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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA ANN CRAFT IRBY

APPELLANT

VS.

CAUSE NO.: 2007-CA-00689

GLORIA DEAN IRBY MARSHALL

APPELLEE

ARGUMENT¹

Appellee's Brief is not persuasive for several reasons. First, the Brief is replete with arguments concerning alleged facts and rulings of the trial court with no citation to the record. How can Plaintiff be expected to reply to vague allegations of facts and rulings without any citation to the record? For example, Defendant argues on page 13 of its Brief, as follows:

The only basis given for the continuance was because Appellant's attorney had told Appellant's attorney that he would object to anything that was untimely produced pursuant to the discovery rules.

Appellee's Br. at 13. There is no citation to the record. On page 15 of its Brief, Defendant states as follows:

The Judge did not find Appellant's explanation credible. Appellee placed the money into a joint account with Appellant. Appellant without the knowledge of Appellee withdrew the money and placed it into an account in her name only with her daughter as beneficiary. Appellant provided no proof whatsoever of what was paid with the funds that she wasted from Appellee's settlement. her only statement was that she paid joint bills.

Appellee's Br. at 15. Plaintiff disagrees with these general statements made by Defendant. However, even more important is the question: how can Plaintiff or this Court analyze this argument without any reference to where these facts are allegedly in evidence or where the trial court allegedly

¹Although Plaintiff has chosen to focus only on limited issues in this Reply Brief, Plaintiff is not conceding or waiving the other issues on appeal raised in her original Brief of Appellant. Plaintiff hereby reasserts by reference all issues raised in the original Brief of Appellant.

made such findings? Such unsupported allegations about the trial court's rulings and even the factual circumstances between the parties run throughout Appellee's Brief. Appellee's Brief should not be considered by this Court as it is based on the unsupported and uncited allegations of Defendant and its counsel.

Further, at least one issue raised in Appellant's original Brief was not addressed at all by Appellee in its Brief. For example, in section IV(C) of Appellant's original Brief, she pointed out that the trial court erred in considering a personal injury settlement on Plaintiff's behalf in a mistaken amount not supported by the record. Appellee did not address this issue at all. As such, Plaintiff would contend that the issue has been conceded by Appellee and that the trial court should be viewed in error on this issue.

V. The trial court erred when it denied Plaintiff's Motion to Declare Judgment Null and Void.

This assignment of error involves the application of Miss. Code Ann. §93-5-2(5) and §93-5-2(3). Miss. Code Ann. §93-5-2(5) provides that:

(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.

Miss. Code Ann. §93-5-2(5). Section 93-5-2(3) provides, as follows:

(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.

Miss. Code Ann. §93-5-2(3). The facts of what occurred between the parties are undisputed. Sandra Irby originally filed for divorce from her husband, Henry Irby, on or about May 18, 2005. R. at 5. Her Complaint for Divorce and Other Relief indicated that she was filing on grounds of habitual cruel and inhuman treatment and/or habitual drug use, and in the alternative, irreconcilable differences. R. at 6. Henry Irby filed an Answer denying all of Mrs. Irby's allegations and filed a Cross-Complaint alleging that he was entitled to a divorce on the ground of habitual cruel and inhuman treatment. R. at 13. Mrs. Irby filed an Answer to the Cross-Complaint denying the allegations of the Cross-Complaint. R. at 18. Mrs. Irby filed an Amended Complaint for Divorce and Other Relief on or about March 13, 2006, requesting a divorce on the grounds of habitual cruel and inhuman treatment, habitual drug use, adultery and irreconcilable differences. R. at 43. The Record in this case reveals that Mr. Irby never filed a responsive pleading to the Amended Complaint.

Prior to trial, the parties entered into a consent to divorce on irreconcilable differences on

May 4, 2006. R. at 103-04. Within the document entitled “Consent of Parties to Divorce on Irreconcilable Differences,” the parties enumerated several items which they requested the Court to consider. R. at 103-04. The list included:

1. All matters of real and personal property, including but not limited to the houses, land, condominiums, business property, cash, cars, trucks, furniture, money in bank accounts, stocks and securities, retirements and any 401k’s accumulated during the marriage.
2. Attorney’s fees.
3. Alimony.
4. The equitable division of any marital assets.
5. Payment of debts.
6. The division of tax refunds/liabilities including the lien of the Internal Revenue Service on record in Rankin County.
7. Mineral rights and oil and gas lease revenues including amounts in suspense by Denbury Resources.
8. The Back Clinic.
9. Entitlement to an Order prohibiting Henry from conduct calculated to or designed to harass, threaten or intimidate Sandra Irby or cause bodily harm to Sandra Irby.
10. Entitlement to life insurance.
11. Cash held in the registry of the Court.

R. at 103-04. Ultimately, the trial court entered a Final Judgment on or about December 19, 2006, granting the parties a divorce on the ground of irreconcilable differences. R. at 162. Plaintiff filed post-trial motions including a Motion to Declare Judgment Null and Void and a Motion to Reconsider. R. at 211. Hearings were held on Plaintiff’s post-trial motions on February 16, 2007, and April 10, 1007. Tr. at 608. The trial Court denied Plaintiff’s Motions by Judgments dated April 18, 2007. R. at 221, 224.

In this appeal, Plaintiff has argued that the Judgment entered by the Court is null and void

based on the fact that the parties never withdrew their fault grounds as set forth in Miss. Code Ann. §93-5-2(5). Defendant alleges that the consent was entered into pursuant to §93-5-2(3), and thus, the parties did not need to withdraw their fault grounds. The trial court agreed with Defendant. Plaintiff respectfully maintains that the trial court erred in its decision of April 18, 2007, on several bases.

First, Defendant and the trial court seem to take for granted that the parties entered into the consent pursuant to §93-5-2(3). However, a reading of the actual document reveals that it only cites “Section 93-5-2, Miss. Code Ann. (1972)” as its basis. The document does not indicate specifically that it is being entered into via sub-section 3 versus sub-section 5. Thus, Plaintiff maintains that the trial court erred in that its decision is primarily based on the assumption that the consent was entered into via sub-section 3.

Next, even if the parties had intended to enter into the consent agreement pursuant to §93-5-2(3), their consent did not qualify under that sub-section. Section 93-5-2(3) makes clear at the beginning that parties can utilize this procedure “[i]f 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, . . .” Thus, parties are allowed to take advantage of this sub-section of the statute when their disagreement only revolves around “custody and maintenance of any children of that marriage or any property rights between them, . . .” This interpretation of the statute is logical. The Legislature wanted to limit those instances wherein parties could agree to a divorce but request that the court rule on contested matters. Theoretically, divorces are either on contested fault grounds or on the ground of irreconcilable differences, which is specifically designed to allow

parties to get a divorce by agreement. The Legislature specifically restricted the use of §93-5-2(3) to instances where the disagreement among the parties is limited.

Clearly, in the case at hand, the parties requested that the court decide matters falling outside of the categories set forth in §93-5-2(3). For example, the parties requested that the trial court rule on matters involving attorneys fees, alimony, payment of debts, entitlement to life insurance and even “entitlement to an order prohibiting Henry from conduct calculated or designed to harass, threaten or intimidate Sandra Irby or cause bodily harm to Sandra Irby.” R. at 103-04. These enumerated issues are clearly not within the definition or purview of either custody and maintenance of children or property rights. Many of these issues involve fault between the parties, and the exact contests and denials filed previously by the parties. Thus, even if the parties had intended to travel under §93-5-2(3), they did not have the right to do so. They requested that the trial court rule on matters which the Legislature did not give the Chancery Court authority to rule on pursuant to §93-5-2(3). Thus, as argued before by Plaintiff, the Judgment of the trial court granting the divorce should be deemed null and void.

Finally, even if the consent was made pursuant to §93-5-2(3) and even if the issues the parties requested the court to decide were properly within the scope of §93-5-2(3), the dictate of §93-5-2(5) that all fault grounds must be withdrawn is still applicable. The trial court focused on the opening section of §93-5-2(5) which reads, “[e]xcept 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” Miss. Code Ann. §93-5-2(5). R. at 221-23. The trial court obviously found that the foregoing section meant that the entirety of sub-section 5 was inapplicable in sub-

section 3 cases. Plaintiff respectfully disagrees.

This issue may be largely one of statutory construction. A semi-colon marks the end of the opening section quoted above. After the semi-colon, sub-section 5 goes on to say, "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." The Legislature specifically chose not to make this last clause contingent upon the opening phrase of sub-section 5, i.e., "[e]xcept as otherwise provided in subsection (3) of this section." By dividing the sub-section into two distinct parts separated by a semi-colon, Plaintiff maintains that the Legislature specifically intended to draw a distinction between the two parts. There is no rule of statutory construction of which Plaintiff is aware which would support the contention that the opening phrase of the first portion of sub-section 5 is applicable to the last portion of sub-section 5. Without this opening phrase, there is no contention that the last clause in sub-section 5 would apply to sub-section 3 divorces. Thus, parties utilizing sub-section 3 would still be required to withdraw their fault grounds.

Further, within the overall framework of the statutes relating to divorce, it is logical that the Legislature wanted all contests and denials withdrawn before courts granted divorces on the ground of irreconcilable differences. This case represents a prime example of this logic. The parties in this case hotly contested the grounds for divorce and all other issues. They sued and counter-sued for divorce on several fault grounds. The Legislature does not want courts granting divorces on the ground of irreconcilable differences when there is any doubt as to the position of the parties relating to fault.

To further this point, Plaintiff would point out that sub-section 5 is the only specific legislative accord of authority to a trial court allowing the granting of a divorce on irreconcilable differences when the parties have previously contested grounds for divorce. Sub-section 3 does not specifically grant the trial court with any authority to grant a divorce on irreconcilable differences grounds. Section 93-5-2(1) gives trial courts the general authority to grant divorces on the ground of irreconcilable differences when there is a joint complaint by the parties or when proper service has been made. Section 93-5-2(2) gives trial courts the authority to grant divorces on the ground of irreconcilable differences when everything is agreed upon. Sub-section 3 does provide a procedure by which a trial court can decide contested child custody and property issues when the parties agree on a divorce on the ground of irreconcilable differences but does not grant the trial court authority to give the parties the divorce. Sub-section 5 in fact gives the trial courts that authority in cases where there has been a contest or denial. In fact, sub-section 5 provides the only authority in this statute or any other statute for trial courts to grant a divorce on the ground of irreconcilable differences when there has been a contest or denial. Thus, parties are free to utilize the procedure in sub-section 3 of the statute to have the trial courts determine disputed issues involving child custody and property only. However, the trial court actually grants the divorce on the ground of irreconcilable differences through the authority in sub-section 5. Obviously, the last portion of sub-section 5 prohibits the granting of such a divorce, unless the parties withdraw their contests or denials. Such was not done in this case. As a result, the Judgment is null and void, and the trial court should be reversed. See also *Caldwell v. Caldwell*, 805 So.2d 659, 665 (Miss. App. 2002); and *Massingill v. Massingill*, 594 So.2d 1173, 1178 (Miss. 1992).

Conclusion

Based on the foregoing, Appellant Sandra Ann Craft Irby requests that the Court reverse the Orders and Judgments of the Rankin County Chancery Court as set forth in Appellant's original Brief and in this Reply Brief.

This the 16th of October, 2008.



JOHN HOLADAY

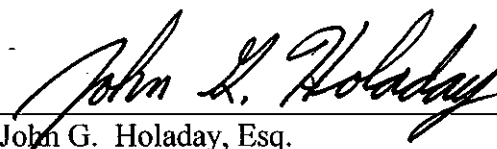
Of Counsel:

JOHN G. HOLADAY, MSB [REDACTED]
681 Towne Center Blvd., Suite A
Ridgeland, MS 39157
Telephone: (601) 956-4557
Facsimile: (601) 956-4478
ATTORNEYS FOR APPELLANT

Certificate of Service

I, John G. Holaday, do hereby certify that I have this day served this document via first class United States mail, postage prepaid, to the following counsel of record: Lisa Anderson Reppeto, Watkins Ludlam Winter & Stennis, P O Box 427, Jackson, MS 39205-0427; Christopher A. Tabb, P.O. Box 87, Brandon, MS 39043-0087; Laura Skeen Kuns, 119 Trace Ridge Dr., Ridgeland, MS 39157; and Honorable Dan Fairly, Rankin County Chancery Judge, P.O. Box 1437, Brandon, MS 39043.

This the 16th of October, 2008.



John G. Holaday, Esq.