

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**NO. 2007-TS-01647**

**FRANK A. POLK**

**APPELLANT**

**VS**

**A.J. JONES AND MARTHA DOUGLAS**

**APPELLEES**

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

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**PRINCIPAL BRIEF OF THE APPELLANT**

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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.

Frank Abner Polk

Defendant in the trial court and Appellant on Appeal

A.J. Jones, As Executor of the Estate of Jacqueline Polk Jones

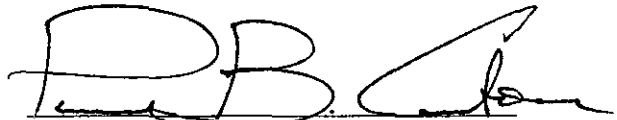
Plaintiff in the trial court and Appellee on Appeal

Martha Douglas

Plaintiff in the trial court and Appellee on Appeal.

The Estate of Martha Douglas

A party in interest in this litigation not joined as a party below.

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Paul B. Caston, MSB # [REDACTED]

Attorney of Record For Frank A. Polk

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Paul B. Caston, MSB [REDACTED]  
Attorney of Record For Frank A. Polk

## **Table of Contents**

	<u>Page</u>
Certificate of interested persons.....	i
Table of Contents.....	ii
Table of Cases.....	iii
Statement of the Issues.....	1
Statement of the Case.....	1
Statement of the Facts.....	2
Summary of the Argument.....	5
Argument.....	6
Conclusion.....	10

## Table of Cases and Other Authorities

	<u>Pages</u>
<i>Aldridge v. Aldridge</i> , 527 So. 2d 96, 98 (Miss. 1988).....	10
<i>Board of Education of Calhoun County, Mississippi</i> , 853 So. 2d 1159 (Miss. 2003).....	10
<i>Caldwell v. Caldwell</i> , 533 So. 2d 413 (Miss. 1988).....	8
<i>Cassell v. Cassell</i> 970 So. 2d 267 (Miss. App. 2007).....	6
<i>Countrywide Home Loans, Inc. v. Parker</i> , 975 So. 2d 233 (Miss. 2008) .....	6
<i>Matter of Estate of Ezell et al. vs</i> <i>Glenda Joyce Thomas, Administratrix</i> , 883 So. 2d 1173 (Miss. 2004) .....	8
<i>Magnolia Textiles, Inc. v. Gillis</i> , 206 Miss. 797, 807; 41 So. 2d 6, 8 (1949).....	10
<i>May v. Hunt</i> , 404 So.2d 1373, 1376 (Miss.1981).....	7
<i>Planters Bank &amp; Trust Co. v. Sklar</i> , 555 So. 2d 1024 (Miss. 1990) .....	6
<i>Tulsa Professional Collection Services, Inc. v. Pope</i> , 485 U.S. 478, 99 L.Ed.2d 565 (1988).....	8
Miss. R. Civ. P. 19(a).....	9

### **Statement of the Issues**

- 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?**
- II. Whether the trial court erred in failing to join indispensable necessary parties?**
- III. 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 and abuse of discretion?**

### **Statement of the Case**

#### **I. Nature of the Case and Course of Proceedings and Disposition Below**

This appeal arises from an action to partition real property owned by three siblings. The siblings are devisees of their parents' homestead through the parents' will. One of the siblings, Jacqueline Polk Jones, died prior to the commencement of the suit. Another of the siblings, Martha Douglas ("Douglas"), died during the pendency of this action in the trial court. Douglas' estate was never made a party in the trial court nor was her estate substituted as a party.

The parents' will guaranteed the siblings a right of first refusal upon 45 days notice, should the property ever be sold. Frank Polk (the Appellant herein and the only surviving sibling) and the deceased siblings' executors could not agree on a sales

price among themselves for the property. The trial court initially ordered the property appraised and sold to the highest bidding sibling on 14 days notice -- instead of the 45 days notice as dictated by the will. However Frank Polk did not receive notice of this order, though he stood ready to bid at a price above the appraisal. Neither of the executors for the deceased siblings exercised their right to bid for the property. As a result, the lower court ordered the property sold at the courthouse steps.

Shortly before the courthouse sale Frank Polk learned of the lower court's order through an examination of the court file. On the day before the ordered courthouse sale, Frank Polk appeared before the lower court at a motion hearing and attempted to tender the full appraisal price plus ten dollars to purchase the property. The trial court denied the motion and the courthouse sale proceeded. This appeal ensued.

## II. Statement of the Facts

The property that is the subject of this dispute was the homestead of E.C. Polk and his wife, Ruth L. Polk (the "Polks"), both deceased. The Polks, through their will, devised the property to their children, Jacqueline Polk Jones, deceased; Martha Douglas, deceased; and Frank Abner Polk. The will provided that each of the children would have a right of first refusal to purchase the property on 45 days notice, if it were ever to be sold.

A.J. Jones was the sole devisee and legatee of Jacqueline Polk Jones, deceased, and appeared in the lower court as plaintiff in his capacity as executor. The estate of Martha Douglas was never substituted as a party to the lower court action, although she passed away on April 12, 2007, during the pendency of this action.

Jacqueline Polk Jones, Martha Polk Douglas and Frank Abner Polk were the sole devisees and legatees of E.C. Polk and Ruth L. Polk and, under the terms of the Polks' will, were to become the owners of the subject property at 730 River Avenue in Hattiesburg, Forrest County, Mississippi.

A.J. Jones and Martha Polk Douglas instituted this action on May 3<sup>rd</sup>, 2005, in the Chancery Court of Forrest County, against Frank Abner Polk seeking, *inter alia*, a partition by sale of the homestead property. (R.E. at 3 ; R at 133-150). Through part of the proceedings in the lower court, Frank Polk was represented by attorney Michael Barefield. However, by agreement with Frank Polk, Barefield subsequently withdrew as his attorney. (R. at 247).

The parties had been unable to agree among themselves on a selling price for the property. At a hearing on this matter on December 13, 2006, the Chancellor decided that a commissioner for the sale of the property would be appointed and appointed attorney Chris Howdeshell. The lower court further decided that the property would be appraised and that Howdeshell would select and appoint the



appraiser. (Transcript of Proceedings of December 13, 2006, page 17 - 19). On February 12, 2007, the lower court entered its order that the property be appraised and that the appraisal would proceed and that the parties would have 14 days – not 45 days as directed by the will– from the conclusion of the appraisal to make an offer of purchase for not less than the appraised value. Otherwise the property was to be sold on the courthouse steps. (R.E. at 4, R. at 240 - 244).

As ordered, attorney Howdeshell obtained an appraisal on the property from Stan Lightsey, who appraised the property at \$80,000. The appraisal was filed with the lower court and on February 12, 2007, the lower court entered an order giving the parties 14 days from the receipt of the appraisal to make offers to purchase the property. (R.E. at 4). The February 12, 2007, order was sent to Frank Polk's attorney, Michael Barefield, but not to Frank Polk personally. Attorney Barefield did not make Frank Polk aware of the February 12, 2007, order. (Transcript of Proceedings of June 4, 2007, page 21). Attorney Barefield subsequently withdrew as Frank Polk's attorney. (R.E. at 5; R at 247-249). Attorney Barefield admitted in open court that through inadvertence, his office had not forwarded the order to Mr. Polk. (R.E. at 6 ; R. at 309-315) (Transcript of proceedings of August 23, 2007, pages 33 - 35; 39). By happenstance, Mr. Polk discovered the existence of the February 12, 2007, through an examination of the court file. As a result of his lack of knowledge of the February

12, 2007, order, Frank Polk had not made a bid for the purchase of the property. Neither of the plaintiffs herein made any bid for the purchase of the property. Since there was no bid for the property among the Polks' children or their estates within the 14 day time limit set by the court, the lower court ordered the property sold at the courthouse steps.

Frank A. Polk, having learned of the lower court's orders, appeared before the court on the day before the courthouse sale and attempted to tender the appraisal price plus \$10 in order to purchase the property. (Transcript of Proceedings of August 23, 2007, pages 33 - 35). The court denied his motion and the courthouse sale proceed resulting in the sale of the property. (Transcript of Proceedings of August 23, 2007, page 40).

The property was sold at the courthouse steps to the highest bidder. Subsequently, the buyer gave notice that he could not raise the necessary funds for the purchase. The property was then offered to the second highest bidder, but before the transaction could close, this appeal was taken and by agreement of the parties, the sale was stayed.

### **Summary of the Argument**

Due process requires that a party to be affected by a court's order be given reasonable notice of that order so that he may act to protect his interests. Here,

through inadvertence, Frank Polk did not receive any notice of the February 12, 2007, order and was unable to bid for the property as he was prepared to do.

Moreover, the lower court did not have the necessary parties before it to render an effective judgment. The Douglas estate owned an interest in the property but was not substituted as a party upon the death of Martha Douglas. The lower court's order of sale was therefore a nullity, and the lower court abused its discretion in refusing to allow Frank Polk to purchase the property at a price above appraised value.

### **Argument**

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

The material facts presented by this appeal from the Chancellor's ruling are not disputed. The only issues presented to the Court are issues of law which this Court reviews *de novo*. *Planters Bank & Trust Co. v. Sklar*, 555 So. 2d 1024 (Miss. 1990); *Countrywide Home Loans, Inc. v. Parker*, 975 So. 2d 233 (Miss. 2008). The trial court's findings are reviewed under the manifest error / abuse of discretion test. *Cassell v. Cassell*, 970 So. 2d 267 (Miss. App. 2007).

#### **2. Application of the Law to the Facts**

The trial court erred in ordering the property sold on the courthouse steps without the Appellant / Defendant, Frank Polk, having received notice the February 12, 2007, order, and in the face of his offer to pay full appraisal price plus ten dollars.

The manifest intent of the will of E.C. Polk and Ruth L. Polk was that their home place remain in their family and that their children be given every opportunity to purchase it before being sold to a third party. It has long been the law in this state that, in the construction of a will and the administration of an estate, that the Testator's intent is controlling. *May v. Hunt*, 404 So.2d 1373, 1376 (Miss.1981). The Chancellor abused his discretion in ignoring the plain intent of the will.

Frank Polk, the Polks' son, had every intention of purchasing the property and had secured the financial backing to make the purchase through a letter of credit from The Peoples Bank of Biloxi, Mississippi. (R.E. at 7; R. at 0070). By a series of unfortunate circumstances, the Appellant, Frank Polk did not receive notice of his right to bid for the property at the private sale. The property, therefore, was ordered sold on the courthouse steps. The lower court, *sua sponte*, and without any explanation in the record, shortened the notice period from 45 days as directed by the will, to 14 days which also constituted an abuse of discretion.

Frank Polk had done everything the law requires of him in order to protect his rights, going so far as to examine the clerk's file to keep himself apprised of the lower court's proceedings. Allowing Frank Polk to purchase the property at an above-appraisal price where the other two siblings' estates had not bid on the property would not have prejudiced the rights of any party. This is especially true since the property

had not yet gone to sale. The trial court's refusal to permit him to purchase the property was manifest error and an abuse of the court's discretion.

In the case of *Estate of Ezell vs Glenda Joyce Thomas, Administratrix*, 883 So.

2d 1173 (Miss. 2004) this Court held:

Due process also demands notice be given in such a case. This Court has recognized this principle in *King* where it stated that Mississippi due process law requires notice or diligent efforts to secure actual notice be given. 579 So. 2d at 1253-54 (relying on *Caldwell v. Caldwell*, 533 So. 2d 413 (Miss. 1988)). In both *King* and *Caldwell*, this Court looked to the United States Supreme Court for authority on the matter in its holding that the Due Process Clause of the Fourteenth Amendment of the United States Constitution requires notice. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 99 L.Ed.2d 565 (1988). *Estate of Ezell* at 1179.

No prejudice would have resulted to anyone had the lower court, upon learning of Frank Polk's failure to receive notice, extended the time which the siblings had to bid on the property before the courthouse sale actually occurred. Likewise, no prejudice would result if the sale were set aside and the siblings again allowed to bid on the property among themselves.

The lower court further erred by proceeding in this matter without requiring the joinder of the Estate of Martha Douglas in these proceedings. Since the Douglas estate held an interest in the property and was not a party to the partition action, any such

sale ordered by the lower court would have been a nullity.

The Mississippi Rules of Civil Procedure, Rule 19, provides as follows:

(a) Persons to Be Joined if Feasible. A person who is subject to the jurisdiction of the court shall be joined as a party in the action if: (1) in his absence complete relief cannot be accorded among those already parties, or

(2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant or, in a proper case, an involuntary plaintiff.

Miss. R. Civ. P. 19(a).

The Douglas estate was being probated in Forrest County, Mississippi, the identical venue of the lower court cause of action. There can be little doubt that a joinder of the estate would have been feasible. Since title to the property was still vested in the Douglas estate, Rule 19 (a)'s provisions are directly on point: No valid title could be conveyed since the owner of record of the subject property was in no way before the court. Secondly, as record owner of the property that was being disputed among the parties, the disposition of the action in its absence may have

impaired the estate's ability to protect that interest. The lower court could not, consistent with due process, in any way modify the rights of the estate in said property without first making it a party to the action.

In a case involving similar issues concerning the lower court's failure to join the state in a 16<sup>th</sup> Section land dispute, the Mississippi Supreme held:

This Court has held that failure to join interested parties in a real estate dispute under M.R.C.P. 19(a) justifies reversal and remand as a violation of fundamental due process. [...] As a general rule, all persons who are materially interest in the event or subject matter, without whom no effective judgment or decree can be rendered, should be made parties, in a suit to quiet title. *Board of Education of Calhoun County, Mississippi*, 853 So. 2d 1159 (Miss. 2003), citing *Aldridge v. Aldridge*, 527 So. 2d 96, 98 (Miss. 1988) and *Magnolia Textiles, Inc. v. Gillis*, 206 Miss. 797, 807; 41 So. 2d 6, 8 (1949).

### **Conclusion**

The lower court did not comply with fundamental notions of due process and abused its discretion by declining to extend the time for Frank Polk to comply with the Court's order when he had not received notice of the filing of the appraisal. The lower court further erred when it set a 14 day notice provision for the sale of the property when the will of E.C. Polk directed that a 45 day notice period be given.

Finally the lower court erred in failing the join the estate of Martha Douglas as

a party to this action. As such, the lower court would have been unable to enter an effective judgment or decree with respect to the property absent the estate's involvement in the litigation.

This Court should reverse the judgment of the trial court and remand the matter with instructions to set aside the courthouse sale of August 24, 2007, and to provide the parties with the requisite period of notice as provided by the will. Only then if there is no purchase of the property by the parties should the lower court order another sale of the property on the courthouse steps.

Respectfully submitted this the 21<sup>st</sup> day of April, 2008.

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Robin L. Roberts, MSB [REDACTED]

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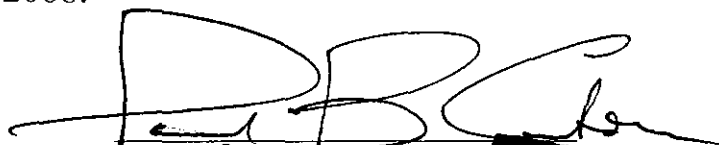

Certificate of Service

I, Paul B. Caston, one of the attorneys for the appellant Frank A. Polk, certify that I have this day served a true and correct copy of the foregoing Principal Brief of the Appellant, Frank A. Polk by first class United States mail, postage prepaid, on the following persons at these address:

Hon. Johnny L. Williams  
Lamar County Chancery Court Judge  
P.O. Box 1664  
Hattiesburg, MS 39403

Christopher Wood  
P.O. Box 2055  
Hattiesburg, MS

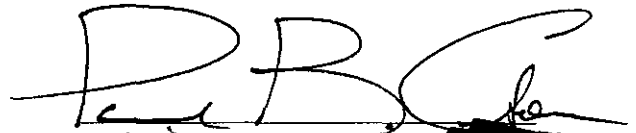
This the 21st day of April, 2008.

  
Robin L. Roberts, MSP  
Paul B. Caston, MSB 

Certificate of Filing

I, Paul B. Caston, one of the attorneys for the appellant Frank A. Polk, certify that I have this day filed the foregoing Principal Brief of the Appellant by depositing an original and three (3) copies of the brief and four (4) copies of the record excerpts with Federal Express overnight courier service addressed the Clerk of the Mississippi Supreme Court.

This the 21<sup>st</sup> day of April, 2008.

A handwritten signature in black ink, appearing to read 'R. Roberts', with a stylized flourish at the end.

Robin L. Roberts, MSB [REDACTED]

Paul B. Caston, MSB # [REDACTED]