

SUPREME COURT OF MISSISSIPPI
NO. 2008-CA-01334

**ESTATE OF CYNTHIA GILKEY
WALLACE, DECEASED; LOUIS M.
WALLACE, PETITIONER; J'BRIA
GILKEY, PETITIONER**

APPELLANTS

VS.

EHMAD H. MOHAMED, M.D.

APPELLEE

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

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

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Deceased
a/ka/ Cynthia Magee | <i>Decedent</i> |
| 7. | Louis M. Wallace | <i>Petitioner/Appellee
Plaintiff (in medical negligence case)</i> |
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Wallace, Deceased</i> |
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STATEMENT OF ISSUES

- I. Whether the Chancery Court Judge correctly found that Ehmada H. Mohamed, M.D., had standing to intervene in the Chancery Court action granting Letters of Administration in the Estate of Cynthia Gilkey Wallace.
- II. Whether the Chancery Court Judge properly removed Louis M. Wallace as the Administrator of the Estate of Cynthia Gilkey Wallace.

STATEMENT OF THE CASE

On or about October 19, 1983, Cynthia Gilkey (hereinafter "Cynthia") gave birth to J'Bria Gilkey¹ (hereinafter "J'Bria") (R.3) and thereafter legally married J'Bria's father, Keith Magee (hereinafter "Keith"). (R.24). Without the benefit of a divorce from Keith, Cynthia later entered into a bigamous marriage with Louis Wallace (hereinafter "Wallace") on February 4, 1989. (R.30). Less than three weeks following her purported "marriage" to Wallace, Cynthia petitioned the Court for a divorce from Keith on February 23, 1989. (R.26-28). For some unknown reason, Cynthia abandoned the petition, which was subsequently dismissed for want of prosecution on December 17, 1991. (R.29). As the divorce petition was dismissed, Cynthia remained legally married to Keith until her death. On or about April 28, 1993, Cynthia gave birth to a son, Christopher Wallace (hereinafter "Christopher"). Christopher is a minor and no guardian has been appointed on his behalf.

On November 26, 2004, Cynthia died intestate. She was survived by J'Bria, her adult daughter, Christopher, her minor son, Bertha Gilkey (hereinafter "Bertha"), her mother, Fred Gilkey,

¹J'Bria Gilkey has gone by J'Bria Iyalla and asserted that this is the name that she uses, but for the sake of clarity she will be referred to as J'Bria Gilkey or J'Bria in this brief.

her father and a number of siblings. Additionally, she was survived by Keith, her legal husband and by Wallace, her purported husband.

After Cynthia's death, Wallace and J'Bria obtained separate counsel and jointly petitioned the Court asking that Wallace be appointed Administrator of the Estate of Cynthia Gilkey Wallace pursuant to *Miss. Code Ann.* § 91-7-61. They alleged in the sworn Petition this was for the purpose of filing a wrongful death action for malpractice. The Petition specifically stated in Paragraph 2 that Wallace was Cynthia's husband at the time of her death. J'Bria and Wallace each signed affidavits stating that the assertions set forth in the Petition for Administration were true. (R.6-7). It should be noted that the Petition was not signed by either attorney of record and there were no contracts attached as referenced in Paragraph 5. (R.3-7). Relying upon the attested truth of the information as set forth in the Petition for Administration, the Court appointed Wallace as Administrator of Cynthia's estate for the purpose of bringing the wrongful death suit and granted him Letters of Administration. (R.8-14).

On or about November 30, 2005, Wallace then proceeded to file an action for wrongful death, medical malpractice against Dr. Emad H. Mohamed (hereinafter "Dr. Mohamed") in the Circuit Court of Lowndes County, Mississippi. (R.42-48). The lawsuit was styled "*Louis Wallace, Personal Representative of the Estate of Cynthia Wallace v. Emad H. Mohamed, M.D.*", Cause No. 2005-0176 CV1. In that suit, Wallace held himself out as the "personal representative" of Cynthia's estate. (R.42). The sobriquet "personal representative" was used by Wallace, in spite of the fact that he had been named Administrator of the estate, was Cynthia's purported husband and a wrongful death beneficiary.

It was during the discovery phase of this wrongful death action that the material misrepresentation regarding the legal status of the parties made to and relied upon by the Chancery Court of Lowndes County came to light. Said misrepresentation, that Wallace was the husband of Cynthia and thus a wrongful death beneficiary, was specifically contradicted by the sworn deposition testimony of J'Bria and Bertha. J'Bria, who was present at Wallace's deposition, testified under oath that she was upset when Wallace was named as Administrator because he and Cynthia did not have a legal marriage. She testified that Wallace knew this and refused to re-marry her mother after she allegedly obtained a divorce from her father Keith. (R.80 (p.24-25), R.86 (p.48-49), R.92 (p.71-72)). This was corroborated by the sworn testimony of Cynthia's mother, Bertha. She testified by deposition on September 28, 2007, that she was privy to a conversation where Wallace and Cynthia discussed that they were not legally married. Bertha also testified that Cynthia was "married" to Ebenezer Iyallah, in the time between her legal marriage to Keith Magee and her bigamous marriage to Wallace. (R.122 (p. 19-20), R.124 (p.26), R.134 (p.67-68)).

In light of this testimony, the representations that Wallace was the legal husband, a wrongful death beneficiary and did not know that Cynthia had been married before were called into question. The evasive nature of Wallace's answers in his deposition taken on December 22, 2006, when he testified that Cynthia was not married before her marriage to him, were apparent. (R.99 (p.18)). Also, in responding to Requests for Admissions, Wallace again denied that he knew of the marriage between Keith and Cynthia. (R. 161).

After the depositions of Wallace and J'Bria were taken, and the assertions that there was not a legal marriage between Cynthia and Wallace came to light, Wallace filed an Amended Complaint in the wrongful death, medical malpractice case on or about June 13, 2007. This Amended Complaint

was styled *Louis Wallace, Personal Representative of the Estate of Cynthia Wallace v. Emad H. Mohamaed*,² (sic) *M.D.; Bristol-Myers Squibb Company; Sanofi-Synthelabo; and John Doe 1-5*". In the Amended Complaint, Wallace again improperly represented himself as Cynthia's legal husband. (R.56-73).

As a defendant in this civil matter, Dr. Mohamed had a strong interest in assuring that the Estate of Cynthia Gilkey Wallace was properly administered in accordance with Mississippi law. Blemished administration of the estate could have precluded a conclusive settlement in the suit to which he had been made a party or, in the event of a judgment, prevent proper distribution of the proceeds and resolution of the matter. Therefore, he filed his Motion to Intervene in the Chancery Court for the purpose of being sure the estate was properly administered and to bring before the Court the potential of problems associated with naming Wallace as Administrator. (R.15-23).

Thereafter, the Chancery Court heard argument of counsel and issued an order granting the Motion to Intervene, removing Wallace as Administrator of the Estate and naming the Chancery Clerk in his stead. (R.179-180). A Motion to Reconsider was filed by Wallace and on July 17, 2008, the Court denied the Motion. (R.181-185). An appeal by Wallace to this Honorable Court followed on July 21, 2008. (R.186-187).

SUMMARY OF THE ARGUMENT

The Chancellor in this case did not abuse his discretion in allowing Dr. Mohamed to intervene in the Chancery Court matter. The Chancellor's findings are supported by substantial, credible evidence and are not an abuse of discretion, manifestly wrong, clearly erroneous or the result

²The Plaintiff incorrectly identified Dr. Mohamed as "Mohamead" in the Amended Complaint.

of an erroneously applied legal standard. Dr. Mohamed clearly had standing to bring his Motion to Intervene as he had a colorable interest in the matter. Someone needed to bring the blatant misrepresentation of the legal status of the Petitioners before the Chancery Court. If not for Dr. Mohamed bringing this before the Court, the Chancellor would have never been the wiser about this misrepresentation. The facts certainly point to the fact that everyone in this family knew of the prior marriage, knew there had been no divorce and knew that Wallace was not a wrongful death beneficiary. The fact is that Wallace and J'Bria came before the Court with unclean hands and should not be able to say that their misrepresentation did not matter as Wallace could be named as "personal representative" of the estate.

After reviewing the facts, the Chancery Court was correct in finding that Dr. Mohamed had standing to bring the motion. He had a colorable interest in the administration of an estate where there were claims being made against him by someone with no standing to bring those claims. The Chancery Court was correct in granting Dr. Mohamed's Motion to Intervene. The Motion was the only way to bring the misrepresentation that Wallace was the legal husband of the decedent before the Court. The Chancellor was correct in removing Wallace as Administrator of Cynthia's estate. The fact that Wallace and J'Bria knew of the illegal marriage, and swore in the Petition that the facts were true and correct, were relevant to the Chancery Court and should have been considered in naming an Administrator of the estate. To allow Wallace and J'Bria to wink at the facts, to misrepresent their relative interests and then come before this Court saying the misrepresentations do not matter would be a travesty of justice, an award for bad behavior and contrary to public policy. This is what Wallace is asking, to ignore the plain truth and give him another title and keep the status quo.

ARGUMENT

Standard of Review

There is a limited standard of review applied to appeals from the findings of a Chancery Court Judge. *Spence v. Scott*, 806 So. 2d 296, 298 (¶ 5) (Miss.Ct.App. 2001). The Chancellor's findings will not be disturbed by the Appellate Court when the findings are supported by substantial, credible evidence and are not an abuse of discretion, manifestly wrong, clearly erroneous or the result of an erroneously applied legal standard. *Harrison, v. Roberts*, 989 So.2d 930, 932 (¶9) (Miss.Ct.App. 2008). As will be shown below, by law, Dr. Mohamed had standing to intervene in the Chancery Court matter. Wallace cannot show there has been an abuse of discretion by the Chancellor in allowing Dr. Mohamed to intervene in the Chancery Court matter and bring the misrepresentations made by the Petitioners to the attention of the Court. Wallace cannot show the Chancellor's findings were manifestly wrong. He cannot show that the Chancellor's findings were not supported by substantial, credible evidence. In addition, he cannot show the Chancellor's findings are clearly erroneous and are the result of an erroneously applied legal standard. Therefore, the Chancellor's findings should not be disturbed.

Dr. Mohamed had Standing to Intervene in the Chancery Court Matter

This Court has held that "[p]arties may sue or intervene where they assert a colorable interest in the subject matter of the litigation or experience an adverse effect from the conduct of the defendant." *Harrison County v. City of Gulfport*, 557 So. 2d 780, 782 (Miss. 1990) (string citations omitted). In this case, Dr. Mohamed's interest is based on his being sued by a party (Wallace) who had no legal standing as a wrongful death beneficiary.

In *Tolliver v. Mladineo*, 987 So. 2d 989 (Miss. Ct. App. 2007), the Court found that a wrongful death action brought by the brother of a deceased woman under *Miss. Code Ann.* § 11-7-13 was improperly filed where the deceased had a living husband and children who took priority under the statute. *Tolliver* at ¶¶ 6-17. As in *Tolliver*, Wallace was, by statute, an improper plaintiff without standing to file suit alleging the wrongful death of Cynthia. Under *Tolliver* and the plain language of the statute, the proper party to file the wrongful death action in this instance was Cynthia's legal husband, Keith, or one of Cynthia's children, J'Bria or Christopher, and not Wallace, who has no legal standing. It is certainly a colorable interest of Dr. Mohamed that if he is being sued, the suit is brought in the name of a proper party.

The sworn testimony of the parties and witnesses seems to suggest that everyone in this family knew that Cynthia and Wallace were not legally married. They knew that Cynthia was not divorced from her former husband when she entered the marriage with Wallace. She filed for a divorce from Keith within weeks of her purported marriage to Wallace. Cynthia told her daughter, J'Bria, and her mother, Bertha, that she was not legally married to Wallace. Cynthia discussed the fact that they were not legally married with Wallace in front of J'Bria and Bertha, yet Wallace and J'Bria both signed affidavits and presented a Petition to the Chancery Court stating that Wallace was Cynthia's husband. In addition, in spite of overwhelming evidence to the contrary, he continues to hold himself out as her husband. Sir Walter Scott said it best with this quote, "[o]h, what a tangled web we weave, when first we practice to deceive," *Marmion*, Canto VI, Stanza 17.

The deception here was perpetrated on the Chancery Court and the Circuit Court when Wallace held himself out to be the legal husband of Cynthia and a wrongful death beneficiary. Dr. Mohamed discovered this deception when it was brought out in the sworn testimony of the parties

and witnesses. Had this information not come out in the sworn testimony of J'Bria, no one would have been the wiser. When the deception was brought before the Chancery Court in Dr. Mohamed's Motion to Intervene, Wallace argued that his status as husband of Cynthia did not matter because he can be the "personal representative" for the estate. That is what he called himself in the Complaint filed in the Circuit Court and begs the question, why?

The Mississippi Supreme Court put to rest the question regarding whether or not a third party has standing to intervene in a Chancery Court matter in *National Heritage Realty, Inc. v. Boles*, 947 So. 2d 238, ¶ 24 (Miss. 2007). In the *Boles* case, a cousin of a former nursing home patient filed a petition in Chancery Court for appointment as Administratrix of her cousin's estate in the county of her former residence. The cousin, as Administratrix, filed a wrongful death claim against the nursing home. When it was determined that the cousin opened the estate in the wrong county and was not a wrongful death beneficiary by statute, the defendant nursing home filed a motion in the Chancery Court to intervene. The Chancery Court denied the motion and on appeal the Mississippi Supreme Court found the defendant nursing home had standing to bring the motion before the Chancery Court. *Boles* at ¶ 24.

The Chancery Court has the authority to correct a decree under the principle that where through accident, mistake or fraud, a decree is incorrectly entered and is not the judgment or decree that would have been entered. In that case, where there is such an accident, mistake or fraud, then the court of equity will offer relief and correct the decree. *Kemp v. Atlas Fertilizer & Chemical Company*, 199 So. 2d 52, 55 (Miss. 1967). In this case, the Court was misinformed, either by accident or design, that Wallace was the legal husband of Cynthia and a wrongful death beneficiary. If Dr. Mohamed did not have standing to bring this motion, then who would? Certainly not anyone

in the family would bring this matter before the Court, as they all apparently knew of the deceit and did nothing about it. J'Bria did nothing to rectify the situation even though she was upset about Wallace being named as Administrator of her mother's estate.

Wallace had no legal relation to Cynthia and his appointment as Administrator of her estate with authority to file a wrongful death action was in error. Therefore, the withdrawal of the appointment of Wallace as Administrator of Cynthia's estate was correct and equitable. The appointment of the Chancery Clerk as the Administrator following consideration of the facts as set forth above, and in keeping with Mississippi law, was a correct and just decision. As will be shown below, consideration of Wallace as potential administrator or personal representative of the estate fails for a number of legal and equitable reasons.

**The Chancery Court was Correct in Removing Wallace as Administrator
of the Estate of Cynthia Gilkey Wallace**

In their sworn Petition to the Chancery Court, Wallace and J'Bria asked the Court to name Wallace as Administrator of the Estate of his purported wife, Cynthia. They specifically stated that the Petition was brought under *Miss. Code Ann.* § 91-7-61 (1972, as amended) for the purpose of bringing the medical negligence claim. This statute provides as follows:

If necessary, an administrator may be appointed to institute and conduct suits, whose power shall cease when the litigation is entirely closed and who shall only account for the proceeds of the suit.

In the Petition, Wallace and J'Bria swore that Wallace was the husband of Cynthia Gilkey Wallace and an heir-at-law. They further swore that Wallace had individually, and on behalf of Christopher, a minor, retained the services of an attorney to investigate and prosecute any claim that they may have due to Cynthia's death. In the petition, Wallace and J'Bria swore that J'Bria was the

daughter of Cynthia and she, too, had retained the services of an attorney. They both signed and attached affidavits attesting that everything in the Petition was true and correct.

It was not until it was brought to the attention of the Chancery Court that Wallace was not the legal husband of Cynthia that he contended that the Court had the discretion to appoint him as Administrator or personal representative based on *Miss. Code Ann.* § 91-7-63(1) (1972, as amended).

This Section states in pertinent part as follows:

The court shall grant letters of administration to the relative who may apply, preferring first the husband or wife and then such others as may be next entitled to distribution if not disqualified, selecting amongst those who may stand in equal right the person or persons best calculated to manage the estate; or the court may select a stranger

.....

Miss. Code Ann. § 91-7-63(1) (1972, as amended). It is his contention now that he should have been granted Letters of Administration no matter what his real marital status was at the time of Cynthia's death.

Pursuant to *Miss. Code Ann.* § 91-7-63(1), the preferred administrator of Cynthia's estate is her lawful husband, Keith, followed by their daughter J'Bria and Cynthia's minor son, Christopher. In interpreting this statute, the Courts have consistently stated that "the chancellor has a large measure of discretion in both the appointment and revocation of Letters of Administration except in cases made mandatory by the statute." *Estate of Moreland v. Moreland*, 537 So. 2d 1337, 1340 (Miss. 1989). "Appointments made mandatory by statute are those involving the husband, wife, or distributees because only those persons have a legal right to be appointed; as regards all others, the appointments lie within the discretion of the chancery court." *Moreland* at 1340. "[T]he court is given wide discretion in the appointment and revocation of administrators, within the limits of the law." *Moreland* at 1343, citing *Stribling v. Washington*, 37 So. 2d 759, 761 (Miss. 1948).

In *Estate of Moreland v. Moreland*, 537 So. 2d 1337, 1340 (Miss. 1989), the mother of a deceased man sought to supersede the rights of the son of the deceased man as administrator of the estate and as plaintiff in the ensuing wrongful death action. The court found that "[o]nly the husband, wife and those relatives as may be next entitled to a distribution are accorded preference in the granting of letters", determining that under the statute the son's rights superseded those of the mother's and that the son's legal guardian was the preferred person to serve as administrator of the estate. *Moreland* at 1341. Further, the Court expressed "grave concern" over the misleading way the mother of the deceased presented her petition, omitting mention of the deceased's son who was the proper legal heir. *Moreland* at 1343.

Similarly, in *Stribling v. Washington*, 37 So. 2d 759, 761 (Miss. 1948), the daughter of a deceased man petitioned to be granted Letters of Administration, omitting mention of the deceased's legal wife (who was not her mother) in her petition. *Stribling* at 535. Acknowledging the statutory preference for the spouse of the deceased as administrator and concerned at the misrepresentation set forth in the daughter's petition where mention of the deceased's widow was omitted, the chancellor set aside the appointment of the daughter and appointed the deceased's widow as administrator of the estate. *Stribling* at 538.

Under the statute, J'Bria or Christopher fall next in the line of right as preferred administrators of the estate of their mother. However, J'Bria clearly knew that Wallace was not legally married to Cynthia at any time and apparently misrepresented this material fact to the Chancery Court; thus her fitness is called into question as potential administrator of the estate.

Christopher, the minor son of Cynthia, has no legal guardian to represent his interests in this matter. His mother was legally married to Keith at the time of his birth. "[T]here is a rebuttable

presumption of the legitimacy of a child born during the course of a marriage" and "[t]he presumption of legitimacy is one of the strongest known to our law." *Smith v. Bell*, 876 So. 2d 1087, ¶ 13 (Miss. Ct. App., 2004). Although circumstances certainly suggest that Wallace is, indeed, Christopher's natural father, the fact of Wallace's paternity and Christopher's illegitimacy has not been legally established to rebut this presumption. See also *Estate of Taylor v. Thompson*, 609 So. 2d 390 (Miss. 1992).

In spite of overwhelming evidence to the contrary, Wallace has continued to maintain that he and Cynthia were legally married. The court has held that a second marriage is invalid and void *ab initio* when entered into while still legally married. *Callahan v. Callahan*, 381 So. 2d 178 (Miss. 1980). Wallace states that they shared a marriage equivalent relationship. However, Mississippi no longer recognized common law marriages as of April 5, 1956. *Miss. Code Ann.* § 93-1-13.

In his Petition, Wallace clearly misrepresented his status to the Court. "He who doeth wrong, may not borrow the hands of the chancellor to draw equity from a source his hands hath polluted." *Thigpen v. Kennedy*, 238 So. 2d 744, 746 (Miss. 1970) (citing *Griffith, Miss. Chancery Practice*, § 41 (1950)). It is the duty of the court to apply this action *sua sponte* when it becomes apparent that the facts call for the doctrine of unclean hands. *Id.* at 446-47. "Simply put, this means that no person as a complaining party can have the aid of the court of equity when his conduct with respect to the matter in question has been characterized by willful inequity." *Griffith, Miss. Chancery Practice*, § 42 (2000); see *Bailey v. Bailey*, 724 So. 2d 335 (Miss. 1998) ("The clean hands doctrine prevents a complaining party from obtaining equitable relief in court when he is guilty of willful misconduct in the transaction at issue.").

Rule 17(a) of the Mississippi Rules of Civil Procedure states that every action shall be prosecuted in the name of the real party-in-interest. Wallace and J'Bria both misrepresented Wallace's personal stake in Cynthia's estate and he came before the Chancery Court with unclean hands. The Chancellor was correct in removing him as the Administrator based on the material misrepresentations and evidence, albeit circumstantial, that he knew of the prior marriage and the fact that Cynthia was not divorced when she married him. Clearly J'Bria and Bertha knew of the previous marriage and that Wallace and Cynthia were never legally married. Wallace's deposition testimony and answers to defendant's Request for Admissions denied knowledge of the previous marriage. However, contrary to Wallace's denials, both J'Bria and Bertha testified that Wallace was, in fact, fully aware of the previous marriage and that his "marriage" to Cynthia was not a legal one. It would appear that neither Wallace or J'Bria came before the Chancery Court with clean hands. The argument that the legal relationship between Wallace and Cynthia is of no import, as they maintained a "marriage equivalent", and is against public policy. Wallace and J'Bria should not be able to so easily shrug off the deceit with this argument. Thus, the decree of the Chancellor removing Wallace as Administrator of the Estate should not be disturbed.

CONCLUSION

Dr. Mohamed avers that the Chancery Court did not commit reversible error in allowing him to intervene in the Chancery Court matter. The Chancery Court was correct in removing Wallace as Administrator of Cynthia's estate. The decision of the Chancellor was not an abuse of discretion, was not manifestly wrong, was not clearly erroneous and was not the result of an erroneously applied legal standard, and thus must stand.

Respectfully submitted this the 10th day of June, 2009.

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CERTIFICATE OF SERVICE

I, Diane V. Pradat, attorney for Appellee, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing to:

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SO CERTIFIED this the 10th day of June, 2009.



Diane V. Pradat 