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

BRIEF OF APPELLANTS
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IN THE SUPREME COURT OF MISSISSIPPI

ISAAC CATHEY, et. al. APPELLANTS

VS. 2007-CA-00830

MARGAREE BARRINGER, et. al. APPELLEES

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 the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

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So certified this the 7th day of December, 2007.

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STATE STATUTES

STATEMENT OF ISSUES

I. WHETHER THE CHANCELLOR ERRED IN RULING THAT THE ENTIRE PROPERTY SHOULD BE PARTITIONED BY SALE WHERE 124 ACRES OF THE 156 ACRES TRACK WAS OWNED BY A SMALL NUMBER OF HEIRS AND ONE CORPORATION AND THERE WAS NO SHOWING THAT THE LAND COULD NOT BE PARTITIONED IN KIND.

II. WHETHER THE CHANCELLOR ERRED IN ORDERING A PARTITION BY SALE AND APPROVING AN OFFER OF A CONTRACT TO PURCHASE THE PROPERTY WHERE THE HEIRS TO THE ESTATE NEVER ACCEPTED THE OFFER AND NEVER SIGNED A CONTRACT AND ORDERED THAT THE PROPERTY BE SOLD TO THE COTENANT MAKING THE OFFER.

STATEMENT OF THE CASE

This case started in May 2001 when Margaree Barringer, Deloris Ghant, Magelene Archie and LaFrance Douglass filed suit in the Chancery Court of Desoto County, seeking to Quiet and Confirm Title and For Partition of Land that had been owned by their grandfather, University Cathey and their step grandmother Mary Etta Cathey. Various motions were filed from May 2001 until August 22, 2005. However, all motions and orders entered by the Court during that time are void because the initial compliant did not list all of the heirs known to complainants and did not affirmatively allege that a diligent search and inquiry had been made for all heirs of University Cathey. Further, many of the known heirs were not personally served and the publication of process was also defective. In March 2006, Complainants filed an Amended Complaint and obtained proper service on the heirs of University Cathey. The complaint requested that the property be partitioned by sale and that the property be ordered sold to McPhail and Associates under a purported Contract.

Some of the Defendants filed an Answer alleging that complainants were not entitled to a partition by sale but that the property should by partitioned in kind. The Defendants further denied that the purported Contract of McPhail and Associates should be approved by the Court.

After hearing the trail Court entered an order requiring that the entire track of land be sold to McPhail and Associates under his purported contract. Defendants disagree.

STATEMENT OF FACTS

In September 1969, University Cathey died intestate, leaving as his sole heirs his wife Mary Etta Cathey and his two children Bernice Cathey and Isaac Cathey. University Cathey owned an 80 acre tract of land that was solely in his name and owned another 80 acre tract that was owned by he and his wife as tenants in common. Together they owned 160 acres more or less. When Mary Etta died intestate she left as her sole heirs her brothers and sisters.

In 2001, Margaree Barringer, Deloris Ghant, Magelene Archie and LaFrance Douglass the surviving children of Bernice Cathey filed a Complaint to Quiet and Confirm Title and for Partition of Land in the Chancery Court of Desoto County. In their Complaint they named themselves and about twenty other people as the heirs at law of University Cathey. However, there were actually many more heirs, many of whom were known to them at the time they filed their Complaint.

On January 29, 2002 the Court entered an order Quieting and Confirming Title and Partitioning of Land in the parties named in the Complaint.

On October 24, 2003 a Motion to Approve Sale of Real Property was filed. As part of that Motion, Complainants requested that an offer to purchase the property from McPhail and Associates be accepted. On November 18, 2003 an Order Approving Sale of Real Property was entered approving the purchase of the property by McPhail and Associated for $235,000.00.

On November 9, 2004 a Motion For Partition of Land By Sale and To Appoint Chancery Clerk as Master to make sale was filed.

On November 29, 2004 an Order For Partition of Land By Sale and Appointing Chancery Clerk as master to make sale was entered on the prior Motion. There was no service of process on any of the heirs who were known to complainants who did not join in the motion. Additionally, there was no publication for unknown heirs.

On February 9, 2005, Complainants filed a Motion to Amend Order Quieting and Confirming Title. The purpose of the motion was to add other heirs who were not included in the initial proceeding. Again there was no service of process or publication for unknown heirs.

On May 17, 2005 Lenwood Cathey, one of the heirs of Isaac Cathey along with other heirs of University Cathey filed a Motion to Set Aside Order Approving Sale of Real Property and the Order For Partition of Land By Sale and Appointing Chancery Clerk as master to make sale. Their motion alleged that Complainants had not stated in the original Complaint that they had made of diligent search and inquiry to determine the heirs at law of University Cathey and that known heirs had not been served and that publication had not been properly made for unknown heirs. Further, it was argued that all orders previously entered were void. After hearing, and over the Objection of McPhail and Associates the Court made a bench ruling ordering all prior orders were void for failure of the Plaintiffs to properly serve all Defendants. A written order was entered on November 15, 2005. Subsequently, the Court entered an order on November 25, 2005 setting aside the order it entered on November 15, 2005.

On March 8, 2006 Complainant filed an amended Complaint To Quiet and Confirm Title and Partition of Land. As part of their Amended Complaint it is requested that the contract of McPhail and Associates be approved by the Court. On April 10, 2006. Defendants filed an answer denying that Complainants were entitle to any of the relief requested.

After trial of this matter, the Chancellor entered an order requiring that the entire property be sold to McPhail and Associates and approving to contract of McPhail and Associates to purchase the property. It is from this order that Defendants appeal.

SUMMARY OF ARGUMENT

I. THE CHANCELLOR SHOULD NOT HAVE ORDERED A PARTITION BY SALE WHEN THERE WAS NO CREDIBLE EVIDENCE THE PROPERTY COULD NOT BE PETITIONED IN KIND.

II. THE CHANCELLOR SHOULD NOT HAVE APPROVED THE PURPORTED CONTRACT OF MCPHAIL AND ASSOCIATES WHERE THE OFFER WAS NEVER SIGNED BY ANY OF THE COTENANTS AND THE CHANCELLOR'S FINDING THAT A MAJORITY OF THE COTENANTS APPROVED THE OFFER IS INACCURATE.

ARGUMENT

I.

THE CHANCELLOR COMMITTED REVERSIBLE ERR BY ORDERING THAT THE PROPERTY COULD NOT BE PARTITIONED IN KIND WHERE THERE WAS NO EVIDENCE SUPPORTING THAT THE PROPERTY COULD NOT BE PARTITION IN KIND.

At the trial of this matter the parties stipulated the following facts:

1. That the two tracks of land involved total 156 acres more or less.
2. Of that total acreage Lenwood Cathey individually owned 30.34 acres or 19.33 percent.
3. Lenwood Cathey and his 2(two) siblings own 44.06 acres or 28 percent.
4. Other represented Defendants own 4.64 acres or 3 percent.
5. McPhail and Associates own 44.06 acres or 28 percent.
6. Defaulted heirs own 33.86 acres or 22 percent.

Throughout the course of this litigation, the represented defendants have maintained that the subject property should and could be partitioned in kind rather than by sale. As indicated above, of the 156 acres in question, represented defendants own 79.04 acres outright. McPhail and Associates owns 44.6 acres and the defaulted defendants own 33.86 acres. The controlling statute is Miss. Code Ann. § 11-21-11 (1972) which reads as follows:

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 cotenants according to their respective interests. The court may appoint a master to

make sale, and may make all proper orders to protect the rights of the parties interested. The court may order the sale of a part of the land and the partition in kind of the residue.

Before the court shall order a sale of the lands, the court may cause an appraisal to be made of the property, the expense of which shall be taxed and collected as costs in the proceedings. If the court causes an appraisal of the property to be made, then, subsequent to the receipt and filing of the appraisal with the court, the court shall hold in abeyance its order for sale of the lands for a period of thirty (30) days in order to allow the parties the opportunity to reach an agreement as to a partition in kind or sale of the lands.

The law in Mississippi is clear that as between partition by sale and partition in kind, the law strongly favors partition in kind. **Shaw v. Shaw** , 603 So. 2d 207 (Miss. 1992). Where there is nothing in the record to indicate that it would be to best interest of all of the parties to sell the property rather than partition in kind, the sale of the property should not be ordered, **Mathis v. Quick**, 271 So. 2d 924 (Miss. 1973). In the absence of evidence that a sale will better promote the interest of the parties or an equal division in kind cannot be made, a sale should not be ordered. **Dailey v. Houston**, 204 Miss. 667, 151 So. 2d 919 (1963) This code section 11-21-11 affords authority for ordering partition in kind to a cotenant desirous thereof, providing owelty if necessary, and a sale of the remainder with division of the proceeds, **Carter v. Ford**, 241 Miss. 511, 130 So. 2d 852 (1961). In determining whether sale and division of proceeds should be ordered instead of partition in kind, the cost of partition in kind, while a consideration, is not controlling, **Carter v. Ford**, 241 Miss. 511, 130 So. 2d 852 (1961).

In the instant case, the burden of proof was on McPhail and Associates to prove that its case comes under the prerequisite statutory provisions for orderings a sale as opposed to a division in kind. McPhail totally failed to carry its burden of proof. During the trial Wayne McPhail, owner of McPhail and Associates testified that he would prefer

that the entire property be sold because he doesn't believe it could be divided fairly. However, it should be noted that of the 200 or so owners, McPhail is the only Co-owner who asked that the property be sold.

McPhail's other witness was Gene Norwood who is a real estate appraiser. Mr. Norwood testified that it was his opinion that the property should be sold because if the property was going to be developed into residential lots then equal division could not be made in kind. It should be noted however, that Mr. Norwood testified regarding facts that were not in evidence, since McPhail testified that he did know what he would do with property if he got it. Also, Mr. Norwood never testified that the value of property would be diminished by a division of the property in kind.

The mere statement by a co-owner that he wants the property sold and an opportunity to buy it does not meet the burden of proof required by the statute. Additionally, McPhail offered no proof that the sale of the property was in the best interest of all the heirs.

ARGUMENT

II.

THE CHANCELLOR COMMITTED REVERSIBLE ERR BY ORDERING THAT THE ENTIRE PROPERTY SHOULD BE SOLD TO MCPHAIL AND ASSOCIATES, INC UNDER A PURPORTED CONTRACT.

A review of the trial court record shows that all proceedings prior to August 22, 2005 were void. There are two reason why those proceeding are void. First, the initial complaint failed to allege that a diligent search and inquiry had been made for the heirs at law of University Cathey. Secondly, the complainants did not include their deceased brother's children as party defendants in the case. After the initial complaint was filed, no service of process or publication was attempted for any defendants. In Frances v. Frances, 413 So.2d 382 (1982), the court noted that when publication of process was resorted to in lieu of personal summons to bring their nonresident defendants the statue, Miss. Code Ann§ 13-3-19 (1972) had to be strictly complied with. I'm sure you are asking why is this relevant to this appeal? From the very beginning in this case the complainants and McPhail have maintained that McPhail had a contract for the purchase of this property and that his contract controlled disposition of this property. Such is not the case. A review of the facts shows that McPhail submitted an offer to purchase this property to Gene Noward, a Real Estate Agent in Hernando, MS. But a review of the offer shows that none of the heirs of University Cathey ever signed that offer contrary to the Chancellor's findings. The only act that could possibly be constructed as an acceptance of this offer was The Motion To Approve Sale of Real Property filed on October 24, 2003. In that motion, the complainants requested the Court to approve the offer of McPhail to

purchase the property. The Complainants are joined in that motion by some of the 20 heirs that had listed in the Original Complaint as the heirs at law of University Cathey. As argued above that proceeding was void due to the lack of proper service of process on all defendants. It should also be noted that the number of heirs who joined in that motion were about 20 out of 300 heirs. A review of the Chancellor's bench ruling on August 22, 2005 shows that he clearly ruled that these proceedings were void. Despite the Court's ruling, the Complainants have continued to insist that those proceedings prior to August 22, 2005 were valid. Even the Chancellor in his ruling at trial seems to indicate that the order approving Sale of Real property is valid. The reason Complainants and McPhail have continued to argue that is because there is nothing else that comes close to an acceptance of the offer from McPhail and Associates. Additionally, the Complainants who brought that motion have already sild their interest in the property to McPhail. The original four complainants could not bind the remaining heirs since they were acting in their individual capacities.

In the last amended complaint, McPhail and Associates in paragraph 12 and 13 asks the trial court to ratify court orders that were obtained when all of the parties were not properly part of the proceedings due to a lack of proper service. However, the Chancellor did in fact ratify those orders by granting the relief requested in his final order.

Another reason there was never an acceptance of McPhail's offer is because there

was never an estate opened on University Cathey. There was never an administrator and or adminstratrix appointed to handle his estate. Since no administrator was ever appointed, the only way an acceptance could have been perfected was for each heir to sign an acceptance of the offer. That never happened. However, counsel for complainants have suggested to the court that a majority of the heirs have done so and the Chancellor in his findings of facts made that finding. That simply is not the case.

Therefore, the Chancellor erred in approving or ratifying the offer of McPhail as a contract with the heirs to purchase their property. If this could be done then the offer of Lenwood Cathey, which was higher than the offer of McPhail should have been approved by the court.

As stated earlier, the Chancellor should have ordered a partition in kind but if the court felt that the property of the defaulted defendants should be sold, then it should have been ordered sold on the Courthouse steps and not to a co owner through a court ordered private sale.

CONCLUSION

In this case, basically two groups, Lenwood Cathey and McPhail and Associates, own 80% of the property involved in this litigation. The property is a rectangular shape piece of property and could easily be divided between into two parcels. The remaining 20% of the land is owned by numerous owners and could be partitioned by sale and the proceeds divided among them. The trial judge erred by requiring that the entire property be sold.

Additionally, the evidence in that case does not support a finding that the co-owners ever accepted the offer of McPhail to purchase the property. Therefore, the trial judge ordered that the entire property be sold to McPhail at, what in effect would be, a private sale.

Accordingly, this case should be reversed and remanded to the trial court with orders to partition in kind the property owned by Lenwood Cathey et. al. and McPhail and Associates and a sale of the remaining property at public auction.

CERTIFICATE OF SERVICE

I, Fredrick B. Clark, counsel for Appellants, Lenwood Cathey, et al, certify that I have, this day served a copy, of APPELLANTS BRIEF on the following persons at these addresses:

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THIS, the 7th day of December, 2007

FREDRICK B. CLARK

CERTIFICATE OF FILING

I, Fredrick B. Clark, counsel for Appellants, Lenwood Cathey, et a, certify that I have this day served the Office of the Clerk, Supreme Court of Mississippi via hand delivery, and counsel of record for the Appellees, vis U. S. Mail, postage pre-paid, a copy of the foregoing Brief of Appellants, Lenwood Cathey, et al.

THIS, the 7th day of December, 2007

FREDRICK B. CLARK