

**IN THE SUPREME COURT OF MISSISSIPPI  
NO: 2007-CA-01420**

**BELINDA ELLZEY**

**APPELLANT**

**VERSUS**

**EDDIE OWEN MCCORMICK**

**APPELLEE**

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**BRIEF OF THE APPELLANT BELINDA ELLZEY**

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**Oral Argument Requested**

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**NICHOLSON & NICHOLSON**

**Gail D. Nicholson, MSB**

**P.O. Box 162**

**Gulfport, MS 39502**

**Phone: (228) 868-3288**

**Fax: (228) 863-1818**

### CERTIFICATE OF INTERESTED PERSONS

The following persons may have an interest in the outcome of this case:

1. Belinda Ellzey, Appellant/Contestant
2. Eddie Owen McCormick, Appellee/Proponent
3. Edward E. Patten, Jr., Chancellor  
Copiah County Chancery Court  
Post Office Drawer 707  
Hazlehurst, MS 39083-707
4. Jim Persons, Chancellor  
Harrison County Chancery Court  
Post Office Box 457  
Gulfport, MS 39502
5. Olen C. Bryant, Esquire Counsel for the Appellee  
Tim Rutland, Esquire  
Post Office Drawer 899  
Hazlehurst, MS 39083
6. Gail D. Nicholson, Esquire, Counsel for Appellant  
Nicholson & Nicholson  
Post Office Box 162  
Gulfport, MS 39502  
(228) 868-3288

BY:

  
GAIL D. NICHOLSON (MSB # )

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## **I. STATEMENT OF THE CASE**

### **A. Course of the proceedings in the Court below.**

In April 2002, Owen McCormick was admitted to Seasons, a geriatric psychiatric ward at Garden Park Hospital in Gulfport, Mississippi, for a two week stay wherein he was diagnosis with dementia with delusions and was displaying symptomology to include paranoia, aggression, confusion and forgetfulness. Two treating physicians signed affidavits that he was incapable of caring for himself or to make decisions in his best interest. (RE-109; Exhibit 7, attachment) The treating Psychiatrist opined this condition was lifelong and not remissible. (Exhibit 12, pp.17-30)

On March 26, 2003, Owen McCormick died in the Hardy Wilson Hospital at 84 years of age. The Death Summary documented, "fall with multiple fractures, resultant multi-infarct dementia, pneumonia, pneumothorax, and subcutaneous emphysema, osteoarthritis, essential hypertension, chronic atrial fibrillation, chronic obstructive pulmonary disease, hydronephrosis, right kidney, gastresophageal reflux disease, and chronic renal failure." (Exhibit 13, p.37)

On April 1, 2003, Mr. McCormick's daughter, Belinda Ellzey, (hereinafter "Belinda"), filed a Petition for Issuance for Letters of Administration, in the Chancery Court of Harrison County, Mississippi, First Judicial District (RE-5) advising that her Father had resided for more than fifty years in Gulfport, Mississippi; that he owned certain real and personal property there. She advised the Court that a "purported Will" existed which she averred was invalid, illegal, and void due to her Father's advanced years, psychiatric history, and medical problems at the time of its creation. She further

advised the Court that she believed that there was a previous Will which would be sought out during the course of the administration of the estate.

The Order granting Letters of Administration issued on April 1, 2003, (RE-8) appointing Belinda as the Administratrix of her Father's estate, and on April 29, 2003, she filed a Petition to Recover Assets; to Set Aside Invalid Will; for an Accounting; and for Equitable Relief. (RE-10) This Petition was filed in response to her discovery, following her Father's death, that in the final few months of his life, her brother had become the beneficiary, person payable on death, or joint tenant with right of survivorship for almost every asset owned by her Father.

Rather than meet these pleadings on the merits, Eddie McCormick filed a Petition for Probate of Will in Copiah County on May 6, 2003. (RE-16) He made no reference to the pending Harrison County, Mississippi matter and presented a self serving Order to the Court providing that his Father was of sound mind at the time he signed the Will and relieving Eddie McCormick of any duty to file an Inventory, obtain an appraisalment, or post a bond. This Judgment admitting the Will to Probate and Granting Letters Testamentary was signed on May 6, 2003. (RE-28)

On May 12, 2003, Belinda Ellzey filed a Special Appearance to Assert Lack of Jurisdiction Over the Subject Matter, specifically raising the issue of the invalid Will in that pleading and attaching thereto copies of the Harrison County Chancery proceedings; requesting that the Copiah County Chancery Court transfer the case to Harrison County Chancery Court; and requesting that the Chancellors of the two jurisdictions confer. (RE-31) Although the Chancellors did confer, a ruling on the

jurisdictional issue did not get entered until January 5, 2006, in part because of the chaos created in Harrison County by Hurricane Katrina during the intervening months.

The Order dismissed the Harrison County action without prejudice pending litigation of the issue of the validity of the Will in Copiah County and provided further that, should the Will be found invalid, the cause would be reinstated and administration of the intestate estate would proceed in Harrison County. (RE-42)

Within a week of this Order being entered, Belinda filed a Petition to Contest Probated Will, to Set Aside Intervivos Gifts, for an Accounting, and for an Order Compelling Disgorgement of Wrongfully Acquired Assets or the Proceeds therefrom in Copiah County. (RE-46) On January 24, 2006, a Response to this petition was filed by Counsel for Eddie asserting a boiler plate statute of limitations defense. (RE-50)

Thereafter, discovery was completed without any objection or reference to the statute of limitations defense. The statute of limitations argument was not raised until the first day of trial, on December 11, 2006. The Court allowed testimony to proceed and then three months later faxed a Ruling Granting the Affirmative Defense of Statute of Limitations (RE-53) to Counsel for Belinda at close of business on Friday, March 23, 2007, when trial was set to resume at 9:00 a.m. on the following Monday, March 26, 2007.

Trial concluded on March 27, 2007; the Court's Findings of Fact and Conclusions of Law was rendered on June 25, 2007 (RE-59); and reduced to Final Judgment on July 16, 2007, (RE-106) from which this appeal follows.

**B. Facts relevant to the issues presented for review.**

In April 2002, Owen McCormick was diagnosed with dementia with delusions after being admitted to Seasons, the geriatric psychiatric ward of Garden Park Hospital in Gulfport, Mississippi for a two week stay. His progress notes for April 18<sup>th</sup> reflect "problem resolving delirium, Son says its ongoing and progressing over the last two years", " he called someone to come fix his car and pulled a gun on them when they arrived". The notes further document episodes of paranoia, aggression, confusion, and forgetfulness. (Exhibit 12, exhibit 2)

His treating Psychiatrist, Dr. James Rusch, noted that Mr. McCormick would try to present himself as having no difficulty; would say he was fine; and would accuse others of trying to trick him. Mr. McCormick who was in his mid eighties, would wander, lost, into other patient's rooms, hide his medication, and tried very hard to go home saying, "I need to take care of stuff for the Sheriff." He had been very noncompliant with medical personnel, wanting to leave, and Eddie calmed him down. (R-85)

Dr. Rusch noted that it was important to Owen not to be placed in assisted living. He also noted highly significant cognitive deficiencies; documented that Owen McCormick was highly suspicious of his son with whom he did not get along well; and gave the opinion that he would need twenty-four hour observation and care for the rest of his life. (Exhibit 12, exhibit 2) On April 22, Dr. Rusch noted, "He will resist external intervention, but Guardianship is indicated since components are, we feel, persistent to put Patient at risk. Filled out Conservatorship form, but family will have to consent to our efforts before this can be filed. "



When asked, at his deposition, about the possibility of recovery or improvement, Dr. Rusch explained that the progressive dementia would stair-step down level by level and never up. The brain tissue is dead and it will not come back, he explained. He noted that Owen McCormick would want to appear independent and self directed but that he had impaired executive functioning and did not have the abstract ability to see his long term course or to see that possibly the information he was using did not fit a factual basis. (Exhibit 12, p.30)

Dr. Rusch acknowledged that a lay person could think that Owen McCormick was fine because Owen would say that everything was fine and would only allow focus on issues he was confident in. Dr. Rusch was firm in his opinion that Owen's current state of dementia was a baseline condition, long term, not treatable nor remissable. (Exhibit 12, pp.17-34) He signed an affidavit, which he testified that he did at Eddie's request, opining that Owen McCormick was incapable of caring for himself or to make decisions in his best interest. (RE-109) Dr. Valerie Lennox, one of Owen's primary care physicians, also signed an affidavit to the same end. (Exhibit 7, attachment)

In March 2003, Owen McCormick was once again in the hospital, this time in Copiah County where he had come to live with Eddie, who was the Administrator of the medical clinics where Owen was being treated. Reference to the hospital records reflects that, as in the 2002 hospitalization, Mr. McCormick was wandering into other patient's rooms, lost, hallucinating, and on the days preceding his death, in restraints to protect him from himself, trailing urine as he walked, incontinent both bladder and bowel, unable to speak to his physical therapist, unintelligible, and unable to stick out his tongue at the physical therapist's request.

Despite the frailties reflected by his medical records, (Exhibit 13) Eddie testified, and the Court accepted, that at 8:00 p.m. on the evening before he died, Owen McCormick chose as his last words, "Eddie, I trust you completely." (R-36)

During this hospitalization, wherein he was sometimes restrained to prevent him from hurting himself, Mr. McCormick signed a deed selling his house (Exhibit 24) and created a trust instrument with the help of a nurse holding his hand on the pen which named Eddie as the trustee for funds being left to his grandson, Brandon Ellzey, Belinda's son, a young man who had absolutely no relationship whatsoever with Eddie McCormick. (Exhibit 8; R-p.197)

Prior to these hospitalizations Owen McCormick lived on the Mississippi Gulf Coast, in the same house for over fifty years. Up until the day he left to go live with his son Eddie in Copiah County, rather than be placed in an assisted care facility against his will, he had never placed Eddie's name on any asset and had designated Eddie as a beneficiary on only one of his many investment accounts. From October 26, 2002, until the day of Owen's death, March 26, 2003, that changed radically with Eddie becoming either the joint tenant with right of survivorship, beneficiary, or "pay on death" designee on every single asset owned by Owen McCormick with the exception of his state P.E.R.S. retirement. Eddie testified that Owen added him to the P.E.R.S. account then changed his mind and took him back off. (R-122)

It is noteworthy that Eddie was the Administrator of the Copiah Medical Associates which maintain clinics in Hazelhurst and in Crystal Springs. He had held this position for twenty-seven years and ran the total business operation of both clinics. The two physicians that treated Owen while he was in Copiah County were Dr.

McDonnell, who had worked with Eddie for twenty-seven years, and Dr. Hankins, who had worked with Eddie for twenty-two years. Despite his long history with these two Doctors, Eddie, who decided where Owen would go for medical care, offered testimony from neither at the trial of this matter. (R-112-113)

The medical records from Owen's two hospitalizations in Copiah County reflect his admission on March 3, 2003 for cerebralvascular accident with complications from pneumonia, chronic renal insufficiency, chronic heart failure, chronic obstructive pulmonary disease and atrial fibrillation. The CT of Owen McCormick's head done on March 3, 2003, reflects extensive cerebral atrophy, severe chronic appearing aschemic changes throughout the white matter, and extensive vascular calcification involving the vertebral incaratid vessels." (Exhibit 13, p.111, 116).

When Owen was admitted again on March 12, 2003, it was because of a fall with multiple rib fractures and pneumathorax with complications from multiinfarct dementia, osteoarthritis, essential hypertension, chronic atrial fibrillation, chronic lung disease, hydromorphosis right kidney, gastro-esophagus disease, and renal failure. Owen died fourteen days thereafter. Belinda nor her daughter, Brooke, were informed of either hospitalization until a very few days before Owen died. (R-202, 311)

As the Brother and Sister were leaving Owen's funeral, Eddie handed Belinda a copy of Owen's new Will and a trust document showing that he was now in control of money Owen had held in a bank account for Belinda's son, Brandon's, education. (Exhibit 8) Both Belinda and her daughter Brooke testified that this was the first that they knew of a new Will. (R-310-313; 194-197) Thereafter, Belinda asked her Brother

about the status of some of her Dad's assets and was met with the response, "its none of your business" which caused her concern and as a result she opened an estate for her Father.

Upon learning that Belinda had opened an estate, Eddie wrote a self serving letter disclosing the status of various assets. (Exhibit 9) The letter is full of, "I'm sure you recall" language, very little of which Belinda recalls at all. The end result of Eddie's disclosure and Belinda's subpoenas to Owen's bank made clear that all accounts, certificates of deposit, and investments had been changed since Owen went to live with Eddie to make Eddie either the beneficiary, the joint tenant with right of survivorship, or the POD designee. Eddie does concede, in this letter, telling Belinda, "its none of your business" in response to her inquiry about one of her Father's assets and then follows with additional, "you will recall" explanations which benefit his version of events and bear little resemblance to Belinda's.

Both Belinda and Brooke testified that Eddie promised to keep Owen's affairs as a "family decision-making process" but that they only learned of all the changes in assets after the Estate was opened. Eddie admits he never told Belinda (R-124), and did not copy her with letters when he began cashing in assets even though he now says they are half hers. A position he first took after the Estate was opened. (R-136-142)

During litigation the facts surrounding the changes and transfers of Owen's assets were revealed:

### The Sale of Owen's House:

The Realtor filled out the Seller's Disclosure form even though the law requires the Owner to do so, and he knew "it was not right to do so." He admitted that the practice in the industry is for the Seller fill out the form. (R-pp.370-372)

The Realtor identified copies of the Disclosure form in his file which were identical except one page would reflected an "X" where Owen should initial and another bore his initials. (Exhibit 18 and 19)

The Realtor admits that Owen would repeatedly remove the "for sale" sign from his yard and would be adamant that he wanted to sell on one day and just as adamant that he did not on another. (R-pp.384-387)

The Realtor was not informed that Eddie had previously obtained an affidavit from his Father's treating Psychiatrist and primary care Doctor that his Father was incompetent to handle his own business affairs, nor was he advised that Owen was in the hospital and was being restrained by straps to his bed on the days surrounding his signature of the deed which was signed five days before his death. The Realtor, testified that it would have certainly been a matter of concern to him had he known as it could void the sale. (R-pp.393))

### The December 2002 Will:

The lawyer, Paul Davis, who wrote and witnessed Owen's new Will, was Eddie's brother-in-law, (their wives are sisters), next door neighbor, and close personal friend. He met with Owen on four occasions for approximately fifteen minutes each, produced a draft of the will, and because of his concern that he might be perceived as lacking independence, took Owen to see another attorney, Robert Lawrence, who attended the

same church with Paul, served as the attorney for a school board which Paul was a member of, and reviewed the Will "as a favor" for Paul. (R-487-532) Neither of these attorneys opened a file, were paid a fee, nor had any notes from their representation of Owen. Neither knew of his psychiatric history.

Incredibly, Robert Lawrence, testified that it was a "red flag" to him when he was asked to review the Will; that Davis had given him a "head's up" on concerns of undue influence. (R-561) Mr. Lawrence testified that it was a common practice to video tape or otherwise memorialize the competency of an elderly client when such issues might be raised, but in this case, he had not one note from his one meeting with Owen wherein he reviewed a Will created by Paul, which was thereafter modified by Paul, and signed with the two attorneys as witnesses thereto. (R-561-580)

Mr. Lawrence, who met Owen only once for about an hour, testified that it also would have mattered to him had he been advised of the previous diagnosis of dementia and the sworn testimony of Owen's treating psychiatrist that Owen McCormick was not competent to conduct his own business affairs. (R-577)

Copiah County Bank:

The Banker who assisted Owen McCormick in opening accounts in Copiah County was the college roommate and fraternity brother of Eddie. He and Eddie and Paul all have cabins at a camp on Lake Yucaton in Louisiana where they go for vacations. He met with Owen and opened an account pursuant to Owen's directive then had to change it when Owen did not like Eddie's name appearing on his checks. He had no knowledge of Owen's psychiatric history. (R-480-484) Eddie remained a Joint Tenant With Rights of Survivorship on the account.

Eddie was a big fish in a small pond, and his Father, once he came to live with Eddie, was submersed in his orbit. This is consistent with Dr. Rusch's observations of the family dynamics while he was treating Owen. He noted that Eddie was a strong personality who was the driving force behind getting the affidavits for conservatorship signed by the Doctors. He documented twice that Owen did not trust Eddie. He also noted that Eddie reported that the dementia had been progressing over the past two years. (Exhibit 12, pp. 27, 37, 50) Dr. Rusch also noted that Belinda could not say "No" to her Dad, and could not tell him what to do. "He would self direct."

## **II. SUMMARY OF THE ARGUMENT**

The Copiah County Chancery Court lacked jurisdiction under the doctrine of priority of jurisdiction. The Court erred in finding that the Will contest was barred by the two year statute of limitations as the Special Appearance filed in Copiah County squarely set forth the challenge to the Copiah County Will; an additional pleading was filed within days of the Order being entered after the Chancellors conferred on jurisdiction; and Eddie did not bring forward his motion to dismiss on the ground of statute of limitations until the first day of trial.

The unrefuted medical testimony establishes that Owen McCormick was unable, because of substantially impaired executive functioning judgment to have the abstract ability to see his long term course or to see that information he was using did not fit a factual basis, and therefore could not conduct his own business affairs in his best interest, thus, all legal acts attributed to him while under the care and control of Eddie are void or voidable.

The stipulation with regard to bank account funds belonging to Brandon Ellzey did not encompass a stipulation that the funds remain in the Trust created on Owen's death bed, which is controlled by Eddie.

The Executor should not be relieved of his fiduciary obligation to account to his sister and co-heir for their Father's assets.

### **III. ARGUMENT**

#### **ISSUE I: JURISDICTION OF THE ESTATE OF OWEN MCCORMICK WAS PROPERLY IN HARRISON COUNTY, MISSISSIPPI**

On April 1, 2003, Belinda filed a Petition for Issuance of Letters of Administration in Harrison County, Mississippi wherein she advised the Court that a purported Will existed which she averred was invalid, illegal, and void due to her Father's advanced years, psychiatric history, and medical problems at the time of his signature. (RE-p.5)

On April 29, 2003, she filed a Petition to Recover Assets; to Set Aside Invalid Will; for an Accounting; and for Equitable Relief. (RE-p.10) Both of these matters were served on Eddie McCormick prior to his filing a Petition for Probate of Will in Copiah County on May 6, 2003. (RE-p.16) These two actions were between the same parties, and sought resolution of the same issues. Under the Mississippi Rules of Civil Procedure, no technical forms of pleadings are required so long as notice of the substance of the claim is given to the parties. see MRCP, Rule 8; see also *In Re: Administration of Estate of Abernathy*, 778 So.2d 123 (Miss. 2001). Belinda's pleadings, in both causes, are very clear as to the nature of her complaint.

This Court has repeatedly stated the, "well established rule in this jurisdiction,"



that where two suits between the same parties over the same controversy are brought in Courts of concurrent jurisdiction, the Court which first acquires jurisdiction retains jurisdiction of the whole controversy to the exclusion or abatement of the second suit.

***Scruggs, et.al. v. Merkle***, 804 So.2d 1000, 1006 (Miss. 2001)

In the case at bar, the two Chancellors conferred as is appropriate under the Chancery Rules, and the Harrison County Chancery Court took a back seat allowing the Will contest to go forward in Copiah County and reserving the right to resume jurisdiction should the Will be proven invalid.

It is respectfully submitted that the original filing in Harrison County properly presented a prima facie case of jurisdiction. <sup>1</sup>Owen's fixed place of residence for over fifty years was in Harrison County, Mississippi. The conveyance of his home was under challenge. It is established in the record that he still had personal property in Harrison

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<sup>1</sup> Miss Code Ann. §9-5-83 establishes jurisdiction for administration of an estate:

The Court in which a Will may have been admitted to probate, Letters of Administration granted, or a guardian may have been appointed, shall have jurisdiction to hear and determine all questions in relation to the execution of the trust of the Executor, Administrator, Guardian, or other officer appointed for the administration and management of the estate, and all demands against it by heirs at law, distributees, devisees, legatees, wards, creditors, or others; and shall have jurisdiction of all cases in which bonds or other obligations shall have been executed in any proceeding in relation to the estate, or other proceedings, had in said Chancery Court, to hear and determine upon proper proceedings and evidence, the liability of the obligators, and/or obligations, whether as principal or surety, and by decree and process to enforce such liability.

2.. Venue is established by Miss Code Ann. §91-7-1

Wills shall be proved in and Letters Testamentary thereon granted by the Chancery Court of the count in which the testator had a fixed place of residence. If he had no fixed place of residence and land be devised in the Will, it shall be proved in and Letters granted by the Chancery Court of the county where the testator died, or in the county in which some part of the property may be.

County in his Hancock Bank Savings and CD accounts.

In *National Heritage Realty v. Estate of Boles*, 947 So.2d 238 (Miss. 2006) this Court discussed in great detail the application of the venue and jurisdiction statutes in the administration of an estate.

The Court, therein, noted that there are three possible places to open an estate as set forth in Miss. Code Ann. §91-7-63 (1):

- (1) The Chancery Court of the county where the intestate had a fixed place of residence at the time of his death;
- (2) If there was no fixed place of residence, then the Chancery Court of the county where (a) the intestate died, or (b) where his personal property or some part may be.

In *Boles*, the original filing in Tallahatchie County was deemed void by the Court because the Decedent's death met none of the requirements of §91-7-63 (1). In the case at bar, the Decedent's "fixed place of residence" was at issue and he still held personal property in Harrison County, Mississippi in the form of various bank accounts and certificates of deposit.

Priority jurisdiction should have kept this case in the Court of initial filing, in the First Judicial District of Harrison County Chancery Court, and upon remand it should be sent to Harrison County.

**ISSUE II: THERE WAS NO STATUTE OF LIMITATION BAR TO THE  
WILL CONTEST IN THIS ESTATE AND, ASSUMING FOR  
SAKE OF ARGUMENT THAT THERE WAS, IT WAS WAIVED  
WHEN IT WAS NOT RAISED UNTIL TRIAL BEGAN**

On the eve of the second day of trial, the Chancery Court entered its Order finding that the Will Contest was barred by Miss. Code Ann. §93-7-23 (sic). (RE-53)

§91-7-23 is the applicable statute of limitations and it is respectfully submitted that the will contest was a well established point of contention within six weeks of Owen McCormick's death.

The Harrison County Chancery pleadings challenge the Will and asked that it be set aside. Those pleadings were exhibits to the Special Appearance filed in Copiah County on May 12, 2003. Eddie McCormick defended the Harrison County matter, and initially the Copiah County matter, through his attorney Robert Lawrence and participated fully in discovery including the Will contest issue up until the day of trial.

The Chancellor, in granting the dismissal based upon the statute of limitations, found that the Special Appearance to challenge subject matter jurisdiction and attached exhibits was insufficient to preserve the challenge to the Will. This Court has found that distinctions between an general appearance or a special appearance is a moot issue without legal significance. see **Schustz v. Buccaneer, Inc.**, 850 So.2d 209 (Miss. 2003). Mississippi does not recognize special appearances except where a party appears solely to object to the Court's jurisdiction over her person on grounds that she is not amenable to process. see **Isom v. Jernigan**, 840 So.2d 104 (Miss. 2003).

The practical matter is that the issue of the validity of the will was squarely before both Courts, Harrison County and Copiah County, and the request of Belinda that the Courts confer and determine which Court would go forward was timely filed along with the original pleading in Copiah County.

Hurricane Katrina disrupted the Coast counties and thus an Order directing that the matter proceed in Copiah County for purposes of examining the will was not entered until January 2006. Within days, a separate pleading setting forth the will contest was

filed by Belinda. (RE-46) The Chancellor's ruling strains to defeat the challenge to the Will utilizing form over substance.

Regardless of this strained interpretation, recent case law makes it clear that affirmative defenses such as a statute of limitations defense are waived if they are not raised and pursued in a timely matter, especially when there has been active participation in litigation such as is the case in this instance. see Whitten v. Whitten, 956 So.2d 1093 (Miss. Ct. App. 2007); ***Estate of Grimes v. Warrington***, 2008 MSSC 2006-CA-01926-022108 (2008).

**III. THE CHANCELLOR'S FINDINGS OMITTED SUBSTANTIAL  
EVIDENCE RESULTING IN AN ABUSE OF DISCRETION  
AND CLEAR ERROR WITH REGARD TO ISSUES OF  
COMPETENCY AND UNDUE INFLUENCE**

Comparing the Chancellor's finding with the actual evidence before the Court compels a finding of a abuse of discretion.

**Finding of Fact:**

...it is noted that one of the reasons that a Conservatorship was not filed is that Owen voiced that it would be embarrassing to him with his friends at the Courthouse where he had previously worked. The Court finds this as supporting evidence of Owen's ability to recognize the ramifications of legal process or procedures."

(RE-p.63; Findings of Fact and Conclusions of Law, p. 5. )

The record reflects that only Belinda complained about the embarrassment. Eddie forwarded to Belinda the two affidavits that he had obtained, one from the treating psychiatrist Dr. Rusch and one from the primary care physician, Dr. Valerie Lennox, each opining that Owen was incapable of making decisions in his own best interest. These affidavits, on their face are addressed to, "the Honorable Chancery

Court of Harrison County, Mississippi." Belinda testified:

A. What happened? My Dad-it was there, and I -my Dad got angry and upset when he saw it was there at the Courthouse. And he said "what is this?" and I told him it was just some papers that came from Eddie and that he had sent them to me and he wasn't happy with it. He didn't understand it at all. He didn't know- basically he didn't want anybody to be in control of him. He didn't want somebody in power of him or in control of him.

Q. So he saw the documents and objected to them?

A. Oh, definitely yes.

Q. Did you have a discussion with Eddie about it?

A. Yes, I told him that I was very upset about it because it had made Dad upset. That I did not want to embarrass him at the Courthouse.

(R184-185)

**Findings of Fact:**

"Owen left the hospital and went to Sea Shore Manor and stayed approximately one month. Owen independently checked himself out of the nursing home, and arranged for a maintenance man to take him home."

(RE-p.66, Findings of Fact and Conclusions of Law, p. 8.)

Belinda's testimony from which the Judge derived that finding:

Q. Did he have his car there?

A. At first, he didn't, and he was having a fit that I took it. Somebody took it. And he had to have his car. And so I did bring his car out, and I put it outside his window so that he could see his car.

Q. Was he still driving...

A. No, he was not driving

Q. And how did he leave Sea Shore Manor?

.....  
A. O.K. When he left in the car, I had taken the keys out for him and for his best friend, Chuck Taylor, to come by and take him for a ride some afternoons before I could get out there. And that way, he could go riding in his car. And one day, he took it upon himself to get in the car and (objections as to hearsay omitted)

A. I took his keys. I had to have his car fixed because he had wrecked his car. It was in a wreck, and it was in a ditch.

Q. And you took his keys, and-

A. I took his keys, and I gave them to the nurses, the head people at Sea Shore Manor, and told him his car is there, and he can see his car, but he could not drive it anymore, for them to just keep his keys. And then he would get mad at me because I didn't give him his keys. I would tell him, the nurses have them...

Q. How did he leave Sea Shore Manor?

A. He got to be buddies with the Janitor, maintenance guy that work there, and he wanted to go home. So he had him take him to the house. They called me. And so I went to his house, and I had him go back and pick up most of his stuff that day in the process of maybe two days to pick -

Q. When you say, "I had him go back," who did you have go back?

A. The Janitor, the guy.

Q. O.K.

A. And I paid him for bringing Daddy to the house. I realized at that time that Daddy wanted to be in his house.<sup>3</sup>

(R-pp.185-188)

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<sup>3</sup> When Owen was discharged from Seasons Geriatric Psychiatric Ward in 2002, Dr. Rusch opined that he needed twenty-four hour supervision, and that he should not drive. Eddie concedes that Owen always had a sitter after he left Seasons until he came to live with him. (R-103)

Owen liked to see his car, and Eddie arranged to bring Owen's car to Covich County so Owen could know it was there even though he admits that Owen could not drive and, in fact, did not drive after he came to Covich County.

## Findings of Fact:

"Owen terminated one or more sitters on his own volition during this time period."

.....

"Brooke Ellzey testified that she was the primary caregiver of Owen from May through October 2002. This conflicts with her Mother's testimony as to the time period Brooke was a sitter. Broke said she saw her Grandfather everyday in 2002 and that his health problems escalated in February and March with hallucinations. However, this was not supported by any medical records and it causes the Court concern that if he was manifesting such changes as early as February and March why his caregiver did not take Owen to the doctor to assess this alleged symptomology."

(RE-p.67)

Belinda's testimony:

Q. What steps did you take to supervise him after he came home?

A. I would take him with me to my house, and I would stay with him at his house, and I would take him to school with me sometimes. I had sitters. The first sitter, my Dad got angry with and fired, and she did come back and work a little bit as long as we would leave the air conditioning on in the summer and not the heat. To make him comfortable, he liked the heat and not the air in the summer. And then I had another sitter that got involved. And so one of them would do half the day shift-well part of the hours, and then the other one would do part of them, and then some of them would stay for twenty-four hours or a day or so, and then the other sitter. And then my daughter had lost her job with the Housing Authority at that time. And so he really just wanted her to live there full time and just take care of him, but she knew that she couldn't do that forever and she would have to be getting a job. So she says, "I will keep you some," so I hired her as a baby sitter or an adult sitter so it was the two ladies, an old lady, a younger lady - a middle aged lady, and Brooke. And they had like a schedule. And after I stayed through the summer and I moved my things out at the end of August or September to Houston, then I would come back and tend to those people and do his grocery shopping and pay his bills. I would drive back on Friday nights. I would stay Saturdays and drive back on Sunday three weekends out of four...

Q. When did that pattern end?

A. Brooke became more of the caregiver when I - about the end of September when I started working a little bit more. And so actually I kept the pattern of coming back and forth until October when Brooke yeah, when Brooke called me and Eddie to both come because she says that Dad had gotten to the point where it was too much for her to handle. . . (objection to hearsay omitted)

Q. When did Brooke quit being your Dad's caretaker?

A. Once Eddie drove off with him in October.

Brooke Ellzey's testimony, while not a mirror image of her Mother's, is highly consistent:

Q. And what was the nature of your relationship? What kind of things did you do?

A. He was more of a father figure than a grandfather; very much a teacher; taught me the way of life; a friend, but stern.

Q. And did that relationship with him that you have described to the Court, did that continue up until his death in so far as your affection for him?

A. Actually, it reversed roles because the last six months of his life-not last six months, but from May until October, I was the primary caregiver for him. So maybe I became the parental role and he became the child.

Q. When do you recall him first having significant health problems?

A. It would have been February or March of that year.

Q. of You're talking about the year he died '03?

.....

A. 2002, because I was with him May 2002 through October when he went to Eddie's. So it would have been February or March when he started showing the signs of hallucination and just deterioration (objections to hallucinations omitted)

Q. What did you observe about your Grandfather that caused you to think that his condition had changed?



A. He saw or what he thought he saw a man breaking into his automobile, upon which time he went into his bedroom, got his pistol

by the Court: Excuse me. Were you there?

A. Yes sir. And charged out of the house after what he thought was a man trying to break into his vehicle and there was no one there.

Q. Now you just told the Court that you were there. How did you come to be with your Grandfather that day?

A. I was there after I worked with the Mississippi Gulf Coast Housing Authority. I went by everyday after work to visit with him because it was it was within a mile or two of his home -my office...

Q. And what did you do in response to this incident where he went out with a gun?

A. I told Mom and I told Uncle Eddie.

Q. And what happened next with regard to your Grandfather's condition? Did he continue to live in his house, or

(objection to relevance sustained by the Court).

It is respectfully submitted that the April 2002 medical records from Dr. Rusch absolutely document the report of hallucinations. Why does this not appear in the pertinent facts considered by the Chancellor? The Chancellor curtailed any further explanation from Brooke with regard to her interaction with her Grandfather in Spring of 2002 finding that it was too remote to be relevant. (R282-287). Why then, in his Findings, does he fault her for not explaining?

The Chancellor next rejects, "Brooke also testified that by October, Owen needed help with hygiene, that he could not go to the shower, could not go to the bathroom nor take care of himself." Brooke's testimony was:

Q. Was he capable of, from your observations of taking care of himself with regard to his hygiene?

A. It was getting to the point where he needed help with that.

(R-288)

After Owen went to live with Eddie, Brooke recounted a telephone conversation with him, "Grandfather mentioned that he was a little embarrassed because he continued to miss the toilet, and they picked on him in jest about it, and that made him insecure." (R-300).

Even Lucy McCormick who did not "remember" much admitted that Owen on at least one occasion got lost on the way to the bathroom and was wandering around their bedroom looking for the bathroom. (R-464-465) She concedes a male "sprinkle" problem. She also confirmed that although Owen could not drive, he wanted his car kept where he could see it, and that Eddie brought the car up from the Coast so Owen could look at it in the driveway. (R-465-466). This is consistent with Belinda's testimony about parking the car where her Dad could see it at Sea Shore Manor.

The Court, in denigrating Brooke's testimony states, "this Court does not find her testimony to be credible., (RE-p.68), noting that at the same time, "Owen was able to drive himself to an attorney's office to execute a revocation of the Power of Attorney that Brooke's mother procured."

The Court does not deign to include the fact that Owen claimed the Power of Attorney was a forgery and that he did not sign it when it is obvious from the record that he did sign it; that Eddie tried to intervene challenging his competency to sign it (Exhibit 7); and that this is, in fact, another example of Owen's head strong, adamant behavior that may be the polar opposite of his headstrong adamant behavior of the day before.

The Court then castigates Brooke for not being credible with regard to her Grandfather not wanting to sell his house.

**Findings of Fact:**

"Sawyer put the realtor sign up the very next day and later took it down because the market had slowed. The sign was taken down by Owen when the old listing ran out and when he mowed the grass."

(RE-p.68)

Mr. Sawyer concedes that he "might have discussed" with Brooke Owen's practice in continuing to remove the sign from his yard. He concedes that Owen would be adamant both ways, either to sell or not to sell, and that Owen took the sign down many times. (R-pp.370-401)

Mr. Sawyer testified that it would have been material to know of the competency issues and the hospitalization on the day the deed and the settlement sheet were signed.

Q: By Ms. Nicholson: My question to you is, did you know when you were dealing with Owen McCormick and Eddie McCormick that his treating physician who had him in the hospital in May 2002 for psychiatric problems had signed an affidavit saying that he was incompetent to handle his own business affairs.

A. No ma'am.

Q. And did you know that on the 18<sup>th</sup>, the day that he signed his deed, did you know that he had been in restraints, and that he had been hallucinating, and that he was incontinent, and both bowel and bladder, and he had been incapable of talking to his physical therapist?

A. No ma'am.

Q. Would that have mattered to you with regard to whether or not you wanted that deed to be

signed by him or not?

A. Very much so.

R. 404-405

The Court also ignores the fact that Andy Sawyer deviated from accepted real estate practice in filling out the disclosure papers for Owen; that Andy Sawyer's file included copies of the same document which on one copy would bear an "X" instead of Owen's initial and on another copy there are Owen's initials.

The Chancellor dismisses any import to the circumstances of the sale of the house by saying, "Belinda had no objections of the sale when she received her share of the proceeds." What should have been evident to the trial Court and hopefully is evident to this Court is that, while Belinda may not object to the end result as the sale of the house would have followed inevitably from her Father's death, she does find the conduct of Eddie McCormick in single mindedness and unilaterally taking control of their Father's assets relevant in presenting the course of his conduct for review of the Court.

The Court's lack of evenhandedness in this matter is further evidenced by the cherry picking from the medical records. The Court incorporates portions of the medical records quoting the doctor's progress notes which, "says he is fairly alert" and the nurse's notes, that Owen, "responds to verbal stimuli appropriately." He wraps this up with, "Eddie says his Father knew exactly what he is doing." (RE-70) Why did he quote those two notes and not these from the same day?

"....lying in bed. Awake, alert, and talking at random.... patient very confused....has called for help stating, "take those dishes out of here." No dishes found in room...incontinency bowel and bladder...calls out for assistance often...refused to eat...confused, wandering assisted back to bed."

Exhibit 13, p. 81-82, Nurse's notes for March 17, 2003.

"Disorientation has increased. He was somewhat a little agitated last night. He does not recognize me this morning. This is one of the main reasons we need to go ahead and discharge him."

Exhibit 13, p.30, Doctor McDonnell's progress notes, March 17, 2003.

"Patient urinating as he walked. Patient confused today stating, "Colonel Powell put dishes in the closet."

Exhibit 13, p.56, Physical Therapist C. Elliot's notes from March 17, 2003.

March 17, 2003, is also the same day a do not resuscitate order was signed in the course of Owen McCormick's treatment. Eddie McCormick denies any knowledge of this order. (Exhibit 13p.42; R-p.440.)

Compare Brooke's conduct in taking her Grandfather to the bank with that of Eddie's:

Brooke:

Q. I want you to describe to the Court what you mean when you say he was making large withdrawals of money.

A. When we went to Hancock Bank in downtown Gulfport, in one situation, he tried to withdraw around twelve thousand dollars. I would not let him do it in my presence. We got in a huge argument. I did not want to be liable for that much cash on his person.

Q. And do you know why- why he needed twelve thousand dollars or what he was going to do with it?

A. No, he didn't have any type of rational explanation for it.

Q. And were you able to convince him not to withdraw it?

A. He did not withdraw it.

(R-p.288)

Owen McCormick always banked at the Gulfport branch of Hancock Bank where everybody knew him from the "security guard at the door to the tellers, to the loan officers, to the safety deposit box people." (R-p.298). Both Belinda and Brooke say that there was no discussion of Eddie taking Owen to the bank on October 26 when the two left for Copiah County. (R193, 298)

Eddie says that he took his Father to the Long Beach branch of Hancock Bank because the Gulfport branch was closed on Saturday. Whatever the reason, when Owen and Eddie left the bank, every account Owen had there was now payable upon death to Eddie. Prior to that day in October there was only one asset listing Eddie as a beneficiary. (R-pp.29-30)

After Eddie "helped" his Father write letters and fill out change of beneficiary forms to the various financial institutions he had assets with, (R-p.34), Eddie was on every asset either as joint tenant with rights of survivorship, payable on death, or beneficiary. The sole exception was Owen's P.E.R.S. retirement account which Eddie says his Dad changed and then changed back. (R-p.122) Belinda says the change was instigated but not completed.

**Findings of Fact:**

"Eddie, Paul Davis, and Bob Lawrence, confirm that Owen was aware of his finances and holdings."

(RE-p.89)

Reference back to Dr. Rusch's testimony that a layman would not necessarily know of Owen's significant cognitive deficits because Owen would present himself as having no difficulty and try very hard to appear independent and self directed. A layman would not recognize that he did not have abstract ability to see long term course or to see that information that he was using did not fit a factual basis. A layman would think he was fine because Owen would only focus on things he was competent in. (Exhibit 12, p.30)

Paul Davis worked in Jackson and spent little time in Crystal Springs. (R-p.523) He met with Owen at Eddie's house on four different occasions for approximately fifteen minutes each. (R-p.529) There is no testimony that he knew what Owen's assets were and so he could not possibly ascertain whether Owen's statements to him were accurate or not about his assets.

Bob Lawrence met with Owen on one occasion for approximately one hour. (R-p.506) There is no testimony of any review of financial documents or other indicia of reliability as to the information exchanged between Owen and Bob at that meeting. Bob did not have a single note from that meeting to refresh his memory from a one hour meeting that was five years in the past at the time of his testimony.

Neither Paul nor Bob knew of the psychiatric determination of incompetency in April of 2002, and Bob Lawrence at least had the professionalism to admit that such knowledge would have been material to him. (R-577)

#### **Findings of Fact:**

While Owen and Eddie were in Gulfport Owen cashed the Whitney Certificates of Deposits and purchased an AIG annuity through Hancock Bank, "with Eddie and Belinda being equal beneficiaries."

(RE-p.76)

Actually, the annuity was titled Owen McCormick, POD to Eddie McCormick, and upon Owen's death, Eddie cashed it in obtaining the proceeds in a check book in his name only about which he testified, "I'm holding that until the end of these legal proceedings so I can split it 50/50." (R-p.120)

Eddie repeatedly testifies that these POD Eddie McCormick accounts were to be split 50/50 with Belinda. He has yet to forward Belinda's share to her despite repeated requests to do so. (see Amended Appearance Form)

**Findings of Fact:**

"Marx thought Owen knew what he was doing . . . later Owen came into the bank and told him that apparently Marx misunderstood. This confirms Owen's awareness of his intentions and memory of what transpired with Marx."

(RE-74)

Is it not just as valid to say that Owen asked for a joint account on one day, and when the checks arrived Owen was having a suspicious moment and did not like seeing his son's name on the account? Much like Owen signing the Power of Attorney and then declaring it to be a forgery with Belinda? Much like changing the P.E.R.S. beneficiary then changing it back? Like putting his house on the market and taking it off?

The Chancellor discusses the 1999 Last Will and Testament which Owen had in place prior to the 2002 Will being drafted. He recounts that Owen was "visibly upset" over provisions in that Will and that he had "no idea" of the effect of a certain provision.

(RE-p.77) This Will was drafted by Owen's cousin, Jack McCormick, an attorney who



had drafted previous Wills for Owen and his Wife and who remained Owen's good friend, although for some reason, he was not consulted when the 2002 Will was contemplated. (R-176-179, 196)

If Owen did not understand a Will he signed in 1999, then how does it follow that he is so "astute" with regard to his affairs in 2002 and 2003 after being declared significantly impaired by his treating Psychiatrist? The 1999 Will was destroyed at the meeting with Bob Lawrence although Mr. Lawrence could not testify as to who had actually destroyed it. (R-p.571)

The Court makes repeated reference to a \$33,000.00 CD that "Belinda would not return." Belinda actually hand delivered the CD to her Father in December 2002 saying that she preferred not to mail it. The CD was immediately cashed and \$19,000.00 of it was utilized to pay Eddie's mortgage and \$21,000.00 given to Eddie's two daughters. (R-pp.113-114).

The Court occasionally chastises Belinda for offering no documents to corroborate payment of a loan back in the 1980's and in support of her confusion over two check books in 2002. Belinda explained that she lost everything in Hurricane Katrina, (R-p.161) and it should be noted that those two issues had very little to do, if anything, with the issues before the Court for adjudication.

In discussing the Trust, the Chancellor again, cherry picks among the medical records. He cites the physical therapist log, "Owen communicated to the physical therapist, 'feeling better today.'" (RE-p.82)

The next line on the same page indicates that, "Pt. had a BM so informed nursing, will attempt again in p.m." This follows previous entries on March 17, of "patient urinating as he walked." 3/19/03, diarrhea noted on sheets."

He summarizes the nurse's notes for March 23<sup>rd</sup>, the day that Owen signed the trust. "These notes reflect that Owen talked randomly and exhibited some confusion."  
(RE-p.82)

What he did not quote is significant, "talking incoherently" Owen is wearing diapers at this point. The "confused" entries continue throughout the day ending with the 8:00p.m. entry "talking at random." (Exhibit 13, pp. 101-102)

This is the very evening that Paul and Eddie obtained Owen's signature on the trust document with the nurse holding his hand with a pen in it. (R118,519) Eddie says, "He was sharp." (R-119)

On page 31 of his Opinion, the Chancellor says, "it would be very easy to surmise that once Owen was out from under the influence of Belinda, he restored his estate to the way he intended." Why this shot at Belinda? Belinda testified that when her Mother died in 1998, her name was added as Signator to her Father's account so that the two of them could write his checks. There is not a scintilla of evidence that she ever abused having access to these checks from 1998 until October 2002 while Eddie bought himself a trailer, paid off his mortgage, and wrote checks to his children for Owen's signature in the short few months he was on the accounts.

Why on page 6 of the Findings does the Chancellor question Belinda's motive with regard to the Power of Attorney? She held the Power of Attorney from April until October and did not utilize it once to her advantage or to Owen's disadvantage. She

obtained a Power of Attorney because the nurses suggested it to her. She did not want to embarrass her Father by having a Conservatorship filed at the Courthouse where he had worked as a bailiff. (R-pp.175-179)

Belinda is a third grade teacher and is not legally astute. She does not know the difference between a conservatorship and a power of attorney. She is fuzzy on dates, and the record reflects that she is easily rattled. She has been a needy child greatly assisted by her parents in raising her own children, and Eddie has been the self sufficient, distant one who was, "glad that his Father would have an opportunity to get acquainted with his children in the few months prior to Owen's death."

While the record reveals a basis for the Chancellor to be aggravated with Belinda for her lack of clarity and sometimes confusing testimony, it does not reflect a basis for the vicious commentary leveled at her in his Findings of Fact and Conclusions of Law.

For example, the Chancellor says:

...It is of note that under the position taken by Belinda, that is, that Owen did not have the capacity to execute the trust, she and Eddie would divide the money equally, depriving her son, Brandon, of the funds. Eddie, on the other hand, claims those funds are not to be divided, and that they belong to Brandon. Eddie makes no claim to any portion of the trust fund.

(RE-p.83)

Belinda could not have been clearer in her testimony that the bank account opened by her Father on behalf of her son, Brandon, was, in her opinion always intended to belong to Brandon. She thought her Dad put her name on it to avoid taxes.

(R-164) Her objection to the trust was that it placed Eddie in control of Brandon's money. There is no evidence suggesting that Belinda would deprive her son of the

funds, and while there may be a technical legal validity to the statement, it would not have been understood by Belinda and the implication of the language is unfair to her.

Similarly, the Court states, "it might very well be argued that Belinda, who was monitoring and supervising Owen's medication, was in part at fault because of Owen's digitalis toxicity." (RE-p.86)

This is simply unwarranted under the facts established in the record. Reference to Exhibit 3 to Dr. Rusch's Deposition, which is Exhibit 12, indicates that the digitalis toxicity occurred during the hospitalization and prior to the transfer to the psychiatric ward. These records further document that Owen was hiding his medicine and trying to dispose of it. Eddie witnessed Owen doing this. (R-85)

If the nurses at the hospital could not control Owen's medication, why should Belinda be subjected to such a statement by the Court? Dr. Rusch noted that Belinda had trouble setting boundaries for her Father and could not tell him what to do. Owen would, on the other-hand, "self direct to do what he wanted to." (Exhibit 12, p. 37)

Other errors are present.

**Findings of Fact:**

"...this Court would also point out that there is absolutely no evidence presented that Bob Lawrence who supervised the execution and editing of Owen D. McCormick's Last Will and Testament ever had an attorney/client relationship with Eddie."

(RE-p.90)

Reference to the Harrison County record, (Exhibit 11) reflects that Bob Lawrence appeared on behalf of Eddie, both personally and as Executor, during the duration of that proceeding and that he was and is attorney of record in the case at bar, although

Olen Bryant has been the attorney active since his Entry of Appearance on August 26, of 2005.

In addressing Dr. Rusch's diagnosis of Owen, the Court subtly minimizes his testimony. Dr. Rusch did not testify that Owen was merely "impaired" he testified that he had, "highly significant cognitive deficits; " that the Conservatorship was necessary because of Owen's poor judgment; his lack of ability to abstract understand a long term course; or to see that information he was using did not fit a factual basis. It was his Opinion, to a reasonable degree of medical probability, that Owen was not able to comprehend an idea or make a judgment upon any legal idea he was asked to address.

Owen did not have "good and bad" periods according to Dr. Rusch, he had "bad and worse" periods. To a reasonable degree of medical certainty this condition would not improve, it would not be changed by nutrition or other modifications. It was baseline, irreversible, and an ongoing lifelong problem. (Exhibit 12, pp.25-50)

...The Judge declares the stipulation or the parties that all the assets which Eddie obtained by operation of law would be divided with Belinda as "settling" these issues between Eddie and Belinda. (RE-pp.95-97) It is respectfully submitted that absolutely nothing is settled.

Eddie's stipulation make look good on paper, but he still holds all these funds despite numerous requests from Belinda to transfer her share to her. There is pending now a Motion in Covich County seeking enforcement of the stipulation. (see Amended Appearance Form)

With regard to a confidential relationship existing between Eddie and Owen, the Court was, "not so persuaded." (RE-p.106)

The discussion set forth in *In Re Will and Estate of Varvaris*, 477 So.2d 273 (Miss. 1985), notes that Courts of equity carefully refrained from defining with precision the particular bounds of a confidential fiduciary relationship, but that the basic question is whether or not one person depends on another. ***Varvaris at 278.***

In the case at bar, Owen came to live with Eddie and his family as the only alternative to going into an assisted care facility. He did not drive, he was driven by Eddie or his Wife every where he went. Everyone who touched his life in Copiah County was closely connected to Eddie. His Banker was Eddie's college roommate, fraternity brother, and current friend; his Doctors had both been employed by Clinics wherein Eddie was the Administrator in excess of twenty years each; there was absolutely no one in his small circle that was not closely affiliated with Eddie.

Eddie wrote all his letters and wrote checks for Owen's signature. Eddie put Owen's medicine in containers for Owen to take, and chose and transported him to the doctor when he needed to go.

It is respectfully submitted that in October 2002, once Owen knew that he would be living with Eddie, the fiduciary relationship was in place.

***Varvaris*** contains an excellent discussion of the concept of undue influence in fact, separate and apart and even in the absence of a confidential relationship.

... it follows, from the very nature of the thing, that evidence to show undue influence must be largely, in effect, circumstantial. It is an intangible thing, which only in the rarest instances is susceptible to what may be termed direct or positive proof. The difficulty is also enhanced by the fact, universally recognized that he who seeks to use undue influence does so in privacy. He seldom uses brute force or open threats to terrorize his intended victim, and if he does he is careful that no witnesses are about to take note and testify to that fact. He observes, too, the same precautions if he seeks by cajolery, flattery, or other methods to obtain

power and control over the will of another, and directed improperly to the accomplishment of the purpose which he desires.

**Varvaris** at 279, Quoting **Jamison v. Jamison**, 96 Miss 288, 51 So.2d 130 (1910)

Why, within a month of moving in with Eddie, did Owen McCormick begin writing all of his financial institutions and questioning and changing beneficiaries? He did not do that after his Wife died while Belinda was helping care for him. The similarities between the medical records of 2002 and those in 2003 during Owen's final hospitalization make it obvious that the sharp minded financially astute dynamo that Eddie would present to the Court is a fictional construct.

In the case of **In Re Estate of Carter**, 912 So.2d 138 (Miss. 2005), this Court discusses the unique position of power given to Executors and other fiduciaries and the high standard of care required in review of their execution of their duties. The Court noted that, "our Chancery Courts thus no doubt have an essential role in serving to protect a weaker, dependent party who has conferred power to a fiduciary under the auspices of confidence and influence.

This case is similar in fact pattern to that discussed by this Court in **Howell v. May**, 2007 MSCA2005-CA-02259-061907 (Miss. 2007), wherein an elderly parent went to live with one child and thereafter made several gifts to include gifts to grandchildren which were challenged after the parent's death. The Court confirmed the existence of a confidential relationship between the parent and child which then led to the burden shifting to the child to rebut the presumption of undue influence by clear and convincing evidence.

The test for a confidential relationship is as follows:

1. Whether one person has to be taken care of by others;
2. Whether one person maintains a close relationship with another;
3. Whether one person has provided transportation and has their medical care provided for by another;
4. Whether one person maintains joint accounts with another;
5. Whether one is physically or mentally weak;
6. Whether one is in advanced age or poor health;
7. Whether there exists a Power of Attorney between one and another.

**Howell** at paragraph 15, p.3

The answer to all of those questions at the case at bar with the exception of the final one is an unqualified "yes." Pursuant to **Howell** Eddie's burden is to show by clear and convincing evidence of (a) good faith on Eddie's part; (b) Owen's full knowledge and deliberation of his actions and the consequence of his actions; (c) independent consent and action by Owen.

The Chancellor, in discussing good faith, recounts the testimony at trial of Owen's secrecy in meeting with Eddie's brother-in-law to rewrite his Will, but he does not discuss the secrecy testified to by Belinda and Brooke.

Belinda and Brooke both testified that when Eddie left with Owen he promised to keep them apprized of Owen's financial dealings. They both testify that they had no knowledge of all the changes made to Owen's bank accounts to payable upon death to Eddie or joint tenant with right of survivorship, or of the change in the CDs and annuities



to Eddie as beneficiary. This was kept secret from Belinda in breach of Eddie's fiduciary duty to her.

Belinda and Brooke also testify that Eddie handed Belinda the new Will and the Trust created to control Brandon's money at Owen's funeral. Eddie's response is that he tried to tell Belinda about the Will, but she wouldn't listen to him. Perhaps the most damning testimony was the admission by Eddie that following his Father's death, when Belinda asked him about the status of a particular asset he told her, "it was none of her business." Eddie falls all over himself in this record testifying about how, despite the legal status of all these assets leaving everything to him, he intends to share evenly with Belinda. He reiterates that at least five times in the record and entered a stipulation that is now part of the Final Judgment. There is pending in the Chancery Court of Copiah County at this very moment, pleadings seeking to compel Eddie to follow through on that promise. He still holds this money, and his protestations to the contrary, this just does not look like good faith.

It is also noteworthy that this promise to share did not occur until Belinda opened the Estate in Harrison County. The self serving letter which is exhibit 9 followed Eddie being served and thus knowing that he was going to have to account in some fashion for all the activity with his Father's assets.

In fact, Belinda, does not want to set aside the deed on the sale of the house. The house needed to be sold when her Father died. She does want the Court to take into consideration the conduct of her brother in getting this deed signed with the light it shines on all the earlier transactions. Belinda does not even want to set aside the intervivos gifts to Eddie's daughters. She believes that Eddie's influence was present in

these gifts. He discussed the gifts; suggested amounts and wrote the checks, but she does not object to her nieces having these funds. Again, the facts of the gifts are probative of the entire course of events.

The second prong in rebutting the presumption of undue influence, has to do with the Grantor's awareness and understanding of his actions. Perhaps most probative here is the opinion of Dr. Rusch that, while Owen could sound knowledgeable, the highly significant cognitive deficits would result in him misinterpreting what was going on and create poor judgment in drawing long range opinions and decisions. This was the case in April 2002 and could not improve according to Dr. Rusch.

The third prong, is of course, is independent consent and action, and it is respectfully submitted that Owen lacks the capacity for meaningful consent.

**ISSUE IV. THERE WAS NO STIPULATION AS TO THE VALIDITY  
OF ANY TRUST FOR BRANDON ELLZEY**

The Court, paragraph five of the final judgment, "the parties have further stipulated that proceeds in Copiah Bank, in a checking account number 25-11-150 are being held for the Brandon Ellzey trust." The record does not support this stipulation. The parties agree that the \$10,533.59 (which would include interest to date) belongs to Brandon. There is no agreement that this money should remain in a trust of any kind, most especially not controlled by Eddie.

Belinda has never claimed that the money in this account belong to anyone other than her son. She testified that her name was put on the account when there was some discussion of tax consequences on transferring the account, after her Mother

died, but she never touched any money in it and her Father continued to refer to it as Brandon's money according to both Belinda and Brooke.

The facts surrounding the signing of the trust are shameful. Owen McCormick was fading from this world and his body was a little more resilient than his mind. The vision created by the medical records is of an ancient human fading away from this world with his infirmed body and mind disturbed with last minute documents being pressed into his hands which were guided by someone else to obtain just one more signature.

**ISSUE V. BELINDA ELLZEY IS ENTITLED TO AN ACCOUNTING  
ON THIS ESTATE AND THE CONDUCT OF EDDIE  
MCCORMICK IS SUCH THAT AN ACCOUNTING IS WARRANTED**

With regard to the Court's finding that the accounting Belinda requests is "unnecessary," what mention does the Court make of Belinda's questions about what happened to her Dad's car, what happened to the cemetery lots he owned, assets from the house that were never accounted for, and the current status of the estate? (R212-216) Why has there been no publication for Creditors and no annual accounting in the five years this estate has been open?

Eddie McCormick is a fiduciary to Belinda and he owes her a legally binding sworn statement of her Father's estate. This record is replete with his arrogance and his lack of respect for his sister. When she asked him about her Father's assets following his death, Eddie admits that he told her, "its none of your business." After Belinda opened an estate and it became evident that he was going to be called to account, he wrote the self serving letter explaining to her how all these accounts had been changed and were now payable to him but he certainly intended to divide them

with her. (Exhibit 9) That was five years ago and her letters requesting her portion still go unanswered.

Eddie did not respect Belinda and he resented the fact that his parents helped her and her children (R-p.310) even though he kept a distant relationship from them and his children had no real relationship with them at all. (R-p.296) When Owen came to live with him, he saw an opportunity to even things out, and he methodically did that. He should be required to file a sworn accounting for the Estate.

The Court in **Carter**, *supra* also discussed in that case the important mechanism of an accounting to monitor the conduct of a fiduciary. Regardless of whether or not a testator waives an accounting, the Chancellor in the interest of equity, may require one.

The fiduciary relationship of an Executor extends to all parties having an interest in the estate. An Executor is not allowed to leave these individuals in the dark concerning his handling of the assets of an estate. "It is therefore the distinct duty of the Chancellor to hold those serving in positions of trusts accountable for their administrative actions, and, in this way, hold a fiduciary fully accountable for the property with which the fiduciary has been entrusted."

In **Carter** the Court found that the fiduciary duty of the purported Executrix, extended back into the life of the Deceased to the minute she agreed to be his power of attorney.

In the case at bar, the accounting to Belinda should relate back to the attachment of the confidential relationship with Eddie in October 2002.

#### **IV. CONCLUSION**

It is true, that Belinda cannot produce a doctors opinion of Owen McCormick's mental status on December 4, 2002, when the Will was signed. The only doctor who testified in this trial was Owen's treating psychiatrist who last saw him in May 2002. That testimony stands un rebutted that to a reasonable degree of medical probability, Owen had substantial cognitive deficits and as do the affidavit of the treating psychiatrist and the primary care physician Dr. Valerie Lennox that Owen is "incapable for caring for himself or to make decisions in his best interest."

The glaring omission in the record is the testimony of Dr. Fred McDonnell and Dr. Richard Hankin. Two doctors that worked under the administrative oversight of Eddie McCormick in excess of twenty years each who did see Owen in December 2002 and treated him during his two hospitalizations in March 2003.

Belinda is a public school teacher of limited financial ability. Eddie could have produced these two doctors at trial for free, but he did not. The Judge, in his Opinion, chastises Belinda for not producing paperwork from a loan her Dad made to her in 1980's or so. At no point does he ever make reference to Eddie's obvious omission of relevant witnesses even though Eddie has the burden of proof once a confidential relationship is shown.

The medical evidence in the record on the day the Deed was signed and on the day the Trust was signed speak volumes as to the credibility of Eddie in this case. Are we to believe Eddie when he says that Owen clearly said, "Eddie I trust you completely," as his final words or believe the medical records which reflect only random incoherent mutterings from Owen?

It is respectfully submitted that every legal action Owen took after being transported to Copiah County by Eddie should be viewed through the lens of incompetency and appropriate equitable relief ordered by this Court.

Eddie concedes that other than the \$10,000.00 his Mother left him when she died, he had received no substantial gifts from his Father in the fifteen years prior to his death. He also concedes that prior to October 2002, he was beneficiary to only one Oppenheimer account owned by his Father. (R-28-29)

After Brooke called her Mother and her Uncle and advised that Owen was too much for her, Owen went to visit with Eddie for a couple of weeks prior to the October 26<sup>th</sup> date when all the bank accounts were changed. Eddie concedes that his Father did not want to be in a retirement home. (R-151) Dr. Rusch notes it in his records and Owen absconded from the one he resided in for a month.

It is respectfully submitted that the confidential relationship with Eddie began in October 2002, upon him being transported by Eddie to Copiah County. At that point, Owen needed Eddie's approval to stay out of a nursing home, as well s for all other purposes.

Even absent a finding of a confidential relationship, the undue influence discussed in **Varvaris** *infra* is present. It is submitted that relief should be granted to Belinda as follows:

1. All accounts changed by Owen in his trip to the Long Beach Branch of Hancock Bank with Eddie in October 2002 should be held for naught and the funds that were in those accounts be deemed to held by Eddie in constructive trust for the appropriate party at the time the change was made. As a practical matter, Belinda has

stipulated to division of these accounts with Eddie with the exception of the one containing Brandon's money which should go to Brandon. Despite this stipulation, the Court should declare the transfers void, as Eddie has not honored his stipulation and there should be no legal doubt remaining that these accounts do not belong to him; see ***Vancleve v. Estate of Fairchild***, 950 So.2d 1047 (Miss. 2007)

2. In November, Eddie brought Owen back to the Coast and cleaned out his safety deposit box. Eddie concedes that the signed 1999 Will was in that box. (Exhibit 10 is an unsigned copy). The signed Will was destroyed by someone during the visit to Robert Lawrence's office to finalize the new Will. The new Will took crystal and silver away from Belinda which had been hers in the 1999 Will and which her Mother had designated for her. There is an aspect of sibling jealousy, punishment to this change. Even though the medical proof in this case is based on opinions expressed in April 2002, those opinions were to a reasonable degree of medical probability that Owen was incapable of making decisions in his own best interest and had no long term appreciation of the effect of his decisions.

This Will should be held statutorily defective due to lack of competency of the testator. In the alternative, it should be declared invalid due to undue influence and lack of independent advice and consent on the part of Owen.

3. The transactions following Owen's move wherein Eddie wrote letters to obtain information from financial investments and beneficiaries were changed should be treated as the bank accounts changed on October 26<sup>th</sup>. The AIG annuity, the Hancock Bank CD, and the Copiah Bank accounts should not be allowed to inure to Eddie's

benefit, but should return to the status they or their proceeds were in prior to October 2002;

4. The deed transferring Owen's home in Gulfport, Mississippi which was signed while he was obviously dying and in dismal mental and physical health should be recognized by this Court as an invalid transfer and Eddie should receive no jurisdictional advantage from having transferred the property five days prior to Owen's death. Practically, Belinda does not wish to undo this transaction as it would have been necessary in the administration of her Father's estate, but legally the transfer should be acknowledged for purposes of this estate as void;


5. The trust putting Eddie in charge of Brandon Ellzey's education funds should be treated as the deed. The signing of this document is awful to contemplate. Review of the pertinent medical records leaves no doubt that Owen had no ability to transact legal business at this stage of his demise. Practically speaking, the stipulation of the parties is that the \$10,000.00 in the Trust are the amounts slightly in excess of \$10,000.00 which was in Brandon's account and should belong to Brandon Ellzey;

6. Finally, the fact that this case was properly brought in Harrison County Chancery Court should be given legal affect and pursuant to Judge Persons' Order that the case come back to Harrison County if the 2002 Will was declared invalid, this case should be remanded to the Harrison County Chancery Court and Eddie should be Ordered to provide an accounting of his Father's assets while they were under his control which accounting should be subject to the review and approval of the Chancery Court of Harrison County, Mississippi.



Respectfully submitted on this the 26 day of March, 2008.

BY:

  
GAIL D. NICHOLSON  
ATTORNEY FOR THE APPELLANT  
BELINDA ELLZEY

**CERTIFICATE OF SERVICE**

I, GAIL D. NICHOLSON, do hereby certify that I have mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellant Belinda Ellzey to the Honorable Edward E. Patten, Jr., Copiah County Chancery Court Judge, at his usual mailing address of Post Office Drawer 707, Hazlehurst, MS 39083; Honorable Jim Persons, Harrison County Chancery Court Judge, at his usual mailing address of Post Office Box 457, Gulfport, Mississippi 39502; Olen C. Bryant, Esquire and Tim Rutland, Esquire at their usual mailing address of Post Office Drawer 899, Hazlehurst, MS 39083.

This the 26<sup>th</sup> day of March, 2008.

  
GAIL D. NICHOLSON

NICHOLSON & NICHOLSON  
Gail D. Nicholson, MSE  
P.O. Box 162  
Gulfport, Mississippi 39502  
Phone: (228) 868-3288  
Fax: (228) 863-1818