

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-CA-00384

CONNIE ELDRIDGE and
POLLY WEAVER

APPELLANTS

VS.

DEBORAH STEVERSON

APPELLEE

APPEAL FROM
CHANCERY COURT OF MADISON COUNTY, MISSISSIPPI
CAUSE NO. 2002-569

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERSTED PERSONS

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:

Connie Eldridge, Appellant

Polly Weaver, Appellant

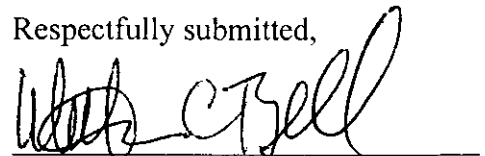
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This the 20th day of October, 2008.

Respectfully submitted,



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STATEMENT OF THE ISSUES

ISSUE I.

The trial court erred as a matter of law by analyzing the contested transfers and transactions using an undue influence analysis.

ISSUE II.

The chancellor abused his discretion, committed manifest error and erred as a matter of law in allowing the contested transfers and transactions to stand.

ISSUE III.

The chancellor abused his discretion and committed manifest error by finding that Lucille had a full understanding of her finances and affairs.

ISSUE IV.

The chancellor erred by not ordering Deborah Steverson to pay the charges incurred for the services of Jim Koerber

STATEMENT OF THE CASE

This case began as a routine testate estate filed July 18, 2002. The chancery court appointed Deborah Steverson ("Deborah") as the Executrix of the Estate of Lucille H. Hart. Connie Eldridge ("Connie") filed a Complaint on November 6, 2002 contesting a number of transactions and gifts that occurred prior to Lucille's death. Eventually, the contested transactions were challenged by Connie and Polly in a trial held July 27, 2006. At trial, the third beneficiary, Polly Weaver ("Polly"), appeared and participated in the trial as a party and joined in the relief sought by Connie.

The parties stipulated that Deborah had a fiduciary and confidential relationship with Lucille. This fiduciary and confidential relationship began in 1993 when Deborah began assisting Lucille with her finances. In June of 1997, Lucille gave Deborah a formal "Power of Attorney".

After entering into a confidential and fiduciary relationship with Lucille, Deborah initiated a number of monetary transactions and transfers from two (2) bank accounts that were solely in Lucille's name. Another account was listed in Lucille and Deborah's name and funded with Lucille's proceeds from the sale of property on School Street in Ridgeland.

Connie and Polly contested a number of transactions and transfers of funds from Lucille's three (3) accounts. At the chancellor's direction, Connie and Polly presented a chart of contested transactions. The chancellor appointed an expert witness, Jim Koerber, to review bank and other records submitted by the parties. Mr. Koerber then presented his report to the court that organized and summarized the contested transactions under each of Lucille's three (3) bank accounts.

Mr. Koerber's report shows that there were a number of withdrawals, cash transactions and transfers of funds from Lucille's bank accounts that Deborah failed to support with invoices or other documentation.

Following a trial, the chancellor entered his "Opinion" on October 16, 2006, in which the chancellor found that Deborah proved by clear and convincing evidence that the contested gifts and transfers of money were not the product of undue influence. The chancellor did not address in his opinion the legal issue of whether the gifts of money to Deborah were void.

The trial court entered a final judgment on October 30, 2006 that denied the relief requested by Connie and Polly. Connie and Polly filed their "Motion for New Trial and for Other Relief" on November 9, 2006. The trial court entered its "Order Denying Post Trial Motion, Certifying Final Judgment and for Other Relief" on June 7, 2007. The parties agreed to include a Rule 54 (b) certification in the June 7, 2007 Order because the Estate itself remained open. In an abundance of caution, Connie filed a "Notice of Appeal" on March 2, 2007. Connie and Polly then filed their "Amended Notice of Appeal" on June 27, 2007, twenty (20) days after the June 7, 2007 order denying their post trial motion.

STATEMENT OF FACTS¹

Lucille H. Hart died testate on June 29, 2002. In her Last Will and Testament, Lucille named her three (3) daughters as equal beneficiaries: Deborah Steverson, Connie Eldridge and Polly Weaver.

The parties stipulated at the beginning of the trial that Deborah had a confidential and fiduciary relationship with Lucille H. Hart during the times in question. See: transcript page 6, lines 19-29, page 7, lines 1-2.

¹ When used in this brief, "RE" refers to Record Excerpts.

Prior to Lucille's death, Deborah was in a confidential and fiduciary relationship with Lucille from 1993 until Lucille's death in 2002. See: transcript page 49, lines 10-20.

At trial, Connie and Polly contested the transactions and transfers that are set out in the chart that the chancellor requested. RE 50. There were other transactions that were contested and added by letter to Don McGraw. Exhibit # 13.

Deborah claimed at trial under oath that she and Lucille reviewed Lucille's bank accounts, and reconciled the big accounts. See: transcript page 138, lines 10-21. Deborah's deposition testimony under oath, however, told a different story. Deborah claimed under oath in her 2004 deposition that she and Lucille did not balance (reconcile) Lucille's bank accounts. See: transcript page 138, lines 22-29 and page 139, lines 1-4.

In addition, Deborah admitted that transfers of money from Lucille to Deborah were made over the internet by Deborah. See: transcript page 141, lines 7-13. The uncontradicted evidence was that Lucille knew nothing about computers and did not know how to operate a computer. (See: transcript page 135, lines 3-15 and page 93, lines 5-14). Deborah even admitted that internet transfers from Lucille to Deborah were made by Deborah on Deborah's computer in Deborah's home when Lucille was not present. See: transcript page 135, lines 3-15.

In addition to the \$20,000.00 "gifts" to Deborah that Deborah initiated with internet transfers, Deborah initiated a number of cash withdrawals, payments and other transactions that were not supported by any evidence or documentation. (See Jim Koerber's Report beginning at RE 6).

Prior to obtaining the 1997 "Power of Attorney", but while in a fiduciary and confidential relationship with Lucille, Deborah even used funds from Lucille's bank account to

pay credit cards were only in Deborah's name. After obtaining the power of attorney, Deborah transferred \$48,388.20 from Lucille and Deborah's account 0320² to pay off Deborah's mortgage. RE 23. Although Deborah's name was on account 0320, Jim Koerber's report shows that account 0320 was funded in December, 2000 with \$150,000.00 from the sale of Lucille's property on School Street in Ridgeland, Mississippi. RE 23.

The "Documents, Accounts and Transaction Contested by Heirs" with Deborah's response contains most of the transactions that Connie and Polly contested at trial. RE 50. In addition, Connie and Polly contested an additional \$20,000.00 transfer to Deborah and her husband that took place in January of 2002, for a total of three (3) contested \$20,000.00 transactions. See Exhibit #13.

The "Agreed Scheduling Order and Order Setting Trial" set out the trial court's directive about the contested transactions. RE 49. Deborah then served her "Response to Documents, Accounts and Transactions Contested by Heirs" on June 14, 2006. RE 50.

The chancellor rendered his "Opinion" on October 16, 2006 without entry of a judgment. RE 79. The chancellor then entered a "Final Judgment" on October 30, 2006 denying the relief requested by Connie and Polly. RE 84. Connie and Polly filed their "Motion for New Trial and for Other Relief" on November 9, 2006. RE 85. In an abundance of caution and due to the change to a new chancellor, Connie filed her "Notice of Appeal" on March 2, 2007 that would be effective upon entry of any order denying their post trial motion. Judge Lutz' successor, the Honorable Cynthia L. Brewer, entered an order denying Connie and Polly's "Motion for New Trial and for Other Relief" on June 7, 2007. Connie and Polly then filed an "Amended Notice of Appeal" on June 27, 2007 to correct a scrivener's error and include Polly's name in the appeal notice. RE 94.

² When used in this brief, 4 digit account numbers are the last 4 digits of each respective bank account.

SUMMARY OF THE ARGUMENT

Under Mississippi law, the inter vivos gifts and transfers to Deborah are presumptively void. The chancellor erred by using an undue influence analysis, and then ruled that the gifts and transfers to Deborah were not the product of undue influence. The chancellor should have begun his analysis with the presumption that the challenged transactions were void. Then the chancellor should have placed the burden on Deborah to show by clear and convincing evidence that the challenged transactions were legitimate and valid.

The chancellor abused his discretion, committed manifest error and erred as a matter of law by allowing the contested transfers and transactions to stand. The court's own expert, Jim Koerber, testified that he was unable to tie any documents that Deborah submitted to any of the challenged transactions. Deborah used Lucille's funds to pay off Deborah's mortgage. Deborah also initiated \$60,000.00 (\$20,000.00 x 3) of internet transfers from Lucille's accounts to Deborah. Mr. Koerber's report shows that these \$20,000.00 transfers were explicitly classified by Deborah as "gifts". Connie and Polly challenged a number of other transactions, including cash transactions from one account of \$11,000.00, that Mr. Koerber found had "no known recipient".

Deborah never provided the court or Mr. Koerber with any documentation that clearly and convincingly shows that he contested transactions were valid and legitimate. Deborah never even produced any document or agreement that governed the "sale" of the Meadowdale property (Deborah's home) to Lucille in March of 2001.

The chancellor abused his discretion and committed manifest error by finding that Lucille had a full understanding of her finances and affairs. When asked about whether Deborah and

Lucille balanced (reconciled) Lucille's bank statements, Deborah testified at trial that they did reconcile the large accounts, but testified in her pre-trial deposition that nobody balanced Lucille's bank statements.

Everyone agreed that Lucille did not know how to use a computer and that Lucille never did any banking over the computer. Yet, Deborah made transfers of funds from Lucille's accounts to Deborah's account over the internet from Deborah's computer, in Deborah's home, when Lucille was not present. Deborah admitted that she signed Lucille's name to all three (3) of the signature cards for Lucille's accounts. When asked at trial about thousands of dollars in cash transactions, Mr. Koerber testified that he could not find any indication that the cash transactions were for Lucille's benefit. At trial, Deborah never presented a budget, accounting or documentation showing Lucille's needs and expenses. The chancellor abused his discretion and committed manifest error by finding that Lucille had a full understanding of her finances and affairs.

The chancellor erred by allowing the challenged transactions to stand. The chancellor therefore erred by not ordering Deborah to reimburse and pay for all costs incurred by and for Jim Koerber, the court-appointed expert.

STANDARD OF REVIEW

The appellate court reviews a chancellor's decisions for manifest error or abuse of discretion. *Clower v. Clower*, 988 So.2d 441, 443 (¶6)(Miss.Ct.App.2008), citing *Holcombe v. Holcombe*, 813 So.2d 700, 703 (¶10)(Miss.2002). "Therefore, we will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or a clearly erroneous legal standard was applied." *Clower* (¶6), citing *Yelverton v. Yelverton*, 961 So.2d 19,

24 (¶6)(Miss.2007). “The word ‘manifest’ as used in this context is defined as ‘unmistakable, clear, plain, or indisputable.’” *Magee v. Magee*, 661 So.2d 1117, 1122 (Miss.1995).

“The chancellor’s findings of fact will not be reversed if there is any substantial credible evidence which supports it.” *Pacheco v. Pacheco*, 770 So.2d 1007, 1009 (¶8), (Miss.Ct.App.2000).

“The standard of review for questions of law is de novo.” *G.B. “Boots” Smith Corporation v. Cobb*, 860 So.2d 744, 777, (¶6), (Miss.2003) (internal citations omitted).

The ‘clearly erroneous’ standard indicates that when the reviewing court views the evidence they are left with a “definite and firm conviction that a mistake has been made.” *United States Fidelity & Guaranty Co. v. Estate of Francis*, 825 So.2d 38, 44, ¶13 (Miss. 2002).
Conclusions of law are reviewed de novo. *Id.*

APPELLANT’S ARGUMENT

ISSUE I.

The trial court erred as a matter of law by analyzing the contested transfers and transactions using an undue influence analysis.

In it’s October 16, 2006 “Opinion”, the chancellor stated that “The burden, therefore, rested on Debbie (Deborah) to prove by clear and convincing evidence that the gifts and transfers of money to Debbie (Deborah) and her husband were not a product of undue influence.” RE 79. This error as a matter of law by the chancellor constitutes reversible error.

The chancellor should have analyzed Deborah’s burden using a different standard. The standard for analyzing inter vivos gifts and transfers while in a confidential and fiduciary relationship begins with the presumption that any such transfers or gifts are void. “An inter

vivos gift to a fiduciary is presumptively void.” *Estate of Rockwell v. J.W. Watkins*, 522 So.2d 733, 737 (Miss.1988).

With all due respect, the chancellor’s inquiry should not have centered on making a determination of whether the challenged transactions were the product of undue influence. The proper legal analysis would have been to determine whether Deborah overcame the presumption that the contested transactions are void. In other words, the chancellor employs an analysis that applies to testamentary gifts and deeds rather than inter vivos gifts. “When a confidential relationship exists, the presumption arises automatically, to be rebutted by clear and convincing evidence presented by the one who wishes to uphold the validity of the gift.” *Madden v. Rhodes*, 626 So.2d 608, 618 (Miss.1993)(internal citations omitted). Therefore, the chancellor erred as a matter of law by concentrating on the presence of undue influence when, under *Madden*, the chancellor should have started with the presumption that the contested transactions and gifts are void.

Connie and Polly renewed their request that the court should have used the legal standard that the transfers and gifts are presumptively void in their November 9, 2006 post trial motion. In their “Motion for New Trial and For Other Relief”, Connie and Polly asserted in paragraph one (1) of their motion that “The court used the wrong legal standard. Under Mississippi law, the standard applicable to wills and conveyances differs from the standard for setting aside inter vivos transfers when the transferee is in a position of trust. The transfers and gifts that are the subject of this action are presumed to be void and the court never used this legal standard.”

RE 85.

Rule 301 of the M.R.E. states that presumptions impose “...on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption...”.

The Comment to M.R.E. 301 states that “The presumption does not disappear until credible or substantial evidence has been produced by the opposing party.” See Comment to MRE 301.

The Mississippi Supreme Court succinctly and eloquently states this rule and presumption in *Estate of Rockwell v. J.W. Watkins*, 522 So.2d 731, 737 (Miss.1988):

The legal principle which declares that a benefit conveyed by a beneficiary unto his trustee is presumptively void is not new. It was a long-settled principle of law prevailing in this country and Great Britain when this Court adopted it in *Meek v. Perry*, 36 Miss. 190 (1858). It has lost none of its vitality over the decades (internal citation omitted). While its applications, like the tide, may ebb and flow, as long as cupidity and avarice remain a part of the human character, courts will retain this salutary principle.

Estate of Rockwell, at 737.

It is well settled in Mississippi that “...the overwhelming weight of the evidence falls short of being clear and convincing...”. *In the Interest of C.B.*, 574 So.2d 1369, 1375 (Miss.1990), citing *Aponaug Manufacturing Co. v. Collins*, 42 So.2d 431, 434 (1949). Therefore, even if Deborah could present overwhelming evidence of the validity of the contested transactions, Deborah would still fall short of showing that the gifts, transfers and other contested transactions were valid.

In addition, the trial court’s “Opinion” fails to make findings of fact and conclusions of law that satisfy the requirements of M.R.C.P. 52(a). Connie and Polly, through counsel, submitted Proposed Findings of Fact and Conclusions of Law (RE 65) and requested in the body of this pleading that the court make such other findings of fact and conclusions of law (RE 65) as the court deems appropriate. The chancellor’s “Opinion” fails to make the requisite findings of fact and conclusions of law. The only conclusion of law is in error because the court concludes

that it should undergo an undue influence analysis rather than starting with the presumption that the challenged transactions are void. The failure of the trial court to adequately comply with M.R.C.P 52(a) constitutes reversible error.

This Court should reverse the trial court and render a judgment ordering Deborah to pay to the Estate a sum equal to the contested transfers and transactions.

ISSUE II.

The chancellor abused his discretion, committed manifest error and erred as a matter of law by allowing the contested transfers and transactions to stand.

Deborah's only comprehensive attempt to explain all of the contested transactions and transfers was her June 14, 2006 "Response Documents, Accounts and Transactions Contested by Heirs". RE 50. In her "Response", Deborah replies with a number of statements that are not supported by any documentation or other supporting evidence. Importantly, the chancellor's June 29, 2006 "Agreed Scheduling Order" required that Deborah respond with "documentation". RE 48. The record is devoid of documentation from Deborah to support the contested transfers and gifts. In fact, the court's expert, Jim Koerber, was presented with a number of invoices for various items, but was unable to tie any documents to any of the larger contested transactions. For example, Mr. Koerber was unable to determine the recipient of a series of cash transactions totaling \$11,000.00 from account 0270. In his report, Mr. Koerber lists these transactions as "Cash-no known recipient". See: transcript page 14, lines 26-28 and RE 12.

The Payoff of Deborah's Mortgage

The largest single contested transaction was the transfer of funds from 0320 in February, 2001 in the total amount of \$48,388.20. Mr. Koerber's report reflects that these funds were transferred from account 0320 and were used to pay off Deborah's mortgage. RE 23. A sure-fire way to show the validity of this transaction is to provide some sort of written agreement with Lucille that memorialized this mortgage payoff in conjunction with the Meadowdale house transaction. There was no HUD-1 closing statement and no sales contract that governed how any consideration was to be paid by Lucille.

While the Steversons did execute a Warranty Deed conveying the Meadowdale property to Lucille, there is no written agreement in the record whereby Lucille was to pay Deborah's mortgage as part of this transaction. Deborah did produce a copy of her paid Deed of Trust and an unsigned 1099 in support of her claim that this mortgage payoff was part of the consideration for the Meadowdale property. However, Mr. Koerber's report shows that Deborah paid off her mortgage in February, 2001---the month before the claimed March 20, 2001 "closing" of the Meadowdale transaction. RE 23. Deborah's June 14, 2006 "Response to Documents, Accounts and Transactions Contested by Heirs" states that "...no money passed from Lucille to me at closing..." RE 51. In reviewing the legal validity of these contested transactions, the chancellor should have found that this entire transfer of funds from Lucille's funds to Deborah to pay off Deborah's mortgage was void not only as an inter vivos transfer, but also under the statute of frauds. "Agreements to transfer an interest in land are clearly within the statute of frauds....all contracts involving the transfer of land must be in writing." *Roffman v. Wilson*, 914 So.2d 279, 282 (¶9)(Miss.Ct.App.2005) (internal citations omitted).

Deborah failed to rebut by clear and convincing evidence the presumption that the \$48,388.20 payoff of Deborah's mortgage is void.

The Three (3) \$20,000.00 Funds Transfers

Connie and Polly also contested the three (3) \$20,000.00 transfers and gifts that Deborah claims are consideration for the Meadowdale property (\$20,000.00) and “gifts” (\$40,000.00). These transactions are set forth in Jim Koerber’s report. RE 20 and 23. Mr. Koerber’s report based on Lucille’s bank records classifies all three (3) of the \$20,000.00 transfers to be “gifts”. RE 20 and 23. Deborah claims in her “Response to Documents, Accounts and Transactions Contested by Heirs” that the June, 2001 \$20,000.00 transfer from account 0320 was part of the consideration for the Meadowdale property. RE 53. Mr. Koerber’s report reflects that Deborah transferred a gift of \$20,000.00 from account 0270 in January, 2002. RE 20. Mr. Koerber’s report also reflects a \$20,000.00 gift transfer from account 0320 to Deborah in April, 2001. RE 53.

Deborah failed to show by clear and convincing evidence that these presumptively void gifts were valid. In support of this argument, one need only look at Deborah’s own inconsistent explanation of the origin of these transfers. Deborah claims that the May, 2001 transfer from 0320 was \$20,000.00 of the consideration for the Meadowdale property. Yet, Mr. Koerber’s report shows that Deborah classified this May, 2001 \$20,000.00 transfer as gifts to Debbie and Billy Steverson. RE 23. Therefore, Deborah can not show by a preponderance of the evidence that these gifts are valid--much less by clear and convincing evidence.

Other Contested Transactions³

Mr. Koerber’s report also reflects a transfer of \$7,700.00 in December, 2002 from account 0270 to Deborah’s personal account. RE 21. Deborah never presented any

³ This discussion does not include all contested transactions. The Appellants have contested all transactions in the record from 1993 forward.

documentation to support this transfer, only claiming that it was to repay her for funeral expenses.

Mr. Koerber's report also shows cash withdrawals with no known recipient in the amount of \$4,330.00 from account 7155. RE 12. Deborah never provided any credible evidence that would overcome the presumption that this transfer is void.

Deborah also attempts to explain other transfers to third parties and other transfers and transactions as being for site preparation for Deborah's "new home", foundation work for Deborah's "new home" and other services. RE 52. However, Debbie wholly fails to provide any documentation, itemization, or a written agreement between her and Lucille.

Summary of Issue II

If one had to sum up the validity of Deborah's explanations of all of the contested transactions, one need only ask this question: If the \$20,000.00 transfer was consideration for the Meadowdale property, then why would Deborah feel compelled to note the transfer as a "gift"? The answer is that Deborah was playing a shell game of shifting money around between accounts, cashing checks for thousands of dollars without producing receipts, ostensibly paying cash to various vendors and initiating internet transfers of claimed "gifts".

When challenged about thousands of dollars in cash withdrawals, Deborah claimed that Lucille liked to pay cash. Deborah never presented a budget, valid receipts, or any other credible evidence to show the amount of funds that she claims to have expended for Lucille each month. Deborah's mortgage payoff of \$48,388.20 and one (1) of the \$20,000.00 transfers that Deborah

claims were consideration for the Meadowdale property were never reduced to writing or documented in any way.

In ruling on the validity of the contested transactions, the chancellor overlooked another rule that has been around for hundreds of years: the statute of frauds. Pursuant to the chancellor's June 29, 2006 scheduling order, Deborah could have produced written agreements between herself and Lucille that might have a fighting chance of satisfying Deborah's clear and convincing burden of proof. As a matter of law, the validity of the contested transactions that Deborah claims constitute consideration for the Meadowdale property are also governed by the statute of frauds. "Agreements to transfer an interest in land are clearly within the statute of frauds....all contracts involving the transfer of land must be in writing." *Roffman v. Wilson*, 914 So.2d 279, 282 (¶9)(Miss.Ct.App.2005) (internal citations omitted). Therefore, any claimed agreements to transfer funds between Lucille and Deborah for the Meadowdale property before or after the delivery of the warranty deed are part of the claimed agreement to transfer land, and are void under the statute of frauds.

"If the court does not watch these transactions with a jealousy almost invincible, in a great majority of cases, it will lend its assistance to fraud." *Estate of Rockwell* at 737. The burden is on Deborah to show by clear and convincing evidence that the presumptively void transactions were valid by something more than coming to court and claiming that "momma knew". There is ample evidence in the record suggesting that "momma did not know", especially given the timing and manner in which Deborah initiated internet transfers of funds to Deborah's account. The chancellor abused his discretion, committed manifest error and erred as a matter of law by allowing the contested transactions to stand and by not ordering Deborah to repay any and all contested sums into the Estate.

To allow the contested transfers, cash withdrawals and other transactions in this case to stand would fly in the face of and effectively eviscerate the age-old rule in Mississippi that is set out in *Estate of Rockwell*: that inter vivos transactions and transfers are presumptively void.

ISSUE III.

The chancellor abused his discretion and committed manifest error by finding that Lucille had a full understanding of her finances and affairs.

This finding by the chancellor in his “Opinion” (RE 79) is not supported by substantial credible evidence in the record. The record reveals that Deborah testified under oath at trial that she and Lucille reconciled Lucille’s larger accounts but not Lucille’s “small accounts”.

See: transcript page 138, lines 10-21.⁴ However, Deborah’s 2004 deposition testimony revealed that when asked who would balance these (Lucille’s) checking accounts, Deborah answered “nobody”. See: transcript page 138, line 22 through page 139, line 4, inclusive. These conflicting answers under oath about such an important issue speak volumes.

Deborah, Connie and Polly all admitted that Lucille did not know how to use a computer. See transcript page 135. Deborah admitted that she made these transfers over the internet in Deborah’s home when Lucille was not present. Deborah’s witness Tammy Smith testified that Lucille never operated a computer or did any banking over the computer. See: transcript page 159, lines 1550-17.

Deborah even admitted that she signed Lucille’s name to the signature cards for all three (3) of Lucille’s bank accounts. See: transcript page 53, line 24, through page 55, line 25, inclusive. The bank statements were not mailed to Lucille but were mailed directly to Deborah.

The trial court went on to find that Deborah showed by clear and convincing evidence that “Debbie (Deborah) did not spend any of Lucille’s funds without her consent and full

⁴ This begs the question: Where are the “small” accounts?

knowledge.” RE 83. This finding by the court is simply not supported by credible evidence in the record, and certainly is not supported by evidence that would satisfy the clear and convincing standard.

The law in Mississippi, as set out in *Estate of Rockwell v. J.W. Watkins* and *Madden v. Rhodes* requires more than vague statements and undocumented explanations about how cash and other funds were expended. The law should not sanction someone in Deborah’s position of trust to initiate this number of transactions without any supporting documentation, and when pressed, simply come to court and say “momma knew”.

The record reflects that Lucille relied heavily on Deborah for assistance with her finances, and the parties stipulated and the court found that Deborah was in a confidential and fiduciary relationship going back to 1993. The court found that the confidential relationship started in 1993. See: transcript page 74, lines 25-27.

Mr. Koerber’s report reflects that Deborah wrote or cashed thousands of dollars in checks in addition to the internet transfers of funds into Deborah’s account. Mr. Koerber could not find any indication that a number of cash transactions were for Lucille’s benefit. See: transcript page 21, line 1 through page 24, line 7 (inclusive). Mr. Koerber noted in his report the checks that Deborah cashed and/or wrote with a small “DS”. The chancellor abused his discretion and committed manifest error by finding that Lucille had a full understanding of her finances and affairs when the court’s own expert could find no indication that thousands of dollars of cash transactions ever benefitted Lucille.

Deborah’s witness Tammy Smith, who claimed to have a close relationship with Lucille, testified that Lucille was getting physically weaker and weaker, that Lucille’s heart was weak and that she had heart problems for years. See: transcript page 158, lines 7-21.

In addition, the chancellor erred by analyzing this case under an undue influence standard (see Issue I). The chancellor's flawed legal analysis leads directly to the error asserted here in Issue III. The trial court found that Lucille had a full understanding of her finances and affairs. The chancellor's flawed legal analysis creates error here (Issue III) because the chancellor should have based his ruling on the presumption that the contested transfers, gifts and transaction are void. The chancellor should not have based his ruling on whether the transfers were the product of undue influence. "...With a gift inter vivos, there is an automatic presumption of undue influence even without abuse of the confidential relationship. Such gifts are presumptively void." *Madden v. Rhodes*, 626 So.2d 608, 618 (Miss.1993).

This Court should reverse the chancellor and render a judgment that directs Deborah to pay all contested sums into the Estate.

ISSUE IV.

The chancellor erred by not ordering Deborah Steverson to pay the charges incurred for the court-appointed expert Jim Koerber.

Jim Koerber was appointed as the court's expert to gather the financial information presented by the parties and issue a report to the court about the contested transactions. Connie and Polly paid the sum of \$5,000.00 for a retainer (transcript page 46) and Mr. Koerber's additional charges were \$4,957.30. See Exhibit #15 (Koerber Statement). The total charge for Mr. Koerber's services in this action was \$9,957.30. The chancellor abused his discretion and committed manifest error by not ordering Deborah to pay any and all charges incurred by and for Mr. Koerber.

As the court-appointed expert, Mr. Koerber's fees are treated as a cost of court. MRE 706(b) provides that a court-appointed expert's fees shall be "...charged in like manner as other costs." MRE 706(b).

The chancellor should have ordered Deborah to repay the Estate for the contested transactions. Therefore, the chancellor abused his discretion by not ordering Deborah to pay \$9,957.30 for fees incurred by or for Jim Koerber as the court-appointed expert.

"As a general rule, the costs of court should be assessed against the losing party." *Leaf River Forest Products, Inc. v. Rowell*, 819 So.2d 1281, 1285 (¶15)(Miss.Ct.App.2002)(internal citations omitted). This Court should reverse the trial court's judgment and render a judgment ordering Deborah to pay all contested sums into the Estate, and in so doing, also render a judgment that Deborah reimburse and/or pay the full amount of fees charged by Jim Koerber.

CONCLUSION

This Court should reverse the trial court's judgment and render a judgment that all contested transfers and transactions are void, and order Deborah to pay into the Estate a sum equal to any and all contested transactions, along with any and all costs incurred for Jim Koerber. This Court should also grant whatever other relief that Connie and Polly may be entitled to in the circumstances.

Respectfully submitted, this 20th day of October, 2008.

Connie Eldridge and Polly Weaver, Appellants

By:



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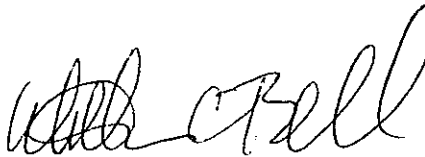
CERTIFICATE OF SERVICE

I, William C. Bell, attorney for the Appellants Connie Eldridge and Polly Weaver, do hereby certify that I have this day filed this Brief of the Appellants with the Clerk of this Court to be received on behalf of the Supreme Court of Mississippi and/or the Court of Appeals and have served a copy of this Brief by first-class U.S. Mail, postage prepaid, upon the following:

Honorable Cynthia L. Brewer
Chancery Judge-11th District
P.O. Box 404
Canton, Mississippi 39046

Donald M. McGraw, Esq.
P.O. Box 1039
Canton, Mississippi 39046

So certified, this 20th day of October, 2008.



William C. Bell
Attorney for Appellants

ADDENDUM

Westlaw.

MS R RCP Rule 52
M.R.C.P. Rule 52

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CWest's Annotated Mississippi Code Currentness
Mississippi Rules of Court State
 ^{MS} Mississippi Rules of Civil Procedure
 ^{MS} Chapter VI. Trials**→ Rule 52. Findings by the Court**

(a) Effect. In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly.

(b) Amendment. Upon motion of a party filed not later than ten days after entry of judgment or entry of findings and conclusions, or upon its own initiative during the same period, the court may amend its findings or make additional findings and may amend the judgment accordingly. The motion may accompany a motion for a new trial pursuant to Rule 59. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised regardless of whether the party raising the question has made in court an objection to such findings or has filed a motion to amend them or a motion for judgment or a motion for a new trial.

CREDIT(S)

[Amended effective July 1, 1997.]

ADVISORY COMMITTEE HISTORICAL NOTE

Effective July 1, 1997, Rule 52(b) was amended to clarify that a motion to amend the trial court's findings must be filed not later than ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases 1997).

COMMENT

Rules 52(a) is adapted from Miss.Code Ann. § 11-7-87 (1972); however, the statute indicates that findings of fact may be entered only upon the request of a party, while the rule authorizes the court to enter its findings whether or not requested. In Tricon Metals & Services, Inc. v. Topp, 516 So.2d 236 (Miss.1987), the Court stated that in cases of any significant complexity the trial court generally should find the facts specially and state separately its conclusions of law.

Under Rule 52(b) the court, upon the motion of a party or upon its own motion, may amend its findings or make additional findings for up to ten days after the entry of judgment. Again, this ten-day period is computed irrespective of the date a term of court is adjourned. See MRCP 6(c).

The purpose of Rule 52(b) is to enable the appellate court to obtain a correct understanding of the factual issues determined by the trial court as a basis for the conclusions of law and judgment entered thereon. A party who failed to prove his strongest case is not entitled to a second opportunity by moving to amend a finding of fact and conclusion of law; the motion must raise questions of substance by seeking reconsideration of material findings or conclusions. See 9 Wright & Miller, Federal Practice and Procedure, Civil § 2582 (1971).

Westlaw.

MS R REV Rule 301
M.R.E. Rule 301

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C

West's Annotated Mississippi Code Currentness

Mississippi Rules of Court State

☞ Mississippi Rules of Evidence

☞ Article III. Presumptions in Civil Actions and Proceedings

→ Rule 301. Presumptions in General in Civil Actions and Proceedings

In all civil actions and proceedings not otherwise provided for by act of the Legislature or by these rules, a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but does not shift to such party the burden of proof in the sense of the risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast.

COMMENT

Rule 301 is only concerned with presumptions in civil proceedings. Once the party with the burden of proof has raised a presumption, a motion to dismiss by the opposing party will not be ordered. If the opposing party enters no evidence to rebut the presumption, then the court should instruct the jury that it may accept the presumption. The presumption does not disappear until credible or substantial evidence has been produced by the opposing party.

Rules of Evid., Rule 301, MS R REV Rule 301

Current with amendments received through June 1, 2008

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