

IN THE COURT OF APPEALS 03/12/96
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-00073 COA

CARVIN SHAW

APPELLANT

v.

**WEBSTER COUNTY DEPARTMENT OF HUMAN SERVICES, LARRY GARY AND
APRIL DAVIS**

APPELLEES

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WOODROW W. BRAND, JR.

COURT FROM WHICH APPEALED: CHANCERY COURT OF WEBSTER COUNTY

ATTORNEY FOR APPELLANT:

BENNIE L. JONES, JR.

ATTORNEYS FOR APPELLEES:

DONALD F. NEWLIN

ROY A. PERKINS

NATURE OF THE CASE: REOPEN PATERNITY PROCEEDINGS

TRIAL COURT DISPOSITION: FINAL ORDER OF DISMISSAL

BEFORE THOMAS, P.J., BARBER, AND DIAZ, JJ.

DIAZ, J., FOR THE COURT

On December 15, 1994, the Chancery Court of Webster County entered a final order dismissing Shaw's petition to reopen his case, his amended petition to reopen case, and motion for relief pursuant to Rule 60 of the Mississippi Rules of Civil Procedure. Feeling aggrieved, Shaw appeals this final order of dismissal. We affirm.

I. FACTS

A child was born October 21, 1987 to April D. Davis (Davis), a single parent. Davis received Aid for Dependent Children through the Department of Human Services (DHS) for the support of this child. On November 18, 1991, Shaw, Davis, and the child submitted to paternity testing. The results showed a 99.95% probability that Shaw was the child's father. Shaw and the DHS entered into an agreed judgment determining paternity by establishing Shaw as the child's father and providing for regular monetary support for the child. The chancellor approved and entered the judgment on February 5, 1992.

Approximately one year later, Shaw filed a petition to reopen his case based on new evidence. He claimed in his petition that new evidence existed proving that he was not the biological father of the child. The new evidence obtained by Shaw consisted of an affidavit from Earnestine Robinson alleging that Larry Gary was actually the father of Davis' child. Subsequently, Shaw filed a motion for relief pursuant to Rule 60 of the Mississippi Rules of Civil Procedure and an amended petition to reopen his case. Therein, Shaw sought an order requiring a supplemental blood test based on the newly discovered evidence. On December 15, 1994, the chancellor dismissed Shaw's petitions and motion on the grounds of laches, res judicata, and untimely filing under Rule 60.

II. ISSUES

Shaw raises three issues on appeal: (1) whether the chancery court erred in its December 15, 1994 order holding that Shaw's petition to reopen his case and his motion for relief from judgment be dismissed based on the doctrines of laches and res judicata; (2) whether Rule 60 supports the chancery court's decision to dismiss Shaw's petitions; and (3) did the chancery court have jurisdiction to reopen the case and order supplemental blood tests?

We address the issues in combination and find that Rule 60 supports the lower court's decision to dismiss.

III. DISCUSSION

Shaw argues in his brief that he is entitled to relief from the February 5, 1992 judgment due to newly discovered evidence proving that another man is the father of Davis' child. The relief sought by Shaw is provided for by Mississippi Rule of Civil Procedure 60(b) which states, in relevant part:

(b) ... the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) fraud, misrepresentation, or other misconduct of an adverse party;
- (2) accident or mistake;
- (3) *newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)*;
- (4) the judgment is void;
- (5) the judgment has been satisfied, released, or discharged . . . ;
- (6) any other reason justifying relief from the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) *not more than six months* after the judgment, order, or proceeding was entered or taken.

M.R.C.P. 60(b) (emphasis added).

Relief under Rule 60(b) of the Mississippi Rules of Civil Procedure is generally left to the sound discretion of the trial court, and appellate review is limited to whether the court abused its discretion. *State ex rel. Mississippi Bureau of Narcotics v. One Chevrolet Nova Auto.*, 573 So. 2d 787, 789 (Miss. 1990) (citing *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221 (Miss. 1984)).

Shaw argues that Rule 60(b)(6) is the appropriate rule to apply to his motion for relief. However, the supreme court has stated that Rule 60(b)(6) is used only in exceptional circumstances where sections (1) through (5) do not apply. *Bryant, Inc. v. Walters*, 493 So. 2d 933, 939 (Miss. 1986). If the court cannot determine the manner of relief being sought by a motion or pleading, it should look to the content of the document to determine the appropriate relief, if any. *See Bruce v. Bruce*, 587 So. 2d 898, 902 (Miss. 1991) (when the manner of motion or pleading is uncertain, the court looks at the content). Shaw's contention that new evidence exists which contradicts the paternity judgment is at the heart of this appeal. Thus, Rule 60(b)(3) is the appropriate rule to apply to Shaw's motion. Rule 60(b)(3) clearly applies to the matter of relief sought in the petition to reopen and motion for relief. Applying Rule 60(b)(6) would be inappropriate when Rule 60(b)(3) clearly addresses the relief requested.

Where the grounds for the action are Rule 60(b)(3), a court is without authority to set aside the judgment if the motion is not made within the six-month time limit contained in the rule. *Burkett v. Burkett*, 537 So. 2d 443, 445 (Miss. 1989). Shaw filed his motion for relief on August 18, 1993, eighteen months after the judgment was entered. The trial court did not abuse its discretion by denying Shaw's Rule 60 motion when it was filed one year after the six-month limitation period had expired. *See Overbey v. Murray*, 569 So. 2d 303, 305 (Miss. 1990) (the trial court did not abuse its discretion by denying a Rule 60(b)(2) motion filed nine months after the six-month limitation period

had expired).

Additionally, Shaw argues that the chancellor had jurisdiction to reopen his case and order the requested supplemental blood tests. We find that the chancery court correctly held it lacked jurisdiction to reopen due to the doctrines of laches, res judicata, and untimely filing of the petitions and motion for relief under Rule 60.

Finally, the Appellees in this case request that Rule 38 sanctions be imposed against Shaw. However, this Court does not find Shaw's appeal sufficiently frivolous to invoke Rule 38.

IV. CONCLUSION

The limitations imposed by Rule 60(b) embody the need to reach a final conclusion in litigation and the desire to allow a litigant to receive a hearing on the merits when appropriate. It is well settled, however, that Rule 60 relief should be denied when merely an attempt to relitigate the issues. *Stringfellow v. Stringfellow*, 451 So. 2d 219, 221(Miss. 1984) (citing *Mastini v. American Tel. & Tel. Co.*, 369 F.2d 378, 379 (2d Cir. 1966), *cert. den.* 387 U.S. 933 (1967)). This is precisely what Shaw attempts to accomplish with his petition to reopen, amended petition, and motion for relief pursuant to Rule 60. It would frustrate the purpose of the time limitations of Rule 60(b)(3) to allow Shaw to reopen his case and upset the February 1992 judgment. Therefore, we affirm the final order of the Webster County Chancery Court.

THE JUDGMENT OF THE WEBSTER COUNTY CHANCERY COURT IS AFFIRMED, COSTS ARE TAXED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.