No. 2010-CA-02070

BEFORE THE COURT OF APPEALS OF THE
STATE OF MISSISSIPPI

NANCY BIRMINGHAM WALTERS

Appellant,

v.

DON BARNES

Appellee.

BRIEF OF APPELLANT NANCY BIRMINGHAM WALTERS

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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 Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Nancy Birmingham Walters, Appellant
2. Don Barnes, Appellee
3. Rosemary Barnes, Appellee
4. Ronnie Boozer, Administrator of Estate of William Birmingham

DATED, this 26 day of June, 2011.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: PAGE(S):

STATUTES AND REFERENCES:

SUMMARY OF THE FACTS

This is a lawsuit between two sisters and a sister and a brother-in-law.

William Birmingham was formerly a resident of Lee County, Mississippi. He left two daughters, Nancy Walters and Rosemary Barnes. Nancy Walters is single and Rosemary Barnes is married to Don Barnes, who both live in Alabama. (RE33-RE35) He lived most of his life in Lee County, Mississippi and went under the name William Birmingham. After his wife died, William Birmingham's health had deteriorated as he was eighty-five (85) years of age and he had become somewhat depressed and he had become forgetful and had become dependent on at least one of his children most of the time. Mr. Birmingham was getting forgetful; he could not remember things and his memory was just getting deteriorated. He was on medications and had to have help to go to the drugstore to get his medications filled. He had to have assistance from someone. He rarely went to the bank and his funds were automatically deposited.

Prior to going to Alabama, all agreed and the consensus of the two daughters was that he was getting to the stage that he could not live alone because he never knew when he might have a stroke, another stroke or heart attack and he did not need to be alone by himself. He wore a necklace, an alert necklace, and a lot of times he did not have it on and had to be reminded to wear it. (RE36-RE37)

Due to the circumstances of Nancy Walter's living situation, the decision was made that William Birmingham would move into the home of Don Barnes in the state of Alabama. (RE39) He later became dissatisfied with these living accommodations after he moved all of this furniture to Alabama and relocated back to Mississippi and lived with his sister in Monroe County, Mississippi until his death. He returned to Mississippi because he was unhappy living in the Alabama situation with his son-in-law and daughter. He had to live with someone and he was left alone there. When he moved back to Mississippi, he moved in with his sister who lived in Monroe County. She was also retired and was able to be with him during the day. (RE45)

At the time that he returned to Mississippi, his driving was restricted. (RE46) He was dependent upon others to prepare his meals when he had returned to Mississippi and before moving to Alabama he also had to have assistance with cooking his meals and going to doctor's appointments. (RE48)

While in Alabama all of his needs were taken care of by Don and Rosemary Barnes. Don Barnes, a public accountant, assisted him by going with him to the bank, opening bank accounts and assisting him with his funds. Don Barnes, his son-in-law, had passed the Certified Public Accountant (CPA) exam but did not at the time of the trial have his CPA license but was a practicing accountant and had been a comptroller for a private industry. (RE26) Don Barnes took William Birmingham to the bank for his

banking business and assisted him in setting up these accounts. (RE26-RE27) Neither the bank officer nor Don Barnes read the entire paperwork concerning the Forty-One Thousand Dollars ($41,000.00) money market account which was worth approximately Fifty Thousand Dollars ($50,000.00) at the time of this trial and Don Barnes, even though he was a public accountant and qualified to be a CPA, had no idea that the account was set up as a joint account and also it would be presumed that Mr. Birmingham , who was 85 years of age himself and could not even read and understand the document, would also not have know the same. It is significant to note that Don Barnes, who was present when this account was set up, had no knowledge it was a joint account and in fact allowed his wife to sign a sworn affidavit that the account belonged to the estate. (RE27-RE28) This account was at the Regions Bank.

When William Birmingham returned to Mississippi he was brought to the Law Office of Gene Barton. Prior to coming there, he indicated to Nancy Walters that he had signed some documents in Alabama and was not sure what he had signed and he thought that maybe one of them was a new Will and so he asked Nancy Walters to take him back to Alabama, which she did. When they went to Bessemer he could not find the place where he had signed the paper. He said that "Don took care of everything and he just signed the papers." He said "I want to know what they were." But he did not recognize any of the places, so they came back to Mississippi and William Birmingham requested that Nancy take him to "sign a Will so I know exactly what it says."(RE49) Nancy Walters actually drove him to Bessemer and he could not locate where he had been and he could not find it and did not know where he had been or the name of the person he had seen but he thought he had signed another Will. Nancy Walters testified that there were papers filled out and furthermore he indicated that any time papers were signed or filled out in Alabama that Don would drive him there and Don did all the talking and told him what to put down and he just signed them. (RE49) Nancy Walters brought William Birmingham to the Law Office of Gene Barton at which time a Will was executed, which is an exhibit in this trial, which clearly referred to the certificate of deposit (CD). The Will was prepared and specifically addressed the CDs. (RE50) This Will was signed in the presence of the various witnesses that are indicated on the Will. There is no dispute in this case about his competency to prepare this written Will and the Will was witnessed by the ex-wife of Gene Barton, Cynthia Barton, along with former secretary, Susan Wiygul, and also step-son and former employee of Gene Barton, Robert Crouch. All of this was done on the 28th day of June, 2007 and at that time Mr. Birmingham was frail, and old man with Alzheimer's and some other health issues. (RE15)

With respect to the money market account at the Regions Bank, which the Honorable Chancellor gave to Don Barnes, Mrs. Rosemary Barnes with the consent and encouragement and suggestion of Don Barnes filed a suit to remove Nancy Walters as the administrator of the estate and alleging that the funds from that Regions Bank account belonged to the estate and it was estate money. (RE16) At the time of the trial,

the Court was holding approximately Forty-Two Thousand Dollars ($42,000.00) in cash which was the monies which were released by the Regions Bank, which itself believed was estate property and these funds had been turned over to Ronnie Boozer as a result of earlier litigation concerning alleged mishandling of the estate based on the earlier pleadings filed by Don Barnes and Rosemary Barnes. (RE17)

While in Alabama there is no dispute that all of the bank accounts were changed to set up to where the fine print language on the account listed Don Barnes as the owner in the event of the death of William Birmingham or Rosemary Barnes and this occurred after the money was taken to Alabama. As indicated earlier, Don Barnes and Rosemary Barnes and William Birmingham had no idea, including Regions Bank that the Forty-One Thousand Dollar ($41,000.00) money market account had such language on the account; as they filed sworn pleadings in the Court indicating to the same effect.(RE18, RE27-RE28)

The intentions as expressed in the Will are consistent with the fact that there was an annuity for Two Hundred Thirty Thousand Dollars ($230,000.00) which was split evenly between the parties, which is consistent with wishes of Mr. Birmingham. (RE18)

ISSUES BEFORE THE COURT

ISSUE I: Did the Chancery Court commit error in directing a verdict for the defendants, Don Barnes and Rosemary Barnes, in this case where the evidence established a fiduciary relationship existed between the Barnes and William Birmingham and they utilized such relationship to create a certificate of deposit which listed one of the two as the beneficiary to the exclusion of the other daughter, which was clearly contrary to the wishes of William Birmingham?

ISSUE II: Does the Will of William Birmingham, with clear instructions as to how his money in the bank is to be divided, supersede the written certificate of deposit?

ISSUE III: Does the filing of a suit in court, under oath, alleging that a certificate of deposit is owned by the estate bar a later change in position and claim by the filing party that they are the sole owner of the account to the exclusion of the other heir?

ISSUE IV: Did the honorable Chancery Court commit reversible error in requiring Nancy Walters to contribute to attorney's fees?

STATEMENT OF THE CASE

It is important to remember that this is a case where the Chancery Judge entered a directed verdict in favor of the Defendants without requiring the Defendants to put on any proof whatsoever or defense. This is not a case where the Court heard all of the testimony. The facts as were laid out earlier in the mentioning of the facts are as related by Nancy Walters herself concerning her father that prior to her father's death that William Birmingham was 85, his health had deteriorated, he had become depressed and forgetful, he had worked for a little while "piddled around" and then he got where he was dependent on Nancy Walters; he needed help buying his medication, going to the grocery store; he was just forgetful. He would come to Nancy Walters' house and do something and the next day he would not remember it. (RE35) He saw a neurologist in Tupelo, Mississippi for these conditions and was treated by a neurologist in Tupelo who was identified as Dr. Harrington. Furthermore Nancy Walters testified that he was forgetful, he could not remember things, his memory was deteriorating and he those were the reasons he saw Dr. Harrington. He was on medication and he was taking Aricept and it was filled at Walgreens in Tupelo and it was necessary for someone to take him to Walgreens to get his medicine filled. (RE36) He always had to have assistance from someone; like Nancy Walters or someone else to give him his checkbook and help him pay bills and to sign checks and prepare checks. He had most of his billing done by automatic draft. He rarely went to the bank. His Social Security was automatically deposited. (RE37) Before going to Alabama, all family members agreed and William Birmingham agreed with his family with consensus of all involved that he was getting to the stage where he did not need to live alone because no one ever knew when he might have a stroke or another stroke or heart attack and he just did not need to be by himself. He wore a necklace, an alert necklace, but a lot of times he would not have it on and had to be reminded to wear it. (RE37) The problem with the necklace that he wore was that he would forget to put it on; he would take it off and forget to put it back on. He would hang it up by his chair and he would not wear it and Nancy Walters would say "Daddy if you fell or if you went to the kitchen or if you did anything and you didn't have it on, you might not be able to reach for it because it's hanging on the wall". (RE38)

He saw Dr. Harrington more than one time, who is the neurologist. (RE38)

The decision for William Birmingham to move to Alabama came to be because his condition got progressively worse and one thing Nancy Walters wanted to make clear is that if she was out of town, she did not have a back-up for her father. In fact she said "one time I was out of town and Daddy had to go to the hospital, and he called my neighbor, who is always his backup, and she got him to the hospital". (RE40) So for these reasons the plan was set up that he would move to Alabama where her sister lived. Nancy Walter indicated that the circumstances of how he got to Alabama were that Don (Barnes) bought a house with an efficiency apartment in the basement for their

son, Brett, to live in. Brett decided not to live there, so they had a convenient place for William Birmingham to stay. William Birmingham was convinced to move into Don's basement with the agreement that Rosemary would retire and would be there for him. She agreed to retire, but she did not so when William Birmingham, moved or went to Bessemer, was left alone during the day all the time. (RE41 & RE42)

In Alabama he was not living independently in an apartment, he was basically living under the care of Don Barnes and Rosemary Barnes. (RE42 & RE43)

It was uncontradicted that the money that went into these bank accounts was money that belonged to William Birmingham. (RE44) It had come from the sale of his property in Lee County. (RE45)

When he returned to Mississippi, there had been restrictions placed on his driving and he had to be driven from place to place because of these restrictions on his driving. Mr. Birmingham had some accidents which were attributed to his age and other frailties. (RE47) When he lived with his sister and also with Nancy Walters, someone else prepared his routine meals for him. Prior to coming to the Gene Barton Law Office, William Birmingham told Nancy that he had signed some documents in Alabama and was not sure what he signed; he thought that maybe it was a new Will and he asked Nancy to take him to Alabama, which she did. They went to Bessemer but he could not find the place where he signed the papers. He said that "Don took care of everything and he just signed the papers." He said "I want to know what they were." But he did not recognize any of the places, so they came back to Mississippi and William Birmingham requested that Nancy take him to "sign a Will so I know exactly what it says." And that was the reason why he was brought to the Office of Gene Barton; he had no recollection of where he had been, what he had signed or what he had done in Alabama when Don took him somewhere. (RE49) Furthermore he indicated that any time papers were signed or filled out in Alabama that Don would take him and Don did all the talking and told him what to put down and he just signed them. (RE49)

Rosemary Barnes acknowledged that before moving to Alabama there were nurses checking on him almost on a daily basis or several times a week and that there was a nursing home care service that had to come by his house to check on him. However this was not working out. (RE19) Rosemary Barnes also acknowledged that he did not need to live by himself. All members of the family had talked about it and it was must not possible for him to continue to live alone. (RE20) Rosemary Barnes herself admitted under cross-examination that William Birmingham needed someone close that he could depend on when he needed them for whatever. (RE21) Rosemary Barnes also acknowledged that she filed a pleading in the Court and swore under oath that Nancy Walters had taken possession of more than Fifty Thousand Dollars ($50,000.00) of the estate. This is one of the bank accounts which was in fact the

checking account. (RE22) When this pleading was signed, Rosemary Barnes and Don Barnes both thought that this money market account did not have a right of survivorship and was owned by the estate and they did not realize until prior to the court hearing that it had a right of survivorship clause in it. However Rosemary Barnes swore out a sworn affidavit that the asset belonged to the estate. (RE23) Furthermore Rosemary Barnes did acknowledge that prior to the Will being done by Gene Barton that an earlier Will had been done in Alabama in June and that Will provided that all assets were to be divided equally. (RE24) This Will was admitted as an exhibit into evidence. (RE25) So there are two Wills involved which explicitly provide that all assets are to be divided equally, which is consistent with the annuity. Furthermore the Will prepared by the Law Office of Gene Barton specifically provides that the certificates of deposit are to be divided equally. Don Barnes admitted that he set up the money market account at the Regions Bank with a bank officer named Kelley in Birmingham. He never testified that the bank officer indicated that the document had any language in there that said it had a survivorship clause. The bank officer did not read the entire document. In fact Don Barnes, a public accountant, who was present when the account was set up on this money market account himself admitted that he did not know it was a joint account when it was set up and he went with William Birmingham to the bank to get it set up and as a public accountant he himself was unaware that it was set up as a joint account. Don Barnes acknowledged that his elderly father-in-law did not read all of the language on the legal documents. It should be noted, and this Court should take judicial notice, that the language of joint rights of survivorship is in very small print, very difficult to read. (RE29) Several instances during his testimony, like Rosemary Barnes, Don Barnes acknowledged that he thought the bank account was strictly owned by the estate and not with a survivorship clause. (RE30) Furthermore Don Barnes sent various letters to Nancy Walters in which he asked about the bank account, being the money market account, which had been released to Nancy Walters and asked for an accounting of those funds since alleged and stated that they were property of the estate which at the trial he changed his position. (RE31) Furthermore Don Barnes stated that at the time he communicated with Nancy Walters after the death of William Birmingham that he had sent her a letter, he sent her keys to the car and at that time he did not know how the money market account was set up. At the time that he wrote the letter he knew that he was the co-owner of the account however he did not know how the account was set up and before she filed what he considered "slanderous charges against me" and this counterclaim, he did not know whether he was the owner or co-owner of either of these accounts but he intended to put all of these accounts into the estate and split it equally. But he changed his mind after he was sued in the court. (RE31) Again later in his testimony which was the third or fourth time Rosemary and Don Barnes had acknowledged it, they had no idea how the Fifty Thousand Dollars ($50,000.00) money market account which was paid over to Nancy Walters and later handled by the Chancery Clerk as administrator of the estate did not realize that it was not the property of the estate. (RE32)

So to summarize, during the entire period Mr. Birmingham was alive, after he died when the estate was initially set up and when Regions Bank turned over about Fifty Thousand Dollars ($50,000.00) to Nancy Walters in which she set it up in an estate account, inquiries were made by Don Barnes as to the status of this Fifty Thousand Dollars ($50,000.00) since it was believed to be owned by the estate. The bank believed it to be owned by the estate or it would not have released the funds to Nancy Walters. Because of allegations that Nancy Walters had not properly managed the estate, the funds were put in the custody and care of the Chancery Clerk who managed the funds until the trial. At all times during the proceedings, including the correspondence and also in the legal pleadings filed, it was the position of the Barnes that the Fifty Thousand Dollar ($50,000.00) money market which was later held in the custody of the Chancery Clerk as administrator of the estate was property of the estate and that there was no survivorship clause. Only until shortly prior to the trial did it become clear when the documents were subpoenaed by a subpoena duces tecum and a lawyer carefully read the fine print did Don Barnes first realize that the document had a survivorship clause in it. (RE32)

ARGUMENT ISSUE I

ISSUE I: Did the Chancery Court commit error in directing a verdict for the defendants, Don Barnes and Rosemary Barnes, in this case where the evidence established a fiduciary relationship existed between the Barnes and William Birmingham and they utilized such relationship to create a certificate of deposit which listed one of the two as the beneficiary to the exclusion of the other daughter, which was clearly contrary to the wishes of William Birmingham?

The court heard the testimony and the witnesses in this case including that of Don Barnes, Rosemary Barnes, and other witnesses and Nancy Walters and at the conclusion of Nancy Walters' case directed a verdict in favor of Don Barnes and Rosemary Barnes and did not require them to put on a defense and ruled as a matter of law that Nancy Walters was no entitled to any of these funds and that all funds including the monies which Regions Bank had released and which the Barnes had filed a sworn affidavit that they belonged to the estate, were taken out of the estate account and returned to the Barnes, although Rosemary Barnes had filed a sworn affidavit that these funds belonged to the estate and had sought to remove Nancy Walters as administrator and caused the Chancery Clerk to be appointed as the administrator because of alleged improprieties and as a result of the same allegations, Nancy Walters to resolve all these issues cashed in a retirement account so that all funds would be accounted for and then after the case comes to trial Rosemary Barnes changes her position contrary to her sworn testimony and alleges that she and her husband are entitled to all funds that are in the estate account thereby leaving no funds to pay the administrator or other parties or other expenses and also depriving Nancy Walters of her share of these funds which belong to the estate. The law with respect to undue influence and the presumption of undue influence was clearly enunciated in the well established decision of *Nancy Clay Madden V. Rhodes,* 626 So.2d 608 (Miss. 1993).

This case is the standard rule of law dealing with undue influence and joint bank accounts created as a result of undue influence. Specifically in the *Madden V. Rhodes* case, the issue was the ownership of the contents of a safety deposit box and a savings account set up in the names of "Andrew A. Sierra OR Nancy Clay Madden, as Joint Tenants with Right of Survivorship". The Special Chancellor ruled that Madden had not presented clear and convincing evidence needed to rebut the presumption of undue influence which had been raised. The Chancellor found all assets were part of the estate. The Court found that the ruling was supported by the evidence and would not be disturbed.

This is a lengthy decision which clearly establishes the rules to be followed with undue influence. The Court cited several cases dealing with the concept of confidential or fiduciary relationship including *Davion V. Williams,* 352 So.2d 804, 807 (Miss. 1977), and referring to *Croft V. Alder,* 237 Miss. 713, 115 So.2d 683 (Miss. 1959). Furthermore

the case of *Hendricks v. James*, 421 So.2d 1031, 1041 (Miss. 1982), where the case went on to state that "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 law does not hesitate to characterize such relationship as fiduciary in character."

Furthermore in another case to be cited by the Appellant, *Rodney Foster V. Tony Ross*, 804 So.2d 1018 (Miss. 2002), the Mississippi Court of Appeals discusses the *Madden V. Rhodes* case and CDs. Specifically on page 1022 of the decision, the Court goes on to say:

> According to Miss.Code Ann. § 81-5-63, the creation of a certificate of deposit creates an automatic presumption of "intent" to give ownership to the persons named on the CD, whether living or as survivors. Such presumptive title may be defeated upon proof of forgery, fraud, duress, or - as alleged here – unrebutted presumption of undue influence. *Madden v. Rhodes*, 626 So.2d 608, 617 (Miss. 1993) (citing *Cooper v. Crabb* , 587 So.2d 236, 242 (Miss. 1991)). Where a gift, such as the one at hand, is *inter vivos* , a presumption of undue influence arises upon clear and convincing evidence of the existence of a confidential relationship between the donor and the donee. *Madden*, 626 So.2d at 618; *Whitworth v. Kines*, 604 So.2d 225, 230 (Miss. 1992) (citing *Mullins v. Ratcliff*, 515 So.2d 1183, 1192 (Miss. 1987)). Thus, in order to prevail in this action, Foster was first required to demonstrate by clear and convincing evidence that a confidential relationship existed between Tony and Nannie Mae. The chancellor found that, not only did Foster fail to offer clear and convincing evidence of a confidential relationship, he failed to offer any evidence tending to demonstrate such a relationship.

The Court went on, specifically on page 1023, to define a confidential relationship as follows:

> 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 upon the former, arising either from weakness of the mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character. *Madden v. Rhodes*, 626 So.2d at 617 (citing *Hendricks v. James*, 421 So.2d 1031, 1041 (Miss. 1982)). Stated otherwise, a confidential relationship exists when one has a dominant, overmastering influence over a person dependant upon him. *Hendricks v. James*, 421 So.2d at 1041. The party asserting that a confidential relationship exists has the burden of establishing such a relationship by clear and convincing evidence.

Whitworth v. Kines, 604 So.2d at 230 (citing *Mullins v. Ratcliff*, 515 So.2d at 1192).

Based on these cases and an analysis of the law as indicated in these cases, it is clear that a *prima facie* case was made out that there was a fiduciary relationship between the Barnes and William Birmingham at the time that these bank accounts were created in the state of Alabama. A *prima facie* case clearly does exist and the Court was in error to direct a verdict as the Court did so do.

Under the particular facts and the particular circumstances of this case where the proof was presented that William Birmingham was dependent upon someone else for much of his basic needs and that he had to have someone to take him to the bank and that Don Barnes did most of the talking and most particularly with respect to the money market account which was sent over to the state of Mississippi and set up as an estate account because even Don Barnes as a public accountant who went in with him to set up these accounts did not even know that the account was set up as a joint rights of survivorship, that William Birmingham was relying on the Barnes to take care of him and look after him and as a result the presumption of undue influence did arise and it was not sufficiently rebutted and the Honorable Chancellor committed rebuttable error by granting a directed verdict.

ARGUMENT ISSUE II

ISSUE II: Does the Will of William Birmingham, with clear instructions as to how his money in the bank is to be divided, supersede the written certificate of deposit?

There seems to be some misunderstanding how joint accounts with right of survivorship are treated in both Mississippi and Alabama. The pertinent Alabama statute, Alabama Code § 5-5-41, reads as follows:

> (a) Any deposit heretofore or hereafter made in any bank in the names of two or more persons payable to any of such persons, upon the death of either of said persons, may be paid by the bank to the survivors jointly, irrespective of whether or not:
>
> (1) The form of the deposit or deposit contract contains any provision for survivorship;
>
> (2) The funds deposited were the property of only one said person;

(3) There was at the time of making such deposit any intention on the part of the person making such deposit to vest the other with a present interest therein;

(4) Only one of said persons during their joint lives had the right to withdraw such deposit;

(5) There was any delivery of any bank book, account book, savings account book, certificate of deposit or other writing by the person making such deposit to the other of such persons; or

(6) Any other circumstances.

The bank in which such deposit is made may pay such deposit, or any part thereof or interest thereon, to either of said persons, or if one is dead, to the surviving of them, and such payment shall fully release and discharge the bank from all liability for any payment so made.

(b) The provisions of this section shall apply to savings accounts, checking accounts and certificates of deposit and shall also apply to any deposit made in the names of more than two persons where there is an express written provision for survivorship in the deposit contract.

(c) Nothing contained in this section shall be construed to prohibit the person making such deposit from withdrawing or collecting the same during his lifetime; nor shall anything contained in this section prohibit any person or persons making a deposit in the names of more than one person from providing for disposition of such deposit and interest thereon in a manner different from that provided above in this section, provided such different manner of disposition is expressly provided for in writing in the deposit contract.

The pertinent Mississippi statute, Mississippi Code § 81-5-63, reads as follows:

(1) When a deposit has been made or is hereafter made in the name of two (2) or more persons, payable to any one (1) of those persons, or payable to any one (1) of those persons or the survivor, or payable to any one (1) of those persons or to the survivor or survivors, or payable to the persons as joint tenants, the deposit or any part thereof or interest or dividends thereon may be paid to any one (1) of those persons, without liability whether one or more of those persons is living or not, and the receipt of acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made. The making of a deposit in that form, or the making of additions thereto, shall create a presumption in any action or proceeding to which either the bank or any survivor is a party of the intention of all the persons named on the

deposit to vest title to the deposit and the additions thereto and all interest or dividends thereon in the survivor or survivors.

(2) (a) Any bank may pay to the successor of a deceased depositor, without necessity of administration, any sum to the credit of the decedent not exceeding Twelve Thousand Five Hundred Dollars ($12,500.00), without liability to any other persons, relatives or beneficiaries, and the receipt of acquittance of the person so paid shall be a valid and sufficient release and discharge to the bank for any payment so made. This section shall apply to all banking institutions, including national banks and postal savings banks within the state. The term "deposit" as used in this section shall include, but not be limited to, any form of deposit or account, such as a savings account, checking account, time deposit, demand deposit or certificate of deposit, whether negotiable, nonnegotiable or otherwise.

(b) For the purposes of this subsection, "successor" means the decedent's spouse; or, if there is no surviving spouse of the decedent, then the adult with whom any minor children of the decedent are residing; or, if there is no surviving spouse or minor children of the decedent, then any adult child of the decedent; or, if there is no surviving spouse or children of the decedent, then either parent of the decedent; or, if there is no surviving spouse, children or parent of the decedent, then any adult sibling of the decedent.

Again, Appellant cites *Rodney Foster V. Tony Ross,* 804 So.2d 1018 (Miss. 2002), wherein the Mississippi Court of Appeals specifically on page 1022 of the decision says:

According to Miss.Code Ann. § 81-5-63, the creation of a certificate of deposit creates an automatic presumption of "intent" to give ownership to the persons named on the CD, whether living or as survivors. Such presumptive title may be defeated upon proof of forgery, fraud, duress, or - as alleged here – unrebutted presumption of undue influence. *Madden v. Rhodes*, 626 So.2d 608, 617 (Miss. 1993) (citing *Cooper v. Crabb* , 587 So.2d 236, 242 (Miss. 1991)). Where a gift, such as the one at hand, is *inter vivos* , a presumption of undue influence arises upon clear and convincing evidence of the existence of a confidential relationship between the donor and the donee. *Madden*, 626 So.2d at 618; *Whitworth v. Kines*, 604 So.2d 225, 230 (Miss. 1992) (citing *Mullins v. Ratcliff*, 515 So.2d 1183, 1192 (Miss. 1987)). Thus, in order to prevail in this action, Foster was first required to demonstrate by clear and convincing evidence that a confidential relationship existed between Tony and Nannie Mae. The chancellor found that, not only did Foster fail to offer clear and convincing evidence of a confidential relationship,

> he failed to offer any evidence tending to demonstrate such a relationship.

The Court, specifically on page 1023 of *Foster V. Ross* defines a confidential relationship as:

> 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 upon the former, arising either from weakness of the mind or body, or through trust, the law does not hesitate to characterize such a relationship as fiduciary in character. *Madden v. Rhodes*, 626 So.2d at 617 (citing *Hendricks v. James*, 421 So.2d 1031, 1041 (Miss. 1982)). Stated otherwise, a confidential relationship exists when one has a dominant, overmastering influence over a person dependant upon him. *Hendricks v. James*, 421 So.2d at 1041. The party asserting that a confidential relationship exists has the burden of establishing such a relationship by clear and convincing evidence. *Whitworth v. Kines* , 604 So.2d at 230 (citing *Mullins v. Ratcliff*, 515 So.2d at 1192).

The legislative history indicates that the purpose of these statutes is to protect the banks and to avoid confusion in the banking industry as reflected by cases against banks and the various cases dealing with certificates of deposits. They were pushed, lobbied for, and adopted at the behest and request of the banking associations. Otherwise the bank had to delve into issues of who put the money into the account, what the donor's intentions were, what was the creator's intention, and deal with these issues before there could be any disbursement of funds in a joint account. The legislature created these statutes so that a bank could rely on the written language of the banking document and would have no liability.

As clearly indicated by all the earlier referred to cases and the *Madden V. Rhodes* case, Mississippi Code § 81-5-63 merely creates a presumption of intent, it is not conclusive.

In this case, a Will was signed and the Will was signed after the creation of these accounts and in fact an earlier Will was signed, which was not probated but which was in fact prepared in Alabama and which is in evidence which is consistent with the second Will prepared at the Law Office of Gene Barton which Will was witnessed by four individuals and which Will explicitly in detail with a sentence covers the disposition of certificates of deposits. This Will and the division of his annuities clearly indicates what this man's intentions were.

There could be nothing clearer than the language that says "I will, devise, give and bequeath all of my property, ...C.D.'s, to my daughters, Nancy Birmingham Walters and Rosemary Birmingham Barnes...." There could be nothing clearer to indicate his intent by such written language witnessed by four non-partial witnesses.

The Court has relied in the past on *In Re Estate of Huddleston*, 755 So.2d 435, 439. The Court in the *Huddleston* case followed the general rule that:

> "where a joint tenancy account in a bank is made payable to either depositor or survivor, the account passes to the survivor upon the death of a joint tenant." (quoting *Strange v. Strange*, 548 So.2d 1323, 1327 (Miss. 1989)). The court further stated that "[w]ithout doubt, our law allows competent adults to use such will substitutes with effect and thereby avoid probate."(quoting *Cooper v. Crabb*, 587 So.2d 236, 239 (Miss. 1991)).

In addition the Court goes on to state that:

> because of the common sense premises 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," the court determined that parol evidence may not be used to impeach an express survivorship clause. (quoting *Cooper*, 587 So.2d at 241). Consequently, the *Huddleston* court found that parol evidence was inadmissible to show the decedent's intent and that the funds represented by the banking instruments never became a part of the decedent's estate.

Principal reliance and theory and legal theory that this case was based upon was the difficulties of relying upon parol evidence.

The statute that has been referred to in all of these cases says that it creates a presumption of intent. Under the particular facts of this particular case, the particular circumstances of this case which is before the Court, the Court does not have to rely on parol evidence. The Will is clear; it cannot be said that it is ambiguous, it is clear as to what William Birmingham intended to do.

It is not uncommon that on short notice and sometimes even in the hospital that an individual in a lucid moment may choose to execute a proper Will in the state of Mississippi with two witnesses or in his own handwriting as a holographic Will. This can be done at any time of the day, even in the hospital and in doing so the entire disposition of an estate can be changed. In this particular case two Wills were prepared

and the final Will was executed in the Law Office of Gene Barton before four witnesses including the lawyer and the Will specifically addressed all bank accounts and certificates of deposits. At that time although he was lucid on the date that he signed his Will, he did not remember where he had been in Alabama and what he had done in Alabama. The problem of clarity and forgetfulness and poor memory is clearly not an issue since the Will is clear and unambiguous. It is extremely clear to the point with respect to the disposition of bank accounts. This document was signed before disinterested parties including the lawyer, the lawyer's ex-wife, the lawyer's former secretary and the son of the lawyer's ex-wife who was working in the law office as an adult. None of these individuals have any reason to fabricate their testimony or state anything to benefit Nancy Walters and the Will is extremely clear that his intentions were to leave all of his money and all of his certificates of deposits equally between his two daughters.

For this Court to rule that under the particular circumstances of this case that a certificate of deposit can never be altered by a legal, legitimate, properly executed will would provide that an individual who had become sick and infirm due to physical illness and could not go to the bank to change his certificate of deposit or desired to change the disposition of a certificate of deposit when the bank was closed, could be bound by what he had signed at the bank and this is in direct abrogation of the statutes that provide individuals may execute Wills. Again this eliminates the option of an individual, if he is in a lucid moment whether it be at night or whether it be on the weekend or whether it be in his hospital bed or whether it be under other circumstance where he may be at home writing out a holographic Will which is clear with its intentions and not being aware of the details of the documents he signed at the bank, being allowed to direct his clear, written intentions of the disposition of certificate of deposit. Wills, as well as holographic Wills, are established by statute. To disallow the right of an individual to change of modify the disposition of his estate by a properly executed written Will with witnesses, as the case is here, or by holographic Will in the testator's own handwriting where his intentions are clear is totally contrary to the intention and provisions of the statute allowing Wills under the Mississippi Code § 91-5-1.

The bank is still protected by the earlier referred to statues if it pays the money to the person that is listed on the document as the survivor. These statutes were created for the bank. There have been contrary decisions concerning whether a written will can contradict a certificate of deposit. There is no case on point in the state of Mississippi but the public policy of this state to allow individuals who are competent and of

testamentary capacity to execute Wills is clear as set out in the very statute allowing Wills. There are innumerable circumstances where a testator might not remember all the banks that he has accounts with and at the time he is drafting a Will might not remember the language in each account at each bank or the bank might be closed when he decides to prepare a Will during his last illness or at the time he might prepare his Will on a weekend and die before the bank reopens and there very well might be a conflict as there is in this case between a properly executed Will in an attorney's office and the banking document, especially with respect to the money market account, no one including Don Barnes, Rosemary Barnes, and even Regions Bank was aware of the language in fine print that created a survivorship clause. The Appellant respectfully states that it makes no sense as a matter of public law that a validly executed Last Will and Testament cannot clearly designate the disposition of the funds in a certificate of deposit between heirs. Again, the statutes created and advocated and adopted at the behest of the banking industry still protect the bank and if the bank pays as the document is drafted and signed, the bank has no liability unless some other exceptional circumstance is involved. The bank can pay as the document proscribes. However, as between heirs, the statutes providing for Wills when a Will is properly drafted and unambiguously spells out the intentions of the testator, William Birmingham, as in the particular facts of this case should govern and to do otherwise, frustrates clearly the intentions of William Birmingham and to have such a rule of law in this state prevents individuals who for whatever reason due to forgetfulness have not remembered the names of all of their bank accounts, do not have time to go back and check all of their bank accounts to review the specific language in the documents, do not remember the language in the documents, or the bank is closed when they are preparing their Last Will and Testament, or for whatever reason they are drafting a holographic Will which is allowed by law and are not aware of what language might have been in some instrument at the bank, prepares a document in which they believe they are dividing equally their assets among their children and then it comes up after their death that there is in some fine print in a banking instrument in another state which was signed in the presence of one of the children, that the wishes of the testator, as in this case William Birmingham, are clearly not followed and are frustrated. Such public policy and such rule of law is clearly contrary to the right of an individual to dispose of his property by Last Will and Testament and to allow otherwise totally frustrates the right of an individual to bequeath his money as he desires to do so.

ARGUMENT ISSUE III

ISSUE III: Does the filing of a suit in court, under oath, alleging that a certificate of deposit is owned by the estate bar a later change in position and claim by the filing party that they are the sole owner of the account to the exclusion of the other heir?

In this particular case, the pleadings under oath and various letters as referred to earlier in the record indicate that Don Barnes, public account, thought that the money market account of approximately $50,000.00 belonged to the estate and Rosemary Barnes believed the same and they filed sworn pleadings, under oath, in the Chancery Court asking that Nancy Walters do an accounting for these funds and due to earlier discussions between the parties which are not a part of the record in this case and are not at issue in this case, Nancy Walters had taken some of those funds out of the estate account and a claim was made against Nancy Walters to replace the funds in the estate of which she had to cash in an IRA to replenish the estate account due to earlier settlement discussions without the benefit of an attorney. The Appellees, by way of both letter communication and sworn pleadings in the Court, contended that the $50,000.00 money market account was the property of the estate. Regions Bank recognized the property as property of the estate and turned the money over to Nancy Walters.

The Court, and all the parties and attorneys and the administrator who is the Chancery Clerk of Monroe County retained attorneys to handle this estate based upon the fact that there was Fifty Thousand Dollars ($50,000.00) approximately in a bank account which had been received from the Regions Bank for which all parties including Rosemary Barnes had sworn under oath belonged to the estate. This case was tried for at least two full days.

Under the doctrine of judicial estoppel, it is error for in the midst of this trial after the pleadings had been filed and under the particular circumstances of this case for Rosemary Barnes to change her position and now claim that these funds belong to Don Barnes. Don Barnes himself earlier in his own testimony acknowledged that he did not know whether this was property of the estate and fully intended for the property to stay in the estate until "Nancy Walters made slanderous accusations against him." Only then did he make an effort to get these funds returned to him. As a result, all of this litigation occurred over this approximately Fifty Thousand Dollars ($50,000.00) when

the bank had returned the funds to Nancy Walters and she had put them in an estate account. Under the facts and circumstances of this case and under the doctrine of judicial estoppel as established by the following case, it was error for the Chancery Court to release these funds and return them to Don Barnes.

The Court found in *Halbert E. Dockins, Jr. v. Michael S. Allred*, 849 So.2d 151 (Miss. 2003) that "Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation. *Banes v. Thompson*, 352 So.2d 812, 812 (Miss. 1977)." The Court in *Dockins v. Allred* went on to say "Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation."

In *H.W. Banes V David K. Thompson*, 352 So.2d 812 (Miss. 1977), the Court states that:

> The doctrine [of judicial estoppel] applies only where a party elects to pursue one of two inconsistent remedies open for the assertion of a right arising from the same set of facts. He is estopped afterward from pursuing the other. *Lumberton State Bank v. Fortenberry*, 222 So.2d 384 (Miss. 1969); *Rea v. O'Bannon*, 171 Miss. 824, 158 So. 916 (1935).

The Court in *Banes v. Thompson* further states that:

> The principle of judicial estoppel prohibits a party in judicial proceeding from denying or contradicting sworn statements made therein. *Ivor B. Clark Co. of Texas, Inc. v Southern Business and Industrial Development Co.*, 399 F.Supp. 825 (S.D.Miss. 1974). Judical estoppel normally arises from the taking of a position by a party that is inconsistent with a position previously asserted. *Wright v. Jackson Municipal Airport Authority*, 300 So.2d 805 (Miss. 1974).

ARGUMENT ISSUE IV

ISSUE IV: Did the honorable Chancery Court commit reversible error in requiring Nancy Walters to contribute to attorney's fees?

At the conclusion of the testimony, the Court required the parties to share in the attorney's fees of the administrator and his lawyers. These fees were all accumulated to be paid to the Law Firm of John Creekmore as a result of a sworn pleading, under oath, having been filed by Rosemary Barnes alleging that the funds from the Regions Bank money market account belonged to the estate and seeking to have a subsequent administrator appointed and this subsequent administrator was appointed at the request of Rosemary Barnes based on her sworn affidavit which was consented to, agreed to, and acquiesced to by Don Barnes that these funds belonged to the estate. Don Barnes himself earlier in the trial admitted and testified that he himself was not aware that the funds were not estate property and had no idea there was any survivorship clause. As indicated earlier in this brief, the banking documents as far as the survivorship clause is concerned are of very fine print of which a normal individual would not even notice unless they read the documents with a magnifying glass. The bottom line is there would have never been a need for another law firm to have been appointed to hold this $50,000.00 if this money was not in the estate and this was a private dispute between the Barnes and Nancy Walters. But by filing a sworn affidavit and a sworn Complaint alleging and requesting that a third party be appointed administrator and that this administrator handle and protect these funds from this Regions money market account, the Barnes created the necessity of the John Creekmore Law Firm being hired and the necessity for the attorney's fees to be paid to the Creekmore Law Firm. The Appellant would respectfully state that the Honorable Chancellor erred in requiring, under these circumstances, Nancy Walters to pay any of these legal fees.

SUMMARY OF THE ARGUMENT

The Appellant would respectfully, by way of summary, state that under the doctrine as espoused in the case of *Madden V. Rhodes* that a fiduciary capacity between the Barnes and William Birmingham was established by the proof presented. It was error for the Honorable Chancery Court to direct a verdict before requiring the defense to put on any case.

In addition, the Appellant would respectfully state that the applicable code sections in the Alabama Code and the Mississippi Code only create an automatic presumption; they are not conclusive or the word presumption as defined by Black's Law Dictionary, Sixth Edition, defined as follows: "A presumption is a rule of law, statutory or judicial, by which finding of a basic fact gives rise to existence of presumed fact, until presumption is rebutted. ... A legal device which operates in the absence of other proof to require that certain inferences be drawn from the available evidence" would not apply; the word presumption is used. The Mississippi courts have held that the presumption cannot be overruled by parol testimony. However Mississippi has adopted specific statutes dealing with and allowing individuals to dispose of their property by written Wills which are properly authenticated by witnesses and also by holographic Wills which have been allowed by statute and case law. A properly executed Will, witnessed by four individuals who are disinterested, clearly enunciates after the creation of these banks that it is the intention of William Birmingham and his request that all of his money including CDs be divided equally between his two children. Appellant would respectfully state that the Wills statutes allowing the creation of Wills where the Will is unambiguous and clear as between disputes among heirs should override and allow and provide for the disposition as between heirs.

With respect to Issue III, as indicated in this particular case the Appellees themselves filed a sworn Complaint in the Court asking that the administrator be removed and a third party, being the Chancery Clerk, be appointed and furthermore that an accounting of all of these monies be required and alleging under oath that the Regions Bank account belonged to the estate. The Appellant contends that it is error to allow in the middle of the trial for the Appellees to change their position after they have filed a sworn pleading and caused this sequence of events to follow.

Finally, with respect to the issue of attorney's fees, all of these of attorney's fees were incurred since there would have been no need for the John Creekmore Law Firm to have been involved if there had not been a sworn Complaint filed with the Court

alleging that these properties belonged to the estate and asking that a third party be appointed as administrator of the estate to manage the money market from the Regions Bank account which Don Barnes himself acknowledged even as a public accountant that he was totally unaware of the fact when his wife filed the sworn Complaint that such account had any language in it that would provide for a survivorship clause and he himself indicated that his original intentions were to split the account with his sister-in-law until she filed "slanderous remarks against him." Under such circumstances where the attorney fees were caused by the filing of false and misleading pleadings and in fact could be construed as a pleading under oath which was in fact a lie since the Barnes in their pleadings allege that the property belonged to the estate when in fact later they said it did not belong to the estate, then the affidavit actually creates Mrs. Barnes swearing under oath that the property belongs to the estate. Again, bottom line, Appellees caused the need for these attorney fees to be incurred and Appellant should not be required to pay any of them.

Appellant would respectfully ask that this case be reversed and remanded with respect to all of the issues raised in this appeal.

RESPECTFULLY SUBMITTED, this the 27 day of June, 2011.

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I, the undersigned, GENE BARTON, Attorney for the Appellant, Nancy Birmingham Walters, have this date filed a true, correct and exact copy of the above and foregoing Appellant's Summary of the Argument, and on said date served a true, correct and exact copy of said document upon the hereinafter named person, via United States Mail, First Class, postage prepaid, the same being their last known and now existing post office addresses, respectively:

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that I, the undersigned, GENE BARTON, Attorney for the Appellant, Nancy Birmingham Walters, have this date filed a true, correct and exact copy of the above and foregoing Brief of Appellant, Nancy Birmingham Walters, and on said date served a true, correct and exact copy of said document upon the hereinafter named person, via United States Mail, First Class, postage prepaid, the same being their last known and now existing post office addresses, respectively:

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