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RESPONSE/REBUTTAL OF APPELLANT
TO BRIEF OF APPELLEE

From the very beginning, the appellee's brief demonstrates the total lack of understanding of the law and the facts surrounding this case. In their statement of issues, Question 1 refers to the "appellants" as the proponents of the deeds and will. The appellants do not argue in favor of the deeds and will, but have been adamant that the author of the deeds and the will, the deceased, Mr. Bobby Ray Finley, suffered undue influence from the people that lived in his home to the exclusion of his other two children. His actions in creating those documents were not free and voluntary, but occurred as a result of the nuanced influences of the two who were taking care of him.

The Supreme Court recognizes such subtlety as in *Jamison v. Jamison*, 51 So.2d 130 (Miss. 1910) when they ruled on the issue of undue influence. While we quoted this case in our original brief, the language is so applicable to this situation, that, at the risk of being redundant, we revisit where it stated:

It follows, from the very nature of the thing, that evidence to show undue influence must be largely, in effect, circumstantial. It is an intangible thing, which only in the rarest instances is susceptible of what may be termed direct or positive proof. The difficulty is also enhanced by the fact, universally recognized, that he who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note of and testify to that fact. He observes, too, the same precautions if he seeks by cajolery, flattery, or other methods to obtain power and control over the will of another, and direct it improperly to the accomplishment of the purpose which he desires

Jamison at page 131, (quoting *Blackman v. Edsall*, 17 Colo.App. 429, 68 P. 790, 792 (1902)).

It is almost as if they are speaking of this case. The most telling part was that when Momma was alive the estate was divided equally among the three children. As soon as Momma passed and Dad had to rely on others for his care, the one who was supposed to take care of him took advantage

of that position. Suddenly, without any signs of warning to the other children, the care-giver, ever so subtly, wound up in control of it all. He accomplished what he set out to do which is exactly what the cases cited in our previous brief warn against.

All four questions in the Statement of Issues filed by the appellees demonstrates a lack of understanding of the law and facts in this case. Their mixed-up statements merely further illustrate the confusion around this entire case going all the way back to the state of mind of the deceased, Mr. Bob Finley. The appellants successfully raised the issue of undue influence by one in a confidential relationship. The burden of proof then shifted to the proponents of the deeds and will to show there was not undue influence. The trial Court never specifically addressed this most important issue.

The appellee, Jessie Darryl Finley, failed to adequately rebut the presumption raised by his confidential relationship with his father. Both other siblings testified that once Jessie Darryl moved into the parent's home and took control, they were excluded from the life of their own father. Some of the witnesses on behalf of the appellees testified that they rarely came around. But how could they when Jessie had made it his home where he didn't want anyone invading his privacy? What influences made them strangers in the home where they grew up?

Jessie Darryl testified clearly that "if that was going to be his house, he was not going to let some kids tear it up." Appellees tried to explain that away as his having a right to privacy, something that anyone deserves. While we cannot disagree with that, it was ludicrous for them to suggest that Jessie Darryl had "given up their entire career and life to help maintain the family farm with no pay." Jessie Darryl did not give up any career. There was no testimony other than that he went from job to job, sometimes as a truck driver, with no steady employment his entire life, oftentimes not even supporting his own children. He and his then girlfriend who later became his wife lived there in the home of the parents totally supported by the father. Granted, he worked in

the family business, but to the exclusion of his other two siblings who had always helped out in the chicken operation through the years. When it was all said and done, Jessie Darryl had everything and the money to boot. He cannot overcome the presumption that he used his position in that home from early on to get that property from his father. He accomplished just that in the way that the Mississippi Supreme Court acknowledged in Estate of Vick (infra), he knew just what tune to play.

Nancy Carpenter, the certified public accountant, did not testify that Jessie Darryl Finley did not take financial advantage of his father. She was only employed to look at the records for theft. She was not involved in the day to day activities of the business and had no knowledge of what influences may have been spread by Jessie on his father. She could not explain how Jessie Darryl came up with the money to pay the bequests when there was relatively no money on one of the most successful chicken farm businesses in the area. Even the trial Court could not understand how, if there was no cash in the estate, Jessie came up with the money to pay cash bequests. When questioned by the Court (TR 286), Jessie gave vague answers about how it was his money, but Daddy's name was on it or he couldn't remember.

We urge the Court to look closely at the testimony in evidence to see how it contradicts itself at the Court's questioning of Jessie Darryl and at other parts. Witnesses for Jessie, the son who took the bulk of the estate, tried to say that no one could influence Mr. Bob Finley. Yet, they turn around almost immediately and say they influenced him. As we quoted in our earlier brief from Estate of Vick, 557 S0.2d 760 (Miss. 1989)

It is beyond cavil that one member of a family can very well be peculiarly vulnerable to entreaties, blandishments, threats from another member. A person to someone outside the family may be as fixed as the Rock of Gibraltar, but the solidity melts at the approach of another member of the family. There is generally a subtle recognition by one family member of what tune to play to get another member of the family to dance. (quoting *Jamison supra*)

With this opinion, the Mississippi Supreme Court recognizes what the appellees cannot or will not allow themselves to see. As the appellees do not understand the theories of this case, neither did Mr. Bob Finley understand what he was doing with his estate. He made a will when there was nothing left to divide because he had already made deeds that took all real property away from the estate. Apparently, he didn't know what he had done. He didn't fully realize the gravity of his actions because he was suffering from that subtle tune being played by the son that lived in the house with him. This Court should not allow that man to prosper from taking advantage of his father.

The deeds that had been filed prior to the will being drawn were not properly notarized which should make them invalid. Assuming for argument that Bob Finley thought they were valid, what did he think he was doing with a will? How much had his mind been poisoned against his children? His brother testified that he wasn't going to leave the two children, who are the appellants herein, anything until he convinced him otherwise. Yet, he and others testified that Bob could not be influenced. Both of those statements cannot be true. Either he could be influenced or he couldn't. His own brother obviously thinks he could influence him. But none of the people who testified about this veritable "Rock of Gibraltar" actually lived with him, took care of him, took him to doctor's appointments. Jessie Darryl and his wife were the self-appointed care-givers to the exclusion of the other two siblings. They even drove him to get the will prepared. When it was time to defend that will in litigation, Jessie Darryl got the same lawyer to handle it. His lawyer! In these many indices is where the subtlety of influence lies.

The facts set out in the appellees brief fairly accurately depict the course of events with this case, although those cold recitations cannot express the reasons behind the deceased's actions. But, they do point out that shortly after Momma died Daddy deeded the property to Jessie Darryl which held the old home place and the chicken houses, the bulk of the estate. Kenneth Finley got about 50

acres from his dad who then later demanded it back and then the dad put both Kenneth and Jessie Darryl's name on that deed, another indication that the father was unsure of his actions outside of the influence of Jessie. Their facts again recite that after disposing of all his property, Bob Finley rewrote the terms of his will at a time when there was little or nothing left to bequeath. We believe this was again done due to the subtle urging of Jessie Darryl. It speaks clearly of the lack of understanding of property ownership on behalf of the dad, Bob Finley. We believe that proper independent counsel would have helped him understand that he no longer owned anything that needed to be addressed in a will. This was a slow methodical process that led Bob Finley to leave out two children who, before the momma died, would have been able to share in what the family had acquired.

The trial Court never adequately answered the question of the confidential relationship which is essential in this case. Since both parties have quoted Grantham, we believe this Court is familiar with the factors and, thus, will not recite it again. But the appellant went right down the list in questioning witnesses on these factors, clearly establishing a confidential relationship between Bob Finley and his son, Jessie Darryl together with his wife. The appellees brief would have you believe that none of those factors would apply to Bob Finley. Yet, if he was so sharp in so many ways, why did he draw up a will when he had already disposed of his property? This Court can see that a confidential relationship existed that creates a presumption of undue influence. Because of the many issues that apply, Jessie Darryl could not overcome them and this case should be reversed to clear up the lack of clarity in this family estate.

The deeds themselves are still in a state of confusion. Due to Bob Finley's changes, Jessie Darryl Finley has an interest in all the land. And, he kept even the household goods. The other two siblings have nothing of the personal effects of their parents. The trial court realized that Jessie

Darryl had never allowed them to have even the smallest memento from their parents. But, they had not pressed for it because after Momma died, they didn't want to upset Dad. Once Jessie Darryl got a hold on things, they again didn't want to upset Dad. Now, this Court must correct the injustice spawned in this family.

CONCLUSION

The will in this case left nothing to be divided with respect to the land of this family. Something is not right in the way he abused his position with his father which this Court should not let stand. Kenneth Ray Finley and Sandra Finley McCardle, again request that this Court recognize that the respondents/appellees failed to overcome the undue influence on the deceased and right this wrong by reversing and rendering with all purported deeds being set aside and the estate being divided according to the laws of descent and distribution which would give the same result as was in effect at the death of the mother before the father was subjected to undue influence.

Respectfully submitted this the 28th day of September, 2009.

KENNETH RAY FINLEY and
SANDRA FINLEY MCCARDLE,
APPELLANTS


DONALD W. MEDLEY
Of Counsel for Appellants

CERTIFICATE OF SERVICE AS TO FILING

I, Donald W. Medley, being the attorney of record for the Appellants in this case, do hereby certify that I have this date mailed, via U.S. Mail, first-class postage prepaid, the original and three copies of the foregoing Response/Rebuttal of Appellant to Brief of Appellee to the Clerk of the Supreme Court, Supreme Court of Mississippi, P.O. Box 249, Jackson, MS 39205-0249.

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Honorable James H.C. Thomas, Jr.
Perry County Chancery Court Judge
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This the 28th day of September, 2009.


DONALD W. MEDLEY

CERTIFICATE

I, Donald W. Medley, being the attorney of record for the Appellants in this case, do hereby certify that I have this date mailed, via U.S. Mail, first-class postage prepaid, a true and correct copy of the above and foregoing instrument to:

Robin L. Roberts
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Perry County Chancery Court Judge
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Hattiesburg, MS 39403-0807

This, the 28th day of September, 2009.


DONALD W. MEDLEY