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. Several interesting cases were decided this past quarter.

In *Solomon v. Robertson*, 980 So.2d 319 (Miss.Ct.App. 2008), a grandparent visitation case, the Court found that MCA Section 93-16-3(1) does *not* require proof of a viable relationship with the child.

In *Strong v. Strong,* 981 So.2d 1052, (Miss.Ct.App. 2008), the Court found the mother in a divorce was properly awarded temporary support for the first time at the divorce trial (when the case was being finally adjudicated), even though she had never before requested temporary support.

In *Williams v. Stockstill*, No. 2008-CA-00599-COA, 2008 WL 2108101 (Miss.Ct.App. May 20, 2008) the Court of Appeals revisited its ruling in *Romans v. Fulgham*, 939 So.2d 849 (Miss.Ct.App. 2006). It found that a father's custody/paternity suit filed when the child was 2 years old and had been living with the mother since birth should be determined solely by the *Albright* factors; rejecting mother's argument that she had *de facto* custody and that the father could not be awarded custody without proving a material change in circumstances and adverse impact upon the child. The case is notable not only for its ruling, but for its dissenting opinions.

In *Keith v. Purvis*, 982 So.2d 1033 (Miss.Ct.App. 2008), the Court reviewed the relationship between child support payments and social security payments the child receives because of the non-custodial parent father's disability. When the child received "back-pay," the father was not entitled to a refund of his child support paid during the period covered by the "back-pay."

In *Hills v. Hills,* 986 So.2d 354 (Miss.Ct.App. 2008), the Court affirmed an "abatement" of child support, where the minor child met the criteria for emancipation but the chancellor was unwilling to find the child was emancipated.

ABSTRACTS OF CASES DECIDED APRIL – JUNE, 2008

SUPREME COURT CASES

In the Interest of N.W. — Supreme Court — April 3, 2008

- Failure to comply with MCA §43-21-557 (requiring Youth Court to begin each adjudicatory hearing with specified questions and admonishments) is reversible error.

- Failure to provide any notice whatsoever to Father of adjudicatory and related hearings was reversible error.

In Re: Hosea Hines — Supreme Court — April 10, 2008

- Order finding non-party (who was previously ordered to have no contact with the child) in contempt for failure to appear at a review hearing was reversed. Telephone notice from a detective to the non-party, informing him he was required to appear at a review hearing, was insufficient to compel his attendance.

- Youth Court is authorized under MCA § 43-21-309(2) to provide reasonable oral or written notice of the time, place and purpose of detention and shelter hearing to "the child, his or her parent, guardian or custodian; to his or her guardian ad litem, if any; and to his or her counsel." However, "reasonable oral notice" is insufficient to compel attendance at court by persons other than the child, parent, guardian, custodian, GAL or attorney.

Bowen v. Bowen — Supreme Court — May 22, 2008

- 13 months after the parties' wedding, Husband sold his interest in a marina and received $200,000 cash and $600,000 in a promissory note. He had owned and worked on the marina for 24 years before the marriage.

- The chancellor awarded Wife "lump sum alimony in the amount of $60,000.00, an amount equal to ten percent of Joe's mortgage note of $600,000.00." The alimony was payable in installments of $2,000.00.

- Husband appealed, claiming the evidence did not show that the promissory note was a marital asset. Wife argued that she wasn't awarded any of the promissory note, but rather was awarded alimony, which was merely *in the amount of* 10% of the note (as opposed to being awarded 10% of the note).

- The Supreme Court found that Husband and Wife had both lived and worked at the marina. During the marriage, they had lived in a house at the marina. "Where a party commingles marital assets or uses them for familial benefit, those assets become marital assets." Thus, the chancellor did not err in finding that Wife was entitled to share in the benefit of the note.

- Husband also claimed the chancellor erred by failing to adjust Wife's award on the basis of her gambling. However, the chancellor found only that Wife gambled, not that she wasted or dissipated marital assets.

Shavers v. Shavers Supreme Court May 22, 2008

- Where Wife answered "Yes" to Judge's question: "Do you tell me that there have been problems, arguments, fights, disputes, disagreements and the like..." and "Do you feel that if you stayed in the marriage that it would be hazardous or injurious to your life, safety, health and that's either physically or emotionally. Do you feel that way?"; and Wife also testified at the temporary hearing that Husband "beat the crap" out of her; and Husband admitted he hit Wife with an open hand but disputed where and how hard he hit her; Held: the Chancellor was not manifestly wrong in granting Wife a divorce on the ground of HC&IT.

- Citing a 1938 case from Arizona, the Court noted that where a case has been removed to federal court but the removing party nevertheless participates at trial of the same matter in state court without objection, the state court judgment of divorce is valid.

- In this case, Husband represented to the trial court that only contempt issues had been removed, not the divorce itself, and while the case was removed to federal court, Husband participated in the state court trial and signed a consent to trial. The Supreme Court found Husband had waived any error.

D.C. and S.G. v. D.C. Supreme Court June 19, 2008

- This opinion grants a rehearing and withdraws the Court's February 28, 2008 decision (reviewed in the Family Law Section 2008 Summer Report).

- In the February decision, the Court applied the fugitive dismissal rule and the doctrine of unclean hands, and found that Mother's appeal would be dismissed. However, it withheld the mandate for 40 days and set conditions which would warrant reinstatement. Mother would have to: (1) surrender the children to DHS; (2) submit herself to the jurisdiction of the chancery court; (3) file proof of compliance with these conditions with the Supreme Court; and (4) show good cause why her appeal should be reinstated.

- The deadline discussed above has come and gone, and there is no proof that Mother complied with any of the four conditions listed above. Therefore, Mother's appeal is dismissed. The Court re-issued its February 28, 2008 decision, "to serve as future reference for application of the fugitive dismissal rule where appropriate, and to provide precedent for conditions which may warrant reinstatement of such an appeal."

- The prior decision also addressed the merits of grandparent visitation. Mother now correctly argues that this issue was not before the Court, having already been remanded to the trial court in February, 2007.

- The remainder of the opinion is a reiteration of the February 28, 2008 decision, discussed at length in the Family Law Section 2008 Summer Report.

In re Spencer Supreme Court June 19, 2008

- This opinion denies the motion for rehearing, but withdraws the Court's February 28, 2008 decision (reviewed in the Family Law Section 2008 Summer Report) and substitutes this decision in its place. This is a companion case to D.C. and S.G. v. D.C., reported above.

- In the companion case, Mother accused Father of child abuse, and Father sued for custody. This opinion recites a lengthy history of abuses by Mother's Attorney, which resulted in several findings of contempt against Attorney, and two $25,000 judgments against Attorney, payable to the GAL and to Father's attorney, respectively. Neither payee had incurred $25,000 in fees.

- Nothing in the LAA or Rule 11 supports awarding attorney's fees and expenses in excess of those actually incurred. LAA and Rule 11 only allow recovery of reasonable fees and costs. Thus, it was error to award an amount in excess of the fees and expenses incurred.

- It was also error to award the judgment in favor of Father's attorney, instead of to Father. Under Rule 11, the sanctioned party is to pay the expenses to the other party, not to his attorney. In a footnote, the Supreme Court noted that the LAA does not include this provision, but the Court cited two cases which explicitly awarded the judgment to the party, not the party's attorney.

- "While we agree that Spencer's initial effort to have the children returned to their mother may have been a good-faith effort to reduce the trauma to the children caused by separation from their custodian, the subsequent pleadings crossed the line. After our review of the record, we cannot say the chancellor abused her discretion in finding the several pleadings filed by Spencer constituted 'harassment' under the Rule."

- Therefore, the chancellor correctly assessed attorney's fees and expenses against Attorney, but the awards of $25,000 were unreasonable. The Supreme Court vacated the judgments and remanded the case to the chancellor to assess a reasonable amount of attorney's fees and expenses.

- Attorney properly held in contempt for violation of UCCR 1.05 [Officers, Witnesses and Solicitors Must Be Prompt] in failing to appear at a hearing which Attorney herself had scheduled. An attorney need only be negligent in failing to appear for a chancellor to give grounds for holding her in contempt. Attorney complained that she was not given notice of the contempt hearing or specification of the charges against her. However, she participated at the hearing without raising this objection. Therefore, her complaint was waived.

- Attorney also argued that the contempt hearing should have been held in public, however she did not object to this at trial. "We find that it is not a violation of the Due Process Clause of the Fourteenth Amendment to hold contempt hearings in youth court abuse proceedings out of the public eye under these circumstances."

- Attorney also argued that the chancellor should have recused herself, since she became personally and substantially involved in the prosecution of the contempt charge. The Supreme Court disagreed, noting that Attorney noticed a hearing which she failed to attend. The next time Attorney appeared before the chancellor, the chancellor took up the contempt charge. The chancellor assessed only a $100 fine or 24-hour sentence, a sentence substantially below the statutory maximum.

- Verbal gag order providing "the parties themselves will be enjoined from disclosing any information to third parties and that injunction would go toward their agents as well", and a written order providing "neither the parties, nor their attorneys, nor their agents shall discuss the proceedings in this Court with any person not directly associated with the parties or their attorneys" was too vague to enforce, and did not "give fair notice to men of common intelligence of the conduct which would offend these orders."

- Attorney found in contempt for violation of gag order when she forwarded an email to children's grandmother containing copies of several pleadings and an order. The email was directed to Mother, through grandmother, for Attorney had not had any contact with Mother for over a month, and had represented grandmother in the custody proceedings, and was entitled to know the outcome of the proceeding. Also, grandmother had paid Mother's fees. Therefore, Attorney was not in contempt, and the contempt order for violation of the gag order was reversed.

- On a separate issue, the chancellor had ordered Attorney to seek court approval before issuing subpoenas. Attorney obtained permission to have the clerk issue subpoenas by misrepresenting to the chancellor in person the nature of the subpoenas she sought. Specifically, the Attorney obtained leave for simple witness subpoenas. However, she prepared and had the Clerk issue subpoenas duces tecum.

- The subpoenas duces tecum included a demand for production of: "...the original or a copy of [the daughter's] note and drawing of an erect penis which stated 'For Mamma's eyes only; my privates hurt real bad'..."

- Although the misrepresentation was in the chancellor's presence, the language in the subpoenas and the request for production of documents in the subpoenas were facts outside the chancellor's personal knowledge. Therefore, the contempt judgment was in the nature of constructive (not direct), criminal (not civil) contempt. Where there is doubt as to whether contempt is direct or constructive, it should be considered constructive.

- Neither Father nor the GAL requested that Attorney be held in contempt for issuing these subpoenas. Rather, "...it appears from the record that the chancellor instigated and prosecuted this contempt charge. It was improper for the chancellor to sit in judgment where she had substantial personal involvement in the prosecution of this charge. Therefore, this finding of contempt is reversed and remanded for a new trial."

In Re Rules of Civil Procedure Supreme Court May 1, 2008

- Subsection (c) added to Rule 60:

- "**(c) Reconsideration of transfer order.** An order transferring a case to another court will become effective ten (10) days following the date of entry of the order. Any motion for reconsideration of the transfer order must be filed prior to the expiration of the 10-day period, for which no extensions may be granted. If a motion for reconsideration is filed, all proceedings will be stayed until such time as the motion is ruled upon; however, if the transferor court fails to rule on the motion for reconsideration within thirty (30) days of the date of filing, the motion shall be deemed denied."

In re: MRAP 5 Supreme Court May 15, 2008

- Uniform Circuit and County Court Rule 4.06 is added: "Interlocutory Appeal. An appeal from an interlocutory order in county court may be sought in the Supreme Court as provided in Rule 5 of the Mississippi Rules of Appellate Procedure."

- The Official comment to MRAP 5 is amended to note the availability of interlocutory appeals to the Supreme Court from county courts.

In re: Local Rules (6TH District) Supreme Court May 15, 2008

- New local court rules adopted for Sixth Chancery Court District [Attala, Carroll, Choctaw, Kemper, Neshoba and Winston Counties].

In Re Rules of Civil Procedure Supreme Court June 19, 2008

- MRCP 6(b) [Enlargement of Time] provides the trial court with some authority to extend a deadline established by the Rules after the deadline has expired.

- Under the terms of Rule 6(b), this authority does not extend to deadlines established under: 1. Rule 50(b) [Motion for Judgment Notwithstanding Verdict]; 2. Rule 52(b) [Amendment to Findings by the Court]; 3. Rule 59 (b), (d) and (e) [New Trials; Amendment of Judgments] and 4. Rule 60(b) [Relief from Judgment or Order; Mistakes, Inadvertance; Newly Discovered Evidence; Fraud, etc.]

- This amendment adds Rule 60(c) [Reconsideration of transfer order] to the list of rules to which Rule 6(b) does not extend.

COURT OF APPEALS

Weeks v. Weeks Court of Appeals April 1, 2008

- This is Weeks II. Weeks I is reported at *Weeks v. Weeks*, 832 So.2d 583 (Miss.Ct.App. 2002). In that case, the Court of Appeals remanded the decree of divorce for the chancellor to award alimony to the Wife, and consider whether Husband should be required to pay for Wife's medical insurance as part of her alimony award, and whether Wife was entitled to an award of attorney's fees.

- After remand, the chancellor ordered "Wife currently has [insurance] at a monthly premium of $516. Husband will pay this for Wife as part of his alimony obligation..."

- When the premium increased to $639/month, the chancellor found Husband was still only obligated to pay $516. Wife appealed.

- The Court of Appeals noted that Husband was also required to pay the vehicle and health insurance premiums for the parties' daughter, without any specified premium amount. Therefore, Husband was required to pay the insurance premiums for the daughter, including any increases thereto. Had the order been intended to do the same for Wife's medical insurance premiums, it would have simply said "Husband is required to pay for Wife's monthly insurance premiums."

- Also, the order explicitly said Husband was to pay $516 monthly, not the fluctuating amount of the actual premium. Finally, this was an order drafted by the court, not an agreement drafted by the parties, so if there was an ambiguity, there is no one more competent than the judge to say what was meant.

- In a separate issue, Husband was ordered to maintain life insurance policy naming Wife as irrevocable beneficiary, but was not ordered to provide Wife with proof of his compliance with this obligation. Wife sued Husband for contempt for failure to provide such proof. Husband testified that he had paid the premiums and complied with the order, and the chancellor found Husband was not in contempt.

- The Court of Appeals affirmed, finding Husband could not be found in contempt for not doing something he was never ordered to do (that is, to provide proof to Wife of his compliance with the court order).

- Husband earned more than $50,000/year. He was ordered to pay $1,890/month in child support, and 100% of the college-age child's college expenses. Husband was authorized to subtract college expenses from child support, and to pay child support semi-annually. After the order was entered, Husband subtracted the child's estimated annual college expenses from $22,680 ($1,890 x 12), and paid Wife the difference.

The Court of Appeals noted that the child support decree made it "virtually impossible" for Husband to be held in contempt. The more he spent on the child's college education, the less he would have to pay Wife in child support.

- "Payments toward education are seldom used to offset child support, as they do not diminish the child's need for food, clothing and shelter." The order in this case allow Husband to pay far less than statutory guidelines, even though the child spent most of the summer with Wife, and many weekends as well, when Wife had to provide food, shelter and clothing. The child support order was remanded for the chancellor to consider an appropriate amount.

- Before child was 21, Wife sued for increase in child support obligation. Chancellor denied Wife's complaint, noting the child was now 21. Wife appealed, claiming the chancellor did not consider her complaint in light of the Court's ability to retroactively increase child support to the time of filing of her complaint.

- The Court of Appeals found no abuse of discretion where the chancellor did not specifically explain why he did not find a MCIC justifying an increase in child support, and Wife did not request Rule 52 findings of fact and conclusions of law.

- Wife sued for modification of alimony, claiming that her medical conditions (extensively reviewed by the chancellor at the original trial) had worsened, and that she now also had asthma and Epstein-Barr virus, which she'd not previously had.

- The Court of Appeals found that the increase in Wife's medical expenses due to the progression of Wife's medical problems was not unforeseeable, and thus the chancellor did not err in finding there <u>was not</u> a MCIC.

- [Editor's note: compare with *Makamson v. Makamson*, 928 So.2d 218 (Miss.Ct.App. 2006), in which the chancellor did not abuse his discretion in finding that there <u>was</u> a MCIC based on an "explosion" in the costs of treating Wife's renal disease, even though the renal disease and costs of treatment had been reviewed by the court when alimony was established in the divorce decree.]

- In denying Wife's suit to modify alimony, the chancellor found she was able to withdraw without penalty over $6,000/month from the 401(k) awarded to her in the divorce. Several months later, Wife learned that she could not make these withdrawals because she was not an employee of the company sponsoring the 401(k). It was not clear whether Wife was unable to make the withdrawals when the chancellor made his order; and, if so, why Wife had not promptly notified the chancellor of this fact. Therefore, Wife's inability to make the withdrawals would not qualify as a MCIC.

- Chancellor did not err in declining to award Wife attorney's fees on appeal, finding she "had a pot full of money" from which to pay them. She owned over $1 million in a retirement plan and 401(k) plan, and another $500,000 from insurance proceeds after Hurricane Katrina destroyed the family home.

- Justice Griffis, Concurring:

- Wife correctly argues that it would have been inconsistent with the judgment as a whole to require Husband to pay $516/month if her insurance premium had decreased below that amount. Likewise, it is inconsistent to require Husband to pay $516/month when her insurance premium has increased above that amount.

- Accordingly, the chancellor's original intent was for Husband to pay the insurance premium, not a fixed dollar amount.

- Logic and common sense dictate that where a chancellor orders one party to take a certain action, then the chancellor should also require that party to provide proof that the action was taken to the other for whose benefit the action was taken. The order should be reversed and remanded to enter an order requiring Husband to provide proof that he has complied with his obligation to make Wife an irrevocable beneficiary of the life insurance policy.

- "I would also encourage chancellors to fashion their judgments to encourage the voluntary submission of proof of compliance rather than encourage secrecy and further litigation, as the majority does here."

- The case should also be remanded for the chancellor to consider the *McKee* factors in determining whether Wife should be awarded attorney's fees. Wife had no liquid assets from which to pay fees, other than her alimony and a small annuity, and *Hemsley* held a wife is not required to liquidate her savings to pay her attorney's fees.

H.D.H. v. Prentiss County D.H.S. Court of Appeals April 1, 2008

- Father's guilty plea to felony child abuse satisfied MCA 93-15-103(c) grounds for TPR with all three of his children, even though the felony pertained to only one of the children.

Hanshaw v. Hanshaw Court of Appeals April 15, 2008

- Where husband filed motion for clarification on the 10th day following entry of judgment of divorce, chancery court retained jurisdiction over the case. Therefore, there was no need for the issuance of a summons and complaint to wife for a contempt action heard before the court ruled upon the motion for clarification.

- Where wife was ordered to vacate the marital residence so that it could be sold, and was fined $500 for each hour she delayed moving, the fine was intended to compel compliance with the court's order, and was therefore civil in nature.

- Civil contempt fines are sometimes payable to the opposing party. They are related to, and should not exceed, the injured party's proved losses and litigation expenses, including counsel fees.

- Where husband incurred no damages for wife's delay in complying with court order directing her to move out of marital residence by a specific day and time, fine of $12,000, incurred at the rate of $500 per hour, was error.

- A $12,000 fine for a 24-hour delay in vacating the marital residence is clearly excessive and an abuse of discretion.

- Although the wife's contempt was indirect, the Court noted that MCA § 9-1-17 limits fines for direct contempt to $100 per offense.

- Fines from criminal contempt are payable only to the court, not the opposing party.

Parker v. Parker Court of Appeals April 15, 2008

- The question presented was "whether a court may order a judicial sale of the marital estate after being given inadequate evaluations [of value] by the parties." Reviewing the law of partition, the Court noted a partition sale is only appropriate where: "(1) the sale is better for the parties involved than a partition in kind; or (2) the property is incapable of being equally divided. A court has no right to divest a cotenant landowner of title to his property by sale over his protests unless these conditions are met." The Court also noted that the chancellor has the authority to order an evaluation of the marital estate.

- Although the chancellor had already ordered the property sold and the issue was now moot, "we urge chancellors in the future to order an evaluation rather than resorting to a judicial sale of marital property."

- Third parties conveyed 3 acres to Husband, apparently in his sole name, and apparently given in return for Husband's clearing of some land owned by the donors. The acreage adjoined real estate that was marital property. Husband contended the acreage was a gift to him.

- The Court of Appeals found there was no evidence that the property was not commingled, or that Wife was not allowed full use and access to the acreage. Therefore, the chancellor did not err in finding the acreage was marital property.

- Prior to marriage, Husband owned a one-half interest in 85 acres. The other one-half interest was jointly owned by Husband's ex-wife and his brother-in-law. During the marriage, the brother-in-law conveyed his interest to Husband. Also during the marriage, Husband's ex-wife sold her interest for a promissory note, which Husband and Wife paid from their earnings.

- The marital residence was situated on 10.4 acres of this tract. Husband contended the remaining 74.6 acres was his separate property. The chancellor found the entire 85 acres was marital property.

- Clearly, one-half of the tract was commingled, because Wife helped pay for the loan used to acquire it. "Therefore, the one-half interest was ultimately accumulated during the course of the marriage."

- Where court ordered parties not to dispose of marital assets and Husband sold his business anyway, without asking the court for leave to do so, chancellor did not err in ordering Husband to pay Wife one-half of the stipulated value of the business, since she had previously received none of the proceeds from the sale.

- Husband conveyed a house and 3 acres to third parties, in contravention of court's order to not dispose of marital assets. The property conveyed was marital property. The chancellor did not err when it ordered Husband to pay one-half of the value of the property to Wife, in spite of Husband's claim that he received no benefit from the transfer, "other than debt relief" (in what amount the opinion does not say). "Be that as it may, Husband clearly conveyed the property in direct contravention of the court's order to the contrary."

- Marital property was sold at judicial sale for $44,150 less than its appraised value after potential buyers at sale learned Husband had granted a third party an option to buy the property, in contravention of the court's order to not dispose of marital assets. The chancellor did not err in ordering Husband to give Wife one-half of this amount.

- Where Wife was awarded nearly $261,000 in property distribution and chancellor did not explain why he awarded Wife attorney's fees, chancellor erred in awarding Wife $10,000 in attorney's fees.

Solomon v. Robertson Court of Appeals April 15, 2008

- Grandparent visitation case.

- [Editor's note: MCA 93-16-3(1) provides that, if:
  A. A court has awarded custody of the child to one parent;
  B. A court has terminated the parental rights of one parent; or
  C. One of the child's parents dies;

  Then the parent of the parent who was not awarded custody, had his/her rights terminated or died may seek visitation rights.]

- Grandparents' visitation rights are solely creatures of statute. They are not as expansive as a parent's visitation rights.

- MCA 93-16-3(1) does not require proof of "a viable relationship with the child", as is required when seeking to establish grandparent rights under MCA 93-16-3(2).

- Chancellor did not err in refusing to award parent attorney's fees under MCA 93-16-3(4); the parent did not submit proof of financial hardship.

- Chancellor did not err in denying divorced mother's motion to dismiss her new husband as a defendant in grandparent visitation case. The new husband testified that he helped oppose the grandparent's visitation, had a close relationship with the child, and actively participated in other custody-related matters.

Pruett v. Prinz Court of Appeals April 15, 2008

- In custody modification suit, Mother's coaching a child to lie under oath about Mother's affair with a married man was an "adverse effect" sufficient to modify custody.

- Where mother admitted that surveillance DVD accurately depicted the location portrayed, DVD was properly authenticated under MRE 901(a).

- Where private investigator billed Father for 9 hours of "surveillance/travel," but produced a surveillance DVD showing only 1½-2 hours of surveillance, chancellor did not err in admitting DVD into evidence, despite Mother's argument that MRE 1002 requires the original writing, photograph, etc. be required to prove the content of the medium, and that without the original recording there was no way to tell whether exculpatory material had been excluded (in the remaining 7-7½ hours of surveillance). There was no indication that the DVD in question was not the original, or that there was any other filmed surveillance. The fact that 9 hours was billed to "surveillance/travel" does not suggest that there should have been 9 hours of video to review at trial.

Weeks v. Weeks Court of Appeals April 29, 2008

- Determination of moral fitness includes allegations of adultery. In some cases, adultery may have an unhealthy influence upon the child; in others, no effect at all.

- Chancellor did not put too much stress upon Mother's adultery, where she cohabited with a violent man whom she held out to others to be her brother.

Ware v. Ware Court of Appeals April 29, 2008

- "The doctrine of recrimination is founded on the basis that the equal guilt of the complainant bars his/her right to a divorce, and the principal consideration is that the complainant must come into court with clean hands."

- Even though defense of recrimination may be demonstrated at trial, chancellor does not have to deny the divorce, pursuant to MCA 93-5-3. In this case, where complainant admitted to adultery, he nevertheless could be granted a divorce on the grounds of his wife's adultery.

- Chancellor properly found that Husband's engaging in sexual intercourse with Wife after learning of her possible adultery did not necessary require finding of condonation.

- Chancellor properly enforced prenuptial agreement executed 2 days before the wedding, even though Husband allegedly told her it was applicable only to death, and inapplicable to divorce. Wife was not forced to sign the agreement, did not read it, did not take it to an attorney to review, and the agreement did not cover all of the parties' marital property, so that Wife was awarded 40% of the marital assets of $234,436.60.

- Independent counsel is not required to fairly execute a prenuptial agreement.

Strong v. Strong Court of Appeals April 29, 2008

- Parties executed an MCA 93-5-2(3) consent for the court to award a divorce on ID grounds, and to try specified issues, including Wife's claim for "temporary child support arrearage." Husband argued at trial and on appeal that by not seeking an order of temporary support, Wife had waived her claim for temporary support. At trial, Husband did not object to Wife's proof of her claim for "temporary child support arrearage." The chancellor awarded Wife 12 months of retroactive child support, and Husband appealed.

- MCA 93-11-65(1)(b) provides: "An order of child support shall specify the sum to be paid weekly or otherwise. In addition to providing for support and education, **the order shall also provide for the support of the child prior to the making of the order for child support**, and such other expenses as the court may deem proper." MCA 93-9-11 provides for an award of retroactive child support in paternity suits.

- The court cannot award child support unless it has been raised in the pleadings or tried by consent. Here Wife's claim for retroactive child support was clearly tried by consent. Thus, the chancellor did not err in awarding retroactive child support.

- Wife received $87,096 from a Katrina-related insurance claim. She said that she spent most of the funds to pay family expenses and to pay down debt. At the time of trial, only $9,696 remained, and Wife had transferred the funds into her mother's name. The chancellor found that, since Wife's mother had not been made a party to the suit, the court could not address that asset.

- Held, the chancellor properly found that the court cannot grant relief that affects a third party who is not a party to the suit. However, the analysis does not end there. Without specifying whether the insurance proceeds were marital or separate, the Court of Appeals cannot tell whether they should be equitably divided. Failure to classify a material asset is grounds for reversal on appeal.

- "The mere fact that the insurance proceeds were placed beyond the reach of the court by Grechen, did not preclude the chancellor's ability to offset those proceeds from Gretchen's portion of the equitable distribution." The case was remanded for a

classification of the insurance proceeds, and then a reapplication of the *Ferguson* factors to all of the marital property.

Lister v. Lister Court of Appeals May 6, 2008

- Husband's appeal of award to Wife of divorce on ground of Adultery.

- After review of the evidence, the Court found the chancellor did not err in awarding Wife a divorce. No particular interpretation of law was discussed in the opinion.

Marshall v. Harris Court of Appeals May 6, 2008

- Paternity suit where parties agreed that Father was the father of both children (1 and 7 years old at the time suit was filed). Father sued for custody only of the 7 year old. Mother was awarded custody of both children.

- Father excepted to statements made by the chancellor at the conclusion of trial: "The main reason outside the [Albright] factors is that the case law prohibits a judge from separating siblings as in your case; you have two children, and the law prefers that siblings stay together, which, of course, would be impossible to do by removing one from your home. ... Moreover, it is presumed that it is in the siblings' best interest to keep them together as a family unit."

- The Court of Appeals interpreted these comments as a recognition that the law prefers children to stay together, and that the chancellor saw no reason why they should be separated. The chancellor refused to separate the children because Father introduced little evidence to show that the 7 year old would be better served by living with Father.

- Quoting *Owens v. Owens*, 950 So.2d 202, 207 (¶16)(Miss.Ct.App. 2006), the Court noted: "While the placement of children with their siblings is not a concern that 'overrides' the best interest of the child, our case law makes it clear that keeping siblings together is assumed to be in the best interest of the child, absent a showing that the circumstances in a particular case are to the contrary."

Connelley v. Lammey Court of Appeals May 20, 2008

- In divorce, parties were awarded joint legal custody and Mother was awarded sole physical custody. Seven years later, Mother moved with the children to Las Vegas. Father sued for paramount custody, and won. Mother appealed.

- Mother moved to Las Vegas to be close to her parents, who were old and in failing health. She claimed to have suitable employment and a free place to live, but this did not prove to be the case. Instead, she found suitable employment 1-2 months after moving, and lived rent-free with her parents for 9 months.

- A psychologist interviewed the boys. The older boy, 14 at the time of trial, had made new friends at school, was involved in extracurricular activities, had no difficulties in talking with his father on the telephone, but had a C in math because school in Nevada was much more difficult than in Mississippi. He missed hunting and fishing, and had done better in baseball in Mississippi. He wanted to live with Father. The psychologist found he had been traumatized by the move.

- The younger boy [age not listed in the opinion] had expressed to the psychologist sadness about being uprooted from his home in Mississippi. The psychologist found that Mother's interference with the boys' interaction with Father's family and the move had adversely affected the boys.

- The chancellor found a MCIC, and found the *Albright* analysis favored Father. He did not err in modifying custody.

Williams v. Stockstill Court of Appeals May 20, 2008

- Husband had an affair while his wife was giving birth to twins. His girlfriend (Mother) conceived, and two years after she gave birth, Husband sued Mother for custody. Because there were no previous custody orders, the chancellor applied the *Albright* factors and awarded custody to Husband, primarily because Mother was on house arrest for 5 years for commercial burglary and drug charges.

- Mother appealed, claiming that because Husband's suit wasn't filed until the child was 2 years old, Mother enjoyed *de facto* custody. Therefore, custody should not be modified unless Husband proved a MCIC and AI.

- The Court of Appeals found that in a paternity suit where the father acknowledges paternity and his duties as a parent, he is on an equal footing with the mother with respect to a custody determination, citing *Smith v. Watson*, 425 So.2d 1030 (Miss. 1983)

- Mother also challenged the chancellor's *Albright* analysis. Noting Justice Griffis' dissent, the majority disagreed with his emphasis on Father's wrongdoing in having an affair while his wife was giving birth. "Our focus should not be on the past wrongdoing of the father but, rather, on what is in the best interest of the child at the present." Citing *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996), the majority found that "a child should not be shackled to the past when a better situation is available in the present."

- Chief Justice King's Dissent, Joined by Justice Carlton:

- "Where a child has an established and longstanding custodial relationship, I think the court must consider and address the issue of de facto custody. Under such circumstances, if, and only if, the court finds that there was no de facto custodian should it proceed to dispose of the case as a simple custody case."

- “While there was no [previous] custody decree entered by the court, the simple fact is that Amy was the person responsible for the care and support of Madison and in my opinion, the de facto custodian of Madison. To ignore this simple fact is contrary to reason and common sense.”

- Justice Griffis Dissenting, Joined by Justice Barnes:

- “The chancellor should have used the heightened standard of modification of custody.” Husband knew he had a child and provided no support or care for the child for two years. He neglected his responsibilities as a father under MCA 93-13-1.

- The law currently does not support this argument, but it should, as discussed in dissent in *Romans v. Fulgham*, 939 So.2d 849 (Miss.Ct.App. 2006). The case should be reversed and remanded for analysis under a modification of custody standard.

- The chancellor also improperly evaluated two *Albright* factors. Under moral fitness, he found that both parents had been deficient, but Husband had shown improvement, while Mother had not. At best, he should have found that neither parent was favored under this factor. Husband restored his relationship with his wife and children by forsaking Mother and their child.

- Second, Mother should have been given more credit under the continuity of care factor.

- Finally, Mother received no benefit under the tender years doctrine [the child was nearly 2 years old when Husband filed his lawsuit].

Keith v. Purvis Court of Appeals May 27, 2008

- When Father qualified for Social Security Disability, child (through Mother) received 22 months’ worth of back payments, plus an ongoing monthly disability check. Both the back payments and the ongoing payments were well in excess of Father’s monthly child support. Father had paid child support until he qualified for disability.

- Father sued for reimbursement of 22 months’ worth of child support payments, and asked that the child’s monthly SSD check be considered a payment in lieu of Father’s child support (i.e., that Father not have to pay child support in any month when the child received an SSD check).

- In the alternative, Father asked that the difference between: (a) the total amount of SSD benefits the child received; and (b) the total amount of Father’s child support be “credited” against Father’s child support obligation when the child became 18 and would no longer be eligible for SSD.

- The chancellor found that Father was entitled to offset SSD against child support, but that he was not entitled to a “credit” to the extent that the monthly SSD exceed Father’s monthly child support obligation.

- The law is clear that a child support obligor is entitled to offset the child's monthly disability benefits against the parent's child support obligation. Social security payments the child receives because of a parent's retirement or disability are an alternate source of satisfying the child support obligation.

- However, this credit is only in the amount of the child support obligation. To the extent that the SSD payment exceeds the child support obligation, the excess is considered a "gratuity to the child." In this case, Father's child support obligation was $350.00 per month, but the child received $900.40 from SSD each month. Thus, the child received $550.40 each month as a gratuity.

- The child's right to SSD benefits will expire when she is 18, but the child may not be emancipated until she is 21. Can Father accumulate the $550.40 monthly "gratuities" the child is now receiving as a credit against the child support he will owe when the child is 18 through 20 years old? No. Citing cases from several jurisdictions throughout the U.S., the Court found that a child's need for support is current – "today, this week, this month" – and the expectation of future payment does not meet those needs. "To hold otherwise would create an incentive for a non-custodial parent to withhold support payments in the hope or expectation that a future receipt of disability benefits by the child would later satisfy those obligations."

- Father also argued that first he paid child support for 22 months; then the child received the full amount of SSD for the same 22 month period; i.e., a double payment. He asked for a refund.

- The Court of Appeals found that while the lump sum payment *represented* disability benefits for the previous 22 months, the payment was not *received* until after the 22 month period. "In this situation, equitable considerations compel that as between the parties, the windfall should inure to [the child]; the excess is considered a gratuity."

- Thus, Father is not entitled to credit the "gratuity" the child received as future child support, because the gratuity is not child support – rather, it is the child's property. Likewise, Father paid child support for 22 months (before SSD benefits were approved), and thus the entire amount of SSD benefits the child received in "back pay" were likewise a "gratuity" to the child; not a double-payment of child support.

- The majority agrees with Justice Ishee's separate opinion that Mother may squander the lump sum payment, and that it should be invested for the child's benefit. However, the possibility that the lump sum payment may be wasted does not prove that it will be wasted. In any event, the Court has no authority "to dictate to this extent the manner in which a custodial parent chooses to use child support payments."

Justice Ishee, Specially Concurring:

- The idea of turning over to the custodial parent over $20,000 [the retroactive benefit payment] for the "use and benefit" of the minor child is disturbing, especially since the parent who provided the funds (Father) will have no control over how they are used.

- If Father had earned the $20,000 on his own, the money would be his to spend as he pleased. Since the parties brought the court into their lives by having a child out of wedlock and receiving government assistance for Father's disability, the government has a vested interest in seeing that the $20,000 is used to serve Father's and the child's best interests.

- Failure to require the funds to be placed in a guardianship account invites waste and fraud. The funds should be required to be placed in a guardianship account.

- Justice Irving, Concurring in Part and Dissenting in Part:

- Concurs with the majority opinion, except that Mother should reimburse Father for the child support he paid for 22 months that SSD also paid. If the SSD payments had been paid *during* those 22 months, instead of afterwards, Father would not have been required to pay any child support. Clearly, the child received two sets of child support payments for the same 22 months, and one of those sets should be refunded.

- The majority cited *McBride v. Jones*, 803 So.2d 1168 (Miss. 2002) in support of its opinion. In that case, a payor sued for reimbursement of child support payments he made after DNA tests showed that he was in fact not the father of the child he had been supporting. The Supreme Court held that once child support has been paid, it cannot be refunded.

- *McBride* should be distinguished on the grounds that it involved a child who received only one set of child support payments, so that a refund would have deprived the child of any support. In this case, there were two sets of payments during those 22 months; thus, a refund of one set of payments would not similarly deprive the child of support.

Davis v. Davis Court of Appeals June 3, 2008

- Husband and Wife signed PSA in 1994, providing that Husband would pay $700/month in child support. The PSA also provided that the parties would split college tuition, and each would pay one-half (½) of the child's private school tuition if they agreed that private school was in the child's best interest. Wife was awarded custody.

- In 2006, the parties agreed that Husband would have custody. The agreed order also provided that "the court shall decide the issue of private school tuition and college expenses." Wife sought a modification of the obligation to pay one-half (½) of the private school tuition.

- The court conducted a hearing, at which Husband argued that the provisions in the PSA for payment of private school expenses were contractual and not modifiable. Wife argued that the provision was in the nature of child support, and therefore modifiable.

- Although the private school expenses were provided for in a contractual agreement, private school tuition is normally viewed as child support, subject to modification. The case is remanded for the chancellor to determine whether a modification of this obligation is appropriate.

Gilliland v. Gilliland Court of Appeals June 10, 2008

- Father awarded custody in divorce. Mother sued for modification of custody. After Mother rested her case, Father moved for dismissal pursuant to MRCP 41(b), which the court granted.

- The chancellor sat without a jury. Under the circumstances, when considering Father's motion, the chancellor was not required to consider the evidence in the light most favorable to Mother. Quoting *Mitchell v. Rawls*, 493 So.2d 361, 362 (Miss. 1986), the Court noted that if the trial court, considering the evidence fairly, as distinguished from "in the light most favorable to the plaintiff", finds the plaintiff failed to prove one or more essential elements of her claim, the proceeding should be halted at that time and final judgment rendered in favor of the defendant. If in doubt, the chancellor generally ought to deny the motion, "but such is the exercise of sound discretion, not obligation imposed by law."

- Mother raised a long litany of instance to demonstrate MCIC, primarily centered on the prospect that Father engaged in a pattern of parental alienation. Mother claimed Father was solely to blame; Father claimed Mother had a vested interest in maintaining a volatile situation in an attempt to manufacture grounds for modification.

- The chancellor found that Mother and Father "let their feelings for one another adversely affect their sons." It is in the children's best interests for parents to maintain a peaceful relationship. The parties "have had a volatile relationship throughout this considerable litigation. A welcome change in the children's circumstances would be *the absence of* a volatile relationship..." The chancellor did not err in finding there had been no MCIC.

- Even if the chancellor erred in finding there was no MCIC, there was no evidence of an adverse effect.

- Mother argued that it was reasonably foreseeable that her problems with Father will have an adverse impact upon the children. Citing *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996), the Court acknowledged that under certain circumstances, adverse effects can be shown where it is reasonably foreseeable that a child will suffer adverse effects because his present custodial environment is clearly detrimental to his well-being. For example, in *Riley* it was established that the custodial parent's home was the site of illegal drug use.

- The Court reviewed *Johnson v. Gray,* 859 So.2d 1006 (Miss. 2003) (mother's alcoholic stupors led to car accidents, arrests and fits of rage); *Glissen v. Glissen*, 910 So.2d 603 (Miss.Ct.App. 2005) (mother's live-in boyfriend did not exercise visitation with his own children, abused drugs and alcohol, became violent and was a convicted felon; mother was untruthful, only pretended to be interested in morals and children were innocent and at an impressionable age); and *Savell v. Morrison*, 929 So.2d 414 (Miss.Ct.App. 2006) (mother's new husband indicated he was prepared to go to jail in the event that he "snapped" and whipped the child, hollered profanities at the child, indicated he believed he could yell at the child whenever he wanted, screamed at the child on a daily basis, admitted he wanted to duct tape the child to a chair and repeatedly pepper the child with paint balls, threatened the child with a belt after she talked back to her mother and scared the child to the point that she turned white); and found the evidence in this case does not begin to approach the evidence in *Riley*, *Johnson*, *Glissen* or *Savell*.

- Finding that there has been a MCIC is not an appropriate remedy in the context of a civil contempt action. However, Father is cautioned that if he continues to disrupt Mother's telephone visitation or otherwise violates the chancellor's orders, he may be found in civil contempt.

- On cross-appeal, Father complained that the chancellor modified the visitation schedule because neither party requested a modification of visitation, or presented evidence that the schedule warranted modification. However, the chancellor could have found that due to the parties' volatile relationship, the schedule should be amended to minimize Mother and Father's contact with each other.

- The opinion notes considerable differences in interpretations of the chancellor's modification of visitation, and remanded the visitation schedule for clarification.

- Justice Chandler, Concurring:

- Language in the majority's opinion cautioning Father that he could be held in contempt is wholly unwarranted. Father was not found in contempt, and it is premature to discuss what could happen if Mother filed a future petition for contempt based on Father's future conduct.

- Given the parties' extensive litigation history, it is fairly predictable that it would take scant provocation to engender a new round of motions for modification and petitions for contempt. The majority's language is imprudent because it only serves as an invitation for further litigation.

Scurlock v. Purser Court of Appeals June 17, 2008

- Parties were granted joint legal and physical custody of their children in the divorce. In a subsequent custody modification suit, Mother was awarded \$4,800 of her \$6,480 in attorney's fees. Father was awarded \$0 of his \$8,400. Father appealed only this issue.

- Award of attorney's fees to Mother upheld, even though her monthly gross earnings were more than Father's ($3,850 vs. $2,712). Mother's expenses exceeded her income, she had borrowed $4,000 from her parents to pay her fees, and her parents were keeping her children because she could not afford daycare.

- Because of Mother's limited resources, she is also entitled upon appeal to an award of one-half of the attorney's fees awarded by the trial court ($2,400).

A.B. v. Lauderdale Co. D.H.S. Court of Appeals June 17, 2008

- This is an appeal of a TPR decree in Youth Court.

- The standard of proof for TPR is clear and convincing evidence. However, the standard of review dictates reversal of the Youth Court "only if reasonable men could not have found as the youth court did beyond a reasonable doubt." In a bench trial, findings of fact will be disturbed only where the record lacks "substantial supporting evidence", defined as "such relevant evidence as reasonable minds might accept as adequate to support a conclusion."

- Desertion of a child involves an avoidance of a duty or obligation. Parents have a duty to provide their children with adequate care, a drug-free environment, electricity and running water. Evidence of the condition of the home provided by the children's parents were sufficient to show that Mother failed in her duty to provide adequate care for the children. The evidence was sufficient to terminate her parental rights.

- Justice Irving, Dissenting, Joined by Chief Justice King:

- Nearly two years before the TPR hearing the Youth Court conducted a neglect hearing. At the TPR hearing, the Youth Court refused to hear evidence of Mother's rehabilitation since the neglect hearing two years earlier.

- At the neglect hearing, Mother had admitted she could not care for the children, *because she was currently incarcerated*. Because of this admission, the Youth Court found the children had been neglected. Later, the charges against Mother were dropped and she was released from custody. Therefore, the court erred when it based the TPR, in part, on findings that Mother had neglected the children two years earlier.

- Secondly, the Youth Court based its TPR on the fact that Mother had a drug problem that was unlikely to be cured. But no evidence of current drug use was introduced into evidence, and the only evidence of past drug use was that she had not cooperated when asked to give hair and urine samples. The Youth Court ignored Mother's negative drug tests taken after the neglect hearing. In short, the Youth Court refused to consider Mother's progress since the neglect hearing.

- It may be that the evidence presented to the court is sufficient to terminate parental rights. However, the court should have looked at all of the evidence concerning Mother's drug use, including evidence of progress Mother has made since the neglect hearing.

Klink v. Brewster Court of Appeals June 24, 2008

- Paternity suit in which father was awarded custody.

- Where Mother was ordered to serve responses to discovery, and failed to serve responses until after deadline had expired, and only two days prior to trial, chancellor did not err in excluding all of Mother's witnesses from testifying, except Mother herself.

Hills v. Hills Court of Appeals June 24, 2008

- *En banc* opinion in which both Mother and Father appeared *pro se* before the Court of Appeals. Mother was the appellant and failed to cite any legal authority in support of her position.

- Father filed suit to have child declared emancipated, so that he would not have to pay any more child support. The chancellor found that the child had not been in school for some time, had been working since leaving school and was not living with Mother at the time of trial. However, he was "unwilling to that extent and rule or determine that [the child] is emancipated." He therefore abated Father's child support obligation, and allowed the parties to return to court if the child's situation changed. Held: Affirmed.

- Justice Carlton's Dissent, Joined by Justices Barnes and Roberts:

- The evidence was insufficient to find that the child was employed full-time; rather, the proof showed that the child held a series of part-time jobs and was *seeking* full-time employment at the time of trial. The evidence was also insufficient to find that the child did not live with Mother at the time of trial; rather, the child testified that he lived with Mother and had never moved out of her house.

- Chancellor correctly found that child was not emancipated. Chancellor erred in abating child support. His ruling clearly stated that his reason for abating child support was because the child was not attending school. The chancellor cited no legal authority for the proposition that child support is unnecessary for an eighteen year old child who is not enrolled in school.

- The evidence did not show that Father could not pay child support, or that the child was able to meet his own financial obligations without child support.

- Cites *Edwards v. Edwards*, 935 So.2d 980, 985-86 (¶¶12-16) (Miss. 2006), in which a child serving time in prison was properly found to be not emancipated, and which held that the fact of the child's ability to meet his own needs "is one of the strongest considerations in determining that a minor is emancipated..."

- Father's lawsuit was filed in May. Trial was not conducted until October. The trial court erred in retroactively abating Father's child support to May. An *increase* in child support can be applied retroactively; a *decrease* cannot. (Citing cases)