

6/3/97

IN THE COURT OF APPEALS

OF THE

STATE OF MISSISSIPPI

NO. 95-CA-00641 COA

SABRENA HINTON GRICE APPELLANT

v.

JOHN KERMIT MORRIS APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. JAMES H.C. THOMAS

COURT FROM WHICH APPEALED: PERRY COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT: JAMES C. STEELE

ATTORNEY FOR APPELLEE: REBECCA TAYLOR

NATURE OF THE CASE: CIVIL: MODIFICATION OF CUSTODY AND CONTEMPT

TRIAL COURT DISPOSITION: CUSTODY SPLIT BETWEEN PARENTS ON ALTERNATING,  
TWO-WEEK BASIS

MANDATE ISSUED: 6/24/97

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

This domestic relations action involves child custody issues and allegations of child abuse. The Appellant, Sabrena Hinton Grice, appeals to this Court from a judgment rendered by the Chancery Court of Perry County, Mississippi, which substantially altered and modified a prior judgment which established the custodial rights of Grice and her former husband, John Kermit Morris, in regard to their minor child, Breanna Hope Morris. Morris cross-appeals and contends that he should have been granted custody of the child. For the reasons set forth in this opinion, we reverse and remand this action for further proceedings before the trial court.

## I. INTRODUCTION

Sabrena Hinton Grice and John Kermit Morris were married on November 17, 1990, and one child, Breanna Hope Morris, was born of that marriage on June 5, 1991. Grice and Morris were subsequently divorced on May 3, 1993, based upon irreconcilable differences, by order of the Chancery Court of Perry County, Mississippi. In accord with the child custody and property settlement agreement which was approved by the court, executed by both parties and made a part of their final judgment of divorce, Grice and Morris were granted joint legal custody of the minor child, Breanna Hope Morris, although Grice was awarded "primary care and control" of Breanna. The parties further agreed to share physical custody of Breanna, with the mother to have the child during the school year, and the father to have physical custody of the child for eight weeks during the summer months of each year. The father was granted extensive visitation rights with the child, both on alternate weekends and during one day of each week while the mother had physical custody of Breanna. Likewise, the mother was awarded similar visitation rights with the child during the summer months. In addition, both parents were granted extensive visitation periods with child on holidays and birthdays. Morris agreed to maintain medical insurance coverage for the child and otherwise pay all medical, doctor, dental, hospital and drug bills for the child. Finally, Morris agreed to pay child support to Grice in the sum of \$200.00 per month for ten months of each year, and \$100.00 per month for the remaining two months of each year.

## II. FACTS

On December 8, 1993, Breanna's father, John Kermit Morris, filed a complaint seeking a modification of the final judgment of divorce and sought permanent custody of the child based upon allegations of child abuse. He also requested that his former wife be granted supervised visitation with the child and be held in contempt for failure to comply with the terms of the judgment. Breanna's mother, Sabrena Hinton Morris Grice, answered the complaint on December 15, 1993, and denied the allegations of child abuse. With her answer, she filed a motion to dismiss, alleging that the complaint should be dismissed because her former husband was delinquent in child support payments which he was required by the final judgment to pay to her for the benefit of the child and because he had otherwise failed to comply with some of the terms of the final judgment. She also filed a "cross-bill" or counterclaim seeking sole and permanent custody of the child as well as a petition seeking to hold Morris in contempt because of his failure to pay the required child support payments, and also because of his failure to provide documentation of health insurance coverage for the child which she could use when the child needed medical attention.

On February 8, 1994, Morris filed (1) an amended complaint essentially seeking the same relief which he sought in his original complaint, The amended complaint was filed without first seeking leave of the trial court to do so, in violation of Mississippi Rule of Civil Procedure 15(a). and (2) an answer to the cross-bill or counterclaim, as well as an answer to the petition for contempt filed by Grice. No answer was filed by Grice to the amended complaint. Thereafter, on March 31, 1994, the parties agreed that Breanna should be examined and evaluated by a child psychologist appointed by the trial court in order to determine whether or not the child had been physically or sexually abused. Pursuant to that agreement, the court entered an agreed judgment on April 7, 1994, and appointed Dr. William

P. Osborn of Hattiesburg, Mississippi, to examine the child. It was further ordered that both parents would allow themselves to be drug tested on March 31, 1994, and would make themselves available to Dr. Osborn for interviews at his discretion. Problems between the parties persisted and on May 27, 1994, Morris filed another motion to hold Grice in contempt as a result of her alleged refusal to allow

Morris to pick up the minor child at a local day care center in order that he could take the child to a prearranged appointment with Dr. Osborn.

This action was finally heard on its merits on September 8 and 9, 1994, before a special master appointed by the trial court pursuant to Mississippi Rule of Civil Procedure 53. On January 25, 1995, after testimony presented by several witnesses, including Dr. Osborn, as well as the testimony of Dr. William Gasparrini, a psychologist retained by the Appellant to evaluate the child, the special master issued his *judgment* and modified the child custody provisions of the final judgment of divorce and the attached child custody and property settlement agreement essentially as follows:

1. Each parent was awarded physical custody of the child for two-week intervals over a period of one year, after which they were required to return to court for a review of the court's ruling.
2. John Kermit Morris was required to pay child support to Sabrena Hinton Grice in the sum of \$125.00 per month.

In making his decision to modify the custodial provisions of the original child custody and property settlement agreement which was approved by the final judgment of divorce, the special master voiced his concern as to whether or not the minor child had been sexually abused. Dr. Osborn testified that the child had been instructed by someone not to talk to him, but, in his opinion, the child was unduly familiar with sexual terms and had been involved in some sort of unhealthy sexual activity. However, he could not say that the child had been sexually abused. On the other hand, Dr. Gasparrini testified that the child had not been sexually abused and appeared perfectly normal. *In fine*, the special master held that he could not make a finding that the child had been abused but was of the opinion that Grice had, since the divorce, provided an unstable living environment for Breanna and had created unnecessary problems which made it difficult for Morris to visit with the child. The evidence was clear that Grice and the child had moved to Tennessee and to a number of other places subsequent to her divorce from Morris.

The judgment of the special master was executed by him, as well as by the chancellor on January 25, 1995, without notice to the parties, and was filed on January 30, 1995. However, on the very next day, the chancellor rescinded and set aside the judgment on his own motion, and by order dated January 31, 1995, allowed both parties a period of ten days to file written objections to the judgment of the special master, pursuant to the provisions of Mississippi Rule of Civil Procedure 53(g)(2). The order further stated: "If any party files objections within the time set out, then this Court will notice the parties of a hearing on the objections as filed by the parties."

Sabrina Hinton Grice filed a timely objection to the special master's judgment, and Morris filed a response. However, no hearing on the objection of Grice was ever noticed or held. Thereafter, the trial court issued its "Judgment Accepting Special Master's Judgment" on May 15 1995.

### III. ISSUES

On appeal, Sabrena Hinton Grice raises the following issues and assignments of error:

1. DID THE CHANCERY COURT ERR IN ENTERING A JUDGMENT ACCEPTING THE MASTER'S REPORT AFTER OBJECTIONS WERE FILED BY THE PLAINTIFF/APPELLANT WITHOUT A HEARING ON THOSE OBJECTIONS PURSUANT TO RULE 53(g)(2) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE?

2. DID THE SPECIAL MASTER ERR IN ENTERING A JUDGMENT MODIFYING THE FINAL JUDGMENT OF DIVORCE WITH REGARD TO THE CUSTODY OF THE MINOR CHILD WITHOUT MAKING A SPECIFIC FINDING THAT SINCE THE ENTRY OF THE JUDGMENT OF DIVORCE THERE HAD OCCURRED A SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES WHICH ADVERSELY AFFECTED THE MINOR CHILD OF THE PARTIES?

3. DID THE SPECIAL MASTER ERR IN ENTERING A JUDGMENT MODIFYING THE FINAL JUDGMENT OF DIVORCE WITH REGARD TO THE CUSTODY OF THE MINOR CHILD BASED ON THE FACT THAT THE APPELLANT MOVED HER PLACE OF RESIDENCE SEVERAL TIMES SINCE THE ENTRY OF THE FINAL JUDGMENT OF DIVORCE, THUS PENALIZING HER FOR HER EXERCISE OF HER CONSTITUTIONAL RIGHT TO TRAVEL?

Since we have determined that our resolution of Issue 1 requires that this action be reversed and remanded to the trial court for further proceedings, we will not discuss Issues 2 and 3.

### IV. ANALYSIS

1. DID THE CHANCERY COURT ERR IN ENTERING A JUDGMENT ACCEPTING THE MASTER'S REPORT AFTER OBJECTIONS WERE FILED BY THE PLAINTIFF/APPELLANT WITHOUT A HEARING ON THOSE OBJECTIONS PURSUANT TO RULE 53(g)(2) OF THE MISSISSIPPI RULES OF CIVIL PROCEDURE?

In her first assignment of error, Grice claims that the trial court committed reversible error when it issued its judgment accepting the special master's judgment, without first granting the Appellant a hearing on its objection to the special master's judgment as required by Mississippi Rule of Civil Procedure 53. Rule 53(g)(2) sets out procedures to be followed when a special master is appointed by a trial court, and states the following:

(2) *Acceptance and Objections.* The court shall accept the master's findings of fact unless manifestly wrong. Within ten days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as provided by Rule 6(d). The Court *after hearing* may adopt the report or modify it or may reject it in whole or in any part or may receive further evidence or may recommit it with instructions.

(emphasis added).

Grice, relying upon *Trovato v. Trovato*, 649 So. 2d 815 (Miss. 1995), contends that before the trial court can accept and adopt the report of a special master, it must first conduct a hearing on the issues and arguments raised in a written objection to the report which has been served by any of the parties to the action. We agree. In *Trovato*, the Mississippi Supreme Court stated:

Rule 53 contemplates the idea that if a party objects to the special master's report, the chancellor must in fact hear the objections and not merely sign off on the submitted report. The chancellor's refusal to hear any argument whatsoever from the parties was an abuse of discretion.

*Trovato*, 649 So. 2d at 820. *See also Banks v. Banks*, 648 So. 2d 1116, 1125 (Miss. 1994) where our supreme court clearly held that such a hearing before the trial court is necessary and

required, citing with approval the case of *Kieffer v. Sears Roebuck & Co.*, 873 F.2d 954 (6th Cir. 1989).

In *Kieffer*, the United States Court of Appeals for the Sixth Circuit interpreted Federal Rule of Civil Procedure 53(e)(2) Federal Rule of Civil Procedure 53(e)(2) is identical to Mississippi Rule of Civil Procedure 53(g)(2). Our supreme court has stated on numerous occasions that we look to federal decisions to interpret our civil rules of procedure which were patterned after the federal rules. *See Nichols v. Tubb*, 609 So. 2d 377, 383 (Miss. 1992); *First Nat'l Bank of Vicksburg v. Middleton*, 480 So. 2d 1153, 1156 (Miss. 1985). and stated:

We do not believe that the fact that a party's objections are comprehensively briefed avoids the plain language of the rule, which clearly states that the court may adopt the report after hearing.

*See also* Wright & Miller, Federal Practice and Procedure: *Civil* 2d 2612 (1995).

The Appellee contends that Grice was dilatory in failing to notice her objection for hearing within a reasonable period of time, and therefore waived her opportunity to be orally heard on the objection. Morris cites no authority in support of this position other than the wording of Rule 53(g)(2) itself: "Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as provided by Rule 6(d)."

Mississippi Rule of Civil Procedure 6(d) states that "[a] written motion, other than one which may be heard ex parte, and notice of the hearing thereof, shall be served not later than five days before the time fixed by these rules or by order of the court." Where a legal position is not supported by meaningful argument or citation of authority, an appellate court will not consider it as a general rule. *Johnson v. State*, 626 So. 2d 631, 634 (Miss. 1993); *Baine v. State*, 604 So. 2d 249, 155 (Miss. 1992). Nevertheless, Morris is generally correct that it is the responsibility of the movant to obtain a ruling from the court on motions filed by the movant, and the failure to do so constitutes a waiver. *Martin v. State*, 354 So. 2d 1114, 1119 (Miss. 1978). Still, it is obvious that Rule 53 and its federal counterpart were carefully worded to discourage trial judges from totally delegating their authority to special masters, and to require a hearing by the trial judge on any objection to the report of a special master, in order to avoid any such delegation of power. It is noteworthy that the special master in this case referred to his report as a "judgment," a practice which is discouraged and criticized by our

supreme court in *Banks*, 648 So. 2d at 1124-25. We therefore reverse and remand this proceeding to the trial court for a hearing on the objection to the report of the special master as required by Mississippi Rule of Civil Procedure 53(g)(2) and for such other proceedings as the trial court deems to be proper.

**THE JUDGMENT OF THE CHANCERY COURT OF PERRY COUNTY IS REVERSED AND REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE TAXED TO APPELLEE.**

**BRIDGES, C.J., McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.**