IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

ORVILLE LEE JOHNSON, APPELLANT

VS. NO. 2008-CA-01418

RITA FRANCES BURFORD HERRON,
JOHN CAL BURFORD, JR., and
PATRICIA A. GRANTHAM, APPELLEES

BRIEF FOR APPELLEES

APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPPI

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NO ORAL ARGUMENT REQUESTED

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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 the case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

1.	Orville Lee Johnson	Appellant
2.	Rita Frances Burford Herron, John Cal Burford, Jr., and Patricia A. Grantham	Appellees
3.	James W. Amos	Attorney of Record for Appellant
4.	Dan Little, Sherry P. Thompson, & law firm of Little, Little, Windel, Oliver, Landgraf & Gallagher, PLLC	Attorneys of Record for Appellant
5.	John T. Lamar, Jr. & law firm of Lamar & Hannaford, P.A.	Attorneys of Record for Appellees, Herron and Burford
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7.	Honorable Mitchell M. Lundy, Jr.	Chancellor

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES i

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF ISSUES vi

STATEMENT OF CASE 1

A. NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW 1

B. STATEMENT OF THE FACTS 3

SUMMARY OF ARGUMENT 7

ARGUMENT 8

A. STANDARD OF REVIEW 8

B. ISSUE # 1: WHETHER SUMMARY JUDGMENT ON THE BASIS OF JUDICIAL ESTOPPEL WAS APPROPRIATE 9

C. ISSUE # 2: WHETHER SUMMARY JUDGMENT ON THE BASIS OF EQUITABLE ESTOPPEL WAS APPROPRIATE 13

D. ISSUE # 3: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT CHESTER DID NOT HAVE ANY OWNERSHIP INTEREST IN THE REAL PROPERTY IN EITHER TATE OR DESOTO COUNTY, MISSISSIPPI WAS APPROPRIATE . . . 15

E. ISSUE # 4: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT CHESTER'S INTEREST AS AN OMITTED SPOUSE IN THE ESTATE OF MARY WAS INSUFFICIENT TO RENOUNCE MARY'S WILL WAS APPROPRIATE 20

F. ISSUE # 5: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT HERRON ACTED AS A REASONABLE PRUDENT PERSON UNDER SIMILAR CIRCUMSTANCES, AND FULFILLED HER DUTIES AS CONSERVATOR WAS APPROPRIATE 23

CONCLUSION 24

CERTIFICATE OF SERVICE 26

TABLE OF AUTHORITIES

Statutes:

Miss. Code Ann. § 85-3-21 (1972) 16

Miss. Code Ann. § 89-1-29 (1972) 15

Miss. Code Ann. § 91-5-25 (1972) 21

Miss. Code Ann. § 91-5-27 (1972) 20

Miss. Code Ann. § 91-5-29 (1972) 21

Case Law:

Banks v. Junk, 264 So.2d 387 (Miss. 1972) 21-22

Caine v. Bartwell, 120 Miss. 209, 82 So. 65 (1919) 22

Dockins v. Allred, 849 So.2d 151 (Miss. 2003) 9-10

Estate of Carter, 912 So.2d 138 (Miss. 2005) 23

Estate of Richardson, 903 So.2d 51 (Miss. 2005) 9-10

Fruchter v. Lynch Oil Co., 522 So.2d 195 (Miss. 1988) 9

Galloway v. The Traveler's Insurance Co.,
515 So.2d 678 (Miss. 1987) 9

Hendry v. Hendry, 300 So.2d 147 (Miss. 1974) 15-16

In re Estate of Lane, 930 So.2d 421 (Miss.Ct.App. 2005) . . . 18

In re Estate of Reid, 825 So.2d 1 (Miss. 2002) 18

In re Estate of Summerlin,
989 So.2d 466 (Miss.Ct.App. 2008) 18

Lewis v. Ladner, 177 Miss. 473, 1772 So. 312 (1937) 15-16

McNeil v. Hester, 753 So.2d 1057 (Miss. 2000) 8

Merchants Nat'l Bank v. Southeastern Fire Ins. Co.,
751 F.2d 771 (5th Cir. 1985) 15-16

Mullins v. Ratcliff, 515 So.2d 1183 (Miss. 1987) 18-19

Osburn v. Sims, 62 Miss. 429 (1884) 22

O'Neill v. O'Neill, 551 So.2d 228 (Miss. 1989) 13

Philan v. Turner, 195 Miss. 172, 13 So.2d 819 (1943) . . . 15-16

PMZ Oil Co. v. Lucroy, 449 So.2d 201 (Miss. 1984) 13-14

Richardson v. Riley, 355 So.2d 667 (Miss. 1987) 8

Roberts v. Grisham, 493 So.2d 940 (Miss. 1986) 16

Roberts v. Roberts, 866 So.2d 474 (Miss.Ct.App. 2003) 10

Sanderson v. Sanderson, 824 So.2d 623 (Miss. 2002) 8

Taylor Machine Works, Inc. V. Great American Surplus Lines, 635 So.2d 1357 (Miss. 1994) 9

Thomas v. Bailey, 375 So.2d 1049 (Miss. 1979) 12

Tillman v. Williams, 403 So.2d 889 (Miss. 1981) 22

Secondary Sources

Miss. R. Civ. P. 56(c) 9

STATEMENT OF ISSUES

The issues presented by the Appellee in this Appeal are:

ISSUE # 1: WHETHER SUMMARY JUDGMENT ON THE BASIS OF JUDICIAL ESTOPPEL WAS APPROPRIATE.

ISSUE # 2: WHETHER SUMMARY JUDGMENT ON THE BASIS OF EQUITABLE ESTOPPEL WAS APPROPRIATE.

ISSUE # 3: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT CHESTER DID NOT HAVE ANY OWNERSHIP INTEREST IN THE REAL PROPERTY IN EITHER TATE OR DESOTO COUNTY, MISSISSIPPI WAS APPROPRIATE.

ISSUE # 4: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT CHESTER'S INTEREST AS AN OMITTED SPOUSE IN THE ESTATE OF MARY WAS INSUFFICIENT TO RENOUNCE MARY'S WILL WAS APPROPRIATE.

ISSUE # 5: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT HERRON ACTED AS A REASONABLE PRUDENT PERSON UNDER SIMILAR CIRCUMSTANCES, AND FULFILLED HER DUTIES AS CONSERVATOR WAS APPROPRIATE.

STATEMENT OF CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

This appeal arises from an order rendered on February 6, 2008 and entered nunc pro tunc on April 9, 2008 in the Chancery Court of DeSoto County, Mississippi which granted the Defendants' Motion for Summary Judgment and dismissed the Appellant's Amended Petition with prejudice. (Appellees' R. 11-25). Appellant's Motion to Set Aside, for Reconsideration or Rehearing and Brief in Support was duly filed, answered by counsel for the Appellees, and an Order denying the Appellant's Motion to Set Aside, for Reconsideration or Rehearing was entered on July 22, 2008. (Appellee's R. 26-38, 141). The Notice of Appeal was filed on August 18, 2008. (Appellees' R. 7-8). The Designation of Record was filed on August 25, 2008. (Appellees' R. 9-10).

On December 2, 2005, an Amended Petition was filed by the Appellant, Orville Lee Johnson (hereinafter "Johnson") against Rita Frances Burford Herron (hereinafter "Herron"), John Cal Burford, Jr. (hereinafter "Burford") and Patricia A. Grantham (hereinafter "Grantham"), that sought the following relief: (1) that Deeds to the real property located in Tate and DeSoto Counties be held to be void and Johnson be established as the sole owner of said property, (2) that Herron be found to have violated her fiduciary duties to Chester Johnson (hereinafter "Chester") which would entitle Johnson to a judgment in excess of $100,000.00, (3) alternatively, that

Johnson is entitled to one-half (1/2) of the estate of Mary Burford Rowland Johnson (hereinafter "Mary") due to the fact that Chester was an omitted spouse under the terms of Mary's will and Johnson is Chester's natural son. (Appellees' R. 28-38). Additionally, Johnson sought attorneys' fees, court costs, legal interest, and any other monetary damages determined at trial. (Appellees' R. 28-38). Herron and Burford answered the Amended Petition on April 17, 2006 and Counter-claimed for slander of title due to Johnson's filing of his complaint and requested damages, as well as reasonable attorney's fees and expenses. (Appellees' R. 39-62).

On August 7, 2007, Appellees, Herron and Burford, by and through their respective solicitors of record, filed their Itemization of Material Undisputed Facts and Motion for Summary Judgment as well as a Memorandum of Authorities in Support of Defendant's Motion for Summary Judgment which sought summary judgment on the following issues: (1) Johnson's ownership interest, by and through his father, Chester, in the DeSoto and Tate County properties, (2) whether Herron breached her fiduciary duties in the Conservatorship of Chester, and (3) Johnson's ownership interest, by and through his father, Chester, in the estate of Mary. (Appellees' R. 63-119). On November 20, 2007, the Appellant, by and through his solicitors of record, filed his Response and Brief in Opposition to Defendants' Motion for Summary Judgment. (Appellees' R. 129).

B. STATEMENT OF THE FACTS

On August 31, 1958, Mary married Chester. (Appellees' R. 66). As is the case with many married couples, Mary conveyed her Desoto County property, where the marital home was located, to herself and her husband, Chester, on May 7, 1963. (Appellees' R. 71-72). A number of years passed, and Chester was diagnosed with colon cancer. (Appellees' R. 76, 77). At this point in time, both Mary and Chester became concerned about the certainty of death and undertook the daunting task of planning and preparing their estates. (Appellees' R. 73-74, 139-140). As part of the preparation of their estates, Chester reconveyed the DeSoto County property solely to his wife, Mary, on March 30, 1978. (Appellees' R. 75).

As circumstances would have it, Chester survived his colon cancer and subsequently survived his spouse, Mary. (Appellees' R. 77, 97, 90, 91-92). In May of 1986, Mary discovered that she had terminal lung cancer and was placed in the hospital for a brief period of time. (Appellees' R. 78). During this period in time, Chester moved from the marital home in DeSoto County, Mississippi to Rosewood Assisted Living Facility in Memphis, Tennessee. (Appellees' R. 79). Upon Mary's discharge from the hospital, she returned to her childhood home, which happened to be next door to her nephew, Burford, and her sister-in-law in Tate County, Mississippi. (Appellees' R. 79, 80). Chester never returned to the home in DeSoto County or to live with his spouse after she moved to

Tate County, Mississippi. (Appellees' R. 80). In fact, Chester lived out the rest of his days in the Rosewood Assisted Living Facility, the Senatobia Convalescent Center, and the State Hospital at Whitfield. (Appellees' R. 80).

On August 18, 1986, Mary executed a series of Deeds of Gift which conveyed the Tate and DeSoto County properties to Herron and Burford. (Appellees' R. 81-86). The Deed on the Desoto County property was filed on August 19, 1986 in Book 188 at Page 589 in the office of the Chancery Clerk of Desoto County, Mississippi. (Appellees' R. 81) The deeds on the Tate County property were filed on August 20, 1986 in Deed Book A-51 at pages 540, 542, and 544 in the office of the Chancery Clerk of Tate County, Mississippi. (Appellees' R. 82-86). At that time, Chester was not residing with Mary and had previously voluntarily moved to Rosewood Assisted Living Facility. (Appellees' R. 79, 80, 122).

Based on Johnson's testimony, Chester was a big man that was not going to be forced to go anywhere against his wishes without the assistance of a court order. (Appellees' R. 87-88, 122). Yet, Chester left the house in DeSoto County on his own free will and accord. (Appellees' R. 79, 80). Over time, Chester's condition diminished to the point that on November 10, 1986, Mary filed an application and affidavit to have Chester committed. (Appellees' R. 87-88). Chester was committed on November 13, 1986 by order of the Honorable Melvin McClure. (Appellees' R. 89).

On December 27, 1986, Mary departed this life after her tragic

battle with lung cancer. (Appellees' R. 90). Her will, which was executed on December 12, 1977, was filed for probate on January 20, 1987 with Herron and Burford being appointed as co-executors of her estate. (Appellees' R. 91-92). Mary's will waived inventory and accounting. (Appellees' R. 73-74, 91-92). While Mary's will made no mention of her spouse, and left all of her asset to Herron and Burford. (Appellee's R. 73-74). Based on the assets of their separate estates, it was clear that it would have been a waste of time to renounce Mary's will due to the fact that Mary's estate was of nominal value and value of Chester's separate estate was greater than his legal share in Mary's estate. (Appellees' R. 116). Further, the executors were under the belief that Mary's estate planning had addressed all matters pertaining to her estate of more than a nominal stake prior to her death. (Appellees' R. 77).

After several attempts to persuade Johnson to come to the assistance of his father, Herron was appointed conservator of Chester on September 2, 1987 by default. (Appellees' R. 79, 93-94, 129). Herron assumed the responsibilities of conservator for Chester due to the fact that no one else in Chester's family was willing to shoulder the burden. (Appellees' R. 79, 93-94, 129). During the pendency of the conservatorship of Chester, Johnson had minimal involvement with the support and care of his father. (Appellees' R. 129, 132). The only inquiries by Johnson were in regards to Chester's property and money, and not in regards to either Chester's health or well-being. (Appellees' R. 132).

In fact, Johnson began his investigation of the assets of Chester, which admittedly included investigation into the real property located in Tate and DeSoto County properties, in 1978. (Appellees' R. 132). Further, as early as 1991, Johnson persuaded his legal counsel, who incidently is his legal counsel in this matter, to begin inquiring into the disposition of the DeSoto County property. (Appellees' R. 95). This inquisition continued until shortly before the closing of Chester's estate. (Appellee's R. 98-99).

Chester died on May 23, 1998. (Appellees' R. 97). In preparation for the filing of the Estate of Chester Johnson, Gaines Baker, the attorney for Herron, sent the conservatorship records, accountings, and relevant deeds to Dan Little, the attorney for Johnson, on March 14, 2001. (Appellees' R. 98-99). Subsequently, Herron and Johnson were appointed as co-administrators for the Estate of Chester and pursuant to their oath assumed the duty of marshaling the assets of Chester. (Appellees' R. 100). Incidentally, the Conservatorship and the Estate were both a part of the same court file. (Appellee's R. 93-94, 100). On September 11, 2002, the Conservatorship and Estate of Chester were closed and disbursed with Johnson being recognized as the sole heir-at-law of Chester, but disbursing the assets on a 60/40 split with 60% disbursed to Johnson and the remaining 40% being split between Herron and Burford. (Appellees' R. 101-103, 137-138). All parties represented to the court that the settlement agreement dealt with

all assets of the Estate. (Appellees' R. 101-103).

The Order closing the estate was agreed to and approved by Johnson, Herron, Burford, and their respective legal counsels. (Appellees' R. 101-103). Further, the settlement was based on a dispute in regards to a lost will, which the Appellant has admitted that he believed gave 50% to be split by Herron and Burford. (Appellees' R. 121). During the pendency of the current action, the lost Last Will and Testament of Chester was found and it clearly established that Johnson was to receive one-half (1/2) of Chester's estate and Herron and Burford were to split the remaining one-half (½). (Appellees' R. 139-140).

SUMMARY OF ARGUMENT

The Appellant is judicially estopped bringing the current causes of actions since the Appellant served as co-administrator in his father's estate, joined in the agreed order closing the estate which affirmatively stated that all of the assets of father's estate had been determined and were being disbursed, and his current actions run counter to the previous legal proceedings. Further, the Appellant is equitably estopped from asserting the current causes of action after inducing the Appellees to sacrifice a portion of the interest to which they felt entitled in order to settle a disputed estate.

Moreover, the deeds to the subject properties are valid due to the fact that Chester voluntarily abandoned his homestead and no confidential relationship existed which would have raised the

presumption of undue influence. As a result of the validity of the deeds, Chester's separate estate was greater than his interest in Mary's estate, and the exercise of renouncing the will would have been a waste of time. Finally, Herron fulfilled her duties, in accordance with the advice of her respective legal counsels, as both the executrix and conservator by acting as a reasonable, prudent person would have acted under similar circumstances. For these reasons, the rulings of the Chancellor should be affirmed.

ARGUMENT

A. STANDARD OF REVIEW

Mississippi appellate courts consider the decisions of chancellors under a limited standard of review. *McNeil v. Hester*, 753 So.2d 1057, 1063 (Miss. 2000). The Court will not disturb the findings of a chancellor when supported by substantial credible evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard. *Sanderson v. Sanderson*, 824 So.2d 623, 625 (Miss. 2002). Even if the appellate court disagrees with the lower court on the finding of fact and might have arrived at a different conclusion, it is bound by the chancellor's findings unless manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Richardson v. Riley*, 355 So.2d 667, 668 (Miss. 1987).

Additionally, summary judgment shall be granted if the pleadings, discovery materials, depositions, and affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Miss. R. Civ. P. 56(c); *Taylor Machine Works, Inc. v. Great American Surplus Lines*, 635 So. 2d 1357, 1361 (Miss. 1994). An allegation of material fact in the pleadings is not sufficient to avoid summary judgment. *Fruchter v. Lynch Oil Co.*, 522 So. 2d 195, 198 (Miss. 1988). When a non-moving party bears the burden of proof at trial to establish an essential element of a claim, and the non-moving party fails to make a showing sufficient to establish an essential element of the claim, then all other facts are immaterial, and the moving party is entitled to judgment as a matter of law. *Galloway v. The Traveler's Insurance Co.*, 515 So. 2d 678, 683 (Miss. 1987).

B. ISSUE # 1: WHETHER SUMMARY JUDGMENT ON THE BASIS OF JUDICIAL ESTOPPEL WAS APPROPRIATE.

The learned chancellor held that judicial estoppel precludes Johnson from serving as co-administrator in his father's estate, joining in the petition to close the estate, and now filing suit to contest assets upon which he agreed with their disposition and validity at the closure of the estate. (Appellees' R. 20). The doctrine of judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes

more convenient or profitable, retreating from that position later in litigation. *Estate of Richardson*, 903 So.2d 51, 56 (Miss. 2005); *citing Dockins v. Allred*, 849 So.2d 151, 155 (Miss. 2003). Because of judicial estoppel, a party cannot assume a position at one stage of a proceeding and then take a contrary stand later in the same litigation. *Id.* Further, judicial estoppel is meant to prevent the misuse of the courts by inconsistent representations, in which litigants choose case by case what representations may do them the most good. *Roberts v. Roberts*, 866 So.2d 474, 483 (Miss. Ct. App. 2003).

The Appellant's initial assault upon this holding questions the intent of the Appellant in the closure of the conservatorship and estate. The Appellant was provided with updates, accounting, and inventories on his father's conservatorship beginning in 1991. (Appellees' R. 95). Further, the Appellant's own testimony reveals that he began searching for his father's assets as early as 1978. (Appellees' R. 132). Appellant was fully informed of the known assets of the conservatorship and estate and had duty to locate any unlisted or undetermined assets.

Apparently, Plaintiff had questions about some real property in Desoto County, Mississippi prior to closing the estate, yet he, along with his counsel of record, joined in the agreed order closing the estate which asserted that all of the assets of Chester

had been determined and were being disbursed. (Appellees' R. 101-103). As a result, Plaintiff cannot now change his position if it could become more convenient or profitable. The deposition of Gaines Baker as well as the agreed order signed by the Appellant and his legal counsel clearly and unequivocally state that all of the assets of Chester had been determined and were being disbursed.(Appellees' R. 101-103; C.R. 344,345). At the time of the closing of the estate, all of the evidence and legal pleadings clearly revel that there was no dispute in regards to the assets of Chester.

However, the settlement agreement reveals that there was a dispute in regards to the disposition of those assets. (Appellees' R. 137-138). Johnson admitted that it was his understanding, due to statements by his father prior to his death, that his father's will left one-half (½) of his assets to be split between Herron and Burford and the remaining one-half (½) of his assets to his son. (Appellees' R. 121-122). The will was lost during the pendency of Chester's estate and later discovered during the pendency of the current action. (Appellees' R. 139-140). Simply put, Johnson took more than the share to which he felt he was entitled and the Appellees took less than the share to which they believed they were entitled in order to fully and finally resolve their controversy. Johnson benefitted and Burford and Herron suffered a loss. Only

after the resolution of Chester's estate did Johnson formerly request a relief contrary to the court proceedings.

Judicial estoppel does not apply when the position first assumed is the result of mistake or when the parties were not adverse in the original proceedings. *Thomas v. Bailey*, 375 So.2d 1049, 1053 (Miss. 1979) However, the Appellant's reliance upon *Thomas* for support of his argument is misplaced. The facts of *Thomas* were far different from this case. In *Thomas*, the parties were in agreement at the time the estate was opened and closed that a piece of commercial property was a part of the Estate. *Id.* at 1051. Five (5) months subsequent to the decree closing the estate, a deed was discovered that had been executed by the decedent prior to his death, but had not been filed of record. *Id.*

In the case at bar, the parties were clearly adverse in regards to the assets of the estate and the respective interests of the beneficiaries. All parties were represented by legal counsel and executed a settlement agreement to resolve their dispute and disagreement, which gave the plaintiff sixty percent (60%) of the assets. (Appellees' R. 137-138). All of the contested Deeds were of public record and executed and recorded subsequent to the Appellant's admitted research on his father's assets, thereby precluding the plaintiff's argument for a mistake of fact. The plaintiff even admits having a copy of the will which decreased his

interest in his father's estate that "got burned up when his truck caught fire". (Appellees' R. 121-122). Clearly, judicial estoppel is appropriate in this matter.

Finally, Johnson alleges that Herron and her attorney purposefully hide known assets of his father from Johnson. This argument completely ignores the fact that Johnson admitted beginning his search in 1978 which corresponded with the time that Chester conveyed his interest to Mary and preceded the deeds to Herron and Burford by nearly ten (10) years as well as the fact that the public records indicated that Chester had no interest in the property.

C. ISSUE # 2: WHETHER SUMMARY JUDGMENT ON THE BASIS OF EQUITABLE ESTOPPEL WAS APPROPRIATE.

The learned chancellor held that equitable estoppel precludes Johnson from filing suit after inducing Herron and Burford to change their position in regards to their interest in Chester's estate in order to settle the Estate. (Appellees' R. 21-23). The doctrine of equitable estoppel is based upon fundamental notions of justice and fair dealing. *O'Neill v. O'Neill*, 551 So.2d 228, 232 (Miss. 1989). There are two elements of equitable estoppel that must be satisfied: (1) the party has changed his position in reliance upon such conduct of another; and (2) the party has suffered detriment caused by his change of position in reliance

upon such conduct. *PMZ Oil Co. v. Lucroy*, 449 So.2d 201, 206 (Miss. 1984). The court in *Lucroy* went on to state that "whenever in equity and good conscience persons ought to behave ethically toward one another the seeds for a successful employment of equitable estoppel have been sown." *Id.*

In the case at bar, the Appellees, Herron and Burford, accepted a smaller percentage of Chester's estate than they believed to which they were entitled in order to close and finalize the estate and conservatorship. Johnson was aware of the actual terms of the lost will, and the detriment that Herron and Burford would receive under this agreement. (Appellees' R. 121-122). The Appellant had a change of heart and changed his position in regards to his father's estate and filed suit against the Appellees.

The Appellant continually attacks the Appellees on the basis that they secreted away the prior transactions and were hiding assets. However, the deeds were filed in the public record and were open and obvious to anyone conducting any sort of investigation into the assets. The public record clearly indicated that the real property did not belong to Chester. Appellant argument rests solely on his allegation that the subject deeds are void. In reality, the subject deeds are clearly valid, and the real property was not an asset that belonged to Chester.

D. ISSUE # 3: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT CHESTER DID NOT HAVE ANY OWNERSHIP INTEREST IN THE REAL PROPERTY IN EITHER TATE OR DESOTO COUNTY, MISSISSIPPI WAS APPROPRIATE.

In order to assist the Court in its analysis of the lower courts decision, the two (2) separate pieces of real property will be addressed in accordance with their locations.

i. DeSoto County Property.

The learned chancellor held that Chester voluntarily abandoned his homestead and therefore had no homestead interest in the property. (Appellees' R. 23). The only interest in the DeSoto county property that Chester could have possibly maintained would have arisen through his homestead rights as the husband of Mary. The Mississippi legislature has addressed these rights in Miss. Code Ann. § 89-1-29 states in pertinent part as follows:

> "A conveyance, mortgage, deed of trust or other incumbrance upon a homestead exempted from execution shall not be valid or binding unless signed by the spouse of the owner if the owner be married and living with the spouse."

The requirement that the owner be living with the spouse is essential in determining whether the property is homestead. *Merchants Nat'l Bank v. Southeastern Fire Ins. Co.*, 751 F.2d 771, 777 (5th Cir. 1985); *citing Hendry v. Hendry*, 300 So.2d 147, 149 (Miss. 1974); *Philan v. Turner*, 195 Miss. 172, 13 So.2d 819, 821 (1943). When a husband removes himself from homestead property

without any intent to return and his wife consents, the homestead is abandoned. *Id.; citing Lewis v. Ladner*, 177 Miss. 473, 1772 So. 312, 313-14 (1937). The question of whether an owner of property is living with a spouse is factual. *Philan*, 13 So.2d at 821.

Appellant strongly argues Section 85-3-21 of the Mississippi Code of 1972, as amended, as well as *Roberts v. Grisham*, 493 So.2d 940 (Miss. 1986) for support of his argument that Chester's abandonment of the property was involuntary. Miss. Code Ann. § 85-3-21 states in pertinent part as follows:

> "...But husband or wife, widower or widow, over sixty (60) years of age, who has been an exemptionist under this section, shall not be deprived of such exemption because of not residing therein."

However, Miss. Code Ann. § 85-3-21 does not eliminate the requirement that an individual not voluntarily abandon his homestead. Further *Roberts* is distinguishable from the current case. In *Roberts*, the individual who abandoned the homestead was incarcerated in prison for the remainder of his natural life. Clearly, he had no choice about abandoning his property, but was instead removed from his homestead while wearing handcuffs.

The facts of this case reveal that in May of 1986, Chester voluntarily moved from the Desoto County property to Rosewood Assisted Living Facility in Memphis, Tennessee never to return to live with his wife. (Appellees' R. 79,80). Mary moved to Tate

County, never to live with Chester again. (Appellees' R. 79, 80). Clearly, Chester voluntarily abandoned any homestead interest that he might have had in the Desoto County property, thereby precluding any claim to the property even if the estoppel holdings were reversed.

The only evidence that the plaintiff has presented to support his assertion that Chester's abandonment was involuntary are statements by Rita that Chester needed care, that Mary could not do it, that Mary needed care from her family, that the address on the 1986 deeds for Mary was the Desoto County address, and reports in the commitment papers that Chester tried to escape. The lower court considered all of this evidence and determined that the abandonment was voluntary.

The facts are that Chester was a physically intimidating individual, who was not going to be forced to do anything against his wishes. (Appellees' R. 87-88, 122). Chester voluntarily abandoned his homestead in May of 1986 never to return, yet the commitment paperwork to have him confined to a treatment facility was not filed until November 10, 1986, some six (6) months later. (Appellees' R. 79,80, 87-88). The evidence is clear that Chester voluntarily abandoned his homestead.

ii. Tate County property

The Tate County property was Burford family property inherited

by Mary, through her mother who was the grandmother of Herron and Burford. (Appellees' R. 79-80). Chester never lived on this property. (Appellees' R. 79,80). As a result, homestead rights do not apply to this property.

Incidentally, the only potential argument that the deeds on this property were void is that Burford and Herron exercised undue influence upon Mary. The undue influence argument could affect both DeSoto County and Tate County property, but will be addressed here as it is the only argument that concerns the validity of deed on the Tate County property.

Gifts of real property between family members are a normal occurrence, and Mississippi courts will not act when a conveyance between family members is a purely voluntary act. *In re Estate of Summerlin*, 989 So.2d 466, 477 (Miss.Ct.App. 2008); *quoting In re Estate of Lane*, 930 So.2d 421, 425 (Miss.Ct.App. 2005). In fact, a deed between family members alone and of itself raises no presumption of undue influence since the grantor is presumably the dominant party. *Id.* Further, Mississippi has defined a confidential relationship as a relationship between two people in which one person is in a position to exercise dominant influence upon the other because of the latter's dependency of the former arising either from weakness of mind or body, or through trust. *In re Estate of Reid*, 825 So.2d 1, 5 (Miss. 2002). However, the

burden of establishing the existence of a confidential relationship is upon the party asserting it. *Mullins v. Ratcliff*, 515 So.2d 1183, 1192 (Miss. 1987).

In the cases cited by the Appellant concerning undue influence, the facts revealed that the heirs-at-law and/or the intended beneficiaries under a valid last will and testament were excluded by the actions of an individual who took advantage of their relationship with the grantor in the final days of his or her life while the individual was in a weakened mental or physical state. In this case, Mary executed a will in 1977 that would have given the property to Herron and Burford. (Appellees' R. 73-74). Mary did not have any children of her own, and Herron and Burford were the closest surviving family members. (Appellees' R. 76). Further, Mary's mental and physical condition were sufficient for her to file commitment papers on her own husband in November of 1986, which was two (2) months subsequent to the execution of the deeds. (Appellees' R. 91-92). Mary was clearly the dominant party.

Appellant would have the court believe that the close family relationship between Mary, Herron and Burford combined with the fact that Herron and Burford assisted Mary with transportation to some of her numerous doctor's visits formed a confidential relationship. However, Herron lived forty five (45) miles away and

was busy raising her children. (Appellees' R. 80). Mary lived alone in a house separate from either of the Appellees. (Appellees' R. 79). The facts reveal that a family existed, but not a confidential relationship which would give rise to a presumption of undue influence. The learned chancellor recognized and applauded Herron for taking action when there was no one else to do so. (Appellees' R. 24).

E. ISSUE # 4: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT CHESTER'S INTEREST AS AN OMITTED SPOUSE IN THE ESTATE OF MARY WAS INSUFFICIENT TO RENOUNCE MARY'S WILL WAS APPROPRIATE.

The learned chancellor found that Chester's interest in Mary's estate was less that the value of his estate, therefore it would be useless and a waste of time to litigate those undisputed issues once the Court found that the Deeds to the subject property were valid. (Appellees' R. 23). The Mississippi legislature laid out clear guidance for dealing with an omitted spouse beginning with Miss. Code Ann. § 91-5-27 which states as follows:

> "If the will of the husband or wife shall not make any provision for the other, the survivor of them shall have the right to share in the estate of the deceased husband or wife, as in case of an unsatisfactory provision in the will of the husband or wife for the other of them. In such case a renunciation of the will shall not be necessary, but the rights of the survivor shall be as if the will had contained a provision that was unsatisfactory and it had been renounced."

The Mississippi legislature continued its guidance by

delineating clearly the process for determining the value of a spouse's interest upon renunciation of a will in Miss. Code Ann. § 91-5-25, which states as follows:

> "...[upon renunciation the surviving spouse] shall be entitled to such part of [the deceased spouse's] estate, real and personal, as [the surviving spouse] would have been entitled to if [the deceased spouse] had died intestate, except that, even if the [deceased spouse] left no child nor descendant of such, the [surviving spouse], upon renouncing, shall be entitled to only one-half (1/2) of the real and personal estate of the [deceased spouse]..."

The Mississippi legislature further limited the value of a surviving spouse's interest in renunciation of a will in Miss. Code Ann. § 91-5-29, which states as follows:

> "In case the [surviving spouse] have a separate property at the time of the [deceased spouse's] death, equal in value to what would be her lawful portion of [the deceased spouse's] real and personal estate, and [the deceased spouse] have made a will, [the surviving spouse] shall not be at liberty to signify her dissent to the will or to renounce any provision or bequest therein in her favor and elect to take her portion of the estate."

The aforementioned statutes make it clear that Chester's interest in the Estate of Mary was at the most one-half (1/2) of her estate. However, the value of Chester's estate must be balanced against his potential interest in Mary's estate to determine whether renunciation should take place. The net value of a surviving spouse's separate estate is ascertained by totaling the value of all property owned by the surviving spouse and by

deducting therefrom the debts of the surviving spouse. *Banks v. Junk,* 264 So.2d 387, 392 (Miss. 1972). Any insurance proceeds or proceeds payable to the deceased spouse as named beneficiary upon the death of the spouse are to be considered a part of the estate of the surviving spouse. *Osburn v. Sims*, 62 Miss. 429 (1884).

The Appellant relies upon *Caine v. Bartwell*, 120 Miss. 209, 82 So. 65 (1919) and *Tillman v. Williams*, 403 So.2d 889 (Miss. 1981), as support for his argument that he is entitled to one-half (½) of the real property since Chester was an omitted spouse in Mary's estate. In *Caine*, the surviving spouse was an omitted spouse that did not have a separate estate, the subject property was determined to be the couple's homestead, and the deeds to her nephews found to be void. In this case, the surviving spouse had a separate estate, the deeds were valid, and the deceased spouse's estate was of nominal value. Further, Chester voluntarily abandoned his homestead and Mary moved to another county, while the court in *Tilman* found that neither spouse had abandoned the homestead or marriage. While the will was renounced in regards to Chester by operation of law, the practical effect is that this renunciation did not provide Chester with any interest in Mary's estate when analyzed in accordance with Miss. Code Ann. § 91-5-29.

Since the questioned deeds are valid, Mary's estate was of nominal value. However, the value of Chester's estate was at least

$23,684.71, which is the amount accounted for in the First Annual Accounting in the Conservatorship of Chester. (Appellee's R. 116). Clearly, Chester's estate was greater than his potential interest in Mary's estate. The Appellant's argument is without merit.

F. ISSUE # 5: WHETHER SUMMARY JUDGMENT ON THE BASIS THAT HERRON ACTED AS A REASONABLE PRUDENT PERSON UNDER SIMILAR CIRCUMSTANCES, AND FULFILLED HER DUTIES AS CONSERVATOR WAS APPROPRIATE.

An executor's or conservator's standard of care is one of ordinary care, skill, and prudence in the performance of all their duties. *Estate of Carter*, 912 So.2d 138, 144 (Miss. 2005). They are bound in all matters of the estate or conservatorship to act in good faith and employ such vigilance, sagacity, diligence and prudence as in general prudent persons of discretion and intelligence in like matters employ in their own affairs. *Id.*

Herron was assisted by attorneys throughout the entire process and dealt with documents that were prepared by trusted attorneys at every juncture questioned by the plaintiff. The learned chancellor accurately analyzed this situation when he stated as follows:

> "Certainly, Chester's son, Orville Lee Johnson could have and should have had more to do with his father's Estate or his father in later years. Including but not limited to the conservatorship. He cannot now, after not having done so, criticize and second guess those who took action when there was no one else to do so."

The closest living relatives of Chester and Mary, outside of

Johnson, were Herron and Burford. Herron shouldered the burden of a conservatorship that lasted eleven (11) years, while attempting to insure that her aunt's final wishes were realized, due in large part to the fact that there was no alternative. (Appellees' R. 79, 93-94, 129). She did what ought to be done, but would not have been done unless she did it because she felt this was her duty. Based on the facts of this case, it is clear that Herron acted as any reasonable, prudent person would have acted under similar circumstances and fulfilled her duties as conservator and executrix.

CONCLUSION

Appellant served as co-administrator in his father's estate, joined in the agreed order closing the estate which affirmatively stated that all of the assets of father's estate had been determined and were being disbursed. Clearly, the Appellant is judicially estopped bringing the current causes of actions against the Appellees which stem from his father's alleged interest in real property in Tate and DeSoto County, Mississippi.

Additionally, the Appellant induced the Appellees to sacrifice a portion of their interest in Chester's estate to resolve the dispute. The principles of equity require that the Appellant be equitably estopped from bringing his current claims.

Clearly, the deeds to the subject properties are valid since Chester voluntarily abandoned his homestead and no confidential

relationship existed which would have raised the presumption of undue influence. Since the deeds are valid, Chester's separate estate was greater than his interest in Mary's estate, and the exercise of renouncing the will would not have produced any assets and would have been a waste of time.

Finally, Herron acted as a reasonable, prudent person would have acted under similar circumstances in the conservatorship of Chester and the estate of Mary. As a result, she fulfilled her duties as both the executrix and conservator. For these reasons, the rulings of the Chancellor should be affirmed, and any requests for partial summary judgment, which were raised by the Appellant for the first time on appeal, denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David M. Slocum, Jr., attorney for Appellees, Rita Frances Burford Herron and John Cal Burford, Jr., 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 Brief for Appellees to:

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So certified, this the 11th day of February, 2009.

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