BRIEF OF THE APPELLEE

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IN THE

SUPREME COURT OF MISSISSIPPI

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APPEAL NO.

2006-CA-01786

A. JENNINGS COX, JR.,

PLAINTIFF-APPELLANT

V.

MARGARET LOUISE (PEGGY) COX

DEFENDANT-APPELLEE

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APPEAL FROM THE CHANCERY COURT OF
LOWNDES COUNTY, MISSISSIPPI
HONORABLE KENNETH M. BURNS, CHANCERY JUDGE

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GARY L. GEESLIN
ATTORNEY AT LAW
P. O. BOX 621
COLUMBUS, MS 39703
(662) 327-5414
MS BAR NO. [redacted]
ATTORNEY FOR THE APPELLEE,
MARGARET LOUISE (PEGGY) COX

ORAL ARGUMENT NOT REQUESTED

IN THE SUPREME COURT OF MISSISSIPPI

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| A. JENNINGS COX, JR. | PLAINTIFF-APPELLANT |
| VERSUS | NO. 2006-CA-01786 |
| MARGARET LOUISE (PEGGY) COX | DEFENDANT-APPELLEE |

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## CERTIFICATE OF INTERESTED PERSONS

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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 justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

A. Jennings Cox, Jr. - Plaintiff-Appellant

Margaret Louise (Peggy) Cox - Defendant-Appellee.

GARY L. GEESLIN
Attorney at Law
P. O. Box 621
Columbus, MS 39703

Attorney for Defendant-Appellee,
Margaret Louise (Peggy) Cox

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## STATEMENT OF THE CASE

### NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE COURT BELOW

On August 4, 1992, Louise R. Cox, the mother of the parties in this case, deeded to her daughter, Peggy (Appellee), approximately 281 acres of recreational land in Lowndes County, Mississippi. Although Peggy's brother, Jennings (Appellant), had been given over 700 acres of farming and recreational land by both parents, he was nonetheless unhappy with his mother's decision.

Three months after the deed from Louise to Peggy was executed and recorded, Jennings, without his mother's blessing, filed in her name the original Complaint to Set Aside Warranty Deed. This Complaint was not on oath, was not signed by Louise, but was signed only by an attorney employed by Jennings. Eight months later Jennings joined with his mother in filing an Amended Complaint. Again this Amended Complaint was not on oath, was not signed by Louise, but was signed only by Jennings' attorney.

On August 23, 1993, over a year after the deed was executed, Jennings took the deposition of Peggy and Peggy took the deposition of Louise. After Louise had testified that on her own, she had asked her attorney, Shields Sims, to draw the deed, that she had not signed the deed under any compulsion, that it had never been her intention to sue her daughter, that she wanted the lawsuit dropped, that she had never asked Peggy to deed the land back to her, and that she did not want Peggy to deed the land back to her, the deposition was abruptly adjourned after only 4 pages of cross-examination.

After Chancellor Woodrow Brand dismissed Louise from the lawsuit, Jennings filed a Second Amended Complaint on September 26, 1994. Peggy filed an Answer and Counterclaim on November 15, 1994, after which the case lay dormant for 10 years and 200 days. When Jennings attempted to re-open discovery 10 years and 110 days late, Peggy moved for a Protective Order to quash the discovery and, pursuant to Rule 41(b), filed a Motion to Dismiss for Failure to Prosecute.

Initially Chancellor Kenneth M. Burns denied Peggy's Motion to Dismiss, but did so without prejudice, reserving "the right to later dismiss the case if the delay is prejudicial to the Defendant [Peggy]". After the presentation of Jennings' case in chief, Peggy moved for dismissal on account of Jennings' failure to prosecute as well as his failure to show a right to relief.

After hearing the arguments of counsel, Judge Burns rendered a bench opinion dismissing the case for failure to prosecute. Judgment was entered accordingly.

## STATEMENT OF FACTS

On August 4, 1992, Louise R. Cox, then an 88 year old widow, and the mother of the parties in this case (T. 143)[1], executed a Warranty Deed by which she transferred to her daughter, Peggy (Appellee), approximately 281 acres of recreational land in Lowndes County, Mississippi. (E. D1)

At the time, Louise was living alone, not requiring any sitters or caregivers. (T. 106, 146) Peggy was living and working in Georgia, returning to Columbus for visits from time to time. (T. 27, 107, 145-146, 148) Jennings, on the other hand, was living in Columbus where, according to him, he observed the serious deterioration of his mother's mental condition. (T. 147) This blatantly false statement could not be reconciled with his testimony that in a ten year period, he provided no care for his mother, and may have taken her to the doctor one time. (T. 147)

Apparently in an effort to prove (by clear and convincing evidence) that the deed from Louise to Peggy was a product of undue influence, Jennings offered only his uncorroborated and seriously impeached testimony. Although he contended that his mother had been seriously impaired for five years at the time of the execution of the deed, he could not produce a single witness to support him on the point. His only witnesses were Jimmy Wilder and Nowell Haggard.

Wilder's testimony was confined to his recalling a single episode when he and Jennings discovered Louise on the floor after she had apparently fallen at home. (T. 101)

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[1] T. Refers to Court Reporter's Transcript; R.E. refers to Record Excerpts; E. refers to Exhibits; and C.P. refers to Clerk's Papers.

Query, why is a single fall by an elderly lady evidence of undue influence? Indeed, why would a hundred falls be relevant evidence of undue influence or even lack of capacity? Regardless, Wilder could only remember that the incident had occurred on a Sunday (T. 101) and that it occurred in the Fall of the year. He could not recall what year (T. 105) and had no recollection of when Louise had deeded the land to Peggy.(T. 109)

Haggard's testimony was even more pathetic. He told about another single incident at a social gathering when Louise did not appear to recognize Haggard's wife. (T. 112) Whatever import that might have had, the witness was emphatic that the incident had occurred in 1994, two years after the deed was executed. (T. 112,114)

Louise's decision to deed this property to Peggy was by no means an expression of favoritism toward Peggy at the expense of Jennings. During the years 1970 to 1973, Jennings' parents transferred to him over 700 acres of farming and recreational land. (E. D4, D5, D6) (T. 155-162)

In her deposition taken August 23, 1993, Louise made it abundantly clear, in the presence of Jennings (T. 139), that she was the one who asked her attorney, Shields Sims, to draw the deed. (E. P11, p.16) While Jennings suggests that Sims was more Peggy's attorney than that of her mother, the irony is that Sims had also represented Jennings, assisting Jennings in securing a hardship discharge from the Air Force. (T. 153-155)

Louise also testified in her deposition that no one asked her to deed the property to Peggy, and that no one forced her to sign the deed. (E. P11,p.16) She was even more emphatic when asked about her participation in this suit. She said she did not want to sue her daughter, did not realize that she had in fact sued her daughter, did not intend to sue

her daughter, and wanted the suit dropped immediately. (E. P11, pp. 9-10) Not wanting to hear any more of this, Jennings' abruptly adjourned the deposition of Louise after 4 pages of cross-examination. (E. P11, p.24) The deposition never resumed.

At her request, Louise was dropped from the case by Order dated June 21, 1994. (C.P. 146-149) On September 26, 1994, Jennings filed a Second amended Complaint in his name alone. (C.P. 150-170) Peggy answered on November 15, 1994. (C.P. 171-176)

Jennings took no further action to prosecute this case until June 3, 2005, when he served Peggy's new counsel with Interrogatories and Requests for Production of Documents. (See Docket Sheet in Clerk's Papers) Put differently, this case lay dormant for 10 years and 200 days and the initiation of discovery was 10 years and 110 days late.

Peggy sought to quash the attempted discovery and also filed a Motion to Dismiss for Failure to Prosecute. (C.P. 182-184, 205-207) A hearing on pending motions was held on January 12, 2006, at which time Chancellor Kenneth M. Burns granted Peggy's Motion to Quash and denied Jennings' Motion to Compel Discovery. Orders to this effect were entered on January 23, 2006, at which time the Court also entered an Order denying Peggy's Motion to Dismiss without prejudice reserving 'the right to later dismiss the case if the delay is prejudicial to the Defendant [Peggy]". (C.P. 212-214)

During the hearing of January 12, 2006, Jennings testified attempting to justify the inordinate, unnecessary , and prejudicial delay. According to Jennings, the delay was not his fault, but was rather a combination of the Judges' fault, his lawyers' fault and Peggy's lawyers' fault. (T. 148) Regarding the fault of his own lawyers, Jennings testified that Josh Stevens told him he was too busy so Lee Morrison took over and subsequently died,

thus forcing Jennings to find additional counsel, Tom Kesler. (T. 13, 149-150) This testimony was thoroughly impeached. In a companion case, Estate of Louise R. Cox, Jennings approved a February 12, 2003, Order which discharged Tubb, Stevens, Morrison and Calhoun as his attorneys, substituting Tom Kesler as his new counsel. (E. D2) While Tom Kesler never made an appearance in this case, that is explained by the very fact that the case lay dormant all during this time.

As Judge Burns observed, it would be highly unlikely to switch counsel in a companion case, but not switch in this case. It really is a matter of no moment, however, since Lee Morrison was very alive on February 12, 2003, and his subsequent death on April 6, 2004, had no bearing on the delay or Jennings' decision to change counsel. (E.D3) No other excuse for the delay of over 10 years was offered.

## SUMMARY OF ARGUMENT

### I

### CHANCELLOR BURNS DID NOT ABUSE HIS DISCRETION IN DISMISSING JENNINGS' COMPLAINT FOR FAILURE TO PROSECUTE

By virtue of Rule 41(b) of the Mississippi Rules of Civil Procedure and as a part of a trial court's inherent authority, it may dismiss an action for want of prosecution. See, e.g., *Wallace v. Jones,* 572 So.2d 371, 375 (Miss. 1990). Indeed, in reviewing a trial court's decision to dismiss under Rule 41(b), an appellate court may reverse only if it finds that the trial court abused its discretion. *Wallace v. Jones, supra*, at 375.

Certainly, allowing a case to remain dormant for 10 years and 200 days evinces a "clear record of delay" as suggested in *Hine v. Anchor Lake Property Owners Association,* 911 So.2d 1001 (Miss. Ct. App. 2005). The only excuse offered for the delay was that Jennings' attorneys were dilatory. Yet, Jennings did not engage new counsel until the case had lay dormant from November, 1994, until June, 2005. Notwithstanding Jennings' attempts to place the blame elsewhere, it is abundantly clear that he was personally responsible for the delay and the resulting prejudice to Peggy.

## II

## CHANCELLOR BURNS SHOULD ALSO BE AFFIRMED SINCE JENNINGS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT HE WAS ENTITLED TO RELIEF

It is well settled that a Chancellor will be affirmed where he reaches a result correct under the law and the facts, even though a wrong reason be assigned. See, e.g., *Huffman v. Griffin,* 337 So.2d 715, 723 (Miss. 1976); *Tedford v. Dempsey,* 437 So.2d 410, 418 (Miss. 1983). Jennings wholly failed to prove by clear and convincing evidence that a confidential relationship existed between Peggy and the parties' mother or that the deed from Louise to Peggy was a product of undue influence.

## ARGUMENT

### I

### CHANCELLOR BURNS DID NOT ABUSE HIS DISCRETION IN DISMISSING JENNINGS' COMPLAINT FOR FAILURE TO PROSECUTE

#### STANDARD OF REVIEW

"The standard of review for a Rule 41(b) dismissal is abuse of discretion." See *Hine v. Anchor Lake Property Owners Association, supra*, citing *Vosbein v. Bellias,* 866 So.2d 489, 492 (Miss. Ct. App. 2004).

*Hine and Vosbein* are both instructive. Yet, in neither case was the delay so long and egregious as in the present case. In *Vosbein* the parties were involved in an automobile collision that had occurred 11 years earlier. The Complaint had been pending for 8 years when the trial judge dismissed it for plaintiff's failure to prosecute. After reciting the familiar standard of review, the Court of Appeals held that the trial judge had not abused his discretion, that the delay had been caused solely by the plaintiff and that the defendant would be prejudiced if the case proceeded to trial.

In the present case, it did proceed to trial and the manifest prejudice to Peggy was obvious to Chancellor Burns. The first and foremost prejudice to Peggy was the absence of her mother whose deed to Peggy was the nexus of the suit.

When the suit was filed, Louise was 88 years old and lived to 96. If Jennings had prosecuted the case during those 8 years, Louise would have been available as a witness to hear what Jennings said about her and to refute it. Incredibly, Jennings waited another 4 years after his mother died to activate the case. Apparently, just for good measure. It

is painfully clear that Jennings wanted to avoid further testimony from his mother after having heard her deposition testimony taken a year after she executed the deed to Peggy.

Louise had already testified in Jennings' face that the deed to Peggy represented her will, not anyone else's will, that it was exactly what she wanted to do, that she wanted to be dismissed from the lawsuit, that she had never intended to sue Peggy, that she had never asked Peggy to reconvey the land to her, and that she did not want Peggy to reconvey the land to her. No wonder Jennings delayed. He certainly did not want to hear any more of that and must have thought his mother's deposition would be lost if he waited long enough.

Another prejudice to Peggy was illustrated in her appearance as an adverse witness in Jennings' case in chief. Hours were spent nit-picking her about nuances in her deposition that had been taken 13 years earlier. Who among us would not have some difficulty testifying in lock step with testimony 13 years old? This is particularly critical in a case such as this where the timing of events is so important. For example, there surely came a time when Louise was in need of help and Peggy most assuredly supplied that help. But that occurred years after the fact. Yet, counsel opposite attempted to blur those distinctions and imply that Peggy was contradicting herself when the facts were that they were talking about entirely different periods of time.

Another prejudice occurred when Peggy sought to impeach Jennings with the admittedly altered and defaced deed to Louis Binder of the Sunflower County property. If Jennings had prosecuted the case, then Louis Binder or Robin Weaver might have been available to refute Jennings' testimony that he knew nothing about that transaction. We

suggest that Jennings knew full well there was no advantage to him to be diligent, thus he purposefully delayed the prosecution of the case until the adverse witnesses were gone. Even so, the only witnesses he could produce were the pathetic Jimmy Wilder and Nowell Haggard.

In *Hine, supra,* the Court of Appeals again held that the chancellor had not abused his discretion in dismissing the complaint under Rule 41(b). There the case had dragged on for 7 years with no activity for the last 3 years. Of interest, the plaintiff attempted to excuse his failure to prosecute on account of the breakup of his marriage and his battle with terminal kidney cancer. The Court did not think these "external factors" were sufficient to justify the delay. Jennings' only excuse, that he could not get his attorneys moving, but waited 9 years to engage new counsel, pales in comparison.

The most recent decision dealing with dismissal for failure to prosecute is *Hensarling v. Holly,* 2003-CA-00096-COA (Miss. Ct. App. 2007). This case, handed down June 5, 2007, is most compelling. The original Complaint had been filed September 11, 1998, after which nothing had been filed until October 4, 2002, when plaintiff sought to substitute counsel. A month later, the Circuit Judge *sua sponte* dismissed the case with prejudice for failure to prosecute. In holding that the four year delay [compared to ten years and 200 days in today's case] was a clear record of delay, the Court said:

> "* * * No action occurred in this case until Hensarling submitted a motion to substitute counsel more than four years after he initially filed the case. Thus, we find a clear record of delay and, as such, we need not consider whether there has been contumacious conduct."

The cases all hold that there is a second prong to the test of whether the trial judge should dismiss for failure to prosecute, i.e., whether lesser sanctions would best serve the interests of justice. *Hine, supra.* *Hine* also informs us that this second prong need not be addressed here for at least two reasons. First, Jennings did not request Chancellor Burns to consider lesser sanctions and that mistake is fatal. In *Hine* the Court said:

> "* * * If the Hines failed to argue at the motion hearing how lesser sanctions would have remedied the harm caused by their delay, they cannot then fault the chancellor for not considering their arguments."

In our case, Jennings' argument is set forth on pages 182-189 of the trial transcript. Except to assert the disingenuous argument that it was Peggy's obligation to prosecute the case [which Chancellor Burns specifically addressed and rejected], Jennings did not address the failure to prosecute portion of Peggy's motion to dismiss. Instead, Jennings' argument is devoted to Peggy's claim that Jennings did not prove that he had a right to relief. Most definitely, he did not argue for lesser sanctions. Hence, he cannot claim that Chancellor Burns should have considered such.

While neither Chancellor Burns' bench opinion , nor the Final Judgment, specifically addresses the issue of lesser sanctions, we should presume that he considered lesser sanctions and concluded that they would not be effective in this case. *Hensarling, supra,* is most persuasive on the point. The Court observed that the trial judge is not required to make record findings regarding the issue of lesser sanctions, but those findings will be presumed. Specifically, the Court commented as follows:

> "The record does not indicate whether the lower court specifically considered lesser sanctions. The dismissal order merely states that the court reviewed the file and the motion to substitute counsel , denied the motion, and dismissed the case for failure to prosecute. It has been held that the trial court 'need not make a "showing" that lesser sanctions would not suffice.' (citation omitted) When a trial judge does not make specific findings of fact, we will 'assume that the trial judge made all findings of fact that were necessary to support his verdict.' *Watson,* 493 So.2d at 1279. In *Watson*, our supreme court held that a trial judge's findings of fact on a Rule 41(b) dismissal were to be presumed. *Id.* In the instant case, therefore, we must presume that the trial court made the requisite findings to support his ruling that lesser sanctions would have been insufficient."

Chancellor Burns was obviously quite concerned with the prejudice to Peggy resulting from Jennings' intentional delay. He thus focused Peggy's counsel's closing to that issue. In *Hensarling,* the Court, after noting plaintiff's failure to prosecute the case for four years and the resulting fact that it had been nine years since the complaint had been filed, observed that such delays likely result in an alteration of the physical evidence as well as an impairment of the memory of witnesses. Such effects are *per se* prejudicial. In Peggy's case, even more so since Jennings failed to prosecute the case for over ten years and it has now been nearly fifteen years since the complaint was filed.

More to the point, however, there were no lesser sanctions that would have been effective. No fines, damages, disciplinary actions or warnings are going to bring back witnesses who passed away while Jennings sat by waiting until they died.

Chancellor Burns did not abuse his discretion when he dismissed the complaint for failure to prosecute. The dismissal should, therefore, be affirmed.

## II

## CHANCELLOR BURNS SHOULD ALSO BE AFFIRMED SINCE JENNINGS FAILED TO SHOW BY CLEAR AND CONVINCING EVIDENCE THAT HE WAS ENTITLED TO RELIEF

Rule 41(b) of the Mississippi Rules of Civil Procedure also provides:

> "* * * After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief."

Hence, Peggy's Rule 41(b) Motion to Dismiss at the conclusion of Jennings' case in chief was two-pronged: failure to prosecute and failure to show a right to relief. Since Jennings wholly failed to show by clear and convincing evidence that the Warranty Deed from Louise to Peggy was a product of undue influence, he failed to show that he was entitled to have the deed set aside.

As it is well settled that a Chancellor will be affirmed where he reaches a result correct under the law and facts, even though a wrong reason be assigned, we will consider whether Chancellor Burns could have sustained Peggy's Motion to Dismiss on this alternative ground as well. See, e.g., *Huffman v. Griffin,* 337 So.2d 715, 723 (Miss. 1976); *Tedford v. Dempsey,* 437 So.2d 410, 418 (Miss. 1983).

## STANDARD OF REVIEW

"The standard of review for a Rule 41(b) dismissal is abuse of discretion." See *Hine* v. *Anchor Lake Property Owners Association, supra.*

This case is before the Court on Jennings' Second Amended Complaint. (C.P. 150-169). A careful review of this comprehensive pleading will confirm that Jennings did not allege that a confidential relationship existed between Louise and Peggy at the time of the execution of the deed. This is not, therefore, a case where Jennings, upon proving the existence of a confidential relationship, would be entitled to a presumption of undue influence. There was never any shifting of the burden of persuasion as would otherwise have been the case. Nevertheless, out of an abundance of caution, Peggy will examine the law and the proof offered by Jennings as if the issue of confidential relationship had been raised.

A clear statement of the burden of proof Jennings would thus assume is found in the case of *Estate of Lane v. Henderson,* 930 So.2d 421 (Miss. Ct. App. 2005). In this case the parties were reversed, i.e., sister is trying to set aside deed to her brother. First, the Court quickly dispelled the notion that there anything sinister or suspect about deeds from one family member to another. Specifically, the Court observed:

> "Mississippi law clearly recognizes that 'an inter vivos gift is a perfectly lawful means of transferring real property in this state.' * * * Gifts of real property between family members are a normal occurrence, and our courts will not act when a conveyance from a parent to a child is a purely voluntary act. *Id.* In fact, '[a] deed from a parent to a child alone and of itself raises no presumption of undue influence since, in the absence of evidence to the contrary, the parent is presumably the dominant party. This is true even though the parent is

aged, or aged and infirm.' * * *" 421 So.2d at 425.

As to Jennings' burden to proof, the Court said:

> "* * * 'The party asserting that a confidential relationship exists has the burden of establishing such a relationship by clear and convincing evidence.' * * * If a confidential relationship is established by the moving party, a presumption of undue influence arises, and the burden shifts to the non-moving party to prove by clear and convincing evidence that the conveyance in question was not tainted by undue influence. . . ." 421 So.2d at 425.

The Court then listed seven (7) factors to be considered in determining whether a confidential relationship exists. Those factors were:

> "(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." 421 So.2d at 425.

The Court further observed that the critical time for application of these factors is the time of the transfer; not what may have occurred later. Specifically, the Court said:

> "* * * Much of the testimony elicited at trial concerned Willie Lane's health and dependence after this transfer had already taken place. Clearly the question at trial should have been *whether a confidential relationship existed at the time of the transfer, not after the transfer had taken place."* (Emphasis added) 421 So.2d at 426

According to the meager record made by Jennings, only one of the above-mentioned factors was present on August 4, 1992. Peggy had been added to her mother's checking account some months before. (T. 37-40) The proof showed, however, that Peggy had

never exercised any privileges as to that account. (T. 40)

The only testimony that Louise Cox was physically or mentally weak on August 4, 1992, was the uncorroborated and impeached testimony of Jennings himself. If, as Jennings contended, his mother was an invalid and an imbecile at the critical time, there would have been many witnesses to that effect. Yet, Jennings produced only Jimmy Wilder and Nowell Haggard. While one incident of falling at home and one incident of failing to recall a name are hardly clear and convincing proof of anything, they were not time relevant. Wilder could recall his observation had occurred on a Sunday in the Fall of the year, but could not tell us what year. Haggard, however, was unequivocal. What he saw had occurred in 1994, two years after the deed was executed.

Jennings' lack of candor about his mother's condition is best illustrated by his admission that, while he was living in Columbus and Peggy was living in Georgia, Jennings took his mother to a doctor one time. (T. 147) Anyone in as critical condition as Jennings would have us believe would surely have required more than one doctor's visit in ten (10) years.

All witnesses testified that on August 4, 1992, Louise Cox was living alone and was not under the care of anyone. (T. 106-107, 146) There was no testimony that the relationship between Peggy and her mother was anything other than that of a normal mother and daughter. That Peggy may have returned home and later become her mother's caretaker is of no moment.

As to the provision of transportation and medical care for Louise, we know for certain that Jennings was not providing it and that Peggy, living in Georgia, could not.

Jennings offered no proof that any third party was providing this help, leading to only one conclusion – Louise was providing it herself. While 88 years old is probably considered to be of advanced age (the closer we get, the more debatable that is), there was not one word of testimony to the effect that Louise had incurred a medical bill, much less was in poor health on August 4, 1992. To be sure, as Louise lived on to be 96 years of age, she did require more help and without doubt Peggy returned home and supplied it, long after the fact of the execution of the challenged deed.

It is exceedingly clear that Jennings did not prove by clear and convincing evidence that a confidential relationship existed on August 4, 1992, between Peggy and Louise. Having thus failed, no presumption of undue influence arose. Without the presumption of undue influence, there was nothing for Peggy to overcome and no need for her to present evidence.

Chancellor Burns could, therefore, have sustained Peggy's Motion to Dismiss on this alternative ground and it would not have been an abuse of his discretion.

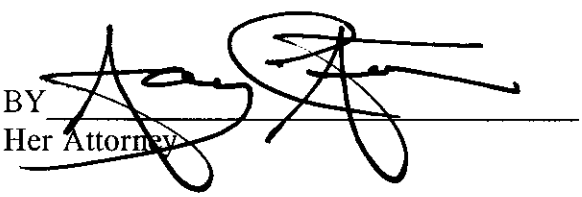
## CONCLUSION

Jennings is guilty of the most outrageous failure to prosecute in the recorded cases. He lay in hiding for 10 years and 200 days waiting for his mother to die, the family lawyer to die, and anyone else who might contradict his version of events. That delay was, as planned, very prejudicial to Peggy. Chancellor Burns was eminently correct in dismissing this case on account of Jenning's failure to prosecute.

Chancellor Burns could have, just as easily, dismissed the case on Peggy's alternative ground of failure to show that Jennings was entitled to relief based on the law and facts developed. In either event, he should be affirmed.

Respectfully submitted,

MARGARET LOUISE (PEGGY) COX
DEFENDANT-APPELLEE



BY
Her Attorney

GARY L. GEESLIN
ATTORNEY AT LAW
P. O. BOX 621
COLUMBUS, MS 39703
(662) 327-5414

MS BAR NO. [redacted]

ATTORNEY FOR THE DEFENDANT-APPELLEE
MARGARET LOUISE (PEGGY) COX

CERTIFICATE OF SERVICE

The undersigned attorney of record for the Defendant-Appellee, Margaret Louise (Peggy) Cox, does hereby certify that he has this day mailed, postage pre-paid, a true and correct copy of the foregoing Brief of the Appellee to:

Honorable Kenneth M. Burns
Chancery Judge
P. O. Drawer 110
Okolona, MS 38860

Presiding Judge

and

Joseph N. Studdard
Attorney at Law
P. O. Box 1346
Columbus, MS 39703

Attorney for the Plaintiff-Appellant, A. Jennings Cox, Jr.

SO CERTIFIED on this the 23rd day of July, 2007.

GARY L. GEESLIN