IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-00830

ISAAC CATHEY, et al	DEFENDANTS/APPELLANTS
VS.	
MARGAREE BARRINGER, et al	COMPLAINANT/APPELLEE
AND	
MCPHAIL & ASSOCIATES, INC.	COMPLAINANT/APPELLEE

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLEE MCPHAIL & ASSOCIATES, INC.

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CERTIFICATE OF INTERESTED PARTIES

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

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STATEMENT OF FACTS

The matter before the Court concerns approximately 156 acres in Desoto County, Mississippi off Grass Pond Road. About half of the property is in a flood zone. R p.15. It is in a swampy area. R p. 22. The land is owned by approximately 300 people, some of whom have very small interests. R p. 62. The land had been for sale for years. R p. 20.. In the 1990's, the land was managed by one of the Cathey heirs. The heirs had conflicts concerning the management. R p. 41. With approximately 300 people having an ownership interest, there was difficulty of managing such acreage. There were accusations relating to the receiving of income from the property.

In 1999, several of the heirs employed Rebecca Thompson, an attorney in Hernando, to start proceedings for the confirming of title and sale of the property. R p. 57. The filing of this case was very complicated because some of the families did not get along well together.

On May 15, 2001, the Complaint to confirm title and partition of land was filed. Because of the large number of people and the lack of knowledge of all the family relationships, it was difficult to get all parties in Court. The filing began the process of getting the heirs in Court so that a confirmation could be made of the title to the property and the property could be sold. During this process, various heirs passed away and the list of heirs continued to increase. The final total of heirs to the property is approximately 300. R p. 62.

An appraisal was done on the property. The appraisal was requested by Joel Walker, who at the time represented Lenwood Cathey's interests. R p. 30. The appraisal was completed by a realtor who had wide experience with land values in this area and eminent domain proceedings. R p. 33.

The Chancery Court has held many hearings on this matter in order to make sure that all of the heirs were property notified. On March 8, 2006, a final Amended Petition was filed. R v. II p. 157. The Amended Petition included all of the heirs. They were properly notified and the matter was set for hearing on March 6, 2007. The Amended Petition set forth that a Contract for sale of the property had been executed with McPhail and Associates and further, that an appraisal had been made of the property. All parties had proper notice of the Amended Petition.

The Court heard the evidence and testimony presented by the Complainants, who sought a sale of the property and the Court heard testimony from the attorney who had spent years in trying to get all the heirs before the Court. The Court considered the monies that had been expended and the costs due from the extended efforts to get the matter ready for trial. R p.43.

A hearing was held on March 6, 2007 at which time the Court heard witnesses as to the Contract to Purchase the property, the nature of the suitability of the property for division in kind, the appraisal on the property, the costs already incurred and, and the number of heirs for division of the proceeds. After hearing and considering all these facts, the Court approved the Contract of Purchase by

McPhail & Associates. The Court set forth in detail the reasons for ordering the sale of the property.

STANDARD OF REVIEW

The standard of review for property partition cases is whether the Appellate Court finds manifest error in the decision of the Chancellor, only then will the Appellate Court reverse the findings of the Chancellor. In Re Last Will and Testament of Lynn 1878 So (2d) 1052 (Miss Ct. App. 2004). The Appellate Court will not disturb the findings of the Chancellor unless the Chancellor was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. Miles v. Miles 949 So (2d) 774 (Miss Ct. App. 2006)

STATEMENT OF THE CASE

This matter involves 156 acres, more or less, in a swampy area of Desoto County, Mississippi. There are approximately 300 heirs, which are co-tenants of the property. The initial Complaint for confirming title and partition was filed in May of 2001. It took years to get all the parties before the Court for a final adjudication. The Court patiently worked on the matter, aided by a diligent attorney who went the extra mile to get all the parties in Court. Finally, an Amended Petition was filed in 2006 and a hearing on he merits was held March 8, 2007. The Court fully considered all aspects of the case including an appraisal and Contract. In the final analysis, the Court ordered a partition by sale for the best

interests of the 300 co-tenants.

SUMMARY OF THE ARGUMENT

The property in question is not capable of being partited in kind among 300 co-tenants. The irregular shape of the property, the swamp and flood zone nature, the uneven frontage, and other factors prevent partition in kind. In addition, because of the costs and large number of co-tenants, it is in the best interest of all parties that there be a partition by sale.

The Court was presented with an appraisal and the contract of a willing purchaser. After more than complete notice and a hearing on the merits, the Court approved a sale for the best interests of all the parties and set forth the procedure for completion of the matter.

ARGUMENT

THE CHANCELLOR SHOULD BE AFFIRMED IN ORDERING A SALE OF THE PROPERTY

The Chancellor was correct in ordering a sale of the property. It literally took years to get all of the heirs in Court. As time progressed, the heirs continued to multiply and the family relationships became more complicated. The Court heard testimony from qualified real estate people concerning the division of the property. The Court received an appraisal on the property. After conducting the hearing, at which all parties had more than adequate notice and had opportunity to appear,

the Court set forth its findings, to-wit:

> "The property consists of a rectangular tract with road frontage across the east and partial south portions of the property. While the east one-half of the property is hilly, the western portion is located partially within a flood zone. The extreme northwest corner of the property is wooded with mature timber.
>
> Based upon the evidence presented in open court, the Court finds that this property is not subject to partition in kind for the following reasons: First of all, the condition of the property. Some of the property lies in swampy areas, some in wood, some in hilly terrain, and of course, again, some located in a flood zone or in areas which are prone to flooding.
>
> The property has tremendous lack of access for the number of record owners which would need to be satisfied. It has limited road frontage again across the east, and only partial road frontage on the south portion. The number of individual interests which must be reflected and protected, some are extremely minute, but this again creates an incredible problem in partiting the property in kind.
>
> And lastly, the expense of the partition thus far is in excess of $20,000.00 which must be paid with no liquid assets by anyone to pay other than those that have offered to pay their proportionate share. There are a number of percentages which

> have been defaulted and which would be unable to pay or unable to be collected except by the sale of the property for the raising of revenue."

The propriety of a partition sale or partition in kind is determined on a case-by-case basis. Fuller v. Chimento 824 So (2d) 599 (2002). To justify a partition by sale, the party seeking the sale must bring the case squarely within Miss Code Ann Sec 11-21-11 (Supp. 2001):

> "If, upon hearing, the court be of the opinion that a sale of the lands, or any part thereof, will better promote the interest of all parties than a partition in kind, or if the court be satisfied that an equal division cannot be made, it shall order a sale of the lands, or such part thereof as may be deemed proper, and a division of the proceeds among the co-tenants according to their respective interests."

The Supreme Court goes on to set forth that the conjunction "or" in this statutory scheme provides a two-prong inquiry into the propriety of a partition sale. A partition sale can be had if it will (1) better promote the interest of all parties than a partition in kind or (2) if the Court be satisfied that an equal division of land cannot be made. Fuller v. Chimento 824 So (2d) at 602.

In our case, the Court received affirmative evidence on each of these two prongs. The Court set forth clearly that because of the shape, swampy nature, road frontage, open areas v. wood v. hilly terrain, record owners, and lack of access, the property was not capable of division.

Yet, the Court went further and found on the second prong, that because of the expense already incurred, and to be incurred, and because of the record number of heirs, it was in the best interest of all parties that a sale be conducted. Through a sale, each of the parties could receive his or her interest and the bickering for years could be stopped.

It is significant that Lenwood Cathey never appeared in person at any of the hearings of the Court. It was represented by Counsel that he missed the final hearing because of a plane connection. But, he never appeared at any of the previous hearings either. The only proof presented was the proof of the complainants. In addition, the attorney who had worked on the matter for years testified. All parties had notice. It literally took years to get notice to all parties, but at the final hearing conducted by the Court, all parties had notice and the only parties who appeared for testimony were the witnesses of the complainants.

THE CHANCELLOR SHOULD BE AFFIRMED IN ORDERING THE PROPERTY BE SOLD TO MCPHAIL AND ASSOCIATES

The contract of McPhail and Associates was clearly set forth in the Amended Complaint which was set for trial on March 6, 2007. All parties had process for the hearing. The statement by Counsel that the contract was void was simply not true. At one time, the Contract was set for approval on a petition which technically did not include all the heirs. At that time, the Court did not approve the contract, but set the matter for further hearings. Counsel Opposite sent an Order to the

Chancellor which had not been approved by other Counsel. This was later corrected by the Court.

The Amended Petition which was set for trial on March 6, 2007 had process on all parties. It took several years to get all parties in Court, but they were in Court with proper process for this hearing. The Chancellor certainly had the right and authority to consider the contract for the best interest of all parties.

Section 11-21-9 Miss Code Ann, 1972, as amended gives the Court the right to adjust all equities between the claims of co-tenants in a partition proceeding, to-wit:

> **§ 11-21-9.** Controverted title and all equities disposed of. If the title of the plaintiffs seeking partition or sale of land for a division shall be controverted, it shall not be necessary for the Court to dismiss the complaint, but the question of title shall be tried and determined in the suit and the court shall have power to determine all questions of title, and to remove all clouds upon the title, if any, of the lands whereof partition is sought and to apportion encumbrances, if partition be made of land encumbered and it be deemed proper to do so. The court may adjust the equities between and determine all claims of the several co-tenants, as well as the equities and claims of encumbrancers.

As set forth in Daughtry v. Daughtry, 474 So (2d) at 603 (1985), the Chancellor has the discretion to consider the pleadings at the proper time after all parties have been made parties to the suit.

In the case before the Court, only the Complainants came forward with proof in this case. Lenwood Cathey never appeared at any hearing to give any evidence to the Court. The Court had this cause set numerous times in order to make sure that all parties were before the Court and had proper notice. There was disagreement among the Catheys. None of the Catheys appeared. The Court had the opportunity to consider all the facts for the best interest of all parties. If Lenwood Cathey had truly been interested in purchasing the property, he would have appeared at this hearing or some other hearing of the Court. He never appeared. His actions were highly suspect. The Court had had this matter before it since 2001. Lenwood Cathey knew about the matters before 2001.

The Court set forth the fine job that the attorney, Rebecca Thompson, did in managing to get all the heirs before the Court. R p. 6. With approximately 300 co-tenants, the Court was faced with the impossibility of partiting the property. The large number of co-tenants is a material factor in ordering a sale rather than a partition in kind. Dunn v. BL Development Corporation, 747 So (2d) 284 (MS. Ct. App. 1999)

The Chancellor was fully within his discretion in approving the contract which had been pled in the Amended Complaint. All parties were before the Court and the Chancellor recognized the fact that the Complainants were ready to go forward with the sale which was in the best interest of all parties. McPhail & Associates were present at all hearings and were prepared to complete the sale.

The Chancellor had the opportunity to observe the witnesses who appeared at the hearings and in particular the witnesses who approved and gave evidence at the trial on the merits. Six years was long enough. The Chancellor was satisfied that it was in the best interest of all parties. The fact that one party out of 300 does not want a sale does not prevent the Court from making a decision that is in the best interest of all parties. There was no manifest error in the decision of the Chancellor. The decision was in the best interest of all parties and the Order of the Chancellor should be affirmed.

CONCLUSION AND PRAYER

The trial court correctly granted the sale of the property to McPhail & Associates, Inc.

WHEREFORE PREMISES CONSIDERED, the Appellee respectfully requests that the Court deny the appeal and affirm the action of the Trial Court and assess all costs to the Appellant and the Appellee prays for such other relief as the Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, M. Lee Graves, Attorney at Law, Counsel for Appellee, McPhail & Associates, Inc., do hereby certify that I have this day served a copy of the Appellee's Brief, mailed by USPS, to the following, to-wit:

This the 22nd day of January, 2008.

Honorable Judge Percy L. Lynchard, Jr.
P. O. Box 340
Hernando, MS 38632

Honorable Rebecca S. Thompson
P. O. Box 346
Hernando, MS 38632

Honorable Frederick Clark
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CERTIFICATE OF FILING

I, M. Lee Graves, Attorney for Appellee, McPhail & Associates, Inc., certify that I have this day served the Office of the Clerk, Supreme Court of Mississippi, by Federal Express, and Counsel for the Appellants, via USPS mail, postage pre-paid, a copy of the foregoing Reply Brief of the Appellee, McPhail & Associates, Inc.

This the 22nd day of January, 2008.

M. Lee Graves

M. LEE GRAVES (MBS[redacted]