

**PETITION FOR WRIT OF CERTIORARI
IN THE SUPREME COURT OF MISSISSIPPI**

APPELLANT

VS.

NO.

APPELLEE

PETITION FOR A WRIT OF CERTIORARI

COMES NOW, _____, by and through his/her Attorney, _____, and files this his/her Petition for a Writ of Certiorari, and Petitioner herein would set out the following matters in support thereof:

I.

QUESTIONS PRESENTED FOR REVIEW:

(1) Whether the decision that was rendered by the Court of Appeals conflicts with prior decisions rendered by the Mississippi Supreme Court?

(2) Whether the present case of _____ vs. _____ involves fundamental issues of public importance requiring determination by the Supreme Court?

II.

STATEMENT OF JURISDICTION: An Opinion was rendered in this case on _____, _____. A Petition for Rehearing was timely filed, and an Order denying the Petition for Rehearing was filed with the clerk of the court on _____, _____. See the Appendix for the Opinion of the Court of Appeals, the Petition for Rehearing, and the Order Denying the Petition for Rehearing. The basis for invoking the jurisdiction of the Supreme Court is that the Court of Appeals has rendered an opinion which conflicts with prior published decisions of the Mississippi Supreme Court, and (2) the opinion involves fundamental issues of broad public importance requiring determination by the Supreme Court.

III.

STATEMENT OF THE CASE: _____, at the time of the alleged execution of the alleged Will in question, was a licensed nurse aide in the State of Mississippi who was paid to take care of _____ during his/her last illness. In addition to being paid, the record shows by _____'s own testimony that _____ owed _____ money and that was part of the consideration for _____ waiting on _____. _____ also held himself/herself out as a _____. The record shows by _____'s own testimony that the house where _____ presently resides was given to _____ by a relative during the relative's last illness. There was also other testimony of gifts from other terminally ill patients, which _____ attempted to

deny. The record shows that immediately after [redacted] had suffered a major stroke, [redacted] accepted a Will from [redacted] which purported to devise all of [redacted] property to [redacted]. As a licensed nurse aide, [redacted] knew or should have known that to solicit or accept the assets of a patient in his/her capacity as nurse aide is against public policy. The record shows that [redacted] was present in [redacted] home during the discussion and execution of the alleged Will. Even though the record does not show that [redacted] was in the room with [redacted], the house was a very small wood frame house where all loud voices could be easily heard. All of the parties who were involved in the execution of the alleged Will were connected in some way. [redacted] had been a client of the attorney used by [redacted] ([redacted]). [redacted] and [redacted] witnessed the will. [redacted] was a member of [redacted] Church, and [redacted] often sang in churches frequented by [redacted]. In addition to [redacted] using the same attorney that [redacted] had used, the attorney testified that the contents of the Will were not discussed, and the attorney, by his/her own testimony, merely acted as a scrivener of the Will. The record shows that [redacted] was ordinarily a strong willed female/male, but [redacted] was physically and mentally weak after he/she had suffered a major stroke, and he/she was unable to handle the strong manipulative skills of [redacted] without proper assistance and guidance. No family members were present during the execution of the alleged Will in question. [redacted] and [redacted] are both reputable parties. There is no proof that [redacted] chose the attorney and witnesses who witnessed the alleged Will, but proof of undue influence is during most times largely by circumstantial evidence, and acts of undue influence are generally done privately. The record shows that [redacted] misused the personal property of [redacted], showed no remorse for the death of [redacted], and did not attend [redacted]'s funeral.

IV.

DISCUSSION OF ISSUES:

(1) Whether the Opinion rendered by the Court of Appeals conflicts with prior published decisions rendered by the Mississippi Supreme Court? The existence of a confidential relationship, coupled with a recent stroke, which caused [redacted] to be both physically and mentally weak, gave rise to the presumption of undue influence. "Weakness of intellect, as distinguished from lack of capacity, when coupled with another factor, such as grossly inadequate consideration, or the existence of a confidential relationship, may merit judicious judicial scrutiny." *Richardson vs. Langley*, 426 So. 2d 780 at 783. Undue influence in the preparation of a will is not dependent upon the lack of testamentary capacity. *In Re Will of Moses (Holland vs. Traylor et al)* 227 So. 2d 829, Miss., 1969. Undue influence will be presumed where beneficiary has been actively concerned in some way with the preparation or execution of the will, or where the relationship is coupled with some suspicious circumstances, such as the mental infirmity of the testator. *Ibid.*, p. 830. In the case of *In Re Will of Moses, Ibid.*, where the independent counsel who drafted the will asked no questions and engaged in no discussions of any kind as to the attorney being preferred to the exclusion of the blood relatives, nor as to possible attorney client relationships being preferred to the exclusion of the blood relatives, the court held that the presumption of undue influence was not overcome. *Ibid.*, p. 829. The burden of proof rests on the proponent of the will throughout, and never shifts to the contestant of the will on the issues of undue influence and mental capacity. *Croft vs. Adler*, 115 So. 2d 683, Miss., 1959. The alleged will in question was executed a few days after [redacted] was hired after [redacted] had suffered a major stroke. The will must be construed in light of the circumstances surrounding the testator at the time the will was written. *In Re Estate of Granberry (Burgess vs. Granberry et al)*, 310 So. 2d 708 Where there is a presumption of undue influence, the beneficiary must prove by clear and convincing evidence: (1) good faith on the part of the

beneficiary, (2) Grantor's full knowledge and deliberation of his actions and consequences, and (3) advice of (a) a competent person, (b) disconnected from the grantee, and (c) devoted wholly to the testator's interest. In *Re Will of Polk*, 497 So. 2d 815 at p. 817). This case discusses the well established three prong test announced by the Supreme Court. See also *In Re Will of Varvaris*, (*Varvaris vs. Kourtouris*) 477 So. 2d 273, Miss 1985. The lower Court in the instant case, gave an instruction on ordinary undue influence. In proving ordinary undue influence, the burden of proof is by a preponderance of the evidence. In *McDowell v. Pennington*, 394 So. 2d 323, Miss, 1981, where the Attorney, by his/her own testimony, acted as merely a scrivener of the will, the Court held that the attorney merely acted as a scrivener of the will, and that the lower Court should have peremptorily instructed the jury to find for the contestant. The lower Court also refused an instruction on insane delusion to which objected. The Appellant is alleging that there was a belief in [redacted]'s mind that arose spontaneously without any extrinsic evidence to support it, causing [redacted] to execute a will in favor of his/her nurse aide without any consideration.

(2) Whether the present case on appeal involves fundamental issues of broad public importance requiring determination by the Supreme Court? In view of the recent enactments of statutory laws and other rules and regulations, [redacted] has certainly caused a lot of public concern by his/her actions. Nurses and nurse aides are not allowed to solicit or accept the assets of their patients. Since [redacted] was a private duty nurse who was not subject to supervision, [redacted] slipped through a loophole in the law. The Department of Human Services maintain that they can investigate actions involving any alleged abuse of the elderly prior to the death of a vulnerable adult, but they contend that they are without jurisdiction if the fact comes to their attention after the party dies. The public certainly has an interest in preventing the abuse of the elderly from the nurse or nurse aide, since most people have to work and the care of a loved one is often entrusted to a private duty nurse or nurse aide. Certainly, if the courts permit such an act, the application of the three-prong test described in *Re Will of Polk*, supra, would provide a good guideline to protect the elderly. The family of [redacted] had no desire to seek any type of prosecution of [redacted], but the family only desired that [redacted] practice nursing in a professional manner, and that he/she not abuse his/her position of trust for private gain. [redacted] is a capable attorney and both [redacted] and [redacted] are reputable parties. [redacted] was ordinarily a strong man/woman, but the parties were struck by the manipulative skills of [redacted].

WHEREFORE, Petitioner respectfully prays that his/her Petition for a Writ of Certiorari be granted.

AND PETITIONER PRAYS FOR GENERAL RELIEF.

Respectfully submitted,

Attorney for

Of counsel:

Telephone:
MSB #
Attorney for