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

VS. — NO. 2007-CA-01230

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

ON APPEAL FROM THE CHANCERY COURT
OF MONROE COUNTY MISSISSIPPI

REPLY BRIEF OF APPELLANT
JOHN E. HAWKINS

CARTER DOBBS, JR.
MISSISSIPPI BAR NO. [redacted]
103 2ND AVENUE NORTH
POST OFFICE BOX 517
AMORY, MISSISSIPPI 38821
TEL: (662) 256-5697
FAX: (662) 256-1483
ATTORNEY FOR THE APPELLANT

ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

TABLE OF CASES

I. INTRODUCTION

The Appellant, John E. Hawkins, files this, his Reply Brief to the Appeal Brief of the Appellees, Charles M. Hawkins, individually, and as Executor of the Estate of Genevieve Kistler, and Florence Hawkins. The Appellees' Brief does not comply in its format with the requirements of Rule 28(a) and Rule 28(b) of the Rules of Appellate Procedure. The Appellees' Argument consists of less than one-half of one page (page 1 of Appellees' Brief.) The Appellees' Brief then proceeds in Paragraph III with a "Statement Of The Law," and in Paragraph IV with a "Standard Of Review."

Appellees' "Statement Of The Law" consists principally of a recitation of the facts in this case. For the sake of continuity and clarity, Appellant John E. Hawkins' Reply Brief follows the format the Brief of the Appellees.

Appellees Charles Hawkins and Florence Hawkins admit in their Brief that the burden of proof at trial was upon them to rebut the presumption of undue influence upon the decedent by clear and convincing evidence. The principal question addressed by this Reply Brief is whether the Chancellor properly required them to meet this burden.

II. RESPONSE TO APPELLEES' STATEMENT OF THE LAW

The Appellees pose the following query at the bottom of Page 3 of their Brief- - "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?"

Appellees' answer to this question in the next sentence of their Brief by stating that the Chancellor specifically found that the burden had been overcome and that undue influence of the Will was not there. (Appellees' R. E. 65; T. 300) Thus, Appellees Charles and Florence Hawkins admit that in this case the burden was upon them to overcome the presumption that the decedent's Will was a product of undue influence by presenting clear and convincing evidence,

It is critical in this case to note that while the Chancellor stated in his opinion that the burden had been overcome, he did not specifically find that the burden had been met by Charles and Florence Hawkins by clear and convincing evidence. A broad and comprehensive reading of the Chancellor's Opinion at Appellees' R. E. 65; T. 300 reveals that the Chancellor wavered in his factual analysis and in reaching his decision. This uncertainty by the Chancellor is clearly not indicative of an Opinion based on clear and convincing evidence, which the Chancellor did not find to have been produced by Appellees Charles and Florence Hawkins. How could the Chancellor have been convinced that Appellees Charles and Florence met their burden of proof by clear and convincing when he stated at the beginning of his Opinion that "this is a close case?" (T. 291; Appellant's R. E. 10.)

As acknowledged by the Appellees in their Brief, Appellees Charles and Florence Hawkins had the burden of overcoming the presumption of undue influence in connection with the decedent's Will by clear and convincing evidence. Appellees Charles and Florence Hawkins were thus required to meet a three-prong test in overcoming this presumption of undue influence. *Murray v. Laird*, 446 So.2d 575, 578 (Miss. 1984), in setting out the three-prong test, requires, as the first prong, good faith on the part of the Grantee/beneficiary. Appellees at the top of Page 4

of their Brief acknowledge that "The Court heard 'no hard evidence' to show that Charles and Florence Hawkins had not acted in good faith. (Appellees' R. E. 63; T. 296)" This underscores the error of the Chancellor in applying the burden of proof in this case. The Chancellor here seems to say that the burden was on Appellant John E. Hawkins to show that Appellees Charles and Florence Hawkins had not acted in good faith. The burden of proof here is misplaced. The burden of proof was upon Appellees Charles and Florence Hawkins to show "by hard evidence" that they had acted in good faith, not upon Appellant John E. Hawkins to show that they had not.

Appellees, in Paragraph 10 at the top of Page 9 of their Brief, state that "John's argument concerning the legal implications of the survivorship account is as convoluted as the cross-examination of Julian Fagan on this point." Appellant John E. Hawkins' argument as to the survivorship accounts and certificate of deposit is certainly not convoluted. The Chancellor in his Opinion stated that he did not know whether the decedent fully knew or appreciated or understood what joint tenants with right of survivorship meant or fully knew or appreciated the status of her bank accounts and her certificate of deposit.

The second prong of the three-prong test is "the grantor's full knowledge and deliberation of the action and consequences." The Chancellor's conclusions concerning Mrs. Kistler's lack of understanding of the legal status of her bank accounts and her certificate of deposit indicates that he was not sure that this prong of the three-prong test had been met. Appellees in their Brief point to no clear and convincing evidence that Mrs. Kistler fully knew or appreciated the status of her banking accounts and her certificate of deposit.

Appellees state at the top of Page 10 of their Brief that since the issue of Genevieve Kistler changing a long-standing pattern in her previous Wills and leaving the bulk of her estate to Appellees Charles and Florence Hawkins was not raised at trial, it could not be explained. The several Wills of the decedent speak for themselves. The burden of proof in this case is admittedly upon Appellees Charles and Florence Hawkins in this case to prove by clear and convincing evidence that there was no undue influence. This "suspicious circumstance," the essential elimination of the decedent's grandchildren, contrary to the provisions of her past Wills, was never addressed or answered by Appellees Charles and Florence Hawkins. It was their burden to do so.

Appellees Charles and Florence Hawkins elicited at trial proof by clear and convincing evidence of two things: (1) that Genevieve Kistler did not lack testamentary capacity, and (2) that she had the advice of a competent person, attorney Julian Fagan, disconnected from her and totally devoted to her interest. The remaining two prongs of the three-prong test set out in *Murrary v. Laird*, good faith on the part of the Grantee/beneficiary, and the Grantor's full knowledge and deliberation of her actions and the consequences, were not met by Appellees Charles and Florence Hawkins by clear and convincing evidence. Therefore, Appellees Charles and Florence Hawkins did not meet their required burden of proof.

Finally, on page 14 of their Brief, Appellees refer to John Hawkins' Interrogatory No. Sixteen (Appellees' R. E. 20.) This inclusion of this Interrogatory is in violation of Rule 11(d)(1) of the Rules of Appellate Procedure. This Interrogatory is not part of the Rule 11(d)(1)(i) Clerk's papers, Rule 11(d)(1)(ii) Transcript, or Rule 11 (d)(1)iii Exhibits. This Court should completely disregard Appellees' argument concerning this Interrogatory that was not submitted at trial as an exhibit or included in the Clerk's papers.

III. CONCLUSION

As outlined in their Brief, Appellees Charles and Florence Hawkins proved at trial by clear and convincing evidence two things: (1) that Genevieve Kistler did not lack testamentary capacity, and (2) that she had the advice of a competent person, attorney Julian Fagan, disconnected from her and totally devoted to her interest. The other two prongs of the three-prong test set out in *Murray v. Laird*, good faith on the part of the Grantee/beneficiary, and the Grantor's full knowledge and deliberation of her actions and the consequences, were not met by Appellees Charles and Florence Hawkins by clear and convincing evidence. For these reasons, Appellant John E. Hawkins urges this Court to render a decision reversing and rendering or reversing and remanding the Chancellor's Order in this case upholding the decedent's purported Last Will and Testament.

Respectfully submitted,

ATTORNEY FOR THE APPELLANT

CARTER DOBBS, JR.
ATTORNEY FOR THE APPELLANT
MISSISSIPPI BAR NO. [redacted]
103 2ND AVENUE NORTH
POST OFFICE BOX 517
AMORY, MISSISSIPPI 38821

TEL: (662) 256-5697
FAX: (662) 256-1483
08.1062.mbw

CERTIFICATE OF SERVICE

I, Carter Dobbs, Jr., attorney for the Appellant, do hereby certify that I have, on this the 14th day of August, 2008, personally delivered to honorable Ann Odom, attorney for the Appellees, and mailed by United States mail, postage pre-paid, to Honorable Glenn Alderson, Chancellor, at his usual mailing address of Post Office Drawer 70, Oxford, Mississippi 38655 a true and correct copy of the above and foregoing Reply Brief Of Appellant John E. Hawkins.

CARTER DOBBS, JR.