

Family Law

Section Quarterly Report

From The Mississippi Bar

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Message From the Editor

“Case Commentary”

Our primary purpose in publishing a Quarterly Report was to provide a forum for Section members to review and comment on statutes and cases as they are enacted and decided. One of the more interesting cases now before the Supreme Court is McSwain v. McSwain, 2005 WL 2979678 (Miss.Ct.App. 2005). The case involves a modification of custody granted upon proof that featured a custodial mother with a \$300/week crack cocaine habit. By the time of the modification trial, mother testified she had successfully completed rehab, and her counselor testified she was not in danger of relapse. There was no evidence that, at the time of trial, the mother was still abusing drugs.

The chancellor modified custody. In a sharply divided opinion, the Court of Appeals reversed, finding that “the chancellor abused his discretion in transferring custody of [the child] from [mother] because he improperly focused on the potential for future problems rather than the presently-existing circumstances of [the child’s] home life.” p. 3 (¶11.) The Supreme Court granted appellee/father’s petition for writ of certiorari, and the case has been fully briefed by the parties.

The *McSwain* Court noted that because the mother had reformed her misconduct, there had been no change in circumstances. In one sense, this is true: at the time custody was originally awarded, the mother was not using drugs. At the time of the modification trial, the mother was, again, not using drugs. However, in another sense, the circumstances had changed completely: at the time custody was originally awarded, the mother was not a drug addict; at the time of the modification trial, she was – albeit a *recovered* drug addict. The modification was based, in substantial part, on the danger posed to the child by living with a (recovered) drug addict.

What makes the *McSwain* opinion interesting is its apparent holding that proof of the mother’s *past* drug abuse is insufficient to change custody absent proof of her *present* drug abuse. The law routinely restricts privileges from persons who have abused those privileges in the past. Felons aren’t allowed the privilege of holding public office, wife-beaters aren’t permitted to own hunting licenses, drunk motorists aren’t allowed driver’s licenses, convicted thieves aren’t allowed professional licenses, and so on. None of these restrictions are imposed as a punishment, and none require proof of *ongoing* misconduct. Society is comfortable with the idea that privileges should be restricted from those who have demonstrated a past willingness to abuse them, even when the person restricted reforms his conduct. How these principles apply to parenting remains for the Supreme Court to decide.

Letter from the Bench

From **Talmadge D. Littlejohn**, Chancellor, Place Four, First Chancery Court District:

As a follow up to the very pertinent observations made by Chancellor John S. Grant, III, in his “Letter from the Bench” that was included in the first issue of the Section Quarterly Report, and in accordance with the provisions of § 93-5-2 of the MCA, I think that it is critically important that there be a tracking of the statute in any judgments of divorce on the grounds of irreconcilable differences. Accordingly, I have adopted as a policy in any judgments of divorce on the grounds of irreconcilable differences the following requirements, to-wit:

- (1) If the divorce involves children and property, the following language should be inserted in the Judgment, to-wit:

“That the Property Settlement and Child Custody and Child Support Agreement filed herein, which is attached to this Judgment and incorporated herein by reference, shall be spread upon the minutes of the Chancery Court. The Court affirmatively finds that the provisions of said Agreement adequately and sufficiently provide for the custody and maintenance of the children born of this marriage and for the settlement of any property rights between the parties.”

- (2) If the divorce only involves children, the following language should be inserted in the Judgment, to-wit:

“That the Child Custody and Child Support Agreement filed herein, which is attached to this Judgment and incorporated herein by reference, shall be spread upon the minutes of the Chancery Court. The Court affirmatively finds that the provisions of said Agreement adequately and sufficiently provide for the custody and maintenance of the children born of this marriage.”

- (3) If the divorce only involves property, the following language should be inserted in the Judgment, to-wit:

“That the Property Settlement Agreement filed herein, which is attached to this Judgment and incorporated herein by reference, shall be spread upon the minutes of the Chancery Court. The Court affirmatively finds that the provisions of said Agreement adequately and sufficiently provide for the settlement of any property rights between the parties.”

- (4) If the divorce does not involve any children or any property, only the following sentence should be inserted in the Judgment, to-wit:

“That the Agreement filed herein, and incorporated in this Judgment by reference, shall be spread upon the minutes of the Chancery Court.”

Furthermore, I think that it is most important that the Property Settlement Agreement be attached to the Final Judgment of Divorce as heretofore noted, and placed upon the minutes of the Court. The reason for it is simply that if a court file is misplaced or lost, and the Property Settlement and Child Custody and Child Support Agreement not placed upon the minutes, in any

subsequent proceedings, including modification and particularly contempt proceedings, a court in such a hearing cannot actually determine what was done with reference to the Property Settlement and Child Custody and Child Support Agreement.

Again, I would emphasize what Chancellor Grant indicated in his letter, this being the admonition of the Mississippi Supreme Court in the case of *Alexander v. Alexander*, 493 So.2d 978 (Miss. 1986), to-wit:

“...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.”

Divorce & Taxes

Award of Dependency Exemption, Part I

A common misconception is that where no decree awarding the dependency exemption has been entered, the parent providing the most financial sustenance for the child during the tax year will be awarded the exemption. This is true in only limited circumstances.

If no decree awarding the exemption is entered, which parent will be awarded the dependency exemption depends on:

- a. Which parent is the **custodial parent**, but only if:
 - (1) The parties are divorced or separated under a decree or separation agreement; or
 - (2) The parties lived apart at all times during the last 6 months of the calendar year.

[The **custodial parent** is the person with custody (obviously), or, if there is either no custody decree or else a decree of joint custody, the person having the child during more of the calendar year than the other parent.]

- b. If the above conditions are not met, then the exemption is awarded to the parent providing the most financial sustenance for the child during the tax year. This is typically the rule used where the parties' separation occurs on or after July 1.

Abstracts of Cases Decided June-September, 2006

MISSISSIPPI SUPREME COURT

J.E.W. v. T.G.S.

Supreme Court

June 29, 2006

- Where the chancellor denied appellant's motion for automatic stay one day *after* appellant filed her notice of appeal, the notice of appeal cannot encompass the denial of the automatic stay. "Jan is attempting to do the impossible – pursue on appeal an issue arising from events that had not yet taken place at the time she filed her notice of appeal."
- Addressing the substance of the MRAP 8 automatic stay, the SCT found the provision at MRAP 8(b)(5) [providing for stay] applies only if a hearing is necessary for issues arising under subpart (b) of the rule, such as for application for a stay of judgment, for approval/disapproval of a supersedeas bond, or for an order suspending/modifying/restoring/granting an injunction while the appeal is pending.
- Appeal of a FF&C Order entered by a Mississippi *chancery* court was moot, where (1) the foreign court order had been dismissed; and (2) the MS *county* court had entered an award of custody. The question presented on appeal (challenging the FF&C order) was too "case-specific and sensitive" to qualify under the "capable of repetition yet evading review" exception for judicial review of moot questions.

J.P.M. v. T.D.M.

Supreme Court

June 29, 2006

- Catherine born 5 months after wedding. H and W separated and H assumed "the primary child rearing responsibilities" of Catherine at W's request. 3 years later, H sued for divorce, and was awarded temporary custody, in large measure because of W's drug use.
- W's answer admitted Catherine was "a child born to the marriage" and that H should retain temporary and permanent custody of Catherine. W's counter-claim requested custody of Catherine, but repeated that Catherine was "a child born to the marriage."
- Immediately prior to the first day scheduled for trial (Oct. 28), W informed the chancellor that H might not be Catherine's father. At this time Catherine was 6 years old. When trial reconvened (Nov. 19), W filed a motion for paternity testing.
- On Jan. 29, H and W agreed to submit to paternity testing. Paternity testing was conducted the same day. It confirmed H was not the father. That afternoon, the chancellor directed W to either (1) completely cut H out of Catherine's life by declaring he had no parental rights; or (2) hold H out as Catherine's father and treat him exactly as if he were in fact Catherine's biological father. The chancellor told W "to think long and hard about the implications of her decision." W filed a petition for TPR of H's rights.
- At a March 25 hearing, the man W said was Catherine biological father testified that he had no relationship with Catherine and no intention to establish a relationship.

- At the final hearing, on June 24, H admitted W had improved her personal life and that he no longer thought drug testing for W was necessary. H and W both sought custody.
- The chancellor found H was the child's "father-in-fact" through judicial adoption and judicial estoppel, and awarded H physical custody, ordering W to pay child support.
- W appealed, arguing that the case presented an attempt by a third-party to gain custody over the interests of a parent [*Sellers v. Sellers*, 638 So.2d 481 (Miss. 1994); *Keely v. Keely*, 495 So.2d 452 (Miss. 1986), requiring a third party seeking custody to prove the natural parent (1) had abandoned the child; (2) engaged in conduct so immoral as to be detrimental to the child; (3) was unfit mentally or otherwise to have custody].
- The SCT distinguished *Sellers* and *Keely*, in which the third parties were an aunt and a grandfather, respectively, from the present case, in which the "third party" was the child's legal father since birth.
- As in *Griffith v. Pell*, 881 So.2d 184 (Miss. 2004) and *Logan v. Logan*, 730 So.2d 1124 (Miss. 1998), the SCT found "merely because another man was determined to be the minor child's biological father does not automatically negate" the parent-child relationship. Where it is in the child's best interests, the non-father should be allowed to have custody of the child based on affection for and support of the child over a period of time.
- Because (1) H is the legal father (his name is on Catherine's birth certificate); (2) H has supported Catherine for several years under the assumption he is her father; (3) H has legal rights as Catherine's legal father which cannot be compromised without sufficient cause; (4) Catherine and W have continually relied on H's support; (5) H and Catherine have established a strong P-C relationship; (6) there is no putative father "waiting in the wings"; (7) disestablishing the P-C relationship would require W, DHS and the court system to expend time and resources to establish another father, with no guarantee he would provide support or establish a relationship with Catherine, Held: it is not in Catherine's best interests to disestablish the P-C relationship.
- SCT declines to establish the "equitable fatherhood" doctrine adopted by the chancellor. [See *Gallagher v. Gallagher*, 539 N.W.2d 479 (Iowa 1995)] Instead, SCT finds H is Catherine's "father-in- fact."
- No abuse of discretion in finding that tender years doctrine inapplicable to 7-year old.
- Factor "continuity of care" does not require a calculation of the total time the child was in one parent's care vs. time in the other parent's care. Chancellor reasonably found that because there was a distinct period of time when each parent was the primary care-giver and also a time when the parties shared parenting responsibilities; thus, neither parent was favored under this factor.
- Where W used drugs for a 9-month period but had reformed by the time of trial,

chancellor could still properly consider W's activities while she used drugs, even though all parties agreed she had reformed.

- Concurring opinion of Justices Cobb, joined by Justices Dickinson and Randolph:
- Use of "in loco parentis" doctrine (for which *Griffith v. Pell* is the seminal opinion) should be clarified. *Pell* was based on *Logan*, which provided use of the "in loco parentis" doctrine for the purpose of awarding temporary custody to a non-parent until a parent could be located and given notice. *Pell* went beyond the limited holding in *Logan*, and found that as between a natural parent and a "deceived" party, the latter's rights were improperly terminated.
- In both *Pell* and *Logan*, the term "in loco parentis" was used. The term means, or should mean, that third parties who assume custody and care of a child whose natural parents are absent or unable to care for the child have rights of custody superior to other non-parents, **but not against the child's parents**. Therefore, "in loco parentis" is inappropriate when used against a parent, as was done here, to award custody to H, a non-parent, instead of W, a parent.
- However, since custody should be awarded to H, another approach should be used: (1) equitable estoppel, or (2) equitable parenthood.
- In other states, two standards have evolved for establishment of "equitable parenthood":
 1.
 - a. child conceived during marriage but not H's child;
 - b.
 - (1) either H and child acknowledge P-C relationship; or
 - (2) W cooperates in development of P-C relationship for period of time prior to filing of divorce;
 - c. H desires rights of a parent; and
 - d. H is willing to support child.
 2.
 - a. child conceived during marriage but not H's child;
 - b. H reasonably believes he is child's father;
 - c. H establishes P-C relationship; and
 - d. Judicial recognition is in child's best interests.
- MS should adopt the second test. The "in loco parentis" theory is inappropriate because it does not ensure the protection of the family unit.
- Concurring opinion of Justice Easley: W's Eleventh hour recantation of H's paternity is perjury; she should be referred to the district attorney's office for an investigation.
- **Editor's note:** The Family Law Section of the ABA devoted an entire issue of its Family Law Quarterly (Vol. 40, No.1, Spring, 2006) to the issue of rights of non-parents vs. parents to custody and visitation of children. The issue examined the background of parental priority laws, and application of those laws to step-parents, grandparents, victims of "paternity fraud" (as in *J.P.M.*), same-sex adopters of children and governmental

interests in children. *J.P.M.* is not likely to be the last word in Mississippi on this “hot button” issue. For an examination of “paternity fraud” in Kentucky on September 1, 2006, see Hinshaw v. Hinshaw, 2006 WL 2519221 (Ky.Ct.App. 2006)

Rush v. Rush

Supreme Court

June 29, 2006

- H and W parents of one child. W awarded garden variety every-other-weekend visitation.
- Although W awarded only standard visitation, court awarded parties joint legal and physical custody, and H primary physical custody. Court also ordered H to pay child support to W, even though child lived primarily with H.
- Looking beyond form to the substance of the award, SCT finds H was granted physical custody, subject to W’s visitation. Citing MCA § 93-5-24(5)(c), SCT found “joint physical custody may be awarded only where ‘each of the parents shall have significant periods of physical custody.’”
- Since W was not awarded “significant periods of physical custody,” it was error to award her joint physical custody. Case remanded to correct “contradictory language” (i.e., W’s award of standard visitation contradicted the award of joint physical custody). Child support award also reversed and remanded.

Edmonds v. Edmonds

Supreme Court

August 3, 2006

- Father seeks termination or reduction of child support obligation based upon minor child’s incarceration and subsequent conviction for murder. The chancellor denied his complaint, and father appealed.
- Father argued child’s lengthy incarceration constituted emancipation, citing cases from other jurisdictions. Father also argued that since child support is solely for the child’s support, and mother is not providing support for the child, father should not be required to continue to pay child support.
- Incarceration, in and of itself, is not grounds for emancipation. Rather, SCT found that since mother deposits \$140/month into child’s canteen account in prison, child is still being supported by his mother and is, therefore, not emancipated.
- However, the trial court erred in not considering father’s complaint to reduce child support, and case remanded for that purpose. Father’s request that he be permitted to pay child support directly to child’s canteen account, instead of to mother, was denied for failure to provide supporting authority.
- Chancellor improperly ordered father to pay part of attorney’s fees incurred by mother for child’s criminal appeal. These fees were not “maintenance”, “support” or “education” of the child, and thus not an expense contemplated by the child support statutes. MCA

93-5-23; 93-11-65(1).

- Additionally, mother's complaint for reimbursement of these expenses was untimely. Mother originally filed a petition asking merely for an increase in child support to cover future out-of-pocket expenses. She then incurred the criminal defense fees, and only later specifically requested reimbursement of them. Because the fees were incurred unilaterally and before she filed a petition for reimbursement or payment of them, the petition was untimely filed.

Gartrell v. Gartrell

Supreme Court

August 24, 2006

- Interlocutory appeal from order granting commission for issuance of out-of-state subpoena dismissed as moot, when appellee waived her right to the commission. No right once solemnly renounced can be reclaimed. A right renounced no longer exists.

In Re: V.M.S.

Supreme Court

September 28, 2006

- Appeal by mother of TPR decree. Court originally tried and denied DHS' TPR complaint. DHS filed a MRCP 60(b)(3) motion [for relief from judgment based on newly-discovered evidence]. Hearing was conducted one year after the Rule 60(b)(3) motion was filed.
- Chancellor granted Rule 60(b)(3) motion, based primarily upon the results of the chancellor's interview with the child conducted four months after the Rule 60(b)(3) motion was filed.
- DHS admitted that the basis of the TPR (the child's deep-seated antipathy towards the mother) existed not only before trial but before the TPR was ever filed. Since the evidence of the child's antipathy was not "newly discovered" nor "of the sort that it could not have been discovered in time to move for a new trial," Rule 60(b)(3) was inapplicable.
- Facts did not support finding of "substantial erosion of the parent-child relationship."
- **Editor's Note.** The Opinion refers to, without substantial discussion of, *Gray v. Gray*, 562 So.2d 79 (Miss. 1990). *Gray* examined the authorities reviewing the federal counterpart to Rule 60(b)(3), and held that for evidence to meet the requirement of the Rule, "it must have been in existence *at the time of trial* or at the time of the judgment which is allegedly in need of correcting." (Emphasis added) *V.M.S.* arguably expands the holding in *Gray* when, at ¶10, it notes that "the text of the Rule does not require that the evidence must have existed at the time of trial; only that the newly discovered evidence was such that it 'by due diligence could not have been discovered *in time to move for a new trial.*'" (Emphasis in the original)

MISSISSIPPI COURT OF APPEALS

Bellais v. Bellais

Court of Appeals

June 6, 2006

- Mother's appeal of divorce judgment awarding custody to father. No new law cited.

LeBlanc v. Andrews

Court of Appeals

June 13, 2006

- Not abuse of discretion to award rehabilitative alimony in the form of payment of debts, as opposed to ordering cash payments to W.
- MRCP 35(a) [Physical and Mental Examination of Persons] grants discretion to trial court to order mental examination of H before visitation awarded. Chancellor did not abuse discretion in not ordering mental examination of H, where evidence for and against such an order was presented to court.

Elam v. Hinson

Court of Appeals

June 20, 2006

- This case is the continuation of *Hinson v. Hinson*, 877 So.2d 547 (Miss.Ct.App. 2004), an appeal dismissed because no final judgment had been entered.
- Chancellor's refusal to award lump sum alimony reviewed under the factors in *Tilley v. Tilley*, 610 So.2d 348 (Miss. 1992). [more commonly referred to as the *Cheatham* factors, *Cheatham v. Cheatham*, 537 So.2d 435, 438 (Miss. 1988)] Chancellor's refusal was supported by substantial evidence.

Arledge v. Arledge

Court of Appeals

July 18, 2006

- Father divorced in 1982, ordered to pay child support. Father's parental rights terminated in 1984, but decree does not mention whether Father's child support obligation is affected by the TPR. 18 years later, in 2002, Mother sues for unpaid child support. Judgment awarded for unpaid support from 1982-84, but not after entry of the TPR. Post-judgment interest also awarded. Mother appeals, claiming the TPR did not terminate Father's child support obligation.
- Held: it is inherent in a voluntary TPR that the child support obligation also ends, unless the voluntary TPR is sought for the sole purpose of extinguishing the child support obligation.
- MCA §75-17-7 is "fairly deferential" to the trial court, and it was not manifest error to award interest at the rate of 8% per annum.
- The Court noted, but did not address, Father's argument that the 7-year statute of limitations expired in 1991, 7 years after his child support obligation was terminated.

Parker v. Parker

Court of Appeals

July 25, 2006

- In a divorce tried in 2004, the parties reached an agreement on all issues in their divorce except: (1) alimony; and (2) distribution of taxes in 2003.
- H had monthly expenses of \$1,742 against income of \$8,333; W had monthly expenses of more than \$4,000 against income of \$1,333. W's net property was \$26,857, while H's was \$103,642. (The opinion is not clear whether these amounts reflect what the parties owned before or after the agreed property distribution.) This was a 24-year marriage with 2 children, one of whom was an adult. H confessed to adultery.
- The chancellor awarded W \$1,500/m in PPA. H appealed, citing the chancellor's finding that the agreed property division was "not relevant" since the property distributed to W was not income-producing. The Court found the chancellor based his award on the disparity in earnings capacity and W's inability to meet her expenses with her income.
- W filed a separate tax return in 2003, because H "refused to cooperate with her." W received a refund, while H incurred significantly higher taxes since he could not use the "married filing joint return" filing status. In the order denying the motion for rehearing, the chancellor amended the prior judgment and awarded H the dependency exemption for the minor child. This would reduce H's 2003 tax liability (and increase W's).
- The chancellor did not otherwise make a ruling distributing the 2003 taxes, but since he had entered relief relating to them, the Court found that he had entered a final judgment in compliance with MRCP 54. (Apparently, H contended that the chancellor had not entered an order which specifically declared what relief was ordered with respect to the 2003 taxes, and that since this issue was still unresolved, the judgment was not yet final pursuant to MRCP 54 [unless certified as a final judgment under 54(b), a judgment is not final unless it adjudicates the claims, rights and liabilities of all of the parties].)

D'Avignon v. D'Avignon

Court of Appeals

August 1, 2006

- Alimony modified 23 years after original divorce decree. At the time of divorce, H was in the Air Force and W worked as a school teacher.
- Distinguishes *Beacham v. Beacham*, 383 So.2d 146 (Miss. 1980), which held that termination of alimony is more appropriate where ex-W is at fault in break-up of marriage. In present case, H and W entered ID divorce, so termination of alimony based on *Beacham* is inappropriate.
- Alimony should not be decreased or terminated because ex-W takes a new job with a high salary. Ex-W is not to be punished for her industry.
- Where original PSA included escalation clause, ex-W's pleadings requesting a modification of alimony and attaching a copy of the PSA to the complaint afforded ex-H

sufficient notice that the escalation clause might be used as grounds for modification of alimony, even though the clause was not specifically plead by ex-W as a ground for modification.

- Chancellor did not err in back-dating increase of alimony award to three years prior to ex-W's filing of petition for modification. The petition was based on the escalation clause in the PSA contract, and the statute of limitations for contracts is 3 years.
- Dissent of Justice Southwick, joined by Justices Lee, Barnes and Roberts:
- *Beacham* involved an at-fault spouse who, but for her necessitous circumstances, would not have been eligible for any award of alimony. Once her financial condition improved, her eligibility for alimony ended.
- *Beacham* also establishes that alimony is not a bounty to which the recipient is indefinitely entitled. In the present case, where ex-W earned more than ex-H, the alimony should have been terminated, since she no longer needed alimony.
- The parties' anticipation that ex-W might improve her financial position should not be considered an *expected* material change in circumstances, since the parties would not know when or by how much W's financial situation would change.
- Chancellor's use of escalation clause was not urged nor argued by either party. "At times, a case simply cannot be decided based on the arguments advanced by the parties without distorting legal principles." However, this discretion is properly exercised "when a reasonable decision cannot be made within the confines of the legal principle offered or the relief requested."
- In the present case, ex-W did not urge a modification of the alimony based on the escalation clause, and the chancellor did not notify the parties he intended to "boldly go where no party had gone before in its argument." The only chance ex-H had to challenge the chancellor was during the motion for clarification, which may have come too late to upset the chancellor's settled view.
- Alimony award should not be based on ex-H's temporary work in Saudi Arabia, where he earned premium income because of the great dangers in the region and other substantial hardships. "A court abuses its discretion to insist that a former spouse either be subjected to significant dangers and deprivations in order to maintain income, or to bear a financial cost for refusing to continue in that capacity by paying a higher alimony."

Franklin v. Winter

Court of Appeals

August 8, 2006

- Parties awarded joint legal and physical custody of child. Shortly after divorce, mother marries Air Force serviceman and moves to Arkansas. Father remains in Jackson County.

- Chancellor finds the visitation schedule is impractical and economically prohibitive, triggering an *Albright* analysis. Court finds that where a parent's move makes the award of joint physical custody impractical, the move is a material change in circumstances.

In Re: C.B.Y., A Minor

Court of Appeals

August 22, 2006

- TPR case involving teenager mother who was adjudicated as a runaway in youth court. MCA § 93-15-103(1) [permitting grounds for TPR to apply to cases in which child has been removed from parent's home and cannot be returned] interpreted to include mother who had run away from home and could not be reunified with child because she was a runaway and avoiding DHS – and, therefore, also her child, whom she had not seen in over a year.
- DHS did not have a conflict of interest in pursuing TPR against teenage mother who was herself in DHS' legal custody.
- Child's marriage did not terminate DHS' custody of her. MCA 93-5-23 applies to emancipation for the purposes of child support; MCA 43-15-13 defines children as persons under the age of twenty-one years who were placed in the custody of DHS by the youth court, and MCA 43-15-151(1-2) provides the youth court's jurisdiction in proceedings over a child who has not reached his twentieth birthday. Since the married child was only 17, the youth court would have jurisdiction over her until her twentieth birthday.

Duke v. Elmore

Court of Appeals

August 22, 2006

- Appeal of custody modification based on mother's moving 4 times within 2 years of divorce decree, mother's sporadic employment and mother's living in two-bedroom home with convicted felon for 10 months. Chancellor notes in his opinion that he could not look the felon in the eye and he didn't like the felon's countenance. He also didn't think the child should grow up under the felon's leadership.
- No error in modification, notwithstanding mother's evidence that felon was not involved in drugs or violence, and that her unemployment had only lasted the first 3 months after her divorce.
- Mother also notes that chancellor's opinion recited "not one fact" demonstrating an adverse impact on the child. Citing *Riley*, the COA found that the chancellor's finding that the child's environment was adverse to his welfare was sufficient to warrant modification.
- Application of *Riley* is not limited to situations involving dangerous or illegal behavior; all that is necessary is a finding that the child is living in a custodial environment clearly adverse to his best interests. The court does not have to wait until the child's safety is in question before removing him from an obviously detrimental environment.

Cockrell v. Watkins

Court of Appeals

August 22, 2006

- Deemed admissions of parental unfitness are not dispositive.
- Not abuse of discretion to find father not unfit, notwithstanding evidence of (1) father's 15 speeding convictions; (2) 5 paternity adjudications (in which he was arrears in every case); (3) false testimony that he did not have a firearm on the night of the mother's death; and (4) false testimony concerning a windshield being broken, particularly where

- no effect on child demonstrated and deceased mother's parents admitted father is "a good father."
- Where all allegations of violence involved father and deceased mother, chancellor did not err in refusing to use MCA § 93-5-24(9)(a)(i) presumption against award of custody to perpetrator of family violence since, because of mother's death, the alleged violence would not possibly continue.
- In suit between parents of deceased mother and father for custody, parents of deceased mother were required to prove: (1) the surviving parent abandoned the child; (2) the surviving parent's conduct is so immoral as to be detrimental to the child; or (3) the surviving parent is unfit mentally or otherwise to have custody.

Yelverton v. Yelverton

Court of Appeals

August 22, 2006

- Where evidence shows H earns at least \$10,000/month, chancellor did not err in awarding \$2,500/m in child support for two children.
- Order to pay \$2,500/m in PPA and \$2,500/m in child support not unreasonable, where evidence shows H earns at least \$10,000/m and H's new wife testified she has a job and will support H.
- Where H's income fluctuated and H attempted to hide assets during divorce, chancellor did not err in awarding to W one-fourth of H's earnings over \$150,000.
- Where H was in contempt of court and had never followed a court order, and W incurred over \$16,000 in attorney's fees, chancellor did not err in awarded W \$10,000 in attorney's fees.

Lawrence v. Lawrence

Court of Appeals

August 29, 2006

- MRCP 56(c) requires all matters upon which a party or the court may rely in a summary judgment proceeding to be filed with the clerk and served on the other party prior to the proceeding. Failure to do so is fatal to the motion.
- Where W accepts H into marital home after his confession of adultery, and resumes sexual relations with him, summary judgment on H's defense of condonation not appropriate, since W filed affidavit in opposition stating she believed H resumed the marital relationship as merely a ploy to defeat her grounds for divorce. H's intent in the resumption of the marital relationship was a genuine issue of material fact. Simply engaging in an act of sex does not seal the defense of condonation.
- Albright factor "continuity of care" requires consideration of caregiver before and after time of separation.
- It is inappropriate to attempt a prediction of which parent is likely to leave the child's

- present community and then use Albright factor “home, school and community record” in other parent’s favor.
- Albright factor “other relevant factors” included inappropriate analysis that H was willing to subordinate his interests to the children while W preferred to balance her interests with her children’s. “There is no requirement that following a divorce the custodial parent remain single and devote his or her entire life only to the children. Indeed, after the termination of the marriage, it should be expected that single parents will socialize and will possibly remarry. Such conduct may not be punished.”
- MCA 93-5-24(9), creating a presumption against the award of custody to perpetrators of family violence, need not be plead to be considered by the chancellor, where a finding of violence and a history of violence is made.

Street v. Street

Court of Appeals

August 29, 2006

- In case of first impression, motion to reconsider filed after rendition of bench opinion but before judgment is entered is timely filed, notwithstanding language of MRCP 59 requiring motion to be filed “not later than 10 days after the entry of judgment.”
- W’s romantic involvement with practicing alcoholic, and moving him into marital residence with children necessitated a (flawed) exercise of parental judgment, and was properly considered in “best parenting skills” factor.
- Where chancellor initially awards alimony to W but revokes award in amended judgment, court on appeal considers only the denial of alimony, not the revocation of the earlier award.

Strack v. Stricklin

Court of Appeals

August 29, 2006

- Right of child to support is not affected by parties’ agreement that child support payments would cease if father allowed mother and children to use his trailer without rent.
- Whether father should be given credit against child support obligation for allowing mother and children to use his trailer without rent is left to chancellor’s discretion.
- Where child who is the subject of arrearage suit has emancipated, recipient still entitled to sue on child’s behalf, and retain the proceeds from the suit to the extent they represent payments made by recipient for child’s benefit over and above recipient’s own support obligations. The remainder must be paid directly to the child.
- Whether child’s marriage resulted in her emancipation for child support purposes is left to chancellor’s discretion.
- Failure to seek modification of “global” support order after child’s emancipation results in amount of support ordered to remain unchanged, even though fewer children are being supported by same amount.

- Under “global” support obligation, statute of limitations expires seven years after youngest child is emancipated. MCA § 15-1-59.

Stewart v. Stewart Court of Appeals September 5, 2006

- No error in finding age and gender of 3 year old girl favored mother.

Phelps v. Phelps Court of Appeals September 12, 2006

- H’s notice of appeal, filed while W’s motion to reconsider was pending, is suspended until the motion is decided, whereupon the notice places jurisdiction in the SCT. MRAP 4(d).

Giannaris v. Giannaris Court of Appeals September 12, 2006

- Primary physical custody modified from mother to father. Chancellor found father’s move to San Diego was the M&SCIC, and mother’s lack of communication and attitude toward father and his new wife constituted an “adverse event.”
- Evidence of lack of communication and attitude: (1) mother did not put father’s new wife on day care check-out list; (2) mother told child she planned to add her maiden name to child’s name (giving child a hyphenated surname); (3) mother refused to sign a therapy consent form; (4) mother denied father a Tuesday night and a Thursday night visit; (5) mother called father’s new wife, in the child’s presence, a “dirty wh—,” and (6) mother did not allow the child to speak of her half-brother (father’s child with his new wife).
- Mother’s argument that the change in circumstances and the adverse effect cannot be based on two entirely different things is rejected. Chancellor did not find that mother’s lack of communication and attitude was the M&SCIC, but it was, since there were no problems with visitations or father’s new wife before the divorce but now there are.
- Any error in evaluation of one *Albright* factor (age of child) was harmless error, since the majority of the *Albright* factors favored father.
- Admission of expert witness testimony is conditioned on (1) the witness being qualified as an expert by knowledge, skill, experience or education; and (2) the witness’ specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue.
- By admitting a social worker’s testimony into evidence, the chancellor necessarily determined that it might assist him in understanding or deciding a fact.
- Testimony by social worker of child’s statements made during therapy sessions are excepted from the hearsay rule. [MRE 803(4) Statements for Purposes of Medical Diagnosis or Treatment]
- Dissent of Justices Griffis and Barnes:

- The focus of the familiar test for modification of custody is whether there has been a substantial change within the home of the custodial parent. The chancellor based his modification on the change in the non-custodial parent's home (i.e., his move to San Diego). Mississippi has never recognized a move by the non-custodial parent as adequate grounds to change custody, nor even a move by a custodial parent as adequate grounds to change custody.
- Father's complaint alleged only financial issues as grounds for modification. The chancellor's opinion relies only upon father's move. Since no legally sufficient grounds for modification were presented, the modification should be reversed and rendered.

Dykes v. McMurry

Court of Appeals

September 19, 2006

- Standard for termination of child support based upon child's rejection of parent-child relationship requires actions by child that are both "clear and extreme."
- Termination of child support obligation is much different than termination of college expense obligation due to parent-child alienation [citing *Caldwell v. Caldwell*, 579 So.2d 543 (Miss. 1991)].
- Where father does not attend child's games or functions, does not call child on the telephone, made unfounded allegations that child had been abused, and where repair of the relationship is conceivable and child testifies he still loves father, court's refusal to terminate child support not error; even though child testified he did not want to have anything to do with father and their relationship was finished.

Spahn v. Spahn

Court of Appeals

September 26, 2006

- H's business grosses \$1.4M per year but H's net income is only \$2,800/month. W challenged H's expenses, but offered no specific proof of the amount of the improper expenses. H submitted his testimony, his CPA's testimony and his tax returns showing he really did earn only \$2,800/month. Held: not error to find H earned \$2,800/month.
- H acquired house 2 months after W filed for divorce, and used his business' employees to renovate the house. He paid the employees from a separate account. Although the house was acquired during the marriage, it was not acquired with "joint efforts." It was not error to characterize the house as H's separate property.
- Not error to divide \$434,000 marital estate 48% to W and 52% to H.
- In footnote discussion of gun collection, chancellor did not err in awarding the collection to H as part of a global award of property to the person in possession. W testified H owned ½ of the guns prior to marriage and acquired others through gifts and inheritances. "No proof was presented to show that any of the guns obtained during the marriage were purchased with marital assets." The opinion does not discuss whether H identified his SP guns, nor whether court characterized guns as MP or SP.
- Award to W of lump sum alimony, stock and "a potentially income-producing business"

[the marital residence, which had been used as a bed and breakfast] supports finding that she lacked inability to pay her attorney's fees.