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

BRIEF OF APPELLANT

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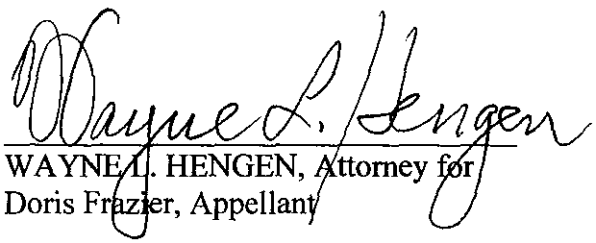
CERTIFICATE OF INTERESTED PERSONS

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
2. Joyce C. Loew



WAYNE L. HENGEN, Attorney for
Doris Frazier, Appellant

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2. Whether or not JOYCE C. LOEW abused the confidential relationship she had with the deceased, GUS SAMUEL CASPELICH.

3. Whether or not the issue regarding the existence of a confidential relationship between DORIS FRAZIER and the deceased, GUS SAMUEL CASPELICH, her brother, is relevant or material.

4. Whether or not a non-disclosed occurrence witness' testimony by way of proffer should be accepted by the Court.

STATEMENT OF THE CASE

Nature, Course, and Disposition of the Case

This is a contest of both inter vivos gifts and a will. On February 27, 2004, JOYCE C. LOEW offered for probate and an ORDER was entered admitting a document entitled Last Will and Testament of GUS SAMUEL CASPELICH. The document was dated January 24, 2001. On March 8, 2004, DORIS FRAZIER, sister of the deceased, filed her PETITION FOR CONTEST OF WILL AND FOR OTHER RELIEF.

DORIS alleged that the document is not the Will of her brother because among other reasons, it was executed under the undue influence of JOYCE C. LOEW, the sole beneficiary. DORIS sought the appointment of a Temporary Administrator which was not granted. She also alleged that certain inter vivos transfers were made benefiting JOYCE. DORIS alleged that JOYCE and GUS were in a confidential relationship giving rise automatically to a presumption of undue influence making the gifts presumptively invalid. No response was filed.

Following various hearings on motions, an ORDER GRANTING PRELIMINARY INJUNCTION was entered on April 1, 2004, which among other provisions, enjoined JOYCE and her attorneys, among others, from dissipating the assets at issue. [This ORDER has been violated several times; the issue was presented to this Court by MOTION REGARDING TRIAL COURT INJUNCTION filed February 26, 2008. This Court denied the MOTION.]

INVENTORIES were filed by both parties as ordered by the Court. Following discovery, depositions, and other pre-trial matters, all interested parties appeared before the Court, and the issues were tried on October 18 and 19, 2006. At the conclusion of DORIS' case, counsel for JOYCE moved for a directed verdict. Arguments were made. The Court took the MOTION under advisement. The trial continued with JOYCE presenting the proffered testimony of a non-

disclosed witness who was objected to, and another witness. The Court then recessed. The Court then entered its JUDGMENT GRANTING INVOLUNTARY DISMISSAL on January 24, 2007. On February 2, 2007, counsel for DORIS filed MOTION TO ALTER OR AMEND JUDGMENT on which JUDGMENT DENYING MOTION TO ALTER OR AMEND was entered on August 21, 2007.

On September 18, 2007, NOTICE OF APPEAL was filed by DORIS.

Statement of the Facts

GUS SAMUEL CASPELICH executed two (2) documents purporting to be his Wills, one on August 21, 2000, and the other on January 24, 2001. (E: 36 and 1). It is the purported Will of 2001 that was admitted to probate and subsequently contested in the case sub judice.

By the prior Will of 2000, GUS left his two (2) estranged sons One Dollar each and everything else to his sister, DORIS. (E: 36). By the purported Will of 2001, he left everything to JOYCE with no mention of his sons or his sister.

GUS died on February 25, 2004. (T: 104). He was at that time 87 years old having been born on December 4, 1916. (E: 25, left column, "D.O.B. 12/14/1916").

JOYCE and GUS began a relationship in August, 2000, following the death of his wife of some 40-45 years in June, 2000. (T: 205). JOYCE was in a longtime relationship with BUDDY HOLDER who died in July, 2000. (T: 47). She had been married three times before. (T: 45-46). At that time, JOYCE was 59, GUS was 84. She said, "Age don't matter". (T: 82). JOYCE resided in Pensacola, Florida. GUS' home was in Biloxi. Between August, 2000, and January, 2001, they dated, visiting back and forth and running up a $200.00 phone bill. (T: 48, 52-53). JOYCE testified that during that time, GUS was feeling pretty down and depressed and did not care whether he lived or not. (T: 47-49). Also during that time, GUS grew to like and trust JOYCE. (T: 59). He bought her roses and gifts and paid her bills as set out in the SECOND AMENDED INVENTORY. (E: 8; T:61-62, 97-101). Even DORIS wrote a check at GUS' direction from his account to send to JOYCE. (T: 212).

GUS had heart problems, a pacemaker, knee problems, fluid build-up in his lungs, diabetes, and eye problems. He took medication for his medical problems. JOYCE accompanied him to the doctor and the hospital during that time. (T: 55-56).

Some four or five months into the relationship, GUS wanted JOYCE to quit her job as hostess and cashier at the Oyster Bar in Pensacola and be with him, and she would not have to do anything. In exchange, he would pay all of her bills. This was in January, 2001. (T: 62, 65).

As JOYCE said, "We was starting a relationship". (T: 65).

On Friday, January 19, 2001, GUS removed his sister, DORIS', name as a "Pay on Death" beneficiary and added JOYCE'S name as a joint owner of his existing savings account which had a balance on that day of $16,571.89 from which a $1,000.00 withdrawal was made. (E: 25 – may be mistakenly shown as E: 26 in the Exhibits; T: 128-130, 137). On the second page of that Exhibit, it can be seen that JOYCE signed her signature, which according to the testimony of VICKY COMPTON, Vice-President of Operations with Bancorp South, was required to be done at that Bank so that the Bank could identify her. (E: 25). JOYCE admitted being present. [JOYCE showed on this document that her birthdate was December 25, 1950, not 1940, her actual birthdate. She denied representing to GUS that she was only 49 years old. (T: 87-88).]

On the following Monday, January 22, 2001, a total of $15,561.00 was withdrawn from this joint savings account leaving only $10.89 in the account. (E: 25).

Then on Tuesday, January 23, 2001, GUS removed his sister, DORIS', name and added JOYCE'S name on his $25,000.00 certificate of deposit. (E: 12, 24; T: 126-128). On that same date, he did the same thing with his $125,000.00 certificate of deposit. (E: 13, 23; T: 122-125).

The following day, January 24, 2001, GUS made the purported Will leaving everything to JOYCE and leaving nothing to his sister, DORIS, the primary beneficiary in his prior Will of August 21, 2000. (E: 1, 36).

Two (2) days after that, on January 26, 2000, GUS' arrangements had been concluded to pay off JOYCE'S mortgage on her house. He paid $11,788.06. (E: 10, 11; T: 72-74).

So, from August, 2000, through January 26, 2001, approximately five (5) months, an 84 year old man who was grieving the death of his wife of some 40-45 years and a woman from Florida who was 25 years younger than him began a relationship during which time she visited him and he visited her spending some $200.00 a month talking on the phone. She quit her job. He paid all her bills. He paid off her mortgage. He put her name on a $25,000.00 certificate of deposit and on a $125,000.00 certificate of deposit. He added her name to his joint savings account in which there was more than $16,500.00 and from which almost all was withdrawn, and he made her the sole beneficiary of his entire estate by the purported Will. (T: 78-79).

On January 31, 2002, approximately one year later, he gave her Power of Attorney. (E: 15).

Notwithstanding all of these transfers, JOYCE consistently took the position and understood that it was GUS' money and GUS' business. (T: 93, 96). According to JOYCE'S testimony, GUS was going to put her name on his accounts whether she agreed or not, that if she did not agree, he would find someone else. (T: 83, 95-96).

On November 29, 2001, GUS transferred his only vehicle to JOYCE, a 1995 Lincoln. (E: 18). For a period of time, he had no vehicle. (T: 102). He purchased another Lincoln, a 2000 model. On November 14, 2003, he put that one in JOYCE'S name too. (E: 19). JOYCE now had Gus' two (2) Lincolns, and Gus had no vehicle. She said he did not drive much, that she was driving it, mainly. She admitted though that when she would leave and go back to her home in Florida, he would be left by himself without any transportation. (T: 103).

On October 14, 2003, GUS transferred the last thing he owned, his home in Biloxi. He sold it for $160,000.00, and JOYCE got the money. In fact, she was present at the closing in the attorney's office. (E: 28, 29; T: 110-114). The money was put in a joint account at the

Compass Bank in Pensacola. (T: 152-153). The Compass Bank is where JOYCE moved $50,000.00 that GUS had previously given to her. (T: 152-153).

JOYCE claimed in her testimony that she and GUS were engaged to be married, and that he bought her rings. However, no evidence was produced, nor did she show any rings. Asked at trial, no other witness knew about this. (T: 156-157).

The certificates of deposit and the savings account at BancorpSouth were moved to Keesler Federal Credit Union and deposited into joint savings accounts with JOYCE and GUS, and from there were moved to the Florida bank. (E: 20, 21; T: 160-161). From the Florida bank (Compass), the money was moved again after GUS' death and used to buy certificates of deposit in Tennessee in violation of the above referenced INJUNCTION. (T: 34-35).

Almost all of the above facts come from the testimony given by JOYCE, herself.

GUS' sister, DORIS, testified that she ordered his medicine and handled the government insurance held by GUS' wife, INEZ. She would make sure GUS was getting the right medicine. She would tape strips of paper to the bottle telling him when to take them. She also cleaned his house and helped with laundry, cooking, and bills. She did this after INEZ died because GUS needed help. Then JOYCE "came in the picture," as she says. (T: 206-207, 218-221, 284-286).

DORIS said that GUS had a terrible temper, and he was very tight with money. He would even freeze tea bags to use them another day. (T: 207). GUS was a womanizer. He was going with INEZ while he was married to MARGIE. He ran around with MARGIE when he was married to FLORENCE. It did not matter to GUS that he was married or that the woman he was interested in was married. (T: 201, 207-208). But he stayed married to INEZ for some 40-45 years. (T: 205).

GUS loved to party and dance. He had a large room at his home for such things. He loved to cook at his party room. But, according to DORIS, not so much after INEZ died. (T: 210).

DORIS pointed out that GUS was a bragger. One of the things he bragged about was women coming on to him, even JOYCE'S boyfriend's mother and a married woman in Stone County. (T: 213-216). He was also characterized as being stubborn and strong-willed except with women. ". . . [W]ith JOYCE it was butter in your mouth. Anything she wanted to do he would do." (T: 217). Up until the relationship with JOYCE began, GUS was strong-willed when it came to parting with his money. He lived off the interest. He never drew the money out. (T: 218). But as seen by the above facts, he gave it all to JOYCE.

DORIS also testified that her brother's health problems included his right eye which caused him to be deferred from military service, his knee which required shots, his heart which required a pacemaker; he also had diabetes, asbestosis, and high blood pressure; he was on medication. (T: 218-219).

After INEZ' death, DORIS said GUS went down hill, acting strange and saying some crazy stuff. He went to Court against INEZ' children trying to take all of the property from them. At Thanksgiving, 2000, he talked about being in the service and storing stuff on some island and if they could get back there, they could all be millionaires. But GUS was never in the service. In fact, he never even went overseas for any military related job. He was classified 4F because of his eye. (T: 279-283).

DORIS also testified that GUS promised that he would not give his assets away to JOYCE, but she found out that he did and that he had lied to her about that. That he lied to her was so serious to DORIS that she broke off her relationship with him. She knew that if JOYCE left with his assets, she would have to take care of him financially. (T: 298-307).

JAMES MICHAEL TONCREY, SR., was a long time close friend of GUS who knew him since he was 16 and went to school with GUS' sons. That relationship changed after JOYCE and GUS started their relationship. (T: 345-346, 352-353). MIKE testified that GUS was obsessed with a woman if she hugged him or sat on his lap. He would want to do things for them; he would overpower them. (T: 349, 365-367). MIKE said that in the first several months after his wife's death, GUS became very possessive and completely consumed with JOYCE. He would talk for hours on the phone with her. He was jealous and would not let her leave his side. He got upset with MIKE over an incident at MIKE'S house and another incident at a dance, both involving JOYCE. (T: 353-355). He said he thought GUS tried to dominate JOYCE, but he did not dominate her because he met his match with her. (T: 369). He said GUS was stubborn except when it came to women, like JOYCE. He was obsessed with JOYCE. (T: 373-374). But he never said he wanted to take care of JOYCE. He said she was very wealthy and had more money than he did and that she would not even want his money. About a month and a half before he died, GUS wanted MIKE to take him to Florida to the bank to get his money, but JOYCE talked to GUS, GUS told MIKE that everything was fine, and so GUS cancelled the trip. He also said that JOYCE would take care of DORIS, that she would give DORIS $100,000.00. (T: 358-359, 361, 371, and 374-375). He said GUS needed someone to help him with his health needs, his finances, and his business dealings. INEZ, his wife, did. Then his sister, DORIS, did. Then JOYCE did. (T: 375-377).

PEGGY HOOD was also a long time friend whose relationship with GUS changed after INEZ'S death and after JOYCE came into his life. He became distant, he did not call for long periods of time, he became a different GUS. (T: 222, 229-230). She testified that JOYCE was introduced to her by GUS as the one who was supposed to take care of him. (T: 222-223, 242). After INEZ died, he was lonely, he needed care, he was sick. (T: 227-228). He was mentally

weak after INEZ died, not the same. He went down hill. He was mentally drained because he lost his wife. He was just as mentally drained in January, 2001, as he was in August, 2000. (T: 238-240). PEGGY also said GUS was just an old man and if a girl paid him any attention, he loved it. (T: 243).

CLELL ROSETTI was in grade school when he met GUS. GUS used to help his father. (T: 244-245). GUS came around CLELL'S business regularly. After JOYCE, he just did not see GUS. He did not come around any more. (T: 246). He testified that GUS introduced JOYCE to him as a friend of his who was taking care of him, that she took care of him well. (T: 245-246). He also said that the last few times he saw him after INEZ died, he was slipping big time both physically and mentally. (T: 248-249).

GILBERT REAUX (mistakenly spelled "RAIL" in the transcript), GUS' long time friend and barber, testified that GUS changed a lot and became so jealous because of JOYCE that he began "shedding" himself of his friends. He said GUS took losing INEZ very bad and acted solemn, even cried. He was different after INEZ died. He went to doctors more. GUS introduced JOYCE to GILBERT as his "girl help" a few months after INEZ died, saying she treats me like a king. (T: 252-255, 262). GUS told GILBERT that he was going to give his sister $100,000.00, but that he could not do anything. He said he did not have anything to do with it. (T: 258).

RAY MITCHELL testified that GUS had a temper and that in GUS' mind, the ladies were attracted to him. GUS even made RAY'S wife uncomfortable when he was working on RAY'S house. He also said GUS was in poor health. (T: 266-267, 274, 276). Regarding JOYCE, RAY said that GUS commented that she was taking care of him and that she was a fine Christian person who GUS could hear praying from one end of the house to the other. (T: 272-273).

GUS sold his house in October, 2003. CHARLES PRINGLE handled the closing. Even then, almost 3 years after the inter vivos transfers and the new Will leaving everything to JOYCE, GUS identified her to CHUCK as his caregiver and the person who was moving him to Florida. JOYCE brought GUS to CHUCK'S office. At that time, GUS was not in good physical condition. CHUCK said, "He was not in a wheelchair, but was probably not far from needing one." "It was very difficult for him to get around." (T: 165-166, 168).

FRED LUSK, the attorney who prepared the contested Will was called by JOYCE, but he testified that GUS did not even know how to spell JOYCE'S last name. A guess was made, but the guess was wrong. It was spelled "LOWE" first and had to be changed later to "LOEW". According to MIKE, this made JOYCE very upset. (T: 357). FRED also said he did not know whether or not GUS was under any undue influence by anyone. (T: 410-411). GUS told FRED that JOYCE was a very good friend. (T: 419). FRED admitted that he did not ask GUS about appraisals of property he owned or whether GUS had spoken to a CPA or estate planner or banker or financial planner. (T: 420-421). FRED said he did the Power of Attorney for GUS. (E: 15; T: 422-423). FRED said he did not think GUS and JOYCE fit together, that he was much older, unattractive, and rough. JOYCE was much younger, refined, polished, that she knew more than he knew. He said that GUS was not up to her level. (T: 425).

SUMMARY OF THE ARGUMENT

JOYCE C. LOEW and GUS SAMUEL CASPELICH, deceased, were in a confidential relationship at the time inter vivos gifts of a substantial amount were made by him to her. Clear and convincing evidence of that fact was presented. GUS trusted JOYCE completely, and he depended on her. GUS was taken care of by JOYCE. He introduced her to all of his friends as the one who takes care of him. They maintained a close relationship. She provided him some transportation and medical care, picking up where GUS' sister, DORIS, left off. He made her joint on his accounts. He was physically weak suffering from various ailments. He was mentally weak following the death of his wife of some 40-45 years to the extent that he did not care whether he lived or not. He was 84 years of age. He was only five (5) months into a relationship with JOYCE, 25 years younger than he, and about a month or two after his wife died when he began turning everything he owned over to her. He was in poor health. He gave JOYCE a Power of Attorney a year after he began putting her name on all of his financial holdings. Because of the confidential relationship, the inter vivos gifts are automatically presumed to have been given under undue influence and are void and must be returned unless the presumption is rebutted by clear and convincing evidence, and it was not.

The acts and actions of JOYCE amounted to suspicious circumstances and an abuse of the confidential relationship voiding the purported Will done in 2001. These acts and actions included her name being placed on his savings account on Friday, a withdrawal of most all of the savings on Monday, her name being placed on his $25,000.00 certificate of deposit and his $125,000.00 certificate of deposit on Tuesday, all prior to the purported Will being signed on Wednesday. Her actions are considered to be undue influence automatically with regard to the inter vivos gifts. The undue influence continued under these suspicious circumstances when he

signed the purported Will the next day. She was carrying out a systematic pattern to get all of his property, and she did. Since five (5), and eventually all seven (7), of the factors used to determine a confidential relationship were met, the presumption of undue influence arose, it was abused, and the presumption was not rebutted.

The only issues before the Court were the validity of the inter vivos gifts to JOYCE from GUS and devisavit vel non, will or no will, as regards the Will of 2001. These are the only issues that the Court can rule on. It was beyond the scope of inquiry and of the pleadings if not addressed therein. Whether DORIS was in a confidential relationship with GUS was not at issue because it was not pled and not a proper issue before the Court.

GENEVA GROSS, JOYCE'S sister, was not disclosed upon request by DORIS' interrogatory for the names of all occurrence witnesses. Therefore, her testimony, which was proffered, should not be accepted by the Court.

ARGUMENT

1.

DID A CONFIDENTIAL RELATIONSHIP EXIST BETWEEN JOYCE C. LOEW AND GUS SAMUEL CASPELICH?

It has been long held by this Court that a confidential relationship does not have to be a legal relationship. It may be moral, domestic, or personal. A confidential relationship arises when a dominant, over-mastering influence controls a dependent person or when trust is justifiably reposed. Murray v. Laird, 446 So.2d 575, 578 (Miss. 1984). It has also been stated this way:

> "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." Madden v. Rhodes, 626 So.2d 608, 617 (Miss. 1993), citing Hendricks v. James, 421 So.2d 1031, 1041 (Miss. 1982).

This Court in Madden places an emphasis on the dependency factor, i.e. the trust factor. Madden at 617. The Madden case also cites In Re Will and Estate of Varvaris, 477 So.2d 273 (Miss. 1985), in which it was stated,

> "In determining whether or not a fiduciary or confidential relationship existed between two persons, we have looked to see if one person depends upon another." Varvaris, at 278. Madden at 617.

It is also pointed out that the above quote from Madden citing Hendricks refers to a person who "is in a *position* to exercise a dominant influence upon the other . . . ." (Emphasis added.) It is submitted that this means that one does not necessarily have to actually exercise the

influence to be in a confidential relationship; one just has to be in that position. See Estate of Grantham, 609 So.2d 1220, 1224 (Miss. 1992), where this Court held that the Chancellor's opinion was manifestly erroneous in holding that there was no confidential relationship when Mr. Grantham had to be taken care of, had a close relationship with the defendants, had transportation and medical care provided by one of the defendants, had his finances and business concerns handled by a defendant, had a joint checking account and certificates of deposit of his money with a defendant, had a safe deposit box with a defendant, was weak physically, advanced in age and in poor health.

This Court went further in establishing the law on confidential relationships in the Dabney case setting out some factors to be considered in determining if and when a confidential relationship exists and included the following:

(1) whether one person has to be taken care of by others,

(2) whether one person maintains a close relationship with another,

(3) whether one person is provided transportation and has their medical care provided for by another,

(4) whether one person maintains joint accounts with another,

(5) whether one is physically or mentally weak,

(6) whether one is of advanced age or poor health, and

(7) whether there exists a power of attorney between the one and another. In Re Estate of Dabney, 740 So.2d 915, 919 (Miss. 1999).

Further, in a prior ruling, this Court even found a confidential relationship between a former husband and wife when it got the impression that at the time of the signing of the deed in question, the former husband was trying to get his former wife to remarry him and would have done almost anything the former wife asked, and hid from his mother that he had signed a deed

knowing that she would not allow such. Norris v. Norris, 498 So.2d 809, 810-811 (Miss. 1986). Actually, a strong parallel can easily be drawn between the facts in Norris and the case sub judice. GUS was doing everything he could to hold onto JOYCE, a much younger woman to whom he was greatly attracted; he even hid from his sister, DORIS, that he had begun making transfers of his assets to JOYCE to accomplish that. (T: 300-307). It is submitted that GUS was as much unduly influenced as Mr. Norris.

In the Madden case, supra, this Court found a confidential relationship between a husband who was caring for his bedridden wife and the former hospice volunteer who stayed on to help him. This Court rejected the volunteer's position that she and the husband were just friends and that their friendship did not rise to the level of a confidential relationship. The truth was that the husband's only escape from the heavy burden of caring for his totally dependent wife was the former volunteer. The trust reposed was additionally evident by the several small gifts the husband gave her, that the key to the house had been given to her, that she knew about the hidden cash box, their income, their bank accounts, and their lock box at the bank. The husband opened a savings account, rented another lock box, and bought certificates of deposit with the former volunteer. The husband trusted her to not only come into his home and into his and his wife's lives, but to care for his wife of more than forty years in his absence. Madden at 611, 617-618. These facts also are very similar to the case now before the Court. GUS completely trusted JOYCE. He gave her numerous gifts and paid many of her bills. She knew about his financial holdings. He removed his sister, DORIS, and placed JOYCE on his savings account. Moreover, GUS' only escape from the loss of his wife of more than 40-45 years was JOYCE.

This Court has ruled that one must prove a confidential relationship by clear and convincing evidence. Norris at 814. The degree of clear and convincing evidence was demonstrated when this Court ruled in the Hendricks case that the evidence was "overwhelming"

that a confidential relationship existed when Mr. Hendricks merely added the defendants' names on:

(1) the checking account,

(2) the safe deposit box, and

(3) the certificates of deposit.
Hendricks at 1042.

The case before the Court has even stronger clear and convincing evidence.

Applying the facts of the case now before the Court to the law above related is best done by examining each one of the factors one by one:

(1) Whether one person has to be taken care of by others:

> It is undisputed that before JOYCE came into GUS' life, DORIS took care of GUS, and before DORIS, INEZ took care of him. (T: 206-207, 218-221, 284-286, 375-377). This is not contrary to the Chancellor's finding that the testimony conclusively showed that all of GUS' business, financial and personal affairs were taken care of by DORIS as of June, 2000, after GUS lost his wife. (JUDGMENT DENYING MOTION TO ALTER OR AMEND, RE: 14). JOYCE came into GUS' life to "be with him", as she puts it. She left her job and GUS agreed to pick up all of her bills. (T: 62, 65).
>
> Granted, GUS was not bedridden or wheelchair bound at that time, but as the Chancellor stated in the above referenced JUDGMENT, GUS suffered physical ailments and after his wife died, he suffered a weakened state and required assistance. In fact, most importantly it was GUS himself who introduced JOYCE to his friends as the one taking care of him, his "girl help". (T: 222-223, 245-246, 253, 272). He even told the lawyer closing the sale of his home years later that JOYCE was his caregiver, his caretaker, the one looking after him. (T: 165, 168).
>
> It should be concluded that GUS needed to be taken care of by others, particularly at the time JOYCE came into his life in August, 2000, only two months after his wife died.

(2) Whether one person maintains a close relationship with another:

It is also undisputed that JOYCE and GUS maintained a close relationship. Everyone who testified stated this, including, in particular, JOYCE. The Chancellor made this finding in his JUDGMENT DENYING MOTION TO ALTER OR AMEND. (RE: 14). And it began in August, 2000, only two months after GUS' wife died. As set out in the Statement of Facts hereinabove, between August, 2000, and January, 2001, GUS and JOYCE dated, visiting back and forth between her home in Pensacola and his home in Biloxi and ran up a $200.00 phone bill. (T: 48, 52-53). GUS grew to like and trust JOYCE. (T: 59). He bought her roses and gifts and paid bills for her such as set out in the SECOND AMENDED INVENTORY and testified to by her. (E: 8; T: 61-62, 97-101).

It should be concluded that JOYCE and GUS maintained a close relationship with each other which began in August, 2000.

(3) Whether one person is provided transportation and has their medical care provided for by another:

It does not appear that GUS had to have someone provide transportation for him all the time until 2002 or 2003, at least according to JOYCE'S testimony. DORIS, however, had to provide for her brother's medical care. (T: 102-103, 206-207, 219-220, 284-285). JOYCE denied having to provide for his medical care, but admitted to being with him for doctor and hospital visits. (T: 55-56). Notwithstanding, the Chancellor found that JOYCE did not provide medical care for GUS and that GUS was not dependent on JOYCE for transportation or anything. (JUDGMENT DENYING MOTION TO ALTER OR AMEND, RE: 14-15).

Considering the first two factors, particularly how GUS himself introduced JOYCE to his friends as the one who took care of him, it would be difficult not to conclude that GUS had both his transportation and medical care provided by JOYCE since August, 2000. There is no record of any miraculous recovery by GUS.

(4) Whether one person maintains joint accounts with another:

It is again undisputed that GUS changed an existing savings account from "Pay on Death" to DORIS, to "joint" with JOYCE. This was done on January 19, 2001, at a time when the account had on deposit $16,571.89 from which was withdrawn $1,000.00 on that day and almost all of it the following day. This was done only about five months after the relationship began. (E: 25; T: 128-130).

Also undisputed is the fact that four days later on January 23, 2001, GUS deleted DORIS and added JOYCE in her place as a "Pay on Death" beneficiary on both a $125,000.00 and on a $25,000.00 certificate of deposit. (E: 23 and 24; T: 122-128). [It is noted that all of these changes were prior to his signing his Will on January 24, 2001. (E: 1).]

This was substantially all of GUS' financial holdings. Within a few months, these certificates of deposit were cashed out at one bank and deposited in another bank into joint accounts with JOYCE. (E: 23 and 24; T: 125, 127, 160-161). The joint savings account with JOYCE was closed on December 31, 2001, and this balance was also moved to another bank into a joint account. (E: 25, 160-161).

The Chancellor stated in his JUDGMENT DENYING MOTION TO ALTER OR AMEND that JOYCE objected to GUS changing the account. (RE: 15). However, this is not what is shown by the actual testimony. (T: 83-84). JOYCE testified that she was present at the bank when the accounts were changed. She testified that GUS said that if she did not want her name on the accounts, he would find someone else. She then admitted again that at that time, she and GUS had a relationship, and then said,

> "I told him he did not have to put my name on there, but he said he wanted to . . . ." (T: 83).

JOYCE then admitted that the money was GUS' money and his business, and that by putting her name on such a large amount of money, he trusted her quite a bit. (T: 84).

So JOYCE did not object to GUS putting her name on the accounts. She just said he did not have to do that.

Nevertheless, this is all from the beneficiary, and there is no corroboration. She did, however, admit against her interest that she and GUS were in a relationship, and she did admit that it was GUS' money just as she had maintained throughout the trial. (T: 93). It is submitted that this means that JOYCE knew the money was not hers to keep, just as Madden knew that Sierra's money was not hers to keep. It did not ripen into a valid gift just because GUS did not later remove her name. The inquiry must be directed to the time of procurement. At the time of procurement, JOYCE and GUS were in a confidential relationship. JOYCE knew it was GUS' money and GUS' business, and there is no evidence, clear and convincing or otherwise, that he ever intended for her to have and keep his money. This is consistent with MIKE'S testimony that GUS thought he could go to Florida and get his money and that Gus never said he wanted to take care of JOYCE. (T: 358, 374-375). To rule in JOYCE'S favor, the Court would have to engage in many assumptions such as the assumption that GUS did not later take JOYCE'S name off the accounts because he intended that she keep his money. But as this Court said in Madden, "Fortunately, we are not called upon to make such deductions at all." Failure to remove JOYCE'S name is not ratification of the accounts set up due to her undue influence. Madden at 623-624.

Also, contrary to the Chancellor's finding, JOYCE was not out of state when the bank accounts were being changed. By her own admission, she was present. (T: 83).

The Chancellor also found that JOYCE never utilized any of the joint accounts at least according to JOYCE, but that, if true, does not keep them from being joint accounts at the time of procurement which demonstrates that there was a confidential relationship.

That which is set out as the Chancellor's findings under this factor is based in great part on that testified to by JOYCE, the beneficiary. But unless corroborated, it should be considered of no consequence because the law provides that

> ". . . when a court of equity is faced with a large gift to a dominant party by the weaker in a confidential relation, it must hear from someone besides the beneficiary, or receive clear and convincing evidence beyond that from the lips of the beneficiary, this is, in

> truth and in fact, what the donor wished to do on his own. Madden at 625.

Accordingly, it should be considered that JOYCE and GUS maintained joint accounts beginning January 19, 2001, and neither the finding of the Chancellor nor the testimony of JOYCE changes that fact.

(5) Whether one is physically or mentally weak:

The Chancellor was correct when he found in the JUDGMENT DENYING MOTION TO ALTER OR AMEND (RE: 15), that no testimony was presented that GUS was physically impaired to the point he was unable to care for himself at the relevant time, but GUS was physically weak due to his age, 84, and his health problems, particularly his heart, his knee, his lungs, and his diabetes for which he took medication. (T: 55-26, 82). Again, by GUS' own statements, JOYCE was there to take care of him. (T: 222-223, 245-246, 253, 272).

It is undisputed that GUS was mentally weak. As even JOYCE testified, he was feeling pretty down and depressed and did not care whether he lived or not. (T: 47-49).

It should certainly be concluded that GUS was mentally weak, and it may be concluded that he was physically weak as well from and after August, 2000. It is noted that only one is required in this factor.

(6) Whether one was of advanced age or poor health:

It must be considered undisputed that GUS was of advanced age, 84, and poor health, even though only one is required in this factor, too. There is no question about his age. It is not insignificant that at this time, JOYCE, was only 59 years of age. (T: 82). Regarding his health, even JOYCE admits that she knew he had a pacemaker and had heart problems, that he had knee problems and had his knee worked on, that he had to take medication for fluid build-up in his lungs, that he had diabetes, that he had stomach or gallbladder surgery, and that he had eye problems. (T: 55-56). DORIS added that the lung problem was from asbestosis and that he took medication for high blood pressure. (T: 218-219). The Chancellor found that Gus was not dependent on JOYCE for anything, but that is not relevant to this factor. (JUDGMENT DENYING MOTION TO ALTER OR AMEND, RE: 15-16).

It should be concluded that GUS was of advanced age and poor health from and after August, 2000.

(7) Whether there existed a power of attorney between one and another.

It is undisputed that there was a power of attorney from GUS to JOYCE. (E: 15). It was signed by GUS on January 31, 2002. This was approximately one year after the first transfer of money and the execution of the Will. (E: 1, 12, and 13). However, it is prior to the sale by GUS of his home on October 14, 2003, and prior to the transfer of the 2000 Lincoln automobile on November 14, 2003. (E: 19, 28, and 29.) It is noted that the net proceeds from the sale of the home were received by JOYCE. (T: 111). The Chancellor found that JOYCE did not use the Power of Attorney at any time. (JUDGMENT DENYING MOTION TO ALTER OR AMEND, RE: 16). That is not corroborated by anyone, but that is also not relevant any more than her testimony that she did not use the joint accounts. The fact is that there existed a Power of Attorney. The fact that GUS gave her Power of Attorney shows trust reposed and that he depended on her. It shows also that she was in a position to exercise a dominant influence over him.

It should be concluded that GUS did give a Power of Attorney to JOYCE.

If the evidence was "overwhelming" in the Hendricks case that a confidential relationship existed, it most certainly is overwhelming, i.e., clear and convincing, here. Hendricks at 1042. With so much undisputed and so much clear and convincing evidence, there should be no question that GUS and JOYCE were in a confidential relationship and that, if it did not begin in August, 2000, or September or October or November or December, 2000, it certainly began when he put her name on his savings account on January 19, 2001. With much less facts than here, this Court in Hendricks said that the confidential relationship commenced "when Mr. Hendricks went to the bank and put the defendants' names on his checking account, safety deposit box, and certificates of deposit." Id.

With more particular regard to the Chancellor's findings, he must hear from someone other than JOYCE. Madden at 625. As argued at the hearing on our MOTION TO ALTER OR AMEND, if we were in a trial to determine who raided the henhouse, how much credibility should be given to the testimony of the fox? According to Madden, none. Regardless, there was no evidence that GUS did not need to be taken care of. GUS introduced her as the one who took care of him. The above referenced clear and convincing evidence shows GUS was much worse off than even Mr. Sierra in the Madden case. GUS and JOYCE had a close personal relationship from the beginning by JOYCE'S own admission and the Court's own finding, and GUS had JOYCE to provide to him the medical care he needed, taking over from DORIS. GUS maintained joint accounts with JOYCE, and it matters not whether she used them, if she did not. Further, the Chancellor cannot assume that, "all these financial moves were made by GUS acting alone with what appears to be the purpose of removing DORIS from all of his financial transactions and to leave them to the woman with whom he was in love." (JUDGMENT DENYING MOTION TO ALTER OR AMEND, RE: 15). The law is that the Court cannot make these assumptions or deductions. Madden at 623-624. GUS was both physically and mentally weak and did not even care if he lived, according to JOYCE herself. GUS was 84 and in poor health. JOYCE was 59 and in good health. GUS gave a Power of Attorney to JOYCE. Again, it is not relevant that she did not use it. If this is not a confidential relationship beginning in August, 2000, then there is no such thing. JOYCE was without question *"in a position to exercise a dominant influence"* on GUS. Madden at 617; Hendricks at 1041. And she did.

Because GUS and JOYCE were in a confidential relationship, all gifts inter vivos are automatically presumed to be given as a result of undue influence exerted upon GUS by JOYCE and are void. Madden at 618; Spencer v. Hudspeth, 950 So.2d 238 (Miss. App. 2007). Proof of abuse of the confidential relationship is not necessary for the argument on this issue.

2.

DID JOYCE C. LOEW ABUSE THE CONFIDENTIAL RELATIONSHIP SHE HAD WITH GUS SAMUEL CASPELICH?

If there is abuse of the confidential relationship, this gives rise to a presumption of undue influence in the making of a will. This Court has cited the following law with regard to abuse of the confidential relationship:

> ". . . [I]t is the general rule in practically all jurisdictions that undue influence is presumed and the burden of proof shifted so as to require the beneficiary to produce evidence which at least balances that of the contestant, when, in addition to the confidential relation, *there exists suspicious circumstances*, such as the fact that the beneficiary or person who benefits by the will took part or participated in the preparation or procuring of the will, or actually drafted it or assisted in its execution." Croft v. Alder, 15 So.2d 683, 686 (Miss. 1959), citing 94 C.J.S. Wills §239, p. 1091-1096. (Emphasis added.)
>
> "Although the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary exercised undue influence over the testator, as it does with gifts inter vivos, such consequence follows where the beneficiary 'has been actively concerned in some way with the preparation or execution of the will, *or where the relationship is coupled with some suspicious circumstances*, such as mental infirmity of the testator;' or where the beneficiary in the confidential relation was active directly in preparing the will or procuring its execution, and obtained under it a substantial benefit." Croft at 686, citing 57 Am. Jur., Wills, Secs. 389, 390. (Emphasis added.)

It must be taken from this law, then, that circumstances other than being actively involved in the preparation and execution of the will constitute abuse of the confidential relationship. This includes ". . . *where the relationship is coupled with some suspicious circumstances*, ..." (See also Madden at 618, where this Court said that a presumption of undue influence only arises in the context of gifts by will when there has been some abuse of the confidential relationship, *such as* some involvement in the preparation or execution of the will. (Emphasis added.) Thus,

involvement in the will is but one example. See also In Re Estate of Saucier, 908 So.2d 883, 886 (Miss. App. 2005).

This Court has ruled on many cases where the abuse is the involvement by the beneficiary in the preparation or execution of the will. There appears to be none "where the relationship is coupled with some suspicious circumstances" other than such involvement. This, then, should be the first. It would be improvident to disregard the law cited in Croft. Croft at 686, citing 57 Am. Jur., Wills, Secs. 389, 390. Those like GUS and his sister need this Court's help.

This Court has stated in the past:

> ". . .[T]here must be some showing that [the beneficiary] abused the relationship either by asserting dominance over the testator or by substituting her intent for that of the [testator]." In Re Estate of Crutcher, 911 So.2d 961, 968 (Miss. App. 2004).

This fits. JOYCE took over from DORIS in caring for GUS. JOYCE admitted a close personal relationship with GUS. JOYCE maintained a joint account with GUS and was a "Pay on Death" beneficiary on two (2) certificates of deposit all totaling over $166,000.00, essentially all of GUS' financial holdings. GUS was deeply depressed and did not care whether he lived or not because he had just lost his wife of some 40-45 years. GUS was 84 years old and in poor health. These are the undisputed facts that demonstrate by clear and convincing evidence that there was a confidential relationship beginning August, 2000, but certainly no later than January 19, 2001, which continued until the day he died. These facts demonstrate that JOYCE asserted complete dominance over him, that she substituted her intent for his. These facts represent no less than 5 of the 7 factors that are to be considered in determining the existence of a confidential relationship. With the confidential relationship well in place, the following events happened:

> On Friday, January 19, 2001, DORIS' name was removed and JOYCE'S name was placed on GUS' existing savings account and $1,000.00 was withdrawn. (E: 25).

January 20, 2001, was a Saturday.

January 21, 2001, was a Sunday.

On Monday, January 22, 2001, a withdrawal was made from the joint savings account of $15,561.00 leaving only $10.89. (E: 25).

On Tuesday, January 23, 2001, DORIS' name was removed and JOYCE'S name was placed on GUS' $25,000.00 certificate of deposit. (E: 24).

Also, on Tuesday, January 23, 2001, DORIS' name was removed and JOYCE'S name was placed on GUS' $125,000.00 certificate of deposit. (E: 23).

On Wednesday, January 24, 2001, the Will in which DORIS was the primary beneficiary was revoked and JOYCE was named sole beneficiary on GUS' new Will.

It was as the Chancellor found, i.e. "systematic", but in a completely different aspect. JOYCE was systematically exercising control and acquiring all of GUS' assets. These factors do not show that GUS was a man who acted on his own as the Chancellor found. It is submitted that these facts show that JOYCE abused the relationship by asserting dominance over GUS and by substituting her intent for that of GUS. Crutcher at 968. In other words, with the confidential relationship automatically giving rise to undue influence as regards the inter vivos gifts, did it simply evaporate the next day when he signed the Will leaving her everything? It is submitted that he was so unduly influenced that he did not even know how her name was spelled when he was preparing the purported Will. Is there any way she could have unduly influenced him Friday, January 19, 2001, through Tuesday, January 23, 2001, with her name being placed on over $166,000.00 of his money and she stopped on Wednesday, January 24, 2001? The answer is no. The inter vivos gifts are evidence of the abuse of the confidential relationship. She continued with the abuse as evidenced by GUS paying off her mortgage totaling $11,788.06 two

days after he signed the Will, January 26, 2001, not to mention his transfer to her of the cars and the house, granting her his Power of Attorney, and all of the gifts and bill-paying he did for her.

The Chancellor disagrees with the argument that he must disregard JOYCE'S uncorroborated testimony. (JUDGMENT DENYING MOTION TO ALTER OR AMEND, RE: 16). He accepts JOYCE'S testimony that she did not take care of him, but that doesn't mean he was not actually cared for by her. That JOYCE claims that she did not provide medical care does not mean that she did not. That JOYCE claims that she did not use the joint accounts does not mean there were not any. That JOYCE claims that she never used the Power of Attorney does not mean GUS did not give her one. JOYCE'S testimony is irrelevant because it comes from her lips alone and that is insufficient. Madden at 625. Besides, there is no other substantial evidence, and there must be. In Re Estate of Holmes, 961 So.2d 674, 681 (Miss. 2007).

The Chancellor finds that JOYCE'S testimony was "consistent with the overwhelming testimony of other witnesses". (JUDGMENT DENYING MOTION TO ALTER OR AMEND. RE: 16). However, the record has no testimony consistent with that of JOYCE as demonstrated above. Moreover, JOYCE only put two witnesses on the stand, one being her sister, GENEVA GROSS, whose testimony was not accepted, but allowed to be proffered over objection because she was not listed as a witness in discovery, and the other being FRED LUSK, the attorney who drafted the Will at issue. (T: 395-398; see summary of LUSK'S testimony above). All other witnesses were called by DORIS. Each one other than COMPTON, the banker, and PRINGLE, the lawyer who handled the closing of the sale of GUS' home, was a close friend of GUS. Their testimony has been reviewed above. None of that testimony is consistent with that of JOYCE, although JOYCE did admit against her interest that GUS' financial holdings were his money and his business. (T: 83-84, 93). There is actually no evidence from another that GUS wanted JOYCE to have it all. It is evident even from LUSK, JOYCE'S own witness, that the general

opinion was that GUS was being taken advantage of by JOYCE. LUSK could not even say that GUS was not unduly influenced in the making of the Will. (T: 410-411).

If all of the things that happened beginning with the change from DORIS to JOYCE made on the joint account on January 19, 2001, were made after the signing of the Will instead of those few days immediately before, this argument may be weaker. But they were not. The facts are that no more than three (3) work days before the purported Will, almost all of GUS' financial holdings had JOYCE'S name added. That is without question suspicious circumstances. That is an abuse of a confidential relationship. Because JOYCE abused the confidential relationship, the presumption of undue influence arises as regards GUS' Will. Crutcher at 968. And the presumption was not rebutted.

It is noted that in a recent case above cited, this Court leaped from a confidential relationship to undue influence in a will contest case without mention of or reference to abuse of the confidential relationship. Holmes at 680. In that case, there was participation by the beneficiary in the preparation of the will, but such was not covered in determining whether or not there was undue influence. The facts of the participation were covered after the presumption of undue influence was found to have arisen. Id. Specifically this Court held:

> "The chancellor found that a confidential relationship existed between Lela and Bertha, and, hence a presumption of undue influence. We agree."
>
> "As all seven of the applicable factors have been met, we find that a confidential relationship clearly existed, and, therefore, a presumption of undue influence.:" Id.

The Court went on to address the three prong test of good faith, full knowledge, and independent action, and there covered in detail the facts of the participation by the beneficiary, Bertha, in the procuring and preparation of Lela's will. Abuse was not discussed. Id. 682-693.

It is submitted that if so many of the factors used to determine a confidential relationship were met, then there can be no question about there being undue influence. In the Holmes case, all seven factors were met. Here, five were met almost immediately – all seven eventually. That should mean that JOYCE unduly influenced GUS to make a new will leaving her everything else. Everything else included his car and his house. The whole scheme took only three (3) work days. Then he signed the purported Will. That must be found to be an abuse by JOYCE of the confidential relationship she had with GUS.

3.

IS THE ISSUE OF A CONFIDENTIAL RELATIONSHIP BETWEEN DORIS FRAZIER AND GUS SAMUEL CASPELICH RELEVANT OR MATERIAL?

The Chancellor in both his JUDGMENT GRANTING INVOLUNTARY DISMISSAL (RE: 18, et. seq.), and his JUDGMENT DENYING MOTION TO ALTER OR AMEND (RE: 12, et. seq.), based much of his ruling on findings regarding the relationship between GUS and his sister, DORIS. However, no contest was filed regarding any action GUS may have taken in favor of his sister. The only contest in any way dealing with GUS was the one raised with the filing of the PETITION FOR CONTEST OF WILL AND FOR OTHER RELIEF filed by DORIS in the probate of GUS' Will filed by JOYCE. Since nothing regarding the relationship between GUS and DORIS or any prior will was filed, no defense was prepared or presented. The issue was not before the Court. The only issues that the Court can rule on are those properly presented in the pleadings. The issue here as it regards the will contest portion of the suit is devisavit vel non, will or no will. Trotter v. Trotter, 490 So.2d 827, 833-834 (Miss. 1986). Besides, it is noted that JOYCE did not even file a responsive pleading to the contest filed by DORIS.

Notwithstanding the issue being devisavit vel non as regards the Will of 2001, the Chancellor ruled that DORIS was in a confidential relationship with her brother regarding the Will of 2000. He did this even though the Will of 2001 revoked the Will of 2000. The Chancellor also made findings to support same. (JUDGMENT GRANTING INVOLUNTARY DISMISSAL, RE: 18, et. seq., and JUDGMENT DENYING MOTION TO ALTER OR AMEND, RE: 12, et. seq). Because these findings and rulings were not before the Court and beyond the scope of inquiry, and not a part of the issue before the Court, such should be so held by this Court.

4.

SHOULD THE PROFFERED TESTIMONY OF GENEVA GROSS BE ACCEPTED BY THE COURT?

JOYCE called her sister, GENEVA GROSS, as her first witness. Objection was raised based upon the fact that JOYCE failed to disclose her in response to a discovery interrogatory seeking all occurrence witnesses. Only FRED LUSK and HOLLY COX were named in the discovery responses. The Chancellor did not accept the testimony, but did allow it as a proffer with consideration to be made later as to whether or not it would be accepted. (T: 395-398).

An occurrence witness is a person having knowledge of discoverable matters. Ladner v. Ladner, 436 So.2d 1366, 1371 (Miss. 1983). GROSS is such a witness as evidenced by her testimony. Rule 26(b)(1) of the Mississippi Rules of Civil Procedure states that parties may obtain the identity and location of persons having knowledge of any discoverable matter, i.e. occurrence witnesses. Rule 26(f)(1) states that a party is under a duty seasonably to supplement a response with respect to any question directly addressed to the identity and location of occurrence witnesses. Where the name of a witness ought to have been disclosed but was not, ordinarily the witness will be precluded from testifying. Maryland Cas. Co. v. City of Jackson, 493 So.2d 955 (Miss. 1986).

If this Court decides to remand to the trial court instead of reversing and rendering, the acceptance by the Chancellor of the testimony of GROSS may be sought. It is submitted that without knowing of the existence of this occurrence witness until she was called to the stand, allowing her testimony would be in violation of the Rules and prejudicial to DORIS. The prejudice is that DORIS has been denied the right to investigate GROSS and that to which she would testify. Deciding this issue now is in the best interest of judicial economy.

CONCLUSION

It is requested that this Court reverse the Chancellor, hold that JOYCE C. LOEW was in a confidential relationship with GUS SAMUEL CASPELICH, deceased, at the time of the inter vivos gifts giving rise automatically to the presumption of undue influence, and hold that she is not entitled to the gifts because their transfer is void in that she failed to rebut the presumption.

It is also requested that this Court hold that JOYCE C. LOEW abused the confidential relationship giving rise to the presumption of undue influence and hold that she failed to rebut the presumption thereby making the Will of 2001 void.

It is further requested that this Court hold that any issue regarding the existence of a confidential relationship between DORIS FRAZIER and the deceased, GUS SAMUEL CASPELICH, her brother, is beyond the scope of inquiry in that same was not an issue brought before the Court by the pleadings and should be stricken.

It is finally requested that the Chancellor be prohibited from accepting the proffered testimony of GENEVA GROSS.

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 BRIEF OF APPELLANT to the following:

Hon. Sanford R. Steckler
Chancery Court Judge
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Hon. Martha G. Carson
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This the 16th day of May, 2008.

WAYNE L. HENGEN