IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00551

TRACY FRANKLIN WILLIAMS **APPELLANT**

V.

LAWRENCE DANIEL WILLIAMS **APPELLEE**

ON APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

(ORAL ARGUMENT NOT 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 this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Tracy Franklin Williams, Appellant
2. Lawrence Daniel Williams, Appellee
3. Eduardo A. Flechas, counsel for Appellant
4. Gary P. Snyder, counsel for Appellee
5. Laura Limerick Gibbes, counsel for Appellee
6. Florence Ann Jermyn, heir of the Estate of Dorothy Ann Williams
7. Kate Ida Williams, daughter of Tracy Franklin Williams

Respectfully submitted, this the 23 day of November, 2009.

Gary P. Snyder

GARY P. SNYDER

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TRACY FRANKLIN WILLIAMS **APPELLANT**

V.

LAWRENCE DANIEL WILLIAMS **APPELLEE**

STATEMENT OF THE ISSUES

1. Whether the Chancery Court of DeSoto County should be affirmed in granting summary judgment in favor of Appellee Lawrence Daniel Williams, Executor of the Estate of Dorothy Ann Williams, on all claims based on Article III of the Last Will and Testament of Dorothy Ann Williams asserted by Tracy Franklin Williams in his Petition For Accounting, Discharge Of Executor, Surcharge Against Executor And For Injunctive Relief, since any expressions of desire contained in Article III of that Will regarding the care of Ida Kate Williams are merely precatory statements and therefore unenforceable as a devise of any interest to or for the benefit of Ms. Williams.

2. Whether the Chancery Court of DeSoto County, Mississippi should be affirmed in dismissing all other claims asserted by Tracy Williams in his Petition pursuant to Rule 37 of the Mississippi Rules of Civil Procedure as a sanction for discovery violations and in awarding attorneys' fees and expenses to the Estate of Dorothy Ann Williams pursuant to Rule 37 and the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 *et seq.*, (Rev. 2002), where Tracy Williams repeatedly failed to respond to written discovery requests, was in contempt of a Court Order requiring him to respond to such discovery, and otherwise failed to establish any factual or legal basis for any of the claims asserted in his Petition.

3. Whether the Chancery Court of DeSoto County awarded the correct amount of attorneys' fees and expenses to the Estate of Dorothy Ann Williams for fees and expenses incurred in defending the frivolous claims filed by Tracy Williams and for Mr. Williams' contempt of the Court's Order compelling him to respond to discovery.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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STATEMENT REGARDING ORAL ARGUMENT

Because this appeal presents issues of well settled Mississippi law and the application of that law to a set of undisputed facts, Appellee Lawrence Daniel Williams does not believe oral argument will assist in the disposition of this appeal.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-00551

TRACY FRANKLIN WILLIAMS **APPELLANT**

V.

LAWRENCE DANIEL WILLIAMS **APPELLEE**

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Mrs. Dorothy Ann Williams, a resident of DeSoto County, Mississippi died in April, 2005. (R. 5). Mrs. Williams left a Last Will and Testament which appointed her son, Appellee Lawrence Daniel Williams ("Dan Williams" or "Dan"), as Executor of her Estate. (R. 8). Mrs. Williams' Will further directed that, once her outstanding debts had been paid, all her remaining property – real and personal - was to be divided equally among her three children – Dan Williams, Tracy Franklin Williams ("Tracy Williams" or "Tracy"), and Florence Ann Williams Jermyn ("Chip Jermyn" or "Chip").

ARTICLE II

> I, DOROTHY ANN WILLIAMS, hereby devise and bequeath *all of my property, of whatsoever kind and wheresoever situated* to my children, Lawrence Daniel Williams, Tracy Franklin Williams and Florence Ann Jermyn, in equal shares, per stirpes.

(R. 8) (emphasis added). After devising[1] all of Mrs. Williams' property to her three children, the Will then stated Mrs. Williams' desires for the care of her granddaughter Kate Ida Williams ("Kate Williams" or "Kate"), the daughter of beneficiary Tracy Williams.

ARTICLE III

It is my desire that Kate Ida Williams be taken care of as I did during my lifetime. (R. 8).

Kate Williams is a disabled adult who has resided at the Baddour Center in Senatobia, Mississippi for many years. (R. 86, R.E. 12). During Dorothy Williams' lifetime, she provided funds to assist in paying her granddaughter's tuition at the Baddour Center. (R. 86, R.E. 12). These funds were derived from loan payments Mrs. Williams received on a house she and her deceased husband previously sold, known as "the Beaver property." (R. 86, R.E. 12). Under Mrs. Williams' Will, the Beaver property funds were contained within the portion of her Estate which was to be divided equally among her three children, including Kate's father, Tracy Williams. (R. 95).

Following his mother's death, Dan Williams, as Executor, filed a Petition for Probate of the Estate. (R. 5). An Order was entered admitting the Will to probate, and Letters Testamentary were issued to Dan. (R. 12-13).

Initially, Mrs. Williams' three children cooperated in the division of their mother's property. On occasion, they met at her home to divide Mrs. Williams' furniture, jewelry, and other personal effects, allowing her grandchildren to participate. (R. 85, R.E. 11). Once the furniture and personal effects had been divided by agreement, Mrs. Williams' home was sold. (R. 86, R.E. 12). Mrs. Williams' children agreed to retain a portion of the proceeds from that

[1] As used in this Brief, the term "devise" is intended to mean any devise or bequest of real or personal property.

sale in the Estate to allow for future expenses, and the remainder of the proceeds was divided equally between the three children. (R. 86, R.E. 12). On another occasion, a cash distribution was made from the Estate, with each of the three children receiving identical payments. (R. 86, R.E. 12).

During the pendency of his mother's Estate, Dan Williams voluntarily agreed to use the full amount of the loan payments from the Beaver property to assist in paying Kate Williams' tuition at the Baddour Center. (R. 95). Dan's sister, Chip Jermyn, agreed with Dan that these voluntary payments could continue until the Beaver notes had been fully paid. (R. 95). Kate's father, Tracy Williams, was aware that these voluntary payments were being made on behalf of his daughter, and he never raised any objection to this use of the funds. (R. 95). However, Tracy ultimately became dissatisfied with merely receiving Dan Williams' and Chip Jermyn's gift to their niece of their interests in the proceeds of the Beaver notes. Instead, Tracy insisted that it was the duty of his mother's Estate to support his daughter through the creation of a trust, a proposition that had no legal basis in Mrs. Williams' Will.

When neither of his siblings would agree with his demands that the provisions of their mother's Will be ignored, Tracy filed a Petition To Obtain An Accounting And Inventory. (R. 19). In his Petition, Tracy Williams alleged that he had "concerns about the assets of the estate," although he failed to note that he had received his 1/3 share of all distributions made from the Estate and that he had agreed to the voluntary payments of the full Beaver property loan payments – including his siblings' portions of those payments - on behalf of his daughter. (R. 19).

Dan Williams denied the allegations of his brother's Petition and provided a complete accounting of the Estate, despite the fact that his mother's Will had waived any such requirement. (R. 21-26). In addition, he filed a Petition For Discharge Of Executor, requesting

that he be allowed to make final distribution of the assets of the Estate in three equal parts as provided under the Will. (R. 21-26). With regard to Article III of the Will concerning Kate Williams, Dan Williams noted that he and his sister had voluntarily attempted to carry out the desire of their mother by applying their portions of the Beaver property loan payments to Kate Williams' care, but that Kate's father and their brother, Tracy Williams, was not satisfied with that arrangement. (R. 95).

Undeterred, Tracy Williams next filed a Petition For Accounting, Discharge Of Executor, Surcharge Against Executor And For Injunctive Relief.[2] (R. 36, R.E. 1). In this Petition, Tracy alleged that Dan Williams had mismanaged their mother's Estate and had breached his fiduciary duties to both the Estate and the beneficiaries. (R. 36-39, R.E. 1-4). Tracy not only requested that his brother be discharged as Executor, but also requested that Dan be held in contempt and incarcerated and/or fined for his alleged mismanagement. (R. 37, R.E. 2). Tracy also requested that Dan's portion of the Estate be surcharged with all attorneys' fees and expenses he incurred in litigating his Petition. (R. 37-38, R.E. 2-3). For the first time in the Estate proceeding, Tracy then asserted that his mother's Will had created a trust for the benefit of his daughter Kate, and he requested an injunction directing that "a health care fund or irrevocable trust be established in the amount of $150,000" to provide care for Kate during the remainder of her lifetime. (R. 38, R.E. 3).

Dan Williams responded to his brother's Petition by denying all allegations and requesting that his brother's portion of the Estate be assessed under the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 *et seq.*, (Rev. 2002), for all attorneys' fees and

[2] Tracy's Petition was filed on behalf of himself and his daughter, Kate. Subsequently, Tracy was appointed guardian *ad litem* of Kate for purposes of this proceeding. (R. 51-52).

expenses the Estate would incur in defending Tracy's patently frivolous Petition. (R. 40-41, R.E. 5-6).

On February 13, 2008, Dan Williams propounded interrogatories and requests for production of Documents to his brother. (R. 114-115, R.E. 24-25). In this discovery, Dan sought to determine the factual and legal basis for Tracy's claims that he had mismanaged the Estate and breached his duties to the Estate's beneficiaries. (R. 119, R.E. 29). Tracy Williams failed to respond to this discovery within thirty days, as required by the Mississippi Rules of Civil Procedure. (R. 147, R.E. 43). When Tracy failed to respond within the required deadline, counsel for Dan Williams allowed additional time for the responses as a courtesy. (R. 147, R.E. 43). However, when Tracy still had not responded to the discovery nearly seven months after it had been propounded, counsel for Dan Williams expressed to Tracy's counsel the need to respond to the discovery. (R. 125-127, R.E. 35-37). When responses still were not received, counsel for Dan Williams sent a letter to Tracy's counsel on October 3, 2008, requesting that the overdue discovery be provided. (R. 125, R.E. 35). Another letter was sent on October 17, 2008, when Tracy still had not responded. (R. 126, R.E. 36). Finally, counsel for Dan Williams again wrote Tracy's counsel on November 4, 2008, noting that the discovery at issue was severely overdue and that he would be required to file a motion to compel and seek sanctions if the responses were not received by November 14, 2008. (R. 127, R.E. 37). Tracy Williams still failed to respond to the discovery.

While Tracy's discovery responses remained outstanding, Dan Williams had filed a Motion For Partial Summary Judgment with regard to all claims contained in his brother's Petition contending that Article III of the Will created any form of trust or devise in favor of

Kate Williams. (R. 55-56, R.E. 9-10).[3] Counsel for both parties submitted briefs on the Motion and were present at the hearing on the Motion, which was conducted by the Chancellor on September 8, 2008. (R. 83).

Still having received no discovery responses from Tracy, Dan Williams filed a Motion To Compel on November 20, 2008, seeking an order requiring Tracy Williams to respond to the discovery that had been outstanding for nearly nine months. (R. 110-112, R.E. 20-22). Dan also requested an award of attorneys' fees pursuant to Rule 37, for all fees incurred by the Estate as a result of Tracy's failure to respond to the discovery. (R. 112, R.E. 22). A hearing was conducted on Dan's Motion To Compel on January 12, 2009, more than seven weeks after the Motion had been filed. (R. 140, R.E. 38). Despite having received notice of the Motion when it was filed, Tracy still failed to serve any responses to the outstanding discovery. Moreover, Tracy failed to file any response to the Motion, and neither Tracy nor his counsel appeared at the January 12, 2009 hearing. (R. 148, R.E. 44). Following the hearing, the Chancellor entered an Order granting the Motion To Compel and required Tracy to respond to the outstanding discovery on or before January 26, 2009.[4] (R. 140-142, R.E. 38-40). A copy of the Order granting the Motion to Compel was provided to Tracy's counsel via electronic transmission on the date it was entered. (R. 148, R.E. 44). However, Tracy Williams still failed to comply with the Court's Order, and no discovery responses were served by the Court's January 26, 2009, deadline. To date, Tracy Williams has failed to ever respond to this discovery.

On February 2, 2009, the Chancellor granted Dan Williams' Motion for Partial Summary Judgment. (R. 145, R.E. 41). In her Order, the Chancellor found that no genuine issue of

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[3] Because the Motion For Partial Summary Judgment raised purely legal issues regarding the unambiguous terms of the Will, the absence of Tracy's discovery responses did not affect Dan's ability to file the Motion.

[4] Dan's request for attorneys' fees was reserved by the Court for future consideration. (R. 142, R.E. 40).

material fact existed with regard to Article III of the Will, and that "Article III [of Mrs. Williams' Will] is unenforceable and is merely a precatory expression of her desire." (R. 145, R.E. 41). Thus, no trust for the benefit of Kate Williams had been established by the Will, and all property was to be divided between Mrs. Williams' three children as directed under Article II of the Will. The Chancellor entered judgment as a matter of law for Dan on all claims related to the enforcement of a trust under Article III of the Will. (R. 145, R.E. 41).

Thereafter, on February 18, 2009, Dan filed a Motion To Dismiss And For Other Relief, seeking to have all remaining claims in Tracy Williams' Petition dismissed with prejudice as a sanction under Rule 37 the Mississippi Rules of Civil Procedure. (R. 147-150, R.E. 43-46). In his Motion, Dan noted that Tracy had failed to comply with the Chancellor's Order requiring him to respond to written discovery by January 26, 2009. (R. 147-150, R.E. 43-46). Moreover, through his failure to respond to discovery, Tracy had failed to even attempt to establish any factual or legal basis for his frivolous claims and had impeded Dan's ability to defend the Petition filed against him. (R. 150, R.E. 46). Because Tracy's conduct was "intentional and in direct defiance of this Court's Order, which constitutes contempt of Court," Dan requested that the Court enter an order finding Tracy in contempt and dismissing the remainder of his claims with prejudice pursuant to Rule 37. (R. 150, R.E. 46). Additionally, Dan sought an award of attorneys' fees and expenses on behalf of the Estate for all fees and expenses incurred in defending Tracy's frivolous Petition, with that award to be surcharged against Tracy Williams' portion of the Estate. (R. 150, R.E. 46).

The Motion To Dismiss And for Other Relief was noticed for hearing before the Chancellor on March 9, 2009. (R. 151, R.E. 47). Both the Motion and a notice of the hearing were provided to Tracy's counsel. (R. 151, R.E. 47). Again, both Tracy Williams and his attorney failed to file any response to the Motion and failed to appear for the hearing. (R. 152,

R.E. 48). The Chancellor conducted the hearing in their absence and, in her Order dated March 10, 2009, found that the Motion should be granted. (R. 152-156, R.E. 48-52). Specifically, the Chancellor found that, despite repeated requests by Dan Williams' counsel, Tracy had failed to respond to written discovery for over one year. (R. 155, R.E. 51). Additionally, the Chancellor found that Tracy failed to respond to that discovery within the January 26, 2009 deadline set by the Court in its Order granting the Motion To Compel. (R. 153-154, R.E. 49-50). Moreover, the Chancellor found that Tracy had failed to offer any proof to substantiate any of the claims asserted against Dan, and that Dan's trial preparation had been prejudiced by Tracy's refusal to respond to discovery. (R. 155, R.E. 51). The Court found that Tracy's failure to respond to the discovery "for over a year, despite having been ordered by the Court to do so, constitute[d] a willful discovery violation, involving the intentional disobedience of the Mississippi Rules of Civil Procedure and the Order of this Court." (R. 155, R.E. 51). Accordingly, the Chancellor found that "[n]o lesser action or deterrent purpose would be served, by imposing sanctions which are less severe than an Order of Dismissal with prejudice." (R. 155, R.E. 51). Therefore, pursuant to Rule 37 of the Mississippi Rules of Civil Procedure, the Chancellor dismissed with prejudice all remaining claims contained in Tracy's Petition. (R. 155, R.E. 51). In addition, the Chancellor awarded attorneys' fees and expenses against Tracy Williams pursuant to Rule 37 and the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 *et seq.*, (Rev. 2002), with those fees to be surcharged against Tracy's portion of the Estate if not otherwise paid directly by him. (R. 155, R.E. 51). A hearing was scheduled for March 23, 2009 to determine the amount of fees and expenses to be awarded. (R. 155, R.E. 51). A copy of this Order was provided to Tracy's counsel by the Chancery Clerk. (R. 175, R.E. 70).

Following an unsuccessful request by Tracy Williams for an interlocutory appeal of the Order granting the Motion For Partial Summary Judgment (R. 157)[5], the hearing to determine the amount of attorneys' fees and expenses to be awarded was conducted on March 23, 2009. (R. 175, R.E. 70). Again, both Tracy Williams and his attorney failed to appear for the hearing or otherwise file any response in opposition to the request for fees. (R. 175, R.E. 70). At the hearing, Dan's counsel presented evidence establishing that, while only $5,000.00 in attorneys' fees had been incurred by the Estate up to the time Tracy filed his Petition, the Estate had incurred $36,375.50 in fees and $1,718.30 in expenses in defending Tracy's frivolous claims. (R. 159, R.E. 54). Dan requested that the $38,093.80 incurred by the Estate in defending the Petition be surcharged against Tracy's portion of the Estate. (R. 159, R.E. 54). Following presentation of the evidence regarding fees incurred and based upon consideration of the factors set forth in *In re Estate of Johnson*, 735 So. 2d 231 (Miss. 1999), the Chancellor awarded the full amount of attorneys' fees and expenses requested, with that amount to be paid separately by Tracy Williams on or before April 23, 2009, or surcharged against his share of the Estate if he failed to make payment. (R. 175-176, R.E. 70-71).

Thereafter, Tracy Williams appealed from the Orders entered by the Chancellor on February 2, March 10 and March 23, 2009. (R. 177). Tracy's Notice of Appeal was filed April 6, 2009. (R. 177).

SUMMARY OF ARGUMENT

The rulings of the Chancery Court of DeSoto County in its February 2, 2009; March 10, 2009; and March 23, 2009 Orders should be affirmed for numerous reasons.

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[5] Tracy Williams' Motion For Interlocutory Appeal did not request any review of the Chancellor's Orders granting the Motion To Compel or the Motion To Dismiss And For Other Relief. (R. 157).

First, in her February 2, 2009 Order granting Dan's Motion For Partial Summary Judgment, the Chancellor correctly ruled that summary judgment should be granted in favor of Dan Williams on all claims related to Article III of the Will, since any statements contained in that provision regarding Mrs. Williams' desires for the care of her granddaughter Kate Williams were merely precatory statements and unenforceable to create any devise or trust. The Chancellor correctly found that Article II of Mrs. Williams' Will devised all of her property in three equal shares to her children Dan, Tracy and Chip, and the wishes expressed in Article III of the Will regarding her granddaughter Kate did not create any devise of property or trust on Kate's behalf. Instead, the statements contained in Article III of the Will were merely precatory words that did not create any legal obligation capable of enforcement by a court.

Next, in her Order of March 10, 2009 granting Dan's Motion To Dismiss And For Other Relief, the Chancellor correctly dismissed the remaining claims in Tracy's Petition pursuant to Rule 37 of the Mississippi Rules of Civil Procedure, due to his willful discovery violations and contempt of the court's Orders. Additionally, the Chancellor correctly awarded attorneys' fees and expenses to the Estate under Rule 37 and the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 *et seq.*, (Rev. 2002), based on the same misconduct. While Tracy has waived his right to contest these issues on appeal due to his failure to address these issues before the Chancellor, to attend the hearing on the Motion, or to brief these issues in his Appellant's Brief, the Chancellor was correct in her decision to dismiss the remaining claims in Tracy's Petition pursuant to Rule 37. Applying the factors set forth in *Pierce v. Heritage Properties*, 688 So. 2d 1385, 1389 (Miss. 1997), it is clear the Chancellor correctly exercised her discretion in ruling that dismissal of Tracy's remaining claims was the appropriate and necessary remedy for his willful violations of his discovery obligations and the Order of the Chancellor.

Finally, the attorneys' fees and expenses awarded by the Chancellor in her March 10, 2009 and March 23, 2009 Orders were proper. Again, Tracy has waived his right to contest this issue due to his failure to address these issues before the Chancellor, to attend the hearings, or to brief these issues in his Appellant's Brief. In any event, the Chancellor was correct on the merits of her rulings. Pursuant to Rule 37 and the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 *et seq.*, (Rev. 2002), the Chancellor correctly awarded attorneys' fees and expenses to the Estate for all fees and expenses incurred as a result of Tracy's discovery misconduct and his assertion of frivolous and unsubstantiated claims.

ARGUMENT

I. In Her February 2, 2009 Order, The Chancellor Correctly Awarded Summary Judgment In Favor Of Dan On All Claims Related To Article III Of The Will.

A. Standard of review for summary judgment.

When reviewing a trial court's grant or denial of summary judgment, this Court must apply a *de novo* standard. *Moss v. Batesville Casket Co.*, 935 So. 2d 393, 398 (Miss. 2006), citing *Stuckey v. Provident Bank*, 912 So. 2d 859, 864 (Miss. 2005). Mississippi law provides that a motion for summary judgment ***shall*** be granted "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Miss. R. Civ. P. 56(c). Summary judgment is mandated where the non-movant "has failed 'to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.'" *Smith ex rel. Smith*

v. Gilmore Mem'l Hosp., Inc., 952 So. 2d 177, 180 (Miss. 2007), quoting *Wilbourn v. Stennett, Wilkinson & Ward*, 687 So. 2d 1205, 1214 (Miss. 1996).

B. The Chancellor correctly ruled that any wishes or statements of desire contained in Article III of Mrs. Williams' Will were merely precatory and therefore unenforceable to create any devise or trust for the benefit of Kate Williams.

Mississippi law long has recognized that judicial interpretation of a will requires the court to "determine and respect the intent of the testator." *Estate of Blount v. Papps*, 611 So. 2d 862, 866 (Miss. 1992); *see also Raworth's Estate*, 211 Miss. 780, 52 So. 2d 661, 663 (1951). In construing a will, the court is not to be guided by its own sense of a fair disposition of a testator's estate, but instead is to respect and enforce the testator's intent as demonstrated in the written terms of the will. *See Matter of Estate of Vick*, 557 So. 2d 760, 765 (Miss. 1989); *Stovall v. Stovall*, 360 So. 2d 679, 681 (Miss. 1978).

To determine a testator's intent, "[w]ords and expressions used in a will are to be construed naturally and to be taken in their ordinary, proper, and common acceptation unless it clearly appears in the will that they are used in a different sense." *Harvey v. Johnson*, 111 Miss. 566, 71 So. 824, 826 (1916). The court "will not make or rewrite a will under the guise of construction." *Hemphill v. Miss. State Highway Comm'n*, 245 Miss. 33, 145 So. 2d 455, 459 (1962), citing *Richmond v. Bass*, 202 Miss. 386, 32 So. 2d 136 (1947); 95 C.J.S. Wills § 609.

In considering the terms of a will, a court is "limited to the four corners of the will" unless an ambiguity exists in the document. *See Dedeaux v. Dedeaux*, 584 So. 2d 419, 421 (Miss. 1991), citing *Rice v. McMullen*, 207 Miss. 706, 731, 43 So. 2d 195, 202 (1949); *Lanham v. Howell*, 210 Miss. 383, 386, 49 So. 2d 701, 702, *cert. denied*, 342 U.S. 834, 72 S. Ct. 57, 96 L. Ed. 631 (1951). *See also In re Last Will and Testament of McSwain*, 946 So.2d 417, 420 (Miss. Ct. App. 2006) ("A will may contain within itself all the needed evidence of its meaning.").

Where no ambiguity exists, the court may not resort to extrinsic evidence to aid in its construction. *See, e.g., Ross v. Brasell*, 511 So. 2d 492, 494-95 (Miss. 1987); *Stovall v. Stovall*, 360 So. 2d 679, 681 (Miss. 1978); *In re Roland*, 920 So. 2d 539, 541 (Miss. Ct. App. 2006) ("The Court's inquiry is to look first within the 'four corners' of the document, and if no ambiguity exists within the writing, then no further search is needed or authorized."). An ambiguity does not exist in a document merely because the parties disagree about its meaning. *See, e.g., Phillips v. Enter. Transp. Serv. Co.*, 988 So. 2d 418, 421 (Miss. Ct. App. 2008) ("The fact that parties may disagree over the meaning of a . . . term does not, by itself, render that term ambiguous."); *Miss. Transp. Comm'n v. Ronald Adam Contractor, Inc.*, 753 So. 2d 1077, 1087 (Miss. 2000).

Applying this standard, the Chancellor correctly found that Article II of Mrs. Williams' Will devised all of her property in three equal shares to her children Dan, Tracy, and Chip, and the wishes expressed in Article III of the Will regarding her granddaughter Kate did not create any devise of property or trust on Kate's behalf. Instead, the statements contained in Article III of the Will were merely precatory words that did not create any legal obligation capable of enforcement by a court.

As noted above, Article II of Mrs. Williams' Will clearly, unambiguously and expressly stated:

> I, DOROTHY ANN WILLIAMS, hereby devise and bequeath *all of my property, of whatsoever kind and wheresoever situated* to my children, Lawrence Daniel Williams, Tracy Franklin Williams and Florence Ann Jermyn, in equal shares, per stirpes.

(R. 72) (emphasis added). Thus, through Article II of her Will, Mrs. Williams devised all of her property, with no limitations, restrictions or conditions whatsoever, to her children to be divided in equal shares. Where an unrestricted devise of property - including real estate – is made in a

will, the beneficiary acquires absolute title to the property, and no limitation is placed upon the beneficiary's ownership or use of the property. *See, e.g., Morris v. Harden*, 295 So. 2d 755, 760-761 (Miss. 1974).

Article III of Mrs. Williams' Will contained the following language regarding her desires toward her granddaughter Kate:

> It is my desire that Kate Ida Williams be taken care of as I did during my lifetime.

(R. 72). While the Will does contain this expression regarding the future care of her granddaughter, no devise of property was made for the benefit of Kate Williams, nor does the Will identify who should take care of Kate or the specific property or sum of money to be set aside for Kate's benefit. Moreover, the Will does not establish any mechanism - a trust, life estate or other interest - which would administer any property or funds on Kate's behalf. "Courts cannot supply a provision in a will and then proceed to give it the desired effect." *Byrd v. Wallis*, 182 Miss. 499, 181 So. 727, 732 (1938). Thus, as a matter of law, the words contained in Article III of Mrs. Williams' Will fail to establish any property interest on behalf of Kate Williams. Instead, these are merely precatory words that are unenforceable to create any devise or property interest on behalf of her granddaughter.

This Court has long recognized that "[w]ords in a will which are merely expressive of a desire or intention on the part of the testator, and are merely advisory or precatory in character, may be useful in resolving doubts in other parts of the will; but generally, the use of such words has no legal effect in the absence of supporting language elsewhere in the will, and they do not impose an obligation which can be enforced by the court." *Farmer v. Broadhead*, 230 So. 2d 779, 781 (Miss. 1970). *See also* 96 C.J.S. Wills §§ 855-856 ("[W]here the language is used by

way of suggestion, advice, or desire, with a view to influence, but not to direct the discretion of the donee, the words are precatory.").

The language contained in Article III of Mrs. Williams' Will is strikingly similar to the language considered by the court in *Wheeler v. Williams*, 235 Miss. 142, 108 So. 2d 578 (1959). In *Wheeler*, the testator was survived by a wife and son, and an adult daughter who had continuously resided in her parents' home throughout her life. The testator's will provided the following with regard to the disposition of his property:

> I hereby give and bequeath unto my beloved wife, Frankie Williams, *all my property, real, personal and mixed* of every nature kind and description, except a certain parcel of land consisting of seven and one third acres more or less, to my son G.E. Williams. . . . It is my will *and desire* that my daughter, Lillie Williams, receive all property, personal and real, that her mother, Frankie Williams, have or possessed with at her death.

Id. at 579 (emphasis added). The issue in *Wheeler* was whether the testator's wife, Frankie Williams, obtained a fee simple interest in the property devised to her under the will, or whether her interest in the property was restricted to a life estate because an interest had been created on behalf of the daughter, Lillie Williams. *Id.* Noting the distinction between the clear and unrestricted words of the testator's will creating the devise to his wife and the less forceful words expressing only his desires for the future care of his daughter, the Court concluded that the portions of the will referring to the testator's desires for his daughter did not reduce the absolute devise of the property to the testator's wife, and that those words were "merely precatory, since it advise[d] [the] wife of [the testator's] desire with respect to the ultimate disposition of her property." *Id.* at 581.[6]

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[6] The *Wheeler* opinion also cites Section 833, Code of 1942 Annotated, which is still positive law and currently codified as Miss. Code Ann. § 89-1-5 (1972). It provides:

> Every estate in lands granted, conveyed, or devised, although the words deemed necessary by the common law to transfer an estate of inheritance be not added, shall be deemed a fee-simple if a less estate be not limited

A similar result should obtain here. In Article II of her Will, Mrs. Williams expressly and clearly devised all of her property to her three children, without any restrictions or limitations whatsoever. The language in Article III expresses Mrs. Williams' desire that her granddaughter be cared for, yet there is no direction that this care be provided by Mrs. Williams' estate, her children together, or by Kate Williams' father alone. What is clear, however, is that no property was devised for the benefits of Kate Williams, nor was any trust or other interest created to provide benefits on her behalf. Under these circumstances, the Chancellor correctly concluded that the language of Article III of Mrs. Williams' Will was merely precatory in nature, and does not in any way restrict or limit the mandatory and absolute devise of property to Mrs. Williams' children as set forth in Article II of the Will.

Mississippi courts have recognized that "[w]here an interest or estate is given in one clause of a will in clear and decisive terms, it cannot be taken away or cut down by raising a doubt upon the meaning and application of a subsequent clause, nor by inference therefrom, nor by any subsequent words that are not as clear and decisive as the words giving the interest or estate." *Harvey,* 71 So. at 826. *See also Morris*, 295 So. 2d at 760, citing *Wheeler v. Williams*, 235 Miss. 142, 108 So. 2d 578 (1959) and *Frierson v. Moorhead*, 211 Miss. 811, 51 So. 2d 925 (1951) ("an absolute devise may not be reduced by succeeding language which is inferior in clarity and certainty to the devising clause, and mere implication is not sufficient."). If Mrs. Williams' had intended to provide a specific interest in the Estate for the benefit of her granddaughter Kate, she could and would have used the same positive language to devise an interest for Kate as was used to devise interests to her three children. *See, e.g., Dedeaux,* 584

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by express words, or unless it clearly appear from the conveyance or will that a less estate was intended to be passed thereby.

So. 2d at 423 (where will made absolute bequest of property to wife and then expressed testator's desires for disposition of the property upon his wife's death, the court founds that the wife was the sole beneficiary of all property devised under the will, and any expressions regarding the testator's desires upon her death were merely precatory and unenforceable); *Morris*, 295 So. 2d at 760 (there was no intent to devise property to a group of descendents where the will used words of intention or desire regarding that group of descendants, rather than express words of devise or bequest as were used with regard to other beneficiaries under the will).

In *Ryals v. McPhail*, 154 Miss. 295, 122 So. 493 (1929), the Court considered a wife's will which stated:

> I give, devise and bequeath unto my husband . . . my real and personal property where ever situated and of what ever kind or chattel that I may die possessed of . . . my said husband, to do with as seemeth to him best, and if in the Providence of God, I should die before my said husband, I desire that he should remember and provide at his death for my children . . . .

Id. at 493. On a challenge to the will filed by the wife's children upon her death, the Court held that the language of the will did not create any property interest or trust in favor of the children, since the will was "clear and unambiguous, and devise[d] and bequeath[ed] to her husband an absolute fee-simple title to all her property." *Id.* With regard to the language of the will expressing the wife's desire for future provisions for her children, the Court noted that those words merely expressed the wife's words of influence toward her husband, and "[w]hat provisions should be made, if any, is clearly left to the choice and discretion of her husband, and the property to which any supposed trust would attach is not certain and definite." *Id.* at 493-494. Indeed, the court further noted that construing the will to create any form of trust in favor of the children would require the court to nullify those provisions of the will granting absolute title of the property to the husband. *Id.* at 494. This, of course, the Court could not do, and it concluded that a trust or other interest in the property in favor of the children was not created. *Id.*

In *Lanham v. Howell*, 210 Miss. 383, 49 So. 2d 701 (1951), the Court recognized that, under Mississippi law, an expression of desire in a will is sufficient to create an implied trust only where the words used in the will expressly state "'the objects to whom such terms are applied, and second, the subjects of property given must also be certain.'" *Id.* at 703, quoting *Lucas v. Lockhart*, 10 Smedes & M. 466. Conversely, where the words of expression contained in the will "are not imperative, if they are not certain as to the subjects, and if they are not certain as to the objects, they do not impair an absolute and unconditional bequest" to other beneficiaries, and no implied trust is created. *Id.*, citing *Rector v. Alcorn*, 88 Miss. 788, 41 So. 370; *Courtenay v. Courtenay*, 90 Miss. 181, 43 So. 68; *Patterson v. Humphries*, 101 Miss. 831, 58 So. 772; *Ryals v. McPhail*, 154 Miss. 295, 122 So. 493. On this basis, the Court found under the facts in *Lanham* that no trust had been created under the will, noting specifically that a trustee was not named in the will and no provision had been made for the property or sum of money to be placed in trust. *Lanham*, 49 So. 2d at 703.

Based on these authorities, the Chancellor clearly was correct in ruling that Article III of Mrs. Williams' Will did not create any devise or trust for the benefit of Kate Williams under applicable Mississippi law. Thus, no genuine issue of material fact existed with regard to these claims, and the Chancellor's Order granting summary judgment on all Article III claims asserted in Tracy's Petition should be affirmed.

II. In Her March 10, 2009 Order, The Chancellor Correctly Dismissed The Remainder Of Tracy's Petition As A Discovery Sanction Pursuant To Rule 37 And Correctly Awarded Attorneys' Fees And Expenses Against Tracy Pursuant to Rule 37 And The Mississippi Litigation Accountability Act.

A. Tracy is barred from raising these issues on appeal.

Through his conduct at both the trial court and appellate levels, Tracy is barred from having this Court consider any issue he purports to raise with regard to the March 10, 2009 Order

Salts v. Gulf Nat'l Life Ins. Co., 872 So. 2d 667, 670 (Miss. 2004), citing *Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990, 996 (Miss. 1999). If the correct legal standard was applied, then the trial court must be affirmed "unless there is a 'definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon weighing of relevant factors.' " *Salts*, 872 So. 2d at 670, citing *Scoggins*, 743 So. 2d at 996; *see also Irby*, 7 So. 3d at 228, citing *Cooper v. State Farm Fire & Cas. Co.*, 568 So. 2d 687, 692 (Miss. 1990).

2. The Chancellor correctly dismissed Tracy's remaining claims as a discovery sanction pursuant to Rule 37.

"The power to dismiss for violations of rules of procedure 'is inherent in any court of law or equity, being a means necessary to orderly expedition of justice and the court's control of its own docket.'" *Palmer v. Biloxi Regional Medical Center, Inc.*, 564 So. 2d 1346, 1367 (Miss. 1990), citing *Watson v. Lillard*, 493 So. 2d 1277, 1278 (Miss. 1986). In addition, Rule 37 of the Mississippi Rules of Civil Procedure provides specific standards to be applied when a party fails to cooperate in the discovery process. Specifically, Rule 37 provides:

> **(a) Motion for Order Compelling Discovery.** A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:
>
> * * * * *
>
> (2) Motion. If . . . a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond . . . the discovering party may move for an order compelling an answer . . .
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> * * * * *
>
> **(d) Failure of Party to . . . Serve Answers to Interrogatories or Respond to Request for Inspection.** If a party . . . fails . . . (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court . . . may make such orders in regard to the failure as are just, and among others it may take any action authorized under subsections (A), (B), and (C) of subsection (b)(2) of

> this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure. . . . .
>
> * * * * *
>
> **(e) Additional sanctions.** In addition to the application of those sanctions, specified in Rule 26(d) and other provisions of this rule, the court may impose upon any party or counsel such sanctions as may be just, including the payment of reasonable expenses and attorneys' fees, if any party or counsel . . . abuses the discovery process in . . . resisting discovery.

Miss. R. Civ. P. 37.

In determining whether the dismissal of claims is a proper sanction under Rule 37 for discovery violations, Mississippi law recognizes that the court is to be guided by the following factors:

(1) whether the discovery violation was the result of willfulness or merely an inability to comply;

(2) whether the deterrent value of Rule 37 could have been achieved through a lesser sanction;

(3) whether the non-offending party's case preparation has been prejudiced;

(4) whether the failure to comply is attributable to the party, or their attorney; and

(5) whether the failure to comply was a consequence of simple confusion or a misunderstanding of the trial court's order.

Pierce, 688 So. 2d at 1389. Where a party's "willfulness or bad faith is so clearly evidenced . . . the [other] four *Pierce* factors will be irrelevant to the upholding of the dismissal." *Smith v. Tougaloo College*, 805 So. 2d 633, 641 (Miss. Ct. App. 2002). For this purpose, "[a] finding of willfulness may be based [on] . . . a gross indifference to discovery obligations." *Pierce*, 688 So. 2d at 1390.

Applying these factors here, it is clear the Chancellor was correct in ruling that dismissal of Tracy's remaining claims was the appropriate and necessary remedy for his willful violations

of his discovery obligations and the Order of the Chancellor. First, the failure to respond to written discovery, and particularly the failure to respond within the court ordered deadline, was the result of a willful contempt for the rules and orders of the court. Tracy has never provided any explanation of his conduct to the Chancellor or this Court, much less an explanation that establishes some excusable basis for his failure to comply with discovery and the Chancellor's Order. Moreover, as the Chancellor noted in her Order, the deterrent value of Rule 37 could not have been achieved through a lesser sanction, given Tracy's repeated failures to provide the discovery responses or appear at court proceedings to explain his conduct. In applying this factor, courts should consider that the desired deterrent effect is "not just to penalize those whose conduct may warrant such a sanction, but to deter those who might be tempted to engage in such conduct in the absence of a deterrent." *Pierce*, 688 So. 2d at 1389, citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 643, 96 S. Ct. 2778, 2781, 49 L. Ed. 2d 747 (1976). In addition, Tracy's failures to comply with discovery not only disregarded the rules and Order of the Chancery Court, but also prohibited Dan from obtaining evidence necessary to defend the claims that had been asserted against him. Finally, given the straight-forward nature of the Chancellor's Order requiring him to comply with discovery by a date certain, it strains credulity to suggest that Tracy or his counsel could have been confused or somehow misinterpreted the Court's Order.

In *Marshall v. Burger King*, 2 So. 3d 702 (Miss. Ct. App. 2008), the Court considered a circuit court's dismissal of an action for failure to comply with discovery requests and court orders compelling responses to that discovery. The defendant, Burger King, had propounded interrogatories and requests for production of documents to the plaintiff, yet he failed to respond to this discovery, even after several letters from Burger King's counsel asking for the overdue responses. Thereafter, the plaintiff also failed to comply with an order entered by the circuit

judge compelling the plaintiff to respond to the discovery within fourteen days. *Marshall*, 2 So. 3d at 704-705. On Burger King's Motion To Dismiss, the circuit court dismissed plaintiff's lawsuit based on his failure to comply with the discovery order. *Id.* at 705. On appeal, the Mississippi Court of Appeals affirmed the dismissal of plaintiffs' lawsuit, noting that plaintiff had failed to comply with the order of the court compelling him to respond to discovery and that the failure to comply with that order was willful. *Id.* at 706-707.

In *Beck v. Sapet*, 937 So. 2d 945 (Miss. 2006), this Court affirmed the dismissal with prejudice of a breach of contract case where the plaintiffs had failed to comply with court orders requiring them to respond to written discovery within specified deadlines. Noting that "the result may be harsh for the [plaintiffs]", this Court found that dismissal with prejudice was warranted where plaintiffs had failed to respond to written discovery for approximately one year and then failed to comply with court orders requiring them to respond within a specified period. *Beck*, 937 So. 2d at 949-51.

In *Salts v. Gulf National Life Ins. Co.*, 872 So. 2d 667 (Miss. 2004), the court affirmed the dismissal of plaintiffs' case under Rule 37 where plaintiffs failed to attend their depositions as required by court order. In so ruling that court noted that

> whether it was their decision or on advice from their attorneys, the plaintiffs chose to disregard the order and did not submit themselves for their scheduled depositions. This was a willful failure to comply with the court's order. By not being able to take the deposition of the plaintiffs, the defendants' trial preparation has been substantially prejudiced.

Salts, 872 So. 2d at 674. *See also Scoggins v. Ellzey Beverages, Inc.*, 743 So. 2d 990, 996 (Miss. 1999) (finding no abuse of discretion in trial court's dismissal of a case for discovery violations where plaintiff's "failure to comply with [the defendant's] discovery requests was willful and that [plaintiff's] attempts to explain her misconduct were not credible..."); *Williams v. Puryear*, 515 So. 2d 1231, 1233 (Miss. 1987) (affirming trial court's dismissal of an action where plaintiff

engaged in "procrastination, disobedience to the . . . court's [discovery] orders, willful failure to comply with most areas of discovery, and obvious contempt for the court's processes" in failing to respond to discovery); *Gilbert v. Wal-Mart Stores, Inc.*, 749 So. 2d 361, 366 (Miss. Ct. App. 1999) (affirming the dismissal of a case where plaintiff had failed to comply with a court order requiring him to appear for deposition.)

"Our trial judges . . . have a right to expect compliance with their orders, and when parties and/or attorneys fail to adhere to the provisions of these orders, they should be prepared to do so at their own peril." *Bowie v. Montfort Jones Mem'l Hosp.*, 861 So. 2d 1037, 1042 (Miss. 2003). By failing to respond to repeated requests to comply with discovery and the Chancellor's Order requiring him to do so by a date certain, Tracy engaged in willful conduct that showed contempt for the Court and its procedures. The "peril" of Tracy's conduct should apply to him, rather that prejudice Dan's ability to adequately defend the claims asserted against him. The Chancellor did not abuse her discretion in dismissing Tracy's claims with prejudice, and her March 10, 2009 Order should be affirmed.

III. The Chancellor Correctly Awarded Attorneys' Fees And Expenses To The Estate In Her March 10, 2009 And March 23, 2009 Orders.

A. Tracy is barred from raising this issue in his appeal.

For the same reasons noted in Section II, Tracy is barred from having this Court consider any issue he purports to raise with regard to the March 10, 2009 and March 23, 2009 Orders awarding attorneys' fees and expenses to the Estate. By failing to respond to the Motion To Dismiss And For Other Relief, and by failing to attend the March 9 and March 23 hearings where attorneys' fees and expenses were considered by the Chancellor, Tracy is procedurally barred from raising any issue here that he failed to place before the Chancellor for her consideration in ruling on the Motion. *Henrichs*, 2009 WL 2857186 at *3. In addition, Tracy

has failed to address the issue of attorneys' fees in his appellate brief, thus relieving this Court of any requirement to consider this issue as part of his appeal.[7] *Hudson,* 977 So. 2d at 378.

B. The Chancellor correctly ruled that attorneys' fees and expenses should be awarded to the Estate for costs incurred in defending Tracy's frivolous and unsubstantiated claims.

In addition to dismissing Tracy's remaining claims with prejudice, the Chancellor also awarded attorneys' fees and expenses to the Estate as a sanction for Tracy's misconduct. The Chancellor's authority to award attorneys' fees as an additional sanction for discovery violations arises from the same source that authorized her dismissal of Tracy's claims, "M.R.C.P. 37 and the court's inherent power to protect the integrity of their processes." *Cooper Tire & Rubber Co. v. McGill*, 890 So. 2d 859, 864 (Miss. 2004). As the Comment to Rule 37 itself notes, the court's broad discretion in sanctioning a litigant's misconduct is intended to "give[] greater flexibility to the trial court in the form of a general grant of power which would enable it to deal summarily with discovery abuses." *Comment*, Miss. R. Civ. P. 37. *See also Cooper Tire*, 890 So. 2d at 867 ("Rule 37(e) gives great flexibility to the trial courts in the form of a general grant of power which enables it to deal *summarily* with discovery abuses, whenever and however the abuse is brought to the attention of the court.") Most relevant here, the Comment to Rule 37 specifically recognizes that, where a party has failed to adequately participate in discovery as required by the

[7] While Appellant's Brief does contain a passing reference to the award of attorneys' fees and expenses against Tracy, it mischaracterizes that award. In Appellant's Brief, Tracy refers to the award of attorneys' fees and expenses as if it was awarded against him when partial summary judgment was granted in favor of Dan on the Article III claims. *See* Appellant's Brief at 11. This is factually incorrect. Moreover, Appellant's Brief summarily requests that the attorneys' fees award be reversed since summary judgment was improperly granted. *Id.* at 11. Tracy's request for relief on this point is clearly improper, since the fee award was based on Rule 37 and the Mississippi Litigation Accountability Act, neither of which he addresses in his Brief. Accordingly, this Court should refuse to consider this issue as part of his appeal.

court, the court may "impose monetary penalties according to the unnecessary expense to which the adverse party was put." *Comment*, Miss. R. Civ. P. 37.

In addition to Rule 37, the Chancellor correctly found in her March 10, 2009 Order that attorneys' fees and expenses had been requested and were warranted under the Mississippi Litigation Accountability Act, Miss. Code Ann. § 11-55-1 (Rev. 2002), *et seq*. Under that Act, attorneys' fees and expenses may be awarded as follows:

> [I]n any civil action commenced . . . in any court of record in this state, the court shall award, as part of its judgment and in addition to any other costs otherwise assessed, reasonable attorney's fees and costs against any party or attorney if the court . . . finds that an attorney or party brought an action . . . that is without substantial justification, . . . or if it finds that an attorney or party unnecessarily expanded the proceedings by other improper conduct, including but not limited to, abuse of discovery procedures available under the Mississippi Rule of Civil Procedure.

Miss. Code Ann. § 11-55-5. Under the Act, the court is required to award costs and fees where a finding has been made that claims are frivolous or without any justification, or where a party has unreasonably protracted the proceedings by engaging in improper discovery. *See, e.g., Garner v. Hickman*, 733 So. 2d 191 (Miss. 1999); *Jackson County School Bd. v. Osborn*, 605 So. 2d 731 (Miss. 1992).

For purposes of the Litigation Accountability Act, a claim is "frivolous" where it is made without any hope of success. *In re Spencer*, 985 So. 2d 330, 338 (Miss. 2008), *cert. denied* 129 S. Ct. 629 (2008). *See also Anderson v. B.H. Acquisition, Inc.*, 771 So. 2d 914, 922 (Miss. 2000). A plaintiff's subjective belief in the merit of his claim is not sufficient to avoid an award of attorneys' fees where that party cannot establish that the claim has any basis in fact or law. *See Foster v. Ross*, 804 So. 2d 1018, 1024 (Miss. 2002).

Attorneys' fees have been awarded under the Act where a party's actions are without "substantial justification" and the evidence submitted to the court on the fees issue establishes

that the fees awarded were "reasonable and fair." *Tupelo Redevelopment Agency v. Gray Corp.*, 972 So. 2d 495, 519-522 (Miss. 2007). *See also Richardson v. Audubon Ins. Co.*, 948 So. 2d 445, 450-451 (Miss. Ct. App. 2006) (affirming chancellor's finding that suit against administrator of estate was frivolous and that administrator was entitled to award of attorneys' fees and costs).

Here, the Chancellor correctly awarded attorneys' fees and expenses to the Estate for all fees and expenses incurred as a result of Tracy's discovery misconduct and his assertion of frivolous and unsubstantiated claims. As the Chancellor found in her Order, Tracy failed to comply with repeated requests of counsel that his discovery responses be provided and was in direct violation of a court Order requiring that those responses be provided by a certain date. (R. 152-154, R.E. 48-50). Moreover, throughout the entire time period his Petition was pending, Tracy failed to substantiate any factual basis for any of the claims he had asserted against Dan. (R. 155, R.E. 51). Finally, Tracy's failure to comply with the court's Order regarding discovery had prejudiced Dan's ability to defend the claims asserted against him and to prepare his defense for trial. (R. 155, R.E. 51). Under these facts, the Chancellor found that a lesser sanction would not serve as a proper deterrent to such conduct, and the award of all fees and expenses incurred by the Estate was warranted. (R. 155, R.E. 51). Because these findings are clearly supported by the record and the Chancellor's authority to award fees and expenses as a discovery sanction is clearly established, there is no "manifest abuse of discretion" sufficient to warrant any reversal of her Orders. The Chancellor should be affirmed in her decision that an award of fees and expenses was warranted.

The Chancellor also should be affirmed with regard to the time period covered by the fee award as well. The Chancellor correctly awarded attorneys' fees and expenses to the Estate for all costs incurred since Tracy's filing of his frivolous Petition. Under Rule 37 and the court's

inherent power, a court may impose purely monetary sanctions once a party has been found in contempt of the discovery orders of the court *Cooper Tire*, 890 So. 2d at 864. Moreover, the amount of monetary sanctions that can be awarded is not limited to the fees and expenses incurred in motion practice related to the discovery violation itself. The court is not limited to "imposition of expenses and attorney's fees . . . caused directly by the other party's failure to comply with the court's orders," and additional fees may be awarded as part of the sanction. *Id.* at 867. Given Tracy's failure to substantiate any factual basis for his claims, as requested in the discovery he refused to answer, the Chancellor correctly ruled that the "[s]ignificant attorneys fees and costs . . . incurred by the Executor and the Estate as a result of the Petition" should be awarded. (R. 175-176, R.E. 70-71).

Finally, the Chancellor should be affirmed with regard to the amount of fees awarded. As *In re Estate of Johnson*, 735 So. 2d 231, 236 (Miss. 1999) makes clear, Tracy must establish that the Chancellor's fee award was "manifestly wrong and [was] not supported by substantial evidence" in order to prevail on this issue. Tracy can make no such showing here. In considering the reasonableness of fees awarded in a will dispute, this Court has held that the chancellor should consider the following factors:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstance;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation and ability of the lawyer or lawyers performing the services; and

(8) whether the fee is fixed or contingent.

In re Estate of Johnson, 735 So. 2d at 237, citing *Moreland v. Riley*, 716 So. 2d 1057, 1062 (Miss. 1998). The Affidavit of Gary P. Snyder submitted in support of the Chancellor's fee award addressed each of these factors, and provided sufficient support for the Chancellor's findings that $36,375.50 in fees and $1,718.30 in expenses should be awarded against Tracy. Having failed to appear at the hearing on the award of fees and otherwise failing to submit any response or evidence in opposition to the fees requested in the affidavit, Tracy should not be heard to complain now of matters that he failed to contest before the Chancellor.

CONCLUSION

For the foregoing reasons, the Chancellor's Orders of February 2, 2009; March 10, 2009; and March 23, 2009 should be affirmed, and all fees and expenses of this Appeal should be taxed against Appellant.

Respectfully submitted, this the 23 day of November, 2009.

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CERTIFICATE OF SERVICE

I, Gary P. Snyder, hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the above and foregoing document to the following counsel of record:

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This, the 23 day of November, 2009.

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