

RULE 81(D) PROCEEDINGS

I. Scope of rule

Rule 81(d) of the Mississippi Rules of Civil Procedure provides special procedural rules applicable primarily to family law cases and matters involving estates. Actions involving paternity, adoption, termination of parental rights, grandparents' visitation, and independent custody and support are conducted under the procedures in Rule 81(d). The Act also applies to temporary relief in divorce, separate maintenance, custody, and support matters; to actions to modify custody, support or alimony; and to actions for contempt. These matters may be tried seven days after service of process under the Rule.

II. Pleadings in Rule 81(d) cases

An action under Rule 81(d) is initiated by filing a petition or complaint. The supreme court has advised attorneys that these pleadings should not be designated as motions. *See Jones v. Lee*, 754 So. 2d 564, 565 (Miss. Ct. App. 2000); *Magee v Magee*, 754 So. 2d 1275, 1281 (Miss. Ct. App. 1999); *Suess v. Suess*, 718 So. 2d 1126, 1128 (Miss. Ct. App. 1998). However, mislabeling is a matter of form and does not affect a court's authority to act on the matter. *Sanghi v. Sanghi*, 759 So. 2d 1250, 1255 (Miss. Ct. App. 2000).

A defendant is not required to file a pleading in response to a Rule 81 petition. Because no responsive pleading is required, a defendant may raise affirmative defenses at the hearing. *Mississippi Dep't Human Servs v. Guidry*, 830 So. 2d 628 (Miss. 2002) (defendant did not waive statute of limitations defense by omitting defense from answer,

because answer was elective). A court may, however, order a response to clarify issues in the case. A defendant who fails to comply with an order to respond may not present evidence on the issue. *Id.* Furthermore, a defendant who seeks affirmative relief must file a counter-petition. The supreme court rejected a father's argument that child support should have been modified in a mother's action to collect child support. Modification was not properly before the court, since he did not file a counter petition for modification. *Id.*

III. Service of process

Rule 81 requires use of a special summons which commands that the defendant appear and defend at a specific time and place set by order of the court and informs him or her that no answer is necessary. *See* MISS. R. CIV. P. 81, cmt. (section (d)(5)) ("recognizes that since no answer is required of a defendant/respondent, then the summons issued shall inform him of the time and place where he is to appear and defend"). In addition, the petition should be attached to the summons. *Sanghi v. Sanghi*, 759 So. 2d 1250, 1253 (Miss. Ct. App. 2000) (noting that the form requires attachment although Rule 81 does not; petition is necessary to notify defendant of substance).

Use of a Rule 4 summons, typically used to initiate a case, does not provide adequate service of process; the Rule 4 summons requires a defendant to answer within thirty days, rather than to appear and defend on a certain date. *Powell v. Powell*, 644 So. 2d 269, 274 (Miss. 1994) (modification based on Rule 4 summons reversed); *Saddler v. Saddler*, 556 So. 2d 344, 346 (Miss. 1990). Similarly, service of a notice of pleading – commonly used in motions – is insufficient process. *Serton v. Serton*, 819 So. 2d 15 (Miss. Ct. App. 2002) (service of motion on defendant); *Sanghi v. Sanghi*, 759 So. 2d 1250 (Miss. Ct. App. 2000) (service of a court administrator's notice of hearing). The

rules of civil procedure provide a sample form for initiating modification actions; the supreme court noted that, while the form is not mandatory, its use “removes any question of sufficiency under the Rules.” The recommended form may be found in Miss. R. Civ. P. APP. A, Form 1D.

A Rule 81 summons must be served on the defendant. Service of process was defective when notice was served on a defendant’s attorney, rather than the defendant in a contempt proceeding. *Dennis v. Dennis*, 824 So. 2d 604 (Miss. 2002). Rule 81 does not address the means of service, so actual service on the defendant can be accomplished as in other actions under the rules of civil procedure. *Sanghi v. Sanghi*, 759 So. 2d 1250 (Miss. Ct. App. 2000).

A court does not have jurisdiction over a defendant unless the requirements for service of process are met. A defendant’s knowledge of a proceeding does not cure defective service of process. *Reichert v. Reichert*, 807 So. 2d 1282 (Miss. Ct. App. 2002) (Rule 81 summons is mandatory; judgment is void without proper service). The defect may be attacked collaterally and is not waived by failure to appear. *Johnson v. Johnson*, 191 So. 2d 840, 842 (Miss. 1966) (Mississippi defendant not personally served in child support action); *Kolikas v. Kolikas*, 821 So. 2d 874, 880 (Miss. Ct. App. 2002) (divorce void for failure to mail copy of published summons to physical address) (also finding wife not estopped from attacking validity of decree). However, defects are waived if the defendant or the defendant’s attorney enters a general appearance in the action. For example, a defendant whose attorney appeared and presented evidence on her behalf without objecting to process was properly before the court. *Isom v. Jernigan*, 840 So. 2d 104 (Miss. 2003); *Dennis v. Dennis*, 824 So. 2d 604 (Miss. 2002) (defendant waived his

procedural rights by appearing voluntarily at the hearing and defending, without objecting to service of process). In contrast, contact with a court administrator to discuss another date for a hearing did not waive defective service of process. *Sanghi v. Sanghi*, 759 So. 2d 1250, 1255 (Miss. Ct. App. 2000); *see also Hamm v. Hall*, 693 So. 2d 906, 908-09 (Miss. 1997) (payment of child support pursuant to an invalid decree did not constitute a waiver); *Venegas v. Gurganus*, No. 2003-CA-01621-COA, 2005 WL 954989 (Miss. Ct. App. April 26, 2005) (defects in service of process waived by failure to assert at trial).

III. Hearings

Rule 81(d) petitions for temporary relief, for contempt, or for modification may be heard seven days after personal service of process or thirty days after the first publication. Petitions for paternity, adoption, termination of parental rights, or grandparent visitation, or for custody or support may be tried thirty days after personal service of process or the first publication. No default judgment is available in Rule 81(d) matters; the petition “shall not be taken as confessed.” MISS. R. CIV. P. 81(D)(3).

IV. Continuances

Rule 81(d)(5) provides that if an action is not heard on the day specified in the summons, it “may by order signed on that day be continued to a later day for hearing without additional summons.” In a number of cases, Rule 81 judgments have been reversed because a hearing was continued by an order that was not signed on that day or by an order which continued the action indefinitely. For example, the supreme court held that when a defendant appeared on the date originally set for hearing and the proceedings were continued indefinitely, a new rule 81 summons was required to notify the defendant

of the hearing. *Caples v. Caples*, 686 So. 2d 1071 (Miss. 1996), *see also Vincent v. Griffin*, 872 So. 2d 676 (Miss. 2004) (same).

It should be noted, however, that in a 2006 case, the Mississippi Court of Appeals stated in dicta that it would no longer require strict compliance with the requirements of Rule 81(d). A father argued that a contempt judgment was invalid because the case was continued in a manner inconsistent with Rule 81. The hearing was continued at the husband's attorney's request and with agreement of opposing counsel. Two weeks later, a new hearing was scheduled by order of the Chancery Court Administrator. The father argued that Rule 81 requires that a continuance order be signed on the day set for hearing. Also, the rule permits chancery clerks to continue rule 81 matters, but does not provide for continuance by court administrators. The court of appeals held that because the appellant's counsel initiated the postponement and he appeared at the hearing, any defects in Rule 81 procedure were waived. The Court of Appeals reviewed prior decisions requiring strict compliance with Rule 81. Signaling a different approach, the court stated: "We further withdraw the conclusion in *Floyd* that 'Rule 81 requires strict compliance.' " *Bailey v. Fischer*, 946 So. 2d 404, 408 (Miss. Ct. App. 2006).