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DAV. CO. CHANCERY COURT

IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE
AT NASHVILLE

DAN T. NICHOLS, a/k/a D. T. NICHOLS,

Plaintiff,

vs.

VIOLA JEAN NICHOLS, HAYWARD H. BREWINGTON, JR., and wife, GLADYS R. BREWINGTON, ROBERT C. REED and wife, RUTH E. REED, and NATIONSBANK OF TENNESSEE (for the purpose of a Restraining Order and Injunction),

NO. 94-2942-II

ORDER FILED & ENTERED AUG 06 1996
MINUTE BOOK 197 PAGE 571

BOOK 10353 PG 54

ORDER

This cause came on to be heard as a Bench Trial on the 15th through the 17th day of July, 1996, before the Hon. Claudia C. Bonnyman, Special Chancellor. Based upon the statements and argument of counsel, sworn testimony of the parties and the witnesses day to day, the exhibits filed, the argument of counsel, and the entire record, the Court rendered a Memorandum Opinion filed July 25, 1996, which is incorporated into this Order in its entirety as follows:

MEMORANDUM

This is an action in which an eighty-five-year old man (Dan Nichols), seeks to rescind a deed and a pasture lease at 314 Nawakwa Trail[1] in Madison, Tennessee, transferred by his wife (Viola Jean Nichols) to her relatives pursuant to a general power of attorney. In May 1995, months after this lawsuit was filed, Viola Jean Nichols died and her estate was substituted. The Court rules the warranty deed and pasture lease signed by her must be set aside because the transfer was the product of undue influence. Counsel for Dan Nichols should draft the judgment, taxing costs to the defendants' Brewington and to the estate of Viola Jean Nichols.

Dan Nichols married Viola Jean Nichols in 1982, after the death of his first wife. Dan Nichols and the first Mrs. Nichols purchased 314 Nawakwa Trail (Lot #10) in the 1950's and several

[1]Typed "Nawaka" Trail in Memorandum Opinion.

of their eight children were raised there. Viola Jean Nichols' two children by a previous marriage were adults in 1982. One of her children, Gladys Brewington, moved next door to the Nichols with her husband, Hayward. This couple, relatives of Viola Jean Nichols, are defendants in the case.

In 1989, Dan Nichols provided a general power of attorney to his wife because of his failing health. He was the victim of several strokes, had cataracts, and suffered from Bell's palsy. Although at trial he contested the validity of the document assigning general powers to Viola Jean Nichols, the court finds that he did sign the document at a time when he understod its import.

By 1993, the children of Dan Nichols and the children of Viola Jean Nichols were aware of the increasing helplessness of both elderly parents. Dan Nichols' serious health problems were longstanding. Viola Jean Nichols now began to need some assistance. The Nichols' marriage, never peaceful, became increasingly discordant. Some physical violence was alleged. Viola Jean Nichols was treated for anxiety and stress. Medical records reflect that she felt rejected by her husband. Viola Jean Nichols began to fear that Dan Nichols would dispose of 314 Nawakwa Trail (Lot #10) and that she would no longer have a home. Indeed, Dan Nichols advised his wife that he intended to convey this property to Kenneth, a son from his previous marriage. On July 25, 1994, in order to prevent such a disposition, she conveyed the residence to her daughter's husband, Hayward Brewington, Jr., pursuant to the power of attorney. The deed recounts consideration of $50,000 and reserves to the Nichols "[T]he right to live in the home place improvement as long as they are living..."

Pleadings filed by the defendants in the Davidson County trial courts indicate the purpose of the transfer of real property was to protect Viola Jean Nichols' access to and marital interest in the home place. Although at trial Hayward Brewington asserted the transfers to him of Dan Nichols' property were for

adequate consideration and were otherwise fair, his first answer to this lawsuit states that Viola Jean Nichols was abused by Dan Nichols and further that

> 2. Defendants show that the home place conveyed to Hayward Brewington, Jr., as alleged in Paragraph No. 13, was conveyed to him in trust for the use and benefit of the defendant, Viola Jean Nichols, who was afraid that plaintiff would convey away the Home place...Defendants would show that they have no actual interest in the home place, but acted only to protect her interest...

Viola Jean Nichols, now deceased but also a defendant, responded to this lawsuit by stating "16. She denies that she has breached any duty to the plaintiff, fiduciary or otherwise. All actions taken by her pursuant to the Power of Attorney were to protect the plaintiff or herself or both."

After this lawsuit was filed in September 1994, the Nichols separated. In October 1994, Viola Jean Nichols filed a sworn divorce complaint (dismissed voluntarily) in which she alleged she and Dan Nichols were still owners of 314 Nawakwa Trail. Her complaint sets forth her concern that she might be left homeless should he dispose of the home place:

> 3. The real property located at 314 Nawakwa Trail, Madison, Davidson County, Tennessee, is owned by the parties although the deed reflects only the name of the husband. Wife would show that she has made a significant contribution to the purchase of the dwelling house located on the property and that she has no funds with which to acquire a residence and will therefore ask this Court to divest all right, title and interest of the defendant in and to such real property and vest the same in her.

The Court must look at the pleadings closely because Viola Jean Nichols died in May of 1995 before her testimony could be recorded. It was only after her death that Hayward Brewington, Jr. altered his position in the case and began to assert a non-trustee ownership interest in Lot #10. His position is twofold: first, his plan to buy Lot #10 had existed at least since 1990. In that year, he began to make partial purchase payments in cash to Viola Jean Nichols for Lot #10. He accepted receipts for these payments. He does not claim to have paid for the property on the day of the transfer. Second, the property conveyed to Mr. Brewington was in exchange for his promise to take care of the

needs of the elderly Nichols couple for as long as they lived. This agreement was with both the Nichols according to the defendant Mr. Brewington.

There is conflicting testimony about exactly what occurred when the warranty deed and pasture lease were signed on July 25, 1994. Most certainly, Gladys Brewington wanted nothing to do with the transaction. She was not aware that her husband planned to purchase Lot #10. Although she could see documents being handed to various persons outside her mother's home, she testified that she did not know what was occurring and did not ask questions. Although Dan Nichols had asked that she contract with him to provide for his basic needs as he became more helpless, she rejected his offer. The numerous tasks she undertook such as taking her mother to the doctor and preparing breakfast for Dan Nichols, she did out of love and concern for her mother and for her mother's husband. She knew almost nothing about the cash receipts presented by her husband at trial although she supplied some of the cash and even made out a receipt at his request. Importantly, before the death of Viola Jean Nichols, both the Brewingtons and Viola Jean Nichols responded to formal discovery requests that there were no receipts or other evidence of payments from the Brewingtons for Lot #10.

When the property was transferred in 1994, Dan Nichols was in poor condition. He was palsied, his speech was slurred, and he could not walk well. By the time of trial in July of 1996, he was able to answer some questions with sensible answers but others were unintelligible. Dan Nichols was able to assert, however, that the two conveyances at issue here, a lease and deed conveying Lot #10, were not accomplished for his benefit or with his consent. It was never his intention that Hayward Brewington become the owner of his home place. He intended his son Kenneth to own the property.

Viola Jean Nichols was not an owner of record of Lot #10. In conveying Lot #10 to her son-in-law, Hayward Brewington, Jr.,

however, she retained or created a life estate for herself and for Dan Nichols. The pasture lease to Hayward Brewington, lessee, was for a period of 25 years, renewable for a second 25-year period. Rent for the three acres was $150 per year. The pasture lease allowed Dan Nichols the right to sue for back rent but provided he could not remove the lessee from the property even if no rent was paid.

An unrestricted power of attorney, in and of itself, creates a confidential relationship between the parties to the document. Matlock v. Simpson, 902 S.W.2d 384 (Tenn. 1995); Mitchell v. Smith, 779 S.W.2d 384 (Tenn. App. 1989). The Court finds a confidential relationship existed between Dan Nichols and Viola Jean Nichols, by virtue of the unrestricted power of attorney entered into between the Nichols in 1989.

The Court finds the conveyance of Lot #10 and the pasture lease were for the benefit of Viola Jean Nichols, the fiduciary in this confidential relationship. A presumption of undue influence arises in this case under these circumstances. See, Matlock v. Simpson, 902 S.W.2d 384 (Tenn. 1995). Only clear and convincing proof of fairness of the transaction will rebut the presumption.

Proof presented by the Brewingtons does not meet that standard. The estate of Viola Jean Nichols did not present proof. It is not clear that any consideration was paid for Lot #10. It is not clear that the rent for pasturage was a reasonable amount or that rent had ever been paid. There is no explanation as to why it would be fair for the lessee Brewington to retain use of the pasture without payment of rent as the lease mandated. Last, it is not clear that Lot #10 was transferred in exchange for future services for the Nichols or that such an arrangement would be fair.

Indeed, the transactions at issue here were not fair. Viola Jean Nichols hoped to delay or prevent a conveyance of her home by her husband. She created a life estate in the property which she did not otherwise have. She attempted to deprive Dan Nichols

of any control, power or benefit he might derive from his ownership of 314 Nawakwa Trail. Although she may have taken these actions in fear and confusion, the conveyances (lease and deed) of July 25, 1994, must be set aside.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that the Warranty Deed as of record in Deed Book 9435, Page 450, Register's Office for Davidson County, Tennessee, from D. T. Nichols by Power of Attorney and wife, Viola Jean Nichols, Grantor, to Hayward H. Brewington, Jr., Grantee, executed on July 25, 1994, is hereby rescinded and set aside, said property more particularly described as follows:

> Land in Davidson County, Tennessee, being Lot No. 10 on the Map of Nawakwa Hills, West End Section, the subdivision not of record, made by Kennedy & Graves 45 acre Tract, surveyed by T. W. Briley, Surveyor, as follows:
>
> Said Lot No. 10 begins at a point in the center of Nawakwa Trail 3323-1/2 feet, more or less, from the intersection of Neely's Bend Road and the Northerly line of said Nawakwa Trail at the common corner of lots Nos. 10 and 11, and runs thence North 21-1/2 degrees West 1,360 feet, more or less, to a point in the Southerly line of the Nashville Agricultural Norman Inst.; thence South 59-1/2 degrees West 120 feet to a point; thence South 22 degrees East 1,340 feet, more or less, to a point in the center of said Nawakwa Trail; thence North 64 degrees 30' East with the center of said Trail 104 feet to the point of Beginning, containing 3.49 acres, more or less.
>
> Being the same property conveyed to D. T. Nichols, et ux, by deed from James R. Manners, unmarried, of record in Book 2037, Page 571, Register's Office for said County, and thereafter by deed from D. T. Nichols by Power of Attorney and wife, Viola Jean Nichols, to Hayward H. Brewington, Jr., as of record in Deed Book 9434, Page 450, Register's Office for Davidson County, Tennessee.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the Lease Agreement for Pasture and Grazing as of record in Deed Book 9431, Page 568, Register's Office for Davidson County, Tennessee, from D. T. Nichols by Power of Attorney and wife, Viola Jean Nichols, as Lessors, to Hayward H. Brewington, Jr., as Lessee, executed on July 25, 1994, for leasing of pasturage at 314 Nawakwa Trail, is also rescinded and set aside, said property more particularly described as follows:

> Land in Davidson County, Tennessee, being Lot No. 10 on the Map of Nawakwa Hills, West End Section, the

subdivision not of record, made by Kennedy & Graves 45 acre Tract, surveyed by T. W. Briley, Surveyor, as follows:

Said Lot No. 10 begins at a point in the center of Nawakwa Trail 3323-1/2 feet, more or less, from the intersection of Neely's Bend Road and the Northerly line of said Nawakwa Trail at the common corner of lots Nos. 10 and 11, and runs thence North 21-1/2 degrees West 1,360 feet, more or less, to a point in the Southerly line of the Nashville Agricultural Norman Inst.; thence South 59-1/2 degrees West 120 feet to a point; thence South 22 degrees East 1,340 feet, more or less, to a point in the center of said Nawakwa Trail; thence North 64 degrees 30' East with the center of said Trail 104 feet to the point of Beginning, containing 3.49 acres, more or less.

Being the same property conveyed to D. T. Nichols, et ux, by deed from James R. Manners, unmarried, of record in Book 2037, Page 571, Register's Office for said County, and thereafter by deed from D. T. Nichols by Power of Attorney and wife, Viola Jean Nichols, to Hayward H. Brewington, Jr., as of record in Deed Book 9434, Page 450, Register's Office for Davidson County, Tennessee.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that the costs of this cause are hereby assessed against the Defendants Hayward H. Brewington, Jr. and wife, Gladys R. Brewington, and the Estate of Viola Jean Nichols, for which execution shall issue, if necessary.

ENTER this _____ day of _____, 1996.

SPECIAL CHANCELLOR
CLAUDIA C. BONNYMAN

APPROVED FOR ENTRY:

PHILIP W. DUER
ATTORNEY FOR PLAINTIFF
214 Third Avenue, North
P. O. Box 190638
Nashville, Tennessee 37219-0638
615/244-2070
Tennessee Supreme Court
Registration No. 4647

I hereby certify that this is a true copy of original instrument filed in my office This 13th day of February 19 97
CLAUDIA C. BONNYMAN Clerk & Master
By _____ Deputy Clerk

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IDENTIF. + REFERENCE

94-2942

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CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing has been mailed, through the U. S. Mail, postage pre-paid, this 24th day of July, 1996, to the following:

Dennis Clifton Wright, Esq.
Attorney for Donna G. Pritchard,
Administratrix, Estate of Viola Jean Nichols
632 West Old Hickory Blvd.
Madison, TN 37115

Thomas M. Black, Esq.
Attorney for Hayward H. Brewington, Jr.
and Gladys R. Brewington
333 Gallatin Road South
Madison, TN 37115

PHILIP W. DUER

cc: Ms. Ethel Imogene Edmonds
Samuel Baron, Esq.

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