

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE JAMES CLARK

APPELLANT

VS.

CAUSE NO. 2009.CA.00011

AILEEN BROWN CLARK

APPELLEE

BRIEF FOR APPELLEE

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**CERTIFICATE OF INTERESTED PERSONS**

**2009 - CA-00011 – Willie James Clark vs. Aileen Brown Clark**

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.

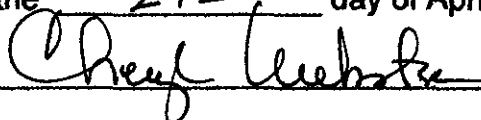
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This the 24<sup>th</sup> day of April, 2009.

, Cheryl Ann Webster MSB 7065

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**Statement of the Issue:**

**Issue: Was the 81 summons served on Willie James Clark sufficient to confer in personam jurisdiction on him such that this Court could render a Judgment of divorce, personal property free from a marital lien, child custody, child support, alimony against Willie as well as award Aileen, attorney's fees?**

**Answer: Yes it was.**

## **Statement of the Case**

Aileen's husband, Willie, was personally served, June 1, 2008, with a MRCP Rule 81 summons setting a date, June 13, 2008, and time certain for a temporary hearing for temporary matters, and a MRCP Rule 81 summons setting a date, July 25<sup>th</sup>, 2008, and time certain, for a hearing on the amended complaint for divorce and related matters along with a copy of the amended complaint that prayed for certain relief including among other things: 1) a divorce certain, 2) child custody of the parties' minor child, 3) child support to be paid to Aileen Clark for the minor, 4) a claim for alimony for Aileen and 5) for a judgment that certain personal property owned by Aileen would be free of any marital lien which might have been claimed by Willie.

The temporary hearing was had at the place and time set forth in the MRCP Rule 81 Summons for the temporary hearing. The Summons said June 13<sup>th</sup>, 2008 and the hearing was held on June 13<sup>th</sup>, 2008, but the order for Temporary matters was not entered until June 18<sup>th</sup>, 2008. The Temporary Order reflects the date of the hearing. The hearing on the divorce and other related matters was held on the date and at the time set forth in the MRCP 81 summons served on Willie. Willie was not present at either hearing nor did he file an answer. Both of which are not required for Aileen to proceed in Chancery Court.

On July 25<sup>th</sup>, 2008, pursuant to the MRCP 81 summons served, the Court held the trial. Sworn testimony was taken by the Court at the hearing. Aileen along with a witness

testified and certain matters were adjudicated. Aileen proved her grounds for divorce and the Court granted the divorce among other things. The Court awarded custody of the minor child to Aileen along with child support. Aileen was awarded ownership of certain personal property free from any marital lien of Willie's. Aileen was awarded alimony. Aileen was also awarded attorney's fees.



## Summary of the Argument

When issues of child support, child custody, alimony, ownership of property such that a division may be likely, or divorce which includes these matters, I believe it must be brought with a MRCP 81 summons. A party may use a MRCP 4 summons for publication in a divorce action because it only confers subject matter jurisdiction such that a Chancellor can award a divorce but nothing else. In my opinion, MRCP 4 in a divorce action does not confer personal jurisdiction such that a taking of property may be had because of the failure to give due process.

I am recently of the opinion that a MRCP 4 summons served on an individual in a divorce action, perpetuates a fraud on the person being summonsed because it leads the defendant to believe that an answer must be filed to defend a divorce or a default will be entered. This is a lie. This lie could have a chilling effect on the defendant such that he may not appear for failure to have hired a lawyer, failure to have filed an answer, or lack of ability or knowledge to know and understand what is required in an answer. Requiring an answer in a divorce case to avoid a default judgment is simply not true. One can appear and defend without an answer being filed. Default Judgments are not allowed in divorce cases. Each allegation must be proved under oath to the satisfaction of a Chancellor.

Having filed a complaint for a divorce and included in it such matters that due

process should be accorded the defendant, to meet the requirements of due process a MRCP 81 summons was correctly served on the defendant. How much more notice does a defendant need than to be advised of the place, the date, and the time of a divorce action? This is certainly more than a MRCP 4 Summons.

## Argument

There are a few matters which control the process of Chancery Court. MRCP 4 and MRCP 81 which states Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures. .... (9) Title 93 of the Mississippi Code of 1972."

The allegation made is that the Process served was not a "MRCP 4" process. The Court must now evaluate the process by the standard set forth in Rule 4 and not MRCP 81. The forms in the book are not official "must use" forms. They are merely suggestions. "APPENDIX A. FORMS... [See Rule 84]...INTRODUCTORY STATEMENT....1. The following forms are intended for illustration only. They are limited in number. No attempt is made to furnish a manual of forms." Rule Book, Appendix A. Forms.

"M.R.C.P. 81 governs procedure in twelve categories of civil actions, including child custody actions. The comment to the Rule states:

Rule 81(a) lists 12 categories of civil actions which are not governed entirely by the M.R.C.P. In each of those actions there are statutory provisions detailing certain procedures to be utilized ... (h)owever in any instance in the twelve listed categories in which the controlling statutes are silent as to a procedure, such as security for costs, form of summons and methods of service of process and notices, service and filing of pleadings, computation of time, pleadings and motions, discovery, subpoenas, judgments and the like, the M.R.C.P. govern.

Comment, Rule 81. The statute pertaining to child custody (including modification of a custody order) is Miss.Code Ann. (1972) 93-5-23 (Supp.1992). It is silent concerning the procedures for summons and service of process; therefore, the M.R.C.P. govern. See Covington v. Covington, 459 So.2d 780 (Miss.1984)..." Powell v. Powell , 644 so. 2d 269 (Ms. 1994). Continuing, "Rule 81(d) (1) provides

that child support actions are "triable 30 days after completion of service of process in any manner other than publication."

So it is clear that the type of summons to be issued in child support and child custody actions is clearly MRCP 81. "RULE 81. APPLICABILITY OF RULES (a) Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures..... (9) Title 93 of the Mississippi Code of 1972; (d) Procedure in Certain Actions and Matters. The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent they may be in conflict with any other provision of these rules. and (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: ..... child custody actions; child support actions; ...." MRCP 81.

The Court has also placed all of the domestic cases under 93-1-1 et seq under MRCP 81.

Mississippi divorce actions are primarily controlled by the provisions of Mississippi Code Annotated section 93-5-1 (Rev.2004); Crowe v. Crowe, 641 So.2d 1100, 1103-04 (Miss.1994). The Mississippi Rules of Civil Procedure govern to the extent that the divorce statutes are silent or not inconsistent. M.R.C.P. 81(a) (9); see also Rawson v. Buta, 609 So.2d 426, 430 (Miss.1992). Austin v. Austin, 981 So.2d 1000 (MS 2007).

"Mississippi divorce actions are governed by the divorce and alimony provisions of

section 93, chapter 5 of the Mississippi Code." Rawson v. Buta, 609 So.2d 426, 430 (Miss.1992).

Mississippi divorce actions are primarily controlled by the provisions of section 93 chapter 5 of the Mississippi Code. Crowe v. Crowe, 641 So.2d 1100, 1103-04 (Miss.1994). The Mississippi Rules of Civil Procedure govern to the extent that the divorce statutes are silent or not inconsistent. M.R.C.P. 81(a) (9); see also Rawson v. Buta, 609 So.2d 426, 430 (Miss.1992). To this end, an uncontested divorce must be heard in open court and the plaintiff is required to establish his claim(s) with evidence despite the defendant's failure to participate in the action. Quoting this Court from Rawson v. Buta,

"Mississippi divorce actions are governed by the divorce and alimony provisions of section 93, chapter 5 of the Mississippi Code. See Miss.Code Ann., § 93-5-1 et seq. (1972). The procedural provisions of this chapter limit the applicability of the Mississippi Rules of Civil Procedure, which govern only where the divorce statute stands silent. Miss.R.Civ.P. 81(a) (9) and comment. See also Mayoza v. Mayoza, 526 So.2d 547, 548 (Miss.1988); Clark v. Whiten, 508 So.2d 1105, 1107 (Miss.1987). Miss.Code Ann. § 93-5-7 (1972) (fn3), in effect at the time of trial, provides:

The proceedings to obtain a divorce shall be by bill in chancery, and shall be conducted as other suits in chancery, except that (1) the defendant shall not be required to answer on oath; (2) the bill shall not be taken as confessed; (3) admissions made in the answer shall not be taken as evidence; (4) the clerk shall not set down on the issue docket any divorce case unless upon the request of one of the parties; and (5) the court shall have full power in its discretion to grant continuances in such cases without the compliance by the parties with any of the requirements of law respecting continuances in other cases. And (6) in all cases the bill must be accompanied with an affidavit of complainant that it is not filed by collusion with the defendant, for the purpose of obtaining a divorce, but that the cause or causes for divorce stated in the bill are true as stated. (Emphasis added)

As a general rule, the failure of a party to answer a complaint opens the party to default judgment. Miss.R.Civ.P. 55(a). In a divorce case, however, the rule for default judgments imposes special requirements:

**Proof Required Despite Default in Certain Cases.** No judgment by default shall be entered against ... a party to a suit for divorce ... unless the claimant establishes his claim or rights to relief by evidence, provided, however, that divorces on ground of irreconcilable differences may be granted pro confesso as provided by statute.

Miss.R.Civ.P. 55(e) (1990); see also Hand, Mississippi Divorce, Alimony, and Child Custody §§ 5-2, 7-6 (1981); J.W. Bunkley & W.E. Morse, Amis on Divorce and Separation in Mississippi § 15.02(4) (1957). Thus, a divorce complainant must prove the allegations of the complaint, even when the defendant has failed to answer. A bill for divorce is never taken as confessed whether answered or not. Ladner v. Ladner, 233 Miss. 222, 102 So.2d 195 (1958). This state imposes this proof requirement because it elects not to treat divorce allegations as evidence: the complainant must provide evidence whether the defendant answers or not. In other words, the complainant's proof requirement does not become lighter because the defendant fails to answer.

In all suits for divorce the state essentially stands as a third party and is represented by the judge. The relationship of marriage is one upon which civilized society is dependent both for tolerable present conditions, and for permanence. The obligations, thereby, are different from those of parties engaged in a mere contract dispute. The interests of the state are represented through the court. It is the duty of the court, regardless of the pleadings of the parties, to fully inquire into the facts and circumstances of each case and to act accordingly. **The state's interest is proven through its refusal to allow default judgments in divorce cases and its requirement of proof on the pleadings.** (Emphasis added) Miss.Code Ann. § 93-5-7 (Supp.1992).

We hold the **statute does not bar a defendant from presenting proof rebutting the plaintiff's proof, although he or she may not have filed an answer.** (Emphasis added) Because the lack of an answer does not confess the allegations and because the plaintiff is still required to place the necessary proof before the court, the defendant is to be allowed to rebut that evidence through his or her own proof. "[T]he policy of the law is to hear all pertinent evidence and to decide cases on fully developed facts." Weeks v. Weeks, 556 So.2d 348, 349 (Miss.1990). Due to the special nature of a divorce proceeding in which the court may not enter a true default judgment, a defendant's failure to answer does not deprive the defendant of

the right to put on evidence to rebut the allegations of the complaint. The defendant cannot offer evidence outside the scope of the complaint and cannot offer any evidence supporting any affirmative charge. "

Rawson v. Buta, 609 So.2d 426, 431 (Miss.1992).

Quoting Shelton Hand,

"Due process is the process which is due..... Due process is both substantive and procedural. It serves the interest of all parties to an action in litigation. Due process is required on behalf of a defendant or respondent in any proceeding. Due process ensures that the defendant or respondent has sufficient notice of the action or proceeding that has been initiated against him or her and is intended to give the respondent adequate time to prepare an orderly response." Section 6-5 7 Ms. Divorce, alimony and child custody (6<sup>th</sup> edition)

The question is did Willie know Aileen was suing him for divorce. The answer is simply yes. Willie was handed the papers with the Rule 81 form for the summons. Did he know when Aileen was going to be presenting her case before the Court? Yes, because this is a MRCP 81 form summons and he had the date and time of each hearing in his hand.

Was personal jurisdiction conferred on the Court by the summons prepared and handed to the Defendant. I submit that this Court has personal jurisdiction and furthermore that the summons went one step further than required by MRCP 4 in that it gave Willie the date and time of the court hearings.

**Chancery Court is not a Court of form over substance.** If the requirements of MRCP 4 are met, then personal jurisdiction is accomplished. I submit that MRCP 4 was met. All that justice requires is that a defendant be given due process.

Willie was afforded his. He chose to ignore it. "Equity looks to intent and will regard substance over form.", Ms. Chancery Practice, Griffith. "Equity regards substance rather

than forms and does not deal with technicalities." Dogan v. Cooley, 185 So. 783 ( Ms. 1939).

Willie knew on June 1<sup>st</sup>, 2008, that his wife had sued him for divorce. He chose to ignore the papers. " Equity aids the vigilant and not those who slumber on their rights." Ms. Chancery Practice, Griffith.

In Crabb v. Comer, 190 Miss. 289, 200 So. 133, 135,(1941) this Court said:

"It is one of the oldest maxims of the law that no man shall, in a court of justice, take an advantage which has his own wrong as a foundation for that advantage." Moreover, one of the maxims of equity is, "He who comes into equity must come with clean hands."

In other words,

"It says that whenever a party, who, as actor, seeks to set the judicial machinery in motion and obtain some remedy, has violated conscience, or good faith, or other equitable principle, in his prior conduct, then the doors of the court will be shut against him in limine; the court will refuse to interfere on his behalf, to acknowledge his right, or to award him any remedy." Vol. 1 Pomeroy's Equity Jurisprudence, 4th Ed., Section 397, page 738. Id. at 746 (quoting Patterson v. Koerner, 220 Miss. 590, 594-95, 71 So.2d 464, 466 (1954)).

The court continued:

"The maxim is often stated in the following language, "he who doeth fraud, may not borrow the hands of the chancellor to draw equity from a source his own hands hath polluted." The maxim is not to be lightly considered and brushed aside. It is the duty of the Court to apply it of its own motion when it becomes evident that the facts are such that they call for the application of the maxim. "



Griffith, Miss. Chancery Practice, § 42 (1950).

Id. at 746-47.

Willie would have this court believe that he has suffered some wrong at the hands of Aileen and her lawyer, because she did not serve him with a MRCP 4 form of summons. Willie now claims that because of such, he allowed her to go forward and have a judgment entered for a divorce, child support, child custody, alimony and personal property, when at all times, he had the summons and complaint in his hands. Willie had the knowledge that she intended to go to court on a day and time certain. Is it equity for him to now stand before the Court and complain that Aileen asserted her rights without notice to him, when in fact she did. What MRCP 4 required her to do under the law, she did, even if it was in a MRCP 81 form summons. The Rule 81 form summons gave him more information than the MRCP 4 summons.

Equity has been served. This Court should affirm the Judgment of the lower court.

## Conclusion

Willie had his due process. This Court had jurisdiction over him and the Amended Judgment is valid and should be enforced. If the Court finds that form now shall be taken over substance by a court of equity, then so be it. If this Court rules that MRCP 4 is the summons that should be used to summons a person to a divorce action, then it should at least rule that divorces may be had by default, if no answer is filed and overturn Rawson v. Buta. Due process is that which is due. Aileen met that burden.

Respectfully submitted,

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Certificate of Service

This day I certify that I have delivered by mail, postage prepaid, or fax, or hand-delivery  
the Appellee 's Brief to Robert D. Evans, Attorney for Willie James Evans,  
POB 1498, Greenville, Ms. 38701.

This the 24<sup>th</sup> day of April, 2009.

Cheryl Ann Webster, Cheryl Ann Webster