

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2009-CA-00956

GUARDIANSHIP OF FRANK LEWIS

**APPEAL FROM THE CHANCERY COURT
OF NEWTON COUNTY, MISSISSIPPI**

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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|-----|-----------------------------|----|
| 8. | CONCLUSION..... | 12 |
| 9. | CERTIFICATE OF SERVICE..... | 13 |
| 10. | CERTIFICATE OF MAILING..... | 14 |

TABLE OF AUTHORITIES

| <u>AUTHORITY</u> | <u>PAGE</u> |
|---|--------------------|
| Mississippi Rules of Civil Procedure, Rule 81 | 6,9 |
| Mississippi Rules of Civil Procedure, Rule 22 | 11 |
| Mississippi Rules of Civil Procedure, Rule 4 | 11 |
| Mississippi Code 93-13-255 | 10 |
| Mississippi Code 93-13-281 | 9 |

STATEMENT OF THE ISSUES

- I. **Whether Service of Process is Required Under Rule 4 or Rule 81 of the Mississippi Rules of Civil Procedure.**

- II. **Whether the Chancellor erred in the Establishment of the Conservatorship in Light of the Requirement of the filing of the Certificates from Two Practicing Physicians Was Not Met.**

- III. **Whether Service of Process is Required Under Rule 4 or Rule 81 of the Mississippi Rules of Civil Procedure for a Complaint for Interpleader.**

- IV. **Whether Counsel for Appellant in the Chancery Court Action Acted Properly by Accepting Appointment as Conservator when she was hired by the Appellant to prevent the Establishment of the Conservatorship.**


STATEMENT OF THE CASE

FRANK LEWIS, appeals from a purported AGREED JUDGEMENT which establishes a

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for the Appellant, FRANK LEWIS, certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal:

1. FRANK LEWIS, Appellant
2. **Appelles**
3. DAVID CLARK, Chancery Judge of Newton County, Mississippi
4. ROBERT M. LOGAN, Attorney for Appellees
5. CONSTANCE SLAUGHTER-HARVEY, Guardian
6. JAMES B. EVERETT, Attorney for Appellees



AL SHIYOU, Attorney for Appellant

TABLE OF CONTENTS

| | <u>PAGE</u> |
|---|--------------------|
| 1. CERTIFICATE OF INTERESTED PARTIES..... | 2 |
| 2. TABLE OF CONTENTS..... | 3 |
| 3. TABLE OF AUTHORITIES..... | 3 |
| 4. STATEMENT OF THE ISSUES..... | 3 |
| 5. STATEMENT OF THE CASE..... | 3 |
| 6. COURSE OF THE PROCEEDINGS AND DISPOSITION OF THE CASE IN THE COURT BELOW..... | 4 |
| 7. STATEMENT OF THE FACTS..... | 5 |
| 7. ARGUMENT..... | 5 |

guardianship over the Estate of Frank Lewis, entered in the Chancery Court of Newton County, Mississippi.

**COURSE OF THE PROCEEDINGS
AND DISPOSITION OF THE CASE IN THE COURT BELOW**

A Petition for Appointment of Conservator and For Other Relief was filed in the Chancery Court of Newton County, Mississippi on April 17, 2009. The petition seeks the appointment of James L. Nelson, Jr. as the conservator.

On April 22, 2009, Newton County Bank filed a Complaint for Interpleader in the same cause of action. The Complaint for Interpleader sets forth a number of accounts which Frank Lewis had on deposit with Newton County Bank. Some of the accounts were listed as "or" accounts with J. L. Nelson, Jr., the same person who had petitioned the court for Appointment of Conservator and For Other Relief, only five (5) days before. Therein, an allegation is made that the bank "is confronted with a law suit filed by Frank Lewis and James L. Nelson, Jr. alleging that Frank Lewis is in need of a conservator because of his physical and mental weakness as evidenced by two (2) licensed physicians'.

On April 4, 2009, an Agreed Order was entered by the Chancery Court of Newton County, Mississippi establishing a conservatorship for Frank Lewis, directing the funds interpled by Newton County Bank be transferred to Frank Lewis and authorizing the disbursement of \$2,000.00 from the Appellant's money be paid to Constance Slaughter-Harvey, \$675.00 to the "Petitioner's attorney" (whomever that is) as well as reimbursing him \$190.00 in expenses.

Being aggrieved, Frank Lewis filed his appeal of the Chancellor's ruling.

STATEMENT OF THE FACTS

A Petition for Appointment of Conservator and For Other Relief was filed in the Chancery Court of Newton County, Mississippi on April 17, 2009. The petition seeks the appointment of James L. Nelson, Jr. as the conservator.

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On April 4, 2009, an Agreed Order was entered by the Chancery Court of Newton County, Mississippi establishing a conservatorship for Frank Lewis, directing the funds interpled by Newton County Bank be transferred to Frank Lewis and authorizing the disbursement of \$2,000.00 from the Appellant's money be paid to Constance Slaughter-Harvey, \$675.00 to the "Petitioner's attorney" (whomever that is) as well as reimbursing him \$190.00 in expenses.

Frank Lewis, after learning of all of the impending matters as a result of having received a copy of the Complaint for Interpleader in the mail, hired Constance Slaughter-Harvey to stop all of the pending actions.

ARGUMENT

I. Whether Service of Process is Required Under Rule 4 or Rule 81 of the Mississippi

Rules of Civil Procedure.

FRANK LEWIS submits that the Constitution of the United States, the Constitution of the State of Mississippi, the laws of the State of Mississippi, and the Mississippi Rules of Civil Procedure **requires** the issuance of a summons to put into effect, the due process protection afforded citizens of the State of Mississippi. In the case at hand, **no summons was ever served upon FRANK LEWIS, the Appellant.** Further, **no summons was ever issued for service upon FRANK LEWIS, the Appellant.** Therefore, it was improper for the Chancery Court to issue any order in this matter. Mississippi Rules of Civil Procedure, Rule 81 requires:

RULE 81. APPLICABILITY OF RULES

(a) Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

- (1) proceedings pertaining to the writ of habeas corpus;
- (2) proceedings pertaining to the disciplining of an attorney;
- (3) proceedings pursuant to the Youth Court Law and the Family Court Law;
- (4) proceedings pertaining to election contests;
- (5) proceedings pertaining to bond validations;
- (6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;
- (7) eminent domain proceedings;
- (8) Title 91 of the Mississippi Code of 1972;
- (9) Title 93 of the Mississippi Code of 1972;
- (10) creation and maintenance of drainage and water management districts;
- (11) creation of and change in boundaries of municipalities;
- (12) proceedings brought under sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-

1-35, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply.

(b) Summary Proceedings. In ex parte matters where no notice is required proceedings shall be as summary as the pertinent statutes contemplate.

(c) Publication of Summons or Notice. Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

(d) Procedure in Certain Actions and Matters. The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent they may be in conflict with any other provision of these rules.

(1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: adoption; correction of birth certificate; alteration of name; termination of parental rights; paternity; legitimation; uniform reciprocal enforcement of support; determination of heirship; partition; probate of will in solemn form; caveat against probate of will; will contest; will construction; child custody actions; child support actions; and establishment of grandparents' visitation.

(2) The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority; temporary relief in divorce, separate maintenance, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and wards' business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above.

(3) Complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed.

(4) No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file an answer or other pleading or the court may require an answer if it deems it necessary to properly develop the issues. A party who fails to file an answer after being required so to do shall not be permitted to present evidence on his behalf.

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a

time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.

(6) Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action provided the defendant has been summoned to answer the original complaint.

(e) Proceedings Modified. The forms of relief formerly obtainable under writs of fieri facias, scire facias, mandamus, error coram nobis, error coram vobis, sequestration, prohibition, quo warranto, writs in the nature of quo warranto, and all other writs, shall be obtained by motions or actions seeking such relief.

(f) Terminology of Statutes. In applying these rules to any proceedings to which they are applicable, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules; thus (and these examples are intended in no way to limit the applicability of this general statement):

Bill of complaint, bill in equity, bill, or declaration shall mean a complaint as specified in these rules;

Plea in abatement shall mean motion;

Demurrer shall be understood to mean motion to strike as set out in Rule 12(f);

Plea shall mean motion or answer, whichever is appropriate under these rules;

Plea of set-off or set-off shall be understood to mean a permissible counter-claim;

Plea of recoupment or recoupment shall refer to a compulsory counter-claim;

Cross-bill shall be understood to refer to a counter-claim, or a cross-claim, whichever is appropriate under these rules;

Revivor, revive, or revived, used with reference to actions, shall refer to the substitution procedure stated in Rule 25;

Decree pro confesso shall be understood to mean entry of default as provided in Rule 55;

Decree shall mean a judgment, as defined in Rule 54;

(g) Procedure Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the

State of Mississippi, these rules, or any applicable statute.
[Amended effective June 24, 1992; April 13, 2000.]

In the very initial Petition filed with the Chancery Court, Paragraph II of the Petition (R.E.-3) states, in part, "process of this Court should be served on Frank Lewis at 111 6th Avenue, Newton, Mississippi". However, the record is totally void of any return of process upon the Mr. Lewis, much less process even being issued. Rule 81 of the Mississippi Rules of Civil Procedure require a Rule 81 Summons for all matters initiated under Title 93 of the Mississippi Code of 1972, which is the instant action.

Further, Mississippi Code Section 93-13-281, requires:

In all proceedings involving a ward and brought under Chapter 13, Title 93, Mississippi Code of 1972, except as hereinafter provided, the proceedings shall join as defendants the parents or parent of the ward then living, or if neither be living, two of his adult kin within the third degree computed according to the civil law. When such petition shall be filed, the clerk shall issue process as in other suits to make such person or persons parties defendants, which process shall be executed and returned as in other cases.

In the case at hand, not only, as previously stated, was process never issued to Frank Lewis or served upon him, no process was ever issued or served upon "two of his adult kin within the third degree". Accordingly, the Court erred in issuing its order establishing the conservatorship and all actions of the Chancellor herein should be reversed.

II. Whether the Chancellor erred in the Establishment of the Conservatorship in Light of the Requirement of the filing of the Certificates from Two Practicing Physicians Was Not Met.

Mississippi Code Section 93-13-255, requires:

The chancery judge shall be the judge of the number and character of the witnesses and proof to be presented, except that there shall be included therein at least two (2) physicians who are duly authorized to practice medicine in this state, or another state or one (1) such physician and a psychologist, licensed in this state or another state, each of whom shall be required to make a personal examination of the subject party, and each of whom shall make in writing a certificate of the result of such examination, which certificate shall be filed with the clerk of the court and become a part of the record of the case. They may also be called to testify at the hearing.

The file of the Chancery Clerk of Newton County is filed herewith. Nowhere in the record may the required certificates of two physicians be found. Mississippi Code Section 93-13-255 states that there "shall be included therein at least two (2) physiciansand each of whom shall make in writing a certificate of the result of such examination, which certificate shall be filed with the clerk of the court and become a part of the record of the case". No such certificates were filed herein. Therefor, the action taken herein should be declared null and void by this Court.

III. Whether Service of Process is Required Under Rule 4 or Rule 81 of the Mississippi Rules of Civil Procedure for a Complaint for Interpleader.

On April 22, 2009, Newton County Bank, filed a Complaint for Interpleader in this

action. Therein, it listed itself as the Respondent when no action had ever been filed to which it was responding. (R.E.-- 4) No summons was ever issued in the matter to Frank Lewis or to James L. Nelson, Jr., the other "Petitioner" listed in the complaint.

As previously stated, the basic laws of this country and state require due process of law. In actions before courts, a summons must be issued to initiate an adversarial action. In the case now before this Court, no summons was issued for this Complaint for Interpleader.

Rule 22 of the Mississippi Rules of Civil Procedure sets forth the applicability of the Interpleader process. Assuming that the Complaint for Interpleader filed herein is proper, the minimum requirements under Rule 81 of the Mississippi Rules of Civil Procedure would be that the matter would be triable 7 days after "after completion of service of process in any manner other than by publication". However, since no service of process was ever completed or even issued, no judgment should have been entered in this matter.

IV. Whether Counsel for Appellant in the Chancery Court Action Acted Properly by Accepting Appointment as Conservator when she was hired by the Appellant to prevent the Establishment of the Conservatorship.

After the Appellant, Frank Lewis, received a copy by mail of the Complaint for Interpleader filed by Newton County Bank, he hired Constance Harvey Slaughter to represent him in the matter before the Chancery Court. According to Mr. Lewis, he instructed her to stop the establishment of the conservatorship, as he did not want or need it. Further, he paid her a retainer to represent him.

On April 6, 2009, the Chancery Court signed an Agreed Order which appointed Ms Harvey as Conservator for the Appellant, paid Ms Harvey \$2,000.00 from the Appellant's money, paid \$675.00 to the "Petitioner's attorney" (whomever that is) as well as reimbursing him \$190.00 in expenses. The Appellant, Frank Lewis, did not agree to any of this action, was at the time totally opposed to the actions and remains, to this date, totally opposed.

CONCLUSION

In light of the overwhelming evidence in support of Frank Lewis' position that the Chancery Court erred in issuing its Agreed Judgment in violation of the due process protection and in violation of the Mississippi Rules of Civil Procedure and Mississippi Code, the Appellant, Frank Lewis hereby requests this Court issue its Order reversing and rendering this matter therein directing all funds disbursed from his funds be immediately returned to him, along with interest thereon and payment of reasonable fees and costs to his Counsel for perfecting this appeal.

Respectfully submitted, this the 4th day of January, 2010.

FRANK LEWIS, Appellant

BY: 

Al Shiyou, His Attorney

CERTIFICATE OF SERVICE

I, AL SHIYOU, 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 of Appellant to:

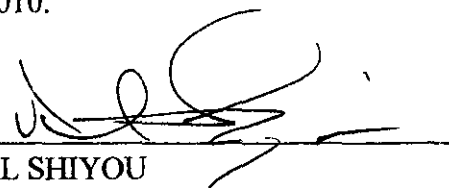
Hon. David Clark,
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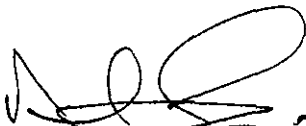
SO CERTIFIED, this the 4th day of January, 2010.


AL SHIYOU

CERTIFICATE OF MAILING

I, Al Shiyou, do certify that I have this date, mailed via United States mail, postage prepaid, first class, an original and three (3) copies of the Brief of Appellant to the Clerk of the Supreme Court and this Brief of Appellant and copies thereof are being deposited into the United States Mail on this, the 4th day of January, 2010, as required by M.R.A.P. Rule 25 (a) for filing of same to be deemed as of this date.

This the 4th day of January, 2010.



Al Shiyou