

# Section Quarterly Report

From The Mississippi Bar  
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## MESSAGE FROM THE EDITOR

As of the date of writing, the Mississippi Legislature is still in session. As usual, several amendments to our Irreconcilable Divorce statute have been offered; all of these proposals are now dead. SB 417, which would have enacted the Uniform Premarital Agreement Act, is likewise deceased.

Several statutes (including MCA § 93-5-23) have been amended to provide that a person found in contempt for failure to pay child support “may be referred for placement in a state, county or municipal restitution, house arrest or restorative justice center or program, provided such person meets the qualifications prescribed in Section 99-37-19.” The full text of the bill is found at HB 469.

HB 461 has also been signed by Governor Barbour. It amends MCA § 93-9-9, which provides a 60-day period for a father to rescind a voluntary acknowledgement of paternity. The amendment provides that the father may request DHS to conduct genetic testing, and further provides that the aforesaid 60-day period is tolled from the time the test is requested until the time the results are revealed. The form used to obtain a voluntary acknowledgement must clearly indicate this right to genetic testing. Perhaps the Legislature had the case of *D.H.S. v. Ray* (reported below) in mind when it passed HB 461.

MCA § 93-16-3 has been amended to add a provision to the Grandparent Visitation Statute that a viable relationship can be established upon proof that the grandparent cared for the child “over a significant period of time during the time the parent has been in jail or on military duty that necessitates the absence of the parent from the home.”

The Uniform Child Abduction Prevention Act has also been passed. It authorizes a court that has jurisdiction to make a child custody determination to enter an “abduction prevention order” that may impose travel restrictions, require the respondent to surrender the child’s passport, limit visitation or impose requirements that visitation be supervised. It also authorizes a court to issue a warrant to take physical custody of a child, and criminalizes the sale, purchase and offers to sell or purchase a child (including an unborn child). The Act can be found at <http://billstatus.ls.state.ms.us/documents/2009/pdf/HB/0500-0599/HB0599SG.pdf> .

## LETTER FROM THE BENCH

From H. David Clark, II  
Chancellor, Second Chancery Court District  
Jasper, Newton and Scott Counties

If you regularly read decisions from our appellate courts, you already know that occasionally, it is not necessary in an appeal to assign as error, brief, argue or cite authority on a particular issue to have that issue addressed; possibly, dispositively.

One such example of this principle is *Pittman v. Pittman*, No. 2007-CP-02091-COA, 2009 WL 596005 (Miss.Ct.App. March 10, 2009). Therein, the Court of Appeals, *sua sponte*, determined that it did not have jurisdiction of the matter; an appeal from a Judgment of divorce granted on the grounds of irreconcilable differences. Thus, the court reversed and remanded the matter to the Chancery Court.

In *Pittman*, the parties converted a fault grounds divorce to an irreconcilable differences divorce. In the process, the parties filed the requisite consent to divorce and also filed a motion to dismiss all contested grounds for divorce pursuant to Miss. Code Ann. § 93-5-2 (Rev.2004). However, no order of the chancery court actually dismissing the previously filed fault grounds for divorce was ever filed. Thus, the Court of Appeals held that “the chancellor manifestly erred in granting the divorce on the ground of irreconcilable differences, as the statutory authority for her doing so was not met by the parties.”

*Pittman* stands for the proposition that prior to the entry of a judgment of divorce on the grounds of irreconcilable differences in an action wherein fault grounds were plead either in a complaint or in a counterclaim, an order dismissing those previously plead fault grounds **must** be entered. Failure to dismiss the previously plead fault grounds for divorce will invalidate any subsequently entered judgment of divorce on the grounds of irreconcilable differences, which invalidity can be raised at any time, even “collaterally, anywhere, and at any time.”

SUPREME COURT OF MISSISSIPPI

**Wilburn v. Wilburn**

Supreme Court

October 2, 2008

- First Issue: Judgment entered June 1. Mother filed motion for reconsideration June 12. The motion for reconsideration was denied by order entered July 19. Mother filed her notice of appeal on August 10. Father asked court to dismiss the appeal as untimely filed.
- The appeal was untimely filed. Rule 59(e) requires a motion to reconsider to be filed within 10 days of the judgment. Since it was not timely filed (by Monday, June 11), the 30-day deadline to file the appeal was not tolled. MRAP 4(d) (referring to deadline running after the disposition of a *timely* Rule 59 motion) did not toll the deadline.
- Therefore, Mother’s deadline to file an appeal was not extended by the filing of her motion for reconsideration. By not filing her notice of appeal until August 10, she failed to meet the deadline.
- However, Father failed to object or respond to the motion for reconsideration. Father is procedurally barred from raising the issue for the first time on appeal.
- Second Issue: Mother complained that she was not allowed to put on her proof in support of her modification petition. However, no objection or offer of proof appeared in the record. In the absence of an objection and offer of proof, her argument was without substantive merit.
- Third Issue: The parties’ PSA provided they would have joint legal custody, Father would have primary physical custody, and Mother would have reasonable periods of visitation. The PSA was approved by the Court and incorporated into the divorce decree. Mother argued that she and Father had a separate agreement that each parent would have alternating week-long visitation, and that Father’s breach of this agreement had an adverse effect on the children, requiring a change in custody.
- It is tantamount to defrauding the court for parties to present a PSA, which is incorporated into a divorce decree, when they intend to abide by a contradictory private contract. This is clearly against public policy. Father’s abiding by the PSA, and not the alleged “side agreement” does not justify modification of custody.
- Fourth Issue: Mother discussed litigation with the minor children, played a tape recording of part of a court hearing to them, and had to be removed from the courtroom (along with one of her family members) while shouting abuse at the chancellor. Earlier in the litigation, the chancellor reduced the Mother’s visitation rights. In declining to restore these rights, the chancellor noted that he was prepared to restore Mother’s visitation, until she disrupted the court proceedings and discussed the litigation with the children
- The Supreme Court reversed, noting that the evidence showed that it was in the children’s best interests to have more time with Mother, and the chancellor’s order raised a question as to whether it was retributive rather than in the children’s best interests.

- Mother agreed to adoption of child by another couple. Father did not agree. The adoption was denied, and Father was awarded custody. Mother sought custody. The Court appointed a GAL, who moved to dismiss Mother's suit for lack of standing. The GAL argued that, by executing an irrevocable consent to adoption, Mother terminated her parental rights, citing MCA 93-17-9 and *Grafe v. Olds*, 556 So.2d 690 (Miss. 1990). That motion was granted, and Mother appealed.
- The Supreme Court reversed. Where a parent seeks to revoke a consent to adoption to deny *the prospective adoptive parents* custody of the child, the consent is irrevocable. However, the consent is not irrevocable against someone else – in this case, Father. In other words, a consent to adoption is irrevocable only as to the person(s) named in the consent, not as to anyone else who might have the child. The consenting parent's rights are terminated only as to the person(s) named in the Consent.
- MCA 93-15-103(2) should not be interpreted to provide that a Consent to Adopt (specifying the adoptive parents) is binding against the natural parent where other person(s) not specified in the Consent seek to adopt, even if those non-specified persons are parents or relatives.
- Where a parent consents to adoption of a child by a specific couple, and the adoption fails for whatever reason, the parent should not be prevented from seeking custody simply because she signed a Consent to Adoption.
- The Court also noted that a parent's claim for revocation of a Consent to Adopt is less compelling where the revocation is sought, not to obtain custody for himself, but for another.

- In the parties' divorce, Father and Mother were awarded joint custody. Father was ordered to pay the mortgage on the former marital residence, and Mother was ordered to pay the 2 children's private school costs. Father was ordered to pay child support of \$2,000/month.
- At some point, Father began paying only the mortgage and the younger child's private school costs. He did not otherwise pay any support. Father agreed that he reduced his payments, but argued that he did so because he was also paying the older child's college expenses. The divorce said nothing about payments for college. Father calculated that his total payments were roughly what they had been under the terms of the divorce decree, although he had not obtained leave of court to modify his obligations.
- Father claimed his actions were justified pursuant to the rationale of *Varner v. Varner*, 588 So.2d 428 (Miss. 1991), which held in part that where a supporting parent made payments directly to the child, the parent may receive credit for having paid child support "where to hold otherwise would unjustly enrich" the other parent. The chancellor agreed.
- Father sued to modify the \$2,000/month child support obligation, on the grounds that the oldest child would soon be emancipated and was no longer incurring private school tuition, and because the younger child lived with him much of the year. The chancellor declined to modify this obligation, and Father appealed.
- *Varner's* use of the term "unjust enrichment" was in the context of granting equitable relief (in the form of a credit) to a supporting father who, though in violation of the court order requiring payment to the *mother*, made payment to the child instead. *Varner* instructed that equity may at times call for *ex post facto* approval of such extra-judicial arrangements.

- For global child support orders [as opposed to per-child orders], the emancipation of one child does not automatically reduce the amount of the payment ordered, for at least 3 reasons: (1) the global support order might contemplate a base amount of support required, regardless of the number of children; (2) the award might not be based solely on the needs of the child, but also on the parents' respective abilities to meet those needs; and (3) the needs of individual children may vary widely, so that pro-rata reduction would be inappropriate.
- The Court found that, standing alone, the older child no longer needing private school tuition is not an unanticipated change in circumstances. Neither is the fact that the younger child lives with Father half of the time, since the parents shared joint custody.
- The chancellor also made orders relating to the parents' payments for college, although neither party raised the issue in their pleadings. There was also no evidence of the college expenses involved.
- The Court found that the failure to raise the issue of college expenses was not a concern, since the parties did litigate the issue of child support, which includes "all matters touching on that subject." However, ordering payment of college expenses when the divorce decree did not address college expenses required modification of the decree, and therefore, proof of MCIC. Since there was no proof of MCIC, the modification was manifest error.
- "For clarity only," the Court noted that because college expenses are considered part of child support, such awards ordinarily are not calculated separately from child support awards. If the total amount of child support plus college expenses ordered exceeds the guidelines, the chancellor must consider the criteria of MCA 43-19-101 and -103, and make an on-the-record finding that application of the guidelines is unjust or inappropriate.
- In other words, to modify a child support obligation already exceeding the guidelines in order to award college expenses, the chancellor must apply the *Brabham* factors [*Brabham v. Brabham*, 84 So.2d 147 (1955)] and the criteria of MCA 43-19-101 and -103.
- Justice Smith, Concurring and Dissenting, Joined by Justices Carlson and Dickinson:
- The majority found that there was no MCIC justifying a change in child support. However, a change in the parties' relative financial conditions and earnings capacities can be a MCIC.
- In this case, Mother's income increased by 400% after the divorce, which could have been a MCIC.
- Although the majority found there was no proof of the child's college expenses, the majority did *not* find that modification was manifestly against the weight of the evidence. There was proof at trial of the child's status in his college preparatory classes, his age when he reached college and his conscientious nature. This evidence is more than sufficient to support the judgment providing for payment of college expenses.

### **Jones v. Jones**

Supreme Court

November 20, 2008

- This is the Supreme Court's opinion after granting certiorari from the Court of Appeals' decision in *Jones v. Jones*, 995 So.2d 743 (Miss.Ct.App. 2007)
- During her deposition, Wife lied about adultery and other issues. She also resisted discovery by destroying her computer. The trial court found that Wife had committed perjury and that sanctions should be imposed. The sanctions were to be determined at a later date, but none were ever imposed. Husband appealed.

- The Supreme Court found that the chancellor abused his discretion by not imposing sanctions for perjury and destruction of evidence. It remanded the case for consideration of the imposition of sanctions and/or a referral to the district attorney to consider criminal prosecution.
- “When faced with such egregious misconduct, courts are obligated to consider sanctions that are severe enough to deter others from pursuing similar courses of action.”
- The chancellor awarded Husband 22% of the marital assets and Wife 78%. Wife is a successful author and earned the great majority of the marital estate. Husband was found to have contributed very little to the accumulation of assets, to have spent large amounts of money solely for his entertainment and pleasure, to have refused to seek gainful employment, and to have an addiction which led to a strain on the marriage. The division of assets was affirmed.
- Justice Waller Dissenting, Joined by Justice Graves:
- The parties entered into an MCA 93-5-2 stipulation of consent to an ID divorce and to trial on specified issues. The consent did not list sanctions as an issue to be tried.
- The same statute permits appeals only of the issues listed in the stipulation and consent.
- The subject of Husband’s motions for sanctions pertained to Wife’s adultery, which were rendered moot by the order approving the MCA 93-5-2 stipulation and consent. Therefore, the Court should not second-guess the chancellor’s decision to not impose sanctions.

**J.C.N.F. v. Stone County D.H.S.**

Supreme Court

December 11, 2008

- This is a TPR case. Grounds for TPR must be proved by C&C evidence.
- MCA 93-15-103(h) is one of the factors that can justify a TPR. It consists of 3 components: (a) That the child has been adjudicated abused or neglected; (b) That the child has previously been placed pursuant to MCA 43-15-13 [governing placement of children in foster care and relative care by DHS by order of Youth Court]; and (c) That a court of competent jurisdiction has determined that reunification is not in the child’s best interests.
- In this case, the first 2 requirements of MCA 93-15-103(h) were met. However, the record on appeal did not show a decision from the Youth Court that reunification was not in the children’s best interest.
- However, the Youth Court had recommended that a TPR petition be filed. The Supreme Court found that “Implicit in a recommendation that parental rights be terminated is the belief that reunification is not in the best interest of the child. ... Hence, there is substantial evidence that the third requirement of Section 93-15-103(3)(h) is met.”
- [Editor’s note: At first blush, this might appear to be circular logic. The opinion does not explicitly explain how a youth court judge’s *recommendation* that the attorney file a TPR petition satisfies the *proof of grounds* for the TPR. After all, the recommendation is merely the first step in a chain that is supposed to conclude in an evidentiary trial, at which the TPR may be granted only upon C&C evidence of each element of the TPR claim. I discussed this with Judge John Shirley (Judge of the Pearl Youth Court and a frequent lecturer on Mississippi Youth Court Practice). He reminded me that MCA 43-21-613 requires the court to conduct permanency hearings, which are on the record, evidentiary and so forth. (*see also* MCA 43-15-13(5)) One of the permissible conclusions from such a hearing is a recommendation that an adoption petition be filed.

- A recommendation for the filing of an adoption petition can be made only after (1) on the record evidence; and (2) after the judge makes an implicit finding that reunification is not in the child's best interests. In other words, *J.C.N.F.* might be recognizing that the recommendation is a judicial determination that reunification is not in the child's best interests.]
- Where substantial, credible evidence supported TPR, any error committed by chancellor in signing a judgment prepared by DHS, which used language essentially identical to the DHS petition, was harmless.
- The trial court did not appoint an attorney to represent Mother, who was indigent. The Court reviewed *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981) and other cases, finding that the Constitution does not require the appointment of counsel in every TPR case.
- *Lassiter* provided these guideposts: whether the hearing involves: (a) potentially criminal allegations of neglect or abuse; (b) expert testimony; or (c) troublesome points of law.
- In this case, the Court found the case did involve potentially criminal allegations of neglect or abuse, but not expert testimony or troublesome points of law. Since an appointed attorney could not have changed the procedural facts that the children had already been adjudicated neglected, that they had been placed with DHS and that the youth court had recommended TPR, the Court could not say that the appointed attorney would have precluded the chancellor from finding a TPR should be entered.
- Dissent of Justice Dickinson, Joined by Justice Easley:
- "Wealth should never be a criterion to defend motherhood. Further analysis would be futile since the judicial proclamations I might present pale in comparison to the inherent unfairness of what happened here."

### COURT OF APPEALS

**Morris v. Morris**

Court of Appeals

October 7, 2008

- Chancellor did not err in considering the possibility of Husband's military deployment when awarding custody to Wife.
- New statute MCA 93-5-34 provides that a service member's temporary duty, deployment or mobilization, and the temporary disruption to a child's schedule, shall not be factors in determining whether a MCIC has occurred so as to transfer custody from the service member. Nothing in the statute alters the duty of the court to consider the best interests of the child in deciding custody or visitation matters.
- Where Husband worked at same job for 20 years and Wife had an unstable work history, and had been at her current job only 2 weeks, chancellor did not err in finding that *Albright* factor "Employment and Responsibilities of that Employment" favored Wife, since her work schedule was 8:00 – 5:00, while Husband's civilian employment required him to be on call 24 hours, and there was a possibility of overseas military deployment.
- Where Husband had an affair a decade before the divorce and was forgiven by Wife, while Wife had an affair at the time of separation, chancellor did not err in finding that *Albright* factor "Moral Fitness of the Parents" did not favor either parent. Although forgiveness is a factor when considering grounds for divorce, Husband cited no authority that it should be considered as a factor or defense under *Albright*.

- Contempt must be deliberate and wilful. Husband argued that he had no knowledge of a child support order, and that he could not be held in contempt for failure to obey an order of which he had no knowledge. The Court affirmed the finding of contempt on the basis that Husband also did not obey another order of which he *did* have knowledge.
- [Editor's note: the opinion notes that Husband failed to show by clear and convincing evidence that his disobedience of the court order was not wilful. Although a *petitioner* must establish contempt by C&C evidence, the opinion does not clearly state whether a *respondent* must prove his defenses to contempt by C&C evidence.]
- Chancellor did not commit reversible error in failing to make the written finding required by MCA 43-19-101(4) [whether application of the child support guidelines was reasonable where obligor's AGI exceeds \$50,000], since chancellor did consider the guidelines, took into account the children's needs, ordered *less* than the guidelines amount of child support, and Husband did not complain that the amount awarded was unreasonable.

### **Spivey v. Porter**

Court of Appeals

October 14, 2008

- [Editor's Note: At the time of writing this Report, our office is preparing an application for Writ of Certiorari in this case. I have therefore asked Jak Smith of Tupelo to prepare the abstract of this case for this Report, which he graciously agreed to do. I should point out that he is not affiliated with either of the parties or counsel in this case. The following is his abstract.]
- Mother/Father granted an ID divorce in October, 2000. Parties agreed to joint legal and physical custody of children. Both parties lived in Jackson area. Both parties remarried.
- In late 2005, Mother's new husband accepted a job in Memphis, TN. In February, 2006, Mother filed Petition to Modify Father's periods of custody due to unanticipated move to Memphis. Father answered and petitioned for sole physical custody, arguing that the move to Memphis would be a material change of circumstances adverse to the interest of the children.
- Chancellor found that move to Memphis constituted a material change in circumstances that adversely affected the children. Chancellor conducted *Albright* analysis and found best interest of the children would be to remain in Jackson with Father, to whom the Chancellor granted sole custody.
- Four weeks after the Chancellor granted sole custody to Father, and before the actual Final Judgment went into effect, Mother's husband lost his job in Memphis (Mother had not yet moved to Memphis), and Mother petitioned under R 60(b)(6) seeking to set aside the previous order, as the anticipated move to Memphis never occurred. The Chancellor denied this relief.
- The COA affirmed the Chancellor, but remanded for further consideration of Mother's visitation in light of the fact that Mother would be remaining in the Jackson area.
- Mother had asked that the Chancellor recuse himself, since the Father's new wife was an attorney specializing in family practice and who was frequently listed as an attorney of record in cases assigned in front of the Chancellor, though most of her cases were *ex parte*. Chancellor refused to do so, citing that he believed he could be fair. COA affirmed, relying on Chancellor's discretion.
- J. Griffis wrote very strong dissent pointing out that the Chancellor may have used the wrong standard. The "adverse effect" consideration is not appropriate where the parties have joint physical custody. J. Griffis stated that one need only show a "material change in circumstances" to change joint physical

custody. The term “adverse effect” is not mentioned in 93-5-4(6) that deals with modification of joint physical custody.

- As to recusal, J. Griffis thought the better decision would have been for the Chancellor to recuse himself, following the “unwritten rule” mentioned in *Robinson v. Irwin* that Chancellors should refrain from hearing the personal divorce (or custody) cases of lawyers who routinely practice before their courts. In this case, the Father and his new wife were lawyers, although the Father did not practice in Chancery Court. Father’s wife had 14 cases assigned to Judge Lutz, the Chancellor, at the time of the hearing.
- Most disturbing to J. Griffis was the fact that the Court failed to consider the Mother’s 60(b) motion. While the post-trial motions were being considered, Mother’s new husband’s employment was terminated and she did not have to move to Memphis. The Chancellor had previously determined that the best interests of the children had been served by the joint custody arrangement. The Guardian Ad Litem, appointed by the Court, also found the best interest of the children was to keep the joint custodial arrangement. The Court had found this arrangement “ideal.” Hence, with the termination of Mother’s new husband’s employment in Memphis, and their family not leaving Jackson, the reasons to modify custody were no longer present. J. Griffis felt that joint custody should have been restored and R 60(b) would have been the way to do this.
- J. Griffis also addressed the fact that the Chancellor imposed significant child support obligations on the Wife even though the Father had not asked for them anywhere in his pleading and no evidence was presented.
- Lastly, the Chancellor had appointed the GAL and had insisted that he would greatly rely on the GAL’s opinion. The Chancellor denied the Wife’s requests for appointment of an expert, based on the confidence the Chancellor had in the GAL. The GAL was going to be the “star witness”. However, the GAL recommended that the children be placed with the Mother. The Chancellor made no mention of the GAL’s opinion in his decision, nor did the Chancellor explain why his ruling was against the recommendation of the Chancellor.

### **Forrest v. McCoy**

Court of Appeals

October 21, 2008

- Father was ordered to pay child support under the terms of a temporary order. He apparently did not pay this temporary support. In the parties’ divorce decree, Father was not awarded visitation, and not ordered to pay child support.
- 16 years later, Mother sued for modification of the custody order, and requested “child support for the past 16 years,” but not for collection of the unpaid temporary support.
- The modification suit was denied. Mother then sued to enforce the temporary order and collect the unpaid temporary child support. The chancellor denied her suit, and Mother appealed *pro se*.
- The Court of Appeals found that Mother’s suit was barred by *res adjudicata*, which bars not only relitigation of claims actually previously adjudicated, but also of those which *could have been* brought in the previous action.
- The Court noted that *res adjudicata* would not prevent the child acting on his own behalf to seek enforcement of the temporary child support order.

**Hayes v. Hayes**

Court of Appeals

November 4, 2008

- During the marriage, Husband executed a Joint and 50% Surviving Spouse Option for Wife. In the PSA executed incident to divorce, each spouse waived all interests in the other's personal property, pensions and so forth.
- Later, Wife refused to sign a waiver of her rights under the 50% Surviving Spouse Option, and the chancellor found her in contempt.
- Wife appealed, and Husband did not file a brief. The Court reversed, noting that Wife had a vested interest in Husband's pension under ERISA. Therefore, Wife's vested interest was *her* personal property in her possession at the time of divorce.
- ERISA requires that a spouse's waiver of interest in a pension must "clearly specify the identity of any beneficiary, the particular plans affected, and the exact manner of calculating benefits." Since the PSA failed to meet those ERISA specifications, Wife never waived her interests in the surviving spouse benefits, and the chancellor erred in finding that she did.

**Chapman v. Ward**

Court of Appeals

November 11, 2008

- *Chapman* revisited the issues discussed at length in *Keith v. Purvis*, 982 So.2d 1033 (Miss.Ct.App. 2008), decided only 6 months earlier, and reported in the September, 2008 Issue of the Section Report.
- In *Keith*, the Father qualified for SSD, and the child (through Mother) received 22 months' worth of back payments, plus an ongoing monthly disability check. The back payments and ongoing payments exceeded Father's monthly child support obligation. Father paid child support until he qualified for disability.
- Father then sued for reimbursement of 22 months' worth of child support payments. In other words, he argued that Mother should not be allowed to keep: a) his child support payment; and b) the SSD payment received as "back pay" for the same months in which Father had already paid child support. Otherwise, Father argued, Mother would be receiving a double recovery.
- The Court of Appeals denied Father's claim: "Equitable considerations compel that, as between the parties, the windfall should inure to [the child]; the excess is considered a gratuity."
- *Chapman* involved the same type of facts, except Father did *not* pay child support. He asked the Court to credit the large SSD back-pay check to the months in which he did not pay child support.
- The Court of Appeals denied Father's claim. It found that allowing the SSD "back-pay" check to be applied toward arrears would encourage obligors to withhold child support payments in the hope that future benefits paid to the child would satisfy their arrears.
- Social security benefits received by a minor child based on the non-custodial parent's retirement or disability are credited against *current* child support (clarifying that *Keith* and *Mooneyham v. Mooneyham*, 420 So.2d 1072 (Miss. 1982) do not provide that social security benefits received in lieu of child support may be used to satisfy *arrearages*).
- The clean hands doctrine can be applied by the court *sua sponte*. Once a court enters judgment against a party for child support arrearages ["the cleansing judgment"], it is free to modify that party's child support obligation.

- On a separate issue, the parties' divorce decree provided: "The husband shall pay child support 24% [sic] of his adjusted gross income with said support due the first month he earns a paycheck...."
- The Court found that the decree obligated Husband to pay 24% of proceeds he received from workers' compensation claims.
- The Court also found that the trial court correctly reviewed the divorce trial transcript in clarifying the court's and Husband's understanding of the divorce decree. "Every judgment may be construed and aided by the entire record. ... A court may resort to the record if it finds the meaning of a judgment is ambiguous."
- Judge Irving, Concurring, Joined by Judge Chandler. Judge Carlton Joins the concurring opinion in part:
- [Editor's note: Judge Irving dissented in *Keith*, finding that the Mother should not be entitled to receive the "double recovery" complained of by Father.]
- Father should not be allowed a credit against his child support arrears for the SSD "back-pay" check *because he did not pay child support and had unclean hands*. If, as in *Keith*, he had paid child support, he would have deserved a credit for the lump-sum payment Mother received.
- Mother did not plead the unclean hands defense. However, she did include a prayer for general relief.
- Technically, Husband never "earned a paycheck" as provided in the divorce decree. However, he did earn income, as provided in MCA 43-19-101, in the form of workers' compensation benefits. His child support obligation began to accrue when he began receiving the workers' compensation benefits.
- Judge Barnes, Dissenting, Joined by Judges King, Griffis and Ishee:
- *Mooneyham* provides that the SSD "back-pay" check should be credited against an obligor's arrears. Therefore, the judgment should be reversed, and Father's arrears credited by the amount of the SSD "back-pay" check.

**Barker v. Barker**

Court of Appeals

November 18, 2008

- Wife appealed from award of alimony which she deemed insufficient. After reviewing the record, the Court found no reversible error.

**Smith v. Smith**

Court of Appeals

November 18, 2008

- Husband owned rental property as his separate property, titled solely in his name. Wife made improvements to the property of unspecified value during the marriage. The value of the property increased by \$30,000 during the marriage. Held: the chancellor did not err in awarding \$5,000 to Wife in recognition of the work she put into the property.
- Trial testimony showed that 2 vehicles were owned and used during the marriage. Although the chancellor did not expressly find the vehicles were marital property, she clearly regarded them as such by dividing them.
- In divorce granted to Husband on grounds of HC&IT after Wife stabbed Husband, without pattern of overwhelming strain placed on the marriage as a result of numerous events throughout the marriage, chancellor did not err in property division (distinguishing case from *Singley v. Singley*, 846 So.2d 1004

(Miss. 2002), in which the chancellor erred by placing minimal weight upon the evidence of the Wife's numerous affairs throughout the marriage).

- Wife plead guilty to simple assault after stabbing Husband. Pursuant to 18 USC § 922(g)(9) (2006), it is unlawful for an individual convicted of a misdemeanor crime of domestic violence to take actual or constructive possession of a firearm or ammunition.
- The Court remanded the award to Wife of 2 pistols in light of the federal statute.
- Judge Chandler, Concurring and Dissenting, Joined by Judges Ishee and Roberts:
- The federal statute made it illegal for Wife to possess the 2 pistols; it was still within the chancellor's discretion to award *ownership* of them to Wife.

**Reid v. Reid**

Court of Appeals

November 25, 2008

- If a spouse believed the other's UCCR 8.05 Declaration is incorrect, he should have addressed the issue during cross-examination. Failure to do so bound the parties to what the "cold documents" actually showed.
- A succinct written explanation of whether or not the child support guidelines are reasonable can be sufficient for purposes of MCA 43-19-101(4).
- Where 3 children lived with Mother and 1 lived with Father, chancellor did not abuse discretion in ordering Father to pay 22% of his AGI in child support, minus 14% of Mother's AGI.
- Child support awards, even if comporting with the statutory guidelines, cannot exceed the needs of the children.
- Where parties agreed to change (from Mother to Father) custody of 1 of their 4 children, their stipulation of a MCIC corresponded only to a modification of custody, not to a modification of child support. "This change allowed the chancellor to modify the previous order, but only with respect to adjusting the amount of child support each party paid to reflect the current custodial situation of all four minor children."
- Chancellor was not manifestly wrong in failing to undergo an *Armstrong* analysis in suit to modify alimony. The standard for modification is a MCIC since the date of the award. Where no MCIC was proved, no further analysis was needed.

**Story v. Allen**

Court of Appeals

December 9, 2008

- After proof that Mother was in contempt of court for denial of visitation, the court found a MCIC and adverse effect, but also that it was not in the best interests of the child that custody be modified. Father appealed.
- Court of Appeals reversed. It found the chancellor's order "not logical or proper" in finding the factors "continuity of care" and "emotional ties of the parent and child" favored Mother, since both factors favored Mother *only because of her malfeasance in denying visitation*. At a minimum, both factors should have been found to be neutral.
- Case remanded for a new analysis of the *Albright* factors, or for a new evidentiary hearing.

- Chancellor properly considered as an “other” *Albright* factor the child’s relationship with his step-sister. Placement of children with their siblings is not a concern that “overrides” the child’s best interests, but keeping siblings together is assumed to be in their best interests. Courts should try to keep siblings together if possible.
- Court awarded joint physical custody, and all but 2 weeks of the child’s summer vacation to Father. Mother had custody of the child during the school year. Father appealed, arguing that his periods of custody were so limited that Mother had in effect been awarded *de facto* sole physical custody.
- The Court held that, while not generous, the award of custodial periods to Father was sufficient to satisfy the “significant periods of physical custody” required by the statutory definition of Joint Physical Custody.
- MCA 93-5-23 gives a chancellor some discretion to determine whether there is a legitimate issue of abuse or neglect [in deciding whether to appoint a GAL], even when one party has made such assertions in the pleadings.
- In appeal of a custody ruling, assuming GAL’s appointment was mandatory [due to allegations of abuse], trial court did not err in failing to summarize GAL’s recommendations where GAL made no custody recommendation, and recommended only that there was no abuse.

- Ray signed an agreement at a DHS office to pay child support, even though he suspected that he was not the child’s father.
- 19 years later, Ray hired an attorney and had DNA tests. The tests showed that Ray was not the child’s father. Ray sued DHS and Mother for reimbursement of child support. The trial court granted Ray a judgment against DHS and Mother on the basis of fraud.
- Court of Appeals reversed. Once child support payments become due, they vested in the child and a payor is not entitled to reimbursement, absent a showing of fraud.
- Ray failed to prove fraud by C&C evidence. Fraud requires proof of the victim’s reasonable reliance on a false statement [among other elements]. Since Ray did not believe he was the child’s father when he signed the agreement, it defies logic to say he reasonably relied on Mother’s statement that he was the father. There was no evidence that DHS knew that Ray was not the child’s father.
- Ray’s fraud claim is also barred by the 3-year statute of limitations.
- Judge Griffis concurring and dissenting, joined by Judges Myers, Chandler and Ishee:
- Although child support vests in the child when payment becomes due, a payor can seek reimbursement against the natural parent for fraud.
- Mother told Ray that he was the father. This was a material misrepresentation. By having multiple sex partners at the time of conception, Mother knew the statement was false, or that she was ignorant of its truth.

- Ray's payment of child support proves that he relied on Mother's statement. He had "the right to rely" on the representation, and established grounds for fraud against Mother.
- The judgment against Mother should be affirmed. The judgment against DHS should be reversed, since it is a "pass-through agency" and retained, at most, only a small portion of Ray's child support payment.

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# Section Quarterly Report

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