2013 WL 10161947 (Miss.) (Appellate Brief)
Supreme Court of Mississippi.

Bronwyn Benoist PARKER, Petitioner- Appellant,
v.
William D. BENOIST, Respondent-Appellee.

No. 2012-CA-02010.
September 11, 2013.

On Appeal from the Chancery Court of Yalobusha County
The Honorable Percy Lynchard Case No. 11-06-56

Brief of Petitioner/Appellant Bronwyn Benoist Parker

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***1 I. Statement of the Issues**

1. Whether the lower court erred when it failed to recognize a good faith and probable cause exception as adopted by most jurisdictions, the Uniform Probate Code and the Restatement to the forfeiture clause in the 2010 Will.

2. Whether the lower court erred in ruling that Benoist, as Executor of the Estate, pay a retainer of $20,000 to the Tollison Law Firm when Benoist and Parker - the only parties in interest - were voluntarily before the court and had joined issue before the court as to the probate of the 2010 Will, leaving no remaining Estate interest.

3. Whether the lower court erred in failing to remove Benoist as the Executor of the Estate during the pendency of the will contest because Benoist was in an adverse position to the Estate.

II. Statement of the Case

A. Course of proceedings and disposition in the court below.

On June 16,2011, this Court granted Letters Testamentary to Bill Benoist (“Benoist”) as the Executor of the Estate of his father, Billy Dean “B. D.” Benoist (“B. D.”), based upon a will that Benoist purported was the last will of B. D. (the “2010 Will”). Record (“R”) [1] 65-67. On June 20, 2011, without knowledge of the probate of the 2010 Will, Bronwyn Benoist Parker (“Parker”) offered for probate a will executed by her father B. D. on January 16, 1998. (the “1998 Will”). [2] R. ***2** 132- 189.

On August 31, 2011, the Court conducted a hearing and agreed to consolidate this cause of action pertaining to the **Trust** with the two (2) causes of action pertaining to the Estate of Billy Dean “B. D.” Benoist. R. 71- 72. On October 20, 2011, Parker filed an Amended Complaint as to the **Trust** of Mary G. Benoist and joined as a respondent the Estate of Billy Dean “B. D.” Benoist pursuant to Rule 15 of the Mississippi Rules of Civil Procedure. R. 76 - 131. Also on October 20, 2011, Parker filed an *Amended Petition for Probate of the 1998 Last Will and Testament of Billy Dean “B. D.” Benoist and Contesting the Probate of the 2010 Will.* R. 132 - 189.

On December 9, 2012, Benoist filed a *Petition for Authority to Liquidate Estate Assets and Pay Estate Assets*, seeking the lower court's permission to sell church bonds that were assets of the Estate in order to pay certain liabilities, which included a retainer fee of $20,000 to the Tollison Law Firm, retained by Benoist to represent “certain litigation concerning the Estate.” R. 347-363. The lower court conducted a hearing on December 21, 2011, and after considering the pleadings and hearing argument

of counsel, ruled from the bench in favor of Benoist by granting his *Petition for Authority to Liquidate Estate Assets and Pay Estate Assets*, which provided *inter alia* for the payment of a non-refundable $20,000 retainer by the Estate to the Tollison Law Firm. R. 364 - 365.

On December 19, 2011, Parker filed *Petition to Remove William D. Benoist as Executor of Estate of Billy Dean "B. D." Benoist, Deceased and to Appoint Administrator/Adminstratrix CTA.* R.372-383. Parker's ground for seeking the removal of Benoist as Executor of the Estate was that Benoist - in a confidential relationship with B. D. - took certain actions that were adverse to the ***3** Estate. *Id.*

Moreover, on December 28, 2011, counsel for Parker wrote counsel for Benoist advising that Parker had decided to abandon her claims against the Estate in the **Trust** action and attached a proposed *Agreed Order of Dismissal with Prejudice.* R. 469 - 470. On December 29, 2011, counsel for Parker wrote Judge Percy Lynchard confirming that Parker would dismiss all claims against the Estate, thus making retention of Tollison on behalf of the Estate unnecessary. R.513-514. On January 5, 2012, Parker filed a *Motion to Reconsider or Alter and Amend Order Allowing Estate to Liquidate Assets* asserting that Parker was agreeable to dismiss with prejudice any claims against the Estate; therefore, Parker's willingness to dismiss all claims against the Estate would eliminate the need for the Estate to retain counsel to defend the Estate against litigation. R.408 - 473. On January 18, 2012, counsel for Parker once again wrote counsel for Benoist regarding the proposed Agreed Order of Dismissal with Prejudice.[3] On February 17, 2012, the lower court conducted a hearing on the *Amended Petition to Remove William D. Benoist as Executor of the Estate of Billy Dean "B. D. Benoist, Deceased, to Appoint Administrator/Administratrix CTA, and to Order Inventory and Accounting and a Motion to Reconsider or Alter and Amend Order Allowing Estate to Liquidate Assets.*[4]

On June 11, 2012, a trial by jury commenced in this matter. R.848-849. After the lower court empaneled a jury, Benoist, introduced in evidence the entire record of the probate proceedings, which included the 2010 Will. Trial Transcript ("T. T.")[5] 2:11-27; 3:1-26; Exhibits 1-3. Article ***4** XIV of the 2010 Will contains a forfeiture clause. *See* Trial[6] Exhibit 1, Article XIV; R.60. At the conclusion of the trial nine (9) members of the jury found that the 2010 Will was valid, but three (3) members sided with Parker and voted that the 2010 Will was not valid. T. T. 511:13-26. Moreover, the jury unanimously found that Parker had proved by clear and convincing evidence the existence of a confidential relationship existed between Benoist and B. D. giving rise to a presumption of undue influence, and the invalidity of the 2010 Will. T. T. 511:13-26.

On December 5, 2012, Appellant filed a *Notice of Appeal* to this court, and later on December 10, 2012, filed an *Amended Notice of Appeal.* R. 1075 - 1088; 1105 - 1112.

B. Statement of the Facts

1. The Players.

First, the players. The decedent and testator, Billy Dean "B. D." Benoist ("B. D.") was married to Mary Gunter Benoist ("Mary"). Trial Transcript ("T.T.") 171:2-7. B. D. and Mary had two children: a daughter, Bronwyn ("Parker") and a son, Bill ("Benoist"). *Id.*

2. The 1998 Mutual and Reciprocal Wills created a credit shelter trust for the surviving spouse.

In 1998 B. D. and Mary executed mutual and reciprocal wills that mirrored the terms of the other spouse's will. Record ("R") 134; 147-156; *See* Trial Exhibit 4. Both wills are four-page documents drafted by the same scrivener, executed on the same

date, with the same attesting witnesses, with each will creating a credit shelter **trust** for the benefit of the surviving spouse, and with each will having the same residuary beneficiaries with inheritances of the same percentage: 50/50. *Id.*

Both wills appointed their two natural children, Parker and Benoist, to serve as Co-Trustees ***5** of the credit shelter **trust**. *Id.* Upon the death of either Mary or B. D., the Co-Trustees were to place into the **trust** the largest amount of assets - both real and personal property - of the deceased spouse that was exempt from federal estate tax by reason of the unified credit and the state death tax credit allowable to his or her estate. *Id.*

The Co-Trustees were to hold and manage the credit shelter **trust** during the lifetime of the surviving spouse and pay all net income of the **trust** for the benefit of the surviving spouse so long as he or she lived. *Id.* Further, the Co-Trustees could pay such sums from any part of or all of the principal of the **trust** estate as reasonably necessary for the support, health and maintenance of the surviving spouse. *Id.* At the death of the surviving spouse, the Co-Trustees were to distribute outright, either in cash or in kind or any combination thereof, all of the remaining assets of the **trust** estate to Parker and Benoist in equal shares, per stirpes. *Id.*

Under the terms of the mutual and reciprocal wills the residue and remainder of the deceased spouse's estate was devised and bequeathed to the surviving spouse. *Id.* Upon the death of the surviving spouse the residuary of the estate – like the residuary of the credit shelter **trust** - passed to Parker and Benoist in equal shares, per stirpes. R.135,147-156. Simply stated, under the terms of the 1998 wills Parker and Benoist were "to share and share alike." T. T. 9:14-29; 173:28-29, 174:1-2.

3. Mary died March 5, 1999, and B. D. began receiving income from her credit shelter trust pursuant to Mary's 1998 Will.

On May 5, 1999, Mary died, and pursuant to her will, all of her assets, which were valued at less than the 1999 tax exclusion of $650,000 vested in the Mary G. Benoist **Trust** (the "**Trust**"). R. 79. Not only was cash totaling more than $369,000 placed in the **Trust**, but also real property, ***6** which included the family home and seven (7) acres of land surrounding the home. [7] *Id.* Over the course of the next ten (10) years B. D. received monthly withdrawals of income from the credit shelter **trust** for his support, health and maintenance. R. 80.

On July 1, 1999, Parker and Benoist as Co-Trustees of the **Trust** opened a **Trust** account at Merrill Lynch for the purpose of holding certain monies and investments for the health and maintenance of B. D. during his lifetime. R. 79; 98-108. As of July 30, 1999, the balance of the **Trust** Account was $369,401 and at its highest valuation the balance was $462,308 on December 31, 1999. R. 80. In November 2006, the balance was $440,234.62. *Id.* From March until December of 2010, B. D. made substantial withdrawals from the **Trust** Account totaling $104,300 – over and above his monthly disbursement of income. R. 81. From the inception of the **Trust** Account in July 1999, until B. D.'s death on May 30, 2011, B. D. withdrew a total of $244,310.03 in addition to the monthly disbursements of income generated by the account. R. 82. On May 31, 2011 – one day after B. D.'s death – the **Trust** Account had a balance of $84,973.24, or a decrease of $377,334.76 from its highest valuation on December 31,1999. *Id.*

4. In late 2008, B. D. began having mental and health issues that were further exacerbated by heavy alcohol use.

In late 2008, B. D., who was seventy-six (76) at the time, began having issues with his mind. T. T. 12:26-29; 13:1-17;178:11-13. He had difficulty remembering things and tended to repeat himself frequently. T. T. 178:14-18. He was also having health issues and was not as active as he had been. T. T. 178:18-29. B. D. was drinking alcohol heavily, which exacerbated his memory problems. T.T. 12:19-29; 13:1-29. B. D. was also taking Lortab, a narcotic pain reliever. T. T. ***7** 14:7-14. According to Benoist - who was in charge of B. D.'s medication - B. D. took "a couple [Lortab] in the morning, a couple at night, and that pain medicine messed Dad's mind up. I mean, he was not himself at all." T. T. 15:1-14. He was also having issues with his

balance. T. T. 180:19-29. It turned out that B. D.'s problem with his balance was related to a drug called Lyrica that Benoist was giving him. T. T. 181:5-8. The drug had actually been prescribed for Benoist, not B. D. *Id.*

5. On January 5, 2009, Sheila Benoist, filed for divorce from Benoist and an expensive and acrimonious divorce proceeding ensued.

On January 5, 2009, Sheila Benoist ("Shelia"), filed for divorce from Benoist, and an expensive and acrimonious divorce ensued. T. T. 11:21-29; 12:1. The divorce was particularly hard on Benoist financially. T. T. 11:29; 12:1. Dana O'Brien ("O'Brien"), a family law attorney, represented Benoist in his divorce. T. T. 53:5-8. Benoist testified that he had been on disability since 2000, for cluster headaches, for which he takes Methadone three (3) times a day. T. T. 6:2-11. As a result, he doesn't do very much and mostly stays at home. T. T. 6:13-21.

6. February 2009, B. D. saw Dr. Cooper McIntosh as a new patient.

On February 10, 2009, Dr. Cooper McIntosh, an internist in Oxford, saw B. D. as a new patient. *See* Exhibit 17, Benoist 4676-4678, Records of Dr. Cooper McIntosh on Bill Benoist. Dr. McIntosh's notes reflect that B. D. came in with Parker, who was "very attentive and caring is [sic] with him and she has noted decline in his cognition, fatigue, malaise. He does not enjoy doing some of the things he usually enjoys doing. He does not have any energy. She is concerned that he might be a little depressed." *Id.* Later at his deposition, Dr. McIntosh described Parker as "very appropriately concerned," and "upstanding." T. T. 356:4-8. Dr. McIntosh further noted that B. D. had been taking close to 450 mg of Lyrica, which was Benoist's medication. *See* Exhibit 17, Benoist ***8** 4676, Records of Dr. Cooper McIntosh on Bill Benoist. Dr. McIntosh was "surprised this didn't really do some serious harm to him" as a result of the Lyrica, coupled with the 600 mg of Neurontin that B. D. was already taking. *Id.*

7. B. D. continued to seek treatment from Dr. McIntosh in March through May, 2009.

On March 24, 2009, B. D. presented at Dr. McIntosh's for a follow-up visit, and Dr. McIntosh noted that "Mr. Benoist carries significant dementia. It is probably vascular in nature." See Exhibit 17, Benoist 4675, Records of Dr. Cooper McIntosh on Bill Benoist; T. T. 368:17-29. On March 31, 2009, he presented again and Dr. McIntosh's notes reflect that "[t]he patient showed diffuse degenerative changes and a compression fracture. *See* Exhibit 17, Benoist 4674, Records of Dr. Cooper McIntosh on Bill Benoist. MRI of head showed old strokes, ischemic changes and atrophy." Id. Dr. McIntosh prescribed Namenda and Aricept. [8] *Id.* Parker understood that Dr. McIntosh had prescribed the two medications for B. D.'s cognition problems. T. T. 182:9-13. According to Dr. McIntosh, B. D. would always need to take the Namenda and Aricept. T. T. 357:13-28. On May 8, 2009, Benoist took B. D. for his appointment and prior to, had phoned Dr. McIntosh's office requesting a prescription for Lortab, a narcotic pain reliever, for B. D. See Exhibit 17, Benoist 4672, Records of Dr. Cooper McIntosh on Bill Benoist; T. T. 357:29; 358:1- 15. Dr. McIntosh was concerned that Benoist was actually requesting the narcotic pain reliever for himself, not B. D., so he would not prescribe the medication. T. T. 357:13-29; 358:1-2.

***9 8. On June 19, 2009, a neuropsychologist at the VA Hospital diagnosed B. D. with a mild level of dementia, most likely Alzheimer's disease.**

On June 19, 2009, Parker took B. D. to the VA Hospital in Jackson, where he underwent a neuropsychological exam and was diagnosed with a mild level of dementia, most likely Alzheimer's disease. *See* Exhibit 18, VA Medical Records on B. D. Benoist; T. T. 182:17-29; 183:1-3. The VA medical notes reflect that given B. D.'s very poor memory that his "family will have to assist him in memory-based tasks, as people with memory scores at his general level often have significant difficulty with things like remembering to take medicines, pay bills, etc." *See* Exhibit 18, VA Medical Records on B. D. Benoist. The notes further reflect that "his memory scores are poor enough that a diagnosis of dementia is certainly warranted." *Id.* It was during this visit to the VA that Parker further observed her father's declining mental capacity. T. T. 183:1-28. As a result of these problems, coupled with B. D.'s excessive drinking problem, Parker had a conversation with Benoist about the need to get a joint power of attorney

for their father. T. T. 183:29; 184:1-26. However, unbeknownst to Parker, Benoist already had in his possession a power of attorney for B. D. granting the power to both Benoist and Parker, which Benoist kept in his home safe. T. T. 184:27-29.

9. In the autumn of 2009, there were rumors that B. D. had been sexually harassing not one, but two women.

In the autumn of 2009, there were rumors that B. D. had been sexually harassing two women. T. T. 18:1-20; 19:10-18. According to Benoist, "Daddy got drunk and went and went down past - Sherry Bennett ("Bennett) was the young lady's name, and he pulled in there and said a couple of things out the way to her, yes, sir, he did." T. T. 19:10-18. Gary Crafton ("Crafton") also testified about this episode involving Bennett, who worked in the same building as he did. T. T. 396:9-12. Crafton tried to speak with B. D. about it, but B. D. was not home, so Crafton told Benoist. *Id.*13- ***10** 17. Crafton was also aware that B. D. had a problem with alcohol. *Id.* 23-24. Crafton saw evidence of B. D.'s alcohol abuse, because B. D. would run into trees leaving scars and equipment would be bent up where he had been crashing it. *Id.* 26-29; T. T. 397:1-8. Benoist told Crafton "that pain medicine messed Dad's mind up. I mean, he was not himself at all." *Id.* 9-18.

Larry Tritt ("Tritt) who has worked in law enforcement for the past thirty-five (35) years and is with the Coffeeville Police Department testified that he had known B. D. for fifty (50) years. T. T. 120:27-29; 121:1-4; 12-14. In the later part of B. D.'s life, Tritt began to notice problems with B. D.'s mind. T. T. 121:17-19. B. D. repeated himself and asked the same question over and over. *Id.* 17-26. Tritt told Walt Parker ("Walt"), husband of Parker and son-in-law of B. D., that B. D. had been contacting a lady - possibly from Clarksdale - and saying inappropriate things to her. T. T. 124:10-16.

Although Benoist believed the first episode involving Bennett, Benoist told B. D. that Walt had made up the second episode as relayed by Tritt. T. T. 19:4-18. Parker spoke to her father about the second sexual harassment episode, but B. D. denied it and as a result, became angry and asked Walt to stay off his property. T. T. 185:27-29; 186:1-14. Later B. D. could not remember having banished Walt from his property, asked Parker where he was, and became emotional, cried and asked that Walt return. T. T. 186:18-29; 187:1-7. However, the reconciliation did not last, and about six (6) weeks later, B. D. called Walt and again told him to stay off his property. T. T. 187:13-19. Parker testified that it was very painful to Walt because he and her father had always had a good relationship, and she knew that her father's rejection had nothing to do with Walt. T. T. 187:20-24. As a result of B. D.'s rejection of Walt, Parker told her father that if her husband was not welcome, that the rejection also applied to her family and her. T. T. 187:25-29; 188:1. However, B. D. continued to phone Parker, and during those conversations told Parker that Benoist had told him that ***11** Walt was telling malicious lies about him all over town. T. T. 188:2-11.

10. Prior to being banished from B. D.'s land, Walt had enjoyed a good relationship with B. D., and for the prior twenty (20) years, Walt and B. D. had spent most weekends working together on building projects on B. D.'s land.

Prior to being banished from B. D.'s land, Walt had enjoyed a good relationship with B. D., and for the prior twenty (20) years, Walt and B. D. had spent most weekends working together on building projects on B. D.'s land. T. T. 82:6-17. In fact, in and about 1995, Walt took a job at a bank in Batesville in order for his family to be closer to Parker's mother, who was battling cancer. T. T. 80:11-23. Bronwyn took time off of her job in education to become the primary caregiver for her mother. T. T. 172:3-9. On weekends, Walt enjoyed helping B. D. with building projects on the land. T. T. 82:9-11. Both B. D. and Walt enjoyed being outside and using their hands. T. T. 82:12-13. Walt helped "a little bit" on the first cabin that B. D. built on the land. T. T. 82:18-21.

B. D. and Walt then decided to build a second cabin for Walt and his family on B. D.'s land. T. T. 34:1-5. According to Benoist, B. D. with Walt's help, built the cabin specifically for Walt and his family. T. T. 34:9-12. Jimmy Dean Waddell ("Waddell") a childhood friend of B. D.'s and golfing buddy, testified that the second cabin "was always known as Brother's cabin."[9] T. T. 63:6-9. Waddell also testified that B. D. would always say that Parker and Benoist would "share and share alike" the land and the cabins when B. D. was gone. T. T. 64:16-22. Nonetheless, Waddell also noticed a change in B. D.'s mind in 2009. T. T. 64:28-29; 65:1-11. B. D. and Waddell were in a golfing foursome, and B. D., who always hit last, would disappear before hitting his ball. T. T. 65:12-20. It got to the point that B. D. would just drive off and go home, without hitting his shot. T. T. 65:20-28.

***12** Walt spent almost every weekend over a period of five (5) years working with B. D. on the second cabin and other projects on the land. T. T. 84:20-24. B. D. assured Walt that he and his family would always enjoy using the cabin and the land. T. T. 84:25-29; 85:1. Walt spent his own money in building the cabin. T. T. 84:9-11. Walt relied on B. D.'s assurance that Benoist and Parker would "share and share alike. T. T. 85:2-4. Walt **trusted** B. D. T. T. 85:8.

11. Medical notes for November and December 2009 reflect that B. D. was involved in a motor vehicle accident and complained of dizziness and falling.

On November 25, 2009, B. D. presented at the Coffeeville Medical Clinic after being involved in a motor vehicle accident. *See* Exhibit 16, Coffeeville Medical Records on Billy Benoist. In December 2009, B. D. saw Sharon Upton ("Upton") at Internal Associates in Oxford and complained of dizziness and falling. *See* Exhibit 17, Benoist 4669-4670, Records of Dr. Cooper McIntosh on Bill Benoist. B. D. confirmed that he had fallen that morning after taking pain medication and muscle relaxers because of an earlier motor vehicle accident in which he ran into a ditch and had to be pulled out. *Id.* He had also missed four prior appointments. *Id.* Upton noted his history of alcohol abuse, but B. D. denied that he had been drinking. Id. However, Upton was not sure that he understood her question, and was concerned that he was dehydrated. *Id.*

12. Benoist, with the assistance of his aunt, Joyce Gesslin, opened an account at the Grenada branch of Regions Bank, in order to hide money from his wife Sheila.

On April 9, 2010, Benoist, with the assistance of his aunt, Joyce Gesslin ("Gesslin"), opened an account at the Grenada branch of Regions Bank, for the purpose of hiding money from his estranged wife Sheila. T. T. 44:15-29. The initial deposit of $80,000 to open the account was comprised of $45,000 from B. D.'s personal Merrill Lynch account and $35,000 from the Mary G. Benoist **Trust** Account at Merrill Lynch. *Id.;* T. T. 45:1. On December 17, 2010, B. D. made ***13** another substantial withdrawal of $50,000 from the Mary G. Benoist **Trust** Account at Merrill Lynch, and Benoist deposited these funds in the Regions account in Grenada. T. T. 45:6-8.

13. In the spring of 2010, Benoist asked his divorce attorney O'Brien to draft deeds conveying a substantial portion of B. D.'s property to him.

In the spring of 2010, Benoist asked his divorce attorney O'Brien to draft deeds conveying a substantial portion of B. D.'s land to him. T. T. 53:28-29; 54:1-6. Benoist mailed O'Brien old deeds to the specific properties that he wanted conveyed to himself. T. T. 23:1-29; 24:1-1-8. O'Brien drafted some deeds for Benoist, but once O'Brien realized that some of the deeds were in the name of a **trust** [10], he referred Benoist to another firm, Yelverton and Stubblefield. T. T.54:2-13. O'Brien only spoke to Benoist, never B. D., about conveying B. D.'s land to Benoist. T. T. 55:13-15. According to O'Brien and Benoist, Benoist, not B. D., paid O'Brien for the drafting of the deeds, because Benoist, not B. D., was his client. T. T. 25:3-10; 57:17-26.

14. Benoist contacted Ralph Yelverton at Yelverton and Stubblefield about drafting the deeds to convey B. D.'s property to him.

In March 2010, Benoist contacted Ralph Yelverton ("Yelverton") at Yelverton and Stubblefield about drafting deeds to convey B. D.'s property to him. T. T. 25:11-24. On March 19, 2010, Benoist then sent Yelverton the information needed to draft the deeds. T. T.25:25-29; 303:5-19. Specifically, Benoist wrote as follows: "Mr. Yelverton, here's a copy of the land that's in the **trust** that you requested. Also enclosed is a copy of the Order of Final Discharge and an extra copy of Mom's will. If you need any additional info, please call me. Thanks so much for your help in this matter... *See* Exhibit 5, Handwritten notes Benoist to Yelverton; T. T. 27:18-25. In a second handwritten, albeit undated note to Yelverton, Benoist wrote as follows: "Here's a copy

of the trust *14 and my mother's will under item 2 and also a plat, if needed, of the 160 and 40 acre tracts Daddy wants me to have. [11] We will be waiting to here [sic] from you. Bill - son Thanks," T. T. 28:4-20; 303:20-28.

Yelverton assigned the Benoist file to Natalie Hutto ("Hutto"), an associate at Stubblefield and Yelverton. T. T. 261:15-22. As Hutto billed for her legal work, Benoist paid for her services by writing checks on his father's account at Renasant Bank. Id.:21-24, *See* Exhibit 6, Checks 1767, 3665, 3669, 3674. In the memo line Benoist specifically noted on Checks 3665 and 3674 that he was paying attorney fees for the drafting of the "will." *Id.* Although Benoist was not a named holder of the Renasant account, he kept two check books of his father's account, one at his house and one in his truck. T. T. 30:1-15; 32:11-18. In addition to drafting the 2010 Will, Stubblefield and Yelverton also drafted deeds that conveyed approximately 240 acres of land behind B. D.'s house. [12] T. T. 32:19-29 33:1-29; See Exhibit 7 Deeds

15. On May 27, 2010, B. D. after executing a prior copy of the 2010 Will, a General Durable Power of Attorney in favor of Benoist and two (2) quit claim deeds conveying property to Benoist, B. D. presented at the Coffeeville Medical Clinic where he was tested for kidney failure.

On May 27, 2010, Hutto came to B. D.'s house in Coffeeville with certain legal documents, which included a prior version of the 2010 Will for him to execute. T. T. 281:12-16. After executing the May 27, 2010, version of the will, along with a General Durable Power of Attorney in favor of Benoist and two (2) quit claim deeds conveying property to Benoist, B. D. presented at the Coffeeville Medical Clinic where he was tested for kidney failure. *See* Exhibit 9, General *15 Durable Power of Attorney; Exhibit 16, Coffeeville Medical Records on Billy Benoist.

16. The day after executing the May 27, 2010, version of the 2010 Will, B. D. presented at the Baptist Hospital ER in Oxford with acute renal failure.

The day after executing the first version of the 2010 Will, two deeds conveying property to Benoist and a General Durable Power of Attorney in favor of Benoist, B. D. presented at the Baptist Hospital ER in Oxford with acute renal failure. *See* Exhibits 19-20, Benoist 4425-4432, Baptist Memorial Hospital Records on Billy D. Benoist. According to the ER Physician Record, B. D. had been sluggish for a week to ten days. *Id.* He had not been taking very much oral intake of any kind - either fluid or solid - over the past week or so. *Id.* He was also having nausea. *Id.* His family was very concerned because of his hypersomnolence. [13] *Id.* According to Dr. McIntosh, B. D. should not have been doing anything of any consequence, if he was in the hospital with the blood pressure that low. T. T. 366:16-20. "[I]n elderly folks, a urinary tract infection can give you a change in mental status, fever, flu, pneumonia, dehydration ...." *Id.* 6-8.

17. On June 4, 2010, B. D. executed the 2010 Will and five (5) quit claim deeds transferring approximately 284 acres to Benoist.

On June 4, 2010, B. D. executed the 2010 Will and five (5) quit claim deeds conveying approximately 284 acres of B. D.'s real property to Benoist. *See* Trial Exhibit 7, Deeds. However, four (4) days later B. D.'s sister-in-law Gesslin took B. D. to see Dr. McIntosh complaining that she was "real concerned" about B. D., as he was not doing well. "He has not been himself, weak, run down and tired." *See* Exhibit 17, Benoist 4665, Records of Dr. Cooper McIntosh on Bill Benoist. Dr. McIntosh continued to prescribe Aricept and Namenda for his vascular dementia. *Id.*

***16 18. B. D.'s checking account is overdrawn because Benoist had been writing checks on B. D.'s account.**

In June, 2010, Parker was at B. D.'s home when her father learned his checking account was overdrawn. T. T. 190:19-29. When Parker took her father to Renasant Bank, she discovered that the checks written on the account causing the overdraft had all been written by Benoist. *Id.* B. D. then called his account agent at Merrill Lynch and requested $12,000 from the **Trust** account to cover the overdraft. T. T. 191:1-4. When Parker asked B. D., "Daddy, what's this all about?" B. D. answered, "I don't know. I'm going to have to ask Bill." T. T. 191:23-27.

19. In August 2010, Attorney Hutto called Parker requesting that she agree to break the **Trust** and deed her interest in the family home and surrounding land to Benoist.

In August 2010, Attorney Hutto called Parker and asked that she agree to break the **Trust** and deed her interest in the family home and surrounding land to Benoist. T.T. 188:16-29. On August 14, 2010, B. D. admitted to the Baptist Hospital ER after being found in a pool of dried blood. T. T. 192:29; 193:1-8. B. D. could not recall what had happened, denied losing consciousness or that he had been drinking. *See* Exhibit 20, Benoist 4353-4355, Baptist Memorial Health Care Records on Billy D. Benoist.

20. On November 26, 2010, Benoist writes Hutto that he has gotten B. D. to sign deeds conveying three (3) additional parcels of B. D.'s land to Benoist.

On November 26, 2010, Benoist writes Hutto that he has gotten B. D. to sign deeds conveying three (3) additional parcels of B. D.'s land to Benoist. See Trial Exhibit 8, T. T. 37:1-29; 38:1-29; 39:1-9, R. 137-138. Benoist's first handwritten note states as follows:

Natalie, I just got Daddy to sign this and am sending it back to you to file. If there is a charge please send me the bill. Thanks so much for all of you [sic] help. Just ***17** wondering do you think you need to call Bronwyn back to see if she will sign. [14] Thanks, Bill Please send me copies back.

In the second note, Benoist wrote:

Natalie, I hope this will work. I already got Daddy to sign this before I read the instructions. I believe you took care of it before. If this won't do please let me know. Thanks, Bill.

21. On May 30, 2011, B. D. died, and the instant will contest ensued.

On May 30, 2011, B. D. died, and the instant will contest ensured. R. 30. On June 11, 2012, a trial by jury commenced, and Benoist introduced into evidence the entire record of the probate proceedings, which included the 2010 Will. T.T. 2:7-29; 3:1-26. Article XIV of the 2010 Will contains the forfeiture clause. See Exhibit 1, Article XIV; R:60. At the conclusion of the trial nine (9) members of the jury found that the 2010 Will was valid, but three (3) members sided with Parker and voted that the 2010 Will was not valid. T.T. 511:13-26. Moreover, the jury unanimously found that Parker had proved by clear and convincing evidence the existence of a confidential relationship existed between Benoist and B. D. giving rise to a presumption of undue influence. T.T. 511:13-26.

22. On August 15, 2012, the lower court conducted a hearing as to whether to impose the forfeiture clause, exclude Bronwyn as a beneficiary of the 2010 Will and levy attorney fees on Bronwyn.

On August 15, 2012, the lower court conducted a hearing on whether to impose the forfeiture clause, exclude Parker as a beneficiary of the 2010 Will and levy attorney fees on Parker. Supplemental Transcript ("S.T.") 2:12-18. [15] After considering the pleadings and hearing argument ***18** of counsel, the lower court ruled to impose the forfeiture clause, exclude Parker as a beneficiary of the 2010 Will and levy attorney fees on Parker. S. T. 34:1-29; 35:1-9.

On August 31, 2012, Parker filed a Motion to *Reconsider Order Granting Respondent's Petition to Exclude Bronwyn Benoist Parker and Order Payment of Attorney's Fees.* R. 928-944. On November 13, 2012, the lower court upheld its ruling on the forfeiture clause, but reversed its decision as to the levy of attorney fees on Parker by finding that the neither the 2010 Will nor the lower court had grounds to impose attorney fees on Parker. R. 1072-1074.

III. Summary of Arguments

The lower court should be reversed as to three (3) questions of law. First, the lower court erred when it failed to recognize a good faith and probable cause exception to the forfeiture clause contained in the 2010 Will. Although this is a question of first impression in Mississippi, the majority of American jurisdictions, the Uniform Probate Code, and the Restatement recognize this exception. In the instant set of facts, both Parker and Benoist knew that it had always been their parents' intent that she and Benoist would “share and share alike” in their parents' marital estate once they died. Her parents had memorialized this intent when they executed mutual and reciprocal wills in 1998, which left the estate of the surviving spouse to Parker and Benoist equally. When their mother Mary died in 1999, her assets were placed in a credit shelter **trust** for the benefit of their father, B. D. Over the course of the next eleven years B. D. used and relied on the income from the **trust** for his care and maintenance.

However, beginning in 2009, an escalating series of suspicious events and circumstances ensued. First, B. D. was diagnosed with significant dementia by his internist and Alzheimer's disease by the VA Hospital. In addition he became increasingly dependant on prescription pain medication, as well as being addicted to alcohol. Not only his family but also his friends noted a ***19** decline in his mental and physical condition. He began to exhibit bizarre behavior with incidents of sexual harassment, as well as automobile accidents. About that same time Benoist and his wife began an expensive and acrimonious divorce proceeding. And Benoist, who did not work and was on disability was in a precarious financial situation.

B. D. began withdrawing large sums of money from both his personal and the **Trust** account, which he gave to Benoist. Moreover, Benoist began to poison B. D. – who was already mentally weak and vulnerable – against Parker's husband Walt. In June, 2010, B. D. began conveying a substantial portion of his real property to Benoist, taking it outside the Estate. Also in June, 2010, B. D. executed a new will, which provided that Benoist would inherit a greater share of his estate, rather than an equal distribution to Benoist and Parker, as intended by Mary and B. D. when they executed their mutual and reciprocal wills in 1998.

After B. D.'s death in 2011, all of these suspicious findings came to surface, as well as the advice of counsel caused Parker to act with good faith and probable cause when she filed the will contest. Parker, like any reasonable person, properly informed and advised, concluded at the time she initiated the lawsuit that there were enough suspicious circumstances surrounding the execution of the 2010 Will to conclude that there was a likelihood that the contest or attack would be successful.

Moreover, at trial the jury unanimously found that Parker had proven all seven (7) factors for the existence of a confidential relationship between B. D. and Benoist; therefore raising the presumption that 2010 Will was invalid. By proving a confidential relationship, Parker had grounds for filing the lawsuit and hope of success in pursuing this action.

The second ground for appeal pertains to the lower court's grant of a $20,000 retainer to the Tollison Law Firm between it and the Executor of the Estate, Benoist. Although Mississippi ***20** statutory law provides that an executor is entitled to reimbursement for attorney fees in the management of the estate, where the services were for the sole benefit of one of the parties as against the other party, there is no remaining Estate interest before the court. Benoist and Parker were the only parties in interest, were both voluntarily before the court, and had both joined issue before the court as to the probate of the 2010 Will. There was no substantial estate interest left and no just cause for Benoist to incur expenses or fees on behalf of the Estate in the will contest. The only apparent purpose of the payment of Tollison's fees by the Estate was to assist Benoist in promoting his own personal interests and to charge a major portion of the attorney fees in the will contest to the Estate, win or lose. Accordingly, the lower court's grant of the $20,000 to Tollison should be reversed.

The third ground for appeal pertains to the lower court's failure to remove Benoist as the Executor of the Estate and appoint a temporary administrator during the pendency of the will contest. As shown above, all of the suspicious activities involving Benoist and B. D. took place after B. D. had been diagnosed with dementia and Alzheimer's disease. Benoist was in a confidential relationship with B. D., which gave rise to a presumption of undue influence and a finding that the 2010 Will was invalid. In the very least, the lower court should have removed Benoist as Executor during the pendency of the will contest, as Mississippi law provides.

IV. Law and Argument

A. Standard of Review

The Mississippi Supreme Court has "declared that when reviewing a chancellor's legal findings, particularly involving the interpretation or construction of a will, it will apply a *de novo* standard of review. *In re Last Will and Testament of Carney*, 758 So.2d 1017 (Miss. 2000)(citing *In re Estate of Homburg*, 697 So.2d 1154, 1157 (Miss. 1997)).

> ***21** This Court has a clear standard of review in an appeal where there are legal question [sic] from a will contest. Typically this Court will not disturb a chancellor's findings of fact unless the chancellor was manifestly wrong and not supported by substantial, credible evidence.... This rule does not apply to questions of law. When presented with a question of law, the manifest error/substantial evidence rule has no application and we conduct a de novo review.

Id.

B. The lower court erred when it failed to recognize a good faith and probable cause exception as adopted by most jurisdictions, the Uniform Probate Code, and the Restatement to the forfeiture clause in the 2010 Will.

This is a case of first impression, because no case on this question has been found in Mississippi. However, the majority of American jurisdictions refuse to enforce forfeiture clauses if the contestant acted with good faith and probable cause. Robert Weems, Wills and Administration of Estates in Miss § 8.23 (Fed. 2001); Restatement (Second) of Property, Don. Trans, § 9.1, Restraints on Contests (1983).

Most jurisdictions have explicitly adopted a probable cause rule, regardless of the grounds for the contest. *South Norwalk **Trust** Co. v. St. John*, 92 Conn. 168 (1917)(state interest in ascertaining validity of will invalidates no-contest condition where probable cause shown; *Wells v. Menn*, 158 Fla. 228 (1946)(probable cause rule extends to contest on ground of undue influence); *In re Cocklin's Estate*, 236 Iowa 98 (1945)(adopting majority rule); *In re Estate of Hartz v. Cade*, 247 Minn. 362 (1956)(adopting majority rule; acknowledging state policy against "thwarting the course of justice" by deterring establishment of invalidity of instruments offered for probate); *Matter of Estate of Seymour*, 93 N.M. 328, 332 (1979)(adopting probable cause rule; transferee had probable cause given "unresolved legal questions"); *Ryan v. Wachovia Bank & **Trust** Co.*, 235 N.C. (1952)(probable cause and good faith for contest on any ground invalidate no-contest provision); *Whitehurst v. Gotwalt*, 189 N.C. 577 (1925) (condition enforceable against contestant who lacked probable cause); *Wadsworth v. Brigham*, 125 Or. 428 (1927), reaffirmed in ***22** *Wadsworth v. Brigham*, 125 Or. 428 (1928) (good faith for contest sufficient to invalidate condition); *In re Friend's Estate*, 209 Pa. 442 (1904)(probable cause for contest on any ground invalidates condition regardless whether contest success); *Tate v. Camp*, 147 Tenn. 137 (1922)(probable cause invalidates condition; if testator were insane or unduly influenced, document would not be testator's will and testato's intentions would not be defeated by finding of invalidity); *Dutterer v. Logan*, 103 W. Va. (1927)(probable cause invalidates no-contest condition); *In re Keenan's Will*, 188 Wis. 163, (1925)(contravenes state policy to require litigant to forfeit, where challenge fails, if probable cause existed). *See* 6 American Law of Property § 27.6 (A.J. Casner ed. 1952).

Connecticut, one of the first states to apply a judicial good faith, probable cause exception carefully explained the public policies supporting their decision in a 1917 Supreme Court case. Gerry W. Beyer, Rob G. Dickinson, & Kenneth L. Wake, *The Fine Art of Intimidating Disgruntled Beneficiaries with In Terrorem Clauses*, 51 SMU L. Rev. 225, 248 (Jan - Feb. 1998).

> The law prescribes who may make a will and how it shall be made; that it must be executed in a named mode, by a person having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having testamentary capacity and acting freely, and not under undue influence. The law is vitally interested in having property transmitted by will under these conditions, and none other. Courts cannot know whether a will, good on its face, was made in conformity to statutory requirements... unless these matters are presented to the courts. And those only who have an interest in the will, will have the disposition to lay the facts before the court. If they are forced to remain silent, upon a penalty of forfeiture..., the court will be prevented by command of the testator from ascertaining the truth, and the devolution of property will be had in a manner against both statutory and common law. Courts exist to ascertain the truth..., and a right of devolution which enables a testator to shut the door of truth and prevent the observance of the law is a mistaken public policy.

Id.(citing *South Norwalk* ***Trust***, 92 Conn. at 169).

The Uniform Probate Code, which has been adopted by eighteen (18) states, follows the public policy concerns as articulated in South Norwalk **Trust** by adopting the good faith and probable ***23** cause exception. *See* Unif. Probate Code § 3-905 (1982). Under the Uniform Probate Code a provision in a will purporting to penalize any interested person from contesting the will or instituting other proceedings relating to the estate is unenforceable if probable cause exists for instituting proceedings. *Id.* Both the National Conference of Commissioners on Uniform States Law and the American Law Institute advocate the good faith, probable cause exception. Beyer, Dickinson, & Wake, *supra*, at 249.

"The Restatement (Second) of Property similarly limits the enforceability of an *in terrorent* provision if 'there was probable cause for making the contest or attack." *Id.* The Restatement defines "probable cause" as follows:
[T]he term "probable cause" means the existence, at the time of the initiation of the proceeding, of evidence which would lead a reasonable person, properly informed and advised, to conclude that there is a substantial likelihood that the contest or attack will be successful. The evidence needed to establish probable cause should be less where there is strong public policy supporting the legal ground of the contest or attack.

Restatement (Second) of Property, Don. Trans. § 9.1, Restraints on Contests (1983).

Although Mississippi has not adopted the Uniform Probate Code, generally speaking, forfeiture of property is not favored in Mississippi. *Cannon v. State*, 918 So.2d 734, 743 (Miss. Ct. App. 2005)(quoting *Jackson v. State ex rel. Miss. Bureau of Narcotics*, 591 So.2d 820, 823 (Miss. 1991)). For example, in a criminal case, before a forfeiture may be ordered, it must come within terms of statute, which imposes liability of forfeiture. *Id.;* Miss. Code § 41-29-153. Simply put, there is no statute in Mississippi holding that forfeiture clauses in wills are valid.

For a thorough analysis of the good faith, probable cause exception to a forfeiture clause in a will, a 1998 Tennessee Supreme Court looked to other jurisdictions as well as the Uniform Probate Code and the Restatement (Second) of Property. See ***24** *Winningham v. Winmingham*, 966 S.W.2d 48 (1998). Concluding that "the jurisdictions are split as to the enforceability of a forfeiture clause in the face of probable cause for contesting the will, the Tennessee Supreme Court found that there is strong support for an exception for good faith and probable cause. *Id.* at 51 (citing Claudia G. Catalano, Annotation, *What Constitutes Contest or Attempt to Defeat Will Within Provision Thereof Forfeiting Share of Contesting Beneficiary*, 3 A.L.R. 5th, 590 (1992)).

The facts in *Winningham* are almost identical to the case *sub judice.* Winningham, 966 S.W. 2d at 48. Alston Winningham and his wife Reba Winningham, executed mutual and reciprocal wills, in which they named their two children, as substantially equal beneficiaries under the survivor's will. *Id.* Reba predeceased her husband and her will was probated. *Id.* Eleven years later, Alston executed a new will, in which the portion of the estate devised to his daughter was reduced substantially, with the portion of the estate going to his son, substantially increased. *Id.* At the time Alton executed the second will he was terminally ill, and four months later he died. *Id.* The second will contained a forfeiture clause similar to the one at issue in this lawsuit. *See Id.* And similar to the clause in B. D. Benoist's 2010 Will, the Willingham clause specifically tried to eliminate the good faith and probable cause exception by stating "(regardless of whether such proceedings are instituted in good faith and with probable cause), then all benefits provided for such beneficiary are revoked and such benefits shall pass to the residuary beneficiaries of this will...." *Id.*

Daughter Willingham discussed with her attorney the advisability of filing suit to contest the second will. *Id.* at 49. Although her attorney advised that in his opinion, there were no grounds on which the will could be successfully contested, he told Ms. Willingham that her father's earlier will could not be revoked because it was mutual and reciprocal will of his wife's will. *Id.* Under the attorney's reading of the law, where wills contained identical language, were witnessed by the same persons, at the same time and place, and the contracting parties were husband and wife, a contract ***25** was formed to dispose of property pursuant to the mutual and reciprocal wills. *Id.* at 50. However, at filing the lawsuit, the attorney for Ms. Willingham was unaware that the law had statutorily changed, and his understanding that a mutual and reciprocal could not be revoked after the death of one of the spouses was no longer the law in Tennessee. Id. Three weeks after filing the lawsuit, the suit was dismissed. *Id.*

Nonetheless, Ms. Willingham's brother brought suit to enforce the forfeiture provision in the second will, and the trial court declared that the forfeiture clause should be enforced. *Id.* The Tennessee Court of Appeals "in a divided opinion, held that the good faith reliance upon the advice of counsel may establish probable cause for initiating a will contest provided the advice follows full and fair disclosure of all material facts." *Id.*

On further review, the Tennessee Supreme Court, after considering the decisions from other jurisdictions, as well as Uniform Probate Code § 3-905 and the Restatement (Second) of Property, held that a forfeiture provision will not be enforced where a contest is pursued in good faith and with probable cause. *Id.* at 51. Moreover, the Tennessee Court further held **that a testator could not eliminate the good faith and probable cause exception even by specific language in the will.** *Id.* at 52 (citing *Tate v. Camp,* 147 Tenn. 137, 154-55 (1922)) (Emphasis added).

In finding that Ms. Willingham filed her suit in good faith, the court based its decision on the following findings. *Id.* The previous will had divided the property equally between the brother and sister. *Id.* Ms. Willingham testified that she believed that her father lacked mental capacity at the time he wrote the second will. *Id.* The second will was written just months before her father's death from cancer, while he was receiving debilitating medical treatment. *Id.* Furthermore, the second will contained significant errors in the will regarding the property owned by the father. *Id.* And too, Ms. Willingham had relied upon the advice of her counsel, albeit, no longer the law in Tennessee. ***26** *Id.* Finding that many of the facts, which showed that Ms. Willingham acted in good faith also demonstrated that she acted with probable cause. *Id.* at 53.

In the instant set of facts, Parker, like Ms. Willingham, acted in good faith and with probable cause when she filed the will contest. Parker knew that approximately eleven years before B. D. executed the 2010 Will, B. D. and her mother Mary had executed mutual and reciprocal wills, which provided for an equal distribution of the estate of the surviving spouse. B. D. often told Parker that upon his death that Parker and, Benoist, would "share and share alike." Parker also knew that her father had been living off the income of the credit shelter **trust** created at the death of her mother, and that it had always been the intent of her parents that Parker and her brother would share and share alike the marital estate upon the death of the surviving spouse.

Parker knew in March 2009, that Dr. McIntosh prescribed Namenda and Aricept, drugs used in combination for people with moderate to severe Alzheimer's disease. In June 2009, or approximately one year before executing the 2010 Will, Parker took B. D. to the VA Hospital where he underwent a neuropsychological exam and was diagnosed with a mild level of dementia, most likely Alzheimer's disease. Parker became increasingly aware of her father's decline both physically and mentally, as well as his increased dependance on alcohol and prescription pain medication.

Not only his family but also B. D.'s friends began to notice changes in B. D.'s mental status in 2009. His golfing buddies testified that he would show up to play, but then when it was his turn to tee off he would disappear. He began to repeat himself and had difficulty remembering doctors' appointments and events. Crafton told Benoist about an episode when B. D. was sexually harassing a woman who worked in his building, and Tritt told Walt about a second episode when B. D. called a woman in Clarksdale and made inappropriate and sexually suggestive comments.

***27** In the later part of 2009, B. D. had a motor vehicle accident and had to be pulled out of ditch. He later saw Sharon Upton ("Upton") at Internal Associates of Oxford and admitted that he had fallen after taking pain medication and muscle relaxers. Upton–aware of his alcohol abuse - didn't think he understood her question when he denied drinking. She was concerned that he was dehydrated.

Commencing in March of 2010, B. D. began making substantial withdrawals from both the **Trust** account and his private account at Merrill Lynch, with the withdrawals going directly to Benoist. In and around the time B. D. executed the 2010 Will, he also conveyed a substantial portion of his real property to Benoist, removing it from his Estate. One day after he executed the first version of the 2010 Will on May 27, 2010, and four days before B. D. executed the actual 2010 Will, he was admitted in the hospital for acute renal failure. In reviewing the hospital records for that time frame Dr. McIntosh commented that he didn't think B. D. could be doing anything of any significance or making any decisions with his blood pressure that low. According to Dr. McIntosh, in older people a urinary tract infection can give you a change in mental status, fever, flu, pneumonia, dehydration Moreover, B. D. not only suffered from dementia, most likely Alzheimer's, but was also an alcoholic, who took narcotic pain pills that according to Benoist, "messed Dad's mind up."

In June, 2010, Parker became aware of the overdraft in B. D's checking account, and the need for B. D. to withdraw a further $12,000 from the **Trust** account to cover the overdraft - an overdraft caused by Benoist writing checks on B. D.'s account. Parker was also aware that a substantial portion of B. D.'s property was being conveyed to Benoist in and around June, 2010. In August, 2010, Hutto contacted Parker and asked her to break the **Trust** and deed her interest in the family home and surrounding land to Bill. Parker knew that all of these events were in direct ***28** contradiction to the intent of her parents when they executed the mutual and reciprocal wills in 1998. Parker knew that all of these events were contrary to her father's often repeated mantra that she and her brother would "share and share alike." Parker was also aware that her father was not the man he had been because of the decline in his health and mental ability coupled with a heavy use of alcohol and pain prescription medication.

Parker also suspected that her brother, who was going through an expensive divorce, was exerting pressure on their father to withdraw large sums of money from both B. D.'s personal account and the **Trust** account for Benois's own personal use. Parker also believed that Benoist was poisoning her father against her husband, Walt Parker, by telling B. D. that Walt wanted to get a power of attorney for B. D. in order to put him in a nursing home, while all along, Benoist already had in his home safe a power of attorney that dated back to 1998 giving both Benoist and Parker a power of attorney over their father, B. D. Parker had also heard about the incidents of sexual harassment of which, her father had been accused, and the further attempt by Benoist to poison her father against her husband by suggesting that Walt had made up the story about the woman from Clarksdale.

All of these suspicious findings, as well as the advice of counsel, caused Parker to act with good faith and with probable cause when she filed the will contest. Parker, like any reasonable person, properly informed and advised by counsel, concluded at the time she initiated the lawsuit that there were enough suspicious circumstances surrounding the execution of the 2010 Will to conclude that there was a substantial likelihood that the contest or attack would be successful.

Moreover, at trial, after hearing the testimony of witnesses and considering the evidence, the jury unanimously found that Parker had proven all seven (7) factors for the existence a confidential relationship between B. D. and Benoist. First, B. D. was of an advanced age. Second, B. D. was ***29** taken care of by others. Third, B. D. was both physically and mentally weak. Fourth, B. D. was provided transportation for his medical care and Benoist dispensed medication to B. D. Fifth, Benoist maintained a close relationship with B. D. and lived in close proximity. Sixth, Benoist held a power of attorney for B. D. Seventh, Benoist maintained a joint banking account with B. D.

Therefore, the forfeiture clause should not be enforced, because Parker acted in good faith and with probable cause when she contested the 2010 Will. Although nine (9) members of the jury found that the 2010 Will was valid, three (3) members sided with Parker and voted that the 2010 Will was not valid. Moreover, the jury unanimously found that Parker had proved by clear and convincing evidence the existence of a confidential relationship existed between Benoist and B. D. giving rise to a presumption of undue influence. Therefore, Parker not only had substantial justification in initiating the will contest, but also she had hope of success in pursing the action. After all, when the jury found the confidential relationship, the 2010 Will was presumptively invalid.

A Mississippi Supreme Court case, *Foster v. Ross,* 804 So.2d 1018 (Miss. 2002) is further supportive of Parker's assertion that she acted in good faith and with probable cause when she contested the 2010 Will. Unlike the instant set of facts, in Foster the Supreme Court upheld the lower court's dismissal of the action and imposition of attorney fees and costs on *Foster* because he failed to offer proof of a confidential relationship. *Id.* at 1025. Therefore, the converse of Foster is that *if a party can demonstrate a confidential relationship,* then she has grounds for filing the lawsuit and hope of success in pursuing the action. *See Id.*

Although Foster and his attorney were held liable under the Litigation Accountability Act of 1998, the premise works equally in this case. A jury of her peers found unanimously that Parker proved the existence of a confidential relationship by clear and convincing evidence, raising a presumption of undue influence by Benoist upon B. D. Therefore, it naturally falls that Parker - ***30** unlike Foster – had grounds for contesting the 2010 Will and hope of success in pursuing the action. Although the majority of the jury ultimately found that the 2010 Will was valid, the jury deliberated more than three hours before reaching its decision. [16]

Parker acted in good faith and with probable cause when she contested the 2010 Will. Like the majority of jurisdictions, including Tennessee, which find that if the contest was made in good faith, and upon probable cause and reasonable justification, the forfeiture clause should not be invoked.

Accordingly, the Court should reverse the lower court's finding that the forfeiture clause in the 2010 Will was valid, and remand the case to the lower court to allow Parker to receive her rightful distribution under the 2010 Will.

C. The lower court erred in ruling that Benoist, as Executor of the Estate, pay a retainer of $20,000 to the Tollison Law Firm when Benoist and Parker - the only parties in interest - were voluntarily before the court and had joined issue before the court as to the probate of the 2010 Will.

As already set forth in the Section A, the course of proceedings and disposition in the court, shortly after the commencement of the will contest, the lower court ruled that the Executor of the Estate of William D. Benoist pay a retainer of $20,000 to the Tollison Law Firm in connection with the fee arrangement that was previously entered into between the Executor and the Tollison Law Firm. For the following reasons, the lower court erred as a matter of law. R. 605-606.

Although Miss. Code Ann. § 91-7-281 provides that an executor is entitled to credit for attorney fees in the management or on behalf of the estate, "[w]here the services were rendered for ***31** the sole benefit of an individual, or group of individuals, interested in the estate, as against the others interested, such an allowance is unauthorized." *Clarksdale Hospital v. Wallis,* 193 So. 627, 628 (Miss. 1940).

In *Wallis* the Testator bequeathed to the Clarksdale Hospital the sum of $30,000. *Id.* at 627. The executor and certain of the devisees and legatees contested the hospital's legacy pursuant to Mortmain and Constitutional Provisions. *Id.* However, the hospital prevailed and claimed reimbursement of its attorney fees from the estate. *Id.* The chancellor disallowed the attorney fees and the hospital appealed. *Id.*

Although the hospital argued that it was in the interest of all concerned that the court decide the validity of the bequest to the hospital, which involved the construction of the will, the Supreme Court did not agree that the hospital's attorney fees should be paid by the estate. For if the hospital was allowed to make its unsuccessful adversaries pay the attorney fees it incurred by bringing about their defeat, it would be akin to punitive damages, which is not allowed in the litigation of a will contest. *Id.* at 628. Further, "[w]here the services were rendered for the sole benefit of an individual, or group of individuals, interested in the estate, as against the others interested, such an allowance is unauthorized. *Id.; See Matter of Estate of Philyaw,* 514 So. 2d 1232, 1237 (Miss. 1987) (holding that attorney's fees were unauthorized where the services were rendered for the sole benefit of an individual interested in the estate, as against the others interested).

Moreover,

> where an executor who has defended a will has acted as an individual or as a volunteer, fees may not be recovered from the estate. Thus, where all parties in interest are voluntarily before the court and have joined issue as between themselves with regard to the probate of a will, there is no substantial estate interest left and thus no just cause for a nominated executor to incur expenses or fees in a contest.

***32** 31 Am. Jur. 2d Executors and Administrators § 413.

In the instant set of facts, Benoist, as Executor of the Estate under the 2010 Will, filed a *Petition for Authority to Liquidate Estate Assets and Pay Estate Liabilities.* R. 347-363. The petition sought leave to pay three separate items: $14,968.76 to the law firm of Stubblefield & Yelverton for fees incurred in administering the Estate, a non-refundable $20,000 retainer to The Tollison Law Firm, PA to litigate certain claims against the Estate asserted by Parker, and $1,387.17 to Grantham, Poole, Randall, Reitano, Arrington & Cunningham PLLC for preparation of the 2010 Federal and State Individual Income Tax Returns for Billy Dean "B. D." Benoist and related services on behalf of the Estate. *Id.* Parker had no objection to the payment of the bills of Stubblefield & Yelverton and Grantham, Poole; however, Parker did object to the payment of the retainer to Tollison. R. 369-371; 408-471.

On December 21, 2011, after reviewing the pleadings and hearing oral argument of counsel, the lower court ruled from the bench and granted Benoist's petition, which included the $20,000 retainer to Tollison. Parker field a Motion to Reconsider or *Alter and Amend Order Allowing Estate to Liquidate Assets* arguing that an issue of devisavit vel non had arisen as to whether the 1998 Will or the 2010 Will was the valid and published Last Will and Testament of Billy Dean "B. D." Benoist. R. 408-471. As such, Benoist - recently appointed as Executor - was in an adverse position to Parker, which raised the presumption that Benoist was in an adverse position to the Estate under the 1998 Will. Id. Further, in an attempt to avoid further depletion of the Estate assets, Parker voluntarily agreed to dismiss any claims against the *Estate In Re: The Mary G. Benoist* ***Trust***, making retention of Tollison to represent the Estate totally unnecessary. *Id.* However, after reviewing the pleadings and hearing argument of counsel, the lower court denied Parker's motion and allowed the liquidation of Estate assets in the amount of $20,000 to pay Tollison. R. 605-606.

***33** Under prevailing Mississippi law, the lower court erred. Benoist and Parker - the only parties in interest - were voluntarily before the court and had joined issue before the court as to the probate of the 2010 Will. Both Benoist and Parker were deemed to be litigating in his or her own interest. Thus, there was no substantial estate interest left and no just cause for Benoist to incur expenses or fees on behalf of the Estate in the will contest. The only apparent purpose of the payment of Tollison's fees by the Estate was to assist Benoist in promoting his own personal interests and to charge a major portion of the attorney fees in the will contest to the Estate, win or lose.

Accordingly, the lower court's grant of the $20,000 retainer to Tollison should be reversed, because the contest was narrowed down to one of personal interest only between the proponent (Benoist) and the contestant (Parker) of the 2010 Will. Therefore, there was no just cause for Benoist to incur attorney fees at the expense of the Estate.

D. The lower court erred in failing to remove Benoist as the Executor of the Estate and appoint a temporary administrator during the pendency of the will contest.

The lower court erred in failing to remove Benoist as the Executor of the Estate and appoint a temporary administrator during the pendency of the will contest. Under Mississippi statutory law, whenever a last will and testament shall be contested, the chancery court or chancellor may appoint a temporary administrator if it shall appear necessary for the protection of the rights of the parties. Miss Code Ann. §91-7-53. The temporary administrator may be authorized to take charge of, preserve, and administer the estate until the appeal or contest shall be determined. *Id.* A temporary administrator may be appointed where estates become involved in protracted litigation, as during the pendency of a will contest. 31 Am. Jur. 2d Executors and Administrators §1016. Further, on the petition of any interested person, the chancellor may appoint a temporary administrator if it shall ***34** appear necessary for the protection of the rights of the parties. *Sandifer v. Sandifer*, 237 Miss. 464, 468-469 (1959). It is not necessary that the chancellor find that the executor named in the will is disqualified or has been guilty of misconduct in office. *Id.* at 469.

On December 19, 2011, Parker filed *Petition to Remove William D. Benoist as Executor of Estate of Billy Dean "B. D." Benoist, Deceased and to Appoint Administrator/Administratrix CTA.* R. 372-377. The ground for Parker's petition was that a disinterested third party should be appointed as the temporary administrator during the pendency of the will contest, because Benoist was in an adverse position to the Estate. *Id.* Parker also requested that lower court order a complete inventory of the assets of the Estate and an appraisal of personalty pursuant to MCA §91-7-91, and order an appraisal of B. D.'s real property. *Id.* After reviewing the pleadings and hearing argument of counsel the lower court denied Parker's petition. *See* FN 3.

As the facts show, the 1998 Will provided for an equal distribution of B. D.'s assets as contemplated by the mutual and reciprocal wills of B. D. and Mary Benoist and the credit shelter **trust**. Whereas, the 2010 Will provided that portion of B. D.'s estate devised to Parker was reduced substantially, with the portion of the estate going to Benoist, substantially increased. Moreover, Parker was aware in 2010 that a substantial amount of her father's real property had been conveyed to Benoist, essentially taking it out of the Estate. Parker had been contacted by Hutto asking her to break the **Trust**, so that her parents' home and the surrounding seven (7) acres could also be deeded to Benoist, instead of sharing equally as set forth in the **Trust**. Parker was also aware that Benoist was writing checks on her father's bank account, and on at least one occasion, causing an overdraft, which forced B. D. to have take $12,000 out of his Merrill Lynch **Trust** Account to cover the overdraft. There was further evidence of an account set up at Regions Bank in Grenada by Benoist, his son, and Gesslin to hide money from Shelia, with substantial withdrawals of funds from both B.

***35** D.'s personal Merrill Lynch account and the Merrill Lynch **Trust** Account going into this secret account.

All of these suspicious activities involving Benoist and B. D. took place after B. D. had been diagnosed in 2009, by Dr. McIntosh as having significant dementia that was probably vascular in nature, and a VA neuropsychologist's diagnosis of dementia, most likely Alzheime's disease. Moreover, B. D. was abusing alcohol as well as taking narcotic pain medication, both of which, further impacted his declining mental ability. Parker was not the only one that had noticed her father's declining mental and physical faculties. B. D.'s friends and golfing buddies had also noticed changes in his mental capacity.

Finally, Benoist was in a confidential relationship with his father, with all seven (7) factors present to prove a confidential relationship, thus raising a presumption of undue influence. In the very least, the lower court should have removed Benoist as Executor during the pendency of the will contest.

Accordingly, the lower court erred when it failed to remove Benoist as Executor of the Estate and appoint a temporary administrator during the pendency of the will contest.

V. CONCLUSION

In summary, the lower court should be reversed on three (3) grounds. First, it should be found that Parker initiated the will contest in good faith and with probable cause; therefore, the forfeiture clause of the 2010 Will should not be invoked, allowing Parker to take her share under the 2010 Will. Second, the lower court erred when it ruled that Benoist, the Executor of the Estate, could pay the Tollison Law Firm a $20,000 retainer when all parties were before the court, and there was no remaining Estate interest to defend. Third, the lower court erred when it failed to remove Benoist as the Executor and appoint a temporary administrator during the pendency of the lawsuit. ***36** Appellant so prays.

Footnotes

1 All Record Excerpts are contained in Exhibit "A."

2 The original petition to probate the 1998 Will was filed in Cause No. 11-06-60, Yalobusha County Chancery Court. Also, on June 20, 2011, Parker filed a *Complaint* pursuant to Miss. Code ANN. § 91-9-303 in which, she asked the lower court to remove Benoist as Co-Trustee of the Mary G. Benoist **Trust**, order him to make a full and accurate accounting; award all costs, attorney fees and expenses incurred in this action; award pre-judgment and post-judgment compound interest; cancel and make void any conveyances or transfer of property, real or personal which, were the result of Benoist's undue influence upon his father; and award whatever other relief, including compensatory and punitive damages, as are necessary to afford full justice. On July 15, 2011, Benoist filed a *Caveat Objection* to the 1998 Will in Cause No. 11-06-60. As such, an issue of *devasavit vel non* was before the lower court, and Parker requested a trial by jury. Later the lower court entered an Order granting leave to amend the pleadings and consolidate all three (3) causes of action under Cause No. 11-06-56.

3 Counsel for Benoist failed to respond to either the December 28, 2011, letter from Parker's counsel or the January 18, 2012, letter.

4 After reviewing the pleadings and hearing argument of counsel the lower court denied both of Parker's motions.

5 All Trial Transcript Excerpts are contained in Exhibit "B."

6 All Trial Exhibit Excerpts are contained in Exhibit "C."

7 Although an additional 200 acres appeared on the Yalobusha tax rolls as being in the **Trust**, the land was never conveyed to Mary; therefore, upon her death, it did not vest in the **Trust**.

8 This combination of drug therapy is used to provide benefits in thinking, daily functioning and behavior in people with moderate to severe Alzheimer's disease. Bob DeMarco, *Combination Therapy for Alzheimer's Disease (Namenda and Aricept)*, June 23, 2011, *available at http:// www.alzheimersreadingroom.com/2011/07/combination-therapy-for-alzheimers.html.*

9 "Brother" is a nickname for Walt Parker. T. T. 63:10-13.

10 The Mary G. Benoist **Trust** that was created in 1999 upon the death of B. D.'s wife Mary.

11 See FN 4, this is the 200 acres thought to be in the **Trust** because it appeared on the Yalobusha tax rolls as being in the **Trust**, but was actually not in the **Trust** because it was never conveyed to Mary prior to her death.

12 See FN 4 & 7, the 240 acres included the 200 acres originally thought to be in the **Trust**.

13 A disorder characterized by an excessive amount of sleepiness. Taber's Cyclopedic Medical Dictionary 803 (15th ed. 1985).

14 Once again Benoist asked Hutto to contact Parker and get her to sign a document breaking the **Trust**, so that he could also take his parents' home and the seven (7) acres in the **Trust**, in addition to the other land B. D. conveyed to him during 2010. According to Benoist, one of the reasons "Daddy hired Ms. Hutto was to try to get Bronwyn to break the **trust** so he could divide it up like he wanted." T. T. 39:19-22. In reality, Benoist wanted all the property in the **Trust**, not for it to be spilt equally between Benoist and Parker if it remained in the **Trust**.

15 All Supplemental Trial Transcript Excerpts are contained in Exhibit "D."

16 Attached to the Jury Instruction was a handwritten list, which confirms that three (3) of the jurors voted that the 2010 Will was not valid. R. 915. Although polling of the jurors is in conflict as all twelve jurors stated that they believed that 2010 Will was valid, after trial, the undersigned counsel spoke to each of the jurors, and jurors 2, 66, and 70 confirmed to counsel that they did not believe the 2010 Will was valid.

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