IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
2009-CA-00956

IN THE MATTER OF THE GUARDIANSHIP
OF THE ESTATE OF FRANK LEWIS

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUIRED

APPEAL FROM THE CHANCERY COURT
OF NEWTON COUNTY, MISSISSIPPI

OTTOWA E. CARTER, JR., ESQ.
MSB NO. [redacted]
801 E. NORTHSIDE DRIVE
POST OFFICE BOX 31
CLINTON, MS 39060-0031
(601) 910-5001 (TELEPHONE)
(601) 910-5003 (FACSIMILE)

ATTORNEY FOR APPELLEE
CONSTANCE SLAUGHTER-HARVEY

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Appellee Constance Slaughter-Harvey 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 this Court may evaluate possible disqualification or recusal.

(1) Ottowa E. Carter, Jr., Esq.
801 E. Northside Drive
P.O. Box 31
Clinton, MS 39060

Appellee Counsel for Constance Slaughter-Harvey

(2) Al Shiyou, Esq.
Post Office Box 310
Hattiesburg, MS 39403-0310

Appellant Counsel for Frank Lewis

(3) Robert M. Logan, Esq.
Post Office box 218
Newton, MS 39345

Appellee Counsel

(4) James Everett, Esq.
Post Office Box 250
Decatur, MS 39327

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STATEMENT OF FACTS

On or about April 17, 2009, a Petition for Appointment of Conservator and for Other Relief ("Petition") was filed in the Newton County Chancery Court in which James L. Nelson, Jr., sought appointment as conservator of Frank Lewis. (See Appellant's Brief, p. 4). Among other things, the Petition averred that "Frank Lewis, by reasons of physical and mental weakness, is in need of a conservator for his person and estate, as evidenced by the certificate of two practicing physicians to be filed herewith..." (See Petition included in Appellant's Record Excerpts)

On or about May 7, 2007, a hearing was held on the Petition in which Frank Lewis was represented by the Honorable Constance Slaughter-Harvey.[1] (See Appellant's Brief, p.11) As a result of this hearing, the Chancellor found that a guardianship should be established after "having conferred with counsel for all the parties and with Respondent Frank Lewis *personally*." (See Appellant's Record Excerpts, Agreed Judgment) (Emphasis added). He also found that "Respondent Frank Lewis retained counsel and appeared this day with his attorney, *joining in the request* that someone be appointed to manage his funds and assist with his personal care and c*onsenting* to all of the relief set forth herein." (See Appellant's Record Excerpts, Agreed Judgment, ¶3) (Emphasis added). The Chancellor also found that "Frank Lewis has previously suffered a stroke and is wheelchair bound ... must have regular kidney dialysis and by reason of these conditions is in need of appointment of a guardian for his person and estate." (See Appellant's Record Excerpts, Agreed Judgment, ¶7).

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[1] Although Attorney Constance Slaughter-Harvey is not a named party in this action, she remains Appellant's attorney of record, however, as she was appointed his guardian and she has not been removed from this appointment. Furthermore, the Appellant alleges that she committed error in not protecting his interests in this matter and he seeks to recover funds paid to her in the execution of her legally required duties. Therefore, to assure that she fully performs in accordance with her ethical requirements and in fidelity to her duty to see that justice is done, and respond to the unfounded allegations regarding her representation, she files her Brief in this action.

Thus, the Court found that "a guardianship of the person and estate [was] in order rather than a conservatorship ..." (See Appellant's Record Excerpts, Agreed Judgment, ¶4).

Based on these findings, the Chancellor ordered "That Honorable Constance Slaughter-Harvey of Forest, Mississippi, be and she is, hereby appointed guardian of the estate of Frank Lewis..." (See Appellant's Record Excerpts, Agreed Judgment, ¶A) The son of the respondent, Frank D. Lewis, was appointed guardian of the person of Frank Lewis. (See Record Excerpts, Agreed Judgment, ¶B) The Court further ordered that "Any and all general or special powers of attorney previously executed by Respondent Frank Lewis are hereby vacated and set aside, and the guardian of the estate is authorized to execute a revocation for recording in the records of Newton County, Mississippi." (See Appellant's Record Excerpts, Agreed Judgment, ¶B)

The Agreed Judgment was signed and agreed to by (a) Robert M. Logan, attorney for Petitioner James L. Nelson, Jr.; (b) Constance Slaughter-Harvey, Attorney for Respondent Frank Lewis; and (c) James B. Everett, Attorney for Respondent Newton County Bank. After execution and filing of this Agreed Order, Constance Slaughter-Harvey became the guardian of Frank Lewis with respect to matters of his estate and Frank D. Lewis became his guardian with respect to his person.

ARGUMENT

A. ARGUMENTS REGARDING ISSUES RAISED BY APPELLANT

The Appellant raised four issues on appeal: (a) Whether service of process is required under Rule 4 or Rule 81 of the Mississippi Rules of Civil Procedure; (b) Whether the Chancellor erred in the establishment of a conservatorship in light of the requirement of the filing of the certificates from two practicing physicians was not met; (c) Whether service of process is required under Rule 4 or 81

of the Mississippi Rules of Civil Procedure for a complaint for interpleader; and (d) Whether counsel for appellant in the chancery court action acted properly by accepting appointment as conservator when she was hired to prevent the establishment of the conservatorship. (See Appellant's Brief) Appellee Harvey will address each of the alleged errors in turn.

I. The Trial Court Did Not Err With Regard to Service of Process Under Rule 4 or Rule 81 of the Mississippi Rules of Civil Procedure.

The Appellant claims the Chancellor committed error when he established "the conservatorship" because "process was never issued to Frank Lewis or served upon him" or any of his kindred within the third degree." (See Appellant's Brief, p. 9) This argument is without any merit whatsoever as it is undisputed that Appellant appeared with his attorney, Constance Slaughter-Harvey, at the hearing in which the Chancellor established the guardianship of Frank Lewis. Furthermore, the record shows that Frank Lewis discussed his situation with the Chancellor and agreed that he needed someone to help him with his affairs. (See Appellant's Record Excerpts, Agreed Judgment) In doing so, Frank Lewis waived any claims he may have had regarding lack of service of process or insufficiency of service of process. *See M.H. v. D. A. and A.A.*, 17 So.3d 610 (Miss.App. 2009).

In *M. H.*, after moving the court to rescind an order terminating his parental rights, the natural father contested the chancellor's subsequent termination of same on the ground that he did not receive the process required under MRCP 81. Id. at 614. The Chancery Court rejected this contention and held that there was insufficient evidence that it lacked jurisdiction. Id. at 615. The Mississippi Supreme Court affirmed and discussed the case of *In re Adoption of Minor Child,* 931 So.2d 566, 574-75 (Miss.2006). There, the defendant claimed he did not receive proper service of process under

Rule 81. The Court found, however, that " any objection to the plaintiff's failure to strictly comply with Rule 81 was waived when: the defendant's attorney made an appearance without objecting to jurisdiction; the defendant agreed to various pretrial motions and orders setting the case for trial; and the defendant introduced testimony on her behalf." Id., *quoting In Re Adoption of Minor Child,* 931 So. 2d. at 574-75. The Court also relied on *Isom v. Jernigan,* 840 So.2d 104 (Miss.2003), a contempt proceeding, in which the court found that the "mother had waived any complaints as to the deficiency of the Rule 81 service "by her attorney making a general appearance, failing to challenge jurisdiction or the sufficiency of service of process and introducing testimony on her behalf." *Id.* (Citations omitted).

In this case, not only did the Appellant and his attorney appear at the hearing in question, he agreed that he needed help with his affairs. The record before this Court shows that the Appellant never objected to jurisdiction, the representation he was receiving by his attorney, establishment of the guardianship, or any action taken by the court in the proceedings. Thus, like the appellants in *M. H., In Re Adoption of a Minor Child,* and *Isom,* it is clear that the Appellant waived any claim he may have had regarding the lack of or insufficiency of service of process when he appeared in court with his attorney, participated in the hearing and even advised regarding his situation, and failed to make any objections to jurisdiction. Therefore, this issue is without merit.

II. The Chancellor Did Not Err in Establishing The Guardianship.

The Appellant next claims the Chancellor erred in establishing a conservatorship in light of the requirement that certificates from two practicing physicians are to be filed. First, this assignment is factually incorrect since the Chancellor established a guardianship rather than a conservatorship. Appellant has provided the Court with no authority that supports his claim that the Chancellor erred

in establishing the guardianship under the facts of this case or any case. *See Funderburg v. Pontotoc Electric Power Assoc.*, 6 So.3d 439, 442 (Miss.App. 2009) (the "failure to cite any authority in support of a claim of error precludes this Court from considering the specific claim on appeal.") In fact, he does not address this issue at all and focuses on the chancellor's alleged error in establishing a nonexistent conservatorship. Consequently, this assignment of error is without merit and should not be considered.

III. The Chancellor Did Not Err With Respect to Any Actions Regarding Service of Process Under Rule 4 or Rule 81 of the Mississippi Rules of Civil Procedure for Complaint of Interpleader

The Appellant next attempts to put the Chancellor in error in his claim that he somehow acted in contravention of service of process requirements under Rules 4 and 81 with respect to the complaint for interpleader. For the reasons set forth in Issue I above regarding waiver of issues regarding the lack of service of process and/or insufficiency of service of process, this issue is without merit.

IV. The Court Did Not Err in Appointing Attorney Slaughter- Harvey As Guardian of Appellant's Estate and She Acted Properly in Accepting the Appointment

In this assignment of error, though not at all clear, the Appellant apparently claims the Chancellor erred in appointing Attorney Slaughter-Harvey as his guardian and she acted improperly in accepting same. It is not clear as to how the Appellant claims the court erred in appointing attorney Slaughter-Harvey to act as Appellant's guardian. There is no allegation that the Chancellor lacked authority to make this appointment or that she was not a fit and proper person to perform the duties of a guardian. That no such allegations were made is not surprising in that it is well known within the State Bar that attorney Slaughter-Harvey is imminently qualified for such an appointment. Appellant fails to cite any case law, statute or ethical rule she allegedly violated in accepting such

appointment or in performing the duties of same. Therefore, the Court is not required to, and should not, consider this specious claim. *See Funderburg*, 6 So.3d at 442 (the "failure to cite any authority in support of a claim of error precludes this Court from considering the specific claim on appeal.")

In addition to Appellant's failure to provide any authority for this assignment of error, he provides absolutely no support for his contention that he "instructed [attorney Slaughter-Harvey] to stop the establishment of the conservatorship" or that he did not agree with the provisions of the order establishing the guardianship. (See Appellant's Brief, pp. 11, 12) To the contrary, the record is clear that he not only agreed with these actions, he advised the Court that he needed help and never objected to the actions of the Court. Furthermore, if he claims that her job was to prevent the establishment of a conservatorship, the records shows that this goal was accomplished since a conservatorship was never established .

B. ARGUMENTS FOR DISMISSAL

I. Appellant Lacks Standing to Assert This Appeal

The Agreed Judgment took effect at its filing and remains in effect today as no application for a stay of the judgment was made to the trial court. See MRAP 8(b)(1) ("Application for a stay of the judgment or order of a trial court pending appeal ... or for an order suspending, modifying, restoring, or granting an injunction during the pendency of an appeal must ordinarily be made in the first instance to the trial court.)" Therefore, "[a]ll matters concerning stays are to be resolved in the first instance by the trial court, if possible." See MRAP 8(b)(1) Comment. The record is totally devoid of any such application and Appellant has made no attempt to show that it was impossible for him to bring the issue of a stay before the trial court.

The "guardian is the legally recognized custodian of the person or property of another with

prescribed fiduciary duties and responsibilities under court authority and direction." *United States Fidelity & Guaranty Co. v. Conservatorship of Melson,* 809 So.2d 647, 651, ¶15, (Miss. 2002). "A ward under guardianship is under a legal disability or is adjudged incompetent." *Id.* Furthermore, MRCP 17(a) provides that"[e]very action shall be prosecuted in the name of the real party in interest." In addition, "[w]henever a party to an action ... is under a legal disability and has a representative duly appointed under the laws of the State of Mississippi ... , the representative may sue or defend on behalf of such party." MRCP 17(a). Thus, when Constance Slaughter-Harvey was appointed guardian of the estate of Frank Nelson, he was, and is, under a legal disability and had no power to appeal the trial court's order to this Court without first obtaining a stay of same. Because Frank Lewis remains under a legal disability, and Constance Slaughter-Harvey is his duly appointed representative, only she is authorized to sue on his behalf. Consequently, Frank Lewis is without standing to appeal the Agreed Order. Because Frank Lewis lacks standing, this appeal should be dismissed.

II. The Appellant Never Raised The Issues Presented Here in the Trial Court

The record is devoid of any evidence that the Appellant ever raised the issues presented on appeal to the Chancellor. *(See* Appellant's Record Excerpts, Docket Entries) This Court has long held that a chancellor cannot be put in error for matters not raised in the lower court. *See Mitchell v. Finley,* 161 Miss. 527, 537, 137 So. 330 ("[I]t does not appear from the record that the questions presented by this assignment of error were presented to the court below, and consequently they cannot be raised here"); *See also Johnson v. State,* 631 So. 2d 185, 191 (Miss. 1994) ("This error was not raised in the lower court and consequently is procedurally barred." (Citations omitted). Thus, because the issues were not presented to the Chancellor, this appeal should be dismissed.

CONCLUSION

The above shows that the Appellant waived any claim he may have had regarding service of process issues, provided no authority for other claims, failed to present his claims to the trial court, and lacked standing to present this appeal. For all of these reasons, Appellant's appeal lacks merit and should be dismissed.

WHEREFORE, PREMISES CONSIDERED, Appellee Constance Slaughter-Harvey, respectfully requests that this Honorable Court dismiss this appeal with prejudice, and for such other relief as the Court deems appropriate under the premises.

RESPECTFULLY submitted, this 2nd day of April, 2010.

CONSTANCE SLAUGHTER-HARVEY, APPELLEE

By: _____
OTTOWA E. CARTER, JR., MSB#[redacted]
Attorney for Appellee

OF COUNSEL:

OTTOWA E. CARTER, JR., P.A.
801 E. NORTHSIDE DRIVE
P. O. BOX 31
CLINTON, MS 39060
Tel: (601) 910-5001
Fax: (601) 910-5003

CERTIFICATE OF SERVICE

I, Ottowa E. Carter, Jr., Counsel for Appellee, Constance Slaughter-Harvey, Esq., do hereby certify that I have this day served a true and correct copy of the above and foregoing document via United States Mail, postage prepaid, to:

Honorable David Clark
Chancellor
Post Office Box 434
Forest, MS 39074

Constance Slaughter-Harvey, Esq.
Post Office Box 88
Forest, MS 39074

Robert M. Logan, Esq.
Post Office Box 218
Newton, MS 39345

James B. Everett, Esq.
Post Office Box 250
Decatur, Ms 39327

Al Shiyou, Esquire
Post Office Box 310
Hattiesburg, MS 39403

SO CERTIFIED, this 2nd day of April, 2010.

OTTOWA E. CARTER, JR.