IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CIVIL ACTION NO. 2006-CA-00766

PATRICIA ANN JACKSON AUSTIN	**APPELLANT**
VERSUS	
JOHN THOMAS AUSTIN	**APPELLEE**

BRIEF OF APPELLEE

ORAL ARGUMENTS REQUESTED

ON APPEAL FROM THE CHANCERY COURT
OF WAYNE COUNTY, MISSISSIPPI

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PATRICIA ANN JACKSON AUSTIN **APPELLANT**

VERSUS

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, John Thomas Austin, 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 Court may evaluate possible disqualification or refusal.

1. John Thomas Austin, Appellee
2. Patricia Ann Jackson Austin
3. Andrew Thomas Austin, John Allen Austin and John Thomas Austin, natural born children to Patricia Ann Jackson Austin and John Thomas Austin
4. David M. Ratcliff, Attorney for Appellee
5. Thomas T. Buchanan, and Marcus D. Evans , Attorneys for Appellant
6. The Honorable Franklin McKenzie, Jr., Chancery Court Judge, Wayne County, Mississippi

This the 13th day of March, 2007.

DAVID M. RATCLIFF, Counsel for Appellee

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SUMMARY OF THE ARGUMENT

Before addressing each of the issues stated by Appellant in her Brief it is, I believe, important to note two unalterable facts utterly ignored by Appellant in her brief that resound deeply and widely and are extremely salient in rebutting all of her stated issues:

1. Appellee, Mr. Austin filed his Motion to Extend Time for Filing Notice of Appeal and to Reopen on July 17, 2003 (R. 31) which was timely according to Rule 4 Mississippi Rules of Appellant Procedure and Rule 60 Mississippi Rules of Civil Procedure and noticed same for hearing to the attorney for Appellant (R. 32). The Trial Court heard said Motion on September 23, 2006 with Appellant and her attorney present having the opportunity to present evidence in opposition and argue their position. The Court ruled in favor of Appellee reciting "newly discovered evidence concerning the income of John Thomas Austin showing a reduction in income of John Thomas Austin "which at the time of hearing was speculative and is now certain". The Court further stated that the Motion was being granted "for the sake of judicial economy pursuant to the inherent equity powers of the Court and Mississippi Rules of Civil Procedure 60(b)(3)(6)." (R. 44)

Further the Court stated in its Order which was agreed to as to Form by the Appellant that the parties agreed to a trial date of January 29, 2004 (R. 44-45). It is apparent that the Trial Court wisely chose to forego the time and cost of allowing the time, effort and expense by both parties for an appeal of its June 6, 2003 Order and also immediate litigation of virtually the same subject matter by a new Petition to Modify by Appellee based on the newly discovered evidence i.e., certain drastic reduction in the income of Appellee (R. 71-78) (T. 46-63). It is equally apparent that Appellant and her attorney saw the wisdom of this approach by agreeing to a trial date of January 29, 2004 and foregoing an effort at interlocutory appeal of the

Court's Order to Reopen. Of course this decision also foreclosed Appellee's appeal of the June 6, 2003 Opinion and Order of the Court.

2. Newly discovered evidence existed that was not available at the hearing resulting in the June 6, 2003 Opinion and Order regarding a substantial decrease in income for Appellee but was attached to the Motion to Reopen giving the exact certain amount of reduction of income(R. 31-40) (Ex. 15 & 17) . What was not known but was revealed to both parties six (6) days after the hearing on the Motion to Reopen was that on September 29, 2003 Appellee was terminated from his job and until October 16, 2003 had no job. Appellee obtained a new job on October 16, 2003 and provided his new income information to Appellant through discovery (R. 85-139) and presented same at the hearing on May 4, 2005 (T. 168-183) that resulted in the April 3, 2006 Opinion and Order (R.E. 75-82).

ARGUMENT

ISSUE I

The Trial Court erred in permitting Mr. Austin an opportunity to relitigate the issues resolved in the Final Decree entered on June 6, 2003.

It is tempting to not respond to the statement of an issue that did not occur; however, it would certainly not be wise. The Trial Court reopened the case for the introduction of newly discovered evidence which was not presented in the previous hearing because it was not available as was borne out in the testimony in both hearings. An Order to Re-Open was issued (R. 44-45) pursuant to a timely Motion (R. 31-40) filed pursuant to Rule 60 Mississippi Rules of Civil Procedure. Subsequent to the Court re-opening the matter new facts arose creating a further material change of circumstances for Appellee i.e., he was terminated from his job (T. 59-60)(T. 168-182); that being the case Appellee filed a new Petition Renewing Request for Modification (R. 68-70) so the Court could consider all of these facts in one hearing which it did resulting in the April 3, 2006 Opinion and Order (R. 236-243).

It is interesting to note that Appellant filed a Motion to Reconsider the Court's Order to Re-Open (R.46) and never made the argument to the Trial Court she is making now i.e., that the newly discovered evidence had already been considered or could have been presented at the earlier hearing. In her Motion to Reconsider she stated only that Appellee had not been terminated from his job but had in fact quit. (R.E. 52)

This Court has affirmed modification through Rule 60(b) motions on much less substantive grounds than appear here, *Dilling v Dilling* 734 So2d 327 (Miss. App. 1999). In *Dilling v Dilling* supra the Court affirmed the Rule 60 ruling of the Trial Court pointing out the statutory authority of the Trial Court to modify, §93-5-2(2) and §93-5-23 Mississippi Code of

1972 as Annotated and Amended. The Court held, "Regardless of whether Rule 60 was sufficient authority to support the chancellor's modification of the judgment of divorce which necessarily followed from his reformation of the Dilling's property settlement agreement, this Court holds that either Section 93-5-2(2) or Section 93-5-23 empowered the chancellor to modify the judgment of divorce by his entry of the supplemental judgment rendered December 9, 1996." In this case before the Court now much more justification was cited to the Chancellor for reopening and the Petition Renewing Request to Modify was filed after reopening on completely new or "fresh" grounds i.e. termination of Appellee's job.

ISSUE II

There is no credible evidence to support the Trial Court's findings of fact concerning the issues of alimony and child support, and thus the Trial Court's ruling is clearly erroneous and manifestly wrong.

There is really not much of substance to respond to in this section of Appellant's Brief except to simply refer to the facts recited by the Chancellor as findings in the June 6, 2003 Final Decree (R.E. 27) (R.E. 40-41). Again the unalterable fact is that Appellee had a dramatic loss of income as a result of losing his job, having no income, and subsequently securing another job at a vastly lower rate of pay (R. 96) (T. 168-183) (R. E. 76-79). Based on these facts the Court reduced child support and on these facts and the conduct of Appellant the Court changed the alimony (T 103-149) (R.E. 79-82) (Deposition of James Perry Snyder P. 17-21 & 31-32). If one looks at the original Divorce Decree (R.E. 8-28) it is obvious the way it was structured that it would only work if Appellee retained that particular job with Northern Pacific and continued his superior performance on behalf of Northern Pacific which inured to his benefit as well as Appellant's. Neither of those facts occurred and the Trial Court made a reasoned decision based

on the entirely new set of facts.

ISSUE III

The Trial Court applied the wrong legal standard in rendering its April 3, 2006 Order, and thus the decision is in contradiction to the provisions of Rule 60 of the Mississippi Rules of Civil Procedure.

Once again Appellant is wandering around in Rule 60 Mississippi Rules of Civil Procedure without considering all of the facts and/or pleadings. Appellee did obtain a re-opening of the case pursuant to Rule 60 reciting and documenting newly discovered evidence. Subsequent to the reopening new facts constituting a material change of circumstances warranting modification occurred (termination of Appellee) whereupon Appellee filed a Petition Renewing Request for Modification under these new facts. The Chancellor heard and considered not only the newly discovered evidence pursuant to Rule 60 but the new facts presented under the new Petition to Modify and rendered a complete overall new decision encompassing all of the facts.

According to this Court in *Askew v Askew* 699 So2d 515 "motions for relief under Rule 60(b) are generally addressed to the sound discretion of the Trial Court and appellate review is limited to whether the discretion has been abused." *Id. Clarke v Burkle* 570 F.2d 824 (8th Cir.1978). In this case Appellant has not even alleged that the Trial Court abused its discretion and certainly under the fact situation recited, his discretion was wisely applied.

ISSUE IV.

The relief provided in the April 3, 2006 Order is barred by res judicata.

Res Judicata does not apply to a Final Judgment reopened pursuant to Rule 60 Mississippi Rules of Civil Procedure or a Petition to Modify based on new facts occurring after the Final

Judgment was entered.

ISSUE V

No agreement occurred on May 25, 2004, and the Court erred in ruling that an agreement was present.

The Court stopped short of enforcing any agreement but simply referred to that amount as the amount agreed to by the parties on that date. (T.10, 46-47)

ISSUE VI.

The Court applied the wrong legal standard in the April 3, 2006 Order, as the Court admitted evidence concerning the alleged material change in circumstances that the Court considered in the June 6, 2003 Final Order.

All of Appellant's issues appear to actually be restatements of Appellants unwillingness to acknowledge the filing of a Petition Renewing Request for Modification after the case was reopened on newly discovered evidence and the Court considering the newly discovered evidence as well as the entire new facts (loss of job by Appellee) supporting the Petition Renewing Request for Modification.

CONCLUSION

In conclusion the facts of this case are fairly simple. Appellee filed a Rule 60 Motion to Reopen on newly discovered evidence timely and with supporting facts of certain drastic decrease in income. After a hearing the Chancellor reopened the case for the introduction of said evidence and reset the case for trial for that purpose (R. E. 55). Six days subsequent to reopening Appellee lost his job (T. 59). This fact was asserted in a new Petition Renewing Request for Modification (R.E.59) prior to trial. The evidence presented at trial amounted to a substantial material change of circumstance (T. 168-183)(Ex. 4 P. 37-38 and Exhibits to Ex. 4) and warranted the change in alimony and child support as stated in the Final Judgment of the Chancellor. At no time in this process did the Chancellor ever abuse his discretion which again has not been alleged by Appellant. The facts dictated the result in this case and it is the proper one.

Respectfully Submitted,

John Thomas Austin

By: _____

DAVID M. RATCLIFF
Attorney at Law

CERTIFICATE OF SERVICE

I, David M. Ratcliff, Attorney at Law, do hereby certify that I have this date, mailed by United States First Class Mail, a true and correct copy of the above and foregoing *Brief of Appellee* to:

Honorable Thomas T. Buchanan
Post Office Box 4326
Laurel, Mississippi 39441
Attorney for Patricia Ann Jackson Austin

Honorable Marcus D. Evans
Post Office Box 672
Laurel, MS 39441

Honorable Franklin C. McKenzie, Jr., Chancellor
Post Office Box 1961
Laurel, Mississippi 39441

This the 13th day of March, 2007.

DAVID M. RATCLIFF

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Post Office Box 706
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fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be filed not later than ten days after the entry of judgment.

(c) Time for Serving Affidavits. When a motion for new trial is based upon affidavits they shall be filed with the motion. The opposing party has ten days after service to file opposing affidavits, which period may be extended for up to twenty days either by the court for good cause shown or by the parties' written stipulation. The court may permit reply affidavits.

(d) On Initiative of Court. Not later than ten days after entry of judgment the court may on its own initiative order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend the judgment shall be filed not later than ten days after entry of the judgment.

[Amended effective July 1, 1997.]

Advisory Committee Historical Note

Effective July 1, 1997, Rule 59(b), (c) and (e) were amended to clarify that motions for a new trial and accompanying affidavits, and motions to alter or amend a judgment, must be filed not later that ten days after entry of judgment. 689 So. 2d XLIX (West Miss. Cases).

Comment

Rule 59 authorizes the trial judge to set aside a jury verdict as to any or all parts of the issues tried and to grant a new trial as justice requires. This practice is not new to Mississippi, but the procedures set forth in this rule are. The grounds for granting new trials remain the same as under prior state practice; generally stated, however, the court has the power and duty to set aside a verdict and order a new trial whenever, in its sound judgment, such action is required. See generally 11 Miss. Digest, New Trial, Key numbers 13–108 (1972).

The motion must be filed within ten days after the entry of judgment. This is a departure from prior Mississippi practice, National Cas. Co. v. Calhoun, 219 Miss. 9, 67 So.2d 908 (1953) (new trial may be ordered any time prior to expiration of court term), and is authorized by MRCP 6(c). The ten-day period cannot be enlarged. MRCP 6(b)(2).

When the motion for new trial is based upon affidavits, they shall be filed and served with the motion; the opposing party then has a maximum of thirty days in which to serve counter-affidavits. MRCP 59(c).

Rule 59(d) allows the court on its own initiative to order a new trial, even though there was no motion for a new trial, for any reason for which the court might have granted a new trial on the motion of a party. Sanders v. State, 239 Miss. 874, 125 So.2d 923 (1961); National Cas. Co. v. Calhoun, supra. If the court exercises this power, it must specify in its order the grounds for the new trial.

If the court is acting entirely on its own initiative in ordering a new trial, it must make the order not later than ten days after the entry of judgment and may not make such an order after that period has expired.

A motion to alter or amend must be filed within ten days after the entry of judgment; the court is not permitted to extend this time period.

[Comment amended effective July 1, 1997.]

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time on its own initiative or on the motion of any party and after such notice, if any, as the court orders up until the time the record is transmitted by the clerk of the trial court to the appellate court and the action remains pending therein. Thereafter, such mistakes may be so corrected only with leave of the appellate court.

(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;

(6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than six months after the judgment, order, or proceeding was entered or taken. A motion under this subdivision does not affect the finality of a judgment or suspend its operation. Leave to make the motion need not be obtained from the appellate court unless the record has been transmitted to the appellate court and the action remains pending therein. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a

bill of review, are abolished. The procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action and not otherwise.

Comment

Rule 60(a) prescribes an efficient method for correcting clerical errors appearing in judgments, orders, or other parts of a trial record; errors of a more substantial nature must be corrected in accordance with MRCP 59(e) or 60(b). Thus, the Rule 60(a) procedure can be utilized only to make the judgment or other document speak the truth; it cannot be used to make it say something other than was originally pronounced. See, e. g., West Virginia Oil & Gas Co. v. George E. Breece Lumber Co., 213 F.2d 702 (5th Cir. 1954). This procedure accords with prior Mississippi practice. See Miss.Code Ann. § 11–1–19 (1972); Ralph v. Prester, 28 Miss. 744 (1855) (this statute applies solely to the correction of judgments and decrees and cannot be extended so as to supply a judgment never rendered); Rawson v. Blanton, 204 Miss. 851, 35 So.2d 65 (1948) (judgment which is erroneous as to plaintiff's name involves merely a clerical error which may be corrected in the supreme court without reversal); Healy v. Just, 53 Miss. 547 (1876) (there is no time limit within which a correction to a judgment may be made); Wilson v. Town of Handsboro, 99 Miss. 252, 54 So. 845 (1911) (all courts have inherent power to correct clerical errors at any time and to make the judgment entered correspond to that rendered).

Under Rule 60(a), evidence dehors the record may be considered in making the correction; this also accords with prior Mississippi practice. See Wilson v. Town of Handsboro, supra (In making a determination as to whether the correction should be permitted, any evidence of parol or other kind is competent which throws material light on the truth of the matter. "The object of every litigation is to obtain . . . a final determination of the rights of the parties. That determination is invariably what the judges direct, and not invariably what the clerks record. The power of the court to make the record express the judgment of the court with the utmost accuracy ought not to be restricted."). See also 6A Moore's Federal Practice ¶¶ 60.01–.08 (1971); 11 Wright & Miller, Federal Practice and Procedure, Civil §§ 2851–2856 (1973).

Rule 60(b) specifies certain limited grounds upon which final judgments may be attacked, even after the normal procedures of motion for new trial and appeal are no longer available. The rule simplifies and amalgamates the procedural devices available in prior practice. Prior to MRCP 60(b), Mississippi recognized the following procedural devices for relief from judgments, other than by appeal:

Statute for Correction of Misrecitals, Miss.Code Ann. § 11–1–19 (1972). This statute, referred to in the preceding discussion of MRCP 60(a), supra, applied solely to corrections of judgments and decrees and could not be extended to supply a decree or judgment never rendered. See Ralph v. Prester, supra; Rawson v. Blanton, supra; V. Griffith, Mississippi Chancery Practice, § 634 (2d ed. 1950).

Writ of Error Coram Nobis. Generally, this device was for review of errors of fact, not of law, which substantially affected the validity of the judgment but which were not discovered until after rendition of the judgment. See Petition of Broom, 251 Miss. 25, 168 So.2d 44 (1964). It was instituted as an independent action.

Bill of Review for Error Apparent. This device was an original bill, and was filed and docketed as such. It cured a material error of law apparent on the face of the decree and the pleadings and proceedings on which it is based, exclusive of the evidence. However, Miss.Code Ann. § 11–5–121 (1972) placed a two-year limitation upon the period of time after the judgment was entered for filing the bill. See Brown v. Wesson, 114 Miss. 216, 74 So. 831 (1917); V. Griffith, supra § 635.

Bill of Review Based on Newly Discovered Evidence. Leave of court was required for the filing of a bill of review based on newly discovered evidence, but after leave was obtained the bill was considered as part of the action it sought to challenge. See V. Griffith, supra §§ 636–641. The two-year limitations of Miss.Code Ann. § 11–5–121 (1972) applied.

Bill in the Nature of a Bill of Review. This bill was available as an original action for vacating judgments tainted by fraud, surprise, accident, or mistake as to facts, not to law. See Corinth State Bank v. Nixon, 144 Miss. 674, 110 So. 430 (1926); City of Starkville v. Thompson, 243 So.2d 54 (Miss.1971); V. Griffith, supra § 642. This device did not require leave of court for filing, nor was it limited to two years' availability. Cf. Bill of Review for Error Apparent and Bill of Review Based on Newly Discovered Evidence, supra.

Motions for relief under MRCP 60(b) are filed in the original action, rather than as independent actions themselves. Further, motions seeking relief from judgments tainted by fraud, misrepresentation, or other misconduct of an adverse party, MRCP 60(b)(1), accident or mistake, 60(b)(2), or newly discovered evidence, 60(b)(3), must be made within six months after the judgment or order was entered. Aside from these two features, Rule 60(b) does not depart significantly from traditional Mississippi practice with respect to relief from judgments, but it dispenses with the arcane writs and technical requirements of prior practice. Importantly, a Rule 60(b) motion does not operate as a stay or supersedeas; further, in the courts governed by these rules, Rule 60 supersedes the devices discussed above for relief from judgments and orders.

RULE 61. HARMLESS ERROR

No error in either the admission or the exclusion of evidence and no error in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Comment

MRCP 61 is identical to Federal Rules 61 and accords with prior Mississippi practice. See, e. g., Nelms & Blum Co. v. Fink, 159 Miss. 372, 131 So. 817 (1930) (supreme court will not reverse on basis of argument of counsel unless it is palpably evident that there has been prejudice injected or misstatement of material facts); Yazoo & M. V. R. Co. v. Williams, 87 Miss. 344, 39 So. 489 (1905) (errors in instructions will not be cause for reversal where interests of com-

appeal, together with the docket fee as provided in Rule 3(e), and, with cost to the appellant, a certified copy of the trial court docket as of the date of the filing of the notice of appeal, a certified copy of the opinion, if any, and a certified copy of the judgment from which the appeal is being taken and a certified copy of the Civil Case Filing Form in civil cases or the Notice of Criminal Disposition Form in criminal cases. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed.

Failure of the clerk to serve notice shall not affect the perfection of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies with the date of mailing.

(e) Payment of Fees. Upon the filing of any separate or joint notice of appeal from the trial court, the appellant shall pay to the clerk of the trial court the docket fee to be received by the clerk of the trial court on behalf of the Supreme Court.

[Adopted to govern matters filed on or after January 1, 1995; amended June 21, 1996.]

Advisory Committee Historical Note

Effective June 21, 1996, Rule 3(d) was amended to require the clerk of the trial court to transmit the Civil Case Filing Form or the Notice of Criminal Disposition Form to the clerk of the Supreme Court. 673–678 So.2d XXXVII (West Miss.Cases 1996).

Effective January 1, 1995, Miss.R.App.P. 3 replaced Miss. Sup.Ct.R. 3, embracing proceedings in the Court of Appeals. Rule 3(d) was further amended to require the clerk of the trial court to transmit additional documents to the clerk of the Supreme Court. 644–647 So.2d XXVI–XXVII (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 3 was amended to note that the fee to be paid under Rule 3(e) is provided by statute. 632–635 So.2d V (West Miss.Cases 1994).

Effective October 29, 1992, Rule 3(c) and Form 1 were amended to state that the notice of appeal shall specify the party or parties against whom the appeal is taken. Rule 3(d) was amended to effect technical changes. 603–605 So.2d XXVII–XXVIII (West Miss.Cases 1992).

Comment

Rule 3 and Rule 4 combine to set forth the procedures and time frame for perfecting an appeal. The same procedures are to be used for appeals in civil and criminal cases. Rules 10 and 11 state how the content of the record on appeal is determined and how the record is completed and transmitted to the Court.

Subdivision 3(a) departs from prior practice and provides that the only absolutely necessary step in the process is the timely filing of the notice of appeal. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. If the notice of appeal is not filed within the time specified in Rule 4, either the Supreme Court or the Court of Appeals, on its own motion or on motion of a party, will dismiss it. Failure to take any step, other than the timely filing of a notice of appeal, is ground for such action as either appellate court deems appropriate, which may include dismissal of the appeal. Steps which must be taken within seven days after filing the notice of appeal include the designation of the record under Rule 10(b)(1) and deposit of cost estimate under Rule 11(b)(1).

The appellant is required by M.R.C.P. 5(a) to serve on all parties a copy of the notice of appeal as submitted to the trial court clerk. Rule 3(d) requires the clerk to transmit to all parties and to the Supreme Court clerk copies of the notice of appeal indicating the date on which the notice of appeal was filed. Ordinarily, the appellant should supply the trial court clerk with a sufficient number of copies of the notice of appeal to accomplish this. The clerk may alternatively prepare the copies at the appellant's expense. The failure of the appellant or the trial court clerk to serve copies of the notice does not affect the perfection of the appeal.

The fee to be paid under Rule 3(e) is set by statute. See Miss.Code Ann. § 25–7–3 (1994).

RULE 4. APPEAL AS OF RIGHT—WHEN TAKEN

(a) Appeal and Cross-Appeals in Civil and Criminal Cases. Except as provided in Rules 4(d) and 4(e), in a civil or criminal case in which an appeal or cross-appeal is permitted by law as of right from a trial court to the Supreme Court, the notice of appeal required by Rule 3 shall be filed with the clerk of the trial court within 30 days after the date of entry of the judgment or order appealed from. If a notice of appeal is mistakenly filed in the Supreme Court, the clerk of the Supreme Court shall note on it the date on which it was received and transmit it to the clerk of the trial court and it shall be deemed filed in the trial court on the date so noted.

(b) Notice Before Entry of Judgment. A notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day of the entry.

(c) Notice by Another Party. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this rule, whichever period last expires.

(d) Post-trial Motions in Civil Cases. If any party files a timely motion of a type specified immediately below the time for appeal for all parties runs from the entry of the order disposing of the last such motion outstanding. This provision applies to a timely motion under the Mississippi Rules of Civil Procedure: (1) for judgment under Rule 50(b); (2) under Rule 52(b) to amend or make additional findings of fact, whether or not granting the motion would alter the judgment: (3) under Rule 59 to alter or amend the

judgment: (4) under Rule 59 for a new trial: or (5) for relief under Rule 60 if the motion is filed no later than 10 days after the entry of judgment. A notice of appeal filed after announcement or entry of the judgment but before disposition of any of the above motions is ineffective to appeal from the judgment or order, or part thereof, specified in the notice of appeal, until the entry of the order disposing of the last such motion outstanding. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(e) Post-trial Motions in Criminal Cases. If a defendant makes a timely motion under the Uniform Criminal Rules of Circuit Court Practice: (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 5.16, the time for appeal for all parties shall run from the entry of the order denying such motion. Notwithstanding anything in this rule to the contrary, in criminal cases the 30 day period shall run from the date of the denial of any motion contemplated by this subparagraph, or from the date of imposition of sentence, whichever occurs later. A notice of appeal filed after the court announces a decision sentence, or order but before it disposes of any of the above motions, is ineffective until the date of the entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgment of conviction, whichever is later. Notwithstanding the provisions of Appellate Rule 3(c), a valid notice of appeal is effective to appeal from an order disposing of any of the above motions.

(f) Parties Under Disability. In the case of parties under a disability of infancy or unsoundness of mind, the various periods of time for which provision is made in this rule and within which periods of time action must be taken shall not begin to run until the date on which the disability of any such party shall have been removed. However, in cases where the appellant infant or person of unsound mind was a plaintiff or complainant, and in cases where such a person was a party defendant and there had been appointed for him or her a guardian ad litem, appeals to the Supreme Court shall be taken in the manner prescribed in this rule within two years of the entry of the judgment or order which would cause to commence the running of the 30 day time period for all other appellants as provided in this rule.

(g) Extensions. The trial court may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time otherwise prescribed by this rule. Any such motion which is filed before expiration of the prescribed time may be granted for good cause and may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to other parties, and the motion shall be granted only upon a showing of excusable neglect. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(h) Reopening Time for Appeal. The trial court, if it finds (a) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry and (b) that no party would be prejudiced, may, upon motion filed within 180 days of entry of the judgment or order or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(i) Taxpayer Appeals. If the board of supervisors of any county, or the mayor and board of aldermen of any city, town or village, or any other board, commission or other officer of any county, or municipality, or district, sued in an official capacity, fails to file a notice of appeal under Rule 4(a) within 20 days after the date of entry of an adverse judgment or order, or within 7 days after filing of a notice by another party pursuant to Rule 4(c), any taxpayer of the county, municipality or district shall have the right at the taxpayer's own expense to employ private counsel to prosecute the appeal in compliance with these rules. If the governmental entity files a notice of appeal, the appeal shall not be dismissed if any such taxpayer objects and prosecutes the appeal at the taxpayer's own expense.

[Adopted to govern matters filed on or after January 1, 1995; amended effective July 1, 1997; July 1, 1998.]

Advisory Committee Historical Note

Effective April 29, 1998, Rules 4(d) and (e) were amended to provide that a notice of appeal filed before disposition of specified post trial motions becomes effective on disposition thereof and is effective to appeal said disposition. In addition, the list of specified motions was enlarged to include M.R.C.P. 60 motions filed within 10 days. 706–708 So.2d XLIV (West Miss.Cases 1998).

Effective July 1, 1997, a new Rule 4(h) was added to provide for reopening of time for appeal in the event that a notice of entry of judgment is not received. The former Rule 4(h) was redesignated 4(i). 689–692 So.2d LXII (West Miss.Cases 1997).

Effective January 1, 1995, Miss.R.App.P. 4 replaced Miss. Sup.Ct.R. 4, embracing proceedings in the Court of Appeals. 644–647 So.2d XXVII–XXX (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to delete references to repealed statutes and material concerning the transition from statutory procedures to Rule practice. 632–635 So.2d V (West Miss.Cases 1994).

Effective July 1, 1994, the Comment to Miss.Sup.Ct.R. 4 was amended to provide that the date of the entry of the judgment is the date the judgment is entered in the general docket of the clerk of court, and to delete an outdated case citation. 632–635 So.2d XLIV–XLV (West Miss.Cases 1994).

Comment

Rule 4 applies to appeals and cross appeals in all civil and criminal cases. The date of entry of judgment is the date the judgment is entered in the general docket of the clerk of court. MISS.R.CIV.P. 58.

The notice of appeal requirement applies to all forms of appeal including cross appeals. Rule 4(c) requires that a notice of appeal for a cross appeal be filed within 14 days after the date on which the first notice of appeal was filed, unless a longer period is prescribed by another provision of Rule 4.

Previously, Rule 4(d) specified certain post trial motions that had to await disposition before a valid notice of appeal could be filed. Any notice of appeal filed before such disposition had no force or effect. Rule 4(e) had the same provisions for specified post trial motions in criminal cases. Those provisions of Rules 4(d) and 4(e), however, created a trap for an unsuspecting litigant who filed a notice of appeal before a post trial motion, or while a post trial motion was pending. Because the Rules required a party to file a new notice of appeal after the motion's disposition, unless a new notice was filed the Supreme Court lacked jurisdiction to hear the appeal. See In re Kimbrough, 680 So.2d 799 (Miss.1996). Many litigants, especially pro se litigants, failed to file the second notice of appeal, and the Court expressed dissatisfaction with the rule. See id. (Banks, J., dissenting) and (McRae, J., dissenting).

Rules 4(d) and 4(e) now provide that a notice of appeal filed before the disposition of a specified post trial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before its disposition is, in effect, suspended until the motion's disposition, whereupon the previously filed notice effectively places jurisdiction in the Supreme Court. Still ordinarily the filing of a notice of appeal should come after the disposition of these motions. An appeal should not be noticed and docketed in the Supreme Court while it is still possible that the appealing party may obtain relief in the trial court.

Because a notice of appeal will ripen into an effective appeal upon disposition of a post trial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a post trial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, an additional notice of appeal is unnecessary.

While Rule 4 is patterned after its Federal counterpart, Rule 4(d) departs from Federal practice by providing that a valid notice of appeal is effective to appeal from an order disposing of a post trial tolling motion. Under FED.R.APP.P. 4(a)(4), if a party wishes to appeal from the disposition of a post trial tolling motion, the party must amend the notice to so indicate. However, requiring amendment of the notice of appeal would create a new, albeit less severe, trap for unsuspecting litigants, without serving a substantial purpose.

Rule 4(d) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is filed within 10 days after entry of judgment. This eliminates the difficulty of determining whether a post trial motion made within 10 days after entry of a judgment is a Rule 59 motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. See Michael v. Michael, 650 So.2d 469 (Miss.1995).

Rule 4(f) continues to recognize an extension for parties under a legal disability. See Parks v. Knight. 491 So.2d 217 (Miss.1986).

Rule 4(g) is based on Fed.R.App.P. 4(a)(5). Rule 4(g) has been drafted to cure ambiguities in the federal rule. A motion filed before expiration of the 30 day period may be ex parte and may be granted for any "good cause." This standard is identical to that found in Rule 26. The extension may not go beyond 30 days after the time prescribed in Rule 4(a).

If the motion is not filed until the extension period has begun to run, the burden rests on the appellant to show the failure to file a timely notice was a result of "excusable neglect." Mere failure to learn of entry of the judgment is generally not a ground for showing excusable neglect. Counsel in a case taken under advisement has a duty to check the docket regularly. But see City of Gulfport v. Saxon, 437 So.2d 1215, 1217 (1983) (when trial court sits as an appellate court, parties may reasonably expect notification from the court or clerk when a ruling is made). Filing a notice is a simple act, and a party must do all it could reasonably be expected to do to perfect the appeal in a timely fashion. Counsel's failure to read published rules of court and counsel's reliance on mistaken legal advice from a trial court clerk will not show excusable neglect. Campbell v. Bowlin, 724 F.2d 484, 488 (5th Cir.1984); Reed v. Kroger Co., 478 F.2d 1268 (T.E.C.A.1973). Excusable neglect will not be shown by counsel's busy trial schedule. Pinero Schroeder v. Fed. Nat'l Mtg. Ass'n, 574 F.2d 1117 (1st Cir.1978).

On the other hand, a party misled by actions of the court can establish excusable neglect. See Chipser v. Kohlmeyer & Co., 600 F.2d 1061, 1063 (5th Cir.1979); In re Morrow, 502 F.2d 520, 522 (5th Cir.1974) (dictum). Excusable neglect may be shown where a timely mailed notice was late because of unanticipated and uncontrollable delays in the mail. Fallen v. United States, 378 U.S. 139, 84 S.Ct. 1689, 12 L.Ed.2d 760 (1964). See generally, 9 W. Moore, Federal Practice ¶ 204.13[1–3].

An excusable neglect motion must be filed within the 30 day extension period. The extension will be limited to that period or to a period ending 10 days after the entry of an order granting the motion, whichever occurs later.

In criminal cases, the Court may suspend this Rule 4 to permit out of time appeals. Post-conviction relief proceedings are governed by the rules controlling criminal appeals. See Miss.Code Ann. § 99–39–25(1) (1994); Williams v. State, 456 So.2d 1042, 1043 (Miss.1984). No such suspension, however, is permitted in a civil case. See Rules 2(c); 26(b).

Rule 4(h) is patterned after Fed.R.App.P. 4(a)(6), which was added to the Federal Rules in 1991. Rule 4(h) provides a limited opportunity for relief, independent of and in addition to that available under Rule 4(g), in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the trial court pursuant to Rule 77(d) of the Mississippi Rules of Civil Procedure, is either

not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. Rule 4(h) allows a trial court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. While the party seeking relief under Rule 4(h) bears the burden of persuading the trial court of lack of timely notice, a specific factual denial of receipt of notice rebuts and terminates the presumption that mailed notice was received. See Nunley v. City of Los Angeles, 52 F.3d 792, 798 (9th Cir.1995). "Prejudice" means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

While the trial court retains some discretion to refuse to reopen the time for appeal even when the requirements of Rule (4)(h) are met, the concept of excusable neglect embodied in Rule 4(g) simply has no place in the application of Rule 4(h). See Avolio v. Suffolk, 29 F.3d 50, 53 (2d Cir. 1994). "To hold otherwise would negate the addition of Rule 4[h], which provides an avenue of relief separate and apart from Rule 4[g]." Nunley v. City of Los Angeles, 52 F.3d 792, 797 (9th Cir.1995). Thus, "where non-receipt has been proven and no other party would be prejudiced, the denial of relief cannot rest on [a lack of excusable neglect, such as] a party's failure to learn independently of the entry of judgment during the thirty-day period for filing notices of appeal." Id. at 798.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment or order to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment or order, as authorized by Miss.R.Civ.P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the trial court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

The taxpayer who prosecutes an appeal under Rule 4(i) must comply with these rules and file a timely notice of appeal under 4(a), or 4(c), if applicable.

[Comment amended effective July 1, 1997; July 1, 1998.]

RULE 5. INTERLOCUTORY APPEAL BY PERMISSION

(a) **Petition for Permission to Appeal.** An appeal from an interlocutory order may be sought if a substantial basis exists for a difference of opinion on a question of law as to which appellate resolution may:

(1) Materially advance the termination of the litigation and avoid exceptional expense to the parties; or

(2) Protect a party from substantial and irreparable injury; or

(3) Resolve an issue of general importance in the administration of justice.

Appeal from such an order may be sought by filing a petition for permission to appeal with the clerk of the Supreme Court within 21 days after the entry of such order in the trial court with proof of service on the trial judge and all other parties to the action in the trial court.

(b) Content of Petition; Answer. The petition shall contain: a statement of the facts necessary to an understanding of the question of law determined by the order of the trial court; a statement of the question itself; a statement of the current status of the case; and a statement as to why the petition for interlocutory appeal is timely. The petition shall further identify all other cases or petitions for interlocutory appeal pending before the appellate court and known to the petitioner which are related to the matter for which interlocutory review is sought. The petition shall include or have annexed a copy of the order from which appeal is sought and of any related findings of fact, conclusions of law or opinion. Within 14 days after service of the petition, the trial judge may file a statement informing the appellate court of any reasons why that judge believes that the petition should or should not be granted, and any adverse party may file an answer in opposition with the clerk of the Supreme Court, with proof of service on the trial judge and all other parties to the action in the trial court. The petition with any statement by the trial judge and answers of all parties responding shall be submitted without oral argument unless otherwise ordered.

(c) Form of Papers; Number of Copies. Four (4) copies of the petition and answer, if any, shall be filed with the original, but the Court may require that additional copies be furnished. The provisions of Rule 27 concerning motions shall govern the filing and consideration of the petition and answer, except that no petition or answer, including its supporting brief, shall exceed 15 pages in length.

(d) Grant of Permission; Prepayment of Costs; Filing of Record. If permission to appeal is granted by the Supreme Court, the appellant shall pay the docket fee as required by Rule 3(e) within 14 days after entry of the order granting permission to appeal, and the record on appeal shall be transmitted and filed and the appeal docketed in accordance with Rules 10, 11, and 13. The time fixed by those rules for transmitting the record and docketing the appeal shall run from the date of entry of the order granting permission to appeal. A notice of appeal need not be filed.

Child Custody and Visitation Law and Practice (Matthew Bender).

§ 93-5-2. Divorce on grounds of irreconcilable differences.

(1) Divorce from the bonds of matrimony may be granted on the ground of irreconcilable differences, but only upon the joint complaint of the husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process.

(2) If the parties provide by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties and the court finds that such provisions are adequate and sufficient, the agreement may be incorporated in the judgment, and such judgment may be modified as other judgments for divorce.

(3) If the parties are unable to agree upon adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between them, they may consent to a divorce on the ground of irreconcilable differences and permit the court to decide the issues upon which they cannot agree. Such consent must be in writing, signed by both parties personally, must state that the parties voluntarily consent to permit the court to decide such issues, which shall be specifically set forth in such consent, and that the parties understand that the decision of the court shall be a binding and lawful judgment. Such consent may not be withdrawn by a party without leave of the court after the court has commenced any proceeding, including the hearing of any motion or other matter pertaining thereto. The failure or refusal of either party to agree as to adequate and sufficient provisions for the custody and maintenance of any children of that marriage or any property rights between the parties, or any portion of such issues, or the failure or refusal of any party to consent to permit the court to decide such issues, shall not be used as evidence, or in any manner, against such party. No divorce shall be granted pursuant to this subsection until all matters involving custody and maintenance of any child of that marriage and property rights between the parties raised by the pleadings have been either adjudicated by the court or agreed upon by the parties and found to be adequate and sufficient by the court and included in the judgment of divorce. Appeals from any orders and judgments rendered pursuant to this subsection may be had as in other cases in chancery court only insofar as such orders and judgments relate to issues that the parties consented to have decided by the court.

(4) Complaints for divorce on the ground of irreconcilable differences must have been on file for sixty (60) days before being heard. Except as otherwise provided in subsection (3) of this section, a joint complaint of husband and wife or a complaint where the defendant has been personally served with process or where the defendant has entered an appearance by written waiver of process, for divorce solely on the ground of irreconcilable differences, shall be taken as proved and a final judgment entered thereon, as in other cases and without proof or testimony in termtime or vacation, the provisions of Section 93-5-17 to the contrary notwithstanding.

(5) Except as other
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SOURCES: Laws, 1976, c
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Cross References — C
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1. Generally.
2. Applicability.
3. Personal appearance r
4. Pleadings.
4.5. Contest or denial.
5. Child custody, support
6. Modifiability.

1. Generally.

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(5) Except as otherwise provided in subsection (3) of this section, no divorce shall be granted on the ground of irreconcilable differences where there has been a contest or denial; provided, however, that a divorce may be granted on the grounds of irreconcilable differences where there has been a contest or denial, if the contest or denial has been withdrawn or cancelled by the party filing same by leave and order of the court.

(6) Irreconcilable differences may be asserted as a sole ground for divorce or as an alternate ground for divorce with any other cause for divorce set out in Section 93-5-1.

SOURCES: Laws, 1976, ch. 451, § 1; Laws, 1978, ch. 367, § 1; Laws, 1990, ch. 584, § 1, eff from and after passage (approved April 9, 1990).

Cross References — Causes for divorce generally, see § 93-5-1.
Provision of divorce decree respecting custody of children and alimony, see § 93-5-23.
Annulment of marriage, see §§ 93-7-1 et seq.

JUDICIAL DECISIONS

1. Generally.
2. Applicability.
3. Personal appearance requirement.
4. Pleadings.
4.5. Contest or denial.
5. Child custody, support.
6. Modifiability.

1. Generally.

Under an irreconcilable differences divorce, pursuant to Miss. Code Ann. § 93-5-2(3), a written consent must state that the parties voluntarily consent to permit the court to decide the issues upon which they cannot agree, and the consent defines the issues that are to be contested and resolved by the chancellor. A chancellor erred when he failed to abide by what the parties had stipulated in the consent to divorce, namely, that all businesses of the parties were to be classified as marital property. Johnson v. Johnson, — So. 2d —, 2003 Miss. App. LEXIS 1203 (Miss. Ct. App. Dec. 16, 2003).

Because there was no enforceable agreement between the divorcing parties, the chancellor was required to address issues of property distribution and support consistent with the principles of equitable distribution; however, the record was completely devoid of any analysis of the appropriateness of the distribution of property or the award of alimony, and the chancellor merely took what was an agreement for purposes of an irreconcilable differences divorce and made it the order of the court, with the result that, by failing to apply the 12 factors to be considered in awarding alimony, there was not an appropriate and equitable distribution of property or a fair and just amount of alimony awarded. Ash v. Ash, — So. 2d —, 2003 Miss. App. LEXIS 1040 (Miss. Ct. App. Nov. 4, 2003).

A separation agreement signed by both parties was valid and binding as of the date of its execution and was not voided by the untimely death of the husband or by any supposed reconciliation of the parties and, consequently, the wife was precluded by the separation agreement from inheriting the estate of the husband. Barton v. Barton, 790 So. 2d 169 (Miss. 2001).

The chancellor did not exceed his statutory authority when he entered a final judgment of divorce on the sixtieth day subsequent to the filing of the joint complaint, rather than waiting until the next day, as the last day of the 60 day period prescribed by subsection (4) of this section is properly included in computing that period. Robbins v. Robbins, 744 So. 2d 394 (Miss. Ct. App. 1999).

Giving a strict interpretation to subsection (2) of this section, the statute provides that the parties provide a written agreement and that the court finds that such provisions are adequate and sufficient; thus, where there was no written

consent agreement, the chancellor exceeded his statutory authority by granting a divorce based on irreconcilable differences. Cassibry v. Cassibry, 742 So. 2d 1121 (Miss. 1999).

The chancellor was manifestly in error when he granted an irreconcilable differences divorce to the parties since there was no written agreement between the parties that resolved all matters touching on child custody and support and the settlement of all property rights; attorneys' notes signed by the parties at the end of a day's negotiations were incomplete and were nothing more than uninformative and practically unintelligible scribblings and were devoid of any information about child custody, visitation, or the various matters touching on the support and maintenance of the children of the parties. Joiner v. Joiner, 739 So. 2d 1043 (Miss. Ct. App. 1999).

Although the parties had not entered into a property settlement agreement nor had the court adjudicated those issues on the date that the court declared the parties divorced, such error was harmless where the agreed judgment of divorce provided for temporary custody and support and the parties thereafter entered into a child custody, support and property settlement agreement which the chancellor found to be adequate and sufficient and which was approved by the chancellor in the final judgment. Rounsaville v. Rounsaville, 732 So. 2d 909 (Miss. 1999).

An oral agreement of the parties is not sufficient to satisfy the requirements of the statute; the consent agreement must be written and signed by both parties. Cook v. Cook, 725 So. 2d 205 (Miss. 1998).

The problem with § 93-5-2 is that it requires all financial matters incident to the divorce to be resolved by voluntary agreement. Section 93-5-2 blithely proceeds on the premise that parties having irreconcilable differences regarding their marriage will somehow be able to reconcile their differences on financial matters. What is needed is a simple amendment to § 93-5-1 providing for a thirteenth ground for divorce: irreconcilable differences. That ground for divorce should be subject to proof as any other. The defendant's denial should have no more effect than his or her denial in the case of any of the other 12 grounds for divorce. That one spouse out of blindness, obstinance or nostalgia refuses to recognize it hardly means that a marriage may not in fact be irretrievably broken. Most important, the defending spouse's refusal to agree on financial matters would be no bar to the granting of a divorce because of irreconcilable differences. Wilson v. Wilson, 547 So. 2d 803 (Miss. 1989).

A prior property settlement agreement entered into by the parties is not enforceable if it is not approved by the court for purposes of § 93-5-2, which requires that parties seeking a divorce on the grounds of irreconcilable differences enter into a property settlement agreement that is to be incorporated into the final decree. Traub v. Johnson, 536 So. 2d 25 (Miss. 1988).

A divorce accompanied by property settlement did not revoke, by implication, a previously executed will where the parties continued to live together, the divorce decree or property settlement contained no proof of intent to revoke the prior testamentary instrument, and there was no showing that the property settlement was anything more than a formality to comply with the requirements of a divorce for irreconcilable differences. Rasco v. Estate of Rasco, 501 So. 2d 421 (Miss. 1987).

Agreement between divorcing husband and wife, which was incorporated into their divorce decree pursuant to Mississippi Code § 93-5-2, which obligated husband to pay $5,000 per month to wife, and further provided that payments to the wife would not terminate upon husband's death or wife's remarriage, and that wife could never ask that payments to her be increased, was, notwithstanding the use of the term "alimony" therein, in fact a property settlement or lump sum alimony, payable in fixed, unalterable installments, which could not be modified on ground of husband's subsequent deteriorated financial condition. East v. East, 493 So. 2d 927 (Miss. 1986).

Although no fault divorce may not be granted without parties having made provisions by written agreement for custody and maintenance of children and for settlement of property rights between parties, effective date of separa
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is granted. Crosby v. Peoples
So. 2d 951 (Miss. 1985).

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(Miss. 1984).

2. Applicability.

Amended § 93-5-2, which
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3. Personal appearance

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ties, effective date of separation agreement is not delayed until no fault divorce is granted. Crosby v. Peoples Bank, 472 So. 2d 951 (Miss. 1985).

When parties who obtain divorce on grounds of irreconcilable differences have submitted property settlement agreement which has been incorporated by court into final decree; contradictory, private contract entered by parties is void as against public policy. Sullivan v. Pouncey, 469 So. 2d 1233 (Miss. 1985).

When § 93-5-2 has been complied with, a custody, support, alimony and property settlement agreement becomes a part of the final decree for all legal intents and purposes, and this is so, whether the agreement is copied verbatim into the text of the decree, whether it is attached as an exhibit and incorporated by reference, or whether it is simply on file with the clerk of the court; if the agreement is sufficient to comply with the statute, that is enough to render it a part of the final decree of divorce. Switzer v. Switzer, 460 So. 2d 843 (Miss. 1984).

2. Applicability.

Amended § 93-5-2, which became effective April 9, 1990, applied to a divorce action in which all pleadings were filed prior to the effective date of the amendment and trial took place after the effective date since the amended statute affected only the mode of procedure and no substantive right of any of the parties, and the proceedings which were in process under the statute had not reached the stage of final judgment at the time the modification by amendment became effective. Massingill v. Massingill, 594 So. 2d 1173 (Miss. 1992).

3. Personal appearance requirement.

In an uncontested divorce action based on irreconcilable differences, it was within the chancellor's discretion to determine whether a personal appearance of a party or of an attorney was required since no proof is required under § 93-5-2, which governs a divorce sought on the grounds of irreconcilable differences, and neither § 93-5-7 nor 93-5-17, which govern the conduct of divorce proceedings, indicates a requirement that the person seeking the divorce must personally appear before the chancellor. The chancellor abused his discretion in refusing to grant the divorce without a personal appearance where the parties were proceeding pro se, the wife was a resident of California, and the husband was incarcerated in a correctional facility. Bullard v. Morris, 547 So. 2d 789 (Miss. 1989).

4. Pleadings.

The mere fact that irreconcilable differences was asserted in the pleadings filed by both parties as an alternate ground for divorce did not, in and of itself, meet all the requirements of § 93-5-2(3), which mandates a written consent to a divorce on the ground of irreconcilable differences signed by both parties, and was not alone sufficient to justify a divorce on the ground of irreconcilable differences; although both parties requested a divorce on the ground of irreconcilable differences, both parties also denied that the other party was entitled to a divorce on that ground, and, therefore, the facts negated any conclusion that there was mutual consent to a divorce on the ground of irreconcilable differences. Massingill v. Massingill, 594 So. 2d 1173 (Miss. 1992).

The chancery court acted beyond its statutory authority in awarding divorce on ground of irreconcilable differences where there was no written agreement of the parties regarding property rights, and husband had filed cross-complaint against wife whose complaint sought a divorce on grounds of adultery, habitual cruel and inhuman treatment, and, in the alternative, irreconcilable differences. Alexander v. Alexander, 493 So. 2d 978 (Miss. 1986).

Filing of second complaint by husband, grounded on wife's adultery, which was inconsistent with first complaint based upon irreconcilable differences, constituted an effective withdrawal from and objection to the first complaint and, since wife had adequate notice, chancellor could grant divorce and custody of minor child to husband on second complaint, notwithstanding the parties' earlier execution of child custody, child support, and property settlement agreements. McCleave v. McCleave, 491 So. 2d 522 (Miss. 1986).

4.5. Contest or denial.

Granting a divorce based on irreconcilable differences on the day set for the trial

to hear a fault-based divorce fully contested by one of the parties and where irreconcilable differences had not been pled as an alternative was manifest error because the statutory requirements for irreconcilable differences divorce were not met. Perkins v. Perkins, 787 So. 2d 1256 (Miss. 2001).

An irreconcilable differences divorce requires that neither spouse contest its granting; this does not mean that both spouses must fervently desire a divorce; unless a spouse exercises the right to contest it, a decree of divorce may be entered. Sanford v. Sanford, 749 So. 2d 353 (Miss. Ct. App. 1999).

The wife was entitled to relief from a judgment of divorce where she was unrepresented, she indicated several times her misunderstanding of her husband's right to a divorce merely by wanting one, she expressed frequently her opposition to the divorce, and, not least of all, she promptly sought to undo the agreement. Sanford v. Sanford, 749 So. 2d 353 (Miss. Ct. App. 1999).

5. Child custody, support.

Although the chancellor erred by granting a divorce absolute before adjudicating all matters involving custody and maintenance of the children and property rights between the parties raised by the pleadings, such error was harmless in the absence of a showing of prejudice. Johnston v. Johnston, 722 So. 2d 453 (Miss. 1998).

Chancellor can modify child support provisions of divorce decree only when there has been material or substantial change in circumstances of one of the parties, and that is true for divorces granted due to irreconcilable differences. Bruce v. Bruce, 687 So. 2d 1199 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1997).

A child support agreement, submitted to the court pursuant to § 93-5-2, which ends support for a child before that child reaches the age of 21 or is otherwise emancipated, is unenforceable as to the rights of the child. Lawrence v. Lawrence, 574 So. 2d 1376 (Miss. 1991).

Chancery courts must refuse to approve any child custody agreement presented under § 93-5-2 or otherwise which mandates, without exception, that children be raised in a given community. Bell v. Bell, 572 So. 2d 841 (Miss. 1990).

The provision in § 93-5-2 stating that a divorce decree "may be modified as other decrees for divorce," refers only to child custody and maintenance because property right settlements are fixed and final. A divorce judgment relating to child support is not a settlement of property rights, which is immutable, fixed and not subject to change, but a decretal provision based upon the reasonable needs of the child coupled with the ability of the parent to pay, and which can vary, dependent upon future developments. Brown v. Brown, 566 So. 2d 718 (Miss. 1990).

In a divorce suit wherein the husband answered and cross-claimed for divorce and for custody of the parties' minor child and, where in the interim, the child was found to be a neglected child while in mother's custody and custody was given to child's maternal grandfather by youth court referee, the chancellor, who, at the divorce hearing, refused to hear testimony on child's custody, left child in custody of maternal grandfather, and granted divorce on irreconcilable differences, was without authority to substitute youth court referee's judgment, and in so doing, he deprived natural father of right to be heard on the custody of his son. Keely v. Keely, 495 So. 2d 452 (Miss. 1986).

Filing of second complaint by husband, grounded on wife's adultery, which was inconsistent with first complaint based upon irreconcilable differences, constituted an effective withdrawal from and objection to the first complaint and, since wife had adequate notice, chancellor could grant divorce and custody of minor child to husband on second complaint, notwithstanding the parties' earlier execution of child custody, child support, and property settlement agreements. McCleave v. McCleave, 491 So. 2d 522 (Miss. 1986).

§ 93-5-2 gives the chancellor the power and the responsibility, in the face of the reasonably foreseeable, to require a reasonable escalation clause in every child support agreement, tailored to the situation of parties, absent unusual circumstances that might render it inequitable. Tedford v. Dempsey, 437 So. 2d 410 (Miss. 1983).

6. Modifiability.

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6. Modifiability.

Chancery court did not err in denying a husband's motion for modification of the amount of child support payable under an agreement entered into in connection with the parties' irreconcilable differences divorce where husband had paid less than 10 percent of the amount due and had voluntarily changed jobs resulting in a lowering of the husband's income; husband was ordered to not only continue paying the agreed amount but the amount of the husband's monthly obligation was increased to pay the past due amount. Seeley v. Stafford, 840 So. 2d 111 (Miss. Ct. App. 2003).

This section empowered the chancellor to modify a judgment of divorce by entry of a supplemental judgment based on substantial evidence to support the reformation of the parties' property settlement agreement. Dilling v. Dilling, 734 So. 2d 327 (Miss. Ct. App. 1999).

Chancellor can modify child support provisions of divorce decree only when there has been material or substantial change in circumstances of one of the parties, and that is true for divorces granted due to irreconcilable differences. Bruce v. Bruce, 687 So. 2d 1199 (Miss. 1996), reh'g denied, 691 So. 2d 1026 (Miss. 1997).

Support agreements for divorces granted on ground of irreconcilable differences are subject to modification, but only if there has been material change in circumstances with one or more of parties which occurs as result of after-arising circumstances not reasonably anticipated at time of agreement. Varner v. Varner, 666 So. 2d 493 (Miss. 1995).

Section 93-5-2 gives the chancellor the power and the responsibility, in the face of the reasonably foreseeable, to require a reasonable escalation clause in every child support agreement, tailored to the situation of parties, absent unusual circumstances that might render it inequitable. Tedford v. Dempsey, 437 So. 2d 410 (Miss. 1983).

Alimony agreements in divorces based upon irreconcilable differences are subject to modification the same as other decrees. Taylor v. Taylor, 392 So. 2d 1145 (Miss. 1981).

RESEARCH REFERENCES

ALR. Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce. 86 A.L.R.3d 1116.

What constitutes "incompatability" within statute specifying it as substantive ground for divorce. 97 A.L.R.3d 989.

Divorce: order requiring that party not compete with former marital business. 59 A.L.R.4th 1075.

Alimony as affected by recipient spouse's remarriage in absence of controlling specific statute. 47 A.L.R.5th 129.

Am Jur. 8 Am. Jur. Pl & Pr Forms (Rev), Divorce and Separation, Form 43 (petition or application for dissolution of marriage).

19 Am. Jur. Proof of Facts 2d 221, Dissolution of Marriage on Statutory Ground of Incompatibility.

CJS. 27A C.J.S., Divorce § 41.

Law Reviews. Symposium on Mississippi Rules of Civil Procedure: Pretrial Procedure, Applicability of Rules, and Jurisdiction and Venue — Rules 16, 81 and 82. 52 Miss. L. J. 105, March, 1982.

1989 Mississippi Supreme Court Review: Child Support. 59 Miss. L. J. 891, Winter, 1989.

1989 Mississippi Supreme Court Review: Divorce. 59 Miss. L. J. 902, Winter, 1989.

§ 93-5-3. Not mandatory to deny divorce because of recrimination.

If a complainant or cross-complainant in a divorce action shall prove grounds entitling him to a divorce, it shall not be mandatory on any chancellor

cailing children of their marriage as witnesses, and counsel should advise their clients against doing so except in the most exigent cases. Jethrow v. Jethrow, 571 So. 2d 270 (Miss. 1990).

RESEARCH REFERENCES

ALR. Divorce: spouse's right to order that other spouse pay expert witness fees. 4 A.L.R.5th 403.

§ 93-5-21. Exclusion of spectators from courtroom.

The court may, in its discretion, exclude all persons from the court room during the trial except the officers of the court, attorneys engaged in the case, parties to the suit and the witness being examined.

SOURCES: Codes, 1880, § 1166; 1892, § 1571; Laws, 1906, § 1679; Hemingway's 1917, § 1421; Laws, 1930, § 1419; Laws, 1942, § 2741.

Cross References — Another section derived from same 1942 code section, see § 93-5-19.

JUDICIAL DECISIONS

Statute provided wide discretion for a chancellor to close trials in divorce and custody cases. In re Memphis Publ'g Co., 823 So. 2d 1150 (Miss. 2001).

§ 93-5-23. Custody of children; alimony.

When a divorce shall be decreed from the bonds of matrimony, the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage, and also touching the maintenance and alimony of the wife or the husband, or any allowance to be made to her or him, and shall, if need be, require bond, sureties or other guarantee for the payment of the sum so allowed. Orders touching on the custody of the children of the marriage shall be made in accordance with the provisions of Section 93-5-24. The court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require. However, where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each. In the event a legally responsible parent has health insurance available to him or her through an employer or organization that may extend benefits to the dependents of such parent, any order of support issued against such parent may require him or her to exercise the option of additional coverage in favor of such children as he or she is legally responsible to support.

Whenever the court has ordered a party to make periodic payments for the maintenance or support of a child, but no bond, sureties or other guarantee has

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SOURCES: Codes, Hutch
§ 1772; 1880, § 1159;

been required to secure such payments, and whenever such payments as have become due remain unpaid for a period of at least thirty (30) days, the court may, upon petition of the person to whom such payments are owing, or such person's legal representative, enter an order requiring that bond, sureties or other security be given by the person obligated to make such payments, the amount and sufficiency of which shall be approved by the court. The obligor shall, as in other civil actions, be served with process and shall be entitled to a hearing in such case.

Whenever in any proceeding in the chancery court concerning the custody of a child a party alleges that the child whose custody is at issue has been the victim of sexual or physical abuse by the other party, the court may, on its own motion, grant a continuance in the custody proceeding only until such allegation has been investigated by the Department of Human Services. At the time of ordering such continuance the court may direct the party, and his attorney, making such allegation of child abuse to report in writing and provide all evidence touching on the allegation of abuse to the Department of Human Services. The Department of Human Services shall investigate such allegation and take such action as it deems appropriate and as provided in such cases under the Youth Court Law (being Chapter 21 of Title 43, Mississippi Code of 1972) or under the laws establishing family courts (being Chapter 23 of Title 43, Mississippi Code of 1972).

If after investigation by the Department of Human Services or final disposition by the youth court or family court allegations of child abuse are found to be without foundation, the chancery court shall order the alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegation.

The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney. Unless the chancery court's jurisdiction has been terminated, all disposition orders in such cases for placement with the Department of Human Services shall be reviewed by the court or designated authority at least annually to determine if continued placement with the department is in the best interest of the child or public.

The duty of support of a child terminates upon the emancipation of the child. The court may determine that emancipation has occurred and no other support obligation exists when the child:

(a) Attains the age of twenty-one (21) years, or

(b) Marries, or

(c) Discontinues full-time enrollment in school and obtains full-time employment prior to attaining the age of twenty-one (21) years, or

(d) Voluntarily moves from the home of the custodial parent or guardian and establishes independent living arrangements and obtains full-time employment prior to attaining the age of twenty-one (21) years.

SOURCES: Codes, Hutchinson's 1848, ch. 34, art. 2 (7); 1857, ch. 40, art. 17; 1871, § 1772; 1880, § 1159; 1892, § 1565; Laws, 1906, § 1673; Hemingway's 1917,

§ 1415; Laws, 1930, § 1421; Laws, 1942, § 2743; Laws, 1954, ch. 228; Laws, 1979, ch. 497; Laws, 1983, ch. 513, § 3; Laws, 1985, ch. 518, § 15; Laws, 1989, ch. 434, § 1; Laws, 1993, ch. 558, § 2; Laws, 1994, ch. 591, § 6; Laws, 1996, ch. 345, § 1; Laws, 2000, ch. 453, § 2, eff from and after July 1, 2000.

Editor's Note — Laws, 1999, ch. 432, § 1, provides that:

"SECTION 1. From and after the date Laws, 1999, ch. 432, is effectuated under Section 5 of the Voting Rights Act of 1965, all family courts are abolished. All matters pending in any family court abolished shall be transferred to the county court of the county wherein the family court was located without the necessity for any motion or order of court for such transfer."

Cross References — Provisions relative to orders for withholding amounts of overdue child support payments from income of obligors, see §§ 93-11-101 through 93-11-119.

Prohibition on divorce on grounds of irreconcilable differences in absence of written agreement providing for custody and maintenance of children and settlement of property rights, see § 93-5-2.

Custody and support of minor children and additional remedies, see § 93-11-65.

Enforcement of support of dependents, see §§ 93-25-1 et seq.

Criminal sanctions against noncustodial parent or relative for removal of child under age of fourteen from state in violation of court order, see § 97-3-51.

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I. ALIMON

1. Generally.

Chancellor erred in cl mony from rehabilitativ periodic alimony at a where a motion for modifi filed. Further, the chanc cusing on the husband's tion; the focus should h wife's financial condition, the husband's financial about the same as it had no bearing on whether t rived at a point that the needed financial help. O So. 2d —, 2004 Miss. A (Miss. Ct. App. Apr. 27, 2

Trial court applied the standard in determining reasonable; the Ferguso used to determine wheth proper in a case, except th not use these factors, but Hemsley factors, which v termine if alimony is r that since he applied t