IN THE MISSISSIPPI SUPREME COURT

DIANE RUTLAND NATIONS, GREG RUTLAND, PEGGY RUTLAND JONES AND CALVIN RUTLAND, EXECUTOR OF THE ESTATE OF WILLIE RAY RUTLAND, DECEASED — APPELLANTS

V. — NO. 2008-CA-01671

RICKIE DALE RUTLAND AND TODD RUTLAND — APPELLEES/ CROSS APPELLANTS

**JOINT BRIEF OF APPELLANTS DIANE RUTLAND NATIONS, GREG RUTLAND, PEGGY RUTLAND JONES, AND CALVIN RUTLAND, EXECUTOR OF THE ESTATE OF WILLIE RAY RUTLAND, DECEASED**

## I. CERTIFICATE OF INTERESTED PARTIES

Pursuant to MRAP Rule 28(a)(1), 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:

| Names | Connection/Interest |
|---|---|
| 1. Diane Rutland Nations<br>11A Nations Road<br>Roxie, Mississippi 39661 | Appellant, and Proponent of the January 18, 2002 Will |
| 2. Thomas M. Murphree, Jr.<br>6060 River Road South<br>Summit, Mississippi 39666 | Attorney for Diane Rutland Nations |
| 3. Calvin Rutland<br>177 Pine Ridge Road<br>Monticello, Mississippi 39654 | Executor of the Estate of Willie Ray Rutland, deceased, Appellant, and Proponent of January 18, 2002 Will |
| 4. Malcolm T. Rogers<br>Attorney at Law<br>P.O. Box 688<br>Monticello, Mississippi 39654 | Attorney for Executor |

| | |
|---|---|
| 5. Greg Rutland<br>Route 5, Box 200<br>Salem, Missouri 65560 | Brother to Diane Nations, Appellant, and Proponent of January 18, 2002 Will |
| 6. Peggy Rutland Jones<br>3811 Highway 31SW<br>Hartselle, Alabama 35640 | Sister to Diane Nations, Appellant and Proponent of January 18, 2002 Will |
| 7. Joseph B. Moffett<br>Attorney at Law<br>P.O. Box 1060<br>Fayette, Mississippi 39069 | Attorney for Appellants Greg Rutland and Peggy Rutland Jones |
| 8. Rickie Dale Rutland<br>Atlanta, Texas | Appellee and Cross Appellant |
| 9. Todd Rutland<br>Hattiesburg, Mississippi | Appellee & Cross Appellant |
| 10. Ray T. Price<br>Attorney at Law<br>P.O. Box 1546<br>Hattiesburg, Mississippi 39403 | Attorney for Rickie and Todd Rutland |
| 11. Chancellor Larry Buffington<br>Chancery Judge, Post 1<br>P.O. Box 924<br>Collins, Mississippi 39428 | Trial Judge |

Respectfully submitted,

DIANE RUTLAND NATIONS, etc. Appellants

BY: Thomas M. McDonald

COUNSEL

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## IV. STATEMENT OF THE ISSUES

The Chancellor was manifestly wrong in finding that the testator, Willie Ray Rutland, lacked testamentary capacity to execute his Last Will and Testament on January 18, 2002.

The Chancellor's Final Judgment is manifestly wrong, clearly erroneous or an abuse of discretion, as devoid of explicable facts, evidence or legal standards.

## V. STATEMENT OF THE CASE

This is the appeal of a will contest case from Lawrence County Chancery Court, involving the January 18, 2002 Last Will and Testament of Willie Ray Rutland. Chancellor Larry Buffington heard the trial in two sessions. The first trial session was held November 14, 2006 in Monticello. At that session, the proponents of the January 18, 2002 will, Diane Rutland Nations and Calvin Rutland, Executor, made a prima facia case by proving the record of probate of the January 18, 2002 will, which revoked all previous wills. At the conclusion of that session, Judge Buffington ordered that Peggy Rutland Jones and Greg Rutland, siblings of Diane Rutland Nations, the will's principal beneficiary, be joined as additional parties. The case was continued pending their joinder. Thereafter, Chancellor Buffington heard the case on March 11, 2008. When all parties rested, Judge Buffington took the case under advisement and rendered a Final Judgment September 4, 2008, finding: (1) Willie Ray Rutland lacked the capacity to execute his Last Will and Testament on January 18, 2002; (2) Willie Ray Rutland's previous will of February 13, 1989 was void because of the obvious fiduciary relationship between Willie Ray Rutland and his nephews Rickie Dale Rutland and Todd Rutland at the time of its execution; and (3) since both wills were set aside and held for naught, the Estate of Willie Ray Rutland would proceed as an intestate estate.

Proponents of the January 18, 2002 will, Diane Rutland Nations, her sister Peggy Rutland Jones and brother Greg Rutland, together with Calvin Rutland, Executor of the Estate of Willie Ray Rutland, under the will of January 18, 2002, have filed this appeal. Contestants Rickie Dale Rutland and his brother Todd Rutland have filed a Cross-Appeal.

## VI. STATEMENT OF FACTS

Willie Ray Rutland, a lifelong resident of Lawrence County, Mississippi, died on January 30, 2005, at the age of 73 years. (R-176) Mr. Rutland had never married and had no children.(R-8) He

had worked all his adult life for the Mississippi Department of Transportation in McComb, Mississippi.(R-117) He left a Last Will and Testament dated January 18, 2002, which left his property to his niece, Diane Rutland Nations.(Exhibit 3) On February 28, 2005, this will was offered for probate by William Calvin Rutland, the Executor named in the will. The Petition for Probate of Will and for Letters Testamentary (Pleadings, pages 2-8) was supported by affidavits from subscribing witnesses Malcolm T. Rogers, the attorney who prepared the will, and Mrs. Elaine A. Davis, the owner/operator of New Dawn Retirement Center, the residence home where Willie Ray Rutland resided from November 1999 until his death in January 2005. This will was accepted for probate by Decree of March 8, 2005, and Letters Testamentary were issued to William Calvin Rutland, Executor.(Exhibit 4) The will revoked any prior will and left all of Willie Ray Rutland's property, both real and personal, to his niece, Diane Rutland Nations.(Exhibit 3)

On May 19, 2005, Rickie Dale Rutland and Todd Rutland, nephews of Willie Ray Rutland, filed a Petition to Set Aside Last Will and Testament and Admit Previous Will in Probate. This Petition alleged that Petitioners were beneficiaries of a prior will of Willie Ray Rutland dated February 13, 1989, by which Mr. Rutland left the vast majority of his property to them. Petitioners alleged the January 18, 2002 will was procured through fraud and undue influence by their cousin Diane Rutland Nations, at a time when the testator allegedly lacked testamentary capacity to execute a valid will. Diane Rutland Nations was named as a defendant in this will contest. Diane Rutland Nations filed her Answer to deny the allegations of the Petition, and alleged the contestants came to Court with "unclean hands".(Pleadings pages 20-22)

Following discovery, this will contest was first heard on November 14, 2006. At that hearing, Diane Rutland Nations, as a proponent of the January 18, 2002 will, offered the testimony of attorney Malcolm T. Rogers. (R-5) Mr. Rogers, who has practiced law in Lawrence County, Mississippi for thirty-one years, testified that he first met Willie Ray Rutland in October 2001 at the request of William Calvin Rutland. (R-6,7) At that time, Mr. Willie Ray Rutland was a resident at New Dawn Retirement Home in the Jayess community of Linclon County, Mississippi and did not want to leave the facility and move to Hattiesburg.(R-7) Mr. Rutland told Mr. Rogers that one of his nephews, Todd Rutland, held a power of attorney for him, and that Todd Rutland and Todd's mother, Josie Nell Lambert, had recently tried to force Mr. Rutland to leave the New Dawn Retirement Home and move to Hattiesburg to live with Todd Rutland there.(R-8) Mr. Rutland also

told Mr. Rogers that he was extremely concerned about how Todd Rutland, and his mother Josie Nell Lambert were handling his certificate of deposit and other property.(R-8) Mr. Rutland wanted Mr. Rogers to revoke the power of attorney Mr. Rutland had given to Todd Rutland in 1996.(R-10) Attorney Rogers testified that he accepted Mr. Rutland as his client, and began an investigation of the whereabouts of Mr. Rutland's property.(R-8-11) Mr. Rogers testified that at the specific request of Mr. Rutland, he prepared a Revocation of Power of Attorney, which Willie Ray Rutland signed on October 18, 2001, to revoke the power of attorney Mr. Rutland had previously given Todd Rutland on July 23, 1996.(R-11,12) From checking the land records in Lawrence County, Mr. Rogers testified that he discovered the existence of a Warranty Deed of July 23, 1996, whereby Willie Ray Rutland purported to convey his 88 acres of land in Lawrence County, together with his house on the property, to Rickie Dale Rutland and Todd Rutland, reserving only a life estate in the property. Mr. Rogers testified that when he questioned his client Willie Ray Rutland about this Warranty Deed, Mr. Rutland adamantly contended that he never intended to deed the property to his nephews, but had originally intended to leave the property to his nephews by will. (R-9-11) Mr. Rutland told Mr. Rogers he was under the impression that the had executed a will and not a Warranty Deed in 1996.(R-10,11) Therefore, Mr. Rutland instructed attorney Rogers to do everything necessary to obtain return of his real and personal property from Josie Nell Lambert, Todd Rutland and Rickie Rutland.(R-11) Mr. Rogers testified that he followed Mr. Rutland's instructions and wrote Mrs. Josie Nell Lambert, Todd Rutland and Rickie Rutland, demanding return of Mr. Rutland's property, including his certificate of deposit, bank records, other property, and reconveyance of Mr. Rutland's 88 acres in Lawrence County.(R-12-14) When Mr. Rogers received no response, on behalf of Willie Ray Rutland, Mr. Rogers testified that on 2/6/02, he filed Civil Action No. 2002-0034 in the Chancery Court of Lawrence County, styled: "Willie Ray Rutland vs. Josie Nell Lambert, Rickie Rutland and Timothy "Todd" Rutland," a Complaint for an accounting of personal property and to set aside the 1996 Warranty Deed as procured by fraud.(R-15) (That litigation came on for trial in May 2003, resulting in a Court mediated settlement, by which Todd Rutland and Rickie Rutland re-conveyed the 88 acres to Mr. Willie Ray Rutland, with costs assessed against Josie Nell Lambert, Todd Rutland and Rickie Dale Rutland. (Exhibit 8-June 23, 2003 Agreed Judgment)

Most importantly for the instant will contest litigation, Mr. Rogers testified that on January 18, 2002, when Willie Ray Rutland executed his Last Will and Testament, that Mr. Rutland had the

ability to understand and appreciate the effects of his act; that Mr. Rutland had the ability to understand the natural persons to receive his property and their relationship to him; and that Mr. Rutland was capable of determining what disposition he desired to make of his property (R-19-22). At the conclusion of this testimony, the Court ordered that Mr. Rutland's other relatives, his niece Peggy Rutland Jones, and other nephew Greg Rutland, be named as additional parties to the case.(R-45-47) Accordingly, in August , 2007 both Peggy Rutland Jones and Greg Jones, through counsel, entered their appearance. (R-47)

The case came on for trial again on 3/11/08.(R-45) Since the proponents of the will, had made out a prima facie case by submitting in evidence the January 18, 2002 will and record of probate, the burden of going forward shifted to the contestants. Edwards v. Edwards, 520 So.2d 1370 (Miss. 1988). Therefore, counsel for contestants Rickie Rutland and Todd Rutland called defendant Diane Rutland Nations as an adverse witness.(R-56) Mrs. Nations testified that her uncle, Willie Ray Rutland, was of sound mind in 2001 and 2002.(R-175,176) She testified that in late 2001, Mr. Rutland was very upset because Todd Rutland and his mother Josie Nell Lambert tried to force him to leave New Dawn Retirment Home and move to Hattiesburg (R-78,79 & 83) and because he had learned that Todd Rutland and Josie Nell Lambert had utilized all of his money,(R-163) including his certificate of deposit at Trustmark Bank in Brookhaven, which Mr. Rutland had intended to be used for his nursing home and burial expenses. (R-165) Mrs. Nations testified that Willie Ray Rutland felt betrayed particularly by Todd Rutland and Josie Nell Lambert.(R-91,92) Mrs. Nations introduced in evidence a large book of documentation, including Trustmark bank records, showing that while Todd Rutland had power of attorney for Willie Ray Rutland from July 1996 through October 2001, Todd Rutland and/or Josie Nell Lambert had received cash and other liquid assets of over $147,000 belonging to Willie Ray Rutland.(R-173)(Exhibit 10) These assets included Mr. Rutland's beginning checking balance, his monthly Social Security checks, his monthly Public Employee Retirement Systems checks, his $24,788.66 Certificate of Deposit and accrued interest at Trustmark Bank in Brookhaven.(Exhibit 10, and Record Excerpt 5) Moreover, Mrs. Nations testified that by the time Todd Rutland's power of attorney was revoked in October 2001, that Willie Ray Rutland was basically penniless, his Trustmark checking account had been assessed with **$1,190 in NSF charges**; his $24,788.66 certificate of deposit at Trustmark had been largely converted and deposited into certificates of deposit for Todd Rutland (Exhibit 10 and deposition of Trustmark's Brenda Henderson, Exhibit 11), and his 88 acres in Lawrence County had been deeded

to Todd Rutland and Rickie Rutland.(Exhibit 6) Mrs. Nations testified that her uncle was extremely upset and disappointed with his nephews Todd Rutland and Rickie Rutland, and their mother, Josie Nell Lambert, and felt that they had tricked him out of his land and property.(R-84, 91) Mrs. Nations testified that Willie Ray Rutland had originally planned to leave his land and property to Todd Rutland and Rickie Rutland and to leave his money and personal property to Mrs. Nations, Peggy Rutland Jones and Greg Rutland. However, in late 2001 and early 2002, after realizing that all his money was gone and that his 88 acres had been deeded to Todd Rutland and Rickie Rutland, Willie Ray Rutland felt betrayed (R-71, 91); that he lost all confidence in Todd Rutland and Rickie Rutland (R-65); and most importantly, that Willie Ray Rutland, in preparing a new will to exclude Todd Rutland and Rickie Rutland knew exactly what he wanted to do with his remaining property.(R-91, 94) Mrs. Nations' testimony of her uncle's testamentary capacity was corroborated by Calvin Rutland. (R-186)

On behalf of the will proponents, the deposition of Mr. Rutland's physician, Dr. David P. Smith, was introduced in evidence. (Exhibit 9) Dr. Smith, whose medical practice is at the Pinnacle Medical Clinic in Summit, Mississippi, testified that in March 2002, he assessed Mr. Rutland's mental status. In doing so, Dr. Smith testified that Mr. Rutland achieved a score of 25 out of 30; that Mr. Rutland showed no evidence of dementia or impairment in his ability to make his own decisions; that although Mr. Rutland suffered from age related medical problems such as hypertension and osteoarthritis, and that Mr. Rutland was fully capable of managing his own affairs at that time. In Dr. Smith's expert medical opinion, Willie Ray Rutland would have possessed the necessary testamentary capacity on January 18, 2002. (Exhibit 9, pages 4 thru 9, and Exhibits 1 and 2 thereto). Dr. Smith's testimony is summarized in Record Excerpt No. 4

The will proponents also introduced in evidence the deposition of Brenda Henderson, a Trustmark Bank employee in Brookhaven, Mississippi. Mrs. Henderson was shown Trustmark bank records, obtained by counsel of Diane Rutland Nations via Subpoena Duces Tecum.(Exhibit 11) Mrs. Henderson testified that the records showed that in October 1999, Willie Ray Rutland's Trustmark certificate of deposit of $24,778.66 had been cashed in by Josie Nell Lambert, and all but $2,000 of the funds were used to purchase certificates of deposit in the name of Todd Rutland. These records also showed that by October, 2001, Mr. Rutland's checking account at Trustmark in Brookhaven had only a nominal balance of $17.34. (Exhibit 11, pages 8-14).

To prove the "good faith" of Diane Rutland Nations, in her handling of her uncle's funds

after October 2001, a number of handwritten ledger sheets were introduced in evidence.(Exhibit 10, Record Excerpt No. 6) Mrs. Nations testified she carefully accounted for all Mr. Rutland's funds, and he was satisfied and pleased as his bank account increased (R-175). These ledger sheets are Exhibit E of Exhibit 10 and Record Excerpt No. 6.

## VII. SUMMARY OF THE ARGUMENT

The Chancellor was manifestly wrong in concluding Willie Ray Rutland lacked testamentary capacity on January 18, 2002 when he executed his Last Will and Testament. The Chancellor's Final Judgment fails to provide any specific facts, testimony or legal authorities to support his conclusion. The Chancellor's conclusion regarding testamentary incapacity is contrary to the overwhelming evidence and is clearly erroneous. The Chancellor's conclusion is unsupported in the record, and is contrary to the testimony of the will's two subscribing witnesses: (1) the testator's attorney Malcolm T. Rogers, who prepared the will according to the testator's directions, and (2) (William) Calvin Rutland, the testator's double first cousin, and the person the testator chose to act as executor. Under Mississippi law, the testimony of subscribing witnesses should be given the most weight on the issue of testamentary capacity. Therefore, the Chancellor's conclusion of testamentary incapacity is contrary to established Mississippi law. The Chancellor's conclusion is also contrary to testimony from beneficiary Diane Rutland Nations, and treating physician Dr. David P. Smith, both of whom testified, without equivocation, that Mr. Rutland knew exactly what he wanted to do with his property. Particularly after the abuse and waste of Willie Ray Rutland's property from 1996 until October 2001, from his nephews Todd Rutland, Rickie Dale Rutland and their mother Josie Nell Lambert, Willie Ray Rutland's desire to change his will to exclude them is completely understandable. Also, under Mississippi law, the "clean hands doctrine" and the doctrine of "equitable estoppel" would preclude Todd Rutland and Rickie Rutland from any favorable determination, in view of their unmitigated waste and abuse of Mr. Rutland's assets from 1996 to 2001.

What legal standard did the Chancellor apply to void and hold for naught Willie Ray Rutland's Last Will and Testament of January 18, 2002, which the overwhelming proof showed Mr. Rutland executed of his own volition? The Chancellor's Final Judement fails to cite any legal authority of any type. The Chancellor's decision is manifestly wrong on the purported lack of testamentary capacity issue, and justice and established law requires that it be reversed and rendered.

## VIII. ARGUMENT

### A. The Chancellor was manifestly wrong to conclude that Willie Ray Rutland lacked testamentary capacity on January 18, 2002

To disturb the factual findings of a Chancellor, the Mississippi Supreme Court must determine that the factual findings are manifestly wrong, clearly erroneous, or the Chancellor abused his discretion. This rule does not apply to questions of law. When presented with a question of law, the manifest error/substantial evidence rule has no application. A de novo review is then conducted. In re Last Will and Testament of Carney, 758 So.2d 1019 (Miss. 2000).

Here, Judge Buffington's conclusion that the testator Willie Ray Rutland lacked testamentary capacity is manifestly wrong and clearly erroneous. What set of facts, what witnesses, what exhibits, what evidence support this conclusion? Respectfully, there are none. Moreover, what legal standard did the Chancellor apply to reach his conclusion of lack of testamentary capacity? The Final Judgment contains only eight sentences, and cites absolutely no legal authority from the Mississippi Supreme Court or otherwise. The Final Judgment fails to meet the standard for a meaningful Chancellor's opinion, as required by this Court in In re Estate of McSwain, 946 So.2d 417 (Miss App. 2006). "When a judicial officer acts, the decision is reviewable. Many decisions for Chancellors are purely discretionary, but the discretion may be reviewed on appeal for abuse. The need for Chancellors to make transparent decisions, i.e. explicable ones whose basis can be reviewed or appealed is an important component underlying the multilayer judicial processes."

Under Mississippi law, the determination of testamentary capacity is based on three factors, as set out in In re Estate of Smith, 722 So.2d 606 (Miss 1998): (1) Did the testator have the ability at the time of the will to understand and appreciate the effects of his act? (2) Did the testator have the ability at the time of the will to understand the natural objects or persons to receive his bounty and their relation to him? (3) Was the testator capable of determining at the time of the will what disposition he desired to make of his property? That opinion goes on to explain:

> The proponents of the will meet their burden of proof by offering and receipt into evidence of the will and the record of probate." Edwards, 520 So.2d at 1372-73 (quoting Harris v. Sellers, 446 So.2d1012,1014 (Miss.1984). A prima facie case is made by the proponent solely on his proof. Id. At 1373. When this burden of proof has been met, the burden

of going forward shifts to the contestants to overcome the prima facie case. Id. At 1373. However, the burden of proof remains with the proponent to show by a preponderance of the evidence that the testator had capacity. Id. After the contestants have attempted to rebut the prima facie case, the proponents may come forward with additional proof in rebuttal. Id. **When weighing all the testimony, this Court has held that it is easiest for subscribing witnesses to tip the scales toward capacity.** Webster v. Kennebrew, 443 So.2d 850, 859 (Miss.1983). This Court has also recognized that although a testator may not possess capacity one day, the next week he may have a lucid interval in which he has the capacity to execute a valid will. Edwards, 520 So.2d at 1373. **Therefore, testimony regarding capacity from witnesses who have not seen the testator in months will be deemed irrelevant by the Court. Id. The date of execution is of utmost import.** Id. (Emphasis added)

Attorney Malcolm Rogers was the attorney who prepared the January 18, 2002 will at the specific request of Willie Ray Rutland (R-14). Mr. Rogers and Calvin Rutland were the only two witnesses who actually saw and talked with the testator on January 18, 2002, the day Willie Ray Rutland executed and published his Last Will and Testament. Therefore, under In Re Estate of Smith, supra, their testimony alone should have established the testator's capacity.

Mr. Rogers testified that he first met Willie Ray Rutland at the New Dawn Retirement Home in the Topeka Community in early October 2001 at the request of Calvin Rutland.(R-7). Willie Ray Rutland was a resident there, and was very upset that his nephew, Todd Rutland, wanted Mr. Willie Ray Rutland to move to Hattiesburg (R-7,8). Mr. Rutland told Mr. Rogers that one of his nephews, Todd Rutland, held a power of attorney for Mr. Rutland and that Todd Rutland and Todd's mother, Josie Nell Lambert, had recently tried to force Mr. Rutland, against his will, to leave the New Dawn Retirement Home and move to Hattiesburg to live with Todd Rutland there. Mr. Rutland also told Mr. Rogers that he was extremely concerned about how Todd Rutland, and his mother Josie Nell Lambert, were handling his property and wanted Mr. Rogers to revoke the power of attorney Mr. Rutland had previously given Todd Rutland. Following revocation of the power of attorney on

October 18, 2001, Mr. Rogers testified that he began an investigation of the whereabouts of Mr. Rutland property. As the investigation progressed, and as it was determined that Mr. Rutland's property had been wasted, lost and deeded away, the subject of a new will was discussed. Mr. Rogers testified that Mr. Rutland wanted to leave his remaining property to his niece Diane Rutland Nations, and wanted Calvin Rutland to serve as executor (R-17). It was Willie Ray Rutland's idea to name Diane Rutland Nations as the beneficiary under his January 18, 2002 will (R-17,18). Mr. Rogers testified that Mr. Willie Ray Rutland knew and understood the role of an executor of a will, and that Mr. Rutland laughed and joked that he might outlive the person he chose for his executor, Calvin Rutland (R-17). Later, after the will had been prepared, Mr. Rogers took the proposed will back to New Dawn Retirement Home to meet with Mr. Rutland, to go over the will and make sure it was what Mr. Rutland wanted.

As to testamentary capacity to execute the will, here is Mr. Rogers' uncontradicted testimony:

Q: Mr. Rogers, I've got to ask you three questions under Mississippi law concerning testamentary capacity. The first is, on January 18, 2002 did the testator, Willie Ray Rutland, have the ability at the time he executed the will to understand and appreciate the effect of his act?

A: Absolutely.

Q: And on January 18, 2002 did the testator, Willie Ray Rutland, have the ability to understand the natural objects or persons to receive his property and her relation to him?

A: Yes.

Q: On January 18, 2002 the testator, Willie Ray Rutland, was he capable of determining what disposition he desired to make of his property?

A: Yes. (R-22)

Attorney Rogers reiterated and confirmed his testimony later in the trial:

Q: Mr. Rogers, at the time you met with your client, Willie Ray Rutland, in October 2001, did he have the ability to understand and appreciate the nature of his act in revoking the power of attorney to his nephew, Todd Rutland?

A: In my opinion, he did.

Q: Then when you met with him to execute to his will January 18, 2002, did Willie Ray Rutland have the ability to understand and appreciate the nature and effect of his act in executing that will?

A: Yes, he did.
Q: When you met with him on January 18, 2002, did Mr. Willie Ray Rutland have the mental capacity to understand him to receive his property under that will?
A: Yes.
Q: When you met with him on January 18, 2002, did Mr. Willie Ray Rutland have the mental capability to determine the disposition of the property that under this will?
A: Yes. I'd already gone over it with him at least three times.(R-147)

Chancellor Buffington was manifestly wrong to disregard this compelling testimony.

William Calvin Rutland, double first cousin to Willie Ray Rutland, was another subscribing witness to the January 18, 2002 will. Calvin Rutland had known Willie Ray Rutland all their joint lives. Calvin Rutland testified that he visited Willie Ray Rutland one to two times a week , took him to the store, and that Mr. Rutland was "always real alert". (R-181) Concerning execution of the will, Calvin Rutland testified that Willie Ray Rutland knew and understood what he was doing on January 18, 2002 when he executed the will. (R-185,186)

The testimony is:

Q: Do you recognize your signature on Page 1 and 2?
A: Yeah.
Q.: And that you acted as a subscribing witness at the request of your double first cousin, Willie Ray Rutland?
A: Yes, sir.
Q: At the time he executed that will, can you tell the Court whether or not, in your opinion, he knew and understood what he was doing?
A: Yes, sir, he - - he well knew what he was doing.
Q: Can you tell the Court whether, in your opinion, the date he executed that will if he knew and understood the disposition–
MR. PRICE: Objection, Your Honor.
Q: - - he was making of his property?
MR. PRICE: Objection.

**THE COURT:** Overruled. He can answer.

A: I think he did. In my opinion, he knew what he was doing.
Q: Did he ever tell you why he was leaving his property

to Diane Nations?

A: He never told me, you know, exactly why. But he told me that, you know, the way he had been misused and he wanted her to have it.

The Chancellor was manifestly wrong to disregard this testimony from a subscribing witness to the will.

Diane Rutland Nations did not know her uncle Willie Ray Rutland had executed a new will on January 18, 2002. (R-162). She had nothing to do with the execution of that will. (R-162). She lives in Roxie, Mississippi, and was not even at the New Dawn Retirement Home where the will was executed on January 18, 2002. She learned of the January 18, 2002 will approximately one week later when Willie Ray Rutland told her: (R-163).

Q: All right. Tell me what your uncle told you about the execution of that will and why he wanted to do it.

A: He told me that he had made out a new will. I said, okay. And he said, I don't have a copy of it. It's at Malcolm Rogers' office. And I said, okay. He said, but I left it solely to you, you know, as the beneficiary. And I said - I said, Well, Unc, I said - - you know, I probably thanked him or whatever, you know. But I did ask him, I said - - I said, why, you know. I asked him why. And he said, Because I feel like that, you know, I have been hurt and I'm angry over the fact that, you know, they spent all this money. And he said, I - - you know, he just wanted to change it. He said, so I did. He was just extremely upset. (R-163).

Mrs. Nations testified that her uncle, Willie Ray Rutland knew exactly what he was doing up until the day he died on January 30, 2005. (R-179).

The Chancellor was manifestly wrong to disregard this testimony.

Dr. David P. Smith, Pinnacle Medical Clinic, Summit, Mississippi, testified by deposition (Exhibit 9). Dr. Smith, a family practitioner, had treated the testator, Willie Ray Rutland for years, both before and after January 18, 2002. Dr. Smith gave expert medical testimony, to a reasonable degree of medical certainty, that Willie Ray Rutland had testamentary capacity on January 18, 2002. Dr. Smith's expert testimony reads:

Q: Well, then, the only other thing I need to ask you is about the will that is the subject of this litigation. It's dated January 18, 2002. So that would be about a little less than two months before you saw him. I have to ask you three questions under

Mississippi law about your examination and treatment and knowledge of Mr. Rutland. Dr. Smith, based on your training and experience and based on your examination and treatment of Mr. Rutland, do you have an opinion, to a reasonable degree of medical certainty, as to whether Mr. Willie Ray Rutland was capable, mentally capable, of understanding and appreciating the nature and effect of his act on January 18, 2002, in making a will?

A: I don't have any doubt that he could have done that. I think he would have been able to have achieved that fine.

Q: The second question I have to ask you under Mississippi law, again based on the same assumptions, whether you have an opinion, to a reasonable degree of medical certainty whether Willie Ray Rutland knew and understood the natural objects of his bounty or the persons to whom he wished to leave his property on January 18, 2002?

A: He didn't get into specifics with me about his will. I didn't even - - I assumed there was probably something about a will going on, but I had no knowledge of any specifics. But I would not have any doubt that he would know what he was doing in regard to who he would be writing a will out to. Now, I don't know the relatives that are in the will or anything, so I can't say anything about that. But as far as his knowledge of who he would be writing down, I wouldn't have any doubt about that.

Q: Then the final thing, once again based on your training and experience as a medical doctor, as Mr. Willie Ray Rutland's medical doctor, do you have an opinion, to a reasonable degree of medical certainty, whether or not on January 18, 2002, Mr. Willie Ray Rutland was able to determine what dispositon he desired to make of his property?

A: I wouldn't think he would have any problem determining disposition of property at that particular time. (Pages 7-9, Exhibit 9).

Dr. Smith reiterated this testimony:

Q: In summary, then, Dr. Smith, do you have any doubt that in January, specifically January 18, 2002, that Mr. Willie Ray Rutland, your patient, knew and understood what he was doing when he wrote the will?

A: I have no doubt he would know what he was doing. (Pages 16-17, Exhibit 9).

Dr. Smith's opinion is summarized in his letter of March 23, 2002, which is Exhibit 1 to his deposition, and Record Excerpt No. 4.

The Chancellor was manifestly wrong to disregard Dr. Smith's expert medical testimony which proved that Willie Ray Rutland had testament capacity on January 18, 2002.

In summary, two of the four witnesses testifying to support testamentary capacity were subscribing witnesses: Attorney Rogers and Executor William Calvin Rutland. When weighing all the testimony, this Court has held that it is easiest for subscribing witnesses to tip the scales toward capacity. Webster v. Kennebrew, 443 So.2d 850 (Miss.1983).

Rickie Dale Rutland and his brother Todd Rutland were the only witnesses opposing Willie Ray Rutland's testamentary capacity to execute his January 18, 2002 will. However, Rickie Dale Rutland, the testator's nephew, (R-98), lived in Atlanta, Texas (R-111) and only saw his uncle Willie Ray Rutland four times a year during the period 1999-2001 (R-112). He had no knowledge whatsoever about the execution of the January 18, 2002 will (R-105 and R-112); had no memory of visiting Willie Ray Rutland in January 2002 (R-113); and had only seen him one time in the four months prior to the January 18, 2002 will, and at that time, Willie Ray Rutland "was not crazy". (R-106 and R-113). The most Rickie Dale Rutland could say was that Mr. Willie Ray Rutland's mental condition had deteriorated. Respectfully, this Court will deem irrelevant any testimony dating back months before the time the will was signed as being too distant to have significant import. In re Estate of Smith, 722 So.2d 606 (Miss. 1998).

Likewise, Todd Rutland, also a nephew, (R-115) lived in Hattiesburg, and only saw his uncle Willie Ray Rutland approximately once a month until October 2001. After the October 2001 confrontation, when Todd Rutland and his mother Josie Nell Rutland Lambert tried to force Mr. Rutland to move away from New Dawn Retirement Home to Hattiesburg, which was absolutely against Mr. Rutland's express wishes, Todd Rutland stayed away from Willie Ray Rutland so as not to upset him further (R-126). Todd Rutland had not seen his uncle since October 2001. (R-132) Todd Rutland believed his uncle's mental state of mind, at the time of the execution of the last will "was progressed pretty bad" (R-127). Respectfully, this lay opinion is not sufficiently specific, in point of time, to assist the Court. How ironic is it that Todd Rutland concedes that Willie Ray Rutland had the capacity to: (1) revoke Todd Rutland's Power of Attorney in October 2001(R-133), and, (2) had the mental capacity to demand that he be allowed to stay at New Dawn Retirement Home in October 2001, yet to argue that Mr. Rutland was incapable of executing his will only three months later? Todd Rutland admitted he did not observe his uncle Willie Ray Rutland's mental capacity from October 2001 until the year 2003. (R-135)

**B. The Testator's January 18, 2002 Will for the disposition of his property was logical**

Under Mississippi law, a man of sound mind may execute a will for any sort of motive satisfactory to him, whether that motive be love, affection, gratitude, even whim or caprice. Holmes v. O'Bryant, 741 So.2d 366 (Miss. App. 1999). Here, the proof shows that Willie Ray Rutland had been betrayed by Todd Rutland, Rickie Rutland and their mother Josie Nell Lambert. Attorney Rogers testified that Mr. Rutland knew everybody in his family (R-19); that he understood perfectly what would happen to his property if he died without a will (R-19,20); that Mr. Rutland had the mental capacity to understand Mississippi law about the disposition of his property and that he could change his mind and do something different with a will but could not do so with a deed (R-21); that Diane Nations was his choice to receive his property (R-21); and that Mr. Rutland did not trust Todd and Rickie Rutland any longer since they had cleaned him out. (R-35) With this knowledge, Mr. Rutland's decision to exclude Tood and Rickie Rutland from his new will was completely logical: they and their mother had already received and spent their inheritance.

Todd Rutland held power of attorney for Willie Ray Rutland (Exhibit 5) for 63 months: from July 1996 until revoked by Willie Ray Rutland on October 18, 2001 (Exhibit 1). During that period of time, Exhibit 10 shows that Todd Rutland and/or his mother Josie Nell Lambert wasted or abused Willie Ray Rutland's funds and property. During that 63 month period, $147,621.85 of Mr. Rutland's funds came into their hands.(Exhibit 10). Yet, when the power of attorney was revoked on October 18, 2001, Willie Ray Rutland only had $17.34 in his checking account at Trustmark in Brookhaven. (R-165). He was dead broke. (R-165). During the subsequent investigation, Mr. Rutland wanted to be driven to Monticello to check on his account there. It had been closed. (R-164). Mr. Rutland then wanted to go to Brookhaven to talk to Trustmark Bank employee Brenda Henderson (R-164), the cashier with whom he always did his business (R-165). Diane Rutland Nations took him to Brookhaven. When Ms. Henderson told Mr. Rutland he only had $17.34 in his checking account, and that his CD had been closed out, Willie Ray Rutland was in shock.(R-165). Tears came to his eyes (R-165). He learned Josie Nell Lambert (mother of Rickie Dale Rutlalnd and Todd Rutland) had withdrawn the proceeds of his certificate of deposit(R-167), that the CD had accumulated to $24,778.66 (R-169). Later investigation revealed that Josie Nell Lambert had written checks to herself of $32,650.94 from Mr. Rutland's funds (R-170); that Todd Rutland had received checks totaling $4,893 (R-171); that Todd Rutland had made ATM withdrawals from Hattiesburg of $6,617.99 (R-171, Exhibit 10) **that NSF charges of $1,109.00** were accumulated (R-171, Exhibit

10). Other questionable expenditures while Todd Rutland had Power of Attorney for Willie Ray Rutland are summarized in Exhibit 10, a large book of documentation complied by use of Subpoena Duces Tecum. In October 2001, Willie Ray Rutland felt he had been tricked and betrayed by Todd Rutland, Rickie Dale Rutland and their mother Josie Nell Lambert.( R-65). He felt they had spent all his money, he was upset, he felt he had been lied to and he wanted his land back. (R-65). Under the circumstances, Mr. Willie Ray Rutland's decision to disinherit his nephews Todd Rutland and Rickie Dale Rutland was imminently logical. No one questioned Mr. Rutland's mental capacity on 10/18/2001 when he revoked the Power of Attorney previously given to Todd Rutland. No one questioned his mental ability on 2/6/02, when Willie Ray Rutland filed his Complaint in Lawrence County Chancery Court against Josie Nell Lambert, Rickie Rutland and Todd Rutland to set aside the 1996 Warranty Deed and for other relief. No one questioned his capacity to do so, and as shown in Exhibit 8, he prevailed and recovered his land and house in 2003. His money had been dissipated by Josie Nell Lambert and Todd Rutland, and Rickie Dale Rutland had not intervened to stop the abuse. They had wasted and squandered his money so he could no longer afford to stay at New Dawn Retirement Home, where he wanted to remain. Therefore, they tried to remove him and force him to live in Hattiesburg with Todd Rutland when the abuse was discovered and finally stopped. Respectfully, Mr. Rutland had every reason to write a new will to exclude his nephews Todd and Rickie Rutland under the circumstances. Under Mississippi law, as set out in Holmes v. O'Bryant, supra, he was entitled to do so.

### C. Contestants Todd and Rickie Dale Rutland are precluded from any relief by the "Clean Hands Doctrine" in an Equity Court

Chancellor Buffington was manifestly wrong to overrule the proponent's Motion to Dismiss the contestant's Petition on the basis of the "clean hands doctrine". Mississippi's chancery courts are courts of equity, and under the "clean hands doctrine," anyone who comes before a court of equity must do equity as a condition of recovery. Galloway v. Inglis, 130 So. 147(Miss 1925); Dill v. Dill. 908 So. 2d. 198(Miss. App. 2005).

The proof overwhelmingly showed that Todd Rutland, Rickie Rutland and their mother Josie Nell Lambert committed inexcusable waste, and abuse of the testator's property. Whereas Josie Nell Lambert and Todd Lambert were active participants, abusing their fiduciary responsibilities to Mr. Rutland, Rickie Dale Rutland failed to intervene for five years to stop it. He was passively

complicit in the waste and abuse. When ordered by the Chancellor to pay the costs of assimilating the Trustmark Bank records, which should have otherwise been preserved and kept in discharge of their fiduciary responsibilities, the contestants failed so to do. (R-47). Therefore, at the conclusion of the proponent's prima facie case, (and renewed again at the conclusion of all the testimony), proponent Diane Nations called up the Second Defense in her Answer, that the "clean hands doctrine" precluded a determination on the merits of the relief sought by Todd and Rickie Rutland.

**D. Contestants are precluded from any relief by the doctrine of equitable estoppel.**

At trial, as part of proponents' Motion to Dismiss, the doctrine of equitable estoppel was raised as follows: "And finally, Your Honor, we ask the Court to dismiss the contest of this will and enter a judgment for the proponent, Diane Nations, on the doctrine of equitable estoppel". (R-160, 161)

Contestants were named defendants in the prior lawsuit filed against them by the Testator. That Complaint was to set aside a deed conveying the same property at issue herein. If this deed had not been set aside, the January 18, 2002 will would have been ineffective as to dispose of the Testator's real property. The prior lawsuit was concluded by an Agreed Judgment wherein the Contestants agreed to have the purported deed set aside.

Contestants are now attempting to gain the same real property by contesting this will and probating a prior will. This begs the question: Why would the Testator have spent his time, energy and money setting aside the deed if Testator wanted the Contestants to have the property anyway? In re Stoball's Estate, 50 So. 2d 635(Miss.1951), Stoball's neighbor, Prather, concealed the existence of Stoball's will after his death. When Prather later attempted to probate the will, this Court held Prather's wilful concealment of the will and its terms, and his failure to record his deeds from the devisees were the causes of the change of position by Mullins in reliance on the misleading, fraudulent, and wrongful acts of Prather. Prather is estopped under these facts from probating the will, and, since Prather claims the entire interest devised under the will, the estoppel extends to any rights which might accrue under it. The elements of equitable estoppel must be considered in the light of all the peculiar circumstances of this case, and of a balancing of the equities of the respective parties.

The Mississippi Supreme Court has generally defined equitable estoppel "as the principle by

which a party is precluded from denying any material fact, induced by his words or conduct upon which a person relied, whereby the person changed his position in such a way that injury would be suffered if such denial or contrary assertion was allowed." Dubard v. Biloxi H.M.A., Inc., 778 So. 2d. 113, 114 (Miss. 2000) (quoting Koval v. Koval, 576 So. 2d. 134, 137 (Miss. 1991).

The Contestants took a position in the lawsuit to set aside the deed, but ultimately agreed that the deed be set aside. Now that the Testator is deceased, the Contestants are attempting to gain said real property by contesting the second will in an effort to probate the prior will leaving the real property to Contestants.

Under the peculiar circumstances of this case, Contestants claims are clearly barred by the doctrine of equitable estoppel.

**E. The Chancellor was manifestly wrong in failing to articulate the legal standard he applied on the testamentary capacity issue, or, the Chancellor applied an erroneous legal standard.**

The rule that this Court will not disturb a Chancellor's findings of fact unless the Chancellor was manifestly wrong and not supported by substantial evidence does not apply to questions of law. When presented with a question of law, the manifest error/substantial evidence rule has no application. Last Will and Testament of Carney, 758 So.2d 1019 (Miss. 2000). But what legal standard did Chancellor Buffington apply to the facts in this case? No legal authority is cited in the Final Judgment, so this Court is left to speculate. For example, did the Chancellor erroneously hold Diane Nations to the burden of proving testamentary capacity by clear and convincing evidence, instead of to a mere preponderance of the evidence? Did the Chancellor erroneously substitute his personal observation of Mr. Rutland at the May 2003 hearing on Mr. Rutland's Complaint to set Aside Warranty Deed, instead of the correct legal standard of testamentary capacity as of January 18, 2002? In Re Estate of Crutcher, 911 So.2d 961 (Miss.App.2004) holds that testamentary capacity is to be tested at the date of the execution of the will. What credibility, what weight did the Chancellor assign to the testimony of Todd and Rickie Rutland to cause him to conclude that their vague testimony would overcome the substantial evidence from the will proponents, including two of the subscribing witnesses to the will? The correct legal standard is that the testimony of subscribing witnesses is entitled to greater weight than the testimony of witnesses who were not present at the time of the will's execution, or did not see the testator the day of the will's execution. Edwards v. Edwards, 520 So.2d 1370. (Miss. 1988).

**F. Contestants wholly failed to prove undue influence on the proponent Diane Nations**

Contestants Todd and Rickie Dale Rutland had alleged that Diane Nations was guilty of undue influence and/or fraud in procuring the January 18, 2002 will. To meet their burden or proof on this allegation, the contestants would have to prove: (1) Diane Nations occupied a confidential relationship with Mr. Rutland; and (2) that she took active participation in either procuring the will or in preparing the will. In re Estate of Smith, 722 So.2d 606 (Miss.1998). However, the contestants offered no proof whatsoever to support the allegations. In fact, the uncontested proof shows Diane Nations had no participation in procuring or preparing the will; was not with Mr. Rutland that day (R-162); was not at the New Dawn facility on January 18, 2002 (R-162); and did not even know that a will had been executed (R-162). Diane Nations did not arrange for the services of attorney Malcolm Rogers: Calvin Rutland did. Moreover, Diane Nations acted in complete good faith, and she proved her good faith, even by clear and convincing evidence. After Todd Rutland's Power of Attorney was revoked, Mrs. Nations drove Mr. Rutland to the Trustmark Bank in Brookhaven at his request (R-164); she heard Mr. Rutland tell the Trustmark cashier, Brenda Henderson, that he wanted to close out his old account, only to learn it held $17.34 (R-165); she was with Mr. Rutland when he learned his Certificate of Deposit had been withdrawn, his safety deposit box had been closed, he was dead broke (R-165), and that Josie Nell Rutland had withdrawn his Certificate of Deposit (R-167). Mrs.Nations began to assist Willie Ray Rutland to locate his missing funds, and Mrs. Nations kept specific and detailed ledger sheets of his funds (R-171). See Exhibit 10, and the ledger sheets thereof, marked "Exhibit E" and Record Excerpt No. 6. Mrs. Nations recorded every receipt and did not skim the funds (R-171). By honestly handling and accounting for Mr. Rutland's funds, Mrs. Nations proved that by January 14, 2004, the balance of Mr. Rutland's accounts had accumulated to $42,111.76 (R-174). (The final balance, at Mr. Rutland's death, after payment of medical and funeral bills, was $31,361.47, as shown in Exhibit 10, Exhibit "E". )Diane Nations testified she handled these funds in good faith (R-174); that Mr. Rutland knew that she was faithfully accounting for his funds (R-174); that Mr. Rutland understood his bank balance was building back up (R-175); that Mr. Rutland was very happy that his bank balance was being restored (R-175); that Mrs. Nations would sit down with Mr. Rutland at the dining room at New Dawn and go over every check (R-175). Mrs. Nations testified that Mr. Rutland knew her, recognized her and showed no indication of mental impairment from October 2001 until he died January 30, 2005. (R-176). This

testimony of Mrs. Nations' good faith also proved that the testator had full knowledge, exercised deliberation and exhibited independent consent and action. Therefore, the contestants utterly failed to prove their allegations of undue influence and fraud. In re Estate of Pigg, 877 So.2d 406(Miss. App.2003).

## IX. CONCLUSION

Appellants Diane Rutland Nations, Greg Rutland, Peggy Rutland Jones and Calvin Rutland, Executor of the Estate of Willie Ray Rutland pray this Court will reverse the Chancellor's Final Judgment of September 4, 2008, and here render judgment finding that Willie Ray Rutland had the necessary testamentary capacity on January 18, 2002 to execute his Last Will and Testament, and the instrument of January 18, 2002 constitutes his valid Last Will and Testament, revoking any prior will. The Court should further dismiss, with prejudice, the cross appeal of Todd Rutland and Rickie Dale Rutland, and assess all costs against the cross appellants.

Alternatively, if the Court were to reverse and remand the case, the appellants pray the Court will enter an Order or Judgment assigning the remanded case to a different Chancellor.

Respectfully submitted,

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COUNSEL

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## CERTIFICATE of SERVICE

I, Thomas M. Murphree, Jr., one of the attorneys for the Appellants, do hereby certify that I have this day mailed a true and correct copy of the foregoing Appellants' Joint Brief to all counsel of record and to Chancellor Larry Buffington.

This, the 3rd day of April 2009.

THOMAS M. MURPHREE, JR.