THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM AIKEN COUNTY
Court of Common Pleas

The Honorable Doyet A. Early, III, Circuit Court Judge
Case No. 2013-CP-02-1337

Appellate Case No. 2019-000362

Adele J. Pope, ……..……Appellant,

v.

Estate of James Brown and The James Brown 2000 Irrevocable Trust, ... Respondents

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RESPONDENTS' REPLY IN SUPPORT OF MOTION TO STRIKE INITIAL REPLY BRIEF AND ALTERNATIVE REQUEST FOR LEAVE TO FILE SURREPLY BRIEF

Russell Bauknight, as Personal Representative and Trustee of Respondents, the Estate of James Brown and the James Brown 2000 Irrevocable Trust, respectfully submits this Reply in further support of its Motion to Strike Initial Reply Brief and Alternative Request for Leave to File Surreply Brief ("Motion"), and in response to the Return filed by Appellant Adele Pope.

INTRODUCTION

Appellant's complaint that Respondents have now filed three motions to strike in this appeal rings hollow when it is considered that each motion was necessitated by her

own violations of the Appellate Court Rules. Respondents cannot be expected to sit idly by while Appellant attempts to gain a strategic advantage by asserting new arguments in her Initial Reply Brief, making factual assertions without supporting citations to the Record on Appeal ("ROA"), and introducing matters that are as irrelevant as they are inflammatory. In moving to strike the Initial Reply Brief or for leave to file a surreply, Respondents seek merely to protect their right to litigate this appeal within the parameters established by the Rules. Appellant's Return demonstrates that she is capable of complying with the Rules—*e.g.*, by providing ROA citations for factual assertions (Return, at 11-18)—she simply chooses not to. Respondents respectfully submit that this is not Appellant's choice to make, and they ask the Court to strike her Initial Reply Brief or, alternatively, grant Respondents leave to file a surreply brief.

ARGUMENT

I. The Court should disregard irrelevant matter in Appellant's Return

Respondents' Motion identified specific arguments that should not have been included in Appellant's Initial Reply Brief, either because they were not raised in Appellant's Opening Brief or because they are not relevant to this matter. (Motion, at 4-5, 8.) Appellant's 22-page Return strays far beyond the arguments raised in Respondents' 8-page Motion. The Court should disregard all portions of Appellant's Return that are not responsive to Respondents' actual arguments. *Cf. Parker v. S.C. Pub. Serv. Comm'n*, 281 S.C. 215, 218, 314 S.E.2d 597, 599 (1984) (refusing to consider irrelevant matters asserted in a party's brief).

The Appellate Court Rules establish that this Court's review encompasses only the

matters listed in the statement of issues in Appellant's Opening Brief. *See* Rule 208(b)(1)(B), SCACR ("Ordinarily, no point will be considered which is not set forth in the statement of the issues on appeal."). Those issues involve only the trial of this matter and Judge Early's January 19, 2016 Fee Order, specifically: whether Judge Early erred in admitting or excluding certain evidence at trial (Issues I, II, and IV); whether the Fee Order contains findings that conflict with the Supreme Court's opinion in *Wilson v. Dallas*, 403 S.C. 411, 743 S.E.2d 746 (2013) (Issue III); and whether Judge Early was biased against Appellant (Issue V). No other issues are before the Court. *See Shirley's Iron Works, Inc. v. City of Union*, 403 S.C. 560, 573, 743 S.E.2d 778, 785 (2013) ("An unappealed ruling is the law of the case and requires affirmance."); *Cannon v. Cannon*, 321 S.C. 44, 54, 467 S.E.2d 132, 138 (Ct. App. 1996) (concluding an issue not argued in brief is deemed abandoned on appeal); *Stier, Kent & Canady, Inc. v. Jackson*, 317 S.C. 179, 183, 452 S.E.2d 606, 609 (Ct. App. 1994) (concluding when only argument in appellants' brief regarding issue appeared once in footnote and no authority was cited, argument was so conclusory as to be deemed abandoned).

In light of this settled law, this Court should reject Appellant's claims that this "is an appeal of multiple orders," including "two FOIA suits and a tort suit with 17 Plaintiffs," *i.e.*, Richland 4900. Return, at 6.) Also not relevant to this appeal are the following matters discussed in Appellant's Return:

- The diagrams of the Estate and Trust and of the settlement vacated by *Wilson v. Dallas*. (Return, at 7.) This case concerns Appellant's performance as co-PR/Trustee *prior to* Judge Early's approval of the settlement and removal of Appellant and Mr. Buchanan on May 26, 2009.

- Terry Brown's transfer of his interest to Forlando Brown, and Forlando's alleged "plant[ing]" of "the false Grammy© claim." (Return, at 7.)

- Appellant's FOIA requests for "the Legacy Trust amendment and documents." (Return, at 8.)

Even if these matters were relevant to this Appeal, it would not change the reality that none of them was asserted in Appellant's Opening Brief.

Likewise, the Court should disregard Appellant's comments regarding orders Judge Early issued in this case, but which are not before the Court because Appellant did not include them in her Opening Brief. These include the following:

- Appellant's contention that her claim for PR/Trustee fees could have been resolved in 2013 with a "simple … hearing." (Return, at 8.) Not only is this irrelevant, the trial in this matter revealed extensive evidence, described in detail in the Fee Order, of Appellant's and Mr. Buchanan's failure to meet their fiduciary obligations to the Estate and Trust. This evidence would not have come to light in a "simple hearing."[1]

[1] The trial also revealed a notable lack of evidence on some key points. For example, Appellant notes that one important issue was whether she and Mr. Buchanan properly used a valuation formula similar to the one used to value songwriter Harlan Howard's estate, when determining the date-of-death value of James Brown's estate. (Return, at 9.) The trial was Appellant's opportunity to provide evidence to support her use of the formula, but she failed to do so.

The formula used to value Harlan Howard's songwriter royalties involved two elements: average annual revenue for the 8 years prior to his death, multiplied by a subjectively determined multiple of 8. This formula was found to be reasonable only after a trial involving extensive fact and expert testimony regarding both elements of the formula. *See In re Estate of Howard*, 2009 WL 2184538 (Tenn. Ct. App. July 22, 2009) (**Exhibit 1**). In particular, the CPA who valued the royalties testified regarding the numerous, specific factors he considered in arriving at a multiple of 8, while opposing experts explained, again in detail, why consideration of those factors should have resulted in a lower multiple. *See id.* at *8-9.

In this case, Appellant failed to provide any meaningful explanation of why she adopted a multiple of 12-14. (**Exhibit 2** (Trial Tr. at 354:21 (Appellant testifying that multiplier came from "[a] lot of different places"); Trial Tr. at 914:1-6 (defense expert Bradley Sharp testifying that the valuation formula is inappropriate, in part because "[i]t is not providing any underlying support or detail with respect to how those multiples were derived")).) She also did not provide expert testimony on this point. Additionally, in the Harlan Howard case the formula was used only to

- Appellant's claim that Respondents "secured multiple orders in this case to suppress documents and testimony" showing the ways in which the Estate and Trust were benefitted by her service as co-PR/Trustee (Return, at 8), as well as her complaints about "a number of confidentiality and protective orders." (Return, at 10.) ***None of these orders is challenged in Appellant's Opening Brief***.

- Appellant's nonsensical assertion that Respondents failed to obtain a ruling on their "efforts to exclude the documents and testimony" found in Appellant's rebuttal deposition designations. (Return, at 10.) As explained in Respondents' brief, the failure here was Appellant's. After Judge Early refused to accept the designated testimony *en masse*, Appellant never attempted to introduce any specific designation. Consequently, she failed to preserve this issue for review.

If Appellant wanted the Court to consider these matters, all she had to do was include them in her Opening Brief. Because she elected not to do so, they are not properly before the Court and should not be considered.

II. Appellant, not Respondents, is responsible for increased costs and undue delay

On pages 3-4 of the Return, Appellant has cut-and-pasted portions of a 2016 motion to disqualify Mr. Bauknight, ostensibly in support of Appellant's claim that Respondents have sought to make this litigation more expensive for her, including by forcing her to "call … or consider calling" certain witnesses. (Return, at 3.) However, Judge Early found that it was *Appellant* who caused undue delay and expense:

> [Appellant] identified twenty-two (22) individuals that would appear as expert witnesses at this trial, and two of these individuals in [Appellant's] expert witness disclosure included herself and her husband. Moreover, [Appellant] deposed a number of individuals from the South Carolina Attorney General's Office, taking the position that these individuals were witnesses in this case. At trial,

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value songwriting royalties. *See Estate of Howard*, 2009 WL 2184538, at *5. Appellant, in contrast, applied the formula "indiscriminately … to three different types of cash flow," not just to royalties. (**Exhibit 2** (Trial Tr. 914:7-12).).

> however, no one from the Attorney General's office appeared as a witness. Further, from her list of twenty-two expert witnesses, [Appellant] offered four witnesses and only one was found qualified to testify in Court—Mr. Steven Johnson.
>
> [Appellant's] valuation witness (Mr. Alexander) was disqualified from providing expert opinion testimony. In addition, [Appellant] identified Mr. Smith as an expert witness in copyright and termination rights. [Appellant] hired Mr. Smith during her administration to advise on those issues. The Defendants called Mr. Smith as a fact witness to establish his lack of qualifications to provide this advice to the Estate and Trust. On cross-examination, counsel for [Appellant] sought to qualify Mr. Smith as an expert in copyright and termination rights. The Defendants objected to Mr. Smith offering opinion testimony, and this Court sustained the objection. February 20-22 Transcript, p. 145, ln. 8- p. 146, ln. 20. [Appellant] also attempted to offer ***herself*** as an expert witness at trial. The Court sustained Defendants' objection to [Appellant] offering expert testimony in her case. September 5-7 Trial Transcript, pp. 24, ln. 25 – p. 27, ln. 15.
>
> The Court again notes that thirty-seven (37) depositions were taken in advance of trial, with [Appellant] noticing twenty-five (25) of these depositions. The Defendants believed they needed to take twelve (12) depositions based upon the representations from [Appellant] in discovery. Against the backdrop of the number of witnesses [Appellant] put up in her case—two live witnesses and four witnesses by deposition—***the inescapable conclusion is that this case was extremely expensive, and unnecessarily so, for the Estate and Trust to defend.***

(Fee Order, at 15-16 (second emphasis added).)

III. Appellant is capable of complying with the Rules when she chooses

Respondents' Motion is based, in part, on Appellant's failure to comply with Rule 208(b)(4), SCACR, which requires that factual allegations in a brief "shall" be supported by "references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal." Rule 208(b)(4); *see State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("[A] brief must reference the Record on

Appeal to support the facts alleged."). Respondents identified numerous factual assertions in the Initial Reply Brief that were unsupported by any citation to the ROA. (Motion, at 6-7.)

In her Return, Appellant does what she should have done in her Initial Reply Brief: she provides references to the ROA in support of her factual allegations.[2] (Return, at 11-18.) The fact that she has done so merely proves that Respondents' Motion is well taken. If, as Appellant contends in her Return, the record supports the factual allegations in her Initial Reply Brief, she should be required to file a corrected brief that incorporates references to the ROA, so this Court can consider those references in their proper context.

CONCLUSION

Respondents, no less than Appellant, are entitled to litigate this appeal on a level playing field. If Appellant does not want to incur the cost of responding to a motion to strike, the solution lies entirely within her own power. If she will stop filing materials that violate the Appellate Court Rules, Respondents will stop moving to strike them.

Despite its length, Appellant's Return fails to refute Respondents' showing that the Initial Reply Brief violates the Appellate Court Rules by raising new issues not asserted in her Opening Brief, making factual allegations without citing to the ROA, and inserting irrelevant matters from other cases. The Court should either strike Appellant's Initial Reply Brief and direct her to file a brief that complies with the South Carolina

[2] By recognizing that Appellant has provided references to the ROA, Respondents do not concede that such references actually support their associated factual allegations. Respondents also do not concede that Appellant's factual allegations, even if consistent with the evidentiary record, justify reversal of the Fee Order.

Appellate Court Rules, or it should grant Respondents leave to file a surreply brief.

Respectfully submitted,

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May 7, 2020

Exhibit 1

2009 WL 2184538
Only the Westlaw citation is currently available.

SEE COURT OF APPEALS RULES 11 AND 12

Court of Appeals of Tennessee.

In re ESTATE OF Harlan Perry HOWARD.
Melanie Smith Howard, Executrix
v.
Harlan Perry Howard, Jr., and
Jennifer Howard Carmella.

No. M2008–00540–COA–R3–CV.
|
July 22, 2009.

An Appeal from the Circuit Court for Davidson County, No. 02P–738; Walter C. Kurtz, Judge.

Attorneys and Law Firms

C. Bennett Harrison, Jr., Nashville, Tennessee, for the appellants, Harlan Perry Howard, Jr., and Jennifer Howard Carmella.

R. Horton Frank, III, and Philip M. Kirkpatrick, Nashville, Tennessee, for the appellee, Melanie Smith Howard, Executrix.

HOLLY M. KIRBY, J., delivered the opinion of the Court, in which ALAN E. HIGHERS, P.J., W.S., and DAVID R. FARMER, J., joined.

OPINION

HOLLY M. KIRBY, J.

***1** This appeal involves the distribution of a decedent's estate. The decedent was a legendary songwriter, and the estate's primary asset was the decedent's songwriter royalties. At his death, the decedent had four adult children. In his will, the decedent left designated percentages of the royalties to three of his children and to his fifth wife (not the children's mother) in a marital trust. To avoid estate taxes, however, the devise to the two oldest children was limited to an amount that would not exceed the federal unified credit for estate tax purposes. The decedent's fifth wife was appointed executrix of the decedent's estate. In administering the estate, she enlisted the help of an accountant who had worked with both the decedent and the wife. Subsequently, she filed an estate tax return, prepared by the accountant. In the return, because of the value assigned to the decedent's songwriter royalties, and because the youngest child's interest in the royalties was included as a part of the taxable estate, the share of the royalties allocated to the two older children was reduced under the tax-avoidance limitation in the will. The wife filed a petition in the trial court to distribute the assets of the estate. The two older children objected, arguing that the wife's accountant had a conflict of interest and should have been disqualified from valuing the songwriter royalties, and that the wife breached her fiduciary duty by making decisions that benefitted her to the detriment of the two older children. After a trial, the trial court concluded that the accountant did not have a disqualifying conflict of interest, and that the wife and her accountant acted in good faith. Therefore, the trial court granted the wife's petition to distribute the assets of the estate consistent with the federal estate tax return. The decedent's two older children now appeal. We affirm the trial court in all respects.

INTRODUCTION

Harlan Perry Howard ("Decedent") was a legendary songwriter, a member of the Country Music Hall of Fame, the Nashville Songwriters Hall of Fame, and the Songwriters Hall of Fame. Described as "the Irving Berlin of country music," second in stature as a songwriter only to Hank Williams, Sr., the Decedent wrote numerous classic songs, including: "I Fall to Pieces," "Busted," "I've Got a Tiger By the Tail," "Heartaches By the Number," "Too Many Rivers," "Pick Me Up On Your Way Down," "Why Not Me," "Don't Tell Me What To Do," "Life Turned Her That Way," and "Blame It On Your Heart." Over many years, his songs have been recorded by artists such as Johnny Cash, Patsy Cline, Charlie Walker, Ray Price, Ray Charles, Brenda Lee, Buck Owens, Waylon Jennings, Ricky Van Shelton, The Judds, Pam Tillis, Patty Loveless, Aaron Neville, Lee Ann Rimes, Burl Ives, Barbara Mandrell, Reba McIntyre, and Glen Campbell. Over one hundred songs written by the Decedent became top ten hit recordings, fourteen of which have been performed over one million times each, twenty-five million times combined.

***2** On March 3, 2002, the Decedent died at the age of seventy-four, after writing songs for some forty-five years. Over the course of his lifetime, he wrote over 4,000 songs, over 1,000 of which have been recorded. At his

death, the right to receive his songwriter royalties was the Decedent's largest asset. This appeal centers on the value of the songwriter royalties and the proper distribution of them under the Decedent's will.

FACTS

Background

At the time of his death, the Decedent was married to his fifth wife, Petitioner/Appellee Melanie Smith Howard ("Wife"). The Decedent's children from previous relationships included his youngest, Clementyne Howard ("Clementyne"), as well as Respondent/Appellants Harlan Perry Howard, Jr. ("Perry"), and Jennifer Howard Carmella ("Jennifer"). [1]

[1] The Decedent also had an adopted son, Carter Howard, from his prior marriage to Jan Howard. Carter Howard was not devised a portion of the estate in the Decedent's Last Will and Testament, "not out of any lack of love or affection, but due to the fact that [the Decedent] consider[ed] him a successful businessman who is otherwise provided for." Therefore, Carter Howard's interests are not implicated in this appeal.

In 1988, the Decedent divorced his fourth wife, Clementyne's mother, Sharon Rucker Howard ("Sharon"). The final decree of divorce with Sharon incorporated a marital dissolution agreement ("MDA") in which the Decedent agreed to make some unusual provisions for Clementyne. As relevant to the issues in this case, the MDA provided that, as to 25% of the songwriter royalties owned by the Decedent, the Decedent would retain a life estate and Clementyne would own the remainder interest. [2] Thus, upon the Decedent's death, Clementyne would own outright the right to receive the 25% interest in royalties. The MDA expressly limited the royalties to be received by Clementyne to songs that were written prior to the time of the divorce with Sharon. [3] The MDA also provided that, in general, the remaining marital property was to be divided evenly between Sharon and the Decedent. Sharon did not receive any spousal support in the MDA, nor did she receive any rights to the Decedent's songwriter royalties.

[2] The MDA originally granted Clementyne a remainder interest in 25% of the Decedent's *copyrights*. That provision was incorrect, because the Decedent did not own any copyrights, but only the contract right to receive royalties from music publishers to whom he had assigned the copyrights. This error was corrected in an agreed order entered in the divorce proceedings.

[3] A list of those songs is attached to the MDA.

In August 1989, the Decedent married Wife, who was thirty years old at the time, about the same age as Appellants Perry and Jennifer. At the time of their marriage, Wife had worked for the Decedent for several years. Together they owned and operated music publishing companies, for which Wife continued to work after the Decedent's death. During the Decedent's lifetime, Wife managed the Decedent's voluminous song catalogs and converted them to a digital format. She recruited other writers to write songs for their companies, and she "pitched" their songs, i.e., contacted performers to persuade them to record the songs.

Sometime in 1989, the Decedent engaged Mike Vaden ("Vaden"), a certified public accountant ("CPA"), to manage his business affairs. As part of his job duties, Vaden prepared the Decedent's income tax returns and advised on business, financial, tax, and estate planning matters. Vaden advised Wife as well. Vaden was a fan of the Decedent's work and, over time, they developed a personal friendship.

The Last Will and Testament

In 1998, the Decedent hired attorney John Van Cleave ("Van Cleave") to do estate planning for him, including the drafting of a new will. On August 25, 1998, Van Cleave met with Vaden to discuss the Decedent's estate plan. [4] Van Cleave recognized that the Decedent's general intent was to leave half of his songwriter royalties to Wife and half to his children, but he also recognized the Decedent's desire to minimize the estate or "death" taxes payable from his estate upon his death. For purposes of his analysis at the time, Van Cleave had to value the Decedent's songwriter royalties. This value was calculated by taking the average annual value of the Decedent's royalties and multiplying that amount by a "multiple," that is the estimated number of years that the songs would continue to generate royalties. At that time, Van Cleave calculated the annual average value of the royalties to be $450,000 and multiplied that figure by a multiple of ten years, for a valuation of $4.5 million.

[4] Van Cleave wrote a memorandum for his office file documenting his August 25, 1998 meeting with the Decedent.

***3** To address both of the Decedent's goals, Van Cleave suggested that the Decedent devise the songwriter royalties to the children up to the amount of the unified credit, which is the amount that can be devised free from estate tax ($625,000 at the time),[5] then devise the balance to Wife in a marital deduction Q–TIP (qualified terminable interest property) trust. Under a Q–TIP trust, the royalties would not be taxed at the time of the Decedent's death; rather, they would be held in trust during Wife's lifetime, the income would be used for her benefit, the children would receive the royalties after Wife's death, and the estate tax on the royalties would be deferred until Wife's death.

[5] In 1998, the year that the Decedent executed his will, the unified credit was $625,000. The applicable unified credit is dependent upon the year in which the decedent dies and is based on a progressive scale; by the time of the Decedent's death in 2002, it had increased to $1 million. *See* 26 U.S.C. § 2010(c) (2002).

Another issue attorney Van Cleave considered in drafting the Decedent's Will was whether the value of Clementyne's 25% interest in the royalties would be includable in the Decedent's taxable estate. If Clementyne's interest were included as a part of the Decedent's taxable estate, the devise to her would consume much of the unified credit, leaving the older children, Perry and Jennifer, to receive only the difference between the unified credit and the value of Clementyne's interest. If Clementyne's interest was not includable in the Decedent's estate, then Perry and Jennifer would receive the value of their full percentage of the royalties up to the entire amount of the unified credit. Attorney Van Cleave determined that the issue of whether to include Clementyne's interest in the Decedent's taxable estate had to be resolved in order for him to develop an estate plan that would avoid paying estate tax upon the Decedent's death and still permit the Decedent to make the desired bequests to his children.

Van Cleave reviewed the Decedent's divorce decree with Clementyne's mother, Sharon, and applicable legal authorities. After doing so, Van Cleave concluded that Clementyne's remainder interest in the royalties as set out in the divorce decree would be includable in the Decedent's taxable estate at his death. In a letter dated October 7, 1998, to the Decedent's CPA/business manager, Vaden, Van Cleave explained to Vaden that the issue of whether Clementyne's interest would be includable in the Decedent's taxable estate depended on whether "adequate and full" consideration was received for the transfer to Clementyne. He explained that, because the gift was over and above the amount of child support that normally would have been awarded, it was not given for full and adequate consideration. Therefore, Van Cleave concluded, Clementyne's interest most likely would be includable in the Decedent's taxable estate. Ultimately, the Decedent decided to limit the value of the bequest to his children to the amount of the unified credit, despite Van Cleave's opinion that Clementyne's interest would consume much of it.

After all of this was resolved, on December 22, 1998, the Decedent executed his new Last Will and Testament ("Will"). The Will appointed Wife as the executrix, and appointed both Wife and Vaden as co-trustees of the marital deduction Q–TIP trust established therein. The Will bequeathed the following to Decedent's three children:

> ***4** B. I give and bequeath in equal shares to my children, HARLAN PERRY HOWARD, JR. and JENNIFER HOWARD CARMELLA, the lesser of (i) that percent of songwriter royalties owned by me at my death which, when combined with the songwriter royalties having passed to my daughter, CLEMENTYNE RUCKER HOWARD, pursuant to [the MDA], equals one-half (½) of all my songwriter royalties whether passing hereunder or outside my Will or (ii) so much of my songwriter royalties which would pass free of Federal Estate Tax by reason of the unified credit and the state death tax credit (provided use of this credit does not require an increase in state death taxes payable) allowable to my estate but no other credit and after taking into account gifts by me in my lifetime and all property passing under or outside this Will which is includable in my gross estate and does not qualify for the marital deduction, the charitable deduction or any other available deduction and after taking into account charges to principal that are not allowed as deductions in computing Federal Estate Tax.
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> * * *
>
> C. I have heretofore conveyed to my daughter, CLEMENTYNE RUCKER HOWARD, an undivided remainder interest in various songwriter royalties pursuant to [the MDA]. I have, therefore, made no provision under subparagraph B. of this *ITEM FOUR* for my said daughter, other than a contingent bequest, and consider the above

> bequests to my son, HARLAN PERRY HOWARD, JR. and my daughter, JENNIFER HOWARD CARMELLA, to result in a fair treatment of my children with respect to my songwriter royalties notwithstanding the fact that the total songwriter royalties passing to each child may not be equal.

Stated more simply, Appellants Perry and Jennifer were to receive 50% of the Decedent's songwriter royalties minus the 25% of the royalties gifted to Clementyne in the MDA (which included only royalties from songs written prior to the 1988 divorce); however, Perry and Jennifer were to receive an amount not to exceed the unified credit applicable in the year of the Decedent's death.

The Will also gave Wife, as the executrix, significant power to make decisions with respect to the required distributions. It provided:

> *ITEM EIGHT:* The Personal Representative and Trustee and their successors shall have the following powers which shall be exercisable in their discretion without application to any Court and until final distribution is made:
>
> > A.... I also authorize the Personal Representative and Trustees to make any division or distribution in cash or in kind or partly in each and reasonably and in good faith to value assets, and such valuation shall be conclusive upon all parties.
> >
> > B. I give the Personal Representative all the powers recited in the introductory paragraph and thirty-three (33) subparagraphs of Tennessee Code Annotated Section 35–50–110, as if the language thereof were incorporated in this Will verbatim.

Tennessee Code Annotated § 35–50–110, referenced above, gives the executrix (Personal Representative), *inter alia,* the power to "determine the value of capital assets for the purpose of making distribution of the assets if and when there is more than one (1) distributee of the assets, which determination shall be binding upon the distributees unless clearly capricious, erroneous and inequitable." *See* Tenn.Code Ann. § 35–50–110(31) (2007).

***5** After the Decedent's death on March 3, 2002, the Will was admitted to probate in solemn form on June 18, 2002. Thereafter, Wife assumed her duties as executrix to administer the estate. To this end, Wife hired accountant Vaden to assist her with estate matters, because he had been the Decedent's business manager and accountant, and he was named in the Will as co-trustee of the marital trust. In addition, Vaden continued to serve as Wife's personal financial advisor.

Proposed Distribution According to the Estate Tax Return

As executrix, Wife marshaled the assets of the estate, obtained appraisals, and performed other administrative duties with Vaden's assistance. Vaden prepared the federal and state estate/ inheritance tax returns for the Decedent's estate. In November 2003, Wife filed the federal and state estate/ inheritance tax returns. In the federal tax return, Vaden listed the value of the Decedent's songwriter royalties as $2,842,996, a significant portion of the total $7.4 million gross estate. In making this valuation of the Decedent's songwriter royalties, Vaden first took an eight-year average of the actual royalties received. For most of the songs, he then multiplied that amount by a multiple of eight. For a few songs, he used a multiple of five or six. Vaden did not attach to the estate tax return a formal appraisal of the songwriter royalties, although formal appraisals were obtained for other assets, such as guitars and real estate. In addition, Vaden included in the taxable estate Clementyne's 25% interest in pre–1988 songwriter royalties, valued at $606,474. At the time of the Decedent's death, the applicable unified credit was $1 million. Consequently, the amount to be divided between Perry and Jennifer was the difference between $1 million and $606,474 (Clementyne's share); this came to $393,526. This total for Perry and Jennifer was a combined 13.8% (6.9% each) of the total value of the songwriter royalties. The remaining percentage of the royalties would go to the Marital Q–TIP trust.

Subsequently, Wife received notices from both the Internal Revenue Service and the Tennessee Department of Revenue that her federal estate tax and state inheritance tax returns had been approved. Wife then prepared to distribute the assets accordingly in order to close the estate.

At that point, Perry and Jennifer objected to the way in which Wife and Vaden had calculated their share of the songwriter royalties. They contended that, in the returns, the total songwriter royalties were overvalued, and that, had they been valued at a lower amount, Clementyne's interest would have been valued at a lower figure, the share for Perry and Jennifer would have increased, and the percentage of their share would have been closer to the 25% that the Decedent intended. They argued that Vaden had a conflict of interest due to his personal and professional relationship with Wife, and

that his valuation of the royalties was therefore tainted. Perry and Jennifer further contended that the value of Clementyne's share should not have been included in the Decedent's gross estate for federal estate tax purposes. They claimed that both the overvaluation of the songwriter royalties and the inclusion of Clementyne's interest in the taxable estate constituted improper self-dealing by Wife and a breach of her fiduciary duties as executrix, because these decisions had the effect of increasing Wife's percentage of the Decedent's songwriter royalties and correspondingly decreasing the percentage that went to Perry and Jennifer.

PROCEEDINGS BELOW

***6** In light of these objections, on March 31, 2005, Wife filed a Petition to Approve Proposed Distribution of Estate Assets, naming Perry and Jennifer (collectively, "Respondents") as the respondents. The petition set out the dispute that had arisen and asked the trial court's permission for Wife to distribute the assets in accordance with the federal estate tax return.

On April 15, 2005, the Respondents filed a motion to remove Wife as the executrix of the Will and to appoint an independent personal representative. The Respondent's motion was based on the same arguments regarding the overvaluation of songwriter royalties and the inclusion of Clementyne's interest in the taxable estate. The Respondents asked for an independent appraisal of the songwriter royalties and for the trial court to consider an appropriate amendment to the federal estate tax return. Wife filed a response to the Respondents' motion, noting her previously filed petition to approve her proposed distribution of the estate. Wife asserted that an evidentiary hearing was required to resolve the parties' disputes. After a hearing on June 21, 2005, the trial court denied the Respondents' motion without prejudice. On March 29, 2006, the Respondents filed a response to Wife's petition to approve the distribution of the assets of the estate.[6] The matter was then set for trial.

6 This response was filed soon after Wife filed a motion for default judgment.

The case was tried on January 28 through January 30, 2008. The trial court heard testimony from all of the parties as well as various experts. In her testimony, Wife described her career in the music business and her involvement in the Decedent's business interests. At the time of trial, she was continuing to work for the production companies that were established during the Decedent's lifetime, pitching the songs owned by the companies and maintaining the catalog of songs written by the Decedent. Evidence introduced at trial showed that, since the Decedent's death, thirty-five new recordings of his old songs had been created, and the royalty income derived from the compilation of his songs had increased.

Wife also testified about her professional relationship with Vaden. Wife said that she met Vaden in 1989 when the Decedent began organizing his business affairs, and she confirmed that Vaden continued to counsel her on accounting and financial matters. As executrix of the Decedent's estate, she sought Vaden's help in administering the estate and in filing the estate tax returns because of his history with the Decedent. She asked Vaden to designate a value for the songwriter royalties because he knew the income streams from the royalties, given his fifteen-year history managing the Decedent's business affair and the fact that Vaden had possession of the records of that income. Furthermore, Wife knew that Vaden had been a friend of the Decedent, and she believed him to be an honest man. Wife said that Perry and Jennifer had been aware that Vaden was preparing the estate tax returns. Wife thought that Vaden's $2.8 million valuation of the songwriter royalties was fair but too low, because she believed that he should have used a multiple of higher than eight. However, she accepted his assessment and used his valuation on the federal estate tax return.

***7** Wife acknowledged that Perry and Jennifer wanted her to obtain an independent appraisal of the songwriter royalties. To obtain an inexpensive, informal, independent appraisal, counsel for the Respondents suggested an "informal poll" of various qualified individuals on the value of the songwriter royalties. They proposed that Vaden and an attorney/accountant for the Respondents, Gary Smith, send a joint letter to persons competent to opine on the value of the royalties, requesting an opinion regarding the value of the Decedent's songwriter royalties. The proposed letter stated, "It is our hope that this will not take you more than 10 or 15 minutes, for we are not asking for an in depth analysis." Ultimately, Wife refused to allow the letter to be sent, and she explained her decision in her testimony. She thought it would be "ludicrous" to ask anyone for an evaluation in fifteen minutes, given the fact that Vaden's valuation took considerable time and effort. She saw no reason to expend money on another appraisal when Vaden's was independent, fair, and reasonable. In addition, Wife believed that it was "bad business" to circulate to others in the music industry the

titles of the Decedent's uncut songs, which are not copyright protected. Wife noted that, prior to the trial, she engaged the services of a "Music Row" attorney, Mike Milam, to review Vaden's appraisal. Milam, whose testimony is discussed below, found that Vaden's appraisal was reasonable and fair.

Wife testified that she had not been involved in the preparation of the Decedent's Will, although she was aware that the Decedent wished to avoid paying estate taxes. She included Clementyne's interest in the taxable estate based on the opinion of the Decedent's attorney, Van Cleave. Wife claimed that she was not aware of the effect that the value of the songwriter royalties would have on the shares of other beneficiaries. She understood that her duty as executrix was to carry out the wishes of the Decedent, and she felt that she had done that fairly.

The Decedent's attorney, Van Cleave, also testified at trial. He corroborated Wife's testimony that she was not involved in the drafting of the Decedent's Will. Van Cleave acknowledged that the inclusion of Clementyne's gift in the estate for estate tax purposes directly affected the share Perry and Jennifer would take under the Will. After researching the issue, Van Cleave concluded that Clementyne's share would be includable in the Decedent's estate. To reach this conclusion, Van Cleave looked to the language in the MDA between the Decedent and Clementyne's mother, which did not indicate that "full and adequate consideration" was given in exchange for the gift of royalties to Clementyne. Van Cleave also thought that the circumstances pointed to donative intent on the part of the Decedent. In his meeting with the Decedent in the course of drafting the Will, Van Cleave said, he made the Decedent aware of his opinion about the inclusion of Clementyne's interest. In fact, the Decedent asked Van Cleave to add a paragraph in his Will explaining that, although he wanted to be fair to each child, he was constrained by tax laws. Van Cleave noted that the Will states expressly that the Decedent realized that "the total songwriter royalties passing to each child may not be equal."

***8** It was years after the Will was signed that Wife hired Van Cleave to help administer the estate. In the interim, Van Cleave said, his opinion regarding the inclusion of Clementyne's interest did not change. Van Cleave asserted that the valuation of the songwriter royalties by accountant/business manager Vaden was valid, even though the supporting documentation was not attached to the tax return. Van Cleave said that the parties discussed obtaining another appraisal, but never reached an agreement on the issue.

The trial court heard testimony from accountant/business manager Vaden. Since 1974, he has represented over 115 entertainers, about 70% of whom were songwriters. In managing the Decedent's business affairs, Vaden paid bills, completed tax returns, and did investment work and anything else related to finances. Vaden described his relationship with the Decedent and Wife as both personal and professional. After the Decedent's death, Vaden continued to perform professional services for Wife, including helping her administer the Decedent's estate. Vaden claimed that he had no personal interest in any of the Decedent's companies, in the estate itself, or in the marital trust for which he was appointed co-trustee. He would charge an hourly rate for his services as trustee rather than payment based on a percentage of the assets of the trust. Vaden said that he owed no duty to Wife; his duty of loyalty was to the estate. He noted that Perry and Jennifer were well aware of his relationship with Wife and had not objected to his assisting her in administering the estate.

Vaden said that, on numerous occasions, he had performed royalty evaluations for artists, publishers, writers, and banks. Vaden characterized himself as the likely choice for helping with the administration of the Decedent's estate, because of his experience with the Decedent and the fact that he possessed the necessary data. Vaden asserted that he gave an independent, accurate, and objective opinion on the value of the Decedent's songwriter royalties. Vaden valued the Decedent's songwriter royalties by seeking to ascertain their fair market value, what a willing buyer would pay a willing seller for the royalties at the time of the Decedent's death. To determine the average annual value of the royalties, he used a measuring period of eight years because a shorter period would not have reflected their true value. He explained that using a shorter period would have placed too much emphasis on the few years immediately prior to the Decedent's death (2000, 2001, and 2002) when the music industry and the economy suffered an unusual economic downturn, exacerbated by the national events that occurred on September 11, 2001.

Once that annual value is obtained, Vaden explained, it is multiplied by a selected "multiple." The multiple is chosen on a subjective basis, taking into consideration a variety of factors such as the earnings history, catalog of songs, number of people who have recorded the songs, the number of old songs that are recorded more than once, and the competence of the administrator. He indicated that a higher multiple is used for royalties on songs that are expected to endure for a

long period of time: "If you put a multiple of 8 on it, you're saying that it's going to continue for eight years." Vaden described the Decedent as a "marquee writer," and said that because of the Decedent's stature, reputation, and prowess in the songwriting community, a higher than usual multiple was warranted. Vaden maintained that a higher multiple was required also because so many different artists had recorded the Decedent's songs. Vaden commented that he knew no songwriter other than the Decedent "who has written as many songs and had as many recorded," noting that "he's probably had 35 ... re-recordings of old songs" since his death. He opined, "[A]n 8 multiple seemed very reasonable in light of the songs that were going to continue to earn money."

***9** The "Music Row" attorney hired by Wife, Mike Milam, testified on Wife's behalf as an expert. Milam said that he had represented "creative people" (songwriters, artists, record producers, authors, etc.) in the entertainment industry for over thirty-five years, and that he had taught classes on copyright law and entertainment law at Vanderbilt Law School. Milam testified that Wife asked him whether the methodology used by Vaden in valuation of the royalties was reasonable and appropriate, and he determined that it was. Typically, he said, the average annual value is based in the value for the prior three to five years, but if that time period does not accurately represent the history of the catalog revenue stream, "one has to look at other factors to determine whether or what period of time would accurately reflect the revenue streams of the catalog in the future." Using an average of past revenue streams, Milam explained, was a method of predicting the future. Because the Decedent's death occurred in 2002, during a time in which a cyclical low in the music industry coincided with a general economic downturn, using only the three to five year period prior to the Decedent's death would not have resulted in a true representation of the value of the Decedent's royalties. In Milam's opinion, "the period [Vaden] selected was an appropriate period of time to use in the stability of the income from this catalog in the long term." Thus, Milam agreed with how Vaden calculated the average annual value of the Decedent's songwriter royalties.

Milam also agreed with Vaden's choice of a multiple for the average annual value. He corroborated Vaden's testimony that the selection of a multiple is subjective and must be "based on a number of factors," such as "[t]he market, the comparable sales, if there are any, the potential for new recordings from the catalog, the potential for other uses, the extent to which the revenue stream will hold up or is perceived to hold up in the long run," and other factors related to the expected longevity of the songs. Milam observed that the multiples used in the music industry at the time of the Decedent's death were between seven and ten, but conceded that smaller multiples were generally used when the royalties did not include administration rights.

Milam acknowledged that administration rights were not included in the Decedent's royalties, which would normally indicate that a smaller multiple should be used. In the case of the Decedent, however, the catalog of songs was "a legendary catalog, [and] it would have marquee value, an intangible value, in addition to just revenue streams. A person who owned it would own Harlan Howard's legacy." Milam characterized the Decedent as "the Irving Berlin of country music," who was "second only ... to Hank Williams, Sr., as he had an enduring legacy as a pure songwriter." He described the Decedent as "probably the most legendary songwriter that I know of in the country music genre." Many of the Decedent's songs, Milam said, were "standards" or "evergreens," old classics that would likely be re-recorded in the future. Moreover, the Decedent's song catalog continued to be marketed by the Wife, one of the owners of the royalty stream, and Sony Tree Publishing Company, Inc. Given these circumstances, Milam determined that it was appropriate for Vaden to use a multiple of eight in valuing the Decedent's songwriter royalties, despite the fact that administration rights were not included.

***10** The Respondents both testified at trial. Both Jennifer and Perry testified that they were not fully aware of Vaden's professional role in the Decedent's life. They were aware that Vaden would be helping Wife administer the Decedent's estate, and neither objected. They claimed, however, that they did not waive any conflicts of interest in Wife's administration of the estate. Perry commented that he had no desire to diminish Clementyne's interest under the Will, and acknowledged that he had no evidence that Wife was motivated by bad intentions in her administration of the Will.

To rebut Wife's position on the various issues, the Respondents submitted the testimony of three experts: Clyde Bright ("Bright"), a CPA and a certified valuation analyst; Gary Smith (by deposition) ("Smith"), a CPA and a music industry attorney; and Ed Pyle ("Pyle"), an attorney with a master's degree in taxation. All three of the Respondents' experts testified that appraisals for tax return assets must be performed by a disinterested party, and they asserted that Vaden was not a disinterested party in this case because of his personal and professional relationship with Wife. They

emphasized that, while a valuation normally would not impact distribution, this case was unique because the value placed on the songwriter royalties would directly affect the size of the interests of the beneficiaries under the Will, to the benefit of some and to the detriment of others.

Bright and Smith both testified about Vaden's valuation of the songwriter royalties. They agreed with Vaden's use of the "income approach," multiplying the average annual royalties by a chosen multiple. They asserted, however, that the measuring period for calculating the average annual value, as well as the multiple chosen by Vaden, were improper. Bright noted the downturn in the music business and in the economy generally in the years 2000 through 2002, and said that, in 2003, he had projected a continued decline for the music business. On the date of the Decedent's death, Smith said, the music industry was experiencing "one of the worst [economic] times" that he could remember. He observed that "record sales were down. There had been massive layoffs in the publishing industry ... [and] a lot of songwriters ... had lost their deals." Therefore, Smith claimed, at that time, very few persons were willing to purchase songwriter interests. In light of the economic situation at the time, Bright and Smith thought that Vaden should have used three to five years as the measuring period for determining the average annual value of the Decedent's royalties. Bright and Smith agreed with Vaden that the choice of multiple to be used was subjective. Citing negative factors such as the economic circumstances, the absence of administration rights, and the death of the songwriter (because no more songs would be added), they opined that the multiple of eight was too high for the Decedent's catalog. Instead, both felt that a multiple of between 5 to 6.5 would have been more appropriate.

***11** Tax attorney Pyle testified that, in his professional opinion, Clementyne's interest should not have been included as a part of the Decedent's taxable estate. He agreed with Van Cleave that a remainder interest such as Clementyne's gifted by a testator during his life is includable in his taxable estate at his death unless "fair and adequate consideration" was given in exchange for the remainder interest. In this case, Pyle believed that, while substantial support was provided for Clementyne in the MDA, the MDA did not grant Clementyne's mother, Sharon, all of the marital rights to which she was entitled. Specifically, Sharon was awarded only a portion of the marital property and was awarded no part of the Decedent's songwriter royalties. Furthermore, she was not awarded spousal support. Assuming that the songwriter royalties constituted marital property, Pyle concluded that the circumstances indicated that Sharon voluntarily surrendered her right to these marital entitlements as "full and fair consideration" for the Decedent's gift to Clementyne. Pyle observed that, had the remainder interest been granted to Sharon and not to Clementyne, there would be no question that the gift would not be includable in the estate. Consequently, Pyle opined, the gift to Clementyne should not have been included in the taxable estate.

On cross-examination, Pyle acknowledged that the MDA contained no language specifically indicating that the gift to Clementyne was granted in exchange for Sharon's surrender of marital rights. He acknowledged further that he was unfamiliar with the particular circumstances of the Decedent's divorce from Sharon or whether the songwriter royalties actually constituted marital property. He acknowledged that tax practitioners could reach different conclusions about whether or not the gift to Clementyne was includable in the Decedent's taxable estate, because the conclusion depended on the particular facts involved in the divorce case.

Wife submitted rebuttal testimony by Tim Whipporman ("Whipporman"), the senior executive at Warner Chapel Music, f/k/a Warner Pros Music, for twenty-nine years. Whipporman was familiar with the Decedent and aware of the depressed conditions in the music industry at the time of the Decedent's death in 2002. Nevertheless, Whipporman said, the Decedent was recognized as "one of the icons of the music industry." He said that, at the time of the Decedent's death, Warner Chapel Music would likely have paid at least a multiple of eight for Decedent's songwriter interests. At the conclusion of the trial, the trial court took the matter under advisement.

On February 11, 2008, the trial court entered an order granting Wife's petition and approving the distribution of the assets of the estate.[7] The trial court first determined that Vaden's valuation of the Decedent's songwriter royalties was fair and within the range of reasonableness. The trial court also found that Vaden had "no disqualifying conflicts" of interest in valuing the royalties, finding specifically that Vaden acted professionally and in good faith, and that there was "no indication that he acted other than for the benefit of the estate in making his valuation." Rejecting the Respondents' argument that Wife was required to prove the fairness of her actions by an elevated "clear and convincing" standard, the trial court determined that Wife's actions instead must withstand "careful scrutiny" by the court. Wife's inclusion of Clementyne's interest in the gross estate was found to

have been made in good faith and based upon competent and reasonable legal advice from Van Cleave. The trial court noted that there was no evidence indicating that Van Cleave's legal decision was motivated by self interest. Accordingly, the trial court granted Wife's petition and approved her proposed distribution of the estate's assets. From this order, the Respondents now appeal.

[7] Two judges recused themselves before the trial judge, Judge Walter C. Kurtz, was assigned to the case.

ISSUES ON APPEAL

***12** The Respondents raised the following issues on appeal:

1. Whether the trial court erred in applying the wrong burden of proof to the executrix's petition instead of requiring her to prove the legitimacy of her self-serving decisions by clear and convincing evidence?

2. Whether the trial court erred in approving the self-serving decisions of the executrix that directly benefitted her to the detriment of the beneficiaries?

3. Whether the trial court erred in approving the executrix's reliance upon a professional with a conflict of interest (Vaden) whose expert opinions resulted in her personal benefit to the detriment of the beneficiaries?

4. Whether the trial court erred in excusing an unwaived conflict of interest of a professional hired by the executrix (Vaden) based upon a credibility analysis?

The Respondents also challenge the trial court's approval of Wife's decision to include Clementyne's interest in the taxable estate, arguing that Wife acted in bad faith in refusing to amend the estate tax return to remove Clementyne's interest from the taxable estate.

ANALYSIS

Standard of Review

Because this case was tried without a jury, the trial court's findings of fact are reviewed *de novo* upon the record, accompanied by a presumption of correctness of the findings, unless the preponderance of the evidence is otherwise. *Wood v. Lowery,* 238 S.W.3d 747, 755 (Tenn.Ct.App.2007); Tenn. R.App. P. 13(d). Conclusions of law are reviewed *de novo* on the record, with no such presumption of correctness. *Wood,* 238 S.W.3d at 755 (citing *Union Carbide Corp. v. Huddleston,* 854 S.W.2d 87, 91 (Tenn.1993)). Whether an executrix acted in good faith in carrying out her duties in the administration of an estate is a question of fact. Thus, we will review the trial court's findings on such matters *de novo* upon the record, accompanied by a presumption of correctness, unless the preponderance of the evidence is otherwise. *Id.* (citing *Rogers v. Estate of Russell,* 50 S.W.3d 441, 445 (Tenn.Ct.App.2001)). The trial court's decisions based on its assessment of the credibility of the witnesses will be given great deference, because the trial court had the opportunity to observe the witnesses and their demeanor. *Id.* at 758. Whether the trial court applied the appropriate standard of review on a given fact is a question of law, which we review *de novo,* with no presumption of correctness. *See Walton v. Walton,* No. W2004–02474–COA–R3–CV, 2005 WL 1922565, at *4 (Tenn.Ct.App. Aug. 10, 2005).

Burden of Proof

The Respondents first argue that the trial court applied an erroneous burden of proof. The trial court found that Wife's actions were required to withstand "careful scrutiny" by the trial court. The Respondents contend that Wife should instead have been required to establish by "clear and convincing" evidence that her decisions were made in good faith. They reason that Wife, in her fiduciary capacity as executrix, has the power to make decisions that directly benefitted her to the detriment of other beneficiaries. Requiring her to show that her self-serving actions were fair and reasonable under an enhanced burden of proof would help prevent abuse of that power and would prevent the undermining of the conflict-of-interest rules governing professionals hired by fiduciaries. In response, Wife argues that the authorities cited by the Respondents in support of this assertion are inapplicable to the facts in this case. They contend that the cases on which the Respondents rely apply to a situation in which a lawyer helps a testator draft a will that benefits the lawyer, or where an attorney-in-fact receives an unlimited power of attorney from a principal and then uses it to benefit himself. Thus, Wife maintains, the Respondents have no authority support their argument, and cannot show that the trial court erred in applying a "careful scrutiny" standard to its review of Wife's actions.

***13** In order to determine the standard by which we should measure Wife's actions, we must first examine the nature of her duty as executrix. An executrix has a general fiduciary obligation to act in good faith and with diligence and prudence. She also has specific fiduciary obligations to the estate and to its beneficiaries to collect and distribute the assets of an estate within a reasonable time in accordance with the will:

An executor of an estate occupies a fiduciary position. *Mason v. Pearson,* 668 S.W.2d 656, 663 (Tenn.Ct.App.1984). As such, the executor must deal with the beneficiaries in utmost good faith and "exercise the same degree of diligence and caution that reasonably prudent business persons would employ in the management of their own affairs." *McFarlin v. McFarlin,* 785 S.W.2d 367, 369–70 (Tenn.Ct.App.1990) (citing *In re Estate of Inman,* 588 S.W.2d 763, 767 (Tenn.Ct.App.1979); *In re Estate of Cuneo,* 63 Tenn.App. 507, 475 S.W.2d 672, 676 (1971); 2 H. PHILLIPS & J. ROBINSON, PRITCHARD ON WILLS AND ADMINISTRATION OF ESTATES § 715 (4th ed.1984)).

> In addition to general fiduciary duties requiring an executor to act with diligence and prudence, an executor owes specific duties to the estate and the beneficiaries of the estate. Most relevant to the present matter is the executor's duty to "collect and disburse the assets as *expeditiously* as possible under the circumstances...." 2 JACK W. ROBINSON, SR. & JEFF MOBLEY, PRITCHARD ON WILLS AND ADMINISTRATION OF ESTATES § 737, at 333 (5th ed.1994) (hereinafter "Pritchard") (emphasis added). The executor owes a duty to marshal and collect the assets of an estate within a reasonable time; discharge his statutory duties and distribute the estate in a timely manner; and close his administration as quickly as possible. *Estate of Doyle v. Hunt,* 60 S.W.3d 838, 844–45 (Tenn.Ct.App.2001) (citing *McFarlin,* 785 S .W.2d at 370; *Love v. First Nat'l Bank,* 646 S.W.2d 163, 166 (Tenn .Ct.App.1982); *Campbell v. Miller,* 562 S.W.2d 827, 832 (Tenn.Ct.App.1977)). This duty arises because the law favors prompt administration of estates. *See Burris v. McConnell,* 187 Tenn. 489, 216 S.W.2d 10, 12 (1948). An executor also has a duty to communicate with beneficiaries and the court in a professional manner. *See Estate of Doyle,* 60 S.W.3d at 846 (noting an executor's failure to communicate).
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> Generally, courts are cautious not to hold executors liable upon slight grounds. *See* 2 PRITCHARD § 734, at 328. Rather, an executor who acts reasonably and in good faith while carrying out his duties will be shielded from liability if his judgment simply turned out to be wrong in light of subsequent events. *Id.* An executor who fails to competently, prudently, and reasonably discharge his duties as required by law, however, finds no protection in his lack of judgment as viewed in hindsight. *Id.* at 328–29; *see also McFarlin,* 785 S.W.2d at 372.

***14** *Ladd v. Marks (In re Estate of Ladd),* 247 S.W.3d 628, 637–38 (Tenn.Ct.App.2007). An executrix also owes "a duty of undivided loyalty to the estate and must deal with the beneficiaries in the utmost good faith." *In re Estate of Wakefield,* No. M1998–00921–COA–R3–CV, 2001 WL 1566117, at *10 (Tenn.Ct.App. Dec. 10, 2001); see also 2 JACK W. ROBINSON, SR., ET. AL, PRITCHARD ON WILLS AND ADMINISTRATION OF ESTATES § 739, at 315 (6th ed.2007) (hereinafter "PRITCHARD").

It is clear from these authorities that the executrix "is bound to demonstrate good faith" in carrying out her duties. PRITCHARD, *supra,* at § 739. The issue then becomes whether the executrix's demonstration of good faith must be made by clear and convincing evidence or by some less-stringent standard.

To support their assertion that the correct standard is clear and convincing evidence, the Respondents rely upon *In re Estate of Wakefield* and cases cited therein. *In re Wakefield* involved a claim that the testator's attorney exerted undue influence over the testator in the execution of his will. *In re Wakefield,* 2001 WL 1566117, at * 12–13. The court noted that the relationship between an attorney and his client "is highly fiduciary in its nature and of a very delicate, exacting, and confidential character, requiring a high degree of fidelity and good faith. It is purely a personal relation, involving the highest personal trust and confidence." *Id.* at * 13 (quoting *Federal Ins. Co. v. Arthur Anderson & Co .,* 816 S.W.2d 328, 330 (Tenn.1991)). The court then applied the well-settled rule that, where a confidential relationship is shown to exist, coupled with a transaction in which the dominant person receives a benefit from the other person, "a presumption of undue influence arises, that may be rebutted only by clear and convincing evidence." *Id.* at * 14 (quoting *Matlock v. Simpson,* 902 S.W.2d 384, 386 (Tenn.1995)). In the same way, the Respondents argue, when Wife, in her fiduciary capacity as executrix, makes a decision that benefits her to the detriment of the other beneficiaries, she should be required to show that her actions were fair and reasonable by clear and convincing evidence.

We find *In re Wakefield* inapplicable to the facts in this case. Unlike *In re Wakefield,* in the case at bar, there is no "presumption of undue influence" arising out of any "confidential relationship." To be sure, Wife has a fiduciary duty of good faith in administering the assets of the estate. She is not, however, involved in a confidential relationship with the Respondents. Her obligation is to carry out the testator's intent in good faith as that intent is set out in the Will. If the Will provides for a distribution to the person who is named as executrix, no presumption of bad faith arises simply because she distributes assets to herself in accordance with the provisions in the Will. Thus, we find *In re Wakefield* inapposite. The other authorities cited by the Respondents also involve allegations of undue influence, and are likewise inapplicable. Therefore, we find no authority to support the Respondents' claim that Wife should be required to prove the good faith of her actions under the elevated "clear and convincing" standard. *See Wood,* 238 S.W.3d at 755 (noting that questions related to the executor's good faith are questions of fact).

Valuation of the Songwriter Royalties

***15** The Respondents next argue that the trial court erred in approving Wife's proposed distribution of the assets because Vaden's valuation of the songwriter royalties was invalid and tainted by the conflict of interest arising from his relationship with Wife. They argue that their personal and professional relationship resulted in Vaden's unfair bias towards Wife and disqualified him from rendering an opinion on the value of the Decedent's songwriter royalties. Vaden's bias, the Respondents argue, is evidenced by his valuation, which was excessive and beyond the range of reasonableness. Had the valuation been lower, they note, their percentage of the royalties would have been closer to the 25% intended by the testator. Instead, the overvaluation decreased their share and caused a corresponding increase in Wife's share. Thus, the trial court should have held that Vaden was disqualified from valuing the songwriter royalties and should have rejected Wife's proposed distribution.

In its ruling, the trial court specifically rejected the Respondents' claim that a conflict of interest for either Wife or Vaden in valuing the songwriter royalties invalidated Wife's proposed distribution of the estate:

Here there is legitimate concern that Mr. Vaden's valuation might have been affected by his long and continuing business relationship with the Executrix. This thus causes the decisions at issue to be subjected to "careful scrutiny." The Court has been aided in this "scrutiny" by the adversarial process and the efforts of able counsel on both sides of the case.

Mr. Vaden owed the estate a duty of loyalty and objectivity. His relationships with the Decedent and also with the Executrix were known to the Respondents prior to his valuation of the royalties. Significantly, while the Respondents admit that they knew Mr. Vaden would be involved in the administration of the estate, neither one objected to his participation until after he had placed a value on the royalties. The Court has assessed Mr. Vaden's credibility and finds that he acted professionally and in good faith when he made his valuation. The Court finds no indication that he acted other than for the benefit of the estate.

The Respondents have cited to the Court the Rules of Professional Conduct governing the practice of accountancy in Tennessee. See Tenn. Comp. R. & Regs. 0020–3–.01 *et seq.* (accountancy regulations). They contend that Mr. Vaden violated those rules related to independence and conflicts of interest. The Court has read the cited provisions and finds no disqualifying prohibitions.

The Court recognizes its obligation to insure fairness as well as its responsibility to see that no decision by the Executrix or Mr. Vaden was affected by self-interest. In probate, however, the executor is often a beneficiary, and sometimes the accountant for a family or small business is called upon to assist with value determinations. A rule of law precluding this participation would ultimately make the administration of estates even more protracted and expensive and thus would be, on balance, contrary to the public interest.

***16** The Court must also give some regard to the Decedent's selection of the Executrix as his personal representative. A testator's choice is accorded great deference. *See* 31 Am.Jur.2d *Executors and Administrators* § 200 (2002). The old saying long-recognized by our courts is that "whom the testator will trust so will the law." 2 Jack W. Robinson et al., *Pritchard on Wills and Administration of Estates* § 544 (6th ed.2007). The Court notes that the Decedent's Will empowers the Executrix to "reasonably and in good faith [ ] value assets, and such valuation shall

> be conclusive on the parties." That provision must also be considered by the Court in assessing a totality of the circumstances presented by this case. Tennessee law has long allowed that the personal representative may well be a person who has an interest in the estate and may even be someone who has an interest "antagonistic to that of other beneficiaries." *See In re Wooten's Estate,* 114 Tenn. 289, 310, 85 S.W. 1105, 1111 (1905).
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> ... The Court believes that it has carefully scrutinized the potential conflicts of interest in this case, and, based upon the record before it, finds no disqualifying conflicts....

(Footnotes omitted). Thus, the trial court recognized that Vaden owed the estate a duty of loyalty and objectivity. It recognized that "Vaden's valuation might have been affected by his long and continuing business relationship with the Executrix," but it concluded from the evidence overall that he fulfilled his fiduciary responsibilities and carried out his duties for the benefit of the estate.

Clearly, Wife is not disqualified from acting as executrix simply because she is a beneficiary whose interest is "antagonistic to that of other beneficiaries." *See In re Wooten's Estate,* 85 S.W. 1105, 1111 (Tenn.1905). Indeed, it is common for the named executor of a will to also be a beneficiary under the will. Furthermore, it is not unusual for an executrix to retain professionals with whom she has worked in the past, particularly where the professionals are familiar with the Decedent and his business. We agree with the trial court's observation that "[a] rule of law precluding this participation would ultimately make the administration of estates even more protracted and expensive and thus would be, on balance, contrary to the public interest."

Moreover, the language in the Will supports the trial court's conclusion that Vaden was not disqualified from assisting Wife in her administration of the Will. Under the Will, Wife, as executrix, and Vaden, as co-trustee of the marital trust, are granted the authority to value the assets of the estate. Indeed, the Will provides specifically that "such valuation shall be conclusive upon all parties." The Will makes it clear that the Decedent took great care to make his testamentary gifts in such a way as to avoid paying estate taxes, acknowledging specifically that the provisions of the Will might not result in equal distributions to each child, and that the valuation of the songwriter royalties would affect the amount of each child's gift. The Respondents may wish that the Decedent had not made the avoidance of estate taxes a higher priority than maximizing the amount of the royalties devised to them. But that decision was the Decedent's to make. The job of the executrix, and ultimately of the court, is to implement the testator's wishes.

***17** With knowledge of these circumstances, the Decedent entrusted Wife with the power to value the assets and distribute them according to the specific provisions in the Will. The Decedent's appointment of Wife must be respected in this regard, because "[w]hom the testator will trust so will the law." PRITCHARD, *supra,* at § 544. Accordingly, we must respectfully reject the Respondents' argument that the relationship between Vaden and Wife, in and of itself, disqualifies Vaden and precludes Wife from using his valuation in administering the Will. [8]

8 The Respondents rely on rules setting forth the code of conduct in the accounting profession in arguing that Vaden has a conflict of interest that disqualifies him from valuing the songwriter royalties in this case. However, the rules of conduct upon which the Respondents appear to require that accountants, in the performance of professional services, do so with integrity and objectivity. The trial court's findings indicate that Vaden met this standard, and the evidence does not preponderate against this finding.

The Respondents further argue that Vaden's valuation of the songwriter royalties was unreasonable, because he used an eight-year period to calculate the average income from the royalties and a multiple of eight in arriving at a total value of the royalties. The resulting overvaluation, they claim, is further evidence that Vaden's decisions were based on his loyalty to Wife, not to the estate, and that he should be disqualified from placing a value on the songwriter royalties.

Respondents' experts, Bright and Smith, criticized Vaden's calculations, contending that the eight-year period used to calculate the average annual income inflated the average because it included the country music "heyday" of the mid–1990s, and that using a multiple of eight overestimated the longevity and viability of the Defendant's song catalog. As a result, the Respondents' share of the royalties was decreased to 6.9% each, rather than the 12.5%, each desired by the Decedent in the Will, and Wife's share was commensurately increased to 61.2%. [9] Respondents urge a valuation consistent with the testimony of Bright and Smith,

using a three to five year average and multiple of six, which would result in an appropriate total songwriter royalty value of $1,672,122 to $1,720,908, making the Respondents' combined share 25%, consistent with the Decedent's wishes.

9 By way of explanation, we note that Vaden valued the royalties at $2,842,996, and that Clementyne's share was $606,474, which was 25% of the pre–1988 songwriter royalties. The Respondents' share was 50% of the royalties ($1,421,498) less Clementyne's share, but not to exceed the amount of unified credit, which was $1 million at the time of the Decedent's death. Therefore, the value of Respondents' share was capped at $393,526, which is 13.8% of the total value of songwriter royalties, or 6.9% each. Thus, as we understand it, as the royalties are collected over time, Clementyne will receive 25% (of pre–1988 songs only), the respondents will each receive 6.9%, and the marital trust will receive the remainder, about 61.2%.

At trial, all of the experts agreed with the concept that the value of the songwriter royalties would be equal to what a willing buyer would pay a willing seller, and that an estimate of this amount would be calculated by taking an average of the royalty stream for a number of years and multiplying this average by an appropriate multiple. In making this analysis, all of the experts indicated, the appraiser must take into account a variety of subjective factors, including the stature of the artist, the number of songs in the catalog, the number of "evergreens" or "standards" in the catalog, the number of performers who have recorded the songs, the popularity of the songs, the market in the industry, comparable sales (if any), the state of the economy at the time, the predictions about the economy in the future, and the existence of administrative rights or the competence of the administrator. All of the experts agreed that the Decedent was an extraordinary talent, of the highest stature as a songwriter in the country music industry, having recorded numerous songs by a wide variety of artists.

***18** In addition to the expert testimony on the Respondents' behalf by Bright and Smith, the trial court heard testimony from Vaden, explaining his valuation, and from experts Milam and Whipporman opining that Vaden's valuation was reasonable. After hearing the articulate testimony by all of the experts and of Vaden, the trial court found that "the valuation of the royalties by Mr. Vaden is within the range of reasonableness and his analysis could readily support the value placed on this asset by the Executrix." The trial court specifically credited Vaden's testimony and found that "he acted professionally and in good faith when he made his valuation." It also commented that "the Respondents' failure to offer testimony in support of their own value considerably lessens the impact of their arguments." In the face of conflicting testimony, the trial court must weigh the evidence, assess the witnesses' credibility, and reach conclusions based on its observation of the witnesses and the content of their testimony. We give great weight to a trial court's credibility determinations, and "[t]he resolution of conflicting expert testimony is a factual issue that must be reserved for the trier of fact." *Martin v. Norfolk Southern Ry. Co.*, 271 S.W.3d 76, 85–86 (Tenn.2008). Here, the trial court specifically credited Vaden's testimony, as supported by Milam and Whipporman, finding that Vaden's valuation was reasonable and that he did not breach his duties of loyalty and objectivity. Giving due deference to the trial court's determination of the witnesses' credibility, we cannot conclude that the evidence preponderates against the trial court's findings.

The Respondents also argue that Wife acted in bad faith by refusing to obtain an independent appraisal of the songwriter royalties, claiming that Wife "clung diligently" to Vaden's biased valuation. They characterize this as a violation of her fiduciary duty. In light of the trial court's finding that Vaden's valuation was reasonable and our finding that the evidence does not preponderate against the trial court's finding, we conclude that this argument is without merit.

Inclusion of Clementyne's Interest in the Taxable Estate

Finally, the Respondents argue that, even if Vaden's valuation of the songwriter royalties is accepted, Wife could have achieved the Decedent's intent of granting them 25% of his songwriter royalties, while still avoiding estate taxes, by excluding Clementyne's interest in the songwriter royalties from the taxable estate. They concede that Wife did not breach her fiduciary duty by initially including Clementyne's interest in the taxable estate, because this was based on the professional opinion of attorney Van Cleave, a specialist in estate planning. Rather, they contend that Wife breached her fiduciary duty by refusing to amend the estate tax return to remove Clementyne's interest from the taxable estate after Wife was made aware that Van Cleave's analysis was suspect, if not erroneous, and that omitting Clementyne's interest from the estate would be legally appropriate.

***19** Given that the inclusion of Clementyne's royalty interest in the taxable estate was fairly debatable from a legal standpoint, the Respondents argue, Wife should have changed her position and amended the return to reflect the legal position that better achieved the Decedent's dual goals to have the Respondents receive a combined 25% of the songwriter royalties and avoid estate taxes. Instead, Wife adhered to the position that benefitted herself to the detriment of the Respondents. This decision, the Respondents argue, constituted a breach of Wife's fiduciary duty.

On this issue, the trial court observed that "the legal question [of whether Clementyne's interest should have been included] is a close one, and there are arguments supporting both sides." It then held that Wife acted reasonably and in good faith in deciding to follow Van Cleave's advice, and it found no indication that her decision was motivated by self interest. The trial court did not specifically address Wife's failure to amend the estate tax return.

The expert testimony heard by the trial court on this issue was conflicting. On behalf of the Respondents, Pyle testified that Clementyne's interest in the royalties was not includable in the taxable estate, because the MDA indicated that Clementyne's mother, Sharon, was not awarded all of the marital rights to which she was entitled. Thus, Pyle surmised that the gift to Clementyne was made as "full and fair consideration" in exchange for marital rights given up by Sharon.[10] Pyle believed that the IRS would not audit or question the estate tax return if Clementyne's interest were not included in the estate, because there would be no taxes due in any event because of the marital trust. Van Cleave, on the other hand, maintained that the gift to Clementyne was properly included in the taxable estate, because the MDA between Decedent and Sharon does not show that the gift was given by the Decedent in exchange for "full and fair consideration," in that Clementyne received substantial support in the MDA in addition to the songwriter royalties. Rather, Van Cleave asserted, the circumstances suggested that the Decedent had donative intent, rather than an intent to give Clementyne the royalty interest as a form of bargained-for consideration. Van Cleave conceded that the contrary position taken by Pyle was arguable, but he did not believe it was correct. Van Cleave stated, "[Y]ou can take a position on the tax return and hope you don't get audited.... I think the question here is, not what you can get away with, but what's the right answer."

10 Inreaching his conclusion, Pyle relied, in part, on *Leopold v. United States,* 510 F.2d 617 (9th Cir.1975). In that case, the court allowed the estate to deduct the amount of a gift to the decedent's daughter made in a property settlement agreement because the gift was the product of "extensive negotiations" and was "bargained for" for "fair consideration." *Leopold,* 510 F.2d at 622–24. In the absence of evidence regarding the divorce negotiations between the Decedent and Clementyne's mother, application of *Leopold* to the instant situation appears to beg the question whether the gift to Clementyne was for "full and fair consideration."

In this appeal, we are not called upon to resolve the legal issue of whether Clementyne's interest should be included as a part of the Decedent's taxable estate. Rather, we must determine whether the evidence preponderates against the trial court's finding that Wife acted in good faith, even after learning of Pyle's opinion that Clementyne's interest need not be included on these facts.

***20** We must conclude that, after having been presented with two different legal opinions, Wife was not obligated to adopt the opinion that benefitted the Respondents. Certainly Pyle articulated a reasonable basis upon which Wife might have been justified in amending the tax return to remove Clementyne's interest in the royalties from the taxable estate. However, both Pyle and Van Cleave rendered opinions based solely on a reading of the MDA; neither had knowledge of facts outside of the MDA upon which to base a decision. For example, neither Pyle nor Van Cleave could be certain as to whether the songwriter royalties would constitute marital property, or whether Sharon would have been entitled to alimony under the circumstances of the divorce. Van Cleave also articulated a reasonable basis for his position, and Wife was aware that when he drafted the Decedent's Will, he had informed the Decedent of his opinion that Clementyne's interest in the royalties would be includable in the taxable estate, to the detriment of the Respondents. Moreover, adhering to Van Cleave's position would protect Wife from liability; if the IRS later determined that the failure to include Clementyne's interest was erroneous, the estate could be subject to penalties; including Clementyne's interest would avoid that possibility. Under all of these circumstances, we cannot conclude that the evidence preponderates against the trial court's finding that Wife acted reasonably and in good faith in following the advice of Van Cleave to include Clementyne's interest in the taxable estate and in declining to amend the tax return when presented with a contrary legal opinion.

CONCLUSION

The decision of the trial court is affirmed. Costs on appeal are to be taxed to Appellants Harlan Perry Howard, Jr., and Jennifer Howard Carmella, and their surety, for which execution may issue, if necessary.

All Citations

Not Reported in S.W.3d, 2009 WL 2184538

Exhibit 2

about the William Morris revenues, I think that had actually come out on the 12th of November.

Everything that I understood then and has proven to be true that his worldwide popularity as demonstrated by being able to draw a crowd of 30,000 at a performance in Europe and his worldwide -- his worldwide prominence was indicative of the value of his right of publicity. It was not the metric that I was seeking to get right, but the number.

Q Okay. Gross known performance contracts in 2006. Do you agree with me that Mr. Brown has to be alive to generate money?

A Oh, absolutely not. I do not agree with you.

Q Bad question. Gross known performance contracts, do you agree with me that that presumes he's alive?

A Sort of. He -- his performance contracts were from when he was alive, but he is able to perform now and forever under modern systems of marketing.

Q Okay. 12 to 14 times royalties, where did you get that number from?

A A lot of different places. A lot of different places. And Mr. Dallas, Mr. Cox -- Dr. Cox, many other places.

Q Okay.

THE COURT: Let me ask you this question: Did you

times to 14 times. It is not providing any underlying support or detail with respect to how those multiples were derived. So as a valuation expert, reviewing the methodology, there's no way to verify tests or review the underlying assumptions that went into that applied multiple range.

Number two, that multiple range is indiscriminately applied to three different types of cash flow streams that the estate is generating. Number one -- and each of those cash flow streams might not necessarily be representative historically of the future cash flow that those royalty streams will generate.

Number one, that multiple range is applied to publishing royalties. It's applied to publishing royalties based on one year with a five year average. In my opinion, there's a potential issue there as the historical royalties generated by the publishing copyrights may not necessarily be reflective of future cash flow due to the risk of recapture rights being exercised by the heirs or termination rights as they've been described.

That multiple range is also applied to the master royalties.

Q That's a different segment of income?

A That's correct. So these are the master royalties that are effectively paid through by Polygram. Master

CERTIFICATE OF SERVICE

I hereby certify that on May 7 2020, I served the foregoing **Respondents' Reply in Support of Motion to Strike Initial Reply Brief and Alternative Request for Leave to File Surreply** pursuant to Supreme Court Order 2020-03-20-01 § g(3) by transmitting a copy of it to the AIS email address for Appellant's counsel, as listed below:

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