IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
APPEAL NO. 2010-CA-02070

NANCY BIRMINGHAM WALTERS
APPELLANT

v.

ROSEMARY BIRMINGHAM BARNES AND DON BARNES
APPELLEES

Appeal from the Chancery Court of Monroe County, Mississippi,
Trial Court Case #07-0643-48
The Honorable Jacqueline Estes Mask, Chancery Judge

BRIEF OF APPELLEES ROSEMARY BIRMINGHAM BARNES and DON BARNES

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and DON BARNES

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NANCY BIRMINGHAM WALTERS — **APPELLANT**

VS. — **NO. 2010-CA-02070**

ROSEMARY BIRMINGHAM BARNES and DON BARNES — **APPELLEES**

CERTIFICATE OF INTERESTED PERSONS

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

1. Nancy Birmingham Walters, Appellant;
2. Rosemary Birmingham Barnes, Appellee;
3. Don Barnes, Appellee;
4. Ronnie Boozer, Executor, *c.t.a.*, of the estate of William Birmingham;
5. Gene Barton, counsel for Appellant;
6. Rhett R. Russell, counsel for Appellees;
7. Samuel C. Griffie, counsel for Executor, *c.t.a.*

Rhett R. Russell

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RESTATEMENT OF THE ISSUES

Don Barnes and Rosemary Barnes respectfully restate the issues presented for review as follows:

1. Whether or not the lower court erred in granting the motion of Mr. and Mrs. Barnes to dismiss the complaints exhibited against them.

2. Whether or not the provisions of Mr. Birmingham's last will and testament override the right of survivorship arising from the express terms of an account or certificate of deposit.

3. Whether or not a pleading initially asserting funds of the money market account to be owned by Mr. Birmingham's estate which was duly amended without objection prior to the presentation of testimony or other evidence present an issue to the non-objecting party for appeal purposes.

4. Whether or not the Chancery Court erred in assessing a portion of the attorney fees of the executor, *c.t.a.*, of the estate of William Birmingham against Nancy Walters.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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STATEMENT OF THE CASE

LOWER COURT PROCEEDINGS

William Birmingham (Mr. Birmingham) passed away on October 14, 2007, survived by two daughters, Rosemary Birmingham Barnes (Rosemary) and Nancy Birmingham Walters (Nancy) (Exhibit 6, T 213). On October 22, 2007, Nancy presented Mr. Birmingham's will for probate and was appointed executrix with letters testamentary issuing to her after taking an oath that she would fulfill all her duties (Exhibit 6). Nancy did not inform Rosemary of her appointment and despite numerous demands refused to provide Rosemary with a copy of their father's will (Exhibit 11, T 106). Nancy fulfilled absolutely none of her statutory and fiduciary duties (R 52, R 56). On January 21, 2009, with the assistance of an attorney, Rosemary finally obtained a copy of her father's will and discovered the probate proceedings (Exhibit 11, T 106, R 24). On March 10, 2009, Rosemary caused her complaint to be filed in the probate proceeding requesting Nancy's removal as executrix, the revocation of her letters testamentary, an accounting and damages (Exhibit 9, R 34-38). By judgments entered May 15 and May 19, 2009, the lower court removed Nancy as executrix, cancelled the letters testamentary issued to her,

directed that she pay to the clerk of the court funds that she had obtained from a joint banking account in Alabama through the use of the letters testamentary and appointed an executor, *c.t.a.*. (R 52, R 56). Nancy alleged undue influence in her counterclaim against Rosemary and in a third-party complaint against Rosemary's husband, Don Barnes (Don) who, in turn, filed a counterclaim against Nancy seeking the return of his funds (R 44, R 59, R 69). Nancy presented her evidence and when she rested the lower court sustained the Rule 41(b) MRCP motion of Rosemary and Don for involuntary dismissal from which Nancy now appeals (R 153).

PERTINENT FACTS

On September 21, 2006, Mr. Birmingham moved to Alabama to live with Don and Rosemary (T 100, T 103). On July 21, 2007, Mr. Birmingham moved from Alabama to Mississippi to live with and assist his sister (T 81, T 100). On October 14, 2007, Mr. Birmingham passed away (Exhibit 6).

A disinterested third party, Dr. Pettigrew, who is a first cousin of and very close to both Nancy and Rosemary having all grown up together (T 152-153, T 163), testified that in the latter part of 2006 he drove Mr. Birmingham and his furniture to Alabama at which time he had a three hour conversation (T 153-155), visited with Mr. Birmingham and his daughters during the following Thanksgiving holidays (November 25, 2006) (T 173), visited with him on numerous occasions in June, 2007, while Mr. Birmingham was visiting with his sister in Mississippi (T 156), drove Mr. Birmingham back to Alabama on July 4, 2007, thereafter visited with him in Alabama (T 156) and after Mr. Birmingham moved in with his sister towards the end of July,

2007, visited with Mr. Birmingham "all the time." (T 157, T 213). Dr. Pettigrew's testimony was that Mr. Birmingham was very alert (T 172), an excellent cook who cooked his own meals (T 173), took care of himself until a few weeks before his death (T 158), only wanted to be around someone in case he needed help (T 154), was very capable of handling his own affairs (T 172), always talked about his investments (T 159), owned his own automobile which he drove around all the time until two weeks before passing away (T 157-158, T 160, T 162), drove to get his hair cut, to the bank and to pick up his medicine (T 158), walked extensively (T 157, T 160), made his own decisions (T 159-160), at no time appeared confused or forgetful until about two weeks before his death (T 165-166) and was sharp as a tack as far as money was concerned (T 159).

Other testimony was that Mr. Birmingham was totally lucid (T 52), coherent (T 61), understood documents (T 55, T 60), not dependent on Rosemary and Don (T65, T74), took care of himself (T65, T 70, T 74), did his own ironing and washing (T 65), was very mentally alert (T 66), administered his own medications (T 69, T 103), took care of his own meals (T 72, T 79), got his medications filled and refilled (T 73, T 74, T 103), made his own investments (T 79), handled his own financial and business affairs (T 104, T 132), was in good health (T 81), worked in the yard every day (T 82), attended church functions (T 82), took care of his own finances (T 82), had a practice of naming beneficiaries on his investments (T 95, T 103), knew what property he owned (T 95, T 96), owned and drove his own automobile (T 103), received, opened and read his own mail (T 103-104, T 138), was very active (T 104), walked two or three miles a day (T 104), worked out on his treadmill (T 104) and did yard work (T 104).

Mr. Birmingham's medical records depict a neurologist's opinions that Mr. Birmingham "wasn't confused," "stable on medications" and "experienced some dementia" with the results of June 26, 2006, mental status exam depicting: "alertness, knowledge are normal."

Mr. Birmingham's general practitioner stated in his June 25, 2007, medical report:

> "Mr. Birmingham has been a patient here for many years. I have examined him in the office today and find that he is of sound mind and body. He is lucid and totally clear mentally. It is my opinion that he is totally capable of making clear decisions." (Exhibit 6)

Three subscribing witnesses to Mr. Birmingham's will stated that on June 28, 2007, "He was mentally competent and of testamentary capacity and understood what he was doing after he had reviewed the document." (R 16-23, T 52-53, T 55, T 60-61).

Mr. Birmingham had a practice of designating co-owners or beneficiaries as to his investments (T 95, T 103). Such testimony is supported by the five major investments existing as of his demise:

1. A certificate of deposit issued November 6, 2006, by an Alabama bank naming Rosemary as the pay-on-death beneficiary (Exhibit 4). This certificate of deposit was renewed June 6, 2007, with Rosemary again depicted as the pay-on-death beneficiary (Exhibit 4).

2. A money market account established November 6, 2006, with an Alabama bank depicting Don as a co-owner (Exhibits 2 and 3).

3. A banking account established June 29, 2007, with a Mississippi bank depicting Nancy as the pay-on-death beneficiary (Exhibit 1).

4. Checking account established September 25, 2006, with an Alabama bank

with Don as a co-owner on July 19, 2007 (Exhibits 2 and 3).

5. An Allstate Insurance Annuity issued June 18, 2003, through a Mississippi bank depicting Nancy and Rosemary as beneficiaries (Exhibit 5).

On November 7, 2007, Nancy proceeded to the Mississippi bank and withdrew Mr. Birmingham's funds from the account which he had designated her as the pay-on-death beneficiary (Exhibit 1, T 109-110). Then on November 16, 2007, Nancy took letters testamentary issued by the Mississippi court to Alabama and improperly withdrew the funds from the money market which was jointly titled to Mr. Birmingham and Don with the instrument creating such joint tenancy expressly specifying right of survivorship (Exhibits 2 and 3, T 105, T 121-122, T 215-216). Nancy claimed these funds from this money market account were her property to the exclusion of Don and Mr. Birmingham's estate (T 220-221). In conjunction with granting the motion of Don and Rosemary for involuntary dismissal of the pleadings exhibited against them, the lower court adjudicated that the funds from this money market account legally were the property of Don (R 153-164, RE 51-62).

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SUMMARY OF THE ARGUMENT

Rosemary and Don certainly had a close relationship with Mr. Birmingham. However, the undisputed testimonies depict by clear and convincing evidence that neither Don nor Rosemary unduly influenced Mr. Birmingham who, as verified by a disinterested third party witness kin to both Rosemary and Nancy, was very active, independent, intelligent, alert, self-sufficient, made his own decisions, handled his own affairs, sharp as a tack as far as money was concerned, took care of himself and at no time appeared confused or forgetful until about two weeks before his death. Such testimony was confirmed by the testimonies of the parties.

Nancy's failure to fulfill any of her statutory and fiduciary duties as executrix necessitated the appointment of an executor, *c.t.a.* and the incurrence of attorney fees by the executor, *c.t.a.*. The actions and nonactions of Nancy certainly justified the lower court requiring Nancy to be responsible for one-half of such attorney fees.

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ARGUMENT

I.

WHETHER OR NOT THE LOWER COURT ERRED IN GRANTING THE MOTION OF MR. AND MRS. BARNES TO DISMISS THE COMPLAINTS EXHIBITED AGAINST THEM.

Nancy presented testimony and other evidence and then rested her case at which time Don and Rosemary moved for a dismissal of the complaints exhibited against them (T 231-232). The lower court sustained the motion.

Rule 41(b) MRCP provides:

> "After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence."

In considering such a motion to dismiss the Chancery Judge should not consider the evidence in the light most favorable to Ms. Walters as the non-moving party, but should consider the

evidence "fairly." Griffith, Mississippi Chancery Practice, 2000 ed., §584(a) and Stewart v. Merchants Bank, 700 So.2d 255 (Miss. 1997).

TESTIMONY AND OTHER EVIDENCE

Mr. Birmingham had a practice of designating co-owners or beneficiaries as to his investments (T 95, T 103). Such testimony is supported by his five major investments existing as of his October 14, 2007, demise:

1. A certificate of deposit issued November 6, 2006, by an Alabama bank naming Rosemary as the pay-on-death beneficiary (Exhibit 4). This certificate of deposit was renewed June 6, 2007, with Rosemary again depicted as the pay-on-death beneficiary (Exhibit 4).

2. A money market account established November 6, 2006, with an Alabama bank depicting Don as a co-owner with the instrument by which the account was created expressing right of survivorship (Exhibits 2 and 3).

3. A banking account established June 29, 2007, with a Mississippi bank depicting Nancy as the pay-on-death beneficiary (Exhibit 1).

4. Checking account established September 25, 2006, with an Alabama bank depicting Don as a co-owner with the instrument by which the account was created expressing right of survivorship (Exhibits 2 and 3).

5. An Allstate Insurance Annuity purchased through a Mississippi bank depicting Nancy and Rosemary as beneficiaries (Exhibit 5).

Mr. Birmingham's medical records depict a neurologist's opinions that Mr. Birmingham

"wasn't confused," "stable on medications" and "experienced some dementia" with the results of June 26, 2006, mental status exam depicting: "alertness, knowledge are normal."

Dr. Robison's June 25, 2007, medical report attached to Nancy's complaint to admit will to probate stated:

> "Mr. Birmingham has been a patient here for many years. I have examined him in the office today and find that he is of sound mind and body. He is lucid and totally clear mentally. It is my opinion that he is totally capable of making clear decisions." (Exhibit 6)

Three subscribing witnesses to Mr. Birmingham's will stated that on June 28, 2007, "He was mentally competent and of testamentary capacity and understood what he was doing after he had reviewed the document." (R 16-23, T 52-53, T 55, T 60-61).

A disinterested third party, Dr. Pettigrew, who is a first cousin of and very close to both Nancy and Rosemary having all grown up together (T 152-153, T 163), testified that in the latter part of 2006 he drove Mr. Birmingham and his furniture to Alabama at which time he had a three hour conversation (T 153-155), visited with Mr. Birmingham and his daughters during the following Thanksgiving holidays (November 25, 2006) (T 173), visited with him on numerous occasions in June, 2007 while Mr. Birmingham was visiting with his sister in Mississippi (T 156), drove Mr. Birmingham back to Alabama on July 4, 2007, thereafter visited with him in Alabama (T 156) and after Mr. Birmingham moved in with his sister towards the end of July, 2007 visited with Mr. Birmingham "all the time." (T 157, T 213). Dr. Pettigrew's testimony was that Mr. Birmingham was very alert (T 172), an excellent cook who cooked his own meals (T 173), took care of himself until a few weeks before his death (T 158), only wanted to be around

someone in case he needed help (T 154), was very capable of handling his own affairs (T 172), always talked about his investments (T 159), owned his own automobile which he drove around all the time until two weeks before passing away (T 157-158, T 160, T 162), drove to get his hair cut, to the bank and to pick up his medicine (T 158), walked extensively (T 160), made his own decisions (T 159-160), at no time appeared confused or forgetful until about two weeks before his death (T 165-166) and was sharp as a tack as far as money was concerned (T 159).

Other testimony was that Mr. Birmingham was totally lucid (T 52), coherent (T 61), understood documents (T 55, T 60), not dependent on Rosemary and Don (T65, T74) took care of himself (T65, T 70, T 74), did his own ironing and washing (T 65), was very mentally alert (T 66), administered his own medications (T 69, T 103), took care of his own meals (T 72, T 79), got his medications filled and refilled (T 73, T 74, T 103), made his own investments (T 79), handled his own financial and business affairs (T 104, T 132), was in good health (T 81), worked in the yard every day (T 82), attended church functions (T 82), took care of his own finances (T 82), had a practice of naming beneficiaries on his investments (T 95, T 103), knew what property he owned (T 95, T 96), owned and drove his own automobile (T 103), received, opened and read his own mail (T 103-104, T 138), was very active (T 104), walked two or three miles a day (T 104), worked out on his treadmill (T 104) and did yard work (T 104).

JOINT OWNERSHIP / POD BENEFICIARY

§ 5-24-12(a) of the Alabama Uniform Multi-Person Accounts Act which became effective March 1, 1998, states that, "On death of a party sums on deposit in a multi-party

account belong to the surviving party or parties." § 5-24-12(b) states as per an account with a POD designation, on death of one of two or more parties, the rights in sums on deposit are governed by § 5-24-12(a) of the Alabama Uniform Multi-Person Accounts Act. § 5-24-13(b) of the Alabama Uniform Multi-Person Accounts Act specifies, **"A right of survivorship arising from the express terms of the account, Section 5-24-12 or a POD designation, may not be altered by will."** (Emphasis added) Funds jointly held pass to the survivor if the instrument creating such joint tenancy specify right of survivorship. Barron v. Scroggins, 910 So.2d 780, 784 (Ala. Civ. App. 2005). In the event the instrument creating a joint interest states that such tenancy is with right of survivorship then the interest of the deceased tenant passes to the surviving joint tenant. *Id.* at 785; Andrews v. Troy Bank, 529 So.2d 987 (Ala. 1988).

CONFIDENTIAL RELATIONSHIP / UNDUE INFLUENCE

Under Alabama law the existence of a confidential relationship between the decedent and Don and Rosemary, without more, will not put upon Don and Rosemary the burden of showing that they did not unduly influence the decedent. Burney v. Torrey, 14 So. 685 (Ala. 1893). Nancy has the burden of showing that a confidential relationship existed between the decedent and Don and Rosemary. Smith v. Vice, 641 So.2d 785, 786 (Ala. 1994). For Nancy to establish a *prima facia* case of undue influence, she must show that a confidential relationship existed, that Don and Rosemary's influence was dominant and controlling in the relationship and that there was undue activity on the part of Don and Rosemary so as to procure the desired results. Smith v. Vice, *Supra.* citing Boland v. Boland, 611 So.2d 1051 (Ala. 1993) and Clifton v. Clifton,

529 So.2d 980 (Ala. 1988). The Supreme Court of Alabama stated in Dees v. Metts, 17 So.2d 137, 140 (Ala. 1944):

> "Of course, all the cases recognize that undue influence must be sufficient to destroy the free agency of the (person). And persuasion or argument addressed either to the judgment or affections, in which there is no fraud or deceit, does not constitute undue influence. ... It must be such as to control the mental operations of the (person), overcome his power of resistance, and oblige him to adopt the will of another, thus producing a disposition of property which the (person) would not have made if left freely to act according to his own pleasure. ... And in the more recent case of Abrams v. Abrams, 144 So. 828, 830 ... ' It is not influence, it must be remembered, but undue influence, that is charged and necessary to be proven to overthrow (the) transaction ....'"

Under Mississippi law as to a will the opponent must show that a confidential relationship existed between the decedent and a beneficiary and after such showing the beneficiary must overcome a rebuttable presumption of undue influence while as to an *inter vivos* gift a rebuttable presumption of undue influence is automatically presumed and the beneficiary must overcome this rebuttable presumption by offering clear and convincing evidence that the gift was the result of the free and independent determination of the giver." Estate of Hall, 32 So.3d 506 (Miss. App. 2009) and Hendrix v. James, 421 So.2d 1031, 1043 (Miss. 1982).[1] A presumption of undue influence is not raised merely because a confidential relationship exists

[1] The Mississippi Supreme Court in Madden v. Rhodes, 626 So.2d 608, 617 (Miss. 1993) states as per the presumption of undue influence that the establishment of a joint account should be considered an *inter vivos* gift thus automatically bringing to bear the rebuttable presumption of undue influence upon the reasoning that the co-owner could have taken possession or otherwise exercised control of the assets in question at any time prior to the demise of the co-owner. However, under the facts at hand, Don was not even aware of his co-ownership until almost a year and a half after Mr. Birmingham's demise.

between the parties; something more is required. There must be some showing that the beneficiary abused the relationship either by asserting dominance or by substituting intentions. Adams v. Adams, 529 So.2d 611, 615 (Miss. 1988). The case *sub juris* is much like that considered by the Mississippi Appellate Court in Estate of Finley v. Finley, 37 So.3d 687 (Miss. App. 2010) which found that the presumption of undue influence had been overcome by evidence depicting the grantor as a shrewd businessman, not solely dependent upon the beneficiaries, controlled his medication himself, capable of driving himself, not easily influenced and reviewed his bank statements. *Id.* at 391-692 (¶ 19). Once a presumption of undue influence arose such rebuttable presumption was defeated by Don and Rosemary demonstrating good faith on their part, Mr. Birmingham's full knowledge and deliberation of his actions and their consequences, and independent consent and action on the part of Mr. Birmingham. Mullins v. Ratcliff, 515 So.2d 1183 (Miss. 1987).

Factors to be considered in determining whether a confidential relationship exists are set out in Estate of Thornton v. Thornton, 922 So.2d 850, 852-853 (¶ 7) (Miss. Ct. App. 2006) include:

1. Whether the person has to be taken care of by others;

2. Whether the person maintains a close relationship with another;

3. Whether the person is provided transportation and has his or her medical care provided for by another;

4. Whether the person is physically or mentally weak;

5. Whether the person is of advanced age or poor health; and

6. Whether there exists a power of attorney between that person and another.

There is sufficient credible evidence to support the chancellor's finding that Don and Rosemary rebutted any presumption of undue influence. The lower court was correct in its order granting the motion for involuntary dismissal in concluding:

> "The credible proof was that he was in his late eighties and may have been occasionally forgetful, but otherwise of excellent mental capacity, knowledgeable of his financial affairs, exercising regularly, operating his own vehicle, lucid and independent thinking. The court concludes the credible proof is insufficient to support a claim of fraud, duress, mistake, incompetency or undue influence. Accordingly, the motion of Rosemary and Don for involuntary dismissal should be and hereby is granted." (R 153-164, RE 51-62).

The appellate court should not interfere with or disturb a chancellor's findings of fact unless those findings are manifestly wrong, clearly erroneous or an erroneous legal standard was applied. In re Estate of Ladner, 909 So.2d 1051, 1054 (¶ 6) (Miss. 2004).

II.

WHETHER OR NOT THE PROVISIONS OF MR. BIRMINGHAM'S LAST WILL AND TESTAMENT OVERRIDE THE RIGHT OF SURVIVORSHIP ARISING FROM THE EXPRESS TERMS OF AN ACCOUNT OR CERTIFICATE OF DEPOSIT.

Mr. Birmingham's primary investments as of the time of his demise were:

1. A certificate of deposit issued by an Alabama bank naming Rosemary as the pay-on-death beneficiary (Exhibit 4). This certificate of deposit was renewed with Rosemary again depicted as the pay-on-death beneficiary (Exhibit 4).

2. A money market account with an Alabama bank depicting Don as a co-owner (Exhibits 2 and 3).

3. A banking account established with a Mississippi bank depicting Nancy as the pay-on-death beneficiary (Exhibit 1).

4. Checking account with an Alabama bank depicting Don as a co-owner (Exhibits 2 and 3).

5. An Allstate Insurance Annuity through a Mississippi bank depicting Nancy and Rosemary as beneficiaries (Exhibit 5).

Nancy asserts no authority whatsoever to back up her claim that the provisions of Mr. Birmingham's last will and testament override express terms of these investment instruments depicting right of survivorship or designation of a beneficiary.

§ 5-24-12(a) of the Alabama Uniform Multi-Person Accounts Act which became effective March 1, 1998, states that, "On death of a party sums on deposit in a multi-party account belong to the surviving party or parties." § 5-24-12(b) states as per an account with a POD designation, on death of one of two or more parties, the rights in sums on deposit are governed by § 5-24-12(a) of the Alabama Uniform Multi-Person Accounts Act. § 5-24-13(b) of the Alabama Uniform Multi-Person Accounts Act specifies, **"A right of survivorship arising from the express terms of the account, Section 5-24-12 or a POD designation, may not be altered by will."** (Emphasis added) Funds jointly held pass to the survivor if the instrument creating such joint tenancy specify right of survivorship. Barron v. Scroggins, *Supra.* at 784. In the event the instrument creating a joint interest states that such tenancy is with right of survivorship then the interest of the deceased tenant passes to the surviving joint tenant. *Id.* at 785; Andrews v. Troy Bank, *Supra.*

The Mississippi Supreme Court in Estate of Strange, 548 So.2d 1323, 1327 (Miss. 1989) stated that under Mississippi law the general rule is that:

> "Where a joint tenancy account in a bank is made payable to either depositor or survivor, the account passes to the survivor upon the death of a joint tenant.
>
> . . .
>
> Absent from the above cases is the situation where the creator of a joint tenancy, or a joint tenant, subsequently executes a last will and testament disposing of the joint tenancy funds to some other source. The answer has to be, and is, that the subsequent will does not destroy the joint tenancy and does not terminate that tenancy and divest the corpus of it into the estate of the testator. In that respect, the joint tenancy differs from the tenancy in common." *Id.* at 1328.

The Mississippi Court of Appeals stated in In re Last Will and Testament of Kistler, 22 So.3d 1209, 1217 (¶ 23) (Miss. Ct. App. 2009) as follows:

> "A will written subsequent to the creation of a joint tenancy, which divests the 'funds to some other source[,] ... does not destroy the joint tenancy and does not terminate that tenancy and divest the corpus of it into the estate of the testator.' ... (The testator) may have intended the funds be distributed as provided in her will, but under Mississippi law, (the surviving owner) became the sole owner of the savings account after (the testator's) death."

Nancy desired equal distribution so much so that she would not even provide her sister with a copy of the will of their father or even disclose that such will had been admitted to probate (Exhibit 11, T 106). On June 28, 2007, Mr. Birmingham executed his will, and on the very next day, June 29, 2007, Nancy took her father to BancorpSouth where he set up account number 51708774 with Nancy named as the pay-on-death beneficiary (Exhibit 1, T 108). Nancy's assertion of equal division among the sisters does not mesh with the fact that less than a month after her father died, November 7, 2007, Nancy proceeded to this bank and withdrew all the funds of this account ($18,753.12) and retained the same in her individual capacity (Exhibit 1,

T 101-102). Further, Nancy got herself appointed as executrix, took the letters testamentary to the State of Alabama and improperly withdrew the funds ($41,388.41) from the money market account (account number 68719299) owned jointly by Mr. Birmingham and Don and thereafter did not divide these funds with her sister but in her individual capacity claimed complete ownership thereof and spent the same (Exhibits 2 and 3, T 122-123, T 215-216, T 220-221).

III.

WHETHER OR NOT A PLEADING INITIALLY ASSERTING FUNDS OF THE MONEY MARKET ACCOUNT TO BE OWNED BY MR. BIRMINGHAM'S ESTATE WHICH WAS DULY AMENDED WITHOUT OBJECTION PRIOR TO THE PRESENTATION OF TESTIMONY OR OTHER EVIDENCE PRESENT AN ISSUE TO THE NON-OBJECTING PARTY FOR APPEAL PURPOSES.

Mr. Birmingham passed away on October 14, 2007 (T 213). Thereafter, despite oral and written demands Nancy refused to give Rosemary a copy of their father's will and Nancy did not disclose that she had caused the will to be admitted to probate and had been appointed executrix on October 22, 2007 (T 106, R 24). Rosemary retained an attorney and through his assistance on January 21, 2009, finally obtained a copy of her father's will and discovered the probate pleadings (Exhibit 11, T 106, R 24). On March 10, 2009, Rosemary caused to be filed her complaint to remove Nancy as executrix, to revoke her letters testamentary, for accounting, for inventory and for damages (Exhibit 9, R 34-38). Under the then belief that such money market account was established solely in her father's name Rosemary alleged on the second page of her pleading that, "Soon after her appointment Nancy Birmingham Walters took possession of more than Fifty Thousand Dollars ($50,000.00) of Decedent's probate estate" (R 35). On the 8th day of

May, 2009, Rosemary received from an Alabama bank in response to a *subpoena duces tecum* the bank records as to the money market account and became aware for the first time that such account was jointly owned by Mr. Birmingham and Don (Exhibit 4, T 16-19, T 97, T 100, T 120, T 131-132, T 222). Don filed a counterclaim setting forth his ownership and seeking return of such funds; so, for quite some time prior to Rosemary's motion *ore tenus* to strike from her complaint the aforestated allegation, Nancy had notice that Don was claiming ownership of the funds in the joint money market account (R 69-71).

Prior to any testimony or other evidence being presented Rosemary's attorney moved *ore tenus* to amend her complaint to remove the executrix, etc., so as to strike from the second page thereof, Paragraph 5, the sentence, "Soon after her appointment Nancy Birmingham Walters took possession of more than Fifty Thousand Dollars ($50,000.00) of Decedent's probate estate." (R 35, T 15-19, T 222). Nancy voiced no objection. It is well-established under Mississippi law that a contemporaneous objection is required in order to preserve an issue for appeal; otherwise, such issue is not preserved for appeal purposes. Johnson v. Gray, 859 So.2d 1006, 1015 (Miss. 2003); Dorrough v. Wilkes, 817 So.2d 567, 577 (Miss. 2002); Barnett v. State, 725 So.2d 797, 801 (Miss. 1998); and Estate of Laughter, 23 So.3d 1055, 1065 (¶ 47) (Miss. 2009). Rosemary's motion, *ore tenus* to amend her complaint was granted (T 21-22, T 222). The court then directed an inquiry to Nancy, "... are you prejudiced in some way as it relates to the amendment moving forward with the case?" to which the response was, "We are not prejudiced." (T 21). Nancy never protested the amendment until at a subsequent hearing, and then when she announced that she was resting her case (T 45) to which the lower court replied: "I ruled on Rhett's amendment

because there was an agreement before trial began. That was allowed. I am not going back and address that." (T 247).

In addition to this issue not being preserved for appellate purposes as a result of no timely objection, Nancy's assertions on Pages 18 and 19 of her brief as to the applicability of the doctrine of judicial estoppel, also known as estoppel by election of remedies, are without merit. The doctrine applies only where a party elects to pursue one of two inconsistent remedies then open and available to the party arising from the same set of facts. Then afterwards he or she is estopped from pursuing the other then available remedy. Rea v. O'bannon, 158 So. 916, 920 (Miss. 1935) and Banes v. Thompson, 352 So.2d 812, 815 (Miss. 1977). At the time Rosemary signed and filed her complaint she believed that the money market account was titled solely to her father and under such belief the only remedy was to assert that such funds should be assets of the probate estate. This doctrine may well be applicable if at the time Rosemary asserted that these funds were assets of the probate estate she had knowledge of the joint ownership and survivorship rights applicable to these funds. At the time she signed and filed her complaint she acted under the assumption of incorrect facts and certainly was not pursuing one of two inconsistent remedies then open and available to her arising from the same set of facts.

IV.
WHETHER OR NOT THE CHANCERY COURT ERRED IN ASSESSING A PORTION OF THE ATTORNEY FEES OF THE EXECUTOR, C.T.A.., AGAINST NANCY WALTERS.

On October 22, 2207, eight days after Mr. Birmingham passed away, Nancy presented his will to probate, she was appointed executrix and letters testamentary were issued to her upon

her taking the oath prescribed by § 91-7-41 MCA which stated in part: "I do swear ... that I, as executor, will well and truly execute the same according to its tenor, and discharge the duties required by law." (R 7-29). Thereafter she refused to provide Rosemary with a copy of decedent's will despite numerous oral and written demands while assuring Rosemary that no probate proceeding had yet been initiated (Exhibit 11, T 106). Rosemary hired an attorney and with the attorney's assistance on January 21, 2009, she finally obtained a copy of her father's will and became knowledgeable of the probate proceeding (Exhibit 11, T 106). The probate file indicates and the lower court found that subsequent to letters testamentary being issued to Nancy she as executrix failed as required by § 91-7-145(1) MCA to give notice to known creditors, failed to verify with the clerk that she had made reasonable, diligent efforts to identify creditors, failed to cause notice to be had by publication to unknown creditors as required by § 91-7-145(2) MCA, failed to protect probate assets and otherwise refused to perform her statutory and fiduciary duties (R 153-164, RE 51-62).

Under color of law Nancy traveled to Alabama where on November 16, 2007, she presented the Mississippi letters testamentary to an Alabama bank and demanded and received funds in excess of forty-one thousand dollars ($41,000.00) from a money market account jointly owned by decedent and Don and took therefrom the funds then belonging to Don (T 105, T 121-122, T 215-216). Nancy utilized her office as executrix and the letters testamentary issued to her to withdraw the funds from this money market account while considering these funds to be her personal property (T 221). She expended the funds on herself individually, and when the court ordered her to pay the funds over to the executor, *c.t.a.* she had to replace

expended funds from the money market account with funds from her retirement account (T 220-221). The lower court by its May 15 and 19, 2009, judgments removed Nancy as executrix and cancelled the letters testamentary issued to her in conjunction with appointing an executor, *c.t.a.* (R 52, R 56). The executor, *c.t.a.* in turn retained legal counsel. The appointment of the executor, *c.t.a.*, and the attorney fees of the executor, *c.t.a.*, incurred were directly caused by the actions and nonactions of Nancy who now objects to the lower court directing her to be responsible for one-half thereof. (It should be Rosemary and Don protesting to the payment of a portion thereof, not Nancy.)

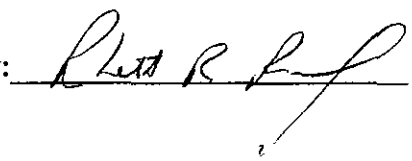
Attorney fees are not a charge upon the probate estate itself but are personal obligations of the executor, *c.t.a.*. Hutton v. Gwin, 195 So. 486 (Miss. 1940). In that the attorney fees of the executor, *c.t.a.*., resulted from Nancy's actions and nonactions then certainly all or a portion thereof should be charged to her. It is within the sound discretion of the lower court in a probate proceeding as to the fees of the attorney. Moreland v. Riley, 716 So.2d 1057, 1062 (Miss. 1998) and Brown v. Franklin, 145 So. 752, 753 (Miss. 1933). Attorney fees is within the discretion of the chancery judge and the judge's decision with reference thereto will not be interfered with unless the chancellor manifestly abused her discretion. Schwander v. Rubel, 75 So.2d 45, 53 (Miss. 1954).

CONCLUSION

The lower court did not err in sustaining the motion of Rosemary Birmingham Barnes and Don Barnes to dismiss the complaints exhibited against them and did not err in assessing a portion of the attorney fees of the executor, *c.t.a* against Nancy Walters. The funds contained in Mr. Birmingham's investments passed to the named pay-on-death beneficiary and /or the joint owner pursuant to rights of survivorship by virtue of the express terms depicted on the instruments creating the accounts and upon applicable law. Nancy's assertion of the doctrine of judicial estoppel has no applicability and the issue of Rosemary's amendment to her complaint was not preserved for appellate purposes. The lower court's decision was supported by substantial evidence and its findings were not manifestly wrong or clearly erroneous and should be affirmed.

Respectfully submitted,

Rosemary Birmingham Barnes and Don Barnes

By: 

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CERTIFICATE OF SERVICE

This is to certify that I, Rhett R. Russell, attorney for Appellee, have this day mailed, postage prepaid, by U.S. Postal Service, a true and correct copy of the above and foregoing Brief of Appellees to the following persons:

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SO CERTIFIED, on this the 25th day of July, 2011.

RHETT R. RUSSELL