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ARGUMENT

Appellant's brief raised four main issues. Each issue dealt with one aspect of the Chancellor's award of grandparent visitation in the lower court.

The appellee's brief did not respond at all to any of the issues raised by appellant in her brief. Rather, the appellee attempted in his brief, to file what amounts to a cross-appeal. As such, the appellee's brief is wholly unresponsive to the issues raised on appeal by the appellant. It is tantamount to not filing a responsive brief at all.

Appellant's brief raised the following issues for this court to consider:

Issue One: Did the Chancellor Err in awarding grandparent visitation in the case at bar?

A. Necessary parties were excluded

B. Court's award of grandparent visitation was outside pleadings and without jurisdiction

C. Grandparent Visitation Act was not invoked

Issue Two: Was the visitation Chancellor awarded to grandparents excessive?

Issue Three: Did the Chancellor deny defendant's constitutional due process rights by awarding grandparent visitation?

Issue Four: Did Chancellor err by giving credence to plaintiff's false or misleading testimony, plaintiff's misleading pleadings and plaintiff's argument to the Court in awarding grandparent visitation?

Appellee's brief raised the following issues:

I. Whether the Court erred in not holding the Mother in contempt when she failed and refused to acknowledge the Father's contractual and statutory

rights to determine the care, custody and control of the minor child since he is the parent vested with complete physical and legal custody of the minor child.

II. Whether the Court erred in awarding temporary physical custody to the Mother when she did not petition the court for a change of custody.

III. Assuming temporary custody of the minor child was properly before the Court, did the Court err in awarding custody based on the natural parent presumption when the mother had voluntarily relinquished complete physical and legal custody of the minor child to the Father.

IV. Assuming temporary custody of the minor child was properly before the Court, and assuming the natural parent presumption was applicable to benefit the Mother in a temporary custody determination, did the Court err in awarding visitation to the paternal grandparents so as to acknowledge the Father's contractual and statutory rights to determine the care, custody and control of the minor child.

Nowhere in appellee's brief can be found an argument rebutting or giving any authority against appellant's issues regarding grandparent visitation. In essence, the appellee has waived his right to argue against the issues raised in appellant's brief. Appellee has chosen to attempt to raise several new issues for the appellate court to consider. However, the Mississippi Rules of Appellate Procedure precludes appellee from raising any new issues for the appellate court to consider as he failed to file a Notice of Cross Appeal.

The only manner in which a party can raise issues on appeal is to timely file a

Notice of Appeal or Notice of Cross Appeal pursuant to Rule 3(a) of the Mississippi Rules of Appellate Procedure. The appellee did not file a Notice of Cross Appeal herein.

The failure of the appellee's brief to address the issues raised by appellant in his brief and to attempt to raise new issues is in effect, a brief in support of a cross-appeal. As a result it constitutes a failure to file a brief at all.

There is a long line of Mississippi cases in which the failure to adequately respond to appellant's brief or to file a brief in response to appellant's brief is in essence a confession of the errors alleged in the appellant's brief.

The Mississippi Supreme Court in *Selman v. Selman*, 722 So.2d 547, 551 (Miss. 1998), held that, "This Court has held that failure to file a brief is tantamount to confession of error and will be accepted as such unless the reviewing court can say with confidence after considering the record and brief of the appealing party, that there was no error." *Reddell v. Reddell*, 696 So.2d 287, 288 (Miss. 1997), quoting *Dethlefs v. Beau Maison Dev. Corp.*, 458 So.2d 714, 717 (Miss. 1984). See also *State v. Maples*, 402 So. 2d 350, 353 (Miss. 1981), *Price v. Price*, 439 So.2d 848, 849 (Miss. 1983), *Green v. Green*, 317 So.2d 392 (Miss. 1975), and *Westinghouse Credit Corp. v. Dep. Gua. Nat'l Bank*, 304 So.2d 636 (Miss. 1974).

The failure to respond to appellant's brief or to file an opposing brief does not in and of itself require an automatic reversal. The appellant's argument "should at least create enough doubt in the judiciousness of the trial court's judgement that this court cannot say with confidence that the case should be affirmed." *Selman* at 551; see also *Muhammad v. Muhammad*, 622 So.2d 1239, 1242 (Miss. 1993) and *Griffin v. Breckinridge*, 204 So.2d 855 (Miss. 1967).

However, where the appellant's brief makes an apparent case of error, the appellate court is not obligated to look to the record to find a way to avoid the force of the appellant's argument. *Dethlef* at 717 (also, *Westinghouse* at 636; *Selman* at 551).

Specifically, the appellee did not distinctly identify any issues presented for review by appellant nor did appellee respond to any appellate issues raised by appellant in separately numbered paragraphs as required by Rule 28(a)(3) of the Mississippi Rules of Appellate Procedure. As a result, no issue not distinctly identified by the appellee may be argued by counsel. Rule 28(a)(3).

Although, appellee technically filed a brief, he did not address any of the issues raised on appeal by appellant. It attempted to raise new issues wherein it disagreed with the relief granted by the chancellor. However, this cannot be done by way of a reply brief. It can only be done by filing a separate cross appeal, something the appellee failed to do.

CONCLUSION

The appellee's brief did not respond to any of the allegations or issues raised by appellant in her brief. The effect is the same as if the appellee filed no brief in response to appellant's brief. Mississippi law considers this a confession of the errors contained in appellant's brief. If the appellant has set forth an apparent case of error in her brief, the appellate court has no obligation to look to the record to find a way to avoid the force of appellant's argument and can reverse the ruling of the chancellor awarding grandparent's visitation to appellee's parents. In this case, appellant clearly demonstrated numerous reversible errors made by the chancellor.

While the appellee technically filed a brief, it was unresponsive to appellant's brief and attempted to raise new and separate issues, effectively making it a brief in support

of a cross appeal. Having not filed a notice of cross appeal, appellee's brief is a nullity and cannot be considered by the appellate court.

The appellate court should immediately issue a ruling reversing chancellor's award of grandparent visitation and assess all costs to appellee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David S. Van Every, do hereby certify that I have this date, delivered, via U. S. Postal Services, postage prepaid, a true and correct copy of the above and foregoing to Honorable J. H. Davidson, Jr., Chancellor, P. O. Box 684, Columbus, MS 39703, J. Douglas Ford, Esq., and Rodney Ray, Esq., Attorneys for Appellee, P. O. Box 1018, Columbus MS 39703.

SO CERTIFIED, on this the 20th day of November, 2007.

David S. Van Every, Sr.
David S. Van Every, Sr.