SUPREME COURT OF THE STATE OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

FREDDIE DABNEY HATAWAY APPELLANT,

VERSUS Supreme Court of Mississippi No. 2009-TS-01923

DAVID H. DABNEY, et al. APPELLEE(S)

Appeal

From

The Chancery Court of Warren County, Mississippi No. 96-0141-PR

CORRECTED BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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10. Whether the Court's finding, that all other proposed findings of fact and conclusions of law submitted by the parties and not specifically listed in this Order are denied, is error or manifestly wrong.

11. Whether with a gift inter vivos there is an automatic presumption of undue influence even without abuse of the confidential relationship.

12. Whether the inter vivos gifts to David H. Dabney by EWD were presumptively invalid.

Statement of the Case

A. Nature of the case

This is an appeal of a Chancery Court ruling on a Petition to recover funds, to set aside transfers, for removal and replacement of a Co-executor, for a final accounting, and to close the estate. By said Petition Freddie Dabney Hataway (hereinafter "FDH") sought to realize the intent of the Eloise Walne Dabney's (hereinafter "EWD") written Will by (1) correcting actions by, for and on behalf of the estate that were inconsistent with said Will and (2) setting aside transactions that were contrary to the Articles of Partnership of The Dabney Company Partnership or to the provisions and/or the intent of said Will.

B. Course of Proceedings and Disposition in Court Below

Frederick Y. Dabney (hereinafter "FYD") prepared (for insurance purposes) an inventory, with stated values and photos, of the personal effects in the home of Frederick Y. and his wife EWD at 1714 Cherry Street, Vicksburg, MS as of Feb. 16, 1954. On Feb. 20, 1954, FYD prepared and executed his handwritten Last Will and Testament. He appointed his wife, EWD, executrix of his estate. He gave all of his personal effects, furniture, automobile, watches, jewelry and the like to EWD, and in addition gave, devised, and bequeathed unto her a one-half interest in all of his other property, real, personal and mixed, in fee simple. He left the remainder of his property to EWD in trust for the benefit of his four children, share and share alike. This Last Will created trusts for each of his four children (Mary, Freddie, Eloise, and David Hunt Dabney (hereinafter "DHD"), his adopted son, and made EWD, the primary trustee of each trust.

On April 17, 1954, FYD, EWD and the four children agreed to the Articles of Partnership of The Dabney Company Partnership. These six named Dabney family members thus were 100% owners, as undivided tenants in common, of The Dabney Company Partnership and the partners'

above referenced real, personal and mixed assets, including cash. Management of the partnership was not to be centralized in any one person in his representative capacity, and "death of a partner, retirement of a partner, or change of ownership in a participating interest automatically will terminate this partnership."

While there is no record of what EWD passed to each trust primary beneficiary when they reached the age of twenty-one (21), her ten (10) item Last Will and Testament, dated July 24, 1987, devises and bequeaths specified personal property to each of her four children (Mary, Freddie, David, and Eloise) and specified granddaughters. She goes on to direct that "[a]ll my remaining household furnishings are to be divided by my four children," and to "give, devise, and bequeath all of my Estate, real, personal, and mixed, of which I die seized and possessed, where situated, unto my four children, Mary Dabney Nicholls, Freddie Dabney Hataway, David Hunt Dabney, and Eloise Dabney Lautier, equally, share and share alike." .

At 10:30 a.m. on July 18, 1994, EWD was admitted to Parkview Medical Center in Vicksburg, MS. Her admission was based primarily on acute compression fracture of the lumbar spine associated with right side rib fractures (3 ribs), bruises to both hands, and for aggressive pain control. She "required a great deal of narcotics to keep her pain under control," and was unable to be kept comfortable without periodic demeral injections and aggressive narcotic therapy. Her medications were dyazide; lopressor; oscal-D; tylox 1 b.i.d.; demeral with vistoril; peri-colase 1 b.i.d.; calcimar and, micro-K. Senile dementia was later added to her diagnosis.

EWD was transferred to the Skilled Nursing Facility for aggressive physical therapy on July 30, 1994. On Aug. 4, 1994, she was discharged from the Skilled Nursing Facility and transported home where she remained bedridden and cared for by private nurses and family until her death. FDH and her daughter, Cheryl Hataway Lineberger, both of whom assisted the nurses in caring for the bedridden EWD, thus became more familiar with EWD's personal property, real estate, and mixed assets. EWD, died in her home in Warren County, Mississippi on August 22, 1996.

On July 21, 1994, DHD presented a document to a prescription narcotics drugged, mentally incapacitated, semi-conscious, and hospitalized EWD, with seriously diminished vision, that made him her agent and attorney-in-fact "with full power from time to time in my name, place and stead: To contract for the sale of, sell, convey and warrant, upon such terms and conditions and under such covenants as he shall think fit and proper, such real and/or personal property as I may own at said time." The document further stated that it was her intention to fully invest him "with all powers and authority as my agent and attorney-in-fact necessary to act fully and completely in my place and stead with regard to the transactions contemplated hereby as if I were personally taking such actions," and that this "power of attorney shall be binding upon me, my estate and my personal representatives." EWD signed the document that day (July 21, 1994), which was three days after admission to the hospital on July 18, 1994.

On Oct. 14, 1994 DHD presented to a prescription narcotics drugged, mentally incapacitated, semi-conscious, and bedridden EWD, with seriously diminished vision, a filled-out Merchants Bank National Association application form for an "existing personal joint checking account with survivorship." The account application was in both of their names, and the address on the application was 1714 Cherry Street for both. The phone number for each of them was different, and they each entered their own Social Security Number. While both parties signed in the signature box provided, EWD's signature was significantly above the line provided and nearly in the box above. It is noteworthy that this transaction took place in the front bedroom of 1714 Cherry, which was different from the bedroom she slept in before her admission to the hospital. When they brought her home from the hospital, the prescribed hospital bed upon which she laid the rest of her life was placed in the front bedroom. It is significant that the bank account was an "existing' account with her money in it. DHD made no deposit when he returned the application to the bank.

It is not known whether checks written on this convenience account required the signature of

both parties. It is known that EWD wrote two checks in the amount of $4,500 each on this account on Aug. 2, 1994, and Aug. 26, 1994, to Jackson Recovery Center for DHD's in house alcohol recovery treatment. It is significant to note that EWD wrote the first $4,500 check fifteen days after her hospital admission on July 18, 1994, two days before her discharge from the hospital on Aug. 4, 1994, and more than two months before her signing of the joint account application on Oct. 14, 1994. By contrast, DHD wrote checks on the account on 8/26/96; on 8/26/96; on 8/27/96; and, on 9/3/96.

On Nov. 14, 1996, a list of the "Contents of 1714 Cherry Street, Vicksburg, MS 39180 September 9, 1996" was filed in the Chancery Court. It consisted of 112 items with a total estimated value of $48,215.00. FDH and her daughters know that the contents of EWD's house prior to her death were substantially different from this Sept. 9, 1996, contents document. For example, they know the house contained a small velvet love seat (Victorian); Sir Walter Scott's First Edition (a set of approximately 40-50 books); Four Gody original prints with gold leaf frames; one chest of plated silverware; a sterling silver tea set (5 pieces); furs, including scarf, mink cape, pastel mink stole, chinchilla tan stole, and sable boa; sterling silver dresser set (1 or 2 silver brushes, 1 silver button hook, 1 silver file or knife like hook, 1 silver comb holder, 1 silver hand held mirror, all on a mirrored tray); a Williamsburg tea table; Dabney family crystal and china; one silver Gorham clock; one Mexican sterling silver tray; one antique Sheffield tray; Maryland pattern sterling silver; at least three 8' x 4' high ceilinged closets filled with very expensive female clothing, hats, and racks of shoes, dozens of which were alligator leather; and, approximately 23 items of fine jewelry, including 14 pieces of gold jewelry, platinum and diamond watch, diamond pin, diamond bracelet, diamond brooch, and a string of Mikimoto cultured pearls.

DHD paid Lillie Thomas, a maid for the Decedent, Sixty-five Dollars ($65.00) per week to wash his clothes and also launder, press and fold napkins for his business at the Martha Vick Home.

For the period between Sept. 6, 1996, to June 12, 1998, Thomas was paid $6,070; for June 19, 1998, to June 2, 2000, $6,830; for June 9, 2000, to Jan. 30, 20003, $9,190; and Feb. 2, 2003, to Feb. 27, 2004, $3,620, for a total of $25,710. He also purchased a new clothes washer and dryer with estate funds for use at the 1714 Cherry property for washing and drying his personal laundry and the linens from his business. See Transcript, January 5, 2004 Hearing, pp. 53-54. To make matters worse, the washer and dryer were secretly removed from 1714 Cherry before the distribution on January 7, 2004, and thus are included on the "Missing Personal Property" list.

DHD was appointed Co-executor along with Mary Dabney Nicholls (hereinafter "Mary"), his sister, by order of the Chancery Court on Aug. 28, 1996, on the basis of a Will later found to be fraudulent. See *Estate of Dabney v. Hataway,* 740 So.2d 915 (Miss., 1999). DHD was again appointed Co-executor along with Mary a second time by EWD's valid June 24, 1987, Will and the order of the Chancery Court dated Dec. 1, 1999. Mary died on February 10, 2001. DHD's deposition testimony indicates that there is a codicil to the subject June 24, 1987, Will.

As indicated by Item Nine of the EWD Will, actions are to be taken by the Co-executors in their joint discretion. It is also the expressed intention of the testator, that "[i]n the event either or both of my said co-executors [Mary and David] shall ... cease to act, then I appoint my daughters, Freddie Dabney Hataway and Eloise Dabney Lautier as my co-executors, in that order of succession, to serve with all of the rights, powers and authority granted my co-executors in Item Nine..." By the unambiguous, expressed terms of said Will, actions were to be taken by two co-executors in their joint discretion and upon the happening of the contingency of the demise of a Co-executor, Freddie Dabney becomes one of the two Co-executors.

Despite this specific provision in EWD's Will that FDH be appointed Co-executor if either DHD or Mary could not serve as a Co-executor, FDH was not immediately appointed Co-executor after Mary's death on Feb. 10, 2001. On April 8, 2004, the Chancellor ordered that FDH "be and she is hereby appointed as co-executor" of the Estate of Eloise W. Dabney. The Order is dated

April 15, 2004, and filed April 19, 2004. Her Letters Testamentary were granted by the Chancery Court Clerk on April 15, 2004, and she signed the Oath of Co-Executor on April 22, 2004. During the period beginning Feb. 10, 2001, through April 22, 2004, DHD acted as sole Executor of the Estate. He resisted and frustrated every effort made to realize the Will's expressed intent that there be two Co-executors and that FDH be one of them. DHD at times took positions (1) diametrically opposed to the clearly expressed language of the EWD's Will and (2) committed various breaches of his fiduciary duties to the Estate of EWD and its heirs. For example, DHD signed estate checks without a Co-executor's signature and transferred real estate.

DHD has claimed several items of property from the Estate without Court approval. One such example is the Decedent's Cadillac which was taken by DHD shortly after EWD's death, signed over to DHD by himself, and sold by him to an unknown party, all in violation of the Chancery Court's Nov. 4, 1996, Order that "the Co-executors shall secure all estate assets, and not dispose of any estate assets, make any distribution, nor make any payment of estate funds without first obtaining order of this Court." The Chancery Court, by Order dated Jan. 12, 2004, found the subject Cadillac automobile to be an asset of the estate, and that the $8,575.00 sale proceeds "shall be deposited to the estate account..." and "a copy of the bank's printout on the current status of this account shall be presented to Mrs. Hataway." To date, no such printout has ever been provided to Hataway.

DHD also claims a chest of sterling silver flatware Melrose Pattern service for 12 as an inter vivos gift from EWD. DHD had the chest of sterling silver 12 of each in Melrose pattern. On Oct. 23, 2000 (1st Accounting Hearing), DHD testified in this Court that the silver service was given to him before mother died. The disposition of this chest of silver flatware was specifically provided for in the subject Will. DHD testified that the chest and its twelve piece silver flatware had been given to him outright, whereas the Will that he probated stated that "to two of my granddaughters ... I bequest a silver chest, each consisting of eight pieces of each item. ... As

long as my son, David Hunt Dabney, has an ownership interest in the Martha Vick Home, he shall have the use of the whole chest with its twelve piece service. Upon his disposition of his interest in the Martha Vick Home or his death, whichever comes first, the provision relative to this bequest to my granddaughters will become effective."

The chest of sterling silver flatware Melrose Pattern service for 12 was to be used by him as long as he had an ownership interest in the Martha Vick Home and thereafter the collection was supposed to be divided between two of the EWD's specified granddaughters. DHD has no evidence to support his claim of an inter vivos gift of the silver flatware. As of May 8, 2002, DHD no longer has an ownership interest of record in the Martha Vick Home. See Warren County Chancery Clerk Book 1288 Page 501. The specified granddaughters now have a right to the chest of sterling silver flatware Melrose Pattern service for 12. Moreover, the additional four pieces of each silver flatware item purchased, per Court Order, by DHD with estate funds makes possible the Will's expressed intent that the granddaughters are to have "a silver chest each consisting of eight pieces of each item."

On February 11, 2004, DHD allowed an estate check to be written, signed and negotiated by an unknown party. In addition, he was the sole endorser on all estate account checks written between Mary's death and Freddie's appointment as Co-executor. These are clear violations of the Court's Nov. 4, 1996, Order that "the Co-executors shall secure all estate assets, and not dispose of any estate assets, make any distribution, nor make any payment of estate funds without first obtaining order of this Court." DHD also ordered the late Carolyn Ramsey not to speak with Co-executor Hataway, and not to give her access to the listed property.

FDH filed the subject Petition. The Chancery Court directed the parties to file findings of fact and conclusions of law. After receiving said findings and conclusions, the Chancery Court issued the Order upon which this appeal is based.

C. Statement of Relevant Facts

The Supreme Court has found there to be a confidential relationship between DHD and EWD.

By acting as a sole executor DHD was not following the testator's expressed intention that the estate be administered by named Co-executors.

All actions by the sole executor DHD were unauthorized and beyond the scope of power allowed or granted by the Will, the Partnership Agreement, or the law on tenants in common transfers..

There is neither petition nor proof evincing any power in the sole executor to bind the estate.

There has been no request or petition by the sole Executor DHD or the Co-Executors of the estate for power to bind the estate or an allowance of fees.

Summary of Argument

The Chancery Court's Ruling is incorrect.

DHD, as a undivided tenant in common owner of partnership assets, was precluded by agreement and law from individually transferring partnership real, personal, or mixed assets.

In construing a Will, the intention of the testator is controlling, unless the intention is invalid under the law.

The Court's duty in a Will construction case is to ascertain and give effect to the testator's intention.

In *Cooper v. Simmons*, 116 So.2d 215, 218 (Miss. 1959), the Supreme Court of Mississippi states, "that courts cannot amend or reform a Will;" "that courts cannot add to or take from a Will, or make a new one for the parties;" "that courts are concerned solely with the intention of the testatrix;" and, that "all provisions of a Will must be considered and held valid and effective if reasonable ..."

Whenever any last will and testament shall empower and direct the executor as to the sale of property, the payment of debts and legacies, and the management of the estate, the directions of the will shall be followed by the executor. Both executors and the Court must respect the

provisions of the Will. Note well that co-executor powers do not survive the death of a co-executor.

All actions by the sole executor DHD were unauthorized and beyond the scope of power allowed or granted by the Will or by law, as the power of the remaining executor DHD do not survive the death of o-Executor Mary Dabney Nicholls.

One who is in a fiduciary relationship, as is an executor, owes the fiduciary a high duty of care. The Supreme Court has found there to be a confidential relationship between DHD and EWD, and the resulting undue influence clearly compels removal.

An executor may not take inconsistent positions which would be detrimental to the heirs on the one hand and beneficial to himself on the other.

In defending a suit and attempting to prevent the subject property from being returned to the corpus of the estate, the executor obviously has a conflict of interest with the estate.

When an executor finds his own interest in conflict with those of the estate, the sanctity of the fiduciary relationship is invaded and he should immediately resign as executor.

Every executor or administrator may be removed if he become disqualified, or for improper conduct in office, at the instance of any person interested.

The Supreme Court has stated that fiduciaries, such as executors, have a duty to collect and protect the assets of the decedent.

DHD has breached his fiduciary duties to the Estate and the heirs by allowing an Estate check to be written, signed and negotiated by a third party.

DHD was charged with keeping the checks and writing them when necessary and this incident shows that he grossly abrogated his fiduciary duties. This breach was exacerbated by his signing and negotiating estate checks without the co-signature of either Mary or Hataway over the period between 2001 and 2004 after Mary's death.

In the instant case, DHD has taken positions inconsistent with the provisions of the Will that

benefited him to the detriment of the other heirs. He has acted as sole executor, written checks on the estate's checking account, and transferred real and personal property in violation of the Chancery Court's Order. DHD took EWD's Cadillac, signed the title over to himself and later sold the Cadillac, and has never accounted for the proceeds to date, despite an order from the Court to do so. Further, DHD claimed an *inter vivos* gift of the chest of sterling silver flatware contrary to the express language of EWD's Last Will and Testament. He has avoided discussing the missing sterling silver tea set. In addition, DHD attempted to claim a diamond ring, specifically devised to Hataway in the probated Will, for himself. See 2nd Accounting Hearing transcript.

The Supreme Court has found there to be a confidential relationship between DHD and EWD, and the resulting undue influence clearly compels removal.

Because the intention of EWD that FDH replace the deceased Mary as Co-executor should have been given effect, it was clear legal error for the Court (1) not to take the ministerial steps necessary to allow FDH to function as a Co-executor, (2) to approve of DHD serving as sole executor, and (3) to ratify the administrative activity of sole executor DHD. Correction of these clear legal errors can only be accomplished through realization of the Court's duty to ascertain and give effect to the testator's intention.

Argument

Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character. *Hendricks v. James*, 421 So.2d 1031, 1041 (Miss.1982). The relationship arises when a dominant, overmastering influence controls over a dependent person or trust justifiably reposed. *Ib.*; *McDowell v. Pennington*, 394 So.2d 323 (Miss.1981); *Croft v. Alder, 115 So.2d 683 (1959).* A confidential relationship such as would impose the duties of a fiduciary may be legal, moral,

domestic or personal. *Murray v. Laird*, 446 So.2d 575, 578 (Miss.1984); *Hendricks*, supra.; and, *Bourn v. Bourn*, 163 Miss. 71, 140 So. 518 (1932).

Weakness of intellect, as distinguished from lack of capacity, when coupled with another factor, such as grossly inadequate consideration, or the existence of a confidential relationship may merit judicious judicial scrutiny. *Richardson v. Langley, 426 So.2d 780, 783 (Miss.1983);* *Cunningham v. Lockett*, 63 So.2d 401, 404 (1953); and *Gillis v. Smith*, 114 Miss. 665, 676-77, 75 So. 451, 456 (1917). The grantor's mental capacity is to be measured as of the time of the execution of the deed, *Richardson*, supra.; *Moore v. Stone*, 208 So.2d 585, 586 (Miss. 1968). *Mullins*, infra. at 1195; *Smith v. Smith*, 574 So. 2d 644, 654 (Miss. 1990).

A confidential relationship, thus, arises whenever there is a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency on the former arising either from weakness of mind or body, or through trust. *Hendricks*, supra. Factors to be considered in determining if and when a confidential relationship exists, include: (1) whether one person has to be taken care of by others, (2) whether one person maintains a close relationship with another, (3) whether one person is provided transportation and has their medical care provided for by another, (4) whether one person maintains joint accounts with another, (5) whether one is physically or mentally weak, (6) whether one is of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another. *In re Estate of Grantham*, 609 So. 2d 1220, 1224 (Miss.1992); *Hendricks*, supra. Once a confidential relationship is found the burden shifts to the beneficiary to disprove the presumption of undue influence by clear and convincing evidence.

Estate of Dabney, infra., at 921; *Griffin v. Armana*, 687 So. 2d 1188 (Miss. 1996).

To overcome the presumption of undue influence, the proponents must show (a) good faith on the part of the beneficiary, (b) the grantor's full knowledge and deliberation of the consequences of her actions, and (c) the grantor's independent consent and action. *Mullins, supra.*, at 1193.

"Where a confidential relationship exists, there is a presumption of undue influence concerning an inter vivos gift. Such gifts are presumed invalid." *Madden vs. Rhodes*, 626 So.2d 608, 619 (Miss. 1993) "...[W]ith a gift inter vivos, there is an automatic presumption of undue influence even without abuse of the confidential relationship. Such gifts are presumptively invalid. Ibid., at 618. "The rule applied in the case of gifts inter vivos, as by deed, [is] that where a confidential relation exists between donor and donee, it is presumptively void and the burden rests on the donee to produce a clear and convincing evidence that the gift is free from the taint of undue influence. . . ." *Croft, supra., at* 687-88. .

On July 21, 1994, there was a relationship between DHD and EWD in which DHD was in a position to exercise dominant influence upon EWD because of EWD's dependency on DHD arising from weakness of mind and body, and/or through trust. *In re Estate of Dabney*, 740 So. 2d 915, 921 (Miss. 1999); *Griffin, supra., at* 1192.

In *Carson v. Carson*, 331 So.2d 913 (Miss. 1976) the Court found that a testamentary power of sale conferred on two named executors did not survive the death of one of them and sales of real property made by the surviving executor were set aside where the intention of the testator, as indicated by repeated references in the will to actions to be taken by the co-executors in their joint discretion, was that the power of the remaining executor not survive the death of one of them. The sole executor was found to not have followed the directions of the Will that it be administered by co-executors.

The lack of evidence showing (a) good faith on the part DHD, (b) EWD's full knowledge and deliberation of the consequences of her actions, and (c) EWD's independent consent and action precludes DHD from overcoming the presumption of undue influence. *Mullins, supra., at* 1193.

DHD's actions in this Estate are analogous to those of the executors in In Re Estate of Holloway, 515 So.2d 1217 (Miss. 1987), wherein the executors claiming property for themselves against the interests of the estates they represented were in breach of their fiduciary duties to the estates and

heirs. In both of those situations the court found that the executor had a conflict of interest and should have been removed with the transfers being set aside. This Court recognized that a cause of action may lie with the Estate and the heirs to overturn a claimed *inter vivos* deed conveying certain cemetery lots from the Decedent to DHD on the grounds of undue influence in a confidential relationship. The Chancery Court specifically refused to confirm the conveyance of the cemetery lots as an *inter vivos* gift. DHD here again claims ownership interest in property adverse to the interests of the Estate and under *Chambers, infra.* and *In Re Estate of Holloway,* infra., should be removed immediately. The presumption of undue influence is patent.

When the circumstances give rise to a presumption of undue influence, the burden of going forward with the proof shifts to the grantee/beneficiary to prove by clear and convincing evidence: good faith on the part of the grantee/beneficiary, grantor's full knowledge and deliberation of his actions and their consequences, and advice of a competent person, disconnected from the grantee and devoted wholly to the grantor/testator's interest. This rationale and the authorities stated hereinabove apply also to the joint bank account DHD inveigled EWD into while she lay semi-conscious on a hospital bed.

DHD treated the 1714 Cherry Street as his primary residence and used the housekeeper, who the Estate was paying $65.00 per week for her services, for his personal laundry needs and also to launder linens for his business, the Martha Vick Home. DHD admittedly paid no rent for his use of the 1714 Cherry property or for the services of the housekeeper, utilities, telephone, etc. at the property. DHD further did not request permission from any of the heirs to engage in his conduct. This is clear breach of his fiduciary duty to the Estate and the heirs. DHD was charged with protecting the interests of the Estate and the heirs and instead he used the Estate's property as his own, disposing of it and consuming it at his own discretion sans Court approval and in violation of Court Order without a thought for the other heirs or for the laws of the State of Mississippi.

"Every disbursement shown by an account of fiduciary must be supported by proper vouchers, which shall conform to the requirements of Miss. Code Ann. (1972) Section 91-7-279 and Miss. Code Ann. Section 93-13-71." Miss. Unif. Chancery Court Rule 6.04.

"Every such voucher shall consist of a receipt or canceled bank check showing to whom and for what purpose the money was paid." Miss. Unif. Chancery Court Rule 6.04. "In every case where it is required that vouchers for disbursements in any annual or final account be filed, each such voucher shall be written upon, or affixed to, not less paper than a one half (1/2) page of legal cap, or a voucher may be an ordinary bank check of such size as is in general use. Each shall be entitled of the cause and numbered with the number of the case, and each shall be filed by the clerk." Miss. Code Ann. § 91-7-279. "The vouchers ... shall not be received, filed, or allowed unless they conform to, or be made to conform to, the requirements of law relating to the vouchers of executors and administrators." Miss. Code Ann. § 93-13-71. A sworn account not accompanied by the vouchers required by law, and not approved by an order of the court, is insufficient, and is of no probative value in support of expenditures for which credit is claimed. *White v. Moore*, 144 So. 696, 698 (Miss. 1932)."All pleadings, including accounts and reports, filed by a fiduciary shall be personally signed and sworn to by him. If required by the Chancellor he must produce proof touching the truth of the facts therein stated." Miss. Unif. Chancery Court Rule 6.13. Where the administrator fails to file sufficiently specific accountings and inventories, the Chancellor may properly remove him under § 91-7-277.

An executor or administrator who may be removed shall continue to be answerable to the court until his final settlement and satisfaction be made.

Significantly, Rule 60(b) provides that relief may be granted 'for any other reason justifying relief from judgment," Rule 60(b)(6), MRCP, such as "fraud, misrepresentation, or other misconduct of an adverse party." "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the

following reasons: ...(4) ... the judgment is void...". Relief may be granted where the judgment or order is void because the court lacked jurisdiction over the subject matter, lacked personal jurisdiction over the parties, acted in some manner inconsistent with constitutional due process, or otherwise acted beyond the powers granted to it under the law. A wrong judgment is not void; only those judgments entered beyond the court's authority to act are void. "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: ...(5) ... a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application..." Relief from a judgment may be granted where a prior judgment on which the present judgment is based has been reversed or otherwise vacated, or in any other circumstance where the continued enforcement of the judgment would be inequitable (e.g., a change in critical facts). "This rule does not limit the power of a Court to entertain an independent action to relieve a party from a judgment, order or proceeding, or to set aside a judgment for fraud upon the court. ...The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise." On July 21, 1994, EWD did not have full knowledge and deliberation of the consequences of her actions. Neither EWD's consent or actions were independent. *Mullins, supra., ay* 1193.

When EWD signed the power of attorney she was (1) a person being taken care of by DHD and others, (2) a person who maintained a close relationship with DHD and others, (3) a person for whom transportation and medical care had to be provided by DHD and others, (4) a person who was physically or mentally weak, and (5) a person who was of advanced age or poor health and, therefore, in a confidential relationship with DHD. *In Re Estate of Grantham*, 609 So.2d 1220 (Miss.1992); see also *Costello v. Hall*, 506 So. 2d 293 (Miss.1987); *Hendricks*, supra.,.

On Oct. 14, 1994, there was a relationship between DHD and EWD in which DHD was in a position to exercise dominant influence upon EWD because of EWD's dependency on DHD

arising from weakness of mind and body, and/or through trust. *Hendricks, supra.*

On July 11, 1996, shortly before Decedent EWD's Aug. 22, 1996, death, DHD caused a deed to be executed by the Decedent conveying certain cemetery lots "unto David Hunt Dabney and Mrs. Eloise W. Dabney as joint tenants with right of survivorship and not as tenants in common..." This deed is filed in the Warren County Chancery Clerk's office in Book 1094 Page 75. In Para. 17 of *Estate of Dabney v. Hataway,* 740 So.2d 915, 920 (Miss. 1999) the Supreme Court observes that DHD signed a hospital record for his mother as her legal guardian because she was "unable to sign due to dementia;" that her medical records show "evidence of cerebral atrophy;" and, that she was diagnosed as having "progressive senile dementia." The Court concluded that according to the record, she was not "fully mentally competent." This raises the issue of whether the cemetery lots deed is void for lack of mental competency thereby making the lots assets of the heirs of EWD. This issue was brought before this Court in the Jan. 5, 2004, hearing. Although it stated that the validity of the deed of the cemetery lots needed to be determined, the Court refused to confirm the deed, recognizing a clear conflict of interest between DHD and the interests of the Estate and the heirs. The Court ruled that the issue was not properly before it.

The convenience joint bank account was an "existing" account with EWD's money in it, and DHD made no deposit when he returned the application to the bank on Oct. 14, 1994, as there is no clear proof of (1) a donor competent to make a gift, (2) a voluntary act of the donor with donative intent, (3) the gift must be complete with nothing else to be done, (4) there must be delivery to the donee, and (5) the gift must be irrevocable. *Ross v. Brasell*, 511 So.2d 492, 496 (Miss. 1987); *Matter of Collier*, 181 So.2d 1338, 1341(Miss. 1980).

DHD's willful disrespect and disregard for the rights of the Decedent and her heirs is manifested in his claims of *inter vivos* gifts from EWD, having EWD's power of attorney, and a joint bank account with rights of survivorship with EWD.

The burden of proof is on the claimant to show by clear and satisfactory proof that a valid gift was made. The requirements necessary for a valid *inter vivos* gift are: (1) a donor competent to make a gift; (2) a voluntary act on the part of the donor with intention to make a gift; (3) a complete gift with nothing left to be done; (4) property delivered by the donor and accepted by the donee; and, (5) the gift is irrevocable. Every element must be clearly shown. Mere possession of the property is not enough, and does not raise a presumption of a gift.

DHD exercised undue influence over EWD from July 18, 1994, through August 22, 1996, see *Holmes-Pickett v. Holmes-Price* So. 2d 674, 680-2, & 692-3 (Miss. 2007); see also *Mullins, supra., at* 1193; *Wright v. Roberts*, 797 So. 2d 992, 998 (Miss. 2001); and, *Burnett v. Smith*, 47 So. 117 (1908).

DHD's use of the Estate's property as his own, disposing of it and consuming it at his own discretion sans Court approval and in violation of Court Order were clear breaches of his fiduciary duty to the Estate and the heirs. *In Re Chambers*, 458 So.2d 691, 693 (Miss. 1984); *In Re Estate of Holloway*, 515 So.2d 1217, 1225 (Miss. 1987); *Estate of Bodman v. Bodman,* 674 So.2d 1245, 1250 (Miss. 1996); *Estate of Holloway v. Holloway*, 631 So.2d 127, 135 (Miss. 1993).

DHD had no powers as an executor after Mary's death on Feb. 10, 2001, *Carson, supra., at* 915; *Carter v. Hurst*, 234 So.2d 616, 619 (Miss. 1970); *Batson v. Humble Oil & Refining Co.,* 56 So.2d 828, 829 (Miss. 1952); and, *Ex Parte White*, 70 So. 949 (Miss. 1918). All actions by the sole executor DHD were unauthorized and beyond the scope of power allowed or granted by the Will or by law, as the power of the remaining executor DHD did not survive the death of Mary, *Carson, supra.; Carter, supra.; Batson, supra.;* and, *Ex Parte White*, supra.

DHD's wrongful and intentional exercise of dominion, ownership or control over the deposits in the estate's checking account, to the exclusion of, and disregard for, the rights of the estate were willful, wrong, malicious, or oppressive. *Phillips Distribution, Inc. v. Texaco, Inc.,* 190 So.2d

840 (Miss. 1966). DHD's actions evinces such callous disregard for the expressed intentions of the testator they could only be in his individual capacity and best interest, and thus of no benefit to the estate itself. See *Scott vs. Hollingsworth,* 487 So.2d 811, 813 (Miss. 1986).

The Will gives, devises, and bequeaths all of her Estate, real, personal, and mixed, of which she dies seized and possessed, where situated, unto her four children, Mary Dabney Nicholls, Freddie Dabney Hataway, David H. Dabney, and Eloise Dabney Lautier, equally, share and share alike. see EWD's Last Will and Testament.

DHD made representation(s) to the partners of The Dabney Company that were false, material, and known to be untrue. Moreover, it was his intent that the representation(s) should be acted upon by said partners in the manner he contemplated, having in mind said partners' (a) ignorance of the falsity; (b) reliance on the truth of the misrepresentation(s); (c) right to rely thereon; and (d) the consequent and proximate injury said partners would sustain thereby; *Singing River Mall Co. v. Mark Fields, Inc.,* 599 So. 2d 938, 945 (Miss. 1992).

DHD is liable to the Estate, the Co-Executors, the Dabney family members, and Hataway for any loss of property, real, personal or mixed, the said parties suffered as a direct or indirect result of his fraudulent wrongdoing, *Hendricks,* supra.

As of May 8, 2002, DHD no longer had an ownership interest of record in the Martha Vick Home (1300 Grove St.). The granddaughters specified in EWD's Will now have a right to possession of the chest of sterling silver flatware Melrose Pattern service for 12 and the additional four pieces of each silver flatware item purchased by DHD with estate funds per Court order.

A Chancellor's removal of executor of a decedent's estate is amply supported by a record showing that his payment of un-probated claims, and his conflicts of interest in the matter of administering the estate. *Harper v. Harper*, 491 So.2d 189, 203 (Miss. 1986). Where the administrator fails to file sufficiently specific accountings and inventories, the Chancellor may

properly remove him under § 91-7-277. *Kelly v. Shoemake,* 460 So.2d 811, 824 (Miss. 1984). "An executor or administrator who may be removed shall continue to be answerable to the court until his final settlement and satisfaction be made..." *Kelly,* supra. The Court has the duty to ascertain and give effect to the testator's intention. Miss. Code Ann. Sec. 91-7-35.

> The elements of fraud are: (1) a representation; (2) its falsity; (3) its materiality; (4) the speaker's knowledge of its falsity or ignorance of its truth; (5) the speaker's intent that the representation should be acted upon by the hearer and in the manner reasonably contemplated; (6) the hearer's ignorance of its falsity; (7) the hearer's reliance on the representation's truth; (8) the hearer's right to rely thereon; and (9) the hearer's consequent and proximate injury. Hernandez v. Vickery Chevrolet-Oldsmoblie Company, Inc., 652 So.2d 179, 183 (Miss. 1995); *Singing River Mall Co.,* supra., at 945.

Because the intention of EWD that Hataway replace the deceased Mary as Co-Executor should have been given effect, it was clear legal error for the Court (1) not to take the ministerial steps necessary to allow Hataway to function as a Co-Executor, (2) to approve of DHD serving as sole executor, and (3) to ratify the administrative activity of sole executor DHD, Whiteway Fin. Co. v. Parker, 226 So.2d 903, 904 (Miss. 1969)

> The court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) fraud, misrepresentation, or other misconduct of an adverse party; (2) accident or mistake; the judgment is void; (5) a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application. Rule 60(b)(1)(2)(4) and (5), MRCP. Relief may be granted where the judgment or order is void because the court lacked jurisdiction over the subject matter, ... or otherwise acted beyond the powers granted to it under the law. See United States v. Indoor Cultivation Equip. from High Tech Garden Supply, 55 F.3d 1311, 1316 (7th Cir. 1995). Only those judgments entered beyond the court's authority to act are void. See *Chambers vs. Armontrout*, 16 F.3d 257, 260 (8th Cir. 1994). Relief from a judgment may be granted where a prior judgment on which the present judgment is based has been reversed or otherwise vacated, or in any other circumstance where the continued enforcement of the judgment would be inequitable (e.g., a change in critical facts). See generally Agostini v. Felton, 521 U.S. 203, 215, 117 S.Ct. 1997, 138 L.Ed.2d 391 (1997). Rule 60(b) provides that relief may be granted 'for any other reason justifying relief from judgment," Rule 60(b)(6), MRCP. Courts have the inherent power to vacate a judgment ... when the judgment is void because of fraud in its acquisition. *Whiteway Fin. Co.,* supra., at 904.

All acts of DHD as sole executor should be ruled null and void as contrary to the expressed intent of the testator. The Court should also enter an Order vacating and setting aside the Order allowing attorney fees because said Order is void for the lack of the Court's authority to allow attorney's fees where there was no evidence of an employment contract, and because the denial of Hataway's appointment as Co-Executor upon which DHD's service as sole Executor was based has been reversed or otherwise vacated and the continued enforcement of the Order entered Jan. 14, 2004, would be inequitable.

By Order dated March 15, 2006, the Court directed that the respective proportionate shares of the sales proceeds be distributed to Eloise Lautier, Dabney Haugh, Kristin Tedder, Wendi Wilhoit, and Amy Richmond, and that "the funds held for the benefit of David Dabney will be held until further order of the Court." These funds should deposited in the Estate bank account and continue to held pending the Court's determination of DHD's return of assets, liability for waste of Estate assets, damages, and interest thereon.

Conclusions

The Chancery Court's Ruling is incorrect and should be reversed.

The Chancery Court had a duty to ascertain and give effect to the testator's intention, Miss. Code Ann. Sec. 91-7-35. All actions by DHD and sole executor DHD were unauthorized and beyond the scope of power allowed or granted by the Will or by law, as his power did not survive the death of Mary, *Carson,* supra., *at,* 915; *Carter, supra., at,* 619; *Batson,* supra., *at,* 829; and, *Ex Parte White*, supra. There is neither petition nor proof showing any power in the sole executor to bind the estate.

Per the Will of EWD, the specified granddaughters have a right to possession of the chest of sterling silver flatware Melrose Pattern service for 12; and, the additional four pieces of each silver flatware items purchased by DHD with Estate funds are the property of the specified granddaughters. Moreover, they have a right to possession of the additional four pieces of each

silver flatware items purchased by DHD with Estate funds and a chest matching the chest containing the sterling silver flatware Melrose Pattern service for 12.

DHD's use of the Estate's property as his own, disposing of it and consuming it at his own discretion sans Court approval and in violation of Court Order were clear breaches of his fiduciary duty to the Estate and the heirs. *In Re Chambers*, supra., at 693 (*citing Estate of Ratliff*, 395 So.2d 956 (Miss. 1981)); and, *In Re Estate of Holloway*, supra., ay 1225. All acts of sole executor DHD as are hereby ruled null and void as contrary to the expressed intent of the testator, *Ruffin v. Burkhalter*, 118 So.2d 357, 360 (Miss. 1960).

Because of the breaches of fiduciary duty to the Estate and the heirs, DHD shall hereby be removed from his position as Co-Executor, *Harper, supra., at* 203; and, *Kelly,* supra., *at* 824.

Because DHD had complete control of the house after EWD died, he knows the whereabouts of the Estate of Eloise W. Dabney Missing Personal Property. DHD is hereby ordered to disclose to the Co-Executor FDH the whereabouts of the Estate of Eloise W. Dabney Missing Personal Property; DHD made representation(s) to EWD that were false, material, and known to be untrue. Moreover, it was his intent that the representation(s) should be acted upon by EWD in the manner contemplated, having in mind EWD's (a) ignorance of the falsity; (b) reliance on the truth of the misrepresentation(s); (c) right to rely thereon; and (d) the consequent and proximate injury she would sustain thereby, *Hernandez,* at 183; *Singing River Mall Co.,* at 945.

DHD exercised undue influence over EWD from July 18, 1994, through August 22, 1996, *Holmes-Picket,* supra., at 680-2, & 692-3; *Mullins v. Ratcliff*, 515 So. 2d 1183, 1193 (Miss. 1987); *Wright v. Roberts*, 797 So. 2d 992, 998 (Miss. 2001)(citing In re Estate of Dabney v. Hataway, 740 So. 2d 915, 919 (Miss. 1999)); and *Burnett v. Smith*, 47 So. 117 (1908).

DHD is liable to the Estate, the Co-Executors, the Dabney family members, and Hataway for any loss of property, real, personal or mixed, the said parties suffered as a direct or indirect result of his fraudulent wrongdoing, *Hernandez*, supra., at 183; *Singing River Mall Co.*, at 945; and,

Hendricks, supra..

DHD, as a undivided tenant in common owner of partnership assets, was precluded by agreement and law from individually transferring partnership real, personal, or mixed assets.

The funds from the sale of 1714 Cherry Street that were being held for the benefit of David Dabney until further order of the Court should be returned to the Estate bank account and continue to be held there pending the Court's directions;

EWD's transfers of personal and real property, the inter vivos gifts EWD is claimed to have made, and the joint convenience checking account EWD is said to have applied for are all hereby set aside;

DHD shall pay the total value of the checks he wrote as sole Executor on the bank account of the Estate Of Eloise Walne Dabney, *Greenlee vs. Mitchell*, 607 So.2d 97, 111 (Miss. 1992).

Hataway requests that after recovering the funds and setting aside the transfers and approving a final accounting, the Court should issue an order determining the liability of the fraudulent Co-executor for reimbursement and damages, plus interest, and closing the Estate.

Respectfully Submitted,

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