

IN THE COURT OF APPEALS 03/11/97

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00117 COA

ROGER W. URBANO

APPELLANT

v.

DONNA URBANO DEMETZ

APPELLEE

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

TRIAL JUDGE: HON. JASON H. FLOYD JR.

COURT FROM WHICH APPEALED: HANCOCK COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

NICHOLAS HAAS

ATTORNEY FOR APPELLEE:

HAROLD DEMETZ

NATURE OF THE CASE: DOMESTIC RELATIONS

TRIAL COURT DISPOSITION: TRIAL COURT DID NOT AMEND FINAL JUDGMENT OF
DIVORCE - TIME BAR AND NEGLECT BY URBANA

BEFORE McMILLIN, P.J., BARBER, AND COLEMAN, JJ.*

McMILLIN, P.J., FOR THE COURT:

Appellant in this case, Roger W. Urbano, seeks to modify certain terms of a divorce judgment entered in the Chancery Court of Hancock County that he now finds not to his liking. In this action, commenced as a separate proceeding from the earlier divorce action, Urbano bases his claim for relief upon an allegation that his waiver of process entered in the divorce proceeding was procured by fraudulent misrepresentations made by the appellee, Donna Urbano DeMetz.

This action was not commenced until some eleven months after entry of the judgment of divorce. It appears from the record that Urbano was aware of the existence of the judgment of divorce within just a few days of its entry. He complied with the terms of the judgment, although not always in a timely manner, until his former wife remarried about six months later. He then ceased paying a monthly obligation due her under the judgment. It is that same monthly obligation that Urbano now seeks to have canceled by judicial fiat in this action.

The original divorce judgment provided for fixed monthly payments from Urbano to DeMetz until she reached the age of sixty-five years. The judgment specifically adjudicated these payments to be lump sum alimony payable in installments. Such an award would appear to be within the authority of the trial court. *See McDonald v. McDonald*, 683 So. 2d 929, 931 (Miss. 1996). Urbano now seeks to have these installment payments canceled as of the time of his former spouse's remarriage. He does not argue in this appeal that the installments are actually periodic alimony. Rather, he seems to be asserting that, but for certain representations made to him by DeMetz, he would not have agreed to voluntarily enter an appearance in the divorce proceeding and permit the entry of a judgment containing such provisions.

Urbano's appeal presents this Court with something of a dilemma. It does not appear, as a matter of law, that Urbano would be entitled to the relief he seeks even were we to conclude that he had proved the fraud he alleges by clear and convincing evidence. The result of a finding of fraud in procuring the execution of the waiver of process would necessarily compel the conclusion that the trial court did not have jurisdiction over Urbano's person at the time the divorce judgment was entered. This would render the entire judgment void and would not provide a basis for Urbano to attack only portions of the judgment. *See Allen v. Mac Tools, Inc.*, 671 So. 2d 636, 646 (Miss. 1996); *Overbey v. Murray*, 569 So. 2d 303, 305-06 (Miss. 1990). Setting aside the judgment in its entirety would involve, of course, setting aside the divorce itself. Yet, upon a review of Urbano's brief, we find that he specifically cautions that he does not desire to have the divorce set aside.

The chancellor conducted a full hearing on the merits of Urbano's fraud claim and denied any relief upon reaching the conclusion that Urbano had failed to prove fraudulent inducement to sign the waiver of process by clear and convincing evidence. Were this Court to review the record and determine that the chancellor was manifestly in error in his ruling, we would be compelled, as a matter of law, to set aside the divorce judgment *in toto*, a form of relief which Urbano does not desire. We will, in deference to his expression of preference, decline to review the chancellor's determinations to see if we can discover an abuse of discretion that would compel us to force upon the appellant relief which he does not seek.

**THE JUDGMENT OF THE HANCOCK COUNTY CHANCERY COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT, ROGER URBANO.**

**BRIDGES, C.J., COLEMAN, DIAZ, HERRING, KING, PAYNE, AND SOUTHWICK, JJ.,
CONCUR. THOMAS, P.J., NOT PARTICIPATING.**

*Judge Frank D. Barber participated in the consideration of this case as a member of the panel; however, he died on March 4, 1997, prior to the hand-down date of this opinion.