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 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 MISSISSIPPI

APPEAL BRIEF OF APPELLANT JOHN E. HAWKINS

CARTER DOBBS, JR.

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ORAL ARGUMENT REQUESTED

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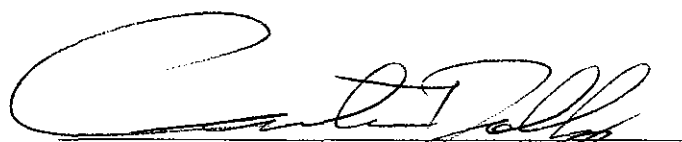
CERTIFICATE OF INTERESTED PERSONS

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 or recusal.

John E. Hawkins	-	Petitioner/Appellant
Genevieve Kistler	-	Decedent
Charles M. Hawkins	-	Respondent/Appellee
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
Florence E. Hawkins	-	Defendant/Appellee
Rose Mary Goff	-	Defendant/Appellee
Carter Dobbs, Jr.	-	Attorney for Petitioner/Appellant
Ann Odom	-	Attorney for Respondents/Appellees
J. Dudley Williams	-	Attorney for Respondents/Appellees
Julian Fagan	-	Attorney for Respondents/Appellees
Honorable Glenn Alderson	-	Trial Judge



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II. APPELLANT'S STATEMENT OF THE CASE

(A) NATURE OF THE CASE.

This appeal involves two principal issues, which are:

(1) The validity of the purported Last Will and Testament of Genevieve Kistler, the mother of the Appellant John E. Hawkins and Appellee Charles M. Hawkins.

(2) Whether the transfer by the decedent during her lifetime of substantial amounts of cash and other property to Appellees Charles M. Hawkins and Florence E. Hawkins, should be set aside, whether Appellee Charles M. Hawkins should be required to render an accounting and whether Appellee Charles M. Hawkins should be removed as Executor of the estate.

(B) COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

Genevieve Kistler died at the age of 95 years on January 31, 2004. Her two surviving sons are the Appellant, John E. Hawkins, and Appellee Charles M. Hawkins.

On February 23, 2004 Appellee Charles M. Hawkins filed an instrument dated April 29, 2002, purporting to be the Last Will and Testament of Genevieve Kistler. This instrument was admitted to probate by Order of the Court dated February 23, 2004, and on February 23, 2004 Letters Testamentary were issued appointing Appellee Charles M. Hawkins as Executor of Genevieve Kistler's estate.

On August 31, 2004 the Appellant, John E. Hawkins, filed a Petition For Contest Of Will, alleging that said Instrument dated April 29, 2002 was not in fact the true Last Will and Testament of Genevieve Kistler.

On October 8, 2004 Chancellor Jacqueline Estates Mask entered an Order recusing herself in said estate proceeding because attorney Julian Fagan, the attorney that drafted said purported Will, was a prospective witness in the trial of the case. Said Order also approved the withdrawal of Julian Fagan as the attorney for the Executor and the estate. On November 12, 2004 an Order was entered by Chancellors Talmadge Littlejohn and Rodney E. Shands, the remaining two Chancellors in the First Chancery Court District, recusing themselves in said will contest matter.

Although no Order evidencing such appears in the Court file, Chancellor Glenn Alderson was appointed Special Chancellor to hear said will contest. On June 16, 2005, an Order was signed by Chancellor Glenn Alderson setting the will contest for trial on August 31, 2005 and September 1, 2005. On July 28, 2005, Appellant John E. Hawkins filed a Motion For Jury Trial. On September 16, 2005 an Order For Jury Trial was entered by the Court, and the case was set for trial on November 7, 8, 9 and 10, 2005.

On July 8, 2005, the Appellant propounded discovery to Appellee Charles M. Hawkins. On July 28, 2005, the Appellant filed a Motion to require Appellee Charles M. Hawkins to respond to said discovery by August 5, 2005. On September 16, 2005, an Order was entered by the trial Court requiring Appellee Charles M. Hawkins to respond to Appellant's discovery within 10 days of September 14, 2005.

On September 26, 2005 Appellee Charles M. Hawkins responded to Appellant's discovery. On October 21, 2005, the Appellant filed a Motion To Compel Response To Request For Production Of Documents, alleging that the discovery responses of Appelle Charles M. Hawkins asserted inappropriate objections and that said discovery responses were not in the form required by Rule 34 of the Mississippi Rules of Civil Procedure.

On Wednesday, November 2, 2005, three working days before the trial of the case set on Monday, November 7, 2005, the attorney for Appellee Charles M. Hawkins delivered to Appellant's attorney amended discovery responses. These discovery responses revealed for the first time that the decedent had established co-ownership of a $100,000.00 certificate of deposit with Appellee Charles M. Hawkins. Appellant's attorney promptly set up a conference call with the attorney for Appellee Charles M. Hawkins and Chancellor Glenn Alderson because of this newly-discovered critical information and verbally moved that the trial of the case be continued.

On November 7, 2005 the day the case was set for jury trial, the Appellant filed a Motion to continue the trial and also a Motion For Leave To Amend Petition to include a Complaint To Set Aside Fraudulent Conveyances and to add an additional party. After a hearing before the Court on November 7, 2005, an Order of Continuance was entered by the Court, continuing the trial of the case to February 24, 2006. Appellee Charles M. Hawkins was ordered to pay the cost of summoning the jury panel, the Court reporter's costs and attorney fees to Appellant's attorney.

On December 12, 2005 an Order Granting Leave To Amend Petition was entered by the Court, granting Appellant John E. Hawkins leave to file a Complaint To Set Aside Fraudulent Conveyances and to add an additional party.

On December 12, 2005 an Agreed Order Withdrawing Request For Jury Trial was entered by the Court, withdrawing the request for jury trial filed by Appellant John E. Hawkins.

On December 16, 2005 the Appellant took the depositions of Appellees Charles M. Hawkins and his wife, Appellee Florence E. Hawkins. Appellees Charles M. Hawkins and Florence E. Hawkins revealed for the first time during the depositions that their names had been placed on checking and savings accounts by the decedent, and that the decedent had transferred other cash funds and an automobile to Appellee Charles M. Hawkins during her lifetime.

On January 19, 2006 the Appellant filed a Complaint To Set Aside Fraudulent Conveyances, For Accounting, For Removal Of Executor And Appointment Of Administrator *Cum Testamento Annexo De Bonis Non.* Appellee Charles M. Hawkins was named as a Defendant and Appellees Florence E. Hawkins, the wife of Charles M. Hawkins, and Rose Mary Goff were joined as new Defendants.

On January 24, 2006 Appellees Charles M. Hawkins and Florence E. Hawkins filed their Answer to Appellant's Complaint To Set Aside Fraudulent Conveyance, etc. On March 22, 2006, Appellee Rose Mary Goff filed her Answer to said Complaint.

The trial Court entered a series of Orders, continuing the trial of the case to February 6 and February 7, 2007. The trial on the merits was held before Chancellor Glenn Alderson on February 6 and February 7, 2007, at which time both sides fully presented their cases. At the conclusion of the trial the Chancellor rendered his Opinion, finding the instrument dated April 29, 2002 to be the valid Last Will and Testament of Genevieve Kistler. The Chancellor determined that since the Will was upheld, on action was deemed necessary on Appellant's Complaint To Set Aside Fraudulence Conveyance, etc.

On February 21, 2007, an Order was entered dismissing Appellant's Petition For Contest Of Will and dismissing the Complaint To Set Aside Fraudulent Conveyances, For Removal Of Executor And For Appointment Of Administrator CTA.

On March 2, 2007, the Appellant filed a Motion For Reconsideration Or, In The Alternative, For A New Trial. On June 5, 2007 this Motion was heard, and at the conclusion thereof the Chancellor overruled Appellant's Motion. On June 19, 2007 an Order Dismissing Petitioner's Request For Reconsideration Or, In The Alternative, For A New Trial was entered. On July 17, 2007 the Appellant filed his Notice Of Appeal.

It is from the Order Dismissing Petition for Contest Of Will And Dismissing Complaint to Set Aside Fraudulent Conveyances, For Removal Of Executor And For Appointment Of Administrator CTA and the Order Dismissing Petitioner's Request For Reconsideration Or, In the Alternative, For A New Trial that Appellant John E. Hawkins has filed this appeal.

(C) STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW.

(1) This case is factually unique, in that it has as its genesis circumstances personally experienced by the principal parties, Appellant John E. Hawkins and Appellee Charles M. Hawkins, that occurred in the 1930's.

(2) Genevieve Kistler was the mother of Appellant John E. Hawkins and Appellee Charles M. Hawkins. In 1938, when John was seven years old and Charles was six, she left them in Mississippi, obtained a divorce from their father, moved out of state, remarried and did not return and was out of her sons' lives for over 40 years (T. 45.)

(3) Genevieve Kistler moved back to Mississippi with her husband on September 1, 1979 (T. 41.)

(4) Genevieve Kistler's husband died in 1995 (T. 41.)

(5) The Appellant, John E. Hawkins had a good relationship with his mother after Mr. Kistler died (T. 291.)

(6) Appellee Charles M. Hawkins retired and moved back to Mississippi from Texas in May, 1985 (T. 234.)

(7) After Appellee Charles M. Hawkins moved back to Mississippi, he and his wife Appellee Florence E. Hawkins developed a close relationship with his mother, Genevieve Kistler, and the relationship with the Appellant with his mother began to deteriorate (T. 291.)

(8) In 1995, Appellee Florence E. Hawkins' name was placed as a joint tenant on the decedent's checking account. No one else was told of this. Appellees Charles M. Hawkins and Florence E. Hawkins took the decedent to the bank for this transaction (T. 53; 111.)

(9) In 1995, Appellee Florence E. Hawkins' name was placed on the decedent's savings account. No one else was told of this. Appellees Charles M. Hawkins and Florence E. Hawkins took the decedent to the bank for this transaction (T. 53; 114.)

(10) In 2001 the decedent executed a Power of Attorney, with Appellee Florence E. Hawkins as attorney in fact. No one else was told of this (T. 142-143; 162; Exhibit #6; R. E. 46.)

(11) On April 11, 2002 Appellees Charles M. Hawkins' and Florence E. Hawkins' names were placed on the decedent's $100,000.00 Certificate of Deposit as joint tenants, with right of

survivorship. No one else was told of this. Appellees Charles M. Hawkins and Florence E. Hawkins took the decedent to the bank for this transaction (T. 53; 128 -1 31 Exhibit #5; R. E. 45.)

(12) On March 6, 2001, $10,000.00 was transferred by the decedent to Appellee Charles M. Hawkins' checking account. No one else was told of this (T. 122 - 123; 128.)

(13) On September 2, 1997 the decedent gave her automobile to Appellee Charles M. Hawkins, which he sold for $6,000.00 soon thereafter. No one else was told of this (T. 125.)

(14) The access card to the decedent's safe deposit box was changed from the Appellant, John E. Hawkins, to Appellee Florence E. Hawkins. On one else was told of this. In addition, in the last years of the decedent's life, Appellee Florence E. Hawkins signed the access card evidencing entry to the safe deposit box, which was a change from prior practice (T. 172 - 173; Exhibit 7; R. E. 57; 62.)

(15) The appointment for the preparation of the Will propounded for probate in this case was made by Appellee Charles M. Hawkins (T. 158.)

(16) Appellees Charles M. Hawkins and Florence E. Hawkins took the decedent to the attorney's office to prepare and sign the new Will. Florence E. Hawkins paid for the new Will from the joint checking account bearing her name and that of the decedent. The decedent told no one other than Charles and Florence Hawkins that she had made this change in her Will (T. 144 - 147.)

(17) After the filing of the Complaint contesting the decedent's Will in this case, the Appellant propounded discovery to Appellee Charles M. Hawkins (T. 2.)

(18) On September 16, 2005, an Order was entered by the trial Court requiring Appellee Charles M. Hawkins to respond to Appellant's discovery within 10 days of September 14, 2005. On September 26, 2005, Appellee Charles M. Hawkins responded to Appellant's discovery (R. 107-109.)

(19) On October 21, 2005, the Appellant filed a Motion To Compel Response To Request For Production Of Documents, alleging that the discovery responses of Appellee Charles M. Hawkins asserted inappropriate objections and that said discovery responses were not in the form required by Rule 34 of the Mississippi Rules of Civil Procedure (R. 252.)

(20) On Wednesday, November 2, 2005, three working days before the trial of the case set on Monday, November 7, 2005, the attorney for Appellee Charles M. Hawkins delivered to Appellant's attorney amended discovery responses. These discovery responses revealed for the first time that the decedent had established co-ownership of a $100,000.00 certificate of deposit with Appellee Charles M. Hawkins (T. 4.)

(21) On November 7, 2005, the same day the case was set for jury trial, the trial Court held a hearing on the Appellant's Motion to continue the case because of the newly discovered evidence, i.e. the $100,000.00 certificate of deposit. The trial Court entered an Order of Continuance and ordered Appellee Charles M. Hawkins to pay the cost of summoning the jury panel, the Court reporter's costs and attorney fees to Appellant's attorney (R. 293.)

(22) On December 16, 2005 the Appellant took the depositions of Appellees Charles M. Hawkins and Florence E. Hawkins. Appellees Charles M. Hawkins and Florence E. Hawkins revealed for the first time during these depositions that their names had been placed on the decedent's checking and savings accounts and that the decedent had transferred other cash funds and an automobile to Appellee Charles M. Hawkins (T. 121 - 123.)

(23) Genevieve Kistler died on January 31, 2004 at age 95. At the time of trial in 2007 her sons, Appellant John E. Hawkins and Appellee Charles M. Hawkins, were 76 and 75 years of age, respectively (R. 1; T. 40 - 42.)

(24) Genevieve Kistler had previously executed, or had drafted, four previous Wills, their dates being September 15, 1981, November 17, 1986, 1999 and May 29, 2001. These four prior Wills essentially left the bulk of her estate as follows: (R. E. 31; 35; 39; 42; Exhibits 1 - 4.)

1/4 to Appellant John E. Hawkins.

1/4 to Appellee Charles M. Hawkins.

1/4 to her daughter, Jean Lembeke, or to her children if deceased.

1/4 to the children of Clifford Kistler, her deceased son.

(25) On April 29, 2002, Genevieve Kistler executed the instrument propounded for probate in this case as her Last Will and Testament. This Will devises the bulk of Mrs. Kistler's estate to her son Appellee Charles M. Hawkins. This Will also provides that any devisee protesting the Will shall receive only the sum of one dollar (T. 144 - 147; 259 - 260; R. E. 23.) The decedent's Will dated May 29, 2001 and the unsigned draft dated 1999 also contained this same provision (Exhibits 1 – 2; R. E. 31; 35.)

(26) No one else, other than Charles and Florence Hawkins, had any knowledge of the decedent's execution of this Will dated April 29, 2002 (T. 259 - 260.)

III. SUMMARY OF APPELLANT'S ARGUMENT

(A) THE CONFIDENTIAL RELATIONSHIP - PRONG ONE OF THE TWO-PRONG TEST IN DETERMINING THE BURDEN OF PROOF IN A WILL CONTEST CASE - A CONFIDENTIAL OR FIDUCIARY RELATIONSHIP BY APPELLEES CHARLES M. HAWKINS AND FLORENCE E. HAWKINS WITH THE DECEDENT.

The Chancellor ruled that a confidential relationship existed between Appellees Charles M. Hawkins and his wife, Florence E. Hawkins, on the one hand, and the decedent, Genevieve Kistler, on the other (T. 295, R. E. 9.) This ruling is not contested in this appeal by the Appellant. It is simply stated here as the beginning foundation point of Appellant's argument.

(B) WHETHER THE CHANCELLOR ERRED IN DETERMINING THAT THE APPELLANT DID NOT ESTABLISH THE SECOND PRONG OF THE TWO-PRONG TEST- "SUSPICIOUS CIRCUMSTANCES" SURROUNDING THE PROCUREMENT OR EXECUTION OF THE WILL OF THE DECEDENT.

The Chancellor was unduly constricted in applying the law to the facts of this case. The Chancellor stated in his Opinion that the second prong of the two-prong test was that Appellee Charles M. Hawkins must have been active or concerned in some way in the preparation or execution of the decedent's Will. The Appellate Court cases actually state that the second prong is that the execution or preparation of the Will must be attended by "suspicious circumstances,"

one of the ways being the Appellees taking part or participating in the preparing or procuring of the Will. The many ways in which Appellees Charles M. Hawkins and Florence E. Hawkins were deeply involved in the daily life and financial affairs of the decedent constitute "suspicious circumstances" in this case. "Suspicious circumstances" are not limited to only what took place in the office of the attorney drafting the Will.

The Chancellor's Opinion in this case is not all clear as to whether the Appellant met the burden of establishing the second prong of the two- prong test.

(C) IF THE TWO-PRONG TEST WAS MET BY THE APPELLANT, WHETHER THE PRESUMPTION OF UNDUE INFLUENCE ON THE PART OF APPELLEE CHARLES M. HAWKINS WAS OVERCOME BY CLEAR AND CONVINCING EVIDENCE.

The presumption of undue influence on the part of Appellee Charles M. Hawkins was not rebutted by clear and convincing evidence. The Chancellor in his Opinion did not fully address whether, if Appellee Charles M. Hawkins had the burden of proving a lack of undue influence by clear and convincing evidence, the three-prong test set out in *Murray v. Laird*, 446 So.2d 575 (Miss. 1984) was met.

(D) 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

The Chancellor at the beginning of the trial in this case ruled that the issue of Appellant's Complaint To Set Aside Fraudulent Conveyance need not be heard or considered until the matter

of whether the Will was valid or not was decided. If the Chancellor's ruling in upholding the Will is affirmed by this Court, then the issue of whether the monetary and automobile transfers were fraudulent conveyances does not matter, because Appellee Charles M. Hawkins would receive this property by operation of the decedent's Will. Because Appellees Charles M. Hawkins and Florence E. Hawkins did not overcome the presumption of undue influence by clear and convincing evidence, this Court should render a decision setting aside the monetary and automobile conveyances by the decedent to said Appellees. In the alternative, this Court should remand this case to the lower Court for a new trial as to whether Appellees Charles M. Hawkins and Florence E. Hawkins overcame the presumption of undue influence as to these *inter vivos* conveyances by clear and convincing evidence.

(E) WHETHER THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

When the Chancellor made his ruling at the conclusion of the hearing on Appellant's Motion For Reconsideration Or, In the Alternative, For A New Trial, he did not address whether the Appellant had established the application of the second application of the second prong of the two-prong test- "suspicious circumstances"- in connection with the preparation and execution of the decedent's Will. Also, he did not address whether, if the second prong of the two-prong test by Appellant had been established, Appellee Charles M. Hawkins had met the three-prong test set out in *Murray v. Laird*, 446 So.2d 575 (Miss. 1984) by clear and convincing evidence.

IV. APPELLANT'S ARGUMENT

(A) THE CONFIDENTIAL RELATIONSHIP - PRONG ONE OF THE TWO-PRONG TEST IN DETERMINING THE BURDEN OF PROOF IN A WILL CONTEST CASE - A CONFIDENTIAL OR FIDUCIARY RELATIONSHIP BY APPELLEES CHARLES M. HAWKINS AND FLORENCE E. HAWKINS WITH THE DECEDENT.

The Chancellor ruled that a confidential relationship existed between Appellees Charles M. Hawkins and his wife, Florence E. Hawkins, on the one hand, and the decedent, Genevieve Kistler, on the other (T. 295, R. E. 14.) This ruling is not contested in this appeal by the Appellant. It is simply stated here as the beginning foundation point of Appellant's argument.

(B) WHETHER THE CHANCELLOR ERRED IN DETERMINING THAT THE APPELLANT DID NOT ESTABLISH THE SECOND PRONG OF THE TWO-PRONG TEST- "SUSPICIOUS CIRCUMSTANCES" SURROUNDING THE PROCUREMENT OR EXECUTION OF THE WILL OF THE DECEDENT.

The Chancellor in this case correctly ruled that a two-prong test is to be applied in determining whether the burden was cast upon Appellee Charles M. Hawkins of disproving undue influence by clear and convincing evidence. The Chancellor however, erroneously ruled in his Opinion that the two-prong test is (1) that Appellee Charles M. Hawkins must have occupied a confidential relationship with the decedent, and (2) that Appellee Charles M. Hawkins must have been actively concerned in some way with the preparation or execution of the decedent's Will, both being necessary in order for a presumption to be raised that Appellees Charles M. Hawkins and Florence E. Hawkins exercised undue influence over the Testatrix, thus

casting upon the Appellees the burden of disproving undue influence by clear and convincing evidence. The second element of the two-prong test is actually much broader than this, and the Chancellor was unduly constricted in applying the law to the facts of this case.

A close reading of the applicable Mississippi cases reveals that, contrary to the Chancellor's statement in his Opinion, the two-prong test to be met in order for a presumption of undue influence to arise, is actually (1) a subsisting and continuing confidential or fiduciary relationship, (2) attended by "suspicious circumstances." *Carter v. Moody,* 2005-CA-01326-COA; *Estate of Lawler v. Weston*, 451 So.2d 739, 741 (Miss. 1984). One of the ways that "suspicious circumstances" can be shown is by the primary beneficiary of a Will (Appellees Charles M. Hawkins and Florence E. Hawkins in this case) taking part or participating in the preparation or procuring of the Will. However, "suspicious circumstances" are not limited to the primary beneficiary being actively involved in the preparation or procuring of the Will, but other factors, such as those that are present in this case, meet the requirement of "suspicious circumstances." Therefore, the presumption of undue influence by Charles M. Hawkins and Florence E. Hawkins was established, and the burden of proof shifted in this case to Appellee Charles M. Hawkins to prove a lack of undue influence by clear and convincing evidence.

The Chancellor's Opinion in this case is not at all clear as to whether the Appellant met the requirement of establishing the second prong of the two-prong test. The Chancellor did state that it was "for Charles (the Appellee) and them to overcome." T. 295. However, the Chancellor in his Opinion did not address whether, if Appellee Charles M. Hawkins had the burden of proving a lack of undue influence by clear and convincing evidence, the three-prong test set out in *Murray v. Laird*, 446 So.2d 575 (Miss. 1984) was met.

Significantly, when the Chancellor made his ruling at the conclusion of the hearing on Appellant's Motion For Reconsideration Or, In the Alternative, For A New Trial, he did not address whether the Appellant had established the application of the second prong of the two-prong test - "suspicious circumstances" in connection with the preparation and execution of the decedent's Will. Neither did he address whether, if the second prong of the two-prong test by Appellant had been established, Appellee Charles M. Hawkins had met the three-prong test set out in *Murray v. Laird*, 446 So.2d 575 (Miss. 1984) by clear and convincing evidence. The Chancellor simply stated "I just don't think the burden of undue influence has been met, I truly don't" (T. 316; R. E. 21.) It is totally unclear as to whether the Chancellor in making this statement was referring to the Appellant or the Appellees.

Appellee Charles M. Hawkins fell short in meeting his burden of proof of showing a lack of undue influence over the decedent by clear and convincing evidence, particularly in failing to explain why, in the short space of 11 months, the decedent changed a long-standing series of Wills, especially the change that effectively disinherited her two sets of grandchildren that had been provided for by her prior Wills (R. E. 31; 35; 39; 42; Exhibits 1 - 4.)

The proof in this case shows that beginning with the time of the death of the decedent's husband, Mr. Kistler, and continuing through the time of the execution of the Will in question in this case, Appellees Charles M. Hawkins and Florence E. Hawkins, cultivated and established a very close relationship with the decedent. The decedent became increasingly isolated from the Appellant, joint accounts were established between the decedent and Appellee Charles M. Hawkins and his wife, confidential transfers of money and an automobile were made and

Appellee Florence E. Hawkins gained access to and increasing control over the decedent's safe deposit box.

There is no testimony of great force or outright intimidation, but rather cajolery, flattery and isolation of the decedent. The case *Croft v. Alder*, 115 So.2d 683 (Miss.1959) speaks at length to these type circumstances in relation to a will contest. The Supreme Court in *Croft*, in reversing the Chancellor and holding that the Will was the product of undue influence, and therefore void, stated:

> The able and respected attorney who prepared the will upon data furnished him by Barney, who stated he was acting for Mr. Alder, testified that, in his opinion, the testator was mentally competent and the instrument reflected testator's independent purpose. However, the record indicates that the witness had not conferred with Mr. Alder about the will prior to its drafting. Moreover, his testimony does not negative the presumption of undue influence resulting from "antecedent agencies" and prior actions by the principal beneficiary who was in the confidential relation. In Jamison v. Jamison, 1909, 96 Miss. 288, 298, 51 So. 130, 131, it was said: " The difficulty is also enhanced by the fact, universally recognized, that he who seeks to use undue influence does so in privacy.
>
> He seldom uses brute force or opens threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to the fact. He observes, too, the same precautions if he seeks by cajolery, flattery, or other methods to obtain power and control over the will of another, and direct it improperly to the accomplishment of the purpose of which he desires. Subscribing witnesses are called to attest the execution of wills, and testify as to the testamentary capacity of the testator, and the circumstances attending the immediate execution of the instrument; but they are not called upon to testify as to the antecedent agencies by which the execution of the paper was secured, even if they had any knowledge of them, which they seldom have." *In re Coins' Will* (*Fortner v. Coins*), Miss.1959, 114 So2d 759.

> We do not think that the testimony of the attorney who attested the will, as to his observations at that particular time, can suffice to rebut the already existing presumption. As stated in Jamison, he naturally would have had no knowledge of any precedent activities by Barney.

The above-recited passage from *Croft v. Alder* was cited and repeated in the case of *In Re Will Of Moses*, 227 So.2d 829 (Miss.1969). These cases shed a great deal of light upon the proper emphasis to be given the testimony of Julian Fagan, the attorney that prepared the Will in the case at bar. As in *Croft v. Alder* and *Moses,* Mr. Fagan testified only as to what happened in his office on two occasions. He had no knowledge of any precedent activities by Appellees Charles M. Hawkins and Florence E. Hawkins. The recurring theme in *Croft v. Adler* and *Moses* is the lesser importance of what transpired in the office of the attorney that drafted the Will, and the greater importance of the antecedent events that occurred over a long period of time before the execution of the Wills in question.

95 C.J.S. *Wills* § 351 *Confidential Relations* states as follows:

> (S)ome jurisdictions have developed a two-pronged test to determine whether undue influence tainted a will. First, the court much search for the presence of a confidential relationship. Second, the court must decide that the stronger party in the relationship assisted in the preparation or procurement of the weaker person's testamentary instrument, **or** that there exists suspicious circumstances surrounding the procurement or execution of the will.

A footnote to this C.J.S. article, in quoting the case of *Matter of Estate of Strozzi*, 120, N.M. 541, 903 P.2d 852 (Ct. App. 1995), states as follows:

> Confidential relationship and suspicious circumstances, warranting determination that will was procured as result of undue influence, existed when beneficiaries were continually present at decedent's home and in all aspects of his life after decedent inherited ranch estate, beneficiaries wrote checks on behalf of decedent, ranch estate was extraordinary consideration for work performed over last few years of decedent's life, beneficiaries rarely visited decedent before he inherited ranch, and decedent became increasing isolated while becoming more dependent on care from beneficiaries.

These facts in *Strozzi* are very similar to those of the case at bar. Appellees Charles M. Hawkins and Florence E. Hawkins were the decedent's constant companions in the years before her death. When invited to accompany the Appellant and his wife, or other family members, on outings, she repeatedly stated that she "would have to check with Buster and Florence." The Appellees wrote checks on behalf of the decedent and the decedent became increasingly isolated from the Appellant, while becoming more dependent for her care and transportation by Appellees Charles M. Hawkins and Florence E. Hawkins. The Chancellor showed that he understood what really happened among Genevieve Kistler and her two sons, Charles and John Hawkins, when he stated that "this might be a situation where Charles outfoxed John...." (T. 300; R. E. 19)

The case of *Carter v. Moody,* 2005-CA-01326-COA, a case decided by the Mississippi Court of Appeals on January 30, 2007, is similar in its facts to those of the case at bar. A close reading of *Carter v. Moody* reveals that it is consistent with the Supreme Court's rulings in *Croft* and *Moses.* The Court in *Carter v. Moody,* in quoting *Estate of Lawler v. Weston,* 451 So.2d 739, 741(Miss. 1984), and citing *Croft v. Alder*, stated:

> Stated differently, "the existence of a confidential or fiduciary relationship, coupled with a showing of 'suspicious circumstances' such as the fact that a beneficiary or person who benefits by the will took part in the execution or preparation of the will, gives rise to a presumption of undue influence."

The Court in *Carter v. Moody* found no such "suspicious circumstances." In the case at bar, "suspicious circumstances" are not limited to the events that transpired in the office of the attorney that drafted the Will.

As reflected by the above cited Mississippi Supreme Court cases and C.J.S. article, the second prong of the two-part test is "suspicious circumstances" surrounding the procurement or execution of the Will. These "suspicious circumstances" are not limited to the events that transpired in the office of the attorney that drafted the Will, or to events immediately preceding or following the actual execution of the Will. In this case, the following events constitute "suspicious circumstances." The fact that many of these events are also elements that show the establishment of a confidential relationship does not mean that they do not also contribute to or constitute "suspicious circumstances."

(1) Appellee Charles M. Hawkins' wife's name, Florence E. Hawkins, was placed on the decedent's checking account. No one else was told of this. Appellees Charles M. Hawkins and Florence E. Hawkins took the decedent to the bank for this transaction (T. 53; 111.) Also, this fact was concealed from the Court and from the Appellant's attorney by Appellee Charles M. Hawkins (T. 119 - 126.)

(2) Appellee Charles M. Hawkins' wife's name, Florence Hawkins, was placed on the decedent's savings account. No one else was told of this. Appellees Charles M. Hawkins and

Florence E. Hawkins took the decedent to the bank for this transaction (T. 53; 111.) Also, this fact was concealed from the Court and from the Appellant's attorney by Appellee Charles M. Hawkins (T. 119 - 126.)

(3) The decedent executed a Power Of Attorney, with Florence E. Hawkins as attorney in fact. No one else was told of this (T. 142-143; 162; Exhibit # 6; R. E. 46 .)

(4) Appellees Charles Hawkins' and Florence E. Hawkins' names were placed on the decedent's $100,000.00 Certificate of Deposit. No one else was told of this. Appellees Charles M. Hawkins and Florence E. Hawkins took the decedent to the bank for this transaction (T. 53; 128 - 131 Exhibit # 5; R. E. 45.) Also, this fact was concealed from the Court and from the Appellant's attorney by Appellee Charles M. Hawkins (T. 119-126.)

(5) $10,000.00 was transferred by the decedent to Appellee Charles Hawkins' checking account. No one else was told of this. Appellee Charles M. Hawkins concealed this from the Court and the Appellant's attorney in his discovery responses. Also, Appellee Charles M. Hawkins was not truthful about this money at the time of the hearing before the Court on the Motion For Continuance. This was revealed only later in his deposition (T. 119-126.)

(6) The decedent gave her automobile to Appellant Charles M. Hawkins, which he sold for $6,000.00 soon thereafter. No one else told of this. Appellee Charles M. Hawkins concealed this from the Court and the Appellant's attorney in his discovery responses. Also, Charles M. Hawkins was not truthful about this conveyance at the time of the hearing before the Court on the Motion For Continuance. This was revealed only later in his deposition (T. 119-126.)

(7) On September 2, 1997 the access card to the decedent's safe deposit box was changed from Appellant John E. Hawkins to Appelle Florence E. Hawkins. No one else was told of this. In addition, in the last years of the decedent's life, Appellee Florence E. Hawkins signed the access card evidencing entry to the safe deposit box, which was a change from prior practice (T. 172 - 173.)

(8) The appointment for the preparation of the new Will was made by Appellee Charles M. Hawkins (T. 158.)

(9) Appellees Charles M. Hawkins and Florence E. Hawkins took the decedent to the attorney's office to prepare and sign the new Will. Florence E. Hawkins paid for the new Will from the joint account bearing her name and that of the decedent (T. 144 - 147.)

(10) Attorney Julian Fagan could not recall whether he discussed with the decedent the legal implications of the survivorship accounts, particularly the savings account, that conflicted with one and one-half (1½) pages of the Will concerning the disposition of the savings account. (T. 199-207; R. E. 63.)

(11) Dean Lindsey- the other witness to the Will- was not called as a witness to testify. No explanation was given as the reason why she was not called as a witness.

(12) Suzette Chaney, one of the Appellees' witnesses, stated that Mrs. Kistler told Florence E. Hawkins, that she wanted to change her Will and that Florence E. Hawkins asked her not to (T. 269.)

The Supreme Court in *In re: Last Will And Testament And Estate Of Smith*, 722 So. 2d, 606 (Miss. 1998) held:

> Suspicious circumstances surrounding the creation of the will also raised the presumption. *Pallatin v. Jones*, 638 So.2d 493, 495 (Miss. 1994). However, we held the test was satisfied and the presumption was raised in *In re Estate of Harris,* 539 So.2d 1040 (Miss. 1989) with very little besides a confidential relationship. *Harris*, 539 So.2d at 1041. The beneficiary simply found an attorney at the testator's request and to drove the testator to the attorney's office.

There is one final "suspicious circumstance" surrounding the execution of the decedent's Will that was not mentioned at all in the Chancellor's Opinion and that is very significant. Genevieve Kistler executed, or had drafted, four Wills after her husband died and before the one that is the subject of the contest in this case. The dates of these Wills are September 15, 1981; November 17, 1986; 1999; and May 29, 2001 (Exhibits 1 - 4; R. E. 31; 35; 39; 42.) These four prior Wills essentially leave the bulk of her estate as follows:

1/4 to the Appellant, John E. Hawkins.

1/4 to Appellee Charles M. Hawkins.

1/4 to her daughter, Jean Lembeke, or to her children if deceased.

1/4 to the children of Clifford Kistler, her deceased son.

Eleven months after the last of the foregoing Wills was signed, the decedent executed the Will that is the subject of the contest in this case, leaving almost all of her estate to Appellee Charles M. Hawkins (R. E. 23.) Appellee Charles M. Hawkins was intent in eliciting proof to

support his position that the reason that his mother changed her Will was that she was mad at Appellant John E. Hawkins because he neglected her and paid no attention to her. No explanation was ever given by the Appellee as to why, by the execution of this last Will, Mrs. Kistler effectively disinherited her grandchildren that she had made substantial provision for in her prior Wills. This lack of explanation as to why, in the space of 11 months, Mrs. Kistler suddenly decided to favor her son Charles M. Hawkins with the bulk of her estate in her Will is clearly a "suspicious circumstance" that meets the second part of the two-prong test.

The two-prong test set out in *Croft v. Alder,* coupled with the confidential relationship established between Appellees Charles M. Hawkins and Florence E. Hawkins and the decedent, raised a presumption of undue influence on the part of Appellee Charles M. Hawkins, shifting the burden of proof to him to show by clear and convincing evidence that he did not exercise undue influence upon his mother in the preparation and execution of her Will.

(C) IF THE TWO-PRONG TEST WAS MET BY THE APPELLANT, WHETHER THE PRESUMPTION OF UNDUE INFLUENCE ON THE PART OF APPELLEE CHARLES M. HAWKINS WAS OVERCOME BY CLEAR AND CONVINCING EVIDENCE.

Even where there is no presumption of undue influence, the burden of proof rests upon the proponents of the Will throughout, and it never shifts to the contestants, both as to undue influence and mental incapacity, by a preponderance of the evidence. *Croft v. Alder*, 115 So.2d 683 (Miss.1959); *Estate of Smith* 722 So.2d 606 (Miss. 1988). The Chancellor held that

Appellee Charles M. Hawkins had met that burden and that the Will should be upheld. Appellant John E. Hawkins respectfully submits that because the two-prong test of (1) the confidential relationship, coupled with (2) "suspicious circumstances" surrounding the execution of the Will in question in this case, has been met and that, therefore, the additional requirement has been cast upon the Appellees to rebut the resulting presumption of undue influence by clear and convincing evidence. This the Appellees have not done.

The Chancellor in his Opinion did not at all make it clear whether the Appellant had established the second prong of the two-prong test, thus shifting the burden to Appellee Charles M. Hawkins to prove a lack of undue influence by clear and convincing evidence (T. 290; R. E. 9.) If the Chancellor did find that the second prong of the two-prong test had been met by the Appellant, then the Chancellor did not clearly apply the three-prong test to determine whether Appellee Charles M. Hawkins had rebutted the presumption of undue influence by clear and convincing evidence, as required by *Murray v. Laird*, 446 So.2d 575 (Miss. 1984); E*state of Smith* 772 So.2d, 606 (Miss. 1998).

The Chancellor's Opinion in overruling the Appellant's Motion For Reconsideration Or, In The Alternative, For A New Trial is, to say the least, confusing when he stated in his Opinion that "I just don't think the burden of undue influence has been met, I truly don't." It is totally unclear as to whether the Chancellor in making the statement was referring to the Appellant or the Appellees.

The three-prong test to determine whether the presumption of undue influence has been rebutted is:

(1) Good faith on the part of the grantee – beneficiary.

(2) The grantor's full knowledge and deliberation of the action and consequences.

(3) Proof of independent consent and action.

Murray v. Laird, 446 So.2d 575 (Miss. 1984*); Estate of Smith,* 772 So.2d, 606 (Miss. 1998).

The case of *Dean vs. Kavanaugh*, 2004-CA-01144-COA (Miss. 2006) is particularly applicable in this case because once the burden of proof shifts to a Respondent to prove a lack of undue influence by clear and convincing evidence, all of the appellate cases on undue influence, including *Kavanaugh*, are applicable because the standard of proof - the three-prong test - is then the same for both Wills and *inter vivos* transfers.

Many of the facts in *Kavanaugh* are very similar to those of the case at bar:

(1) In *Kavanaugh,* the proponent destroyed Kavanaugh's bank records after his death. Appellee Charles M. Hawkins did likewise (T. 107.)

(2) In *Kavanaugh*, the proponent concealed the existence of an account in the amount of $100,000.00. Appelle Charles M. Hawkins concealed the status and existence of the $100,000.00 Certificate of Deposit, and also of monetary and automobile *inter vivos* transfers.

(3) No evidence was produced that Kavanaugh knew the value of his assets. The proponent relied upon assumptions. The proof in the case at bar is that the decedent, Genevieve Kistler, either did not understand the legal effect of joint tenants with right of survivorship, OR

she did not understand that her Will had no legal effect upon the ultimate ownership of her cash assets, particularly the savings account, OR BOTH. Attorney Julian Fagan testified that he assumed that Mrs. Kistler understood these matters (T. 199 - 204; R. E. 63-68.)

Appellee Charles M. Hawkins did not show by clear and convincing evidence that the decedent had full knowledge and deliberation in the execution of her last Will. One of the elements of this test is whether the testatrix was aware of her total assets and their general value. The decedent clearly did not understand either the legal effect of joint tenants with right of survivorship or the ineffectiveness of her Will on her cash assets, particularly the savings account, or she did not understand either. The testimony of attorney Julian Fagan on this point consists of suppositions.

Another element of the requirement that the testatrix must have full knowledge and deliberation in the execution of the Will is whether the testatrix knew who controlled her finances and by what method. The same point concerning the conflict between the decedent's joint survivorship accounts and her Will is applicable here. Further, the two elements under the question of whether the testatrix knew who controlled her finances and by what method are (1) How dependent is the testatrix on those handling her finances?, and (2) How susceptible is she to influence by those handling her finances? Not only has Appellee Charles M. Hawkins not overcome the presumption of undue influence raised by these two questions; rather, the clear and convincing proof is that Mrs. Kistler was dependent on Appellee Charles M. Hawkins and his wife, Florence E. Hawkins, in handling her finances and that she was susceptible to the influence of Charles and Florence Hawkins in handling her finances. Appellee Charles M. Hawkins has not met his burden of proof in this respect by clear and convincing evidence.

Much has been made of the fact that when the decedent left the office of attorney Julian Fagan after signing her Will, she reiterated that anyone who contested the Will would only get one dollar. It is important to note that this same provision is contained in her prior Will executed on May 29, 2001 and also in the draft of the unsigned Will dated 1999 (Exhibits # 1 – 2; R. E. 31; 35.)

Finally, there are two important points when viewing at the overall picture painted by the proof in this case. First, the Chancellor remarked at the beginning of his rendition of his Opinion from the bench, that this "is a close case." (T. 291; R. E. 10.) If this is in fact a close case, then it follows *a-fortiori* that the burden of proof cast upon Appellee Charles M. Hawkins has not been met by clear and convincing evidence. In other words, if the burden as to undue influence had been met by clear and convincing evidence, it would not be a close case.

Second, is the failure by Appellee Charles M. Hawkins to explain why, in the space of eleven months, Mrs. Kistler changed a long-standing series of Wills, particularly the change that effectively disinherited her two sets of grandchildren that had been provided for in her prior Wills.

(D) 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

The Chancellor ruled at the beginning of the trial that the matter of the alleged fraudulent conveyances would not be addressed until after a determination was made as to whether or not the decedent's Will was valid (T. 38.) As set out in the foregoing three issues addressed by this

Brief, this honorable Court should reverse the Opinion of the Chancellor in this case and render a decision that Appellee Charles M. Hawkins did not meet his burden of proof as to rebutting the presumption of undue influence by clear and convincing evidence and that, therefore, the instrument propounded for probate is not the true Last Will and Testament of Genevieve Kistler. If this Court renders an Opinion as the Appellant requests, then it becomes important as to whether the monetary and automobile transfers by the decedent to Appellees Charles M. Hawkins and Florence E. Hawkins are set aside. If the Chancellor's action in upholding the Will is affirmed by this Court, then the issue of whether the monetary and automobile transfers were fraudulent conveyances does not matter, because Appellee Charles M. Hawkins would receive this property anyway by operation of the decedent's Will.

Appellant John E. Hawkins respectfully submits, for the factual and legal reasons particularly set out above in this Brief, that the monetary and automobile conveyances by the decedent to the Appellees Charles M. Hawkins and Florence E. Hawkins should be set aside as fraudulent conveyances. The same legal and factual analysis set out above in this Brief as to the Will of the decedent applies to the monetary and vehicle conveyances by the decedent to Appellees Charles M. Hawkins and Florence E. Hawkins, namely:

(1) There was a confidential and fiduciary relationship between Appellees Charles M. Hawkins and Florence E. Hawkins with the decedent, which gave a rise to a presumption of undue influence on their part.

(2) The burden of rebutting the presumption of undue influence on the part of Appellees Charles M. Hawkins and Florence E. Hawkins as to these monetary and vehicle transfers was not overcome by clear and convincing evidence.

Since Appellees Charles M. Hawkins and Florence E. Hawkins did not overcome the presumption of undue influence by clear and convincing evidence, this Court should render a decision setting aside the conveyances of the $100,000.00 Certificate of Deposit, checking and savings accounts of the decedent, the $10,000.00 cash transfer and the automobile conveyance having a value of $6,000.00. In the alternative, this Court should remand the case to the lower Court for a new trial as to whether Appellees Charles M. Hawkins and Florence E. Hawkins rebutted the presumption of undue influence as to these *inter vivos* conveyances by clear and convincing evidence.

(E) WHETHER THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

When the Chancellor made his ruling at the conclusion of the hearing on Appellant's Motion For Reconsideration Or, In The Alternative, For A New Trial, he did not address whether the Appellant had established the application of the second prong of the two-prong test - "suspicious circumstances" - in connection with the preparation and execution of the decedent's Will. Neither did not address whether, if the second prong of the two-prong test by Appellant had been established, Appellee Charles M. Hawkins had met the three-prong test set out in *Murray v. Laird*, 446 So.2d 575 (Miss. 1984) by clear and convincing evidence. The Chancellor simply stated "I just don't think the burden of undue influence has been met, I truly don't" (T. 316; R. E. 21.) This statement in the lower Court's Opinion simply does not make it clear as to whether the burden of undue influence was on the Appellant or the Appellees. Therefore, this cause should be remanded to the lower Court for a new trial.

V. CONCLUSION

For the reasons set out above, this Court should render a decision reversing the decision of the Chancellor and finding that the instrument propounded for probate is not the true Last Will and Testament of the decedent, requiring Appellee Charles M. Hawkins to render an accounting and removing Appellee Charles M. Hawkins as Executor of the estate. In the alternative, this Court should remand the case to the lower Court for a new trial on the issue of the validity of the decedent's Will and on the issue of the alleged fraudulent *inter vivos* conveyances to Appellees Charles M. Hawkins and Florence E. Hawkins.

Respectfully submitted,

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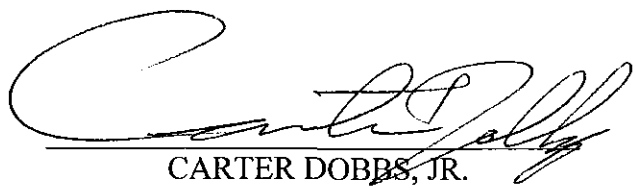
CERTIFICATE OF SERVICE

I, Carter Dobbs, Jr., attorney for the Appellant, do hereby certify that I have, on this the 14 day of April, 2008, mailed by United States mail, postage pre-paid, a true and correct copy of the above and foregoing Appeal Brief Of Appellant John E. Hawkins to Honorable Glenn Alderson, Chancellor, at his usual mailing address of Post Office Drawer 70, Oxford, Mississippi 38655 and to Honorable Ann Odom, attorney for the Appellees, at her usual mailing address of Post Office Box 180, Amory, Mississippi 38821.



CARTER DOBBS, JR.