No. 2010-CA-02070-COA

BEFORE THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI

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

REBUTTAL BRIEF OF APPELLANT NANCY BIRMINGHAM WALTERS

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Oral Argument 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.

1. Nancy Birmingham Walters, Appellant
2. Don Barnes, Appellee
3. Rosemary Barnes, Appellee
4. Ronnie Boozer, Administrator of Estate of William Birmingham

DATED, this 23rd day of September, 2011.

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INTRODUCTION

Appellant Nancy Birmingham Walters, files this her Rebuttal Brief to the Appellee's Brief which addresses the issues of the significance of the will, and the joint ownership of a Certificate of Deposit and separately the issue of attorney fees.

Numerous cases have been cited in Appellee's Brief in support of their opposition to Appellant's Brief.

ARGUMENT

The case of *In Re Will and Estate of Strange*, 548 So.2d 1323 (Miss.1989) has been referred to in the Briefs.

Significantly, Appellees rely on this case for the proposition that it is well stated law according to this decision that a Last Will and Testament cannot chance the terms of a instrument signed at the bank creating a joint tenancy. Apparently the 1989 case is the last case where the issue specifically was addressed where a Last Will and Testament included disposition of bank accounts and the Court in the *Strange* case held that the Last Will and Testament prepared subsequent to the execution of the banking documents would not codify the terms of the banking documents and does not destroy the joint tenancy. This case was decided approximately twenty (20) years ago and the opinion was written by the Honorable Chief Justice Roy Noble Lee of Forrest, Mississippi. The Appellant Nancy Birmingham Walters would respectfully state that this decision should be revisited. This decision does not follow common sense and good policy. It is well established by the statutes of Mississippi being specifically Mississippi Code § 91-5-1 that an individual has a right, if they are mentally competent, to execute a will and if they have some issues with dementia, during a lucid moment, they may execute a Last Will and Testament. There is nothing in the will statutes that precludes it to applying to bank accounts; there is nothing at all in any of the statues dealing with the creation of wills that does not allow an individual by will to devise a bank account. As a practical matter, a ruling that an individual can only change a joint tenancy clause in a bank account creates a situation where an individual in a lucid

moment desire to execute a will and may during that moment may have forgotten about the terms of a banking instrument he/she signed at some time in the past but desired to clearly devise the bank account to other individuals contrary to the banking document. Also during a lucid moment the individual may desire to change the terms of the distribution of a joint tenancy or payment of death provision in a banking instrument when it is impractical or impossible for him/her to return to the bank to physically do so. Such circumstances could be when the bank is closed for a three day weekend since the banks are only open during periods when the Federal Reserve is open and if it is a federal holiday and the Federal Reserve system is closed, banks are closed. Also a similar situation could arise as in this case where the bank accounts in question were at banks in Birmingham, Alabama, some three (3) hours away and in fact the decedent, William Birmingham, did not even recall creating the joint tenancy. He clearly chose by the execution of a will by placing the specific clause in his Last Will and Testament to address the disposition of the Certificate of Deposit. His intent was clear.

The various cases that provide for the creation of a Certificate of Deposit with a joint tenancy and the statutory language adopted provide that it only creates a presumption under Mississippi law. An old case cited *In Re: Lewis' Estate*, 194 Miss. 480, 13 So.2d 20 (1943), as cited in the *Strange* case, the rationale for the creation of a joint tenancy was referred to as follows:

> A joint ownership of a deposit is created when it clearly appears to have been the intention of the original owner to divest himself of the exclusive ownership and control of the money and vests such ownership and control jointly in himself and another with the attendant right of survivorship. The intention to make a present gift of joint interest in such a deposit may appear in the statement of the depositor to the bank, or it may be shown by his accounts and the attendant circumstances. Change of a bank deposit standing in the name of an individual, to the joint account of the depositor and another, may operate as a present and completed gift in joint ownership if the original depositor clearly intended such a result, and the gift of an interest in the deposit, though not ripening into full ownership until the death of the donor, is not testamentary in character, but creates a joint tenancy therein if the depositor intended to vest a joint interest and ownership in such other person in praesenti when establishing such joint account; and it is immaterial in such case whether the fund originally belonged exclusively to the depositor or belonged to him and the other jointly.

In the *Lewis* case the Court talks extensively about, and in these other cases, the intention of the grantor in creating this joint tenancy with right of survivorship. The Mississippi statute which has been referred to being Mississippi Code §81-5-63 clearly indicates that it only creates a presumption of intent and it is not conclusive. The issue on conflict of laws applies as far as the disposition of the property belonging to the decedent. The decedent in this case, William Birmingham, died an elderly man in his late eighties and had lived, with the exception of a brief period of time with the Barnes, in the state of Mississippi; he was a life-long resident of Mississippi and only moved to Alabama for health reasons since he needed to stay with someone else due to his failing mental (dementia) and physical health. He returned to Mississippi where he subsequently died and was an adult resident citizen of the state of Mississippi at the time of his death and he executed his will in Mississippi. The creation of multi-state banking institutions certainly does complicate the issue. However, under the facts of this case where the late Mr. Birmingham lived his entire life in Mississippi, only briefly left the state due to health reasons, returned to Mississippi where upon his return he executed his Last Will and Testament and then subsequently died in Mississippi and was buried in Mississippi clearly indicates that Mississippi was his residence and had always been his residence and the laws concerning Wills and Estates of the state of Mississippi should apply to all of his assets and the same rules and regulations concerning bank accounts should apply as he had always been a resident citizen of the state of Mississippi. The laws of disposition of bank accounts in the state of Alabama do not govern this case. As a matter of history, Regions Bank is a giant conglomerate bank. In fact, historically, it bought up many banks. More locally, First Citizens National Bank of Tupelo, Mississippi has branches throughout North Mississippi was later bought out by Deposit Guarantee National Bank, a major banking institution of the state of Mississippi located in Jackson, Mississippi. Deposit Guarantee National Bank was bought out by First American Bank out of Nashville, Tennessee and then First American Bank was bought out by AmSouth Bank, which had branches all over the South, and then AmSouth Bank was bought out by Regions Bank. A check on the

internet or any other source of information concerning banking would reflect that Regions Bank, along with BancorpSouth, which was formerly Bank of Mississippi and prior to that Bank of Tupelo, and Renasant Bank, which at one time was People's Bank and Trust Company of Tupelo, have branches and offices in numerous states; not just two states but numerous states. There are other banking institutions that may have banks in every state. To rule that Alabama law applies because the account was signed in Alabama but it is a national banking corporation with offices all over the country, would seem to contradict the laws of the state of Mississippi which provide for the disposition of property of Mississippi residents. Appellant Nancy Birmingham Walters would respectfully state that this Court must take into account that we are way past the day of small town banks with offices located in only one state and now we are faced with multiple, huge banking institutions with offices in numerous states and sometimes in every state. The rule as far as disposition of property would come under the area of conflicts of law between states; what state's law applies? Mr. Birmingham, as indicated, was clearly a Mississippi resident; lived in Mississippi his entire life; raised his two children, which includes the daughter who moved to Alabama, in the state of Mississippi; owned land in Mississippi, which he subsequently sold and moved to Alabama for a brief period of time as his health failed and returned to Mississippi and in Mississippi under the terms and the laws of the state of Mississippi executed a Last Will and Testament and then subsequently died in the state of Mississippi and was buried in the state of Mississippi. Appellant Nancy Birmingham Walters would respectfully state that this Court must address the issue of whether Mississippi law applies or Alabama law applies. Appellant Nancy Birmingham Walters respectfully states that the laws of the state of Mississippi dealing with the bequest of property apply; not Alabama law. Now again looking at the laws of the state of Mississippi, Appellant would concede that the *Strange* case ruling precludes the will changing a banking instrument. Appellant urges this Court to revisit that decision in light of today's banking procedures and the changes in the banking industry and further to revisit the issue as to how such decision conflicts with the Mississippi statutes that fully

authorize an individual to prepare a will. The decision written by the Honorable Chief Justice Roy Noble Lee does not clearly spell out by detailed legal analysis as to why a subsequent will does not destroy a joint tenancy. It is just a blanket statement in the next to last paragraph of the decision written by Chief Justice Roy Noble Lee; there is no legal analysis to explain how you can have the clearly enunciated series of statutes that authorize a will in the state of Mississippi, which can be signed by an individual even suffering from dementia and having health problems if it is signed during a lucid moment to devise and leave his/her property. The *Strange* decision does not explain the rationale for such ruling.

The facts in the present case involve several certificates in the state of Alabama including specifically a Certificate of Deposit created in the amount of One Hundred Thousand Dollars ($100,000.00) that is payable directly to Rosemary Birmingham Barnes which excludes the other sister, Nancy Birmingham Walters. The Last Will and Testament of William Birmingham specifically addresses this Certificate of Deposit. Furthermore there were two other bank accounts as the record reflects in the state of Alabama which were created, one being a rather large bank account which funds were released to Nancy Birmingham Walters by Regions Bank since they were of the opinion the property belonged to the estate and which further a lawsuit was filed by Rosemary Birmingham Barnes alleging that they were property of the estate. Consequently in the very fine, detailed printed language of the Certificate of Deposit which this Court can review and clearly recognize that an elderly person, including most individuals that may not be elderly, probably would not have noticed the fine print that said "joint tenancy with right of survivorship". In fact the uncontradicted testimony was from Don Barnes that he himself as a public accountant was totally unaware of the fact that the other bank account had any joint tenancy provisions in it and he thought it was property of the estate and therefore the issue was never discussed; it was never brought up. The caregiver of the late Mr. William Birmingham, who went with him to the bank, who was a public accountant, he himself did not even know it had the language in there of joint tenancy. This fact is uncontradicted.

Other cases dealing with Certificates of Deposit under Mississippi law have held that a determination has to be made as to whether or not it was the intentions of the creator of the joint account to make an inter vivos gift to the other party by creating the joint tenancy. Coincidentally the *Strange* case cites the case of *Carter v. State Mutual Federal Saving & Loan Ass'n*, 498 So.2d 324 (Miss. 1986). In that case the chancellor stated in his opinion:

> As stated in the *Carter* case, several requirements must be met in order to make a valid inter vivos gift, to-wit: (1) the donor must be competent to make the gift, (2) there must be a free and voluntary act by the donor with the intention to make a gift, (3) the gift must be complete with nothing left to be done, (4) there must be delivery by the donor and acceptance by the done, and (5) the gift must be gratuitous and irrevocable. Going further, in defining delivery, the Supreme Court stated that to perfect delivery, the donor must surrender all dominion and interest in the property.

In this case presently before the Court there are Certificates of Deposit, all of which have someone payable upon death or a joint right of survivorship. Oddly while in Alabama, while in the care of the Barnes, all Certificates of Deposit which include the One Hundred Thousand Dollar ($100,000.00) specific Certificate of Deposit and the other bank accounts either name as payable at death Rosemary Birmingham Barnes or name Don Barnes. Appellant would submit that it is impossible to establish that Mr. William Birmingham intentionally made an inter vivos gift intending to create a joint tenancy when neither he or nor Mr. Don Barnes, being a public accountant knowledgeable about financial instruments, or even the bank realized that the account being created was a joint tenancy. The bank itself paid the money to Nancy Birmingham Walters upon presentation of letters of administration; acknowledging that they thought it was property of the estate. Rosemary Birmingham Barnes, heir in the will that was probated, filed a sworn Complaint alleging that the monies in that account belonged to the estate and at that time neither she nor her husband, Don Barnes, who is a public accountant never had any idea or belief that such account had been created with such intentions. If the child of the late Mr. William Birmingham, who was living at the time, did not realize that her father had created a bank account leaving the son-in-

law as the beneficiary and in fact the son-in-law, who is not simply a high school graduate but a public accountant familiar with banking instruments, did not also realize that the document created a joint tenancy and both filed legal pleadings stating under oath that the property belonged to the estate, then Appellant respectfully submits that there is no reasonable conclusion can be reached that the late Mr. William Birmingham intended to create a joint tenancy and there is no evidence to support that he intended to give this property, being the money in the account, to his daughter, Rosemary Birmingham Barnes, and his son-in-law, Don Barnes. As referred to earlier, the applicable Mississippi statute §81-5-63 merely creates a presumption of intent. Under the facts and circumstances of this case, that presumption is clearly overridden where all parties involved prior to the day of the trial believed that at least one of these big accounts was the property of the estate and swore under oath it was the property of the estate and the bank itself recognized it as property of the estate and released it to the initial administrator of the estate. Under these facts and circumstances, with the addition of the fact that a will was executed clearly indicating the intentions concerning the late Mr. William Birmingham, the presumption is overridden. The facts and circumstances of this case are clearly distinguishable from the *Strange* case as far as the issue of the will is concerned. Even if this Court sees fit to not modify the ruling in the *Strange* case concerning the use of a will to subsequently change the banking instrument, the facts in this case are distinguishable in that there is certainly an issue as to the presumption, when the bank and the parties that benefit had no knowledge of the existence of any joint tenancy and in fact stated under oath that the accounts were property of the estate; that the will is not a parole instrument, it is a written document that reflects intent.

The will must be considered as a clear indication of what the intentions were and it rebuts this rebuttable presumption. As noted in the original Appellant's Brief, the statutory presumption was created to protect to banking industry and the presumption can be overridden. Most of the cases that deal with the presumption overridden deal with issues where there has been undue influence. However the presumption may also

be overridden where the individual signing the document did not even know he/she was signing some kind of written document creating a joint tenancy as the case is uniquely here and you have a subsequent will which clearly indicates his intention. The same would be true if there was not a will but there was a hand-written journal in which Mr. Birmingham kept a daily diary and he reflected in his daily diary numerous times that his bank accounts in Alabama were part of his estate; that might not have been actually a will but it could have been a written document that is not parole evidence and that would clearly be an indication that the presumption did not apply as the case is here. So the earlier rule of law with respect to wills, Appellant respectfully states, should be reversed or there should be some better explanation as to why that rule applies. Appellant however respectfully submits if the Court chooses not to go that route that it is certainly contrary to the laws of this state of Mississippi which is the law under the issue of choice of which state's laws apply, being the laws of Wills and Estates and also the laws dealing with the disposition of bank accounts being the laws of the state of Mississippi where the decedent died and therefore under the unique circumstances of this case where all interested parties including the bank itself did not recognize the fact that the banking instruments indicated or created a joint tenancy with right of survivorship is uniquely different from the *Strange* case and any written document, whether it be a daily diary or a calendar or a letter written to family members discussing his Certificates of Deposit or a will, all override the presumption and when the presumption is overridden there is no joint tenancy with right of survivorship.

Coincidentally another case that has been referred to in some of these Briefs, being the case styled *Cooper v. Crabb*, 587 So.2d 236 (1991), contains a great deal of discussion concerning Certificates of Deposit and the presumption. In the *Cooper* case, the Court has extensive discussion concerning, again, the issue of joint accounts payable to a survivor. The *Cooper* case is an Itawamba County case and the Opinion was written by Justice Robertson in 1991. The Court goes on to discuss in detail the fact that in some situations will substitutes may be used to avoid probate. The Court also discusses the

issues of inter vivos gifts which was referred to in the earlier mentioned *Strange* case, being *In Re Will and Estate of Strange*, 548 So.2d 1323 (Miss.1989).

The Court made particular mention of page 4 of the decision concerning the determination of what was the intention. As indicated earlier by the statute cited, Mississippi law merely creates a presumption. In the *Cooper* case, the Court specifically states as follows: "We search for intent, but when we search for intent we accept that the law directs our search and points first and foremost to the text the parties created... Common sense suggests the parties' writings the most reliable evidence of their intent." The problem that arose in the *Cooper* case is that the Court considered parole evidence in determining what the intentions were of the decedent. Mississippi law establishes that the Certificate of Deposit and the other banking instruments only create a presumption. This case, being *Cooper v. Crabb*, again goes into what the intentions were of the decedent. Although the Court in this case does indicate they will not accept parole evidence to give some indication of intent. However, as indicated earlier in this Rebuttal Brief, there are numerous forms of written communication that can be identified as writings of a deceased person that would indicate their intent, such writings could be a daily diary, letters to other members of the family which were either typed and signed or written in the handwriting of the decedent describing how he has set up his estate plan, a written memorandum contained in his desk drawer, or as in this case a will which clearly spells out his intentions concerning his Certificate of Deposit. This written document deals clearly with the issue of the parole evidence rule. Regardless of whether or not a will can supersede a banking instrument, the will can certainly indicate intent where in this case no one knows what his intention was because of the fact that the bank and the parties all believed that the property belonged to the estate and one of the parties was a public accountant; under these circumstances no one knows his intent and they all thought it was his intent to make it part of his estate until the day of the trial. Under such circumstances the Court can consider, and should have considered, or given some consideration as to whether or not his intent

could have been construed from the language in the will. It was error for the Court not to address this issue.

The remaining issue is the issue of, as clearly enunciated in the case of *Madden v. Rhodes*, 626 So.2d 608 (Miss. 1993) and its cases that followed and interpreted the case of *Madden v. Rhodes*, where the Court has created an exception and stated that regardless of the statement of the written banking instrument, *Madden v. Rhodes* creates an additional exception. Then as stated in *Madden v. Rhodes* decision specifically on page 1022, the Court again stated as referred to on page 10 of Appellant's Brief:

> According to Miss.Code Ann. § 81-5-63, the creation of a certificate of deposit creates an automatic presumption of "intent" to give ownership to the persons named on the CD, whether living or as survivors. Such presumptive title may be defeated upon proof of forgery, fraud, duress, or - as alleged here - unrebutted presumption of undue influence.

In this case presently before the Court, the Court granted all the evidence that was before it a directed verdict to the defendants, not requiring them to put on any defense in spite of the evidence that there was undue influence and that the undue influence was not rebutted. The Honorable Chancery Court was in error to find as a matter of law that a directed verdict was inappropriate.

With respect to the issue of attorney fees, Nancy Birmingham Walters would agree that normally it is in the discretion of the Chancery Court. However in this particular case, the Appellees filed a lawsuit swearing under oath that this money belonged to the estate and sued Nancy Birmingham Walters to have the money returned to the estate and for Nancy Birmingham Walters to be replaced as administrator by the Chancery Clerk, who was to be paid and serve as administrator. Although it is not admitted into evidence or allowed as proof, the parties had earlier reached some type of alleged settlement where Nancy Birmingham Walters was to have kept the funds that the bank released to her and she, without talking to her attorney, had removed them from the estate account and then a suit was filed by the Barnes alleging that such property belonged to the estate and Nancy Birmingham Walters had to as a result cash in funds of her own from retirement plan, incurring substantial tax

liability for early withdrawal, to put the funds back in the bank account when she thought, although she had not worked through her attorney, that there had been some agreement reached as indicated in the transcript on pages 223 through 226, where Nancy Birmingham Walters, a secretary, testified as to what Don Barnes, a pubic accountant, instructed her do with the monies she had initially received from Regions Bank and deposited into the estate account. This evidence was objected to and not put in the record, but suit was clearly filed against Nancy Birmingham Walters for removing funds from an estate account and putting the funds in her personal account and there would never have been a need for a suit to be filed for an accounting of this estate and allegations of the need for another administrator to be appointed if the funds automatically passed to the Barnes and in fact, if this issue was so clear, the Barnes could have simply walked into the bank with an attorney and Regions Bank would have given them the funds, but they chose to litigate this issue in the Mississippi Court system. In light of the actions of the Barnes in filing this lawsuit, under oath claiming that the funds belong to the estate, and asking the Court to appoint another administrator which was at the request of the Barnes and requiring such administrator to retain another lawyer to handle the administration of estate funds which the Barnes later argued at trial never even belonged to the estate caused by such actions attorney fees to be unnecessarily incurred for legal fees to represent the Chancery Clerk when according to the position taken by the Appellees, the property was never even estate property. Under such circumstances it was an abuse of discretion to make Nancy Birmingham Walters pay any attorney fees; all attorney fees should be paid by the Appellees.

CONCLUSION

In concluding this Rebuttal Brief, Appellant Nancy Birmingham Walters would state that this is an unfortunate argument that so frequently occurs between surviving children of an elderly parent. Regardless of anyone's feelings toward Nancy Birmingham Walters or her sibling, it is the intention and policy and laws of the state of

Mississippi that the wishes of her late father, William Birmingham, should be carried out. Under the facts and circumstances of this case, the Court has not made clear findings of fact that the intent of William Birmingham was carried out, it has blindly followed the language of the Alabama banking instruments, without any consideration or determination as to whether or not the intention of William Birmingham was to create a joint tenancy with right of survivorship and to create a gift to the other person on the Certificate of Deposit and/or bank account. Nancy Birmingham Walters, as Appellant, would respectfully state that this case must be reversed with after a thorough review of the facts of this case and the unique circumstances of none of the parties which include a public accountant and the bank acknowledging or recognizing that the banking instrument created a joint tenancy with right of survivorship and all parties recognizing until the first day of trial that the bank account was property of the estate and under such unique facts there are questions as to what was the intent of the late William Birmingham. This Court, being the Honorable Chancery Court of Monroe County, never made a determination of what the intentions of the late William Birmingham were; there is no finding of fact as to what his intentions were. The Appellant would respectfully state that this case should be reversed and remanded to the Monroe County Chancery Court for a determination with respect to each specific banking instrument for a determination based on all of the facts and written documents as to what the intentions were of William Birmingham and that the Honorable Chancellor erred in not making such findings of fact and more specifically under the facts as they exist, Appellant Nancy Birmingham Walters would suggest that the case should be reversed and rendered in her favor that the will itself clearly indicates what the decedent's intentions were, but if the Court is not prepared to go that far, the case should be reversed and remanded for another hearing with specific instructions for the Court to review each Certificate of Deposit and make a determination as to what the specific intentions were of the late William Birmingham and the Court in this case did not make a finding and did not discuss what the intentions were and therefore the case, in the alternative, should be reversed and remanded for that reason. Also in this case,

with respect to the issue of attorney fees, the Court should reverse and render with respect to the award of any attorney fees to be paid by Nancy Birmingham Walters. Nancy Birmingham Walters would further respectfully suggest that this Court revisit the *Strange* decision and review all of the statutes governing the execution of wills and give more specific rationale as to why an individual cannot, by will, express his intention and devise a bank account by will. Such decision in the *Strange* case defies the present reality of the banking industry and the logic of the will statutes and the long case law establishing the right of an individual in a lucid moment in the presence of two individuals to execute a will or in a lucid moment to write out a holographic will. The *Strange* decision completely defies all of the cases that establish such right to execute a will and devise one's property by way of a will as provided under Mississippi law. Appellant respectfully asks that this Court revisit that decision and give careful analysis to whether or not such decision conflicts with the right of an individual to execute a will devising personal property, and money in the bank would be considered personal property.

RESPECTFULLY SUBMITTED, this the 22 day of September, 2011.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I, the undersigned, GENE BARTON, Attorney for the Appellant, Nancy Birmingham Walters, have this date filed a true, correct and exact copy of the above and foregoing Rebuttal Brief of Appellant, and on said date served a true, correct and exact copy of said document upon the hereinafter named person, via United States Mail, First Class, postage prepaid, the same being their last known and now existing post office addresses, respectively:

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SO CERTIFIED, this the 23 day of September, 2011.

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