SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALICE MITCHELL — APPELLANT

V. — SUPREME COURT NO. 2007-CA-01787

DAVID POYNOR — APPELLEE

AN APPEAL FROM THE CHANCERY COURT OF
CALHOUN COUNTY, MISSISSIPPI
EIGHTEENTH CHANCERY JUDICIAL DISTRICT

BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney 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 disqualifications or recusals.

1. Alice Mitchell, Appellant (Plaintiff), 979 Peppertown Rd. Eupora, MS 39744;

2. David Poyner, Appellee (Defendant), Big Creek, MS;

3. George M. Mitchell, Jr., attorney for Appellant, 209 South Dunn Street, Eupora, MS, 39744;

4. Honorable Tina M. Scott, attorney for Appellee, P.O. Box 167, Houston, MS, 38851; and

5. Honorable Edwin H. Roberts, Jr., Chancellor, P.O. Box 48, Oxford, MS, 38655.

RESPECTFULLY SUBMITTED:

GEORGE M. MITCHELL, JR.
ATTORNEY FOR APPELLANT

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STATEMENT OF THE ISSUES

ISSUE 1: THE TRIAL COURT ERRED IN ITS NOT FINDING A LACK OF TESTAMENTARY CAPACITY AT THE TIME OF EXECUTION OF THE WILL AS WELL AS FAILURE TO PROPERLY FOLLOW ESTABLISHED PROCEDURES FOR THE EXECUTION TO BE VALID.

ISSUE 2: THE TRIAL COURT CORRECTLY FOUND A CONFIDENTIAL RELATIONSHIP BETWEEN ROBERT WAYNE HALL AND DAVID POYNOR, BUT IT ERRED WHEN IT RULED THAT THIS WAS OVERCOME WITH CLEAR AND CONVINCING EVIDENCE.

THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ALICE MITCHELL **APPELLANT**

VS. **SUPREME COURT NO. 2007-CA-01787**

DAVID POYNOR **APPELLEE**

STATEMENT OF THE CASE

This is an Appeal from the Chancery Court of Calhoun County, MS, concerning the actions of a long time friend, David Poynor, with Robert Wayne Hall, deceased, and his obtaining a Power of Attorney (RE I) and Will (RE 2) for Robert Wayne Hall. As recognized by the Court in its Opinion (RE 13) David Poynor and his wife, Lisa Poynor maintained a close relationship for over thirty- five (35) years with Robert Wayne Hall and further provided him with transportation, food, shared a joint bank account with him (RE 9) and Robert Wayne Hall executed a durable Power of Attorney in favor of David Poynor.

The Trial Court in its Opinion found that David Poynor overcame the presumption of undue influence by clear and convincing evidence even though he occupied both a confidential relationship as well as a fiduciary relationship with Robert Wayne Hall. This was further compounded by the fact that David Poynor was an active participate in the obtaining of the Power of Attorney, which was notarized by his daughter. He was the individual who obtained the services of a paralegal and a law firm to write the Last Will and Testament of Robert Wayne Hall, and he was very active in the execution of the Last Will and Testament of Robert Wayne Hall. The Court totally ignored all of these factors as well as the fact that David Poynor was the individual who paid for both the Power of Attorney involved in litigation as well as the Will. There was no independent advice and consent on the part of Robert Wayne Hall as to the preparation of the Last Will and Testament. All testimony presented in the Trial indicated that if any advice was to be given by the law firm it was to David

Poynor who was their client. Thus, Robert Wayne Hall never actually received any independent information from any party dealing with the distribution of his assets.

The Trial Court failed to consider as required by case law that at the time of the execution of the Last Will and Testament, the testator was to have full knowledge of his assets, his heirs, who controlled his assets, what affect it would have to either include or leave out family members, as well as the ramifications of giving such to non-family members. The testimony was very explicit that none of this was touched upon or even brought out at the time of the obtaining of information for the Last Will and Testament by Charles Brown on January 13, 2003, nor for sure was none of it considered or discussed on January 14 at night in the hospital room when David Poynor asked two (2) nurses to witness the signature of Robert Wayne Hall.

Additionally, when the Court considered the legality of the use of the Power of Attorney by David Poynor it ignored the law dealing with agent and ward as well as the fact that one could not substantiate the obtaining of assets for his or her own use from assets of the ward and support such by his or her testimony or someone closely related to them. This was what actually transpired in the case on appeal. The Court accepted the fact that David Poynor removed Thirty Five Thousand and no/100 Dollars ($35,000.00) from a bank account and the only proof or authorization to such was that Robert Wayne Hall wanted him to do that and Lisa Poynor, David Poynor's wife, testified that she heard Robert Wayne Hall mention that also.

The rulings of the learned Chancellor are flawed in that on the day of the execution of the Will no testamentary capacity was established or proven, the totality surrounding the Last Will and Testament and the involvement of David Poynor cast very serious suspicious light upon the circumstances, none of the check lists as set forth and established by the Mississippi Supreme Court and the Court of Appeals were actually followed by the learned Chancellor when he evaluated the total circumstances in the Trial as well as the fact that no proof was offered granting authority to

David Poynor for the utilization of the Power of Attorney except his and his wife's testimony. Further just as a side note when David Poynor actually removed the monies from the joint account having knowledge that it was to go to Alice Mitchell in the Last Will and Testament he utilized a fictitious address, which was neither his, nor Robert Wayne Hall's at that time.

SUMMARY OF THE ARGUMENT

As to the circumstances surrounding the Power of Attorney, testimony in the Court below was that Robert Wayne Hall presented himself to the hospital for a checkup and at that time, he was accompanied by David Poynor's wife, Lisa Poynor. The two (2) of them according to hospital records gave information to the treating physician. Note should be made that at the time Robert Wayne Hall presented himself on this occasion he had lost twenty (20) pounds according to the records, suffered from severe headaches, and was not being able to prepare his own food nor able to get around. This reflects his true physical condition and is in line with someone suffering from a brain tumor.

The doctor did instruct Robert Wayne Hall that if he did need to get any affairs in order he should do such and it was noted in the medical records. (RE 3, RE 4) David Poynor's wife was present when this took place, and it is believed that she related the information back to her husband who in turn then supposedly received instructions from Robert Wayne Hall. The testimony was that the Power of Attorney was prepared by a paralegal, Charles Brown. He did such at the insistence of David Poynor. After the Power of Attorney was prepared, it was delivered to David Poynor from the law firm who in turn took it to North Mississippi Medical Center and his daughter notarized the signature of Robert Wayne Hall. Remembering that this is the Power of Attorney, which will later be used by David Poynor to remove Thirty Five Thousand and no/100 Dollars ($35,000.00) from a joint survivorship account, that Robert Wayne Hall had with his sister, Alice Mitchell.

Later in Robert Wayne Hall's stay at North Mississippi Medical Center David Poynor requested a Will to be prepared for Robert Wayne Hall and at this point and time Charles Brown accompanied David Poynor to North Mississippi Medical Center. David Poynor provided the transportation and as well paid for the preparation of the Will. It should be noted also that David Poynor paid for the preparation of the Power of Attorney.

When the information was presented as to the preparation of the Will, no one could for sure state that David Poynor was out of the room the total time the conversations and discussion took place. The one thing for sure is that the notes of Charles Brown (RE 6) did include language dealing with the joint checking account between Robert Wayne Hall and Alice Mitchell and that it was to be hers. The reviewing attorney in the preparation of the Will did review the notes of Charles Brown and did advise that in order to be safe in the preparation of the Will that Charles Brown needed to include the serial number on the mobile home and vehicles. Why was not the joint checking account listed and placed in the Will is the question that does arise suspicious circumstances. Additional suspicious circumstances arise since David Poynor is the individual who took the Will for Robert Wayne Hall to review and execute. He had the Will in his possession and returned it back to the attorney's office. He had full access to it and knew what was contained therein. At that point and time, he had the Power of Attorney from Robert Wayne Hall.

Prior to the January 9, 2003, hospitalization of Robert Wayne Hall for his tumor the testimony was that David Poynor and his family did provide transportation for Robert Wayne Hall to the doctor, cleaned his home, prepared meals for him, provided Robert a free place on which to locate his mobile home, washed his clothes at time, helped him do other kind of matters, and on January 9, 2003, had a Power of Attorney prepared and used the Power of Attorney to establish a joint checking account.

The execution of the Will took place in Robert Wayne Hall's hospital room as well as the signing of the Power of Attorney. When the Power of Attorney was executed only David Poynor and his daughter, Christy Poynor Collins, were present. When the execution of the Will took place, only David Poynor and the two (2) nurses were present. The testimony of the two (2) nurses will be examined further when the issues are presented with some interesting questions to be examined.

The Trial Court even with all of David Poynor's involvement with the Power of Attorney and Will failed to find anything suspicious under the circumstances and in its Opinion found that David Poynor only did what a life long friend would do under the circumstances.

The Trial Court failed to take into consideration first the responsibilities connected with a confidential and fiduciary relationship as the one between Robert Wayne Hall and David Poynor. Next, the Court failed to properly apply the test for overcoming the burden of undue influence, which definitely existed as defined by case law and checklist provided by the Supreme Court. The Court filed to take into consideration the requirement of the duties of one who holds a fiduciary relationship with another. There was no proof presented that would overcome the guidelines and checklists established by the Supreme Court and sanctioned by the Court of Appeals when considering the involvement by David Poynor in the obtaining of the Power of Attorney and its utilization as well as the procurement of the Will which left everything to him.

The Court committed reversible error which the Appellant Court should take notice of after reviewing the issues as presented and reverse and render in favor of Alice Mitchell both as to the return of the monies obtained by use of the Power of Attorney and deliver of the assets conveyed by the Will back to her as next of kin by descent and distribution laws of the State of Mississippi.

ARGUMENT

ISSUE 1.

THE TRIAL COURT ERRED IN ITS NOT FINDING A LACK OF TESTAMENTARY CAPACITY AT THE TIME OF EXECUTION OF THE WILL AS WELL AS FAILURE TO PROPERLY FOLLOW ESTABLISHED PROCEDURES FOR THE EXECUTION TO BE VALID.

For the Court to have been able to make a determination that Robert Wayne Hall did in fact have testamentary capacity he would have had to listen to the testimony of the only three (3) individuals present at the time such occurred. The only individuals present at the time of the execution of the Will were David Poynor who inherited everything under the Last Will and Testament, Nurse Gwendolyn Gibson and Nurse LaDonna Miller McCarley. These would be the only three (3) individuals who posses knowledge of whether or not at the time of the execution of the Will whether or not Robert Wayne Hall met the required testamentary elements in order for the Court to declare a Last Will and Testament.

First, it is asked that the Court examine the testimony of Gwendolyn Gibson who was an RN treating Robert Wayne Hall on the Neuro floor. (T 33-35) It was Gwendolyn Gibson's testimony that Robert Wayne Hall had small cell carcinoma of the brain. (T 35) According to her Subpoena, she brought with her the medical records covering Robert Wayne Hall. (T 35) According to her testimony, Robert Wayne Hall on January 14 got a Decadron IV push, a Zantac PO, and Keppra, also PO. Keppra was a seizure medication, pepcid was an acid reflux medication and Decadron was a steroid anti-inflammatory. (T 38)

In response to any independent recall of signing the Will this nurse replied, "I remember signing a document". (T 43) When asked did she sign that at Mr. Hall's request her response was "I'm not for sure. I believe Mr. Poynor asked us if we could sign or witness him signing because he wanted to sign these documents". (T 43) There was no one else in the room that she recalled. (T 43)

In response to questions about his admission to the hospital, she testified from the records that his admission was 1/9/03 and information was provided by a close friend was what she said the document said. There was testimony from Nurse Gibson that Robert Wayne Hall was seen as stated by the records being Exhibit "3B". His neuro surgeon diagnosed him with a principal diagnosis of Metastic right frontal brain tumor. Secondary complications along with small cell lung cancer, chronic obstruction pulmonary disease. (T 47) There was also another consulting physician who saw Robert Wayne Hall on January 10, 2003, and that was Dr. Charles Montgomery according to the records. (T 48)

This witness for the proponent of the Will, David Poynor, testified from the medical records that the operation was to keep Robert Wayne Hall comfortable and maybe prolong his life. It was to keep him where he was not in so much pain. (T 51) From the records her testimony went on with "it says I had a lengthy discussion tonight with the patient and his girlfriend regarding the indication, alternative hope for benefit and possible complications associated with surgery versus a non operative approach including death, stroke, permanent neurological deficits, myocardial infraction, infection requiring further surgery, and prolonged antibiotics. Cerebral spinal fluid is the CSF. (T 52)

She was asked by Attorney Scott if the doctor was telling him that he hoped to relieve some of his pain but he could die or get worse when he got through. Her answer was "correct". (T 53)

The only indication whatsoever that was ever presented in the course of the Trail in regards to Robert Wayne Hall and his testamentary capacity at the signing of the Will was that he was checked by nurses at times to determine whether he was alert and oriented to person, place and time and situation. This was the testimony of Gwendolyn Gibson. (T 58) None of this occurred at the signing of the Will by Robert Wayne Hall.

On cross-examination by attorney Mitchell for Alice Mitchell, Gwendolyn Mitchell testified from the medical records Exhibit "3B" that Mr. Hall had been doing fairly well until approximately

two (2) weeks prior to his admission. At that time, he began to develop a persistent headache. The headache was similar to the headache he had when diagnosed with brain metastisis only more severe. (T 65) The records further reflected weakness of his lower extremity and unsteadiness of gate. (T65)

The nurse Gwendolyn Gibson admitted that from the record it would appear that Robert Wayne Hall had been suffering from persistent headaches severe in nature. (T 66) Further testifying from Exhibit "3B" it was brought out that "Mr. Hall has been in fairly good health until recently. He has lost twenty (20) pounds in weight. He has had no fever. He does complain of fatigue and headache". (T 57) This document further went on to state that Robert Wayne Hall did wear glasses. (T 67) Also, it made reference to the fact that he had some mild memory loss. (T 67)

Nurse Gibson was further questioned and was presented Exhibit "3B" and then asked to read three (3) lines. "Reveals and emaciated, cachectic and poorly nourished, chronically ill appearing white male in no distress. He is afebrile with stable vital signs". When questioned about this the nurse testified that poorly nourished meant that it would tie in with losing twenty (20) pounds and chronically ill meant long periods of illness. (T 69) This witness did admit on cross-examination appearing from the medical records that Robert Wayne Hall would be an individual who was somewhat weakened and ravished by his medical condition. (T 69) In addition, she testified that he had severe headaches. (T 69)

This witness further did admit that under the conditions described in the medical records of Robert Wayne Hall that under such conditions a person as described like Robert would have problems being able to think coherently. (T 69-70) At times, his ability to be coherent would be affected. (T 70)

When questioned about her involvement in this matter on cross-examination this witness related, "From what I can recall of the incident, we were making rounds and Mr. Poynor said that Mr. Hall wanted us to witness a document. And when LaDonna and I went into the room we

witnessed him signing that document". (T 72) She did not recall anyone else reading it to him. (T 72) She was not sure if he had on his glasses or not. (T 72) To the best of her recollection, no one read the Will to Robert Wayne Hall. (T 73) All that she remembered was him signing his name and could not recall any conversations with him afterward. (T 74)

In examination of what nurse LaDonna Miller McCarty had to say on direct examination it was brought out that she was an RN (T 82) and that on Exhibit "2" being the Last Will and Testament proportedly of Robert Wayne Hall that it looked like her signature on it. (T 83) She did admit that she recalled signing it. (T 83)

Then an unusual circumstance developed from the cross-examination of Nurse McCarty in that it was brought to her attention that the Will and the Affidavit were on two (2) different dates. This was two (2) different incidences. (T 85) This witness at that point testified that the only thing she recalled was one night. When asked if she recalled just signing documents one night her answer was "Yes sir, that's the only one I recall". (T 86) When asked about Christy Poynor Collins she testified that she had met her outside of the courtroom. (T 86) When asked, "So to your knowledge, having met her outside, she never notarized any signature for you" and her response was "No, Sir" (T 86) (RE11) When asked about the time the Will was signed she had no independent recollection. (T 87) Further, when questioned about who was present when it took place, this witness testified that she was uncertain except that it was she and Gwen in the room but she knew David Poynor was. (T 87)

She did not recall if Robert Wayne Hall told her that this was his Will. (T 87) She did not even remember how she was recruited for being a witness to the Will. (T 87-88)

Then the only other person involved at the time of the execution of the Will was David Poynor. He was called as an adverse witness in the Trial. (T 91) In questioning him about what had transpired and how he was involved in the Will, he testified about going to the James's Law Office.

He and Charlie Brown rode together one (1) day to get the information at North Mississippi Medical Center. (T 105) During the time that Charlie Brown was obtaining the information to be included in the Last Will and Testament of Robert Wayne Hall, David Poynor could have been in and out of the room or came in at the end. (T 106)

He was questioned about who was present when the Will was signed, and he testified that he was there, possibly his daddy-in-law and maybe two (2) nurses. (T 108) The Will was signed in his presence with two (2) witnesses. (T 109) He did admit however, that he was not sure about anyone being in the room other than him and the two (2) nurses. (T 109) The testimony was that in response to any of Robert Wayne Hall's relatives being there he did not remember. (T 109) He admitted that he probably paid for the Will. (T 109) David Poynor when questioned about whether anybody read the Will to Robert Wayne Hall in their presence he testified "not that I am aware of". (T 115) He related that "I went and told them that Robert needed them to come down there, that he had some papers that he needed to sign". (T 115)

The following cross-examination occurred of David Poynor as to the Will and Power of Attorney:

Q. Okay, and it was your testimony on January 14, 2003, that Robert's demeanor, that there was nothing wrong with him prior to the signing of the Will.
A. I didn't say nothing was wrong with him. I just said that it did not appear that you know, anything that his head was hurting him or anything like that.
Q. Okay. But still nobody read him the Will did they?
A. I can't say that. I wasn't in there all the time.
Q. Nobody ever read the Will in your presence?
A. Not that I saw, No, Sir, he had it himself.
Q. Nobody ever read him the Power of Attorney in your presence?
A. Not that I am aware of. (T 145-146)

Having set forth the above recap of testimony on January 14, 2003, in reference to the alleged Will of Robert Wayne Hall, it is brought to this Court's attention the following cases and the rules of law contained therein which support the position of Alice Mitchell:

(1) Smith vs. Streater, 827 So.2d 673 (Miss.2002) brought forth and reiterated previously holdings of the Supreme Court and cited in that case a holding in the case of Estate of Edwards, 520 So.2d 1370 [1372], wherein the Court stated the requirements of determining competency as follows:

> "Consistently, this Court has held that the test of one's capacity to execute a will, 'is the ability of the testator at the time to understand or appreciate the nature and effect of his act, the natural objects or persons to receive his bounty and their relationship to him, and is capable of determining what disposition he desires to make of his property.' Such capacity, 'is to be tested as of the day of the execution.'"

(2) The Supreme Court has again most recently addressed the issue of testing the testamentary capacity of an individual and such was done in the case of The Matter of the Estate of Lela W. Holmes v. Bertha Holmes-Price, 961 So.2d 774 (SCT,2007) wherein it was stated:

> [2] ¶ 12. A determination of testamentary capacity is based on three factors:
> 1. Did the testatrix have the ability at the time of the will to understand and appreciate the effects of her act?
> 2. Did the testatrix have the ability at the time of the will to understand the natural objects or persons to receive her bounty and their relation to her?
> 3. Was the testatrix capable of determining at the time of the will what disposition she desired to make of her property?
>
> Smith v Averill 722 So.2d 606, 610 (Miss.1998) ...
> ...
> [9] ¶ 39. This Court has held that he following factors should be considered in determining the grantor/testator's knowledge at the time of execution of the instrument:
> (a) his awareness of his total assets and their general value, (b) an understanding by him of the persons who would be the natural inheritors of his bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect that prior will or natural distribution, (c) whether non-relative beneficiaries would be excluded or included and, (d) knowledge of who controls his finances and business and by what method, and if controlled by another, how dependent is the grantor/testator on him and how susceptible to his influence.
> The guidelines of our prior cases suggest that the testator/grantor should give a thoughtful deliberation to all of these factors. No set amount of time is stated as required, but a positive factor to overcome the undue influence presumption is a mature and thoughtful weighing of the legal consequences of a grantor/testator's action.
>
> Murray, 446 So.2d at 579. See also Mullins, 515 So.2d at 1195.

Thus, it is brought to the attention of the Appellate Court that at the time of the execution of the Last Will and Testament of Robert Wayne Hall that none of these safeguards took place at the time of the execution of the Will as referenced by the testimony set forth prior to the listing of the cases.

Attention is brought to the case of Pigg v. McClendon, 877 So.2d 406 (COA,2003) wherein the Court of Appeals has held:

> ¶ 11 Once the will proponents have established the prima facie case, the initial burden of proof has been satisfied. The obligation of going forward then falls to the contestants to provide evidence to support the factual basis of the challenge that they make.
> * 410 [6] ¶ 12. Testamentary capacity is a necessary prerequisite to a valid will. Miss.Code Ann. § 91-5-1 (Rev.1994). We look to three factors measured on the date of the will to determine the issue of capacity: (1) Did the testatrix have the ability to understand and appreciate the nature and effect of her actions? (2) Did the testatrix have the ability to recognize the natural objects or persons of her bounty and their relation to her? (3) Was the testatrix capable of determining what disposition she desired to make of her property? Estate of Wasson v. Gallaspy, 562 So.2d 74,77 (Miss.1990)

Thus, attention is again referenced to all the testimony surrounding the circumstances and the event of the alleged signing of the Will by Robert Wayne Hall. None of the testamentary requirements were met. Further, when one looks at what is deemed necessary it is stated that execution means the placing of a signature or some other type of mark to indicate his signature and that only when a document is signed does it become a Will. Thus, if we look to the date of the Will this would mean that all of the above referenced requirements had to be made at the time of the execution, which is in fact the time that the Will was signed. None of this was met in the case that is being presented on Appeal.

It is important at this point the Appellant feels that there should be a recap of the testimony presented in regards to the utilization and procurement of the Power of Attorney as well as the procurement and involvement of David Poynor therein. David Poynor was the one who contacted the

lawyer for the Power of Attorney. (T 85) When questioned about whom he actually talked with about the Power of Attorney he was confused and could not remember but finally admitted that it was Terry James's office. (T 96) He went by Terry's office and picked up the Power of Attorney. He then carried it to Tupelo to the hospital. David Poynor stated that he gave the Power of Attorney to Robert and assumed he was reading them. (T 97) David Poynor's daughter notarized the Power of Attorney. (T 98) Neither he nor his daughter read the Power of Attorney to Robert Wayne Hall. (T 98) The only three (3) people in the room at the signing of the Power of Attorney were David Poynor and his daughter and Robert Wayne Hall. (T 98)

The testimony was that later David Poynor took the Power of Attorney to Bancorp South in Houston and removed Thirty Five Thousand and no/100 Dollars ($35,000.00) from a joint account, which Robert Wayne Hall had with his sister, Alice Mitchell. He admitted that Alice Mitchell was listed on the bank account as a survivorship. (T 99) David Poynor testified that he put the money in another account with Robert Wayne Hall's name, his name, and David Poynor's wife, Lisa. (T 100) He was questioned about what his address was, and the answer was 15 County Road 316, Big Creek. He never lived at 267 County Road 142, Coffeeville, MS., which was listed as the address on the new account. (T 100)

David Poynor was shown Exhibit "4B" (RE4) and questioned about his signature on it. This was the opening of the account and Robert Wayne Hall was not there with him when he used the Power of Attorney. (T 101)

David Poynor's testimony was that after he had opened this account by means of the Power of Attorney that his wife later moved the account to a bank located in Calhoun City. The testimony was that his wife did this after Robert Wayne Hall had passed away (T 102) and that there was now approximately Twenty Four Thousand and no/100 Dollars ($24,000.00) The testimony was that he spent Five Thousand and no/100 Dollars ($5,000.00) or Six Thousand and no/100 Dollars

($6,000.00) for the funeral and could not account for the remaining Five Thousand and no/100 Dollars ($5,000.00) or Six Thousand and no/100 Dollars ($6,000.00). (T 102)

In his deposition shown in Trial, he had testified as reflected on page 103 of the Trail transcript that he had paid cash and received no receipts for disbursements for the said funds. (T 103) Prior to obtaining the Power of Attorney, he was not on any checking accounts with Robert Wayne Hall. (T 119) David Poynor knew that Robert Wayne Hall was not blind in one eye but that he had blurry vision. (T 119)

Having denied that he was involved in any way with taking care of Robert Wayne Hall, he was questioned about his signature on Exhibit "7" which was the Exhibit introduced showing that Robert Wayne Hall had been signed up for hospice. (T 121) It was his signature.

David Poynor testified that he did pay for the Power of Attorney and Will. (T 122)

On direct examination when asked about why he transferred the Thirty Five Thousand and no/100 Dollars ($35,000.00), David Poynor testified that Robert asked him to do it. (T 128) David Poynor's excuse for removing the Thirty Five Thousand and no/100 Dollars ($35,000.00) was that Robert Wayne Hall told him that he didn't know when he was going to die, and when he died he didn't want David Poynor and his wife to be out anything on his bills and that whatever was left if they were out anything that he (David Poynor and Lisa) could use it the way they wanted to. (T 130)

He was questioned on direct examination that after Robert moved on to his place how often would he see him, and the testimony was about every day every night.

Then on cross examination being questioned again as to the issue of the Thirty Five Thousand and no/100 Dollars ($35,000.00) removed from the bank account, David Poynor said that "No. I didn't say that he wanted me to have it all. I said that he asked me to take the money, put it in his name, my name and my wife's name. After his bills were paid because he didn't know --- I mean, we don't know how long we are going to live. And he said he didn't know what would have to be

paid. Anything left, we could use it the way we seen fit". (T 141) He was questioned about why he did not get Robert to write a check for the Thirty Five Thousand and no/100 Dollars ($35,000.00), and he just could not answer it. His only answer was that Robert Wayne Hall asked him to remove the money. (T 142)

David Poynor admitted that in regards to driving Robert Wayne Hall to the hospital when Robert was receiving treatments that his wife performed most of the services but he did it once or twice. (T 143-144)

Another important individual connected with the totality of the circumstances surrounding Robert Wayne Hall and his relationship with David Poynor was Christy Poynor Collins.

David Poynor is Christy Poynor Collins's father. It was her testimony that she and her father took the Power of Attorney to Tupelo to the hospital where Robert Wayne Hall was located. David Poynor gave the Power of Attorney to Robert Wayne Hall, left, and went down the hall. Robert Wayne Hall read through the papers. (T 244) He asked her where to sign and she notarized it. (T 245)

When questioned about the separate Affidavits attached to the Will her testimony was that she, David Poynor, and her mother took them to the nurses station for the nurses to sign. (T 246)

This witness took Robert Wayne Hall once or twice to the grocery store but testified that her mother did take him back and forth to doctor appointments. (T 247)

Cross-examination of Christy Collins revealed that no one read the Power of Attorney to Robert. (T 248)

This witness testified that her family prepared most of the meals for Robert Wayne Hall. (T 249) Her mother, her or her father help transport him to the doctors appointments and upon being asked this she testified that it was her mother. (T 249)

She did acknowledge that when Robert Wayne Hall moved up by her parents that he was suffering from some medical problem. (T 249) When questioned about Robert Wayne Hall and his medical condition, she did admit that prior to going into the hospital January 2003 that he did lose some weight and due to the therapy he was undergoing he lost his hair. (T 250) She testified that they did help clean Robert's trailer and help take care of it for him. (T 251)

In response to cross-examination, this witness further stated:

> Q. Would it be a true statement that Robert was dependant on her parents there for his care and assistance?
> A. As I said before, when he got to a point that he couldn't do things for himself he was. That was the reason he moved down there.
> Q. That was the reason he moved down there?
> A. He knew that when he got to a point that he could not take care of himself, that we would take care of him. (T 253)

When the witness signed the Affidavits to the Will, the notarizing party could not remember whether or not she gave them anything else to read other than the Affidavits. (T 256)

Melissa Poynor the wife of David Poynor testified that when Robert Wayne Hall was taken off the boat with his first round of cancer, it was March 2001. (T 286) It was a weekly thing for her to transport Robert back and forth to the doctor. (T 289)

On the visit January 9, 2003, she was with him at the hospital. They had left and were called back. (T 291) It was during the interview at this time by the consulting doctor when he told Robert Wayne Hall we need to build you up because Robert had gotten to where sometimes he would not eat. It was always, you know, food was always offered. This was the testimony of Lisa Poynor. (T 292)

The testimony of Lisa Poynor reiterated that Robert Wayne Hall would come out at night and eat supper with them and would sometimes during the day come out and if they were eating lunch would sit down and eat with them. (T 295)

In response to questioning about Robert Wayne Hall and statements made to her she testified:

"He said, well, he said, when I'm gone, he said the first thing I want you to do is to go back to school, he said, you've been my nurse, you've taken excellent care of me". (T 296)

As to the Thirty Five Thousand and no/100 Dollars ($35,000.00) she stated that she could hear Robert telling David about wanting it put in a separate account so if something happened to him they could make sure his needs were taken care of and they wouldn't be out anything on his expenses because Robert was one of those that paid his way. (T 300)

On cross-examination, Lisa Poynor admitted that since Robert had been living up there from August 2001 that she had actually been driving and carrying him to the doctor and all. (T 305) More specifically from August 2001 until January 2003 she had been doing that. (T 305) As to the meals, it was her testimony that he would eat supper with them every night. (T 305) From August 2001 through January 2003 when questioned about helping clean his trailer she testified that she did not do it all of the time. (T 307) She was questioned about the severity of Robert's headaches. (T 308) Then when confronted with testimony from her deposition taken October 14, 2004, she did admit that her testimony was correct and such is as follows:

Q. At that point and time – when did Robert start really complaining of his severe headaches? And your answer was it would have been – severe would have probably been around November or December. Before then, he complained of just having light headaches. Is that your answer now?
A. Yes sir.
Q. So that's your testimony about the severity, they were back in November and December, weren't they.
A. Yes sir.

She was then asked about his physical disabilities and she admitted that she had heard him state that he was somewhat blinded or blurred in one eye. (T 310) She admitted that in her deposition that when questioned about Robert's eyes that she testified that they were bothering him, until he had surgery. The surgery was the 16th of January. (T 310)

The severity of Robert's pain as characterized to Lisa Poynor by Robert Hall was as one coming off a three (3) day drunk. (T 311)

She did admit that she did move the money from the account where David Poynor had placed it into her account. (T 314)

From the testimony of Mr. Terry T. James, whose law firm prepared the Power of Attorney and Will for Robert Wayne Hall, Terry James testified that Charlie Brown was employed as a paralegal. (T 324) Mr. James testified that in regards to the Will and Power of Attorney he reviewed them to make sure that everything was in order. (T 325-326) To the best of Terry James' recollection he determined how the Will was going to be executed, where and under what circumstances. (T 347) He advised that it must be signed in the presence of two (2) uninterested parties. (T 327) Mr. James testified about the putting of a serial number on the mobile home but not anything else. He did testify that he told Mr. Brown when dealing with personal property, it would be to my client's best interest if we got a serial number on that mobile home before the Will was prepared, or if the Will had been prepared, to insert that serial number in there. (T 327) Terry James had no contact with Robert Wayne Hall when the notes were made. (T 328)

The following testimony was solicited from Mr. James:

> Q. You have no knowledge of your own personal nature of who was present either when the Power of Attorney was signed or the Will; is that correct?
> A. That is correct, Your Honor--- Mr. Mitchell.
> Q. At any time have you discussed the contents of the Will with Robert Wayne Hall?
> A. No, Sir.
> Q. At any time have you provided any independent legal advice to Mr. Robert Wayne Hall?
> A. Not that I am – not that I am aware of. I do not believe Mr. Mitchell, I talked with Mr. Hall one time on the telephone or a gentleman that identified himself as Mr. Hall. I did not know him personally, but that would be the extent of my conversation with him. And I believe it was in the fall of 19 - - of 2002. (T 329)

When questioned about who his client was Mr. James did admit that who paid him would be the client. (T 330)

He was questioned if he knew anything or had any knowledge of the mental or physical condition that Robert Wayne Hall was in as of January 2003 and Mr. James stated that he did not. (T 330)

The next and last witness dealing with the incidences of the Will and Power of Attorney was Charles W. Brown. Mr. Brown testified that on January 13, 2003, he did recall having a conversation with Mr. Robert Wayne Hall. (T 336)

In regards to the Power of Attorney Brown testified that January 10th fell on a Friday of that year and January 13th fell on a Monday. At closing time on Friday he was still at the office and was shutting down when Mr. Poynor and his daughter, Christy, appeared at the door. He knew them, unlocked the door and let them in. Mr. Poynor explained that he was in need for a Power of Attorney for a friend of his, Robert Wayne Hall. This Power of Attorney needed to be done quickly. Charlie Brown testified that he prepared the Power of Attorney and gave it to David Poynor. (T 336-337) He explained that it had to be signed by Mr. Hall, notarized, then recorded. (T 337)

Charlie Brown testified:

> "On the following Monday January 13th, as I stated, Mr. Poynor I think first talked to Mr. James and then talked to me that Mr. Hall needed to Power his - - I mean his Last Will and Testament very quickly.

He agreed that David Poynor would transport him to Tupelo to talk with Robert Wayne Hall". (T 338)

It was his testimony that prior to that time he knew who Mr. Hall was but as having any conversation or business dealings or any type with him he did not recall him he just knew his face. (T 338)

Charles Brown and David Poynor went to Tupelo to the hospital where Robert Wayne Hall was located. After a time Charlie Brown testified that he was there to do an interview with Robert to get his affairs in order. (T 339) David Poynor excused himself and was going to the bathroom. He left the room. Then after that, Charlie Brown admitted that he knew Robert Hall was not married and when asked if he had any children, he said no. In the conversations with Robert Wayne Hall, Robert told he did have a checking account with Bancorp South. Brown's testimony was "and he told me he did have a checking account with Bancorp South and that his sister was on that with him. And I asked him how was that set up. He said that was a survivorship, and that if anything happens to him it goes to her. And I explained to him well you understand that if you die, then that's automatic. It doesn't even go through your Will. He said I know that, and that's how I set that up". (T 340-341)

Charlie Brown did testify that David Poynor came back in just as the interview was ending just right before it was over. (T 343)

Charlie Brown testified on cross-examination as to work for David Poynor that "We have done some work for him from the standpoint of I think he purchased a couple of houses in Big Creek and we did the title work and the Deed work for that". (T 349) He testified that he never performed any other legal work to his knowledge for Robert Wayne Hall. (T 349)

Charlie Brown was asked the following:

Q. The information as to the Power of Attorney was supplied to you by Mr. David Poynor; is that correct?
A. That's correct.
Q. And Mr. Poynor also supplied you with the ride up to the hospital to interview Mr. Robert Wayne Hall; is that right?
A. That's correct.
Q. Now, Mr. Poynor is also the one that paid you for the Will and Power of Attorney; is that correct?
A. I didn't take any money from Mr. Poynor. I understand that he did pay for it, though.
Q. Paid cash; is that right?
A. That's what I've been told I never actually saw that.
Q. But Robert Wayne Hall never paid you anything?

A. No, Sir, not that I'm aware of.

...

Q. Okay. And you provided no legal advice to Robert Wayne Hall in regards to his execution of that Power of Attorney?
A. No, Sir. I never talked to him about the Power of Attorney. (T 350)

Charlie Brown did not include any notation in the Last Will and Testament in regards to the survivorship and the bank account in Houston. (T 351) Further, he didn't make any mention anywhere in the Will of the Etna policy as well as the survivorship bank account. There is no specific statement of that. (T 352) This testimony of Charles Brown occurred in regards to Exhibit "2" being the Last Will and Testament of Robert Wayne Hall and further from Exhibit "9" his notes from at the time of the interview.

Charlie Brown admitted that he and Terry James both talked to David Poynor about the execution of the Will. (T 353)

Charlie Brown testified that the Will was given to David Poynor and he was the one that took it to the hospital. (T 353)

Further cross-examination revealed:

Q. So under those conditions, he would know what's inside the Will.
A. If he read it, Yes, Sir.
Q. I don't believe - - you didn't go into any real detail with Robert Wayne Hall did you, about what would happen him leaving out his non relatives and all, leaving out his relatives and non relatives and situations.
A. Says I knew he was not married and he informed me he had no children, I really had no concern over that.
Q. Alright, Sir, did you discuss with him his current business arrangements and who was handling his monetary and financial means?
A. No Sir.
Q. Did you ask Mr. Hall if he had consulted with anyone about the preparation of the Will, other than giving you this information?
A. No, Sir. (T 354)

ISSUE 2.

THE TRIAL COURT CORRECTLY FOUND A CONFIDENTIAL RELATIONSHIP BETWEEN ROBERT WAYNE HALL AND DAVID POYNOR, BUT IT ERRED WHEN IT RULED THAT THIS WAS OVERCOME WITH CLEAR AND CONVINCING EVIDENCE.

In consideration of the existence of a confidential relationship, attention is directed to the case of Holland v. Traylor, 227 So.2d 829 (SCT,1969) wherein the Supreme Court had the following to state:

[2] ....

> It is clear from his own testimony that, in writing the will, the attorney-draftsman, did no more than write down, according to the forms of law, what Mrs. Mosses told him. There was no meaningful independent advice or counsel touching upon the area in question and it is manifest that the role of the attorney in writing the will, as it relates to the present issue, was little more than that of scrivener. The chancellor was justified in holding that this did not meet the burden nor overcome the presumption.
>
> In Croft v. Alder, 237 Miss. 713, 724, 115 So.2d 683, 686 (1959) there was an extensive review of the authorities relating to the question here under consideration. This Court said:
>
> Meek v. Perry, 1858, 36 Miss. 190, 243, 244, 252, 259, is perhaps the leading case. It involved a will by a ward leaving a substantial amount of her property to her guardian. The court held that the presumption of invalidity applies to wills as well as deeds. It was said the law watches with the greatest jealously transactions between persons in confidential relations and will not permit them to stand, unless the circumstances demonstrate the fullest deliberation on the part of the testator and the most abundant good faith on the part of the beneficiary. Hence the law presumes the existence of undue influence, and such dealings are prima facie void, and will be so held 'unless the guardian show by clearest proof that he took no advantage over the testator, and the cestui's act was a result of his own volition and upon the fullest deliberation.
>
> ....
>
> ... In *835 Jamison v. Jamison, 1909, 96 Miss. 288, 298, 51 So. 130, 131, it was said: '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 of and testify to the 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 direct it improperly to the accomplishment of the purpose which he desires. Subscribing witnesses are called to attest the execution of wills, and testify as to the testamentary capacity of the testator, and the circumstances

> attending the immediate execution of the instrument; but they are not called upon to testify as to the antecedent agencies by which the execution of the paper was secured, even if they had any knowledge of them, which they seldom have. "in re Coins' Will (Fortner v. Coins), 1959, (237 Miss. 322) 114 So.2d 759.
> ....
> [11][12] as stated in Croft, supra, the rule that a presumption of undue influence arises when a fiduciary relationship is established applies with even greater stringency in cases of transactions inter vivos.

Thus, this would definitely apply to the analization of the use of the above referenced Power of Attorney given by Robert Wayne Hall to David Poynor, and further by Poynor using the Power of Attorney to remove Thirty Five Thousand and no/100 Dollars ($35,000.00) from a bank account, which was to go to Alice Mitchell. David Poynor being present when the information about the Will was given to Charles Brown. He could have known that Alice Mitchell was to receive this and when he got the Will, he could read it and then knew that it was not in the Will.

In the case of Rogers v. Pleasant, 729 So.2d 192, [3] ¶ 7. (SCT,1999) it was held:

> [3] ¶ 7. In order for Robert to have overcome the presumption of undue influence, the evidence must have been clear and convincing, and must have shown that (A) Robert exhibited good faith in the fiduciary relationship with Littie; (B) Littie acted with knowledge and deliberation when she executed her will, and (C) Littie exhibited independent consent and action. In re Will of Fankboner, 638 So.2d 493, 495 (Miss.1994)...
> [4] ¶ 13. There are four factors to be considered in determining Littie's knowledge and deliberation at the time the will was executed. They are: (1) Littie's awareness of her total assets and their general value, (2) an understanding by Littie of the persons who would be the natural inheritors of her bounty under the laws of descent and distribution or under a prior will and how the proposed change would legally affect the prior will or natural distribution, (3) whether non-relative beneficiaries would be excluded or included, and (4) knowledge of who controls Littie's finances and business and by what method, and if controlled by another, how dependent was Littie on him and how susceptible to his influence. Murray, 446 So.2d at 579.

The Supreme Court has enumerated several factors to consider in determining whether a confidential relationship existed and such was set forth in the case of Wright v. Roberts, 797 So.2d 992, [6] ¶ 18 (SCT,2001):

> [6] ¶ 18. This Court has enumerated several factors to consider in determining whether a confidential relationship exists:

(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 is 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 of advanced age or poor health, and
(7) whether there exists a power of attorney between the one and another.

[8][9][10]¶ 21. ...
[A} though the mere existence of confidential relations between a testator and a beneficiary under his will does not raise a presumption that the beneficiary exercised undue influence over the testator, as it does with gifts inter vivos, such consequence follows where the beneficiary "has been actively concerned in some way with the preparation or execution of the will, or where the relationship is coupled with some suspicious circumstances, such as mental infirmity of the testator,: or where the beneficiary in the confidential relation was active directly in preparing the will or procuring its execution, and obtained under it a substantial benefit.

Croft v. Alder, 237 Miss. 713, 723-24, 115 So.2d 683, 686 (1959). Furthermore, when there is a fiduciary or confidential relation, and there is a gift or conveyance of dubious consideration from the subservient to the dominant party, it is presumed void. This is not because it is certain the transaction was unfair, to the contrary, it is because the Court cannot be certain it was fair.

....
[16]¶ 37. We have previously stated that "[t]he participation of the beneficiary/grantee, or someone closely related to the beneficiary, arouses suspicious circumstances that negate independent action. Harris v. Sellers, 446 So.2d 1012, 1015 (Miss.1984).

As under the Wright v. Roberts ruling, the proponent of the Will, David Poynor, did not prove by clear and convincing evidence good faith on his part, that Robert Wayne Hall had full knowledge and deliberation of his actions and their consequences and that there was independent consent and action by Robert Wayne Hall. David Poynor failed on each one of these points and by making such a finding the Judge committed reversible error in the case at bar.

In 2002, the Court of Appeals in the case of Tinsley v. Taylor, 830 So.2d 699 (COA,2002) there was a guide provided for determining the beneficiary good faith and it was set forth as follows::

[5][6] ¶ 11. Among a chancellor's considerations in determining good faith are these:
a) the person who initiated the procurement of a will;
b) the location at which the will was executed and the individuals who were present;

c) the payment of consideration for the will;
d) if paid, the person who paid it; and
e) the relative secrecy or openness in the execution.
Citing In re Last Will and Testament and Estate of Smith, 722 So.2d 606 (¶22) (Miss.1998)

In the Tinsley case, as is the case before the Court the Will was executed in the privacy of a hospital room. As in the Tinsley case, it is important for consideration that the Court held that in the Tinsley case Evan's physician testified that his patient had been surprisingly lucid during the last illness, as confident as a person of his age and condition could be. However, Evans did not discuss his assets with a doctor, that he was having a Will prepared, or any other related matter. They discussed Evans's physical conditions. While the doctor may be able to establish that Evans was mentally competent, that is not enough to show the absence of undue influence. The same situation would be true as in the Hall case except none of his treating doctors testified as to his competency.

Additionally, there was no testimony about Robert Wayne Hall getting any advice from the lawyer who drafted his Will, nor his paralegal and such were the facts in the Evans case. In the Evans case, the proponent found the lawyer, provided instructions to the lawyer, and there was no evidence of independent action on the part of Evans. Basically, this would be the same situation as existed in the case of Robert Wayne Hall considering the above cited testimony from the Trial. It is submitted that David Poynor, like Tinsley in the Evans case had the burden of producing clear and convincing evidence to rebut the presumption of undue influence. In the Evans case, she did not carry or meet the burden, and it is submitted that in this case on Appeal, David Poynor did not meet the burden even though the Chancellor so found. It is submitted the Chancellor erred as a matter of law.

In the case of Dean v. Kavanaugh, 920 So.2d 528 (COA,2006) the Court of Appeals reiterated and followed and recognized the guidance and requirements set forth by the Supreme Court dealing with independent consent and action and such was stated:

[13][14] ¶ 46. The Mississippi Supreme Court has held that the best way to show **independent consent** and **action** is to provide "advice of (a) competent person, (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interests." Id. at 622. ....

The 2007 case, Spencer v. Hudspeth, 950 So.2d 238 (COA,2007) dealt with the execution of a Deed. This case reaffirmed prior rulings by the Supreme Court and also rulings of the Court of Appeals when the Opinion was rendered. In this particular case, it was enumerated that there existed two (2) doctrines of undue influence in Mississippi that, if proved, would invalidate a Deed; traditional undue influence and confidential relationship.

What the Mississippi Supreme Court has done was set out factors to be considered when a Court is called upon to determine whether a confidential relationship exists.

Spencer v. Hudspeth set forth the factors as:

1) Whether one person has to be taken care of by another,
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 a joint account with another; and
5) Whether one person is mentally or physically weak.

This particular case set forth and reaffirmed prior definitions of a confidential relationship as well as the Supreme Court giving lower courts a three (3) prong test to determine whether the presumption of undue influence was overcome.

[8] ¶ 14. The Supreme Court has established a three-prong test to overcome the presumption of undue influence. The three prongs are:
(1) That the grantee/beneficiary acted in good faith.
(2) That the grantor had full knowledge and deliberation of his actions and the consequences of these actions, and
(3) That the grantor exhibited independent consent and action.

Going further, the Court also looked at a gift.

[9] [10] ¶ 15. To determine whether or not a gift was executed in good faith the Mississippi Supreme Court has outlined the following five (5) factors:
(1) Determination of the identity of the initiating party in seeking preparation of the instrument,

(2) The place of the execution of the instrument and in whose presence,
(3) The consideration and fees paid, if any,
(4) By whom paid, and
(5) The secrecy and openness of the execution of the instrument.

As in the Spencer v. Hudspeth case, Robert Wayne Hall did not have or exhibit independent consent and action. As required in Spencer v. Hudspeth, there was no independent advice or counsel given to Robert Wayne Hall by any person. Thus, David Poynor never rebutted this requirement under the three (3) prong test.

The Court of Appeal in its case Van Cleve v. Fairchild, 950 So.2d 1047, (COA,2007) recognized the entire prior checklist enumerated by the Mississippi Supreme Court when it considered the execution of certain deeds and transfer of monies. The issue of a confidential relationship was again defined and elements confirmed as well as a checklist governing such conduct.

Alice Mitchell would submit that the case In the Matter of The Estate of Lela W. Holmes v. Bertha Holmes-Price, 960 So.2d 674 (SCT,2007) would totally govern what has transpired in the case at bar which is now on Appeal. In The Matter of the Estate of Lela W. Homes v. Bertha Holmes-Price the Supreme Court very specifically addressed the issue of undue influence. In that particular case, not only was undue influence addressed but also further issues and guidelines were set forth. Alice Mitchell would ask that this Court now consider the rulings set forth:

> ¶ 16. "This Court held that a confidential relationship did not have to be a legal one, but that the relation may be moral, domestic, or personal...The confidential relationship arises when a over-mastering influence controls over a dependent person or trust, justifiably reposed." Murray v. Laird, 446 So.2d 575 (Miss.1984) (citations omitted).
>
> [6] ¶ 16. Several factors must be considered in determining whether a confidential relationship exists:
> (1) whether one person has to be taken care of by other, (2) whether one person maintains a close relationship with another, (3) whether one person is 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 of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.

Wright v. Roberts, 797 So.2d 992, 998, (Miss.2001) (citing In re Estate of Dabney v. Hataway, 740 So.2d 915, 919 (Miss.1999)).

[7] ¶ 18. As all seven of the applicable facts have been met, we find that a confidential relationship clearly existed and, therefore, a presumption of undue influence. With regard to the presumption of undue influence, this Court has established a three-prong test:
Thus, our law may be summarized to state that when the circumstances give risk to a presumption of undue influence, then the burden of going forward with the proof shifts to the grantee/beneficiary to prove by clear and convincing evidence of:
(1) Good faith on the part of the grantee/beneficiary;
(2) Grantor's full knowledge and deliberation of his actions and their consequences; and
(3) Advice of (a) competent person (b) disconnected from the grantee and (c) devoted wholly to the grantor/testator's interest.

Murray, 446 So.2d at 578. Subsequently, this Court redefined the third prong of the Murray test because it was being read too strictly. "We declare that the appropriate third prong of the test is a requirement that the grantee/beneficiary prove by clear and convincing evidence that the grantor/testator exhibited independent consent and action." Mullins v. Ratcliff, 515 So.2d 1183, 1193 (Miss.1987) "Independent advice is but one way independent consent and action may be shown." *Id.*

*681 ¶ 19. This Court has previously found that the testimony of the proponents or interested parties is not sufficient to rebut the presumption of undue influence.
In those cases where you admittedly have a confidential relations transfer from a dependent to a dominant party, it seems to me that the ultimate test should be something on the order of the following: Excluding the testimony of the grantee, those acting in the grantee's behalf (such as the attorney), and any others who could have a direct or indirect interest in upholding the transfer (such as grantee's family), is there any other substantial evidence, either from the circumstances, or from a totally disinterested witness from which the Court can conclude that the transfer instrument represented the true, untampered, genuine interest of the grantor? If the answer to this question is yes, then it becomes a question of fact whether or not there was undue influence. If the answer is no, then as a matter of law the transfer is voidable.

Pallatin v. Jones, 638 So.2d 493, 495 (Miss.1994) (citing Vega v. Estate of Mullen, 583 So.2d 1259, 1275 (Miss.1991) (Hawkins, P.J., dissenting on reh'g)).

¶ 20. This Court reiterated that finding in Irving v. Phillips, 827 So.2d 673, 680 (Miss.2002). ...

...

> [8] ¶ 25. This Court has held that the following five factors should be considered in determining questions of good faith:
> (a) the determination of the identity of the initiating party in seeking preparation of the instrument, (b) the place of the execution of the instrument and in whose presence, (c) what consideration and fee were paid, if any, and (d) by whom paid, and (e) the secrecy or openness given the execution of an instrument.
>
> Murray, 446 So.2d at 579. See also Mullins 515 So.2d at 1195.

To recap what has previously transpired in the case which is appealed at this time Alice Mitchell would ask this Court to remember the following as set forth in the referenced testimony above:

(1) David Poynor was the individual who obtained the preparation of the Power of Attorney as well as providing the individual who notarized the signature on the Power of Attorney as well as being the individual who paid for it and then later utilized it to remove Thirty Five Thousand and no/100 Dollars ($35,000.00) from a joint bank account on which Alice Mitchell was a survivor and which Robert Wayne Hall when even if he knew what he was doing gave instructions that he wanted Alice Mitchell to have the monies from this account.

Note also that David Poynor was a moving party in the preparation of the Will. He sought out and obtained the services of the law firm, provided transportation for the paralegal to go to the hospital, was in and out of the room when the information was given to the paralegal, picked up the Will at a later date and transported it back to the hospital for execution, obtained witnesses to observe the signature of Robert Wayne Hall, testified that no-one read the Power of Attorney nor Will to Robert Wayne Hall and further was the one that inherited everything that Robert Wayne Hall had on this earth and then knowing such utilized the Power of Attorney to raid the bank account which was left to Alice Mitchell at the prior direction of Robert Wayne Hall when he supplied information to Charlie Brown.

Very applicable case law is set forth in the case of Irving v. Streater, 827 So.2d 673 (Miss.2002).

As a point of reference when considering the utilization of the Power of Attorney, the case of Turner v. Johnson, 498 So.2d 389, 388 (Miss.1986) related:

> [2] It is fundamental law that an agent owes his principal absolute good faith and fidelity, and he cannot in the exercise of his authority as agent acquire property or interest therein rightfully belonging to his principal without full disclosure and free consent of his principal. Any property or interest obtained thereby is voidable by, and may be set aside by the principal or his estate. Consumer Credit Corp. of Miss. v. Swilley, 243 Miss. 838, 138 So.2d 885 (1962);...

It has already in prior discussion in this Brief been brought to the Court's attention that the case law requires that in order for there to be a gift as alleged by David Poynor he must have total independent supporting evidence and such cannot be from the beneficiary i.e. David Poynor or any member of his family. Nowhere was this proven or accomplished, and yet the learned Chancellor ruled otherwise.

Reference is now made to the case of Madden v. Rhodes, 626 So.2d 608 (COA,1993) when the Court stated:

> [16] ....
>
> But a Court of equity has an equal obligation to be certain, in a transfer between parties in a fiduciary relation, that an elderly or weak person is not abused or overreached. There exists a very simple rule which should be observed by any compassionate or considerate person, aside from any rule of law; In the singular event you happen to be in the dominant position in a fiduciary relation and the person dependent upon you tells you he *625 wants to give you his life's savings or property far beyond any sum you may have earned, have the decency to see that he talks to someone besides you.
>
> [17] Put more simply, when a court of equity is faced with a large gift to a dominant party by the weaker in a confidential relation, it must hear form someone besides the beneficiary, or receive clear and convincing evidence beyond that from the lips of the beneficiary, this is, in truth and in fact, what the donor wished to do on his own.
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> In Wright v. Roberts, 797 So.2d 992 (Miss.2001) the issue of fiduciary or confidential relationships and undue influence was addressed and settled:

[*998] [3] ¶ 16. The law in this state on fiduciary or confidential relationships and undue influence is well settled. Its application has been made to both inter vivos and testamentary transactions. Murray v. Laird, 446 So.2d 575, 578 (Miss.1984). With both gifts testamentary and gifts inter vivos, once the presumption of undue influence has been established, the burden of proof shifts to the beneficiary/grantee to show by clear and convincing evidence that the gift was not the product of undue influence. In re Estate of Dabney, 740 So.2d 915, 921 (Miss.1999).

I. DID A CONFIDENTIAL RELATIONSHIP EXIST BETWEEN EMMA JANE AND ROBERTS?

[4][5] ¶ 17. This Court has long held that a confidential relationship does not have to be a legal one, but the relation may be moral, domestic, or personal. The confidential relationship arises when a dominant, over-mastering influence controls over a dependent person or trust, justifiably reposed.
Murray, 446 So.2d at 578.

Whenever there is a relation between two people in which one person is in a position to exercise a dominant influence upon the other because of the latter's dependency upon the former, arising either from weakness of mind or body, or through trust, the laws does not hesitate to characterize such relationship as fiduciary in character.
Madden v. Rhodes, 626, So.2d 608, 617 (Miss.1993)

[6] ¶ 18. This Court has enumerated several factors to consider in determining whether a confidential relationship exists:

(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 is 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 of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another.
Dabney, 740 So.2d at 919.

In the above Trial testimony referenced in this Brief, it was definitely established that Robert Wayne Hall had to be taken care of by others; that he did have and maintained a close relationship with David Poynor; that David Poynor or a member of his family provided transportation for Robert Wayne Hall and saw to his medical care; that after a period of time in the obtaining of the Power of Attorney there were joint accounts set up with Robert Wayne Hall by David Poynor; no doubt from the testimony that Robert Wayne Hall was suffering with a brain tumor having lost approximately

twenty (20) pounds and very feeble and suffered from severe headaches; and that he was definitely of poor health; and yet David Poynor obtained a Power of Attorney with Robert Wayne Hall. All of this is definitely supported by the testimony of the proponent of the Will and his immediate family. All testimony dealing with the Power of Attorney and Will established that David Poynor was active not only in the obtaining of such, paying for such, but took much care and concern with the execution of the documents. Considering the fact that he paid for such, and it is maintained that the execution of the documents were done in secrecy since they were done in the hospital room of Robert Wayne Hall under the supervision of David Poynor further taints and cast doubt upon what transpired and what were the intentions of David Poynor.

When viewing the totality of the circumstances and the involvement by David Poynor and his wife, Melissa Poynor, it is expressly requested that consideration be given when considering the issues on appeal as to the following point of law set forth in Harris v. Sellers, 446 So.2d 1012 (SCT,1984) [5]

> .... The participation of the beneficiary/grantee, or someone closely related to the beneficiary, arouses suspicious circumstances that negate independent action. McDowell v. Pennington, supra; Croft, supra.

The relationship between David Poynor and Robert Wayne Hall, deceased, was one both of a fiduciary nature as well as a confidential one. In reviewing how to consider such and what the Trial Court should have done is set forth by the Supreme Court in the case of Van Zandt v. Van Zandt, 86 So.2d 466 (SCT,1956) [3]:

> [3] In 3 C.J.S., Agency, § 138, it is said: '* * * the relationship existent between principal and agent is a fiduciary one, demaning conditions of trust and confidence.'
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> *538 [4] [5] In 3 C.J.S., Agencyd, § 142, appears the following: 'As related in § 138, **470 the relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty ad good faith to his principal. Any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud for which the agent will be held accountable, either

in damages or by judgment precluding the agent from taking or retaining the benefits so obtained.'

The testimony as set forth herein above and referenced from the Trial Transcript establishes that David Poynor did have both a confidential relationship as well as a fiduciary relationship with Robert Wayne Hall, deceased, when he removed the Thirty Five Thousand and no/100 Dollars ($35,000.00) from the checking account by means of a Power of Attorney. Further, it is established that during the time that David Poynor took part in the obtaining and procurement of the Last Will and Testament for Robert Wayne Hall, deceased, that he occupied a confidential relationship with him.

It is stressed that throughout the citing of issues dealing with Wills and issues relating to confidential relationships the Supreme Court has maintained a very stringent interpretation of its guidelines established and the rules governing such. This is evidenced in Reid v. Pluskat, 825 So.2d 1 (Miss.2002) where it was reaffirmed:

> [3] [4] [5] ¶ 13. Where a confidential relationship exists, there is a presumption of undue influence concerning anointer vivos gift. Such gifts are presumed invalid. Madden v. Rhodes, 626 So.2d 608, 619 (Miss.1993). A confidential relationship arises "whenever there is a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency on the former arising either from weakness of mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character." Hendricks v. James, 421 So.2d 1031, 1041 (Miss.1982). Factors to be considered in determining if and when a confidential relationship exists, include: (1) whether one person has to be taken care of by other, (2) whether one person maintains a close relationship with another, (3) whether one person is 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 of advanced age or poor health, and (7) whether there exists a power of attorney between the one and another. In re Estate of Grantham, 609 So.2d 1220, 1224 (Miss.1992); Costello v. Hall, 506 So.2d 293 (Miss.1987); Hendricks v. James, 421 So.2d 1031 (Miss.1982).
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> [6][7] ¶ 14. Once a confidential relationship is found the burden shifts to the beneficiary to disprove the presumption of undue influence by clear and convincing evidence. In re Estate of Dabney, 740 So.2d 915, 921 (Miss.1999); Griffin v. Armana, 687 So.2d 1188, 1192 (Miss.1996). To overcome the presumption of undue

> influence, the proponents must show (a) [*6] good faith on the part of the beneficiary, (b) the grantor's full knowledge and deliberation of the consequences of her actions, and (c) the grantors independent consent and action. Mullins v. Ratcliff, 515 So.2d 1183, 1193 (Miss.1987).

The above Reid v. Pluskat case dealt with a situation where the Chancery Court was called upon to determine the validity of a Deed, Adoption, and Will. After considering the totality of the circumstances, the Court found that the adopted son was unable to rebut the presumption of undue influence, that he committed fraud on the Adoption Court, and further that he failed to overcome the presumption that the testator's Will was not the product of undue influence.

CONCLUSION

Under the principles of stare decisis the Trail Courts are to follow the guidelines and precedents set forth by the Appellant Courts. This case which is on appeal in this Brief is a case where the Trial Court has totally not adhered to what has been the established procedural safeguards set forth dealing with the use of Powers of Attorneys and the writing and execution of Wills.

It would appear that at the present time a lot of the cases on appeal from the Trial Courts to the Appellant Courts seem to be where the Trial Court has failed to take notice of the stringent statutory requirements dealing with certain areas of the law. The area of Power of Attorneys and Wills is one of those particular areas. In dealing with the Wills and their execution, the statutes are very specific, and the Trial Courts have not followed in the past nor currently follow certain technical procedural requirements set forth by the Supreme Court. The Trial Courts seem to lean toward what they might deem most favorable under the circumstances without giving due regard to what has been set forth procedurally to be followed. It is submitted that this case is an example of where a Trial Court has totally deviated from what has been established by the Mississippi Supreme Court and the Court of Appeals as to technical procedures that must be followed in order for a legal Will to exist.

Further, this case represents where a holder of a Power of Attorney has totally exceeded and stepped beyond acceptable established legal safeguards in utilization of a while in a position of trust.

The undersigned attorney for Alice Mitchell would ask that when this Honorable Court is examining what took place that it would be mindful of all of the totality of the suspicious circumstances involved. Of the above cited testimony and its comparison with applicable case law it would appear very evidently David Poynor totally exceeded his position of trust both being occupied in a fiduciary as well as confidential relationship. The Supreme Court has said that one who stood in the shoes of David Poynor had a very stringent burden to bear and that any and all actions performed by him had to be overcome by clear and convincing evidence. It is submitted that at no point did David Poynor come close to meeting the burden required of him by law. The Honorable Chancellor did not give total consideration to the circumstances surrounding the execution of the Last Will and Testament when he did not hold the proponent of the Will to the standards established by applicable case law.

Given the requirements and circumstances surrounding the utilization of the Power of Attorney with no supporting testimony or proof other than he and his wife, it is submitted that David Poynor did not meet the burden required for a intervivos gift and therefore the funds which he took from the checking account that was jointly owned by Robert Hall and Alice Mitchell should be restored back to Alice Mitchell.

As mentioned above in a preceding paragraph relating to suspicious circumstances, in conclusion it is further emphasized that David Poynor selected the law firm to be used for the Will; provided transportation for the paralegal to take notes for the Will; was in and out of the room when the notes were given, paid for the Will; obtained the witnesses for the Will; had possession of the Will to know that there was no mention of the checking account in the Will; the Will nor Power of Attorney were never read to Robert Wayne Hall; Robert Hall never received any type of advice or

guidance as to either the Will or the Power of Attorney; Robert Hall was in failing health with a brain tumor; and as a result of the Will and the use of the Power of Attorney, David Poynor received all of Robert Hall's possessions.

Alice Mitchell would ask that this Honorable Court review the totality of the circumstances and then after having done such would reverse and render a verdict in her favor.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF SERVICE

I, George M. Mitchell, Jr. do hereby certify that I have this day mailed by first class United State Mail, proper postage prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

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