SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALICE MITCHELL — APPELLANT

V. — SUPREME COURT NO. 2007-CA-01787

DAVID POYNOR — APPELLEE

AN APPEAL FROM THE CHANCERY COURT OF
CALHOUN COUNTY, MISSISSIPPI
EIGHTEENTH CHANCERY JUDICIAL DISTRICT

APPELLANT'S REPLY BRIEF

(ORAL ARGUMENT REQUESTED)

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SUPREME COURT OF MISSISSIPPI
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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusals.

1. Alice Mitchell, Appellant (Plaintiff), 979 Peppertown Rd. Eupora, MS 39744;

2. David Poyner, Appellee (Defendant), Big Creek, MS;

3. George M. Mitchell, Jr., attorney for Appellant, 209 South Dunn Street, Eupora, MS, 39744;

4. Honorable Tina M. Scott, attorney for Appellee, P.O. Box 167, Houston, MS, 38851; and

5. Honorable Edwin H. Roberts, Jr., Chancellor, P.O. Box 48, Oxford, MS, 38655.

RESPECTFULLY SUBMITTED:

GEORGE M. MITCHELL, JR.
ATTORNEY FOR APPELLANT

TABLE OF AUTHORITIES

THE SUPREME COURT OF MISSISSIPPI
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RESPONSE TO APPELLEE'S STATEMENT OF THE CASE

It should be pointed out that in Appellee's Statement of the Case there was an attempt to circumvent what the law actually requires as to the execution of Wills and how such is to be performed. The Appellee here attempted to get this Court's opinion that it was okay for someone to make a decision about what transpired on a prior day or weeks later or even months later without having seen the individual on the day in question. This is evident by the fact that reference was made to testimony by Mr. Bobby Harrison, David Poyner, Bro. Jimmy Vance, and by pleading that Alice Mitchell refused to assist in the funeral. Further, Appellee attempted to circumvent the requirements by bringing out testimony about Appellee's reputation in the community for truth and veracity.

In regards to the bank account and the removal of funds by David Poyner and his use of the Power of Attorney there was no contradiction as to the fact that David Poyner and Lisa Poyner were the only two who testified about what Robert Hall wanted. (T 99-100, 128-130)

As to the reference by Appellee to the medical records suffice it to say that in one respect the medical records were not executed nor documented at the time of the execution of the Will in question.

APPELLANT'S REPLY ARGUMENT

REPLY ARGUMENT TO ISSUE 1

THE TRIAL COURT ERRED IN ITS NOT FINDING A LACK OF TESTAMENTARY CAPACITY AT THE TIME OF THE EXECUTION OF THE WILL AS WELL AS FAILURE TO PROPERLY FOLLOW ESTABLISHED PROCEDURES FOR THE EXECUTION TO BE VALID.

Responding Appellant does not feel it necessary to reiterate and set forth the factual scenario as previously stated in her original Appellant's Brief. However, since this case was tried January 30, 2007, and finalized January 31, 2007, it is felt that there should be brought to the Court's attention some additional cases which continue to support the Appellant's position.

First Appellant would state that the case of Howell v. May, 983 So. 2d 313 (COA,2008) continued to support what has already been pointed out factually as to the law in Appellant's Brief. The Court in this case at its discussion of Independent Consent and Action had the following to reiterate:

> [10] ¶ 25. Under the third prong of the test to rebut the presumption of undue influence, Sharnee was obligated to demonstrate, by clear and convincing evidence, that Ann exhibited independent consent and action. *Wright* 797 So.2d at 1002 (¶ 38). The "best way" to show independent consent and action is to provide advice of (a) a competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interests. *Dean v. Kavanaugh*, 920 So.2d 528, 537 (¶ 46) (Miss.Ct.App.2006).

In that particular case in ¶ 26 the Court further had the following to add:

> .... "The participation of the beneficiary/grantee, or someone closely related to the beneficiary, arouses suspicious circumstances that negate independent action." *Id.* (quoting *Harris v. Sellers*, 446 So.2d 1012, 1015 (Miss.1984)).

Reference is made that the Chancellor in his Opinion on page 11 had the following to state:

> "While suspicious circumstances are not present in the instant case, David Poynor was actively concerned with the preparation and execution of the Durable Power of Attorney and Will."

Appellant would ask this Honorable Court to review the actual step by step circumstances and scenario as to how both the Power of Attorney and the Will were obtained. David Poyner was active in obtaining both, paid for both, supplied information for the Power of Attorney and provided transportation and was present during the time the information was supplied to the paralegal. The law firm allowed David Poyner to take the Will to Robert Hall and he himself was the sole individual responsible for seeing to the execution of said Will. The Court further in its Opinion on page 12 stated:

> "Given the fact that David actively concerned himself with the Durable Power of Attorney and the preparation and the execution of the Will, and that a confidential relationship existed between Mr. Hall and Mr. Poynor, there is a presumption of undue influence. To overcome this presumption, Mr. Poynor was required to prove by clear and convincing evidence that (1) he, as the beneficiary, acted in good faith, (2) the testator had full knowledge and deliberation in the execution, and (3) the testator exhibited independent consent and action."

It is submitted that the learned Chancellor was correct here in his analysis of the law, but in fact totally acted in not following what has been the established case law. The case of In re Estate of Pope, 2008 WL 2097593 (Miss.App.,2008) reiterated and set forth a lot of what has already been pointed out in Appellant's Brief. However, it is felt that certain short exerts should be brought to this Court's attention:

> [7] ¶ 14. Juanita next argues that she presented evidence sufficient to rebut the presumption of undue influence. Once a presumption of undue influence is established, the burden of proof shifts to the beneficiary to rebut the presumption with clear and convincing evidence of:
>
> (1) Good faith on the part of the grantee/beneficiary;
> (2) Grantor's full knowledge and deliberation of his actions and their consequences; and
> (3) Advice of (a) competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.
>
> *Murray*, 446 So. 2d at 578 (citations omitted). The third prong of *Murray* has been redefined to require that the proponent establish "that the grantor/testator exhibited

independent consent and action." *Mullins*, 515 So.2d at 1193. In *Mullins*, the court explained:

> [The three prongs of *Murray*] should not be understood as entirely separate and independent requirements that ought to be rigidly exacted in every case. Undue influence is a practical, non-technical conception, a common sense notion of human behavior. As helpful as *Murray* may be to identify factors that ought to be considered, common sense counsels against rigid, inflexible multi-part tests, particularly as the parties our law saddles with proof of the negatives are laymen, not legal technicians. Better that the scope of equitable principles be imperfectly defined than that justice be overborne by the weight of artificial rules.

*5 *Mullins*, 515 So.2d at 1194. The Mississippi Supreme Court has recently instructed that "the testimony of the proponents or interested parties is not sufficient to rebut the presumption of undue influence." *Holmes-Pickett,* 961 So.2d at 681 (19) (citing *Pallatin,* 638 So.2d at 495).

1. Good Faith

[8][9] ¶ 15. In determining whether the beneficiary acted in good faith, the following factors are considered: (a) who initiated procurement of the will, (b) where the will was executed and in whose presence, (c) the consideration paid, (d) who paid the consideration, and (e) the secrecy or openness of the will's execution. *Smith*, 722 So.2d at 612(22) (citing *Pallatin,* 638 So.2d at 495-97).

The case of In re Will and Testament of Boyles, 2008 WL 711729 (Miss.App. 2008) makes reference to the fact that the testimentary capacity must be established on a day certain and the Court stated:

> ¶ 15. In the instant case, our inquiry is whether the trial court was manifestly wrong in its decision that Mrs. Boyles had testamentary capacity on May 3, 1999. From the testimony above, it is clear that the Windhams failed to shoulder their burden of showing testamentary incapacity on the day the May 3, 1999 will was executed.

Appellant submits that Appellee never established that Robert Hall had true testamentary capacity at the time of the execution of the said Will.

Applicable to both issues raised by Appellant is the fact that much proof was brought about on behalf of the Appellee as to the character of David Poynor.

In re Will and Testament of Boyles:

> ¶ 19. However, without speaking to the accuracy of the Windhams' interpretation of *Fielder*, as a general matter, " 'character evidence' is not admissible in civil cases' unless character is one of the issues in the case." .... When determining whether a confidential relationship exists, an individual character is irrelevant. Therefore, as the evidence pertained to events that occurred post execution, and character evidence is irrelevant to a determination of whether a confidential relationship existed, we find the trial court did not err in excluding the evidence.

Appellant asks this Honorable Court to reassess the holdings in the Trial Court in view of the holdings of the Mississippi Supreme Court in the case of In re Estate of Holmes 961 So.2d 674, (SCT,2007) wherein the Supreme Court addressed the following issues:

(1) determination of testamentary capacity and reaffirmed the three factors to be considered;
(2) personal and confidential relationships;
(3) the factors to be considered whether a confidential relationship exists;
(4) requirements that the beneficiary must show that the testator exhibited independent consent and action in order to rebut presumption of undue influence in will contest, independent advice is but one way independent counsel and action may be shown; etc.

In this particular case the Supreme Court reiterated as follows:

> *681 ¶ 19. This Court has previously found that the testimony of the proponents or interested parties is not sufficient to rebut the presumption of undue influence.
>
> In those cases where you admittedly have a confidential relations transfer from a dependent to a dominant party, it seems to me that the ultimate test should be something on the order of the following: Excluding the testimony of the grantee, those acting in the grantee's behalf (such as the attorney), and any others who could have a direct or indirect interest in upholding the transfer (such as grantee's family), is there any other substantial evidence, either from the circumstances, or from a totally disinterested witness from which the Court can conclude that the transfer instrument represented the true, untampered, genuine interest of the grantor? If the answer to this question is yes, then it becomes a question of fact whether or not there was undue influence. If the answer is no, then as a matter of law the transfer is voidable.

Pellatin v. Jones, 638 So.2d 493, 495 (Miss.1994) ....

[9] ¶ 39. This Court has held that the following factors should be considered in determining the grantor/testator's knowledge at the time of execution of the instrument:

(a) his awareness of his total assets and their general value, (b) an understanding by him of the persons who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect that prior will or natural distribution, (c) whether non-relative beneficiaries would be excluded or included and, (d) knowledge of who controls his finances and business and by what method, and if controlled by another, how dependent is the grantor/testator on him and how susceptible to his influence.

REPLY ARGUMENT TO ISSUE 2

THE TRIAL COURT CORRECTLY FOUND THAT A CONFIDENTIAL RELATIONSHIP BETWEEN ROBERT WAYNE HALL AND DAVID POYNOR BUT IT ERRED WHEN IT RULED THAT THIS WAS OVERCOME BY CLEAR AND CONVINCING EVIDENCE.

In the case of Dean v. Kavanaugh 927 So.2d 528, (COA, 2006) in the Court's addressing knowledge and deliberation under that area the following was stated:

> (B) Knowledge and Deliberation:
>
> [12] ....¶ 44. .... "What is required of *Madden* is to give clear and convincing proof that she showed good faith, that Sierra had full knowledge and deliberation of precisely what he was doing and its consequences and that Sierra showed independent consent and action."
>
> *Madden*, 6262 So.2d at 621
>
> (C) Independent Consent and Action
>
> [13][14] ¶ 46. The Mississippi Supreme Court has held that the best way to show independent consent and action is to provide "advice of (a) competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest." ... "The participation of the beneficiary/grantee, or someone closely related to the beneficiary, arouses suspicious circumstances that negate independent action." *Harris v. Sellers,* 446 So.2d 1012, 1015 (Miss.1984). ....

It is requested by the Appellant that after the Court of Appeals considers the Record; Appellant's Brief; Appellee's Brief, and Appellant's Reply Brief, that it rule as a matter of law that the Trial Court would be deemed to have acted in error. Such submissions are based upon the rulings set forth in the case of Spencer v. Hudspeth, 950 So.2d 238, (COA,2007) wherein this Court stated:

> [6][7] ¶ 11. A confidential relationship is defined as follows:
>
> Whenever there is a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of the mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character.
>
> *Fost v. Ross,* 804 So.2d 1018, 1022-23)¶ 15) (Miss.2002)... The Mississippi Supreme Court has set out factors to be considered when determining whether or not a confidential relationship exists. These factors are:

(1) whether one person has to be taken care of by another,
(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 a joint account 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 the other.

In re *Moran v. Necaise*, 821 So.2d 903, 906-07 (Miss.Ct.App.2002).

¶ 13. In *Madden v. Rhodes,* 626 So.2d 608,618 (Miss.1993), the Supreme Court stated that when a confidential and/or fiduciary relationship exists that there is an automatic presumption of undue influence regarding an inter vivos gift. The Supreme Court further stated, "When circumstances give rise to a presumption of undue influence, the burden of proof shifts to the grantee to establish by clear and convincing evidence the validity of the gift. Id, at 624. ...

[8] ¶ 14. The Supreme Court has established a three-pronged test to overcome the presumption of undue influence. The three prongs are: (1) that the grantee/beneficiary acted in good faith, (2) that he grantor had full knowledge and deliberation of his actions and the consequences of those actions, and (3) that the grantor exhibited independent consent and action. *Murray v. Laird,* 446 So.2d 575, 578 (Miss.1984).

[9][10] ¶ 15. To determine whether or not a gift was executed in good faith the Mississippi Supreme Court has outlined the following factors: (1) determination of the identity of the initiating party in seeking preparation of the instrument, (2) the place of the execution of the instrument and in whose presence, (3) the consideration and fees paid, if any, (4) by whom paid, and (5) the secrecy and openness of the execution of the instrument. Id. ....

CONCLUSION OF APPELLANT'S RESPONSE

Without totally recapping every circumstance involved in the trial of the case or those facts which are set forth in the Appellant's Brief, the Appellant would respectfully ask that this Court consider the following factual brief scenario in her final response to the Court.

Alice Mitchell would submit that the Trial Court did not properly or procedurally follow the requirements necessary to determine the validity of a Will and the exact responsibilities that such are mandated on the day of execution of the Will. In the present case all one has to do is recap the facts surrounding the Will, and one would find that at no time did Robert Hall ever have it determined that he possessed testamentary capacity on the date of the execution. Further, even the execution of the Will is surrounded by suspicious circumstances as well as the procurement thereof. The burden of overcoming a fiduciary relationship, confidential relationship, and undue influence was not accomplished or achieved by the Appellee, David Poynor.

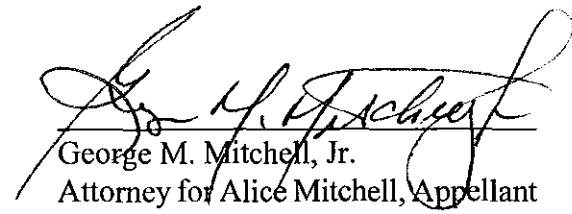
Suffice only to say in regards to the Power of Attorney that this Court as well as the Supreme Court for the State of Mississippi has held that under the circumstances set forth in this case that there must be more than the testimony of David Poynor and/or his wife to support the transfer or inter vivos gift of those funds in the checking account to he and his wife. There was no independent proof that Robert Hall knew what he was doing, and further, there was no independent advice on his behalf by anyone to Robert Hall as to the Power of Attorney and its use nor the Will.

Alice Mitchell respectfully asks that this Court render and reverse the decision of the Trial Court and in doing such declare the Will as presented null and void, and find that it was obtained by undue influence by an individual while in a fiduciary and confidential relationship. That all physical assets be ordered to be returned to Alice Mitchell and/or an accounting and a monetary amount paid to be paid for any which have been disposed of or destroyed. Further, Alice Mitchell would ask that

this Court reverse and render as to the Trial Court's decision concerning the use of the Power of Attorney and the funds in the said bank account. Alice Mitchell would ask that this Court order that she be given the amount of the funds which were in the bank account as of the date of the transfer of such by David Poynor to himself, Robert Hall and his wife.

In asking this Honorable Court to make such a decision it is submitted that the Trial Court erred when it found that David Poynor overcome his requirements as set forth by law with clear and convincing evidence.

RESPECTFULLY SUBMITTED:



George M. Mitchell, Jr.
Attorney for Alice Mitchell, Appellant

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M. R. A. P. 25 (b) CERTIFICATE OF SERVICE

This day I, George M. Mitchell, Jr., do hereby certify that I on September 22, 2008, did mail postage pre-paid, first class, U. S. Mail a true and correct copy of the Response to Appellee's Statement of the Case to:

Honorable Edwin H. Roberts, Jr.
Chancery Court Judge
Post Office Drawer 49
Oxford, Mississippi 38655-0049

Honorable Tina M. Scott
Attorney at Law
P. O. Box 167
Houston, MS 38851

This the 22 day of September, 2008.

George M. Mitchell, Jr.
Attorney for Appellant