

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
APPEAL NO. 2010-TS-00639**

**HILDA JANE ROBY KELLY
APPELLANT**

v.

**THERESA A. ROBY, MARY PHYFER, d/b/a SRT INVESTMENTS, GARON ROBY,
SHANE ROBY and SHARON ROBY SARGENT, Individually and as Administratrix
of the ESTATE OF JIMMY DALE ROBY, DECEASED
APPELLEES**

Appeal from the Chancery Court of Monroe County, Mississippi, (Cause No. 2005-570-48-M)
(Consolidated with Pontotoc County, Mississippi Chancery Cause No. 14,115)
The Honorable Jacqueline Estes Mask, Chancery Judge

BRIEF OF APPELLANT

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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 the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Hilda Jane Roby Kelly, Appellant;
 2. Theresa A. Roby, Appellee;
 3. Mary Phyfer, d/b/a SRT Investments, Appellee;
 4. Garon Roby, Appellee;
 5. Shane Roby, Appellee;
 6. Sharon Roby Sargent, individually and as Administratrix of the Estate of Jimmy Dale Roby, deceased, Appellee;
 7. Rhett R. Russell, counsel for Appellant;
 8. David E. Flautt, lead counsel for Mary Phyfer, d/b/a SRT Investments, Appellee;
- and
9. A. Rhett Wise, counsel for Garmon Roby, Shane Roby and Sharon Roby Sargent, individually and as Administratrix of the Estate of Jimmy Dale Roby, deceased, Appellees.


Rhett R. Russell

TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

The following issues are presented upon this appeal:

1. Whether or not the lower court erred in failing to set aside and hold for naught as to Hilda Jane Roby Kelly (hereinafter referred to as "Hilda") the conveyances of Jimmy Dale Roby (hereinafter referred to as "Jimmy") in favor of his sister-in-law, Mary Phyfer (hereinafter referred to as "Mary") asserted to have been entered into with the intention to hinder, delay or defraud Hilda as his judgment creditor in satisfaction of a questionable antecedent indebtedness of which the burden of proof was not met requiring showing by clear and satisfactory evidence not only that the indebtedness was bona fide with intentions to be enforced, but also that the amount thereof was not materially less than the fair and reasonable value of the properties conveyed.

2. Whether or not the lower court erred in finding that the real properties in question were assets of or reachable by Jimmy's probate estate and, whether contradictorily, finding that the real properties in question as of Jimmy's death were owned by him and Theresa as joint

tenants with right of survivorship, or as tenants by the entireties, resulting in his ownership therein passing immediately upon his demise to her.

3. Whether or not the lower court erred in not ruling that by application of § 89-5-3 MCA Jimmy's unrecorded conveyances to his sister-in-law were void as to Hilda, his judgment creditor.

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STATEMENT OF THE CASE

COMES NOW, Hilda Jane Roby Kelly pursuant to Rule 28(a)(4) of the Mississippi Rules of Appellate Procedure and submits herewith her statement of the case.

Nature of the Case, Course of Proceedings and Disposition by Lower Court

A December 10, 1979 Final Decree of Divorce as to Jimmy and Hilda was entered by the Pontotoc County Chancery Court mandating, and incorporating therein their support agreement, setting forth his required child support payments to her. On September 24, 1998, Hilda caused to be filed her motion for citation for contempt and monetary judgment for delinquent child support. On March 30, 1999, the Chancery Court approved an agreed order of judgment finding Jimmy in contempt for failure to pay child support and finding him to be in arrearage for the period beginning May 1, 1995 through March 1, 1997 while awarding Hilda a judgment against him in the amount of \$6,000.00. Such judgment was enrolled on the judgment rolls of the Circuit Clerk of Monroe County on May 28, 1999. Jimmy passed away on August 4, 2002 and on August 20,

2002 four deeds each dated March 3, 1999 from Jimmy and Theresa in favor of her sister were recorded in the Land Deed Records of Monroe County.

Hilda caused to be filed her petition, later amended, for a writ of execution and for the sale of real properties in Monroe County in which, as to Hilda, Jimmy held ownership interest as of enrollment of her judgment and at all times relevant thereafter. The petition designated Theresa and her sister as defendants and later Garon Roby, Shane Roby and Sharon Roby Sargent, the remaining heirs at law of Jimmy, were added as defendants. Thereafter Jimmy's probate proceeding was initiated in Monroe County Chancery Court with the probate proceeding and the Pontotoc County proceeding consolidated. Theresa and Mary were duly served with process and each, along with the remaining three defendants, made personal appearances in the lower court proceeding. At no point during the lower court proceedings did either Theresa or Mary cause to be filed an answer to the petition or the amended petition of Hilda.

The lower court refused the relief requested by Hilda while finding that Hilda's petition should be construed as a petition to sell real property belonging to the probate estate of Jimmy and further finding, somewhat contradictorily, that the real properties in question passed immediately to Theresa upon Jimmy's death in that such was then held and owned by Jimmy and Theresa as joint tenants with rights of survivorship or as tenants by the entireties. Hilda moved the court to alter or amend its judgment which the lower court denied.

Statement of Facts Relevant to the Issues Presented for Review

Facts relevant to the issues presented for review set forth in chronological order are as follows:

<u>Date(s)</u>	<u>Occurrence</u>
December 10, 1979	Final Decree for Divorce as to Jimmy and his then wife, Hilda, was entered directing Jimmy to make child support payments while incorporating therein the written agreement of the parties for such payments (R 15-22 ¹).
June 1, 1995 - April 11, 1998	Jimmy made no child support payment to Hilda and was in arrearage for child support payments for this time period (R 24-29, R 37-38, Exhibit 2).
February 11, 1998	Four deeds of trust dated December 1, 1997 executed by Jimmy and his then wife, Theresa, were recorded being secured by five parcels of Monroe County real property for an alleged \$200,000.00 indebtedness in favor of "SRT Investments" which was later identified to be a name utilized by his sister-in-law (Exhibit 1, T 35, 38 and 39 ²).
September 24, 1998	Hilda filed her motion for citation for contempt asserting under oath that Jimmy had not paid child support from May 1, 1995 through March 1, 1997 except for two checks which bounced (RE 12, R 24-29).
March 30, 1999	The parties jointly submitted and the court entered an agreed order of judgment finding Jimmy in contempt of court for failure to pay child support and finding that he was in arrearage for child support payments for the period beginning May 1, 1995 through March 1, 1997 while awarding Hilda a judgment against him for delinquent child support payments in the amount of \$6,000.00 (RE 18, R 37-38, Exhibit 2 and T 32, 36, and 39).

¹All references to the record, "R," shall throughout this brief refer to the separate record of the Pontotoc County Chancery Court proceeding unless specifically noted otherwise.

²All references to the transcript, "T," shall throughout this brief refer to the transcript of the August 6, 2009 lower court proceeding and testimony.

March 30, 2010

The lower court denied Hilda's motion to alter or amend its judgment while reasserting that the subject real properties were assets of Jimmy's probate estate and, again somewhat contradictorily, that such real properties were held as of his death by him and Theresa as joint tenants with right of survivorship with all of his ownership interest therein passing at such time immediately to Theresa (RE 35, R 239-243).

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SUMMARY OF THE ARGUMENT

Hilda petitioned the Chancery Court for writ of execution to sell so much of the property of Jimmy Dale Roby (hereinafter referred to as "Jimmy") so as to satisfy the judgment against him in favor of Hilda Jane Roby Kelly (hereinafter referred to as "Hilda") alleging that his conveyances of the lands in question were not in satisfaction of a bona fide antecedent indebtedness but an attempt to defraud her as a judgment creditor and that such conveyances were void to her as a judgment creditor. Neither his then wife, Theresa Roby (hereinafter referred to as "Theresa"), nor her sister, Mary Phyfer (hereinafter referred to as "Mary"), filed an answer in the lower court proceedings and Mississippi law is quite clear that "averments in a pleading to which an answer is required are deemed admitted when not denied in the answer."

The lower court's March 30, 1999 "agreed order of judgment" adjudicated Jimmy to be in contempt of court for failure to pay Hilda child support while finding his child support arrearage to be \$6,000.00 for the period beginning May 1, 1995 through March 1, 1997. Mississippi's statutory law, § 93-11-71 MCA, specifies that when court-ordered child support payments remain

unpaid for a period of at least thirty (30) days then judgments arose by operation of law against Jimmy as the obligor in favor of Hilda having the "same effect and fully enforceable as any other judgment entered in this state" which "shall operate as a lien upon all the properties of the judgment debtor, both real and personal." A judgment debtor and judgment creditor relationship existed between Jimmy and Hilda from and after June 1, 1995.

Almost five years after Hilda's initial judgment against Jimmy, more than five months after Hilda filed her motion requesting that Jimmy be found in contempt of court and for judgment of his non-payment of child support and less than a month prior to the entry of the agreed order adjudicating such, Jimmy signed four March 3, 1999 deeds conveying all his ownership interest in five parcels of real property, being all his material possessions, to "SRT Investments" which was later admitted to be a name utilized by his sister-in-law, Mary. Neither Theresa nor Mary met their requisite burden of proof to show by clear and satisfactory evidence that a bona fide indebtedness existed which was intended to be enforced and further that the amount of such alleged indebtedness was not materially less than the fair and reasonable value of the property conveyed. Further, since the March 3, 1999 deeds Mary never took possession of the subject properties. Jimmy and Theresa continued to reside on the subject properties and otherwise had exclusive use. Jimmy and Theresa never relinquished control of the subject properties. The March 3, 1999 deeds were executed by Jimmy while a lower court motion to hold him in contempt and for judgment against him was pending and at a time when he was by statute a judgment debtor of Hilda. The deeds were not recorded until April 20, 2002 being more than three years after execution thereof and weeks subsequent to his death. It is obvious that the conveyances were transacted with the intent to hinder, delay or defraud Hilda as a judgment

creditor. The lower court should have set aside and held for naught Jimmy's conveyances as per his judgment creditor, Hilda.

The deeds from Jimmy to his wife's sister were recorded subsequent to the enrollment of Hilda's judgment against him in the judgment rolls of the Circuit Clerk of Monroe County where the subject parcels are located. Such enrollment extended to Theresa constructive notice of Hilda's judgment against Jimmy. By statute, § 89-5-3 MCA, Jimmy's conveyances to his sister-in-law were void as to Hilda as his judgment creditor. Even though the deeds were not recorded until subsequent to the enrollment of Hilda's judgment and subsequent to Jimmy's demise, such conveyances were valid as to the parties thereto. Prior to such conveyances Jimmy and Theresa as husband and wife held such properties as joint tenants by the entireties with right of survivorship. The fact that both of them signed the deeds in favor of Mary effectively terminated the tenancy by the entireties and terminated Theresa's ownership interest therein. Jimmy's conveyances to Mary were valid as to her but void as to Hilda. He transferred the properties to Mary subject to the right of Hilda as judgment creditor to have the property seized under a writ of execution for satisfaction of her judgment. The judgment lien followed the land and not Jimmy to his grave.

The lower court further erred in finding that the real properties conveyed by Jimmy during his lifetime were property of his probate estate and further erred in contradictorily finding that as of Jimmy's death the subject real properties passed to Theresa who with Jimmy then held the properties as joint tenants with right of survivorship, or as tenants by the entireties.

The lower court should have set aside and held for naught as to Hilda the conveyances of Jimmy so as to allow her to proceed with execution.

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ARGUMENT

I.

WHETHER OR NOT THE LOWER COURT ERRED IN FAILING TO SET ASIDE AND HOLD FOR NAUGHT AS TO HILDA THE CONVEYANCES OF JIMMY IN FAVOR OF HIS SISTER-IN-LAW, MARY, ASSERTED TO HAVE BEEN ENTERED INTO WITH THE INTENTION TO HINDER, DELAY OR DEFRAUD HILDA AS HIS JUDGMENT CREDITOR IN SATISFACTION OF A QUESTIONABLE ANTECEDENT INDEBTEDNESS OF WHICH THE REQUISITE BURDEN OF PROOF WAS NOT MET BY SHOWING BY CLEAR AND SATISFACTORY EVIDENCE NOT ONLY THAT THE INDEBTEDNESS WAS BONA FIDE WITH INTENTIONS TO BE ENFORCED, BUT ALSO THAT THE AMOUNT THEREOF WAS NOT MATERIALLY LESS THAN THE FAIR AND REASONABLE VALUE OF THE PROPERTIES CONVEYED.

Hilda requested the lower court to set aside as to her as Jimmy's judgment creditor his conveyances to his sister-in-law while asserting in her petition and amended petitions under oath that such transactions were entered into by the parties thereto in a conspiratorial attempt to defraud and hinder her as his creditor and that such transactions were not supported by good and sufficient consideration (R 39-45, R 86-93 and R 191-192). Neither the decedent's wife, Theresa, nor his sister-in-law, Mary, caused to be filed an answer in the lower court proceeding. A defendant shall serve an answer and every defense, in law or fact, to a claim for relief in any

pleading shall be asserted. Rule 12 MRCP. Each averment in a pleading to which an answer is required is deemed admitted when not denied in the answer. Rule 8(d) MRCP and Griffith, Mississippi Chancery Practice, 2000 Edition, ¶ 346.

An agreed order of judgment dated March 30, 1999 between Jimmy and Hilda was entered by the Chancery Court of Pontotoc County adjudicating Jimmy to be in contempt of court for failure to pay monthly child support, specifically finding him to be in arrears in child support for the period beginning May 1, 1995 through March 1, 1997 and awarding Hilda judgment against him in the amount of \$6,000.00 for delinquent child support payments (RE 18, R 37-38, Exhibit 2, T 36, 39). § 93-11-71 MCA states:

“Whenever a court orders any person to make periodic payments of a sum certain for the maintenance or support of a child, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, a judgment by operation of law shall arise against the obligor in an amount equal to all payments that are then due and owing. A judgment arising under this section shall have the same effect and be fully enforceable as any other judgment entered in this state. A judicial or administrative action to enforce the judgment may be begun at any time; ... Any judgment arising under the provisions of this section shall operate as a lien upon all the property of the judgment debtor, both real and personal ...”

Thus, by application of this statute, between June 1, 1995 and April 1, 1997 Hilda obtained consecutive monthly judgments by operation of law against Jimmy.

On February 11, 1998 Jimmy as the judgment debtor of Hilda signed but did not record four deeds of trust with the collateral being all of his real properties consisting of five parcels in Monroe County in favor of “SRT Investments” [later admitted to be his sister-in-law T 38] for an alleged \$200,000.00 (Exhibit 1, T 35, 39). Jimmy’s wife testified that this indebtedness resulted

from \$200,000.00 “mostly in cash” paid to them by her sister (T 39).

Hilda’s judgment against Jimmy was enrolled on May 28, 1999 in the judgment rolls of the Circuit Clerk of Monroe County (RE 20, Exhibit 3, T 37, 39). On August 4, 2002 Jimmy passed away (T 32, 39). Thereafter on August 20, 2002 four deeds as to all the real property previously held by Jimmy and his wife dated March 3, 1999 in favor of “SRT Investments” were recorded in the Land Deed Records of Monroe County (RE 21, Exhibit 1, T 39). Importantly, as of Jimmy’s March 3, 1999 executions of the deeds the September 24, 1998 motion of Hilda to hold Jimmy in contempt and for judgment for child support arrearage was pending and less than a month had passed since Jimmy had agreed to an order finding him to be in contempt of court for failure to pay child support for the period beginning May 1, 1995 through March 1, 1997 (RE 12, RE 18, R 24-29, R 37-38, Exhibit 2). Further, at all times subsequent to the execution of the March 3, 1999 deeds Jimmy’s sister-in-law never took possession of the subject properties and Jimmy and his wife never relinquished control thereof while continuing to utilize one parcel for residential purposes and all properties for their own benefit (T 41).

§ 15-3-3 MCA states:

“ Every ... conveyance of lands ... by writing ... had or made and contrived of ... fraud, covin collusion, or guile, to the intent or purpose to delay, hinder, or defraud creditors of their just and lawful actions, suits, debts ... shall be deemed and taken only as against the person or persons, ... and every of them whose debts, ... or interests by such guileful and covinous devices and practices shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding.”

Conveyances made to satisfy or secure antecedent indebtednesses were discussed in Blount v.

Blount, 95 So.2d 545 (Miss. 1957) as follows:

"A conveyance or transfer, whether founded on a valuable and adequate consideration or not, if entered into by the parties with the intent to hinder, delay, or defraud creditors, is void as to them, and this rule has been applied to transfers made in anticipation of, or pending, a suit against the transferor." *Id.* at 552.

...
"The rule is well settled that, in a case of this kind, where it is claimed that a conveyance was made to satisfy or secure an antecedent indebtedness, there must be clear and convincing proof of the existence of a valid debt, including disclosure of details as to the items and amount of the debt, and it must clearly appear that the conveyance was in fact made in consideration of such debt. The necessity of clear and satisfactory proof of indebtedness particularly exists in the case of conveyances to near relatives" *Id.* at 557.

...
"It seems incredible that a businessman should make advances of money and other financial assistance over a period of years, even to a member of his own family ... for which he expected to demand payments at a later date, and yet preserve no contemporaneous records, memoranda or books of account, to show the dates or amounts of such advancements. The lack of such records in this case is sufficient in itself to cast doubt and suspicion upon the claims put forth by the appellant in an effort to show a preexisting debt equal to or in excess of the value of the property conveyed to him; and the fact that the appellant had failed to preserve and was unable to produce any contemporaneous records or books of account to support his claim ... is a circumstance in itself which strongly indicates that the appellant did not intend that the assistance rendered in each such instance should constitute a debt for which payment should be exacted ... [T]he financial assistance rendered by the appellant ... over a period of years, for which no records were kept, was not intended to be treated as a debt at the time such assistance was rendered, and that the purpose to treat the same as a debt was not formed until the prospect of a decree for (support) in favor of the appellee was imminent." *Id.* at 559.

The burden of proof stated in Blount v. Blount, *Supra.* at 559 as reemphasized in Morreale v. Morreale, 646 So.2d 1264,1268 (Miss. 1994) is stated as follows: "The burden of proof in this case was on the appellant to show by clear and satisfactory evidence not only a bona fide indebtedness, which was intended to be enforced, but also the amount thereof was not materially less than the fair and reasonable value of the property conveyed to him; and the appellant failed to make such proof."

Additionally, “The rule as to voluntary conveyances may be thus stated: A grantee in a voluntary conveyance must show, as against a creditor of the grantor, who is such at the date of conveyance, that such grantor left out of such voluntary conveyance property easily accessible to execution, amply sufficient, in the ordinary course of events, to satisfy his then-existing legal liabilities. That is his precise burden.” Odom v. Luehr, 85 So. 218, 219 (Miss. 1956) quoting Golden v. Goode, 24 So. 905, 906 (Miss. 1899). Jimmy conveyed all of his real property interest by such four March 3, 1999 deeds and did not leave out of such conveyance property easily accessible to execution, amply sufficient, in an ordinary course of events, to satisfy his then legal liability owed to Hilda who held a judgment lien as of the time of such conveyances.

“In order to ascertain whether, under the facts, actual fraud occurred, the trial court should analyze the presence of the ‘badges of fraud’ to determine the issue of a bona fide conveyance In Reed v. Lavecchia, 193 So.2d 439 (Miss. 1940), we enumerated several ‘badges of fraud’ regarding the issue of a bona fide conveyance: ‘[I]nadequacy of consideration, transaction not in usual course or mode of doing business, absolute conveyance as security, secrecy, insolvency of grantor, transfer of all his property, attempting to give evidence of fairness ... retention of possession, ... relationship of the parties, and transfer to person having no apparent use for the property.’” Morreale v. Morreale, *Supra*. at 1267.

Under the facts at hand the transaction certainly was not in the usual course or mode of doing business. Jimmy attempted an absolute conveyance of all of his property interest which he placed as security to notes which attempted to give evidence of fairness, secrecy was sought as exemplified by the failure to identify in the documents the sister-in-law as the actual grantee and

failure to record the instruments, the retention of the properties by Jimmy and his wife, the grantee was Jimmy's sister-in-law and the notary public was her daughter, the failure of the sister-in-law to take possession, the assertion that the conveyances were in satisfaction of \$200,000.00 paid "mostly in cash" to Jimmy and his wife by his sister-in-law and a transfer to the sister-in-law who apparently had no use for the properties.

Numerous "badges of fraud" exist to indicate Jimmy's intention to hinder, delay or defraud Hilda as his judgment creditor. Morreale v. Morreale, *Supra*. Neither the wife nor sister-in-law of Jimmy met the requisite burdens of proof to show by clear and satisfactory evidence that not only the indebtedness was bona fide with intentions to be enforced, but also that the amount thereof was not materially less than the fair and reasonable value of the properties conveyed. Blount v. Blount, *Supra*. Further, there is no requisite showing that Jimmy left out of such conveyance property easily accessible to execution, amply sufficient, to satisfy his then existing legal liability owed to Hilda. Odom v. Luehr, *Supra*.

II.

WHETHER OR NOT THE LOWER COURT ERRED IN FINDING THAT THE REAL PROPERTIES IN QUESTION WERE ASSETS OF OR REACHABLE BY JIMMY'S PROBATE ESTATE AND, WHETHER CONTRADICTORILY, FINDING THAT THE REAL PROPERTIES IN QUESTION AS OF JIMMY'S DEATH WERE OWNED BY HIM AND THERESA AS JOINT TENANTS WITH RIGHT OF SURVIVORSHIP, OR AS TENANTS BY THE ENTIRETIES, RESULTING IN HIS OWNERSHIP THEREIN PASSING IMMEDIATELY UPON HIS DEMISE TO HER.

The lower court in its November 3, 2009 opinion specifically found that "Hilda's pleadings should be construed as a creditor's petition to sell property of the estate to satisfy an outstanding lien" and then summarized long-standing probate law that probate assets personal

property must first be liquidated and utilized to satisfy debts prior to the sale of real property (RE 25, R 207-216, ¶¶ 23-24). The subject real properties did not become an asset of Jimmy's probate estate. Prior to his August 4, 2002 demise by four deeds dated March 3, 1999, recorded on April 20, 2002, he conveyed his real property interests to his sister-in-law (RE 21, Exhibit 1, T 38-39). Such conveyances were valid as to Jimmy and his sister-in-law even though they were void as to his judgment creditor, Hilda. § 89-5-1 MCA, § 89-5-3 MCA and § 11-7-191 MCA. As between Jimmy and Theresa as grantors and her sister as grantee, the March 3, 1999 deeds were valid and binding as of the date of execution even though the instruments were not recorded until April 20, 2002. Herrington v. Heidelberg, 141 So.2d 717, 719 (Miss. 1962) and Harrell v. Lamar Co., LLC, 925 So.2d 870, 875 (Miss. App. 2005). "As per the parties, an unrecorded deed is effective. If the deed is not acknowledged, such does affect the validity of the deed, but only its admittance to record." Harrell v. Lamar Co., LLC, *Id.*

Further, the lower court was in error in finding that as of Jimmy's demise he held ownership in the subject properties with Theresa as either joint tenants with right of survivorship or as tenants by the entireties resulting in his ownership interest passing immediately to Theresa as of his death (RE25, RE 35, R207-216 ¶ 31, and R 239-243 ¶ 7). Again, on March 3, 1999 Jimmy and his wife as parties to the deeds effectively divested their ownership interest in and to the properties at issue. Harrell v. Lamar Co., LLC, *Supra.* and Herrington v. Heidelberg, *Supra.* Up until March 3, 1999 Jimmy and his wife held the properties as joint tenants by the entireties but the deeds executed by both terminated such tenancy. A transfer of common property held by tenants by the entireties can be effected by the co-owners. Ayers v. Petro, 417 So.2d 912, 914 (Miss. 1982) and 20 AmJur 2d, Co-Tenancy and Joint Ownership, §§ 95 and 97.

III.

WHETHER OR NOT THE LOWER COURT ERRED IN NOT RULING THAT BY APPLICATION OF § 89-5-3 MCA JIMMY'S UNRECORDED CONVEYANCES TO HIS SISTER-IN-LAW WERE VOID AS TO HILDA, HIS JUDGMENT CREDITOR.

Neither Jimmy's wife nor his sister-in-law caused to be filed an answer in the lower court proceeding. A defendant shall serve an answer and every defense, in law or fact, to a claim for relief in any pleading shall be asserted. Rule 12 MRCP. Each averment in a pleading to which an answer is required is deemed admitted when not denied in the answer. Rule 8(d) MRCP and Griffith, Mississippi Chancery Practice, 2000 Edition, ¶ 346.

The March 30, 1999 agreed monetary judgment in favor of Hilda against Jimmy was enrolled May 28, 1999 in the judgment rolls of the Circuit Clerk of Monroe County where Jimmy had ownership interest in five parcels of real property (RE 20, RE 21, Exhibits 1 and 3). Jimmy passed away on August 4, 2002 (T 32). On August 20, 2002 four March 3, 1999 deeds by which Jimmy and his wife transferred to his sister-in-law all ownership interest in said five parcels of real property were recorded in the Land Deed Records of Monroe County, Mississippi (Exhibit 1).

"A judgment so enrolled shall be a lien upon and bind all the property of the defendant within the county where so enrolled ... in favor of the judgment creditor, his representatives or assigns, against the judgment debtor and all persons claiming the property under him after the rendition of the judgment." § 11-7-191 MCA. A judgment lien extends upon the undivided estate of the debtor and shall thereafter be a lien on the share of the property held by the owner.

Simmons v. Gordon, 53 So. 623, 625 (Miss. 1910). "A creditor by his judgment ... gets a lien on an undivided interest in the land of his debtor, which gives him a fixed and immediate interest."

Id.

Much like a mortgage lien attached to real property, a judgment lien attached to real property is not extinguished by the death of the judgment debtor. Mortgage foreclosures of real property and execution of judgment liens on real property frequently occur after the death of the judgment debtor. "The lien follows the property and may be enforced against the property whenever it may be found within the county, without regard to intervening rights of any third parties." Meredith v. United States, 327 F. Supp. 429, 434-435 (N.D. Miss. 1970). Affirmed 449 F. 2d 186 (5th Cir. 1971). Under § 11-7-191 MCA Hilda's judgment against Jimmy constituted a lien upon and bound all of his properties, including the subject real properties, within Monroe County, where it was enrolled and attaches to after-acquired property. Motor Securities Co. v. B.M. Stevens Co., 83 So.2d 177, 179 (Miss. 1955).

"A conveyance of land shall not be good against ... any creditor, unless it ... be lodged with the clerk of the chancery court of the county in which the lands are situated to be recorded"

§ 89-5-1 MCA. "All conveyances whatsoever of lands ... shall be void as to all creditors ... unless they be ... lodged with the clerk of the chancery court of the proper county, to be recorded in the same manner that other conveyances are required to be acknowledged or proved and recorded."

§ 89-5-3 MCA. Black's Legal Dictionary, 4th Edition defines "void" as nullatory, having no legal force or binding effect, are of no effect whatsoever.

From and after June 1, 1995, including as of the March 3, 1999 execution of deeds, Jimmy was a judgment debtor of Hilda. § 93-11-71 MCA (RE 18, Exhibits 2 and 3). Jimmy's March 3, 1999 deeds effectuated a conveyance of his ownership interest to his sister-in-law; however, in that the deeds of conveyance were not recorded until more than three years subsequent to Hilda's

enrollment of her judgment through application of § 89-5-3 MCA dictates that such conveyances of Jimmy “shall be void” as to Hilda as his judgment creditor.

One who purchases property on which there is an enrolled judgment lien holds the property subject to the right of the judgment creditor to have it seized under writ of execution for the satisfaction of the judgment. Meredith v. United States, *Supra.* at 433; Motor Securities Co. v. B.M. Stevens Co., 83 So.2d 177 (Miss. 1955); Taylor v. Doe Ex Dem. Miller, 54 U.S. 287 (1852); Brookhaven Bank & Trust Co. v. Gwin, 253 F.2d 17, 22 (5th Cir. 1958).


CONCLUSION

This Court should remand this matter back to the lower court for setting aside and holding for naught as to Hilda conveyances by Jimmy of the subject real properties so that a judgment interest rate may be set pursuant to § 75-17-7 MCA and permit Hilda to proceed in obtaining a writ of execution and for the selling of so much or all of Jimmy's real property interests. Further, that all costs at the lower court and appellate levels be assessed jointly and severally against Appellees, Theresa A. Roby and Mary Phyfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, Rhett R. Russell, attorney for Appellant, have this day mailed, postage prepaid, by U.S. Postal Service, a true and correct copy of the above and foregoing Brief of Appellant to the following persons:

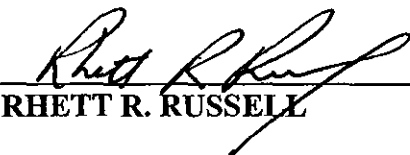
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SO CERTIFIED, on this the 13th day of August, 2010.


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