**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2003-CA-01139-COA**

**IN RE: ESTATE OF ISAAC CRUTCHER, DECEASED: REBECCA C. JOHNSON** **APPELLANT**

**v.**

**DOROTHY DODSON, CAROLYN NEWSOM, OZELL NEWSOM, DIANE MASON, ISSAC DODSON AND WALLACE ANDERSON** **APPELLEES**

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|---|---|
| DATE OF TRIAL COURT JUDGMENT: | 12/30/2002 |
| TRIAL JUDGE: | HON. DENNIS M. BAKER |
| COURT FROM WHICH APPEALED: | DESOTO COUNTY CHANCERY COURT |
| ATTORNEY FOR APPELLANT: | JOHN THOMAS LAMAR |
| ATTORNEY FOR APPELLEES: | J. KEITH TREADWAY |
| NATURE OF THE CASE: | CIVIL - WILLS, TRUSTS, AND ESTATES |
| TRIAL COURT DISPOSITION: | THE DECEDENT HAD TESTAMENTARY CAPACITY AND WAS NOT THE SUBJECT OF UNDUE INFLUENCE; THEREFORE, THE WILL DATED MARCH 29, 1995 IS THE VALID LAST WILL AND TESTAMENT OF THE DECEDENT. |
| DISPOSITION: | AFFIRMED - 11/23/2004 |
| MOTION FOR REHEARING FILED: | |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | |

**EN BANC.**

**LEE, P.J., FOR THE COURT:**

¶1. This is an appeal from a will contest from the Chancery Court of DeSoto County. The chancellor found that Isaac Crutcher, the decedent, had testamentary capacity to make a will both on November 25, 1991 and on March 29, 1995. Furthermore, the chancellor found that the decedent was not the subject of any undue influence, and, therefore, the will dated March 29, 1995, was the valid last will and testament of the decedent. The proponents of the will are the decedent's great nieces Carolyn Newsom, the

executrix, and Diane Mason Jones, and great nephew Isaac Dodson, all of whom are beneficiaries named in the will. The contestant, Rebecca Johnson, sister of the decedent, raises the following two issues on appeal:

> I. THE CHANCELLOR ERRED IN FINDING THAT THE DECEDENT HAD TESTAMENTARY CAPACITY TO MAKE A WILL ON NOVEMBER 25, 1991 AND MARCH 29, 1995.
>
> II. THE CHANCELLOR ERRED IN FINDING THAT THE DECEDENT WAS NOT THE SUBJECT OF UNDUE INFLUENCE IN THE MAKING OF THE WILLS.

FACTS

¶2. Isaac Crutcher, a retired factory worker, departed this earth on September 5, 1996, at the age of seventy five. He left no surviving wife and had no children. Prior to 1989, Crutcher lived alone in a small house on approximately six-acres outside the town of Olive Branch, Mississippi. In 1989, Crutcher suffered a debilitating stroke that greatly impaired his speech and ability to walk. However, he was able to get around with the aid of a walker and often visited nearby neighbors and family by riding his riding lawn mower through the yards to their homes. Crutcher did not have a driver's license, and he was illiterate. His business affairs had been tended to by his sister, Agnes Brown, and this practice continued after his 1989 stroke. He was also looked after by several of his sisters, nieces, and nephews who lived in the surrounding area. Various members of the family provided him with needed transportation, cleaned his house and clothes, and sometimes cooked for him.

¶3. On November 25, 1991, Crutcher executed a will in the law offices of Olive Branch attorney Wallace Anderson. Crutcher's great-niece, Carolyn Newsom, along with her husband Ozell Newsom, provided him with transportation to and from Anderson's office. The Newsoms lived next door to Crutcher on a one and a half acre plot that Crutcher sold to them after their marriage sometime around

1975. Carolyn, along with her mother, Dorothy Dodson, her brother, Issac Dodson, and sister, Diane Mason Jones, had been raised in Crutcher's home from the time they were small children and testified that they looked to Crutcher as a father figure. Carolyn, who went to high school with Wallace Anderson, was ultimately responsible for recommending him to Crutcher for the purpose of making out a will. Before this meeting, Anderson had never met Isaac Crutcher.

¶4. In the 1991 will, Crutcher named his great-niece, Diane Mason (who later remarried and would add the name "Jones"), as executrix of his will. Under Section IV of the will, he bequeathed his brothers, E. B. Crutcher and R. T. Crutcher, "the right to live in my house as their residence for the term of their natural lives." He also bequeathed all real and personal possessions, including the remainder interest in his house and land, to Diane Mason. The execution, which included Crutcher's full signature, was witnessed by Wallace Anderson and Toni Luther, Anderson's employee.

¶5. In 1993, Crutcher suffered another stroke or series of strokes, leaving him, according to testimony, mostly incapacitated. In 1994, after leaving a nursing home, Crutcher lived with his niece, Dorothy Dodson. She, along with Carolyn, assisted him with daily living. Dorothy and Carolyn also took over Crutcher's business affairs from Agnes Brown. During this absence from his own home, Crutcher allowed his great-nephew, Isaac Dodson, to reside in his house.

¶6. In March of 1995, Crutcher met with Wallace Anderson to prepare a new will, and on March 29, 1995, Crutcher again met with Anderson to execute this will. Carolyn and her husband again provided transportation to Anderson's office for Crutcher on both occasions.

¶7. The 1995 will named Carolyn as executrix of Crutcher's estate. The will also divided Crutcher's real property, the six acres of land, into three tracks comprised of two acres each. Carolyn Newsom and Diane Mason were bequeathed two acres each. The will bequeathed to Isaac Dodson the house, two

acres, and all remaining personal property located in and around the house, with the exception of three items specifically bequeathed to other family members. These items included a rifle bequeathed to Agnes Brown, a garden tiller bequeathed to Ozell and Carolyn Newsom, and a riding lawnmower bequeathed to Dorothy Dodson. The will was signed with an "X" on all three pages, and witnessed by Wallace Anderson and his wife, Brenda Anderson.

¶8. Isaac Crutcher died on September 5, 1996. On February 24, 1997, Rebecca Johnson, Agnes Brown, and Lovie Cowans, sisters of the decedent, filed a motion for declaratory judgment in the Chancery Court of DeSoto County to declare the decedent's last will and testament legally insufficient, and thus declare that Isaac Crutcher died intestate. On October 17, and December 13, 2002, a trial was held before Chancellor Dennis Baker. Testimony from family members attested to the mental capacity of the decedent and whether the decedent was unduly influenced. On December 30, 2003, the chancellor entered an order declaring that (1) Isaac Crutcher had testamentary capacity on November 25, 1991, and March 29, 1995; (2) Isaac Crutcher acted without undue influence in the making of the wills; and (3) the will dated March 29, 1995 was the last will and testament of Isaac Crutcher. A motion for reconsideration was denied on May 19, 2003. Rebecca Johnson now appeals the order of the chancellor.

## ANALYSIS

### I. DID THE CHANCELLOR ERR IN FINDING THAT THE DECEDENT HAD TESTAMENTARY CAPACITY TO MAKE A WILL ON NOVEMBER 25, 1991 AND MARCH 29, 1995?

¶9. Johnson asserts that the chancellor erred in finding that Isaac Crutcher had testamentary capacity when he executed both of his wills. Johnson bases her assertion on the direct testimony from herself and various family members who knew the decedent, saw him on a regular basis, and claimed that after his strokes in 1989 and 1993, Crutcher could not speak, talk, or conduct his own financial business. Johnson

also entered into evidence various medical records of the decedent from six occasions where the decedent underwent various medical procedures and was observed by the same physician. On several of these forms, the physician, Dr. Kyle Creson, noted that in addition to suffering various physical ailments, he showed signs of "multi infarct dementia." Dr. Creson also noted that Crutcher had even complained that he "had a change in mental status." On one medical form, dated November 19, 1995, the doctor wrote that Crutcher had been "born with retardation," and was assessed as having "moderate retardation."

¶10. The proponents of the will offered testimony that Crutcher was fully capable of making a will on both dates. The witnesses admitted that Crutcher had serious physical ailments, including a severe slur, but countered that he was still capable of communication, that he was able to recognize visitors, and that he was well aware of the amount of property that he owned.

¶11. When reviewing the decision of a chancellor who has made findings regarding the credibility of witnesses and weight that is to be given to evidence, our role "is to determine if those findings are supported by substantial evidence, whether the chancellor abused his discretion, was manifestly wrong, or clearly erroneous, or whether he applied an erroneous legal standard." *Estate of Evans v. Taylor*, 830 So. 2d 699, 701 (¶8) (Miss. Ct. App. 2002); *In re Estate of Mathis,* 800 So. 2d 119, 121 (¶7) (Miss. Ct. App. 2001).

¶12. This Court has previously addressed the analysis for establishing mental capacity of a testator:

> [T]he test of one's capacity to execute a will "is the ability of the testator at the time to understand and appreciate the nature and effect of his act, the natural objects or persons to receive his bounty, and their relation to him, and is capable of determining what disposition he desires to make of his property."

*In re Estate of Byrd*, 749 So. 2d 1214, 1217 (¶11) (Miss. Ct. App. 1999); *Matter of Estate of Edwards*, 520 So. 2d 1370, 1372 (Miss. 1988)(quoting *Humes v. Krauss*, 221 Miss. 301, 310,72 So. 2d 737, 739 (1954)).

¶13. In this case, the chancellor heard testimony from family members as to Isaac Crutcher's mental capacity. The witnesses, most of whom are possible beneficiaries and have a stake in the outcome of the trial, gave conflicting accounts of Crutcher's mental state both before and after his strokes. However, while accounts of the decedent's mental history provide us with a broad picture, we are mainly concerned with the decedent's capacity at the time of the signing of the wills. Testamentary capacity "is to be tested as of the date of the execution of the will." *Byrd*, 749 So. 2d at 1217 (¶11) (quoting *Scally v. Wardlaw*, 123 Miss. 857, 878, 86 So. 625, 626 (1920)). Therefore, we shift our focus to the testimony surrounding November 25, 1991, and March 29, 1995.

¶14. The proponents of the will proffered the testimony of three witnesses who observed Crutcher on November 25, 1991. Carolyn and Ozell Newsom testified that they drove Crutcher to the law offices of Wallace Anderson that day and waited in the reception area while Crutcher and Anderson discussed the contents of the will. Anderson and an employee then witnessed Crutcher's execution of the will.

¶15. The supreme court has held that "the testimony of subscribing witnesses is entitled to greater weight than the testimony of witnesses who were not present at the time of the will's execution or did not see the testator on the day of the will's execution." *Edwards*, 520 So. 2d at 1373. Here, the chancellor read deposition testimony from Anderson, a named defendant and the only subscribing witness to testify. He weighed that decision against testimony from the contestants, who, although were not with him the day of the execution, claimed that Crutcher could not read or write and could not have signed his name on the will. The record is void, however, of any other proof that Isaac Crutcher could not have signed his name

at that time. The proponents of a will "must prove the testator's testamentary capacity by the preponderance of the evidence." *Id.* at 1373. However, while the proponents may have to carry the burden of proof at trial, "the burden of going forward with proof of testamentary incapacity shifts to the contestants, who must overcome the prima facie case." *Id.* The contestants only testified that they had never witnessed Crutcher signing his name. Since the proponents offered no other proof that Crutcher could not have signed his name prior to or on November 25, 1991, and since they could not prove that Crutcher was incapable of understanding the nature of the act, the persons receiving the bounty, and the disposition of his gift, the chancellor was correct, in lieu of the proof submitted, that Crutcher had the mental capacity to create a will on that date.

¶16. The 1995 will is more problematic. In 1993, Crutcher suffered a stroke or series of strokes that left him virtually immobile. According to testimony, Crutcher was confined to a nursing home for several months, after which he moved into the home of Dorothy Dodson. Testimony revealed that Crutcher's speech was greatly impaired, and that day to day chores, such as cleaning and dressing himself, required the assistance of his sisters, nieces, and great-nieces. There was also testimony that he had a difficult time feeding himself due to the impairment of his hands.

¶17. On two separate occasions in March of 1995, Carolyn and her husband again transported Crutcher to Wallace Anderson's office. During the first meeting, the date of which does not appear in the record, Crutcher met with Anderson for several hours concerning the drafting of the will. On March 29, 1995, Crutcher met once again with Anderson to execute the will. Once again, Anderson was a subscribing witness. Anderson's wife, Brenda, was also a subscribing witness, although she did not testify at the trial. Carolyn Newsom also testified that Anderson called her back to the inner office to observe the signing. Crutcher executed this will, however, with an "X" in the place of his signature.

¶18. The contestants offered into evidence Crutcher's medical records from six dates ranging from April of 1994 to March of 1996. During these visits, Crutcher was admitted into the Eastwood Medical Center in Memphis, Tennessee, by Dr. Kyle Creson. While the purpose for the medical treatments were for various physical ailments, Dr. Creson noted in his evaluations on each occasion that Crutcher suffered from "dementia." On three records, Dr. Creson even noted that Crutcher was "retarded" or had been "born with retardation." However, only one record, dated April 10, 1994, was introduced that would have relevance to the decedent prior to the execution of the March 29, 1995 will. Furthermore, this record only shows the medical status of Crutcher nearly one year before the will's execution. Subsequent records only show Crutcher's status eight months after the execution. No testimony was offered by either the proponents or contestants that Crutcher was retarded. In her own testimony on cross-examination, the contestant, Rebecca Johnson, even stated that she disagreed with Dr. Crutcher's observation that her brother had been retarded since birth. Moreover, no expert testimony was proffered to support the proposition that Crutcher was incapable of making a will on March 29, 1995.

¶19. In support of her claim of incapacity, Johnson cites to the case of *Kirk v. Kirk*, 206 Miss. 668, 40 So. 2d 548 (1949). In that case, the decedent suffered a debilitating stroke and his condition continued to worsen for several years until his death. The supreme court upheld the jury's verdict that the testator did not have the capacity to create a will. However, the facts of *Kirk* are distinguishable from the case at bar. In *Kirk*, the decedent had a prolonged history of violent and eccentric behavior, and was confined to constant medical care. *Kirk*, 206 Miss. at 676, 40 So. 2d at 549. At times, the decedent stripped naked and had threatened to jump out of a window. *Id*. The only subscribing witness testified that although the testator seemed calm at the time of the will's execution, he never asked the testator any questions to ascertain the testator's mental state. 206 Miss. at 678, 40 So. 2d at 549.

¶20. In this case, however, the decedent showed no such signs of delusion. All family members attested to Crutcher's slurring of speech and the difficulty of oral communication. However, physical incapacity does not render one incapable of making a will.

¶21. Even if the doctor's observations were correct and Crutcher suffered from dementia on the dates he visited the medical center, there is no proof that he lacked capacity on the day of the execution. It is generally accepted that even a person deemed "insane" may make a valid will during a period of lucidity. *Gholson v. Peters*, 180 Miss. 256, 267, 176 So. 605, 606 (1937). Though there is significant evidence that Isaac Crutcher was physically impaired, there is no evidence here that he was mentally incapable of making a will on March 29, 1995. Therefore, we hold that the chancellor did not err in finding that Crutcher had the mental capacity to make both wills.

II. DID THE CHANCELLOR ERR IN FINDING THAT THE DECEDENT WAS NOT THE SUBJECT OF UNDUE INFLUENCE IN THE MAKING OF THE WILLS?

¶22. Johnson asserts that Crutcher was unduly influenced by Carolyn and Ozell Newsom when he executed both wills in question. She bases her assertion by claiming Carolyn Newsom had a confidential relationship with Crutcher, that she and her husband chose their high school friend, Wallace Anderson, to prepare Crutcher's wills, and that the Newsoms drove the testator to Anderson's office when he executed both wills. Furthermore, Johnson argues that the proponents failed to prove by clear and convincing evidence that Crutcher was not unduly influenced by them.

¶23. Johnson claims that because of this confidential relationship between Crutcher and the beneficiaries, there is raised a presumption of undue influence. However, that is not necessarily the case.

> A presumption of undue influence is not raised merely because a beneficiary occupies a confidential relationship with the testator; something more is required, such as active participation by the beneficiary in the procurement, preparation or execution of the will or mental infirmity of the testator. *Croft v. Alder*, 237 Miss. 713, 115 So. 2d 683 (1959).

> 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].

*Matter of Will of Wasson*, 562 So. 2d 74, 78 (Miss. 1990) (quoting *Matter of Will of Adams*, 529 So. 2d 611, 615 (Miss. 1988)). Furthermore, the party who establishes the benefit of having a confidential relationship must clearly establish his entitlement through clear and convincing evidence. *Norris v. Norris*, 498 So. 2d 809, 814 (Miss. 1986). Whenever a will is contested, there is a presumption of undue influence where there is a confidential or fiduciary relationship. *Mullins v. Ratcliff*, 515 So. 2d 1183, 1192 (Miss. 1987).

¶24. Clearly, there was a confidential relationship between Carolyn and Crutcher as she helped him with his daily living and his financial affairs. In order for Carolyn to overcome this presumption of undue influence, the evidence must have shown by clear and convincing evidence that (1) she exhibited good faith in the fiduciary relationship with Crutcher; (2) Crutcher acted with knowledge and deliberation when he executed the wills; and (3) Crutcher exhibited independent consent and action. *Murray v. Laird*, 446 So. 2d 575, 578 (Miss. 1984), as modified in *Mullins*, 515 So. 2d at 1193.

¶25. In determining whether Carolyn exhibited good faith in the fiduciary relationship with Crutcher, we find that there was no testimony that she mishandled any of Crutcher's finances. Carolyn took over Crutcher's finances from Agnes Brown sometime before the making of the 1995 will. Furthermore, according to testimony, Carolyn was close to Crutcher, grew up in his house, thought of him as a father figure, saw him on a daily basis, lived within close proximity of him, and physically tended to him.

¶26. We must also look at four other factors to help us determine whether Carolyn exhibited good faith: (1) the identity of the initiating party; (2) the place of execution and the persons present at the time of execution; (3) the consideration or fee for the will; (4) the party that paid for the will; and (5) the secrecy

or openness surrounding the execution of the will. *Matter of Will of Fankboner*, 638 So. 2d 493, 495-96 (Miss. 1994). Carolyn testified that she suggested Crutcher make a will in 1991 in order that someone should inherit his land. After Crutcher asked her to choose an attorney, Carolyn chose Anderson partly because she knew him from high school and his office was nearby. As to the 1995 will, there was no credible testimony as to why Crutcher changed his will.

¶27. Both wills were drafted at Anderson's office, away from Carolyn. Carolyn and her husband were present in the room when Crutcher signed his name with an "X" on the 1995 will. Both executions were observed by the requisite number of disinterested witnesses. In regards to payment for the drafting of the will, the record indicates that $100 was charged for the 1995 will; however, no witness kept records or statements for the payment. No witness could remember how the payment was procured. There was no record of payment for the 1991 will.

¶28. In determining whether Crutcher acted with knowledge and deliberation when he executed his wills, we look to see whether Crutcher was aware of his total assets and their general value; whether he understood who would receive his assets regardless of a will and how changing a prior will would affect the distribution; whether non-relative beneficiaries would be excluded or included; and the knowledge of who controlled his finances and how dependent upon or susceptible to that person he was. *Murray*, 446 So. 2d at 579. Carolyn and Anderson testified that Crutcher spent several hours alone with Anderson. It does appear from the wills that Crutcher understood the nature of his property and who would be the beneficiaries. Crutcher knew how much property he owned and bequeathed specific items to members of his family, such as a rifle and a riding lawn mower. Although Crutcher depended upon others to manage his finances, we cannot find from the testimony that Crutcher lacked full knowledge and understanding of his actions.

¶29. In determining whether Crutcher acted with independent consent and action, we look for the advice of a competent person disconnected from Carolyn and devoted solely to Crutcher's interest. *Id*. Clearly, Anderson as Crutcher's attorney is most qualified to give that independent advice. Although Anderson was procured by Carolyn we cannot find that that in itself raises a red flag. Carolyn knew Anderson in high school and obviously thought he would be qualified to handle a matter such as this. In looking for an attorney, especially in small towns with seemingly fewer options, we fail to see how suggesting someone she knew is conclusive evidence regarding Carolyn's intent. Anderson testified through deposition that at the time of the will executions he had no information concerning Crutcher's property or heirs. Anderson also stated that the only persons in the room while Anderson was drafting the will were himself and Crutcher. Thus, Anderson received the information from Crutcher and was able to draft two different wills according to Crutcher's wishes.

¶30. In his opinion the chancellor found that Crutcher knew what he wanted to do with his property and executed both wills on his own volition. In looking at the record, the chancellor found that there was no undue influence exerted upon Crutcher by Carolyn. The chancellor was able to observe the witnesses and make his findings accordingly with which we are unable to disagree. There was no evidence in the record that Carolyn abused her relationship with Crutcher by exerting dominance over him. We find that this issue is without merit.

**¶31. THE JUDGMENT OF THE DESOTO COUNTY CHANCERY COURT IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**IRVING, CHANDLER, BARNES AND ISHEE, JJ., CONCUR. BRIDGES, P.J., DISSENTS WITH A SEPARATE WRITTEN OPINION JOINED BY KING, C.J., MYERS AND GRIFFIS, JJ.**

**BRIDGES, P.J., DISSENTING:**

¶32. Although I agree with the majority that the decedent had testamentary capacity, I disagree with the majority's opinion that the chancellor correctly applied the law in his finding that there was no undue influence in the making of the 1995 will. The chancellor never addressed whether a confidential relationship existed before he rendered his opinion regarding undue influence. In my opinion, Carolyn Newsom had a confidential relationship with her uncle, Isaac Crutcher, and thus she had the burden of rebutting, through clear and convincing evidence, that she did not unduly influence her uncle. Though the factors in determining undue influence were alluded to in the closing arguments of the parties' attorneys, there is no indication that the chancellor addressed such factors, and, in my opinion, Newsom did not successfully rebut the presumption of undue influence. The chancellor made some disconnected and somewhat unrelated statements during the recitation of his opinion concerning facts outside those testified to in the case without relating them to the facts of this case. Appropriate findings may well have helped me determine his direction in this case. Therefore, I respectfully dissent.

¶33. The Mississippi Supreme Court has long recognized the importance of establishing the existence of a confidential relationship:

> ¶34. 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 may be moral, domestic or personal. The relationship arises when a dominant, overmastering influence controls over a dependent person or trust justifiably reposed. Such a relationship must be shown before we will scrutinize one's right to give away his property. . . .

*Mullins v. Ratcliff*, 515 So. 2d 1183, 1191-92 (Miss. 1987) (citations omitted). Furthermore, the party who establishes the benefit of having a confidential relationship must clearly establish his entitlement through

clear and convincing evidence. *Norris v. Norris*, 498 So. 2d 809, 814 (Miss. 1986); *Gillis v. Smith*, 75 So. 451, 453 (Miss. 1917). Whenever a will is contested, there is a presumption of undue influence where there is a confidential or fiduciary relationship. *Mullins*, 515 So.2d at 1192.

¶35. Here, a confidential relationship has been established. Carolyn Newsom testified that she suggested to Crutcher that he should make a will. Carolyn also chose the attorney, Wallace Anderson, a high school classmate, to draft the will. She also cared for Crutcher while he resided in her mother's home and while he was unable to physically take care of himself. During this time, for a period of nearly three years, Carolyn assisted in handling his financial affairs. Additionally, she and her husband were the sole providers of transportation for Crutcher during his visits to Anderson's law office on three occasions (once in 1991, twice in 1995) for the purpose of drafting and executing a will. The judge could have and indeed should have declared that a presumption of undue influence existed at this point, requiring the proponents of the will to show, by clear and convincing evidence, that such was overcome.

¶36. In order for Carolyn to overcome this presumption of undue influence, the evidence must have shown by clear and convincing evidence that (A) she exhibited good faith in the fiduciary relationship with Crutcher; (B) Crutcher acted with knowledge and deliberation when he executed the wills; and (C) Crutcher exhibited independent consent and action. *Murray v. Laird*, 446 So.2d 575, 578 (Miss.1984) as modified in *Mullins*, 515 So.2d at 1193.

*A. Good Faith*

¶37. Under the first prong of the test, we must determine whether Carolyn exhibited good faith in her relationship with Crutcher. There was no testimony that Carolyn abused her fiduciary duty or mishandled Crutcher's fiances. However, proper handling of funds is not enough to establish good faith. The supreme court has used a simple inquiry to address this issue:

> Excluding the testimony of the grantee, those acting in the grantee's behalf (such as the attorney), and any others who could have a direct or indirect interest in upholding the transfer (such as grantee's family), is there any other substantial evidence, either from the circumstances, or from a totally disinterested witness from which the court can conclude that the transfer instrument represented the true, untampered, genuine interest of the grantor? If the answer to this question is yes, then it becomes a question of fact whether or not there was undue influence. If the answer is no, then as a matter of law the transfer is voidable.

*Matter of Will of Fankboner*, 638 So. 2d 493, 495 (Miss. 1994) (quoting *Vega v. Estate of Muller*, 583 So.2d 1259, 1275 (Miss.1991) (Hawkins, P.J., dissenting)).

¶38. In this case, the proponents offered testimony only from family members who were named beneficiaries in the will. No testimony from a totally disinterested witness was offered to prove that the will represented the true interest of the grantor. Wallace Anderson, the attorney who drafted both wills and was also a subscribing witness to both wills, apparently testified through deposition testimony. However, his testimony was absent from the record, save for the selected excerpts that were read during the closing arguments of the contestants' attorney, Drue Birmingham. This cannot be considered as evidence and the judge certainly should not have given credence to it. Furthermore, as Anderson was named as a defendant in the case, we cannot call him disinterested. Two other subscribing witnesses to the wills, Toni S. Luther, who appears from the record to have been employed by Anderson, witnessed the 1991 will, and Brenda W. Anderson, the wife of Wallace Anderson, witnessed the 1995 will, signed an affidavit as to the testator's capacity at the time the wills were signed. However, neither of these two witnesses were called upon by Newsom in her rebuttal of the presumption of undue influence. We look, therefore, to the circumstances surrounding Crutcher's life at the time of the execution of both wills.

¶39. At the time of the 1991 will, Crutcher lived alone in his home. His physical condition had not deteriorated to the point of needing constant help. His sister, Agnes Brown, tended to his financial affairs,

and many family members, including his sisters and great nieces and nephews, saw him on a daily basis. After Crutcher's stroke in 1993, he lived with his niece, Dorothy. There, Dorothy, Carolyn, and Diane Mason cared for his daily needs. There is testimony that Agnes Brown relinquished her duties of tending to Crutcher's financial business to Dorothy and Carolyn, and the record does not indicate that this transfer was anything but amiable. Carolyn, along with her sister and brother, according to testimony, were close to the decedent, grew up in the decedent's home, saw the decedent on a daily basis, lived within close proximity of the decedent, and physically tended to him.

¶40. To further determine if Carolyn Newsom acted in good faith at the time of the execution of the wills in question, we must also examine four factors: (1) the identity of the initiating party; (2) the place of execution and the persons present at the time of the execution; (3) the consideration or fee for the will; (4) the party that paid for the will; and (5) the secrecy or openness surrounding the execution of the will. *Fankboner*, 638 So. 2d at 495-496.

¶41. Carolyn testified that she suggested to Crutcher that he should make a will in 1991. She explained that she offered the suggestion to make sure that "someone gets the land." She then testified that Crutcher asked her to choose a lawyer for the drafting of the will. Carolyn admits that she procured Anderson because she personally knew him and his office was conveniently located. No other family members testified that they were aware that Crutcher had made a will.

¶42. Carolyn also testified as to the circumstances surrounding the 1995 will. She testified that her grandmother, Crutcher's sister, had died and left a will that disinherited her mother, Dorothy Dodson. At the time, Crutcher was living with Dorothy and was being cared for by both Dorothy and Carolyn. Carolyn testified that her grandmother's will caused animosity within the family, and she admitted having a discussion

with Crutcher about the issue. She opined that he simply wanted to change his will. Again, there was no other testimony as to why Crutcher changed his will.

¶43. For the second factor, we examine the location of the will's execution. The will was drafted and executed in the law offices of Wallace Anderson. Both wills, according to the testimony of Anderson and Carolyn, were drafted in the back offices, away from Carolyn, where no immediate influence could be imposed upon Crutcher. However, Carolyn and her husband were present in the room at the signing of the 1995 will. She testified that she saw Crutcher sign his name with an "X," and that she was notified that she was named as the will's executrix.

¶44. The third and fourth factors surround the payment of the attorney's fees for the drafting of the will. The record indicates that $100 was charged for the 1995 will, and was silent as to the fee for the 1991 will. No witness, including Anderson or Carolyn Newsom, kept records or statements for the payment. Furthermore, neither Anderson nor Carolyn could remember how the payment was procured. It is very possible that Carolyn may have had no involvement in the payment of the 1991 will. At that time, Crutcher was living alone and Carolyn had not yet taken over the financial duties of her great uncle. She may have not been concerned with the payment of the fee. However, during the execution of the 1995 will, there is conflicting testimony as to exactly when Crutcher's sister, Agnes Brown, turned over Crutcher's financial business to Dorothy and Carolyn. Carolyn testified that she often helped with Crutcher's financial affairs. She paid many of his grocery bill, utility bills, his lawn mower note, and his taxes, yet she could not recall how the attorney's fees were paid. There was no other testimony or proof as to the payment of the fees.

¶45. Lastly, we examine the secrecy or openness surrounding the execution of the wills. Both wills were drafted and executed in the private inner offices of Anderson's office. However, both executions were observed by the requisite number of uninterested witnesses. The fact that other family members may not

have been present or may not have known about the existence of the wills has no consequence on this factor. "[T]he actual issue to be addressed is whether the physical place the will was executed was in plain view of the witnesses." *In re Estate of Smith*, 722 So. 2d 606, 613 (¶ 23) (Miss. 1998). The only subscribing witness testimony in the record is from the testimony of Anderson, which was read during closing arguments. No other subscribing witness testified during the trial. The only other eyewitnesses to the 1995 will was Carolyn and her husband Ozell, both of whom are beneficiaries.

*B. Knowledge and Deliberation*

¶46. The second prong of the *Murray* test requires that Crutcher must have acted with knowledge and deliberation when he executed the wills. There are four factors to consider: (1) Crutcher's awareness of his total assets and their general value, (2) whether Crutcher understood 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 the prior will or natural distribution, (3) whether non-relative beneficiaries would be excluded or included and, (4) the knowledge of who controls his finances and business and by what method, and if controlled by another, how dependent is the grantor/testator on that person and how susceptible is he to that person's influence. *Murray*, 446 So.2d at 579.

¶47. Both Carolyn and Anderson provided testimony that, during the preparation of both wills, Crutcher spent several hours alone with Anderson. While it appears from the wills themselves that Crutcher understood the nature of his property and who would be the beneficiaries, the wills are the only evidence we have to go by. Conflicting testimony was offered by both sides regarding whether or not Crutcher understood the extent of his finances during the final years of his life. Even before his second stroke in 1993, Crutcher depended upon others to manage his finances. Anderson's testimony indicated that he did

not ask Crutcher about the extent of his holdings. Therefore, besides Carolyn's testimony, there is no indication that Crutcher had full knowledge and understanding.

*C. Independent Consent and Action*

¶48. The supreme court has stated that the best way to prove independent consent and action is by the advice of a competent person disconnected from the grantee and devoted solely to the testator's interest. *Smith*, 722 So. 2d at 683. In most cases, an attorney is qualified to give that independent advice. However, in this case, there is cause for suspicion. Carolyn procured Anderson as Crutcher's attorney. Though separated from Crutcher during the drafting of the two wills, Carolyn was nonetheless present in the offices. Anderson was a high school classmate of the Newsoms. While that itself is not enough to waive a red flag, it is enough, when combined with other peculiar circumstances, to raise our level of suspicion. The issue is further complicated by the fact that while no family member from either the proponents or contestants had ever seen Crutcher sign his name, Anderson was the only person who testified as to the authenticity of Crutcher's signature on the 1991 will.

¶49. In his closing argument, Keith Treadway, attorney for the proponents, surmised that his client had the burden of proof, but could only predicate his proof by the testimony of Wallace Anderson. Since we do not have the full deposition testimony of Anderson before us, and because the chancellor relied heavily on this testimony, I believe that the chancellor should have better delineated his findings that no undue influence existed. Because Carolyn Newsom had a confidential relationship with Isaac Crutcher, she had the burden of rebutting the presumption that undue influence existed. Wallace Anderson is a defendant in this case, and no other subscribing witness testified.

¶50. The following questions arise and are unanswered from the record in this case:

1. Which of the two wills did the chancellor opine as being the will for probate in this matter?

2. What testimony did he rely upon to establish this and which one of the said wills was made by the testator free of undue influence?

3. What evidence overcame the presumption of undue influence raised by the foregoing facts?

¶51. The chancellor himself in his oral bench opinion stated that he was bothered by the testimony - certainly I am. All of the foregoing appears to raise a presumption of undue influence and certainly raises a question to this writer as to whether same was clearly and convincingly proved by sufficient testimony. Appropriate findings would establish this, relieving the mystery in my mind as to such presumption. Further, it would be unfair, if not prejudicial, to the objector and opponents (of whichever will is probated) to affirm the chancellor and deny them justice without a clear showing.

¶52. Our supreme court has repeatedly stated that appropriate findings of facts and conclusions of law should be made in complicated cases, as well as in cases where it is not clear from a reading of the testimony, how the chancellor resolved the case. *Tricon Metals & Services, Inc. v. Topp*, 516 So. 2d 236, 239 (Miss. 1987). We, as an appellate court, are required by law to follow the mandates and precedents of the supreme court. Apparently, the majority relies on two sentences in the order of the court dated December 30, 2002, and filed May 19, 2003, those shown as paragraphs II and III, without those appropriate findings.

¶53. Therefore, it is my opinion that, with regard to the factors delineated above, and without the benefit of Anderson's full testimony, Newsom did not provide sufficient evidence to rebut the presumption of undue influence, and, therefore, I would reverse and remand the case to the chancery court for a new trial to establish whether these factors can be resolved, or, at least remand to make proper findings in accordance with the aforementioned factors.