

**IN THE COURT OF APPEALS  
OF THE  
STATE OF MISSISSIPPI  
NO. 96-CA-00396 COA**

**IN THE MATTER OF THE ESTATE OF CLARA  
JANE HENDERSON, DECEASED: DALE  
MILSTEAD**

**APPELLANT**

**v.**

**VIOLA CLIFTON, EXECUTRIX**

**APPELLEE**

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

DATE OF JUDGMENT:	02/13/96
TRIAL JUDGE:	HON. JERRY G. MASON
COURT FROM WHICH APPEALED:	LAUDERDALE COUNTY CHANCERY COURT
FOR APPELLANT:	T. JACKSON LYONS
ATTORNEY FOR APPELLEE:	OFFICE OF THE ATTORNEY GENERAL BY: BOBERT JAMES BRESNAHAN
NATURE OF THE CASE:	CIVIL - REAL PROPERTY
TRIAL COURT DISPOSITION:	DEED SET ASIDE AND TITLE CONFIRMED IN ESTATE OF CLARA HENDERSON
DISPOSITION:	AFFIRMED - 12/16/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/4/98

BEFORE BRIDGES, C.J., COLEMAN, AND HINKEBEIN, JJ.

BRIDGES, C.J., FOR THE COURT:

Suit was filed in the Lauderdale County Chancery Court to set aside certain deeds to real property and confirm title in the estate of Clara Henderson. The chancellor did so, and on appeal Dale Milstead argues that he was a bona fide purchaser for value without notice and therefore the chancellor erred in setting aside the deeds to certain real property he purchased in Meridian, Mississippi. Milstead raises the following issues on appeal:

**I. BECAUSE THE ESTATE AND MS. CLIFTON AS EXECUTRIX, HAVE NO INTEREST IN THE REAL PROPERTY, THEY HAVE NO STANDING TO SEEK RELIEF AND THE TRIAL COURT HAD NO SUBJECT MATTER JURISDICTION OF THE LAWSUIT.**

**II. AS A BONA FIDE GOOD FAITH PURCHASER FOR VALUE WITHOUT NOTICE, DALE MILSTEAD SHOULD TAKE AN INTEREST IN THE REAL PROPERTY WHERE THE WARD'S GUARDIAN'S FAILED, FOR FOUR YEARS, TO PROTECT THE WARDS'S ESTATE.**

We agree with the chancellor's finding that Clara was unable to execute the deeds while under the guardianship, and that Milstead was not a bona fide purchaser for value without notice and affirm.

### **FACTS**

This action involves two parcels of real property in Meridian, Mississippi originally conveyed to Clara Henderson by her then husband William Johnson in June 1956. Houses were on both pieces of property; Clara lived in one house and rented out the other. In the late 1980's, Clara began to show signs of dementia and was treated by several doctors. In March 1990, Dr. White, her psychiatrist, opined that Clara did not have testamentary capacity and that a guardianship should be established. The Lauderdale County Chancery Court rendered an "order of appointment of guardian" on May 16, 1990. Clara subsequently moved to Chicago, Illinois where she was cared for by a nephew who was appointed guardian in Cook County, Illinois. The Mississippi guardianship was closed and the guardian released on November 10, 1992. A final accounting was submitted; however, no mention was made of any real property.

This suit was filed by Freddie Walker, Clara's Illinois guardian, on May 24, 1994. Subsequently to the filing of the complaint, Clara died. On August 5, 1994, the attorney for the Estate of Clara Henderson moved the court to substitute the estate as plaintiff in this cause. The court granted the motion. The motion did not specify anywhere that the estate was acting for the benefit of the heirs.

At trial, several witnesses testified about their observation of Clara in the late 1980's and early 1990's. Apparently Clara had taken up with Joe Joseph, a man much younger than she was. Testimony revealed that Joe Joseph was also known as William Young. Joseph lived behind Clara, but was often at her house. Several times Clara and Joseph were found in extremely compromising positions by different people. They were found naked at her house by neighbors, as well as engaging in different sexual acts. Often Clara would dress inappropriately for the season, wearing fur coats and the like in the middle of July. Once Clara was found walking the streets of her neighborhood in the early morning hours partially clothed. Several people close to Clara felt that Joseph was getting Clara's money and "taking her to the bank."

A marriage license issued in February 1990 evidences that Clara and Joseph may well have been married. The Clarke County Circuit Clerk testified that she remembers issuing the license, despite her feeling that Clara did not have control of her mental capacity. The Clerk felt that Joseph, who did all the talking, was trying to get something out of Clara. Subsequently, several deeds were executed over the next several years conveying Clara's two parcels of property to various grantees. The parcels ultimately by mesne conveyances ended up in the hands of appellant, Dale Milstead. Milstead entered into transactions with Rissho Ankoku to purchase the two parcels. The consideration paid for the

two parcels was a boat motor, a trailer, and a 1979 Ford pickup truck. No money ever passed between Milstead and Ankoku.

Milstead testified that Ankoku originally wanted \$15,000, but then dropped his asking price to \$10,000. At one point in his testimony, Milstead stated that the value of Tract I and Tract II was between \$16,000 and \$18,000. Milstead applied for a \$10,000 loan, but the loan was refused because of outstanding liens on the property. The title check revealed that the property was vested in Rissho Ankoku, Inc. and Joe Joseph Real Estate, and was subject to taxes and special assessments for 1993, as well as a tax sale and interest for 1991 and 1992. Additionally, there were two judgments rendered against the property. However, there was no indication of Clara's guardianship. Milstead stated that the liens and the judgments did not bother him because he could take care of them. He claims that he was a bona fide purchaser in good faith without notice of the guardianship or Clara's incompetency. He asserts that the guardian, as fiduciary, had a duty to protect Clara's property and has waited too late to do so.

The chancellor found that a fiduciary relationship existed between Clara and Joe Joseph, and that Joseph exercised undue influence over Clara. Further, the chancellor found no evidence rebutting the presumption that Joseph exercised undue influence over Clara to get her to convey Tract I and Tract II to him and other entities. Moreover, it was the chancellor's finding that Clara did not have the capacity to execute the deeds while under the guardianship. Additionally, the chancellor found that Milstead failed to prove by a preponderance of the evidence that he was a bona fide purchaser for value, in good faith, and without notice. Consequently, the chancellor canceled and set aside all deeds out from Clara and all subsequent conveyances. The chancellor confirmed title in the Estate of Clara Henderson.

**I. BECAUSE THE ESTATE AND MS. CLIFTON AS EXECUTRIX, HAVE NO INTEREST IN THE REAL PROPERTY, THEY HAVE NO STANDING TO SEEK RELIEF AND THE TRIAL COURT HAD NO SUBJECT MATTER JURISDICTION OF THE LAWSUIT.**

Milstead claims that the chancellor lacked subject matter jurisdiction of this action. His real complaint, however, is that it was not brought by the real parties in interest. The suit was brought by the executrix of Clara's estate on behalf of the estate, and Milstead claims that the real parties in interest were the devisees under the will since title to the real property passed to them without the necessity of any intervening formal act by the executrix. The executrix in this case was also one of the two devisees under the will. He refers the Court to the case of *Clinton v. Robbins*, 32 So. 2d 145, 145 (Miss. 1947), where the supreme court held that an administratrix was without authority to litigate matters affecting the title to her decedent's real property. In that case, the court observed that "[n]o basis is alleged for her assumption of this prerogative of the heirs." *Id.*

In the case before us now, both devisees under the will petitioned the court to permit the executrix to pursue the recovery of the real property on their behalf, and the court approved the petition. It was under this specific grant of authority that the executrix was proceeding and not strictly under her generic rights and duties as executrix. In effect, the devisees were content to have the executrix appointed as their agent to pursue their rights in the property. They would, therefore, appear to be bound by the outcome of the litigation, unlike the heirs at law in *Clinton* who were neither parties to the litigation nor had consented to its commencement in any way.

We observe that the statute governing the rights and duties of an executor includes the provision that the executor "shall also have a right to the possession of the real estate so far as may be necessary to execute the will, and may have proper remedy therefore." **Miss. Code Ann. § 91-7-47 (Rev. 1994)**. Although it was done in a somewhat unusual manner, we conclude that in the absence of a timely objection at the trial level under **Mississippi Rule of Civil Procedure 17(a) (1997)**, the proceedings leading up to the filing of this suit were sufficient to vest the executrix with authority to seek recovery of the real property under this statute and that the chancellor, therefore, had subject matter jurisdiction. However, in the end, the chancellor should have vested title to the property in the heirs who were being represented by the executrix, instead of vesting title in the estate. "Real property descends directly and immediately to the heirs or devisees of the deceased subject only to the debts of the deceased over and above his personal estate." *Turner v. Estate of Hightower*, **417 So. 2d 919, 922 (Miss. 1982)**. On this one point we reverse the chancellor's vesting title in the estate and instead hold that title should vest in the heirs, Viola Clifton and her niece. We do so under our "plain error" authority. *See State Highway Comm'n of Mississippi v. Hyman*, **592 So. 2d 952, 957 (Miss. 1991)**.

**II. AS A BONA FIDE GOOD FAITH PURCHASER FOR VALUE WITHOUT NOTICE, DALE MILSTEAD SHOULD TAKE AN INTEREST IN THE REAL PROPERTY WHERE THE WARD'S GUARDIAN'S FAILED, FOR FOUR YEARS, TO PROTECT THE WARDS'S ESTATE.**

Milstead claims on appeal that he was a bona fide purchaser for value without notice, and the chancellor erred in divesting him of title. The lower court stated in its opinion that Milstead failed to prove his status as a bona fide purchaser for value without notice. The following is the history of the two parcels of land now in question:

- 1) June 15, 1956: Conveyance to Clara of Tract I and Tract II as sole owner.
- 2) February 26, 1990: Clara conveys Tract I and Tract II to Clara W. Johnson Carpenter Joseph and Joe Joseph.
- 3) October 10, 1990: Clara and Joe Joseph convey Tract I and Tract II to Clara Joseph, Joe Joseph and 6531 Real Estate Agent and Managers.
- 4) January 22, 1992: Clara Joseph, Joe Joseph and 6531 Real Estate Agent and Managers (by William Young--a.k.a. Joe Joseph) convey Tract I and Tract II to William Young-Joe Joseph Real Estate.
- 5) July 14, 1992: William Young conveys Tract I to Fredwrick Young.
- 6) July 14, 1992: William Young conveys Tract II to Fredwrick Young.
- 7) July 29, 1992: Fredwrick Young conveys Tract I to Rissho Ankoku, Inc.
- 8) July 29, 1992: Fredwrick Young conveys Tract II to Rissho Ankoku, Inc.
- 9) March 31, 1994: Conveyance by Special Warranty Deed of Tract I and II by Rissho Ankoku, Inc. to Dale Milstead.

The chancellor held that the guardianship of Clara began in May of 1990 and continued through November 1992, during which time Clara lacked the capacity to execute a valid deed. It is upon this finding that we affirm the chancellor's decision. Additionally, the chancellor found that Joe Joseph exercised undue influence over Clara in getting her to convey her property to him two months before the guardianship was established. Clara's doctor testified that Clara lacked any testamentary capacity in March 1990, as well as the previous six months.

In February 1990, two months before her guardianship was established, Clara executed a deed conveying her property to herself and Joe Joseph. The evidence clearly established that Clara was not capable of making rational decisions at that time. Her doctor stated that she was suffering from senile dementia and Alzheimer's. Additionally, the record is replete with evidence that a confidential relationship existed between Clara and Joe Joseph and that Joseph exerted undue influence over Clara. In the instant case, the burden of proving Clara's lack of capacity to execute the February 1990 deed rested on the heirs. "Clear and convincing evidence is required to establish lack of mental capacity and the crucial time in such incapacity is when the document is executed." *In re Conservatorship of Stevens v. Patrick*, 523 So. 2d 319, 322 (Miss. 1988). The chancellor was correct in finding that Clara lacked the mental capacity to execute a deed conveying her property to Joe Joseph in February 1990.

After her guardianship was established, Clara executed several more deeds conveying her property to Joe Joseph and his alter egos. Guardianships in Mississippi may be created for several categories of people, including persons of unsound mind, **Miss. Code Ann. § 93-13-123 (Rev. 1994)**, and incompetent adults, **Miss. Code Ann. § 93-13-121 (Rev. 1994)**. "A ward under guardianship is under a legal disability or is adjudged incompetent." *Harvey v. Meador*, 459 So. 2d 288, 291 (Miss. 1984). The Mississippi Supreme Court stated many years ago in *Jackson v. Banks*, 144 Miss. 392, 197, 109 So. 905, 905 (1926):

Infancy and lunacy are disabilities similar in their effect on the contracts of the parties, and we see no good reason why a different rule should be applied to the contracts of a person *non compos mentis* from that applied in the case of infants. In the case of *Conn v. Boutwell*, 101 Miss. 353, 58 So. 105, after an extensive consideration of the authorities, this court approved as the true rule the announcement in *Brantley v. Wolf*, 60 Miss. 420, that - "The right of a infant to void his contract is an absolute and paramount right, superior to all equities of other persons, and may therefore be exercised against a *bona-fide* purchaser from the infant's grantee.

These older cases, while not specifically dealing with situations involving guardianships, support the rule that instruments out from a non *compos mentis* are at the very least voidable, if not void. In *Hicks v. Blakeman*, 74 Miss. 459, 477, 21 So. 7, 7 (1896), the Mississippi Supreme Court held that a purchaser of real property at a guardian's sale, where the sale was neither reported to nor confirmed by the appropriate court, could not claim the property as a bona fide purchaser except upon claim of adverse possession.

Clara executed several deeds to Joe Joseph and his business entities while under guardianship. Under such circumstances, the law is clear that no conveyance of the ward's property can take place without court approval pursuant to the provisions set out in **Miss. Code Ann. § 93-13-51(Rev. 1994)**, after due notice is given to the ward's next of kin, or guardian ad litem, or by joinder of such parties,

pursuant to the provisions of **Miss. Code Ann. § 93-13-281 (Rev. 1994)**. Normally, only the guardian can petition the chancery court to sell the ward's real property. *Id.* None of these procedures were followed in the instant case. The conveyance to Joe Joseph and all subsequent conveyances are void. The supreme court has voided a deed conveyed by one under a conservatorship in *Lee v. Lee*, **337 So. 2d 713, 714 (Miss. 1976)**. "[W]e upheld the lower court's ruling that one under a conservatorship was without the contractual power to execute a valid land deed." *Id.* One under a conservatorship may be unable to manage his estate due to illness, advanced age or mental weakness, while one under a guardianship is under a legal disability or is adjudged incompetent. *Harvey*, **459 So. 2d at 291**. However, "[a]fter establishment of such protective procedures, the duties, responsibilities, and powers of a guardian or conservator are the same." **Miss. Code Ann. § 93-13-259 (Rev. 1994)**. Accordingly, the deeds executed by Clara while under the guardianship were void, and Milstead's claim of bona fide purchaser is meritless.

While we affirm the finding that the deeds executed by Clara were void, we do take issue with one thing done by the chancellor. Instead of vesting title to the property in Clara's estate, the chancellor should have vested title to the property in the heirs, Viola Clifton and her niece, Larnetta Buck, on whose behalf the suit was filed.

**THE JUDGMENT OF THE LAUDERDALE COUNTY CHANCERY COURT DIVESTING TITLE OF DALE MILSTEAD IS AFFIRMED. THE CHANCELLOR'S VESTING TITLE IN THE ESTATE IS REVERSED AND TITLE IS VESTED INSTEAD IN THE HEIRS. COSTS OF THIS APPEAL ASSESSED TO APPELLANT.**

**McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**