2006-CA-02006-SCT

appellant's reply brief

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RESPONSE TO THE APPELLEE STATEMENT OF FACTS

The Appellee's statement of facts presents two misrepresentations to this honorable Court. First, there is the misrepresentation on Page 4 of Appellees' Brief, that the Carson Family Trust was executed prior to the decedents' deaths and second, that the Court held the Trust Could therefore not be a party to the estate proceedings below. (Page 4 of Appellees' Brief, inaccurately citing the Record) In fact, the trial court did not so hold, although the chancellor did rule that the assignment of the heir at law, Gary Carson, to the Carson Family Trust was ineffective relative to the vesting of the real property of the estate, the old homestead that the Executor had rented out for some indefinite time prior to the first death, being that of Hubert Earl Carson, on July 1, 2002, when title then became vested in Lela Irma Carson, as the survivor, until her death on September 15, 2002. Because the Court would not acknowledge the validity of the Assignment to the Carson Family Trust specifically related to real estate, Gary Carson, who was never served nor executed a waiver in the probate, was required to sign deeds in his individual capacity to the other heirs and the Trust dividing the approximately fifteen acres of the old place. If the Appellee now raises, for the first time on appeal, that Gary Carson, not the Carson Family Trust, was the

proper party, then the Executor was derelict in his duties in never having formally joined Gary Carson into the proceeding.

The Carson Family Trust was, in fact, executed on October 25, 2002, and it was specifically irrevocable, and specifically included the real property. The Trustee, acting on behalf of her beneficiaries, filed the initial probate proceedings while the Executor was admittedly concealing the Wills, of which he had apparently always had possession since execution. [TR 64, ll. 6-10] The filing of initial proceedings was defensive in nature, because the Trust and the other heir, Edwin Dale Carson, who has joined this appeal, were concerned about the continued rental of the old homestead to third parties by their eldest sibling and his wife, Douglas and Mary Frances Carson. The concern did not merely include the misdirection of rental proceeds, which were actually placed in a personal joint account belonging to Douglas and Mary Frances, not the joint account between Mary Frances and the decedents, but included real anxiety over potential personal liability if the third party were injured by some defect or dangerous condition of the property which the Executor prevented them from inspecting. In any event, there was no consent for Douglas and Mary Frances to rent the estate property, which Douglas admitted was necessary, experience gained in his expertise as a long time real estate agent.

RESPONSE TO APPELLEE'S ISSUES

ISSUE 1: The Appellant Carson Family Trust, Martha G. Carson, Trustee, has standing to perfect the instant appeal, as does Edwin Dale Carson, who has joined in the appeal on the part of the Trust, and Martha G. Carson, as former Administrator, additionally has standing to perfect the appeal, to address issues relating to the Executor's failure to marshal the assets of the estate, including the failure to disclose personal loans to owed to the decedents and improper and unaccounted rents from estate property deposited in the Executor's joint checking account with Mary Frances Carson during her administration.

It is the position of the Carson Family Trust, Martha G. Carson, Trustee, that it is irrelevant when the Trust and Assignment of the interest in the estate was executed, and that the Trust, not Gary R. Carson, is the real party in interest in prosecuting this appeal with the other heir, Edwin Dale Carson. In Bayless v. Alexander, 245 So.2d 17, at Page 19, the Supreme Court of Mississippi relied on the rule set out in 3 American Law of Property, Section 14.12 at 601 (1952), in holding that assignees, regardless of when assignment was made, had interest in real property in litigation. That the assignment to the Carson Family trust was made after the deaths of the decedents had no moment in the position of the Trust in pursuing the appeal or filing the initial probate.

ISSUE 2: The Court improvidently denied jurisdiction, as a matter of law, to consider the confidential nature of intervivos transfers by the decedents to the Executor, and that denial of jurisdiction was used to prevent all inquiry into the Executor's own accounting including established and admitted ongoing conflicts: refusal to disclose personal debts owed to the decedents, and misapplications of Estate funds to his personal accounts during the pendency of the estate proceedings.

On page 8 of Appellee's Brief, the Appellee argues that this Court's standard of review over the chancellor's denial of jurisdiction related to "[t]he issue of any wrong doing pursuant to a fiduciary relationship between the Executor/and or his wife and the decedents" to be one of "manifest error." The Appellant urges this Court to apply the standard of review normally applied to legal decisions by trial courts—de novo review. The recent decision In Re Conservatorship of Davis, 2007 So.2d (2005-CA-01710-COA), decided April 17, 2007, the Court of Appeals reviewed the chancellor making the identical decision refusing to conduct a hearing on allegations of malfeasance by a fiduciary, and the appellate court reversed and remanded, citing Jackson v. Jackson, 732 So.2d 916, 920 (Miss. 1999) and Bodman v. Bodman. 674 So.2d 1245, 1248 (Miss. 1996). In Davis, the issue of standing was also held to be a legal issue under Brown

v. Miss. Dep't of Human Servs., 806 So.2d 1004, 1005 (Miss. 2000).

ISSUE 3: The trial court improvidently denied even a hearing to determine if a bond was appropriate before the executor's appointment, despite well founded and documented allegations of personal conflict with the estate.

Indeed, upon hearing an allegation that Douglas Carson remembered borrowing money from the decedents, though he didn't recall how much, [TR 58, l. 23] or that Douglas Carson was deliberately concealing the wills [TR 64, ll. 6-10], the chancellor below, instead of issuing a protective order to a fiduciary and his wife, should have used the procedure set out in MCA Section 91-7-285 (Revised 204):

> Whenever it shall appear of record, or otherwise, that any executor, administrator, guardian, receiver, or fiduciary appointed by any chancery court is derelict in the performance of any duty required of him by law or the orders of the court or chancellor, or is liable to be punished or removed for any cause prescribed by law, then such court or the chancellor in vacation may, on the application of any interested party or of his or its own motion, order a citation for such executor, administrator, guardian, receiver, or other fiduciary, as the case may be, to be issued by the clerk of the court in which such cause or matter is pending, returnable forthwith or at such time and place, in term or vacation, as may be specified in such order, to appear and show cause why he should not be removed or punished for contempt, either or both, as may be directed in such order. . . .

Instead, the chancellor below denied the other heirs jurisdiction to hear their claims of malfeasance and wrapped the Executor and his wife in a protective order—even as to their own accounting.

The court below refused a hearing on the Executor's bond on the legal basis that bond was waived in the will, and he had no authority to even conduct a hearing, a legal conclusion clearly contrary to the statute.

ISSUE 4: The trial Court improvidently directed the closing of the estate on an unexamined and improper accounting, with all the liquid assets not in the possession of the Executor's Wife directed to the Executor's counsel as fee, the personal items left in the hands of the Executor, and no payment for expenses of publication for Creditors or Unknown Heirs, or filing fees to the former Administrator who remains out of pocket for those expenses.

In the case of In re Last Will Lynn, 2004 So.2d (2001-CA-00922-COA), decided July 20, 2004, the Court of Appeals cited Estate of Collins: "The decision whether to award attorney's and executrix's fees is a matter addressed to the discretion of the chancery court. In the absence of an abuse of that discretion, this Court will not disturb the chancellor's rulings." Attorney's fees are the responsibility of the executor and they *may* be paid out of the estate. Scott v. Hollingsworth,

487 So.2d 811, 813 (Miss. 1986), cited in Lynn, italics in original.

While attorney's fees are allowable by the chancellor and normally are within the judge's discretion pursuant to MCA Sections 91-7-281 and 91-7-299, attorney's fees are not allowable when the services were rendered for the sole benefit of an individual interested in the estate, as against the other interested. Clarkdale Hospital v. Wallace, 193 So. 627 (Miss. 1941), cited in the decision of In re Estate of Philyaw, 514 So.2d 1232 (Miss. 1987).

In the instant case, the attorney for the Executor, Mr. Parsons, collected the entire liquid assets of the estate, in priority of expenses for publication paid by the Trust, and performed no services for the estate. Mr. Parsons acted solely on behalf of the Executor, Douglas Carson, and from the same firm, Tad Parsons represented Douglas' wife, to jointly prevent assets from being returned to the estate—assets acquired through their confidential relationship with the decedent Hubert Earl Carson and his incompetent wife, Lela, as well as assets that were taken into their joint possession after the decedents' deaths (rental proceeds of estate property, sale of Hubert's truck, more than six thousand dollars remaining in the joint account with Mary Frances Carson and her in-laws.) Further, the function of Mr. Parsons was to promote and object when any

question was posed to the Executor–even as to his own accounting. Relying on In Re Chambers, 458 So.2d 691 (Miss. 1984), the Lynn decision articulates the same basis of conflict as appeared in the instant case:

> In defending this suit and attempting to prevent the subject property from being returned to the corpus of the estate, [the executor] obviously had a conflict of interest with the estate. As we have held in [Estate of] Ratliff v. Ratliff, 395 So.2d 956 (Miss. 1981), an executor may not take inconsistent positions which would be detrimental to the heirs on the one hand and beneficial to himself on the other. When an executor finds his own interest in conflict with those of the estate, the sanctity of the fiduciary relationship is invaded and he should immediately resign as executor.

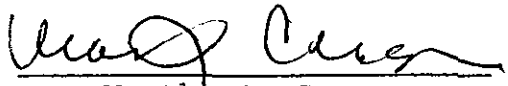
It is the position of the Carson Family Trust and Edwin Dale Carson that neither should they be held accountable for the actions of the attorney who held the executor's interest and that of his wife superior to the other heirs. The chancellor erred in awarding attorney's fees to Jack Parsons and his son because they represented the interests of the executor and his wife at the expense of the other heirs. Indeed, Mr. Parsons, with his son and law partner, entered into the same sort of conflicts in which the executor himself was caught and which conflict formed the basis for the other heirs' original motions to remove the Executor and appoint an Administrator de bonis non. The Parsons' firms was conflicted in representing both Douglas Carson and Mary Francis Carson (who received the balance of the decedents checking account, access to which she

purported to possess only for their benefit) in seeking protective orders for them both—becoming an enabler of the executor's continuing breaches of fiduciary duty. The erroneous payment of estate funds to the Parsons' firm should be restored to the estate to provide for a proper administration of the estate under a new administrator, who has none of the conflicts of his predecessor.

CONCLUSION

For all the reasons and arguments made above, the Appellant seeks this cause to be remanded for a new accounting and inventory, with complete and open disclosure by an Administrator de bonis non, with the Will attached, as fiduciary to the decedent's financial matters that belong in the estate, and for the return of the liquid assets misspent in attorney's fees. In the event that the Respondent has no security for the funds he distributed without authority, or for the funds that he diverted into personal accounts, that the Respondent be held personally liable thereon, and for other general relief. The Appellants pray that the demand for Five Thousand Dollars ($5,000) demanded by Mr. Parsons on page 11 of the Appellee's Brief be stricken as baseless and inflammatory.

RESPECTFULLY SUBMITTED, this the 16th day of November, 2007.



Martha G. Carson

CERTIFICATE OF SERVICE

I, Martha G. Carson, do hereby certify that I have this day deposited into the United States Mail, first class, prepaid postage, a package containing the original and three (3) copies of the above and foregoing Appellant's Reply Brief, to Betty Sephton, Clerk, Supreme Court of Mississippi, P. O. Box 249, Jackson, MS 39205-0249, and to:

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

Jack Parsons, Esquire, Parsons Law Firm, Post Office Drawer 6, Wiggins, Mississippi 39577;

Tadd Parsons, Esquire, Parsons Law Firm, Post Office Drawer 6, Wiggins, Mississippi 39577;

This the 16th day of November, 2007.

Martha G. Carson

MARTHA G. CARSON
Attorney at Law
MSB No. [redacted]
Carson Law Office
162 Porter Avenue
P. O. Box 141
Biloxi, MS 39533-0141
Telephone: (228) 374-8072
Facsimile: (228) 374-8073