IN THE SUPREME COURT OF MISSISSIPPI

COPY

IN THE MATTER OF THE ESTATE
OF PATRICIA McDANIEL LANGSTON

MANSFIELD LANGSTON — APPELLANT

VS. — CAUSE NO. 2008-CA-01090

ETHEL WILLIAMS — APPELLEE

Appeal from Final Judgment of the Chancery Court of Sunflower County, Mississippi, Cause No. 2005-0225, the Honorable Janace Harvey-Goree, by Special Appointment Presiding

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BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

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

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RESPECTFULLY SUBMITTED on this the 1st day of May, 2009.

MANSFIELD LANGSTON

By: _____
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REASON WHY ORAL ARGUMENT REQUESTED

This is a case where inter vivos transfers between a husband and wife in a long-term marriage are challenged by the deceased wife's mother and adult children from a prior marriage on the ground of a presumption of undue influence arising out of a confidential relationship in the husband and wife marital setting. Oral argument is needed in order to assist the Court in setting out the parameters of when, if ever, a confidential relationship might be found in a long-term, marital relationship.

RESPECTFULLY SUBMITTED on this the 1st day of May, 2009.

MANSFIELD LANGSTON

By: _____
LINDSEY C. MEADOR, MSB No. [redacted]
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TABLE OF AUTHORITIES CITED

Cases

Rules and Statutes

NOTE ON REFERENCES TO TRANSCRIPT, EXHIBITS, COURT PAPERS, AND RECORD EXCERPTS

The brief of Appellant, Mansfield Langston, will be annotated and referenced as follows:

Transcript - T.
Exhibits - E.
Court Papers - C.P.
Record Excerpts - R.E.

As the record reflects, there were some difficulties in preparation of the transcript and record below. Almost all of the exhibits were misplaced, but counsel for the Appellant, Mansfield Langston, and the Appellee, Ethel Williams, reconstructed all exhibits and jointly agreed by documents filed in this appeal that Exhibits D-1 through D-14 and P-1 through P-10 were the true and correct exhibits in this case.

The corrected trial transcript is numbered pages 1 through 381. The clerk's papers (exclusive of its Table of Contents) are numbered 1 through 437. The Appellant's record excerpts are numbered 1 through 39.

The corrected trial transcript which was filed on or about March 26, 2009, had one page missing which was page 82. That error is being addressed by a separate motion filed with this Court.

STATEMENT OF THE ISSUES

Appellant, Mansfield Langston, submits that the following issues are presented for review:

1. Whether the Chancery Court committed reversible error, as a matter of law, in ruling that a confidential relationship existed between the husband, Mansfield Langston, and his wife, Patricia McDaniel Langston, regarding their creation of joint tenancies with the right of survivorship (JTROS) in their marital home and a certificate of deposit when facts supporting the validity of the JTROS included, but were not limited to, the following:

a) these JTROS estates were created eight and nine years, respectively, into their marriage,

b) at the time of the creation of the JTROS estates, the Langstons were well-educated, competent adults, not hospitalized or in any type of institution, and,

c) the Langstons had a history of holding their marital properties in joint tenancies with survivorship rights?

2. Whether the Chancery Court's findings of fact on the issues of confidential relationship and undue influence are not supported by substantial credible evidence and are clearly erroneous, especially in light of the fact that the Court attempted to rule that there was a confidential relationship without ever receiving proof on this issue by the Appellant, Mansfield Langston?

STATEMENT OF THE CASE

Mansfield Langston and Patricia McDaniel Langston were husband and wife. They married May 25, 1994, and after eight years of marriage, put their marital home in a joint tenancy with the right of survivorship on May 9, 2002, and after nine years of marriage on September 4, 2003, executed a certificate of deposit in the amount of $200,000 as joint tenants with the right of survivorship. The trial testimony was uncontradicted that they owned their prior marital home as joint tenants with the right of survivorship, and had made previous investments of their money in joint accounts, with rights of survivorship.

On May 11, 2005, Patricia McDaniel Langston passed away after a sudden illness, and her estate was opened by her mother, Ethel Williams. Despite the couple's prior history of owning their property in joint tenancies with survivorship rights, the estate sought to set aside the survivorship rights in the marital home and the certificate of deposit in order to bring these assets into the estate for distribution to the will beneficiaries (Mrs. Langston's adult children by a prior marriage and sister). Although at trial the Court attempted to rule that a confidential relationship existed between Mr. and Mrs. Langston without receiving any proof from Mr. Langston, the Court, after objection by Mr. Langston, proceeded to hear his proof, and then ruled based on the seven factors of In re Estate of Dabney, 740 So.2d 915 (Miss. 1999) that Mr. and Mrs. Langston were in a confidential relationship in their marriage. The Court then ruled that the burden shifted to Mr. Langston to prove by clear and convincing evidence that the creation of the survivorship rights in the deed and the certificate of deposit were not the result of undue influence. The Court further ruled that these transfers

were the result of undue influence, and set aside both the survivorship rights in the Langston's marital home and their certificate of deposit, ruling that the entirety of both assets should belong to the Estate of Patricia McDaniel Langston. The Court further ruled that no evidence had been introduced to support Mr. Langston's counterclaim alleging various rights arising out of his widowerhood, and dismissed same. Final judgment was rendered on June 16, 2008, and thereafter Mansfield Langston timely perfected his appeal on June 23, 2008.

STATEMENT OF FACTS RELEVANT TO THE ISSUES PRESENTED FOR REVIEW

THE LANGSTONS

Mansfield Langston and Patricia McDaniel Langston were married on May 25, 1994. He was 44 years of age, and she was 40. It was the second marriage for both, and both had children by their prior marriages. T. 238-239. After 11 years of marriage, Mrs. Langston passed away on May 11, 2005, from a sudden illness.

THE LANGSTONS' EDUCATION AND WORK HISTORY

Mr. Langston completed two years of junior college. T. 238. Mrs. Langston had a degree from Jackson State University with a major in finance and a minor in accounting. T. 81.

Both Mr. and Mrs. Langston were working at the Modern Line Factory in Indianola when they married. Mrs. Langston was a buyer and held a management position. T. 240. Mr. Langston worked in the control department. T. 249. They both worked there until it closed in 2002. Mrs. Langston's prior work history included working in banking and working for the local ASCS office in Indianola. T. 249. Mr. Langston had previously worked in construction. During their marriage, Mr. and Mrs. Langston worked together in businesses that they operated in addition to their work at Modern Line. These businesses were a liquor store, café, and pool hall. T. 241.

THE LANGSTONS' PHYSICAL AND MENTAL HEALTH

Mrs. Langston was a heart patient during the marriage, and Mr. Langston would

accompany her to her doctor's office – although he did not consult with the doctor. T. 47-48. If she needed help with her medicine, he would assist her. T. 49. She also had a kidney problem, and saw a kidney doctor. T. 52-53. Mr. Langston sometimes would ride with her to make these doctor visits.

Mr. Langston suffered from diabetes and a digestive tract disorder. At the time of the trial he was receiving Social Security disability benefits. T. 251.

April Frierson, Mrs. Langston's sister and a beneficiary of her estate, testified that she thought her sister's main conditions were a heart condition, high blood pressure, gout, and asthma. T. 59.

Ms. Frierson testified that these conditions did not affect her sister's mental state. T. 60. In 2001, Mrs. Langston had a legal claim against the manufacturers of the diet drug Phen-Fen, and Ms. Frierson testified that the Phen-Fen did not aggravate her sister's medical conditions. T. 61-62.

Ethel Williams, Mrs. Langston's mother and the Appellee herein, testified that Mrs. Langston never had any problems with any type of drug or alcohol dependency, and never had any mental or emotional problems. T. 84-85. Mrs. Williams admitted that her daughter, Mrs. Langston, was generally in good health. T. 88.

Keith White, Mrs. Langston'a adult son and a beneficiary of her estate, testified that Mrs. Langston kept up to eight grandchildren at the Langston home, and that she did a "great job" at cleaning, cooking, and looking after them up until the time she suddenly died. T. 360-61. In response to the Court's question about the quality of Mrs. Langston's health from

2001 until she died in 2005, Mr. White stated that "her health was good," and only qualified that by saying, in essence, that some days were not always good, and some were better than others. T. 365.

The record does not reflect that any witness ever testified that Mrs. McDaniel suffered from any mental weakness at any time. Further, no exhibit was ever introduced into evidence that in any way suggests this conclusion. The record reflects that April Frierson, Mrs. McDaniel's sister and estate beneficiary, Mrs. Williams, her mother and the Appellee, and Keith White, Mrs. McDaniel's son and estate beneficiary, all testified directly to the contrary, including the following:

> Ms. Frierson: Q: "Did these conditions in your opinion appear to affect her mental state?" A: "Oh no." T. 60.
>
> Mrs. Williams: Q: "And as far as you know, your daughter never had any mental problems, is that correct?." A. "As far as I know." T. 85.
>
> Keith White: Q: "She was the brains relative to Mansfield...is that a fair statement...?" A: "Right." T. 364.

Mr. Langston's testimony was to the effect that he did not agree with the extent of Mrs. Langston's health problems as testified to by Mrs. Williams and the estate beneficiary witnesses. It is noteworthy that no medical records of Mrs. Langston were ever introduced as exhibits and no medical providers of Mrs. Langston ever testified at trial. No death certificate was ever introduced as an exhibit. The nature and extent of Mrs. Langston's health conditions were testified to by the Appellee's and estate beneficiaries' lay witnesses

versus Mr. Langston and his lay witnesses.

Ms. Frierson was the only proof offered of Mrs. Langston's alleged hypertension. Mr. Langston testified that he observed his wife take her blood pressure, but was not aware it was one of her medical problems. T. 259; 270.

Mr. Langston clearly knew of his wife's kidney condition, and testified that he rode with her to the kidney doctor and "she had lost a portion of her kidney function of her kidney...." T. 52. He did not know how serious it was, only stating that he had had kidney infection problems that had cleared up. T. 259.

Mr. Langston testified that his wife had three leaking heart valves, and had rheumatoid fever as a child. T. 47-48. In terms of the seriousness of the heart valve problem, he did not know how serious this ailment might be. T. 259-60.

There is no proof on the record that Mrs. Langston ever had pneumonia , or suffered from pancreatitis. These ailments only exist in the record as the unsubstantiated questions asked by Ethel Williams' counsel. T. 260.

THE LANGSTONS' GOOD MARRIAGE BASED ON MUTUAL CONFIDENCES

Mr. and Mrs. Langston had a loving and close marital relationship in which they trusted each other and placed confidence in each other. They trusted and had mutual confidence in each other from the first day of their marriage. T. 256. Well prior to the transactions in question in this case, they shared joint checking and depository accounts with survivorship rights, and owned real property in joint tenancies with the right of survivorship.

They worked together and assisted each other in the liquor store and café/pool hall that they owned and operated. T. 35; 38-39; 203; 291-292; 241.

When Mr. and Mrs. Langston married, in 1994, Mr. Langston already owned a home which was solely titled in his name and which was located on Kentwood Lane in Indianola. Three years after the marriage on August 23, 1997, Mr. Langston conveyed this home, solely titled in his name, back to himself and Mrs. Langston as joint tenants with the right of survivorship. This home on Kentwood Lane would remain their marital home until the spring of 2002. T. 291-292.

THE 2002 LEGAL DOCUMENTS EXECUTED BY THE LANGSTONS LEADING UP TO THE MAY 9, 2002, DEED

On February 8, 2002, Mr. and Mrs. Langston executed mutual powers of attorney and living wills, which were prepared by Attorney Richard Noble of Indianola. Mr. Langston named Mrs. Langston as his power of attorney and agent under his living will, and Mrs. Langston named Mr. Langston as her power of attorney and agent under her living will. Attorney Noble testified at trial that neither party appeared to be in bad health or in any eminent fear of sickness or death. There was no proof in the record that any of these documents were ever utilized by either party. T. 181-183; E. D-5; D-6,

It is noteworthy to point out that Attorney Richard Noble testified live at the trial of this case, with his testimony being found at page 170 through 196 of the trial transcript. However, the Trial Court did not base its Findings of Fact and Conclusions of Law upon Mr. Noble's testimony in open court or any deposition that was introduced into evidence. Nevertheless, the Trial Court cites to Attorney Noble's deposition numerous times in its

Findings, and states in its Findings that: "According to his deposition (which was apart) (sic) of the court file...." C.P. 419; R.E. 21.

On March 1, 2002, the dwelling located at 209 French Road was purchased and titled solely in Mrs. Langston's name. E. P-5. On March 11, 2002, Mrs. Langston quitclaimed to Mr. Langston some commercial property in Inverness, Mississippi, which had always been solely titled in Mr. Langston's name and which he had brought into the marriage. Also, on March 11, Mrs. Langston quitclaimed to Mr. Langston the marital home located on Kentwood Lane. E. D-13. Then, on March 15, 2002, Mrs. Langston executed her separate Last Will and Testament in Attorney Noble's office. The essence of the will was that Mrs. Langston left everything that she would have solely titled in her name at her death to her children by her first marriage, and her sister, April Frierson. E. P-6.

Thereafter, on May 9, 2002, Attorney Noble prepared three deeds which were executed in his office. His trial testimony was clear, that it was Mrs. Langston who called in the information regarding how these deeds were to be drawn. T. 175-76. Notably, in one of the deeds executed on May 9, 2002, Mr. and Mrs. Langston actually conveyed their former marital home located on Kentwood Lane to the Appellee herein, Ethel Williams (mother of Mrs. Langston and Executor of Mrs. Langston's estate). This property had been solely titled in Mr. Langston's name since March 11, 2002. E. D-4; D-13; D-14. This property was sold, together with all of its furnishings, for what Mr. Langston testified was a discounted price to Mrs. Williams. This allowed her to upgrade her home. On that same date, May 9, 2002,

Mrs. Williams sold and conveyed her home located in Indianola. T. 297-98.

Yet, despite the fact that Mrs. Langston actually conveyed property to her the same date, the only deed which Appellee Ethel Williams, challenges in this case, is the deed from Mrs. Langston back to herself and Mr. Langston as joint tenants with the right of survivorship regarding property located at 209 French Road, which was the new marital residence, where Mr. and Mrs. Langston resided. This property had been initially titled in Mrs. Langston's name only, by deed dated March 1, 2002.

All deeds were prepared by Attorney Noble and filed and recorded at the courthouse. Attorney Noble testified at trial that he saw no signs whatsoever of duress, overreaching, or undue influence on the part of any grantor involved in these transactions. T. 183-85.

THE LANGSTONS' SEPTEMBER 4, 2003, CERTIFICATE OF DEPOSIT

On September 4, 2003, Mr. and Mrs. Langston met with Banker Paul Townsend of Guaranty Bank & Trust in Indianola, Mississippi, to invest certain of their funds in a certificate of deposit. The proof was uncontradicted that Mr. and Mrs. Langston owned their bank and investment accounts jointly with rights of survivorship prior to September 4, 2003. T. 44-45; 209; 303-304. Banker Paul Townsend testified that this certificate of deposit was not the first time the Langstons deposited certificates with his bank, and that they had been doing business with his bank for a year or two before September of 2003. The Langstons had come in together when they first started doing business with Guaranty Bank. T. 207-208, 211. Banker Townsend testified that Mrs. Langston had told him that she had initially come

to his bank because she had a relative who worked at Planters Bank, and she did not want her knowing about her business. Mrs. Langston's mother (Ethel Williams) worked at Planters Bank. T. 113; 204.

Banker Townsend testified that relative to the September 4, 2003, investment of the certificate of deposit that Mrs. Langston at all times appeared competent and knowledgeable, was not under any duress, and her questions dominated the conversation between him, Mr. Langston, and Mrs. Langston. T. 201-02; 212-13.

MRS. LANGSTON'S ACCESS TO COMMUNICATION WITH FAMILY AND FRIENDS

Ethel Williams testified that she visited with her daughter (Mrs. Langston) 3-4 times per week, or more, during the entire time of her marriage until her death, in May of 2005. T. 98-99. April Frierson testified that she called her sister (Mrs. Langston) on the telephone daily during this same time period. T. 62-63.

Both Ethel Williams and April Frierson admitted that at all relevant times Mrs. Langston took family trips with them and other family members, which were, on occasion out-of-state. T. 67; 68-69; 93.

MRS. LANGSTON'S STRONG WILL

On the crucial, core issue of whether Mrs. Langston was a subservient person subject to will and influence of others, Ethel Williams', the Appellee's, sworn trial testimony was as follows:

Q. My question, was that typical of her to be strong-minded

enough to do what she had to do when she – if I could finish the question your answer under oath, yes, like I say, a lot of times, you know, she would maybe – I don't know, withdrawn or something, but after a while, you know, I am going to do this, and would do it. Is that true?

A. That is true. Whatever the circumstances afterwards she would deal with because she caught hell afterwards when she decided to do something. But she was willing to do.

Q. But the fact of the matter is, Pat your daughter was intelligent enough, strong minded enough, independent enough when it came right down to it she did what she wanted to do with her business?

A. Right. And catch the hell later. T. 96-97.

Q. My question was, Mrs. Williams, isn't it true that your daughter was strong-minded enough that where she bought this house on French Road even if Mansfield Langston initially objected to?

A. Yea, he said he wanted to stay in Kentwood and she said I am going to buy this house over on French Road. So she deeded the house over on Kentwood to him and she went to French Road. T. 106.

Q. In your opinion, does that sound like somebody with a strong mind?

A. It does. Because she wanted this house and he didn't want the house, yea. T. 107.

Furthermore, on the issue of Mrs. Langston's intelligence and strong will, Keith White, the adult son of Mrs. Langston by her first marriage, and an estate beneficiary, testified as follows:

Q. Now, did she actually assist in running one of the businesses in Inverness as well?

A. She is a finance major. She graduated in finance. She ran his liquor store. When his café burned down, she initiated the cost – per cost what to go buy and how to go buy it. She was a brain. She had the sense. T. 350.

Q. Here's the question, on direct examination did you not testify that she ran the liquor store?

A. Right.

Q. Thank you. You also made the statement that "she was the brains." Did you testify to that?

A. Right.

Q. She was the brains relative to Mansfield, is that a fair statement, in your opinion?

A. Right.

Q. Okay. And she set the tone. Was that your testimony on direct testimony, correct. Was that your testimony that she set the tone?

A. Yes.

Q. All right. And by that you meant the tone between the two of them in the business, correct? Is that what you were talking about?

A. That's all I was talking about was the business. Because there was nothing but a business relationship between them. T. 363-64.

Q. So your mother's mind was at all times sharp was it not?

A. My mother was a Christian woman so she focused her thinking in a Christian way. She respected her husband – yes, if you want me to try to answer the question, but let me explain why –

Q.: Yes, your mother's mind was sharp?

A.: Sharp. Everything was sharp. T. 367.

Similarly, Mr. Langston and his witnesses testified that Mrs. Langston was intelligent, well-educated, and strong-willed at all times. The proof was simply overwhelming on this crucial, key point in this case.

MR. LANGSTON'S STATUS AS WIDOWER RESIDING IN THE HOMESTEAD

The proof was uncontradicted and unchallenged at trial that Mr. Langston was married to Mrs. Langston at the time of her death, that he survived Mrs. Langston as her widower, that their marital home and homestead was located at 209 French Road, and that he resided in this homestead as a widower. T. 32, 238.

SUMMARY OF THE ARGUMENT

The Chancery Court committed error as a matter of law when it ruled that Mansfield Langston and Patricia McDaniel Langston were in a confidential relationship, although they had a traditional, long-term marriage. Mr. and Mrs. Langston were ages 44 and 40, respectively, when they married on May 25, 1994. At the time of their marriage and at all times relevant to the execution of the documents in this case, neither was under any disability, or in any type of hospital or institutional setting. They were working, intelligent, well-educated, high achieving adults.

After eight years of marriage, on May 9, 2002, Mrs. Langston executed a deed to herself and Mr. Langston regarding their marital home located at 209 French Road, with rights of survivorship. This ownership was exactly what had been done earlier in the marriage, when Mr. Langston had the marital home solely in his name, and then executed a deed putting it both in his name and his wife's name as joint tenants with the right of survivorship. On September 4, 2003, Mr. and Mrs. Langston went to Guaranty Bank where they had been doing business, and invested $200,000 in a certificate of deposit, which was in a joint tenancy with the right of survivorship. The proof was uncontradicted that they had previously had joint accounts with survivorship rights in which they invested their funds, and they had been doing business with Guaranty Bank for one to two years before September, 2003.

Mrs. Langston had certain medical ailments (as did Mr. Langston) during their

marriage, but these were in no way debilitating. She worked very competently at her job, kept-up her home, and traveled with friends and family. She was active in her church. At no time relevant to the May 9, 2002, execution of the deed to the marital home and on September 4, 2003, relevant to the investment in the certificate of deposit, was Mrs. Langston in any way hospitalized, institutionalized, or suffering from any type of debilitating physical, mental, or emotional illness. Her mother, Ethel Williams, the Appellee, and her adult son, Keith White - an estate beneficiary, admitted that she was strong-willed enough to do what she wanted to do with her property. Her son, Mr. White, testified that she was intelligent, she was the "brains" as between she and her husband, and that she "set the tone" in their marriage.

Despite all these facts and in the context of a long term marriage, the Trial Court found that Mr. and Mrs. Langston were in a confidential relationship that gave rise to a presumption of undue influence. The Trial Court based its ruling on the factors that the Langstons shared joint accounts, that Mr. Langston admitted that he and his wife trusted and loved each other, that he admitted that he assisted her and would drive when she had to go to the doctor, and that he admitted that they had given each other powers of attorney. In short, Mr. Langston admitted that he did all the things that a normal, trusting husband and wife do in a good marriage. Yet, the Trial Court used these factors to find a confidential relationship, and set aside their inter vivos transfers, which were the type transfers to be reasonably expected between a husband and a wife in a good marriage. This was error as a matter of

law.

With all due respect to the learned Chancellor, it is incumbent upon the undersigned, as counsel for Mr. Langston, in order to properly represent my client to point out that the Trial Court committed manifest and clear error in failing to analyze and failing to take note of clear admissions as to Mrs. Langston's strong-willed nature and independence. These admissions were made by both Mrs. Langston's mother (the Appellee, Mrs. Williams) and Keith White, Mrs. Langston's son by her first marriage, and a beneficiary of her estate. These are just some of the examples of the Trial Court's failure to sift through and analyze all of the testimony and proof in this case, which will be set forth in more detail hereinafter. When this is done, it will be seen that there was clear and manifest error committed by the Trial Court in its determinations that a confidential relationship existed and that undue influence was present at the execution of the May 9, 2002, deed to the marital home and the September 4, 2003, investment in the certificate of deposit.

It is respectfully submitted that further example of clear and manifest factual error committed by the Trial Court was in its utilization of Attorney Richard Noble's discovery deposition which the Court said was "apart" of the Court file, although it was not introduced into evidence. C.P. 419; R.E. 21. This highly unusual use of a deposition not introduced into evidence was done despite the fact that Attorney Richard Noble appeared and testified live at the trial. Moreover, Attorney Noble's testimony at trial was straightforward and unimpeached. His deposition testimony had no objections made, because (pursuant to the

usual deposition stipulation) they were all reserved for trial, if the deposition was introduced. Since it was not used or introduced at trial, no objections could be made and presented to the Trial Court, regarding this outside-the-record testimony.

Respectfully, the Trial Court displayed a rush to enter judgment against Mansfield Langston on the issue of a confidential relationship after Ethel Williams' put on three witnesses (Attorney Herbert Lee, Mansfield Langston, adversely, and April Frierson), and then rested its case on this issue. At that point, Mr. Langston made a motion for directed verdict on the issue of confidential relationship. The Trial Court then proceeded to fully rule against Mr. Langston and find that a confidential relationship existed, without giving Mr. Langston the opportunity to put on any proof. When Mr. Langston, through counsel, urged the Court not to rule on this issue until Mr. Langston had an opportunity to put on his proof, the Court admonished Mr. Langston and his counsel stating that it was going to be "very frustrated if it seems to me that you are trying to circumvent and manipulate this Court." T. 80; R.E. 39. Mr. Langston simply wished to put on his proof after his motion for directed verdict had been overruled, instead of the Court ruling in Mrs. Williams' favor without ever having heard from Mr. Langston, and his witnesses.

ARGUMENT

Mississippi caselaw on confidential relationships giving rise to a presumption of undue influence and public policy considerations illustrate why applying the Dabney factors to find a confidential relationship between the Langstons (who were in a long term marriage) was clearly erroneous.

ISSUE NO. 1:

(A.) Comparing the facts of the case at hand with the caselaw regarding confidential relationships giving rise to a presumption of undue influence between a husband and wife, illustrates why a finding of undue influence with regard to the Langstons is clearly erroneous.

The Mississippi Supreme Court has recognized that there are some circumstances in which undue influence may be exercised by one spouse over the other, but these circumstances are rare. In Genna v. Harrington, 254 So. 2d 524 (Miss. 1971), the Mississippi Supreme Court stated the following:

> It is undoubtedly true that a husband or a wife may exercise undue influence upon the other spouse, but the mere fact that there is a close relationship between the parties in a marriage does not mean that one's influence upon another is undue influence...
>
> In order to set a will aside upon the grounds of undue influence on the part of a spouse, it must be shown that the devisee spouse used undue methods for the purpose of overcoming the free and unrestrained will of the testator so as to control his acts and prevent him from being a free agent. 254 So. 2d at 528-529.

Twelve years after Genna v. Harrington, the Mississippi Supreme Court decided the case of Ard vs. Ard, 438 So. 2d 1356 (Miss. 1983). In affirming the Chancery Court's

finding of no fraud or undue influence in the testator's execution of his last will and testament, the Mississippi Supreme Court set forth exactly how difficult it is to attempt to set aside a transfer between spouses on the ground of undue influence.

Mr. Ard, was terminally ill, and had been prescribed both a highly addictive pain medication and medication for patients who are mentally disturbed. He was totally dependent on his wife of just four years. His will, leaving everything to his new wife, was executed in his hospital room, with Mrs. Ard, the sole beneficiary, sitting at the foot of his bed. In executing his will, he left nothing to his two teenage daughters, who presumably were dependent upon him. Notably, in Ard, there were no facts to suggest that the marriage was contrived by Mrs. Ard in order to gain control over Mr. Ard and his assets. Such as the case here, for Mr. and Mrs. Langston had been married for eight years before the transactions in question in this case, and there is nothing to suggest that they married to gain control over each other's assets. Further, Mrs. Langston had a sharp mind and never suffered from mental weakness, as did Mr. Ard.

A number of states recognize that a confidential relationship which gives rise to a presumption of undue influence cannot be established out of the natural, mutual confidences essential to a good marriage. See: Neill v. Brackett, 234 Mass. 367, 126 N.E. 93 (1920) ["The mere opportunity of the wife, when living happily with the husband, to influence the execution of a will favorable to herself, or to cause discrimination against or amongst children, is not alone sufficient to warrant submission to the jury of the question of undue

influence." 126 N.E. 94]; Snell v. Seek, 363 Mo. 2d 23 225, 250 S.W. 6 (1952) ["A proper and usual husband and wife relationship in and of itself denotes mutual confidence and, in one sense, each spouse is in a "fiduciary" relationship to the other. It is necessarily something beyond this relationship, however, which must exist as between husband and wife before it may be said that either is the fiduciary of the other within the meaning of "fiduciary" or "confidential" relationship necessary to be established as a basis for an inference or a presumption of undue influence." 250 S.W. 2d at 342.]; Estate of Robinson v. Jennings, 231 Kan. 300, 644 P. 2d 420 (1982); Estate of Knight vs. Knight, 108 So. 2d 629, 631 (D.C. App. Fl., 1959); Detsch v. Detsch, 191 Or. 161, 229 P. 2d 264 (1951).

The Appellate Courts of Mississippi have never cancelled a conveyance (whether inter vivos or testamentary) to a surviving spouse from a deceased spouse on the ground of confidential relationship or undue influence while the surviving spouse was living, except for the recent exception of Estate of Pope vs. White, 2008 WL 2097593 (Miss. 2008) where there was a contrived marriage by a nurse to an old man in the final months of a terminal illness.

The Mississippi Court of Appeals has decided three cases since Ard, supra, in the context of whether a confidential relationship could arise between a husband and wife. The first of these cases was Spencer v. Hudspeth, 950 So. 2d 238 (Ct. App. Miss., 2007). In Spencer, the Court of Appeals reversed and rendered the Chancery Court's ruling which had denied a motion to set aside a deed to forty acres of land on the ground of undue influence.

The motion was filed by the wife's (Ethel) estate against the husband's (Montie) grantee's heirs-at-law. Thus, at the time the motion was filed both the wife and husband were deceased. In Spencer, after being confined to a nursing home and being "disoriented, very weak, and frail," Ethel signed a deed to the forty acres to Montie; however, Ethel's signature was misspelled and the notary on the deed was not present when Ethel allegedly signed the deed. The deed was dated June 30, 1986, after Ethel had been in the nursing home for more than a year. Montie died on October 30, 1988, and four days before he passed away, his brother (Marvin Hudspeth) obtained a deed to the forty acres from Montie. Then, on January 18, 1989, Ethel died. The deed from Ethel (which had been executed in the nursing home) to Montie was not found until after Ethel died.

Under this very unique set of facts involving a dispute between the heirs-at-law and successors in interest of both the deceased husband and deceased wife, the Court of Appeals found a confidential relationship giving rise to unrebutted, undue influence, and thereby, set the deed aside. Of course, Spencer is distinguishable from the instant case, in that the signature by Ethel to the deed while she was in the nursing home was highly suspect, and a surviving spouse was not involved. Here, there is no question regarding the proper execution of the May 9, 2002, deed, and the proper execution of the investment of the certificate of deposit on September 4, 2003. Moreover, Mr. Langston is the surviving widower.

The next case after Ard, is Estate of Chapman, 966 So. 2d 1262 (Ct. App. Miss., 2007) in which the Court of Appeals of Mississippi, in an unanimous 10-0 decision, affirmed

the Chancery Court's finding of no confidential relationship and no undue influence between a husband and wife, where the husband had left all of his property to the wife – thus, disinheriting his son.

In Chapman, Leslie Chapman, on June 18, 1997, made a will leaving all of his property to his wife of more than thirty years, Betty. On that same date, Leslie deeded five acres of land to his daughter, Lesley Darlene Reeves. Leslie Chapman made no provision for his son, Gary. At the time he made his will and deed, Leslie traveled in the same vehicle with his wife Betty, and his daughter Lesley Darlene Reeves, to the attorney's office. Moreover, Leslie was aware at the time of making the will and deed that he had been diagnosed with terminal cancer. A little over one year after the execution of the will and deed, Leslie Chapman died on September 10, 1998.

Gary Chapman claimed that there was a confidential relationship which existed between Leslie Chapman (the decedent), and his wife Betty, and, thus, there was created a presumption of undue influence regarding the execution of the will. Gary Chapman also claimed that Betty Chapman (the wife) could not overcome this presumption of undue influence created by the confidential relationship. The Court of Appeals noted that a close relationship between two married people in a long term marriage was to be expected, and that all of the witnesses pointed out that Leslie, the testator, was a strong-willed man. The attorney present at the signing of the will stated that Leslie was the type of person who took charge, and dominated the conversation at the execution of the will. Therefore, the Court

found no confidential relationship or undue influence existed.

In the instant case, Mansfield Langston and Patricia McDaniel Langston had a long-term marriage of eleven years, and it was well into this marriage (at least eight years) when the documents in question were executed. See: Johnson v. Johnson, 877 So. 2d 485 (Ct. App. Miss., 2004) [a marriage of twelve years favors alimony to the wife]; Fleches v. Fleches, 724 So. 2d 948 (Ct. App. Miss., 1998) [marriage of six years is a "marriage of significant length"]. The trial testimony of Attorney Richard Noble and Banker Paul Townsend was clear, and uncontradicted, that at the time of execution of the deed and the certificate of deposit Mrs. Langston was not under any kind of weakness, and actually dominated the conversation relative to the certificate of deposit.

The last and most recent Mississippi appellate case decided after Ard is Estate of Pope vs. White, supra, in which, the Court of Appeals did find existence of a confidential relationship between a husband and a surviving wife, where there was a marriage by a seventy-three year old terminally ill man suffering from Alzheimer's disease and dementia in the last five months of his life.

Factually, the husband, Earsel, who was under hospice care, met nurse Juanita when she sat with him beginning in September of 2003. In October of 2003, Juanita married Earsel, and a few days after the marriage she contacted an attorney to set up an appointment to prepare a will for Earsel. Juanita transported her new husband to the lawyer's office within a week after the marriage, to sign a will disinheriting his children by his prior

marriage of fifty years. She also managed that same week to withdraw $50,000 out of an annuity. Slightly more than two months after they married, she withdrew an additional $200,000.

The Court of Appeals easily found a confidential relationship under this unique set of facts, when nurse Juanita quickly became involved with terminally ill Earsel, and then immediately took him to the lawyer's office after the marriage and actively participated in the will's preparation and execution. In the instant case, this was not a contrived marriage between Mr. and Mrs. Langston, but a long-term marriage between two well-educated, competent adults. Both had some medical problems, but these medical problems were not debilitating where either of them had to be cared for in a hospital, or under the care of a hospice, or in any such fashion at the time of or leading up to the execution of the May 9, 2002, deed and the September 4, 2003, certificate of deposit.

It is respectfully submitted that Estate of Pope is a clear example of when a confidential relationship might arise in a contrived marriage between a husband and wife on one extreme, as opposed to a normal, second marriage of only four years, such as in Ard, which will not give rise to a confidential relationship.

(B.) Public policy considerations further illustrate why a finding of undue influence with regard to the Langstons is clearly erroneous.

It almost does not require citation of authority to establish the proposition that in Mississippi mutual confidence and trust is encouraged between spouses and encouraged in

marriages. Yet, in the instant case, the Trial Court used these factors against Mr. Langston in his marriage in order to raise a presumption of undue influence arising out of a confidential relationship.

Mississippi courts, however, have addressed the public policy issue of encouraging confidence and trust with regard to the rule disqualifying a husband and wife from testifying against one another. In the sad and unfortunate case of Merritt vs. State, 339 So. 2d 1366 (Miss. 1976), where a father killed his two year old daughter for insurance money, the Mississippi Supreme Court affirmed the Circuit Court's allowance of the wife's testimony against the husband as a competent witness as an exception to the statute (Miss. Code Ann. § 13-1-5) making husbands and wives incompetent as witnesses in civil and criminal cases with certain exceptions. In noting the history of the common law and the statute which codified it, the Mississippi Supreme Court stated the following:

> The original statute was a partial codification of the common law rule that one spouse was incompetent to testify in any case for or against the other. The reason for the common law rule in its codified form are two-fold: (1) at common law the husband and wife were considered as but one person and because of this unity and identity of husband and wife, when one was excluded on the ground of interest, the other was also excluded. At that time a party in interest was not a competent witness on his behalf; (2) the Courts were reluctant to sanction any rule tending to promote domestic dissension and violate the mutual confidence which is essential to the marriage relation, the peace of society, and the social welfare...the common law rule is of great antiquity. 339 So. 2d at 1368.

On this point also see the case of Graham vs. State, 250 Miss. 816, 168 So. 2d 496 (1964) wherein the Court stated: "The purpose of the statute limiting competency of one

spouse to testify against the other is to avoid occasion for domestic dissension and discord and to preserve inviolate the mutual confidence essential to marriage relations, peace of society and the social welfare."

However, in the instant case these factors, which are promoted in Mississippi law, were used by the Trial Court to establish a confidential relationship in order to negate the transfers between a husband and wife concerning their marital home and their certificate of deposit.

At pages 5 and 6 of its Findings of Facts and Conclusions of Law, the Trial Court found that Mr. Langston assisted Mrs. Langston with her medical care by helping her with her medication and accompanying her to visits with her heart doctor and kidney doctor. C.P. 415; R.E. 17. These are the type of activities which are normal and encouraged between husbands and wives, in assisting each other in the marital relationship. However, the Trial Court turned these factors on their head, and used them as if they were in a relationship other than husband and wife. The Trial Court also at page 6 of its Findings of Facts and Conclusions of Law, held against Mr. Langston the fact that he readily admitted that he and his wife loved, trusted, and had confidence in each other. In finding a confidential relationship giving rise to a presumption of undue influence, the Trial Court stated: "Mansfield and Patricia shared a close relationship..." C.P. 415; R.E. 17. Thus, what is encouraged by the law and essential to a good marriage, was held against Mr. Langston.

The Trial Court went on in its Findings of Fact and Conclusions of Law at page 6, to hold as a factor against Mr. Langston that: "Patricia and Mansfield had joint bank accounts at Planters Bank, Community Bank, and Guaranty Bank." C.P. 415; R.E. 17. Again, joint bank accounts and joint investments between a husband and a wife should be considered the norm, and certainly comport with prior case law that the public policy of Mississippi seeks to "preserve inviolate the mutual confidence essential to marriage relations."

At page 7 of its Findings of Fact and Conclusions of Law, the Trial Court again uses the fact that Mrs. Langston had executed a power of attorney and living will in February of 2002 (more than three years before she passed away due to a sudden illness) in favor of Mr. Langston. C.P. 416; R.E. 18. Attorney Richard Noble, in his trial testimony, clearly stated that it is entirely normal for husbands and wives to execute powers of attorney and living wills in each other's favor, and that was done in this case. T. 183. At the same time Mrs. Langston designated Mr. Langston, Mr. Langston likewise designated his wife, Mrs. Langston, as his power of attorney and agent under his living will. These type actions once again indicate a good marriage, and are simply evidence of "the mutual confidence essential to marriage relations." These mutual grants of power are not, in this context of a husband and wife, evidence of one dominant party obtaining power over a subservient one.

(C.) The analysis of the Dabney factors with regard to the Langstons' property transfers leads to a clearly erroneous result.

The Trial Court in its analysis of the seven factors set forth in Estate of Dabney, 740

So.2d 915 (Miss. 1999) used five of the seven factors (which evidence a normal, good marriage with mutual confidence) against Mr. Langston in his marriage in order to establish a confidential relationship. Thus, the facts that Mr. Langston assisted his wife with her medications, accompanied her to the doctor, had a close loving relationship with her, shared joint accounts with her, and exchanged mutual powers of attorney and living wills with her were used against him as factors of dominance by the Trial Court, rather than accepted as evidence of a good marriage in which both parties exhibited mutual confidence in each other. C.P. 414-416; R.E. 16-18.

It is submitted as a matter of law that the analysis of the seven Dabney factors simply "do not work" in the context of a long-term, marriage where a husband and wife exhibit mutual confidence in each other. It is submitted that the rule in Mississippi in a husband and wife context in a non-contrived, long-term marriage should simply be that there cannot be a presumption of undue influence created out of a confidential relationship in this context.

The instant case is really an example where Ethel Williams, Appellee, and the adult children of Mrs. Langston's first marriage and her adult sister, are seeking to vault over the issue of confidential relationship because there is none in this case, and try to prove what they "should have gotten" from Mrs. Langston by parole evidence.

Mississippi law is crystal clear that parole evidence cannot be introduced in a case seeking to set aside lifetime transfers with rights of survivorship (here, a certificate of deposit and deed). Estate of Beckley v. Beckley, 961 So. 2d 712 (Ct. App. Miss., 2006) [reversed

on other grounds at 961 So. 2d 707]. [Parole evidence that decedent said he wanted the particular property to go through his will is inadmissable]; Estate of Dunn v. Reilly, 784 So. 2d 935 (Miss. 2001) [Parole evidence is inadmissable that decedent intended for the will beneficiaries to have the property that went via certificate of deposit]; Estate of Huddleston vs. Horn, 755 So. 2d 435 (Ct. App. Miss., 1999) [Parole is evidence inadmissable that decedent did not understand legal matters]; Thornhill v. Chapman, 748 So. 2d 819 (Ct. App. Miss., 1991) [Parole evidence is inadmissable about who was the source of funds that created the deposit or enabled the purchase of the property]; Cooper v. Crabb, 587 So. 2d 236 (Miss. 1991) [Parole evidence is inadmissable of a will executed before the property was placed into a survivorship account]; The Estate of Strange v. Strange, 548 So. 2d 1323 (Miss. 1989). [Parole evidence of a will executed after property is placed into a survivorship account is inadmissable].

All of these arguments were made by the Appellee on behalf of the estate and the adult children and adult sister of Mrs. Langston. As the Supreme Court stated in Cooper v. Crabb, supra:

> Where the language of a legal text is without gross ambiguity, neither parole testimony nor other extrinsic evidence are admissible to show meaning. The rule proceeds from common sense premises, here, that resurrecting the mind of the deceased and deciphering its thoughts four years after the fact is an enterprise fraught with hazard and not just because it is pursued by the self interested. 587 So. 2d at 241.

Thus, it is respectively submitted that under the facts of the instant case, this Court should reverse and render a decision in favor of Mansfield Langston upholding the May 9,

2002, execution of the deed to the martial home with survivorship rights and upholding the investment of the certificate of deposit of September 4, 2003, with survivorship rights, in that as a matter of law there was no confidential relationship under the facts of this case.

ISSUE NO. 2:

It is respectfully submitted that here follows the clear and manifest error of the Trial Court's Findings of Fact where either the finding is clearly contradicted by the trial record or the finding is not found in the trial record.

Manifest Error of Fact 2-1:

Beginning with the factor under confidential relationship, as to "whether one person has to be taken care of by another, and provided transportation," the Trial Court stated that Mrs. Langston's medical conditions "were aggravated as a result of her taking Fen-Phen diet drugs in 2001." C.P. 414; R.E. 16. This conclusion is not supported anywhere in the entire record, and is exactly contrary to the testimony of April Frierson (a witness called by Ethel Williams). T. 62. The Trial Court, also at page 6 of its Findings of Fact and Conclusions, restates this erroneous statement of fact. C.P. 415; R.E. 17.

Manifest Error of Fact 2-2:

The Trial Court both under the factors of "whether one person has to be taken care of by another, and provided transportation," and "whether one is physically or mentally weak" concludes that Mrs. Langston's medical conditions grew worse and caused "mental weakness." C.P. 415-416; R.E. 17-18. This is not supported anywhere in the record. There

was never any evidence of mental weakness on behalf of Mrs. Langston, and her mother, adult son, and sister (as well as all other witnesses) testified exactly to the contrary. T. 60; 85; 364. There is no testimony to support the conclusion that Mrs. Langston's medical conditions grew worse. Rather, the testimony was simply that the conditions were chronic.

Manifest Error of Fact 2-3:

Again, under the confidential relationship factors of "whether one person has to be taken care of by another, and provided transportation" and "whether one is physically or mentally weak," the Trial Court concludes that Mrs. Langston's medical conditions grew progressively worse and "eventually culminated in her death." C.P. 415-416; R.E. 17-18. Yet, what caused Mrs. Langston's death is not in the record, and there is nothing to support that any medical condition that was mentioned either by Mr. Langston or Ethel Williams or any witness was the cause of Mrs. Langston's death. In other words, there is nothing in the record to support the notion that Mrs. Langston's heart condition, kidney condition, or alleged asthma, gout, high blood pressure, and swelling of her feet in any way caused her death. Respectfully, this finding of fact is speculation, without support in the record.

It must be remembered that the only testimony in the record is that in May of 2005, Mrs. Langston suffered a sudden illness and died as a result of it. It is Ethel Williams' burden to go forward on these issues, and she put forth no proof that the cause of Mrs. Langston's death was in any way related to any chronic medical condition that she had. Counsel for Mrs. Williams asked unsubstantiated questions about pneumonia and

pancreatitis, and it is respectfully submitted that these were not the cause of Mrs. Langston's death. T. 260. This could be clarified, but Counsel for Mr. Langston does not wish to go outside the record.

Manifest Error of Fact 2-4:

The Trial Court found that Mr. Langston was unaware of his wife's health problems, casting doubt on his credibility. C.P. 422-423; R.E. 24-25. However, as set forth in the Statement of Facts, Mr. Langston did not testify that he was unaware of his wife's health problems. He simply disagreed with Mrs. Williams and some of her family members as to the exact nature and extent of her problems. Mr. Langston could not be unaware of his wife's health problems, when he testified about taking her to the heart doctor, to the kidney doctor, and assisting her with her medicine when she needed it. T. 47-49; 52-53.

Manifest Error of Fact 2-5:

The Trial Court concedes that Mrs. Langston was a relatively young woman at her death (age 49), but then concludes that she was in poor health at the time of the execution of the warranty deed on May 9, 2002, and the certificate of deposit on September 4, 2003. Yet, it is uncontradicted in the record that at all times relevant to the execution of these documents Mrs. Langston:

1. Was not in a hospital and had not been in a hospital.
2. Was not under hospice care or under the care of any nurses or sitters. T. 66.
3. Was capable of driving her automobile, taking care of her home, going to

church, and going on family trips. T. 64-66; 89-90; 93.

4. Was well-educated, intelligent, and had a "sharp mind." T. 367.

5. Had a strong will, sufficient that when she made up her mind to do something she would do it, even though she might "catch hell" later. T. 96-97.

Manifest Error of Fact 2-6:

Finally, under the issue of confidential relationship, the Trial Court does not note that in February of 2002, Mr. Langston executed a mutual power of attorney and living will designating Mrs. Langston as his attorney-in-fact, and does not note that there is no proof that either of these documents was ever utilized. Attorney Richard Noble's testimony (trial testimony) was uncontradicted that it is commonplace for husbands and wives to execute mutual powers of attorney and living wills, and at the time of these documents' execution, he observed no signs of illness or weakness in either Mr. or Mrs. Langston. Mutual execution, by husbands and wives, of powers of attorney and living wills in each other, denotes a mutual confidence, not a dominant party vis-a-vis a subservient one.

Manifest Error of Fact 2-7:

Assuming for argument only that a confidential relationship could have been established, Mr. Langston has no argument with the burden of proof and the factors that a grantee/will beneficiary must prove and address to overcome the presumption of undue influence. In Re: the Last Will and Testament of McCaffrey vs. Fortenberry, 592 So.2d 60 (Miss., 1991).

Again, the Trial Court's Findings of Fact and Conclusions of Law are clearly erroneous and manifestly in error on this issue. The Trial Court concludes that attorney Richard Noble was the attorney for Mansfield Langston prior to the transaction in question. Of course, that is not all the proof. The transaction in question is the May 9, 2002, deed to the Langston's marital home. Prior to that time in February of 2002, both Mansfield Langston and Patricia McDaniel Langston had mutual living wills and powers of attorney prepared by Attorney Noble. Then, Mrs. Langston went back to Attorney Noble in March of 2002 and had deeds and a will prepared by him. Then, on May 9, 2002, the Deed in question was prepared. Thereafter, Mrs. Langston would go back to Attorney Noble to have another version of her will prepared and also consult with him about a business venture she was considering opening in Indianola. Mrs. Langston obviously expressed confidence, by her numerous contacts with Attorney Noble, in his abilities and objectivity. T. 173-192.

Manifest Error of Fact 2-8:

The September 4, 2003, certificate of deposit was an investment by Mr. and Mrs. Langston with their bank, Guaranty Bank, and was certainly not a situation where Mrs. Langston appeared for the first time ever on September 4, 2003, having been brought in with her husband, to open a new account at this bank. The proof was clear that she had prior business, as did her husband, with this bank for at least one and maybe two years. T. 203; 207-208. The proof was uncontradicted (but, not noted by the Trial Court) that Banker Paul Townsend testified that Mrs. Langston wanted to make investments at his bank because she

did not want a relative who worked at another bank knowing all of her business (i.e., her mother, and Appellee herein, Mrs. Williams). T. 204. Without any support in the record the Trial Court concluded that "Patricia moved the CD, that was in her name only, from a bank of her initial selection, to Guaranty Bank, the bank Mansfield was doing business with." C.P. 419; R.E. 21. There is absolutely no proof in the record that the source of funds for the September 4, 2003, certificate at Guaranty Bank was from a "CD, that was in her name only, from a bank of her initial selection." The proof in the record is clear that Mansfield and Patricia had both been doing business with Guaranty Bank for one to two years before the September 4, 2003, transaction, contrary to the Trial Court's finding that this was Mr. Langston's bank only. T. 204-205; 207-208.

Manifest Error of Fact 2-9:

The Trial Court committed manifest error in Finding of Fact Number 15 when it stated that: "Mansfield had been a customer at Guaranty Bank for six (6) or seven (7) years before Patricia became a customer." C.P. 412; R.E. 14. The trial testimony of Banker Paul Townsend simply does not warrant this conclusion. Mr. Townsend stated that he had known Mansfield Langston for six or seven years in a capacity of "in and out of the bank doing transactions." T. 200. His trial testimony was taken in November of 2007. That would logically mean that he had known Mansfield Langston since the year 2000 or 2001. Banker Townsend went on to testify that he first met Mrs. Langston a year or two before the certificate of deposit was executed in September of 2003. T. 207. Two years before the

certificate of deposition of 2003 would be 2001. Logically, then he would have known Mrs. Langston from the same approximate time he began to know Mr. Langston, six years. Tellingly, Banker Townsend testified (on cross-examination) that:

> Q. Alright. How long had Mr. Langston done business with your bank before you met Mrs. Langston?
>
> A. They came in at the same time when they started doing business with me.
>
> Q. So you met them for the first time together?
>
> A. Yes, sir. T. 211.

Thus, the truth of Banker Townsend's testimony, when all the testimony is reviewed, is that he knew Mr. Langston and Mrs. Langston for the same period of time (about six years), and that he met them together when they first started doing business with his bank. "I remember meeting Patricia and Mansfield together the first time I ever met them in the bank." T. 205.

The finding by the Trial Court that Mr. Langston had been a customer at Guaranty Bank for six (6) or seven (7) years before Patricia became a customer, is totally contrary to Banker Townsend's testimony, which is the only proof in the record on this point.

Manifest Error of Fact 2-10:

The Trial Court committed manifest and clear error in Finding Number 16 when it stated: "Patricia primarily banked at Planters Bank where her mother, Ethel Williams, was employed." C.P. 412; R.E. 14. The suggestion that Mr. Langston spirited away Mrs. Langston from her primary bank to use a bank where he had banked exclusively for a number

of years, is without any support in the record. The only references in the record as to which banks were used in the record are that Mr. Langston dealt with several banks including Guaranty, Planters, and Community. T. 42. On cross-examination, Mr. Langston was asked whether Mrs. Langston used the bank that he traditionally used, Guaranty Bank, and Mr. Langston's response was that they used all three banks. T. 46. Ethel Williams, Appellee and Mrs. Langston's mother, was asked by her attorney whether they (i.e., Mr. and Mrs. Langston) maintained joint accounts or an account at Planters Bank. Her response was that Mrs. Langston had an individual account a few years before she and Mr. Langston met, and his name was added to the account. T. 113. The conclusion that Mrs. Langston "primarily banked at Planters Bank" (emphasis added) is without support in any trial testimony or trial exhibit.

Manifest Error of Fact 2-11:

The Trial Court chose to ignore the in-court testimony of Attorney Richard Noble, and without introduction into evidence or consent of either party based its findings on a deposition which it found in the Court file. Attorney Noble's trial testimony was clear that Patricia McDaniel Langston was the one who called his office about preparation of the May 9, 2002, deed, and that all the information he received regarding this deed came from his conversations with her, not Mr. Langston. However, the Trial Court went outside the record and used Attorney Noble's deposition to conclude that he just assumed Mrs. Langston gave him the information for the deed. Respectfully, selective use of found depositions that are not introduced into evidence and not part of the record is patently unfair. The deposition of

the Appellee, Ethel Williams, is also in the Court file, but not introduced into evidence (just like Attorney Noble's deposition). Mrs. Williams' trial testimony differed greatly from her deposition testimony, and Mr. Langston, through counsel, had to impeach Mrs. Williams on numerous occasions with her deposition. T. 102-110. Had the Trial Court used this deposition of Mrs. Williams, rather than her trial testimony, her (Ethel Williams') admissions would have been even stronger, and her case even weaker.

Manifest Error of Fact 2-12:

In Finding Number 7, the Trial Court references that Mrs. Langston received settlement proceeds from a Phen-Fen lawsuit of 1.6 million dollars. C.P. 411; R.E. 13. Factually, this is correct. However, this fact is not to be found in the testimony of any witness or in the text of any trial exhibit in this case, because upon objection, this was excluded pursuant to the parole evidence rule. T. 7-15; Thornhill v. Chapman, 748 So. 2d 819 (Ct. App. Miss., 1991).

However, after having kept this out of evidence, the Trial Court accessed this information from a deposition attached to a Motion for Summary Judgment, which is in the court papers, but not introduced into evidence. C.P. 246. This use of outside the record information by a court destroys the ability of counsel for a party to properly present a case at trial. Had counsel for Mr. Langston known that the Court was actually going to "admit" this information and make a finding of fact regarding it, rather than exclude it, then Mr. Langston's counsel could have proceeded at trial to show these funds were placed into joint

investment accounts with rights of survivorship, just as the Langstons had always done. Moreover, Mr. Langston could have shown how he and Mrs. Langston spent their jointly owned, commingled funds, much of which went to some of the very family members who in turn sued Mr. Langston. However, Mr. Langston relied on the Trial Court's exclusion of this material at trial, and had no way of knowing it would be later brought in by the Trial Court without giving Mr. Langston any opportunity to offer proof to put this in proper context.

Mississippi Rule of Civil Procedure Rule 31(a)(3) explains when a deposition may be used by a party, and this type of use by the Trial Court, after trial, is not mentioned. In fact, the rule references the "due regard to the importance of presenting the testimony of witnesses orally in open court...."

Manifest Error of Fact 2-13:

Under the element of consideration, the Trial Court states that Mr. Langston gave no consideration for the warranty deed or the certificate of deposit. This conclusion ignores the fact that the deed of May 9, 2002, was the deed to the marital home in which Mr. and Mrs. Langston resided, and that the testimony was uncontradicted that it was the Langston's custom and habit to jointly own their marital home with survivorship rights. The record clearly reflects that the marital home on Kentwood Lane in Indianola had been solely titled in Mr. Langston's name, and he had brought it into the marriage. Then, without any monetary consideration, he placed Mrs. Langston on that deed with survivorship rights. T. 287-293.

Insofar as consideration for the certificate of deposit, the Trial Court concludes that the source of funds for the certificate of deposit was from separate funds of Mrs. Langston. The source of funds for the September 4, 2003, certificate of deposit, whether from the lawsuit or from Mr. Langston's business ventures or a combination of both, was never established in the record. It is pure surmise and speculation, without support in the record, to conclude that the source was separate funds of Mrs. Langston, and, thus, Mr. Langston had given no consideration toward it.

Manifest Error of Fact 2-14:

The Trial Court found that Mr. Langston failed to exercise good faith in the execution of the documents, "engaged in a pattern of systematically alienating Patricia from her family and friends," and that somehow the deed and certificate of deposit were done in secret or not open. C.P. 424; R.E. 26. Yet, it is uncontradicted that the warranty deed of May 9, 2002, was filed at the Courthouse and of public record, just like the deed that same day that Mr. and Mrs. Langston executed to Ethel Williams, Appellee, to the Kentwood Lane property. Further still, it is uncontradicted that all three of the main participants in this matter (Patricia McDaniel Langston, Mansfield Langston, and Ethel Williams) signed and/or received deeds prepared on May 9, 2002, by the same lawyer, all of which were filed at the same Courthouse.

If Ethel Williams did not have any knowledge of the certificate of deposit of September 4, 2003, it was because (as the uncontradicted testimony of Banker Paul

Townsend stated) Mrs. Langston did not wish to have a family member who worked at another bank (and she only had one relative working at another bank, and that was her mother, Mrs. Williams) knowing about all of her business. T. 204.

Moreover, Ethel Williams testified that she visited with her daughter the entire time of her marriage, at least 3 – 4 times every week, until she died,. T. 98-99. April Frierson, Mrs. Langston's sister, testified that from 2001 until Mrs. Langston's death, they talked daily on the telephone. T. 62-63.

Manifest Error of Fact 2-15:

The Trial Court notes at page 11 of its Findings of Fact and Conclusions of Law that: "According to Noble, he had no specific recollection of whether Patricia asked that he prepare the Warranty Deed, conveying title to Mansfield and Patricia as joint tenants with the right of survivorship. He just assumed that she did, because it was stated that way in the Deed." This was not his trial testimony, which is as follows:

> Q. Did you speak to her the proceeding days leading up to the preparation of the deed?
>
> A. Yes, sir, I spoke to her. She indicated to me that she wanted that deed prepared since that was a new residence that she and Mansfield – or that she had bought before on French Road in Indianola. There was another deed she wanted me to prepare to deed – she and Mansfield to deed their present home to Ms. Williams and then another deed that Ms. Williams was going to execute. So there were three deeds that I recall preparing.
>
> Q. When you were receiving the information regarding the preparation of the deed or deeds from Mrs. Langston was anyone else participating and giving that information to you?

A. No, sir, I don't recall anyone else.

Q. So she was the sole source for the preparation of Exhibit 4 that deed that we have introduced into evidence?

A. As I recall, yes, sir. T. 175-176.

Q. Okay. You said that no one else provided information in preparation of these deeds I believe that was your testimony?

A. As I recall, she provided the information for the deeds in the second – what I call the second deed to the Grove Park property. And then it was another deed that Ms. Williams executed. T. 191-192.

Manifest Error of Fact 2-16:

The Trial Court further notes at pages 11-12 of its Findings of Fact and Conclusions of Law, that in the June, 2003, will executed by Mrs. Langston she changed her executor from Mr. Langston to her mother, Mrs. Williams. The Trial Court concludes that this suggests "an erosion of trust has occurred." C.P. 421; R.E. 23 Yet, less than three months later on September 4, 2003, when the certificate of deposit is invested in joint ownership with rights of survivorship, trust must have existed between the Langstons in order for the Trial Court to find a confidential relationship. There is no proof in the record as to why Mrs. Williams was named as executor. The will of June, 2003, may well have been drafted with the changed executor, to placate Mrs. Williams. However, merely changing an executor without more, should not suggest either an erosion of trust or an attempt to placate the newly named executor. Respectfully, to imply the intent of the testatrix from a change of executrix is surmise and speculation.

Manifest Error of Fact 2-17:

At the very beginning of the Trial Court's Findings of Fact and Conclusions of Law, the Trial Court states: "The Respondent filed a counterclaim, but failed to present any evidence in support of his claims." C.P. 410; R.E. 12. This is a conclusion that ignores the record in this case. The counterclaim alleged certain rights in Mr. Langston as a widower, such as his right to reside in the homestead as long as he remained a widower, and his right to a widower's allowance. The essence of the counterclaim, however, was the right to the marital homestead, during his widowerhood. C.P. 36. All of the proof that could be put on regarding this point is clearly in the record. Mr. and Mrs. Langston were married when she died, Mr. Langston is her widower, and Mr. Langston resides in the marital home which was the homestead of the parties at the time Mrs. Langston died. To suggest that no proof was put on, is entirely contrary to the record. All the proof that needed to be put on, on this issue, was put on. Miss. Code Ann. § 91-91-23.

CONCLUSION

With all respect, the Trial Court, committed manifest legal error in ruling against the widower on the question of a confidential relationship between the widower and his wife during a long-term marriage. The mother of Mrs. Langston and Mrs. Langston's children by her first marriage simply did not like the fact that Mrs. Langston preferred her husband over her adult children by her first marriage, if she died first. The Trial Court erred as a matter of law when it used the Dabney factors, which are relevant in a non-husband and wife

setting, to create a confidential relationship and shift the burden to the widower to prove no undue influence.

What Ethel Williams would have this Court do is turn the law of confidential relationships and undue influence on its head, and hold that the mutual confidences and trust which are promoted by the law between husband and wife can be used to raise a confidential relationship, create a presumption of undue influence, and negate inter vivos transfers among husbands and wives. This is simply not the law in Mississippi regarding long-term marriages, and never has been.

If this were to be the law, then normal joint tenancies with survivorship rights between husbands and wives who have good, close, and loving marriages would always be subject to being set aside by third parties after the death of one of the spouses. This would upset and make suspect every deed and every bank deposit in Mississippi made between husbands and wives where they own property in joint tenancies with survivorship rights. The inter vivos transfers in this case were exactly what one might expect between spouses, such as the Langstons, who had a close loving relationship.

Moreover, a careful analysis of the record and facts in this case indicates that the Trial Court's Findings of Fact and Conclusions of Law are clearly erroneous and manifestly wrong. Many of the conclusions are totally unsupported by the record, and in many instances directly contrary to the record.

The May 9, 2002, deed to the Langston's marital home and the September 4, 2003,

investment of the Langston's certificate of deposit were made by well educated, intelligent, competent adults who are under no disabilities or undue influence at the time of the execution of these documents. The very parties who would have this Court void these instruments, testified that Mrs. Langston was intelligent, a "brain," "sharp," and strong willed enough to do whatever she wished with her property even though she might "catch hell" for it later. This deed and certificate of deposit simply were not entered into by a subservient person who had her will supplanted by someone who dominated her.

It is respectfully requested that this Court reverse the Trial Court on the issue of a confidential relationship existing, hold that there was no undue influence relative to the execution of the deed to the marital home and the investment of the certificate of deposit, and render a decision in the widower's favor.

RESPECTFULLY SUBMITTED on this the 1st day of May, 2009.

MANSFIELD LANGSTON

By: _____
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CERTIFICATE OF SERVICE

I, Lindsey C .Meador, do hereby certify that I have this day mailed by regular United States mail, a true and correct copy of the above and foregoing Brief of Appellant to the following:

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