IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

LATOYA MAPP, INDIVIDUALLY AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT AND ESTATE OF WILL FRANK MAPP, JR., DONALD A PUGH, SR., DARRYL MAPP, THE ESTATE OF WILL FRANK MAPP, JR., AND JOHN DOES 1-5, APPELLANTS

V. CASE NO. 2008-TS-02093

MARILYN MAPP CHAMBERS, INDIVIDUALLY AND AS GUARDIAN OF VIRGINIA MAPP, APPELLEES

"BRIEF OF APPELLANT"

(ORAL ARGUMENT NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

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II. WHETHER THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT MARILYN MAPP CHAMBERS DID NOT EXECUTE THE DEED IN QUESTION

STATEMENT OF THE CASE

COURSE OF PROCEEDINGS AND DISPOSITION OF COURT BELOW

This is an appeal by Latoya Mapp, individually and as executrix of the last Will and Testament of the estate of Will Frank Mapp, Jr., Darryl Pugh, and Donald Pugh, Sr. from an adverse ruling by the Chancery Court of Scott County, Mississippi, in CAN. 2006-0540.

On October 5, 2006, a complaint was filed (C.P. Vol. 1 p. 19). On October 23, 2007, the first amended complaint was filed (C.P. Vol. 1 p. 146). On April 9, 2008, a 2nd amended complaint was filed (C.P. Vol. 2, p. 248). The gist of the complaint, and amendments, were that the signature of Marilyn Mapp Chambers on the deed of April 2, 2003, (T. 90; Plaintiffs Exhibit 3, the deed in question, Appellant R.E. Tab. #5 and R.E. Vol. 1 33-37) was a forgery on the April 2, 2003, and that Virginia Mapp was not competent to execute the deed in question.

The ruling of the lower court was that the deed in question contained a signature of Marilyn Mapp Chambers that was not in fact the signature of Marilyn Mapp Chambers and that Virginia Mapp was not competent on April 2, 2003, to execute the deed in question. The lower court did not rule whether the signature Virginia Mapp on the deed in question was a forgery.

Latoya Mapp, as executrix of the estate of Will F. Mapp, Jr, Darryl Mapp and Donald Pugh bring this appeal alleging errors at the trial court level by finding that the signature of Marilyn Mapp Chambers was a forgery and that Virginia Mapp was not mentally competent to execute the deed in question.

STATEMENT OF FACTS

Virginia Mapp is the mother of Marilyn Mapp Chambers and Will F. Mapp, Jr. Latoya Mapp is the niece and Darryl Mapp is the nephew of Marilyn Mapp Chambers.

Virginia Mapp lived in Forrest, Mississippi, up to the year 2001 when she moved to

Jackson, Mississippi, where she lived with her daughter, Marilyn Mapp Chambers. A guardianship was set up for Virginia Mapp by Marilyn Mapp Chambers in the Hinds County Chancery Court in civil action number P2006-571 R/11 and an order was entered on October 4, 2006 setting up the guardianship. On March 6, 2008, the Order setting up the guardianship was amendment for the purpose of changing the guardianship to reflect that accountants would be filed and the guardianship would be set up because of the advanced age of Virginia Mapp. (Appellants R.E. Tab 6 Tr. Exhibit 5).

The deed in question, (R.E. 33-37 Appellee's Trial Ex. 3 Appellants R.E. Tab#5) is dated April 2, 2003. (T. 201:2-25) This deed was executed by Virginia Mapp and Marilyn Chambers Mapp to Will F. Mapp, Jr., to certain parcels of property located in Scott County, Mississippi, which included Mapp funeral home. For the sake of brevity the appellee's collectively will at times be referred to as "Chambers".

After the execution of the deed of in question there were other transactions between Latoya Mapp, individually, and Donald Pugh, however, those transactions are not the subject of this appeal. It was agreed by and between the parties that the interest of Pugh will rise or fall based upon the validity of the deed in question. For the sake of brevity at times the appellants collectively will be referred to as "Pugh".

Trial

April 14, 2008, the trial began. There was a dispute regarding the expert designation of Dr. George E. Wilkerson. The lower court resolved the dispute by allowing the direct examination of Dr. Wilkerson and then adjourned the trial to allow Pugh to take the deposition of Dr. Wilkerson if desired. Pugh did not and on **August 21, 2008**, the trial reconvened and after receiving evidence and testimony the court rendered a bench opinion in favor of Chambers.

WHETHER THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT VIRGINIA MAPP DID NOT POSSESS THE REQUIRED MENTAL CAPACITY TO UNDERSTAND THE NATURE OF HER ACTIONSWHEN SHE SIGNED THE DEED IN QUESTION

Dr. George E. Wilkerson, M.D.: Dr. Wilkerson is a neurologist and his qualifications were stipulated. (T. 16 :28-29; 17:1-5). Dr. Wilkerson's treated Virginia Mapp and was examined on the following dates: July 24, 2001; January, 2002; February, 2002; April, 2002; October, 2002; March 26, 2003; July 23, 2003; January 19, 2004; and April 28, 2004. Virginia was taken to Dr. Wilkerson by Marilyn.

Dr. Wilkerson first saw Virginia Mapp on July 24, 2001. (T. 50:28) and on that date conducted a mental status examination. (T. 31:10: 16-18). This evaluation lasted approximately 1 hour for a new patient. (T. 32:8). The initial diagnosis for Virginia Mapp by Dr. Wilkerson was dementia of Alzheimer type and that she had hypertension. (T. 32: 8:12-13:16-17). Dr. Wilkerson stated that from the time a person develops Alzheimer's until the time they are totally incapacitated and require full time nursing care normally would be 5-8 years and with the use of medications currently in use and available can extend that as much as 2 more years. (T.33:25-29 and 34:1-2). There is no known cure, correction or more importantly reversal of Alzheimer. (T. 34: 2-4). Dr. Wilkerson tries to see patients with a mental infliction and loss of memory or mental capacity every 3-6 months after the initial visit. (T. 43 : 16-18)

January, 2002, Dr. Wilkerson saw Virginia Mapp and there had been a progression of Alzheimer's. Dr. Wilkerson recommended of a conservatorship. (T. 51: 11-21). A conservatorship for Virginia Mapp was opened because of advanced age, not because of any kind of infirmity. (T. 54: 27-29). Dr. Wilkerson found Virginia was having increased difficulty with her memory in particular recent recall, problems keeping a checkbook, difficulty keeping up

with day to day activities, somewhat suspicious and, at one point in time, became psychotic, was hallucinating and having active psychosis. Active psychosis meant a loss of touch with reality. (T. 58 : 12-20). Dr. Wilkerson did not specify what visit this information came from but was approximately the 2nd or 3rd visit, i.e., January or February 2002.

March 26, 2003, Dr. Wilkerson saw Virginia Mapp and was of the opinion that she was continuing to decline. She was placed on anti-psychotic medication. Virginia Mapp also had Sundowning. Sundowning means a patient with mental infirmities and dementia will do fine during the day time and then once the sun goes down they get very agitated and restless. (T. 59 : 25-29) (T. 60 : 1-5).

As to Virginia ability to take care of her affairs, Dr. Wilkerson testified that as far back as January, 2002, evaluation she was no longer capable of taking care of her own affairs and was not able to manage the financial issues; her memory had gotten to the point where she was having problems understanding what was going on around her. (T. 60 : 13-25)

April 28, 2003, Dr. Wilkerson saw Virginia Mapp at the Rankin Medical Center because she had become overtly psychotic, was delusional, out of contact with reality, agitated and not sleeping. (T. 61 and 62)

July, 2003, during an office visit, Dr. Wilkerson found that Virginia Mapp memory was worsening and had some evidence of psychosis and changes were made in her medication for the psychotic behavior. (T. 62:13-20)

January 19, 2004, Dr. Wilkerson saw Virginia Mapp and she had shown some responses to the medication as far as the degree of agitation, hallucination and psychosis. That part was better, however, diagnosis of Virginia never changed. (T. 62: 27-29, 63:5-17).

Dr. Wilkerson was of the opinion that in April, 2003, Virginia Mapp was not competent to execute a deed. (T. 71:11-29, 72:1-2). No details were given supporting that opinion.

Marilyn Mapp Chambers: Up until 2006 Virginia was able to bath and feed herself with supervision (T. 114 : 26-27) and Marilyn was taking care of Virginia own her own (T. 117:4-7) even though Marilyn alleged that Virginia was in a daily living Center from the time Marilyn took Virginia to Jackson in 2001 Marilyn produced no evidence of where Virginia was on April 2, 2003 (T. 132 and 133). After 2001 Virginia did spend the night in Forest ,Mississippi, when Marilyn was out of the state at workshops and Marilyn would leave Virginia with Will F. Mapp, Jr., (T. 126:7-15). Virginia had a house in Forest, Mississippi, in 2003 (T. 126: 22-24).

Latoya Mapp: Latoya testified that there was only one occasion in 2006 that Virginia Mapp did not recognize or remember who Latoya was. (T. 201 : 5-11) and that after April, 2003, there was never an occasion when Virginia Mapp was talking out of her head. Further, when Latoya would speak to Marilyn Mapp Chambers about Virginia Mapp before April, 2003, and Marilyn never mentioned anything unusual regarding Virginia other than the incident with the phone call and Josie Gammage. (T. 202 : 1-24).

Pamela Jeanette Patrick: Pamela worked at Mapp Funeral Home from July, 1997, through July, 2003, where she cleaned, ran errands and did whatever Will Mapp, Jr., told her. Pamela knew Virginia Mapp a long time and Virginia Mapp had taught Pamela in school. (T. 221-223). Pamela's work hours were from 7:30 a.m. until 5:00 p.m. or 12:00 p.m., it just depended. (T. 223 : 27-28). At times Pamela was involved in paying bills and collecting money for the funeral home. (T. 220 : 5-8). Pamela knew of the debt of the funeral home and that the bills were behind because the ultimate reason for leaving Mapp Funeral Home in July, 2003, was not getting paid. (T. 220 : 11-13).

In March or April, 2003, Will Mapp, Jr., directed Pamela to go pick up Virginia and bring her to the Funeral Home. (T. 224 : 27-29). As a result of that conversation, Pamela went and picked up Virginia at Virginia's home in Forest (T. 226 : 21-22). Virginia was talking normally. (T. 227 : 25-29). Will Mapp, Jr., had told Pamela he and Virginia Mapp were going to conduct some business. Will Mapp, Jr., told Pamela that Virginia was going to give Will Mapp, Jr., her rent houses and things, and give up her portion of the funeral home. (T. 228 : 5-9). This occurred in the morning, approximately 8:00 am. (T. 237:27-29, 238:1-2). After Virginia finished signing the deed, Pamela took Virginia home in the afternoon because the news was on (T. 238 : 3-11). Pamela remembers the day being early April, 2003, because she had to pick up her baby who was having a jamboree at school, and that would have been in April. (T. 233 : 19-22). Pamela remembers that in March and April, 2003, Virginia Mapp would not be at the Funeral Home every day and was during that time going was back and forth between Marilyn Mapp Chambers and Will Mapp, Jr's home. (T. 234 : 1-19). Pamela also had conversations with Virginia Mapp during March and April, 2003, and Virginia understood what they were talking about and responded appropriately. There were many occasions when Virginia would just sit and read magazines. (T. 234 : 20-29) and (T. 235 : 1-16). During March and April, 2003, if Will Mapp, Jr., left the funeral home, Virginia Mapp would accept premiums for burial policy and write receipts. Virginia Mapp would also answer the phone. (T. 235 : 19-22). Pamela remembers on April 2, 2003, that she picked up Virginia Mapp and brought her to the funeral home for the purpose of signing some documents. (T. 237 : 6-10).

Josie Gammage: Josie Gammage is the notary on the deed in question. Jose was employed by Mapp Funeral Home in April 2003, and had been employed there since the early '90s up to August, 2006 (T. 85 and 86). Will F. Mapp, Jr., was her boss. Virginia Mapp was in and out of

Mapp Funeral Home a lot when Josie first started working there (T. 87 : 8) and Josie knew Virginia Mapp very well and felt they had a close relationship. The last time Josie saw Virginia was approximately January, 2007. (T. 87 and 88). Josie Gammage stated Virginia Mapp came to the funeral home up to 2006 and there was never an occasion when Virginia Mapp did not recognize Josie or converse intelligently, talk out of her head or did not appear to know what she was doing. (T. 142 : 14-17) or was confused. (T. 141 : 18-29). Josie Gammage remembered that Virginia Mapp drove herself to the funeral home up until April, 2003, on Saturday afternoons and other occasions to help keep the office and would take care of funeral home business. (T. 140 : 9-18).

The court conducted an examination of Josie Gammage and Josie Gammage told the court that Virginia Mapp would come to the office and have a seat, talk to other people, and talk about what was going on in the city in general. There was no time period that she noticed a change in Virginia Mapp physically, mentally or emotionally. (T. 145 : 12-25). Josie Gammage further told the court that there was no time that she, Virginia, had any limitations or disabilities. (T. 146 : 2-11). Josie Gammage did testify that on one occasion Virginia Mapp apparently had gone to some other ladies home and had told that lady to call the funeral home. After that phone call, one of the individuals working at Mapp Funeral home went and found Will Mapp, Jr., and called the number back and told the lady that someone would be there to pick up Virginia. (T. 147-149)

WHETHER THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT MARILYN MAPP CHAMBERS DID NOT EXECUTE THE DEED IN QUESTION

Marilyn Mapp Chambers: Marilyn testified that Josie Gammage did notarize documents but never notarized a document that she signed. (T. 111 : 21-22) and that the signature that appeared on the deed in question was not her signature. (T. 111 : 28-29). Further,

Marilyn Mapp Chambers was of the opinion, overruling the defendant's objection, that the signature that appeared on the deed in question was not the signature of Virginia Mapp. (T. 113 : 2-10). Marilyn Mapp Chambers did state that she and Virginia sometimes would go to the funeral home if someone had died or they were in town. (T. 115 : 5-6).

Josie Gammage: Josie does not remember if Virginia or Marilyn appeared before her on the date the deed in question was signed on April 2, 2003. (T. 92: 4-10, 93:15-17, 97:23-25). Josie Gammage later invoked the 5th Amendment against self incrimination. (T. 100 and 101). Josie Gammage stated on one occasion during her deposition that Marilyn Mapp Chambers was not there when the deed was notarized. During the trial testimony, Josie Gammage testified that she did not remember. The Court thereafter in denying the Motion for Directed Verdict found that there was not a presumption of validity of the deed in question in that the notary had taken the 5th Amendment. (T. 185 : 1-20). However, Josie Gammage did recognize Virginia Mapp signature as being Virginia signature on the deed in question because Josie had seen Virginia Mapp signature on many occasions. (T. 98 : 4-8).

Latoya Mapp: Latoya is the niece of Marilyn Mapp Chambers and is the daughter of Will Mapp, Jr. Latoya Mapp testified that she was familiar with the signature of Marilyn Mapp Chambers, however, the Court would not allow that testimony. (T. 199 : 1-16). This is true even though the Court allowed the same testimony regarding Marilyn Mapp Chambers recognition of the signature of her mother, Virginia. (T. 113 : 2-10). Pugh proffered the testimony of Latoya regarding the signature of Marilyn. Latoya based her opinion regarding the signature of Marilyn upon the following: annual gifts which included a signed card; graduation gifts with signed cards; visiting in the home of Marilyn Mapp Chambers and watching Marilyn sign checks for Latoya's college books (T. 204: 24-29, 205:1-29, 208:20-29, 209: 1-29) Latoya Mapp

recognized the signature on the deed as the signature of Marilyn Mapp Chambers. (T. 206 : 1-9). The Court sustained an objection to this testimony (T. 209 : 3-4).

A. Frank Hicks: Frank Hicks testified by deposition as a expert in forensic document examination and was accepted by the court. (T. 284 : 23-25). (Appellants Tr. Exhibit 9 and Appellants R.E. Tab# 7) Mr. Hicks was of the opinion that to a reasonable degree of probability in the field of forensic document examination that Marilyn Chambers signature on the deed was probably written by Marilyn Chambers. (Appellants R.E. Tab# 7 Deposition page 14 : 10-20). Mr. Hicks further testified that it was more likely than not that Marilyn Mapp Chambers did sign the deed in question. (Appellants R.E. Tab# 7 Deposition page 17 : 16-19). The lower court found that Mr. Hicks had insufficient exemplars to state with a certainty, virtual certainty, that the signature that appeared on the deed in question was the signature of Marilyn Mapp Chambers. The lower court did not find his testimony to add a "whole lot". (T. 289-290)

SUMMARY OF THE ARGUMENT

It is respectfully submitted that the learned chancellor committed manifest and reversible error in applying the clear and convincing standard in his finding that Virginia Mapp was mentally not capable of understand the nature of her actions when she executed the deed in question and further finding that the signature of Marilyn Mapp Chambers was a forgery.

ARGUMENT

I. THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT VIRGINIA MAPP DID NOT POSSESS THE REQUIRED MENTAL CAPACITYTO UNDERSTAND THE NATURE OF HER ACTIONSWHEN SHE SIGNED THE DEED IN QUESTION.

II. THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT MARILYN MAPP CHAMBERS DID NOT EXECUTE THE DEED IN QUESTION.

STANDARD OF REVIEW

The well-established law concerning this court's role in reviewing a decision of a Chancellor is that "The appellate scope of review is limited since the Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Steen v. Steen,* 641 So. 2d 1167, 1169 (Miss. 1994); *Mississippi Dep't of Human Serv. v. Marquis,* 630 So. 2d 331, 334 (Miss. 1993). The word "manifest" is defined as open, clear, unmistakable, and evident. *BLACK'S LAW DICTIONARY* 962 (6th ed. 1990). Moreover, the manifest error and substantial evidence rule applies only to factual situations and not to questions of law, which require de novo review. *Holliman v. Charles L. Cherry & Assocs., Inc.,* 569 So. 2d 1139, 1145 (Miss. 1990)." We will not disturb a chancellor's fact findings on appeal unless those findings are "manifestly wrong, clearly erroneous, or not supported by substantial credible evidence." *City of Picayune v. S. Reg'l Corp.,* 916 So.2d 510, 518(¶ 22) (Miss.2005) (citing *Brown v. Miss. Dep't of Human Servs.,* 806 So.2d 1004, 1005(¶ 4) (Miss.2000)). If substantial evidence supports the chancellor's findings, we will not reverse, even though "we might have found otherwise as an original matter." *Id.* at 518-19(¶ 22) (citing *In re Guardianship of Savell,* 876 So.2d 308, 312(¶ 4) (Miss.2004)). "While we give deference to a chancellor's determination of fact, we review the chancellor's determinations of law de novo." *Id.* at 519(¶ 23). Further, the lower Court is not required to make a detailed finding on the record as to his view of each witness's credibility. *Fortenberry v. Parker,* 754 So.2d 561, 564(¶ 14) (Miss.Ct.App.2000) where this court stated that "[i]t is well-settled that 'where conflicting testimony is presented, expert and otherwise, the chancellor is required to make a judgment on the credibility of the witnesses in order to resolve the questions before the court. "

I. THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT VIRGINIA MAPP DID NOT POSSESS THE REQUIRED MENTAL CAPACITYTO UNDERSTAND THE NATURE OF HER ACTIONSWHEN SHE SIGNED THE DEED IN QUESTION

In cases questioning mental capacity, this Court has repeatedly announced that the burden of proof to set aside a deed is by clear and convincing evidence and rests with the party asserting lack thereof. "Well established in this jurisdiction is the long-standing rule that the burden of proving lack of mental capacity rest squarely on the party seeking to have such deed set aside." *Richardson v. Langley, 426 So.2d 780 (Miss. 1983), citing Thigpen v. Payton, 391 So.2d 629 (Miss. 1980); Williams v. Wilson, 335 So.2d 110 (Miss. 1976); Herrington v. Herrington, 232 Miss. 244, 98 So.2d 646 (1957).* "Clear and convincing evidence is necessary to establish this lack of mental capacity. Unless the proof put on by the party seeking to set aside a deed establishes that the grantor was permanently insane up to and beyond the time of the execution of the deed, the test of the grantor's mental capacity is to be applied as of the time of the execution of the deed." Citing *Moore v. Stone, 208 So. 2d 585 (Miss. 1968); Texaco, Inc. v. Musgrove, 253 Miss. 209, 175 So. 2d 490 (1965), id at 783.* "It is not enough to show that at the time of the conveyance the grantor was suffering from a general mental weakness or condition; mental incapacity and insanity are not always permanent and a grantor may experience a lucid interval when he would possess the mental capacity to understand the legal consequences of his actions. *Whitworth v. Kines, 604 So.2d 225, 228 (Miss. 1992).* Even if an individual has suffered from a severe mental defect, "[t]emporary or intermittent insanity or mental incapacity does not raise a presumption that such disability continued to the date of execution." *Id.* (quoting *Young v. Martin,* 239 Miss. 861, 871, 125 So.2d 734, 738 (1961)). In this case

A grantor who has executed a facially valid deed, is presumed to be competent, and the party challenging the validity of a deed bears the burden of showing, by clear and convincing evidence, that the grantor lacked the capacity to execute the deed. *Id.; Mullins v. Ratcliff,* 515 So.2d 1183, 1190 (Miss.1987); *Richardson v. Langley,* 426 So.2d 780, 784 (Miss.1983). The *Whitworth* court specifically noted that "mental incapacity or insanity, 'is not always permanent, and a person may have lucid moments or intervals when that person possesses necessary capacity to convey property.' " *Whitworth,* 604 So.2d at 229 (quoting *Smith v. Smith,* 574 So.2d 644, 653 (Miss.1990)). The critical time period that we must look at is the time of the execution of the deed. *Mullins,* 515 So.2d at 1190. . In *Conerly v. Lewis* 117 So 2d. 460 (Miss. 1960) a 90 year old grantor at time of execution of deeds was mentally competent to act for himself and was fully capable of knowing and understanding nature of transactions so that deeds were valid. This was true notwithstanding showing that grantor had suffered during several years from arteriosclerosis, cardiac insufficiency, swelling in feet and legs; that he was feeble and unable to get in and out of the house without help and was at times confined to his bed; and that at times he paid little attention to those who tried to engage him in conversation and other ailments which manifest themselves in persons of such advanced age. In *Conerly* at page 465 the court announced the test: "In this kind of case, the test is whether the grantor had mental capacity to understand the nature and effect of the transaction at the time the instrument was executed, and testimony relating to that particular time is entitled to the most weight." *Citing Lum v. Lasch. 93 Miss. 81, 46 So. 559; Ward v. Ward, 203 Miss. 32, 33 So.2d 294; Exum v. Canty, 34 Miss. 533.*

Further, the same rule for testing mental capacity applies to wills and deeds. *Lambert v. Powell, 199 Miss. 397, 24 So. 2d 773 (Miss. 1946).*

Finally, "A properly executed deed carries with it a presumption that the grantor was

mentally competent at the time of execution." *Conservatorship of Moran v. Necaise, 821 So.2d 903 (Miss. Ct. App. 2002),* citing *Richardson v. Langley, 426 So. 2d 780, 786 (Miss. 1983).*

Dr. George E. Wilkerson, MD, visited with Virginia 6 times before the deed in question was executed: July 24, 2001; January, 2002; February, 2002; April, 2002; October, 2002; March 26, 2003. The first visit of July 24, 2001, (T. 50 : 28) which lasted approximately 1 hour (T. 32:8) and on that one visit he diagnosed Virginia with Alzheimer and hypertension. (T. 32 :8 and 12-13 and line 16-17).This is no information in the record as to how long the other visits lasted. Therefore, from the time Dr. Wilkerson first saw Virginia, July 24, 2001, until March 26, 2003, approximately 10 days before April 2, 2003, the date of execution of the deed in question, 20 months had passed and five other examinations. During the visits of January, 2002 or February, 2002 Virginia was having **increased difficulty** with her memory in particular recent recall, problems keeping a checkbook, difficulty keeping up with day to day activities, somewhat suspicious and, at one point in time, became psychotic, was hallucinating and having active psychosis. It is important to note that for Virginia to be having increased difficulty means that Virginia at times she did not have difficulty and had a good recent recall, (there was no mention of long term memory problems), was keeping a checkbook, doing day to day activities and was not always suspicious. On March 26, 2003, Dr. Wilkerson was of the opinion that Virginia was continuing to decline and placed her on anti-psychotic medication. It was during this visit and for the first time Dr. Wilkerson mentioned Sundowning. In other words Virginia will did fine during the day and but declined once the sun goes down. (T. 59 : 25-29, 60:1-5). April 28, 2003, Dr. Wilkerson saw Virginia Mapp at the Rankin Medical Center because she had become overtly psychotic and was delusional and out of contact with reality, very agitated and not sleeping. (T. 61 and 62) However, in July, 2003, Dr. Wilkerson changed Virginia's medication for the

psychotic behavior. (T. 62 :13-20) and during the January 14, 2004, visit Virginia shown some responses to the medication as far as the degree of agitation, hallucination and psychosis. (T. 62: 27-29, 63: 5-17).

Dr. Wilkerson's testimony was basically that Virginia had good days and bad days. That does not establish the condition of Virginia Mapp on April 2, 2003, and does not overcome the burden of proof of clear and convincing evidence to show that Virginia Mapp did not possess the required mental capacity to understand the nature of her actions when she signed the deed in question. In *Moran, supra.* a doctor who was the physician for over a decade for the grantor in a deed executed on October 17, 1997, stated that the grantor was first diagnosed as having Alzheimer's in 1997, and that in February and December 1997 the grantor was confused and agitated; that his then-current mental state in 2000 was confused and disoriented; that the grantor's mental condition had progressively diminished over the previous five years, back to 1995 and the doctor believed that the stress of losing two close family members had accelerated the effects of Alzheimer's. The lower court in *Moran* found that the deeds were valid and the Supreme Court upheld that opinion. Dr. Wilkerson apparently tendered no affidavit regarding the competency of Virginia Mapp in the conservatorship (R.E. of Appellant Tab#6). Marilyn Mapp Chambers nor Dr. Wilkerson offered an affidavit at trial that may have been used in setting up the guardianship even though Dr. Wilkerson was treating Virginia Mapp and had been treating Virginia Mapp since July of 2001. It is also interesting to note that Dr. Wilkerson's opinion "that during April of 2003 that Ms. Virginia Mapp, secondary to a mental infliction and infirmity, did not know the nature and extent of her bounty and did not understand the consequences of her actions" (T. 71:27-29, 72:1-2) is a recitation of the legal standard from a expert well versed in testifying.

The lower court also erred by placing so much weight on the testimony of Dr. Wilkerson and finding that Virginia Mapp was not competent on April 2, 2003, when the deed in question was executed. In fact, the testimony of Dr. Wilkerson and Pamela Jeanette Patrick were the only testimony contrasted by the lower court in the bench opinion.

Pamela Jeanette Patrick testimony is supported by Marilyn because March or April, 2003, Will Mapp, Jr., directed Pamela to go pick up Virginia at her home in Forest and bring her to the Funeral Home. (T. 224:27-29) which she did. (T. 226:21-22, 227:25-29). Pamela remembers many specific details about the early April, 2003, deed signing and specifically that it was in the morning when she picked up Virginia, at approximately 8:00 am. (T. 237:27-29, 238: 1-2). Virginia spent the night on occasion in Forest even after she moved to Jackson with Marilyn. (T. 126:7-15, 126:22-24). March 26, 2003, is when Dr. Wilkerson used the term Sundowning to describe Virginia Mapp (T. 59 line 25-29) (T. 60 line 1-5). After Virginia finished signing the deed, Pamela took Virginia home in the afternoon because the news was on (T. 238 line 3-11).

Marilyn Mapp Chambers testimony shows that Virginia was able to bath and feed herself with supervision (T. page 114 line 26 and 27) and up to 2006 Marilyn was taking care of Virginia own her own (T. page 117 line 4 through 7). After 2001 Virginia did spend the night in Forest Mississippi on occasion when Marilyn was out of the state on workshops when Marilyn would leave Virginia with Will F. Mapp, Jr., (T. 126:7-15). Also, Virginia had a house in Forest Mississippi in 2003, (T. 126:22-24).

Latoya Mapp: Latoya testified that there was only one occasion in 2006 that Virginia Mapp did not recognize or remember who Latoya was. (T. 201:5-11) and after April, 2003, there was never an occasion when Virginia Mapp was talking out of her head.

Josie Gammage: Josie Gammage was the individual who notarized the deed in question on April 2, 2003, and knew Virginia Mapp very well. Jose felt they had a close relationship. There was no occasion when Virginia Mapp appeared confused to Josie or could not take care of her business. (T. 141:18-29, 140:9-18, 142:14-17, 145:12-25, 146:2-11). Josie Gammage did testify that on one occasion Virginia Mapp apparently had gone to some other ladies home and had told that lady to call the funeral home. After that phone call, one of the individuals working at Mapp Funeral home went and found Will Mapp, Jr., and called the number back and told the lady that someone would be there to pick up Virginia. (T. 147-149)

As to the conservatorship/guardianship of Virginia even if there was a serious question as to Virginia's lack of mental capacity, our Appellate Courts have consistently held that insane persons enjoying a lucid interval may legally execute a deed or will. See *Polk v. Martin, 116 So. 107, 107 (Miss. 1928).* Likewise, persons under a guardianship or conservatorship may execute a legally valid will or deed unless it be shown by clear and convincing evidence that they lacked sufficient mental capacity to do so. *Mullins, id., 1191; In the Matter of the Conservatorship of Vera Mae Stevens v. Patrick, 523 So.2d 319, 322-323 (Miss. 1988)*

The Chancellor was incorrect in finding by clear and convincing evidence that Marilyn Mapp Chambers had proven Virginia lacked the necessary mental capacity to sign the deed in question on April 2, 2003.

II. WHETHER THE COURT COMMITTED MANIFEST ERROR IN FINDING THAT MARILYN MAPP CHAMBERS DID NOT EXECUTE THE DEED IN QUESTION.

The lower court did not rule on whether the signature of Virginia Mapp on the deed in question was the signature of Virginia Mapp although the court found that the deed in question "was signed on 2nd day of April 2003" (T. 291:21-25). This issue was raised in the initial

Petition filed by the Marilyn Chambers Mapp. (C.P. Vol. 1p 22) which alleged that Virginia Mapp signature was a forgery. The testimony of Josie Gammage, the Notary, was that she could not remember if Virginia Mapp was there or not when she, Josie Gammage signed the deed in question. (T. 92:6-10, 97:22-25). However, Josie Gammage does recognize the signature of the Virginia Mapp, having seen it on numerous occasions, as being Virginia Mapp's signature. (T. 98:4-8). The order and opinion, from which this appeal was taken, as specified in the notice of appeal, did not address this issue. (R.E. Vol. 3 376-382 and Appellants R.E. Tab#2) See M.R.A.P. 3(c). Failure to preserve this issue for appeal purposes renders this issue procedurally barred. *Corey v. Skelton, 834 So.2d 681, 686 (Miss.2003); Barnes v. Singing River Hosp. Sys., 733 So.2d 199, 202 (Miss.1999); Educational Placement Servs. v. Wilson, 487 So.2d 1316, 1320 (Miss.1986).* The evidence and testimony heard by the lower court establishes that the signature on the deed is the signature of Virginia Mapp. The court accepted the testimony from Pamela Jeanette Patrick that in March or April, 2003, Will Mapp, Jr., directed Pamela to go pick up Virginia and bring her to the Funeral Home (T. 224:27-29) in Forest (T. 226:21-22, 227: 25-29) for the purpose of signing some documents. (T. 237: 6-10). It was in the morning, approximately 8:00 am. (T. 237 : 27-29) and (T. 238 : 1-2) and after Virginia finished signing the deed, Pamela took Virginia home in the afternoon because she remembers that the news was on (T. 238 : 3-11). Marilyn was of the opinion, and the Court allowed her to give her opinion based upon her experience with her mother's signature over the years, overruling the defendant's objection, that the signature that appeared on the deed in question was not the signature of Virginia Mapp. (T. 113 : 2-10).

An "acknowledgment" is a formal statement, made by the person executing a deed to an official who is authorized to take the acknowledgment, that the execution of the deed was of that

person's own free will and accord. *Estate of Dykes v. Estate of Williams* 864 So.2d 92 (Miss. 2003) In *Cotton v. McDonnell* 435 So. 2d. 683 (Miss. 1983) this court held that a quitclaim deed acknowledged by a Tennessee notary public having no authority on the premises was defective and ineffective as to third parties. However, a deed defectively acknowledged may still be good between the parties to it. See *Kelly v. Wilson,* 204 Miss. 56, 63, 36 So.2d 817, 819 (1948); and *Campbell v. State Highway Commission,* 212 Miss. 437, 443, 54 So.2d 654, 656 (1951). The Chancellor held in *Cotton* and this court affirmed, that as between the as grantors and grantees, to the quitclaim deed in *Cotton* it was wholly effective. In the case at bar the signature on the deed in question is the signature of Virginia Mapp and is an effective conveyance to the Estate of Will F. Mapp, Jr.

Signature of Marilyn Mapp Chambers: Josie Gammage does not remember if Marilyn Mapp Chambers was in front of her when the deed in question was signed. (T. 93 -15 through 17) and she could not testify that the signature on the deed in question was the signature of Marilyn Mapp Chambers (T. 98: 7-8). Josie later invoked her right against self incrimination under *Fifth Amendment to the United States Constitution, and Article 3, § 26 of the Mississippi Constitution.* The testimony of Josie Gammage was that Marilyn was not there when the deed in question was notarized by Josie Gammage. She did not know if Marilyn's had signed a document or if she notarized it or if Will F. Mapp, Jr., told her to notarize it and he was going to get Marilyn to sign. (T. 98:26-29, 99:1-2) This seriously calls into question the presumption of validity of the notarization of the signature of Marilyn. It does not dictate if the signature on the deed in question was Marilyn's.

Marilyn testified that Josie Gammage did notarize documents but never notarized a document that she had signed. (T.111:21-22) and the signature that appeared on the deed in

question was not her signature. (T. 111:28-29). Latoya Mapp testified that she was familiar with the signature of Marilyn Mapp Chambers, however, the Court would not allow that testimony except on proffer. (T. 199:1-16). This is true even though the Court allowed the same testimony regarding Marilyn Mapp Chambers's recognition of the signature of her mother. (T. 113:2-10). Latoya Mapp received annual gifts from Marilyn Mapp Chambers and they would include a card, graduation gifts and visited in the home of Marilyn Mapp Chambers when Marilyn was signing checks. (T. 204 : 24-29) (T. 205 : 1-29) (T. 208 : 20-29) (T. 209 : 1-29) Latoya recognized the signature on the deed as the signature of Marilyn Mapp Chambers. (T. 206 line 1-9). The Court sustained an objection to this testimony (T. 209 line 3-4). On proffer, Latoya Mapp further laid as a basis for her testimony that she had seen Marilyn Chambers' signature on checks that paid for Latoya's college books. Latoya further testified to the same grounds for recognizing the signature of Virginia Mapp. (T. 209:17-29, 210:1-29, 211:1).

A Frank Hicks testified by deposition as a forensic document examiner. (Defendants Trial Exhibit #9, T. 192 and Appellants R.E. Tab#7.) Mr. Hicks was accepted as a forensic document examiner by the Court. Mr. Hicks was of the opinion that to a reasonable degree of probability in the field of forensic document examination that Marilyn Chambers signature on the deed was probably written by Marilyn Chambers. (Deposition page 14 line 10-20). Mr. Hicks further testified that it was more likely than not that Marilyn Mapp Chambers did sign the deed. (Deposition page 17:16-19). The lower court after reviewing the deposition of Mr. Hicks rendered its bench opinion and stated that it did not find his testimony to add a whole lot (T. 290: 28-29). It is the position Pugh that the lower court erred in disregarding the opinion of Mr. Hicks. In *Sewell, supra., 721 So.2d 129, (Miss.,1998)* Frank Hicks, the State's handwriting expert, testified as to the opinions a handwriting expert can give when examining a known exemplar and

a questioned writing. Mr. Hicks did not have ten exemplars as suggested by the lower court (T. 288: 6-10) were needed to "form a conclusive opinion but things don't always work out the way I want them to" (T. 287:10-12. Again, in *Sewell, supra.* at ¶ 53 Hicks testified that the "strong reason to believe" opinion was "as close as you can get to an identification without actually being able to make an identification." Even when the expert's opinion does not serve to identify or eliminate a particular writer as the source of questioned writing, that opinion is helpful to the trier of fact because "[a]n expert opinion regarding handwriting need not be based upon absolute certainty in order to be admissible." *United States v. Herrera,* 832 F.2d 833, 837 (4th Cir.1987). In this case Hicks was of the opinion that the evidence contained in the handwriting point rather strongly toward the questioned unknown riding having been written by the same individual, however, it falls short of virtual certainty degree of confidence.(T. 287:1-7)

In *Sewell, supra.,* the court allowed the trial of fact to consider the opinion of Mr. Hicks with two exemplars. Although the lower court did consider the opinion of Hicks the lower Court erred in failing to give Hicks testimony the sufficient weight it deserved when the lower court stated that "I don't find his testimony to add a whole lot". (T. 288: 6-10). The lower court erred in basically disregarding the opinion of Hicks that the signature on the deed in question was in fact the signature of Marilyn Mapp Chambers.

When a party challenges the validity of a properly acknowledged deed, that party must overcome several presumptions favoring the legitimacy of the document. The *first presumption* provides that where a deed is properly acknowledged, the instrument is presumed to be authentic because the certificate of acknowledgment imports verity and presumptively states the truth. This presumption can be overcome only by clear and convincing evidence. *Jones v. Minton,* 244 Miss. 354, 358, 141 So.2d 564, 565 (1962). See also *Thompson v. Shell Western E & P Inc. 607 So.2d*

37, 40 (Miss.,1992) There is a presumption against bad motive, dishonesty and fraud, and fraud is not a thing to be lightly charged and most emphatically not a thing to be lightly established. A mere preponderance is not sufficient to establish fraud; it must be established clearly and convincingly, especially where a long time has elapsed and some of the actors are dead. *Griffith, Miss. Chancery Practice, Sec. 589.* Further, as set forth in *Cotton v. McDonnell* 435 So. 2d. 683 (Miss. 1983) a deed defectively acknowledged is ineffective as to third parties, however, a may still be good between the parties to it. See *Kelly v. Wilson,* 204 Miss. 56, 63, 36 So.2d 817, 819 (1948); and *Campbell v. State Highway Commission,* 212 Miss. 437, 443, 54 So.2d 654, 656 (1951).

Pugh would aver that the Chambers did not overcome the clear and convincing evidence standard regarding either the signature of Marilyn Mapp Chambers or Virginia Mapp. This has become a swearing match. The lower court committed error in finding that the signature of Marilyn Mapp Chambers was not her signature. And while the lower court apparently did not make a ruling as to the signature of Virginia Mapp Pugh asserts that the signature on the deed in question of Virginia Mapp is in fact her signature. And that even though the acknowledgement as to both may be defective that does not void or cancel the deed as between the parties to the deed, only third parties.

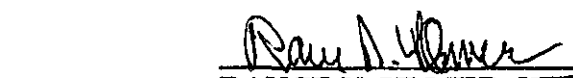
CONCLUSION

Pugh respectfully submits that the trial court committed manifest and reversible error when the Chancellor overlooked the evidence presented by Pugh of Virginia Mapp's mental competence. Pugh has presented proof from lay witnesses regarding the mental capacity of Virginia Mapp on the date of execution of the deed in question proving that she did know and understand the consequences of her actions when she signed the deed in question. Chambers

presented general medical proof that Virginia Mapp did not know or understand what she was doing but this is insufficient to overcome the clear and convincing standard. Thus, Virginia Mapp did have the mental capacity to understand her actions to execute a deed.

Finally, the lower court committed error in finding that the signature of Marilyn Mapp Chambers was a forgery. And while the lower court apparently did not make a ruling as to the signature of Virginia Mapp Pugh asserts that the signature on the deed in question of Virginia Mapp is in fact her signature. Even though the acknowledgement as to both may be defective that does not void or cancel the deed in question as between the parties to the deed, only third parties.

Respectfully submitted,



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