

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CHERYL PERRY

APPELLANT

VS.

NO. 2009-TS-01432

THE ESTATE OF LESTER PERRY

APPELLEE

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record, in accordance with Rule 28 (a)(1) of the MRAP, 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 disqualifications or recusal.

Cheryl Perry, appellant

Patrick Rand, Attorney for appellant

Lee Andrew Perry, Executor of the Estate of Lester Perry

E. Michael Marks, Attorney for the Estate in the lower Court



Patrick Rand
Attorney for appellant

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RULES OF PROCEDURE

MRCP 4(c)4(b)	3,7
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STATEMENT OF THE ISSUES

- I. Whether the Chancery Court erred in denying the motion to reopen
- II. Whether, due to the void process to unknown heirs, the Estate should be re-opened to determine the heirs of the late Lester Perry

STATEMENT OF CASE AND PROCEDURAL HISTORY

The Estate of Lester Perry was filed in Madison County Mississippi Chancery Court on March 12th, 2002, and Lee Andrew Perry was appointed the Executor thereof by order of the Chancery Court pursuant to the terms of the Last Will and Testament of the deceased. (R.E 9)

The Estate remained dormant for a period of three years until April 15th, 2005 when a motion to remove executor was filed by Michael Perry, claiming an interest in the estate. (R.E. 16)

Thereafter, on August 4th, 2005, appellant and others filed an additional motion to remove executor alleging a complete failure to administer the estate. (R.E.19)

On December 30th, 2005, the estate responded to the first motion to remove executor, claiming difficulty in determining heirs, but denying the right of the Movant to take under the estate. (R.E. 22)

On March 13th, 2006 the Estate filed a motion to approve first and final accounting and for other relief, some four years after the Estate's opening. (R.E. 29)

On February 13th, 2007 the Estate responded in similar fashion to Appellant's motion. (R.E. 41)

Thereafter, the Estate attempted to notice unknown heirs to the estate by publication with a first date of publication on February 22nd for a hearing date on

March 22nd, 2007. (R.E. 47)

The attempted notice was defective for failing to give thirty days notice after the first date of publication. See MRCP 4(c)4(b).

No motion to determine heirs was filed by the estate in connection with these efforts.

The Estate re-issued summons for publication to unknown heirs (R.E. 52) returnable the 22nd day of May 2007, but with a first date of publication of April 26th, 2007, again failing to provide the required thirty days notice.

On May 22nd, 2007 the Court entered its order requiring appellant to produce a certified copy of her birth certificate within fourteen days to establish her claim to an interest in the estate. (R.E. 53)

The appellant failed to submit the certified copy within the timeframe and the Court entered an order on July 20th, 2007 purportedly closing the estate. (R.E. 56)

Not having any notice of this order, Appellant filed a motion to re-open the estate to allow consideration of the certified birth certificate on December 3rd, 2007 (R.E. 62)

This motion was denied by order entered on August 4th, 2009 *nuc pro tunc*. (R.E. 79.

This notice of appeal is therefore timely filed.

SUMMARY OF THE ARGUMENT

The lower Court erred in denying the appellant's motion to reopen the estate because it failed to properly balance the equities between the appellant and the estate.

The harm to the appellant by the Court's order is a divestiture of property, both real and personal. The harm to the estate, if any, is a delay in determining the rightful heirs of the estate.

Based on the void process issued by the estate to unknown heirs, the estate should also be reopened to clear what is an actual cloud over the estate assets.

Reopening the estate will benefit both the appellant, through her right to establish her claim and the estate, by resolving concrete legal problems with title to estate assets.

ARGUMENT

A. Standard of Review for denial of motion to re-open

The decision on whether or not to re-open the Estate is a discretionary matter that should be reviewed under the abuse of discretion standard. International Paper Co. v. Basila, 460 So. 2d 1202(Miss 1984).

The Court's discretion should be a balancing test, as held by the Mississippi Supreme Court in Kelly v. Shoemaker 460 So.2d 811(Miss 1984), involving the proper balance between administering full justice in the individual case and maintaining prompt, efficient and orderly administration of justice, free from inexcusable neglect by the parties. *Id* at 816.

B. Standard of Review for jurisdictional issue

The standard of review on all matters jurisdictional is a question of law. Burnette v. Hartford Underwriters Ins. Co. 770 So. 2d 948, 950(Miss 2000).

The jurisdiction of the Court, where a lack of process is noted, should be subject to review for the first time on appeal where the process is void, not merely insufficient.

I. The lower Court abused its discretion in denying the motion to re-open

Appellant is constrained to admit that she did not file a certified copy of her birth certificate within the time frame in the lower Court's order entered on May 22nd, 2007.

There are equitable factors that weigh in favor of the appellant's motion to reopen the estate to allow for the receipt of evidence necessary for her to establish, within the statutory framework for establishing heirship, her claim to inherit under the estate.

The appellant is required to show that the delay was not inexcusable neglect, as mandated by Kelly, supra.

Every mistake necessarily contains some element of negligence. Miss State Building Commission v. Bucknell Const. Inc. 329 So. 2d 57, 61 (Miss 1976).

In the case at hand, the Certified copy of the birth certificate was not issued by the State of Illinois until July 5th, 2007, which was after the deadline in the Court's order. Assuming it was promptly requested, this fact was beyond the control of the appellant and weighs in favor of allowing the motion to reopen. No notice was provided to the appellant of the subsequent order closing the estate and no further attempts were made to correct the invalid process on unknown heirs.

Additionally, due to the failure of the executor to do anything for over three years, the appellant and others, filed motions to have the executor removed for failing to administer the estate.

Further, it was at the behest of a show cause order that the nuc pro tunc order was entered denying the motion to reopen the estate. (R.E. 75-77).

Therefore, in examining the equities and balancing the interests of the appellant and the estate, the appellant's four month delay in providing the birth certificate pales in comparison to the negligence of three plus years for the estate

to file any documentation in furtherance of moving the estate towards closure.

Likewise, due to the failure to properly determine the heirs of the estate, as discussed in the next section, it is in both the appellant's and the estate's interests for the matter to be reopened to allow for the proper determination of the heirs and proper beneficiaries to the estate of Lester Perry, deceased.

Based on the foregoing, the estate should be reopened and appellant and any other heir, known or unknown, allowed to try and establish their interest in the estate of the deceased.

II. The Court should allow the Estate to be reopened based on the void process on unknown heirs.

As explained in the procedural history, the attempts to publish notice for unknown heirs of the Estate failed due to providing less than thirty days notice in each instance prior to the noticed hearing date. MRCP 4(c)4(b).

Because the summons and notice were void, not merely insufficient, no jurisdiction existed for the Court to rule on the heirs of the estate.

In First Jackson Sec. Corp v. B.F. Goodrich Co., 176 So. 2d 272, 282 (Miss 1965) the Court stated:

It is a cardinal principal in the administration of justice that no man can be condemned, or divested of his rights, until he has had an opportunity of being heard. He must, by service of process, by publication of notice or in some equivalent way be brought into court, and if judgment be rendered

against him before that is done, the proceedings will be as utterly void as though the court had undertaken to act where the subject matter was not within its cognizance.

Additionally, no specific pleading was filed requesting a determination of heirs, although the need for such was raised by the estate in its responsive pleading to the motion to remove executor. (R.E. 23). Therefore, had someone seen the notice, there would have been no pleading on file with which to respond.

Although not raised in the lower Court by the appellant, the fact remains that as to potential claimants of the estate, the order is void and that it would be in the best interests of the estate to have it reopened so that a proper determination of heirs may be had.

CONCLUSION

Appellant moves this Court to reverse the opinion of the lower Court denying the motion to reopen as an abuse of discretion, or, alternatively, on the void process to unknown heirs, as it would be in the best interests of the appellant, the estate, the named beneficiaries and the unknown heirs to allow all interested parties the opportunity to present their claims to the estate of Lester Perry, Deceased.

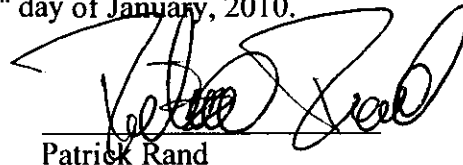
CERTIFICATE OF SERVICE

I, Patrick Rand, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

E. Michael Marks, Esq.
120 N. Congress Street Ste. 730
Jackson, Ms. 39201-2605

Honorable Cynthia Brewer
Chancellor for Madison County
P.O. Box 404
Canton, Ms. 39046

This the 12th day of January, 2010.



Patrick Rand