

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

CASE NO. 2007-TS-01664

BORDMAN C. HUMPHREY, by and through
THE ESTATE OF BORDMAN C. HUMPHREY

APPELLANT

VERSUS

JEANETTE HUMPHREY SMITH, by and through
THE ESTATE OF FERN JEANETTE SMITH a/k/a
JEANETTE HUMPHREY SMITH;
JOE A. HERRIN d/b/a HERRIN TIMBER CO.;
BRUCE A. RAWLS and K. ELAINE RAWLS

APPELLEES

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Supreme Court may evaluate possible disqualification or recusal.

1. Hon. James H. C. Thomas, Jr.
Chancery Judge of Pearl River County
2. Larry Norris, Esq.
Attorney for Appellees Bruce A. Rawls & K. Elaine Rawls
3. Joe A. Herrin
Appellee
4. William E. Smith
Appellee
5. David Earl Johnson
Chancery Clerk of Forrest County



ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUE

The Chancery Court of Pearl River County erred when it dismissed the Plaintiff's claims of undue influence and lack of testamentary capacity at the close of Plaintiff's case in chief.

STATEMENT OF THE CASE

This matter arises from the Final Judgment of the Chancery Court of Pearl River County, entered on August 24, 2007. Appellant the Estate of Bordman C. Humphrey timely perfected its appeal.

NATURE OF THE CASE AND COURSE OF PROCEEDINGS BELOW

This case arises from a dispute where Bordman C. Humphrey ("Bordman") alleged that Jeanette Humphrey Smith ("Jeanette") fraudulently obtained conveyances of land from him, more specifically two parcels identified for purposes of this Appeal as tracts 3 and 4, on or about March 27, 1992.. This matter has previously been before this Court on an appeal from a grant of summary judgment for the Defendants. R. 12-21. This Court reversed and remanded the decision of the Chancery Court of Pearl River County, finding that there were genuine issues of material fact before the Court such that summary judgment was not appropriate. *Id.* The decision of the Court of Appeals directed the Chancery Court to consider several issues on remand: first, whether the claims of Bordman against Jeanette held in abeyance by the Chancellor's order should be dismissed; second, whether Bordman was competent on September 17, 1997 such that the purported dismissal he signed would be valid; third, whether relief under M.R.C.P. 15(a) sought by Joe A. Herrin ("Herrin") is appropriate, inasmuch as Bordman's

conservator did not seek prior court approval before filing a third amended complaint. R. 19-20. The Court of Appeals found that the claims of Bordman against Jeanette in connection with tracts 3 and 4 of the land in question were viable and not affected by the conservator's failure to seek prior court approval before raising them. R. 20.

Since the remand, Bordman and Jeanette both passed away, Bordman dying intestate, and Jeanette dying testate. R. 43-49. The Chancery Court of Pearl River County held a trial on the sole issue of Bordman's competency on or about December 6, 2006, and found that on or about the purported date of Bordman's voluntary dismissal of his claims against Jeanette, September 17, 1997, Bordman was not competent. R. 57-8. As a result of this finding, the Court set aside the dismissal. *Id.* Following the trial, the Chancery Court of Pearl River County entered two orders, one granting a pre-trial motion of the Defendants to dismiss with prejudice the claims brought by the Plaintiff in the Original and Amended Complaints related to Deeds executed by Ruby Humphrey to Jeanette, and the second to substitute the estates of the two deceased litigants as parties. R. 83-4.

The Final Judgment of the Chancery Court of Pearl River County following reversal and remand dismissed with prejudice the claims of Bordman, and in this dismissal mooted Jeanette's Complaint to Quiet Title and the Cross-Complaints of Herrin and the Rawlses. R. 85-6. The basis of the Court's final judgment dismissing the Third Amended Complaint was that because Stevens had participated in the drafting of the deeds, she could not assert that the conveyance by Bordman to Jeanette resulted from undue influence of Jeanette. T. 157-161. Interestingly, the Judgment of the Chancery

Court states that a full trial on the merits was had, but the transcript reflects that the Chancellor ordered a dismissal in response to the Rawlses's motion to dismiss filed in 2006 and revived *ore tenus* after Bordman rested his case. *Id.*; R. 31-3.

STATEMENT OF THE FACTS

Bordman was hospitalized and near death during January and February of 1992. T. 85-6. At the end of February, 1992, Bordman was moved from the hospital to the Picayune Convalescent Center by his children, and his health began to improve. T. 86. Following this recovery, Bordman conveyed his interest in two tracts of land, tracts 3 and 4, located in Pearl River County, Mississippi, to Jeanette on or about March 27, 1992. R. 14; Exhibits 2 & 3, 8/16/07. Both of these deeds were typed at Jeanette's direction by Bordman's other daughter, Nadine B. Stevens ("Stevens"). T. 118; Exhibit 4, 8/16/07. Jeanette had promised Bordman and Stevens that she would act as a custodian for the land so that the property would not be alienated away from the family due to Bordman's illness. T. 88-9; 119. Bordman gave Stevens a durable general power of attorney, effective on October 5, 1992. Exhibit 1, 8/16/07; T. 115. On September 10, 1993, Bordman filed suit against Jeanette asking the Chancery Court of Pearl River County to set aside those two deed on the grounds of fraud and undue influence. *Id.* Bordman filed a notice in the Lis Pendens record of Pearl River County describing the land at issue on or about June 24, 1993, in Deed Book No. 6, pp. 525-6. Exhibit 7, 8/16/07.

The Court appointed Erik Lowrey as guardian ad litem to review Bordman's competency in 1994. T. 126-7. Lowrey opined that Bordman was competent in 1994, and ably assisted by competent counsel. *Id.*; Exhibit 5 8/16/07. Stevens testified that Bordman was not in his right mind during the time period in 1992 when he was in the hospital, and that he acted in accordance with the wishes of whatever family member was around him at the time. T. 123-4.

Herman Barber ("Barber"), Bordman's grandson and the son of Stevens, testified that Bordman had effectively no short term memory, in that he could not remember conversations for more than 20 minutes, and that he would stand out in the middle of the road. T. 144. Barber testified that Bordman at one point disappeared, and that Wilda, a third daughter of Bordman's, was holding Bordman in Orange County, Texas. T. 145. Barber further testified that at this time Bordman was highly suggestible and would do whatever the person who currently had him in his custody wanted. T. 146. Bordman failed to recognize Barber on at least one occasion in 1994. T. 146-7.

Homer Lewis ("Lewis"), Bordman's brother-in-law, testified that from Bordman's hospitalization in the beginning of 1992, Bordman was able to make conversation but did not seem aware of what he was saying. T. 151. Bordman would ask Lewis to travel with him several times to meet with Jeanette in Texas to try to get her to release either the land or some money to Bordman, and she would refuse to do so. T. 153. Lewis did not go with Bordman to Texas on those trips. *Id.* On November 17, 1997, Stevens was appointed conservatrix, with Bordman as her ward. Exhibit 3, 12/5/06.

Jeanette sold the land to Herrin in February of 1998. Some time after that, Charlie Whittington ("Whittington") arrived on Bordman's property and proceeded to measure the timber, until Stevens, Bordman's executrix and then-conservatrix, showed him a copy of the lis pendens notice. T. 95-6. Following that meeting, Stevens informed Herrin of the lis pendens notice and asked Herrin to meet with her and her father before he began cutting timber. T. 98-9. Herrin never met with Stevens and her father, and began cutting timber on or about September 23, 1998. T. 99. Stevens received a call

from a neighbor that day informing her that some men had torn down the fence surrounding the property and were cutting the timber. *Id.*

The man cutting the timber was Claude Boland ("Boland"). T. 100. Stevens spoke with Boland and informed him about the pending litigation and the lis pendens notice. *Id.* Boland continued the cutting until 24 acres of timber were cut. *Id.* Stevens contacted the Sheriff of Pearl River County, who declined to assist her by stopping the timber from being cut; she also spoke with James Holder, who was purported to represent Herrin. T. 102. Neither Bordman nor Stevens ever received any money from the cutting of the timber, or the sale of the property to Herrin. *Id.*

Herrin sold the property to Bruce and Elaine Rawls ("the Rawlses") some time later. T. 131-2.

SUMMARY OF THE ARGUMENT

The Chancery Court of Pearl River County erred when it dismissed the claims of Bordman following his case in chief at trial. The order of the Court erroneously stated that a full trial was had on the merits, and that a judgment was had for the Defendants. In fact, the transcript reflects that the Court ordered a dismissal based upon a motion to dismiss under Rule 41(b).

The evidence before the Court demonstrated that Bordman suffered from great mental weakness, such that Jeanette exerted undue influence on him causing him to convey tracts 3 and 4 to her. No contrary evidence was shown, and none of the testimony was impeached. The Court erred when it found that because Stevens had mechanically prepared the deeds for conveyance and been misled by Jeanette as to Jeanette's intentions, Stevens as the executrix of Bordman's estate was barred from raising a claim of undue influence against Jeanette. Bordman demonstrating his great mental weakness created a rebuttable presumption of undue influence, which defendants could only rebut by clear and convincing evidence. Defendants failed to present such evidence, and the Court erred by dismissing the claims of undue influence.

The Court also erred when it failed to address the claims of Bordman that he lacked the capacity to convey the land in 1992. The sole evidence before the Court demonstrated that Bordman's testamentary capacity was severely curtailed; he was unable to identify his adult grandson, he had just begun to recover from being on death's door, and he was easily manipulated by those around him. Although he experienced some

periods of lucidity, the evidence shows that he lacked testamentary capacity sufficient to convey land or to represent his own interests in any transactions.

This Court should reverse and render the judgment of dismissal of the Chancery Court of Pearl River County because it is not supported by substantial evidence, and the Chancellor committed manifest error in finding for the Defendants.

ARGUMENT

The Chancery Court of Pearl River County erred when it dismissed the Plaintiff's claims of undue influence and lack of testamentary capacity at the close of Plaintiff's case in chief.

STANDARD OF REVIEW

The decisions of a chancellor are reviewed under a two-fold standard of review: questions of fact are reviewed for clear error or abuse of discretion, and questions of law are reviewed *de novo*. *Rush v. Wallace Rentals, LLC*, 837 So. 2d 191, 194 (11) (Miss. 2003) (citing *Bell v. Parker*, 563 So. 2d 594 (Miss. 1990)). The judgment of dismissal did was rendered after Bordman rested his case in chief and the Rawlses revived their Rule 41 motion to dismiss. The standard of review for a dismissal granted under Rule 41 (b) requires is that the judgment of dismissal must be supported by substantial evidence. *Stewart v. Merchants National Bank*, 700 So. 2d 255, 258-9 (Miss. 1997).

- 1. The Chancery Court of Pearl River County erred when it determined that Bordman had failed to show undue influence in the conveyance of tracts 3 and 4.**

Undue influence is presumed when a confidential relationship exists. *Madden v. Rhodes*, 626 So. 2d 608, 619 (Miss. 1993). A confidential relationship between grantor and grantee arises when there is a relationship between two people in which one person is in a position to exercise dominant influence over the other because of the latter's dependency on the former arising either from weakness of mind or body or through trust.

Hendricks v. James, 421 So. 2d 1031, 1041 (Miss. 1982). This relationship is considered a fiduciary one. *Id.*

Among the factors that the court should consider when evaluating whether such a relationship exists are:

(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; (7) whether there exists a power of attorney between the one and another.

In re Estate of Reid, 825 So. 2d 1, 5 (¶13) (Miss. 2002), citing *In re Estate of Grantham*, 609 So. 2d 1220, 1224 (Miss. 1992).

The evidence before the court demonstrated that Bordman had to be taken care of by others, that he was close with Jeanette and Stevens, that Bordman was weak physically and mentally, and that Bordman was of advanced age and poor health at the time when he conveyed the property in question to Jeanette. This uncontroverted and unimpeached evidence clearly supports a finding that a confidential relationship between Bordman and his daughters, Jeanette and Stevens, existed. The existence of such a relationship suffices in and of itself to raise the presumption of undue influence with inter vivos gifts. *Miner v. Bertasi*, 530 So. 2d 168, 171 (Miss. 1988).

Bordman having brought enough evidence to create the presumption, the Court should have required the Defendants to demonstrate by clear and convincing evidence the following three elements to rebut the presumption of undue influence by Jeanette:

(1) good faith on the part of the grantee/beneficiary; (2) grantor's full knowledge and deliberation of his actions and their consequences; (3)

advice of (a) a competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.

Mullins v. Ratcliff, 515 So. 2d 1183, 1193 (Miss. 1987).

The only evidence presented on these issues showed that Jeanette acted in bad faith, that Bordman was confused concerning Jeanette's intentions, and that the only independent advice received was from Texas attorney Carl Griffith, who opined to Stevens that he believed that Bordman's conveyances of the property were defective. Taken together, there is insufficient evidence to rebut the presumption of undue influence.

The Chancery Court erred when it determined that Bordman had failed to establish that Jeanette had exercised undue influence, and the dismissal is not supported by substantial evidence.

2. The Chancery Court of Pearl River County erred when it found that Stevens was forestalled from bringing claims on behalf of the Estate of Bordman C. Humphrey against Jeanette by reason of her mechanically drafting the deeds that conveyed the land from Bordman to Jeanette.

The Chancery Court erred as a matter of law when it found that Stevens as executrix was forestalled from bringing the Estate's claims against Jeanette because she as an individual had actually drafted the warranty deeds by which Jeanette acquired title to tracts 3 and 4. The Court failed to consider that Stevens was wearing two hats; on the one hand, she is the executrix of Bordman's estate; on the other hand she was his conservator for some time before then, and had had a general durable power of attorney for Bordman from October of 1992. There is no justification for the Chancellor concluding that this action by itself disqualifies the estate from seeking to set aside the

conveyances. The law of Mississippi is clear: the executrix of an estate represents the estate, and her individual capacity in this matter is wholly irrelevant. *Hill v. James*, 252 Miss. 501, 508 (1965).

Presumably the Court determined that Stevens was *in pari delicto* with Jeanette; however, the inescapable fact is that if Stevens in any way contributed to the wrong committed by Jeanette, she received no benefit from it. Thus, she cannot be said to be *in pari delicto*. Additionally, to the extent that Stevens was involved, she merely participated in a mechanical sense, inasmuch as she merely drafted the deeds. See *In re: Estate of Reid*, 825 So. 2D at 8 (¶29), where the Supreme Court found that even when an independent attorney prepared a will naming a fiduciary of the testator as the sole beneficiary, that was not independent advice negating the undue influence. The attorney was deemed to be, in that matter, a mere scrivener. *Id.*

3. The Chancery Court of Pearl River County erred when it found that Bordman did not lack testamentary capacity on March 27, 1992.

The Estate of Bordman C. Humphrey bears the burden of proving by clear and convincing evidence that Bordman lacked testamentary capacity when he conveyed the property in question to Jeanette on March 27, 1992. *Smith v. Smith*, 574 So. 2d 644 (Miss. 1990). Mental incapacity is not always permanent, but may be punctuated by lucid intervals. *Id.* The only testimony adduced at trial was that Bordman suffered a complete mental and physical breakdown at the beginning of 1992, and at the time that he conveyed the property to Jeanette he was only beginning to recover from what had been believed would be his deathbed. Barker, Stevens, and Lewis all testified that Bordman

was in a highly suggestible mental state, and Barker testified that during the two year period following his hospitalization that Bordman resided with Stevens, Bordman had the unfortunate tendency to stand in the middle of the road and wave at passing cars, as well as an inability to identify Barker as his grandson. The evidence was overwhelming that Bordman was not of sound mind, and lacked the capacity to understand the transaction in which he was engaged, and its consequences and effects upon his rights and interests. *Id.* at 651.

Subsequent evidence, including the Chancery Court's determination that from September 1997 Bordman lacked testamentary capacity, indicates that this was merely a step on a long downward trend in Bordman's mental and physical health. The only evidence adduced at trial indicated that Bordman was highly suggestible, mentally ill, and physically weak at the time he conveyed the property to Jeanette. The fact that later he may have had lucid periods is not determinative, since the key question of lack of capacity must be focused upon the time when he conveyed the property. *Smith*, 574 So. 2d at 653.

The Chancery Court erred when it dismissed the claims that Bordman lacked the capacity to devise the property in question to Jeanette on March 27, 1992.

CONCLUSION

The Chancery Court of Pearl River County erred when it dismissed the claims of the Estate of Bordman C. Humphrey against Jeanette Humphrey Smith and the other defendants in connection with the conveyance from Bordman to Jeanette of tracts 3 and 4 of the property. The only evidence presented at trial showed that Bordman was subject to manipulation by Jeanette, who was a fiduciary and received a benefit from that relationship, and there was no independent advisor to protect Bordman.

The Court erred in finding that Stevens was *in pari delicto* with Jeanette and thus forestalled from pursuing the claims of the estate against Jeanette. The executrix represents the estate in an administrative and legal capacity; her individual capacity is wholly irrelevant to that administrative capacity. Given that she received no material benefit, the Chancery Court erred as a matter of law when he determined that the estate would not be able to pursue the claims if it were represented by Stevens.

In addition, Bordman lacked the testamentary capacity to convey the land to Jeanette. Stevens presented clear and convincing evidence that in March 1992 Bordman was merely a shell of a man, utterly physically and mentally decrepit. He had no input into the drafting of the deeds, and merely signed papers that were put in front of him.

For the foregoing reason, this Court should reverse and render the decision of the Chancery Court of Pearl River County.

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APPELLEES

CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this day mailed for filing, via United States mail, postage prepaid, the original and four (4) copies of the foregoing Brief of the Appellant to the Clerk of the Supreme Court of Mississippi, Ms. Betty Sephton, Post Office Box 249, Jackson, Mississippi, 39205-0249.

THIS the 24th day of March, A.D. 2008.

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CERTIFICATE OF SERVICE

I, Alexander Ignatiev, attorney for Appellant, do hereby certify that I have this
day mailed, via United States mail, postage prepaid, a copy of the foregoing Brief of the
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THIS the 24th day of March, A.D. 2008.



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