
IN THE SUPREME COURT OF MISSISSIPPI

DOCKET NUMBER: 2010-CA-01608

RE

VERONICA BAUMGARDNER McKEE ARRINGTON and
CHARLIE C. BAUMGARDNER

PLAINTIFFS /
APPELLANTS /
CROSS-APPELLEES

VERSUS

WILLIAM E. READY, Trustee

DEFENDANT /
APPELLEE /
CROSS-APPELLANT

ON APPEAL FROM THE
CHANCERY COURT OF LAUDERDALE COUNTY, MISSISSIPPI
CIVIL ACTION No.: 96-834-S

REPLY BRIEF OF DEFENDANT / APPELLEE / CROSS-APPELLANT

Oral Argument Requested

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CONSTITUTIONS

Mississippi

<u>Article 6, §159 Mississippi Constitution 1890</u>	1, 4
<u>Art. 6, Section 160, Miss. Constitution</u>	4

United States

None

STATUTES

Mississippi

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United States

None

TREATISES

None

RULES OF COURT

None

ARGUMENT IN REPLY

Introduction

Plaintiff / Appellant / Cross-Appellee bore the burden / onus to prove that the Chancery Court's jurisdiction was properly invoked. (Brief for Appellant 38). Trustee Ready objected. Plaintiff failed to meet the burden of proof. The learned Chancellor erred by not dismissing the case.

On cross appeal, Cross-Appellee's abbreviated response (Reply Brief Appellant 22-23) makes no cites to the record or any transcript and cites no authorities. It could be taken as confession of error.

Out of an abundance of caution, a more detailed reply follows:

Mischaracterization

Plaintiff / Appellant / Cross-Appellee insists that this is a matter testamentary within the ambit of Article 6, §159 Mississippi Constitution 1890 (Cross-Apple Brf. 18). Plaintiff / Appellant / Cross-Appellee errs.

As previously stated in Cross-Appellant's Brief:

This action is not an action in an ongoing estate, but rather an action in a private trust. Where, as here, a private trust establishes the Trustee's duties and obligations, including specific waivers of inventory, accounting, appraisal, etc., the Chancellor has no subject matter jurisdiction concerning the

specifically waived matters.

The only exception arises in cases of demonstrated fraud or other misbehavior. In re Jane W. Stubbs-Kelley Trust, 573 So.2d 734, 735-736 (Miss. 1990) [trust setting]; Ellzey v. McCormick, 17 So.3d 583, 591 (Miss. 2009) [estate setting]. Only after predicate proof of Trustee's misbehavior, may the Court require accounting, inventory, appraisal, etc. to remedy the misbehavior. [*38] Decell v. Hazlehurst Oil Mill & Fertilizer Co., 83 Miss. 346, 35 So. 761 (1904). Plaintiffs never proved misbehavior and, therefore, the learned Chancellor had no subject matter jurisdiction. [Brief for Cross-Appellant 37-38].

Uncontradicted Facts

It is uncontradicted that, under the express terms of Harold D. Baumgardner's Last Will and Testament, Plaintiff / Appellant / Cross-Appellee could receive property if the Trusts' assets were not exhausted at the time of the death of the last the three trust beneficiaries. No present (immediate) interest in Trust assets passed to Plaintiff / Appellant / Cross-Appellee, only a contingent future interest (contingency being that assets remained upon termination of the Trusts).

It is uncontradicted (1) that the Chancery Court of Lauderdale County, Mississippi closed Estate of Harold D. Baumgardner no later than June 12, 1981 and (2) that the requisite trusts were established. In the next sixteen and a half plus (16½+) years, the Trusts' sole beneficiary (Emogene Baumgardner), participated with and made no complaint to or of the Trustee, nor of his actions or omissions.

Litigation

On January 14, 1998, Cross-Appellee sought authority to file the instant complaint.

Defendant / Appellee / Cross-Appellant Ready promptly asserted a lack of jurisdiction over a private trust (1) absent Plaintiff's standing to sue and/or (2) absent proof of the Trustee's misbehavior and/or (3) because Plaintiff had a demonstrable conflict of interest (6/30/1998 (R.116, 123, 127)).

The Chancellor found that Plaintiff had a conflict of interest and removed Plaintiff Arrington as conservator of the estate, substituting Hon. Edward N. Kramer, III, Esq. as Guardian Ad Litem (2/28/2000 (R Ex.69, R.282)) and later, as Conservator of the Estate (3/18/2002 (R Ex.87, R.466)).

On June 30, 2002, the Chancellor ordered (1) that the assets of the Marital Deduction Trust be transferred from the Trustee Ready to the Court's Guardian Ad Litem / Conservator Edward N. Kramer, III, Esq. and (2) that upon conclusion of transfer of all of the Trust's assets, the Marital Deduction Trust would cease and Trustee Ready would stand acquitted (7/30/2002 Order, REx 29-30, R.779).

On or about April 12, 2004, Mrs. Baumgardner died, thus ending both the Conservatorship and the Family Trust. Thereafter, the Court's Guardian Ad Litem / Conservator, Edward N. Kramer, III, Esq., filed his 6th and Final Accounting (R.1018)

and the Chancellor entered its Order approving the same (R.1180).

The Court's Guardian Ad Litem / Conservator, Edward N. Kramer, III, Esq., made no complaint to or of Trustee Ready.

Appeal

First, Plaintiff / Appellant / Cross-Appellee continues to mischaracterize this matter as one arising under Article 6, §159 Mississippi Constitution 1890 [see subparagraph (c) thereof "Matters testamentary and of administration;"]. As previously shown, no matter testamentary was apparent below.

Second, as a "fallback" position, Plaintiff / Appellant / Cross-Appellee cites the Chancery Court's

* * * authority to hear matters of title and real estate. Art. 6, Section 160, Miss. Constitution.
(Brief for Cross-Appellee 19).

With respect, no "matters of title" were apparent below or here. As to timber, Trustee Ready did not sell or remove timber, except with the learned Chancellor's July 30, 2002 Order so to do. It is uncontradicted that the Trusts' sole beneficiary, Emogene Baumgardner, requested that Trustee Ready, during her lifetime, refrain from cutting timber on the Trusts' land.

At the April 22, 2002 hearing, the Court and the Trustee agreed to sell the timber. ¹ On May 20, 2002, the Court entered

¹ The Order recited at paragraph 3.B., page 2 (R.Ex.19):
B. Upon April 22, 2002, consultations of Court
(continued...)

an agreed (Court and Trustee) Order for Court Ordered Sale of Timber (R.735). On July 30, 2002, the Court entered its Order to Accept Timber Bids and to Transfer Assets of Baumgardner Marital Deduction Trust (R.779, REx23-31). A review of the July 30, 2002 Order reiterates Trustee Ready's voluntary cooperation with the Court (§4.D. and F., p.3, R.Ex.25; §5.C., p.5, R.Ex.27; §6.A., p.6, R.Ex.28).

"Uniform Principal and Income Law"

Under both common law and statute, a trustee's judgment is entitled to much deference. Gulf National Bank v. Sturtevant, 511 So.2d 936, 937 (Miss. 1987). Although dealing with income beneficiaries and vested remaindermen (whereas the instant trust

¹(...continued)

and counsel, the Trustee of the Baumgardner Trust and the Conservator of the Estate of Emogene Baumgardner both agreed with the findings of peril to Trust timber assets and that the said timber should be sold.

Later, the Order directed:

* * *. Whereupon, after review of said results, the trustee shall immediately make a determination as to whether he will accept or reject the bids, this being at his sole discretion, notifying all interested parties by 1 p.m. of his decision.

(emphasis representing Chancellor's interlineated, handwritten order) (Order p.4, R.Ex.21).

The Order concluded:

IT IS FINALLY ORDERED, ADJUDGED AND DECREED that the aforesaid "requests of the Trustee" were made after detailed consultations among counsel and without any waiver or inference of waiver of any position, right or immunity of the Trustee.

(Order p.5, R.Ex. 22).

vested both income and principal (title) in the Trusts), nevertheless the Mississippi "Uniform Principal and Income Law", §91-17-1 et seq. Mississippi Code 1972) may be helpful.

§91-17-21 Mississippi Code 1972 [Timber] states:

If any part of the principal consists of land from which merchantable timber may be removed, the receipts from taking the timber from the land shall be allocated in accordance with section 91-17-5(c) [Mississippi Code 1972].

(emphasis and [bracketed] material supplied).

In turn, §91-17-5 Mississippi Code 1972 [Trustee's duty, receipts, expenditure] states:

A trust shall be administered with due regard to the respective interests of income beneficiaries and remaindermen. A trust is so administered with respect to the allocation of receipts and expenditures if a receipt is credited or an expenditure is charged to income or principal or partly to each:

(a) * * *.

(b) * * *.

(c) If neither of the preceding rules of administration is applicable, in accordance with what is reasonable and equitable in view of the interests of those entitled to income as well as those entitled to principal, and in view of the manner in which men of ordinary prudence, discretion, and judgment would act in the management of their own affairs.

If the trust instrument gives the trustee discretion in crediting a receipt or charging an expenditure to income or principal or partly to each, no inference of imprudence or partiality arises from the fact that the trustee has made an allocation contrary to the provisions of this chapter.
(emphasis supplied).

Here, net timber proceeds were allocated "in accordance with what [was] reasonable and equitable" as approved by the learned

Chancellor and in the "manner in which men of ordinary prudence, discretion, and judgment would act in the management of their own affairs." Therefore, "no inference of imprudence" arose.

Plaintiff's claim is unfounded in fact or law.

After Mrs. Baumgardner's death, then Plaintiff (residual distributee) complained that

During the entire conservatorship period from (October of 1997 to June of 2004) when the Conservator spent over \$429,000 for Emogene's care,
[Reply Brief for Appellee / Cross-Appellant].

It is uncontradicted that the Conservatorship of Emogene Baumgardner received \$744,467.62 (Brf.Appellant 9, *citing* R.832) as the Conservatorship's portion of the net timber sale proceeds. Thus, even by Plaintiff's (residual distributee's) reckoning, the Trusts more than amply met Mrs. Baumgardner's needs. There is no evidence that the Trusts' sole beneficiary (Emogene Baumgardner) suffered a lack of support or any requested item nor that Trustee Ready breached his duty to the Trusts' sole beneficiary.

Third, Plaintiff / Appellant / Cross-Appellee invokes the Chancery Court's power to remove a Trustee for cause (Brf. Cross-Appellee19). Yet, Plaintiff wholly failed to substantiate any basis for cause. Trustee Ready's accounts were examined by the Court's Guardian Ad Litem / Conservator Edward N. Kramer, III, Esq., who, on December 7, 2001, reported to the Court (R Ex 74-80), making no finding of deficiency, or of misbehavior. Again, there is no evidence that the Trusts' sole beneficiary (Emogene

Baumgardner) suffered a lack of support, timely provision of all requests, or that Trustee Ready breached his duty to the Trusts' sole beneficiary.

Fourth, Plaintiff / Appellant / Cross-Appellee claims a right to be given notice, citing \$93-13-281 Mississippi Code 1972 [joinder of parties in suits involving wards]. By its own terms, the statute is limited to "all proceedings brought invoking a ward and brought under Chapter 13, Title 93, Mississippi Code 1972, * * *." (Brief for Cross-Appellee 20).

Trustee Ready's objection to Plaintiff / Appellant / Cross-Appellee standing to sue was founded upon, inter alia, Plaintiff's conflict of interest, which the Court determined. Trustee Ready did not contest the Court's appointment of a Guardian Ad Litem or establishment of a conservatorship for Emogene Baumgardner and cooperated in such Guardian's inquiry into the Trusts. In light of Plaintiff's conflict of interest, Trustee Ready did contest Plaintiff's standing to sue.

Fifth, Plaintiff claims a direct interest in the Trusts' land (note the abandonment of fiduciary relationship) (Brief for Cross-Appellee 20). Now Plaintiff / Appellant / Cross-Appellee claims ownership of standing timber on the Trust's lands. There is neither factual nor legal basis for this claim. After Mrs. Baumgardner's death, Trustee Ready executed deeds, drafted by Plaintiff / Cross-Appellee's own counsel, conveying specified

lands from the Trusts to Plaintiff and her brother. If the timber ever belonged to Plaintiff and her brother, Plaintiff should have appealed from the timber sale order. This did not occur. Plaintiff did not claim ownership of the timber and, by implication, the Chancellor found none, because all parties understood that the timber belonged to either the Marital Deduction Trust or to the Family Trust. Plaintiff / Appellant / Cross-Appellee only had an interest contingent upon the land remaining in Emogene Baumgardner's estate at her death, i.e. no present interest in the land or the timber.

Conclusion

Having again failed to meet the burden of proving subject matter jurisdiction and/or standing to sue, Plaintiff / Appellant / Cross-Appellee's claims should be dismissed as without jurisdiction and unsupported in fact or law.

Respectfully submitted,

WILLIAM E. READY, SR., Defendant
/ Appellee / Cross-Appellant

BY: _____

Attorney for Defendant /
Appellee / Cross-Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the undersigned has this day caused to be hand delivered or mailed, postage prepaid and firmly affixed thereto, a true and correct copy of the foregoing writing to the following:

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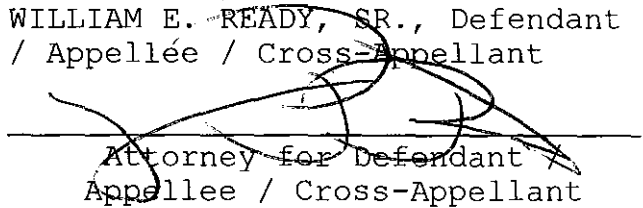
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SO CERTIFIED, this the 10th day of JUNE, 2011.

Respectfully submitted,
WILLIAM E. READY, SR., Defendant
/ Appellée / Cross-Appellant

BY: _____


Attorney for Defendant /
Appellee / Cross-Appellant