

89-R-99001

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
IN RE: AMENDMENT OF M.R.C.P. 81

FILED
JAN 10 2020
OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

MOTION TO AMEND M.R.C.P. 81

Comes now the Supreme Court Advisory Committee on Rules, pursuant to M.R.A.P. 27(f), and moves the Mississippi Supreme Court to amend M.R.C.P. 81 in the manner shown in Exhibit A attached hereto. The proposed amendment to M.R.C.P. 81 seeks to clarify some provisions of the rule, and to eliminate confusion over its operation in several respects.

A. 81(d)(1).

Determination of wrongful death beneficiaries. Most practitioners file actions to determine wrongful death beneficiaries in chancery court. Some circuit judges require that they do. Often, they also wish to determine heirs. As it stands now, determination of wrongful death beneficiaries is a Rule 4 matter, and determination of heirship is a Rule 81 matter, thus requiring two different petitions and two different summonses, needlessly increasing cost and attorney time. By making determination of wrongful death beneficiaries a Rule 81 matter, the two can be combined into one matter, with a single summons.

Form of the summons. This proposed amendment clarifies the form of the summons that meets the requirement of the rule.

B. 81(d)(2).

Paternity actions. When the M.R.C.P. were adopted, Miss. Code Ann § 93-11-65 did not provide for temporary hearings in paternity actions as it now does. This proposed amendment makes it clear that a temporary hearing in a paternity case is handled as are other temporary hearings.

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C. 81(d)(3).

Defaults. This proposed amendment clarifies that the traditional chancery court language “taken as confessed” includes default judgments and adds an explanation that adequate proof must be presented to the court to obtain a judgment. This is intended to aid attorneys who do not frequently practice in chancery court.

D. 81(d)(4).

Service. Proposed language clarifies that not only filing, but also service of the answer on the opposing party, is required.

Order to answer. The current language that the court may “require an answer” is vague and does not fit our customary chancery practice. The proposed amendment clarifies that the court may order it.

Counterclaims. This proposed amendment clarifies that service of counterclaims and cross-claims are made pursuant to Rule 5, and that further process is not required because the court already has personal jurisdiction over a plaintiff or petitioner, and over a co-defendant who has been served with process, as further provided in Rule 81(d)(6). This change reflects the customary practice in chancery court, and is intended to remove any confusion. The Court of Appeals, in *Pearson v. Browning*, 106 So. 3d 845 (Miss. Ct. App. 2012), reversed because the plaintiff in a pending case had not been served with a Rule 81 summons on a counterclaim. A similar issue was raised in *Hilton v. Hilton*, a Court of Appeals case decided November 5, 2019, on other grounds.

E. 81(d)(5).

Setting date for hearing. The proposed amendment clarifies that the court has flexibility in how to designate dates for Rule 81 hearings.

Consequence of attendance or non-attendance. The proposed amendment clarifies that if a party appears all further notices of hearing are given per Rule 5, and if a party does not appear no further notice is required.

Linking continuances. The current rule requires that the attorney have continuance orders signed first on the original return day, and then on every consecutive continuance date. This sometimes requires lawyers to travel over several counties to meet the chancellor, have the defendant called, have the order of continuance signed by the chancellor, and then return to the office. The proposed amendment eliminates that requirement and allows Rule 81 actions to be continued on the same terms as Rule 4 and statutory matters.

F. 81(d)(6).

Rule 5 notice. The proposed amendment clarifies and removes confusion over whether additional process is required for motions, counterclaims, cross-claims, and contempt motions within the original action, such as contempt of a temporary order.

The changes in subsection (d) as to counterclaims and subsection (e) as to date for hearing and linking continuances were approved by the Conference of Chancery Judges at a business meeting in 2013 with only one dissenting vote. The motion to amend M.R.C.P. 81 was unanimously approved by the Committee on November 1, 2019. In addition,

The Supreme Court Advisory Committee on Rules therefore moves that the above proposed amendment to M.R.C.P. 81 be considered by the Mississippi Supreme Court.

SO MOVED, this the 10th day of January, 2020.

SUPREME COURT ADVISORY COMMITTEE ON RULES



JUDGE ASHLEY HINES, CHAIR

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Exhibit A

RULE 81. APPLICABILITY OF RULES

(a) Applicability in General. These rules apply to all civil proceedings but are subject to limited applicability in the following actions which are generally governed by statutory procedures.

- (1) proceedings pertaining to the writ of habeas corpus;
- (2) proceedings pertaining to the disciplining of an attorney;
- (3) proceedings pursuant to the Youth Court Law and the Family Court Law;
- (4) proceedings pertaining to election contests;
- (5) proceedings pertaining to bond validations;
- (6) proceedings pertaining to the adjudication, commitment, and release of narcotics and alcohol addicts and persons in need of mental treatment;
- (7) eminent domain proceedings;
- (8) Title 91 of the Mississippi Code of 1972;
- (9) Title 93 of the Mississippi Code of 1972;
- (10) creation and maintenance of drainage and water management districts;
- (11) creation of and change in boundaries of municipalities;
- (12) proceedings brought under sections 9-5-103, 11-1-23, 11-1-29, 11-1-31, 11-1-33, 11-1-35, 11-1-43, 11-1-45, 11-1-47, 11-1-49, 11-5-151 through 11-5-167, and 11-17-33, Mississippi Code of 1972.

Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply.

(b) Summary Proceedings. In ex parte matters where no notice is required proceedings shall be as summary as the pertinent statutes contemplate.

(c) Publication of Summons or Notice. Whenever a statute requires summons or notice by publication, service in accordance with the methods provided in Rule 4 shall be taken to satisfy the requirements of such statute.

(d) Procedure in Certain Actions and Matters. The special rules of procedure set forth in this paragraph shall apply to the actions and matters enumerated in subparagraphs (1) and (2) hereof and shall control to the extent they may be in conflict with any other provision of these rules.

(1) The following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: adoption; correction of birth certificate; alteration of name; termination of parental rights; paternity; legitimation; uniform reciprocal enforcement of support; determination of heirship; determination of wrongful death beneficiaries; partition; probate of will in solemn form; caveat against probate of will; will contest; will construction; child custody actions; child support actions; and establishment of grandparents' visitation. For such actions, a summons returnable to a time and place certain and

in substantial conformity with Form 1D or Form 1DD shall be issued commanding the defendant or respondent to appear and defend at a specified date, time and place, either in term time or vacation, at which such action may be heard.

(2) The following actions and matters shall be triable 7 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to wit: removal of disabilities of minority; any temporary relief in divorce, separate maintenance, paternity actions pursuant to MCA § 93-11-65, child custody, or child support matters; modification or enforcement of custody, support, and alimony judgments; contempt; and estate matters and wards' business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above. For such actions, a summons returnable to a time and place certain and in substantial conformity with Form 1D or Form 1DD shall be issued commanding the defendant or respondent to appear and defend at a specified date, time and place, either in term time or vacation, at which such action may be heard.

(3) Unanswered complaints and petitions filed in the actions and matters enumerated in subparagraphs (1) and (2) above shall not be taken as confessed or subject to default judgment, and adequate proof is required to support a judgment.

(4) No answer shall be required in any action or matter enumerated in subparagraphs (1) and (2) above but any defendant or respondent may file and serve an answer or other pleading or the court may require an answer order a party to answer if it deems it necessary to properly develop the issues. A party who fails to file an answer after being required ordered so to do shall not be permitted to present evidence on his behalf. Any defendant or respondent may file and serve counterclaims and cross-claims pursuant to M.R.C.P. 13, and service of any such counterclaims or cross-claims shall be made pursuant to M.R.C.P. 5 without necessity of further process.

(5) Upon the filing of any action or matter listed in subparagraphs (1) and (2) above, summons shall issue commanding the defendant or respondent to appear and defend at a time and place, either in term time or vacation, at which the same shall be heard. ~~Said time and place shall be set by special order, general order or rule of the court. The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue the same for hearing on a later date.~~ Said time and place shall be set by court order, or the court may authorize its clerk or court administrator to set such actions for original hearings and to designate dates to continue the same for hearing at a later time. If a defendant or respondent who has been properly served with process pursuant to this Rule does appear at the initial setting of such action, notice of later hearings or proceedings shall be given in the manner provided for in Rule 5. If a defendant or respondent who has been properly served with process pursuant to this Rule does not appear at the initial setting of such action, no further notice or process is required. If such action is not heard on the day set for hearing, it may by order ~~signed on that day~~ be continued to a later day for hearing without additional summons on the defendant or respondent. ~~The court may by order or rule authorize its clerk to set such actions or matters for original hearing and to continue same for hearing on a later date.~~

(6) ~~Rule 5(b) notice shall be sufficient as to any temporary hearing in a pending divorce, separate maintenance, custody or support action provided the defendant has been summoned to~~

answer the original complaint: Once the court has acquired personal jurisdiction, Rule 5(b) notice shall be sufficient as to: (A) any temporary hearing in a pending divorce, separate maintenance, paternity, custody, or support action, provided the defendant was summoned to answer the original complaint; and (B) any subsequent counterclaim or cross-claim filed pursuant to these rules; and (C) any motion for further proceedings, including, but not limited to, contempt of temporary orders and other proceedings arising in connection with or out of the original action.

(e) Proceedings Modified. The forms of relief formerly obtainable under writs of fieri facias, scire facias, mandamus, error coram nobis, error coram vobis, sequestration, prohibition, quo warranto, writs in the nature of quo warranto, and all other writs, shall be obtained by motions or actions seeking such relief.

(f) Terminology of Statutes. In applying these rules to any proceedings to which they are applicable, the terminology of any statute which also applies shall, if inconsistent with these rules, be taken to mean the analogous device or procedure proper under these rules; thus (and these examples are intended in no way to limit the applicability of this general statement):

Bill of complaint, bill in equity, bill, or declaration shall mean a complaint as specified in these rules;

Plea in abatement shall mean motion;

Demurrer shall be understood to mean motion to strike as set out in Rule 12(f);

Plea shall mean *motion or answer*, whichever is appropriate under these rules;

Plea of set-off or set-off shall be understood to mean a permissible counter-claim;

Plea of recoupment or recoupment shall refer to a compulsory counter-claim;

Cross-bill shall be understood to refer to a counter-claim, or a cross-claim, whichever is appropriate under these rules;

Revivor, revive, or revived, used with reference to actions, shall refer to the substitution procedure stated in Rule 25;

Decree pro confesso shall be understood to mean entry of default as provided in Rule 55;

Decree shall mean a judgment, as defined in Rule 54;

(g) Procedure Not Specifically Prescribed. When no procedure is specifically prescribed, the court shall proceed in any lawful manner not inconsistent with the Constitution of the State of Mississippi, these rules, or any applicable statute.