

**IN THE COURT OF APPEALS 07/18/95**  
**OF THE**  
**STATE OF MISSISSIPPI**  
**NO. 94-CA-00105 COA**

**IN THE MATTER OF THE ESTATE OF**  
**JOVITA C. WELDON: JAY COURTNEY APPELLANT**

**v.**

**FREDA GALLIGAN, EXECUTRIX OF THE LAST WILL**  
**AND TESTAMENT OF JOVITA C. WELDON, DECEASED;**  
**AND GARY CHANEY APPELLEES**

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

TRIAL JUDGE: HON. HOWARD L. PATTERSON, JR.

COURT FROM WHICH APPEALED: FORREST COUNTY CHANCERY COURT

ATTORNEYS FOR APPELLANT: DAN R. WISE AND RAY T. PRICE

ATTORNEYS FOR APPELLEES: JAMES D. HESTER AND

R. CHRISTOPHER HOOD

NATURE OF THE CASE: CIVIL: WILL CONTEST

TRIAL COURT DISPOSITION: SUMMARY JUDGMENT FOR FREDA

GALLIGAN AND GARY CHANEY

BEFORE BRIDGES, P.J., COLEMAN AND SOUTHWICK, JJ.

BRIDGES, P.J., FOR THE COURT:

Jay Courtney, nephew of Jovita C. Weldon, filed a bill of complaint in the Chancery Court of Forrest County seeking to have Weldon's will set aside on the ground that the will was procured by undue influence. Galligan and Chaney were granted a motion for summary judgment. Finding

that the lower court acted erroneously in granting summary judgment to Galligan and Chaney, we reverse.

#### STATEMENT OF THE FACTS

Jovita C. Weldon died in 1992, leaving only her two nephews, Jay and Ronnie Courtney as her sole surviving heirs at law. Prior to her death, Weldon drafted a will leaving her entire estate to Freda Galligan, her long time friend, and Gary Chaney, her live-in nurse. Weldon's two nephews were left out of this will because, according to Galligan, Weldon felt that she "had done enough for [her nephews]."

Although Galligan and Weldon had been friends for about twenty years, the two women became even closer during the last few years of Weldon's life. During these later years, Galligan began helping Weldon with her financial affairs. On numerous occasions, Galligan had been granted power of attorney by Weldon. Galligan stated that her name had been on "a lot of her stuff and business for years." For example, at some point prior to Weldon's death a Certificate of Deposit in the amount of thirteen thousand dollars was placed in the bank by Weldon, listing Galligan's name, as well as her own. Also, it was during this same time Galligan's name was added to Weldon's bank account, giving both Galligan and Weldon access. In addition to Galligan's name appearing on Weldon's checking account, it was also added to Weldon's safe deposit box.

During her last year, Weldon had been placed in and out of hospitals for different reasons. Galligan claims that during this time Weldon asked her about making a will and also about hiring an attorney to draft it. Galligan recommended that attorney James Hester draft the will. Galligan claims that Weldon gave Galligan the provisions of the will in a sealed envelope. Galligan further claims that she took this information, still unopened, to Hester's office asking him to prepare the will and to send Weldon the bill. At the suggestion of Hester, Weldon was examined by a doctor and

judged competent to handle her own affairs.

On that same day, Galligan brought the will into Weldon's room where it was signed by Weldon in front of two witnesses. The will was witnessed by a friend of Galligan's and a man whom Galligan found walking in the hallway of the hospital. Galligan stated that she was present when the will was executed and after the will was signed, she may have written the check to Hester for drafting the will. Shortly thereafter, Weldon died.

On June 15, 1992, Freda Galligan filed a petition to probate the will in the Chancery Court of Forrest County. Jay Courtney, nephew of the deceased, contested the will seeking to have the will set aside on the grounds that the will had been procured by the undue influence of the beneficiaries, Galligan

and Chaney. Galligan and Chaney filed a motion for summary judgment, submitting the affidavit and deposition of Freda Galligan, which through inadvertence, was not considered by the chancellor, the affidavit of Gary Chaney and the answers to interrogatories of Jay Courtney, in support of their claim that there was no genuine issue as to any material fact. The chancellor granted the motion. Courtney then filed a motion to alter and set aside the judgment, alleging that the deposition testimony of Freda Galligan had not been considered in the chancellor's opinion. Along with this motion, Courtney submitted Galligan's deposition to the chancellor for his review. The chancellor overruled Courtney's motion and stated that after reading the deposition of Freda Galligan, "the Court is still of the opinion that the Motion for Summary Judgment is well taken and should be granted."

## DISCUSSION

### I. WHETHER THE CHANCELLOR ERRED IN GRANTING SUMMARY JUDGMENT WHERE AMPLE EVIDENCE IN THE RECORD SUPPORTED COURTNEY'S CLAIM OF UNDUE INFLUENCE ON THE PART OF THE APPELLEES IN THE EXECUTION OF THE DECEDENT'S WILL.

In *Palmer v. Anderson Infirmary Benevolent Ass'n*, the Mississippi Supreme Court provided the standard of review in determining whether a trial court properly granted summary judgment, and stated:

In our de novo review, this Court looks to see if the moving party has demonstrated that no genuine issue of fact exists. *Daniels v. GNB, Inc.*, 629 So. 2d 595, 599 (Miss. 1993). 'A motion for summary judgment should be overruled unless the trial court finds, beyond a reasonable doubt, that the plaintiff would be unable to prove any facts to support his claim.' *Id.* at 599 (citing *McFadden v. State*, 580 So. 2d 1210, 1214 (Miss. 1991)). 'The lower court is prohibited from trying the issue; it may only determine whether there are issues to be tried.' *Id.* (citing *Brown v. Credit Center, Inc.*, 444 So. 2d 358, 362 (Miss. 1983)).

*Palmer v. Anderson Infirmary Benevolent Ass'n*, No. 91-CA-654-SCT, slip op. 6 (Miss. Feb. 23, 1995). The evidence must be viewed in a light most favorable to the party against whom the motion has been made. "The movant has the burden of demonstrating that no genuine issue of fact exists while non-movant is given the benefit of every reasonable doubt." *Marsalis v. Lehmann*, 566 So. 2d 217, 219 (Miss. 1990). If the court finds that the moving party is entitled to a judgment as a matter of law, summary judgment should be entered in his favor. Otherwise, the court should deny summary judgment. *Mantachie Natural Gas Dist. v. Mississippi Valley Gas Co.*, 594 So. 2d 1170, 1172 (Miss. 1992).

In order for Courtney to survive a motion for summary judgment, there must be a genuine issue as to whether the proponents of the will, Galligan and Chaney, exercised undue influence over Weldon. To accomplish this, Courtney must show: 1) the existence of a confidential relationship between the beneficiary and the testator, and 2) participation by the beneficiary in the making of the will or

suspicious circumstances attending the execution of the will. *Croft v. Alder*, 237 Miss. 713, 721, 115 So. 2d 683, 685 (Miss., 1959). Once this is shown, a presumption of undue influence is raised, and the will is prima facie void, unless the guardian can show by clear and convincing evidence that he took no advantage over the testator, and that the testator's acts were a result of his own volition and upon the fullest deliberation. *Croft*, 115 So. 2d at 686. If the evidence in this case is viewed in the light most favorable to Courtney, it appears that he has at least created a genuine issue of undue influence, which should preclude summary judgment.

There appears to be a genuine issue as to whether Galligan and Chaney held a confidential relationship with Weldon. "Whenever there is a relationship [sic] between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such relationship as fiduciary in character." *Hendricks v. James*, 421 So. 2d 1031, 1041 (Miss. 1982). While the fact that Galligan was given power of attorney over Weldon's financial affairs does not prove, in and of itself, that there was a confidential relationship, it is a factor to be considered. *Costello v. Hall*, 506 So. 2d 293, 297 (Miss. 1987).

A confidential relationship will be found to exist if the beneficiary exerted a dominant, overpowering influence over the testator. *Lee v. Estate of Polk*, 497 So. 2d 815, 818 (Miss. 1986). The Mississippi Supreme Court has found that a confidential relationship exists when the testator depends upon the beneficiary to manage her affairs and to assist her in getting around town. *Estate of Harris v. Bradley*, 539 So. 2d 1040, 1041 (Miss. 1989). In *In re Estate of Grantham*, 609 So. 2d 1220, 1224 (Miss. 1992), the Mississippi Supreme Court outlined some factors which showed the existence of a confidential relationship. Some of those factors include: (1) decedent's close relationship with the beneficiaries; (2) one of the beneficiaries provided transportation and arranged for medical care; (3) the decedent's business and financial concerns were controlled by beneficiary; (4) decedent and beneficiary held a joint checking account; and, (5) the beneficiary and decedent had a joint safe deposit box. *Id.* The Court stated that given the decedent's advanced age and poor health, the beneficiaries "were in a position to exercise a dominant influence over her decisions." *Id.* Here, Weldon was in poor health, and in and out of hospitals. She relied upon Chaney to live with her and take care of her on a daily basis. Galligan had power of attorney over Weldon's financial affairs, and Galligan's name was on Weldon's checking account. Finally, Galligan and Weldon had a joint safe deposit box. From the above, it appears that there is at least a question as to whether there was a confidential relationship between the parties.

Once it is shown that there exists a confidential relationship between the parties something more must be shown before it is determined that a presumption of undue influence has been raised. *In re Will of Adams*, 529 So. 2d 611, 615 (Miss. 1988). This something more is a showing that the beneficiary substituted his intent for that of the testator, or an "active participation by the beneficiary in the procurement, preparation or execution of the will or mental infirmity of the testator . . . . In other words, there must be some showing that [the beneficiary] abused the relationship either by asserting dominance over the testator or by substituting her intent for that of [the testator]." *Id.*

In this case, we believe that a reasonable fact finder may find that there exists a genuine issue of material fact. Galligan recommended the attorney who drafted the will, took the information concerning the provisions of the will to the attorney, brought the completed will to Weldon, and

obtained the witnesses for the execution of the will. Moreover, Galligan was present when the will was signed, and finally wrote the check to the attorney out of Weldon's account for the payment of the attorney's services. In *Grantham*, the beneficiaries were held to have actively participated in the procurement of the will because they "arranged an appointment with the attorney who drafted the will, they drove [the testator] to the lawyer's office, and they were present when [the testator] executed the document." *Grantham*, 609 So. 2d at 1224. Galligan's actions appear to go beyond those of the beneficiaries in *Grantham*.

Because there appears to be a question as to whether there was a confidential relationship between the parties, and there also appears to be a question as to whether Galligan actively participated in the procurement of the will, it is this court's opinion that summary judgment should not have been granted and the case should be reversed and remanded for a trial on the merits.

**THE JUDGMENT OF THE FORREST COUNTY CHANCERY COURT GRANTING SUMMARY JUDGMENT IN FAVOR OF FREDA GALLIGAN AND GARY CHANEY IS REVERSED AND THE CASE IS REMANDED FOR TRIAL. ALL COSTS ARE TAXED TO THE APPELLEES.**

**FRAISER, C.J., THOMAS, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**