IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 97-CP-01127-COA

RICKY D. CALDWELL **APPELLANT**

v.

ELIZABETH A. CALDWELL A/K/A ELIZABETH A. BROCK **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	05/23/1997
TRIAL JUDGE:	HON. TIMOTHY E. ERVIN
COURT FROM WHICH APPEALED:	TISHOMINGO COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	PRO SE
ATTORNEY FOR APPELLEE:	NONE LISTED
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	PARTIES GRANTED DIVORCE ON IRRECONCILABLE DIFFERENCES AND APPELLEE AWARDED $15,000 INTEREST IN MARITAL HOME
DISPOSITION:	AFFIRMED - 01/22/2002
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	2/12/2002

BEFORE McMILLIN, C.J., BRIDGES, AND CHANDLER, JJ.

CHANDLER, J., FOR THE COURT:

¶1. Ricky and Elizabeth Caldwell were granted a divorce based on irreconcilable differences. The trial court ordered the marital home sold and divided the proceeds between the parties. The court granted Elizabeth $8,500 in lump sum alimony to be paid from the proceeds of the sale. Finally, the court set aside a default judgment entered against Elizabeth. Ricky filed a motion to reconsider the judgment which the trial court dismissed. Ricky appeals the dismissal of his motion and cites two issues as error. First, he claims the trial court erred in failing to reconsider the portion of the opinion that granted Elizabeth one-third of the equitable interest in the marital home without first taking into account existing liens on the property. Ricky next claims the trial court erred in refusing to reconsider the decision to set aside the default judgment against Elizabeth.

¶2. Finding no error, we affirm.

FACTS

¶3. Ricky and Elizabeth Caldwell were married on June 22, 1985. They both had two children from previous marriages but none were born of their union. On September 15, 1994, Elizabeth filed for divorce citing habitual cruel and inhuman treatment. Ricky filed a cross-complaint for divorce alleging grounds of

habitual cruel and inhuman treatment and adultery.

¶4. The court allowed Elizabeth to remain in the marital home while the case was proceeding. When Elizabeth began working in Memphis, the court allowed Ricky to move into the home to prevent waste. When he returned to the home, he alleged that it had been damaged and many items were missing. On November 10, 1995, he filed a motion for citation for contempt of court alleging that Elizabeth had disposed of or destroyed property, real and personal. He submitted a list of items to the court that he testified to be a true and accurate list of the missing goods with correct values attached to each item. Elizabeth failed to appear at the contempt hearing and the court awarded Ricky the $12,598 he sought.

¶5. The couple finally agreed to an irreconcilable differences divorce but could not agree to a property division and so submitted those issues to the court. This agreement was reached after the trial on the merits had begun and Elizabeth had presented her case-in-chief. The court ordered the sale of the marital home, the only asset found to be of any value.

¶6. At the sale, Ricky Caldwell was the highest bidder for $46,400. The commissioner announced that purchase of the home would be subject to two outstanding mortgages, totaling about $21,000. However, this information was not included in the notice of sale. After the home was sold, the court deducted the costs of court and payment of the commissioner. Then the judge awarded Elizabeth $15,466.66 as one-third of the sale price. He also awarded her $8,500 in lump sum rehabilitative alimony. This sum was to be paid from the proceeds of the sale of the home.

¶7. The court also set aside the default judgment at that time because there was no credible evidence that Elizabeth disposed of or destroyed any marital or personal property. Further the court stated that Ricky was not an expert on the values of the items he claimed were missing or destroyed. The court found that it would be manifest injustice to allow the judgment to stand.

LAW AND ANALYSIS

I. DID THE TRIAL COURT ERR IN AWARDING ELIZABETH ONE-THIRD OF THE EQUITABLE INTEREST IN THE MARITAL HOME WITHOUT FIRST TAKING INTO ACCOUNT THE AMOUNTS OWED ON EXISTING LIENS?

¶8. This Court's scope of review in domestic relations matters is limited. *Montgomery v. Montgomery*, 759 So. 2d 1238 (¶5) (Miss. 2000). The findings of a chancellor will not be disturbed by this Court unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Id.*

¶9. Ricky first asserts that the trial court erred when it awarded Elizabeth one-third of the proceeds of the sale of the marital home. There were two outstanding mortgages on the property at the time of the court ordered sale. One lien existed in favor of the FHA in the amount of approximately $21,000. The other lien was executed in favor of Ricky's parents in the amount of $2,000. Ricky asserts that the court should have ordered payment of these liens and then awarded Elizabeth one-third of the amount left after satisfying the loans. Ricky attests that the court's division of the marital property is inconsistent with the guidelines set forth in *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994). Specifically, he claims that the court erred in failing to consider the dictates of factor number five: "tax and economic consequences, and contractual or legal consequences to third parties, of the proposed distribution." *Id*. at 928.

¶10. A court is vested with the authority to order a sale of marital property subject to or free of

encumbrances. *O'Neill v. O'Neill*, 551 So. 2d 228, 232 (Miss. 1989). The trial court ruled that it would be unfair to the general public with an interest in the sale to subject the sale to the payment of the liens because the notice of sale did not mention existing liens or indicate the proceeds of the sale would be used to satisfy the debts on the property. Neither of the mortgagees were made parties to the ancillary proceedings relating to the sale of the property. Under *Powell v. Davis*, the commissioner conducting the sale was, therefore, without authority to convey the interests of these mortgagees at the sale, which would be required if the purchaser were to get title free of all prior encumbrances. *Powell v. Davis*, 119 Miss. 175, 80 So. 556, 557 (1919). While it certainly would have been preferable for the notice of sale to explicitly mention the fact that outstanding encumbrances were unaffected by the sale, nevertheless, it was the duty of all potential bidders, including Ricky, to acquaint themselves with the law relating to such matters and to govern their bidding decisions accordingly. We cannot find an error of law in the manner in which this sale was conducted that would suggest it was appropriate to afford Ricky the relief he seeks.

¶11. Aside from pure questions of law, any inequity arising by virtue of Ricky's claim that he thought he was bidding for the property free of existing encumbrances - even if we accept that representation as true - is substantially tempered by the chancellor's finding that, based on evidence that the property's true market value was in the range of $66,000, he concluded that an award of $15,466.66 to Elizabeth was an equitable division of the proceeds even if it represented a higher percentage of the net proceeds than the thirty-three percent mentioned in his earlier order.

¶12. Ricky further alleges that the chancellor erred by failing to set forth specific findings of fact and conclusions of law as required by *Ferguson.* A court is better equipped to review disputed issues if the chancellor makes specific findings; however, a reviewing court should reverse and remand only where the failure to make sufficient findings of fact and conclusions of law constitute manifest error. *Selman v. Selman*, 722 So. 2d 547 (¶29) (Miss.1998); *Sandlin v. Sandlin*, 699 So. 2d 1198, 1204 (Miss. 1997). This Court concludes that the findings made by the chancellor in this case were sufficient to avoid reversal.

II. DID THE TRIAL COURT ERR IN SETTING ASIDE THE DEFAULT JUDGMENT AGAINST ELIZABETH?

¶13. Ricky asserts that the trial court erred when it set aside the default judgment previously entered against Elizabeth. The chancellor, after hearing testimony on the issue, held it would be a manifest injustice to uphold the default judgment. The court noted that Ricky was not qualified as an expert to testify to the values he assigned the alleged missing or destroyed items. The court also noted that the values assigned by him were often in direct contravention to the testimony of other witnesses as to the value of the listed items. The court further found that no credible evidence had been presented to show that Elizabeth, or anyone acting on her behalf, had taken or destroyed any of the items listed in Ricky's motion for contempt.

¶14. Under Mississippi Rule of Civil Procedure 60(b)(6), a court may set aside a final judgment for any reason justifying relief. Relief under Rule 60(b)(6) is reserved for extraordinary and compelling circumstances. *Briney v. U.S. Fidelity and Guar. Co.*, 714 So. 2d 962 (¶12) (Miss. 1998). This rule is a catch-all provision which serves as a "grand reservoir of equitable power to do justice in a particular case . . ." *Id.* (quoting *Bryant, Inc. v. Walters*, 493 So. 2d 933, 939 (Miss.1986)). The chancellor acted within his discretion in setting aside the default judgment. His determination that there was no credible evidence to support the default judgment and that it would be a manifest injustice to maintain the default judgment clearly supports his decision to set it aside.

¶15. **THE JUDGMENT OF THE TISHOMINGO COUNTY CHANCERY COURT IS AFFIRMED. COSTS ARE ASSESSED TO THE APPELLANT.**

McMILLIN, C.J., KING AND SOUTHWICK, P.JJ., BRIDGES, THOMAS, LEE, IRVING, MYERS AND BRANTLEY, JJ., CONCUR AS TO ISSUE I. SOUTHWICK, P.J., CONCURS WITH SEPARATE WRITTEN OPINION AS TO ISSUE II JOINED BY MCMILLIN, C.J., THOMAS AND MYERS, JJ. IRVING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY BRIDGES, J.

SOUTHWICK, P.J., CONCURRING:

¶16. With respect for both the majority and the dissent, I find myself pursuing a third path to a conclusion in this case.

¶17. The default judgment entered against Mrs. Caldwell was on a motion filed in the pending divorce proceedings. Mr. Caldwell sought a determination that his then-wife was committing waste at their former marital home. That judgment was reconsidered twice by the chancellor on motion of Mrs. Caldwell and allowed to stand. Later, however, the chancellor in the decree of divorce placed the parties on notice that he might reconsider the default when the determination on a final property division was made.

¶18. I do not find that Civil Rule 60 is implicated here. That rule applies to reconsideration of final judgments. Here, the trial judge was exercising his authority under Rule 54 to revise "at any time before the entry of judgment" an "order or other form of decision, however designated which adjudicates fewer than all the claims" of the parties. M.R.C.P. 54 (b); *Mauck v. Columbus Hotel Co.*, 741 So.2d 259, 268-69 (Miss. 1999) (later reconsideration of denial of partial summary judgment is within trial judge's authority under Rule 54).

¶19. In my view, Rule 54 is blanket authority for a trial judge to return to issues resolved in preliminary rulings in a case. I do not find that the parties control whether the trial judge exercises this authority. Therefore, whether they presented the issue to him as part of the still-disputed matters in the irreconcilable differences divorce is irrelevant. If upon further reflection the court determines that a different order is appropriate, it can be entered. That is what occurred here, and I find no error. I therefore agree with the majority's affirmance.

MCMILLIN, C.J., THOMAS AND MYERS, JJ., JOIN THIS SEPARATE WRITTEN OPINION.

IRVING, J., CONCURRING IN PART, DISSENTING IN PART:

¶20. The majority, citing Rule 60(b) of Mississippi Rules of Civil Procedure,[(1)] concludes that the chancellor did not err in setting aside the default judgment previously granted to Ricky Caldwell. The concurring opinion concludes that the trial court and the majority's reliance on Rule 60(b) is misplaced; however, the concurring opinion believes Rule 54 provides a sufficient basis for upholding the decision of the chancellor to set aside the default judgment.[(2)]

¶21. On the facts of this case, I do not believe that either Rule 60(b) or Rule 54 provides a basis for affirming the chancellor on the matter of the default judgment. My disagreement with the two opinions stems

from the fact that (a) the divorce was granted on the ground of irreconcilable differences, (b) the matter of the default judgment had been resolved and concluded prior to the parties' consenting to the divorce on the ground of irreconcilable differences and even if it had not been so concluded, the parties did not submit reconsideration of the default judgment as an issue to be resolved by the chancellor, and (c) the parties did not comply with the statutory requirements which are a prerequisite to the chancellor's authority to consider the divorce as well as any attendant issues. Accordingly, I respectfully dissent from this portion of the majority's opinion.

¶22. As noted by the majority, on September 15, 1994, Elizabeth Caldwell filed for divorce from Ricky. As the basis for the divorce, she alleged habitual cruel and inhuman treatment and adultery. Ricky filed a cross-claim for divorce on the same basis.

¶23. The trial of this cause commenced on July 31, 1996, and continued through a portion of the next day before being recessed until September 25, 1996. On the morning of September 25, 1996, after the case was called, the chancellor observed that there had been an unsuccessful effort to settle the case. He also noted that he had been provided an agreement entitled "Agreement to Divorce on Irreconcilable Differences." Paragraph II of the agreement provides:

> The parties agree that they are unable to agree on all other aspects of the divorce and herewith voluntarily consent to permit this Court to decide all other aspects of the divorce and the parties further state that they understand that the decision of the Court shall be a binding and lawful judgment.

¶24. The chancellor then summed up the agreement as permitting "the Court to decide all other matters that pend between them, whether that be property settlement, alimony, attorney fees, costs, things of that nature." Upon inquiry from the chancellor, counsel for both parties confirmed the nature of the agreement. The chancellor then asked Elizabeth and Ricky if they signed the agreement and understood it. Both answered in the affirmative.

¶25. Mississippi Code Annotated Section 93-5-2 (3) (Rev. 1994) permits divorces on the ground of irreconcilable differences provided the parties execute a written agreement in which the parties: (1) consent in writing to the divorce on this ground, (2) give permission to the court to decide the issues upon which they cannot agree, (3) enumerate the specific issues to be decided by the court, and (4) acknowledge their understanding that the decision of the court shall be a binding and lawful judgment. Miss. Code Ann. § 93-5-2 (Rev. 1994). In cases, as here, where there has been a contest or denial, the contest or denial has to be withdrawn or cancelled, by leave and order of the court, by the party who filed the contest or denial. Miss. Code Ann. § 93-5-2 (5) (Rev. 1994).

¶26. The agreement executed by the parties in this case does not meet the requirements of the statute. The agreement was defective in that it failed to enumerate the specific issues to be decided by the court. Additionally, the record does not contain a withdrawal or cancellation of the previously- filed complaints and denials of the parties, either with or without an order granting leave of the court to do so.

¶27. Despite the fact that the parties' agreement, nor the oral explanation of that agreement, did not list or acknowledge reconsideration of the default judgment as an issue to be decided by the chancellor, on October 29, 1996, the chancellor entered a decree wherein he listed reconsideration of the default judgment as an issue to be revisited by him. In this decree the chancellor ordered the following:

> The Defendant, Ricky D. Caldwell, shall upon the aforementioned hearing date, produce any and all evidence which he possesses to justify the Default Judgment previously entered in his favor and against the Plaintiff, Elizabeth A. Caldwell, by this Court. *A summons shall issue by the Defendant, Ricky D. Caldwell, to Arthur Waymire, the individual who purchased certain items from the Plaintiff, Elizabeth A. Caldwell, to determine how much lumber and other items were sold to him by either or both of the parties, and further, to allow the Court to determine if it shall revisit the Default Judgment entered into previously*.

(emphasis added).

¶28. On March 27, 1997, Ricky filed a motion in *limine* seeking to bar Elizabeth from offering any testimony attacking the default judgment. On March 26, 1997, the chancellor entered an order containing, among other things, the following provisions:

> A prior Decree of this Court was entered on October 28, 1996, which reserved the right of the Court to review the division of the properties between the parties, and to review the prior Default Judgment entered against the Plaintiff in this cause, as well as all attorney's fees and other fees of record of both parties.
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> * * * *
>
> This Court will hear any and all testimony of both parties regarding the Default Judgment previously entered by this Court, and directs the Defendant, Ricky D. Caldwell, to comply with Paragraph C of the Decree of this Court dated October 28, 1996.

¶29. On May 23, 1997, the chancellor issued an opinion and order wherein he stated one of the issues before him as follows: "The Motion to Reconsider the Default Judgment entered by this Court against the Plaintiff on March 28, 1996 in the amount of $12,598.00." The chancellor then made the following finding regarding this issue:

> *The Court further finds that the Default Judgment entered in this cause on March 28, 1996 in the amount of $12,598.00 is hereby set aside and held for naught.* The Court finds that there was no credible evidence that the Plaintiff Elizabeth Caldwell, took any of the items in question from the marital property of the parties, that Ricky D. Caldwell is not an expert on the value of numerous of these items, and that one of the witnesses of the Defendant, Ricky D. Caldwell, directly contradicted the testimony of Ricky D. Caldwell as to the value of the items. *The Court finds that it would be manifest injustice to allow this Judgment to stand and it is hereby set aside and held for naught*.

(emphasis added).

¶30. It is not entirely clear whether the chancellor viewed the default judgment as a final judgment when he entered it. However, judging from the language he used in setting it aside, it appears that he likely considered it so.[(3)] Also, it appears that the parties, as well as the majority, consider the default judgment a final judgment. Since the default judgment was entered during the pendency of the divorce, I do not believe it was final for purposes of Rule 60(b). The judgment grew out of an allegation that Elizabeth had committed waste upon a portion of the marital estate. When the judgment was entered, the chancellor had not made a division of the marital estate. Therefore, it seems to me that he possessed the authority to set the judgment

aside if that became necessary in the equitable division of the marital estate.

¶31. It is clear that the default judgment did not dispose of all the claims in the divorce action. Sometimes a final judgment may be entered that does not dispose of all the claims. However, such a judgment must be entered in accordance with Rule 54(b) of the Mississippi Rules of Civil Procedure. This rule provides in part:

> When more than one claim for relief is presented in an action . . . the court may direct the entry of a final judgment as to one or more but fewer than all of the claims . . . only upon an expressed determination that there is no just reason for delay and upon an expressed direction for the entry of the judgment. In the absence of such determination and direction, any order or other form of decision, however designated which adjudicates fewer than all of the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

M.R.C.P. Rule 54(b). No serious argument can be made that this default judgment was a final judgment within the meaning of Rule 54(b).

¶32. Even if I were to agree with the majority that the default judgment was a final judgment subject to being set aside pursuant to Rule 60(b), I cannot agree that it was properly set aside. The majority finds the catch-all provision of the rule, subsection six, to be applicable. The findings of the chancellor, as set forth in the earlier portion of this dissent, leave no doubt that the chancellor concluded that Ricky had misrepresented the facts to the court or committed outright fraud at the time the default judgment was rendered. Rule 60(b) provides that any motion for relief based on: (1) fraud, misrepresentation, or other misconduct of an adverse party or (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), must be brought within six months after the judgment is entered. Two points are applicable here. First, the record does not reflect that Elizabeth ever filed a Rule 60(b) motion. Second, the record also reflects that the one motion, a motion to reconsider the default judgment, that Elizabeth did file was filed on April 9, 1996. This motion was disposed of on May 9, 1996. It was brought up for further consideration on June 29, 1996, and again rejected. In the motion to reconsider, Elizabeth did not contend that Ricky had committed fraud, misconduct or misrepresented the facts to the court. Rather, her sole contention was that she "did not understand that the hearing was also a hearing on "[Ricky's] motion for citation for contempt." The chancellor found that Elizabeth had proper notice of the hearing wherein the judgment was rendered but failed to attend and defend.

¶33. While I believe the chancellor initially possessed the authority to cancel or set aside the default judgment, I also believe he lost that authority when the parties agreed to obtain a divorce on the ground of irreconcilable differences because the parties, at that time, did not list reconsideration of the default judgment as one of the issues to be resolved by the chancellor. The matter of the appropriateness of the default judgment had already been decided, but even if the chancellor could revisit his decision in this regard pursuant to Rule 54, as contended in the concurring opinion, he could do so only by the express permission of the parties since the posture of the case had shifted from a contested divorce to an irreconcilable differences divorce.

¶34. As stated, in the parties' agreement to obtain their divorce on irreconcilable differences, they agreed to

allow the chancellor to decide "all other aspects of the divorce." The phrase "all other aspects of the divorce" is not defined anywhere in the agreement executed by the parties. Of more importance, however, is the fact that the parties did not list reconsideration of the default judgment as an issue to be decided by the chancellor. Given the fact that the matter of the default judgment had been twice considered and its continuing viability twice affirmed, it certainly is not logical to assume that the parties intended to allow further reconsideration of it without specifically saying so in the agreement that allowed the chancellor to resolve all issues which they could not resolve. The oral explanation between the trial court, counsel, and the parties regarding what was meant by the phrase "all other aspects of the divorce" cannot fill the gap resulting from the failure of the parties to comply with the statutory requirements for having property issues resolved by the trial judge in cases where the divorce is obtained on the ground of irreconcilable differences.

¶35. Consequently, the chancellor, as a matter of law, did not acquire the authority to either grant the divorce on the ground of irreconcilable differences or revisit the issue of the default judgment. Since Ricky does not challenge, in this appeal, the authority of the chancellor to grant the divorce on the ground of irreconcilable differences, I would not reverse that aspect of the judgment of the trial court, but I would reverse and render that portion of the final judgment which vacates the earlier default judgment. For the reasons presented, I concur in part and dissent in part.

BRIDGES, J., JOINS THIS SEPARATE WRITTEN OPINION.

1. Subsection (b) is commonly termed the "catch-all" provision of Rule 60. It allows the trial court, on motion, to set aside a previously granted judgment "for any reason justifying relief from the judgment."

2. Rule 54(b) provides, among other things, that any judgment or order which adjudicates fewer than all the claims in a case may be revised at any time before entry of judgment adjudicating all the claims.

3. It should be noted that the chancellor who set the judgment aside was not the same chancellor who granted it.