IN THE SUPREME COURT OF MISSISSIPPI
CASE NO. 2007-CA-02047

CHARLES E. ALLEN, III **APPELLANT**

VS.

JANET ELLEN DAVIS ALLEN **APPELLEE**

Appeal from the Chancery Court of Pearl River County, Mississippi
Cause No. 02-0328-GN-Th

BRIEF OF THE APPELLEE

Oral Argument Not Requested

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for Appellee, certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualifications or recusal.

Chancellor:

Honorable James H. C. Thomas, Jr.
Chancellor for Pearl River County, Mississippi
Post Office Box 807
Hattiesburg, Mississippi 39403

Appellant:

Estate of Charles E. Allen, III, Deceased
Arthur D. Carlisle, Esq., Executor
900 Washington Avenue
Ocean Springs, Mississippi 39564

Appellee:

Janet Ellen Davis Allen
609 Pine Street
Picayune, Mississippi 39564

Attorney for Appellant:

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Attorney(s) for Appellee:

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Respectfully submitted, this the 2nd day of October, 2008.

Joey Fillingane
JOEY FILLINGANE

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I. STATEMENT OF THE ISSUES

The purpose of the restatement of the Statement of Issues from the Appellant's Brief is for the specific reason of clarity. While the presentation of the Statement of the Issues in the Appellant's Brief was sufficient to cover all of the issues in the case, they were not specifically argued in the Appellant's Argument Section of their brief, therefore, we are organizing them in a way so as to cover them specifically in our Appellee's Argument section as follows:

A. PROCEDURAL ISSUES

1. Whether the Trial Court erred in failing to strike the Motion to Reconsider filed by Janet Ellen Davis Allen, for having been filed untimely?
2. Whether the Trial Court erred in setting aside its Judgment Quashing the Joint Application to Set Aside the Divorce, and allowed Janet Ellen Davis Allen, to put on proof of the parties' alleged reconciliation after Charles' death?
3. Whether the Trial Court had jurisdiction to proceed on the Joint Application of the Parties to Set Aside their divorce, after the death of one of the parties, namely, Charles E. Allen, III?
4. Whether the Trial Court erred in allowing Janet Ellen Davis Allen to put on proof regarding the reconciliation of the parties' marriage, pursuant to Section 93-5-31, Mississippi Code Annotated 1972, as amended, after the death of Charles E. Allen, III.
5. Whether the Trial Court erred in not dismissing the action to Set Aside the Divorce, due to the failure of Janet Ellen David Allen to file a Revivor of the action subsequent to the death of Charles E. Allen, III?

B. SUBSTANTIVE ISSUES

6. Whether the Trial Court erred in holding that the evidence adduced at the trial of this matter was sufficient to set aside the divorce of Charles E. Allen, III, and Janet Ellen Davis Allen?

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

This case involves an appeal from the Chancery Court of Pearl River County, Mississippi, in which the parties were divorced upon Joint Petition for Divorce by a Final Judgment of Divorce approved by the Pearl River County Chancery Court on September 23, 2002. (C.P. 12-20) On May 17, 2006, the parties filed a Joint Application to Revoke Judgment of Divorce pursuant to Section 93-5-31, Mississippi Code Ann. 1972. (C.P. 21-24) Charles Edward Allen, III, died on June 16, 2006.

On November 20, 2006, a Petition for Letters of Administration was filed with the Chancery Court of Pearl River County, Mississippi. On the same day, November 20, 2006, the Court entered an Order appointing Arthur D. Carlisle as Administrator of the Estate of Charles E. Allen, III. On June 22, 2006, Appellee, through counsel, filed a Petition to Enter an Appearance in the Estate of Charles E. Allen, III, and Join this Suit as an Interested Party for the Purpose of Showing that this is not an Intestate Estate but a Testate Estate Naming Janet D. Allen (Appellee herein) as Executrix and for Related Purposes. On November 15, 2006, Arthur D. Carlisle, Administrator for the Estate of Charles E. Allen, III; filed a Petition to Admit Will to Probate, to Dismiss Administrator and to Appoint Executrix. After conferencing with Chancellor Johnny L. Williams (assigned Chancellor in the estate case), the Chancellor stated that he would not be able to proceed with any further action on the estate case until the issue of whether the couple was married or divorced (Appellee and the deceased) was determined by Chancellor James H. C. Thomas, Jr. (Cause No. 06-0126-PR-W in the Chancery Court of Pearl River County, Mississippi)

On June 11, 2007, Chancellor James H. C. Thomas, Jr. entered a Judgment Quashing Application for failure on the part of the parties prior to the death of Charles E. Allen, III, one of

the Joint Applicants for the Judgment Revoking Divorce, to present evidence of the reconciliation of the parties. (C.P. 25) On June 22, 2007, a Motion for Reconsideration of Judgment Quashing Application was filed by the Appellee. (C.P. 26-28) After an evidentiary hearing held on October 2, 2007, the Chancellor entered a Judgment Revoking Divorce on October 24, 2007. (C.P. 48-50) On November 19, 2007, the Appellant filed an Appeal to the Mississippi Supreme Court. (C.P. 51-54)

B. Statement of Relevant Facts

On October 2, 2007, Chancellor Thomas conducted an evidentiary hearing on the matter of whether evidence of satisfactory reconciliation existed. The first witness called was Janet Ellen Davis Allen, the Appellee herein and wife of the deceased, Charles E. Allen, III. (Tr. 5) Janet Ellen Davis Allen testified before Chancellor Thomas as to when they moved back in together and how their actions changed after the signing of the Joint Application to Revoke Judgment of Divorce:

Q. When did you or – did you ever decide to move back in with him [Charles E. Allen, III]?

A. I did move back in with him.

Q. When was that?

A. After we signed the papers, we put on our wedding rings and we considered ourselves married; and we wanted to come together to ask Judge Thomas to overturn the divorce because Charlie wanted it to be as if we were never divorced at all.

. . .

Q. Were you reconciled with Charles by then [after Hurricane Katrina]?

A. Yes, we had been talking on the phone and talking about getting the divorce turned over. We were always talking about this. Yes, we were really getting close at this point.

Q. Had you moved into his home at Hideaway Lake?

A. Not at that time, no.

Q. Had you spent the night there?

A. Back before the hurricane, no.

Q. Had he moved into your home on Pine Street?

A. No.

Q. Had he spent the night there?

A. Yes, he did sometimes. When I stayed over there, he would come over there. We had spent the night there.

(Tr. 15-17)

After Hurricane Katrina, Janet Ellen Davis Allen fell and crushed her hip and pelvis and this altered somewhat their relationship and the tempo of their reconciliation. (Tr. 64)

Q. Let's break it down. Before your accident, before Hurricane Katrina, how often did y'all talk?

A. He used to call me every night.

Q. After your accident and going through rehab, how often did y'all talk?

A. Well, the phones were down for a while. When the phones got back up, so he could start calling me, he did.

Q. How often did you talk?

A. He called many times a day. The rehab nurses would go and – "He is on the phone; he is on the phone." And I would be in rehab.

Q. Did y'all discuss your relationship during this time?

A. Yes, we were back together. There was no doubt about it; we were back together.

. . .

Q. Did y'all continue your relationship?

A. Yeah, the minute I got home from the hospital, he came. He had a phone put in, a direct line to my house and would not let anybody else have the number. If anybody found out the number, he would change it. He changed it three times because somebody found out the number. He wanted it to be direct from me to him.

Q. Did that continue until his death?

A. Yes. We talked into the night, all night. We would listen to music. We would play games and things like that. He would put on a song and say, Who wrote it; can you guess who did this. That type of thing. And we talked about lots of things.

. . .

Q. Did you spend the night with Charles after you got out of rehab at his home?

A. Yes, I did.

Q. About how often did you stay with him?

A. I stayed with him on weekends, starting the first of March – no, the end of March, first of April, I started staying with him at his house, but I would

have to come back home because I needed help to wash my hair, and I would have to sit on a bench to take a bath. The lady who stayed with me would get me ready and pack my clothes; and I would stay over the weekend and come back usually Monday or Sunday night, but he never wanted me to come back; he always wanted me to stay there; he wanted me to move in there actually.

Q. Did he ask you to move in?

A. Yes.

Q. Did he ask you more than once?

A. Oh, yeah.

. . .

Q. Did you stay with him on weekends? Was this on a regular basis?

A. Yes, every weekend.

Q. Is that March of 2006?

A. Yes, after the hurricane.

Q. Your accident was after the hurricane in 2005?

A. Yes. I was well enough that I could go to his house starting like the end of March, first of April.

Q. That is when you started going on weekends?

A. Yes.

Q. When you were spending the weekend with him, what did you do?

A. We watched TV; we ate pizza, we talked; we listened to music; we went to bed together. And we were just like any normal people, married people would be. We considered ourselves married.

. . .

Q. Did Charles ever go with you to any of your doctors' appointments?

A. Always.

Q. I will ask you to look again at the document that is in your lap, the joint application to revoke judgment of divorce. Who prepared this document?

A. Arthur Carlisle.

. . .

Q. Who presented you with this document?

A. Charlie.

Q. Did you understand what this was?

A. Yes, he didn't want to go and get remarried. He wanted to come before Judge Thomas, the both of us, and ask him personally to turn it over because he did not want the marriage – he wanted it to be as if the divorce had never taken place, everything would be back the same. That is what I understood.

Q. Did you have any misgivings about signing this document?

A. Oh, no.

Q. Do you know of any misgivings that Mr. Allen had?

A. No.

(Tr. 18-22)

The further testimony of Janet Ellen Davis Allen revealed that she and Charles E. Allen, III, opened a joint checking account shortly after they had executed the Joint Application to Revoke Judgment of Divorce and had deposited five hundred dollars ($500.00) into the joint account. (Tr. 23-25) Further testimony from Mrs.

Davis revealed that the parties once again started wearing their wedding bands after they signed the Joint Application to Revoke Judgment of Divorce. (Tr. 26)

Finally, Janet Ellen Davis Allen testified concerning the reason why they did not get their Order signed before Charles E. Allen, III, died.

Q. Why didn't Charles or you go and get a judgment entered setting aside the divorce?

A. We were waiting for Judge Thomas to come back to Pearl River County where we had gotten divorced and he wanted the two of us to come before Judge Thomas and ask him together to turn it over.

Q. We are here in Columbia today [Marion County] to see Judge Thomas on a Pearl River County case?

A. Right.

Q. Why didn't y'all go to another county to see Judge Thomas?

A. Because we would have to have somebody drive us. He wanted it done in Pearl River County because that is where we got the divorce. He wanted it there; wanted it to happen there.

(Tr. 28)

The Appellee then called two additional witnesses to testify to the existence of the reconciliation of the relationship. First, Beverly Slaydon testified (Tr. 50-59). She testified to being a housekeeper for Charles E. Allen, III, and witnessing their relationship during the last weeks of Mr. Allen's life. According to Mrs. Slaydon, Charles Allen, III, told her about Appellee. Then Beverly Slaydon and Appellee began visiting on the phone while Mrs. Slaydon was at Charles Allen, III's home. (Tr. 52) Mrs. Slaydon testified that Charles Allen, III, had arranged for Appellee to have a phone line reserved just for him. (Tr. 52)

Mrs. Slaydon told the Court that Charles Allen, III, and Appellee were on the phone "constantly". (Tr. 53) Mrs. Slaydon also told the Court that she observed Appellee going to Charles Allen, III's home to spend the weekend on a regular basis. (Tr. 53) Mrs. Slaydon visited Charles Allen, III, and Appellee socially on Saturdays. Charles Allen, III, and Appellee would be at Charles Allen, III's home. (Tr. 54)

Mrs. Slaydon last saw Charles Allen, III, alive on Tuesday, June 13, 2006. She found him dead on Friday, June 16, 2006. (Tr. 55) Mrs. Slaydon testified that Appellee spent the preceding weekend with Charles Allen, III; Mrs. Slaydon is the one who actually picked Appellee up and took her to Charles Allen, III's home their last weekend together. Further, Mrs. Slaydon visited with Charles Allen, III, and Appellee for several hours on Saturday. And Charles Allen, III, spoke to Mrs. Slaydon about his weekend with Appellee on Tuesday, June 13, 2006. (Tr. 56) Mrs. Slaydon believed that Charles Allen, III, loved Appellee very much and that Appellee loved Charles Allen, III, very much. (Tr. 57-58)

The next witness, Patricia Faye Beard, was Janet Ellen Davis Allen's personal caregiver. (Tr. 63-71) She also knew Charles E. Allen, III, from high school and testified to their reconciliation after the Joint Application to Revoke Judgment of Divorce had been executed and filed and prior to the death of Charles E. Allen, III. (Tr. 63-71) Mrs. Beard worked for Appellee twelve hours per day, Monday through Friday. Mrs. Beard's care of Appellee included dressing and bathing her. (Tr. 64)

According to Mrs. Beard, Charles Allen, III, visited Appellee three to four times a week, often bringing her flowers and her favorite foods. Mrs. Beard testified that he brought Appellee a gift about once a week. (Tr. 65-66)

Mrs. Beard spoke with Charles Allen, III, about his relationship with Appellee. According to Mrs. Beard; Charles Allen, III, loved Appellee very much and never felt that they

were divorced. Charles Allen, III, even told Mrs. Beard that Appellee was his "life partner". (Tr. 66) Likewise, Mrs. Beard learned from Appellee that she loved Charles Allen, III, very much; Mrs. Beard never observed Appellee date anyone else. (Tr. 67)

Mrs. Beard observed both Charles Allen, III, and Appellee execute the Joint Application to Revoke their divorce. Mrs. Beard even drove the couple to the courthouse to file the papers. (Tr. 68)

Mrs. Beard observed that Charles Allen, III, and Appellee were affectionate. (Tr. 68) She learned that Appellee had a phone line that was reserved for Charles Allen, III, only. (Tr. 69) Mrs. Beard observed the couple on the phone together for hours at a time. Additionally, she observed Charles Allen, III, attending Appellee's medical appointments. She also overheard the couple discussing arrangements to live together. (Tr. 70) Mrs. Beard observed that Charles Allen, III, began wearing his wedding band again. (Tr. 72)

II. SUMMARY OF THE ARGUMENT

A. Procedural Issues:

Appellee's Motion to Reconsider was timely filed. There was no error when the Trial Court set aside its Judgment Quashing the Joint Application to Set Aside the Divorce and allowed Appellee to put on proof of the parties' reconciliation.

The Trial Court had jurisdiction to proceed on the Joint Application of the Parties to Set Aside their divorce after the death of one of the parties, namely, Charles E. Allen, III.

Miss. Code Ann. § 93-5-31 does not prohibit Janet Ellen Davis Allen from proving after the death of Charles E. Allen, III, the reconciliation of the parties' marriage.

It was not necessary for Appellee to file a reviver of the action subsequent to the death of Charles Allen.

B. Substantive Issues:

The Trial Court did not err in holding that the evidence adduced at the trial sub judice was sufficient to set aside the divorce of Charles E. Allen, III, and Janet Ellen Davis Allen.

Mississippi Code Section 93-35-31 states:

> The judgment of divorce from the bonds of matrimony may be revoked at any time by the court which granted it, under such regulations and restrictions as it may deem proper to impose, upon the joint application of the parties, and upon the production of satisfactory evidence of their reconciliation.

It is beyond dispute that the two requirements of this statute were met by the parties herein. First, on May 4, 2006, Charles E. Allen, III, and Janet Ellen Davis Allen jointly signed the Joint Application to Revoke Judgment of Divorce as evidenced by Notary Public, Angelin Howell, having properly notarized said document. This Joint Application was then filed with the Chancery Clerk's Office of Pearl River County, Mississippi, on May 17, 2006. Ironically, this document was prepared for the couple by none other than Attorney Arthur D. Carlisle, who has

since testified against the divorce being set aside and initially had himself appointed as Administrator of the Estate of Charles E. Allen, III.

Second, after a hearing before Chancellor James H. C. Thomas, Jr., where numerous persons testified including Appellee, Janet Ellis Davis Allen, Arthur D. Carlisle, and several other witnesses to the reconciliation of the couple testified, Chancellor Thomas determined that sufficient evidence of the couple's reconciliation had been shown to set aside the divorce.

The statutory requirements are clear and very straightforward and have been met by the couple seeking to have their divorce set aside. Chancellor Thomas simply followed the statute and has now set aside the divorce which he had previously granted to the parties. Nothing more or less is required of him.

III. ARGUMENT

A. PROCEDURAL ISSUES

1. Whether the Trial Court erred in failing to strike the Motion to Reconsider filed by Janet Ellen Davis Allen, for having been filed untimely?

Appellant argues that M.R.C.P. 59 requires that a Motion to Reconsider be filed within ten days of a Judgment. However, Rule 59 requires the filing of a Motion *for New Trial*, not a Motion *to Reconsider*, within ten days (emphasis added). Appellee's motion could not be a request for a new trial because there had not even been a trial yet. Appellee's Motion to Reconsider is actually a motion under Rule 60, a motion for relief from a Judgment or Order, which can be made for any reason justifying relief from a judgment. A Rule 60 motion should be made within six months. Appellee certainly did not exceed the timeliness required by Rule 60.

2. Whether the Trial Court erred in setting aside its Judgment Quashing the Joint Application to Set Aside the Divorce, and allowed Janet Ellen Davis Allen to put on proof of the parties' alleged reconciliation after Charles E. Allen, III's death?

This argument seems specious to the Appellee. The Mississippi Code in Statute 93-5-31, Mississippi Code Annotated 1972, as amended, requires that the production of satisfactory evidence be presented of the parties' reconciliation before the Judgment of Divorce may be revoked. How is the Chancellor ever supposed to be able to properly determine whether the requirements of the statute have been met if he never holds a hearing to determine whether that evidentiary burden has been met? For the Appellant to argue that Chancellor Thomas wrongly determined to set aside its previous Judgment Quashing the Joint Application to Set Aside the Divorce is totally self-serving. Of course, the Appellant would prefer that no hearing be held to determine if sufficient evidence of the parties' reconciliation could be produced by the Appellee, however, the interests of justice dictate otherwise.

3. Whether the Trial Court had jurisdiction to proceed on the Joint Application of the Parties to Set Aside their divorce, after the death of one of the parties, namely, Charles E. Allen, III?

Appellant argues that the Trial Court did not have jurisdiction to hear the Joint Application of the Parties to Set Aside their divorce because Charles Allen died. This is not true; the Lower Court had jurisdiction to hear the Joint Application.

In ***Wells v. Roberson***, 209 So. 2d 919 (Miss. 1968), a final decree of divorce had been granted to the couple on December 16, 1966; and on December 27, 1966, the just divorced former husband died. On December 30, 1966 (three days after the death) the former spouse's attorney signed and filed on her behalf an unsworn motion to "cancel, set aside and hold for naught the final decree entered in this case on December 16, 1966, for the following reason: Subsequent to the entry of such decree, the Complainant and Defendant had a complete reconciliation and resumed and continued to live and cohabit as husband and wife. ***Id.*** at 921. The Supreme Court noted that "This was an ex parte motion, and no notice of any kind was given to any of the heirs at law of Noath Roberson or to his legal representative." ***Id.*** The Mississippi Supreme Court reversed and rendered the granting of the revocation of the divorce in this instance precisely because it was not done by both parties as was done in the cause *sub judice*.

The ***Roberson*** Court held:

> In the United States where no ecclesiastical courts were established, it was considered not within the jurisdiction of equity to grant divorces in the absence of a constitutional provision or statutory enactment. Divorce in Mississippi, therefore, is purely and simply a creature of statute. The revocation or setting aside of divorce decrees is also governed entirely by statute. Section 2747 Mississippi Code 1942 Annotated (1956) sets forth the procedure that must be followed as a condition precedent to revoking a decree of divorce on reconciliation of the parties. Section 2747 provides: "The decree of divorce from the bonds of matrimony may be revoked at any time by the court which granted it, under such regulations and restrictions as it may deem proper to impose, *upon the **joint application** of the parties, and upon the production of satisfactory evidence of their reconciliation.*" (emphasis added)

Id. at 923.

The Court goes further to explain rights granted by statute, quoting ***Price v. Price***, 202 Miss. 268, 272-273, 32 So. 2d 124, 125-126 (1947):

> The power or authority or jurisdiction to grant a divorce in this country depends solely upon statute, and is not derived from the common law. 27 C.J.S., ***Divorce***, Section 69, page 629 *et seq.*; 17 Am Jur., page 151. This brings into operation the well-established rule that where a statute creates a right of action which did not exist at the common law and the same statute fixes the conditions upon which the right may be asserted, the conditions are an integral part of the right thus granted – are substantive conditions, the observance of which is essential to the assertion of the right. As tersely stated in ***United States ex. rel. Texas Portland Cement Co. v. McCord***, 233 U.S. 157, 34 S.Ct. 550, 58 L.Ed. 893, when a right is given solely by statute, it is subject to the terms named in the statute.

Id. at 923.

The case at bar fits precisely into the standard established by the Mississippi Supreme Court in ***Wells***. Unlike the couple in ***Wells***, Charles Allen, III, and Appellee jointly filed a Joint Application to Revoke Judgment of Divorce prior to the death of Charles E. Allen, III. The testimony at trial below demonstrated that the parties intended to have their request granted by the Chancellor and would have already presented their Joint Application to the Lower Court but for the fact that they could not drive themselves and were waiting for the Chancellor to return to Pearl River County, Mississippi. The testimony at trial herein revealed a true and ongoing reconciliation between the parties.

Further, Griffith's Mississippi Chancery Practice Section 29(a) (2000 ed) explains, "The court must have jurisdiction which is determined by the scope and the content of the pleadings. There must be some contestable issue or issues between the adversary parties, not moot questions. Courts do not initiate litigation nor stir up questions the parties have not raised for themselves." In the case at bar, the jurisdiction was conferred to the Lower Court at the time the contested pleadings were filed in the initial divorce case and again when the Joint Application to Revoke Judgment of Divorce was jointly filed by the parties in this case. The fact that a death

occurred before the case was closed by the signing of the order or the denial by the Lower Court does not negate the fact that the Lower Court did then - and does now - maintain jurisdiction over the cause.

Additionally, M.R.C.P. 25 anticipates that deaths do and will occur in cases. The rule controls the procedure for proceeding with a civil action after the death of a party and provides a mechanism whereby the case may continue unhindered.

There is no longer any statutory law regarding this event; (although there are a couple of statutes regarding steps to execute on a judgment or lien after a death. *See* Miss. Code Ann. Sections 13-3-149, 13-3-159, 11-35-59, 11-7-29, and 85-7-51.) Formerly, Miss. Code Ann. Section 13-3-17 controlled procedure following the death of a party; however, in 1991, the Mississippi Legislature amended Miss. Code Ann. Section 13-3-17 to state that "Substitution of parties in case of death of a party shall be governed by the Mississippi Rules of Civil Procedure."

According to Mississippi Rules of Civil Procedure, Rule 25, "If a party dies and the claim is not thereby extinguished, the court shall, upon motion, order substitution of the proper parties." Rule 25 goes on to explain that the appropriate action is for a suggestion of death to be filed, and then, within 90 days, for a motion for substitution to be made. According to Rule 25, the motion may be made by any party.

First, there is no time limit for making the suggestion of death. ***After*** a suggestion of death is made, ***then*** a 90-day period for substitution begins. In the case at bar, no one has made a suggestion of death; thus, any time limit has not yet tolled nor expired if a party is to be substituted for the deceased. A substitution may still be made in the case at bar.

Second, any party can make the suggestion of death. In the case at bar, the current administrator of the estate of the deceased has known of this action; he entered an appearance on August 16, 2006, more than two years ago. If the administrator so desperately wanted a

substitution, he could have acted himself and should not now be allowed to use this failure as a cause for reversal of the Lower Court's Judgment.

A substitution would not make sense in this matter. The case at bar is not an adversarial action in its genesis; it is not an action to recover money or to enforce a contract, a debt, land rights, etc. In such adversarial actions, a substituted party can potentially recover or provide the relief sought in the suit. However, in the case at bar, a substituted party cannot provide the relief sought by Janet Ellen Davis Allen, i.e. marriage. She cannot be married to an estate and certainly does not want to be married to another person substituted in place of Charles E. Allen, III.

The purpose of Rule 25 is to allow substitution where the deceased can no longer recover or provide the relief. Rule 25 allows the appropriate one who can enforce or be subject to a judgment to be substituted. Janet Ellen Davis Allen does not desire a judgment with an estate. She and her now-deceased husband desired a joint agreed judgment.

4. Whether the Trial Court erred in allowing Janet Ellen Davis Allen to put on proof regarding the reconciliation of the parties' marriage, pursuant to Section 93-5-31, Mississippi Code Annotated 1972, as amended, after the death of Charles E. Allen, III.

The argument against this suggestion is identically the same as the answer to Issue 2 above. In an effort to not be redundant, the Appellee would simply point the Court to the argument above in Issue 2.

5. Whether the Trial Court erred in not dismissing the action to Set Aside the Divorce, due to the failure of Janet Ellen Davis Allen to file a Revivor of the action subsequent to the death of Charles E. Allen, III?

Appellant argues that the action below was abated, or otherwise avoided or defeated, by the death of Charles E. Allen, III. Appellant cites Miss. Code Ann. §15-1-69. However, as explained hereinabove, there is no longer any statutory law regarding the death of a party. Rule 25 controls.

Section 15-1-69 does not state that an action is abated, avoided or defeated. Section 15-1-69 states "If" an action is abated, avoided or defeated. Section 15-1-69 is a savings provision. Section 15-1-69 is not a prohibition or bar of action.

B. SUBSTANTIVE ISSUES

6. **Whether the Trial Court erred in holding that the evidence adduced at the trial of this matter was sufficient to set aside the divorce of Charles E. Allen, III, and Janet Ellen Davis Allen?**

The statutory requirements of Mississippi Code Section 93-5-31 were met.

Mississippi Code Section 93-35-31 states:

> The judgment of divorce from the bonds of matrimony may be revoked at any time by the court which granted it, under such regulations and restrictions as it may deem proper to impose, upon the joint application of the parties, and upon the production of satisfactory evidence of their reconciliation.

Section 93-5-31 is a very uncomplicated statute. As outlined above, only two (2) requirements are needed for compliance with this straightforward statute. First, the application for the relief must be joint (mutual). Second, the parties must show to the court's satisfaction which granted the divorce that sufficient evidence of a reconciliation of the parties previously divorced has taken place.

In the present case we have both requirements completely satisfied. As the record bears out, on May 4, 2006, both previously divorced parties: Charles E. Allen, III, and Janet Ellen Davis Allen, executed their Joint Application to Revoke Judgment of Divorce. On May 17, 2006, the Joint Application to Revoke Judgment of Divorce was filed in the Chancery Court of Pearl River County, Mississippi, and was properly assigned to Chancellor James H. C. Thomas, Jr., who had previously divorced the couple. The first requirement was, therefore, clearly met.

Worth noting also is the fact that one of the Joint Applicants, the late, Charles E. Allen, III, was an attorney. This is mentioned simply because if there was any question whether the

deceased party to this Joint Application to Revoke Judgment of Divorce knew what he was doing by executing this document, obviously, a member of the bar would know exactly what the implications of filing such a Joint Application would be. There would be testimony later offered at the evidentiary hearing that would question what the motives were for said Joint Application to be drafted and signed. The fact that Charles E. Allen, III, was a practicing attorney at the time these documents were signed and filed should put to rest any concerns or questions about intent on the parties' parts. Whatever any ulterior motives might have been, it is quite clear that these two individuals intended to have their previous divorce set aside.

The second requirement of Section 93-5-31, is that there is the production of satisfactory evidence of their reconciliation produced to the Chancellor. This is a question for the trier of fact – Chancellor Thomas. He heard the evidence and was convinced that the parties were in fact reconciled at the time of the filing of the Joint Application to Revoke Judgment of Divorce. It is evident from the procedural history of this case that Chancellor Thomas did not enter into his decision lightly. In fact, he initially entered a Judgment Quashing the Application on June 11, 2007, wherein he stated:

> Having reviewed the materials submitted by each party in support and opposition to the request by the Estate of Charles E. Allen, III to uphold the divorce granted and to Quash the Joint Application to Revoke Judgment of Divorce, the Court finds as controlling Section 93-5-31 of the Mississippi Code of 1972, as amended, which requires the filing of a joint application and the production of satisfactory evidence the divorced parties reconciled. **While the joint application was filed *sub judice*, no hearing or other evidence of the reconciliation was presented prior to the death of Charles E. Allen, III, and the Court finds the application should be quashed. The Court will, however, entertain a motion to reconsider this finding should the co-applicant timely file such a request and show sufficient facts evidencing a satisfactory reconciliation of the parties.** (Emphasis added).

Judgment Quashing Application, filed June 11, 2007.

As to the Court's precedence on this issue, the Appellant relies heavily on the ***Wells v. Roberson***, 209 So.2d 929 (Miss. 1968). This case, as pointed out correctly by Chancellor Thomas in his Judgment Revoking Divorce, is completely distinguishable from the present case. In ***Wells***, the woman waited until after the ex-husband died to file her single (not joint) application to have their prior divorce set aside. ***Id.*** The Court rightly determined that the statute requires a "joint application of the parties" and in ***Wells*** no such application existed. ***Id.*** at 921. As Chancellor Thomas points out, in the present case, we do have a joint application that meets the statutory requirements.

CONCLUSION

The Appellee believes that Chancellor Thomas rightly decided this case and that the six issues delineated above do not show either procedural error nor substantive error that would require the decision below to be overturned.

Respectfully submitted, this the 2nd day of October, 2008.

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Appellee

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CERTIFICATE OF SERVICE

I, the undersigned attorney for Janet Ellen Davis Allen, do hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of foregoing Brief to:

Honorable Michael J. Vallette
900 Washington Avenue
Ocean Springs, Mississippi 39564

Honorable Chancellor James H. C. Thomas, Jr.
Pearl River County Chancery Court
Post Office Box 807
Hattiesburg, Mississippi 39403-0807

This, the 2nd day of October, 2008.

JOEY FILLINGANE