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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2007-CA-00880

CANDACE D. PRICE — APPELLANT

VERSUS

JASON LAGARRET McBEATH, JR — APPELLEE

APPEAL FROM THE CHANCERY COURT
OF HARRISON COUNTY, MISSISSIPPI
SECOND JUDICAL DISTRICT

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant certifies that the following people have an interest in the determination of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. CANDACE D. PRICE, Appellant
2. DARNELL L. NICOVICH, Attorney for Appellant
3. LA QUETTA M. GOLDEN, Former Attorney for Appellant
4. JASON LAGARRET MCBEATH, JR., Appellee
5. JAY FOSTER, Trial Counsel for Appellee
6. MICHAEL J. VALLETE, Former Attorney for Appellee
7. HONORABLE MARGARET ALFONSO, Chancellor

RESPECTFULLY SUBMITTED, this the 11th day of December, 2007.

DARNELL L. NICOVICH

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STATEMENT OF THE CASE

A. COURSE OF THE PROCEEDINGS AND DISPOSITION IN THE COURT BELOW

This case was commenced in the Court below on October 26, 2004, when Jason LaGarret McBeath filed his Petition for Custody of Minor Child in the Chancery Court for the Second Judicial District of Harrison County, Mississippi. Jason had previously been adjudicated to be the father of the minor child and ordered to pay child support in a separate action brought by the Mississippi Department of Human Services. (RE 5-8) In his Complaint in this cause of action, Jason requested that he be granted custody of the minor child, JASON LATRELL MCBEATH, a male child, born February 25, 2002, and that the mother, Candace Price, be granted reasonable visitation and ordered to pay child support, or in the alternative if not granted custody, Jason requested liberal visitation rights with Jay. The Petition further alleged that Candace was in basic training in the military, but would be temporarily returning to Mississippi, where she

could be served with process at her home, located at 315 Bayview Ave, Apt. 13, Biloxi, Mississippi. There was no Motion for Temporary Relief filed, either separately or as a part of the Petition. (RE 1-8)

Process was not issued to Candace at the time of the filing of the Petition, but on December 28, 2004, a Rule 4 Summons and a Rule 81 summons were issued to Candace, with an address of 330 Benachi Ave. Apt 118, Biloxi, MS. (RE 9-10, 11-14) The Rule 81 summons summonsed Candace to appear and defend against the petition at 9:30 a.m. on January 20, 2005. (RE 9, 11) Subsequently, on December 29, 2004, the summonses were returned, purportedly having been personally served upon the Defendant on December 28, 2004, at 330 Benachi Avenue Apt 118, Biloxi, Mississippi. (RE 11-14) However, Candace disputes the assertion that there was any service of process, and in fact, has continued to deny that she was ever served with a summons of any kind in the matter that is before the Court. (R 129-130)

On January 20, 2005, Jason appeared with counsel for hearing, but Candace did not appear. A Judgment was entered on January 24, 2005 granting Jason the primary care, custody and control of Jay, and reserving the issue of Candace's child support until such time as Jason can produce proof of Candace's income and further reserving Candace's visitation "until such time as Candace files the proper pleadings seeking said visitation." (RE 17-19)

Candace, through counsel, filed a Motion to Reconsider, or in the alternative to Set Aside the Judgment pursuant to MRCP Rule 60(b), and requested Rule 11 Sanctions, on February 23, 2005. In her Motion, Candace asserted that she had not been personally served with process, but that the documents had been left with her sister at an address other than Candace's residence address. (RE 20-25) (R 129-130)

Jason filed a Petition for Citation of Contempt and Other Relief, alleging that Candace was in contempt for failing to abide by the terms of the Judgment of January 24, 2007, by refusing to give Jay to Jason. Jason requested that Candace be incarcerated for her contempt and further requested that the Court enter another order granting him custody of Jay and assessing Candace with child support. This Petition for Citation of Contempt and Other Relief was purportedly served on Candace through her attorney, LaQuetta Golden. The clerk's docket entries reveal that no summons of any kind was either issued or served personally upon Candace on this Petition to cite her with contempt.

A Temporary Judgment was entered on May 31, 2005, and filed of record on June 2, 2005, on Candace's Motion to Reconsider and to Set Aside Judgment and For Sanctions, in which the trial Court reserved its decision on whether to set aside the January 24, 2005, but restored temporary "paramount and physical custody" of Jay to Candace, granted Jason specific periods of visitation with Jay, and ordered Jason to resume child support payments. The Temporary Judgment also ordered the parties to file UCCJA Affidavits with the court clerk, and ordered the parties to notify each other and the clerk of any change of address and telephone number. It further set the final hearing for August 10, 2005. (RE 46) The August 10th hearing was not held, and there is no record as to why. However, both Candace and Jason filed UCCJA affidavits with the court clerk on that date. The case was reset by the Court Administrator to September 9, 2005, but could not be heard on that date because of it being during the immediate aftermath of Hurricane Katrina. From the docket entries, it appears that there was no further activity in this case for more than a year until October of 2006, when the case was noticed for trial on January 17, 2007, and then re-noticed for trial by the Court Administrator for March 26, 2007.

Candace's attorney, LaQuetta Golden, filed a Motion to Withdraw as Counsel on March 19, 2007. (RE 66-67) An Order was entered on March 21, 2007 allowing Mrs. Golden to withdraw, and a second Order allowing her to withdraw was entered on March 26, 2007, the day of trial. The primary difference between the two (2) Orders is that the March 21st Order includes a sentence giving Candace [blank] days to find new counsel, with a blank space being left and initialed by the Chancellor, whereas in the March 26th Order, which was signed during a discussion on the record (R 4-5) the provision allowing Candace additional time to obtain counsel has been stricken through. (RE 68-69) In discussion on the record prior to the commencement of the trial, Candace agreed to allow Mrs. Golden to withdraw. In the same discussion on the record Candace appeared with prospective new counsel, Fred Lusk. Mr. Lusk advised the Court that he had been contacted on Friday, had not been able to obtain a copy of the file from Mrs. Golden's office because it had been destroyed in the hurricane, had not had the chance to review any file or to familiarize himself with the issues and was unprepared to go forward, representing Candace. Mr. Lusk also advised the Court that if he were allowed additional time to prepare for trial, he would represent Candace (R 4-6, 14-15). After a brief recess in which the Chancellor conferred with Mr. Lusk and Mr. Foster, in chambers, Mr. Lusk did not return to the courtroom, and Candance proceeded *pro se*.

Prior to commencing the trial, there was discussion between the Chancellor and Plaintiff's counsel as to what pleading was being heard, and it was determined that Mr. Foster was proceeding on the original Petition for Custody that had been filed in October of 2004.(R 15) During the trial, Candace indicated that she had not been aware that the case would be going forward to trial on the issue of custody, stating "Can I get another witness, Your Honor?

Like just not just ask somebody else to come talk because I didn't know we were going this far today." (R 77)

At the conclusion of trial, another temporary order was entered on March 27, 2007, granting Jason make up visitation with Jay until a decision could be rendered by the Chancellor. (RE 71)

A "Final Judgment" was entered on April 18, 2007, awarding custody of Jay to Mr. McBeath, granting visitation to Candace, and ordering her to pay child support to Mr. McBeath (RE 72-94) The Judgment does not address the issue of the defective service of process or Candace's Rule 60(b) motion per the reservation of Temporary Judgment of May 31, 2005. To the Contrary, in a footnote in that "Final Judgment" the Chancellor notes that she finds the issue to have been abandoned by Candace, because it had not been addressed again since May of 2005. (RE 73) However, there was testimony at trial, that the process was left at Tonya's home when Candace was not present (129-130); Candace re-asserted her claim that she was never served with process (R129); and the Chancellor acknowledges that there is a dispute as to whether Candace was in fact served. (R147)

It is from that Judgment, and the original Judgment of January 24, 2005 that Candace Price appeals. Notice of Appeal and Designation of the Record were filed on May 18, 2007.

B. FACTS

The parties, JASON LAGARRET MCBEATH (Jason) and CANDACE D. PRICE (Candace), were never married, but had a relationship that produced a child, JASON LATRELL MCBEATH (Jay), a male child, born February 25, 2002. Jason was adjudicated to be Jay's father in a separate cause of action brought by the Department of Human Services, and was ordered to pay child support on January 7, 2004 in Cause No. C2402-03-816 (3). (RE 5-8)

Candace claims that Jason has never paid his child support as ordered, (R 94-95, 136-137) and has not provided anything for Jay, other than a car seat and stroller. (R 120, 136-137)

Candace allowed Jason and his family to visit with Jay fairly frequently after Jay was born. Often Jason was not available, so his mother, Connie McBeath was allowed to have visitation with Jay. This continued until Candace entered the military. (R 29-31, 87)

Subsequent to the adjudication of paternity, Candace joined the U.S. military. Incident to attending boot camp, she was required to make provisions for the temporary care of her child. Candace chose to give her mother, Tonya Price, temporary guardianship of Jay, but did not give Jason proper notice of the temporary guardianship. (R 30) Jason, aggrieved that Candace gave Jay to her mother, albeit temporarily, took possession of Jay (R 79-80) and filed for custody of Jay by filing his Petition in the Chancery Court of Harrison County, Mississippi, Second Judicial District. (R 31-32) Thereafter, Jason complains that Candace would not allow visitation, and tried to thwart his attempts to have a relationship with Jay, allegations which Candace denies. According to Candace, she allowed Jason to have all visitation prescribed by the Court in its various orders, but was hesitant to allow Jason to have Jay at other times, in the absence of a Court order, because of the trust issues that had developed between them. (R 72-74, 115, 137, 142-146) The mistrust that Candace has for Jason stems in part from his filing this lawsuit and getting an order without her having been served with process, and also from the fact that he would not allow Tonya to take Jay to see Candace's graduation from basic training in October of 2004 (R 123, 146)

Jason is twenty four years of age and is in good health. He lives in Moss Point, Mississippi, with his wife and seven year old step son. Jason lives in a three bedroom home that was given to him by his mother, and is paid for. (R97) At the time of trial, Jason had a pit bull,

but the dog was ordered to be removed from the home before Jay could be placed there. Mr. McBeath was employed as a firefighter, and had held that job since 2006, with an income of approximately $2,000.00 per month. Prior to becoming employed by the Moss Point Fire department, Jason held numerous different jobs, some of which were part time jobs (R 93-94) His wife is employed at the Biloxi V.A. as an x-ray technician. (R 34-39, R60, 65-66)

Candace is twenty three years old and in good health, other than a minor back problem. She is a food inspector for the U.S. Army and lives in Goose Creek, S.C. where she is stationed for military duty. Candace lives in a three bedroom home with her husband and their daughter, who was born on July 7, 2003. There are no pets in the home. Candace recently re-enlisted in the Army until 2011. She makes approximately $3,000.00 per month. Candace's husband is a sous-chef at a retirement home, and is taking online courses in real estate and business management. (R106-108, 115)

Jay is five years old and is in good health. At the time of trial, he was attending Head Start, and was expected to start kindergarten at the beginning of the next school year. While in Head Start, which he enjoys, Jay is learning to speak Spanish in addition to English. (R138) He is an active child, and gets along well with his half sister and his step brother. (R 138) Jay has a good relationship with both parents.

Jason complained that there were several incidents in which he or his mother had to seek medical treatment for Jay. On one occasion, Jay had a burn on his foot from spilled coffee. A friend of the family who is an R.N. had looked at the burn and advised Candace as to treatment, which Candace was providing, including "that silver spray that you spray on burns and an ointment." (R 126) However, several days later, Connie McBeath, Jason's mother took Jay to Dr. Steven Fineburg, who prescribed a more intensive treatment over the course of two (2)

weeks. (R 40-44) As an infant and toddler, Jay ran fevers and had ear infections from time to time, and on occasion Jason's mother to Jay to the doctor's office or to the emergency room. Sometimes Candace informed Connie of the illnesses, and other times she did not, but none of the illnesses were extraordinary. (R40, R122) In addition to the typical illness of a small child, Jay had a black eye in 2003. Jay, is an active child and is prone to get scrapes, bumps and bruises. In 2003, he was running inside the house, and bumped into a bedpost, resulting in the black eye. (R 45-46, 124-127, 151) At the time of trial, Jay had another black eye, that was caused by a playground accident at Head Start, when Jay and another child, not paying attention, ran into each other (R151)

In addition to the above illnesses and accidents, the child was treated for ringworms and athlete's foot in May of 2005. Jason and Candace blame each other for the ringworms. Jason claim that the ringworms were discovered when Jay got a haircut, and had "dots in his head that looked like a Dalmatian" (R 50-51) Candace claims that she said she discovered the ringworms and the athlete's foot after Jay returned to her, having been with his father for a period of time. She took Jay to one of the physicians on base, who was treating him for or had treated him for athlete's foot, and that the physician advised her that the ringworms came from being in a house with animals. Candace has no pets in her home, although Jason does. (R50-51, 75, 140-141)

Accidental injuries occurred when Jay was in his father and/or grandmother as well. In one incident, a dog jumped in Jay's face and scratched him while in Jason and/or Connie McBeath's care (R56-57, 60) Significantly, at the time of trial, Jason had a pit bull as a pet, even though his mother had warned against it. (57, 66)

Jason complained of was an incident sometime in 2004 when both Jason and Candace arrived at the day care to pick Jay up and an argument ensued. The day car provider called the

police, who claimed there was a smell of marijuana in the car that Candace was traveling in. (R 20, 22, 69-72) However, Candace denies that there was any marijuana, and denies that she uses marijuana. (R25, 82) Similarly, Candace provided some testimony that Jason has also smoked marijuana. Although Jason denied marijuana use, Tonya Price was able to testify that Jay had returned from visiting his father and that his clothes smelled like marijuana (R121)

In addition to Jay, Jason's has fathered another child out of wedlock. (R82-84) He does not have any relationship with the other child and is pursuing one, although he is providing court ordered child support for that child (R 96, 102) The other child and Jay born within a couple months of each other. In addition to fathering those two children in the same time period, Jay was also dating his current wife when Jay was conceived. (R136)

In essence, the litany of complaints that these parties have against each other regarding the physical, financial, and emotional care of the child, and their respective fitness as parents, is endless. Notwithstanding the issues between the parties, there are major legal and factual issues regarding process, service of process, and the jurisdiction of the chancery court to proceed.

SUMMARY OF THE ARGUMENT

Candace's primary argument is that the Chancellor was without jurisdiction to render any judgment whatsoever in this cause of action because of a complete failure to effect service of process upon her, either personally or constructively, and also because the summons, as issued, was fatally defective on its face. As such, all judgments rendered by the Chancellor in this cause of action from January 24, 2005 through April 18, 2007, are utterly void, should be vacated, and this cause of action should be summarily dismissed.

Further, Candace is aggrieved by award of custody of Jay to Jason, and argues that not only was the Chancellor without jurisdiction to render any Judgment, but that the Albright

factors were not correctly applied or considered by the trial court, and that the award of custody to Jason was manifestly in error.

ARGUMENT

STANDARD OF REVIEW

The standard of review for domestic cases has been clearly established. The Court will not disturb the findings of a chancellor unless there is an abuse of discretion, an erroneous application of law, or a manifest error. ***Andrews v. Williams***, 723 So.2d 1175, 1176(¶ 7) (Miss.Ct.App. 1998). However, the chancery court's interpretation and application of the law is reviewed under a de novo standard. ***Isom v. Jernigan***, 840 So.2d 104, 106(¶ 6) (Miss.2003).

Additionally, when reviewing questions concerning jurisdiction, the court employs a *de novo* review. ***Trustmark Nat'l Bank v. Johnson,*** 865 So.2d 1148, 1150 (¶ 8) (Miss. 2004); ***American Cable Corp. v. Trilogy Communications, Inc.***, 754 So.2d 545, 549 (¶ 7) (Miss. Ct. App. 2000). The appellate court reviews jurisdictional issues *de novo* by examining the facts set out in the pleadings and exhibits to determine the propriety of the proceedings. Id at 549(¶ 7). See also ***Sorrells v. R & R Custom Coach Works, Inc.***, 636 So.2d 668, 670 (Miss.1994).

I. THE CHANCERY COURT WAS WITHOUT PROPER SUBJECT MATTER OR IN PERSONAM JURISDICTION IN THIS CAUSE OF ACTION BECAUSE OF A COMPLETE FAILURE OF SERVICE OF PROCESS UPON CANDACE PRICE.

When Jason filed his Petition for Custody on October 26, 2004, he alleged that Candace was a resident of the Second Judicial District of Harrison County, Mississippi, who was currently in the military and would soon be available for service of process at her home located at 315 Bayview Ave., Apt. 13, Biloxi, Mississippi. (RE 1) No summons was issued at that time, but was later issued. On December 28, 2004 a Rule 81 Summons was issued to Candace at 330 Benachi Ave. Apt. 118, Biloxi, MS, commanding her to appear and defend the Petition at 9:30 a.m. on

January 20, 2005, a mere twenty-three (23) days after the issuance of the summons itself. A Rule 4 Summons was also issued at that time.

Rule 4(d) of the Mississippi Rules of Civil Procedure designates who is to be served with process and by what means process can be complete upon a defendant, and it provides the following:

> (d) Summons and Complaint: Person to Be Served. The summons and complaint shall be served together. Service by sheriff or process server shall be made as follows:
>
> (1) Upon an individual other than an unmarried infant or a mentally incompetent person,
>
> (A) by delivering a copy of the summons and of the complaint to him personally or to an agent authorized by appointment or by law to receive service of process; or
>
> (B) if service under subparagraph (1)(A) of this subdivision cannot be made with reasonable diligence, by leaving a copy of the summons and complaint at the defendant's usual place of abode with the defendant's spouse or some other person of the defendant's family above the age of sixteen years who is willing to receive service, and by thereafter mailing a copy of the summons and complaint (by first class mail, postage prepaid) to the person to be served at the place where a copy of the summons and of the complaint were left. Service of a summons in this manner is deemed complete on the 10th day after such mailing.

In order to effect service of process, Candace had to either be personally handed a copy of the summons and complaint by the process server, or the summons and complaint could have been left with a family member over the age of sixteen (16) at Candace's home at 315 Bayview Avenue, Apt. 13, Biloxi, Mississippi, with a copy of the summons and complaint being mailed to Candace at the same address. The returns on the Rule 4 and Rule 81 summonses were filed with the clerk on December 29, 2004, and indicate that Candace D. Price was personally served by Marie Singleton at 330 Benachi Ave., Apt. 118, Biloxi, MS on December 28, 2004. (RE 11-14) According to Candace, she was never personally served with the summons and complaint, and

was neither living at nor present at the Benachi Ave. address when the summons and complaint were allegedly delivered there. (RE 15, 20-25, R 129-130) On January 10, 2005, a letter from Tonya Price was filed of record, stating that the summons for her daughter, Candace Price, who is in the army, was left with her daughter, Donella Price. The letter further states that Candace was only in Mississippi for the weekend of Christmas and had to leave on that Monday. (RE 15) Thereafter, an affidavit from the process server, Marie Singleton, was filed of record, stating that she personally served the complaint on Candace D. Price, and that the female who answered the door identified herself as Candace D. Price, prior to being served on December 28, 2004. (RE 16) Looking closely at the facts, however, the accuracy of the information contained on the Return of summons and in the process server's affidavit becomes questionable.

As evidenced by the address given for Candace in paragraph II and VI of Jason's Petition, Jason knew that Candace's Mississippi residence at that time, was the Bayview Avenue address, and that the Benachi Ave. address was a prior address. One must wonder why Jason would then try to serve Candace on Benachi Avenue on Dcember 28th, knowing that she lived on Bayview Avenue. Tonya Price's letter states that Candace was in Mississippi for the weekend of Christmas, and that she left the following Monday. A December 2004 calendar indicates that Christmas day in 2004 (December 25th) occurred on Saturday and the 28th of December was on the following Tuesday. Candace would not have been on Benachi Ave. on Tuesday December 28, 2005, if she had returned to her military post on Monday December 27th. Tonya Price's letter further states that the court papers were left with her daughter, Donella Price. If one pays close attention to the return on the Rule 4 Summons, one sees that although it indicates in the body of the return that service was upon Candace D. Price, on the top portion of the return is a line for the process server to fill in, indicating the name of the person or entity served. That line

clearly states that the person served was "Candace Donella Price," with "Donella" being spelled by the process server exactly as it is spelled in Tonya Price's letter. (RE 14) As indicated by Jason's letter of May 26 2005, Candace's middle name is not Donella, but is Deon (RE 44). There is no mention of the name "Donella" in Jason's pleadings, or on the summonses as issued by the court clerk. "Donella" only appears on the process server's return, indicating the person upon whom the summons was served. There does not appear to be any way in which the process server could have possibly come up with the name "Donella" unless that is the name given to her by the person answering the door at the Benachi Ave. residence. Drawing reasonable inferences from the foregoing facts, it appears that Marie Singleton, having asked the person answering the door at 330 Benachi Ave., Apt 118, Biloxi, MS, her name, and after being told by that person that her name was "Donella," erroneously assumed that the D in Candace D. Price, stood for Donella. Mistakenly, Marie Singleton served Donella Price, rather than Candace Price, with process.

If the process had been left with a family member over the age of sixteen at 315 Bayview Ave., Apt 13, Biloxi, MS, rather than at 220 Benachi Avenue, the service could have been completed by mailing a copy of the summons and the complaint to Candace at that address. Additionally, the Plaintiff could have acknowledged the error, re-issued the summons, and properly serve Candace. However, it is evident from the clerk's docket entries that neither was done, and that the Plaintiff chose to rely on his defective attempt to serve Candace.

"Complete absence of service of process offends due process and cannot be waived." ***Isom v. Jernigan,*** 840 So.2d 107 (¶ 10)(Miss. 2003). However, the right to contest the court's jurisdiction based upon a claimed problem with service may be lost after making an appearance in the case if the issues related to jurisdiction are not raised at the first opportunity. ***Schustz v.***

Buccaneer, Inc., 850 So.2d 209, 213 (¶ 15) (Miss.Ct.App.2003). Candace filed a Motion under Rule 60(b) of the M.R.C.P. raising the issue of a complete lack of service of process on February 23, 2005. The Chancellor apparently heard that Motion, and on May 31, 2005, entered its Temporary Judgment which, among other things, reserved its decision on the issues of defective service of process. Since filing her Motion to Reconsider or in the Alternative to Set Aside, Candace has filed no responsive pleadings to Jason's original Petition for Custody or to his Petition to cite her with contempt. Nor has she filed any written waiver of service of process or taken any action which would serve as a waiver of service. Further, the Chancellor acknowledge on the record at trial that the issue of insufficient service of process was a problem in this cause of action. However, the Chancellor did not address the issue of insufficient process or the void or violability of the Judgment at that time or at any other time, notwithstanding the fact that the issue had been taken under advisement in May of 2005 and was specifically reserved by the Chancellor in her temporary order executed on May 31st, and later filed of record.

II THE CHANCERY COURT WAS WITHOUT PROPER JURISDICTION OR AUTHORITY TO PROCEED OR TO RENDER ANY JUDGMENT IN THIS CAUSE OF ACTION BECAUSE THE REQUIREMENTS OF RULE 81, REGARDING NOTICE AND SUMMONS TO A DATE CERTAIN WERE NOT COMPLIED WITH, THEREBY INFRINGING UPON CANDACE PRICE'S DUE PROCESS RIGHTS.

Although the complete failure of service of process upon Candace alone is sufficient to show that the Chancellor lacked jurisdiction in this matter, the problem with the failed attempt at service of process is not the only jurisdictional defect with regard to procedural due process, herein. In addition to the failure to properly serve Candace with process, Jason did not comply with Rule 81 of the M.R.C.P. with regard to the summons.

Rule 81(d) of the Mississippi Rules of Civil Procedure, provides in pertinent part as follows:

> (1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: adoption; correction of birth certificate; alteration of name; termination of parental rights; paternity; legitimation; uniform reciprocal enforcement of support; determination of heirship; partition; probate of will in solemn form; caveat against probate of will; will contest; will construction; child custody actions; child support actions; and establishment of grandparents' visitation.
>
> * * *
>
> (5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. Said time and place shall be set by special order, general order or rule of the court. If such action or matter is not heard on the day set for hearing, it may by order signed on that day be continued to a later day for hearing without additional summons on the defendant or respondent. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.
>
> (6) Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action ***provided the defendant has been summoned to answer the original complaint.*** (emphasis added)

Inasmuch as Jay's Petition was a child custody action, he was required by Rule 81(d)(1) to summons Candace to appear to a date and time certain, no less than thirty (30) days from completion of service of process, to appear and defend the lawsuit. The only Rule 81 Summons issued to Candace was issued on December 28, 2004, commanding her to appear and defend on January 20, 2005, which is a date less than thirty days from issuance, much less thirty days from any possible service. The summons was fatally defective on its face, and could not possibly have conferred jurisdiction over Candace under any circumstances other than an express waiver

of service of process, by virtue of a written document executed by Candance, or by a voluntary appearance by Candace on January 20, 2005. Candace neither executed and filed a waiver of service or process, nor did she appear at the hearing on January 20, 2005. Consequently, the chancellor did not have jurisdiction to enter any Judgment arising from the January 20, 2005 hearing or any subsequent Judgments arising therefrom.

Although Rule 81(d)(2) does provide for hearing seven (7) days after completion of service of process in temporary matters, there was no Motion for Temporary Relief filed by Jason, either separately or contained in the body of his original Petition for Custody. As such, there is no question that the January 20, 2005, setting was not intended as a hearing on temporary custody or support, but was intended as notice for hearing on the merits of his claim for custody of Jay. Further, the Judgment entered on January 24, 2005, as a result of the January 20, 2005 hearing, appears on its face to be a final Judgment granting custody to Jason, and cannot in any way be construed to be intended as a temporary order.

The entry of a Judgment granting custody to Jason on January 20, 2005, less than thirty (30) days after purported service of process has no authority in equity or law, is a denial of procedural due process, and is contrary to the provisions of the Mississippi Rules of Civil Procedure. A valid judgment requires (1) jurisdiction of subject matter, or of parties and (2) due process of the law. ***Bryant v. Walters***, 493 So.2d 933, 938 (Miss.1986). If a court lacks jurisdiction or the requirements of due process are not met, the judgment is void and must be vacated. *Id.* at 937-938. A judgment rendered by a court having no jurisdiction, is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such a judgment is a usurpation of power and is an absolute nullity. ***Roberts v. Roberts***, 866 So.2d 474, (¶ 8) (Miss Ct App. 2003), citing ***Duvall v. Duvall***, 224 Miss. 546, 80 So.2d 752, 755 (1955).

Because the Judgment of January 20, 2005 appears on it's fact to be a Final Judgment granting custody, the question arises as to what the purpose of the March 26, 2007 was. A review of the clerks docket reveals that there had been two other pleadings filed after the initial Complaint ("Petition") , namely Candace's Motion to Reconsider or in the Alternative to Set Aside the Judgment, and Jason's Petition for Citation of Contempt and other relief. Although numerous notices of various kinds were sent from the court administrator, only one set of summonses were issued, namely, the summonses issued on December 28, 2004.

Jason filed his initial Complaint on October 26, 2004 and process was issued on December 28, 2004. The rule 81 summons issued at that time was to January 20, 2007, at which time custody was granted to Jason. There was no continuance order entered, and no other order entered contemporaneously purporting to carry the cause over to another date; nor was any additional summons issued pursuant to Rule 81 regarding any petition or motion for custody, temporary, permanent, or otherwise, at any time prior to May 26, 2007.

Candace timely filed a Motion to Reconsider or in the Alternative to Set Aside Judgement, and properly noticed Jason, through his attorney. The initial notice set the Motion for March 9, 2005, and a subsequent notice was sent, setting the matter for hearing on May 6, 2005.

Jason then filed a Petition for Citation of Contempt and other relief on March 16, 2005, seeking enforcement of the custody order of January 24, 2004. No summons was issued to Candace under Rule 81 or under Rule 4. She was simply sent a Notice of Hearing, indicating that the matter was set for May 6, 2005.

Certain Rule 81 matters, because of their special nature, require special notice. ***Powell v. Powell***, 644 So.2d 269, 274 n. 4 (Miss.1994). Rule 81 applies to matters where the parties seek

to modify, or enforce final custody, alimony, or support judgments. ***Sanghi v. Sanghi***, 759 So.2d 1250, 1253 (¶ 13) (Miss.Ct.App.2000). This includes contempt matters. M.R.C.P. 81(d)(2). Requires that a summons be issued and contain a statement notifying a party of the time and place for the hearing, and that no answer is needed. ***Sanghi***, 759 So.2d at 1256 (¶ 28). Although the clerk is permitted to set the date and time for hearings without the need for a chancellor's signature on an order, there is no authorization for the chancellors of a district to bypass the summons requirement by using court administrator notice. ***Sanghi***, 759 So.2d at 1256 (¶ 29). See also, C***hasez v. Chasez,*** 916 So.2d 572 (Miss Ct.App. 2005)

The failure to have Rule 81 process issued to and served upon Candace, commanding her to appear and defend Jason's Petition for Citation of Contempt and Other Relief, serves to compound the procedural due process and jurisdictional problems that have plagued this case since its inception.

Inasmuch as Candace did not file any answer or other responsive pleading to the Petition for Citation of Contempt, and inasmuch as the Temporary Order entered on May 31, 2005, and filed of record on June 2, 2005, clearly recites that the cause had come on for hearing on Candace's Motion to Reconsider, or in the Alternative to Set Aside, and is silent as to Jason's Petition to cite Candace with contempt, it appears that the issues raised in Jason's Petition for Contempt and other relief were not addressed at that hearing. Thereafter, there was still no issuance of Rule 81 summons regarding the Petition for Citation of Contempt.

Because the initial Rule 81 Summons issued for Candace on the original Petition for Custody was defective, because Candace neither appeared on January 20, 2005, as commanded in the summons itself, nor filed any waiver or process or responsive pleading to the Petition,

and because the Judgment of January 24, 2005, was a final Judgment, there was no matter pending and triable on March 26, 2007 arising from Jason's Petition for Custody.

Similarly, because no Rule 81 Summons had ever been issued incident to the March 16, 2005 Petition for Citation of Contempt, much less served upon Candace, because Candace filed no answer, waiver, or other responsive pleading to that Petition for Contempt, and because it appears from the record that Candace did nothing more on May 6, 2005, than present evidence on her Motion to Reconsider or in the Alternative, to Set Aside Judgment, there was no matter triable on March 26, 2007, arising from Jason's Petition for Citation of Contempt and Other Relief. As such, the trial court was without jurisdiction to proceed on any of the issues raised in that Petition on March 26, 2007.

The only matter legitimately pending in this cause of action before the Chancery Court on March 26, 2007, was the issue of the Court's decision on Candace's Motion to Reconsider, or in the Alternative, to Set Aside. Thus, the Chancellor had no jurisdiction to enter its Temporary Order of March 27, 2007 or the Final Judgment of 18, 2007.

If a court lacks jurisdiction or the requirements of due process are not met, the judgment is void and must be vacated. ***Bryant v. Walters,*** 493 So.2d 933, 937-938 (Miss.1986). A judgment rendered by a court having no jurisdiction, is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such a judgment is a usurpation of power and is an absolute nullity. ***Roberts v. Roberts***, 866 So.2d 474, (¶ 8) (Miss Ct App. 2003), citing ***Duvall v. Duvall,*** 224 Miss. 546, 80 So.2d 752, 755 (1955).

Clearly, for a plethora of reasons as set forth above, the Judgements entered in the case, ***sub judice,*** are void, having been entered in the absence of both jurisdiction and due process.

As such, the Chancellor's rulings should be reversed, the Final Judgments herein immediately vacated.

III. IN THE ALTERNATIVE, IN THE EVENT THAT THE COURT DID HAVE PROPER JURISDICTION, THE CHANCERY COURT ERRED IN AWARDING CUSTODY OF JASON LATRELL MCBEATH TO JASON LAGARRET MCBEATH, JR.

It is well established in our system of jurisprudence that the polestar consideration in all child custody cases is the best interest if the child. ***Sellers v. Sellers*** 638 So. 2d 484, *485* (Miss. 1994); ***Moak v. Moak,*** 631 So. 2d 196,198 (Miss. 1994).

In making its determination as to custody, the court is charged with considering several factors. The age, health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the 'willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship ***Albright v. Albright,*** 437 So. 2d *1003,1005* (Miss. *1983).*

Looking more closely at the ***Albright*** factors as applied to the facts in the case *sub judice,* one sees the following:

1. Age, health, sex of the child. Jay is a male child, who is now five years of age. Although Jay experienced some accidental injuries while a toddler, and has experienced typical childhood illnesses, he has not had any unusual health related problems, and appears to have

enjoyed good health to date. However, Candace, being in the military, has readily accessible health care available for Jay, in the event that it is needed. Additionally, there is still a presumption that a mother is generally better suited to raise a young child, and our courts do still hold that along with the rest of the ***Albright*** factors, the tender years docrine is a factor worthy of weight in determining the best interest of a child. ***Hollon v Hollon*** 784 So. 2d 943 at 947 (2) (Miss. 2001) Therefore, factor number 1, should have been weighted in Candace's favor, but was erroneously weighted slightly in Jason's favor because of gender.

2. Continuity of care prior to the separation. Candace provided the majority of the care for Jay prior to the entry of the Final Judgment. Although she allowed Jason and his mother to have visitation with Jay, Candace provided his care from birth until she entered the military. At that time, Candace allowed her mother to have temporary guardianship while Candace attended boot camp. For a short period during this time, Jay did stay with his father in Moss Point, where he attended day care with Sylvia Thigpen for a couple of weeks. After completion of her military training, Candace resumed her position as Jays primary caretaker. Jason was allowed some extended visitation in May of 2005, and was allowed make-up visitation between the hearing of March 27, 2007 and the entry of the Final Judgment on April 18, 2007. This factor although slightly weighted in Candace's favor should have been weighted heavily in Candace's favor by the Chancellor.

3. Parenting skills and willingness and capacity to provide primary child care. Both parents claim that they are willing to provide care for Jay. Jason and Candace each have other children as a result of other relationships. Candace has a daughter, who was born in on July 7, 2003 and who lives with Candace and her husband in South Carolina, and with whom Candace

has an ongoing and loving relationship. Jason's other child was born close in proximity to Jay's birth, but Jason does not have and does not intend to seek a relationship with that child, other than the payment of court ordered child support. Prior to the filing of his complaint for custody, Jason did not materially participate in Jay's life. Even though Candace allowed liberal visitation at that time, Jason was often not available to spend time with Jay, so the visitation took place between Jay and the paternal grandmother. Further, Jason has not provided support as ordered for Jay or any in-kind support other than a car seat and a stroller. Although he claims to be paying child support via wage withholding order, he did not produce any pay stubs or other documentary evidence of such withholding and was not compelled to do so by the chancellor. Candace has not received those alleged payments, and the minor child has not had the benefit of any financial support from his father. This factor should have been heavily weighted in Candace's favor,

4. Employment of the parent and responsibilities of that employment. Jason is a firefighter in Moss Point, Mississippi. Candace is a food inspector for the army. Further, Candace's employment with the federal government, provides stability and benefits that are not necessarily secure in the private sector. Candace's regular working hours should weigh in her favor as opposed to Jason's job as a firefighter which requires him to be away from home for long periods during his shifts.

5. Physical and mental health and age of the parents. Candace is 23 years of age and Jason is 24 years of age Both are in good physical and mental health, although Candace has some minor back problems. This factor should be and is weighted equally.

6. Emotional ties of the parent and the child. Both Candace and Jason claim to be

closely bonded to the minor child.

7. Moral fitness of the parents, Candace and Jason are equally fit. Both Candace and Jason attend church regularly, and both are married. Jason and Candace both presented evidence that the other had some exposure to marijuana, although there was no evidence presented by either indicating recent evidence of drug use by the other party. Additionally, Jason fathered another child out of wedlock at approximately the same time during which Jay was conceived, and has not sought a relationship with that child, which should reflect negatively on his moral fitness. As a result of the foregoing, although the Chancellor weighted this factor in favor of Jason, it should have been weighted negatively against him.

8. The home, school, and community record of the child. There was no school or community record to be considered, because of the child's age. He was not yet in school, although he was attending head start in South Carolina, and there was no evidence of participation in any community sports activities. However, Jay was enjoying participation in Head Start in South Carolina, and was learning Spanish there. This should have weighed in Candace's favor.

9. The preference of the child at the age sufficient, by law, to express a preference Jay at five years old, is too young to express any preference as to custody.

10. Stability of home and employment of each parent. Both Candace and Jason live in three bedroom homes that are suitable for raising Jay. Jason is buying his home and has lived in the same area for many years. Jason lives with his wife, who is an x-ray technician at the Biloxi V.A., and her son. Jason has only been employed as a firefighter since June of 2006, and is considering another career change once he completes his bachelor's degree. He has had several

different jobs, some of which were part time, while he was enrolled in school.

Candace has been in the military since 2004, and has re-enlisted, committing herself to military service until 2011. Candace's husband is employed as a sous-chef at a nursing home and is taking online courses in real estate and business management. Candace has demonstrated her ability to provide a stable home for Jay, and to maintain stable and secure employment. Although she may be subject to military transfer to another location, with any move to a new location, Candace will have the benefit of base housing, security, and organized children's activities for Jay. Any changes in location because of the military, would be infrequent, at intervals of not less than four years, and would not be indicative of instability. To the contrary, any such moves would offer Jay the opportunity to travel and experience other cultural elements that non-military children do not have the benefit of.

One of the considerations in the trial court's custody determination appears to have been the fact that Jason was living in close proximity to his mother's home in Jackson County, with other relatives nearby, that could and were assisting with raising Jay, While having an extended family in close proximity is favorable, and arguably beneficial for a child, Candace does not feel that it should be a major determinative factor in custody matters. In essence, the weight given to this factor by the chancellor effectively penalized Candace for her clearly demonstrated ability to maintain a successful career, live independently, and take care of her child without the assistance of other family members. Therefore, Candace argues that her ability to raise Jay and provide a stable home for him while stationed away from her extended family should have been weighted positively in her favor, rather than negatively.

Candace feels that she has demonstrated greater home and employment stability than Jason has, and that the military would offer Jay travel opportunities that he will not have if in

Jason's custody. Consequently, this factor should have been weighted in her favor, rather than in Jason's favor.

11. Other factors relevant to the parent-child relationship. Jason has fathered another child out of wedlock that he does not have a relationship with. Additionally, although Jason has been ordered to pay child support for Jay in the past, Candace has received relatively little from him. While Jason claimed that he had been paying the court ordered support by virtue of wage withholding order, the chancellor did not require Jason to provide any proof that such payments were actually being made. This factor should have weighed against Jason.

The polestar consideration in custody matters is the best interest and welfare of the child, and the above stated factors are to be employed in the furtherance of that determination, ***Albright v. Albright,*** 437 So. 2d at 1005. It appears from the record that the Chancellor did not appropriately apply the evidence presented at trial to the ***Albright*** factors. If he had done so, the scales of justice would have been definitively tipped in Candace's favor on the issue of custody. If a chancellor improperly considers and applies the ***Albright*** factors, the Court is obliged to find error. ***Hollon v. Hollon,*** 784 So.2d 943(¶ 11) (Miss.2001).

The Albright factors are not the only matters to be considered in making custody determinations, particularly when there are siblings involved. The general rule set forth in ***Mixon v Bullard,*** 217 So. 2d 28 (Miss. 1968) provides that the Court shall in all cases attempt insofar as possible to keep the children together in a family unit. "It is well recognized that the love and affection of a brother and sister, it is important in the lives of both of them and to deprive them of the association ordinarily would not be in their best interests." ***Mixon v Bullard,*** 217 So. 2d 28, at 30-31 (Miss. 1968).

In ***Sparkman v. Sparkman,*** 441 So. 2d 1361 (Miss. 1983), the court took the rule promulgated by ***Mixon*** one step farther. The ***Sparkman*** court stated:

> "This expresses a common sense recognition of the ordinary facts of life, that in the absence of some unusual and compelling circumstance dictating otherwise, it is not in the best interest of children to be separated" Id at 1362

In ***Sootin v. Sootin***, 737 So.2d 1022 (¶ 15)(Miss. Ct.App 1998) the court reaffirmed the above its dedication to the foregoing principles, that siblings should be kept together absent any compelling circumstances to the contrary, but went a step further by reversing a chancellor who had separated siblings without articulating his justification for separating them. ***Sootin*** provided that when the record itself contains no substantial evidence to account for the ruling, as we find in the case sub judice, we are compelled to reverse and remand to the chancellor for findings that would justify the separation of the two children. Id. at (¶ 15)

While the placement of children with their siblings is not a concern that "overrides" the best interest of the child, our case law makes it clear that keeping siblings together is assumed to be in the best interest of a child, absent a showing that the circumstances in a particular case are to the contrary. ***Owens v. Owens***, 950 So.2d 202 (MS 2006).

Although Jay does not have any full siblings, he does have a half-sister, with whom he was raised until Jason was granted custody. Although Jay has a step-sibling in his father's home, that relationship only developed during Jason's brief periods of visitation, whereas Jay and his sister lived together on a constant basis. Granting custody of Jay to Jason, has separated Jay from his sister and has deprived them of each other's company, which is not in either of their best interest.

Candace would therefore, submit to this Honorable Court that the it was clearly in Jay's best interests to award custody to her, and that award of custody of Jay to Jason was clearly and manifestly erroneous, and should be reversed.

CONCLUSION

The profusion of procedural defects at the most fundamental level of civil procedure and jurisprudence in the case ***sub judice,*** is astonishing with successive layers of defective or non existent process compounding the problems that preceded it. Quite simply, the Court below was without jurisdiction to proceed or to render any decisions or judgments other than a judgment of dismissal for failure to effect service of process upon the defendant, Candace Price. Every Judgment entered in this cause of action has been void, not voidable. Period. This cause should be reversed, the Judgments vacated, and the cause of action summarily dismissed, with all costs being assessed against Jason McBeath.

In the alternative, in the event that this Honorable Court does find that the Chancellor had proper jurisdiction, the award of custody of Jay to Jason should be reversed, and Candace restored to her position as primary custodian of the minor child.

RESPECTFULLY SUBMITTED, this the 11th day of December, 2007.

CANDACE D. PRICE

By: _____

DARNELL L. NICOVICH

CERTIFICATE OF SERVICE

I, DARNELL L. NICOVICH, attorney for the Appellant, hereby certify that I have this date forwarded via United States Mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLANT to:

Jason Lagarret McBeath Jr., Appellee
5325 Martin Luther King Drive
Moss Point, MS 39563

Honorable Margaret Alfonso
Chancellor, Eighth Chancery District
P.O. Box 1446
Gulfport, MS 39502

SO CERTIFIED, this the 7th day of December, 2007.

DARNELL L. NICOVICH

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CERTIFICATE OF MAILING

I, the undersigned, DARNELL L. NICOVICH, do hereby certify that on this the ___ day of December, 2007, I personally deposited in the United States Mail, addressed to the Clerk of the Supreme Court of the State of Mississippi the following:

1. The original and three (3) copies of the Brief of Appellant, and

2. Four (4) copies of the Record Excerpts.

This the 11th day of December, 2007.

DARNELL L. NICOVICH

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