

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2007-CA-01633

DORIS FRAZIER

APPELLANT

VERSUS

JOYCE C. LOEW

APPELLEE

APPEAL

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

REPLY BRIEF OF APPELLANT

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ARGUMENT

Reply to Joyce's Statement of the Facts

At Paragraph 1 on Page 1 of BRIEF OF APPELLEE, Joyce states, "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," The fact is that the entire premise that Doris had a confidential relationship with Caspelich is disputed. There is no proof of such confidential relationship, but more importantly, the issue of a confidential relationship between Doris and Gus is irrelevant, immaterial, and not an issue properly before the trial court or this Court. Please refer to BRIEF OF APPELLANT, Page 30.

At Paragraph 2 on Page 1 of BRIEF OF APPELLEE, Joyce states, "Caspelich was an independent individual, . . ." This statement leaves out what everyone but Joyce testified to and that was that he was not independent when it came to Joyce. (T:217, 243, 251-255, 262, 266, 274, 369, 373-374).

At Paragraph 3 on Page 1 of BRIEF OF APPELLEE, Joyce states, "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]." There is no evidence supporting this statement and the reference to Pages 217-218 of the Transcript does not deal with this statement. Accordingly, same should be stricken.

At Paragraph 4 on Page 2 of BRIEF OF APPELLEE, Joyce states, "Lusk asked Caspelich to supply him with a doctor's statement establishing, without doubt, that Caspelich was mentally competent and was acting knowledgably, that he understood the effect of his will change." This is simply not true and will mislead this Court. The question was specifically asked of Fred Lusk

whether or not he sent Gus out to get a doctor's statement, and Fred's answer was, "No". In fact, Fred Lusk stated that it was real unusual in his thirty-three years of practice that someone would come in to sign a will and bring a statement from a doctor. (T:404, 414). Accordingly, this portion of BRIEF OF APPELLEE should also be stricken. Further, the note is suspicious. It was actually hand-written on a prescription slip. Dr. Pavlov was never called to testify, and the exhibit was entered into evidence over the objection of the undersigned. Its admission into evidence should be overruled. (E:38/P2; T:19-27, 331-332).

At Paragraph 5 on Page 2 of BRIEF OF APPELLEE, Joyce states, "The dispute between Caspelich and Appellant Frazier began in early 2001 when Frazier rushed Caspelich, in Caspelich's vehicle, to the hospital emergency room," "She was still angry in March, 2001," Contrary to these representations, the issue between Gus and his sister, Doris, began in March, 2001, two months after Gus had transferred most of his assets to Joyce and made his will leaving everything to her. (T:303-307).

At Paragraph 6 on Page 3 of BRIEF OF APPELLEE, Joyce states, "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." Again, this is simply not true and will mislead the Court. There was a case involving Gus' home and whether or not he could only stay at the home until he died and whether or not it would revert back to his wife's children. (T:281, 293). There was a will, but one of the children of Gus' wife admitted that it was no good. The witnesses whose names appeared on the will did not know Inez or Gus Caspelich. (T:294). The case was not litigated, but settled. (T:294-295).

There is no evidence as to when the case was settled, and there is no evidence regarding Gus' participation in the matter. He ultimately got the house which was Gus' one-fourth interest in his wife's estate with her three children being granted the other three-fourths by virtue of the settlement. (T:295). Sometime during 2003, Gus made a decision to sell his home and made a deal with a buyer and closed the sale receiving \$160,000.00 on October 14, 2003. (T:167, E:28 and 29). The closing took place in a law office in Biloxi and not in Pensacola, Florida. The check was delivered to Gus at the closing at that office in Biloxi. (T:166-167).

Reply to Joyce's Statement of Chancery Court Proceedings

At Paragraph 9 on Page 5 of BRIEF OF APPELLEE, Joyce states, “. . . [T]he matter was reassigned to Chancellor Sanford R. Steckler because the Appellant, Doris Frazier, had made *ex parte* contact with Chancellor Margaret Alphonso [sic] seeking to influence her. [R:52-53].” Again, Joyce has misstated and misrepresented the record. The order referred to is ORDER EXTENDING TEMPORARY RESTRAINING ORDER AND REASSIGNING TO NEW JUDGE. The ORDER states, “That the Court received an *ex parte* telephone call from one of the parties.” There is nothing in that ORDER or in any other part of the record that states who the party was and nothing stating that any contact was made by a party seeking to influence the Court. (CP:52-53). This highly improper statement should be stricken.

At Paragraph 11 on Page 5 of BRIEF OF APPELLEE, Joyce makes reference to a “counter” appeal, but upon a review of the trial court record and upon inquiry with the Clerk of the Supreme Court, no notice of appeal nor any notice of cross-appeal filed by Joyce was found. There is but one procedure for perfecting an appeal and that is pursuant to the Rules of Appellate Procedure. An appeal permitted by law as of right from a trial court to the Supreme Court shall

be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4. Rule 4 states that with regard to appeals and cross-appeals, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within thirty days after the date of the entry of the judgment or order appealed from. The undersigned filed NOTICE OF APPEAL for Doris Frazier on September 18, 2007, appealing from the JUDGMENT GRANTING INVOLUNTARY DISMISSAL entered on January 4, 2007, and the JUDGMENT DENYING MOTION TO ALTER OR AMEND entered on August 21, 2007. There is no notice of appeal or cross-appeal by Joyce in the record because none was filed.

At Paragraph 16 on Page 6 of BRIEF OF APPELLEE, Joyce makes reference to certain matters regarding the trial court's ruling regarding a deed of trust and the bond posted by Doris in the trial court, but these things are not before the Supreme Court, are not a part of the record on appeal and can not be raised by Joyce in that she filed no notice of appeal or cross-appeal.

Reply to Joyce's Summary of the Argument

At Paragraph 17 on Page 6 of BRIEF OF APPELLEE, Joyce states, "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]". Of course that is disputed, but more importantly, it is not an issue before the Court and is irrelevant and immaterial. We have addressed that in Brief of Appellant, Page 30, as pointed out by Joyce.

Also in Paragraph 17 on Page 7 of BRIEF OF APPELLEE, Joyce mistakenly states, "... [I]n 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." In addition to the disputed facts regarding Doris' control of Gus' medicines and finances, the

January, 2000, date is in error. Gus' wife, Inez, died on June 11, 2000, not in January, 2000. (T:47). In January, 2000, Gus was dependent on his wife, Inez, and friends. (T:218-220).

At Paragraph 18 on Page 7 of BRIEF OF APPELLEE, Joyce states, "Doris Frazier argues that her confidential relationship, her abandonment of the relationship and her brother's termination of the confidential nature of the confidential relationship are irrelevant and that the termination of the relationship was caused by Caspelich entering into a confidential relationship with Appellee, Joyce Loew." There is no evidence supporting the first part of that statement. Joyce cites none. It is not relevant or material. However, it is true that Gus did enter into a confidential relationship with Joyce the month after Gus' wife died on June 11, 2000. (T:47-48, 52-53, 59, 61-62, 97-101).

Also in Paragraph 18 on Page 7 of BRIEF OF APPELLEE, Joyce states, "Appellant Frazier put on an abundance of evidence that she did and continued to dominate Caspelich," There is no such evidence. Joyce cites none. It is again pointed out that same is irrelevant and immaterial and not properly before the Court. BRIEF OF APPELLANT, Page 30.

At Paragraph 19 on Page 7 of BRIEF OF APPELLEE, Joyce again refers to her cross-appeal, but as stated above, there is no cross-appeal and any argument that is made under the premise that there is a cross-appeal by Joyce should be stricken.

Reply to Joyce's Standard of Review

At Paragraph 20 on Page 7-8 of BRIEF OF APPELLEE, Joyce sets out numerous cases and statements of law relevant to this Court's standard of review, all of which are correct. Doris, however, takes exception to the final sentence. It is improper and should be stricken.

Reply to Joyce's Issues and Arguments

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.

The above stated issue is unclear and confusing, and Paragraphs 21 through 24 on Pages 8-10 of BRIEF OF APPELLEE do not make it any less unclear and confusing. Part of Doris' appeal addresses the question of whether or not a confidential relationship existed between Joyce and Gus. BRIEF OF APPELLANT, Pages 14-21. Joyce does not respond to Doris' argument on that issue. It is not for Doris to set out any lack of evidence of a confidential relationship. That is for Joyce, and if it was Joyce's intent here, she failed. Besides, there is no lack of evidence.

There are seven (7) separate factors that are to be addressed in determining whether or not a confidential relationship exists. They are set out in BRIEF OF APPELLANT, Page 15. Doris applied the factors to the facts of the case with specific references to the record, one by one, demonstrating that a confidential relationship did indeed exist between Joyce and Gus. None of this has been rebutted or even challenged by Joyce. No cases were cited by Joyce. Those cited by Doris support her position that a confidential relationship did in fact exist between Joyce and Gus.

Joyce's position cannot be made by unreferenced and unsupported statements such as the one in Paragraph 22 wherein she states, ". . . Gus Caspelich, was the dominant member of the relationship he enjoyed with Appellee Loew," (See T:369 to the contrary.) The factors must be given due regard as this Court ruled in Estate of Grantham, 609 So.2d 1220, 1224 (Miss. 1992). The factors are for a reason and addressing them is the only way that a confidential relationship can be shown to exist. Doris addressed them. Joyce did not. Joyce says in Paragraph 22 on Page 9 of BRIEF OF APPELLEE that Doris testified that "she never saw Loew

make Caspelich do anything he didn't want to do. [T:238]" That was in fact Doris' testimony, but Doris was not always in the presence of Joyce and Gus. That she never actually saw Joyce make him do anything that he did not want to do does not mean that did not take place. That is one of the reasons the factors exist. Besides, this statement is not one that can be plugged into any one of the factors used to determine whether or not a confidential relationship exists. It just is not probative.

At Paragraph 23 on Pages 9-10 of BRIEF OF APPELLEE, Joyce tries to establish that there was a confidential relationship between Doris and her brother, Gus, but again, such is irrelevant, immaterial and not an issue properly before the Court. See BRIEF OF APPELLANT, Page 30. More importantly, Joyce does not even address the factors to support her claim. Since it is irrelevant, immaterial, and not an issue properly before the Court, it should be stricken.

Finally, under this issue, it is important to recognize that Doris is the only witness addressed. In BRIEF OF APPELLANT, Doris, in addition to setting out the factors, set out the relevant testimony of all of the witnesses, including the testimony of Joyce herself who made certain admissions, and applied the law of the factors to those facts to arrive at a conclusion that a confidential relationship did exist. BRIEF OF APPELLANT, Pages 17-22. It is set out in detail with specific references to the record showing that the trial court abused its discretion, was manifestly wrong, clearly erroneous, and that it applied the legal standard erroneously. Madden v. Rhodes, 626 So.2d 608, 616 (Miss. 1993). Additionally, the trial court's ruling was against the overwhelming weight of the evidence as set out in detail in BRIEF OF APPELLANT, Pages 17-23. Hendrix v. James, 421 So.2d 1031 (Miss. 1982).

Issue: Whether the Chancellor erred in finding that the Appellee had no undue influence over Caspelich.

That Joyce chose to set out this statement as an issue illustrates that she fails to understand the law on the subject. In both the JUDGMENT GRANTING INVOLUNTARY DISMISSAL and the JUDGMENT DENYING MOTION TO ALTER OR AMEND, the Trial Court ruled that there was no confidential relationship between Joyce and Gus. (CP:107-115, 118-123). The issue of undue influence is not addressed at all until there is a determination of a confidential relationship. The Madden case sets out the law with regard to both gifts testamentary and gifts inter vivos after the confidential relationship has been established, to-wit:

“Thus, the Rules of law are different regarding gifts testamentary and gifts *inter vivos* where a confidential relationship exists between the testator/grantor and the beneficiary/grantee. The prior holdings of this Court indicate a presumption of undue influence only arises in the context of gift by will when there has been some abuse of the confidential relationship, such as some involvement in the preparation or execution of the will. On the other hand, with a gift *inter vivos*, there is an automatic presumption of undue influence even without abuse of the confidential relationship. Such gifts are presumptively invalid.” Madden at 618.

In both instances, one does not arrive at the issue of undue influence until there is established a confidential relationship. In the case sub judice, the Court held that there was no confidential relationship and granted an involuntary dismissal terminating the case. Doris does not need to reiterate here all that is stated in her argument setting out the evidence of a confidential relationship between Joyce and Gus. Reference should be sufficient. BRIEF OF APPELLANT, Pages 14-23.

Addressing again the matter of the abuse of the confidential relationship that Joyce had with Gus, it is noted that the above quote from the Madden case shows that one example of the abuse of the confidential relationship is proof of some involvement in the preparation or execution of the will by the beneficiary. Involvement is merely an example of the abuse that can

be committed by the beneficiary. As set out in the Croft case, the general rule is that undue influence is presumed and the burden shifts to the beneficiary where there exists suspicious circumstances in a confidential relationship or as is also stated in the same case, where the relationship is coupled with some suspicious circumstances. Croft v. Alder, 115 So.2d 683, 686 (Miss. 1959), citing 94 CJS Wills §239, Page 1091-1096, and citing 59 Am.Jur., Wills Secs. 389, 390. See also BRIEF OF APPELLANT, Pages 24-29, setting out the argument on the issue of whether or not Joyce abused the confidential relationship that she had with Gus. So, contrary to Joyce's statement in Paragraph 25 on Page 10 of BRIEF OF APPELLEE that there must be found evidence that Joyce participated in the making of the will, such is not the law. The law is that if the parties are in a confidential relationship and there exists suspicious circumstances or the relationship is coupled with suspicious circumstances, then in that event, there is abuse. It is submitted that Doris not only showed that Joyce and Gus were in a confidential relationship, she also showed that Joyce abused that confidential relationship. BRIEF OF APPELLANT, Pages 14-23, 24-29. Therefore, the statement by Joyce at Paragraph 27 on Page 11 that the test of "undue influence" in a will requires participation in the execution of the will is not an accurate statement of Mississippi law.

At Paragraph 26 on Page 11 of BRIEF OF APPELLEE, Joyce states the following: "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 the Madden case creates an 'automatic presumption' even if there was no evidence that Caspelich depended on Loew." Again, it is not Doris' job to point out any lack of evidence. That is the job of Joyce, and she has failed to point to any evidence that was lacking. She has failed to set out the factors and address them and key her argument by reference to the record as required. Rule 28(e), Rules of Appellant Procedure. She has failed to even state a proper conclusion as to why she finds that

there was no confidential relationship. To the contrary, Doris did address each factor and set out portions of the record supporting her position that each factor showed that there was a confidential relationship between Joyce and Gus. There is no lack of evidence. The evidence is overwhelming, and the JUDGMENT of the Trial Court is against this overwhelming weight of evidence. Further, Doris did not merely recite the factors, she recited the evidence relevant and material to each factor with specific keys by reference to the record as required showing that there was no doubt a confidential relationship between Joyce and Gus beginning in July or August, 2000, some four or five months prior to the transfer of funds to her name in January, 2001. That confidential relationship did not evaporate, but according to the record and application of that record to the law, it existed until the day Gus died. BRIEF OF APPELLANT, Pages 17-22. Even the Court recognizes there was a confidential relationship between Joyce and Gus near the end of his life. JUDGMENT DENYING MOTION TO ALTER OR AMEND (CP:122).

Also in Paragraph 27 as it continues on Page 12 of BRIEF OF APPELLEE, Joyce sets out those factors that deal with the “good faith” prong of the three-prong test that is required of Joyce and seeks to apply it to Doris. Those factors are to be used when a confidential relationship is established, and if the issue is not regarding inter vivos gifts but a will, then after an abuse of that confidential relationship. Those factors are to be met with clear and convincing evidence by Joyce, the beneficiary in the will and the grantee of the inter vivos gifts, to rebut the presumption of undue influence. It would appear that again Joyce misunderstands the law. In the case sub judice, the Court found no confidential relationship, and accordingly, the burden of going forward did not shift to Joyce for rebuttal of the presumption of undue influence by requiring her to prove good faith, full knowledge, and independent consent and action. Madden at 619-621.

In Paragraph 28 on Page 12 of BRIEF OF APPELLEE, Joyce states, as follows: “Caspelich’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.” This is simply not true. The fact is that for some peculiar reason which may in fact be evidence of Joyce’s participation in the execution of the will, Gus presented that statement without being asked by Fred Lusk at all. (T:404, 414-415). Joyce repeats that false statement in Paragraph 20 on Page 12 of BRIEF OF APPELLEE, when she states that Gus consulted with a physician at the insistence of his attorney, Fred Lusk. These statements are simply not true. They will be misleading to the Court, and they should be stricken.

In Paragraph 32 on Page 13 of BRIEF OF APPELLEE, Joyce again attempts to create an issue by stating that the August, 2000, will “was clearly the product of undue influence”. This simply was not an issue before the trial court and could not be addressed by the trial court as set out in BRIEF OF APPELLANT, Page 30. It should be stricken. Joyce uses that position to state the following: “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 inter vivos gifts that were transferred three years before Caspelich’s death.” By so stating, Joyce makes the assumption that a confidential relationship between Joyce and Gus is proven and then she combines the rule of law regarding gifts testamentary and the rule of law regarding gifts inter vivos. While she somewhat correctly states Doris’ position, at least to the limited extent set out, we are not to that point in this case because the trial court found no confidential relationship. Accordingly, again, Joyce argues matters that are irrelevant, immaterial, and not properly before the trial court or this Court. It is also noted that where the inter vivos gifts and/or transfers were made while the parties were in a

confidential relationship, they do not ripen into valid gifts over the passage of time and/or the failure on the part of the grantor to remove the grantee's name. Joyce makes a point of the inter vivos gifts being transferred three years before Gus' death. We submit that at that time, Gus and Joyce were in a confidential relationship. The Court held that they were in a confidential relationship near the end of Gus' life. The law on that issue is as follows:

“A search through the case law of all fifty state court systems, as well as all federal courts, has revealed not one single case in which failure to remove someone's name was held to equal ratification of an account set up because of the beneficiary's undue influence. Mississippi will not now set such an unwise precedent.” Madden at 623-624.

They were invalid gifts then. They are invalid gifts now.

Issue: Whether the Chancellor erred in failing to award attorney's fees to Joyce Loew.

As stated above, this is not an issue properly before this Court and should be stricken. Joyce did not file a notice of appeal or a notice of cross-appeal and has no right to bring this issue before this Court. As stated in the Rules of Appellate Procedure, Rule 3(a), there shall be one procedure for perfecting appeals, and that is set out in the Rules. The Rule states:

“An appeal permitted by law as of right from the trial court to the Supreme Court shall be taken by filing a notice of appeal with the clerk of the trial court within the time allowed by Rule 4.” Rule 3(a), Rules of Appellate Procedure.

Rule 4 of the Rules of Appellate Procedure requires that appeals and cross-appeals be filed with the clerk of the trial court. No appeal or cross-appeal was filed by Joyce, and accordingly, this issue and the argument thereon should be stricken.

Issue: The Appellant's proffered evidence argument.

In Paragraph 36 on Page 15 of BRIEF OF APPELLEE, Joyce states that she is unable to address Doris' Issue 4 which is regarding whether or not the proffered testimony of a non-disclosed occurrence witness should be accepted. Joyce's position is that there was nothing in BRIEF OF APPELLANT as to the nature of the testimony or any weight that the trial court gave to it. While the admission of proffers may be at the discretion of the trial court, case law and Rule 26 of the Mississippi Rules of Civil Procedure provide that a party is under a duty to seasonably supplement their discovery responses, particularly regarding the identity and location of occurrence witness, and where not disclosed, "ordinarily the witness will be precluded from testifying." Maryland Cas. Co. v. City of Jackson, 493 So.2d 955 (Miss. 1986). See also BRIEF OF APPELLANT, Page 31. This Court should rule to exclude the testimony of this non-disclosed witness.

Reply to Joyce's Conclusion

Joyce's BRIEF OF APPELLEE is difficult to follow and confusing in content. Most of the legal authority cited is regarding the standard of review with not much legal authority supporting her argument. There is minimal reference to the record contrary to the requirement of the Rules. Many times, the statements Joyce makes are not true, misleading, completely unsupported by the record, or exactly the opposite of what the record shows. It contains issues and arguments on issues that are irrelevant, immaterial and not properly before this Court. Some of those issues presuppose the filing of a notice of appeal or cross-appeal which Joyce did not do. Joyce continues with her misrepresentations in her Conclusion.

In Paragraph 37 on Page 15 of BRIEF OF APPELLEE, not only does she again argue that Doris exercised undue influence over her brother, Gus, she states, "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." Again, there is no reference to the record that such evidence exists. It is submitted that it does not. If it was properly before the Court, Doris would have been able to put on a defense, but again, such was not an issue before the trial court. Regarding the two estranged sons, Joyce forgets that one son was deceased. The heirs of that son and the other son, himself, each signed a WAIVER OF SERVICE OF PROCESS AND ENTRY OF APPEARANCE together with an AFFIDAVIT joining in the prayer of the PETITION FOR CONTEST OF WILL AND FOR OTHER RELIEF filed by Doris. They each consented that the Court could proceed with the PETITION at any time designated by the Court and enter a judgment thereupon. (E:5, 6, 7, 39).

The other things stated by Joyce are completely irrelevant to the issue of the confidential relationship between Joyce and Gus and the abuse of that relationship. Much emphasis is placed on the relationship between Doris and Gus. It is irrelevant. Representing them to be "more like scorpions in a bottle" is a terrible misrepresentation of the record. Almost every witness testified to quite a different set of facts regarding their relationship. But again, it is irrelevant, immaterial, and not an issue properly before the trial court.

The trial court ruled that there was no confidential relationship. It is Doris position that there was and that the trial court abused its discretion, was manifestly wrong, clearly erroneous, was erroneous in the application of the legal standard, and ruled against the overwhelming weight of the evidence. BRIEF OF APPELLANT, Pages 14-23. It is also Doris' position that Joyce abused the confidential relationship she had with Gus. BRIEF OF APPELLANT, Pages 24-29.

When Joyce states in Paragraph 39 on Page 16 of BRIEF OF APPELLEE, "There was no evidence whatsoever to support the view that Appellee Joyce Loew exercised undue influence over Caspelich," she fails to address the facts and the law set out in BRIEF OF APPELLANT regarding the confidential relationship between Joyce and Gus and the abuse of that confidential relationship by Joyce. The words she chooses instead of dealing with the facts and the law do not undue the proof, and in fact, could be considered to support Doris' position that there was a confidential relationship and an abuse by Joyce of that relationship. Joyce says in Paragraph 39 on Page 16 of BRIEF OF APPELLEE that he selected a woman that he considered trustworthy and one who needed love, companionship and support like he did. She says there was a strong emotional bond. Joyce then states, "only at his weakest, after the death of his wife Iris, was Caspelich ever dependant on another, his sister, Doris Frazier, the Appellant herein." First of all, Gus' wife's name was Inez, not Iris. (T:46). Second, she died on June 11, 2000. (T:47). Third, Gus was dependent on others after Inez died. (T:219-220). Fourth, Inez was still dead in August when Joyce began a relationship with him. (T:47). Last, there is no evidence of any miraculous recovery by Gus between June 11, 2000, when Inez died, and July or August, 2000, when Joyce came into his life. By Joyce's own admission, when they began their relationship, Gus was feeling pretty down and depressed and did not care whether or not he lived. (T:47). So contrary to Joyce's statement that Gus met and befriended Joyce after his period of mourning and loss, she actually admitted in her testimony that when they began talking, only a few weeks after Inez died, he was still in a period of mourning and loss feeling pretty down and depressed and did not care whether he lived or not. (T:47). Gus trusted and depended on Joyce from the beginning.

CONCLUSION

With all of the above taken with the other testimony referenced in BRIEF OF THE APPELLANT addressing each one of the seven factors used to determine whether or not there was a confidential relationship, Doris submits that the trial court did abuse its discretion, was manifestly wrong, clearly erroneous, was erroneous in the application of the legal standard and ruled against the overwhelming weight of the evidence because there was a confidential relationship, and there was an abuse of that confidential relationship by Joyce. That means that there is an automatic presumption of undue influence by Joyce over Gus with regard to all inter vivos gifts and transfers, and it means that there was a presumption of undue influence, although not automatic, by Joyce over Gus in the making of his will. BRIEF OF APPELLANT, Pages 24-29.

Doris reasserts that which is set out in her CONCLUSION on Page 32 of BRIEF OF APPELLANT, and more particularly highlights to the Court the following:

- (1) That the trial court abused its discretion, was manifestly wrong, and was clearly erroneous when it ruled that Gus did not have to be taken care of by others in that such is against the overwhelming weight of the evidence.
- (2) That the trial court was correct that Joyce maintained a close and loving relationship with Gus.
- (3) That the trial court abused its discretion, was manifestly wrong, and was clearly erroneous when it ruled that Joyce did not provide transportation and did not provide medical care to Gus in that such is against the overwhelming weight of the evidence.
- (4) That the trial court abused its discretion, was manifestly wrong, was clearly erroneous, and was erroneous in the application of the legal standard when it ruled that although Joyce and Gus maintained joint accounts with one another, it is of no consequence because Joyce never utilized any of the joint accounts that she shared with Gus.
- (5) That the trial court abused its discretion, was manifestly wrong, and was clearly erroneous when it ruled that Gus was not physically or mentally weak in that such was against the overwhelming weight of the evidence.

- (6) That the trial court abused its discretion, was manifestly wrong, was clearly erroneous, and erroneous in the application of the legal standard when it discounted Gus' advanced age and poor health in that such is against the overwhelming weight of the evidence.
- (7) That the trial court abused its discretion, was manifestly wrong, was clearly erroneous, and erroneous in the application of the legal standard when it ruled that although Gus executed a power of attorney to Joyce, it was of no consequence because Joyce did not utilize the power at any time.

Further, the trial court's ruling was erroneously centered on its belief that there was a confidential relationship between Gus and his sister, Doris. It was also centered on Joyce's testimony. But Joyce was the grantee and the beneficiary. And, contrary to the trial court's finding, her testimony was not consistent and, in fact, was completely inconsistent with the overwhelming weight of the evidence as is set out in BRIEF OF APPELLANT and its specific references to actual testimony elicited at the trial.

This Court stated the following with regard to review on appeal:

"This Court was not called upon to decide 'who should get the money,' but to review the findings of the chancellor, to make sure he employed the right legal standard, see he applied it correctly, and determine if his findings were adequately supported by the record before us." Madden at 625.

There was a confidential relationship between Joyce and Gus just as there was between Madden and Sierra in the Madden case and just as there was between Hendrix and the Jameses in the Hendrix case, all as more specifically set out in BRIEF OF APPELLANT, Pages 14-23. The trial court in Hendrix was reversed because it failed to rule that there was a confidential relationship when Hendrix went to the bank and put the Jameses names on his checking account, safe deposit box, and certificates of deposit. This Court stated that the evidence was overwhelming when it made that ruling. The same is true here for the same reasons, and the trial court here should be reversed too. The legal standard was not applied correctly and the findings were not supported by the record.

This Court also stated the following:

“There is absolutely no requirement the presumption of ownership such an action raises be explained to the depositor; nor that it be explained putting another’s name on their account gives that other person ownership of all the funds at any time – including upon the death of the depositor.

“In such a legal climate, how can it be argued that the presumption of undue influence places a too harsh a burden upon one seeking to claim benefits?

“[W]e must guard against the rare grasping opportunist. If such caution makes it slightly more difficult for some of the former to benefit from their kindnesses, it is small price to pay for the protection of our older adults from the latter.” Madden at 626.

While the above quote deals with circumstances after the finding a confidential relationship and the presumption of undue influence, the content is applicable for the entire process. The rules and the law are in place for a purpose. The purpose is to protect those who are subject to someone taking advantage of them. Whenever one is “in a position to exercise a dominant influence” upon another “through trust”, the law does not hesitate to characterize such relationship as confidential. Madden at 617, citing Hendrix at 1041. Joyce, by virtue of the evidence as it relates to the factors, was no doubt “in a position to exercise a dominant influence”, and she was in that position “through trust”. Joyce and Gus were in a confidential relationship, and this Court should reverse the trial court and could even hold that she is not entitled to the inter vivos gifts and transfers because they are void in that she failed to rebut the presumption of undue influence. This Court should also hold that she abused the confidential relationship, that is, the trust Gus reposed in her, by her actions, and this Court could even hold that she failed to rebut the presumption thereby making the will of 2001 void. This Court should also hold that any issue regarding the existence of a confidential relationship between Doris and Gus be considered beyond the scope of inquiry and not an issue properly before the trial court or this Court, and the Court should strike it. This Court should also strike all matters attempted to be appealed by Joyce because she filed no notice of appeal or notice of cross-appeal. Finally,

this Court should prohibit the chancellor from accepting the proffered testimony of Geneva Gross who was not disclosed as a witness.

CERTIFICATE OF SERVICE

I, WAYNE L. HENGEN, do hereby certify that I have this day mailed a true and correct copy of the above and foregoing REPLY BRIEF OF APPELLANT to the following:

Hon. Sanford R. Steckler
Chancery Court Judge
P.O. Box 659
Gulfport, Mississippi 39502

Hon. Martha G. Carson
P.O. Box 2875
Gulfport, Mississippi 39505

Hon. Walter L. Nixon, Jr.
P.O. Box 409
Biloxi, Mississippi 39533

This the 4th day of August, 2008.


WAYNE L. HENGEN