IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01607

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)

Steven G. Roberts, MS[redacted]
Attorney for Appellee
6263 Poplar Avenue, Suite 1032
Memphis, Tennessee 38119
Telephone: (901) 683-3111
Facsimile: (901) 683-3181

ATTORNEY FOR APPELLEE

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01607

MARGIE EDNA (GALLOWAY) MALLETT WILSON, APPELLANT

v.

BYRON KEITH MALLETT, APPELLEE

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 Attorney for Appellee at Trial; and
6. Honorable Vicki B. Cobb, Chancellor.

Steven G. Roberts
Attorney for the Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

STATEMENT OF THE ISSUES

ISSUE I. DID THE COURT ERR EXCEEDING ITS JURISDICTION IN SEEKING TO ENFORCE AN ORDER THAT WAS APPEALED, OF WHICH THE COURT DID NOT HAVE JURISDICTION TO HEAR.

ISSUE II. DID THE COURT ERR IN SEEKING TO ENFORCE AN ORDER WHICH APPELLANT ASSERTS WAS ON ITS FACE SUBJECT TO TWO INTERPRETATIONS AND FOR WHICH THERE WAS A MOTION PENDING BEFORE THE COURT ON JULY 7, 2008 FOR HEARING PURSUANT TO RULE 59 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE

ISSUE III. DID THE COURT ERR IN FAILING TO SET THE HABEAS CORPUS CAUSE IN THE HABEAS CORPUS COURT, INSTEAD OF CHANCERY WHERE SAME WAS APPARENTLY HEARD EX PARTE BY THE COURT ON THE MORNING OF JULY 21, 2008 BETWEEN 9:00 A.M. AND 11:00 A.M.

ISSUE IV. DID THE CHANCELLOR ERR IN FAILING TO PROPERLY APPLY THE STATUTORY PROVISIONS OF A WRIT OF HABEAS CORPUS SO AS TO DEPRIVE MARGIE EDNA (GALLOWAY) MALLETT WILSON OF DUE PROCESS OF LAW.

STATEMENT OF THE CASE

This is ostensibly the second appeal in this matter arising from an Agreed Order Modifying Custody entered in the Chancery Court of DeSoto County, Mississippi on July 2, 2008. (R. 61-67, M.R.E. 36-42) The first appeal having been dismissed for lack of jurisdiction pursuant to M.R.A.P. 4(d), because the Appellant, Margie Edna (Galloway) Mallett Wilson, timely filed a Rule 59 and a Rule 60 Motion (R. 46-60) which were still pending when she filed her Notice of Appeal. (R. 75) Wilson v. Mallet, 28 So.3d 669, 2009 WL 3175908 (Miss. App. 2009) (Cert. denied) (No. 2008-CA-01196).

On July 21, 2008, the Appellee, Byron Keith Mallett, filed a Petition for Writ of Habeas Corpus in the Chancery Court of DeSoto County, Mississippi seeking the assistance of the Court in obtaining custody of his minor child (name redacted) pursuant to the terms of the Agreed Order Modifying Custody entered on July 2, 2008. (R. 13, M.R.E. 13) The chancery Court of DeSoto County, Mississippi issued an Order on Petition for Writ of Habeas Corpus (R. 16, M.R.E. 16) and directed the Chancery Court Clerk to issue the Writ of Habeas Corpus and Writ of Assistance. (M.R.E. 17) and setting the cause for a hearing on August 18, 2008.

The Appellant, Margie Edna (Galloway) Mallett Wilson, filed a Response and Motion to Set Aside the Petition for Writ of Habeas Corpus. (R. 275-292, M.R.E. 18-35) The matter was continued to August 22, 2008, at which time the Chancellor heard the testimony as related to the issuance of the Writ of Habeas Corpus. (R. 328, T. 12-96) The Chancery Court entered an Order on numerous motions and took the issue of ruling on the Writ of Habeas Corpus under advisement. (R. 338-340)

Prior to the entry of the Order finding that the Writ of Habeas Corpus was properly granted, the Appellant, Margie Edna (Galloway) Mallett Wilson, filed her Notice of Appeal on September 29, 2009. (R. 372) The Order on the Writ was not signed by the Chancellor until October 6, 2009, and filed for entry with the Chancery Court Clerk on October 14, 2009.

Note: While the first Wilson v Mallett, 28 So.3d 669 (Miss. App. 2009) (No. 2008-CA-01196) matter was on appeal, an Order was entered in the Chancery Court of DeSoto county, Mississippi on October 13, 2008 disposing of numerous Motions and Petitions, wherein the Chancery Court found that the Rule 59 Motion and the Rule 60(b) Motion filed by the Appellant, Margie Edna (Galloway) Mallett Wilson, on July 7, 2008 were moot as a result of the Notice of Appeal filed on July 8, 2008. (R. 338-340) However, the holding by the Court of Appeals dismissing the appeal for lack of jurisdiction, based upon M.R.A.P. 4(d) made it clear that the Rule 59 and 60(b) Motions were not moot, finding that the first appeal was premature. Wilson v. Mallett, 28 So.3d 669, 2009 WL 3175908 (Miss. App. 2009) (Cert. Denied) (No. 2008-CA-01196). No order disposing of the Rule 59 and 60(b) Motions has been entered in the Trial Court, except for the Order, dated October 13, 2008, finding that they were moot. (R. 338-240)

STATEMENT OF THE FACTS

This appeal, Wilson v. Mallett II, begins with the same order in controversy as the first appeal, the Agreed Order Modifying Custody, entered on July 2, 2008 in the Chancery Court of DeSoto County, Mississippi. (R. 61-67) The first appeal, which was dismissed by the Court of Appeals for lack of jurisdiction pursuant to M.R.A.P. 4(d), was premised on the claims of the Appellant, Margie Edna (Galloway) Mallett Wilson, that the Chancery Court of DeSoto County, Mississippi abused its discretion in refusing to timely hear her Rule 59 and 60(b) Motions.

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. The Property Settlement Agreement provided in part that the Parties would have joint custody of the minor child, with the Wife having physical custody. (R. 116-132)

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. 133-143). 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. 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, pursuant to paragraph 5 of the Agreed Order, with the Orders to take effect immediately. The Order for Withholding was signed by the Appellant, Margie Edna (Galloway) Mallett Wilson. (R. 66).

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. 68). The Appellant, Margie Edna (Galloway) Mallett Wilson, did not respond to the letter of July 3, 2008, but 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. 46-60).

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. 71-72). The Attorney for Appellant, Margie Edna (Galloway) Mallett Wilson, requested a hearing on either of two (2) dates, July 9 or July 11, 2008. (R. 71-72)

Contrary to the statements of the Appellant, Margie Edna (Galloway) Mallett Wilson, in her Brief (Statement of Facts, p. 3-4) 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. 71-72). 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. 72).

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. 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. 71-72, M.R.E. 43-44). 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. 75-76, 302-303, M.R.E. 45-46) the Court of Appeals, pursuant to M.R.A.P. 4(d), dismissed the appeal for lack of jurisdiction because the Rule 59 and 60(b) Motions filed by the Appellant, Margie Edna (Galloway) Mallett Wilson, were still pending when she filed her Notice of Appeal and no order disposing of said motions had been entered. Wilson v. Mallett, 28 So.3d 669, (Miss. App. 2009) 2009 WL 3175908 (Cert. Denied) (No. 2008-CA-01196).

Pursuant to Paragraph 4.H. of the Agreed Order Modifying Custody, entered on July 2, 2008, the Appellant's eight (8) weeks during the summer ended July 18, 2008. (R. 63, M.R.E. 38, T. 16, Calendar-Ex. 1) The Appellee, Byron Keith Mallett, attempted

to contact the Appellant, Margie Edna (Galloway) Mallett Wilson, on numerous occasions concerning the change of custody. (T. 17-18)

On July 21, 2008, the Appellee, Byron Keith Mallett, unable to obtain custody of his minor child pursuant to the Agreed Order Modifying Custody entered July 2, 2008, filed a Petition for Writ of Habeas Corpus in the Chancery Court of DeSoto County, Mississippi under the same cause number as the previous custody actions between the parties involving their minor child. (R. 13, M.R.E. 13)

On July 21, 2008, the Chancellor issued an Order on Petition for Writ of Habeas Corpus placing physical custody of the minor child with the Appellee, Byron Keith Mallett, ordering the Appellant, Margie Edna (Galloway) Mallett Wilson, to deliver custody (body) of the minor child to the Appellee, Byron Keith Mallett, ordered the DeSoto County Sheriff to assist in the transfer of custody, directed the Clerk to issue the Writ of Assistance, and continued the matter to August 18, 2008. (R. 16, M.R.E. 16) The Chancery Court Clerk issued the Writ of Habeas Corpus and Writ of Assistance as ordered by the Chancellor. (M.R.E. 17)

During the late afternoon or early evening hours of July 21, 2008, the DeSoto County Sheriff's Department, pursuant to the Order on Petition for Writ of Habeas Corpus and the Writ of Habeas Corpus and Writ of Assistance issued by the Chancery Court Clerk obtained physical custody (the body) of the minor child from the Appellant, Margie Edna (Galloway) Mallett Wilson, and delivered the minor child to the Appellee, Byron Keith Mallett.

Contrary to the statements of the Appellant, Margie Edna (Galloway) Mallett Wilson, in her brief (Statement of Facts pp. 70, 11) that she was never served with a

copy of the Writ and Order, Commander Frank Herring, with the DeSoto County Sheriff's Department, testified that on July 21, 2008, he personally placed the Writ Order in Ms. Wilson's hand. (T. 49-51) The Appellant, Margie Edna (Galloway) Mallett Wilson, who denies that she was ever served with the Order and Writ, did not remember Commander Herring being present at her residence on July 21, 2008. (T. 84) Commander Herring, however, remembered Ms. Wilson and identified her in the courtroom on the day of the hearing. (T. 48-49)

For whatever reason on the date of the hearing on the Petition for Writ of Habeas Corpus, August 22, 2008, the returns on the Order and Writ were not in the Court file. Contrary to the Statement o the Appellant in her Brief (Statement of Facts p. 7) that the Sheriff's Department never filed a return, Commander Herring was emphatic that he did make the return and sent it back to the Court. (T. 56) On August 22, 2008, Commander Herring again signed returns on the Writ and Order indicating that he personally delivered copies of the Order and Writ to the Appellant, Margie Edna (Galloway) Mallett Wilson. (R. 332,333)

Much of the Appellant's Brief (Statement of Facts pp. 9-12) and the testimony elicited at the hearing complain about how the Writ of Habeas Corpus was served by the DeSoto County Sheriff's Department, not whether the Writ was properly issued by the Court. Commander Herring did state that five (5) or six (6) officers were present, but denied that guns were drawn. (T. 48-64) Ms. Wilson and her daughter, Jessica Holland, on the other hand wanted to tell a very different and dramatic story. (T. 73-95) However, Ms. Wilson could not even remember Commander Herring being present on

July 21, 2008. (T. 84) The Trial Court noted that the issue at the hearing was the validity of the Writ, not how it was executed by the Sheriff's Department. (T. 77)

The Appellant, Margie Edna (Galloway) Mallett Wilson, wants to asset that the Agreed Order Modifying Custody entered July 2, 2008 was subject to more than one interpretation and therefore, was not enforceable by way of a Writ of Habeas Corpus. However, nowhere in Ms. Wilson's pleadings or in the transcript does she or anyone on her behalf ever assert or advise the Court what the other interpretation is, was, or may be. The only interpretation of the July 2, 2008 Order, other than the Order itself, is the testimony of the Appellee, Byron Keith Mallett, that Ms. Wilson's time ended July 18, 2008. (T. 16-17)

In reality, the issues raised on appeal are moot. As the Trial Court noted in her ruling from the bench taking the matter under advisement after the hearing on August 22, 2008, the Parties are now operating under the agreement and the minor child is going back and forth. (T. 98) This is further support by the Docket Pages from the Office of the DeSoto County Chancery Court Clerk that indicate that at least form August 22, 2008 through November 2, 2009, there have been no Petitions for contempt, modification, etc. (R. 11-12)

SUMMARY OF ARGUMENT

The Chancery Court did not exceed its jurisdiction upon issuing the Order on Petition for Writ of Habeas Corpus pursuant to the Agreed Order Modifying Custody entered on July 2, 2008. The Order from which the Writ of Habeas Corpus is sought does not have to be a final/appealable order. See Weaver v. Parks, 947 So.2d 1009 (Miss. App. 2006) where the issuance of a Writ of Habeas Corpus was based upon a Temporary Agreed Order.

The Agreed Order Modifying Custody dated July 2, 2008, was not subject to two (2) interpretations. If Ms. Wilson had a different interpretation from Mr. Mallett, she never testified about it. The only interpretation present to the Court was that of Mr. Mallett. Regardless, the fact that an order may be subject to more than one (1) interpretation does not make it void.

The filing of the Petition for Writ of Habeas Corpus in the pending Chancery Court child custody action was proper. Pursuant to M.C.A. §93-11-65, the Chancery Court has jurisdiction over habeas corpus proceedings involving custody of minor children.

The issuance and service of the Writ of Habeas Corpus was proper pursuant to M.C.A. §11-43-1 et. seq.

The underlying basis for the issuance of the Writ of habeas Corpus and the appeal was the date of the exchange of custody in the summer of 2008. The underlying basis having now passed, the basis for the appeal is moot.

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.*

ISSUE I:

DID THE COURT ERR EXCEEDING ITS JURISDICTION IN SEEKING TO ENFORCE AN ORDER THAT WAS APPEALED, OF WHICH THE COURT DID NOT HAVE JURISDICTION TO HEAR.

The Chancery Court did not err or exceed its jurisdiction in issuing the Writ of Habeas Corpus. The Appellant cannot have it both ways. She cannot claim that the Order is not a "final" order because she filed a Rule 59 and a Rule 60(b) Motion, while at the same time assert that the Trial Court lost jurisdiction because a day after she filed the Rule 59 and Rule 60(b) Motions she filed and perfected a Notice of Appeal. (R. 302, M.R.E. 45)

As previously noted in the Statement of The Case, the Court of Appeals dismissed the first appeal in this case for lack of appellate jurisdiction pursuant to M.R.A.P. 4(d) Wilson v. Mallett, 28 So.3d 669, (Miss. App. 2009) 2009 WL 3175908 (Cert. Denied) (No.2008-CA-01196). The Trial Court in a subsequent Order, filed October 13, 2008, after the hearing on the Petition for Habeas Corpus, found the Rule 59 and Rule 60(b) Motions to be moot because of the appeal by Ms. Wilson. (R. 338-340) However, the ruling from the Court of Appeals on October 6, 2009 dismissing the appeal, establishes that the issue is not moot. Since the holding by the Court of Appeals in Wilson v. Mallett I, no other order has been entered in the Chancery Court disposing of the Rule 59 and Rule 60(b) Motions.

The Appellant's argument that the Chancery Court did not have jurisdiction to issue the Writ of Habeas Corpus because the Agreed Order Modifying Custody was not a final/appealable Order is misplaced. In Weaver v. Parks, 947 So.2d 1009 (Miss. App. 2006), the Father, Weaver, entered into two (2) Temporary Agreed Orders with the minor child's Maternal Grandmother, Parks, establishing temporary visitation by the Father with the minor child, pending a hearing on the Father's Petition for Custody. Before a final hearing on the Petition for Custody, the Father left with the minor child. The Maternal Grandmother, Parks, filed a Petition for Habeas Corpus and Other Emergency Relief. The Chancellor entered an Order on Habeas Corpus and Writ of Assistance. The Temporary Agreed Order was not a final or appealable order. The Court in Weaver v. Parks noted in footnote 4 that the Habeas Corpus simply acknowledged what had been established in the Temporary Agreed Order. Weaver, 1015.

The basis for the issuance of a Writ of Habeas Corpus is set forth in M.C.A. § 11-43-1 which provides as follows:

§ 11-43-1. To what cases the writ extends.

> The Writ of Habeas Corpus shall extend to all cases of illegal confinement or detention by which any person is deprived of his liberty, or by which the rightful custody of any person is withheld from the person entitled thereto, except in the cases expressly excepted. (Emphasis Added)

The Code Section does not provide or require that "rightful custody" be pursuant to a final/appealable court order. Like the Court in Weaver v. Parks, id, the Chancellor simply acknowledged what had been established and agreed to between the parties pursuant to the Agreed Order Modifying Custody entered on July 2, 2008. The Court found that the issuance of the Writ of Habeas Corpus was proper and that the Appellee, Byron Keith Mallett, was entitled to physical custody of the minor child pursuant to the Agreed Order of July 2, 2008.

ISSUE II:

DID THE COURT ERR IN SEEKING TO ENFORCE AN ORDER WHICH APPELLANT ASSERTS WAS ON ITS FACE SUBJECT TO TWO INTERPRETATIONS AND FOR WHICH THERE WAS A MOTION PENDING BEFORE THE COURT ON JULY 7, 2008 FOR HEARING PURSUANT TO RULE 59 OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE.

The Appellant, Margie Edna (Galloway) Mallett Wilson, alleges that the Agreed Order Modifying Custody, dated July 2, 2008, is subject to two (2) interpretations and is, therefore, unenforceable. This is not the law, nor does the case of Morgan v. U.S. Fidelity & Guaranty Co., 191 So.2d 851 (Miss. 1966) support such a position. In Morgan, the issue was one of contempt, not the issuance of a Writ of Habeas Corpus. The Mississippi Supreme Court in Morgan, 854, found, "the decree did not order any particular defendant to do any specific act, nor did it refer to any specific obligation of the defendants." The Court in Morgan, 854, went on to hold, "Decrees ordering the extraordinary writ of injunction should state what the defendant must do or refrain from doing without reference to other documents and without necessity for interpretation of other documents." Morgan, decided in 1966, was a pre-Rules of Civil Procedure case. The requirements set forth for extraordinary writs of injunction in Morgan are similar to the requirements of the issuance of injunctions pursuant to M.R.C.P. 65.

In relationship to the case now before the Court, the requirements of Morgan, if they apply at all, are applicable to the issuance of the Writ of Habeas Corpus, not the Agreed Order Modifying Custody of July 2, 2008. Applying the Morgan standards to the Order and the Writ of Habeas Corpus, both, are specific as to the acts and obligations of all parties.

Additionally, while the Appellant, Margie Edna (Galloway) Mallett Wilson, claims the Agreed Order Modifying Custody of July 2, 2008 is subject to two (2) interpretations, she never, in pleadings or testimony, stated what her or the other interpretation was. The only interpretation of the Agreed Order modifying Custody as to the date of the exchange was from the Appellee, Byron Keith Mallett, that Ms. Wilson's eight (8) weeks was up on July 18, 2008. (T. 16-17, Calendar-Ex. 1)

Looking at other provisions of the Agreed Order Modifying Custody, in conjunction with the issue of custody, specifically, child support from Ms. Wilson to Mr. Mallett which began in July 2008, there can be only one interpretation. The Chancellor did not err in issuing the Writ of Habeas Corpus on July 21, 2008.

ISSUE III:

DID THE COURT ERR IN FAILING TO SET THE HABEAS CORPUS CAUSE IN THE HABEAS CORPUS COURT, INSTEAD OF CHANCERY WHERE SAME WAS APPARENTLY HEARD EX PARTE BY THE COURT ON THE MORNING OF JULY 21, 2008 BETWEEN 9:00 A.M. AND 11:00 A.M.

Where is a habeas corpus proceeding to be filed? M.C.A. §11-43-7 provides as follows:

> **§ 11-43-7. By whom granted.**
>
> The writ of habeas corpus may be granted by a judge of the Supreme Court, or a judge of the circuit or chancery court, in term time or in vacation, returnable before himself or another judge.

In addressing the jurisdiction of the chancery courts of The State of Mississippi, M.C.A. § 93-11-65 provides, in part, as follows:

> **§ 93-11-65. Custody and support of minor children; additional remedies; temporary support awarded pending determination of parentage.**
>
> (1)(a) In addition to the right to proceed under Section 93-5-23, Mississippi Code of 1972, and in addition to the remedy of habeas corpus in proper cases, and other existing remedies, the chancery court of the proper county shall have jurisdiction to entertain suits for the custody, care, support and maintenance of minor children and to hear and determine all such matters. (Emphasis Added)

As previously noted, in Weaver v. Parks, 947 So.2d 1009 (Miss. App. 2006), while a custody action was pending, the Maternal Grandmother, Parks, filed a Petition for Habeas Corpus in the same Chancery Court action wherein the custody proceeding was pending. The Chancery Court issued a Writ of Habeas Corpus based upon the temporary order pending in said matter.

In McMurry v. Sadler, 846 So.2d 240, 242 (Miss. App. 2002), the record reflects that the Father filed a Petition for Writ of Habeas Corpus in the Chancery Court requesting the immediate return of his son. The Chancery Court granted the Petition and entered the Writ , immediately returning his son to him.

In Pruitt v. Payne, 14 So.3d 806, 810 (Miss. App. 2009), the Father, Payne, filed a Petition for Writ of Habeas Corpus in the Chancery Court of Clarke County against the Step-Father, Pruitt, for the return of his children after the children's mother had died. The Court of appeals stated:

> This cause was initiated by Richard, who properly filed a petition for writ of habeas corpus with the Chancery Court to obtain custody of his minor children. (Emphasis Added)

The two (2) cases cited by the Appellant, Margie Edna (Galloway) Mallett Wilson, for the proposition that a special Court is required to hear habeas corpus proceedings, Fulton v. Fulton, 218 So.2d 866 (Miss. 1969) and Gray v. Gray, 83 So. 726 (Miss. 1920), are both in conflict with the more recent decisions of the Mississippi appellate courts as cited above. Additionally, both cases, Fulton and Gray, are pre-1972 Mississippi Code cases. M.C.A. §93-11-65 specifically provides that the Chancery Court has jurisdiction to hear habeas corpus proceedings involving custody of minor children.

ISSUE IV

DID THE CHANCELLOR ERR IN FAILING TO PROPERLY APPLY THE STATUTORY PROVISIONS OF A WRIT OF HABEAS CORPUS SO AS TO DEPRIVE MARGIE EDNA (GALLOWAY) MALLETT WILSON OF DUE PROCESS OF LAW.

The statutory requirements for habeas corpus proceedings are set forth in M.C.A. §11-43-1 et. seq. the statutory requirements for an application for a writ of habeas corpus are set for in M.C.A. §11-43-9, which provides as follows:

> **§11-43-9. How obtained.**
>
> Application for a writ of habeas corpus shall be by petition, in writing, sworn to by the person for whose relief it is intended, or by someone in his behalf, describing where and by whom he is deprived of liberty, and the facts and circumstances of the restraint, with the ground relied on for relief; and the application shall be made to the judge or chancellor of the district in which the relator is imprisoned, unless good cause be shown in the petition to the contrary. However, any petition filed by an inmate of any training school or hospital attacking his commitment for a claimed denial of a fundamental constitutional right under the Constitution of the state of Mississippi or of the United States which would affect his commitment shall be filed in a court of the county from which he was committed. And, if filed in any other court, the judge of that court shall, if he grants the writ, make it returnable to a court of the county from which the relator was committed; and in the case of a person committed by a youth court, not less than five (5) days' notice prior to hearing shall be given to the county attorney or district attorney of the county of commitment.

The Appellee, Byron Keith Mallett, complied with the provision of M.C.A. §11-43-9. He filed a sworn petition in writing, describing the deprivation of liberty (custody), the facts and circumstances , with grounds (R. 13, M.R.E. 13) relied on for relief, before a chancellor in the district. The application for writ of habeas corpus was proper.

The content, form, and requirements of service of the writ are contained in M.C.A. §11-43-17 which provides:

§11-43-17. Form and service of writ.

The writ may be in substance, as follows, to wit:
"The State of Mississippi, to _____:
"We command you to have the body of _____, by you detained, as it is said, before _____, a judge of our ____ court, at ____, forthwith (or on a given day), to do and receive what may be then and there considered concerning him. Witness my hand," etc.
And it may be served by such person as the judge granting it may direct, or by the sheriff or any constable, and it shall be served by the delivery of a true copy thereof to the person to whom it is directed, if to be found, it may be served by leaving a copy with any deputy or servant of the officer to whom it is directed, at the p[lace where the prisoner or other person is detained; and it shall be returned with an indorsement of service as in other cases. (Emphasis Added)

The Writ of Habeas Corpus and the Writ of Assistance issued in the Clerk's Office was in substance in compliance with M.C.A. §11-43-17. The Writ issued contained additional language as required by the Chancellor's Order on Petition for Writ of Habeas Corpus. (M.R.E. 16, 17) The statutes dealing with habeas corpus do not limit or restrict what the Court may include in its Order, nor do the statutes limit what may be included in the Writ itself. The statutes set forth the minimum requirements.

The Appellant, Margie Edna (Galloway) Mallett Wilson, complains that the Court placed in the Order that the child be delivered to the Appellee, Byron Keith Mallett, pending the hearing on August 18, 2008, as opposed to delivering the child to the Court. M.C.A. §11-43-35 Provides as follows:

§11-43-35. Temporary Orders.

The Court or judge may make any temporary order in the cause during the progress of the proceedings that may be right and proper, or that justice may require.

As the Court has the authority to make any temporary order during the progress of the proceedings, it was right and proper for the Court to place the minor child with the Appellee, Byron Keith Mallett, pending the hearing in this cause.

At the hearing in this cause, the Court's obligation was to award custody to the party entitled thereto. M.C.A. §11-43-33 provides:

> **§11-43-33. The trial.**
>
> The judge or chancellor before whom the prisoner or other person may be brought, shall inquire into the cause of imprisonment or detention, and shall either discharge, commit, admit to bail, or remand the prisoner, or award the custody to the party entitled thereto, as the law and the evidence shall require; and may also award costs and charges, for or against either party, as may seem right. And the clerk of the court in whose office the proceedings may be field, shall issue execution for the costs and charges so awarded, against the party bound therefor. But the judge may continue the trial from day to day as the case may require. (Emphasis Added)

Contrary to the allegations of the Appellant, Margie Edna (Galloway) Mallett Wilson, that she was not served with a copy of the Writ of Habeas Corpus (R. 85), Commander Frank Herring testified that he placed the Order and Writ in Ms. Wilson's hand on July 21, 2008. (T. 49-51) Further, Commander Herring testified that he made the returns on the Writ and Order and why they were in not the Court file, he did not know. He completed a copy of the returns which were subsequently filed with the Court. (R. 332, 333)

The real issue in controversy which initiated the first appeal in Wilson v. Mallett I and which is also the core issue in the present appeal, is when did the Appellant's eight (8) weeks of summer visitation with the minor child begin and end in the summer of 2008. We are now past the summers of 2008, 2009, and halfway through the summer

of 2010. As the Chancellor noted after the hearing on August 2008 when she took the matter under advisement, that the Parties were operating under the agreement and the child is going back and forth. (T. 98) Additionally, the Docket Page from the DeSoto Chancery Court Clerk's Office indicates that at least from August 22, 2008 through November 2009, no contempt or modification pleadings have been filed. (R. 11-12)

The Mississippi Supreme Court in J.E.W. v. T.G.S., 935 So.2d 954, 959-960, (Miss. 2006) with respect to ruling on moot issues stated as follows:

> ¶ 14. This Court has stated: "[c]ases in which an actual controversy existed at trial but the controversy has expired at the time of review, become moot. We have held that the review procedure should not be allowed for the purpose of settling abstract or academic questions, and that we have no power to issue advisory opinions." Monaghan v. Blue Bell, Inc., 393 So.2d 466, 466-67 (Miss. 1980) (internal citations omitted). Monaghan, this Court was called on to decide the validity of a trial court's order enjoining a party for one year from working for his former employer's competitor. However, by the time the case was submitted to this Court on briefs and oral argument, the one-year period of injunction had expired, thus, the issue was moot. We will not adjudicate moot questions. Id.; City of Madison v. Bryan, 763 So.2d 162, 166 (Miss. 2000).
>
> ¶ 15. This principle of mootness applies in child custody cases as well. In an earlier child custody appeal which this court dismissed as moot, the trial court had initially entered an order giving custody of the child in a divorce proceeding to the father, but then later entered a decree modifying that order, awarding a two-month period of custody to the mother, who was to redeliver the child to the father at the end of that time. Campbell v. Lovgren, 171 Miss. 385, 157 So. 901 (1934). This Court was presented with the issue of whether the later decree modifying the first order should stand, but never directly addressed that issue because the two-month period had ended. "the period of time during which the custody of the child was changed by the decree appealed from having expired, the questions presented by the record have become purely academic, and therefore no actual controversy is presented for the decision of this court, from which it follows that the appeal should be dismissed." Id. at 901 (citation omitted). In Savell v. Savell, 206 Miss 55, 56-57, 39 So.2d 532, (1949), the trial

> court had directed that the children, who were in custody of their mother following a divorce, be placed in certain boarding schools during the scholastic year, and that the father pay five times per month the mother was to pay. The children were to be returned to the mother for six weeks, and then transferred to the custody of the father for six weeks. Id. the husband appealed, and this Court relied on Campbell to dismiss the appeal as moot, as the appeal took place after both the school year and the two six week periods of custody had ended. Id. (Emphasis Added)

The actual issue in controversy, the exchange of custody in the summer of 2008 has long since passed and the issue is now moot.

CONCLUSION

Based upon the above and foregoing facts and argument, the Appellee, Byron Keith Mallett, asserts that the Chancellor did not err in the issuance of the Writ of Habeas Corpus.

Respectfully Submitted,

Steven G. Roberts
Attorney for Appellee
6263 Poplar Avenue, Suite 1032
Memphis, Tennessee 38119
901/683-3111

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 1st day of July, 2010.

Steven G. Roberts