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IN THE SUPREME COURT
STATE OF MISSISSIPPI

KENNETH RAY FINLEY AND
SANDRA FINLEY McCARDLE

APPELLANT

VS.

CAUSE NO.: 2008-CA-01289

JESSIE DARYL FINLEY

APPELLEE

STATEMENT REGARDING ORAL ARGUMENT

Kenneth Ray Finley and Sandra Finley McCardle assert that oral argument in this matter would be beneficial to the Justices to adequately allow Appellant's counsel to explain the errors committed at the trial court level.

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, Appellants' Trial Counsel
Honorable James H.C. Thomas, Jr., Perry County Chancery Court Judge
Robin L. Roberts, Appellee's Trial Counsel
Jessie Daryl Finley, Appellee

Respectfully submitted on this the 8th day of May, 2009.

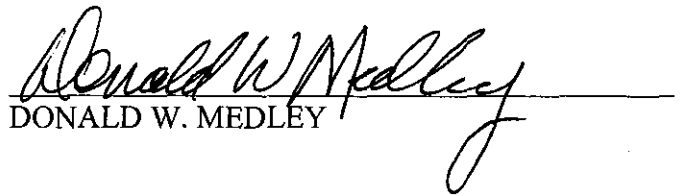

DONALD W. MEDLEY

TABLE OF CONTENTS

STATEMENT REGARDING ORAL ARGUMENT.....	i
CERTIFICATE OF INTERESTED PERSONS.....	ii
TABLE OF CONTENTS.....	iii
TABLE OF AUTHORITIES.....	iv
STATEMENT OF ISSUES.....	1
I. THE TRIAL COURT ERRED IN THE JUDGEMENT WHEN STATING IN THE BURDEN SHOULD BE ON THE OPPONENTS.	
II. THE TRIAL COURT ERRED WHEN DETERMINING IF AND WHEN A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN JESSIE DARRYL AND BOB FINLEY.	
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS.....	3
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	5
CONCLUSION.....	17
CERTIFICATE OF SERVICE AS TO FILING.....	18
CERTIFICATE.....	19

TABLE OF AUTHORITIES

<u>Clardy v. National Bank of Commerce of Miss.</u> , 555 So.2d 64, 66 (Miss 1989).....	5-6
<u>Clark v. Magee</u> , 105 So.2d 753 (Miss, 1958).....	6, 12
<u>Morris v. Morris, et al</u> , 6 So.2d 311.....	6
<u>Hendricks v. James</u> , 421 So.2d 1031 (Miss. 1982).....	6, 8
“Fiduciary relation.” Black's Law Dictionary. Rev. Fourth ed. 1968....	7
<u>Peckham v. Johnson, Tex.Civ.App.</u> , 98 SW2d 408, 416.....	7
<u>In re Estate of Grantham</u> , 609 So.2d 1220, 1224 (Miss. 1992).....	7, 8, 9, 10, 13
<u>Costello v. Hall</u> , 506 So.2d 293 (Miss. 1987).....	8, 13
<u>Croft v. Alder</u> , 115 So2d 683 (Miss. 1959).....	12
<u>Jamison v. Jamison</u> , 51 So.2d 130 (Miss. 1910).....	12
<u>Blackman v. Edsall</u> , 17 Colo.App. 429, 68 P. 790, 792 (1902).....	12
<u>Spencer v. Hudspeth</u> , 950 So.2d 238 (Miss 2007).....	14
<u>Estate of Vick</u> , 557 So.2d 760 (Miss. 1989).....	14

STATEMENT OF ISSUES

- I. THE TRIAL COURT ERRED IN ITS JUDGMENT WHEN IT INACCURATELY APPLIED THE BURDEN OF PROOF TO THE APPELLANTS.
- II. THE TRIAL COURT ERRED IN ITS LACK OF DETERMINING THAT A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN THE DECEASED, BOB FINLEY AND HIS SON, JESSIE, WHICH WOULD INCREASE THE BURDEN OF PROOF.

STATEMENT OF THE CASE

This case arose when the appellants learned after the death of their father that he had put the bulk of his estate into one son, leaving the other two children, the appellants herein, with only a small portion. Prior to the death of the mother, the two parents had matching wills that divided the estate equally among the three children. Due to their relative exclusion from their father once their brother moved in with dad, the two siblings believed their exclusion was the result of undue influence on their father and this action ensued.

After a trial before the lower court Chancellor without a jury, the Court rendered a verdict for the proponent of the deeds and/or the will that improperly placed the burden of proof on the contestants. Feeling aggrieved as being against the legal precedent of this Court, this appeal was taken.

STATEMENT OF FACTS

At the death of the wife of Bob Finley, the deceased in the instant case, each of them had matching wills that equally divided their combined estate among their three children. At the death of momma, son Jessie Finley moved into the home of his parents and essentially took over the life of his father. At some point after that, Jessie's girlfriend (who later became his wife) moved in, also, and they did almost everything for Bob Finley including cooking, cleaning, banking practices, general and medical care for him and driving him to most major appointments, including medical or legal. During the time shortly thereafter, Bob Finley began to make drastic changes in how his property was distributed to his children. Those changes left the bulk of the old home place and the family chicken business to one son, Jessie, to the exclusion of the other two, who are the appellants in this case. Whether this result was done through deeds or through a will, the result came from undue influence.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT ERRED IN ITS JUDGMENT WHEN IT INACCURATELY APPLIED THE BURDEN OF PROOF TO THE APPELLANTS.

The law of this ultimate Court for the State of Mississippi places the fundamental burden of persuasion on the proponents of these deeds and/or will. Nothing in the record or in the Judgment of the lower Court can avoid the reality that the Court placed the wrong burden on these Appellants.

II. THE TRIAL COURT ERRED IN ITS LACK OF DETERMINING THAT A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN THE DECEASED, BOB FINLEY, AND HIS SON, JESSIE, WHICH WOULD INCREASE THE BURDEN OF PROOF.

The facts presented in testimony at this case are clear that the proponents of the deeds and will cannot meet the burden of clear and convincing evidence to overcome the charge of undue influence.

ARGUMENT

I. THE TRIAL COURT ERRED IN THE JUDGEMENT BY SADDLING THE WRONG PARTIES WITH THE BURDEN OF PROOF.

The Judgment entered in this case improperly applies the law resulting in an erroneous outcome. The Trial Court acknowledged that the opponents of the will sufficiently raised the issue of undue influence but then stated in the Judgment that the burden of proof shifted to the opponents to establish the lack of capacity and undue influence. (Judgment, page 1) The Judgment goes on to say that the burden should be on the opponents/contestants which is not a correct application of the law. (Judgment, page 3, paragraph 3)

This initial burden of proof clearly falls upon the proponent to prove the validity of the will. Mississippi Code §91-7-29. The proponent may meet his prima facie burden of proof by simply introducing proof that the will was admitted to probate in common form. §91-7-27. The burden then rests upon the contestant to produce sufficient evidence to overcome the proponent's prima facie proof as to the will's validity. The burden of proving the validity of the will, i.e. testamentary capacity and proper execution, never shifts to the contestant. Put more succinctly by this Court:

The proponent of the will at all times bears the burden of persuading the trier of fact on all issues requisite to the validity of the will, e.g., due execution and testamentary capacity. At the outset the proponent bears the burden of producing evidence of due execution and testamentary capacity. This burden is conventionally met by offering the will itself, the affidavits of subscribing witnesses and the judgment admitting the will to probate. These offerings make out what is referred to as the proponent's prima facie case, meaning only that in such a state of the record the proponent is entitled to survive the contestant's motion for directed verdict, in the event the case is heard before a jury, and that a jury verdict upholding the will may survive a motion for judgment notwithstanding the verdict. In the event no further proof is offered in a non-jury trial, the proponent will have carried its burden of persuasion sufficient to survive a motion to

dismiss. Of course, if there is to be a contest of the will, the proponent does not have to rest after proving the common form probate but may and generally should offer other witnesses and evidence at that time and as part of his case-in-chief.

Once the proponent has shouldered his burden of production such that he has made out a prima facie case, the burden of *production* shifts to the contestants. *What is critical for present purposes is that the burden persuading the trier of fact on the issues of due execution and testamentary capacity resets on proponent throughout and never shifts to contestants.* The burden of persuasion is subject to the familiar preponderance of the evidence standard.

Clardy v. National Bank of Commerce of Miss., 555 So. 2d 64, 66 (Miss. 1989) (citations and foot note omitted) (emphasis added).

II. THE TRIAL COURT ERRED IN ITS LACK OF DETERMINING THAT A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN THE DECEASED, BOB FINLEY, AND HIS SON, JESSIE, WHICH WOULD INCREASE THE BURDEN OF PROOF.

In *Clark v. Magee*, 105 So. 2d 753, (Miss, 1958), the Supreme Court said that it is the end accomplished which entitles a court to speak. (*Clark*, at page 259, quoting *Morris v. Morris*, et al, 6 So.2d 311). In the instant case, the end accomplished forces us to look at the intent of the testator in his prior Will. At the death of the wife of Bob Finley, each of them had matching wills that equally divided their combined estate among their three children. At her death, Jessie Finley moved into the home of his parents and essentially took over the life of his father. At some point after that, Jessie's girlfriend (who later became his wife) moved in and they did almost everything for Bob Finley.

In *Hendricks v. James*, 421 So. 2d 1031 (Miss.1982), this Court stated that

Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character. *Hendricks* at page 1041.

Black's Law Dictionary defines Fiduciary Relation as "an expression including both technical fiduciary relations and those informal relations which exist whenever one man trusts and relies upon another." (Quoting *Peckham v. Johnson*, Tex.Civ.App., 98 SW2d 408, 416.) Black's goes on to say that "it exists where there is special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to interests of one reposing the confidence."

Black's also sets out that:

the law raises the rule that neither party may exert influence or pressure upon the other, take selfish advantage of his trust, or deal with the subject matter of the trust in such a way as to benefit himself or prejudice the other except in the exercise of the utmost good faith and with the full knowledge and consent of that other, business shrewdness, hard bargaining and astuteness to take advantage of the forgetfulness or negligence of another being totally prohibited as between persons standing in such a relation to each other. Examples of fiduciary relations are those existing between attorney and client, guardian and ward, principal and agent, executor and heir, trustee and *cestui que trust*, landlord and tenant, etc.

The nature of the relationship between Jessie and his father, while not technically a guardian and ward, was so close as to be essentially the same since the son did so much for the father. And, the father placed so much trust in the son. Certainly, the circumstances presented through testimony at trial gave the burden of showing there was no undue influence to Jessie.

Courts have generally used the term fiduciary interchangeably with confidential. Factors to be considered in determining if and when a confidential relationship exists, include: (1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another. See *In re Estate of Grantham*, 609

So.2d 1220, 1224 (Miss.1992); *Costello v. Hall*, 506 So.2d 293 (Miss.1987); *Hendricks v. James*, 421 So.2d 1031 (Miss.1982).

The testimony elicited at trial from the proponent's witnesses followed this list. The first item examines whether one person has to be taken care of by others. The prevailing testimony was that Bob Finley could rarely be left alone. Sandra testified that the day her mother died, she spoke with her father about moving to his home to help take care of him, but he told her that Jessie and his girlfriend (later his wife) had told him that they were going to take care of him and had already made arrangements to move in. (Tr 36) Jessie testified that he moved in right after his mother's funeral and was already thinking that the home was going to be his house. (Tr 264-265) He did this because his father was so down; "his father had been broken all to pieces." (Tr 265) and the drugs alone his father was on gave evidence of the condition of the aging, weakened Bob Finley.

When asked if Bob had to have someone around all the time, Braddis Crocker, the sister of the deceased and a devisee/beneficiary of his death, answered "Yes, they didn't want to leave him by himself." (Tr 154) She further confirmed his weakened medical conditions and his multitude of medications. She stated that he couldn't walk around and do what he wanted to do. (Tr 150)

Thomas Finley, the brother of the deceased, testified that Jessie's wife did all the meals and controlled the medications. (Tr 72) He also testified that after Bob's wife died, he would come up and spend time with his brother, but that he couldn't say what kind of influence Jessie and his wife, Rachel, had on Bob Finley. He knew that Jessie and Rachel were taking care of Bob, living there day in and day out, cooking, cleaning, and controlling his medications. (Tr 72)

This testimony also supports the next two factors from *Grantham* (*supra*) of whether one person maintains a close relationship with another and whether one person is provided transportation

and has their medical care provided for by another. Living with the man day in and day out suggests a close relationship. Jessie's testimony that his father wanted him to move in there further indicates their close relationship. He testified that his father stated that he (Jessie) knew him better than anybody. (Tr 255) Apparently, Jessie knew him well enough to get his father to leave him the farm, or the bulk of it.

Will?

Rachel testified about the medications he was taking at his death, which included (but not limited to) Dilaudid, Limbitrol, Coreg, Amaryl, and Morphine in a pump. While she testified that he took care of his own medicines, several others contradicted this. Even her own testimony indicated she knew much more about his medications than she let on. She had worked at a nursing home taking care of patients medications and assisting nurses. (Tr 224) See also testimony of Thomas Finley (Tr 72), Kenneth Finley (Tr 101).

Even though some testified that Bob Finley still drove occasionally, the witnesses all agreed that Jessie or Rachel drove him to most major appointments, including medical or legal. Sandra even testified that she offered to help drive him if they needed it. (Tr 38) The list of drugs alone creates a picture of one whose life is riddled with pain and agony, making him very susceptible to the influence of others. Each witness that testified tried to say that Bob Finley knew what he was doing, but each also gave evidence of a certain amount of influence held with conflicting accounts of his mental status and his ability to make free and clear decisions. His own brother testified that he influenced him to leave Kenneth and Sandra something. (Tr 64) One has to wonder what influence was had by someone who lived with him all the time.

Bob clearly put Jessie on his accounts, which is the fourth factor from *Grantham*, (*supra*), maintaining joint accounts with another. Jessie was on his father's bank accounts and Rachel, the

wife, testified that she handled all the business accounts (Tr 226) and often wrote out personal checks for Bob Finley, even balancing his checkbook. (Tr 225) Despite her protestations that she had nothing to hide (*TR same page*), neither she nor her husband had any clear testimony of how they paid their own living expenses. Neither of them could explain exactly how they paid for funeral expenses, but filed to be reimbursed as if they had paid for those expenses from their own funds. With this same confusion, they paid the alleged devise to Sandra out of what Jessie tried to call his own money, (Tr 281) even when they allegedly had no money since they took no salary from poor Bob.

Two more of the factors for the Court to consider in finding a confidential relationship is “whether one is physically or mentally weak” and “whether one is of advanced age or poor health.” *Grantham, supra*. There was no question in the testimony of whether Bob Finley was of advanced age or poor health. And, all the testimony showed that he was physically weak. There was some conflict on what his mental status was, but with a standard of clear and convincing testimony, we believe the scales tip very far to the side of Bob Finley’s mental health being to the point of influence.

For instance, his own brother, Thomas, testified that Bob was angry at two of his children but could give his brother no reason why. When questioned, Thomas Finley testified the he found nothing out of the ordinary with his niece and nephew, Kenneth and Sandra. (Tr 63) He said he loved them as much as he loved the others. Thomas also testified that his brother really didn’t even know what he owned at the time he was making his will. (Tr 71) As it turned out, he didn’t own much at that time, because he had already signed deeds that gave the bulk of it to Jessie. Bob had deeded some piece to Kenneth, but then had demanded it back. Kenneth testified that he gave the

deed back to his dad, because his dad called him crying saying that "people over there was going to hate me." When Kenneth tried to find out what was going on, his dad told him not to worry about it, that he had just messed up giving him the deed. Kenneth finally gave in and wrote a deed back to his dad, Bob Finley. (Tr 103). While the deed was out of Kenneth's control, the timber was cut, but Jessie had no idea what happened to that money. Then, Jessie wound up with deeds to the property that held the chicken houses and the home which was the bulk of the farm. Prior to the death of the mother, she and Bob Finley had wills that divided the estate equally among their three children.

No one knows just what Jessie and Rachel may have said to Bob on the many nights they had him there alone. None of the witnesses that testified could say with any certainty just what subtle influences Jessie Finley and his wife, Rachel, had on the elder Bob Finley. They tried to claim how hard they worked for almost nothing, yet they lived without any expenses. And somehow, somewhere, the unaccounted CD's turned up when Jessie needed the money to try to pay off his sister, purportedly as part of the will. One has to wonder if the estate had no funds, as Jessie tried to say, why he would give her money out of his own pocket that he tried to say was empty.

There is no evidence of who prepared the will and no expert or professional testimony of the circumstances surrounding the preparation of any deeds. There was some testimony that counsel opposite may have prepared one of the deeds, and Jessie may have been the one who took him to the lawyer's office, since Jessie testified that Bob didn't know who to see or where to go and needed Jessie to take care of it for him. (Tr 276) We find it very interesting that Jessie considered counsel opposite his lawyer when it came time for the instant defense.

The trial held ample evidence of the amount of time and the number of ways Bob spent with Jessie and Rachel, to the exclusion of Kenneth and Sandra. Undue influence is an intangible thing which only rarely is susceptible to direct or positive proof, and the only positive and affirmative proof is that of facts and circumstances from which undue influence may be reasonably inferred. *Croft v. Alder*, 115 So.2d 683 (Miss. 1959) In *Jamison v. Jamison*, 51 So.2d 130 (Miss. 1910) the Court, in addressing the issue of undue influence, 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)).

This sphere of influence makes it Jessie Finley's burden or duty to repel the presumption of undue influence since he is the one who ended up with the majority of the estate. Mississippi law establishes that where a confidential relationship is shown to exist between parties to a deed and where the grantee, who is the beneficiary, is the dominant spirit in the transaction, the law raises a presumption of undue influence, or, as is sometime said, a deed is prima facie voidable in such cases. *Magee, supra*. Jessie Finley violated his fiduciary requirements arising from the confidential relationship between himself and his father. Jessie and Rachel were self-appointed caretakers and healthcare intermediary for the father for quite some time prior to his death. There is ample evidence establishing that Bob Finley looked to Jessie and his wife to care for his personal needs, to tend to him, to handle his affairs in money matters and numerous other ways. The testimony established six

of the seven factors of *Granthan (supra)*, and as such, their duty arises to that of a fiduciary.

They knew of the contents of the first Will and knew the father's intent to share everything three ways. But once they developed their special relationship after moving into his home, the father began to make distributions of his property that favored them disproportionately. It is impossible in hindsight for the Court to clearly determine the true, independent wishes of the Bob Finley because after the death of his wife, he never had the opportunity to be independent of Jessie and Rachel. His son, Kenneth, testified he was only allowed to visit on the front porch or in the kitchen with Jessie or Rachel present. (Tr 109) Even his daughter, Sandra, testified that each visit got more difficult to be alone with her father. They even followed her into the house to go to the bathroom. (Tr 29)

The proponents of the Deeds and Will (appellees herein) must prove by clear and convincing evidence that they did not unduly influence the deceased, Bob Finley. In *Costello v Hall*, 506 So.2d 293 (Miss. 1987), this Court reaffirmed the elements that a proponent of a Will must prove by clear and convincing evidence. Those elements are:

1. Good faith on the part of the grantee/beneficiary.
2. Grantor's full knowledge and deliberation of his actions and their consequence;
3. Advice of
 - (a) a competent person
 - (b) who is disconnected from the Grantee and
 - (c) who is devoted wholly to the grantor/testator's interest.

There was no lawyer around to testify about any independent counsel given Bob Finley for putting the bulk of the family estate into Jessie's name. No one could say where the Will in question came from even though two people signed on as witnesses. The fact that these two individuals are elected officials is not enough to satisfy the burden of proof for undue influence by the proponents

of the will. They testified that Bob Finley asked them to attest his will, but neither could say anything specific about his testamentary capacity, what was in the will or that his devises had already been deeded away. (See Testimony of Chancery Clerk Vickie Walters and former Sheriff Carlos Herring). Even the deeds that purportedly put property into the name of Jessie had issues of being improperly executed due to an invalid notary.

Such factors are exactly what this Court addressed in Spencer v Hudspeth, 950 So 2d 238, (Miss 2007) when they set aside a deed. As in the instant case, *Spencer* was “littered with suspect instances that suggest that (the grantor) did not have full knowledge and deliberations of her actions or the consequences of those actions.” *Supra* at page 242.

This Court came to its conclusion in *Spencer* using the same guidelines we have urged above. As in *Spencer*, the testimony in the instant case calls for the deeds (and the will) to be set aside for a return to the status of the estate when the mother passed. Thomas Finley, the deceased’s brother, testified that when Bob was making out his will, he really didn’t even know what he owned. (Tr 71). Kenneth Fairley testified that when his dad was making out deeds, he was so distraught that he called him up crying. Even Jessie stated he just misunderstood himself. (Tr 269)

In the Estate of Vick, 557 S0.2d 760 (Miss. 1989), the Court found that they could not

unravel the secrets behind the bond between parent and child, child and parent, husband and wife. 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*)

The most revealing testimony relative to the property was when Jessie said that if that house was going to be his, then he wanted those kids out of it. (Tr 254) That slip demonstrates that he set out with deliberate intent to get the property in his name from the day his mother died. And even

though Ben McIlwain, President of the Richton Bank and Trust said that Bob Finley came into the bank and handled some banking transactions, he also said that "Mr. Bob just never was the same after his wife died." (Tr 292) Bob Finley's health, both mental and physical, made him sensitive to the influence of others. And, even though he may have appeared rock solid to some, his condition made him respond to the tune played by his care-givers.

The many questions over the state of the title propels this matter toward a conclusion that all the Deeds and the Will since the death of Mrs. Finley should be set aside with the property of the Estate divided equally among the three children. Jessie Finley and his wife took advantage of all the circumstances including the father's age and physical condition, the father's need to be taken care of and the need for help in the business which the father and his wife had built, to get title in any way they could to the property, excluding the other children.

Even though the testimony indicated that Kenneth was to get a share of the family estate, his property wound up in the possession and control of his brother, Jessie. And, even the personal effects of the mother and father wound up in the hands of Jessie and his new wife. The Court actually recognized that it was not right for Jessie and his wife to get all of the personal effects of the mother and father.

We believe that for a fair and equitable result this Court should direct the will and the deeds to be set aside as tainted by undue influence. Whether the Court goes back to the previous Will of the deceased or sets it all aside and goes by intestate succession, the result will be the same. The Estate of the Finley family would be divided equally among the heirs, the three children of Bobby Ray and Avis Finley. Our petition asked that the Court order a total and complete accounting of all actions by Jessie and Rachel Finley as it relates to Bobby Ray Finley and his Estate. The facts

presented at trial showed that Jessie and Rachel took over all the assets and the other two children, Kenneth and Sandra, got nothing of the personal effects of their parents, not even a sugar bowl or a hairpin from momma or a fishing pole from daddy. They spent the last days of their father's life in exile from him.

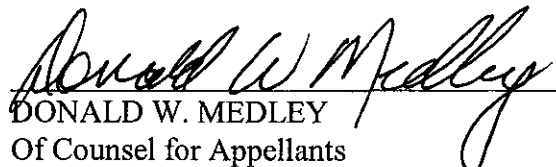
We ask, in addition to the real property being divided among the three heirs, that the Administrator complete an inventory of any and all personal property assets including cash, effects from a safety deposit box and any and all other assets of the estate of which Jessie or Rachel obtained possession from the time they moved into the family home of the father, so that these can be equitably divided among these heirs.

CONCLUSION

For all of the above and foregoing reasons, Kenneth Ray Finley and Sandra Finley McCardle, request that this Court recognize that the respondents/appellees failed to meet their burden of overcoming 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 8th day of May, 2009.

KENNETH RAY FINLEY and
SANDRA FINLEY MCCARDLE,
APPELLANTS


DONALD W. MEDLEY
Of Counsel for Appellants

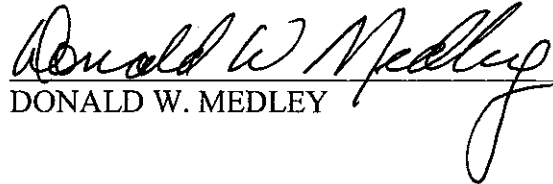
CERTIFICATE OF SERVICE AS TO FILING

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 Brief of the Appellants to the Clerk of the Supreme Court, Supreme Court of Mississippi, P.O. Box 249, Jackson, MS 39205-0249.

Robin L. Roberts
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Honorable James H.C. Thomas, Jr.
Perry County Chancery Court Judge
P.O. Box 807
Hattiesburg, MS 39403-0807

This the 8th day of May, 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
Montague Pittman & Varnado, PA
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Honorable James H.C. Thomas, Jr.
Perry County Chancery Court Judge
P.O. Box 807
Hattiesburg, MS 39403-0807

This, the 8th day of May, 2009.


DONALD W. MEDLEY