

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-CA-01196

MARGIE EDNA (GALLOWAY) MALLETT WILSON,

APPELLANT

v.

BYRON KEITH MALLETT,

APPELLEE

BRIEF OF APPELLEE

Appeal from the Chancery Court of DeSoto County, Mississippi
Cause No. 02-07-0977

(ORAL ARGUMENT IS NOT REQUESTED)

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APPELLANT

v.

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record 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 Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Margie Edna (Galloway) Mallett Wilson, Appellant;
2. Byron Keith Mallett, Appellee;
3. H.R. Garner, Attorney for the Appellant
4. Steven G. Roberts, Attorney for the Appellee;
5. L. Anne Jackson-Hodum, Attorney for Appellee at Trial; and
6. Honorable Vicki B. Cobb, Chancellor.



Steven G. Roberts
Attorney for the Appellee

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STATEMENT OF THE ISSUES

- ISSUE I. DID THE CHANCELLOR ABUSE HER DESCRETION IN REFUSING TO HEAR THE MOTION TO SET ASIDE JUDGMENT PURSUANT TO RULE 59 AND IN THE ALTERNATIVE ORDER GRANTING RELIEF FROM JUDGMENT PUSUANT TO RULE 60(b) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE FILED BY THE APPELLANT ON JULY 7, 2008, UNTIL AUGUST 18, 2008, MORE THAN A MONTH AFTER IT WAS FILED.
- ISSUE II. DID THE CHANCELLOR BY HER REFUSAL TO GRANT A HEARING ON THE MOTION TO SET ASIDE JUDGMENT PURSUANT TO RULE 59 AND IN THE ALTERNATIVE ORDER GRANTING RELEIF FROM JUDGMENT PUSUANT TO RULE 60(b) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE FILED ON July 7, 2008 AND MOTION FOR EMERGENCY HEARING FILED ON THE 8th DAY OF JULY, 2008 UNTIL AUGUST 18, 2008, CONSITUTE AN ABUSE OF DISCRETION AND DENIAL OF DUE PROCESS TO APPELLANT

STATEMENT OF THE CASE

The Parties, Margie Edna (Galloway) Mallett Wilson (the Appellant herein) and Byron Keith Mallett (the Appellee herein), were divorced by a Final Decree of Divorce on the ground of Irreconcilable Differences from the Chancery Court of DeSoto County, Mississippi, on January 6, 2003, which incorporated therein the Property Settlement Agreement executed by the Parties. (R. 31-46, M.R.E. 13-28). Pursuant to the terms of the Final Decree of Divorce and the Property Settlement Agreement, the Parties were awarded joint legal custody of the Parties' minor child, with the Appellant, Margie Edna (Galloway) Mallett Wilson, being awarded primary physical custody. (R. 34, 45).

Subsequent thereto, both Parties filed Petitions and Counter-Petitions for modification of custody and for contempt. (R. 95, 105, 121, 125). The matters were set for trial on July 2, 2008, by an Administrative Order of the Court. (R. 120). On July 2, 2008, the Parties presented to the Court and the Court entered the Agreed Order Modifying Custody. (R. 140-146).

On July 7, 2008, the Appellant, Margie Edna (Galloway) Mallett Wilson, filed a Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief from Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. (R. 149-167). The following morning, the Appellant, Margie Edna (Galloway) Mallett Wilson, filed a Motion for Emergency Hearing. (R. 167-171). Contrary to the assertions of the Appellant that the Chancellor refused to hear the Motions until August 18, 2008, the letter from the Appellant's attorney, dated July 8, 2008, indicated that the Chancellor was willing to hear the Motions the next day. (R.

175-176). On July 8, 2008, late afternoon, the Appellant, Margie Edna (Galloway) Mallett Wilson, filed her Notice of Appeal from the Agreed Order Modifying Custody.

STATEMENT OF THE FACTS

The Appellant, Margie Edna (Galloway) Mallett Wilson, and the Appellee, Byron Keith Mallett, were divorced on the ground of Irreconcilable Differences by a Final Decree of Divorce dated January 6, 2003, from the Chancery Court of DeSoto County, Mississippi, which incorporated therein the Property Settlement Agreement executed by the Parties. (R. 31-46). Concerning the child custody and child support, the Property Settlement Agreement provided in part as follows:

CHILD CUSTODY: The parties mutually agree that the best interest of the parties' minor child, (Name Redacted), will be served by the Husband and Wife having joint legal custody of said minor children as in accordance with Section 93-5-24 of the Mississippi Code Annotated (1972) with the physical custody of the said minor child being awarded to the Wife. The parties further mutually agree that for purposes of joint legal custody, the parties hereto agree to "share the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of the said child". The parties further agree to "exchange information concerning the health, education and welfare of the said minor child, and to confer with one another in the exercise of decision-making rights, responsibilities and authority", all as in accordance with Section 93-5-24(5) (3) of the Mississippi Code Annotated (1972)...

(3) **CHILD SUPPORT:** The Husband agrees to pay unto the Wife the sum of \$250.00 per month as child support for the support and maintenance of the parties' minor child, (Name Redacted). That the child support payment shall commence on the 1st day of January, 2004, and shall be due and payable on the 1st day of each consecutive month thereafter. (R. 34-35).

Subsequently, both Parties filed Petitions and Counter-Petitions to Modify Custody alleging a substantial and material change of circumstances and to cite for contempt alleging violations of the previous orders of the Court. (R. 95, 105, 121, 125). The matters were set for a hearing on July 2, 2008, at the DeSoto County Courthouse in Hernando, Mississippi, pursuant to an Administrative Order of the Court. (R. 120). On July 2, 2008, the Parties announced to the Court that they settled the matters in controversy and presented to the Court an Agreed Order Modifying Custody which had

been signed by both Parties and their attorneys. With respect to the issues of child custody and child support, the Agreed Order provided in part as follows:

3. That physical custody and legal custody of (Name Redacted), dob 2/10/00, shall be vested jointly in the parties.

In all matters where "full joint legal" custody applies, as here expressed, or as defined by the 1983 Mississippi Legislature in ch. 513, Sections 1 and 2 (Section 93-5-24), "joint legal custody" here shall mean that the parents to the child of this marriage shall share the decision-making rights, the responsibilities and the authority relating to the health education and welfare of said child. It is understood by both parties, that this agreement for joint legal custody obligates each party, to exchange information concerning the health, education and welfare of the child of this marriage, and that each party agrees here to readily confer with one another in the exercise of any such decision-making rights, responsibilities and authority, without interference from third parties except for professionals in the area being considered at the time and moment, such as medical, physical, mental, educational, or spiritual.

4. That physical custody between Mother, Margie Edna (Galloway) Mallett Wilson, and the minor child shall be as follows:

A. Weekends. Mother shall have periods of physical custody with the minor child of the parties on alternate weekends from 6:00 p.m. on Friday through 6:00 p.m. on Sunday, with her first period of physical custody with the child being that of the weekend of July 4th and alternating physical custody each weekend thereafter. That the parties also agree that the Motion will be allowed to have dinner with the minor child, (Name Redacted), once a week, every week any time between 5:30 p.m. and 7:30 p.m. for an hour and a half...

H. Summer. The Mother shall have physical custody with the minor child eight (8) weeks during the summer. The Father shall have physical custody of the minor child for five to six days immediately after school and for five to six days before school begins.

The Mother shall notify the Father in writing by May 15th of each year of her intended eight (8) straight weeks periods of physical custody. That the parties also agree that the Father will be allowed to have dinner with the minor child, (Name Redacted), once a week, every week any time between 5:30 p.m. and 7:30 p.m. for an hour and a half during the Wife's summer periods of physical custody. (Last sentence interlineated and initialed by LAJ and HRE.) Father shall notify Mother on or before May 15th (except 2008) of 5 days during summer in which to have vacation with child.

5. The parties agree that the Mother shall pay the Father One Hundred Dollars (\$100.00) per month as child support for said minor child, via Withholding Order, with the first of said child support payment in the amount of \$100.00 with the first payment being due on the 1st day of July, 2008, with a like amount being due and payable on the first (1st) day of each month thereafter until the child is emancipated, being defined pursuant to Miss. Code Ann. Section 93-5-23 and 93-11-65 (1972 As Amended 1996) to mean:

"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 a full time employment prior to attaining the age of twenty-one (21) years, or*
- e) Joins the military and serves on a full-time basis, or*
- f) Is convicted of a felony and is incarcerated for committing such felony, or*
- g) Cohabits with another person without the approval of the parent obligated to pay support."...*

Additionally, on the same date, the Court entered an Order for Withholding for the Appellant, Margie Edna (Galloway) Mallett Wilson, to pay child support to the Appellee, Byron Keith Mallett, beginning July 1, 2008, with the Orders to take effect immediately. The Order for Withholding was signed by the Appellant, Margie Edna (Galloway) Mallett Wilson. (R. 147-148).

On July 3, 2008, the day after the entry of the Agreed Order, the Attorney for Appellee, Byron Keith Mallett, forwarded to the Attorney for Appellant, Margie Edna (Galloway) Mallett Wilson, a letter requesting the exchange of the Parties' minor child as the Appellant, Margie Edna (Galloway) Mallett Wilson, will have had the child for eight weeks on July 10, 2008. (R. 165). What is noticeably absent from the appellate

record is any response to the July 3, 2008, letter from the Attorney for the Appellant to the Attorney for the Appellee.

On July 7, 2008, five (5) days after the entry of the Agreed Order, the Appellant, Margie Edna (Galloway) Mallett Wilson, filed her Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief from Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure, consisting of fifteen (15) pages, excluding exhibits. (R. 149-163).

On July 8, 2008, the Appellant, Margie Edna (Galloway) Mallett Wilson, filed a Motion for Emergency Hearing requesting that the Chancellor set a hearing on the previous Rule 59 and 60(b) Motion filed by the Appellant, Margie Edna (Galloway) Mallett Wilson, to be heard "at such time and place as the Court has available to hear this Motion." (R. 167-168). The Attorney for Appellant, Margie Edna (Galloway) Mallett Wilson, requested a hearing on either of two (2) dates, July 9 or July 11, 2008.

Contrary to the statements of the Appellant, Margie Edna (Galloway) Mallett Wilson, in her Brief (Statement of Facts, p. 4-5) and the arguments throughout her Brief (p. 14-22) that the Chancellor refused to hear her Rule 59 and 60(b) Motion until August 18, 2008 (42 days later), the letter from the Attorney for the Appellant to Chancellor Cobb, dated July 8, 2008, confirms that the Chancellor did not refuse to hear the Motion, but in fact, was willing to hear the Motion the very next day (July 9, 2008) in Winona. (R. 175). The letter from the Attorney for Appellant stated, "... I was free to present same in the morning, July 9, 2008 before the Court in Winona." (R. 175).

As the Court is aware, DeSoto County is in the Third Chancery Court District which stretches from DeSoto County (Hernando) in the north, south along Interstate 55

to Montgomery County (Winona). During the week the Appellant requested the hearing, July 9 or July 11, 2008, the Chancellor was holding court in Winona, Montgomery County.

The request of the Appellant, Margie Edna (Galloway) Mallett Wilson, as contained in the prayer for relief of the Motion for Emergency Hearing for a hearing "... on either July 9th or 11th at such time and place as the Court has available to hearing this Motion" was granted. (R. 168). The Chancellor was willing to hear the Motion the very next day (July 9, 2008) and the Appellant was free to present her evidence at that time. (R. 175). But for whatever reason, the Appellant elected not to present her proof and make whatever record she desired, but instead chose to reset her Motion for a future date and allege that the Court denied her an opportunity to timely present her position to the Court.

During the later afternoon of July 8, 2008, the Appellant, Margie Edna (Galloway) Mallett Wilson, taking the erroneous position that the Court refused to hear her Motion, filed her Notice of Appeal. (R. 173).

SUMMARY OF ARGUMENT

The Chancellor did not refuse to hear the Appellant's Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief from Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure.

Therefore, the Chancellor did not abuse her discretion.

The Appellant, Margie Edna (Galloway) Mallett Wilson, filed a Motion for Emergency Hearing on July 8, 2008, to hear the Rule 59 and 60(b) Motion filed on July 7, 2008. The Chancellor agreed to hear the Motion the very next day, July 9, 2008, in Winona. The Appellant, Margie Edna (Galloway) Mallett Wilson, elected not to present the Motion for a hearing on July 9, 2008, and create a record for appellate purposes, but instead filed a Notice of Appeal in the late afternoon of July 8, 2008.

The Chancellor cannot have abused her discretion on a matter she did not hear due to the failure of the Appellant, Margie Edna (Galloway) Mallett Wilson, to present the Motion and any evidence in support thereof to the Chancellor.

ARGUMENT

STANDARD OF REVIEW

Generally, the standard of review by the appellate courts of a chancellor's decision in a domestic relations matter, as stated in Pierce v. Chandler, 855 So.2d 455, 457 ¶ 8, (Miss. App. 2003), is as follows:

Our scope of review in domestic matters is limited. This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Denson v. George, 642 So.2d 909, 913 (Miss. 1994). This is particularly true "in the areas of divorce and child support." Nichols v. Tedder, 547 So.2d 766, 781 (Miss. 1989). This Court is not called upon or permitted to substitute its collective judgment for that of the chancellor. Richardson v. Riley, 355 So.2d 677, 668-69 (Miss. 1978). A conclusion that we might have decided the case differently, standing alone, is not a basis to disturb the result. *Id.*

In Perkins v. Perkins, 1999-CA-01357, ¶9 (Miss. 2001), the Mississippi Supreme Court stated the standard of review in Rule 59 and 60(b) motions is:

An appeal from a denial of a Rule 59 motion may address the merits of the entire underlying proceeding, and review of a trial judge's denial of a Rule 59 motion is limited to abuse of discretion. Bang v. Pittman, 749 So.2d 47, 52 (Miss. 1999); Dissolution of Sanford v. Sanford, 749 So.2d 353, 357 (Miss. Ct. App. 1999). Review of a denial of Rule 60(b) motion considers only whether a judge abused the broad discretion granted by that rule which provides for extraordinary relief granted only upon an adequate showing of exceptional circumstances, and neither ignorance nor carelessness on the part of an attorney will provide grounds for relief. King v. King, 556 So.2d 716, 722 (Miss. 1990). A party is not entitled to relief merely because he is unhappy with the judgment, but he must make some showing that he was justified in failing to avoid mistake or inadvertence; gross negligence, ignorance of the rules, or ignorance of the law is not enough. *Id.* at 722.

ISSUE I:

DID THE CHANCELLOR ABUSE HER DESCRETION IN REFUSING TO HEAR THE MOTION TO SET ASIDE JUDGMENT PURSUANT TO RULE 59 AND IN THE ALTERNATIVE ORDER GRANTING RELIEF FROM JUDGMENT PUSUANT TO RULE 60(b) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE FILED BY THE APPELLANT ON JULY 7, 2008, UNTIL AUGUST 18, 2008, MORE THAN A MONTH AFTER IT WAS FILED.

Contrary to the position of the Appellant, Margie Edna (Galloway) Mallett Wilson, as contained in her brief, Statement of Facts (p. 4-5) and throughout the Argument portion (p. 14-22), the Chancellor did not refuse to hear the Appellant's Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative, Order Granting Relief from Judgment Pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure. On the morning of July 8, 2008 (8:13 a.m.), the Appellant, Margie Edna (Galloway) Mallett Wilson, filed a Motion for Emergency Hearing requesting an emergency hearing "on either July 9th or 11th at such time and place as the Court has available to hear this Motion." (R. 168).

The letter, dated July 8, 2008, from the Attorney for the Appellant to Chancellor Cobb acknowledged that Chancellor Cobb in essence granted the Motion for Emergency Hearing in that she was willing to hear the Rule 59 and 60(b) Motion the next morning, July 9, 2008, at 9:00 a.m. in Winona, Mississippi, where she was holding court. (R. 175). The letter stated, "...I was fee to present same in the morning, July 9, 2008, before the Court in Winona." (R. 175).

For whatever unknown reason(s), distance, timing, or otherwise, the Appellant, Margie Edna (Galloway) Mallett Wilson, elected not to present her Motion and any evidence in support thereof to the Court on July 9, 2008, in Winona, Mississippi.

Instead, the Appellant, Margie Edna (Galloway) Mallett Wilson, foregoing a hearing on the Rule 59 and 60(b) Motion, chose to file a Notice of Appeal at 4:47 p.m. on July 8, 2008. (R. 11, 173).

The Appellant, Margie Edna (Galloway) Mallett Wilson, on appeal argues she was denied due process by the Court for refusing to hear the Rule 59 and 60(b) Motion. The Court of Appeals state in Moore v. Moore, 98-CA-01437, ¶13 (Miss. Ct. App. 2000) as follows:

¶13. "Every defendant has a right to introduce evidence at a hearing." *Morreale v. Morreale*, 646 So.2d 1264, 1270 (Miss. 1994) (citing *Edwards v. James*, 453 So.2d 684, 686 (Miss. 1984)). But, if there is not evidence to present or no proffer as to what would have been presented, then there is no legitimate basis for complaining on appeal about the chancellor's control of evidentiary presentations. *Id.* (Emphasis Added.)

The Appellant, Margie Edna (Galloway) Mallett Wilson, had the right and opportunity to present and introduce evidence to the Court on July 9, 2008, but for whatever reason she chose not to present her evidence. Having failed to present her evidence or even pursue the opportunity to attempt to present evidence to the Court, she cannot now be heard to complain about the lack of a hearing or ruling on a Motion she failed/refused to present to the Court after having been given the opportunity to do so.

The Appellant, Margie Edna (Galloway) Mallett Wilson, in her Rule 59 and 60(b) Motion, a large portion of which is reprinted in her Brief (p. 8-13), that with respect to the summer custody period as contained in the Agreed Order alleges that unbeknownst to the Appellant, Margie Edna (Galloway) Mallett Wilson, and her attorney, the summer custody and tutoring provisions had been "inserted and misconstrued." (R. 155, Appellant's Brief p. 8). This allegation in support of the Rule 59 and Rule 60(b) Motion

is without merit. The second paragraph of Section 4H of the Agreed Order entered on July 2, 2008, addressing the summer schedule, contains a handwritten, interlineated sentence allowing the Father (Appellee, Byron Keith Mallett, herein) five (5) days during the Appellant's eight (8) week summer period, except for the summer of 2008. This handwritten, interlineated sentence was initialed by the attorneys for both Parties. Therefore, this paragraph was not and could not have been inserted unbeknownst to the Attorney for the Appellant.

Additionally, the Appellant's argument that custody of the Parties' minor child was not supposed to change in the summer of 2008 until mid-August, 2008, is likewise without merit. Paragraph 5 of the Agreed Order (R. 145) and the Order for Withholding, both provide for the payment of child support from the Appellant, Margie Edna (Galloway) Mallett Wilson, to the Appellee, Byron Keith Mallett, beginning July 1, 2008. There would be no need or justification to begin child support payments in July if custody was not going to change until mid-August.

ISSUE II:

DID THE CHANCELLOR BY HER REFUSAL TO GRANT A HEARING ON THE MOTION TO SET ASIDE JUDGMENT PURSUANT TO RULE 59 AND IN THE ALTERNATIVE ORDER GRANTING RELEIF FROM JUDGMENT PUSUANT TO RULE 60(b) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE FILED ON July 7, 2008 AND MOTION FOR EMERGENCY HEARING FILED ON THE 8th DAY OF JULY, 2008 UNTIL AUGUST 18, 2008, CONSITUTE AN ABUSE OF DISCRETION AND DENIAL OF DUE PROCESS TO APPELLANT

As previously set forth in response to Issue I, the Chancellor did not abuse her discretion in ruling or failing to rule on the Appellant's Rule 59 and 60(b) Motion. The Chancellor was not given the opportunity to hear the evidence, arguments, and to grant or deny the Motion. The Appellant, Margie Edna (Galloway) Mallett Wilson, requested an emergency hearing on the Rule 59 and 60(b) Motion and the Court agreed to hearing the Motion the every next morning, July 9, 2008, in Winona. (R. 175).

The Appellant, Margie Edna (Galloway) Mallett Wilson, decided not to present her Rule 59 and 60(b) Motion to the Court in Winona on July 9, 2008, but instead filed a Notice of Appeal on the afternoon of July 8, 2008. (R. 11, 173). The decision of the Appellant, Margie Edna (Galloway) Mallett Wilson, not to present her Motion and any evidence to the Chancellor on July 9, 2008, prevented the Chancellor from taking any action. How can the Chancellor have abused her discretion when the Appellant chose not to present the Motion to the Court? The decision of the Appellant, Margie Edna (Galloway) Mallett Wilson, not to present the Motion, prevented the creation of record from which either Party could appeal and from which this Court could determine if the Chancellor abused her discretion.

By not presenting her Rule 59 and 60(b) Motion to the Court, the Appellant, Margie Edna (Galloway) Mallett Wilson, failed to create a record from which she could appeal and which the appellate courts could review. The Appellant, Margie Edna (Galloway) Mallett Wilson, created the very circumstances from or on which she now appeals.

The underlying issue in controversy resulting in the filing of the Rule 59 and 60(b) Motion by the Appellant, Margie Edna (Galloway) Mallett Wilson, was the date for the exchange of custody of the Parties' minor child in the summer of 2008, July or August. As the summer of 2008 has passed, the issue is now moot.

Finally, the Appellee, Byron Keith Mallett, would submit to this Court that this appeal by the Appellant, Margie Edna (Galloway) Mallett Wilson, is frivolous and without merit and that the Appellee, Byron Keith Mallett, should be awarded his attorney's fees and expenses for having to respond to this appeal.

CONCLUSION

For the above and foregoing reasons, the Appellee, Byron Keith Mallett, asserts that the Chancellor did not abuse his discretion.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Steven G. Roberts", is written over a horizontal line. To the right of the signature, there is a small, solid black rectangular redaction mark.

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CERTIFICATE OF SERVICE

I, Steven G. Roberts, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

Hon. H. R. Garner
Attorney for the Appellant
P.O. Box 443
Hernando, MS 3863

Hon. Vicki B. Cobb
Chancellor
P.O. Box 1104
Batesville, MS 38606

This the 22nd day of December, 2008.



Steven G. Roberts