2007-CA-01420 E

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Belinda Ellzey, Appellant/Contestant

2. Eddie Owen McCormick, Appellee/Proponent

3. Edward E. Patten, Jr., Chancellor
   Copiah County Chancery Court
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CERTIFIED, this the 22nd day of May, 2008.

Olen C. Bryant, Jr.

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OTHER AUTHORITIES

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§ 91-7-87, Mississippi Code Annotated (1972)

STATEMENT OF ISSUES

Since Belinda did not present to the Court any issues for review on this appeal (which would have amounted to her assignment of errors by the lower court), Eddie is faced with the task of arguing the facts adduced at trial, applying these facts to each point of law relating to fiduciary relationships, mental capacity, undue influence, wills and inter vivos gifts.

STATEMENT OF THE CASE

1. ***Nature of the Case.***

This case involves the contest of the probated will of Owen D. McCormick together with the contest of certain inter vivos gifts. Owen's wife had predeceased him, and he left as his heirs at law his two children, Eddie O. McCormick (Eddie) and Belinda Ellzey (Belinda). The probated will left the estate equally to Eddie and Belinda, with the exception of some household furnishings which were individually bequeathed. Belinda is the Contestant as to the will and the gifts.

2. ***Course of Proceedings and Disposition.***

Owen died on March 26, 2003, while a resident of Copiah County, Mississippi. He had formerly lived in Gulfport. At Owen's funeral, Eddie gave to Belinda a copy of the will which was later admitted to probate. Instead of filing a caveat against the will which Belinda knew existed and protecting her rights as afforded by that statute, on April 1, 2003, Belinda petitioned for and opened an estate administration in Harrison County. In response to the administration proceeding, Eddie probated the will in Copiah County on May 6, 2003. Again, instead of taking steps to contest the Copiah probate, Belinda attacked subject matter jurisdiction by a Special Appearance in Copiah County Chancery Court on May 12, 2003. The Harrison County estate administration was ultimately dismissed on January 5, 2006. On January 13, 2006, Belinda filed a Petition to contest the will probated in Copiah County Chancery Court. The Petition also sought to set aside certain inter vivos gifts and sought other relief. Eddie filed his response on February 24, 2006, asserting, among other things, that the will contest was barred by the statute of limitations. Trial of the contested issues began on December 11, 2006. Immediately prior to trial, the Court heard arguments on the statute of limitation issue. No objection to the timeliness of the motion on the statute of limitations was

made by Belinda. At the conclusion of argument, the Court reserved its ruling. The trial proceeded for one day on December 11, 2006. The trial was then recessed to March 26, 2007, and was concluded on March 27, 2007. Prior to resumption of the trial on March 26, 2007, the Court ruled that the will contest was barred by the statute of limitations. The Court rendered its findings of fact and conclusions of law on June 25, 2007, and final judgment was entered on July 16, 2007.

3. ***Statement of Facts.***

Owen had lived in Harrison County for over fifty years until he moved to Crystal Springs to live with Eddie in late October, 2002. He died in Copiah County in March, 2003.

In April, 2002, Owen was admitted to Garden Park Medical Center in Gulfport. He was discharged on April 30, 2002. While there he was treated by Dr. John Rusch. Even though his discharge occurred some six months prior to the events which are the subject matter of the gifts and the will, Belinda claims the facts surrounding his stay at Garden Park proved Owen's permanent mental incapacity. Eddie strongly contested the claim of incapacity, and the Court found no merit in Belinda's claim. Much is made by Belinda over the testimony of Dr. Rusch. However, she ignores the testimony of Dr. Rusch which clearly demonstrates that Owen was not mentally deficient. A summary of this testimony follows (all references are to pages in Dr. Rusch's deposition).

Dr. Rusch treated Owen between April 17 and April 30, 2002. He did not see or treat Owen after the discharge on April 30, 2002. During the period of treatment, it had been determined that Owen had not properly taken his medications. (D-23) Dr. Rusch testified that medication could stabilize Owen's condition. (D-21, 22)

Dr. Rusch has no record of any specific impairment of Owen. (D-33) He did not try to determine Owen's capacity to understand legal documents and undertook no tests to show areas of deficiency. (D-33, 34) When asked whether Owen's relationship with a son or a daughter could

be affected by his disease, Dr. Rusch stated that he did not know. (D-37) Dr. Rusch refused to predict whether Owen's condition would affect the way he related to his children. (D-38) Dr. Rusch admitted that Owen's condition could remain stable for extended periods of time. (D-38)

Dr. Rusch testified that during the course of his treatment, Owen improved rapidly and remained stable. Owen was greatly improved by the time of his discharge. (D-39)

Dr. Rusch further testified that acute stress would affect Owen's mental condition (D-41) and that Owen's mental condition would be affected by whether or not he properly took his medication. (D-42)

Dr. Rusch did not have any knowledge of what type of personal or business affairs Owen was handling for himself before he entered the hospital. Dr. Rusch further testified that he never saw Owen again after his discharge and had no knowledge of his physical or mental condition after that time. (D-43) Dr. Rusch stated that he had no opinion as to the degree, if any, of the progression of dementia. (D-45) The doctor agreed that it was possible for people with a diagnosis such as Owen's to function normally for long periods of time. (D-46) When asked whether dementia may make one susceptible to influence by others, the Dr. stated that he could not answer the question. (D-47)

Although Belinda claims Owen was mentally incompetent after the hospital stay, she later obtained his power of attorney (R-252) and made no objection when Owen sold his house. (R-225) Owen independently took steps to revoke the power of attorney immediately after his hospital discharge. (R-422)

After leaving the hospital, Owen spent approximately one month at an assisted living facility on the coast. He was not satisfied there, and moved himself back to his residence in Gulfport. (R-187) During this time Belinda had moved to Texas and was living with a man that she

later married. Owen did not approve of this living arrangement, and ruled out the possibility of living with Belinda. (R-240) He made several requests to move to Crystal Springs to live with Eddie. These requests were resisted by Eddie and they explored other possibilities. (R-411)

Owen had decided to sell his house. (R-348) He independently contracted with a real estate broker, Andy Sawyer. Sawyer's testimony is among the most important of the trial, since he was perhaps the most disinterested of all of the witnesses. Sawyer's testimony shows Owen to be competent, independent and capable. These characteristics are demonstrated by Owen negotiating the real estate commission downward (R-356), setting the terms of a rental agreement with the ultimate purchaser (R-377), deciding to take the house off the market when conditions were slow (R-364), and furnishing detailed information to Sawyer regarding the house. Owen told Sawyer that his children would not handle the sale of the house. (R-369)

Owen had accounts and investments at several financial institutions on the coast. Belinda was listed as a joint owner. Owen was not happy that Belinda had moved to Texas to live with her boyfriend. (R-240) He was also unhappy that she was not furnishing him timely information about his accounts. (R-241) Belinda had previously obtained a power of attorney over Owen, but he took steps through an attorney to revoke the power of attorney. (R-252-255) Belinda admitted that Owen was a strong willed person. (R-246)

On October 26, 2002, Eddie agreed that Owen would come to Crystal Springs to live with him. When Eddie came to Gulfport on that date (a Saturday) to pick Owen up, Owen instructed Eddie to drive him to the Long Beach branch of Hancock Bank, which was the only branch open on Saturday. While at the bank, and without any involvement from Eddie, Owen changed all of his accounts and placed them in his name alone. They were designated to be payable on death to Eddie. However, he instructed Eddie to divide the proceeds equally with Belinda at his death. (R-411-416)

Eddie so informed Belinda, and the parties stipulated to a division of these funds prior to trial. (R-33)

While in Crystal Springs, Owen initiated the making of certain gifts to his grandchildren. These included Eddie's two daughters. The idea for the gifts was not brought up by Eddie, but was specifically Owen's idea. When Owen asked Eddie for input regarding the gifts, Eddie made suggestions for gifts for all four of Owen's grandchildren. Owen strongly rejected Eddie's suggestion. (R-426-429) Direct gifts were made to Eddie's two children, and a trust arrangement was made for one of Belinda's children, Brandon. Owen wanted the money in trust, since Brandon had made sporadic progress in his educational efforts. No gift was made to Belinda's other child, since Owen had already given her substantial sums, and she was a college graduate. Eddie's two daughters were in college at the time.

George Marx, president of Copiah Bank, testified that he dealt with Owen in opening a checking account. He testified that Owen was astute and knew what he wanted. They discussed some of Owen's other investments. A problem developed with the checking account, when checks were printed with both Owen's name and Eddie's name on the checks. Owen insisted that Eddie's name be removed, and the checks had to be reprinted. (R-480).

Owen independently contacted Paul Davis, Eddie's brother-in-law who is an attorney, to discuss changing his will. The initial change related to making Eddie the Executor, since Belinda had moved to Texas. In the course of four meetings with Paul Davis, Owen made it known that he wanted his estate divided equally between Eddie and Belinda. This required some other changes to his will. Davis informed Owen that because of his connection with Eddie, he wanted an independent lawyer to review the will and have it executed to remove any questions of undue influence. (R-491-511)

At this point, attorney Bob Lawrence in Crystal Springs was consulted. Mr. Lawrence

had no previous attorney-client relationship with any of the McCormick family, nor did he have any professional or personal relationship of any significance with Paul Davis. Mr. Lawrence closely questioned Owen regarding his family, his assets, his desires and the disposition of his estate and other matters which might affect his mental capacity. Both lawyers determined that Owen possessed testamentary capacity and was not being unduly influenced. (R-559-575)

SUMMARY OF THE ARGUMENT

The Chancellor's findings of fact were grounded on credible, and often times uncontradicted, evidence. Under no circumstances could there be a finding of manifest error.

The ruling of the trial court on the questions of jurisdiction and statute of limitations was grounded in solid statutory and case law. The court of proper jurisdiction was the Court where the will was probated, the Chancery Court of Copiah County. The ruling on the statute of limitations was correctly made. In any event, the validity of the will was fully tried by the Chancery Court, since the facts surrounding the execution of the will were probative of the other issues in this case. There was no evidence regarding the execution of the will that Belinda was prevented from introducing to the trial court because of that court's ruling on the statute of limitations.

Owen was not mentally incompetent as a result of the stay in Garden Park Hospital. The numerous business affairs which he subsequently conducted for himself are a testament to this fact. All of the gifts made by Owen and his Last Will and Testament were not the product of undue influence and are legally valid.

ARGUMENT

1. ***Jurisdiction/Statute of Limitations.***

Belinda's primary arguments in this appeal seems to be that "jurisdiction" is proper in Harrison County, and that the will contest was not barred by the statute of limitations.

The trial court allowed evidence of the execution of the will, since it had probative value on the other issues which were presented (such as undue influence, mental competency, independent acts, etc.). These issues primarily had bearing on the question of the inter vivos gifts. After listening to much evidence surrounding the preparation and execution of the will, the Chancellor specifically found "ample evidence" that the will is good and valid.

These actions of the Court in allowing evidence of the preparation and execution of the will and the Court's finding of its subsequent validity (the Court's ruling on the statute of limitations not withstanding), make Belinda's argument on jurisdiction and limitation of actions entirely moot. Nevertheless, these issues will be addressed.

Belinda seems to confuse the term "jurisdiction" with "venue". Her citation of §9-5-83, Mississippi Code Annotated (1972) is not helpful, since this statute simply confers jurisdiction of Estate matters in all Mississippi Chancery Courts. It cannot be seriously argued that the Copiah County Chancery Court lacks jurisdiction of a will probate or an estate administration.

By statute the filing of a will probate supercedes a previously filed administration on the same estate.

> If a will shall be found and probated and Letters Testamentary be granted thereon, the same shall be a revocation of the administration; but acts lawfully done by the administrator without actual notice of such revocation shall be valid and binding. §91-7-87, Mississippi Code Annotated (1972).

Belinda became aware of the will probate at least by May 12, 2003, when her counsel

entered appearance to contest "jurisdiction". Belinda's sole focus appeared to be having the estate administered in Harrison County. This focus persisted to the peril of allowing the statute of limitation on the will contest to expire before a petition to contest the will was filed on January 2, 2006. Simply stated, the will must be contested within two years of probate, if at all. This statute of limitation is clearly set forth by §91-7-23, Mississippi Code Annotated (1972). The word "probate" within the meaning of this statute refers to the act of the clerk accepting the will for probate rather than the date upon which the estate is closed. Therefore, the two year statute of limitation runs from the date the clerk admits the will to probate. *In Re: Will of Fields,* 570 So.2d 1202 (Miss. 1990). The will contest was not filed until January 2, 2006. This was clearly beyond the two year statute of limitations. Eddie raised the statute of limitations as a defense in his response to the will contest. The issue of the statute of limitations was timely raised. What has not been timely raised is Belinda's objection to the statute of limitations defense raised by Eddie. The statute of limitations was raised by oral motion prior to the beginning of the trial. The parties made their arguments to the Court at that time. Belinda's argument did not include any objection to the timeliness of the oral motion for hearing on the statute of limitations defense. This has been raised for the first time only on this appeal. Therefore, it should not be considered by this Court.

Belinda's citation of *Whitten v. Whitten,* 956 So.2d 1093 (Miss. CA 2007), in support of her argument on the statute of limitations is misplaced. In the *Whitten* case, the affirmative defense asserted, if successful, would have led to a termination of the entire litigation. In the present case, the litigation would have continued, as it did, regarding the other issues surrounding the inter vivos gifts. Therefore, no prejudice to Belinda existed.

It is clear that the contest of a probated will must be brought in the Court in which the will was probated. *Armisteads Estate,* 4 F.Supp. 606 (S.D. Miss. 1933). Following the holding

in this case, any action or petition filed in any court other than the court in which the will is probated is not sufficient to properly contest the will and toll the statute of limitation.

In the *Last Will and Testament of Winding,* 783 So.2d 707 (Miss. 2001), the Court analyzed §91-7-23, Mississippi Code Annotated (1972), after a motion to dismiss based on the statute of limitations was granted by the trial court. *Winding* presented a factual analysis similar to the case at bar. The contestant knew almost from the moment the will was offered for probate of its contents and effects. The contestant argued that she was misled to believe that her rights were protected. The Court stated:

> "This case is a matter of clear statutory language. Williams awaited to contest a will that had been admitted to probate for nearly four years. She admits knowing of the probate proceedings and her absence as legatee for over three years. Even if she was misled to believe her rights were protected, we do not reward those who fail to protect themselves. '[E]quity aids the vigilant and not those who slumber on their rights.' *In Re: Estate of Davis*, 510 So.2d 798, 800 (Miss. 1987). The statute of limitations for a will contest has run. The Chancellor did not err in dismissing the petition for a will contest." *Last Will and Testament of Winding*, P.711.

The case of *National Heritage Realty, Inc. v. Estate of Boles,* 947 So.2d 238 (Miss. 2006) cited by Belinda is instructive in the present case, but not for the reasons argued by her. In *National Heritage Realty, Inc.* an administration was opened in Tallahatchie County where it was later determined that the proper venue was Leflore County. The specific holding of the Supreme Court was to the effect that the Chancellor erred in transferring the case from one Court to the other, when the proper procedure would have been to dismiss the case and then have it re-filed in the proper county. The Court determined that "Section 91-7-63(1) is an exclusive venue statute, making it jurisdictional *in nature*". This is, in effect, what happened in the case at bar. The Harrison County proceeding was dismissed and the will probate was properly filed in Copiah County. The problem

for Belinda is that she did not contest the will until almost three years after probate. Contrary to the argument of Belinda, an estate administration and a will probate are two completely distinct and separate actions. In the special appearance to assert lack of jurisdiction filed on May 12, 2003, no claim for relief under the will contest issue was sought. The only relief sought in that pleading was a transfer of the will probate matter from Copiah County to Harrison County. Her pleading was not sufficient under Rule 8 Mississippi Rules of Civil Procedure to constitute a will contest.

2. ***Chancellor's Findings.***

A large part of Belinda's argument alleges manifest error on the part of the chancellor in rendering his findings of fact. We believe the findings of fact are the result of a well-reasoned consideration of the testimony and are supported by substantial credible evidence. The extent of review by the appellate court as to claims of manifest error is well settled. The appellate court has a limited standard of review of a chancellor's finding of fact. This standard of review was recently summarized by the Court in the case of *In the Matter of the Last Will and Testament of Boyles v. Tadlock,* So.2d - - - -, 2008 WL 711729 (Miss. App.)

> This Court considers decisions of chancellors under a limited standard of review. *McNeil v. Hester,* 753 So.2d 1057, 1063 (¶21) (Miss. 2000). Specifically, "[t]he chancellor, as the trier of fact, evaluates the sufficiency of the proof based on the credibility of witnesses and the weight of their testimony." *Volmer v. Volmer,* 832 So.2d 615, 621-22 (¶21) (Miss. St. App. 2002) (quoting *Fisher v. Fisher,* 771 So.2d 364, 367 (¶8) (Miss. 2000)). As well as being the fact-finder, the chancellor is the sole judgment of the credibility of witnesses when resolving discrepancies in a witness's testimony. *Murphy v. Murphy,* 631 So.2d 812, 815 (Miss. 1994). Its findings will not be disturbed unless this Court finds that they were made in manifest error. *Richardson v. Cornes,* 903 So.2d 51, 56 (¶18) (Miss. 2005). In other words, "where the record contains substantial credible evidence to support the chancellor's findings, we will defer to them." *Volmer,* 832 So.2d at 622 (¶21). Errors of law, however, are reviewed de novo. *Cooper v. Crabb,* 587 So.2d 236, 239 (Miss. 1991). *Boyles v. Tadlock,* p.3.

Belinda seems to believe that Owen's stay in Garden Park Hospital in April 2002 established his permanent mental incompetence. This issue is dealt with elsewhere in this brief. Suffice it to say here that the chancellor followed clear case law and substantial credible evidence in his finding that at the relevant times Owen had sufficient legal capacity to act.

In making her argument for manifest error, Belinda would have this Court completely discount the testimony of all witnesses with the exception of Belinda and Brooke. The testimony of Brooke was contradicted in large part by the testimony of Andy Sawyer. Sawyer had absolutely no stake in the outcome of the litigation. (Belinda did not even contest the sale of the house.) His credibility is beyond question. The chancellor obviously made a careful evaluation of this matter in finding that Brooke's testimony was not credible.

Neither Belinda nor Brooke had any personal knowledge whatsoever about the making of any of the gifts or the will which are at issue in this appeal. Nevertheless, Belinda urges this Court to totally disregard the sworn testimony of two reputable, experienced and ethical members of the bar and the other uncontradicted testimony of numerous witnesses that all relate to the making of the will and the inter vivos gifts.

3. ***Confidential Relationships and Undue Influence.***

Our jurisprudence on confidential relationships and undue influence in making wills and gifts is extensive and clear. We will cite only a limited number of such cases in support of the arguments made in this brief.

A presumption of undue influence arises where one in a fiduciary relationship with the donor-testator is involved in the making of the will or the gift. In other words, two elements are necessary — a confidential relationship and active participation. The burden of proving the existence of the confidential relationship is on the party who alleges it. To set aside a deed or a will

due to undue influence, it must be shown that the one exerting the influence used undue methods and actually overcame the free and unrestrained will of the grantor or the testator to the extent that his acts were controlled and he was prevented from being a free agent. *In Re: Estate of Chapman,* 966 So.2d 1262 (Miss. 2007).

The Mississippi Supreme Court has established a three-pronged test to overcome the presumption of undue influence — whether the grantee\beneficiary acted in good faith; whether the grantor acted with full knowledge and deliberation; whether the grantor exhibited independent consent and action. *Murray v. Laird,* 446 So.2d 575 (Miss. 1984). In determining good faith on the part of the beneficiary, the determinations include who initiated the procurement of the instrument, where it was executed, who was present, and whether secrecy existed surrounding the instrument. Elements to determine whether the grantor/testator acted with full knowledge and deliberation include his awareness of his assets and their value, the identity of his natural inheritors, his understanding of how any changes would affect prior wills, who controlled his finances, and susceptible he was to influence. *Johnson v. Dodson,* 911 So.2d 961 (Miss. 2004). *Estate of Clyde v. Woodfield,* 968 So.2d 475 (Miss. Ct. App. 2006). *Madden v. Rhodes,* 626 So.2d 608 (Miss. 1993), *Murray v. Laird,* 446 So.2d 575 (Miss. 1984), *In Re: Estate of Chapman,* 966 So.2d 1262 (Miss. 2007).

The case of *Williams v. Estate of Cheeks,* 961 So.2d 65 (Miss. Ct. App. 2007), has facts which are particularly instructive in the present case. Witnesses testified that Cheeks was strong willed and independent, comparable to the testimony in this case regarding Owen. No evidence was presented in the Cheek case that the testator was not aware of the value of her assets or did not understand who her natural inheritors were, or the consequences of her distribution. A particularly striking similarity with the present case was the fact that Cheeks sold her house shortly

before making her will and no one objected to the sale.

> Cheeks was strong-willed and independent. No one testified that she was not in control of her mental faculties. No evidence was presented that she was not aware of the value of her assets or that she did not understand who her natural inheritors were or the consequences of her distribution. Cheeks had three bank accounts. One account was held solely by Cheeks. One account was held jointly by Cheeks and Harper. Another account was held jointly be Cheeks, Harper, and a third person. Witnesses testified that Cheeks was a "business woman" and was not dependent on anyone to handle her finances. Smith, however, testified that she had been assisting Cheeks with her business affairs since 1986 and that Cheeks was not as "sharp" as others testified. Despite Smith's testimony that Cheeks was not independent, sufficient evidence was presented to the contrary to support the chancellor's finding that Cheeks acted with knowledge and deliberation. For example, no one objected when Cheeks sold land shortly before making the will or during the sale of her home which was put on the market the day after the will was made and sold about three months later. No evidence exists in the record that it was anyone other than Cheeks's idea to prepare a will. *Williams,* 961 So.2d at 69.

It was shown that it was no one other than Cheeks' idea to prepare the will. The attorney preparing the will stated that Cheeks read and understood the will and expressed that that was what she wanted. This is a close parallel to the circumstances under which Owen executed his will. Witnesses in the Cheeks' case testified that the testator was competent and sharp, similar to the testimony in the present case.

Independent consent can be shown in several ways. First, did the donor/testator have the advice of a competent person? Was that person disconnected from the grantee? Was that person wholly devoted to the grantor's/testator's interests? *Howell v. May,* So.2d - - - -, 2007 WL 1747120 (Miss. App.). Citing *Dean v. Kavanaugh,* 920 So.2d 528, 537 (Miss. Ct. App. 2006). In the preparation of the will, Owen had the advice of attorney Bob Lawrence who without question was an attorney competent to provide this advice. The testimony is clear that Mr. Lawrence had no

connection with the McCormick family. His only interest was to produce a will which was in strict conformity with the desires of Owen. He testified that this was accomplished.

Howell v. May, (supra) is also significant for an additional finding. One of the issues in that case was a challenge of a gift made by the donor to the defendant's children. The Court found that a confidential relationship existed between the donor and her daughter. However, the Court further found that no confidential relationship existed between the donor and the grandchildren. On this basis, the Court refused to set aside the gifts to the grandchildren.

In this case, there is no evidence whatsoever that a confidential relationship existed between Owen and the children of Eddie to whom gifts were made.

Two elements of the independent consent test also exist in Owen's relationship with Paul Davis. The evidence establishes that Mr. Davis was a competent person to give advice to Owen. The evidence also establishes that in all of his dealings with Owen, Paul Davis was devoted to Owen's interest only. While Mr. Davis was not disconnected from the family of Eddie McCormick, the fact that he recommended consultation with a disconnected attorney (Bob Lawrence) certainly establishes that Mr. Davis was giving Owen competent advice and was devoted to his interest.

4. ***Application of Law to the Facts of This Case.***

a. ***Good Faith of the Grantee/Beneficiary*** - The uncontradicted testimony of Eddie was to the effect that he had no involvement in the preparation or execution of the Last Will and Testament of Owen. (R-79) Owen had requested on several occasions that he be taken to Crystal Springs by Eddie to live in his household. These requests were resisted by Eddie. He relented only when it became evident that it was absolutely necessary to make the move. Eddie obtained the consent of his wife, which was also given reluctantly. (R-411)

During all of the time that Owen lived with Eddie up until the date of his death, Owen never gave a power of attorney to Eddie. (R-421)

Eddie never initiated discussions with Owen regarding any of the gifts made to Eddie's children. (R-426)

Eddie's good faith is further demonstrated by his attempt to uphold the validity of the trust for Brandon. If the validity of this trust is upheld, all of the money goes to Brandon. If the validity of the trust is not upheld, this money becomes part of the estate, as to which Eddie would receive half, either under the will or under any intestate succession.

Perhaps the most important evidence of the good faith of Eddie involves the arrangements Owen made regarding his investment accounts. Owen changed all of these accounts by removing Belinda's name and having the accounts listed in the name of Owen alone, payable on death to Eddie. Owen then gave verbal instructions to Eddie that upon his death the proceeds were to be divided equally with Belinda. A person acting in bad faith would perhaps simply remain silent on these verbal instructions. However, Eddie voluntarily disclosed to Belinda the instructions Owen had given to him. Eddie's good faith is further demonstrated by his suggestion to Owen regarding gifts to grandchildren. When Owen asked for his input, Eddie suggested additional gifts to all grandchildren including Belinda's children. (R-426) While the rejection of these suggestions shows Owen's independence, it should not detract from evidence of Eddie's good faith.

b. ***Owen's Knowledge and Deliberation*** - Both Belinda and Eddie have acknowledged that Owen was well aware of his assets. Belinda testified on cross examination that Owen knew all of his financial arrangements. (R-241) The record contains many instances in which Owen acted with deliberation and full knowledge of his affairs. Owen had reached a decision prior to October 26, 2002 to remove Belinda from his investment accounts. The testimony shows that

Owen was concerned over his inability to obtain information from Belinda regarding his accounts. When Eddie arrived at Owen's home on that date, Owen directed Eddie to take him to the Long Beach branch of Hancock Bank. That day being a Saturday, Owen obviously knew that was the only Hancock Bank branch open. He then proceeded to close all of his accounts and open new accounts with his name only, payable on death to Eddie. He instructed Eddie to divide the proceeds with Belinda at his death. (R-30,31)

Owen and Eddie returned to Gulfport on November 14, 2002. Owen closed his safe deposit box and made arrangements to reinvest some of his assets that were on deposit at Whitney Bank. (R-72,73) Owen was specifically aware that Belinda had possession of a $33,000.00 CD in their joint names. He repeatedly asked for the return of this CD. Belinda reluctantly delivered the CD to Owen at Christmas 2002.

Another incidence of Owen's deliberation in regard to his affairs concerned the change of Executor on his will. Since Belinda had moved to Texas, he thought it advantageous to substitute Eddie. (R-78) Eddie had no involvement in the preparation of the new will. (R-79)

Owen also initiated contact with Paul Davis regarding changes in his will. (R-492) Owen asked Paul to come to Eddie's home when no one else was present. (R-493) Owen had several meetings with Paul which were independent of any other members of the McCormick family. (R-494-501) During these meetings Paul Davis stated that Owen had detailed knowledge of his business and personal affairs and was "sharp as a tack". (R-491)

Owen also exhibited full knowledge of his affairs and detailed deliberation in connection with his gifts to grandchildren after he moved to Crystal Springs. He raised the issue with Eddie and asked for his input. Eddie made some notations on suggested gifts to all four grandchildren. This was summarily rejected by Owen. Owen then proceeded to make the gifts as

he chose. (R-426,429)

Owen also was concerned over his grandson Brandon. He apparently knew that Brandon had struggled in his educational endeavors. He did not want to directly give money to Brandon. He therefore initiated the idea of a trust with Paul Davis. Paul suggested a termination of the trust at age twenty-five. This was rejected by Owen, who required a termination at age thirty. (R-512-515)

The record testimony cited immediately above is also clear evidence of the party initiating these actions. In each instance, it was Owen who initiated the change in his will, the gifts to the grandchildren, and the trust for Brandon. All of these elements apply in the determination of good faith. There is no evidence whatsoever that any of the beneficiaries of these acts, (be it Eddie McCormick, Mollie McCormick, Carrie McCormick or Brandon Ellzey) had any input or any kind of involvement whatsoever in the decision by Owen to undertake these acts.

c. ***Independent Consent and Actions*** - The record also contains numerous examples of Owen's independence. He acted independently to terminate the power of attorney which had been created by Belinda. Belinda herself testified that Owen was very strong willed. (R-246,246) Owen was dissatisfied with his living arrangements at Seashore Manor. He alone made the arrangements to check himself out. (R-187) As recited above, he alone made the decision to remove Belinda from his investment accounts. (R-102)

Practically all of the testimony of Andy Sawyer demonstrates Owen's independence. He alone made the decision to list his house for sale. He negotiated the commission. He dictated the terms of the rental agreement, giving consideration to the fact that the renter would have pets. When he became dissatisfied with the number of showings for the sale of his house, he pulled the house off of the market. (R-364) He insisted that his children not be involved in the sale of his

house. (R-369)

Owen showed anger at the suggestion of a conservatorship. (R-184) He made extensive efforts to have the power of attorney revoked, including contacting an independent attorney. (R-422) He rejected any suggestions of Eddie regarding gifts to his grandchildren. (R-429)

When Belinda moved to Texas, Owen eliminated the option of living with her due to the fact that she was living with a man outside of marriage. (R-240)

We have previously referenced the transcript for the testimony of George Marx relating the opening of a bank account by Owen. We have also referenced the testimony of Paul Davis regarding the trust. We again cite the testimony of Mr. Marx to establish the independence of Owen. When the bank had checks on the account printed with both Owen's name and Eddie's name, Owen immediately insisted that the bank have the checks reprinted without Eddie's name. Likewise, when Paul Davis suggested termination of the trust at age twenty-five, Owen rejected this advice and insisted termination at age thirty.

d. ***Testamentary Capacity*** - In evaluating the deposition of Dr. Rusch, consideration must be given not only to the substance of the testimony, but also to the remoteness of the facts testified to. The events related by Dr. Rusch occurred over six months prior to the making of the will and the gifts in question.

> This Court has also recognized that although a testator may not possess capacity one day, the next week he may have a lucent interval in which he has the capacity to execute a valid will. Therefore, testimony regarding capacity for witnesses who have not seen the testator in months will be deemed irrelevant by the Court. The date of execution is of utmost importance.... Because the Court will deem irrelevant any testimony dating back months before the time the will was signed, much of the appellees' proof was too distant to have significant import. *In Re: Last Will and Testament and Estate of Smith,* 722 So.2d 606 (Miss. 1998) p.611.

The idea that Owen was somehow rendered permanently incompetent by the stay in Garden Park Hospital is also refuted by the findings of the Court in the case of *Brown v. Ainsworth,* 943 So.2d 757 (Miss. 2006). That case involved an inter vivos gift by a grantor who had previously been diagnosed as schizophrenic and had spent extended periods of time in a mental hospital. In finding the grantor competent to make the gift, the Court states "even if an individual has suffered from a severe mental defect, 'temporary or intermittent insanity or mental incapacity does not raise a presumption that such disability continued to the date of execution'". *Brown,* 943 So.2d at 764. The Court went on to say that the party challenging the validity of such a gift bears the burden of showing by ***clear and convincing evidence*** that the grantor lacked capacity. In the present case, there is ample uncontradicted credible evidence that Owen possessed the requisite mental capacity to make his will and the gifts.

Testamentary capacity is based upon three factors, the ability to understand the effects of the acts undertaken; awareness of the natural objects of the testator's bounty and their relationship; and the ability to determine desired dispositions of property. *In Re: Estate of Holmes,* 961 So.2d 674 (Miss. 2007). References to the testimony of witnesses in this case clearly demonstrate Owen's testamentary capacity. Paul Davis and Bob Lawrence both testified that Owen understood the effects of his acts in making the will. Owen initially wanted only to change Executors. Through discussions with Paul Davis, Owen became aware that his will did not accomplish his desire to evenly divide his estate between Eddie and Belinda. Owen was quite aware of his assets, and became concerned over the possession of one of his certificates of deposit by Belinda. The beneficiaries under his will were his only two children, whom he treated equally. (This begs the question of what is accomplished if the will is invalidated and Eddie and Belinda inherit equally through intestate succession?)

Belinda claims that it is a "glaring omission" that no testimony was had from Dr. McDonnell or Dr. Hankins. The simple fact is that neither of these doctors were present or had any involvement during the time the gifts were made, or when the will was executed, or when the trust document was signed. The fact that they did not testify is simply the result of the fact that they would have had nothing to say which would be probative.

5. ***Belinda's Request for Relief.***

The first request for relief deals with the accounts changed by Owen on October 26, 2002. Belinda wants these accounts awarded to her by the appellate court. She did not ask the trial court to award her these accounts. They were the subject of a stipulation at the outset of trial. (R-14-15) These assets are still being held by Eddie in his capacity as Executor subject to the stipulated division and the closing of the estate which has not yet occurred. Since Belinda did not ask for this relief in the trial court, it is not an appropriate request here. Normally, an account with a "POD" designation passes outside the will and is not subject to the administration of the Estate except in extraordinary circumstances. However, Owens instructions to split these assets removes them from this category. Eddie believes theses assets are part of the Estate (subject to the stipulations). If mistaken in this belief, the matter should be addressed to the court administering this Estate, which is the Chancery Court of Copiah County.

Secondly, the AIG annuity and the Copiah Bank accounts are subject to the same stipulation entered into by Belinda at the outset of trial. She asked for no relief at trial that these assets be awarded to her. They are being held subject to the stipulation and the closing of the estate.

Third, Belinda admitted at trial that she was not contesting and had never contested the sale of the house. (R-225-26) She now, for the first time ever, makes the bizarre request of this Court not to "undo" the transaction, but to hold it legally void.

Fourth, while Belinda devotes much energy on appeal to addressing the undue influence and lack of capacity issues as relate to gifts by Owen to Eddie's children, on page 37 of her brief she states that she does not want the gifts set aside.

Therefore, we are confronted with the inexplicable situation of Belinda foregoing relief she sought from the trial court, but asking relief from the appellate court that she did not seek from the trial court.

Relief or issues not sought or raised at trial may not be addressed in this appeal. "We accept without hesitation the ordinarily sound principle that the Court sits to review actions of trial courts and that we should undertake consideration of no matter which has not been first been presented to and decided by the trial court. We depart from this premises only in unusual circumstances." *Corey v. Shelton,* 834 So.2d 681, 686 (Miss. 2003) quoting from *Educational Placement Services v. Wilson,* 487 So.2d 1316 (Miss. 1996).

The failure of Belinda to raise an issue at trial and thus preserve it for appeal renders the issue procedurally barred for the purposes of this appeal. *Allen v. National Railroad Passenger Corp.,* 934 So.2d 1006 (Miss. 2006).

CONCLUSION

At trial Belinda did not contest the sale by Owen of his house. Belinda did not contest the equal division of the pay on death assets which were the subject of the oral instruction by Owen to Eddie. The division of these assets was stipulated at the outset of trial by Eddie and Belinda. For the first time in her brief, Belinda informs the Court that she does not contest the gifts by Owen to Eddie's children.

This Court should determine that, as to the sale of the house, there is no issue presently before the Court. As to the stipulated division of assets, the Court should further determine that this is not an issue before the Court. The Court should further rule that the inter vivos gifts to Eddie's children are no longer at issue.

As to the will, the court should determine that, in spite of the correct ruling of the trial court that the contest was barred by the statute of limitations, all of the facts necessary to determine the validity of the will were before the trial court. All of the credible evidence supports the trial court's ruling that Owen possessed requisite mental capacity and that the execution of the will was not the product of undue influence.

Respectfully submitted,

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CERTIFICATE

I, Olen C. Bryant, Jr., attorney for Eddie Owen McCormick, hereby certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the above and foregoing to:

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CHANCELLOR, COPIAH COUNTY CHANCERY COURT

This the 2nd day of May, 2008.

Olen C. Bryant, Jr.