IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01289

KENNETH RAY FINLEY AND
SANDRA FINLEY McCARDLE **APPELLANTS**

VS

JESSIE DARYL FINLEY **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT
OF PERRY COUNTY, MISSISSIPPI

BRIEF OF THE APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

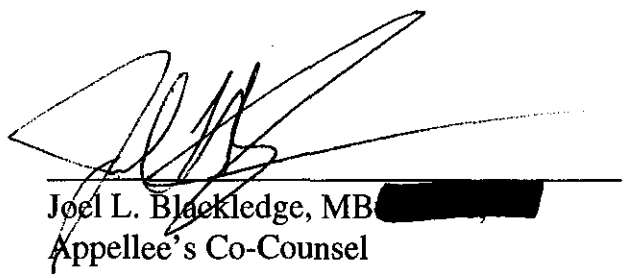
The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Kenneth Ray Finley and Sandra Finley McCardle,
Plaintiff in the Trial Court and Appellant on Appeal

Donald W. Medley,
Appellant's Trial Counsel

Honorable James H.C. Thomas, Jr.,
Perry County Chancery Court Judge

Jessie Daryl Finley, Appellee
Rachel Finley



Joel L. Blackledge, MB[redacted]
Appellee's Co-Counsel

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STATEMENT OF THE ISSUES

1. Did Appellants, proponents of the deeds and will executed by Bobby Ray Finley, meet their burden of proof?

2. Did Appellee, contestant of the deeds and will, meet his burden of going forward with sufficient proof as to place in issue the validity of the documents in regard to testamentary capacity and undue influence, especially as regards the confidential relationship with the beneficiary?

3. Did the Appellants adequately rebutt any presumption of undue influence raised by a confidential relationship between Bobby Ray Finley and Jessie Daryl Finley?

4. Did the trial court err in finding that Bobby Ray Finley was mentally competent and without undue influence when he executed the various deeds transferring property to Jessie Daryl Finley and Kenneth Ray Finley and when he executed his Last Will and Testament?

STATEMENT OF THE CASE

I. Nature of the Case and Course of Proceedings Below

This appeal from the Chancery Court of Perry County is to resolve issues of testamentary capacity and undue influence among the children of Bobby Ray Finley. Bobby Ray Finley made a conscious, informed and uninfluenced decision to devise and/or deed to Jessie Daryl Finley, his youngest son, a larger portion of his estate than that given to his two other children. This gift was accomplished through certain deeds and confirmed by the terms of his last will and testament.

Chancellor James H. C. Thomas, Jr., properly entered judgment finding that Bobby Ray Finley was mentally competent to execute the deeds and his will and his decisions were not as a result of undue influence by Jessie Daryl Finley. The post-trial motion for reconsideration was denied. This appeal has ensued.

II. Statement of the Facts

Bobby Ray Finley, and his wife, Avis Finley, built an egg farm operation in Perry County. Once they began producing eggs (ARE 1; Tr. 25), both Bobby Ray Finley and Avis Finley participated in the operation of the egg farm; Bobby Ray Finley, due to injuries from a tractor accident (ARE 1; Tr. 25), participated in the management and oversight (ARE 2; Tr. 84), while Avis Finley was primarily responsible for the physical labor (ARE 1; Tr. 25).

Avis Finley often asked various family members for assistance with labor (ARE 1, 3; Tr. 25, 135), but primarily relied on her son, Jessie Daryl Finley, to assist (ARE 4, 5; Tr. 253, 254). Jessie Daryl Finley worked all weekend on the farm when he was not away due to his primary employment as a trucker (ARE 4; Tr. 253). Ultimately, prior to Avis Finley's death, Jessie Daryl Finley was required to take off two months out of the year to assist with the chicken operation (ARE 4, Tr. 253). After the death of Avis Finley in April 2001, Jessie Daryl Finley quit his employment, moved back home and began working on the farm full time (ARE 5, 6; Tr. 254, 255). His only remuneration for this work was the roof over his head and the food on the table (ARE 7; Tr. 256).

In August 2001 after the death of Avis Finley, Bobby Ray Finley executed a deed to 70.95 acres, the "old homeplace" and chicken houses, to Jessie Daryl Finley, reserving unto himself a life estate (ARE 8; Tr. 261). Additionally, on November 13, 2001, Bobby Ray Finley deeded 57.45 acres to Jessie Daryl Finley and Kenneth Ray Finley, reserving a life estate in himself (ARE 9; Tr. 122). In December 2001, Bobby Ray Finley executed

an additional deed to this property in favor of Kenneth Ray Finley, which did not contain the reservation of the life estate (ARE 10; Tr. 152).

A dispute arose between Bobby Ray Finley, the father, and Kenneth Ray Finley, the elder son, regarding this 57.45 acres. Bobby Ray Finley had not intended to transfer a full interest in this property to Kenneth Ray Finley, but instead had wanted to retain a life estate in it (ARE 11; Tr. 265), as done in the first deed. Due to damaging beetles infecting the pine trees located on this acreage, Bobby Ray Finley sought to have the timber cut (ARE 11; 265). This is when he learned of the mistake in the second deed (ARE 12; Tr. 139). Bobby Ray Finley requested that Kenneth Ray Finley grant him a life estate, but Kenneth Ray Finley refused (ARE 13; Tr. 119). As time went on, the hostility between the father and eldest son grew greater (ARE 13; Tr. 119). On August 28, 2002, almost a year later, Kenneth Ray Finley finally executed a deed granting a life estate in the property back to his father (ARE 14; Tr. 61, ARE 13; Tr. 119). Four months later, December 2002, Bobby Ray Finley rewrote the terms of his will.

SUMMARY OF THE ARGUMENT

1. The Chancellor did not improperly shift the burden of proof to the opponents/appellants.

The trial court properly applied Mississippi law in finding that the burden of proof as to the validity of a will is on the proponent. However, the burden of going forward with proof of undue influence, or lack of testamentary capacity, or other defense, shifts to

the Appellants. Appellants did not meet that burden sufficiently. Appellant must present proof that raises a question of fact.

2. The Chancellor did not err in finding that Bobby Ray Finley was mentally competent when he executed the various deeds transferring property to Jessie Daryl Finley and Kenneth Ray Finley and when he executed his Last Will and Testament.

The facts presented in testimony clearly establishes that Bobby Ray Finley was neither incompetent nor under undue influence when he executed the deeds and will changing his estate plan.

3. To the extent that any presumption arose as to undue influence upon Bobby Ray Finley, Appellees fully rebutted the presumption.

The facts presented in testimony clearly establish that any presumption of undue influence was rebutted.

ARGUMENT

A. Standard of Review

The Chancellor's factual findings are reviewed under the manifest error/abuse of discretion test. *Cassell v. Cassell,* 970 So.2d 267 (Miss.App. 2007). This case primarily presents issues of fact upon which the Chancellor, *viva voce*, made determinations of credibility. This Court conducts *de novo* review of pure questions of law. *Planters Bank & Trust Co. v. Sklar,* 555 So.2d 1204 (Miss. 1990); *Countrywide Home Loans, Inc. v. Parker*, 975 So.2d 233 (Miss. 2008). In this case, there are some mixed questions of fact and law.

B. Analysis

1. The Appellees Met Their Burden of Proof Showing the Will Was Genuine and that Bobby Ray Finley Had Testamentary Capacity.

In its Judgment of March 25, 2008, the trial court properly followed Mississippi law as it relates to the admission of Bobby Ray Finley's will into evidence and the various burdens imposed upon the parties.

Mississippi Code Annotated § 91-7-29 establishes that the burden of proof for the issue of *devisavit vel non* falls clearly upon the proponent of the will, to determine the "validity of a paper asserted and denied to be a will, to ascertain whether or not the testator did devise, or whether or not that paper was his will." *In re Estate of Woodfield,* 968 So. 2d 475 (Miss. 2006) (quoting Black's Law Dict. (6th ed. 1990)). In fact, this Court has stated that the order of proof "begins with the proponent of the will as he has the burden of proof." *Harris v. Sellers,* 446 So.2d 1012, 1014 (Miss.1984).

As further stated in *Harris v. Sellers*, "(T)he burden of proof is met by the offering and receipt into evidence of the will and the record of its probate." *Id.* As Miss. Code § 91-7-27 clearly establishes, the admittance of a will to "probate shall be *prima facie* evidence of the validity of the will."

Herein, the testimony of two witnesses to Bobby Ray Finley's will, namely Carlos Herring and Vicki Walters, was presented to the trial court. Both witnesses testified that they signed the will as a witness to its execution. (ARE 15; Tr. 11; ARE 16; Tr. 17). Upon the conclusion of this testimony, the trial court accepted the will for probate

purposes. With such acceptance into probate, the will creates a presumption that Bobby Ray Finley had testamentary capacity, and that "the will was the free and voluntary act of" Bobby Ray Finley. *See Harris v. Sellers,* 446 So.2d 1012, 1014 (Miss.1984) *citing Sheehan v. Kearney,* 82 Miss. 688, 21 So. 41 (1896).

2. Testamentary Capacity.

To determine whether a testator had the capacity to validly execute a will, the Mississippi Appellate Courts have established a three part test:

(a) Did the testator have the ability to understand and appreciate the nature and effect of his actions?

(b) Did the testator have the ability to recognize the natural objects or persons of his bounty and their relation to his?

(c) Was the testator capable of determining what disposition he desired to make of his property?

In re Estate of Pigg, 877 So.2d 406, 409 (Miss.Ct.App. 2003) citing *Estate of Wasson v. Gallaspy,* 562 So.2d 74, 77 (Miss.1990).

As previously stated, both Carlos Herring and Vicki Walters testified that on the day of the execution of the will, Bobby Ray Finley was by himself, acted in his normal manner, seemed fine to them, and had made up his own mind about what he was doing. He knew he was executing his will (ARE 15; Tr. 11, ARE 17; Tr. 13, ARE 18; Tr. 18). As this Court has recognized, "The testimony of a subscribing witness is entitled to greater weight than that of witnesses who were not present at the time the instrument was executed or who did not see the testatrix on that day." *In re Estate of Pigg,* 877 So.2d

406, 409 (Miss.Ct.App. 2003), citing *Estate of Edwards v. Edwards,* 520 So.2d 1370, 1373 (Miss.1988).

Additionally, as in the *Pigg* case, Bobby Ray Finley left his estate to the natural objects of his bounty, "although not in the amounts some beneficiaries would have preferred." *Id* at 411. Given his specific bequests, and the acreage he sought to see distributed, he was capable of determining the best manner for his property disposition.

While the Appellants try to call into question Bobby Ray Finley's testamentary capacity, the witness testimony contradicts any such claim. Appellants argue that because Bobby Ray Finley mentioned property in his will that he had previously disposed of by deed and the fact that he was prescribed multiple medications, he lacked testamentary capacity. However, as the testimony revealed, Bobby Ray Finley's mention of this property was to merely confirm the transfers he had already accomplished, to make "sure that everybody got their part of the land that he made sure that he was gonna give." (ARE 19; Tr. 149, ARE 20; Tr. 269). Additionally, even Bobby Ray Finley's pharmacist testified that the multiple medications had no effect on his mental competency (ARE 21; Tr. 245, ARE 22; Tr. 248, ARE 23; Tr. 249). No doctor was called by the Appellees to raise a question of fact on capacity.

3. <u>The Appellants, Opponents of the Will, Have the Burden of Going Forward</u>.

Once the proponent of the will has met the initial burden of proving the validity of the will, this Court has recognized that: "(T)he burden of proof is still with the proponent,

but the **burden of going forward** with proof of undue influence, or lack of testamentary capacity, or other defense, shifts to the Appellants." *Harris v. Sellers,* 446 So.2d 1012, 1014 (Miss.1984) (emphasis added). *See also In re Estate of Pigg,* 877 So.2d 406, 409 (Miss.Ct.App. 2003). In other words, the Appellants, in order to move forward, must "provide evidence to support the factual basis of the challenge that they make." *In re Estate of Pigg,* 877 So.2d 406, 409 (Miss.Ct.App. 2003)

In the case at bar, the trial court correctly noted in its Judgment that "the proponents of the Last Will and Testament of Bobby Ray Finley have met the burden of proving the validity of the will with the Appellants then having the **burden of going forward with evidence sufficient to challenge the will.**" (RE 6, Judgment, pg 3, ¶ 3) (emphasis added). The trial court properly found that the record did not reflect that the Appellants had met this burden. Therefore, the Court followed the law and all that remains for appeal is the Chancellor's finding of fact.

4. Going Forward, the Opponents Failed to Produce Sufficient Evidence of Undue Influence or Incapacity.

In order for the Appellants herein to prevail, some evidence must be established "showing that the beneficiary under the will abused the relationship either by asserting dominance over the testator or by substituting his intent for that of the testator." *In re Estate of Grantham* 609 So.2d 1220, 1224 (Miss. 1992), citing *In re Will of Adams,* 529 So.2d 611, 615 (Miss. 1988); *see also Costello v. Hall,* 506 So.2d 293, 298 (Miss. 1987).

In the absence of a confidential relationship, no presumption exists that there was undue influence. *In re Estate of Pigg,* 877 So.2d 406, 411 (Miss.Ct.App. 2003) citing *Greenlee v. Mitchell,* 607 So.2d 97, 105 (1992).

The trial court carefully considered evidence as to whether Bobby Ray Finley was mentally competent to execute the will at issue in this case, the deeds executed shortly before the will, and the claim of the Appellants of undue influence. The Chancellor found, as a matter of fact, that the Appellants had not met the burden of going forward with proof in establishing a confidential relationship or undue influence.

In re Estate of Grantham, 609 So.2d 1220, 1224 (Miss. 1992), provides framework for the Court's determination. They are as follows:

a. Whether one person was uneducated, could not be left alone, and had to be taken care of others;

b. Whether one person depends on and maintains a close relationship with others;

c. Whether one person provides transportation and arranges medical care for the other;

d. Whether one's finances and business concerns were entirely within another's control;

e. Whether joint checking accounts which contain funds actually belonging to another are maintained;

f. Whether one is extremely weak physically and confined to a wheelchair;

g. Whether one is of advanced age and poor health;

h. Whether there exists a power of attorney between one and another.

In re Estate of Grantham 609 So.2d 1220, 1224 (Miss. 1992).

Applying these factors, established by *Grantham,* to the case at bar, no confidential relationship and no presumption of undue influence arose. *See Harris v. Sellers,* 446 So.2d 1012 (Miss.1984).

Education and Physical Condition

Bobby Ray Finley could not be called uneducated. In fact, Brian Phillips, his Sanderson Farms manager, testified that Finley was a "shrewd businessman" and a very good manager of his farm (ARE 2; Tr. 84), that he was able to negotiate contracts (ARE 24; Tr. 86), and that he was mentally capable of engaging in business transactions (ARE 24; Tr. 86).

Furthermore, it is quite evident that Bobby Ray Finley could be left alone. Finley often traveled to his camp in Waynesboro (ARE 25; Tr. 64). His sister testified that when he got lonesome he did not stay by himself (ARE 26; Tr.154). Nowhere in the transcript did anyone testify that Bobby Ray Finley could not be left alone. In fact, Finley was often out riding his four wheeler alone (ARE 19; Tr.149, ARE 27; 231) and even drove to Hattiesburg from Richton in order to get his morphine pump filled (ARE 28; Tr.237).

Rachel Finley, Jessie Daryl Finley's wife, did the cooking for the residents, and ensured that Bobby Ray Finley ate when he was supposed to, as he was a diabetic. (ARE 29; Tr.72, ARE 30; Tr. 223). However, merely cooking for a man does not establish that

he could not care for himself. Clearly, Appellants fail to prove the first factor as set forth in *Grantham.*

The Appellants argue that merely living under the same roof establishes that a close relationship existed. As the Chancellor found, standing alone that is not enough. However, while Bobby Ray Finley lived with and had a relationship with his son Jessie, absolutely no evidence was presented that he depended solely on this relationship.

No evidence was presented as to who actually arranged for Bobby Ray Finley's medical care. Warren Strickland, a pharmacist called by the Appellants, testified that he could not recall any instance where Jessie and Rachel came into the pharmacy with Bobby Ray Finley. (ARE 23; Tr. 249). All of the witnesses who had knowledge of Bobby Ray Finley's travels, testified that he drove himself around Richton and even to Hattiesburg. (ARE 31; Tr. 275, ARE 28; Tr. 237, ARE 30; Tr. 223, ARE 32; Tr. 185). Finally two witnesses, Braddis Crocker and Rachel Finley, each testified that Bobby Ray Finley himself controlled his medication, keeping his medicine in a "little cigar box." (ARE 33; Tr.146, ARE 34; Tr. 235, ARE 35; Tr. 221).

Independence of Personal Finances

The next *Grantham* factor is that the person's finances and business concerns were entirely within another's hands. The Appellants fail to address this factor. The trial transcript is replete with evidence that Bobby Ray Finley handled his own affairs. Carlos Herring, the former sheriff of Perry County, stated that Finley was not easily influenced

and stood by his ways (ARE 36; Tr. 12). Again, Brian Phillips, a former Sanderson Farms Representative, whose testimony devastates the Appellant's position, testified that Finley was a "shrewd businessman" and a very good manager of his farm (ARE 2; Tr. 84). He further testified that Bobby Ray Finley was involved in the everyday operations of the farm from a mental and management standpoint (ARE 21; Tr. 84). He also testified that Finley participated in contract negotiations with Sanderson Farms (ARE 24; Tr. 86) and that the operation of the farm by Finley did not change up through the last day Mr. Philips saw Bobby Ray Finley (ARE 37; Tr. 88).

Braddis Crocker testified that she saw Bobby Ray Finley "pretty much every day or every other day" (ARE 31; Tr.135) and that he had the mental capacity to make up his mind about what he wanted to do (ARE 38; Tr. 136). Furthermore, she testified that no one would influence him if he had something set on his mind (ARE 39; Tr. 137).

Helen Guy testified that you could try to influence him all you wanted but he was smart. "You couldn't tell him what to do" (ARE 40; Tr 179). Jimmy McClain testified that Bobby Ray Finley was mentally competent (ARE 41; Tr. 190) and even drew up a contract between them (ARE 42; Tr. 191). Gaines Newell testified that "Bob had a mind of his own and did what he felt was right" (ARE 43; Tr. 202). Gary Crowder, another representative of Sanderson Farms, testified that he never saw Bobby Ray Finley appear mentally incompetent and that he did "have his wits about him." (ARE 44; Tr. 211).

Rachel Finley testified that Finley was in poor health because of the tractor wreck, but that his mind was sharp as a tack. (ARE 45; Tr. 220).

Jessie Daryl Finley testified that his father did add his name to the checking accounts maintained by Finley for both personal and business operations. (ARE 46; Tr. 277). However, the testimony clearly established that both Jessie Daryl Finley and Rachel Finley worked on the farm without being paid. The testimony of the Court-appointed accountant proves that nothing other than ordinary living expenses for the three was paid. Nancy Carpenter said there was no misuse of funds (ARE 47; Tr. 164).

Bobby Ray Finley signed checks himself. (ARE 48; Tr. 225). He insisted on seeing the bank statement each month and going over it with the checkbook to know exactly what the statement said. (ARE 48; Tr. 225) While Rachel Finley did testify that she maintained the books for the business (ARE 49; Tr. 226), Bobby Ray Finley controlled his business.

It can hardly be argued that all of the funds in those accounts belonged solely to Bobby Ray Finley (ARE 47; Tr. 164), or that Jessie Daryl Finley and Rachel Finley were taking advantage of Bobby Ray Finley.

Physical Dependence

Finally, the last *Grantham* factor has not been proved. Bobby Ray Finley was not extremely weak physically, confined to a wheelchair, or of advanced age and poor health, such that dominant influence could be had over that person's decisions. As previously

discussed herein, each witness testified that Finley had a mind of his own and stood by his decisions. The Chancellor's decision is firmly rooted in the facts and testimony presented.

Bobby Ray Finley suffered from residual pain from his tractor accident, diabetes and a related heart condition, high cholesterol, high blood pressure, and chest pains. However, no doctor was called to testify about his medical conditions and/or his mental capacity (ARE 50; Tr. 244-246). Finley's pharmacist testified that "customers who have been taking morphine for two to three years" function properly (ARE 22; Tr. 248), and that he never saw any time when Bobby Ray Finley was mentally incapacitated (ARE 23; Tr. 249).

Bobby Ray Finley Changed his Will Because Kenneth Ray Finley and Sandra Finley McCardle Were Not in his Good Graces

Further, Bobby Ray Finley's change to his will after the death of his wife, standing alone, is insufficient proof of undue influence. As this Court has noted, many people frequently change their wills between the time of an initial will and death; the fact that a person makes a change does not "call into question the validity of the will." *In re Estate of Pigg,* 877 So.2d 406, 413 (Miss.Ct.App. 2003).

Testimony shows that Bobby Ray Finley and Avis Finley each had wills at the time of Avis Finley's death in 2001 (ARE 51; Tr. 114-117), but that Bobby Ray Finley changed his will after Avis Finley's death to reduce the property received by both Appellants. In fact, the testimony of the Appellants themselves explained that between

the time of the initial will and the final Last Will and Testament of Bobby Ray Finley, Appellants, Kenneth Ray Finley and Sandra Finley McCardle, fell into disfavor with their father. Kenneth Ray Finley testified that his father "had an attitude, especially after the property deal went on. I mean, he hated me I imagine. But, I mean, he give it to me and then he wanted it back. And I let him cut the timber the first time and split with him." (ARE 52; Tr. 102). Additionally, he testified that his father's anger "had gotten - - was very terrible. His anger toward me had gotten some kind of bad within just a few months," "Especially when the land deal come up about the warranty deed." (ARE 13; Tr. 119). Kenneth Ray Finley even provided the details of his father's anger stating that Finley "thought I should have done it (executing a deed in favor of Finley granting a life estate in the property) right away. I said, I can't do it right away. I said, I've got to think about this. I don't understand what's going on. **And he really got mad**." (ARE 13; Tr. 119) (Emphasis added).

Bobby Ray Finley's resentment for Kenneth Ray Finley and Sandra Finley McCardle was further acknowledged by the testimony of James T. Finley (Bobby Ray Finley's brother) and Braddis Crocker (Bobby Ray Finley's sister). James testified that Bobby Ray Finley discussed his displeasure with Kenneth Ray Finley and Sandra Finley McCardle with him, stating that "they done me so dirty, I ain't giving them nothing." (ARE 53; Tr. 63). James T. Finley explained Bobby Ray Finley's issues with Kenneth Ray Finley as a dispute emanating from the transfer of the acreage to Kenneth Ray Finley.

Bobby Ray Finley had planted pine trees on the acreage and had to prematurely cut them because of pine beetles. When the trees were cut, Finley discovered that the second deed executed by him to Kenneth Ray Finley had erroneously left out his retention of a life estate. Kenneth Ray Finley received most of the money from the sale of the timber and Bobby Ray Finley became angry because of it (ARE 54; Tr. 75).

Braddis Crocker provided similar testimony regarding Bobby Ray Finley's discussions with her regarding his intent in the distribution of his property (ARE 38; Tr. 136, ARE 55; Tr. 155). She likewise discussed Finley's anger related to the property deal (ARE 12; Tr. 139) and that the relationship between Kenneth Ray Finley and Bobby Ray Finley did not appear to her to be "very much." (ARE 56; Tr. 140). She also testified that Finley was aggravated with "Sandy" and Kenneth Ray Finley (ARE 55; Tr. 155) and that she could "count on one hand in four years how many times (she) saw "Sandy" at her daddy's house." (ARE 56; Tr. 140).

Helen Guy also testified that Bobby Ray Finley was talking to her and her husband one day, outside of the presence of the Appellee and his wife. In that conversation, Ms. Guy recalled Bobby Ray Finley saying "he didn't know if he wanted to leave Sandy and Kenneth anything because they hadn't helped Darrell (sic) any." (ARE 40; Tr. 179). Additionally, Bobby Ray Finley did not trust "Sandy." (ARE 57; Tr. 227).

Almost every witness, mantra-like, testified that Bobby Ray Finley was not easily influenced, had his own mind, and did not appear to be under the influence of prescription

drugs (ARE 36; Tr. 12). Throughout the testimony, over and over and over, the resounding truth of Finley's independence comes through. ["Negative. None at all. He stood his ways." (ARE 36; Tr. 12) "No. He had a mind of his own." (ARE 22; Tr. 64) "Well, after his wife died, I'd say up until a month or two before he got down to where he couldn't go, you know, he got worser and worser." (ARE 58; Tr. 66) "He was never disoriented about where he was." (ARE 59; Tr. 67) "Physically, no; mental and from a management standpoint, yes." (ARE 2; Tr. 84) Contract negotiations occurred between Brian Phillips, Bobby, and the immediate manager (ARE 21; Tr. 86). "He still handled business in the same manner, in my opinion." No observation of being under the influence of drugs or alcohol (ARE 37; Tr. 88). "But as far as seeing any evidence of that (morphine pump), no." (ARE 60; Tr. 89) If Kenneth Ray Finley felt like his father was being unduly influenced, he did not get his father out of it (ARE 61; Tr. 118). "I think he was more or less kinda (sic) making up his mind as to what he was gonna (sic) do." He had the mental capacity to make up his mind up about what he wanted to do (ARE 38; Tr. 136). "Bob was his own person. Nobody influenced him at all. If he had something on his mind he was gonna (sic) do, he'd do it." (ARE 39; Tr. 137) When his pain pump filled up he would go to sleep "but his mind wasn't bad. I mean, he - - when he was awake, he was fine he'd just get sleepy." (ARE 62; Tr. 141-142) He could not be influenced by Jesse Daryl and Rachel (ARE 31; Tr. 146) "He was - -smart." "You couldn't tell him what to do. When he made his mind up on something, you could forget

it." "The final decision he would make. And he was smarter than people give (sic) him credit for." (ARE 40; Tr. 179) "Like I said, Uncle Bob's mind was very sharp." "But as far as mentally, he was still sharp and he just needed somebody to be there to talk." (ARE 63; Tr. 182 & 184) "The morphine pump was helping him apparently, but it didn't affect his mind." (ARE 64; Tr. 186) He said he was fully capable of taking his own medicine (ARE 45; Tr. 220). His pain medicine might cause sleepiness but he knew exactly what he was doing (ARE 65; Tr. 222). The only time he might act strange was when they first filled his pump up (ARE 66; Tr. 224). He took advice but when it got down to it, he would do what he wanted to and he was as sharp as a tack (ARE 66; Tr. 224, ARE 46; Tr. 225). He was never under the influence of medications when he drove (ARE 28; Tr. 237). No change in his demeanor after his wife passed away (ARE 21; Tr. 245). I did not see any mental incapacity (ARE 23; Tr. 249), never saw Jessie or Rachel influence Mr. Finley in any way (ARE 23; Tr. 249, ARE 67; Tr. 250). "He was sharp." (ARE 7; Tr. 256) The medicine "never did affect my father." (ARE 68; Tr. 258) He was depressed for a little while after his wife died. "I mean, he basically worked his way out of it, but he was sad. I would say sad because of what - - you know, how my brother and sister treated him." (ARE 69; Tr. 259) He never felt that Mr. Finley was not mentally capable of doing his own banking business (ARE 70; Tr. 294-296).]

Appellants must provide enough evidence so that the trier of fact "could conclude that it was improbable that the will was written free of undue influences." *In re Estate of*

Pigg, 877 So.2d 406, 414 (Miss.Ct.App. 2003). The Appellants' attempt to show that Bobby Ray Finley was either under the influence of prescription drugs or confused about what he was doing. The evidence presented by Appellants relies on speculation and is not enough. As stated in *Pigg,* "Only speculation could have placed such weight on the proof presented as to make the question of undue influence one for the trier of fact." *Id.* Chancellor Thomas refused to engage in such speculation, nor should this Court.

5. Appellees Fully Rebutted Any Presumption of Undue Influence.

Assuming, for a moment that there was sufficient proof to establish a confidential relationship or undue influence, this Court has established a three part test to decide whether the beneficiary under the will has overcome the presumption. *Mullins v. Ratcliff,* 515 So.2d 1183 (Miss.1987). That test is:

> (i) Good faith on the part of the beneficiary;
>
> (ii) the testator's full knowledge and deliberation of his actions and their consequences; and
>
> (iii) independent consent and action on the part of the testator.

Mullins, 515 So.2d at 1193; *see also In re Estate of Harris,* 539 So.2d 1040, 1041-42 (Miss. 1989).

In the instant case, the record contains sufficient proof to satisfy each of the three prongs.

Nancy Carpenter, a certified public accountant and the court appointed expert, testified that based on the financial records of Bobby Ray Finley, Jessie Daryl Finley did not take financial advantage of his father. Jessie Daryl Finley, as a joint account holder, could have signed any check that he wanted to (ARE 71; Tr. 171). Ben McIlwain, the bank president, confirmed this fact (ARE 70; Tr. 294-296). Given such testimony, it is obvious that Jessie acted in good faith.

Without reiterating testimony of numerous witnesses (*See* ARE 53; Tr. 63, ARE 54; Tr. 75, ARE 38; Tr. 136, ARE 12; Tr. 139, ARE 56; Tr. 140, ARE 55; Tr. 155, and ARE 40; Tr. 179), almost all of which were called by the Appellees, there is overwhelming proof in rebuttal that any presumption of undue influence raised by any, as yet unproven, confidential relationship, has been overcome.

6. Deference to the Chancellor.

The record in this case establishes that the trial court informed the parties that there were several exhibits that the court wanted to review and consider in terms of their detail and the timing of certain issues (ARE 72; Tr. 300). Further review of the documents admitted into evidence in this case provide an insight into the trial court's review and a time-line for Bobby Ray Finley's actions.

On August 13, 2002, Bobby Ray Finley, settled the wrongful death claim the family had brought for Avis Finley's death. All of the children believed their father to be

fully competent to undertake this task, even signing waivers of part of their portions of the wrongful death action over to Bobby Ray Finley.

Exhibit 2 (ARE 73), the Last Will and Testament of Bobby Ray Finley, was clearly executed on December 30, 2002. The warranty deed from Bobby Ray Finley for the "old home place and family chicken business," which creates the basis of Appellants' chief complaint, was admitted into evidence as part of composite Exhibit No. 4 (ARE 74). This deed was executed in on August 13, 2001. Exhibit No. 7 (ARE 75), as admitted into evidence, was the original deed where Bobby Ray Finley granted an interest in 57.45 acres to Jessie Daryl Finley and Kenneth Ray Finley dated November 13, 2001, reserving a life estate in himself. Additional warranty deeds and quitclaim deeds for the 57.45 acres received by Kenneth Ray Finley, one of the Appellants herein, were admitted as a composite exhibit to the trial as Exhibit No. 5 (ARE 76). The second warranty deed executed by Bobby Ray Finley in favor of Kenneth Ray Finley, which did not contain the reservation of the life estate, was dated December 5, 2001. The quitclaim deed returning a life estate to Bobby Ray Finley was dated August 28, 2002. Each of these dates bear significant importance to the final judgment entered by the trial court.

Kenneth Ray Finley testified that he knew about and had seen all the deeds (ARE 77; Tr 113). In fact, the deed for the old home place was executed prior to the deed to him. Furthermore, final settlement of the car wreck which killed Bobby Ray Finley's wife occurred on August 13, 2002, according to the testimony and reports of Nancy

Carpenter, CPA (ARE 78; Tr. 169, and Exhibit 10 (ARE 79)). Kenneth Ray Finley and Sandra Finley McCardle testified that they felt Bobby Ray Finley was competent to handle this transaction and signed waivers of claims in his favor (ARE 80; Tr. 128). Surely if Finley was competent to finalize this settlement, he was likewise competent to dispose of his other property contemporaneously.

Finally, in their continuing effort to misconstrue the facts of this case and the testimony presented, the Appellants claim that the "most revealing testimony relative to the property was when Jessie Daryl Finley said that if the house was going to be his, then he wanted those kids out of it." However, a true examination of the testimony reveals what Jessie Daryl Finley actually said; "If that house was gonna be my house **too,** they wasn't gonna run and stomp through my personal belongings, you know, **because I was living there too then**. You know what I'm saying, because they had no business in my personal belongings, you know." (ARE 5; Tr. 254, ARE 6; Tr. 255) (emphasis added). The Appellants attempted the same *legerdemain* at trial as they are attempting here. Upon being questioned about his previous testimony, Jessie Daryl Finley responded again to the question that "if that was gonna be my house, I didn't want them running through my stuff" by stating that "Well, if I was gonna be living there, I didn't". (ARE 81; Tr. 274). There was no slip of the tongue. There was no hidden meaning. Jessie Daryl Finley was simply saying that because he was living in the house, he had a right to

privacy. Anyone deserves that, especially when they have given up their entire career and life to help maintain the family farm, with no pay.

CONCLUSION

For the foregoing reasons, the trial court properly applied Mississippi law in finding that the burden of proof as to the validity of a will is on the proponent, but the burden of going forward with proof of undue influence, or lack of testamentary capacity, or other defense, shifts to the Appellants. Further, the facts presented in testimony clearly establishes that Bobby Ray Finley was neither incompetent nor under undue influence when he executed the deeds and will changing his estate plan. The trial court did not err in upholding the transfers by deed and the will.

The Chancellor is entitled to deference and did not commit clear error as more specifically argued herein. As such, this Court should affirm the Chancery Court of Perry County.

Respectfully Submitted this the 10th day of August, 2009.

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Certificate of Service

I, Joel L. Blackledge, hereby certify that I have this day mailed a true and correct copy of the foregoing Appellee's Brief to the following by first class United States mail, postage prepaid.

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This the 10th day of August, 2009.

Joel L. Blackledge

Certificate of Filing

I, Joel L. Blackledge, hereby certify that I have this day filed with the Clerk of the Supreme Court of the State of Mississippi the foregoing Appellee's brief by depositing an original and three copies of same in the United States mail, with all postage prepaid.

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