

IN THE COURT OF APPEALS

7/15/97

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00729 COA

IN RE: THE LAST WILL AND TESTAMENT OF

WYDELL FORTENBERRY: CHARLES FORTENBERRY APPELLANT

v.

DIANA F. BROWN, KATHERINE BRISTER AND TRESSIE

MAE HAMMOND APPELLEES

PER CURIAM AFFIRMANCE MEMORANDUM OPINION

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

TRIAL JUDGE: HON. WILLIAM L. STEWART

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: JOY HARRISON GOUNDAS

ATTORNEY FOR APPELLEE: TIMOTHY LEE MURR

NATURE OF THE CASE: WILL CONTEST

TRIAL COURT DISPOSITION: 1990 WILL UPHELD

MANDATE ISSUED: 8/5/97

BEFORE McMILLIN, P.J., HERRING, HINKEBEIN, AND KING, JJ.

PER CURIAM:

This is an appeal of a will contest from the Eighth Chancery Court District. The two wills involved are the last will and testament executed on July 9, 1992, and an earlier executed will dated May 14, 1990. The 1990 will was offered to probate prior to the discovery of the 1992 will on January 15, 1993. After the discovery of the 1992 document, a petition to contest the validity of the 1990 will was filed by the executrix of the 1990 will, Diana Brown.

A trial on the merits was heard on April 4 and 5, 1995. Chancellor William L. Stewart held that the subsequent last will and testament executed on July 9, 1992 was invalid on the grounds that the testator, Wydell Fortenberry, lacked the necessary testamentary capacity to execute a last will and testament on July 9, 1992 and further, the decedent was subject to undue influence of Charles Fortenberry in the execution of the July 9, 1992 will.

The Court having found that Wydell Fortenberry lacked the necessary testamentary capacity to execute the July 9, 1992 will, held that the May 14, 1990 last will and testament was not revoked prior to his death and that the estate of Wydell Fortenberry was to be administered according to the provisions of his May 14, 1990 will.

Being aggrieved of the chancellor's decision, Charles Fortenberry assigns the following issues for our consideration on appeal:

I. Wydell Fortenberry executed his Last Will and Testament on July 9, 1992, before subscribing witnesses, and with the requisite mental capacity. The duly executed Last Will and Testament thereby revoked an earlier will dated May 14, 1990.

II. The evidence did not support a finding that the testator lacked the requisite mental capacity to knowingly and voluntarily declare his testamentary intentions.

III. Upon the close of the testimony from the witnesses, the trial court did not rule that the existence of a confidential relationship had been established, nor that the presumption of undue influence had been raised.

IV. The trial court, upon the submission of Findings of Fact and Conclusions of Law, ruled that the Last Will and Testament executed on May 14, 1990 was valid and therefore, upheld by the court.

After reviewing the briefs and the record, we conclude that the trial court was correct for the reasons stated in its opinion.

**THE JUDGMENT OF THE HARRISON COUNTY CHANCERY COURT IS AFFIRMED.
COSTS ARE ASSESSED TO THE APPELLANT.**

**BRIDGES, C.J., McMILLIN, P.J., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING,
PAYNE, AND SOUTHWICK, JJ., CONCUR. THOMAS, P.J., NOT PARTICIPATING.**