IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

IN THE MATTER OF THE LAST WILL AND TESTAMENT AND ESTATE OF GENEVIEVE KISTLER, DECEASED

JOHN E. HAWKINS — APPELLANT

V. — NO 2007-CA0-01230

CHARLES M. HAWKINS, EXECUTOR OF THE ESTATE OF GENEVIEVE KISTLER CHARLES M. HAWKINS, LOUIS LEMBCKE, LAURA LEE HUBACEK., CHRISTOPHER LEE KISTLER, CHARLES F KISTLER, MARY CATHERINE KISTLER ARMSTRONG, FLORENCE HAWKINS & ROSE MARY GOFF — APPELLEES

ON APPEAL FROM THE CHANCERY COURT OF MONROE COUNTY, MS

APPEAL BRIEF OF APPELLEES CHARLES M HAWKINS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF GENEVIEVE KISTLER, AND FLORENCE HAWKINS

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CERTIFICATE OF INTERESTED 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 this Court may evaluate possible disqualifications of recusal.

Charles M. Hawkins	Respondent/Appellee
Florence Hawkins	Respondent/Appellee
Hon. Ann Odom	Attorney for Charles M. & Florence Hawkins
Louis Lembcke	Respondent/Appellee
Laura Lee Hubacek	Respondent/Appellee
Christopher Lee Kistler	Respondent/Appellee

Charles F. Kistler	Respondent/Appellee
Mary Catherine Kistler Armstrong	Respondent/Appellee
Rose Mary Goff	Respondent/Appellee
Estate of Genevieve Kistler	Decedent
John E. Hawkins	Petitioner/Appellant
Hon. Carter Dobbs, Jr.	Attorney for Petitioner/Appellant
Hon. Julian Fagan	Former Attorney for Genevieve Kistler, Estate of Genevieve Kistler, Charles M. Hawkins & Florence Hawkins
Hon. J. Dudley Williams	Former Attorney for Estate of Genevieve Kistler, Charles M. Hawkins & Florence Hawkins
Hon. Glenn Alderson Chancery Court Judge	Trial Judge

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APPELLEES' STATEMENT OF THE CASE

Come now the Appellees Charles Hawkins, Individually and as the Executor of the Last Will and Testament of his mother Genevieve Kistler, and Florence Hawkins, (hereinafter Charles and Florence) and file their Brief in response to the appeal of John Hawkins.

A. NATURE OF THE CASE

This is the response to an appeal filed by a disgruntled son questioning the decision of his mother to leave a larger interest in her meager estate to her younger son. The Chancery Court Judge ruled after hearing two full days of testimony that the Last Will and Testament of Genevieve Kistler was valid, and ruled after considering briefs and hearing oral argument on Appellees Motion for Reconsideration that the Will was valid and that the Appellees had met all requisite burdens of proof.

APPELLEES' ARGUMENT

(A) THE CONFIDENTIAL RELATIONSHIP

The Chancellor ruled that a confidential relationship existed between Florence E Hawkins and Charles Hawkins, and the decedent Genevieve Kistler. Florence and Charles do not contest this ruling.

(B) Upon the finding of a Confidential Relationship is it possible for the Testatrix to devise a portion of her belongings to the persons upon whom she has placed her trust? What is the appropriate standard that the Court should apply? Was this standard applied herein?

STATEMENT OF THE LAW

When a confidential relationship is found, John Hawkins argues that a presumption of undue influence arises, and the burden of proof shifts to Charles and Florence Hawkins to prove by clear and convincing evidence that the Last Will and Testament was not the product of such undue influence. The Chancery Court found that Charles and Florence had prevailed in meeting this requirement.

"The statutes of Mississippi invest every person above the age of twenty-one years, regardless of condition, being of sound and disposing mind, with the power to dispose of his estate by will, and this right is one of the most sacred to the citizens, and should not lightly be set aside. It will not be set aside upon mere suspicion or conjectures." *Barnett v. Barnett*, 124 So 498, 155 Miss.449 (Miss.1929).

The history of our state's law governing the presumption of undue influence began in the case of *Meek v. Perry,* 36 Miss. 190 (1858). There, this Court held a will or deed from a ward to his guardian raises a presumption of undue influence which can be overcome by the grantee/beneficiary's showing full deliberation on the part of the grantor and abundant good faith on the part of the grantee. *Meek v. Perry,* 36 Miss. 190, 258-59 (1858).

In 1926, the case of *Ham v Ham*, 146 Miss, 161 110 So. 583 (Miss.1926) dealt with a proof which was insufficient to rebut the presumption of undue influence. The Court adopted the language of *2 Pomeroy Equity Jurisprudence* (4th ed.) Section 957 in stating that the presumption could be overcome by clear and convincing evidence of the good faith of the grantee, full knowledge of the grantor and of independent consent and action of the grantor.

Murray v. Laird, 446 So.2d 575, 578 (Miss. 1984), attempted to settle the issue of the requirements needed to rebut the presumption of undue influence. *Murray* set forth its interpretation of the *Ham* three prong test:

(1) good faith on the part of the grantee/beneficiary;

(2) grantor's full knowledge and deliberation of his actions and their consequences; and

(3) advice of (a) a competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.

Three years later the Supreme Court addressed the law on undue influence again and declared that "independent consent and action" is the appropriate third prong of the test. *Mullins v. Ratcliff,* 515 So.2d 1183, 1194 (Miss. 1987).

While the Supreme Court Court has modified the *Murray* requirements of "[a]dvice of (a) competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest," such advice is still clearly the best way to show the "independent consent and action" still mandated by *Mullins v. Ratcliff.* For what constitutes "independent consent and action?" Each case must be determined individually on its merits."

Madden v. Rhodes, 626 So. 2d 608

In this case did Charles and Florence overcome the presumption that Genevieve Kistler's Will was the product of undue influence by presenting clear and convincing evidence to the Court? The Chancellor specifically found that the burden has been overcome and that undue influence in the making of the Will was not there. (R.E. 65, T. 300)

If undue influence was found not to be there at all, the Chancellor was clearly convinced, and this appeal should be dismissed!

The Court heard "no hard evidence" to show that Charles and Florence had not acted in good faith. (R.E. 63, T. 296) Rather, he heard from Mrs. Kistler's church members that she was upset by her strained relationship with her son, John. (R.E. 64, T. 297) Honorable Julian Fagan who drew up the April 2002 Will, testified that he thought "Charles influenced her in a positive way; and John influenced her in a negative way. (R.E. 43, T. 191)

"(T)here was no question in my mind that this lady was her own person. She was profoundly independent and very opinionated and very, very strong. I think as are her two sons in their own individual ways. I was convinced that she was of her own mind, that she knew exactly what she wanted to do. She had thought about it at length - - for a lengthy period of time, and she was profoundly clear and directive with me exactly what she wanted done. Which is the way I tried to draft her will." (R.E. 43, T. 191)

"Mrs. Kistler told me that she had made a decision that she wanted to change her will. She gave me a copy of her then current will, I assume it was her then current will, and stated that she wanted to make changes. And she told me why she wanted to make those changes, and she wanted to make a distinction between what her sons were to receive. She stated to me that she was very disappointed with her son, John. And that she had been there for many years and their relationship - - that she had made efforts in their relationship and he had not made any. And that she was - - had made up her mind that she was going to change her will, at which point I probed her on that issue, because with the experience that I had any time a parent makes these distinctions it can cause problems in the family later on, and I presented that issue specifically to

her. She discussed it, and she said, I have thought about that and I have made up my mind that this is what I want to do, and I want you to do it for me and I want you to write it up just like I said. As she was leaving my office, I remember specifically she had on a dark dress and I remember the gray hair, it reminded me of my grandmother, and she turned and looked at me and pointed her finger at me, and she said, "Mr. Fagin, (sic)" she said, "you know that clause at the end of that will that says if anybody contests this will they get a dollar." I said, "Yes, ma'am." She said, "You make sure that clause is in this will. Because the way John is doing, I just have a feeling that he is going to contest it, and if he contests this will I want him to get a dollar and nothing else." And I said, "Yes, ma'am." And she left. (R.E. 41, T. 189)

Clearly Mr. Fagan is a competent independent counselor who was devoted wholly to Mrs. Kistler's interests.

John Hawkins' assertion that Charles himself wrote the Will or told Mrs. Kistler what to say, remains an unfounded allegation, directly disproven by the testimony of both Charles Hawkins and Julian Fagan.

A will is said to be the product of undue influence when an adviser has been so importunate as to subdue the testator's will and free agency. *Longtin v Witcher*, 352 So.2d 808 (Miss 1977). ("Such may be accomplished through a variety of methods, such as advice, arguments or persuasion." *Id.)* At 818. "However, not all influence exerted is undue. The influence must have been so overwhelming that the resulting instrument reflected the will of the adviser rather than the testator." *Greenlee v. Mitchell*, 607 So.2d 97, 104 (Miss. 1992). Charles and Florence convinced the trial Judge that Genevieve Kistler's Last Will and Testament was not the product of any form of undue influence.

THERE ARE NOT SUSPICIOUS CIRCUMSTANCES WHICH INDICATE UNDUE INFLUENCE.

John Hawkins raises the specter of certain " suspicious circumstances," which must be overcome by clear and convincing evidence to avoid a finding of undue of influence on the part of Charles and Florence. John lists eleven areas which he says were suspicious. Specifically he argues in many of these areas, "that no one knew about these circumstances." What is obvious from the sworn testimony adduced throughout the discovery process and over the two days of trial was that John Hawkins did not know about them, but that other persons did. Suzette Chaney, a young friend of Genevieve Kistler testified that "several times she would just ask me and cry and tell me she just didn't know what she had done to make (John and his family) have nothing to do with her." (R.E. 57, T. 264) Another non-relative witness, Fred Blaylock, testified that Mrs Kistler often cried and told him "there was no relationship that she felt between her and John. It was–there was no mother and son relationship. She had just been , more or less, – well forgotten is a bad word, but that would be – that would almost be the word." (R.E. 33, 34 T. 220, 221)

Charles and Florence feel it is necessary to address each of John's allegations specifically:

1. John argues that it was a "suspicious circumstance" that Florence Hawkins's name was placed on the decedent's checking account and "no one else was told of this." (R.E. 21, Appellant's Brief P. 20) Florence Hawkins' name was imprinted on the checks for the joint checking account! (R.E. 59, T. 272) Clearly the argument that this was a "suspicious" hidden circumstance is specious!

2. John argues that placing her son's name, Charles Hawkins, on her savings account was suspicious and "No one was told of this." The person who was not told was John and this change occurred at a time when John chose not to be involved in his mother's life or ask questions of her. The change was performed openly at the Banking institution where Genevieve Kistler had a long time relationship. (R.E. 61, T. 280)

3. John argues that "no one was told" that Florence Hawkins was listed as Genevieve Kistler's Power of Attorney. Again, the person who was not told was John. Mrs. Kistler apparently told several people that "Florence had her power of attorney." (R.E. 19, Florence Hawkins Deposition P. 23)

4. John argues that "no one was told" that Charles and Florence were added to Mrs Kistler's Certificate of Deposit and makes much that they "took her to the bank for this transaction." Genevieve Kistler did not drive, and obviously could not change her CD from home. Charles testified that he did not know she planned to make this change to her Certificate of Deposit. (R.E. 59, T. 272) No testimony was offered to contradict this testimony at all.

5. John raises the specter of suspicion concerning a $10,000.00 gift deposited into Charles Hawkins' bank account, alleging that it was concealed. It was concealed------in fact the uncontradicted testimony of Charles Hawkins showed "I didn't know anything about it until I got the deposit report from the bank. (R.E. 38, T. 124) This gift was secretive on the part of Mrs. Kistler. But no proof was offered to counter Charles Hawkins explanation of his mother's actions.

6. Appellant argues that "no one else was told of" the gift of Genevieve Kistler's automobile to Charles. This is the weakest argument of all! It is uncontroverted that Mrs.

Kistler did not drive, so the absence of "her car" would have been pretty obvious to anyone coming by her property. And John conveniently forgets that he himself testified that Charles told Appellant that "their mother had sold the automobile to one of our deacons up there." (R.E. 25, T. 53) Nothing was secretive or suspicious about this transaction!

7. John alleges that "no one else was told" that he had been taken off the safe deposit box. Charles and Florence argue that they do not know why Genevieve Kistler did not inform John of this change, but point out that it would have been to their best interest that John know ahead of time rather than learning on an occasion when he arrived at the Bank to go into his mother's safe deposit box. Such a situation would have been embarrassing for everyone and would have driven a further wedge between the brothers. Luckily it appears John never tried to enter the box after his mother chose to remove his name.

8. John alleges that it is suspicious that Charles Hawkins made the appointment for his mother to make her new will. Since she could not drive herself, it was very practical of her to ask her driver to set up a convenient time to take her on her errand. It is uncontroverted that Mrs. Kistler chose Julian Fagan to help her after hearing him preach at her church, and that Mr Fagan did not know Charles Hawkins until introduced by Mrs. Kistler (R.E. 39, 40, T. 186, 187)

9. John argues that it is suspicious that Charles and Florence transported Mrs. Kistler to the attorney's office and Florence Hawkins paid for the new Will from the joint account bearing her name and the name of the decedent. Mr. Fagan testified that no one accompanied Mrs. Kistler into his private office, and that no one else was present during the execution of the Will except his then secretary. Mrs. Hawkins testified that Mrs. Kistler asked her to pay for the Will out of her joint checking account. (R.E. 60, T. 277) Mr. Fagan, the attorney who prepared the

Will testified, "Charles was not present. Mrs. Kistler from her own person gave me the information that I've reported on these notes, and I had no contact with Charles Kistler (sic) at all.....(R.E. 44, T. 195)

10. John's argument concerning the legal implications of the survivorship account is as convoluted as the cross examination of Julian Fagan on this point. Discussion of this issue covers over 10 pages of the trial transcript. (R.E. 45-56, T. 196-207) Throughout his testimony Julian Fagan stated that Mrs. Kistler trusted her daughter-in-law, Florence Hawkins and indicated "that Florence would use that money to do what she is supposed to do or what I want done, that she won't take the money and spend it." (R.E. 50, T. 201) Mr. Fagan testified that he thought Mrs. Kistler understood the legal ownership of the money and she trusted Florence. (R.E. 50, T. 201). No direct evidence was adduced to contradict Mr. Fagan.

11. How is it suspicious behavior on the part of Charles and Florence that their attorney chooses not to call a possible witness?

12. It is obvious to anyone who reads (or heard) the testimony of Suzette Chaney that rather than being a suspicious circumstance which showed undue influence, the fact that Mrs. Kistler related that she told Florence Hawkins that she wanted to change her Will and that Florence asked her not to do so **proves** that Mrs. Kistler was not influenced by the Appellees at all, but rather did as she pleased. Ms. Chaney's testimony showed that the Will Mrs. Kistler wanted to change was the prior Will in which the brothers were treated equally and it **was** changed by Mrs. Kistler after Florence asked her not to do so. (R.E. 58, T. 268)

13. The final "suspicious circumstance" is apparently John's concern for his half nieces

and half nephews, those same persons against whom he filed suit in the original Complaint. Appellant alleges the "lack of explanation as to why Mrs. Kistler decided to favor Charles." Since this issue was not raised at trial, how could anyone explain it? The attorney who prepared her Will related that Mrs. Kistler specifically wanted to revoke all previous Wills including the one executed eleven months earlier. She identified all of her relatives including these named Defendants and told Julian Fagan how she wanted her assets to be divided among them. Mississippi law has never required a Testator or Testatrix to give a reason for why certain devises are made. Mrs. Kistler's intentions were her own according to Mr. Fagan. (R.E. 43, T. 191)

These 13 circumstances are only suspicious to the mind of John Hawkins.

Undue influence has been defined as "so overwhelming that the resulting instrument reflected the will of the adviser rather that the testator." *Greenlee v. Mitchell*, 607 So 2d 97, 105 (Miss 1992). John Hawkins himself testified that Charles Hawkins told their mother that "if she didn't sell that house and move a trailer down on their property that they was packing up and going to Texas and leaving her sitting there." (R.E. 28, T. 59) But this 92 year old woman never did sell her house. (R.E. 29-30, T. 61, 62)

If she was so overwhelmed and controlled by Charles, such a threat (R.E. 29, T. 61), would have terrorized her. If Genevieve Kistler was under Charles' thumb to such an extent as to change her Will to please him, then she would have reacted immediately to the thought of losing his company. John testified that she tried to sell it "off and on" but she still lived in her home independently when she died at 95" (R.E. 30, T. 62) (Although she was actually only 92.)

Mr. Fagan testified that he remembered telling his secretary "that (Mrs. Kistler) was one of the most strongest, independent, individuals I had ever met. And she absolutely knew what she wanted, and I better do what she said." (R.E. 45, T. 196)

WHETHER THE APPELLANT'S COMPLAINT TO SET ASIDE FRAUDULENT CONVEYANCES SHOULD BE SUSTAINED AND JUDGMENT ENTERED FOR THE APPELLANT OR WHETHER THE COMPLAINT TO SET ASIDE FRAUDULENT CONVEYANCE SHOULD BE REMANDED FOR A NEW TRIAL

Charles and Florence Hawkins believe that the Chancellor's ruling was correct in finding that the Will prepared for Mrs. Kistler by Honorable Julian Fagan was indeed her Last Will and Testament, and that therefore John Hawkins's argument is moot. The Chancellor specifically ruled that Charles Hawkins had overcome the burden of presumption of undue influence, by clear and convincing evidence. (R.E. 65, T. 300) As the beneficiary of the property in question under the Will as well as the *inter vivos* recipient Charles Hawkins owns this property.

WHETHER THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S REQUEST FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

Charles and Florence Hawkins believe that Chancellor Alderson was correct in dismissing the John Hawkins's Request for Reconsideration or in the Alternative for a New Trial. By choosing to quote that "I just don't think the burden of undue influence has been met, I truly don't." (R.E. 67, T. 316) John Hawkins conveniently ignores the language used by the Chancellor in other parts of his same opinion. "A person has a right to make a Will as long as it is done freely and voluntarily and without undue influence. (R.E. 66, T. 315) "I'm going to have to overrule your motion." (R.E. 67, T. 316)

STANDARD OF REVIEW

This Court considers decisions of chancellors under a limited standard of review. *McNeil v. Hester,* 753 So. 2d 1057, 1063 (Miss. 2000). Specifically, "[t]he chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Volmer v. Volmer,* 832 So. 2d 615, 621-22 (Miss. Ct. App. 2002) (quoting *Fisher v. Fisher,* 771 So. 2d 364, 367 (Miss. 2000)). As well as being the fact-finder, the chancellor is the sole judge of the credibility of witnesses when resolving discrepancies in a witness's testimony. *Murphy v. Murphy,* 631 So. 2d 812, 815 (Miss. 1994). Its findings will not be disturbed unless this Court finds that they were made in manifest error. *Richardson v. Cornes,* 903 So. 2d 51, 56 (Miss. 2005). In other words, "where the record contains substantial credible evidence to support the chancellor's findings, we will defer to them." *Volmer,* 832 So. 2d at 622. Errors of law, however, are reviewed de novo. *Cooper v. Crabb,* 587 So. 2d 236, 239 (Miss. 1991). This Chancellor correctly stated the standard of proof to be applied in this case. (R.E. 62, T. 295) and specifically ruled that undue influence in the Will was not there. The burden has been overcome. And the Will will stay as it's written shall be the Will of Mrs. Kistler. (R.E. 65, T. 300).

SUMMARY AND ARGUMENT:

Clearly, this Honorable Court is considering an Appeal filed by a disgruntled and jealous son, who is resentful of the close relationship his younger brother had with the mother who had abandoned them. Is an elderly woman entitled to make a difference in her treatment of the natural objects of her affection? Even contestant has admitted that his mother had the right to treat the brothers differently. (R.E. 17, John Hawkins Deposition p. 56).

Testatrix knew her own mind and instructed the new attorney she chose to help her, what she wanted to accomplish through her will. (R.E., 41, T. 189) . John Hawkins has stated that he has no first-hand knowledge of the preparation and execution of the Last Will and Testament. Upon cross examination John Hawkins listed his reasons for believing that the April 29, 2002, Will should not be upheld as the true Last Will and Testament of Genevie Kistler.

1. The language is not hers. (R.E. 26, T. 57)

2. The arithmetic is not hers. (R.E. 27, T. 58)

3. Charles Hawkins put every bit of that (language) in there. (R.E. 27, T. 58)

4. She couldn't do nothing without Buster(Charles) and Florence's permission. (R.E. 30, T. 62)

5. Charles "probably wrote the notes to have the Will drawed up." (R.E. 31, T. 64)

6. She didn't have the education (R.E. 24, T. 51)

Each of John's allegations was disproved by the testimony of Julian Fagan (R.E. 42, T. 190) The truth that shone through was that John was resentful. When he offered to take his mother places she would reply, "I have to check and see what Buster and Florence is going to do." (R.E. 22, T. 44) Or, when he would invite her anywhere she said "Well, let me see what Buster (Charles) and Florence is going to do and I will get back with you." "And---never hear no more!" (R.E. 23, T. 45) John has stated under oath " And all this junk that he's got in that will over there, ain't none of her thinking , It's his ."(R.E. 17, Deposition of John Hawkins p.62)

When asked in the First Set of Interrogatories Propounded to John Hawkins why he thinks his mother should have made any provision to his benefit in her Last Will and Testament,

CERTIFICATE OF SERVICE

I Ann Odom, do hereby certify that I have this date hand delivered a true and correct copy of the above and foregoing APPEAL BRIEF OF APPELLEES CHARLES M HAWKINS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF GENEVIEVE KISTLER, AND FLORENCE HAWKINS to the to the Honorable Glenn Alderson, Chancellor, at his usual mailing address of P.O. Box 70, Oxford, Mississippi, 38655 and to the Honorable Carter Dobbs, Jr., Attorney for John Hawkins at P.O. Box 517, Amory, Mississippi 38821.

So certified this the 13th day of June 2008.