

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MARGIE EDNA (GALLOWAY) MALLETT WILSON

APPELLANT

V.

SUPREME COURT CASE NO.: 2009-CA-01607

BYRON KEITH MALLETT

APPELLEE

APPELLANT'S BRIEF

**APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY,
MISSISSIPPI
AND HABEAS CORPUS COURT OF DESOTO COUNTY, MISSISSIPPI**

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualification or recusal.

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The Appellee:

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STATEMENT OF THE ISSUES

The issues presented by the Appellant in this appeal are:

ISSUE I: The Court erred exceeding its jurisdiction in seeking to enforce an Order that was appealed, of which the Court did not have jurisdiction to hear.

ISSUE II: The Court erred in seeking to enforce an Order which on its face is subject to two interpretations and was pending before the Court on July 7, 2008 for hearing pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. The Order as written is unenforceable in that it requires that before a person may be held in contempt of a court judgment, the judgment must "be complete within itself--containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree...." Morgan v. U.S. Fidelity & Guaranty Co., 191 So.2d 851, 854 (Miss. 1966), quoting Griffith, supra, §. 625; see also, Miss. R. Civ. P. 65(d)(2); Hall v. Wood, 443 So.2d 834, 841-42 (Miss.1983); Aldridge v. Parr, 396 So.2d 1027 (Miss.1981); Webb v. Webb, 391 So.2d 981 (Miss. 1980).

ISSUE III. The Court erred 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. Fulton v Fulton, 218 So2d 866 (Miss. 1969).

ISSUE IV. The Chancellor erred 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

A. Nature Of The Case, Course Of The Proceedings And Disposition In The Court Below *

This is an appeal from the Habeas Corpus and Chancery Court of DeSoto County, Mississippi from Habeas Corpus proceeding an Agreed Order Modifying Custody entered on the 2nd day of July , 2008; A Motion to Set Aside Judgment Pursuant to Rule 59 and in the Alternative Granting Relief from Judgment Pursuant to Rule 60(b) filed July 7, 2008; Motion for Emergency Hearing filed on July 8, 2008; Notice of Appeal filed on July 8, 2008; a Petition for Writ of Habeas Corpus filed on July 21, 2008; an Order on Petition for Writ of Habeas Corpus, Writ of Habeas Corpus and Writ of Assistance, filed on July 21, 2008; Response and Motion to Set Aside Petition for Writ of Habeas Corpus and Writ of Habeas Corpus and/or Writ of Assistance filed on August 14, 2008; Request for the Court to Make Separate Findings of Facts and Conclusions of Law filed on August 15, 2008; a Motion Requesting the Court to Render an Opinion on the Habeas Corpus Proceeding Held on Friday, August 22, 2008 by Chancellor Vicki B. Cobb; and an Order entered on October 6, 2009, filed on October 14, 2009 by Chancellor Vicki B. Cobb which held "that the Writ of Habeas Corpus was properly granted". That the Appellant, Margie Edna (Galloway) Mallett Wilson, being aggrieved of same and the denial of due process by the Court to her perfected an Appeal to the Supreme Court on the Habeas Corpus proceeding on September 29, 2009.

*** The following abbreviations shall apply as used herein for reference: CP means Clerk's Papers. TR means transcript. MRE means mandatory record excerpts.**

B. STATEMENT OF THE FACTS AND CIRCUMSTANCES OF THE CASE

The case begins where the other ends. On July 2, 2008, an Agreed Order Modifying Custody was entered in the Chancery Court of DeSoto County, Mississippi signed by the parties and their attorneys and approved by the Chancellor. (CP 154, MRE 36) No testimony was taken or received, nor is there any transcript of same.

That on the 7th day of July, 2008, 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 was filed by Margie Edna (Galloway) Mallett Wilson. Attaching therewith Exhibits "A" which was the Court Agreed Order of Modification , and Exhibit "B", which was a letter from L. Anne Jackson-Hodum, attorney for the Appellee, Byron Keith Mallett, Sr., dated July 3rd, 2008, one day after the Agreed Order was entered, filed by the Appellant, Margie Edna Galloway Mallett Wilson . A copy being served upon the Appellee's attorney via mail and telefax receipt attached to the Motion. (CP 279-280, MRE 22, 23)

On July 8, 2008, a Motion for Emergency Hearing was filed by the Appellant, Margie Edna Galloway Mallett Wilson, requesting an emergency hearing by the Chancellor to set a hearing of the 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 filed with attorney's affidavit being attached as to what he believed to be the basis for the emergency motion on the part of the Appellant, Margie Edna Galloway Mallett Wilson. (CP 280, MRE 23)

On July 8, 2008, because the Chancellor was holding Court on that particular date in another portion of the Third Chancery Court District, attorney for Appellant, Margie

Edna Galloway Mallett Wilson, attempted to communicate with the Chancellor through the Court Administrator. Copies of the Motions and attachments were mailed and telefaxed to the Court Administrator by attorney for Appellant, Margie Edna Galloway Mallett Wilson . A copy of the letter was sent to the Court Administrator requesting a hearing be set on either the 9th or 11th of July, 2008. On the afternoon , of July 8th , 2008, the Court Administrator telephoned attorney for Appellant, Margie Edna Galloway Mallett Wilson, advising that she had discussed setting the matter on the docket for hearing with the Chancellor. The Chancellor advising through the Court Administrator, that she had reviewed the Motions, documentation, and correspondence, and felt that the matter was not an emergency, but the attorney for Appellant, Margie Edna Galloway Mallett Wilson, was free to present same on the morning of July 9, 2008 before the Court in Winona . (The Court in Winona is located approximately one hundred (100) miles from the DeSoto County Courthouse in Hernando). The Chancellor also advised through the Court Administrator that the Motion was not a Motion pursuant to Rule 59, 60, and 62 of the Mississippi Rules of Civil Procedure, that could not be heard at the next regular Ex Parte Term on August 18, 2008, in DeSoto County, Mississippi. (A period of time of approximately a month and a half after the Agreed Order was entered, and over a month after the Motion for Reconsideration was filed by the Appellant, Margie Edna Galloway Mallett Wilson). By letter dated July 8, 2008, attorney for the Appellant, Margie Edna Galloway Mallett Wilson, basically set out the circumstances of the conversation via Court Administrator and re-noticed same for hearing on the 18th of August, 2008, pursuant to the Chancellor's instruction . A copy of the letter dated July 8, 2008 to the

Chancellor from Attorney for Appellant, Margie Edna Galloway Mallett Wilson, was made a part of the Court Record . (CP 300, MRE 43)

Being aggrieved of the refusal on the part of the Chancellor to even grant a hearing before August 18, 2008 on the 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 and the Motion for Emergency Hearing filed the Appellant, Margie Edna Galloway Mallett Wilson, the Appellant, Margie Edna Galloway Mallett Wilson, filed a Notice of Appeal and perfected same to the Mississippi Supreme Court on July 8, 2008. (CP 302, MRE 45) The Court of Appeals held in the case of Wilson v Mallett, ____ So2d _____ 2009 WL 3175908 (Miss. App. 2009) that mother's Motion to Set Aside Judgment rendered the Judgment non-final, precluding review. Appeal dismissed.

On July 21, 2008 at 4:02 P.M. a Petition for Writ of Habeas Corpus was filed by L. Anne Jackson-Hodum , attorney for the Respondent/Counter- Petitioner, Byron Keith Mallett, under the same cause number with the Clerk ,at the bottom of the Petition was marked "Filed 7-21-08 Vicki B. Cobb Chancellor. (CP 13, MRE 13)

On July 21, 2008 at 4:03 P.M. An Order on Petition for Writ of Habeas Corpus entered by Chancellor Vicki B. Cobb was filed by L. Anne Jackson-Hodum, attorney for the Respondent/ Counter- Petitioner. The Order was signed by Chancellor Vicki B. Cobb, and dated 7-21-08 11:10 A.M. (CP 16, MRE 16)

On July 21, 2008 at 4:05 P.M. a "Writ of Habeas Corpus and Writ of Assistance to Margie Edna (Galloway) Mallett Wilson /Sheriff of DeSoto County, Mississippi issued and returned to Attorney L. Anne Jackson-Hodum, by the Clerk. (CP 224, MRE 17)

The Petition for Habeas Corpus was filed in the cause as the divorce, and was not assigned a new number or filing, which is required to be done in the Habeas Corpus Court. (CP 13, MRE 13)

The Petition for Writ of Habeas Corpus filed by the Respondent /Counter-Petitioner , Byron Keith Mallett, Sr., with the Court on July 21, 2008 stated as his basis for custody the following: (CP 13, MRE 13)

"2. The Counter - Petitioner is the legal custodian and natural father of the minor child, Byron Keith Mallett , Jr. , dob 2/10/00, by virtue of the fact that the Counter-Petitioner was awarded physical custody of the minor child pursuant to an Agreed Order on July 2, 2008.

3. That despite the Order of the Court, Counter-Respondent, Margie Edna Galloway Mallett Wilson , is refusing to hand over the minor child to the Counter- Petitioner. Counter- Petitioner has asked for the child several times but the Counter-Respondent refuses to go by the Order and has stated that it will start next year.

4. That the Counter-Respondent , Margie Edna Galloway Mallett Wilson , has wilfully, wrongfully and unlawfully refused to permit Byron Keith Mallett,, to exercise custody of said child as provided by law, and is unlawfully restraining the child and depriving him of his liberty and is unlawfully withholding the custody and control from Byron Keith Mallett.

5. Byron Keith Mallett, has demanded that said child, Byron Keith Mallett, Jr. , be surrendered him by the Counter-Respondent , Margie Edna Galloway Mallett Wilson , in order that he might assume control , custody, and care of the child to which he is entitled and to which he is willing and able to exercise. Notwithstanding his demands , Counter-Respondent , Margie Edna Galloway Mallett Wilson , has wilfully refused to surrender the child to the custody of the Counter- Petitioner , Byron Keith Mallett, and has stated that she illegally intends to deprive him of said custody.

6. Byron Keith Mallett, states and believes that it would be in the manifest best interest for the minor child to be returned to him immediately as he is the custodial natural parent and has neither been declared unfit nor has abandoned the child.

7. That the Counter-Respondent has no cause or justification for withholding the minor child from the custody and control of the Counter-Petitioner .”

The Order on Petition for Writ of Habeas Corpus issued by the Chancellor on July 21, 2008, at 11:10 A.M. ordered that the custody of the child be delivered to the Counter- Petitioner, Byron Keith Mallett, Sr., and not to the Court for hearing . The Writ of Habeas Corpus issued by the Clerk on July 21, 2008, directed that the child be placed in the custody of Byron Keith Mallett, Sr., not the Court. And the officers of the Sheriff's Department were directed to assist Byron Keith Mallett, Sr. in obtaining custody of Byron Keith Mallett, Jr. (TR 48, 49, 52, 53 , 55, 56, CP 16, MRE 16)

That no writ was ever served on the Counter-Respondent, Margie Edna Galloway Mallett Wilson, by the DeSoto County, Mississippi Sheriff's Department on July 21, 2008, when they burst into her house with guns drawn and laser lights pointing all over the place that was occupied by the Counter-Respondent, Margie Edna Galloway Mallett Wilson; her son, Byron Keith Mallett, Jr.; her daughter, another small child, and her friend. Taking her child, Byron Keith Mallett, Jr. , and delivering him to Byron Keith Mallett, Sr. as ordered by this Court on July 21, 2008. (TR 50) This testimony was corroborated by Jessica Holland, the daughter of Margie Edna (Galloway) Mallett Wilson, who was present at the time the deputies took the child from her house. (TR73-81)

The Sheriff's Department never filed a return on the Writ of Habeas Corpus, under the pretext that they lost it. (Herring TR 56)

The hearing was held on the 21st day of July, 2008, wherein lie the following issues:

(A) In exceeding its jurisdiction in seeking to enforce an order that was appealed, and which the Court did not have jurisdiction to hear.

(B) In seeking to enforce an order which on its face is subject to two interpretations and was pending before the Court on July 7, 2008, for hearing pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. Order as written is unenforceable in that it requires that before a person may be held in contempt of a court judgment, the judgment must "be complete within itself--containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree...." Morgan v. U.S. Fidelity & Guaranty Co., 191 So.2d 851, 854 (Miss. 1966), quoting Griffith, supra, §. 625; see also, Miss. R. Civ. P. 65(d)(2); Hall v. Wood, 443 So.2d 834, 841-42 (Miss.1983); Aldridge v. Parr, 396 So.2d 1027 (Miss.1981); Webb v. Webb, 391 So.2d 981 (Miss. 1980).

(C) 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. Fulton v Fulton, 218 So2d 866 (Miss. 1969).

(D) In making the Writ of Habeas Corpus and the custody of the child returnable to Byron Keith Mallett, Sr. instead of the Court, in violation of the law.

(E) In modifying the Order without granting a right on the part of Margie Edna Galloway Mallett Wilson, to be heard in open Court on the Writ of Habeas Corpus proceeding, and the Motion for Reconsideration filed on July 7, 2008, until August 18,

2008. Yet at the same time granting a Writ of Habeas Corpus awarding custody of the parties' child to the father, Byron Keith Mallett, Sr. without benefit of hearing or notice to Margie Edna Galloway Mallett Wilson and her attorney until several days after the action by the Court .

The facts are undisputed that no notice was ever given to Margie Edna (Galloway) Mallett Wilson and her attorney of record , HR Garner, of the hearing that was held on the Habeas Corpus proceeding before Chancellor Cobb on the morning of July 21, 2008, prior to the hearing. Nor is there any transcript of any testimony taken of any witness. Apparently the only testimony given at the hearing was that of Byron Keith Mallett. (TR 33, 34,40)

That the following witnesses testified for in behalf of Byron Keith Mallett :

Byron Keith Mallett (TR12 -44) who admitted that the custody order was subject to two interpretations by Margie Edna (Galloway) Mallett Wilson and himself . (TR 32) That he was the only witness at the hearing on July 21, 2008 in Coffeerville . That he was present when the Deputies delivered the child to him after taking the child from the home of Margie Edna (Galloway) Mallett Wilson. (TR 41-42)

Frank Herring (TR44-64) - was a DeSoto County Deputy Sheriff whose duty was to serve the Writ of Habeas Corpus on Margie Edna (Galloway) Mallett Wilson and take the child and deliver him to his father, Byron Keith Mallett, on July 21, 2008. He admitted that he had served a Writ of Habeas Corpus before. (TR 53) He admitted that he delivered the child to Byron Keith Mallett, and not the Court. (TR 55- 56) He alleged that he served the Writ upon Margie Edna (Galloway) Mallett Wilson, but he failed to ever make a return on same or file it with the Court.(TR 56) He testified that he had lost

it. (TR 56) He testified that he and six Deputy Sheriffs went to the home of Margie Edna (Galloway) Mallett Wilson, where two minor children were present, the daughter of Margie Edna (Galloway) Mallett Wilson, the friend of Margie Edna (Galloway) Mallett Wilson, and Margie Edna (Galloway) Mallett Wilson. (TR 58-59) He denied that the Deputies had their pistols drawn, but testified that they had their taser guns. (TR 57-58)

Marlyss Mallett (TR 64- 73) testified that Byron Keith Mallett had visited with his son and vice versa since July 2, 2008. (TR 70)

The following witnesses testified for in and in behalf of Margie Edna (Galloway) Mallett Wilson:

Jessica Holland (TR 73-81): She testified that she was the daughter of Margie Edna (Galloway) Mallett Wilson, and was visiting her mother, Margie Edna (Galloway) Mallett Wilson, at about 5:30 P.M. on Monday, July 21, 2008. (TR 74-75) That the Deputies rushed into the house, with guns drawn, and that they found the two minor male children hiding in a closet. (Tr 75) That they delivered the child to Byron Keith Mallett. That the Deputy Sheriff, Frank Herring, did not at any time ever serve a paper (Writ of Habeas Corpus) on her Mother, Margie Edna (Galloway) Mallett Wilson, nor did he leave any documents of any kind with her on July 21, 2008. (TR 76)

Margie Edna (Galloway) Mallett Wilson (TR 81- 96): She testified that a Motion for Rehearing was pending on July 21, 2008 and an Appeal to the Mississippi Supreme Court had been perfected by her and her attorney. (TR 81-82) She testified that she was in her home on the evening of July 21, 2008, at 5:30 P.M. That also present were her daughter, Jessica Holland; her friend, Jeremy; her son, Byron Mallett, and another child visiting. (82-83) She heard beating on the door front and back. (TR 83-84) She

and her daughter, Jessica Holland, went to the front door and saw several officers were already in the house, having come in through the back door. (TR 84-85) All Deputies were yelling that they were from the Sheriff's Department. They had weapons drawn with laser lights across her chest. She was afraid and became upset. (TR 84-85) One of the officers was yelling that he had a Court Order to get her son, Byron, Jr., which he was holding high in the air. (TR 85) She asked to see the paper and the officer refused to let her see the paper. He refused to tell her what it was, he said it was an order to get her son, Byron. She asked for a copy of the Order, but the officer told her that he did not have two copies and that he could not give her his copy. (TR 85-86) All officers were talking to her at once asking her where the child was and who else was in the house. (TR 86) She testified that she was present when the officers found Byron, Jr., and his friend. That when the officers kicked open the closet door with their guns pointed inside the closet, they found the two frightened little boys, one of whom was Byron Keith Mallett, Jr. (TR 88-89) Byron ran over to Margie and other ran over to her friend, Jeremy. (TR 89) She had to explain to the child that the policemen had come to take him to his father, Byron Keith Mallett. She got a few clothes for the child. The officers left with the child, Byron. (TR 89-90)

Margie testified that she called her attorney, H. R. Garner, after the officers left with the child late on the afternoon of July 21, 2008. (TR 91)

She testified the first time she ever saw the Petition for Writ of Habeas Corpus, Order or any other papers was at least two days later, when her attorney sent her a copy. (TR 91)

She testified that the Order of July 2, 2008, was in conflict as to its meaning by Byron Keith Mallett and herself. (TR 92)

On cross examination she once again testified that the officers had their guns drawn. (TR 95). She denied telling the child to hide in the closet. (TR 95)

The Court then took the matter under advisement (TR 103-104) and did not rule on same until October 6, 2009, when she held that “the Writ of Habeas Corpus was properly granted”, and it was filed on October 14, 2009. (CP 378, MRE 61)

SUMMARY OF THE ARGUMENT

The argument of the Appellant, Margie Edna (Galloway) Mallett Wilson, is summarized as follows:

ISSUE I: The Court erred in exceeding its jurisdiction in seeking to enforce an order that was appealed, of which the Court did not have jurisdiction to hear.

The basis of this argument is that the Order upon which the Petition for Writ of Habeas Corpus was predicated, was an order granting Byron Keith Mallett, Sr. custody of Byron Keith Mallett, Jr., entered on July 2, 2008. From which a Motion to Set aside, Etc. was pending, and was subsequently appealed to the Mississippi Supreme Court. Therefore, it was not a final Order awarding Byron Keith Mallett custody of his son, and therefore, the Habeas Corpus proceeding was predicated on an Order that was not final and which the Chancellor held she did not have jurisdiction to modify. (TR 5)

ISSUE II: The Court erred in seeking to enforce an Order which on its face is subject to two interpretations and was pending before the Court on July 7, 2008 for hearing pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. The Order as written is unenforceable in that it requires that before a person may be held in contempt of a court judgment, the judgment must "be complete within itself--containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree...." Morgan v. U.S. Fidelity & Guaranty Co., 191 So.2d 851, 854 (Miss. 1966), quoting Griffith, supra, §. 625; see also, Miss. R. Civ. P. 65(d)(2); Hall v. Wood, 443 So.2d 834, 841-42 (Miss.1983); Aldridge v. Parr, 396 So.2d 1027 (Miss.1981); Webb v. Webb, 391 So.2d 981 (Miss. 1980).

The argument is presented that the Order of July 2, 2008, was not complete within itself. That even the parties could not agree upon the meaning of the Order between themselves. That the Petition for Writ of Habeas Corpus was predicated upon the Order of July 2, 2008, which was unenforceable as to its meaning.

ISSUE III. The Court erred 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. Fulton v. Fulton, 218 So2d 866 (Miss. 1969) .

The argument is made that a Habeas Corpus proceeding is statutory outside the Rules of Civil Procedure, see Rule 81, and is governed by statute. That the Chancellor treated the Habeas Corpus proceeding as part of the Chancery Court proceeding, when in reality it was a separate and distinct proceeding.

ISSUE IV. The Chancellor erred 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 argument is made that the Chancellor failed to follow the statutes governing Habeas Corpus proceedings which require strict compliance with same. That by her failure to follow the law and apply same, that the entire Habeas Corpus proceeding should be set aside, reversed and rendered, as same deprived Margie Edna (Galloway) Mallett Wilson of due process of law by the Chancellor failing to apply the law as written.

ARGUMENT

A. STANDARD OF REVIEW

The standard of review for factual determinations made by a trial judge sitting without a jury is the substantial evidence standard. Hill v. Thompson, 564 So.2d 1, 10 (Miss.1989); UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc., 525 So.2d 746, 753 (Miss.1987). We will not disturb the findings of a Chancellor when they are supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. Herring Gas Co. v. Whiddon, 616 So.2d 892, 894 (Miss.1993).

B. ISSUE I: The Court erred exceeding its jurisdiction in seeking to enforce an order that was appealed, of which the Court did not have jurisdiction to hear.

Custody Order of July 2, 2008, was not a final order due to the fact that there was pending 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 filed by the Appellant, Margie Edna (Galloway) Mallett Wilson . (CP 279-280, MRE 22-23) That also filed and perfected was an Appeal to the Mississippi Supreme Court (CP 281, 302, MRE 24, 45) all pending at the time the Petition for Writ of Habeas Corpus was filed with the Court on July 21, 2008 in Coffeeville with the Chancellor.(CP 13, MRE 13) The Petition filed with the Court in paragraph 2 stated as follows:

“2. The Counter Petitioner(Byron Keith Mallett) is the legal custodian and natural father of the minor child, Byron Keith Mallett, Jr. , dob 2/10/00, **by virtue of the fact that the Counter-Petitioner (Byron Keith Mallett) was awarded physical custody of the minor child pursuant to an Agreed Order of July 2, 2008.”**

That the Order upon which the Petition for Habeas Corpus of July 2, 2008, was not a final order with the filing of the notice of appeal perfecting the Appeal and divesting the Chancery Court of Jurisdiction . Martin v State, 732 So2d 847, 851 (Miss. 1998) . See Mississippi Rules of Appellate Procedure Rule 13. Further, at the time the Motion for Reconsideration was filed and not heard by the Chancellor, and the Appeal had been perfected to the Mississippi Supreme Court, the Chancellor was without justification to hear the Motion . See Depreo v State, 407 So2d 102 (Miss. 1981).

Habeas Corpus is set forth under the provisions of Miss. Code Ann. § 11-43-1 to 11-43-55 (1972 as amended).

Under the provisions of Miss. Code Ann. § 11-43-1 (1972 as amended) Only such defects on face of judgment may be made a basis of attack by Habeas Corpus under Mississippi jurisprudence . Harvey v State of Miss, 340 F2d 263 C . A. 5 (Miss. 1965). An aggrieved party may resort to Habeas Corpus to reverse judgment or proceedings void on their face and subject to collateral attack. Kelly v Douglas, 164 Miss. 153, 144 So 237 (Miss. 1932) See also, Krohn v Miguez, 274 So2d 654 (Miss. 1973) The Supreme Court has held that where divorce decree awarded custody of children to wife, and husband later took children without permission of wife who sued out Writ of Habeas Corpus, trial court's refusal to give controlling effect to prior decree was error since husband could not use Habeas Corpus proceeding as a device to amend existing decree. Hinman v Craft, 204 Miss. 568, 37 So2d 770 (1948).

In the case of Fulton v Fulton, 218 So2d 866 (Miss. 1969), it was held that where a father had been granted custody by a divorce decree, made arrangements with wife to take care of children while away working in another city, and the wife's subsequent

refusal to give up children did not amount to wrongful withholding of children and did not entitle father to a Habeas Corpus decree to obtain custody of children.

Fulton v Fulton, Supra further held that a Petition Requesting Writ of Habeas Corpus is not a Chancery Court proceeding; rather a Habeas Corpus proceeding is a separate Court and is to be distinguished from Chancery Court or Circuit Court and is organized when a judge issues an Order for hearing on a Writ of Habeas Corpus returnable before himself or another judge.

The Chancellor, herself, held that it did not have jurisdiction in the matter once the Appeal was perfected to the Mississippi Supreme Court . (TR.7)

The entire Petition for Writ of Habeas Corpus was predicated on the Order of July 2, 2008, awarding Byron Keith Mallett custody of Byron Keith Mallett , Jr., the very Order that was the basis for filing a Motion to Set Aside and perfecting an Appeal to the Mississippi Supreme Court, was before the Court on the date of the Ex Parte Hearing on the Petition for Habeas Corpus on July 21, 2008.

That the Chancellor did not have jurisdiction to grant and hear the Habeas Corpus which was predicated upon an order that was not final .

C. ISSUE II: The Court erred in seeking to enforce an Order which on its face is subject to two interpretations and was pending before the Court on July 7, 2008, for hearing pursuant to Rule 59 of the Mississippi Rules of Civil Procedure. The Order as written is unenforceable in that it requires that before a person may be held in contempt of a court judgment, the judgment must "be complete within itself--containing no extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning. Nor should a final decree leave open any judicial question to be determined by others, whether those others be the parties or be the officers charged with execution of the decree...." Morgan v. U.S. Fidelity & Guaranty Co., 191 So.2d 851, 854 (Miss. 1966), quoting Griffith, supra, §. 625; see also, Miss. R. Civ. P. 65(d)(2); Hall v. Wood, 443 So.2d 834, 841-42 (Miss.1983); Aldridge v. Parr, 396 So.2d 1027 (Miss.1981); Webb v. Webb, 391 So.2d 981 (Miss. 1980).

The Order of July 2, 2008, which the Petition for Issuance of Writ of Habeas Corpus was predicated upon two interpretations by the parties themselves. Byron Keith Mallett (TR 19, 29, See Proffered Testimony TR 29-30) Byron Keith Mallett (TR 32-33).

Therefore as it written on its face was incomplete, the only way that the Order of July 2, 2009 could have been understood was a reference to extraneous references, leaving open no matter or description or designation out of which contention may arise as to the meaning.

The Order of July 2, 2008, was unenforceable as written, and therefore, not a sound basis upon which to have issued a writ of habeas corpus for the custody of a child.

D. ISSUE III. The Court erred 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. Fulton v Fulton, 218 So2d 866 (Miss. 1969).

A Habeas Corpus Court is a special Court convened to try a single cause, and when its final judgment is rendered, its functions and powers wholly cease. Nor may it by special order prolong its powers and jurisdiction. Gray v. Gray, 121 Miss. 541, 83 So2d 726 (1920) See Also *Bunkley and Morse's Amis, Divorce and Separation in Mississippi* Section 8.13.

E. ISSUE IV. The Chancellor erred 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.

Proceedings pertaining to the Writ of Habeas Corpus are special proceedings and fall out outside the provisions of Rule 81 as to the applicability of civil rules and **are generally governed by statutory procedures. See Rule 81 (a) (1) of the Mississippi Rules of Civil Procedure.**

Habeas Corpus is set forth under the provisions of Miss. Code Ann. § 11-43-1 to 11-43-55 (1972 as amended).

Under the provisions of Miss. Code Ann. § 11-43-1 (1972 as amended), only such defects on the face of a judgment may be made a basis of attack by Habeas Corpus under Mississippi jurisprudence. Harvey v State of Miss., 340 F2d 263 C. A. 5 (Miss. 1965). An aggrieved party may resort to Habeas Corpus to reverse judgment or proceedings void on their face and subject to collateral attack. Kelly v Douglas, 164 Miss. 153, 144 So 237 (Miss. 1932). See also, Krohn v Miguez, 274 So2d 654 (Miss. 1973). The Supreme Court has held that where divorce decree awarded custody of children to wife, and husband later took children without permission of wife who sued out Writ of Habeas Corpus, trial Court's refusal to give controlling effect to prior decree was error since husband could not use Habeas Corpus proceeding as a device to amend existing decree. Hinman v Craft, 204 Miss 568, 37 So2d 770 (1948).

In the case of Fulton v Fulton, 218 So2d 866 (Miss. 1969) it was held that a Petition Requesting Writ of Habeas Corpus is not a Chancery Court proceeding; rather a Habeas Corpus proceeding is a separate court and is to be distinguished from Chancery Court or Circuit Court and is organized when a judge issues an Order for hearing on a Writ of Habeas Corpus returnable before himself or another judge.

Miss. Code Ann. § 11-43-9 provides for the procedure for obtaining a Writ of Habeas Corpus. Set forth in pertinent parts as follows:

“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. .." See Logan v Rankin, 230 Miss. 749 , 94 So2d 330 (1957)

Miss. Code Ann. § 11-43-15 (1972 as amended) sets forth what the Order to issue writ as follows:

"The judge granting the writ may order it to be issued by the clerk of the supreme court, or of any circuit or chancery court, who shall immediately issue it on receiving the order; or, when not convenient to a clerk, the judge himself shall issue the writ. Any judge or chancellor who shall wilfully refuse or neglect to grant, or to issue and try, the writ of habeas corpus, when required by law to do so, shall be guilty of a high misdemeanor in office, and any clerk who shall not, when ordered, immediately issue the writ, and other process, shall be liable, on conviction thereof, to be removed from office; and the judge or clerk shall, in case of such neglect or refusal, be liable, civilly, to the party aggrieved."

Miss. Code Ann. § 11-43-19 (1972) provides for taking of a person as follows

"When it shall be shown to the judge to whom application is made for the writ, that there is reasonable ground to apprehend that the person in whose behalf the writ is applied for will be concealed or removed so as not to be brought up with the writ, it shall be the duty of the judge to order or issue the writ directed to the sheriff or other officer or person designated to execute it, commanding him to take the body of the person to be relieved by the writ, and bring him forthwith before the judge, and to summon the person alleged to have illegally detained him; in which case the form of the writ shall be, in substance, as follows, to wit:

"The State of Mississippi.

"To the sheriff or any lawful officer of _____ county:

"We command you to take and have the body of _____ restrained of his liberty, it is said, by _____, before _____, a judge of our _____ court, at _____, forthwith, to do and receive what shall then be considered; and do you summon the said _____ to appear, then and there to show the cause of detaining said _____; and have you then and there this writ, with your proceedings indorsed thereon. Witness my hand," etc.

The writ shall be executed according to its tenor and effect, and returned as other writs."

The Order on Petition for Writ of Habeas Corpus issued by the Chancellor on July 21, 2008, at 11:10 A.M. ordered that the custody of the child be delivered to the Counter- Petitioner, Byron Keith Mallett, Sr., and not to the Court for hearing . The Writ of Habeas Corpus issued by the Clerk on July 21, 2008, directed that the child be placed in the custody of Byron Keith Mallett, Sr. And the officers of the Sheriff's Department were directed to assist Byron Keith Mallett, Sr. obtaining custody of Byron Keith Mallett, Jr.

That no writ was ever served on the Counter-Respondent, Margie Edna Galloway Mallett Wilson , by the DeSoto County, Mississippi Sheriff's Department on July 21, 2008, when the burst into her house with guns drawn and laser lights pointing all over the place that was occupied by the Counter-Respondent, Margie Edna Galloway Mallett Wilson; her son, Byron Keith Mallett, Jr.; her daughter, another small child, and her friend. Taking her child, Byron Keith Mallett, Jr., and delivering him to Byron Keith Mallett, Sr. as ordered by this Court on July 21, 2008.

The Petition for Writ of Habeas Corpus relies for its basis on an order that was not final. The only basis for the writ being issued was that Byron Keith Mallett was entitled to immediate custody of Byron Keith Mallett ,Jr. based upon the Order of July 2, 2008, which was unenforceable at that time as same was not a final Order . (CP 13, MRE 13)

The Order on Petition for Writ of Habeas Corpus issued by the Chancellor on July 21, 2008 at 11:10 A,M, directed the child to Byron Keith Mallett , the father and not the Court, and scheduled a hearing for August 18, 2008 in DeSoto County , Mississippi. (CP 16, MRE 16)

The Writ of Habeas Corpus and Writ of Assistance (CP 224, MRE 17)directed that the child be delivered by the Sheriff to the Father, Byron Keith Mallett, and set for final hearing on August 18, 2008.

No return by the sheriff was ever filed on the Writ of Habeas Corpus showing that service had been served upon Margie Edna (Galloway) Mallett Wilson and that custody of the child, Byron Keith Mallett , Jr., being delivered to Byron Keith Mallett .


That the entire proceeding was founded upon an order that was not final and proceeding were pending regarding the validity of same. That the statutory requirement required in a Habeas Corpus proceeding were never met by Byron Keith Mallett , and was improperly implemented by the Court so as to deprive Margie Edna (Galloway) Mallett Wilson of due process of law in this entire proceeding. Fulton v Fulton, 218 So2d 866 (Miss. 1969).

That this Court should set aside the entire Habeas Corpus proceeding, as same was improper for the reasons set forth above.

CONCLUSION

This Court is requested to reverse the finding of the Chancellor in holding that the Habeas Corpus was proper; and reverse and render the decision of the Chancellor .

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, H.R. Garner, do hereby certify that I have this date mailed by United States Mail,
postage prepaid, a true and correct copy of the foregoing APPELLANTS BRIEF to:


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Dated this the 6th day of May, 2010.



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