

DOCKET NO. 2007-CA-01633

SUPREME COURT OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

DORIS FRAZIER

APPELLANT

VERSUS

JOYCE C. LOEW

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICIAL DISTRICT**

BRIEF OF APPELLEE

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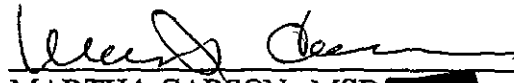
JOYCE C. LOEW

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel 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, to-wit:

1. Doris Frazier, Appellant
2. Wayne L. Hengen, Attorney for Doris Frazier
3. Joyce C. Loew, Appellee
4. Martha G. Carson, Lead Counsel for Joyce C. Loew
5. Walter L. Nixon, Jr., Co-counsel for Joyce C. Loew



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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF CASES	iii
STATEMENT OF THE ISSUES	iv
STATEMENT OF THE CASE	1
CHANCERY COURT PROCEEDINGS	4
SUMMARY OF THE ARGUMENT.....	6
ARGUMENT	
STANDARD OF REVIEW	7
I. ISSUE: DORIS FRAZIER’S APPEAL DOES NOT ADDRESS THE LACK OF EVIDENCE OF A CONFIDENTIAL RELATIONSHIP WHICH WOULD GIVE RISE TO THE PRESUMPTION FOR WHICH SHE ARGUES, WHICH THE CHANCELLOR IN HIS WELL REASONED OPINION FOUND DID NOT EXIST IN THIS CASE	8
II. ISSUE: WHETHER THE CHANCELLOR ERRED IN FINDING THAT THE APPELLEE HAD NO UNDUE INFLUENCE OVER CASPELICH	10
III ISSUE: WHETHER THE CHANCELLOR ERRED IN FAILING TO AWARD ATTORNEY’S FEES TO JOYCE LOEW	13
IV. ISSUE: THE APPELLANT’S PROFFERED EVIDENCE	15
ARGUMENT	
CONCLUSION	15
CERTIFICATE OF SERVICE	17

TABLE OF CASES AND OTHER AUTHORITIES

Mississippi Case Law

<u>Cooper v. Crabb</u> , 587 So. 2d 236 (Miss. 1991)	8
<u>Croft v. Alder</u> , 237 Miss. 713, 115 So. 2d 683 (1959)	10
<u>Fisher v. Fisher</u> , 771 So. 2d 364 (Miss. 2000)	8
<u>Harris v. Sellers</u> , 446 So. 2d 1012 (Miss. 1984)	13
<u>Hendricks v. James</u> , 421 So. 2d 1031 (Miss. 1982)	11
<u>In re Estate of Edwards</u> , 520 So 2d 1370 (Miss. 1988)	13
<u>In the Matter of the Estate of Pope</u> , 2008 MS - lw080521176	8, 10
<u>In Re Spencer</u> , 2008 MS - lw080620181	14
<u>In re Will and Estate of Varvaris</u> , 477 So.2d 273 (Miss. 1985)	11
<u>Leaf River Forest Prods. v .Deakle</u> , 661 So. 2d 188, 196 (Miss. 1995)	14
<u>Madden v. Rhodes</u> , 626 So. 2d 608 (Miss. 1993)	11, 12
<u>McNeil v. Hester</u> , 753 So. 2d 1057 (Miss. 2000)	7
<u>Mullins v. Ratcliff</u> , 515 So. 2d 1183 (Miss. 1987)	8
<u>Murphy v. Murphy</u> , 631 So. 2d 812 (Miss. 1994)	8
<u>Richardson v. Cornes</u> , 903 So. 2d 51 (Miss. 2005)	8
<u>Rogers v. Pleasant</u> , 729 So.2d 192 (Miss.1998)	12
<u>Sanderson v. Sanderson</u> , 824 So.2d 623 (Miss.2002)	8
<u>Smith v. Averill</u> , 722 So. 2d 606 (Miss. 1998)	10
<u>Smith v. Malouf</u> , 597 So. 2d 1299 (Miss. 1992)	14
<u>Watkins v. Watkins</u> , 142 Miss. 210, 106 So. 753 (1926)	10

TABLE OF CASES AND OTHER AUTHORITIES (continued)

Mississippi Statutory Authority and Rules

Mississippi Code Annotated § 11-55-3	14
Mississippi Code Annotated §11-55-5	14
Mississippi Rules of Civil Procedure, Rule 11	14

STATEMENT OF THE ISSUES

- I. ISSUE: DORIS FRAZIER'S APPEAL DOES NOT ADDRESS THE LACK OF EVIDENCE OF A CONFIDENTIAL REALTIONSHIP WHICH WOULD GIVE RISE TO THE PRESUMPTION FOR WHICH SHE ARGUES, WHICH THE CHANCELLOR IN HIS WELL REASONED OPINION FOUND DID NOT EXIST IN THIS CASE**
- II. ISSUE: WHETHER THE CHANCELLOR ERRED IN FINDING THAT THE APPELLEE HAD NO UNDUE INFLUENCE OVER CASPELICH**
- III. ISSUE: WHETHER THE CHANCELLOR ERRED IN FAILING TO AWARD ATTORNEY'S FEES TO JOYCE LOEW**
- IV. ISSUE: THE APPELLANT'S PROFFERED EVIDENCE ARGUMENT**

STATEMENT OF THE CASE

STATEMENT OF THE FACTS:

1. Gus Caspelich died of heart disease on February 25, 2004, at the age of eighty-seven. At the time of his death Caspelich was a widower, his third wife of approximately forty years, Inez, having predeceased him in June of 2000. Decedent had two (2) grown sons from a marriage to his second wife, Margie; Caspelich had long been estranged from his sons [T 202] and Caspelich took the death of Inez especially hard. The Appellant herein, Doris Frazier, Caspelich's sister, undoubtedly helped her brother by seeing him through a depressing time, and it is undisputed that she entered into a confidential relationship with Caspelich, placing her name jointly on his checking accounts, writing his checks, seeing that he took his medicines, and placing her name as the "Pay On Death" beneficiary on her brother's Certificates of Deposit. [E 24, LRE 32]]

2. The Appellee, Joyce Loew, was almost sixty years of age when her long time gentlemen friend, Buddy Holder, died in July of 2000. Loew initially met Caspelich through a mutual minister friend, Buddy's father, while he was married to Inez, and all three couples enjoyed pleasant social occasions in Pensacola, Florida, where Loew lived and worked. Loew owned her own car and a house with a small mortgage of just over Eleven Thousand Dollars (\$11,000.00), which Caspelich eventually paid off. Caspelich felt deep affection for Loew, and Caspelich's male friends remarked that he was "jealously possessive of her." Caspelich was an independent individual, and Doris Frazier described him as a "womanizer;" but she testified that, until Loew, Caspelich always sought her approval of his women. [T 207-208]

3. Caspelich found solace in Loew, and Loew found solace in his companionship as well. Doris Frazier began to lose control of her brother and she was very unhappy when Caspelich ignored her warnings against Loew and began to exert control over his own funds and assets. [T 217-8] With Loew

and Caspelich traveling between Pensacola and D'Iberville, Mississippi, Caspelich lovingly provided Loew with more reliable transportation than she owned, and put her name on his car title. Caspelich continued to drive, but Loew objected to his aggressive driving style, and thus, Loew frequently drove. Caspelich removed his sister's name as the "Pay on Death" beneficiary on his Certificate of Deposit, and transferred the money to a joint account he shared with Loew. [E 24, LRE 32]

4. Caspelich wanted to change his previous will which Appellant Doris Frazier's attorney had prepared, Frazier having driven him to her attorney's office. His previous will left all of his assets to Frazier. Caspelich consulted with Fred Lusk, a Biloxi attorney recommended by one of Caspelich's longtime friends, Mike Toncrey. Lusk asked Caspelich to supply him with a doctor's statement establishing, without doubt, that Caspelich was mentally competent and was acting knowingly, that he understood the effect of his will change. Ironically, Caspelich asked his sister Doris Frazier for the name of a doctor she respected, and she gave her brother the name of her own physician, Dr. Paul Pavlov. Caspelich made an appointment with Dr. Pavlov and at the end of the consultation, Dr. Pavlov wrote his opinion attesting to Caspelich's mental capacity on a prescription pad [R.19; E2; LER 29-30]. Caspelich then took Dr. Pavlov's opinion to Lusk and, in the presence of a friend who urged Caspelich not to change his will, Mr. Lusk prepared the will that was validly executed by Caspelich. The will prepared by Lusk is the will in question, the will offered into probate, in which he left everything to Loew [E 1; LRE 29-30]. At the time the will was executed Loew was in Florida unloading some of Caspelich's possessions into her house at Caspelich's direction. She did not know he was making the will.

5. The dispute between Caspelich and Appellant Frazier began in early 2001 when Frazier rushed Caspelich, in Caspelich's vehicle, to the hospital emergency room, so that Caspelich could receive cardiac care. As Caspelich struggled with a serious medical situation, Frazier left Caspelich's bedside, returned to the hospital parking lot and using the key to the trunk of Caspelich's car, without his

knowledge or consent, opened his personal briefcase where she knew Caspelich maintained his private records. Frazier was livid when she learned that Caspelich had already transferred assets to Loew. She was still angry in March of 2001 when the insurance invoice for Caspelich's car arrived at her address on Iroquois Street in Biloxi, where she had directed all Caspelich's business mail to be sent after the death of his wife, Inez. Frazier left the envelope on her brother's doorstep in D'Iberville with a handwritten note: "Why didn't you change this, you change[sic] every other f--king thing, brother." [E. 37; LRE 37] It is undisputed that Frazier disowned Caspelich and represented that he wasn't her brother anymore, which she readily admitted at trial. [T 57]

6. Caspelich was an independent and colorful character. Every witness called by the Appellant so testified. Though Loew's name was on the vehicles that Caspelich bought, she only drove them as he consented. She never wrote any checks on Caspelich's personal account; Caspelich signed his own checks. At the request of the bank Loew did go to the bank and signed a signature card after Caspelich listed her as a joint owner of the Certificates of Deposit. Though Caspelich executed a Power of Attorney to Loew it is undisputed that she never used it; Caspelich made all his medical decisions until the day he died. During the three years that Caspelich was estranged from his sister, Frazier, the Appellant, Caspelich independently directed and assisted his attorney, David Wheeler, in successfully managing fairly complex real estate litigation against Inez' children, from her previous marriage. His share of the proceeds from that sale was deposited directly in a joint bank account of Gus Caspelich and Joyce Loew in Pensacola, Florida account. Those assets were never located in Mississippi. The closing attorney, Charles Pringle, testified that although he thought Caspelich was having difficulty getting around, Caspelich signed the documents and understood the nature of the visit to the attorney's office.

CHANCERY COURT PROCEEDINGS

7. Gus Caspelich was living primarily in Florida after he sold his home in Mississippi, but he sought medical treatment in Biloxi for what turned out to be his final illness because his deceased wife, Inez, had been pleased with her care at the facility. Although Caspelich had given Loew a Power of Attorney to dispose of his remains by cremation, the funeral home required a Court Order. Caspelich thought that he had disposed of his assets during his lifetime, but nevertheless he prepared the will that is in dispute in the instant case and executed it on January 21, 2001. Chancellor Margaret Alphonso signed an Order admitting the now contested Will to Probate on February 27, 2004 [R 21-22], whereupon Joyce Loew filed her Oath, Affidavit as to Creditors, Notice to Creditors, and Letters Testamentary were issued the same day.

8. On March 8, 2004, Doris Frazier filed a Petition to Contest the above will seeking the revocation of all *intervivos* gifts to Joyce Loew arguing an automatic presumption of invalidity [R 30] and seeking the removal of Loew as Exeatrix and the appointment of a Temporary Executor to freeze Caspelich's accounts and assets in the State of Florida. [R 31] In the prayer for relief Doris Frazier prayed that Caspelich's prior will which he executed on August 21, 2000, and which left all his assets to Frazier, be probated. On March 9, 2004, Doris Frazier filed a Motion for Preliminary Injunction and Temporary Restraining Order, with a certificate of mailing to attorneys for Joyce Loew dated that same date. [R 35] On March 9, 2004, the chancery court, without notice, entered an *ex parte* order granting Frazier's motion for the temporary restraining order [R. 41-44], and the chancery court, *nunc pro tunc*, amended the order to March 10, 2004. [R. 43-48]

9. On March 19, 2004, the original hearing date for the Preliminary Injunction, the chancellor extended the Temporary Restraining Order and ordered the partial freeze lifted on Fifteen Thousand Dollars (\$15,000.00) which Loew had paid to her new attorneys. The March 19, 2004 order reaffirmed

Loew as Executrix. [R 49-51] Again, the Temporary Restraining Order was extended on March 26, 2004, and the matter was reassigned to Chancellor Sanford R. Steckler because the Appellant, Doris Frazier, had made *ex parte* contact with Chancellor Margaret Alphonso seeking to influence her. [R 52-53]

10. On March 29, 2004, the reassigned chancellor held a hearing on the Motion to Dismiss the Temporary Restraining Order, which Motion was denied. In denying the motion the chancellor did not require that Doris Frazier produce any evidence in support the requested Preliminary Injunction. [R 56] The Order Granting Preliminary Injunction was entered on April 1, 2004, with Findings of Fact of the same date. [R 61-67] Joyce Loew was not present at the March 29, 2004, hearing, and the chancery court relied on the Affidavit of Doris Frazier and the arguments of her counsel. The burden to prove likelihood of success on the merits was listed in the Conclusions of Law by the Court, but the record is clear that no evidence was produced. The chancellor granted the Preliminary Injunction without supporting evidence that Frazier would prevail on the merits, and adopted Doris Frazier's argument of "automatic invalidity of *intervivos* gifts" -- assuming a confidential relationship without first requiring proof of such.

11. On June 3, 2004, Loew timely filed her Answer and Affirmative Defenses to Counter Petition to Probate Decedent's Will [R 82-84] raising several affirmative defenses, including failure to state a claim upon which relief can be granted. These affirmative defenses formed the basis for the Appellee's Motion for Sanctions and the counter appeal on that issue.

12. On October 18 and 19, 2006, the chancery court conducted a hearing on the issues, attended by all parties and their respective counsel. The court heard the testimony of witnesses, considered the evidence as presented and the arguments of counsel [T 1-426]. After the Appellant, Doris Frazier put on her case in chief and after the Appellee moved for an involuntary dismissal, the chancellor recessed

the proceedings and advised counsel that he would “look at the law and rule on the motion before determining whether or not we have to go into another session of this unless you all can get it reset now.” [T 428-439]. Neither party made an attempt to reset the matter.

13. On January 23, 2007, Joyce Loew filed a Motion for Sanctions seeking attorneys’ fees and other relief. [R 105-106; LRE 27-28]] The Court refused to rule on the Appellee’s motion.

14. On January 24, 2007, the chancellor entered his Judgment Granting Involuntary Dismissal, with Findings of Facts. The chancellor ruled that an Involuntary Dismissal under Rule 41(b) M.R.C.P. was warranted and granted the dismissal thus giving rise to this appeal. [R 107-119; LER 12-28]

15. On February 2, 2007, Appellant Frazier filed her Motion to Alter or Amend Judgment (R 116-117), and a hearing was had on said motion on June 18, 2007 [T 430-512]. At this hearing Appellee Loew reurged her previously filed Motion for Sanctions, specifically seeking a ruling on her motion for attorneys’ fees.

16. On August 21, 2007, the chancery court entered its Judgment Denying Motion to Alter or Amend [R 118-123; LER 21-26] denying Frazier’s motion. However, the chancellor mandated that Joyce Loew give a Deed of Trust on her home in Georgia (purchased after the January 24, 2007, Judgment) in favor of the Clerk of Chancery Court for the Second Judicial District of Harrison County, Mississippi, until this appeal has been resolved. In addition, the chancery court allowed Doris Frazier to withdraw the Twenty Five Thousand Dollars (\$25,000.00) bond that had been a condition of the Preliminary Injunction thus leaving Joyce Loew without security for attorneys’ fees when, and if, the Court’s Judgment is affirmed.

SUMMARY OF THE ARGUMENT

17. There is no dispute that Appellant Doris Frazier, Gus Caspelich’s sister, was in a confidential relationship with her brother after his wife Inez died. [Brief of Appellant, 30] Doris Frazier argues that her confidential relationship with Caspelich is irrelevant to the instant Will that is the subject of this

appeal. Frazier disowned Caspelich three (3) years prior to his death and never saw him or spoke to him again, but she never disowned his assets. The evidence was clear, as the chancellor found in his Judgment, in January of 2000 Caspelich was dependent on his sister Frazier, who was in control of her brother's medicines and finances when he was terribly depressed after the death of his wife.

18. Doris Frazier argues that her confidential relationship, her abandonment of the relationship and her brother's termination of the confidential nature of the relationship are irrelevant and that the termination of the relationship was caused by Caspelich entering into a confidential relationship with Appellee Joyce Loew. The chancellor did not find that Loew ever dominated or tried to dominate Caspelich and could not in equity, make such a finding as no such evidence was presented to the court. Appellant Frazier put on an abundance of evidence that she did and continued to dominate Caspelich, to the point of disowning him when he acted independently. It would be the height of inequity for the chancery court, a court of equity, to nullify the stated intentions of a competent person, dominant in the relationship as Caspelich was with Loew, and for the court to require assets disposed of by *intervivos* gift and by a subsequent valid will be disbursed to another person who had no relationship at all for the final three (3) years of the deceased's life.

19. The issue on cross appeal before this Court is whether the litigation by Doris Frazier is frivolous - even malicious - and whether the Chancellor, given his final ruling and findings of fact, improvidently refused to consider awarding Joyce Loew attorneys' fees, relinquishing any security therefore, while requiring the Deed of Trust to the Clerk of Chancery Court on Joyce Loew's home in Georgia.

ARGUMENT

Standard of Review

20. As the Mississippi Supreme Court reasoned in *McNeil v. Hester* this Court considers decisions of chancellors under a limited standard of review. (753 So. 2d 1057, 1063 (¶21) (Miss. 2000)) The

chancellor in the case now before this Court entered a well reasoned, nine (9) page Judgment Granting Involuntary Dismissal [R 107-115] and included in his judgment specific findings of facts which provided the basis for his conclusions on the law. "The 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 (¶21) (Miss. Ct. App. 2002) (quoting Fisher v. Fisher, 771 So. 2d 364, 367 (¶8) (Miss. 2000)). In addition to 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), and the chancellor's findings will not be disturbed unless this Court finds that they were made in manifest error or clearly erroneous. Richardson v. Cornes, 903 So. 2d 51, 56 (¶18) (Miss. 2005); Sanderson v. Sanderson, 824 So.2d 623, 625(¶ 8) (Miss.2002). As the Court reasoned in Volmer, "where the record contains substantial credible evidence to support the chancellor's findings, we will defer to them." (832 So. 2d at 622 (¶21). In other words, [t]his Court will not disturb the findings of a chancellor when supported by substantial credible evidence unless the chancellor abused his or her discretion was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Sanderson, at 625-26(¶ 8). Errors of law are reviewed *de novo*. Cooper v. Crabb, 587 So. 2d 236, 239 (Miss. 1991) The Appellant failed to address the standard of review under which she seeks review, choosing instead to reargue her case in a shotgun manner hoping that something sticks.

I. ISSUE: DORIS FRAZIER'S APPEAL DOES NOT ADDRESS THE LACK OF EVIDENCE OF A CONFIDENTIAL REALTIONSHIP WHICH WOULD GIVE RISE TO THE PRESUMPTION FOR WHICH SHE ARGUES, WHICH THE CHANCELLOR IN HIS WELL REASONED OPINION FOUND DID NOT EXIST IN THIS CASE

21. As has been the law in this state for years and as the Court of Appeals reiterated in In the Matter of the Estate of Pope, 2008 MS - LW080521176; "[t]he party asserting the existence of a confidential relationship bears the burden of proving it by clear and convincing evidence." Mullins v. Ratcliff, 515

So. 2d 1183, 1191-92 (Miss. 1987). The Appellant's brief does not address the lack of evidence of a confidential relationship existing between the deceased, Gus Caspelich, and the Appellee, Joyce Loew, which would give rise to the presumption for which she argues, which the chancellor in his well reasoned opinion and findings of facts determined did not exist in this case.

22. The facts developed at the hearing on this matter clearly established that the testator, Gus Caspelich, was the dominant member of the relationship he enjoyed with Appellee Loew, the beneficiary to his will which is the subject of this appeal. He made his own decisions including the decision to have the Will that is before this Court made. Appellant Frazier swore that "common sense" told her there was no sexual relationship between Caspelich and Loew; he was an old man. [T 325-326] She testified that, to her knowledge, Caspelich never had any mental condition and she never saw Loew make Caspelich do anything he didn't want to do. [T 328] Frazier warned Loew to be careful of Caspelich because he had a "bad temper." [T 328] The clear inference could only be that Frazier expected her brother to dominate Loew, which the lower court found to be the case, consistent with the testimony of Appellant's own witnesses.

23. The only evidence of a confidential relationship was the relationship that Appellant Fraizer once knew with her brother, Gus Caspelich. After the death of his wife, Inez, Caspelich was depressed and relied on Frazier. Appellant Frazier testified that she "hired" the attorney, David Wheeler, to prepare a will for Caspelich in August of 2000. The testimony showed that Wheeler had never done work for Caspelich [T 320] before Frazier drove Caspelich to the Wheeler's office and she was *physically present* when Caspelich published his will. [T 321] Frazier swore that Caspelich "gave" her the original will either going out the door or after they got to the sidewalk, and that she signed one of Caspelich's checks for One Hundred Dollars (\$100.00) to pay Mr. Wheeler for his services. When confronted with a document from Bancorp South containing photocopies of the cleared checks on Gus Caspelich's account

and when directed to check number 171 [E 27; LER 36], she admitted that the check was in her own hand. When asked about the memo line on check 171 which indicates reimbursement to herself 500.00 lawyer 229.00 insurance on car” Frazier insisted that the Five Hundred Dollars (\$500.00) was for house insurance and not for attorney services.

24. Frazier’s testimony at the hearing contained inconsistencies. Frazier insisted that “Gus was fine until he met Loew. That’s when he started going downhill” [T 322] but when asked whether there was any change in Caspelich between the time of August 21 of 2000 and when he executed a will in favor of Joyce Loew, Frazier responded “I don’t remember.” [T 323] When Frazier was asked if she knew any of the circumstances surrounding his [Caspelich’s] execution surrounding the execution of the 2001 will Frazier responded: “No.” [T 324] Then she recalled that Mike Toncrey, Caspelich’s longtime friend, had been present.

II. ISSUE: WHETHER THE CHANCELLOR ERRED IN FINDING THAT THE APPELLEE HAD NO UNDUE INFLUENCE OVER CASPELICH

25. On the separate issue of whether the Appellee had any undue influence over Caspelich which caused him to execute the January 2001 Will that left everything to Appellee Loew, the chancery court found that there was no evidence offered to show that Loew participated in the making of that document. It is well established law in this state that “[a] presumption of undue influence arises ‘where a confidential relation exists between a testator and a beneficiary under his will, and the beneficiary has been actively concerned in some way with the preparation or execution of it . . .’” (emphasis added) See *In the Matter of the Estate of Pope*, 2008 MS - lw080521176 citing *Croft v. Alder*, 237 Miss. 713, 722-23, 115 So. 2d 683, 686 (1959); see also, *Smith v. Averill*, 722 So. 2d 606, 612 (¶18) (Miss. 1998)

26. Undue influence is a question of fact. *Watkins v. Watkins*, 142 Miss. 210, 229, 106 So. 753, 755 (1926). As the chancellor pointed out in his well-reasoned nine (9) page opinion, there were two issues in the instant case — each issue with a separate and distinct rule of law. A confidential relationship

exists when there is a dependency by a weaker individual on another. At page 6 of his opinion, the Chancellor quoted Madden v. Rhodes, 626 So. 2d 608, 609 (Miss. 1993):

Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. Hendricks v. James, 421 So. 2d 1031, 1041 (Miss. 1982) (emphasis added)

The dependency factor was emphasized again when we stated, '[I]n determining whether or not a fiduciary or confidential relationship existed between two persons, we have looked to see if one depends upon another.' In re Will and Estate of Varvaris, 477 So.2d 273, 278 (Miss. 1985)

[R 112; LER 17]

The Court found that Doris Frazier 'failed to carry her burden' of proving a confidential relationship between Gus Caspelich and Joyce Loew at the time he transferred assets to Loew; no proof was presented that Caspelich depended on Loew for medical or financial decisions or placed any special trust in her. The Court agreed with every witness who testified that Caspelich was strong-willed and independent and the Court found that Caspelich acted independently in doing as he wished in making transfers to Loew. [R 113; LER 18] Doris Frazier's appeal does not address the issue of the evidence that was lacking, but she would argue to the Court that the mere recital of the factors enumerated in Madden v. Rhodes creates an "automatic presumption" even if there was no evidence that Caspelich depended on Loew.

27. On the separate issue of the Caspelich's Will, the Court found no evidence presented to show Joyce Loew participated in the making of that document and was not aware that it was being executed. She was not in the State of Mississippi, Caspelich was advised by an attorney of his choosing, and he acted entirely independently. The test of "undue influence" of a will is different from *intervivos* transfers — participation in the execution of the will is required.

First, we consider whether there was substantial credible evidence that the Parkers acted in good faith. To determine this element, we must examine five factors: (1) who sought the preparation of the deed, (2) where and in whose presence was the deed executed, (3) what was the fee that was paid to execute the deed, (4) who paid the fee, and (5) was the deed executed openly or secretly. Rogers v. Pleasant, 729 So.2d 192, 194 (¶¶ 8-11) (Miss.1998).

The Appellant Doris Frazier would seek to reverse long standing law and allow the mere recital of factors enumerated in Madden v. Rhodes -with nothing more- to create an "automatic presumption" of invalidity of wills, even when her case in chief showed independent legal advice and admitted testamentary capacity.

28. The evidence adduced at the hearing clearly established that Joyce Loew was not in Mississippi at the time the January 24, 2001, will was executed and that Caspelich used the services of an attorney of his choosing to prepare the will and that he acted independently. Cospelich's attorney that drew up the 2001 will, Fred Lusk, specifically asked for and was provided a statement from a medical provider that Caspelich was of sound mind before he allowed Caspelich to execute the will. That documentation was provided to Lusk on a sheet from a prescription pad written and signed by Dr. Paul Pavlov, attesting to Caspelich's mental capacity [R 19; E 2; LER 31]

29. James M. "Mike" Toncrey was called as a witness by the Appellant and testified that he recommend that Caspelich use his attorney, Fred Lusk. [T 370] He also testified that he went with Caspelich to Fred Lusk's office and tried to talk Caspelich into not changing his previous will. Toncrey also testified that the Appellee, Joyce Loew was definitely not present in Mr. Lusk's office and had no participation in the preparation of Caspelich's will. [T 345-374]

30. The undisputed evidence is that Joyce Loew was not present when Caspelich executed the contested January 2001 Will and that Caspelich acted independently, obtaining his own attorney, ignoring the advice of his close friend and after having consulted with a physician, at the insistence of his attorney, Fred Lusk, who found him mentally sound and capable.

31. At trial, the proponents of a will carry the burden of proof, which was met in this case by the offering and receipt into evidence of the will and the record of its probate, and thus a prima facie case was made by the proponent Appellee solely by this proof. *Harris v. Sellers*, 446 So. 2d 1012, 1014 (Miss. 1984) (overruled in part on other grounds) The burden of incapacity shifts to the contestants who must overcome the prima facie case. *In re Estate of Edwards*, 520 So 2d 1370, 1373 (Miss. 1988). In the case now before this Court no evidence of incapacity was offered by the Appellant, more importantly, the Appellant stipulated that no claim of incapacity was being argued.

32. In neither will was there any property left to natural heirs, the sons of Gus Caspelich. The August of 2000 Will prepared by David Wheeler, in favor of Appellant Doris Frazier was clearly the product of "undue influence" because Frazier actively participated in the making of the will. The will in question, the Will of January 24, 2001, in favor of Joyce Loew, was executed at a time and place when Appellee Joyce Loew was not present and had no participation. Doris Frazier's theory is that, once the valid will of Caspelich to Loew is set aside, then the invalid will in favor of Frazier would be probated and Frazier would receive not only the assets of the estate, but those intervivos gifts that were transferred three years before Caspelich's death. It is evident that the chancellor improvidently issued the Temporary Restraining Order, the Preliminary Injunction, and the post Judgment Order that froze, and continues to freeze, assets transferred to Loew three years prior to Caspelich's death.

III. ISSUE: WHETHER THE CHANCELLOR ERRED IN FAILING TO AWARD ATTORNEY'S FEES TO JOYCE LOEW

32. On January 23, 2007, Joyce Loew filed a Motion for Sanctions and set the matter for hearing. The lower court has consistently refused to rule on the Motion and, on Appeal the Appellee asks this Court to award her the requested attorneys' fees.

33. Mississippi Code Annotated §11-55-5(1) (Supp. 2001), Mississippi Rule of Civil Procedure 11(b), and common law provides that attorney's fees may be awarded where a party's conduct would justify an award of punitive damages, even when such damages are not actually awarded. MCA §11-55-5(1) permits an award of attorney's fees in cases where the "... court, upon the motion of any party or on its own motion, finds that an attorney or party brought an action, or asserted any claim or defense, that is without substantial justification, or that the action, or any claim or defense asserted, was interposed for delay or harassment, or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct including, but not limited to, abuse of discovery procedures available under the Mississippi Rules of Civil Procedure.." Section 11-55-3(a) of the Mississippi Code Annotated provides "[w]ithout substantial justification" is defined as any claim that is "frivolous, groundless in fact or in law, or vexatious, as determined by the court.". The Mississippi Supreme Court opined in *In Re Spencer*, 2008 MS - lw080620181, " 'frivolous' as used in this section takes the same definition as it does under Rule 11: a claim or defense made 'without hope of success.' Citing *Smith v. Malouf*, 597 So. 2d 1299, 1303-04 (Miss. 1992); *Leaf River Forest Prods. v. Deakle*, 661 So. 2d 188, 196 (Miss. 1995)

34. Additionally, the Mississippi Rule of Civil Procedure, Rule 11(b) authorizes a court to award of attorney's fees when a "party files a motion or pleading which, in the opinion of the court, is frivolous or filed for the purpose of harassment or delay."

35. To have been successful in her Petition the Appellant, Doris Frazier had to prove both a confidential relationship between Joyce Loew and Gus Caspelich as well as undue influence. The Appellant stipulated that she was making no claim of incapacity on the part of the testator, Gus Caspelich, and her testimony described her brother as a "womanizer" confirming his relationship with

Appellee Joyce Loew was not suspect but in character. The chancery court held that Doris Frazier offered no evidence of a confidential relationship between Joyce Loew and Gus Caspelich at the relevant time, and the Appellant's own testimony clearly established that Gus Caspelich never depended on Joyce Loew.

IV. ISSUE: THE APPELLANT'S PROFFERED EVIDENCE ARGUMENT

36. The undersigned counsel is unable to address Doris Frazier's fourth issue in the Appellant's Brief regarding the Court's acceptance of proffered testimony from a witness allegedly not disclosed in discovery. There is nothing in the Appellant's Brief as to the nature of the testimony or any weight that the chancellor gave it. The admission of proffers is at the discretion of the chancellor and no case authority was cited to demonstrate error.

CONCLUSION

37. In conclusion, there was overwhelming evidence to support the view that the Appellant, Doris Frazier, exercised undue influence over her brother, Gus Caspelich, even though she ultimately failed. One must recall that she contrived to have her own name placed on her brother's assets, knowing full well that his two estranged sons were his rightful heirs. One must recall her pilfering through the briefcase Caspelich kept in his car trunk, while he faced mortal issues in the emergency room. One must recall the rather harsh note she wrote to her "dear" brother, upbraiding him for crossing her.

38. Far from being loving siblings, Caspelich and Frazier were more like scorpions in a bottle, both were strong willed individuals whose wills clashed again and again, until Caspelich finally banished her from his affections, just as he had his own children and she renounced him for the three years prior to this death. However regrettable the estrangement of siblings, Caspelich's clash with Frazier is strong evidence that he continued until his demise to be a self-directed individual fully capable of exercising his own free will, and most unwilling to submit to anyone's overbearing influence, thus supporting the chancellor's findings.

39. There was no evidence whatsoever to support the view that Appellee Joyce Loew exercised undue influence over Caspelich. In choosing a companion for his last years, Caspelich made no frivolous choice, but selected a woman that he considered sensible and trustworthy and just as much in need of love and companionship and support as himself. Caspelich did apparently form a strong emotional bond with Loew and was extremely jealous of her affections as confirmed by the testimony of Appellant's own witnesses. If anything, Loew became dependent on Caspelich, and it was partly in recognition of this fact that he tried, as best he could, to secure her financially.

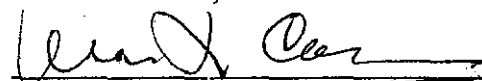
Caspelich certainly possessed free will in the usual understanding of that term and was no one's fool and no one's puppet, as demonstrated by Frazier's failed effort to be the martinet. Ultimately, Caspelich's choice was his own. Only at his weakest, after the death of his wife Iris, was Caspelich ever dependant on another, his sister, Doris Frazier, the Appellant herein. After his period of mourning and loss and upon meeting and befriending Joyce Loew did Caspelich grow strong and independent of Frazier. In the end, the emotionally strong and secure Caspelich refused to be influenced even slightly by others, much less unduly influenced.

The findings by the chancery court judge in his well-reasoned Judgment of Involuntary Dismissal are correct; are supported by not only substantial, but overwhelming evidence; were not manifestly wrong or clearly erroneous; no erroneous legal standard was applied; and, the lower court did not abuse his discretion, thus the chancellor's grant of the Appellee's Motion for Involuntary Dismissal of Appellant's Petition should be affirmed by this Honorable Court.

RESPECTFULLY SUBMITTED, this the 17th day of July, 2008.

JOYCE LOEW, APPELLEE

By:



MARTHA CARSON, MSB
Lead Counsel for Appellee

AMENDED CERTIFICATE OF SERVICE

I, MARTHA G. CARSON, do hereby certify that I have had hand delivered this day a true and correct copy of the above and foregoing Brief of Appellee to Wayne Hengen, attorney for the Appellant, at his usual address of **979 Howard Avenue, Biloxi, MS 39530**. Due to scribner's error the true and correct copy mailed to Wayne Hengen, Attorney for the Appellant, on July 17, 2008, was mailed to an incorrect street address thus making this hand delivery necessary.

Further, I do hereby certify that I have this day mailed, United States mail, first class postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to the trial judge at his usual mailing address as listed below:

Chancery Court Judge Sanford R. Steckler
Harrison County Chancery Court
Post Office Box 659
Gulfport, MS 39502

So certified this the 21st day of July, 2008.


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