

IN THE SUPREME COURT OF MISSISSIPPI

No. 2006-CA-02006

**IN THE MATTER OF THE ESTATE OF
HUBERT EARL CARSON, DECEASED and
LELA IRMA CARSON, DECEASED
CARSON FAMILY TRUST and EDWIN DALE CARSON**

APPELLANT

VERSUS

HUBERT DOUGLAS CARSON

APPELLEE

APPEAL FROM

CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

FIRST JUDICIAL DISTRICT

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

Honorable Larry Buffington, Chancellor, *Presiding trial court Judge*

Carson Family Trust, *Appellant*

Martha G. Carson, *Attorney for Appellant*

Edwin Dale Carson, *Devisee and Heir at Law of Estates of
Hubert Earl Carson and Lela Irma Carson*

Gary Roger Carson, *Devisee and Heir at Law of Estates of
Hubert Earl Carson and Lela Irma Carson*

Hubert Douglas Carson, *Appellee, Devisee and Heir at Law of Estates of
Hubert Earl Carson and Lela Irma Carson*

Mary Frances Carson, *Appellee*

Jack Parsons and Tadd Parsons, *Attorneys for Appellee*

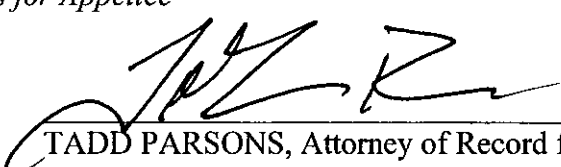

TADD PARSONS, Attorney of Record for
Appellee

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APPELLEES' BRIEF

ISSUES TO BE CONSIDERED BY THE COURT

1. WHETHER A PARTY THAT WAS NOT INVOLVED IN THE LOWER COURT'S LITIGATION MAY PERFECT AN APPEAL.
2. WHETHER OR NOT THE COURT REFUSES AN HEIR PERMISSION TO LITIGATE MATTERS ALLEGED TO HAVE OCCURRED MANY YEARS BEFORE THE DEATH OF THE DECEDENT WAS IMPROPER.
3. WHETHER OR NOT THE LOWER COURT ERRED BY NOT REQUIRING THE EXECUTOR TO FILE BOND WHEN THE COURT FOLLOWED THE INSTRUCTIONS IN THE WILL TO PERMIT THE EXECUTOR TO SERVE WITHOUT FILING BOND.
4. WHETHER OR NOT THE COURT ERRED IN DIRECTING HOW THE ASSETS OF THE ESTATE WOULD BE DISBURSED AND PAID WITHOUT FEES, COSTS AND OTHER EXPENSES AND A JUDGMENT APPROVING THE FINAL ACCOUNT.

STATEMENT OF FACTS

The decedents, Hubert Earl Carson and his wife, Lela Irma Carson, died on July 1, 2002 and September 15, 2002 respectively. At the time of their death they left a Last Will and Testament and were survived by three sons; Hubert Douglas Carson, Edwin Dale Carson and Gary Roger Carson. The decedents died leaving a Last Will and Testament leaving all of their assets to their three sons to share equally. The Will nominated Hubert Douglas Carson as Executor to serve without filing bond in this matter.

The decedents had, several years before their death, appointed their daughter-in-law, Mary Frances Carson (wife of Hubert Douglas Carson), as general power of attorney, and went to their bank, Hancock Bank, to place their small checking account in the name of the decedents and Mary Frances Carson as survivor. These funds passed automatically to Mary Frances Carson at their death however the funds that were not spent for the benefit of the decedents was paid into the estate by Mary Frances Carson despite being the sole owner of these funds at the death as the survivor of the Carsons.

Shortly after the death of the survivor of Mr. and Mrs. Carson, the other daughter-in-law, Martha G. Carson, attorney for the Appellant (who was not mentioned in the Will or blood relationship and not right to be appointed) was appointed as the Administratrix of the Estate and Letters of Administration were issued on the 18th day of November, 2002. The designated Executor, Hubert Douglas Carson, retained an attorney in Gulfport, Mississippi to probate the Last Will and Testament of the decedents and the attorney failed to file the appropriate Complaint to probate the Last Will and Testament and after several months the Executor picked up the file from this attorney and asked the attorney for the Estate, Jack Parsons, to proceed to probate the Last Will and Testament which was done.

A Motion to Remove Administratrix and Counterclaim and to admit the Last Will and Testament of Hubert Earl Carson and Lela Irma Carson to probate in common form was filed on March 17, 2003. When this was done the Appellant filed several requests, among them being a request for Findings of Fact and Conclusion of Law, list of exhibits, points of law and legal authorities was filed on March 24, 2003.

The Administratrix, Martha G. Carson, while she was Administratrix, proceeded to have Notice to Creditors published on the 10th, 17th and 24th days of March, 2003 but this was done only after the pleadings were filed by the named Executor to remove he and admit the Will to probate and appoint him Executor of the decedent's Last Will and Testament. The Administratrix proceeded to attempt to take depositions supposedly for partial Summary Judgment and/or declaratory relief and the Administratrix proceeded to file Motion to Compel, Answers to Interrogatories and Requests for Production of Documents and set deposition, Motion for Accounting and Inventory, Motion for Appointment of Administrator De Bonis Non, Motion to Show Cause for Contempt, Affirmative Defenses, Answer to Motion and Counterclaim of Hubert Douglas Carson, Notice of Deposition, Notice of Hearing to the Honorable D. Jeffrey White. Jeffrey White was contacted by Hubert Douglas Carson to probate the Last Will and Testament, and filed a Motion to Withdraw as attorney, which was filed on April 4, 2003. Martha G. Carson filed a Motion for Continuance on April 7, 2003 and then again on April 10, 2003 she filed for a Protective Order.

Martha G. Carson proceeded to file any number of Motions and on May 16, 2003 the Administrator was removed and Hubert Douglas Carson was appointed as Executor according to the terms and provisions of the Last Will and Testaments of the decedents, Mr. and Mrs. Carson. Among the provisions of this Judgment was a requirement Mr. Carson file an Inventory within

between themselves and the Executor, whether or not in a confidential relationship existed, and whatever the nature of the transfer, if any, may not legally be litigated in the estates proceedings but in separate proceedings. (Page 15, Lines 1-21) Counsel for the Movants is reminded that the Court expressed a consistent verbal ruling at the status conference on May 16, 2003, although no written Order was entered by this Court relative to particular matter at the May 16, 2003 hearing.” This was the Court’s continual ruling that any matter of breach of fiduciary relationship by Mrs. Mary Frances Carson who was not a party and the matter should be heard in the estate. The Court had previously given her time to take depositions and file any action she wanted to and she wholly failed to do so.

The Court proceeded to enter an Order on the 28th day of January 2005 closing the estates and directing certain expenses be paid including those of administration of the former Administrator and the proceedings that were taken pursuant to the Last Will and Testaments of the decedents. All three devisees had already amicably agreed to have the property divided into three portions, one for each of the children, and signed Deeds to effectuate this agreement. The Court stated its recognition of the transfer of interest of Gary Roger Carson to the irrevocable trust, Carson Family Trust. Martha G. Carson was appointed as Trustee. The Court found it was a valid transfer of any and all interest of Gary Roger Carson in the estate was transferred to him. This Judgment stated “The Court finds that the heirs at law of the decedents were established by a previous Order of this Court. The Court further notes that the heir at law and will beneficiary, Gary Roger Carson, executed an Irrevocable Trust, an original of which is filed herein, specifically, the Carson Family Trust, appointing Martha G. Carson, Trustee, which the Court accepts as a valid transfer of any and all interest which Gary Roger Carson had in his parents’ estates to the Carson Family Trust, specifically including all real and personal holdings of the

decedents. The trust, the Executor, Hubert Douglas Carson, and Edwin Dale Carson, entered into an Agreed Order to divide the real property held by the decedents during their lifetime". The same Order on Page B, provided among other things she had an additional sixty days to do whatever depositions and the estate may be reopened for proper distribution. There were various other pleadings filed and an Order was entered on February 14, 2005 which held the Court had jurisdiction over Mary Frances Carson and stated 1) "That this Court, although Judgment has been entered on the probate estate, finds that it continues subject matter and personal jurisdiction over the Defendant MARY FRANCES CARSON to determine if any further or undisclosed assets may be due the estate, in which event the Estate shall be reopened", and; 2) :That the Deposition of MARY FRANCES CARSON DUCES TECUM, should be, and hereby is, scheduled for 10:00 a.m. on the 17th day of March, 2005, continuing from day to day in the Law Office of Martha G. Carson at 162 Porter Avenue, Biloxi, Mississippi, and that at the Deposition MARY FRANCES CARSON shall appear with all documents related to the financial affairs and banking accounts of HUBERT EARL CARSON and/or LELA IRMA CARSON, and EARL CARSON and/or LELA IRMA CARSON, and questions additional to those normally permitted leading to discoverable material, may be posed regarding those documents in the possession of MARY FRANCES CARSON, as well as the documents from the Decedents' checking account at Hancock Bank from 1999 forward, the statutory seat upon which Counsel for the Movants is hereby authorized to open immediately." There have been no further pleadings of any type filed in the estate against Mary Frances Carson and/or the Executor, Hubert Douglas Carson. The deposition of Mary Frances Carson was taken as permitted by the Court and no additional pleadings were filed and this appeal was taken.

ARGUMENT

1. WHETHER A PARTY THAT WAS NOT INVOLVED IN THE LOWER COURT'S LITIGATION MAY PERFECT AN APPEAL.

The Carson Family Trust was not a party to the underlying litigation. “The general rule [is] that non-parties lack standing to appeal.” Federated Mut. Ins. Co. v. McNeal, 943 So.2d 658, - 662 (Miss 2006). The Court reviewed this as an issue of first impression. In Federated, the Court adopted the three part test established by the Fifth Circuit Court of Appeals in SEC v. Forex Asset Management LLC, 242 F.3d 325, 328-29 (5th Cir.2001), this test is “whether ‘the non-part[y] actually participated in the proceedings below, the equities weigh in favor of hearing the appeal, and the non-part[y] ha[s] a personal stake in the outcome.’” Id. at 663. The Carson Family Trust was not an heir-at-law or a devisee of the Estates of Hubert Earl Carson and Lela Irma Carson. The Carson Family Trust also failed to properly file a petition to intervene. When you look at the facts in light of the three prong test, the Carson Family Trust did not participate in the lower Court proceeding thus it fails the first prong of the *Forex* test. Also, there is no equitable justification for allowing the Carson Family Trust to appeal the lower Court’s ruling so the second prong fails. Further, since the Carson Family Trust was not an heir-at-law or a devisee of the wills of the decedents there is no personal stake in the outcome of the litigation for the Carson Family Trust in the probate of the estates of Hubert Earl Carson and Lela Irma Carson, thus the third prong of the *Forex* test fails. Given this proposition the Appeal should be dismissed.

2. WHETHER OR NOT THE COURT REFUSES AN HEIR PERMISSION TO LITIGATE MATTERS ALLEGED TO HAVE OCCURRED MANY YEARS BEFORE THE DEATH OF THE DECEDENT WAS IMPROPER.

The issue of any wrong doing pursuant to a fiduciary relationship between the Executor and/or his wife and the decedants is an issue for a separate suit. The parties to the suit would be entitled to a jury as the finders of fact and as stated in Cossitt v. Nationwide Mut. Ins. Co., if the case is “historically tried by a jury” the Chancery Court should not retain jurisdiction. Cossitt v. Nationwide Mut. Ins. Co., 551 So 2d 879, 883 (Miss 1989). These matters were not an issue for probate of the estate and the alleged frustration of the parties to accomplish discovery could have been done in a Circuit Court or County Court litigation in the appropriate Court in Harrison County or Stone County which is the residence of the Defendants. Whether or not to hear these matters relies solely on the discretion of Chancellor and his ruling should not be disturbed unless there is manifest error which there is not in the case at bar.

3. **WHETHER OR NOT THE LOWER COURT ERRED BY NOT REQUIRING THE EXECUTOR TO FILE BOND WHEN THE COURT FOLLOWED THE INSTRUCTIONS IN THE WILL TO PERMIT THE EXECUTOR TO SERVE WITHOUT FILING BOND.**

It is well established law in the State of Mississippi that the Mississippi Supreme Court will only review a Chancellor’s findings through the manifest error/substantial evidence rule. In Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005), this Court found, “This Court’s ‘review of a chancellor’s findings of fact is the manifest error/substantial evidence rule.’ This Court has held that a chancellor’s finding of fact may only be disturbed if the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied the wrong legal standard.” Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005) (citing Med. Devices, Inc., 624 So. 2d at 989 and Denson v. George, 642 So. 2d 909, 913 (Miss. 1994)). This issue of bond lies solely within the discretion of the Court. The Appellants argument that the executor and/or his wife had converted

assets of the estate, however to the contrary, the wife of the executor held a bank account jointly with the decedents and rather than cause the problems which have arisen here she paid these funds into the estate when there was no duty to do so. Given the proposition that jointly held funds on deposit are held as joint tenants with full rights of survivorship unless otherwise stated Mary Frances Carson was entitled to the funds in the account she held with the decedents, however she turned these accounts over to the estate for distribution under the will. Also, It was the intent of the Decedents that bond for the Executor be waived. In the language of the will the necessity for bond was waived. "[A]lthough a will speaks as of the time of the testator's death, the testator's intent is manifested as of the time the will is executed." Shriners Hospitals for Crippled Children v. Coltrane, 465 So.2d 1073, 1076 (Miss 1985).

4. WHETHER OR NOT THE COURT ERRED IN DIRECTING HOW THE ASSETS OF THE ESTATE WOULD BE DISBURSED AND PAID WITHOUT FEES, COSTS AND OTHER EXPENSES AND A JUDGMENT APPROVING THE FINAL ACCOUNT.

The Court may only disturb a Chancellor's findings if there is a clear or manifest error. This Court has held that a chancellor's finding of fact may only be disturbed if the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied the wrong legal standard." Biddix v. McConnell, 911 So. 2d 468 (Miss. 2005) (citing (Med. Devices, Inc., 624 So. 2d at 989 and Denson v. George, 642 So. 2d 909, 913 (Miss. 1994))). It is within the Chancellor's discretion to award fees as a result of the administration of an estate. The case of Estate of Woodfield v. Woodfield, as cited in the Appellants brief is irrelevant. The Woodfield case addresses the issue of attorney fees as sanctions pursuant to Rule 11(b). The fees ordered in this case were related to services rendered to the estate. Estate of Woodfield v. Woodfield, 2006 WL 3365370, (Miss App 2006).

CONCLUSION

The Appellee urges the Court to confirm the lower Court's decision for the following reasons, to-wit:

1. The Executor has done each and every act required of him under the laws of the State of Mississippi and the Court, more particularly as follows:
 - a) After appointment he had his sworn Inventory filed within the thirty day requirement.
 - b) The Executor proceeded to administer the estate and promptly filed the First Annual and Final Account after some very peculiar pleadings filed by the former Administratrix and now acting as individuals attorney attempted to question the actions of a third party not involved or party to the Estate that occurred without asserting any valid or legal basis therefore but purely speculation about actions prior to the deaths of the decedents.
 - c) The Court proceeded to have a hearing on the alleged exceptions taken to the First Annual and Final Account and found the accounting was proper in every respect and there was no legal basis for the challenges.
 - d) Before the First Annual and Final Account was approved by the Court the parties had entered into an amicable agreed division of the real property and a Judgment was entered approving said agreement and the Court directed the former Administratrix to go and divide the personal property into three separate groups and permit the parties to draw for them or make the choice of which group they desired. The former Administratrix wholly failed to do so,

however, pleadings were filed to question this and each party obviously concluded it was not worth litigating.

- e) All three of the devisees in the Will reached an agreement on the division and agreed to the Judgment dividing the property which thwarts any appeal.

The Appellee takes the position that all actions taken by the Court in the estate were proper and were sustained by the preponderance of evidence and followed the law in administration of the Estate.

The Appellee requests the Court to affirm the lower Court's Judgment and award attorney fees in the sum of \$5,000.00 against the Appellant.

Respectfully submitted:

THE ESTATE OF HUBERT EARL
CARSON AND LELA IRMA
CARSON, Deceased.

By: 

TADD PARSONS, Attorney for the
Estates

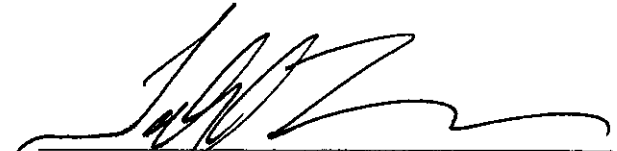
CERTIFICATE OF SERVICE

I, JACK PARSONS, do hereby certify that I have this day served by United States mail, first class postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief on:

Honorable Larry Buffington, Special Trial Judge, Post Office Box 924, Collins, MS 39428;

Martha G. Carson, Esquire, Carson Law Office, Post Office Box 141, Biloxi, MS 39533;

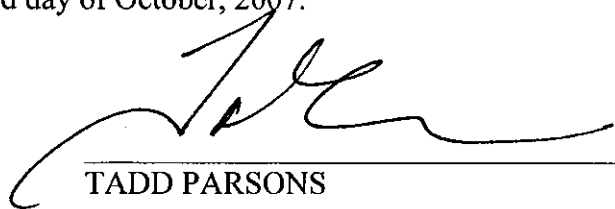
This the 3rd day of October, 2007.


TADD PARSONS

CERTIFICATE OF FILING PURSUANT TO
MISSISSIPPI RULE OF APPELLATE PROCEDURE RULE 25(a)

I, JACK PARSONS, do hereby certify that I have this day deposited into the United States Mail, a package containing the original and three (3) copies of the above and foregoing Appellee's Brief, which was addressed to Betty Sephton, Clerk, Supreme Court of Mississippi, Post Office Box 249, Jackson, Mississippi 39205-0249, and contained first class, prepaid postage.

SO CERTIFIED, on this the 3rd day of October, 2007.



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