

**IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

**NO. 2005-CA-01680-COA**

**SHIRLEY ANN JAMES HANSHAW**

**APPELLANT**

**v.**

**LARRY HANSHAW**

**APPELLEE**

DATE OF JUDGMENT:	7/29/2005
TRIAL JUDGE:	HON. EDWIN H. ROBERTS, JR.
COURT FROM WHICH APPEALED:	LAFAYETTE COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	RALPH STEWART GUERNSEY
ATTORNEY FOR APPELLEE:	THOMAS HENRY FREELAND
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	APPELLANT FOUND IN CONTEMPT OF COURT AND ORDERED TO PAY \$500 PER HOUR FOR NON-COMPLIANCE WITH COURT ORDER, NOT TO EXCEED TWENTY-FOUR HOURS.
DISPOSITION:	REVERSED AND RENDERED: 02/13/2007
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

**BEFORE KING, C.J., IRVING AND GRIFFIS, JJ.**

**KING, C.J., FOR THE COURT:**

¶1. Shirley Ann James Hanshaw was cited for contempt of court for her failure to comply with a Lafayette County Chancery Court order requiring that she vacate the marital residence. Shirley raises the following issues on appeal, which we quote verbatim:

- I. THE TRIAL COURT ERRED BY GRANTING AN UNNOTICED OR IMPROPERLY NOTICED CONTEMPT CITATION AGAINST PLAINTIFF/APPELLANT, SHIRLEY HANSHAW.
- II. THE TRIAL COURT ERRED IN ASSUMING JURISDICTION OF A CONTEMPT CHARGE WITHOUT PROPER NOTICE.

III. THE TRIAL COURT ERRED IN AWARDING \$500 PER HOUR CONTEMPT PENALTY AGAINST PLAINTIFF/APPELLANT, AS SUCH PENALTY IS EXCESSIVE.

**FACTS**

¶2. Shirley originally filed for a divorce from Larry Hanshaw on August 23, 1996. The divorce action was dismissed four months later when the couple attempted reconciliation. On May 22, 1998, Shirley filed a second complaint for divorce. That same day an emergency temporary restraining order was entered, enjoining the parties from contact with each other and dividing the use of the marital home between the parties. The parties subsequently agreed to an irreconcilable difference divorce, reserving the issues of dissolution of the marital estate and alimony to be resolved by the trial court.

¶3. On June 23, 2004, the court entered an order which divided the marital property and awarded Shirley \$10,000 in lump sum alimony. As part of the division of the marital property, the chancellor ordered that the marital home be sold and the mortgage paid.<sup>1</sup> The chancellor further ordered that the sale proceeds be used to pay off all marital debt, which was calculated by the chancellor, and the remaining proceeds would be divided by the parties in accordance with the order. Shirley subsequently arranged for a private sale of the marital home.

¶4. It appears that on October 4, attorneys for both parties engaged the chancellor in an informal, off-the-record conversation regarding their mutual concern that Shirley may not be moved out of the marital home in time for the scheduled closing. As a result of this conversation, the chancellor entered an order which was filed the next day. The October 5 order stated the following:

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<sup>1</sup>The order provided that if the parties could agree to a private sale of the marital home, the private sale must occur within ninety days of the entry of the order. If the parties could not agree to a private sale, the house would be sold at public auction within ninety days of the entry of the order.

This cause came before the Court on an oral motion to enforce an agreement arranged by the plaintiff and agreed by both parties to sell the marital residence of the parties at a price higher than its stipulated value. The sale was originally scheduled by the plaintiff with the defendant's agreement to close on September 30[.] [T]he plaintiff obtained an extension until October 5 for the closing. When the attorneys for both parties came before the Court on October 4, they stated that the plaintiff had not yet retained a moving company and were concerned that this would prevent a closing from occurring and endanger the sale and the favorable price.<sup>2</sup> They further represented to the Court that the attorney for the buyer will not be able to close the sale transaction until the plaintiff has vacated the marital residence. After argument, this Court ruled and communicated its ruling to counsel. . . .

The Court has ruled as follows:

It is ORDERED that the plaintiff is to vacate the marital residence by 2:00 p.m. on October 5, 2004, and further that after 2:00 p.m. if the plaintiff has failed to vacate the marital residence, she shall be fined by payment to the defendant from the proceeds Five Hundred Dollars (\$500) for each hour after 2:00 p.m. until vacated or until 2:00 p.m. on October 6, 2004, whichever occurs first;

It is further ORDERED that if the plaintiff has not vacated the marital residence by 2:00 p.m. on October 6, 2004, at the request of the defendant's counsel she shall be found in contempt of this Court and shall be subject to incarceration in the Lafayette County Jail until such time as she shall purge herself of contempt by vacating the marital residence.

Shirley did not vacate the marital residence, and on October 6, Larry filed a motion asking the court to find her in contempt. On October 7, the chancellor entered an order (1) finding that Shirley did not vacate the marital residence by 2:00 p.m. on October 6 as per court order, (2) holding Shirley in contempt, (3) ordering Shirley to vacate the marital residence by "the close of business October 7, 2004," and (4) ordering Shirley and Larry to sign by noon on October 7 an addendum to the real estate contract providing for an extension until October 8 for the closing. This order, which was apparently drafted by Larry's attorney, contained one paragraph ordering Shirley to be held in the

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<sup>2</sup>The record contains an e-mail to Shirley from Hilltop Quick Move indicating that she had retained its services for October 4 at 6:00 a.m. but then cancelled the move. Shirley's stated reason for cancelling the move was that she was hospitalized on October 4 because of nausea, vomiting, and acute hypocalcemia due to chronic fatigue syndrome. This assertion is supported by an affidavit from her doctor.

county jail until she purged herself of the contempt. Another paragraph stated, “Larry Hanshaw shall be paid at closing from Shirley Hanshaw’s proceeds \$12,000 as the fine for contempt of court based on this Court’s order of October 5, 2004.” However, both of these paragraphs were marked through and initialed by the chancellor. In his July 29, 2005 order denying Shirley’s October 15, 2004 motion for rehearing, the chancellor acknowledged striking the incarceration and fine from the order, stating “The Court held that it would not enforce the incarceration or fine at this time, but that it would wait until after a full hearing to rule on those issues.”<sup>3</sup> The record contains no evidence of a hearing or ruling in which the incarceration and or fine were ever reinstated.

### ANALYSIS

¶5. Before addressing the finding of contempt in the October 7 order, we must first address the October 5 order, which is the basis of the contempt finding. We begin by noting that neither the record nor the certified copy of the docket entries indicates that a motion was ever filed seeking the relief granted in the October 5 order. Mississippi Rules of Civil Procedure Rule 7(b)(1) provides in pertinent part, “An application to the court for an order shall be by motion which, unless made during a hearing or trial, shall be made in writing, shall state with particularity the grounds therefor, and shall set forth the relief or order sought.”

¶6. More problematic, however, is the fact that Shirley was given no notice of the October 4 “hearing,” the result of which Shirley’s attorney on appeal characterizes as a summary eviction. Mississippi Rules of Civil Procedure Rule 6(d) requires that a non-movant must be given a minimum of five days notice of a motion hearing. Although Rule 6(d) applies to written motions, the supreme court has stated that, “[A] party should not be permitted to circumvent notice requirements simply

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<sup>3</sup>After being held in contempt, Shirley obtained new counsel, and on October 15, 2004, her new attorney filed a Rule 59 motion to alter or amend judgment. Shirley’s attorney argued that Shirley was never given notice of a hearing on the motion to cite her for contempt.

by offering a motion orally instead of a written one.” *Taylor v. Morris*, 609 So. 2d 405, 409 (Miss. 1992). In *Taylor*, the court decided that although the trial judge erred in conducting an unnoticed hearing that resulted in an amended judgment, the error was harmless because a properly noticed hearing would have yielded the same result. *Id.* However, the court stated, “Had the results been different, the failed notice requirement would demand reversal.” *Id.* The case *sub judice* is easily distinguishable from *Taylor* because had Shirley been given notice she could have presented her defense of impossibility of compliance with the court order.

¶7. We now address Shirley’s issues regarding the contempt proceedings.

- I. THE TRIAL COURT ERRED BY GRANTING AN UNNOTICED OR IMPROPERLY NOTICED CONTEMPT CITATION AGAINST PLAINTIFF/APPELLANT, SHIRLEY HANSHAW.
- II. THE TRIAL COURT ERRED IN ASSUMING JURISDICTION OF A CONTEMPT CHARGE WITHOUT PROPER NOTICE.

¶8. In reviewing a contempt order, this Court ordinarily begins with a determination as to whether the contempt is civil or criminal. *Dennis v. Dennis*, 824 So. 2d 604, 608 (¶7) (Miss. 2002). Because the crux of the case *sub judice* is the lack of notice of a contempt hearing resulting in Shirley’s inability to appear and defend, we pretermitt a discussion as to the classification of the contempt in question and proceed with a discussion of the multiple procedural errors requiring reversal.

¶9. The procedure for contempt actions is governed by Rule 81(d) of the Mississippi Rules of Civil Procedure. Contempt actions are triable seven days after service of a Rule 81 summons. M.R.C.P. Rule 81(d)(2). A Rule 81 summons must set out a specific time and place where the defendant is to appear. M.R.C.P. 81(d)(5). There is no indication on the case docket nor anywhere else in the record that a Rule 81 summons was ever issued to Shirley for a contempt hearing.

¶10. “Complete absence of service of process offends due process and cannot be waived.” *Chasez v. Chasez*, 935 So. 2d 1058, 1062 (¶12) (Miss. Ct. App. 2005) (quoting *Isom v. Jernigan*, 840 So. 2d 104, 107 (¶10) (Miss. 2003)). However, one’s right to later contest the court’s jurisdiction may be waived by making an appearance before the court without challenging jurisdiction or improper service. *In re Adoption of a Minor Child*, 931 So. 2d 566, 575 (¶21) (Miss. 2006). This is especially true when the party complaining of a Rule 81 violation participates in scheduling the hearing and presents evidence at the hearing. *Id.*

¶11. It appears from a thorough examination of the record that a contempt hearing was neither noticed nor held. The October 5 order ordering Shirley to vacate the marital home by 2:00 that afternoon states, “It is further ORDERED that if the plaintiff has not vacated the marital residence by 2:00 p.m. on October 6, 2004, **at the request of the defendant’s counsel she shall be found in contempt of this Court . . .**” (emphasis added). The next document in the transcript is Larry’s October 6 motion for relief asking the trial court to find Shirley in contempt.<sup>4</sup> The next document is the Court’s October 7 order finding Shirley in contempt. The order states:

This cause came before the Court on a Motion of Defendant Larry Hanshaw for Relief from Plaintiff Shirley Hanshaw’s contempt of the orders of this Court and refusal to perform agreements relating to the sale of the marital residence. It is undisputed that, as of 2:00 p.m. on October 6, 2004, Shirley Hanshaw had not vacated the marital residence, although she had previously signed agreements in which she had agreed to deliver possession, first on September 30, 2004 and later on October 4, 2004. On October 4, 2004, this Court ordered that she vacate the marital residence by October 5, 2004 at 2:00 p.m. or be subject to fine and incarceration for contempt. This Court finds as a fact that she is and continues to be in contempt of the orders of this Court.

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<sup>4</sup>We note that Mississippi Rules of Civil Procedure Rule 81 (d)(3) provides that contempt actions are to be initiated via complaint or petition rather than by motion. *Young v. Deaton*, 766 So. 2d 819, 821 n.1 (Miss. Ct. App. 2000). *See also Sanghi v. Sanghi*, 759 So. 2d 1250, 1252 (¶10) (Miss. Ct. App. 2000).

Although the order states that it is undisputed that Shirley had not vacated the marital residence, complaints for contempt cannot be taken as confessed. M.R.C.P. 81(d)(3).

¶12. The next document in the record is an October 14 order which addresses a September 13 motion filed by Larry in which he asks for clarification of a previous ruling concerning marital debt and disbursement of proceeds from the sale of the marital residence. The order suggests that a hearing on this motion was held, and at that hearing Shirley's attorney made an oral motion to rehear or reconsider the contempt order. The chancellor summarily denied this request in the October 14 order. Shirley immediately obtained new counsel, and on October 15 Shirley's new attorney filed a Rule 59 motion to alter or amend judgment, arguing that (1) Shirley was never given notice of any hearing on the motion to cite her for contempt, (2) the \$12,000 penalty is disproportionate, and (3) Shirley has legitimate defenses to the contempt charges and should be given an opportunity to present her defense. On July 29, 2005, the trial court entered an order denying Shirley's request to review the contempt order. The court found that although Shirley was not personally served, the following facts "effectively cur[ed] any jurisdictional deficiencies that may have been present": her attorney was present at the October 4 "hearing" in which the court originally ordered Shirley to vacate the marital home; Shirley's attorney was given proper process; and Shirley made a general appearance before the court. We disagree with the chancellor's analysis.

¶13. The fact that Shirley's attorney was present at the October 4 "hearing" is irrelevant to the issue of Shirley not receiving notice or a hearing before being held in contempt of court on October 7. Next, the chancellor's assertion that Shirley's attorney was given proper process is simply not supported by the record. As stated above, a Rule 81 summons was never issued. The docket entries clearly indicate that on October 5 an order was filed ordering Shirley to vacate the marital home that day. The next day Larry filed a motion asking the court to find her in contempt. The following day,

the trial court summarily found that Shirley was in contempt of court. Nowhere in between was any process, much less proper process, ever issued. We also find the chancellor's finding that Shirley waived her right to contest the court's jurisdiction based upon lack of notice by making a general appearance to be unsupported by the record. As a contempt hearing was never held, the only appearance Shirley could have made in the contempt action would have been after the entry of the order summarily finding her in contempt. One week after the contempt order was filed, Shirley filed a Rule 59 motion arguing that she was never given notice of any hearing on the motion to cite her for contempt. Clearly, Shirley could not have waived her right to attack the notice requirement by filing a motion arguing that she never received notice.

¶14. Because we find that Shirley did not receive the due process considerations of notice and a hearing before being held in contempt of court, we reverse the chancellor's order. Finding Shirley's first two issues to be dispositive, we decline to address her third issue.

**¶15. THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

**LEE AND MYERS, P.JJ., IRVING, CHANDLER, GRIFFIS, BARNES AND ISHEE, JJ., CONCUR. ROBERTS AND CARLTON, JJ., NOT PARTICIPATING.**