

## Family Law

# Section Quarterly Report

From The Mississippi Bar

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### MESSAGE FROM THE EDITOR

Few attorneys relish the prospect of preparing a UCCR 8.05 financial declaration, particularly where the case has been settled, the agreement signed, and the declaration seems to be little more than “busy work.” Prior to the Court of Appeals’ decision in *Kalman v. Kalman*, 905 So.2d 760 (Miss.Ct.App. 2004), clients and attorneys were often permitted to skirt Rule 8.05. After *Kalman*, in more and more districts, parties are required to follow the strict requirements of Rule 8.05, even in agreed cases. In this issue, Judge Jon M. Barnwell, Chancellor in the Seventh District (Bolivar, Coahoma, Leflore, Quitman, Tallahatchie and Tunica Counties) discusses attorneys’ options in grappling with this Rule, and provides helpful language to include in divorce agreements.

On a related note, the Family Law Section has formed a committee chaired by Richard C. Roberts III to review UCCR 8.05. The committee’s report is expected to be presented at the Section Meeting during the Annual Convention this Summer. Your comments and suggestions are greatly appreciated.

The ease of paternity testing has created a new field of domestic relations law, as courts unscramble determinations of child custody and support when someone named as a parent in a decree turns out not to be so; or, more troubling, when a man who has parented a child discovers he is not the biological father. Craig Robertson of Ridgeland reviews *Griffith v. Pell*, 881 So. 2d 184, 186 (Miss. 2004), *J.P.M. v. T.D.M.*, 932 So. 2d 760 (Miss. 2006) and other Mississippi cases against a backdrop of national developments in this field.

Finally, the Court of Appeals decided all but one of the family law opinions handed down from October 1 through the end of the year. We review all of the cases handed down this quarter in *Abstracts*.

### Letter from the Bench

From **Jon M. Barnwell**, Chancellor, Seventh Chancery Court District:

During the parties' marriage in *Kalman v. Kalman*, 905 So.2d 760 (Miss.Ct.App. 2004), the husband won the Ohio Lottery. He did not disclose his winnings to his wife, and did not serve a MUCCR 8.05 financial declaration. After the parties divorced, the ex-wife discovered her ex-husband's winnings, and sued for contempt of court and modification of the property division. The Mississippi Court of Appeals found that the plain language of MUCCR 8.05 requires the parties in every case to comply with the rule, and that failure to do so "shall constitute contempt of Court."

"Although this Court is aware that chancellors commonly do not requires these disclosures, the rule serves the specific purpose of providing the court with accurate information to assist in its disposition of litigation." *Kalman*, 905 So.2d at 764 (¶12)

There are many occasions in which the parties will have legitimate reasons for not serving or filing MUCCR 8.05 financial statements. However, the Court of Appeals in *Kalman* made clear that the rule must be followed in every case, and chancellors throughout Mississippi are sworn to follow these requirements. What are the parties' options?

First, MUCCR 8.05 does not require parties to file their financial disclosures with the court. All they are required to file is a "Schedule C" certificate of compliance with the rule.

Second, where privacy is a concern, the parties can request the court to seal the court file, which is otherwise a public record. This may be particularly appropriate where particularly sensitive financial information appears in the financial declaration or elsewhere in the file.

Third, the parties can ask the court to excuse them from the requirements of MUCCR 8.05 "for good cause shown." Insisting on receipt of a full MUCCR 8.05 declaration goes a long way toward satisfying an attorney's "due diligence" obligations in recommending settlement, so counsel should carefully consider whether the client should be advised to waive service from the other party. However, where the parties desire to waive the financial declaration and terminate litigation prior to conducting full discovery, the following language may prove useful. It is taken from an agreement prepared by Mr. David L. Tisdell, Esq., of Tunica, and is particularly-well crafted:

1. FULL DISCLOSURE: Each party covenants with and represents to the other that he or she has made a full and fair disclosure of all property and interests in property owned or believed to be owned by him or her. Each party further covenants with and represents to the other that he or she has fairly and reasonably stated the value of each such property interest.

If any property exists or be hereafter discovered in which the parties own any right or

interest, and which has not already been divided among the parties or is not described in this Settlement Agreement, such property shall be owned, held, and dealt with by the parties as tenants in common, and not as joint tenants with right of survivorship. On the discovery of any such property by either party, he or she shall promptly notify the other of the discovery.

In the event that a court of competent jurisdiction determines that either the Husband or Wife has failed to make a full disclosure of all property and interests in property which he or she had any interest at the time of the execution of the Settlement Agreement, the party having failed to make disclosure of such asset shall be obligated to pay to the other party a sum equal to one-half ( $\frac{1}{2}$ ) of the value of such asset either at the time of the execution of this Settlement Agreement or at the time such asset is discovered, whichever is the greater sum, plus actual attorney's fees and court costs reasonably incurred to obtain the amount owing pursuant to this section.

2. WAIVER OF FINANCIAL STATEMENTS AND DISCLOSURES: Both parties have been advised that, pursuant to Rule 8.05 of the Uniform Chancery Court Rules, each party in every domestic case involving economic issues and/or property division shall provide the opposite party or counsel certain disclosures as specifically spelled out in the rule unless excused by Order of the Court. Rule 8.05 includes requirements of the following disclosures:
- a. A detailed written statement of actual income, expenses, assets and liabilities, such statement to be on the form attached to the Rule;
  - b. Copies of the preceding year's Federal and State Tax Returns, in full form as filed, or copies of W-2s if the return has not yet been filed;
  - c. A general statement of the providing party describing employment history and earnings from the inception of the marriage or the date of divorce, whichever is applicable;

Both parties are advised of their right to receive the financial statement and disclosure set forth in Rule 8.05 of the Uniform Chancery Court Rules. Both parties are aware of the obvious beneficial effect of imposition of this Rule. The parties, having made themselves fully aware of Rule 8.05 and its implications, hereby waive the right and/or necessity to receive the information set forth in Rule 8.05 of the Uniform Chancery Court Rules.

### Letter from the Office

From **M. Craig Robertson**, Ridgeland, and **Ashley Buckman**, 3L MC School of Law

Questioning the paternity of otherwise presumed fathers is a rapidly developing problem facing family courtrooms in Mississippi and around the nation due to the growing public recognition and the accessibility of inexpensive DNA tests. This area of the law is in a constant state of change and development because modern advances in science allow for the general public to easily gain accurate genetic results from readily available DNA tests. The basic idea of genetic testing presents a unique situation where state courts are steadily reshaping their own laws to keep pace with modern

technology through balancing the best interest of the child and the rights of biological and non-biological fathers. Questioning the legitimacy of a child's recognized father is an activity with profound implications.

Legal fatherhood can be established three different ways: marriage, a paternity action, or voluntary paternity acknowledgment. The law continues to hold that a married man is the legal father of children born to his wife during their marriage. One of the strongest presumptions known to law is, in fact, that a child born during marriage is that of the husband. *Rafferty v. Perkins*, 757 So. 2d 992, 995 (Miss. 2000) (quoting *Karenina v. Presley*, 526 So. 2d 518, 523 (Miss. 1988)). See also *Michael H. v. Gerald D.*, 491 US 110 (1989)). However, recent advances in science and the vast availability of inexpensive DNA tests have certainly introduced a new twist in this ideal of the typical family. The presumption of legitimacy may be rebutted by proof beyond a reasonable doubt that the child was fathered by another, including evidence of genetics tests. *Baker v. Williams*, 503 So. 2d 249, 253 (Miss. 1987). Once a genetics test has been taken and the results are exposed, there is no turning back. Therefore, courts must carefully and delicately tread through this rapidly developing area in the law, hopefully with the best interest of the child at the heart of the case.

Because the internet alone provides an immense volume of information on genetic testing, courts are regularly presented with situations where the DNA test results have already been obtained and exposed to all involved parties. At this point, the damage may be done and the court must turn to how it can pick up the pieces for the sake of the child involved. When typing "DNA test" into [www.google.com](http://www.google.com), the results include over 33 million matches, making it incredibly easy to obtain information regarding DNA testing. For example, [www.homedna.com](http://www.homedna.com) offers an affordable 4-step at-home DNA test kit for only \$99. Another website, [www.dnanow.com](http://www.dnanow.com), also provides an easily accessible solution for any person questioning paternity. This particular website also provides documentation of their "court recognized parentage test" providing indisputable proof of parentage or non-parentage and a 1-800 telephone number with operators standing by to assist any further questions.

While surfing through the googled results, it becomes quite clear that businesses have successfully jumped on the opportunity to turn a profit by providing scientific answers to the unfortunately complex and uneasy question of paternity. Generally, the normal working time to receive the DNA test results takes approximately between eight to twelve days or you can have the results express mailed to your doorstep in only two to three days. The solution that these companies set forth appears to be so simple – a DNA test that would so quickly and discretely ease a person's mind and solve such a difficult question in less than two weeks!

Now, fast-forward to when the DNA results have been received. Suppose the results conclude that the man currently assuming the responsibilities of fatherhood is clearly not the biological father. Are these results alone sufficient for courts to uproot the parent and child's worlds as they have known it? Are the results alone sufficient for courts to now establish parentage of the biological father? By basing all parenting rights and responsibilities on biology alone, the law would succeed in creating a proper legal relationship between the child and the biological father. More importantly, though, the court would fail in ensuring a loving, nurturing relationship for the child. But, keep in mind that at this point in time to reject the known DNA results completely would be to

ignore the importance of genetics and heritage. Obviously a tough situation emerges, as courts have established that there is no simple answer to such a fragile topic.

Until recently, Mississippi courts refused to hear best interest of the child defenses in all paternity actions, holding that DNA test results would control the issue and rights of paternity. In 2004, the Mississippi Supreme Court carved out a more modern, functional approach in holding that a determination of a biological father as being a different man than the presumed father does not necessarily govern custody and support issues, nor does it require termination of the presumed father's parental rights. *Griffith v. Pell*, 881 So. 2d 184, 186 (Miss. 2004). With the burden should go the benefit. Mississippi courts have also suggested that the doctrine of in loco parentis requires a person who functions as an active parent to be treated as a biological parent for purposes of support and custody. Furthermore, the Court in *Griffith* allowed the paternity action to proceed, but also suggested that the determination of custody and support should be determined in a divorce or separate custody action, rather than in a paternity suit.

In 2006, the Mississippi Supreme Court again reaffirmed this ideal in *Thoms v. Thoms* and more clearly defined the current Mississippi guidelines involving paternity suits. In *Thoms* the presumed father urged the Mississippi Supreme Court to reconsider the chancery court's order of genetic testing on his child and the purported biological father. The father sought to continue the active, nurturing relationship with his child and felt it to be in the child's best interest to forgo genetic testing and leave well enough alone. However, the *Thoms* court established that even though the best interest of the child is at the heart of a paternity suit, these interests should not necessarily be weighed before the DNA tests are performed. The court also reaffirmed *Griffith*, holding that the best interest of a child would best be addressed in another proceeding besides the paternity suit. Furthermore, Miss. Code Ann. § 93-9-21(2)(Rev. 1999) dictates where either party in a paternity action motions for an order requiring blood tests, the trial judge MUST grant the motion, regardless of the best interest analysis. Therefore, Mississippi courts now allow paternity suits to take place to resolve the issue of genetics identity, but fixed rights concerning the child should be established in another separate action where the child's best interest would be the polestar consideration.

"Paternity fraud" is yet another fragile topic redefining the area of family law and exploding into courtrooms across the nation. Paternity fraud assumes a deviant, fraudulent act by the child's mother in hiding the true identity of the child's father. It is certainly not a hard task in today's society to identify a victim of paternity fraud. Several day time talk shows focus the majority of their episodes on headlines such as "Who's my baby's daddy?" or "I have to confess. I cheated on you 5 years ago and you may not be the father of our child." However, even though talk show hosts expose these paternity fraud cases a year on national television, most paternity fraud cases never make their way into the courtroom. Most victims fall through the legal cracks and are quickly shuffled through the system based on default judgment either because the presumed father cannot afford legal counsel or he does not understand the legal process. The United States Department of Health and Human Services spends approximately \$4 billion per year on child support enforcement and claims credit for establishing more than one million paternities per year. Press Release, U.S. Dep't of Health and Human Services, HHS Role in Child Support Enforcement (July 31, 2002). On the other hand, the American Association of Blood Banks reports year after year that approximately twenty-eight percent of all paternity tests exclude the targeted man. Although courts around the nation differ

wildly on the manner of reconciliation when paternity fraud is exposed, most courts generally agree that the court system should not be a party to further injustice already executed on these innocent men.

In a 2006 Mississippi paternity fraud case, genetics testing proved that the presumed father was not actually the biological father. The Mississippi Supreme Court, in an effort to reconcile the damage and hold the best interest of the child at heart, held the presumed father to be the “father in fact” and entitled to rights of custody, visitation, and the like. *J.P.M. v. T.D.M.*, 932 So. 2d 760 (Miss. 2006). However, the *J.P.M.* court distinguished this case from previous Mississippi cases, which based paternity mainly on biology, in that there was no putative father attempting to have his paternity established and that the presumed father maintained a father-child relationship with the child for the child’s entire life and the presumed father wished to continue to do so. This court also suggested that a father cannot disestablish a child based solely on results of genetic testing if he has maintained a supportive, active father-child relationship.

The recognition of paternity fraud is steadily gaining momentum around the nation and becoming a regular topic of conversation in society rather than a taboo subject. In a Baltimore Sun newspaper article, columnist Ellen Goodman asks “what does make a father? Diapers or DNA?” Goodman further observes that “family law seems to be going in two dimensions at once. We are giving more recognition to non-biological relationships . . . and more weight to DNA.” Goodman has the right idea; however, this fork in the road is precisely where the court system weighs in with the difficult task of providing every unique, but tragic, situation with an equitable remedy. Several victims of paternity fraud have established websites on behalf of their quest to strengthen the laws against paternity fraud. For example, Carnell Smith, the director of U.S. Citizens Against Paternity Fraud and a victim of paternity fraud himself, established [www.paternityfraud.com](http://www.paternityfraud.com) and stands by his ideal of “if the genes don’t fit, you must acquit.” For more information about “duped dads,” see generally [www.infidelitycheck.us](http://www.infidelitycheck.us) or [paternityfrauddna.com](http://www.paternityfrauddna.com). There is also a current petition to the state and U.S. legislators providing for a change in the current paternity fraud laws. Visit <http://www.petitiononline.com/pfv1/petition.html> for more information.

For further reading on the topic of paternity fraud see Ronald K. Henry, *The Innocent Third Party: Victims of Paternity Fraud*, 40 Fam. L. Q. 51 (2006); Melanie B. Jacobs, *When Daddy Doesn’t Want to be Daddy Anymore*, [16 Yale J.L. & Feminism 193](#) (2004); Tresa Bladas, *Parent Trap? Litigation Explodes Over Paternity Fraud*, Nat’l L.J. (2006); Damian G. Garcia, *Who is Your Daddy?*, [24 J. Juv. L. 91](#) (2004); Niccol D. Kording, *Little White Lies That Destroy Children's Lives - Recreating Paternity Fraud Laws to Protect Children's Interests*, [6 J. L. Fam. Stud. 237](#) (2004).

## ABSTRACTS OF CASES DECIDED OCTOBER-DECEMBER, 2006

### MISSISSIPPI SUPREME COURT

**Payne v. Whitten**

Supreme Court

October 26, 2006



- Appellee did not file a brief, so reviewing court must reverse if the case is complicated or of large volume, and the appellant has made out an apparent case of error (as in the present case), unless the reviewing court can conveniently examine the record, and the examination reveals a sound and unmistakable basis or ground upon which the judgment may be safely affirmed.
- Failure to appoint a GAL in TPR proceedings is reversible error.
- Although MCA § 43-21-261 provides for the confidentiality of records pertaining to children, MCA § 43-21-261(3) provides that a parent, or an attorney for a parent has the right of inspection of the records. The trial court erred in refusing to permit the parties to review DHS' records pertaining to the child, and in conducting an *in camera* interview of the DHS worker investigating the child.

**Davison v. MS DHS**

Court of Appeals

October 3, 2006

- Contemnor appeals to chancellor 3 months after entry of master's report. DHS argues MRCP 53(g)(2) requires appeals to be filed within 10 days after entry of the report. Held: the master's report has no effect until it is accepted or rejected by the chancellor. Even if the contemnor did not file an objection or appeal, the chancellor still had to determine whether to accept or reject the report. The Rule does not require the chancellor to hold a hearing before determining whether to accept or reject the report, but it authorizes him to do so.

**Blalack v. Blalack**

Court of Appeals

October 3, 2006

- No new issue of law discussed in the opinion.

**Owens v. Owens**

Court of Appeals

October 10, 2006

- In ID divorce, H and W agree that W will have custody of 16 year-old, and submit issue of custody of 7 year old to court. Chancellor awards custody to W, indicating he relied heavily on policy against separating siblings. "The general principle ... is that, when siblings have been separated, other circumstances have dictated that the decision is in the best interest of the children. When other circumstances do not require the separation of children, Mississippi courts should attempt to keep siblings together." *citing Sootin v. Sootin*, 737 So.2d 1022 (Miss.Ct.App. 1998) (requiring an "unusual and compelling circumstance" to require separation of siblings) "In essence, the rule from our case law is that the non-separation of a child from his or her siblings is usually in a child's best interests." (¶35)
- In reviewing cases addressing the *Albright* factor "the employment of the parent and responsibilities of that employment," Court of Appeals found "[t]his factor appears to be applied in two ways: either to prefer a parent who draws an income over one who does not, or, more often, to prefer a parent who works less or not at all and can therefore spend

more time with his children. In the cases we have found where an **unemployed** parent was preferred, the reason cited is the time that the parent can spend with the child. In cases where an **employed** parent is found more suitable under this factor, the reasoning is that the unemployed parent has no source of income or appears to be unable to hold a steady job.” (§26)

- Issue of property division remanded because *Ferguson* analysis: (1) did not determine the domestic contributions of the parties; (2) found that W had a greater attachment to the house because she lived and raised her children there, even though the same was true of H; and (3) did not address the parties’ income and ability to provide for themselves.
- Chancellor’s award to H of only one-sixth (1/6) of W’s retirement fund an abuse of discretion because inappropriate analysis used. Chancellor based the decision on W’s intention to use the funds to educate the children, even though assets are to be divided equitably, not according to which spouse will use the funds to provide for the children. “If one party intends to use all of her portion of the retirement fund on her children’s education, and the other party wants to spend their portion of the retirement fund on alcohol and cigarettes, the latter party should not be punished for such in the chancellor’s distribution of assets.” H’s inability to pay child support (due to his disability) is irrelevant to the distribution of assets. “Lack of child support has nothing to do with an equitable division of marital property.” (§47)
- Parties owned a Cutlass, which H primarily used, and an Expedition, which W primarily used. Little evidence of value for either vehicle was submitted, but H testified the Expedition was purchased for \$30,000, and he paid \$7,000 toward the purchase price. \$2,300 was owed at the time of trial. Chancellor did not err in awarding the Expedition to W and the Cutlass to H, since (1) each vehicles were awarded to the party who primarily used it; and (2) since H only paid \$7,000 toward the purchase price of the Expedition, W paid the remaining \$23,000; and (3) the vehicles were purchased at the same time.
- “A chancellor should not refuse to adjudicate an issue which has specifically been placed before the chancellor for adjudication on the basis of insufficient evidence without first informing the parties that they have not provided sufficient information for adjudication.” (§61) (distinguishing *Glass v. Glass*, 857 So.2d 786 (Miss.Ct.App. 2003))

### **Faris v. Jernigan**

Court of Appeals

October 10, 2006

- This case involves the same parties involved in *Jernigan v. Jernigan*, 830 So.2d 651 (Miss.Ct.App. 2002), in which custody was modified and awarded to father on the basis of mother’s frequent moves and repeated unfounded allegations of father’s sexual abuse of the child, *Isom v. Jernigan*, 840 So.2d 104 (Miss. 2003), in which mother’s incarceration for visitation contempt was upheld, and *In the Interest of J.S.J.*, 253 Ga.App. 174 (Ga.Ct.App. 2002), in which Georgia found Mississippi had jurisdiction over custody matters involving the child.

- Chancellor properly awarded father \$40,000 in attorney's fees and imposed \$40,000 *ne exeat* bond on mother's exercise of visitation outside of Mississippi, in light of mother's prior incarceration for visitation contempt, withholding child from father for 13 months in Georgia while pursuing unfounded charges of sexual abuse, prior forfeiture of a \$5,000 *ne exeat* bond, and father's incurring \$55,000 in attorney's fees in the Georgia litigation, to secure a return of the child to his home in Mississippi, and \$20,000 in fees to pursue a Mississippi contempt action.

### **Romans v. Fulgham**

Court of Appeals

October 10, 2006

- 1997 Paternity judgment brought by DHS for one-year-old child entered, ordering father to pay child support, but does not mention custody. In 2004, Father sues for custody shortly before child's 8th birthday. The question presented is whether father's suit is for modification or an original custody proceeding.
- Court rejects mother's argument that the 1997 award to her of child support was an implicit award of custody. Mother was not a party to the DHS judgment, DHS is not entitled to bring custody suits, the paternity judgment did not use the words "custody" or "custodial parent," nothing in the record suggests custody was considered, and mother did not provide a transcript of the paternity hearing. Therefore, since no custody had previously been entered, father's suit was an original custody proceeding.
- Mother's contention that the paternity judgment was a custody determination was not brought before the chancellor; therefore, her argument was waived on appeal.
- **Editor's Note:** But see *Brown v. Thompson*, 927 So.2d 733 (Miss. 2006)) (prohibition against raising matter for first time on appeal applies only to *issues*, not *arguments*)
- Dissent of Justice Griffis, jointed by Justices Southwick and Chandler:
- The award of child support to the mother created an implicit finding that she was the child's custodial parent.
- By waiting until the child was nearly 8 years old to bring his custody suit, the father impermissibly "slumbered on his rights" (distinguishing *Law v. Page*, 619 So.2d 96 (Miss. 1993) from the present case and *C.W.L. v. R.A.*, 919 So.2d 267 (Miss.Ct.App. 2005), because in *Law*, the biological father brought suit immediately). Both *Law* and *C.W.L.* were incorrectly decided, since they did not recognize that a paternity suit is an implicit award of custody to the child support recipient.

**Norman v. Norman**

Court of Appeals

October 10, 2006

- H's appeal of award of custody of 7-year-old daughter to W after trial of ID Divorce.
- Chancellor's consideration of three particular *Albright* factors was not enumerated in his opinion. However, his consideration of these factors is evidenced by the testimony and other evidence offered at trial.
- Dissent of Justice Southwick, joined by Justices Lee, Griffis, Ishee and Roberts:
- Failure to make an on-the-record discussion of each *Albright* factor is reversible error (rejecting argument that chancellor's view on the missing factors was discoverable from the nature of the evidence).

**Bradley v. Jones**

Court of Appeals

October 17, 2006

- Father sued for custody and paternity, and was awarded both. Mother appealed.
- Mention of *Albright* factors in chancellor's opinion may be sufficient to find chancellor considered each factor, without express enumeration of his findings on each factor.

**H.L.S. v. R.S.R.**

Court of Appeals

October 17, 2006

- In divorce, H awarded custody and W awarded visitation. H sued for modification and for injunctive relief (to suspend further non-supervised visitation), alleging W's abnormal behavior had caused child to suffer an adjustment disorder. W counter-claimed for modification of custody and contempt, alleging H had denied W summer visitation.
- Noncustodial parent met her burden of proof for modification of visitation (that the schedule is unworkable or inappropriate) by proving the custodial parent denied visitation.
- Review of factors in *Laird v. Blackburn*, 788 So.2d 844, 852 (¶17)(Miss.Ct.App. 2001) not necessary before court awards dependency exemption.
- Chancellor did not err in modifying previous award of dependency exemption. In divorce decree, the exemption was awarded to custodial parent every year; after modification, the parties were awarded the exemption in alternating years. "Both parties ... are employed and would benefit from use of the dependency exemption." (¶14) The Opinion does not identify the criteria used for modifying the award of the exemption. Noncustodial parent testified that her wage decreased from \$15 to \$13 per hour.
- Chancellor finds that proof of allegation that noncustodial parent's teenage son put his tongue in child's mouth during visitation "did not rise to the level required to supervise or restrict visitation." Court of Appeals disagrees, finds that more weight should have

been given to physician's testimony (who found the claim to be "very believable"), and remands for new trial on the issue.

- Modification requiring custodial parent to provide health insurance not an abuse of discretion, where noncustodial parent no longer had insurance available through her employment, her income decreased, and custodial parent was already providing insurance.

### Stuart v. Stuart

Court of Appeals

October 17, 2006

- Not error to award attorney's fees to W where (1) majority of her income pays business loans; (2) Wife had received little or no liquid assets in the property settlement; (3) H filed, but did not pursue, a plethora of motions which required the attention of W's attorney; and (4) H's attorneys caused many delays.

### McLean v. Kohnle

Court of Appeals

October 24, 2006

- UIFSA case. Original child support order entered in MS in 1990. H moves to GA. W moves to VA. In 1998 H and W agree to VA court hearing claim and counter-claim for modification and enforcement of child support order. VA enters order modifying the *manner*, but not the *amount* of payment. It also modified the parties' respective obligations for the children's health insurance and uninsured medical expenses.
- W filed suit for modification and enforcement of H's college expense obligation *in MS*, even though the "controlling order" was entered in VA. MCA 93-25-17(b) says MS cannot modify an order if its order is not the controlling order, unless the parties consent to MS jurisdiction, which H did not. [**Editor's Note:** The "controlling order" is typically the last order entered by a court with jurisdiction. MCA § 23-25-21 (2)]
- MS retains jurisdiction to modify and enforce its support order, even if both parents and the child no longer reside in MS. However, once another state with jurisdiction enters an order modifying the MS decree, MS no longer has jurisdiction, unless the parties consent to MS jurisdiction pursuant to MCA § 93-25-17(1)(b).
- Where VA modifies the *manner* but not *amount* of payment, VA has nevertheless issued a "controlling order," and has continuing, exclusive jurisdiction (rejecting mother's argument that MS retained jurisdiction over the *amount* of child support, while VA had continuing, exclusive jurisdiction only over the *manner of payment* of child support).
- **Editor's Note:** This is a well-written opinion summarizing how jurisdiction is considered under UIFSA. Practitioners will recall that, under URESA, different states could issue perfectly valid support orders at the same time for the same child, both binding on the parties. One of the primary advantages of UIFSA over URESA is the former's insistence that, at any one time, there be only one controlling support order. W's argument that VA

could enter an order controlling one facet of the support obligation while MS entered another traduces this benefit of UIFSA.

**Seymour v. Seymour**

Court of Appeals

October 31, 2006

- 14-year marriage ends in divorce based on H's adultery. W awarded 97% of the marital estate, \$1,000/m PPA, \$800/m CS and ½ children's private school tuition (\$262/m). H complains that court erred in awarding W 97% of marital estate *plus* 57% of his AGI in alimony, child support and private school tuition. Held: *affirmed*.
- Chancellor did not err in assigning to H the full value of the shares to him in the equitable distribution analysis, even though he owned them prior to the marriage. The shares were classified as his separate property, but any increase in value (none was proved) could have been deemed marital property.
- Property division upheld on finding that H received his SP owned before the marriage, which had an approximately equal value as the marital estate, particularly in light of W's needs and the disparity in the parties' respective earnings capacities.
- Findings that: (1) H earned more than \$50,000; (2) \$800/m CS was based solely on H's reported income; (3) the children had always attended parochial school; and (4) H's mistress was a teacher at the public school the children would attend if they did not attend parochial school; and (5) attending school where mistress taught would cause undue stress and conflict for children supported order requiring H to pay ½ children's private school tuition.
- Dissent of Justice Southwick, joined by Justices Lee, Irving and Griffis:
- "Never in a situation in which some significant marital property exists, has equitable distribution meant nonexistent distribution to one of the spouses. That is in essence what occurred here, with ninety-seven percent of the marital property being allocated to the former wife."

**Ellis v. Ellis**

Court of Appeals

November 7, 2006

- W's ongoing refusal to obey visitation orders results in change of custody. "[T]here comes a time when the severity of the interference with a non-custodial parent's visitation rights rises to a level that justifies a finding of material change in circumstances." The chancellor properly considered evidence of interference that had been presented in H's previous suits to modify custody.
- Case distinguished from *Touchstone v. Touchstone*, 682 So.2d 374 (Miss. 1996) because in *Ellis*, H had spent an "alarming" amount of "court time" in attempting to exercise his visitation rights, and there was ample evidence that W intentionally refused visitation and





seek appellate review of his case while refusing to submit himself to the Court's jurisdiction.

**Burrus v. Burrus**

Court of Appeals

December 12, 2006

- Husband and Wife awarded joint physical and legal custody in divorce. Children ordered to live with Wife during the school year. Wife awarded alimony "until remarriage or further order of the Court."
- After divorce, Wife cohabited with Husband's brother, a convict of four counts of indecency with a 14 year old minor, and recently released from a Texas prison. Husband sued for custody, child support and to terminate alimony, all of which the chancellor granted. The chancellor found that Wife and James, the sex offender, cohabited and mutually supported each other.
- The Court of Appeals affirmed, and cited the evidence supporting the chancellor's finding: (1) James had a key to wife's home and kept his clothes there; (2) James had an ATM card to wife's account; (3) Wife spent \$7,500 on James; (4) James provided "in kind" household services and chores for wife, including home repair and maintenance; (5) Wife showed the child her new tattoo which read "James' girl"; and (5) Wife visited James after he was re-incarcerated.
- The moral aspects of couples living together is not to be considered in determining the effect of post-divorce cohabitation on a recipient spouse's alimony entitlement. (Citing *Hammonds v. Hammonds*, 641 So.2d 1211, 1217 (Miss. 1994)) Upon proof of cohabitation, the recipient former spouse must rebut the presumption that there is mutual support within the relationship. The opinion reviewed a number of cases discussing the standard of proof required to terminate alimony based on cohabitation. In the present case, termination was appropriate since Wife did not rebut the presumption that she and James were providing each other with mutual support.
- Modification of custody was sufficiently supported by evidence that (1) Wife and children cohabited with sex offender; (2) Wife was inconsistent in getting child to school on time; (3) Wife would sleep for days at a time, awakening only to eat and return to bed; and (4) Wife did not discipline child.

**Graham v. Graham**

Court of Appeals

December 12, 2006

- No error in awarding convenience store to Wife, where she has a tenth grade education and no training in any field other than convenience and grocery stores, while Husband has training as a diesel mechanic and truck driver. Court rejected husband's argument that the chancellor erred in awarding Wife a business generating \$40,000/year while he had to perform difficult physical work to support himself.