and convincing evidence, that she was mentally incompetent on the day the deed was signed. In fact, the evidence showed, at the very most, according to the testimony of Dr. Stoudenmire, that Amy suffered from a "weakness of intellect." T. 370. As such, the Chancellor's finding that Amy had met her burden of proof was manifest error and the setting aside of the warranty deed was an abuse of discretion. This Court must reverse and render, reinstating the warranty deed from Amy to Amy and Brandi and remand to the trial court for the sole purpose of partitioning the land.

II. THE CHANCELLOR'S FINDING THAT THE CONSIDERATION FOR THE LAND WAS INADEQUATE WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND/OR WAS BASED ON AN ERRONEOUS LEGAL STANDARD AND WAS MANIFESTLY WRONG; THUS THE CHANCELLOR ABUSED HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED, AND THIS COURT SHOULD REVERSE AND RENDER, SETTING ASIDE THE JUDGMENT OF THE CHANCERY COURT AND REINSTATING THE DEED, AND REMAND TO THE TRIAL COURT FOR THE SOLE PURPOSE OF PARTITIONING THE PROPERTY

After finding that there was no evidence that *Moran* was incompetent on the date the deed was executed, the *Moran* court addressed Appellant's contention that '[e]ven if Moran was not completely incompetent, he suffered from a *weakness of intellect.*'" *Moran,* 821 So.2d at (¶ 15) (emphasis added). The court determined that "such a weakness, when coupled with some other factor such as grossly inadequate consideration or the existence of a confidential relationship, may lead to setting aside a deed." *Id.* (citations omitted).

"Under Mississippi law, love and affection are considered consideration . . . 'A man of sound mind may execute a will or a deed from any sort of motive satisfactory to him, whether

that motive be love, affection, gratitude, partiality, prejudice, or even a whim or caprice.'" *Holmes,* 741 So.2d at (¶ 19), citing *Herrington v. Herrington,* 250-251, 98 So.2d 646, 649 (Miss. 1957) (quoting *Burnett v. Smith,* 47 So. 117, 118 (Miss. 1908)).

In addressing the question of inadequate consideration, the *Moran* court stated that "love and affection will suffice as consideration," and found that Moran's desire to gift land to one daughter was not unreasonable even though "equally beloved family were thereby provided less." *Moran,* 821 So.2d at (¶ 18). Indeed, the *McGowen* court stated that "gifts frequently occur between family members," and when a parent voluntary gives property to one of his children, the court should not interfere, even when a confidential relationship is established. *McGowen*, 752 So. 2d at (¶ 23). "Common experience teaches that gifts frequently occur between family members." *Anderson,* 507 So.2d at 36. See also *Mathieu v. Crosby Lumber & Mfg. Co.*, 49 So.2d 894, 895 (Miss. 1951) (where the consideration for 10 acres of land conveyed by a husband and his wife to the husband's sister was "love and affection"). Indeed, the *Lancaster* court found adequate evidence of consideration between *non family* members where the evidence showed that the parties had been close friends for many years, and that the grantee become his primary caregiver when the grantor became ill. *Lancaster v. Boyd*, 927 So.2d 756 (¶ 25) (Miss. 2005).

The Chancellor, in the case at bar, found that "[c]ase law holds that love and affection will suffice as consideration, however, the testimony during this trial does not show a relationship between the sisters that would establish a loving and affectionate relationship." C.P. 134-35; R.E. 32-33. Yet, the Chancellor herself noted that, during the "same time period that the Warranty Deed and Promissory Note were executed between the sisters," Amy agreed to have her father's trust documents changed to include Brandi's unborn child, and the Order for Instruction to Trustee was entered on August 3, 2001. C.P. 128; R.E. 26. Additionally, Amy

testified that she was on speaking terms with Brandi at the time of their father's funeral, in March of 2001, and that she visited Brandi in Hattiesburg, when Brandi was in labor with her daughter, who was born on July 27, 2001. T. 332; 24. Furthermore, the girls' agreed that Brandi would lend money to Amy, beginning on May 26, 2001, just over two weeks before the deed was executed, which would be repaid when Amy obtained the first payout from their father's trust fund. T. 33; C.P. 124; R.E. 22. Also, although Amy denied at trial that she wanted to gift half the land to Brandi, Brandi; Brandi's husband, Lance; Paulette, the girls' mother; and Cherri, the sisters' cousin, all testified that Amy told them she wished to split the land with Brandi. T. 33; 72; 101; 133; 221; 273-74.

Indeed, there is no evidence to show that, at the time the deed was executed, the sisters were anything other than close; on the contrary, there is substantial evidence that they were very much involved in each other's lives. In fact, per the Mississippi Supreme Court's 1908 decision in *Burnett*, even if Amy deeded the half interest in the property purely on a whim or caprice - because she believed it was her father's wish - and then later changed her mind, that impulse would still constitute sufficient consideration for the transfer.

Thus, the Chancellor's finding that the evidence did not show that the sisters had a loving and affectionate relationship was manifestly wrong, based on an erroneous legal standard, and unsupported by any evidence that "reasonable minds might accept as adequate to support [this] conclusion" *McGowan*, 752 So. 2d at (¶ 11). Therefore, the Chancellor's setting aside of the deed was an abuse of discretion and this Court must reverse and render, reinstating the warranty deed from Amy to Amy and Brandi and remand to the trial court for the sole purpose of partitioning the land.

III. THE CHANCELLOR WAS MANIFESTLY WRONG AND ABUSED HER DISCRETION IN SETTING ASIDE THE WARRANTY DEED WHERE THERE WAS NO EVIDENCE OF A CONFIDENTIAL RELATIONSHIP BETWEEN BRANDI AND AMY, AND THIS COURT SHOULD REVERSE

AND RENDER SETTING ASIDE THE JUDGMENT OF THE CHANCERY COURT AND REINSTATING THE DEED, AND REMAND TO THE LOWER COURT FOR THE SOLE PURPOSE OF PARTITIONING THE PROPERTY

"Before the court will scrutinize a facially valid inter vivos deed, a confidential relationship *must* be shown." *Holmes v. O'Bryant,* 741 So.2d at (¶ 20) (emphasis added).

> A confidential relationship exists when a dominant over-mastering influence controls over a dependent person or trust, justifiably reposed. It is well established that the contestant has the burden of establishing the existence of a confidential relationship. Factors to be considered in determining if and when a confidential relationship exists, include: (1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.

In re Estate of Dabney, 740 So.2d 915 (¶ 12) (Miss. 1999) (citations omitted).

Despite the fact that one of the children cooked, cleaned and shopped for her father, was his attorney-in-fact, paid his bills, and was a joint signatory on her father's checking account, the *McGowen* court found no undue influence. *McGowen,* 752 So.2d at (¶ 20). In *Moran,* the court found that no confidential relationship existed with the daughter to whom Mr. Moran had deeded some property because the evidence showed that "he was alert and in good spirits when the deed was executed . . . drove his own car (though perhaps not far) and handled his finances . . . eventually became dependent but not on [the daughter to whom he deeded the property and said daughter] was not given any authority over bank accounts, or to handle his finances." *Moran,* 821 So.2d at (¶ 16).

Similarly, in the case at bar, there was no evidence of a confidential relationship between Brandi and Amy. According to Brandi, she had no power of attorney over Amy, never had a joint account with her, did not handle Amy's finances, did not cook or clean for her or drive her

places and did not care for Amy or her children in any way. T. 39-40. Paulette and Cherrie testified that Amy was perfectly capable of looking after herself and her children. T. 222; 275-76. Indeed, Amy herself went out of her way to show she had no relationship with Brandi by claiming that she was brought up in a dysfunctional family where she was a "daddy's girl" who never got along with her sister or mother. T. 312-315. Additionally, the fact that Brandi prepared the warranty deed and, together with Lance, drove Amy to the Chancery Clerk's office, is not sufficient, pursuant to *Moran* or *McGowen,* to establish a confidential relationship.

Thus, even if Amy does suffer from a "weakness of intellect," because the substantial evidence failed to show a confidential relationship, the Chancellor committed manifest error and abused her discretion when she invalidated the deed from Amy to Amy and Brandi. Therefore, this Court must reverse and render, reinstating the deed, and remanding to the lower court for the sole purpose of partitioning the property.

CONCLUSION

The Chancellor made findings of fact without substantial evidence, applied the wrong legal standard, was manifestly wrong in her conclusions, and abused her discretion in setting aside the warranty deed executed by Amy to Amy and Brandi. The record does not support the Chancellor's finding that Amy was mentally incompetent on the day the deed was executed, and the Chancellor employed the wrong legal standard in concluding that Amy could never have a lucid moment. Furthermore, the evidence revealed that, at most, Amy suffered from a weakness of intellect, and the Chancellor's finding that the testimony did not demonstrate a loving and affectionate relationship between the sisters sufficient to show consideration for the transfer of half of the land to Brandi, was not supported by substantial evidence, was based on an erroneous legal standard, and was manifestly wrong. Finally, the Chancellor was manifestly wrong and

abused her discretion in setting aside the deed when the evidence showed there was no confidential relationship between the sisters.

Therefore, this Court should reverse and render, setting aside the judgment of the Chancellor and reinstating the deed, remanding to the trial court for the sole purpose of partitioning the property.

RESPECTFULLY SUBMITTED, this the 30th day of October, 2007.

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CERTIFICATE

I, HOLLY TRUDELL, of the law firm of Phelps Dunbar, LLP, do hereby certify that I have this day mailed, by United States Mail, postage prepaid, a true and correct copy of the above and foregoing correct copy of the foregoing Brief of Appellant to the Honorable Jaye Bradley at her usual business address of Post Office Box 998, Pascagoula, MS 39568, to the Honorable Earl Denham and Honorable Wendy Hollingsworth at their usual business address of Post Office Drawer 580, Ocean Springs, MS 39566, and to the Honorable Arthur Carlisle, at his usual business address of 900 Washington Avenue, Ocean Springs, MS 39564.

SO CERTIFIED this the 30th day of October, 2007.

Holly Trudell

HOLLY TRUDELL