

**IN THE SUPREME COURT OF MISSISSIPPI**

**FRANK A. POLK**

**APPELLANT**

**VERSUS**

**CAUSE NO. 2007-CA-01647**

**A. J. JONES and MARTHA DOUGLAS**

**APPELLEE**

**ON APPEAL FROM THE CHANCERY COURT OF  
FORREST COUNTY, MISSISSIPPI**

**CIVIL ACTION NO. 05-0250-GN-W**

---

**BRIEF OF APPELLEES**

**ORAL ARGUMENT NOT REQUESTED**

---

R. CHRISTOPHER WOOD, ESQ.  
DUKES, DUKES & WOOD  
STATE BAR NO. [REDACTED]  
DUKES, DUKES & WOOD  
POST OFFICE BOX 2055  
HATTIESBURG, MS 39403  
(601-544-1421); FAX: (601) 544-4425

**IN THE SUPREME COURT OF MISSISSIPPI**

**FRANK A. POLK**

**APPELLANT**

**VERSUS**

**CAUSE NO. 2007-CA-01647**

**A. J. JONES and MARTHA DOUGLAS**

**APPELLEE**

**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.

1. Honorable Johnny L. Williams, Chancery Judge, Forrest County
2. Honorable R. Christopher Wood, Attorney for Defendant
3. Honorable Paul B. Caston, Attorney for Plaintiff
4. Mr. Frank A. Polk, Plaintiff
5. Mr. A. J. Jones, Defendant
6. Successor in interest to Martha Douglas, deceased

This 24<sup>th</sup> day of June, 2008.

Respectfully submitted,

  
\_\_\_\_\_  
R. CHRISTOPHER WOOD

R. CHRISTOPHER WOOD, ESQ.  
STATE BAR NO. 7368  
DUKES, DUKES & WOOD  
POST OFFICE BOX 2055  
HATTIESBURG, MS 39403  
(601-544-1421); FAX: (601) 544-4425

**TABLE OF CONTENTS**

Table of Authorities ..... *i*

Statement of the Facts ..... 1

Summary of the Argument ..... 2

Argument ..... 4

Conclusion ..... 8

Certificate of Service ..... 9

## STATEMENT OF FACTS

The mother of the Appellant, Ruth L. Polk, departed this life July 26, 1973; the father of the Appellant, E. C. Polk, departed this life December 7, 1987. By Decree Vesting Title to Real Properties and Providing for Disposition of Personal Properties, filed February 12, 1992 in the Chancery Court of Forrest County *In Matter of the Estate of Ruth L. Polk, Deceased*, Cause No. 30,643, Frank Abner Polk, Martha Louise Douglas, and Ruth Jacqueline Jones<sup>1</sup> were vested with title as joint tenants in common to 730 River Avenue, the parcel of real property which is the subject of this Appeal. Said Decree allowed the beneficiaries 30 days from January 23, 1992 to reach agreement regarding the division of the personal property contained within the property, after which a sale of the subject personal property was to be ordered. This order was amended one year later by Order filed February 23, 1993 in the Chancery Court of Forrest County *In Matter of the Estate of Ruth L. Polk, Deceased*, Cause No. 30,643 consolidated with *In Matter of the Last Will and Testament and Codicils of E. C. Polk, Deceased*, Cause No. P-756, which rescinded the forced sale of the personal property. Sixteen (16) years have passed since the initial order, and there has been no mutual agreement as to the division or sale of the personal property.

After many years of disagreement among the legatees of E. C. Polk, the

---

<sup>1</sup>The interests of Ruth Jacqueline Jones are now represented by A. J. Jones, her surviving spouse and the Executor of her Last Will and Testament.

house at 730 River Avenue remains uninhabited to this day, and at one point was condemned by the City of Hattiesburg. On May 3, 2005, A. J. Jones and Martha Douglas, Appellees herein, filed their Complaint for Partition of Real Property and Sale of Personal Property, which was amended on September 6, 2002 [RE 176], from which this appeal rises. Appellant, Frank Abner Polk, was so adroit at avoiding service of process of the original Complaint that the Court, by Order dated September 5, 2006 [RE 1(c)], directed that the Sheriff of Forrest County personally serve Mr. Polk at his residence. It is a fundamental maxim of Chancery practice that one who comes into equity must come with clean hands, which only highlights the irony of Frank Polk complaining to the Supreme Court of Mississippi of lack of notice.

## **SUMMARY OF THE ARGUMENT**

### **Appellant's Issue I.**

**Whether the trial court erred in ordering the subject property sold on the courthouse steps without the Appellant having actual notice of his earlier right to bid on the property.**

The Court is bound by the Mississippi Rules of Civil Procedure Rule 5(b) to serve pleadings upon counsel of record. The Order of February 12, 2007 [RE 240] was served upon Frank Polk's attorney of record. Mr. Polk's attorney formally withdrew as counsel on March 28, 2007. Henceforth, all pleadings and

correspondence were mailed directly to Mr. Polk. After public notice, the property was sold on August 24, 2008. It was not until September 14, 2007, that Mr. Polk retained counsel to represent his interests herein.

**Appellant's Issue II.**

**Whether the trial court erred in failing to join indispensable  
necessary parties?**

Martha Douglas was a party to both the Complaint for Partition and the Amended Complaint. During the spring of 2007, Mrs. Douglas died. Mrs. Douglas had given her consent and approval of the partition prior to her death by filing the Complaint. The substitution of whomever is successor in title to the interest of Martha Douglas in 730 River Avenue will be required in order to effect the sale, but had no bearing on the Court's order to proceed with the public sale. To date, no estate has been opened.

The substitution of the successor in interest can be accomplished by either the Plaintiff or Defendant filing a suggestion of death pursuant to M.R.C.P. Rule 25, or Miss. Code Ann. § 91-7-237, *Party dying during lawsuit*, provides that the Court may serve a summons upon the executor or administrator of an estate, who shall become a party to the suit.

**Appellant's Issue II.**

**Where the lawful beneficiary under the will stood ready, willing**

**and able to purchase the property at a price above the appraisal,  
was the trial court's order of sale on the courthouse steps an  
abuse of discretion?**

Frank Polk has had over twenty (20) years to come to an agreement with the other beneficiaries of the will regarding the family homestead. During that time, the value of the house and property have daily decreased and deteriorated such that the property was condemned by the City of Hattiesburg. The Chancellor in the lower court heard testimony on several occasions from Frank Abner Polk, who has at times appeared pro se. When the Chancellor ordered the sale of the property to proceed after hearing directly from Mr. Polk, it was not an abuse of discretion or manifest error, but was the discretion of the Court to take whatever action is necessary to bring an action to conclusion.

## **ARGUMENT**

### **1. Standard of Review**

The standard of review for property partition cases is whether this Court finds manifest error in the decision of the chancellor, only then will this Court reverse the findings of the chancellor. *Robberson v. Burton*, 790 So.2d 226(¶9) (Miss.Ct.App.2001) (citing *Dunn v. BL Dev. Corp.*, 747 So.2d 284, 285(¶8) (Miss.Ct.App.1999). *In re Last Will and Testament of Lynn* 878 So.2d 1052, 1055 (¶11) (Miss.App. 2004)

## 2. Application of Law

The case law cited in Frank Abner Polk's Brief, *Estate of Thomas v. Thomas*, 883 So.2d 1173, at ¶22, 1179 (Miss.2004) (incorrectly cited as *Estate of Ezell v. Glenda Joyce Thomas, Administratrix*) and upon which Appellant relies regarding notice to Frank Polk of the Order issued February 12, 2007 by the lower Court, [RE 240], pertains to an administratrix's notice of the adjudication of the decedent's estate to the known and reasonably ascertainable illegitimate children of decedent, and has no application to this matter.

M.R.C.P. Rule 5(b) is the applicable rule of Court in this instance.

M.R.C.P. Rule 5(b) states as follows:

"Service: How Made. Whenever under these rules service is required or permitted to be made upon a party who is represented by an attorney of record in the proceedings, the service shall be made upon such attorney unless service upon party himself is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to him; or by transmitting it to him by electronic means; or by mailing it to him at his last known address, or if no address is known, by leaving it with the clerk of the court, or by transmitting it to the clerk by electronic means."

On February 12, 2007, Frank Abner Polk was represented by counsel. The lower Court provided Mr. Polk's counsel with a copy of the Order. Service was complete. The Order allowing withdrawal of record of Mr. Polk's counsel was not filed with the Court until March 28, 2007. [RE 247] See *McClain v. White* 738 So.2d 306, 308 (Miss. App.,1999), in which the Court held:



“Attorney Reed acted in his capacity as counsel for Mr. McClain by filing the complaint and the answer to the counterclaim. However, neither a motion requesting his formal withdrawal as counsel nor a court order permitting withdrawal were present in the record. The circuit court and Attorney Parlin were therefore obligated under M.R.C.P. 5(b) to serve all motions and notices upon Mr. McClain's attorney of record.”

The Chancellor in the lower court heard testimony on several occasions from Frank Abner Polk, who has at times appeared pro se. After hearing various motions filed by Mr. Polk and his former attorney, the Court ordered “. . . the sale of real property ordered by this Honorable Court shall proceed as noticed” by Order dated August 23, 2007. [RE 318] When the Chancellor ordered the sale of the property to proceed after hearing directly from Mr. Polk, it was not an abuse of discretion or manifest error, but was the discretion of the Chancery Court to take whatever action is necessary to bring an action to conclusion.

As stated in *Standard Lumber & Mfg. Co. v. Deposit Guaranty Bank & Trust Co.* 152 So. 639, 641 (Miss. 1934):

“The statutes invest the chancellor with discretion as to confirming sales of land, and we cannot disturb a finding of fact of the chancellor, unless we could say, and point out with certainty, that it was manifestly wrong under the controlling fixed decisions of this court.”

Frank Abner Polk argues that failure to join the State of Mississippi in a 16<sup>th</sup> Section land dispute should apply to the case at hand. The fact that the Estate of Martha Douglas has yet to become a party to the proceeding is irrelevant in light of

the fact that the decedent, Martha Douglas, was a party to the original and amended Complaint to Partition before her demise, and was, in fact, an originator of the partition proceeding. When a party to a lawsuit dies, M.R.C.P. Rule 25, Substitution of Parties, which states as follows, applies:

(a) Death.

(1) If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of summons. The action shall be dismissed without prejudice as to the deceased party if the motion for substitution is not made within ninety days after the death is suggested upon the record by service of a statement of the fact of the death as herein provided for the service of the motion.

Further, Miss. Code Ann. § 91-7-237 states as follows:

“When either of the parties to any personal action shall die before final judgment, the executor or administrator of such deceased party may prosecute or defend such action, and the court shall render judgment for or against the executor or administrator. If such executor or administrator, having been duly served with a scire facias or summons five days before the meeting of the court, shall neglect or refuse to prosecute or defend the suit, the court may render judgment in the same manner as if such executor or administrator had voluntarily made himself a party to the suit. The executor or administrator who shall become a party shall be entitled to a continuance of the cause until the next term of the court.”

The substitution of whomever is successor in title to Martha Douglas will be required in order to effect the sale of 730 River Avenue, and will most certainly be accomplished before any Warranty Deed is issued to the purchaser.

## **CONCLUSION**

The lower Court fully complied with the Mississippi Rules of Civil Procedure, statutory law, and precedent case law. The decision of the Chancery Court should be affirmed.

## CERTIFICATE OF SERVICE

I, R. Christopher Wood, do hereby certify that I have forwarded via U.S. Postal Service, the original and three (3) copies, plus a CD-ROM of the Brief of Appellee to:


Betty W. Sephton  
Clerk of Court  
Supreme Court of Mississippi  
P. O. Box 249  
Jackson, MS 39205-0249

and one (1) copy of the Brief of Appellee to the following:

The Honorable Johnny L. Williams  
Chancery Court Judge  
P. O. Box 1664  
Hattiesburg, MS 39403-1664

Paul B. Caston, Esq.  
Montague Pittman & Varnado  
P. O. Drawer 1975  
Hattiesburg, MS 39403

on this the 24<sup>th</sup> day of June, 2008.

  
\_\_\_\_\_  
R. CHRISTOPHER WOOD  
MSBN [REDACTED]  
Dukes, Dukes & Wood  
P. O. Box 2055  
Hattiesburg, MS 39403-2055  
(601) 544-4121; FAX (601) 544-4425