

Family Law

# Section Quarterly Report

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From The Mississippi Bar

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### Message From the Editor

“Our First Issue”

Several members of the Family Law Section have mentioned they would like to see our Section publish a periodic report that summarizes recent developments in our area of practice and provides tips for those of us who haven't yet learned all of the tricks of the trade – probably all of us. This Report is the first in what I expect to be a regular feature of the Family Law Section.

Please take this as an open call to all attorneys in our Section to send us their tips, lessons learned the hard way, and things they've seen in the courtroom that the rest of us might want to copy – or avoid. We're not trying to create another law journal in Mississippi, just an open forum where attorneys who regularly practice domestic relations law can compare notes and get an update on what's going on throughout the State and beyond. I hope you will consider sending along your contribution to our efforts at [david@rcrobertslaw.com](mailto:david@rcrobertslaw.com).

David Bridges  
Editor

## Letter from the Bench

From **John S. Grant, III**, Chancellor, Place Two, Twentieth Chancery Court District:

The preparation of the wording in a Final Judgment of Divorce – Irreconcilable Differences is an important task and should not be relegated to outdated form nor linguistic shortcuts.

An example: “Support and property issues have been settled . . .,” or like words often appear in Final Judgments presented to the Court. Such a statement is far from complete with regard to child custody, support and property rights.

Consider the admonition of the Mississippi Supreme Court:

“ . . . No divorce shall be granted on the ground of irreconcilable differences unless the Court shall find in its decree that the parties have made adequate and sufficient provisions by written agreement for the custody and maintenance of any children of that marriage and for the settlement of any property rights between the parties.” *Alexander v. Alexander*, 493 So 2d 978 (Miss. 1986).

Please help the Chancellor (and save yourself) by presenting a Judgment including the above language.

## Letter from the Office

From **W. Benton Gregg**, Wright Law Firm, P.A., Jackson:

### Custody Modification Standard

*Things have materially changed...but since when?  
Must a chancellor wait for adverse effects?*

When asking a court to modify child custody, the petitioner must show a material change in circumstances since the entry of the last custody decree. That change must have adverse effects on the child's welfare. If a material change that adversely affects the child is found, the petitioner must then show that the best interests of the child will be furthered by a change in custody. Thus, the “best interests” *Albright* analysis is triggered.

The most recent statement on this issue has come from the Court of Appeals in *Savell v. Morrison*, No. 2004 CA 02231-COA (Miss.Ct.App. May 23, 2006), available at <http://www.mssc.state.ms.us/decisions/HandDowns/default.asp>. In *Savell*, modification was granted and affirmed where a stepparent’s actions constituted the material change. The chancellor considered facts reaching back to the date of divorce, taking into account things which occurred after the divorce but before an intervening unsuccessful motion to modify.

Importantly, the chancellor didn't wait to find adverse effects on the child, finding instead that the potential harm was obvious and sufficient such that it justified a change.

The parties, Mary Savell and Robert Morrison, were divorced in 1999, and had one daughter, Anna, who was four years old when her parents divorced. By agreement, Mary had physical custody of Anna with legal custody shared between Mary and Robert.

In the summer of 2003, Robert sought modification with a petition that was eventually denied. One year later, in the summer of 2004, Robert again sought modification, and on this second try was awarded sole legal and physical custody of Anna.

By 2004, both Robert and Mary had remarried. Mary's husband (Anna's stepfather) displayed "a pattern of obscene language and threats of violence directed at Anna." This conduct served as the material change in the lower court's findings. Some of this conduct occurred after the original custody determination (1999) and before Robert's first petition was denied.

Mary appealed, claiming the chancellor should have only considered events that occurred after the first petition was denied. The Court of Appeals disagreed: "All events that have occurred since the issuance of the *decree sought to be modified* may be considered by the chancellor." As Robert was seeking modification of the 1999 custody decree, the chancellor was within his authority to consider all evidence from that point (1999) to the present.

Also, Mary appealed the lower court's finding of adverse effect. The Court of Appeals disagreed with Mary again. The court stated that there are limited circumstances where a chancellor can find that it is "reasonably foreseeable that the child will suffer adverse effects" because the child's situation is "clearly detrimental to his or her well being." In such limited circumstances, a chancellor is within his discretion to order a custody change. The chancellor need not wait for the minor child to actually be injured before finding an adverse effect.

*Savell* represents such a limited circumstance. Anna's situation included being yelled at by her stepfather who consistently used obscenity and threatened physical harm. The Court of Appeals summarized it this way: "Being subjected to an almost constant barrage of yelling and profanity does not a healthy and happy child make. This may or may not have produced the adverse environment Anna experienced during her stay at the Savell household but when added to the facts that Roger had already threatened her with physical punishment, had desires to 'pepper' her with paintballs and bind her to a chair with duct tape, and his admitted willingness to go to jail if he 'snapped,' an adverse effect on the child was just a matter of time."

For further reading on other "limited circumstances" see *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996); *Johnson v. Gray*, 859 So. 2d 1006 (Miss. 2003); *Glissen v. Glissen*, 910 So. 2d 603 (Miss. Ct. App. 2005), each of which is cited and discussed in *Savell*. See also, *Hill v. Hill*, No. 2004-CA-00312-COA (Miss. Ct. App. April 4, 2006), available at <http://www.mssc.state.ms.us/decisions/HandDowns/default.asp>.

## Divorce & Taxes

In a hypothetical case, the marital estate consists of only two assets, each worth about the same: the marital residence, purchased for \$120,000 but now worth \$200,000, and a stock trading account with a tax basis of \$120,000, but now with a value of \$200,000. Should your client have a preference for either asset?

Absolutely. Current tax laws allow a single person to sell their house every two years, if certain residency requirements are met, and the first \$250,000 (\$500,000 for a married taxpayer) that exceeds the tax basis (usually the purchase price of the house) is not taxed as a capital gain. There is no longer a requirement that the proceeds from the sale be reinvested in a new house.

Although the marital residence and the trading account appear to be equal in value, after taking into account the tax consequences associated with their respective sales, their values aren't close to equal. Assuming the client's effective tax bracket is 25%, the after-tax value of the stock account is only \$180,000, while the after-tax value of the residence is still \$200,000. Counsel should be sure to identify the marital assets which have a capital gains tax "built-in" to their values.

## Abstracts of Cases Decided January – May 2006

### MISSISSIPPI SUPREME COURT

**MS Credit Center, Inc. v. Horton**

Supreme Court

February 23, 2006

- Announces "new guidelines for assertion of all affirmative defenses."
- Involves invocation of arbitration clause; holds defendants waived right to demand arbitration because of participation in litigation process for eight months before filing a motion to compel arbitration and requesting a hearing on the motion.
- Ordinarily, neither delay in pursuing the right to compel arbitration nor participation in the judicial process, standing alone, will constitute a waiver. A party invoking and pursuing the right to demand arbitration does not waive the right simply because of involvement in the litigation process. A party seeking to compel arbitration after a long delay will not ordinarily be found to have waived the right where there has been no participation in nor advancement of the litigation process.
- However, where there is substantial and unreasonable delay in pursuing the right, combined with active participation in the litigation process, the Court will not hesitate to find a waiver of the right to compel arbitration.
- Holding is not limited to assertion of right to compel arbitration. "A defendant's failure

to timely and reasonably raise and pursue the enforcement of any affirmative defense or other affirmative matter or right which would serve to terminate or stay the litigation, coupled with active participation in the litigation process, will ordinarily serve as a waiver.”

- “To pursue an affirmative defense or other such rights, a party need only assert it in a pleading, bring it to the court’s attention by motion, and request a hearing. Once a hearing is requested, any delay by the trial court in holding the hearing would not constitute a waiver.”

**Brown v. Thompson and Bolivar C.S.D.**      Supreme Court      March 2, 2006

- Prohibition against raising matter for first time on appeal applies only to *issues* not raised until appeal. There is no prohibition against *arguments* raised for the first time on appeal, so long as the underlying issue was raised at the trial court level.

**Matter of Adoption of Minor Child**      Supreme Court      March 16, 2006

- Petitioners with actual possession of child pursuant to agreed order (signed by birth parents) sued for TPR and adoption of 4-year old child. Birth father joined petition, birth mother counter-claimed for custody.
- Petitioners apparently plead that suit was brought pursuant to UCCJA. Although erroneous, the mistake in pleading did not deprive court of subject matter jurisdiction. SMJ turns on the well-pleaded allegations of the complaint. {review 812-980}
- Complaint’s allegations that birth mother did not support or visit child, and exhibited ongoing behavior making it impossible to return child to mother’s care and custody – combined with entry of pre-trial order with allegations of birth mother’s mental problems, unfitness, and moral misconduct – were sufficiently plead to sustain judgment of TPR (if said allegations were proved).
- Birth mother’s motion to dismiss for failure to state a claim upon which relief could be granted was properly denied; allegations and pre-trial order, when read in connection with MCA 93-15-103 and 93-17-7 (setting forth grounds for TPR) supported grounds for relief.
- Child had been subject of DHS paternity suit before the present case was filed. DHS was not an indispensable party. MCA 93-17-5 makes DHS an indispensable party in an adoption only if the child has been placed in foster care.
- Strict compliance with Rule 81 waived, although no order of continuance was entered on day case originally scheduled for trial, when birth mother’s attorney appeared in court without objecting to personal jurisdiction, agreed to pre-trial orders and order setting case for trial, and introduced testimony on her behalf at trial.
- Any error in incorporating expert’s and GAL’s testimony into chancellor’s findings

because of expert's and GAL's lack of qualifications was waived, where no objection made at trial.

- Burden on petitioner in TPR case is to show by C&C evidence that objecting parent has either abandoned or deserted the child, or is mentally, morally or otherwise unfit to rear or train the child.
- Finding of abandonment pursuant to MCA 93-15-103 requires proof of "any conduct by a parent which evinces a settled purpose to forego all duties and relinquish all parental claims to the child." In present case, where mother visited child regularly, finding of abandonment was not supported by the evidence.
- Court declines to extend to TPR jurisprudence *Hill v. Mitchell*, 818 So.2d 1221 (Miss. App. 2002) (holding in modification of custody case that mother constructively abandoned child by being absent for 11 years, rarely visiting child and assuming no parental rights)
- Unreasonable to first determine parent not legally obligated to support child, then use non-support as basis for TPR

**In Re Rules of Appellate Procedure**          Supreme Court          March 23 and May 27, 2006

- WRAP 11 (Completion and Transmission of the Record) amended.
- Clarifies the clerk's duties to begin assembly of the record does not begin until the appellant has filed the designation of the record and deposited the estimated fees for the completion of the record.
- MRAP 27 (Motions) Commentary amended.
- The rule itself is not amended. The commentary clarifies that motions for reconsideration (MRAP 27(h)) are not to be repetition of the original argument, but should specifically show why the opinion should be reconsidered.

**Owen v. Owen**    Supreme Court    April 27, 2006

- This is *Owen II* [*Owen I* appears at 798 So.2d 394 (Miss. 2001)]. In *Owen I*, the chancellor awarded H 60% of the marital property, based primarily on H being the primary financial contributor. The SCT in *Owen I* remanded the case for a detailed *Ferguson* analysis. It found the chancellor erred in basing the property division upon one factor (H's economic contributions), instead of upon all eight *Ferguson* factors.
- Upon remand, the chancellor provided a detailed *Ferguson* analysis supporting the award to H of 60% of the marital property, and did not alter the original division of property. W appealed.
- The chancellor's analysis is provided verbatim in the *Owen II* opinion. Although it

reviews the *Ferguson* factors, it did not specify a value for H and W's respective non-financial contributions. It also provides no conclusions of law explaining the 60/40 division of property. The case is again remanded to the chancery court to provide an equitable distribution.

- On a separate issue, the original decree provided that the parties would deliver a number of assets for public auction, with the proceeds to be divided between them. H charged W with contempt for failing to deliver some of these assets for auction. H was awarded a \$5,000 judgment to offset the items W failed to deliver. However, the chancellor did not itemize how the \$5,000 was calculated. The SCT instructed the chancellor on remand to itemize how the judgment was calculated.
- Finally, a repair estimate is inadmissible without expert opinion evidence showing what repairs were necessary, and the reasonable cost of said repairs.

**Thoms v. Thoms**

Supreme Court

May 11, 2006

- Rusty is married to Wendy. Wendy has an affair with Rusty's cousin Hank. Wendy bears a child, who may be Hank's or Rusty's.
- Rusty sues Hank for alienation of affections. Rusty sues Wendy for divorce. Hank files a paternity suit to determine whether Wendy's child is his.
- In the paternity suit, the chancellor orders Hank, the child and Wendy to submit to paternity testing. The chancellor also orders that if the test indicates Hank is the probable father, Rusty must also be tested.
- Rusty brings an interlocutory appeal, arguing the paternity test should be vacated because (1) the chancellor did not find the test was in the child's best interests; (2) no guardian ad litem was appointed; (3) Hank's request for a paternity test was barred by doctrines of clean hands, laches and equitable estoppel; and (4) testing Rusty amounts to an unreasonable search and seizure.
- Held: MCA 93-9-21(2) (requiring the court to enter a paternity test order on the motion of plaintiff or defendant) is mandatory, even if the court finds that the test is not in the child's best interests. The child's best interests are to be considered only *after* the tests are complete. Since testing is mandatory, objections 1, 2 and 3 are without merit.
- Rusty's constitutional claims are not ripe for review. The chancellor's order requires Rusty to be tested *only if* the first round of testing indicates Hank is the probable father. If Hank is excluded, Rusty will not be tested. Thus, Rusty's constitutional claims will not ripen for review until the testing indicates Hank is the probable father.

**Dobbins v. Coleman**

Supreme Court

April 13, 2006

- Paternity case where Mother argues MCA 93-9-7 requires Father to pay all of the child's medical expenses.

- Held: MCA 93-9-7 requires a father in a paternity suit to pay for the child’s medical expenses “to the same extent as the father of a child born of lawful matrimony.” There is no *requirement* that a divorcing father pay all of a child’s medical expenses. Chancellor did not err in requiring each parent to pay one-half of the child’s medical expenses.
- After an adjudication of paternity, the child’s relationship to the father with regard to financial support is no different than that of a legitimate child born to a marriage that ended in divorce.
- MCA 93-9-45, requiring the defendant in a paternity suit to pay the petitioner’s attorney’s fees, expert witness fees, etc. is not absolute – the petitioner’s attorney’s fees must be reasonable.

**M.W.F. v. D.D.F.**

Supreme Court

April 20, 2006

- Trial of divorce case bifurcated. After the issue of divorce only was tried, chancellor granted W divorce on grounds of HC&IT. The decree directed the parties to schedule a trial date to resolve the remaining issues.
- H appealed the decree. Neither party on appeal raised the issue of the finality of the decree, but the Supreme Court reached the issue on its own initiative. Since the “Judgment of Divorce” concerned only the divorce itself, but not custody, visitation, property division, etc., the decree was not final and appealable – it did not adjudicate all of the claims, rights and liabilities of the parties. MRCP 54(b)
- **Editor’s Note.** The identical conclusion was reached by the Supreme Court opinion decided May 18, 2006 in *Rosson v. McFarland*, where the Final Judgment did not compass the claims against all of the parties-defendant. Where finality in result is desired, one might consider use of a MRCP 54(b) order, providing that what would otherwise be an interlocutory order is directed to be a final, appealable judgment.

### MISSISSIPPI COURT OF APPEALS

**Neshoba County DHS v. Hodge**

Court of Appeals

January 3, 2006

- DHS obtains custody of 1-day-old child in Youth Court. Child placed with foster parents. DHS employee, serving as homemaker to foster parents, sues individually for adoption of child. Adoption is approved. DHS and foster parents appeal.
- Court rejects argument that Youth Court case gave priority to Youth Court, thus barring Chancery Court from hearing the adoption case. MCA 93-17-3 requires adoption petitions to be filed in chancery court. *K.M.K.* 775 So.2d 115 (Miss. 2000)(holding that where county court sits as youth court in addition to a chancery court, the youth court has priority) is factually inapplicable.

- Chancellor’s findings adequately articulated reasons for not following guardian ad litem’s recommendation to deny adoption.
- Foster parents were prohibited by contract with DHS from filing their own adoption petition until Youth Court issued a permanency order. Foster parents then attempted to intervene in adoption suit, which was rejected as untimely filed. Ruling affirmed, since continuing litigation was not in child’s best interests.

**Fulton v. Fulton**

Court of Appeals

January 3, 2006

- Award of divorce on grounds of HC&IT appropriate, where pattern of abuse was proved, even though only one incident occurred during marriage and other incidents occurred prior to marriage when parties cohabited.
- Resumption of sexual relations for at least seven months after confession of affair sufficient to prove condonation of adultery.

**Jones v. McQuage**

Court of Appeals

January 3, 2006

- One post-divorce lawsuit to modify visitation, and a second lawsuit to correct a clerical error in the visitation schedule, is not a “continued series of litigation” between the parents sufficient to justify a modification from joint to sole custody (distinguishing *Cook v. Whiddon*, 866 So.2d 494 (Miss. App. 2004), in which the parties had filed numerous contempt motions against each other almost immediately after the divorce was entered).
- Non-custodial parent’s remarriage also does not justify a modification from joint to sole custody. “The involvement of a stepparent in the lives of their spouse’s children should not be hindered by courts, but encouraged.”

**Engel v. Engel**

Court of Appeals

January 17, 2006

- Divorce set aside because MCA § 93-5-2(3) consent did not expressly say that certain issues were presented to the Court for adjudication “voluntarily,” did not specifically set forth the issues to be decided by the court, and did not recite that the parties understood the decision of the court would be a binding and lawful judgment.
- Although appellant did not show that procedural errors in § 93-5-2(3) consent amounted to prejudice warranting reversal, failure of appellee to file brief was tantamount to confession of error and thus precluded appellate court from finding that there was no error.

**Breland v. Breland**

Court of Appeals

January 17, 2006

- No withdrawal of fault-based grounds for divorce necessary to obtain divorce on ground of ID, where spouse served with process and filed no answer, contest or denial to petition alleging HC&IT and ID.

**Payne v. Whitten**

Court of Appeals

February 7, 2006

- Personal injury case where Defendant asserts for the first time at trial that an auto accident was caused in part by Plaintiff sitting in his lap and kissing him immediately prior to the accident.
- The “kissing incident” was not disclosed in discovery, although Defendant was questioned extensively in interrogatories and his deposition on what caused the accident and why he thought Plaintiff was guilty of contributory negligence.
- Held: Defendant’s untruthfulness was sufficient to warrant a new trial. {Editor’s note: although not a family law decision, this case may prove useful when an opponent/party’s version of a critical fact changes dramatically between discovery and trial.}

**Ellzey v. White**

Court of Appeals

February 21, 2006

- Chancellor’s award of attorney’s fees (\$1,545) reversed because no *McKee* findings were made; case remanded for further findings of fact
- Chancellor’s finding of father’s AGI (\$6,000) also reversed because insufficient findings of fact showing how Court calculated this figure. Case featured conflicting evidence over tips father received as manager of Babes Show Club, and of his expenses operating a waterfront bar in Louisiana.
- Although case was continued from date listed on Rule 81 summons to another date in June, 2004, no continuance order was signed on the original hearing date in May, 2004. Nevertheless, because father did not object to lack of service of process but instead defended himself at the June, 2004 hearing, the defect in process was waived (even though he was *pro se*).

**Jackson v. Jackson**

Court of Appeals

February 21, 2006

- Regular drinking binges, foul language, rude and condescending behavior to wife and children, mysterious expenditure of marital funds and unexplained extended absences properly found to be HC&IT.
- Household furnishings received by wife as gift properly classified as her separate property, even though she necessarily utilized the furnishings for domestic purposes. Court relied on husband’s testimony that he disavowed an interest in this property.
- Award of the vast majority of marital assets to wife warranted in light of husband’s extended absences from the home and minimal contributions to acquisition of assets.

**Fogarty v. Fogarty**

Court of Appeals

February 28, 2006

- Although the Ole Miss Body Shop is marital property, it has no assets other than goodwill in the husband. It is inequitable to use goodwill in both the valuation of business and in the alimony determination. Therefore, chancellor properly used the value of the body shop solely in its determination of alimony and not in the division of property.

- Award to Wife of possession of marital residence for 2 years, rent free, at value calculated by trial court of \$400 per month, or \$9,600 total, was adequate compensation for her interest in the marital residence. Trial court properly awarded remaining ownership and possession of house to Husband in property distribution.

**Henderson v. Henderson**

Court of Appeals

March 7, 2006

- Not error to overrule three separate motions for continuance where movant changed attorneys three times, no showing how lack of preparation affected his case, and case pending more than a year
- Not error to deny continuance so that party can obtain DNA [sic] testing of hair left on hairbrush to determine whether wife used cocaine; where only chain of custody is husband, DNA results would be inadmissible.
- Not error to deny *ore tenus* motion for recusal based on judge's refusal to admit test results of hair left on hairbrush.
- Where age (2 and 3 at time of trial), health and sex of boys favor mother, continuity of care favors father, and other *Albright* factors are neutral, chancellor did not err in awarding custody to mother. Court agrees with father that age of child is not determining factor for custody, best interest of child is. No discussion of the children's health was presented in the opinion, or any specific findings why best interest of children indicated award of custody to mother.
- GAL recommends liberal visitation, but chancellor finds the visitation recommended by GAL would have to be modified when the children reach school age and orders standard visitation. Shifting children constantly from one parent to the other only accommodates the parent and is not in the children's best interest. The liberal visitation recommended by GAL is not described in the opinion, nor a consideration of whether less-expansive visitation would have avoided the problem mentioned by the court.
- Father is a doctor whose AGI is \$9,370/month, but chancellor finds he is not earning at full capacity. Child support of \$2,000/month is awarded (application of the guidelines would have yielded \$1,874/month). The record shows father is capable of supporting himself and paying the child support ordered by the chancellor, and award is not an abuse of discretion.
- Father properly held in contempt of court for failing to pay temporary alimony; his refusal to pay was based on mother's return to work. Court affirms award of temporary alimony, as father has ability to pay, is a doctor, and wife is a nurse. Attorney's fees associated with the contempt proceeding also properly awarded
- No error in holding father in contempt for violating order prohibiting adult member of opposite sex from staying overnight while children were present.

- This is *Lauro II*, on appeal after the Supreme Court in *Lauro I* remanded the case for a proper classification of property, re-evaluation of the Ferguson factors, and equitable distribution. *Lauro v. Lauro*, 847 So.2d 843 (Miss. 2003)
- Because alimony and equitable distribution (1) “command the entire field of financial settlement of divorce,” and (2) where one expands, the other must recede, any remand of equitable distribution necessarily requires a remand of alimony, so that the chancellor can re-evaluate both at the same time.
- In *Lauro II*, the husband argued the Supreme Court in *Lauro I* ordered the chancellor on remand to award rehabilitative alimony. The Court of Appeals disagreed, holding the Supreme Court had merely explained that rehabilitative alimony, unlike permanent periodic alimony (PPA), is not considered during equitable distribution, and therefore, does not necessarily have to be re-evaluated upon a remand of equitable distribution. *Lauro I* did not mandate an award of rehabilitative alimony; it simply provided an instructive discussion of how each of the two varieties of alimony is handled when a case is remanded for equitable distribution.
- Husband’s income was \$200,000/year, and he was ordered to pay \$3,000/month in PPA and \$2,001/month in child support for 3 children. Husband’s insistence that Wife maintain a high standard of living, combined with his desire that Wife not work, even after the parties’ separation, and her present unemployment, supported the PPA award.
- An award of “reasonable visitation as specifically dictated in the record and agreed by the parties” is impermissibly vague where the record does not indicate any specific visitation schedule or agreement between the parties.
- Award of \$19,391.95 in attorney’s fees appropriate where (1) a large sum of the fees were incurred because of husband’s contemptuous conduct; (2) wife unemployed; (3) wife provided direct testimony she was unable to pay her attorney’s fees, had no income, and monthly expenses of \$7,007.68; and (4) the chancellor found husband used his superior financial position to beat wife down.

- Husband and Wife reside in Mississippi. Wife obtains separate maintenance award against Husband.
- Husband moves to Florida and obtains Florida divorce which recites there are no claims for alimony, and purports to divide parties’ property. Wife never lived in Florida and apparently had no insufficient contacts to permit Florida to establish *in personam* long-arm jurisdiction over Wife. {Editor’s note: If a state does not have sufficient contacts over a non-resident to establish long-arm jurisdiction for purposes of *property division*, if the plaintiff is a resident of that state, the court still has *in rem* jurisdiction to enter a decree of divorce. Divorce is a mere status adjudication not requiring *in personam* jurisdiction over the non-resident}

- After entry of the Florida divorce, Wife filed a *pro se* suit with the Florida court for enforcement of the Mississippi separate maintenance suit. She later amended the motion to request a rehearing. The motion was denied.
- Husband filed suit in Mississippi for the separate maintenance order to be terminated, since the parties were no longer married. Wife counterclaimed for the separate maintenance obligation to be converted into an alimony obligation. Husband answered that the Florida decree denied Wife’s claim for alimony and operated as *res judicata* against her Mississippi claim, seeking full faith and credit for the Florida decree.
- The Mississippi Chancery Court and Court of Appeals, after a review of US Supreme Court and Mississippi Supreme Court cases, found a foreign decree of divorce purporting to divide property and adjudicate alimony issues is entitled to full faith and credit only if the foreign court properly acquired *in personam* jurisdiction over the non-resident defendant.
- The Court distinguished the present case from other cases in which the non-resident defendant voluntarily submitted to the foreign court’s jurisdiction by filing an answer and participating in the litigation.
- Under Florida law, a non-resident’s suit brought solely to enforce an out-of-state visitation, child support or alimony award does not subject the non-resident to Florida’s personal jurisdiction. Because in this case Florida did not have *in personam* jurisdiction over Wife, its divorce decree purporting to adjudge Wife’s entitlement to alimony was not entitled to full faith and credit in Mississippi. Father’s defense of *res adjudicata* was properly denied by the Chancellor.

**Stevens v. Stevens**

Court of Appeals

March 21, 2006

- Chancellor’s extensive discussion of facts pertaining to *Armstrong* factors suffices as a consideration of the *Armstrong* factors, even though he did not weigh each individual factor in his opinion.
- Where husband’s estate is valued at \$604,776 and wife’s at \$174,450, wife is unemployed and husband earns \$140,000, Court did not err in awarding PPA of \$5,000 per month, and lump sum alimony of \$75,000, payable at \$1,000 per month.
- Wife not entitled to larger award of lump sum alimony, even though the LSA awarded leaves husband with an estate of \$529,776 and Wife with \$249,450.

**Bounds v. Bounds**

Court of Appeals

March 21, 2006

- PSA incorporated into final judgment of divorce providing “there currently exists, as aforesaid, certain federal and state tax liens in the appropriate amount of Thirty Thousand Dollars and No/100 (\$30,000.00) against [husband] individually, and [husband] does hereby assume said federal and state tax liens, as aforesaid, and he agrees to hold [wife] harmless from any and all loss(-es) resultant from his nonpayment of same,” held

sufficiently specific to enforce payment of tax liens by contempt, even though husband is not specifically required in the PSA *to pay* the tax liens.

- Finding that contemnor did not prove defense of inability to pay upheld, where only proof at trial conducted in October, 2004, was that contemnor lost his business once in a fire and again in a tornado in 1997 and 2000, respectively. Proof of inability to pay was not met since no showing of contemnor's present inability to pay was shown. {editor's note: for defense of civil contempt, proof of *past* inability to pay is irrelevant, the only relevant time period for inability to pay in civil contempt is *present* inability to pay. Exactly the opposite is true for defense of criminal contempt. Civil contempt is a remedy to enforce present compliance; criminal contempt is a punishment for past non-compliance.}
- Where (1) third-party owes money to husband; (2) husband owes money to wife; (3) husband directs third party to make payment of debt directly to wife: Held, husband not entitled to credit against debt he owed wife, if proof not clear and convincing that payment was intended as partial payment of debt owed to wife. Absence of notation on third party's check that payment was intended as partial payment of husband's debt to wife, and wife's testimony that payment was for another purpose, held sufficient evidence to defeat husband's claim of partial payment.
- Quantum of relief in award of attorney's fees is different in divorce and child support actions vs. contempt actions. In divorce and child support actions, the amount of attorney's fees awarded is "the amount necessary to secure a competent attorney." In contempt actions, the quantum is "to make the plaintiff whole." Without proof that the amount of fees was unreasonable, chancellor did not err in awarding all of the fees charged by wife's attorney, without review of the *McKee* factors. (Citing *Mabus v. Mabus*, 910 So.2d 486 (Miss. 2005))

### **Bryant v. Bryant**

Court of Appeals

March 21, 2006

- Mother and father were the parents of two children. When they divorced, mother was awarded custody of both, and child support. Later, the parents orally agreed father would take custody of the oldest child, mother would retain the youngest child, and neither parent would pay child support to the other. The agreement was never submitted to the Chancellor for approval. After the oldest child emancipated, mother sued for all the child support that father had not paid since he took possession of the oldest child. Father contended the oral agreement should be ratified by the court to prevent mother from being unjustly enriched.
- The Chancellor denied the petition for contempt, and the COA affirmed. Invalidation of the parties' oral agreement would unjustly enrich mother. *Varner v. Varner*, 588 So.2d 428 (Miss. 1991) (encouraging post-divorce *detente*, and ratification of agreements made by parties "without burdening the courts," including *ex post facto* approval of extra-judicial modifications) {editor's note: *but see* Houck v. Ousterhout,

- Father's counter-claim that he be relieved from paying support for youngest child was notice to mother that he requested a child support modification.
- Written findings of fact are not required for modifications of child support. Written findings are required only where there is a deviation from MCA 43-19-101 guidelines.

**Suber v. Suber**

Court of Appeals

March 21, 2006

- Wife files suit for divorce and sole custody of the parties' two adopted children. The GAL reported that the children told him that Husband molested them. GAL recommended all but telephone contact between Husband and the children be stopped. The Court entered a temporary order to this effect.
- At trial, there was no physical evidence of abuse, but the children testified Husband molested them. There was also testimony that Husband: (1) did not provide for the family; (2) ate all the food in the house; (3) ate the children's lunches on the way to school; (4) put the children in scalding bath water; and (5) beat the son with an electrical cord.
- Wife was awarded sole custody, Husband was prohibited from all contact with the children and ordered to pay child support. On appeal, Father contended his parental rights had effectively been terminated. Citing *In re T.A.P.*, 742 So.2d 1095 (Miss. 1999), the COA noted termination of contact with a parent's child is not termination of parental rights.
- Husband provided only two pay stubs to provide his income. Because he did not provide sufficient evidence to prove his income, the chancellor was entitled to impute an income figure to Husband, and set child support accordingly.
- Chancellor did not err in admitting into evidence Husband's personal journal discussing his past sexual problems [which were not identified in the opinion], even in the absence of MRE 702 (Testimony by Experts) evidence.
- **Editor's Note.** The opinion does not explain the nature of Husband's objection; apparently he contended that (1) without expert opinion to the contrary, the Chancellor could not conclude a person with his past sexual problems was any more likely to commit the alleged abuse than a person without the sexual problems; therefore, (2) the existence of the sexual problems did not make the present allegations of abuse more probable or less probable; therefore, (3) evidence of the sexual problems (the personal journal) was irrelevant and inadmissible (MRE 401, defining relevant evidence as that which makes a fact of consequence to the determination of the action more probable or less probable). Since expert testimony would be required to disprove postulate (1), above, and none was offered, the journal was inadmissible. The COA found that by admitting the journal was his, Husband had authenticated the journal, and it was therefore admissible.

**Patton v. State Bank & Trust**

Court of Appeals

March 28, 2006

- MRAP 4(h) time period for filing motion to reopen time for appeal did *not* begin when

appellee's attorney made a telephone call to appellant's attorney and advised that a final order granting summary judgment had been entered in the case; rather, the time period began when the appellant's attorney received a copy of the final judgment from the clerk of court.

**Hill v. Hill**

Court of Appeals

April 4, 2006

- Parties to divorce awarded joint legal, W awarded primary physical custody.
- After modification trial, Court's written *opinion* awards sole legal and physical custody to H, but Court's *judgment* awards only primary physical custody to H (leaving prior award of joint legal custody unchanged). COA holds that only the *judgment* is subject to review; the opinion is the rationale for the judgment and not the subject of the appeal.
- W's (1) moving 4 times since divorce entered 5 years earlier, (2) plans announced at trial to move again, (3) dating several men in past 3 years, (4) subsequent marriage, divorce and plans to remarry after entry of prior divorce, (5) reckless behavior, including dating a married man whose wife W called a "psycho" and (6) printing and keeping pornographic emails all demonstrated W could not provide child with a stable living environment. When combined with (7) W's living with the child and a man to whom she was not married, "totality of circumstances" supported finding of material change in circumstances supporting modification of custody.
- Although no proof of *present* adverse impact discussed in opinion, chancellor correctly found absence of adverse impact is based upon child's resilience and W's good fortune. Since child had suffered harmful effects, even though none are demonstrated now, would suffer harmful effects in the future, evidence supporting finding of "adverse impact on child."
- Case distinguished from *McSwain v. McSwain*, (Miss. Ct. App. Nov. 8, 2005), in which mother with past drug habits had reformed, and chancellor was reversed for considering mother's potential for relapse a change in circumstances supporting a change in custody. In the present case, W has not reformed the behavior creating an unstable environment.

**Harper v. Harper**

Court of Appeals

April 11, 2006

- Parents awarded joint legal and physical custody of children, with W awarded primary physical custody during the children's school year. The children lived with W in Minnesota during the children's school year, and with H in Mississippi during the summer months.
- Eight years later, parties agreed that H would have primary physical custody of oldest daughter. H also sued for modification of custody for the youngest child, who has moderate Down Syndrome, and was awarded primary physical custody of this child.
- At trial, parties admitted that the change of custody of the oldest child was a substantial and material change in circumstances. The majority opinion and the dissent, which quotes extensively from the trial record, differ as to whether this consent was (1) intended

as a stipulation that the change of custody of the oldest child operated as a substantial and material change in circumstances for the youngest child (as the majority opinion found); or (2) was merely a stipulation that the court was authorized to enter an order changing custody of the oldest child, i.e., a stipulation that the change in custody was appropriate (as the dissent argued).

- Not error to permit child over twelve years of age and with moderate Down's Syndrome to testify about his custody preference, where chancellor finds child to be "not incommunicative," child clearly states preference for a parent, and child's preference given only partial weight.

**Ethridge v. Ethridge**

Court of Appeals

April 11, 2006

- Where a trailer is the only property owned by either party to divorce case, chancellor did not err in foregoing *Ferguson* analysis to make award.

**In Re: BNN**

Court of Appeals

April 11, 2006

- Appeal of denial of petition to adopt minor child. Child born during marriage, but is not H's child. Mother dies shortly after child's birth. Child's maternal aunt and uncle ("aunt") secured custody of child in Youth Court.
- Approximately one month after child's birth, child's biological father sued for custody and paternity testing (confirming his paternity). 2 months later, aunt sued for adoption. Chancellor granted custody to aunt, visitation rights to biological father, and denied aunt's claim for TPR against father.
- Where father sued for custody of child approximately 1 month after child's birth, attempted to provide pre-natal support for child but was rebuffed by mother, and attempted to provide support for child after birth, but was rebuffed by child's custodians (aunt), chancellor did not err in finding father demonstrated his willingness to make "a full commitment to parenthood" pursuant to MCA 93-17-5(3).
- Chancellor did not err in concluding evidence did not support finding of desertion, abandonment or moral unfitness, notwithstanding proof of father's extensive criminal record for burglary, drug crimes and domestic violence.

**Coleman v. Mallory**

Court of Appeals

April 11, 2006

- W ordered to pay H \$47,125 within 30 days of divorce judgment. W files motion for new trial (MNT). At hearing, court denies MNT and holds W in contempt for failure to pay the \$47,125.
- Contempt finding reversed. MRCP 62(a) prohibits execution on judgment before disposition of a MNT.

- W awarded increase in PPA 12 years after divorce. Original award of PPA increased as child support reduced when children emancipated. Wife suffered from renal problem at time of divorce, and both parties were aware of the problem. Increase based on increase in W's medical expenses and H's increased net worth.
- H argued W's medical condition and expenses was not an unforeseen change in circumstances, since the parties were aware of the condition at the time of divorce and dealt with it by providing an escalation clause in the alimony award. The chancellor found the parties had not foreseen the "explosion" in the cost of W's medical treatment, and could not have anticipated the future cost, duration or extent of W's future medical condition.
- The COA found the PSA, and specifically the escalation clause, did not mention W's medical condition or medical expenses. Therefore, the extent of W's present medical problem and the resulting expenses was an unforeseen change in circumstances.
- H also objected to the new PPA award being based on his increased net worth (from \$1.5M at the time of divorce to \$5.7M) instead of his disposable income, which remained unchanged. COA found the chancellor considered all of the *Armstrong* factors and not just H's net worth.

- Parties divorce, W awarded primary physical custody of 6 year old son, joint legal. 1 year later, H sued for custody, which was denied on finding there was no MCIC. H appealed, W did not file appellee's brief.
- (1) W was a casino waitress working from 8 p.m. to 4 a.m.; (2) living with her boyfriend, whom she married before trial so that H couldn't use live-in relationship against her; (3) renting out 2 apartments in the house, where (4) people were observed to be coming and going at night and the early hours of the morning; (5) the child had bruises and when questioned said W "lost it again"; (6) child had difficulty adjusting to W and boyfriend/husband's relationship; (7) when child found boyfriend and W in bed and asked for breakfast, W told him to "get it himself;" (8) H had possession of child 179 nights out of past year; and (9) GAL recommended change in custody.
- Failure to file appellee's brief is tantamount to confession of error unless reviewing court can say with confidence there was no error. In this case, chancellor did not err in finding no MCIC.
- In cases where appointment of GAL is mandatory (such as where abused is alleged, see MCA 93-5-23) and chancellor disregard's GAL's recommendation, he should include a summary of GAL's qualifications and recommendations in the FOFCL, and also his reasons for disregarding the GAL's recommendations. This was not done, but failure to do so – standing alone – is not grounds for reversal. Chancellor clearly did consider

GAL's testimony and recommendations.

**Herron v. Herron**

Court of Appeals

May 2, 2006

- Divorce case. 2 months before separation H assigns title of camper/trailer to his son so that son can live in it at school and not have to drive back and forth. H also testifies camper/trailer was originally bought by son, but title was vested in H because son was too young to have title in son's name. H also took \$3,500 from savings account and testified he used it to pay off a credit card on which W had "run up some bills."
- Chancellor mentioned the camper/trailer and the \$3,500, but did not include them in the final property division. Therefore, the chancellor considered both issues (Ferguson factor #2, the degree to which each spouse has expended, withdrawn or otherwise disposed of marital assets), but apparently did not consider these to be fraudulent transfers. Affirmed.

**Ory v. Ory**

Court of Appeals

May 2, 2006

- En banc opinion. H sues for divorce on grounds of HCIT and adultery. Divorce awarded to H on ground of HCIT. H appeals, complaining divorce should have been awarded on ground of adultery, and that his proof of HCIT was insufficient. W remarried shortly after the divorce was entered.
- H's complaint barred, because he did not object to the divorce nor complain in a post-trial motion.
- House and 5 acres are part of larger 80 acre plot. Land was in W's family for over 100 years, and W owned this 80-acre plot before marriage. Before marriage, H paid off a \$49K lien on the property. At time of marriage, property was unencumbered and in W's sole name.
- The only way H can have an interest in the 75 acres (as opposed to the 5-acre plot where the marital residence sits) is by the commingling doctrine. H's efforts to improve the 75 acres is unclear. H hauled dirt and planted seedlings on the 75 acres, but his efforts were not so pervasive as to convert the 75 acres into marital property, or show how the land increased in value during the marriage. Held: the 75 acres remains separate property.
- Prior to marriage, W owned trailer (apparently) worth \$19K, but owed \$30K. W had made payments on the debt for 6-7 years. H paid off the lien on the trailer prior to marriage. W sold the trailer for \$19K and invested the proceeds in the marital residence. Held: trial court erred in finding entire \$19K was W's separate property; remanded for recalculation of parties respective contributions to the trailer.
- During the marriage, W received \$16K in personal injury proceeds and invested the money in the marital residence. No *Tramel* evidence was introduced (*Tramel v. Tramel*, 740 So.2d 286, 289 (¶19) (Miss. 1999)(describing how compensation for different forms of damages in personal injury are classified as marital or separate property)). Held: investment of \$16K in the marital residence commingled the \$16K and it is marital property.

- H sold his oil change franchise. He testified he sold it for \$500K, paid \$296K in related expenses and netted \$204K. However, H also testified he netted \$250K. W’s expert testified that, judging by the sales price and what H had left in his bank accounts after the sale, H in fact netted \$314K. The chancellor valued the net of the sale at \$296, apparently using H’s sale-related expenses, but, in fact, a value advanced by neither party. This issue was remanded to recalculate the sale of the franchise and the appreciation in its value during the marriage.
- W admitted adultery, but H submitted no proof of how W’s adultery affected the stability of the marriage. The chancellor did not err in ignoring the factor of marital misconduct.
- Dissent: Although H did not raise as error to chancellor that divorce was granted on the wrong ground, the chancellor’s error is “manifest error” which can be raised for first time on appeal. MCA 93-5-17(1) requires “the proceedings to obtain a divorce shall not be heard or considered nor a judgment of divorce entered except in open court. ... Any judgment made or entered contrary to the provisions of this section shall be null and void.” In this case, the testimony was not presented in open court, therefore the decree must be voided.
- Majority’s Response: The decree recites the chancellor heard and considered both oral and documentary evidence. There is no record on appeal because H did not raise the issue until the appeal. Thus, the COA has no record to review and W cannot respond to H’s argument. The chancellor should have been given the opportunity to review H’s MCA 93-5-17(1) objection before it was raised for the first time on appeal. H may still present this claim to the chancellor via a MRCP 60(b)(4) motion. Finally, even on appeal, H has not raised the MCA 93-5-17(1) issue – his appeal has solely been one of evidence, that there was not enough of it to support a decree based on HCIT. H did not complain about MCA 93-5-17(1); the dissent came up with that argument on its own.
- **Editor’s Note.** If H and W had never married, what interest would he have had in the trailer, even though he paid off the note? Does a payment made in contemplation of marriage give the payor an interest in the (formerly-)secured property? If so, what is the nature of the interest, and what interest does he have if the marriage does not take place? If not, on what basis does H’s payment prior to marriage create a property interest in the trailer? One possible answer is that H had at the time of payment a claim against W for unjust enrichment. The survival of a pre-marriage claim by one spouse against the other upon the dissolution of their subsequent marriage some 6+ years later is not discussed in the opinion.
- **Editor’s Note II.** Since the \$16K from the personal injury settlement was traced, the commingling was apparently irrevocable. But if so, why bother with the remand of the \$19K for the trailer since the investment of the \$19K into the marital residence should have equally resulted in an irrevocable commingling, just as with the \$16K? One possible answer is that the COA found that, without the *Tramel* evidence, the \$16K was marital property to begin with. If so, there is no need to discuss whether it was commingled.

**Watkins v. Watkins**

Court of Appeals

May 9, 2006

- W obtains separate maintenance order. While living with his girlfriend, H went to W's house and asked if she'd received his divorce settlement proposal. He told her "you don't want me moving back in." Held: this was not a good faith offer to reconcile, and chancellor did not err in refusing to terminate H's separate maintenance obligation.
- H also argued that the original separate maintenance order did not include findings of fact. Held: H's argument was waived when he did not present this objection in an appeal of the original separate maintenance order.
- H also filed a petition to amend the separate maintenance order, which was denied on December 10. On December 17, H filed a motion to amend and/or alter judgment. This motion was overruled January 7 and H appealed the denial of the petition on January 31.
- Held: the appeal was timely filed for appellate consideration of the denial of the petition to amend, not of the original separate maintenance order.
- Husband's slight decrease in income, particularly with no corresponding increase in expenses, did not constitute MCIC meriting modification of separate maintenance.

**Long v. Long**

Court of Appeals

May 9, 2006

- Pre-nup provides that upon death or divorce, each party will retain ownership of property owned before the marriage as if there had been no marriage. H owned house before the marriage, which he lost in eminent domain proceedings. H used the proceeds to build a new house. W had also owned a house before she married. W sold the house during the marriage, investing the proceeds in a CD. The CD was pledged as collateral for H's construction loan, but never used to pay the construction loan. The chancellor found the residence had been "commingled" and was thus marital property. She also found H's business had increased in value and characterized the increase as marital property.
- Held: the first rule of contract construction is to follow the intent of the parties. The intent of the parties was that the property owned before the marriage remain their separate property. Thus, W's CD remained her separate property, and H's new house was his separate property.

**King v. King**

Court of Appeals

May 16, 2006

- H and W lived on a 58-acre "family compound," which included 10 bedrooms, 5 bathrooms, 3 kitchens, a church and a candy shop. H controlled all of the family finances and was in control of "every aspect of life." H gave W \$40-60 every two weeks to buy groceries for H, W, and others living at the compound, and controlled the time W was away from the compound.
- H, 60 years old at the time of trial, was convicted for tax evasion and multiple counts of sexual battery. He is serving a 60-year sentence.
- At the time of H's arrest, W was told to go to the courthouse and sign "a piece of paper,"

which was a quitclaim deed of the property to one of the parties' adult children. The deed was set aside in the divorce because undue influence was used against W, and the adult child was holding title for H; thus, the property was being held in a constructive trust for H's benefit.

- The chancellor also found W was not consulted in the tax fraud for which H was convicted. Although \$336,000 was owed in unpaid taxes, the chancellor found this was not marital debt, but rather H's separate property. The chancellor noted the tax debt was not in W's name, that the judgment for it was not against W, and that she had not been consulted in the transactions leading to the tax debt.
- Finally, the chancellor found the marital estate was worth \$632,000, but that H had taken \$265,000 which was not accounted for; therefore, the chancellor awarded \$334,100 of the remaining assets to W – virtually all of what was on-hand at the time of trial.
- H and his adult daughter claimed the chancellor erred in not taking into account the services provided by the parties' adult children in accumulating marital property. The COA held the issue was (1) barred, because it was not raised at trial (notwithstanding some testimony that the adult children worked at the compound, as this testimony would not have led W or the chancellor to believe that the equitable distribution of the property needed to include the interests of the adult children, nor was any argument presented to that effect to the chancellor at trial); and (2) without merit, as H presented no authority to show the interests of adult children should be taken into account in dividing marital property.
- H complained the chancellor erred in accepting W's property values listed on her UCCR 8.05 financial statement, without any supporting testimony or other corroboration. This might normally be error, but since H provided no UCCR 8.05 financial statement, nor any testimony or other valuation of the marital property, the chancellor did not err in accepting W's values.

### **Savell v. Morrison**

Court of Appeals

May 23, 2006

- Parents of one child divorce in 1999. Mother is awarded custody. Father sues for modification of custody in June, 2003. His case is dismissed in November, 2003, in large measure because Mother marries live-in boyfriend shortly before trial.
- After the November, 2003 trial, when Mother and her new husband were now living together as husband and wife for the first time, new husband began a pattern of yelling at the then-8 year old child on a daily basis, using obscenity, and testified he believed he was entitled to yell at the child whenever he wanted. He also admitted he wanted to "pepper" the child with paintballs and duct tape her to a chair. He threatened her with discipline until she turned white with fear.
- Although new husband never disciplined or struck child, and at worst merely used profanity in child's presence, chancellor appropriately awarded custody to Father when he again sued for modification of custody. New husband's increasing level of aggression was a material change of circumstances.

- Proof of adverse effect on child not necessary, if it is reasonably foreseeable that adverse effects will occur if child continues in an adverse environment. The chancellor need not wait for a minor child to be actually injured before finding an adverse effect. “Being subjected to an almost constant barrage of yelling and profanity does not a healthy and happy child make.”
- Child’s enjoyment of time spent with half-sibling (Father’s child by subsequent marriage) is a valid consideration in custody modification proceeding.
- The time period under consideration when considering a modification of custody is “all events that have occurred since the issuance of the decree sought to be modified.” (In this case, the original divorce decree) The chancellor erred in confining the scope of inquiry to events occurring only after the November, 2003 trial.
- Non-custodial parent’s visitation rights, or the hindrance thereof, are largely irrelevant in custody matters unless the interference has an adverse impact on the child.

**Guardianship of Williams**

Court of Appeals

May 30, 2006

- Unmarried mother of children dies; father seeks guardianship of children. A settlement of the children’s wrongful death claims (\$1.23M) awaits administration. Aunt seeking guardianship is instrumental in bringing the claim; father was not at all diligent in its pursuit. Aunt bases her claim for guardianship on her comparative diligence.
- Considering MCA 93-15-1 and 93-15-5, the COA gleans the following: (1) a father and mother are joint custodians of their natural child (person and estate); (2) when one parent dies, the other becomes sole guardian; (3) the natural parent will remain guardian until adjudicated “unsuitable”; and (4) if the natural parent is unsuitable, he will be removed and a suitable guardian will be appointed. No distinction is made between married and unmarried parents.
- Unsuitability is demonstrated by (1) abandonment; (2) immoral conduct detrimental to the child; or (3) unfitness. Father’s lack of diligence in pursuit of the wrongful death claim does not rise to this standard of unsuitability. “A review of what many parents have done in the handling of financial matters involving their children would likely find a basis for criticism. However, parental deficiencies that do not sink to the level of unfitness are not enough to deny parents the management of minor children’s financial affairs.”

**Bailey v. Fischer**

Court of Appeals

May 30, 2006

- Child support contempt hearing scheduled for hearing on June 5. Parties agree to continuance. No order entered that day, but on June 21, Court administrator issues notice of hearing for August 6. [Father later argues court lost jurisdiction at this point, because only the court or the clerk can reschedule a MRCP 81 matter – the rule does not provide for a court administrator to do so.] Both attorneys appear on August 6, but because of crowded docket, chancellor postpones case. Both attorneys go to court administrator for

new date. Court administrator issues notice of hearing for August 12.

- Father incarcerated upon contempt finding at hearing conducted August 12. Father is later released, but court schedules “review hearings” every four months. Case continued multiple times. On November 10 of following year, Father again found in contempt and another review hearing scheduled for April 28 of next following year.
- Prior to this April 28 hearing, Father awarded social security benefits dating back 3 years. Father moves to set aside all orders and to modify child support. Chancellor denies these motions and Father appeals.
- Held: Father did not raise objections to administrator, rather than clerk, issuing the rescheduling orders, and cannot complain of a lack of fairness. His complaint that the wrong official prepared the notice did not affect his notice or his ability to prepare.
- Previous dicta that “strict compliance” with MRCP 81 is required is withdrawn. “Instead, all civil procedure rules are to be applied so as to ‘secure the just, speedy and inexpensive determination of every action.’” MRCP 1
- In an earlier judgment, Father agreed to pay SSI benefits, when received, to Mother in payment of child support arrears. When he received the benefits, he refused to pay all of them to Mother, arguing the agreement had been made under duress (that she would have him incarcerated if he did not agree) and that SSI benefits are not assignable under federal law.
- The COA found that SSI benefits are subject to legal process in child support matters, that Father was not under duress, and that Father should have appealed the agreed order when it was entered, not several months later when it was enforced.
- **Editor’s Note.** MRCP 81(5) also requires that “If such action or matter 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.” Whether “strict compliance” with the requirement that the continuance order be signed on the day set for hearing is still required is not discussed in the opinion. Father appeared and litigated the original contempt case (apparently without objection to any MRCP 81 defect) and thereby waived the point.