

**IN THE SUPREME COURT OF MISSISSIPPI
CAUSE NO. 2017-CP-00828**

**MICHAEL T. GERTY; and
THE STATE OF MISSISSIPPI *EX REL.*
JIM HOOD, ATTORNEY GENERAL**

APPELLANTS

VS.

JOESIE R. GERTY

APPELLEE

On Appeal from the Chancery Court of Harrison County,
First Judicial District, Cause No. C2401:13-cv-2446-2

**REPLY BRIEF OF APPELLANT
THE STATE OF MISSISSIPPI**

****ORAL ARGUMENT NOT REQUESTED****

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument will not assist the Court. The Chancery Court's judgment invalidating Code Section 93-5-2 should be vacated or reversed for numerous straightforward factual and legal reasons. Neither Appellant Michael Gerty nor Appellee Joesie Gerty dispute the State's points of error. Moreover, oral argument may impose an undue burden and expense for Appellant Michael Gerty, an out-of-state resident proceeding *pro se* on appeal.

REPLY ARGUMENT

The Chancery Court improperly struck down Section 93-5-2 *sua sponte* to award the Gertys an irreconcilable differences divorce. There is nothing for the Court to do on appeal but reject its constitutional ruling, by either finding a non-constitutional way around it, or reversing on the various procedural and substantive errors below.

I. If at all Possible, the Court Should Apply the Constitutional Avoidance Doctrine.

Michael contends the Chancery Court should have awarded a divorce on fault grounds. [Michael Gerty Appellant's Br. at pp. 37-41]. Joesie, for her part, argues under ***Rounsaville v. Rounsaville***, 732 So. 2d 909 (Miss. 1999), and related cases, the parties' technical lack-of-compliance with Section 93-5-2 did not preclude the Chancery Court from awarding an irreconcilable differences divorce. [Joesie Gerty Appellee's Br. at p. 38]. The State takes no position on the Gertys' competing arguments, except to underscore that if they have merit, the Chancery Court's judgment regarding Section 93-5-2's constitutional validity should be vacated.

The Court should avoid constitutional issues "where the issues involved in a

particular case are such that the case may be decided on other grounds.” **Warner-Lambert Co. v. Potts**, 909 So. 2d 1092, 1093 (¶3) (Miss. 2005). If Michael or Joesie (or both) are correct, no reason to address Section 93-5-2’s constitutional validity would exist. In that event, the Court should render a divorce judgment, address any necessary issues involving the parties’ property and custody, vacate the Chancery Court’s constitutional holding regarding Section 93-5-2, and dismiss the State.

II. The Chancery Court Exceeded its Authority.

If the Court cannot resolve the Chancery Court’s erroneous invalidation of Section 93-5-2 on non-constitutional grounds, then it should apply the settled holdings in **Martin v. Lowery**, 912 So. 2d 461 (Miss. 2005) and its predecessors. Mississippi trial courts cannot raise and decide constitutional issues *sua sponte*. **Id.** at 464-66 (¶¶8-11); *see also, e.g., Lawrence County Sch. Dist. v. Bowden*, 912 So. 2d 898, 900 (¶¶4-5) (Miss. 2005); **City of Jackson v. Lakeland Lounge of Jackson**, 688 So. 2d 742, 749 (Miss. 1996); **Smith v. Fluor Corp.**, 514 So. 2d 1227, 1234 (Miss. 1987); **Estate of Miller v. Miller**, 409 So. 2d 715, 718 (Miss. 1982). A trial court’s *sua sponte* constitutional ruling is furthermore doubly-erroneous when, as here, nobody complies with Rule 24(d)(2) before final judgment. *See, e.g., Martin*, 912 So. 2d at 466 (¶11); **In re D.O.**, 798 So. 2d 417, 423 (¶22) (Miss. 2001).

As the State already established, the Chancery Court below’s *sua sponte* constitutional adjudication prejudiced the parties and the State. [See State Appellant’s Br. at pp. 13-25]. Michael and Joesie tacitly agree with the State. Neither disputes that (1) they never challenged Section 93-5-2’s constitutionality in the Chancery Court, (2) nobody put the Attorney General on notice of the Chancery Court’s intent to assert and

decide its own challenge to Section 93-5-2's constitutionality before its final judgment, and (3) now, on appeal, they do not contend Section 93-5-2 is unconstitutional.

No Mississippi authority condones a trial court's *sua sponte* constitutional adjudication, much less holds that maneuver constitutes mere "harmless error." That new ground should not be broken here. If the Court must reach any constitutional issues, the Chancery Court's ruling should be reversed, the State should be dismissed, and the case remanded for a new trial with explicit instructions that the Chancery Court may only address any constitutional issues if, and only if, the Gertys specifically plead them and comply with Rule 24(d)(2).

III. Section 93-5-2 is Constitutional.

If the Court must reach the merits of the Chancery Court's constitutional arguments, the State reasserts all its reasons Section 93-5-2 does not violate the Gertys' (or anyone else's) Fourteenth Amendment rights. [State Appellant's Br. at pp. 25-44]. The Chancery Court erred in *sua sponte* holding Section 93-5-2 unconstitutional.

Joesie's briefing leaves little for the State to rebut—except acknowledge her observation the State already adequately briefed the constitutional issue. [Joesie Gerty Appellee's Br. at p. 39]. The State also concurs in Joesie's candid disagreement with the Mississippi Coalition Against Domestic Violence's *amicus* contentions. [*Id.*]. The Coalition's *amicus* brief, as she aptly recognizes, "is completely off-base." [*Id.*]. The State joins her request to "reject that Brief outright." [*Id.*].¹

¹ Departing from the usual course under the appellate rules, the Coalition filed its *amicus* brief opposing the State's position before the State filed its initial brief. Section IV of the State's initial brief explains why the Court should reject the Coalition's contentions, so the State need not repeat that explanation here. [See State Appellant's Br. at pp. 45-47].

If the Court must address Section 93-5-2's constitutionality, it should reverse the Chancery Court's amended judgment, and render judgment in the State's favor here.

CONCLUSION

The Court should examine the Gertys' arguments for a divorce award that do not implicate Section 93-5-2's constitutional validity. If they are correct, the Court should award a divorce, vacate the Chancery Court's constitutional holding, and dismiss the State.

Alternatively, if there are no valid bases for the Gertys' divorce which do not implicate Section 93-5-2's constitutional validity, the Court should reverse the Chancery Court's *sua sponte* constitutional holding, dismiss the State, and remand the case for a new trial, with explicit instructions that the Chancery Court may only adjudicate any constitutional issues after the Gertys specifically plead them, and comply with Rule 24(d)(2).

In the further alternative, if the Court must examine the Chancery Court's constitutional argument's merits, it should hold Section 93-5-2 comports with the Fourteenth Amendment, reverse the Chancery Court's amended judgment in that regard, and render judgment in the State's favor.

THIS the 13th day of April, 2018.

Respectfully submitted,

THE STATE OF MISSISSIPPI *EX REL.*
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief has been filed with the Clerk of Court utilizing the Court's MEC system and thereby served on all counsel who have entered their appearance in this appeal. A true and correct copy of the foregoing brief has also been served on the following persons via US Mail, properly addressed and postage prepaid:

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Hon. Jennifer Schloegel
Chancery Court Judge
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Michael Channing Powell
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THIS the 13th day of April, 2018.

S/Justin L. Matheny
Justin L. Matheny