

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE No. 2017-TS-00828

MICHAL T. GERTY

APPELLANT

VERSUS

JOSIE R. GERTY

APPELLEE

AMICUS BRIEF OF THE MISSISSIPPI COALITION AGAINST DOMESTIC VIOLENCE
IN SUPPORT OF FINAL JUDGMENT OF THE
CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI

ORAL ARGUMENT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

This undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of this Court may evaluate possible disqualifications or recusal.

MICHAEL GERTY, APPELLANT

JOSIE GERTY, APPELLEE

JENNIFER T. SCHLOEGEL, TRIAL COURT

JIM HOOD, MISSISSIPPI ATTORNEY GENERAL

So certified, this 17th day of October 2017.

s/ Brandon Jones
Brandon Jones
Attorney of Record for AMICUS CURIAE

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STATEMENT REGARDING ORAL ARGUMENT

The Amicus believes that oral argument would assist the Court in reaching a just decision in this case because of the specific facts involved and the issues presented in this appeal. Accordingly, Amicus respectfully requests that oral argument be granted.

STATEMENT OF THE ISSUES

This court should examine the Mississippi Divorce Statute through the eyes of a domestic violence victim, and affirm the judgment of the trial court.

STATEMENT OF THE CASE

A. PROCEDURAL HISTORY AND FACTS

The Mississippi Coalition Against Domestic Violence is a nonprofit Mississippi corporation in good standing with the Secretary of State which was founded in 1980 by domestic violence shelter programs and advocates for battered women to help all victims of domestic violence. The coalition is comprised of persons working directly, indirectly or who have expressed interest in the issues and concerns of victims of family violence. The coalition provides technical assistance to domestic violence shelters, community and professional education and other related assistance to victims of domestic violence across the state. During the last thirty years, there has been a movement to end domestic violence and to help those who are victims of this crime. The Mississippi Coalition Against Domestic Violence is committed to this

movement. The overall goal of the Coalition is to provide an end to domestic violence in the home and in our state.

The Coalition is not a party to this case but submits this amicus brief on the issue which concerns the unconstitutionality of Mississippi's Divorce Statute, which does not allow for unilateral divorce, and which deprives domestic violence victims of their constitutional rights. Upon information and belief, domestic violence was not an issue raised by the parties in the case below, but the issue of the unconstitutionality of the divorce statute was raised sua sponte by the trial court, which finding the Coalition hereby prays this Court affirm.

The case history of the case at bar, pursuant to the trial Court's summation in the final Amended and Restated Judgment of Divorce states in pertinent part:

The trial Court entered its *Final Judgment of Divorce and Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as amended*, sua sponte raising the issue of the unconstitutionality of the mutual consent provision contained within the irreconcilable differences divorce statute giving notice to the parties as well as to the Attorney General of Mississippi, Jim Hood, and adding him as a party pursuant to Mississippi Rules of Civil Procedure 21 and 19(a). As a result of the Court's finding that the statute is unconstitutional, the Court granted the parties a divorce through irreconcilable differences.

Following the Court's entering of its final amended and restated judgment of divorce, this appeal was filed before this Court. Upon information and belief, no domestic violence issue was raised before the trial Court. However, the amicus in this case does have a vested interest in the protection of the safety and well-being of

domestic violence victims in the State of Mississippi, and the amicus would further show that the Mississippi divorce statute is unconstitutional as written because it fails to allow for unilateral divorce, which deprives domestic abuse victims of their constitutional rights.

SUMMARY OF THE ARGUMENT

This Court should examine the Mississippi Divorce Statute through the eyes of a domestic violence victim, and affirm the judgment of the trial court. The current Mississippi Divorce Statute deprives domestic abuse victims of constitutional rights and should be declared unconstitutional, and the trial court affirmed.

ARGUMENT

A. THIS COURT SHOULD EXAMINE THE MISSISSIPPI DIVORCE STATUTE THROUGH THE EYES OF A DOMESTIC VIOLENCE VICTIM, AND AFFIRM THE JUDGMENT OF THE TRIAL COURT.

Her husband hit her so hard, she could not hear out of one ear for over two weeks. Her son saw the whole incident. When she finally was able to get away, her son would have post-traumatic stress disorder and dental problems as a result of grinding his teeth, would have nightmares, and would come check on her every night to make sure she was okay.

When she went to file for divorce, once she knew he was incarcerated, she was afraid. What if he refused to give her a divorce? What if the judge found she did not have enough evidence to grant her a divorce? What would he do to her after he found out she did not want to be married anymore? When she sued him for divorce,

would she have to face him again? What if she blanked out in fear and could not tell her story? What if she was too afraid to face him in court? Would she have the courage?

This is a true story. It is a story which is all too often heard in our courts. The domestic violence victim in this case is not here mentioned to preserve her safety and privacy.

This honorable Court should look at the Mississippi divorce statute through her eyes, the eyes of every domestic violence victim, including the children of domestic violence victims (who are themselves victims), and should find that Mississippi needs a unilateral divorce statute, for the health, safety and welfare of domestic violence victims.

The purpose of this amicus is to convey to this Court that, as it stands, the current Mississippi divorce statute traps domestic violence victims in marriages with their abusers, then mandates the victim to obtain the consent of their abuser. In order to break the bounds of matrimony, the domestic violence victim must again be victimized by having to actually try the case and put on proof as to grounds of habitual, cruel, and inhuman treatment, and/or domestic violence. The victim must again be faced with the danger of having to face her abuser in Court, look him in the eyes, and find the courage to actually relive, in Court, before strangers, the most traumatizing and hellacious events of her life, and, in that task, risk future harm in speaking out and exposing her abuser. Mississippi is risking the lives of domestic abuse victims by requiring them to put on proof of domestic violence to obtain a

divorce. The current Mississippi divorce statute actually re-victimizes domestic violence victims.

The trial Court should be affirmed because the current Mississippi divorce statute is unconstitutional. The amicus in this case does have a vested interest in the protection of the safety and well-being of domestic violence victims in the State of Mississippi, and the amicus would further show that the Mississippi divorce statute is unconstitutional as written because it fails to allow for unilateral divorce, which would be the most effective procedural safeguard for domestic violence victims in obtaining a divorce from abusive spouses.

In the story of the aforementioned domestic violence victim (“victim”), she had to file suit against her abuser in chancery court to obtain a divorce as a result of the current Mississippi divorce statute which does not allow for unilateral divorce, as this Court well knows. Fortunately, the victim in the aforementioned case was able to find sufficient evidence, and the Court did grant her a divorce. However, she still had to try the case, and relive the nightmare. Why? What if her fears came true and she could not prove the domestic violence took place and she remained trapped in a marriage with an abusive spouse?

Our United States Supreme Court has shed light on the plight of domestic violence victims:

The American Medical Association (AMA) has published a summary of the recent research in this field, which indicates that in an average 12-month period in this country, approximately two million women are the victims of severe assaults by their male partners. In a 1985 survey, women reported that nearly one of every eight husbands had assaulted their wives during the past year. The AMA views these figures as “marked underestimates,” because the nature of these incidents discourages women from reporting them, and

because surveys typically exclude the very poor, those who do not speak English well, and women who are homeless or in institutions or hospitals when the survey is conducted. According to the AMA, “[r]esearchers on family violence agree that the true incidence of partner violence is probably double the above estimates; or four million severely assaulted women per year. Studies on prevalence suggest that from one-fifth to one-third of all women will be physically assaulted by a partner or ex-partner during their lifetime.” AMA Council on Scientific Affairs, *Violence Against Women* 7 (1991) (emphasis in original). Thus on an average day in the United States, nearly 11,000 women are severely assaulted by their male partners. Many of these incidents involve sexual assault. *Id.*, at 3–4; Shields & Hanneke, Battered Wives’ Reactions to Marital Rape, in *The Dark Side of Families: Current Family Violence Research* 131, 144 (D. Finkelhor, R. Gelles, G. Hataling, & M. Straus eds. 1983). In families where wifebeating takes place, moreover, child abuse is often present as well. *Violence Against Women*, *supra*, at 12. Other studies fill in the rest of this troubling picture. Physical violence is only the most visible form of abuse. Psychological abuse, particularly forced social and economic isolation of women, is also common. L. Walker, *The Battered Woman Syndrome* 27–28 (1984). Many victims of domestic violence remain with their abusers, perhaps because they perceive no superior alternative. Herbert, Silver, & Ellard, Coping with an Abusive Relationship: I. How and Why do Women Stay? 53 *J. Marriage & the Family* 311 (1991). Many abused women who find temporary refuge in shelters return to their husbands, in large part because they have no other source of income. Aguirre, *Why Do They Return? Abused Wives in Shelters*, 30 *J. Nat. Assn. of Social Workers* 350, 352 (1985). Returning to one’s abuser can be dangerous. Recent Federal Bureau of Investigation statistics disclose that 8.8 percent of all homicide victims in the United States are killed by their spouses. Mercy & Saltzman, Fatal Violence Among Spouses in the United States, 1976–85, 79 *Am. J. Public Health* 595 (1989). Thirty percent of female homicide victims are killed by their male partners. Domestic Violence: Terrorism in the Home, Hearing before the Subcommittee on Children, Family, Drugs and Alcoholism of the Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess., 3 (1990).

Planned Parenthood of S.E. Pennsylvania v. Casey, 505 U.S. 833, 891–92 (1992).

Research also shows that there is a correlation between unilateral divorce statutes and smaller rates of domestic violence. See Bargaining in the Shadow of the Law: Divorce Laws and Family Distress, Betsey Stevenson, Justin Wolfers, *The Quarterly Journal of Economics*, Volume 121, Issue 1, 1 February 2006, Pages 267–

288 (Finding “[i]n states that introduced unilateral divorce [] a 8–16 percent decline in female suicide, roughly a 30 percent decline in domestic violence for both men and women, and a 10 percent decline in females murdered by their partners.”)

In her Mississippi Law Journal article of 2013, the now Ole Miss Law School Dean, Deborah H. Bell, grapples with the dilemma of divorce in Mississippi and its effects, particularly on low income families, victims of domestic violence and self-represented litigants. Deborah H. Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra 131 (2013). Dean Bell enumerates that the fault-based system increases the costs of litigation, and that proving fault grounds are necessarily more costly than true unilateral divorce due to the potential of increased attorney’s fees and expenses. Representation in fault-based divorce is beyond the means of many low-income litigants who might be able to afford an attorney for a no-fault divorce. Low-income litigants are left with two choices. One, they can step unrepresented into a fault-based system that they are unlikely to successfully navigate. They must understand the grounds, the elements, the type of proof required, and the potential defenses. They are unlikely to understand and properly apply the rules of evidence and procedure. Or, two, they can remain outside of the system—married but separated. Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra at 142.

Despite the strong interest the state has in protecting and preserving marriage, this burdensome system may also increase and expand the litigation even when the marriage itself is over. The result can be an extended separation with no reconciliation, a worsening of the relationship, and increased conflict, which has a negative impact on children. *Id.* at 144-145. The financial and personal

consequences are significant. A spouse who cannot obtain consent to a divorce or prove grounds may live for many years (potentially for life) married but separated, without resolution of financial issues. The court cannot order division of marital assets in this situation—property division is available only upon divorce. Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra at 144. Low-income victims of domestic violence are physically at risk of harm and more at risk of being denied relief by the court:

Abusers are more likely to refuse to agree to divorce as a means of control, increasing the likelihood that the victim will be forced into the fault-based system. Corroboration of the often-secret act of spousal abuse may be hard to come by. And the condonation defense, which acts as a bar to divorce, is at direct odds with the state and national emphasis on protecting victims of violence.

Bell, *The Cost of Fault-Based Divorce*, 82 Miss. L.J. Supra at 145.

True unilateral divorce is simple and inexpensive to obtain, although parties may ultimately litigate contested matters such as child custody or property division. However, the divorce itself is still granted. *Id.* at 138. Professor Bell point out that “The requirement of corroboration can be a serious barrier to divorce for abused spouses. Domestic violence primarily occurs in private, behind closed doors. An abuser often inflicts violence only on a romantic partner or spouse; a perpetrator of domestic violence is not necessarily violent outside the home, which makes eyewitness testimony virtually impossible. *Id.*

In a 2010 case, the Mississippi Court of Appeals reversed a divorce based on physical abuse, even though the wife had obtained an order of protection. *Ladner v. Ladner*, 49 So. 3d 669, 672 (Miss. Ct. App. 2010). Her testimony was not sufficiently corroborated by police reports and the protective order petition because both were based on her statements. *Id.* at 672 (also stating that testimony that the son feared his father did not prove abuse of the mother). Similarly, a wife who

testified to physical abuse before and during her short marriage was denied a divorce. *Cochran v. Cochran*, 912 So. 2d 1086, 1090-91 (Miss. Ct. App. 2005). Although she provided corroboration of premarital abuse, she could not produce a witness to the abuse during the eighteen-month marriage. *Id.* Furthermore, the requirement of corroboration can be a serious barrier to divorce for abused spouses. Domestic violence primarily occurs in private, behind closed doors. An abuser often inflicts violence only on a romantic partner or spouse; a perpetrator of domestic violence is not necessarily violent outside the home, which makes eyewitness testimony virtually impossible. *Id.*, citing Cheryl Hanna, The Paradox of Hope: The Crime and Punishment of Domestic Violence, 39 WM. & MARY L. REV. 1505, 1564-66 (1998) (discussing study indicating that only twenty-five percent of batterers exhibit violence outside the home).); See *Stribling v. Stribling*, 215 So. 2d 869, 870 (Miss. 1968) (wife condoned husband's acts of violence, which caused permanent physical damage, by reconciling and resuming cohabitation); *cf. Langdon v. Langdon*, 854 So. 2d 485, 490-91 (Miss. Ct. App. 2003) (condonation of two incidents of violence by reconciliation following separation; but divorce granted because violence recurred, removing condonation).

The amicus curiae would show unto the Court that certainly the sanctity of marriage must be upheld, and the intention to buttress that belief which supported the current Mississippi divorce statute must be continued, but the Court must also look to the sanctity of human life itself, and whether our current statute causes undue risk to human life. This amicus would show that it does cause undue risk. Furthermore, there is biblical support for the notion of unilateral divorce (which

Christ allowed as a result of the hardness of men's hearts). The Book of Deuteronomy itself (Chapter 24) proscribes the procedure to consist simply of a husband handing his wife a bill of divorce. There is no adjudication, no third-party interference, no governmental oversight by any judicial branch as to the propriety of the divorce. Indeed, the sanctity of marriage must be upheld, and the tragedy of divorce avoided by the parties if possible in the best interest of the parties and their children, but the procedure of divorce must be constructed in the most civil and humane way possible so as to protect the health, safety and welfare of the people of Mississippi.

This Court well knows that the best interests of children are paramount in our chancery courts. The "polestar consideration" in any child custody determination is the best interests of the child. *Grant v. Martin*, 757 So.2d 264, 266 (Miss. 2000). The best interests of children are not served by the current Mississippi divorce statute. Children, as well as their mothers, are often put in the limbo created by our current fault based system, and also become victims of physical and psychological abuse as well because the abused spouse, often their mother, is unable to separate from her abuser.

This Court should find that, without a unilateral divorce statute, domestic abuse victims are being deprived on their constitutional rights, specifically, their right to protect their children be free from their abuser. Domestic abuse victims are also being deprived of their right to marry under *Obergefell v. Hodges*, 135 S.Ct. 2584, 2598 (2015), and, conversely, the right to not be married to an abusive spouse. Under our current law, domestic violence victims are trapped.

In the words of one dead lawyer, “The job of the law is to fight for those who cannot fight for themselves.”¹ T.S. Eliot once wrote: “The communication of the dead is tongued with fire beyond the language of the living.” Our laws are meant to protect those who are the most vulnerable, the most abject of our society. If our laws do not protect them, then are not our courts only an empty charade, and vain theatrics?

Even if the Court finds that the lower Court acted improperly by sua sponte finding the Mississippi divorce statute unconstitutional, this Court can still decide the constitutionality of the law despite lower court error. *Lawrence County Sch. Dist. v. Bowden*, 912 So. 2d 898, 900 (Miss. 2005) (“In light of the fact that neither of the parties in this case raised the constitutionality of Mississippi's Education Employment Procedures Law, the chancellor exceeded his powers in raising the issue sua sponte. Though this alone is dispositive of the case, we nonetheless address the issue of whether the statute is unconstitutional...”) Respectfully, this Court is going to be faced with this issue again and again, and the Court should take the initiative to take a new look at this law, and view it from the eyes of a domestic violence victim, and as Atticus Finch said in “To Kill A Mockingbird,” to “climb into their skin” and “walk around in it.” This Court should stand in their shoes and imagine having to face their abuser again and face danger, trauma, and perhaps risking death, to be able to part from their abusive spouses. This does not comport with the interests of justice which are to be the *raison d’etre* of our laws.

¹ Mark Bedford Strickland, d. July 31, 2015.

M.R.C.P. 1. This Court should examine the Mississippi Divorce statute through the eyes of a domestic violence victim and affirm the trial Court.

CONCLUSION

This court should examine the Mississippi Divorce Statute through the eyes of a domestic violence victim, and affirm the judgment of the trial court.

Respectfully submitted, this 17th day of October 2017,

Mississippi Coalition Against
Domestic Violence, Amicus Curiae

By: Brandon C. Jones
Brandon C. Jones

CERTIFICATE OF SERVICE

I do hereby certify that I have this day caused to be served via the Mississippi Electronic Court system a true and correct copy of the above and foregoing Amicus Brief which forwarded notice of such filing to all known counsel of record and interested parties as indicate below:

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So certified, this 17th day of October 2017.

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