IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00046 COA

IN RE: THE ESTATE OF GLOVER MOORE, DECEASED: T.J. RANCE, EXECUTOR; EMMA CALDWELL, EILEEN DURDEN FIELDS AND JOHN HENRY EVANS PATTERSON — **APPELLANTS**

v.

ROBERT DEAN, JR. — **APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

DATE OF JUDGMENT:	12/15/95
TRIAL JUDGE:	HON. PAT WISE
COURT FROM WHICH APPEALED:	HINDS COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANTS:	TIMOTHY DREW MARTIN
ATTORNEY FOR APPELLEE:	WILLIAM E. SPELL
NATURE OF THE CASE:	CIVIL - WILLS, TRUSTS AND ESTATES
TRIAL COURT DISPOSITION:	CHANCELLOR FOUND THAT SURVIVING CO-TENANT PRESENTED SUFFICIENT EVIDENCE TO OVERCOME THE PRESUMPTION OF UNDUE INFLUENCE.
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	12/30/97
CERTIORARI FILED:	2/24/98
MANDATE ISSUED:	5/14/98

BEFORE McMILLIN, P.J., KING, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

PROCEDURAL HISTORY

This appeal originated from the order of the Hinds County Chancery Court dated December 15, 1995. On June 28, 1994, the will of Glover Moore dated July 31, 1993, was admitted to probate. The executor, T. J. Rance, brought suit to determine the assets of the estate and take other actions as

needed to gather the assets of the estate. The suit was filed against Robert Dean based upon the theory of undue influence. The chancery court held that despite the fact that the surviving co-tenant and the deceased co-tenant were in a confidential or fiduciary relationship, the surviving co-tenant presented sufficient evidence to overcome the presumption of undue influence. Feeling aggrieved, T. J. Rance, as executor, lodges this appeal, along with Emma Caldwell, Eileen Fields, and John Patterson. We find that the chancellor's findings were not manifestly wrong, nor erroneous, nor against the overwhelming weight of the evidence.

FACTS

In 1990, due to financial problems, Glover Moore failed to pay the taxes on three parcels of real estate, those being located on: State Street, Brown Street, and Cynthia Road. On May 16, 1991, Robert Dean, a long time friend and business associate of Glover Moore, paid all the taxes that were due except for a separately assessed parcel, which is included in the State Street property. Six days after payment of the overdue taxes, on May 22, 1991, two of the three deeds were executed. On May 23, 1991, the third deed was executed. At the time when the deeds were executed, Moore was approximately eighty-five years of age.

The deeds name Glover Moore and Robert Dean as joint tenants with full rights of survivorship and not as tenants in common. Accordingly, this changed Glover Moore's previous status of being the sole owner of the three parcels. These deeds were prepared by attorney Larry Stamps, a practitioner in Jackson, Mississippi. Rance was under the impression that Moore was asking Larry Stamps, the attorney, to draft documents giving Dean collateral for the tax payments. Dean refuted this contention throughout the trial.

In 1994, prior to Moore's death, Dean obtained a forfeited tax land patent on the separately assessed State Street parcel in Dean's name only. The title to this parcel had previously matured to the State of Mississippi because the taxes had not been paid prior to the expiration of the redemption period.

On June 28, 1994, the will of Glover Moore, dated July 31, 1993, was admitted to probate. T. J. Rance was authorized by the chancellor as the executor of the will. Following the initiation of probate on July 5, 1994, T. J. Rance filed suit against Robert Dean, Jr. to set aside these certain deeds possessed by Robert Dean on the theory of undue influence.

During the course of the trial the chancellor heard testimony from several individuals. The witnesses are: Willie Rodgers, Freddie Maxon, Louise Jackson, Dr. D. E. Magee, Jr., and attorneys Larry Stamps and Robert King.

A tenant of Moore, Willie Rodgers, wished to purchase some property from Glover Moore. The exchange between the two recalled by Rodgers went as: "and his [Moore] exact words were, well, I give it to Robert Dean, my son--he said, well, I give it to my son; he's out in California." Rodgers further stated that Moore told him that Dean might sell the property to him. "Those were his exact words."

A long time friend of Glover Moore since 1949, Freddie Maxon noted throughout his testimony that Moore remembered well and spoke fondly of Robert Dean. Further, Maxon testified that Moore wanted Dean to have his property if something were to happen to him. Maxon also testified that

Moore considered Dean as a son and stated that repeatedly "many, many, many times."

Another witness, Louise Jackson, observed that specifically during May of 1991, Glover Moore did nothing which caused her to believe that Moore could not understand or read. She also testified that she had daily contact with Moore from 1990 until his death.

Eileen Fields, one of the appellants, testified that she visited Moore on several occasions and that both usually traveled the city looking at Moore's property. Likewise, she testified that one of those visits could have been in 1991. She stated that Glover Moore knew who she was and that he knew all of the other relatives and their relationship to him.

The attorney who drew up the deed, Larry Stamps, testified that Glover Moore seemed to have a keen mind. Further, he stated that Moore introduced Robert Dean to him, that he received an impression that Dean and Moore had a bond, a relationship something akin to an uncle and nephew, and that Moore appeared to like Dean a lot. As Larry Stamps stated:

> [I]t's no question in my mind that this transaction that's involved in these deeds was done under the direction and with the complete knowledge and understanding on Mr. Glover Moore. There's no question in my mind that he knew what was going on, and this was his intention in my opinion based on my observations and discussions with him.

Even T. J. Rance, the individual who lodged a suit to disgorge Dean of the newly acquired property, stated under oath concerning Glover Moore's acquisition of cash funds when he was low: "he told me that he had a friend in California that he had befriended, and that he could get some money from him without any strings attached or whatever, and that he could get it immediately."

Later in the record, T. J. Rance recalled Glover Moore's saying that he received a house from a relative who had died. Rance, restating his conversation with Moore, stated that Moore had told him that because he could not pay off the mortgage he would like Dean to have it, "if anybody was gong to reap any benefits, he would like for him to do it."

During his lifetime, Glover Moore executed two separate wills. Neither will named Robert Dean, Jr. as a beneficiary. However, Robert Dean was named executor of the March 29, 1989 will.

ARGUMENT AND DISCUSSION OF THE LAW

STANDARD OF REVIEW

Our standard of review is well known. This Court will not reverse a chancery court's findings of fact where they are supported by substantial credible evidence in the record. ***Anderson v. Burt,* 507 So. 2d 32, 36 (Miss. 1987); *Norris v. Norris,* 498 So. 2d 809, 814 (Miss. 1986); *Gilchrist Machinery Co. v. Ross,* 493 So. 2d 1288, 1292 (Miss. 1986); *Cotton v. McConnell,* 435 So. 2d 683, 685 (Miss. 1983); *Culbreath v. Johnson,* 427 So. 2d 705, 707-09 (Miss. 1983); *Richardson v. Riley,* 355 So. 2d 667, 668 (Miss. 1978).** This fact is as true of ultimate facts as of evidentiary facts. ***Norris,* 498 So. 2d at 814; *Gilchrist,* 493 So. 2d at 1292; *Spain v. Holland,* 483 So. 2d 318, 320 (Miss. 1986).** In other words, this Court will generally affirm a trial court sitting without a jury on a question of fact unless, based on substantial evidence, the court be manifestly wrong. ***Brown v. Williams, et al.,* 504 So. 2d 1188, 1192 (Miss. 1987); *Harkins v. Fletcher,* 499 So. 2d 773, 775**

(Miss. 1986). This Court must examine the entire record and accept:

> that evidence which supports or reasonably tends to support the findings of fact made below, together with all reasonable inferences which may be drawn therefrom and which favor the lower court's findings of fact . . . .

***Cotton,* 435 So. 2d at 685.**

Finally, the trial judge, sitting in a bench trial as the trier of fact, has the sole authority for determining the credibility of the witnesses. ***Hall v. State ex rel. Waller,* 247 Miss. 896, 903, 157 So. 2d 781, 784 (1963).** Thus, this Court must examine assignments of error presented in light of the aforementioned principles.

In determining whether there is in the record sufficient credible evidence that the trial court's findings should be affirmed, we bear in mind the quantum of proof the party burdened at trial was required to produce in order to prevail. In this case, T. J. Rance, as executor, along with Emma Caldwell, Eileen Fields, and John Patterson challenge the deeds which conveyed property to Robert Dean as a joint tenant with rights of survivorship, necessarily forcing Dean to prove that the deeds were not conveyed by undue influence, thus invoking the clear and convincing evidentiary burden. We look at all of the evidence and decide whether a rational trier of fact may have found undue influence by clear and convincing evidence. Cf. ***Anderson v. Liberty Lobby, Inc.*,106 S. Ct. 2505, 2512-13 (1986); *United States v. Taylor*, 464 F. 2d 240, 242 (2d Cir. 1972).** We find no undue influence here.

ANALYSIS OF ISSUES PRESENTED

I. WHETHER THE CHANCERY COURT ERRED IN ITS ANALYSIS BY NOT SHIFTING THE BURDEN OF PROOF TO THE GRANTOR OF AN INTER VIVOS TRANSACTION ONCE IT WAS ESTABLISHED AT TRIAL THAT A CONFIDENTIAL RELATIONSHIP EXISTED BETWEEN THE GRANTOR AND THE GRANTEE.

As stated in the case of ***Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982):**

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.

A confidential relationship such as would impose the duties of a fiduciary does not have to be a legal one, but this charge may be moral, domestic, or personal. ***Murray v. Laird,* 446 So. 2d 575, 578 (Miss. 1984); *Hendricks v. James*, 421 So. 2d 1031 (Miss. 1982)**. Accordingly, this relationship arises when a dominant, overmastering influence controls over a dependant person or trust justifiably reposed. ***Hendricks,* 421 So. 2d at 1041; *McDowell v. Pennington,* 394 So. 2d 323 (Miss. 1981)**. Such a relationship must be shown before we will scrutinize one's right to give away his property, for an inter vivos gift is a perfectly lawful avenue of transferring real property in this State. ***Anderson v. Burt,* 507 So. 2d 32, 36 (Miss. 1987); *Matter of Collier*, 381 So. 2d 1338, 1341 (Miss. 1980); *Longtin v. Witcher,* 352 So. 2d 808, 810-11 (Miss. 1977).**

From the onset of this litigation, Robert Dean's attorney conceded that a confidential relationship

once existed between Moore (the deceased) and his client. Thus, the issue of a confidential relationship is conceded in regard to the relationship of Dean and Moore, but of close import is the related issue of undue influence. Accordingly, the burden of establishing the existence of a fiduciary relationship is not upon the appellants (because that fact was conceded), as normally would be the case. ***Norris v. Norris*, 498 So. 2d 809, 813 (Miss. 1986).** ***See also Gillis v. Smith*, 114 Miss. 665, 676, 75 So. 451, 453 (1917)** (finding clear and convincing evidence necessary to show conveyance procured by undue influence).

Contrary to the appellants' assertion that the chancellor failed to shift the burden of proof onto the appellee, a careful reading of the memorandum opinion and order by the chancellor reveals that the chancellor attentively inquired into the law of confidential relationships and undue influence. In fact, even if the burden failed to be shifted onto the appellee orally in the course of trial, the law was otherwise carefully maintained.

In the case of ***Murray v. Laird*, 446 So. 2d 575 (Miss. 1984)**, the Mississippi Supreme Court described a three prong test:

> 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:
>
> (1) good faith on the part of the grantee/beneficiary;
>
> (2) grantor's full knowledge and deliberation of his actions and their consequences; and
>
> (3) advice of (a) a competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.

***Murray*, 446 So. 2d at 578.** Since *Murray*, the Mississippi Supreme Court has had occasion to state the three part test simply as that requiring good faith, full knowledge, and independent consent and action. ***See Estate of Lawler v. Weston*, 451 So. 2d 739, 743 (Miss. 1984).**

Stringent adherence to this independent advice prong cloaks the person seeking to overcome the presumption of undue influence with a heavy burden. The Mississippi Supreme Court declares that the appropriate third prong of the test is a requirement that the grantee/beneficiary prove by clear and convincing evidence that the grantor/testator exhibited independent consent and action. ***Mullins, et al. v. Ratcliff, et al.*, 515 So. 2d. 1183, 1193 (Miss. 1987).** These prongs should not be understood as entirely separate and independent conditions that ought to be rigidly exacted in every case. Undue influence is a constructive, non-technical conception, a common-sense notion of human behavior. ***Mullins*, 515 So. 2d at 1194.** Applying this test, this Court must determine whether the chancery court's finding that Robert Dean had successfully rebutted the presumption of undue influence was manifestly erroneous and against the overwhelming weight of the evidence.

GOOD FAITH AND FULL KNOWLEDGE

The *Murray* decision suggests five factors that ought to be considered in determining whether the grantee/beneficiary has acted in good faith. These are (a) determination of the identity of the initiating party in seeking preparation of the instrument, (b) the place of the execution of the instrument and in

whose presence, (c) what consideration and fee were paid, if any, and (d) by whom paid, and (e) the secrecy and openness given the execution of an instrument. ***Murray*, 466 So. 2d at 578.**

While the testimony is not exactly clear whether Glover Moore or Robert Dean initiated the discussion about whether an attorney should be secured, the facts are clear that T. J. Rance initiated communications with the attorney in order to prepare the instrument. Rance picked an attorney by skimming the phone book. Furthermore, Dean testified that he did not know the attorney until he met him (Stamps) in the attorney's office when Rance drove both himself (Dean) and Moore to the attorney's office. From our reading, Dean had no prior knowledge of the attorney nor did he set up the meeting. Although Larry Stamps could not recall whether he was present at the signing of the deeds, he stated that a lady in his office notarized the deeds, thus it appears that the signing was one which was not so secret. We find no subterfuge existing here. Even though there was no evidence of new funds having changed hands in consideration for the giving of the instruments, it is undisputed that less than a week earlier, Dean had paid all the taxes on the properties. Dean stated that he paid the attorney's fees for services rendered. From the forgoing facts and those listed below, we find that Dean operated in good faith.

The *Murray* decision suggests four factors to assess in determining the grantor's *knowledge*, at the time of the execution of the instrument. These factors are (a) his awareness of his total assets and their general value, (b) an understanding by him of the persons who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect that prior will or natural distribution, (c)whether non-relative beneficiaries would be excluded or included, and (d) finally, knowledge of who controls his finances and business and by what method, and if controlled by another, how dependent is the grantor on him and how susceptible to his influence. ***Murray*, 466 So. 2d at 579.**

One of Moore's relatives, Eileen Fields, testified that she and Moore often drove through downtown Jackson and visited his properties and that he was aware of his relatives. A long time friend of Moore, Freddie Maxon, testified that Moore's memory was good. Rance testified that he collected monies for Moore and that Moore was shrewd in his business approach. It appears from these facts that Moore was adequately dependent upon himself and in control of his business. Concerning good faith and the second prong of the test - full knowledge and deliberation of actions and consequences - Larry Stamps, the attorney who drew up the deeds, provides this reviewing body insight into the grantee's good faith and the grantor's understanding of his actions. Stamps testified that Moore seemed fond of Dean, that Moore appeared to have all his faculties, and that Moore was fully aware of his actions. As Larry Stamps stated, "[I]t's no question in my mind that this transaction that's involved in these deeds was done under the direction and with the complete knowledge and understanding on Mr. Glover Moore. There's no question in my mind that he knew what was going on, and this was his intention in my opinion based on my observations and discussions with him." Barring any other evidence not placed into the record, the only hint of impropriety might be that Dean paid for the services of the attorney, and this does not convince us of misconduct.

Thus, we can infer that Moore, the grantor, was fully knowledgeable and deliberate in his action. Nothing in the facts echoes of bad faith, and as it appears, Glover Moore knew the consequences of his actions.

INDEPENDENT CONSENT AND ACTION

Freddie Maxon's testimony that Glover Moore expressly wished Robert Dean to have his property if something were to happen to him, and Willie Rodgers' testimony that Moore had given the property to Dean, and that Rodgers should call Dean if he wanted to purchase the property are in today's posture entitled to substantial weight. Providing for the final prong of the *Murray* test as modified by *Mullins*, we find that Dean provided sufficient evidence to meet this "clear and convincing" requirement. We also find the record deficient of evidence that Larry Stamps failed to use his legal skill in a manner consistent with providing competent advice or that he was connected to the grantee. From the evidence compiled, we find that the third requirement was met.

There is little in the record to indicate that at the time of the deeds' preparation that Dean manipulated Moore into adding him as a joint tenant, with full rights of survivorship; likewise, there is only the evidence from Rance's testimony that the deeds were collateral for Dean's paying Moore's taxes.

In the end, we revisit our scope of review. *Culbreath* states:

> The trial judge saw these witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

***Culbreath*, 427 So. 2d at 708.**

Perhaps it is disappointing to the heirs at law that Glover Moore decided to dispose of his property by this arrangement, but to that extent, "[a] testator may entertain his animosities, cherish his prejudices, and nurse his wrath against those who would be the heirs at law of his estate, and may be guided by those feelings in the disposition of his property and still have testamentary capacity, unless the sentiments harbored by him amount to an insane delusion. . . ." ***Gholson v. Peters*, 180 Miss. 156, 176 So. 605, 606-07 (Miss. 1937).** Now Mr. Dean is the sole owner of the State Street, Brown Street, and Cynthia Road properties. This ownership necessarily arises from the legal characteristics of a joint tenancy. Upon the death of one joint tenant, the survivor becomes the owner of the property. ***Weaver v. Mason*, 228 So. 2d 591 (Miss. 1969).** This is so even if the decedent's will left property to another. ***Estate of Strange*, 548 So. 2d 1323 (Miss. 1989).**

CONCLUSION

In substance, the chancery court held that Dean had proved by clear and convincing evidence that considering the totality of the circumstances, he had not procured the deeds through the exercise of undue influence. We find the record to contain evidence of sufficient quality and quantity that a rational trier of facts could have so concluded. The assignment of error is denied. Thus, we affirm the chancery court's decision on the matter.

THE JUDGMENT OF THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY IS AFFIRMED. ALL COSTS ARE TAXED TO THE APPELLANTS.

BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, AND SOUTHWICK, JJ., CONCUR.