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FAMILY LAW

CONTINUING LEGAL EDUCATION

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FAMILY LAW DEVELOPMENTS

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FAMILY LAW DEVELOPMENTS

I. Divorce grounds

A. Habitual drunkenness

Garrison v. Courtney, 304 So. 3d 1129 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's award of divorce to a wife based on her husband's habitual alcohol use. His drinking increased during their marriage – at the time of separation, he was drinking up to a six pack a day five days a week. The wife and her daughter testified that he became argumentative when drinking, belittled his wife, and punched furniture. The wife left home on several occasions because of his drinking. During their separation, he texted and called her multiple times a day, often while intoxicated, and left abusive messages. The chancellor properly found that the husband's drinking was habitual, that it negatively affected the marriage, and that his use of alcohol continued at the time of trial. The court also found that the wife did not condone his drinking. Condonation is based on the offending spouse's continued good behavior. If the conduct continues, the ground for divorce is revived. Nor did the wife's premarital knowledge that he drank prevent her divorce on this ground – his drinking became progressively worse during the marriage.

B. Adultery

Williams v. Williams, 303 So. 3d 824 (Miss. Ct. App. 2020). A wife of forty-five years did not condone her husband's adultery by remaining married to him. The couple separated after fifteen years of marriage because of his affairs, but continued to function as an economic unit for another thirty years. They jointly owned businesses that the husband operated and for which the wife provided financial management. The court of appeals rejected the husband's argument that his wife condoned his adultery by remaining married to him. During the marriage, he had multiple affairs and fathered six nonmarital children. Both parties agreed that the wife had never forgiven him for the affairs.

NEWS FLASH: The New Hampshire Supreme Court granted a husband a divorce based on adultery upon proof of his wife's intimate relationship with another woman. The court redefined adultery, expanding the definition from "intercourse between a man and a woman" to include intimate sexual contact between persons of the same sex. *In re Matter of Blaisdell,* 2021 WL 1222134 (N.H. Apr. 1, 2021).

C. Spousal domestic abuse

Williams v. Williams, 309 So. 3d 560 (Miss. Ct. App. 2020). A chancellor properly granted a wife of thirteen years a divorce based on spousal domestic abuse. She testified that her husband had threatened to shoot her and stated

that he wished she were dead. He sexually assaulted her on several occasions, once ripping the phone from the wall to prevent her from calling for help. He destroyed her personal belongings and sold $30,000 worth of jewelry she inherited from her grandmother. He removed her name from their joint checking account, which included her deposits. The court rejected his argument that her testimony was uncorroborated – corroboration is not required to prove spousal domestic abuse. And, her testimony was corroborated through recorded phone conversations and the testimony of the guardian ad litem who withdrew from the litigation because of the husband's threats toward him and his family.

Wangler v. Wangler, 294 So. 3d 1138 (Miss. 2020). A wife filed for divorce on the basis of habitual, cruel, and inhuman treatment after separating from her husband of one year. She sought to amend the complaint to allege spousal domestic abuse the day before trial. The chancellor denied her motion to amend and found that she did not prove habitual cruelty. The supreme court held that no amendment was necessary. The allegation of habitual, cruel, and inhuman treatment included spousal domestic abuse as a form of habitual cruelty. However, she failed to prove grounds under either. The wife testified that her husband deprived her of sleep several nights a week with arguments and criticism that stretched into the night. The court noted, however, that it was not clear whether the lack of sleep was caused by her husband or by caring for their newborn child. She stated that he tried to isolate her and control her communication with family, sometimes taking her cellphone or keys and once cutting off the internet to prevent her from contacting them. However, the court noted that she talked with her mother several times a week and her mother visited her once a week. His accusations of infidelity toward the end of their relationship did not rise to the level of constant and long-term accusations that constitute habitual cruelty. She testified that if she was not ready to go to bed when he was, he would sometimes physically pick her up and force her to go to bed. However, this only happened every four to six weeks. The court also emphasized that she accompanied her husband on three interview trips to North Carolina in the four months before they separated, resigned her job, and took a job in North Carolina. She decided to leave him on the day that they were moving. During their short marriage she posted positive comments about her husband on social media. The supreme court agreed that the wife's evidence amounted to "nothing more than unkindness, rudeness, incompatibility, and/or want of affection" under the spousal domestic abuse ground. Two justices dissenting, arguing that the husband's controlling conduct had a serious impact on the wife and should be sufficient to constitute spousal domestic abuse.

Rankin v. Rankin, No. 2019-CA-00238-COA, 2020 WL 5905077 (Miss. Ct. App. Oct. 6, 2020), *cert granted,* 314 So. 3d 1162 (Miss. 2021). The court of appeals held that a chancellor erred in denying a wife's petition for divorce based on habitual, cruel, and inhuman treatment. She testified that during their ten-year marriage, her husband constantly berated and emotionally abused her, including in front of his church congregation. Specific incidents included abusing her dog on one occasion, pushing her during an argument when she was

pregnant, kicking a suitcase that struck her, picking the lock on the bathroom door to continue an argument, calling her derogatory names, and leaving with the children overnight because she would not have sex with him. She testified that the abuse caused her to have migraines and elevated blood pressure. Her husband admitted several of the incidents. Her mother testified that she had heard him call her daughter stupid. The court of appeals held that there was sufficient evidence to establish a pattern of emotional abuse that affected the wife's health. Two judges dissented, arguing that the court should have affirmed the chancellors' ruling.

D. Habitual, cruel, and inhuman treatment

Lindsay v. Lindsay, 303 So. 3d 770 (Miss. Ct. App. 2020). The court of appeals reversed a chancellor's grant of divorce to a wife based on habitual, cruel, and inhuman treatment. She testified that her husband was condescending, mean-spirited, and belligerent. As examples, she stated that he left the house rather than participating in family time, that he would scream in her face, and that he sometimes threw dinner in the trash. The court of appeals held that the evidence did not rise to the level of habitual, cruel, and inhuman treatment. She also failed to show that his conduct affected her negatively – she testified that she had a heart attack but did not show that it was related to his behavior. In addition, the evidence was contradicted by her earlier testimony that he was a good husband. The court also noted that she failed to reply to requests for admissions that asked whether her husband's conduct caused her to fear for her life or health. The chancellor deemed the requests admitted. She did not request a withdrawal until two years later when her husband sought summary judgment based on her failure to respond.

Dickinson v. Dickinson, 293 So. 3d 322 (Miss. Ct. App. 2020). A wife proved habitual cruel and inhuman treatment. Throughout their nineteen-year marriage, her husband rigidly controlled her life, exploding into anger if she or her daughters disobeyed his rules regarding gum chewing, noise, use of hot water, or making sounds at night. A hoarder, he refused to allow his wife to clean and clear out the house, which belonged to her prior to their marriage – to the point that she was embarrassed to have anyone in the house. He would refuse to speak to her as punishment, once for almost a year. He exhibited such extreme jealousy that she could not speak to other men in public. He accused her of infidelity with her daughter's boyfriend and with her cousin and spread rumors to that effect. After separation, he followed her, came uninvited to her house, and slashed her tires. He drove her daughters from their home with his anger, resulting in a deterioration of the mother-daughter relationships. She suffered from depression, weight loss, and low self-esteem and sought help from a priest and counselor. Her sister corroborated the control and abuse, stating that her sister had transformed from an outgoing person to one who was afraid and shut down. The court of appeals affirmed the chancellor's finding that the husband's conduct and its impact on the wife satisfied the test for habitual, cruel, and inhuman conduct. The court acknowledged that a 2017 legislative amendment

did away with the requirement of corroboration for spousal domestic abuse, but declined to address whether the amendment applied to this 2014 action, since the abuse was corroborated.

E. Constructive desertion

Watson v. Watson, 306 So. 3d 800 (Miss. Ct. App. 2020), *cert. denied,* 308 So. 3d 440 (Miss. 2020). The court of appeals held that a chancellor erred in granting a husband a divorce based on constructive desertion. He testified that his wife engaged in "combative public outbursts," including a confrontation with a waiter and someone who cut in line in front of her; that she made irrational accusations against him; and that she failed to take care of herself and the household, as she agreed to do upon discontinuing law practice. He described one specific incident on vacation when he believed that she drugged him. A friend who was presented corroborated that his incapacitated state seemed incompatible with his alcohol intake, but no one saw his wife put anything in his drink. The court of appeals held that her alleged conduct did not rise to the level that would render the continuance of the marriage unendurable or dangerous to life, health or safety. While the spouses exhibited "mutual animosity" during the marriage, the basic problem was fundamental incompatibility, not the kind of extreme conduct on which constructive desertion is based.

F. Constitutionality of Mississippi Irreconcilable Differences Divorce

Watson v. Watson, 2021 WL 1254354 (S.D. Miss. April 5, 2021). Following the Mississippi Court of Appeals' reversal of a chancery court's grant of divorce, the husband filed a petition for divorce based solely on irreconcilable differences. He pled that the Mississippi statute violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. His wife removed the matter to federal court based on federal question jurisdiction. The Mississippi Attorney General's petition to intervene was granted. The husband moved to remand the action to chancery court, arguing that the federal court lacked jurisdiction under the domestic relations exception and in the alternative that the court should abstain. The court held that the domestic relations exception, which prevents federal courts from hearing family law matters based on diversity jurisdiction, does not apply if the case raises a federal question. The court also declined to abstain, holding that ruling on the constitutionality of the statute did not require the court to delve into complex state law matters or regulatory schemes.

II. Domestic violence

A. Effect of temporary Domestic Abuse Protection Order

Griffin v. Adams, 291 So. 3d 825 (Miss. Ct. App. 2020). A circuit court judge erred in finding that a woman's tort action against her abuser was barred

by res judicata because of a justice court's issuance of a temporary domestic abuse protection order. The tort action, seeking damages based on the defendant's abuse, lacked identify of subject matter with the justice court matter, which sought injunctive relief from abuse. By statute, justice courts may issue emergency or temporary orders of protection, with relief limited to enjoining abuse and contact, granting the petitioner possession of a shared residence, and enjoining transfer of commonly owned or leased assets. In addition, res judicata applies only to final judgments, not to temporary orders. While the petitioner could have sought a permanent order of protection in the chancery court, she chose instead to pursue relief in tort.

Carter v. Carter, 304 So. 3d 1160 (Miss. Ct. App. 2020). The court of appeals affirmed a circuit court's dismissal of an ex-husband's appeal from a county court's temporary order of protection from domestic violence, but on different grounds than the trial judge. The circuit court held that it lacked jurisdiction because the order was interlocutory and not subject to appeal. The domestic abuse protection act provides that both temporary and final orders of protection may be appealed. However, the appeal is to chancery court, not to circuit court. The court of appeals also noted that the circuit court erred in stating that the appeal was "denied" – the appropriate ruling was that it was dismissed.

B. The Advocate Confidentiality Law

In 2020, the legislature passed the Advocate Confidentiality Law, making confidential a victim's communications regarding domestic violence, sexual assault, stalking, and human trafficking. The act defines an advocate as an "employee, contractor, agent or volunteer of a victim service provider whose primary purpose is to render services to victims of domestic violence, sexual assault, stalking, or human trafficking and who has completed a minimum of twenty (20) hours of training [in specified subjects]," one who supervises an advocate, or a third party whose presence is necessary for the services. Miss. Code Ann. δ 93-21-125. Domestic violence includes emotional as well as physical violence. Examples of covered services include "crisis hotlines, operation of safe homes and shelters, assessment and intake, case management, advocacy, individual and peer counseling, support in medical, legal, administrative, and judicial systems, transportation, relocation, and crisis intervention." Covered communications are broadly described to include "information received or given by the advocate in the course of the working relationship, advice, records, reports, notes, memoranda, working papers, electronic communications, case files, history, and statistical data that contain personally identifying information." *Id.* (1).

An advocate may not disclose a covered communication or be compelled to testify except with the victim's consent, unless (1) a provision of state or federal law requires disclosure; (2) failure is likely to result in imminent risk of serious bodily harm or death; (3) the victim dies or is incapable of giving consent and the information is necessary for a law enforcement investigation or

criminal proceeding involving the death or incapacitation; or (4) based on a valid court order. *Id.* (2). A court in a civil or criminal proceeding may compel disclosure "if the court determines, after in-camera review, that all of the following conditions are met: (i) the information sought is relevant and material evidence of the facts and circumstances involved in an alleged criminal act which is the subject of a criminal proceeding; (ii) the probative value of the information outweighs the harmful effect, if any, of disclosure on the victim, the advocacy relationship and provision and receipt of services; and (iii) the information cannot be obtained by reasonable means from any other source. *Id.* (2)(b). Advocates who violate the act may be liable for up to $10,000 plus compensatory damages to the victim. *Id.* (6).

III. Property division

A. Findings of fact

Johnson v. Johnson, 297 So. 3d 342 (Miss. Ct. App. 2020). The court of appeals reversed and remanded a chancellor's division of marital assets and award of lump sum alimony for failure to discuss the *Ferguson* factors for property division. The court held that consideration of the factors is required in property division.

Williams v. Williams, 303 So. 3d 824 (Miss. Ct. App. 2020). The court of appeals reversed a chancellor's division of marital assets based on the court's failure to value marital businesses and to conduct a *Ferguson* analysis to determine the appropriate division of marital assets. Because the property division was reversed, the court also reversed the award of permanent alimony to the wife.

B. Classification: Family use

Neely v. Neely, 305 So. 3d 164 (Miss. Ct. App. 2020). A marital home was properly classified as the wife's separate property in spite of two years of family use. From 1993 until 2013, the couple rented the home from the wife's father and stepmother, who purchased the house to provide a home for them. The wife made all rental and utility payments. Her father made all major repairs. The husband mowed the lawn and made minor repairs. In 2013, two years before they separated, the wife inherited the debt-free home from her father. The court of appeals rejected the husband's argument that family use converted the house to marital. The couple used the inherited home for only two years, after their children left home. The wife made all payments on the property both before and after she inherited it. The chancellor also found significant that for the last twenty years of their thirty-nine-year marriage, the couple maintained separate bank accounts and finances. He noted that they lived by the premise "What's mine is mine."

Dean v. Dean, 304 So. 3d 156 (Miss. Ct. App. 2020). The court of appeals rejected a wife's argument that the marital home should have included forty acres owned by the husband prior to their marriage because they filed homestead exemption on the forty acres. The determination of homestead property for tax purposes and the test for marital property are not the same. The property used by the family included the home and three fenced acres. The fact that the family occasionally rode four-wheelers across the larger tract did not convert it to marital property.

Oates v. Oates, 291 So. 3d 803 (Miss. Ct. App. 2020). The court of appeals held that a chancellor did not err in classifying thirty-nine acres of inherited property surrounding the marital home as the wife's separate property even though she mortgaged the property and apparently used some of the mortgage funds for marital purposes. The court stated, "merely using inherited property or cash for a joint purpose does not in and of itself equate into a conversion of separate property to marital property." The husband presented no evidence of action that would transform the inherited property to marital.

Gaskin v. Gaskin, 304 So. 3d 641 (Miss. Ct. App. 2020). A chancellor properly classified sixty-five acres inherited by a wife as her separate property. The land was not converted to marital by the husband's occasional bush-hogging, recreational use, or storage of business equipment on the property. In contrast, the home purchased by the husband two years prior to marriage was marital – the family lived there together for fifteen years.

C. Classification: Jointly titled gift

Anderson v. Anderson, 310 So. 3d 1176 (Miss. Ct. App. 2020). A chancellor properly classified fifty-nine acres as a wife's separate property even though her grandmother deeded the property to both her and her husband. The wife testified that her grandmother intended that the property go to her; however, she was afraid of her husband's reaction if his name was not on the deed. The wife was granted a divorce based on adultery and habitual, cruel, and inhuman treatment. Evidence showed that her husband threatened her, abused her verbally and physically, and killed two of their dogs. The chancellor held, and the court of appeals agreed, that the joint titling did not require marital classification – there was sufficient evidence that the property was intended to be the wife's separate property. The couple did not use the land or expend funds to improve it. The court also affirmed the chancellor's division of personal property based on the wife's list of furniture that she had removed and furniture that was left in the marital home. The husband argued that she removed valuable furniture and requested a credit for half of the value but did not provide a list of the furniture or its value.

Wildman v. Wildman, 301 So. 3d 787 (Miss. Ct. App. 2020). The court of appeals held that a chancellor erred in finding that a $19,000 joint account in the names of the wife and her father, funded by her father, was his property and not partly her separate property. She testified that her father said the funds were to be used for her children and evidence showed that at least one check had been written to her from the account.

D. Marital property cutoff date

Williams v. Williams, 303 So. 3d 824 (Miss. Ct. App. 2020). The court of appeals rejected a husband's argument that the ending date for marital property accumulation should have been when the couple separated after fifteen years of marriage, rather than the date of filing for divorce thirty years later. The couple continued to operate as an economic unit throughout the marriage. However, the court reversed the division of marital assets based on the trial court's failure to value marital businesses and to conduct a *Ferguson* analysis.

Wildman v. Wildman, 301 So. 3d 787 (Miss. Ct. App. 2020). A husband argued that a chancellor erred in setting the demarcation date for accumulation of marital assets at the trial date rather than the date of separation, resulting in a substantial increase in the value of his retirement account. The court of appeals disagreed, noting that trial courts have discretion to set the date as early as separation or as late as trial.

E. Appreciation in premarital business

Dean v. Dean, 304 So. 3d 156 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's finding that a husband's business was one-half separate property and one-half marital. He owned one-half prior to the marriage and purchased the other half during the marriage. The wife argued on appeal that the business should have been classified as all marital because it appreciated during the marriage, becoming a mixed asset, and the husband failed to introduce evidence to separate the premarital value and appreciated value. Neither party addressed the issue at trial. The court of appeals held that a non-owning spouse has the burden of proving that appreciation occurred and that the appreciation was marital, which she failed to do.

Wallace v. Wallace, 309 So. 3d 104 (Miss. Ct. App. 2020). The court of appeals reversed a chancellor's classification of a building as the husband's separate property. At the time of the marriage, he owned a 50% interest in a business and a building that he and his partner leased to the business. The chancellor found that it was impossible to determine whether the husband's equity in the building had increased because the wife failed to prove the amount of debt on the building at the time of the marriage. He found instead that the fair market value of the building had decreased by $12,000, based on an appraiser's testimony. The court of appeals noted that testimony showed that the husband and his partner reduced the debt on the building by at least $147,000 during

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the marriage, increasing his equity. The debt was paid with marital funds (the husband's income) therefore any increase in his equity would be a marital asset. The court reversed and remanded for the chancellor to consider equitable division of the increase in equity in the building. Because the court remanded property division, it also remanded the chancellor's denial of alimony.

F. Valuation

Dean v. Dean, 304 So. 3d 156 (Miss. Ct. App. 2020). The court of appeals rejected a wife's argument that a chancellor erred in valuing her husband's business based on the amount he paid to purchase his uncle's share of the business four years earlier ($312,000). Both parties presented less-than-ideal valuation evidence. The wife's expert's value of $792,000 relied on estimates developed from databases because the husband had no record of his accounts receivable. The husband's $344,150 value did not include values for land, accounts, deposits, inventory, or investments. Under these circumstances, the chancellor did not err in looking to the actual sale price that a willing buyer paid to a willing seller.

Dickinson v. Dickinson, 293 So. 3d 322 (Miss. Ct. App. 2020). A chancellor did not err in accepting a wife's home valuation of $126,170 based on tax records, rather than the husband's valuation of $500,000 for which he provided no support.

Norwood v. Norwood, 305 So. 3d 175 (Miss. Ct. App. 2020). A chancellor did not err in accepting a husband's valuation of his poultry business based on his twenty-five years of experience in the business. He testified that the business – including 129 acres of land and chicken houses – was worth $600,000. The wife testified that the land and houses were worth $1,148,000 but admitted that she did not know the value of the property. The chancellor found that the husband's testimony was uncontradicted, that the property was encumbered by substantial debt, and that the equity in the business and the couple's home was $93,644. He also found that although the husband owned the land prior to marriage, the property was commingled and converted to marital when he built chicken houses on the property during the marriage. He awarded the business and marital home to the husband and ordered the husband to pay his wife a lump sum payment of $46,922. The court of appeals affirmed, emphasizing that it is the responsibility of the parties, not the court, to provide evidence of value. The majority disagreed with four dissenters, who thought it was error to value the couple's primary asset without more concrete evidence of value than the husband's unsupported testimony. The court also rejected the wife's argument that she was entitled to alimony. The marital assets were divided equally, and her income exceeded her husband's.

G. Division

1. Equal division

Descher v. Descher, 304 So. 3d 620 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's combined awards over a husband's argument that the awards were excessive. His wife was awarded one-half of the marital assets, including a lump sum of $856,794, permanent alimony of $7,500 a month, child support of $7,500 a month for two children, all costs of college, medical insurance and costs, and a $1 million life insurance policy. The marital estate was composed of thirteen MacDonald's franchises, an apartment building, car wash and commercial building in the husband's name. The value of the businesses, under Mississippi rules excluding goodwill, was $2,301,300. The court divided the marital estate, valued at $3,584,766 equally, awarding the wife $856,794 in lump sum alimony to equalize her share.

Gaskin v. Gaskin, 304 So. 3d 641 (Miss. Ct. App. 2020). A chancellor properly divided marital property between spouses, ordering the husband to pay his wife lump sum alimony in the amount of $174,441 to equalize their shares. Both had contributed financially to the estate and both had dissipated assets – the wife by cashing out her retirement and the husband by purchasing a home during their separation and while having an affair.

2. Unequal division based on fault

Poisso v. Poisso, 300 So. 3d 1067 (Miss. Ct. App. 2020). The court of appeals rejected a husband's argument that he should have been awarded property that he managed during the couple's marriage, including a convenience store and fourteen rental properties. His post-separation mismanagement of the businesses and dissipation of assets weighed against awarding him these properties. He closed the store within months of being awarded possession in a temporary order, costing the couple between $40,000 and $80,000 in monthly receipts. The temporary order also awarded him thirty-six rental properties, which generated approximately $9,000 a month in rent. After three years under his management, a number had been lost to foreclosure. Only fourteen remained and those were in poor condition and subject to $97,437 in outstanding property taxes. He deeded 210 acres to his son, in violation of court orders, to borrow money. The property was ultimately sold at foreclosure for far less than its fair market value. The husband was incarcerated for possession of methamphetamine during their separation and, at the time of trial, incarcerated for violation of parole. Under the circumstances, the chancery court did not err in awarding these assets to the wife, in spite of the husband's substantial contributions to them during the marriage.

Pond v. Pond, 302 So. 3d 1236 (Miss. Ct. App. 2020). A chancellor did not err in awarding a wife a greater share of assets, based on his finding that the husband's addiction, financial mismanagement, and resulting periods

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of unemployment and treatment for addiction affected the family's finances and stability. The chancellor also properly considered the husband's post-separation adultery, which was the basis for the divorce, as a lesser contributing factor to marriage instability.

Dean v. Dean, 304 So. 3d 156 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's unequal division of marital assets, awarding a wife 35% of assets ($400,000) and her husband 65%, in addition to his $1,135,943 in separate property. The husband made the bulk of financial contributions and contributions to family stability during their eighteen-year marriage. During the last seven years of the marriage, the wife developed a drug addiction, was fired from her job, pled guilty to two felony charges, was charged with DUI, had three wrecks, and was in several treatment programs. Her husband provided most of the care for their children during this time. He spent substantial sums to replace vehicles, pay her attorneys' fees, and pay for drug treatment. During the first ten years of marriage, she worked as a nurse. He contributed $15,000 to start her nursing business and $20,000 for her doctorate degree and supported the family while she was in school. She engaged in two extra-marital relationships.

She argued that the chancellor ignored her financial contributions early in the marriage and did not consider the *Ferguson* factor of need, since she was currently unable to work. She was seriously injured in her last wreck, had several surgeries, and was in a wheelchair at the time of the trial. The court noted that the court considered all these factors, that she was not ordered to pay child support to her husband, and that there was no evidence that she was permanently disabled.

H. State retirement benefits

1. Classification; deferred distribution

Sullivan v. Sullivan, 302 So. 3d 1280 (Miss. Ct. App. 2020). The court of appeals addressed division of a spouse's Public Employee Retirement (PERS) account in the second appeal of this case. On the first appeal, the court remanded for findings of fact on property division and alimony. In the second trial, the chancellor awarded the wife $571,108 in marital assets and the husband $553,232. The court calculated the marital portion of the husband's PERS account as 32% of the account, dividing the number of years worked during the marriage (12) by the total number of years in service (38.75). She ordered that the husband pay his wife one-half of 32% of his monthly payment in the amount of $1,360 for twelve years. She also ordered that the husband pay his wife 16% of his annual cost-of-living increase.

The wife filed a post-trial motion arguing that she was entitled to a lump sum judgment for the value of future payments. The chancellor denied her motion, quoting an earlier case stating that orders for payment of PERS benefits to a spouse "are in the nature of alimony." The court of appeals, however, characterized the award as a deferred distribution of the marital share of the husband's

retirement and held that the wife's payments were linked to his receipt of payments. She was not entitled to a lump sum judgment – neither party provided the court with evidence of the present value of the stream of payments. The court properly divided the asset through deferred distribution. However, the chancellor clearly intended to divide the marital share equally, therefore it was error to limit the payments to twelve years.

Gerty v. Gerty, 296 So. 3d 704 (Miss. 2020)**.** On appeal after remand, the supreme court affirmed the trial court's decision regarding division of marital assets and custody but reversed to correct a mathematical error in division of the husband's pension. The chancellor properly divided the marital portion of the husband's military retirement by dividing the number of months the husband served during the marriage by the total number of months served, and awarding the wife one-half of the marital portion. However, the court remanded because the chancellor miscalculated the number of months served during the marriage.

2. Valuation

Pond v. Pond, 302 So. 3d 1236 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's valuation of a husband's pension at $169,140, the same amount as his wife's. The husband initially failed to disclose the pension. Under cross-examination, he stated that he did not know the value of the pension and had no documentation to prove its value. The chancellor valued it at the same amount as the wife's pension, based on the fact that they had similar salaries, work history, and type of employment. The chancellor was not required to consider a pension account statement showing a value of $36,635, provided in the husband's Rule 60(b) motion. The statement was not newly discovered evidence that was unavailable at the time of trial. The chancellor's valuation based on similarity to the wife's pension was not an abuse of discretion.

Gaskin v. Gaskin, 304 So. 3d 641 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's valuation of a wife's PERS retirement benefits based on the $43,582 cash-out value of the account at her retirement, rather than the alleged $188,118 value of the anticipated stream of payments. The court found that she dissipated assets when she unilaterally cashed out the account and used a portion of the funds to enroll two children in private school. However, the court held that the husband's expert's testimony regarding the value of the future stream of payments was too speculative, considering that she had in fact cashed out the account and that she was disabled and her future work prospects uncertain. The court of appeals affirmed, holding that the chancellor was within his discretion in valuing the account based on the cash-out amount.

IV. Rights between unmarried partners

White v. Brown, 301 So. 3d 750 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's order removing a woman's name from the deed

to her former cohabitant's home. Her boyfriend purchased the home while they were dating. She signed the contract and deed on his behalf, signing both her name and his. He testified that she signed on his behalf because he had poor penmanship – he was unaware she had included her name on the contract and deed. All other documents, including the loan documents and deed of trust, were in his name alone. She testified that he intended to make her a gift of one-half of the property. When the deed was mailed to the home, she kept the document. She moved out without notice one month later. According to him, he discovered that her name was on the deed ten years later when he planned to sell the house. He had made all the payments on the mortgage. The chancellor found that he met the proof required to reform a deed by proving a unilateral mistake, in combination with inequitable conduct on the part of his former girlfriend. The court of appeals held that her argument based on the statute of limitations was barred because she failed to raise the affirmative defense in a timely manner.

V. Alimony

A. Awards affirmed

Descher v. Descher, 304 So. 3d 620 (Miss. Ct. App. 2020). The court of appeals rejected a husband's argument that a chancellor's awards of alimony and child support were excessive. His wife was awarded one-half of the marital assets, including a lump sum of $856,794, permanent alimony of $7,500 a month, child support of $7,500 a month for two children, all costs of college, medical insurance and costs, and a $1 million life insurance policy. The wife, who worked for the husband's MacDonald's franchises monogramming uniforms and handling customer complaints, had earned $2,491 a month during their marriage. She listed monthly expenses of $7,199. Her husband's net monthly income was $71, 377. Without alimony, she would be required to deplete her lump sum award to meet monthly expenses. The court held that the award was appropriate in light of the standard of living of the marriage and the enormous disparity between their incomes. Even with an award of $7,500 in alimony and $7,500 in child support, the husband would have $41,547 remaining each month after payment of his own monthly expenses of $14,829.

The dissent argued that the court erred in awarding alimony to meet the wife's monthly expenses without considering her earning capacity of $2,000 a month and the potential investment earnings on her lump sum award.

Ewing v. Ewing, 301 So. 3d 709 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's second award of $500 a month in permanent alimony to a wife leaving a fifteen-year marriage. The case was remanded in 2015 for findings of fact regarding property division and the proper amount of permanent alimony, considering the husband's reasonable needs and standard of living. The court held that the chancellor failed to weigh the husband's ability to pay the combined monthly obligations for child support, lump sum alimony, and attorneys' fees. *Ewing v. Ewing*, 203 So. 3d 707 (Miss. Ct. App. 2016).

On remand, the chancellor eliminated the lump sum alimony award and again awarded the wife $500 a month in permanent alimony. The chancellor also ordered that the husband pay $938 in child support (14% of his AGI) and $11,808 in attorneys' fees payable at the rate of $250 a month. At the time of the remand, the wife had net monthly income of $3,100 and expenses of $3,840. The husband had a monthly income of $4,700 after paying child support. The court of appeals agreed with the chancellor's finding that the order left him with sufficient funds, considering that he had only himself to support while his wife had custody of four children.

Gaskin v. Gaskin, 304 So. 3d 641 (Miss. Ct. App. 2020). A chancellor properly awarded a disabled wife of seventeen years $1,000 a month in permanent alimony. The husband's monthly net income was $12,085, while hers was $500. The court divided marital property equally, with the wife receiving assets valued at $612,080 and a lump sum payment of $174,441.

Oates v. Oates, 291 So. 3d 803 (Miss. Ct. App. 2020). The court of appeals affirmed an award of permanent alimony of $504 a month and lump sum alimony of $2,000 to a wife of thirteen years from a husband with annual income of $33,000 a year. Her expenses were $2,000 a month; his were $2,300 a month. She was unable to work because of health issues and the marriage ended because of his infidelity. The court also affirmed the chancellor's award to her of $8,538 in attorneys' fees.

Williamson v. Williamson, 296 So. 3d 206 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's award of $1,500 a month in alimony to be reduced to $1,200 after one year. The wife had adjusted income of $1,384 and expenses of $3,421, while her husband had adjusted monthly income of $8,617 and separate property assets valued at $180,000. The assets the wife received in equitable distribution were not income-producing. Their twenty-one-year marriage ended because of her husband's infidelity.

B. Awards reversed as excessive

Wildman v. Wildman, 301 So. 3d 787 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's division of assets but reversed the court's alimony award as excessive. The couple divorced after fifteen years of marriage. The thirty-eight-year-old wife, an intensive care and pre-operative nurse, worked half time earning a net income of $1,726 a month. She was awarded custody of their two children. The thirty-nine-year-old husband, a nurse anesthetist, had net income of $10,049 a month. The chancellor divided their marital assets with $143,277 to the wife and $252,225 to the husband. He was ordered to pay her $55,000 in lump sum alimony to equalize the property division, payable at the rate $11,000 every six months. He was also ordered to pay $1,800 a month in child support, private school tuition, and $3,000 a month in permanent alimony. He argued that his wife was not entitled to alimony, based on her re-

ceipt of liquid assets in the property division and her ability to work full time. The court affirmed the award of permanent alimony, finding that she clearly had a monthly deficit after property division, but held that the amount awarded was excessive. A chancellor must consider not only the reasonable needs of a lower-income spouse but also the right of the payor to live as normal a life as possible, with a decent standard of living. The wife had a $2,893 monthly deficit in her $6,420 in expenses for her and the children after receipt of child support, which the court attempted to remedy. However, the husband's monthly obligations for child support, alimony, and lump sum alimony payments (for 2 ½ years) equaled $6,633 of his monthly net income of $10,049, leaving him $850 short of meeting his own monthly expenses of $4,266. The court held that the amount was excessive, considering that the wife had the ability to work full time and increase her earnings without additional training. She received $82,190 in cash assets and was living in the marital home, while the husband lived in an apartment and would be left with a monthly deficit in meeting his needs.

Krohn v. Krohn, 294 So. 3d 680 (Miss. Ct. App. 2020). A chancellor erred in denying a husband's request to modify alimony after an unexpected loss of more than half of his income. At divorce, the husband, who was earning $218,000 a year, agreed to pay $1,500 in child support for one child and $2,000 a month in alimony to his wife, who earned $39,000 a year. He was earning $84,132 at the time of the modification hearing. The chancellor found that his job loss was an unforeseeable, material change in circumstances and reduced his child support obligation to $982 a month but refused to modify alimony. The court of appeals held that requiring the husband to pay $11,784 in child support and $24,000 in alimony a year from an annual salary of $84,000, while supporting a second family, was oppressive and an abuse of discretion. The court remanded for the chancellor to apply the *Armstrong* alimony factors to determine the appropriate amount of alimony.

C. Alimony denied: Equal incomes

Neely v. Neely, 305 So. 3d 164 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's denial of alimony, finding that the division of assets adequately provided for the parties' needs, their earnings for the last ten years were approximately the same, neither had significant debt, and they had maintained separate finances for twenty years. The fact that the husband had recently suffered a loss of income during a hospitalization did not require an award of alimony.

D. Payor's income

Ray v. Ray, 304 So. 3d 598 (Miss. 2020). A chancellor did not err in considering a husband's separate property military retirement as income for purposes of determining alimony. Retirement benefits earned entirely prior to marriage are separate property and may not be divided in equitable distribu-

tion. However, in determining alimony, a court should consider all sources of income, including income from separate property.

E. Modification

Alford v. Alford, 298 So. 3d 983 (Miss. 2020). The supreme court reversed the court of appeals' decision in this case, clarifying the requirement that a material change in circumstances must be unforeseeable in order to justify modification of alimony. The couple divorced at sixty-three years of age after thirty-nine years of marriage. The chancellor awarded the wife $5,000 in monthly periodic alimony. Her husband had net monthly income of $8,070 and expenses of $3,109, while she had income of $1,516 and expenses of $6,376. At trial, the parties and their attorneys assumed, based on then-current law, that when the wife began drawing Social Security benefits based on her husband's work history, her alimony would be reduced by that amount. However, the Mississippi Supreme Court subsequently overruled the dollar-for-dollar offset rule in *Harris v. Harris*, 241 So. 3d 622 (Miss. 2018). In *Harris*, the supreme court held, "Social Security benefits derived from the other spouse's income *do not* constitute a special circumstance triggering an automatic reduction in alimony. When a spouse receives Social Security benefits derived from the other spouse's income, the trial court must weigh all the circumstances of both parties and find that an unforeseen material change in circumstances occurred to modify alimony." *Id.* at 628. As the court of appeals read *Harris*, the husband in *Alford* would not be able to obtain a modification when his former wife began to draw benefits because the event was clearly foreseeable and imminent at the time of trial. The court of appeals remanded the case, holding that when receipt of Social Security is "clearly foreseeable," chancellors should consider the pending benefits in the initial alimony award.

On certiorari, the supreme court clarified that the foreseeability of Social Security benefits does not prevent modification of alimony. To so hold would prevent anyone from obtaining a modification since it is foreseeable that most spouses will receive Social Security. *Harris* held instead that a chancellor must consider "whether all of the circumstances, including the impact the reception of derivative Social Security benefits had on both parties, constituted an unforeseen material change in circumstances." While the *receipt* of Social Security may be foreseeable at the time of divorce, the *impact* is not. Parties should seek modification at the appropriate time, rather than chancellors being required to speculate at divorce about future benefits.

VI. Agreements

A. Set aside based on duress

Lindsay v. Lindsay, 303 So. 3d 770 (Miss. Ct. App. 2020). The court of appeals held that a couple's property settlement agreement was signed under duress and was unenforceable. The husband was transported from jail to the divorce hearing after almost two weeks of incarceration for contempt. At the hearing, he told the court that he had lost his job, filed for bankruptcy, and could

not pay the $105,470 required to obtain his release. At the court's suggestion, he met with his wife and her attorney in an attempt to settle the matter. After initially refusing their terms, he was told by the court that the matter would be reset for March or April. At that point, facing reincarceration for months, he agreed to pay $1,400 a month in child support, deed the marital home and a condominium to his wife, pay all debts on both properties, pay $900,000 in lump sum payments, obtain $1 million in life insurance, pay all of the court-appointed expert's fees, the expert's and his wife's attorneys' fees (in an amount yet to be calculated) and transfer to his wife one-half of any business interest that he acquired within the next five years. The court of appeals held that the agreement was signed under duress and unenforceable.

B. Disapproved by chancellor

Gerty v. Gerty, 296 So. 3d 704 (Miss. 2020). On appeal after remand, the supreme court affirmed a trial court's decision regarding division of marital assets and custody but reversed to correct a mathematical error. The chancellor divided the couple's marital assets – two houses and their retirement benefits – equally. The supreme court rejected the husband's argument that the chancellor was bound by the couple's property settlement agreement, which did not provide for division of the husband's military retirement. The agreement stated that the "this Agreement shall be made a part of the Judgment and that such Judgment shall not conflict with the terms of the Agreement *except to the extent disapproved*" and that "*each mutually submits to the personal jurisdiction of [the court] so that said Court has the power to decide any and all matters and questions concerning the dissolution of the parties' marriage, and the division of the parties' property*]." The supreme court held that the agreement authorized the court to decide matters in a manner contrary to the agreement.

C. Effect of agreement on joint tenancy

In re Estate of Callender, 309 So. 3d 131 (Miss. Ct. App. 2020). A couple's divorce settlement agreement destroyed the right of survivorship in two mineral interests. During their marriage, the couple acquired title as joint tenants with rights of survivorship to oil fields in Brookhaven and Mallaliue. At divorce, they agreed that they would "divide equally all mineral rights" in the Brookhaven field. They also agreed that the wife would "waive any and all claims to the Mallalieu oil royalty proceeds" and that the husband "shall have exclusive rights to all mineral rights associated with the Mallalieu field." For six years after their divorce, they divided the payments from the Brookhaven field and the husband retained all proceeds from the Mallalieu field. The husband died in 2016, leaving his interests in the oil fields to his son. The wife argued that she was the sole owner of both properties based on the right of survivorship under the pre-divorce deeds, which were never revoked. The court of appeals disagreed. Joint tenants with rights of survivorship may terminate their joint tenancy by agreement through an explicit contract or one that is inconsistent with the continuance of the joint tenancy, without transferring the interest

by deed. It was clear from their agreement that they intended to sever the joint tenancy and divide the interests. The court rejected the wife's argument that her former husband improperly attempted to defeat the right of survivorship by will – the joint tenancy was severed by their divorce agreement.

VII. Custody

A. Temporary custody

Hammons v. Hammons, 289 So. 3d 1214 (Miss. 2020). A chancellor properly denied a father's petition to modify custody of his fourteen-year-old son. The court rejected his argument that the mother's household created an environment adverse to his son because of his older sister's drinking and sexual conduct. The court also rejected his argument that the chancellor's award of temporary custody to him implied a finding of adverse impact on the boy. A court decides permanent custody de novo – it is not controlled by a temporary award. At the time of the temporary award, the mother had not presented evidence to refute the father's allegations.

B. Custody between parents: The *Albright* factors

Baumann v. Baumann, 304 So. 3d 175 (Miss. Ct. App. 2020). The court of appeals held that chancellor's failure to address each *Albright* factor in awarding custody did not require reversal. The chancellor specifically adopted the findings of the guardian ad litem who addressed each factor in detail and made additional comments on two of the factors.

Riley v. Heisinger, 302 So. 3d 1243 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's modification of custody from a Mississippi mother to a father in Oregon, in the second appeal of this matter. In the first trial the chancellor found that the custodial mother's interference with the father-child relationship was a material change in circumstances that adversely affected the child. She refused to comply with visitation, filed unsubstantiated claims that the child was burned in his custody, and, according to the guardian ad litem, engaged in conduct that could be damaging to the child emotionally. However, applying the *Albright* factors, the chancellor found that it was in the child's best interests to remain with her mother notwithstanding her wrongful conduct. The court of appeals reversed, holding that the chancellor erred in finding that the *Albright* factors of continuity of care and emotional bond favored the mother. At most, the factors should be considered neutral, since the amount of care and their bond were based in part on her wrongful conduct. On remand, the chancellor found that the mother had continued during the first appeal to deny visitation and to disobey court orders. She failed to change the birth certificate to reflect the father's name and to inform the child's school and medical providers that he, and not her current husband, was the child's father. The guardian ad litem recommended a change in custody to the father. The chancellor found that most factors were neutral but that the father was favored on parenting skills and moral fitness because of the mother's interference with

his relationship with the girl. The mother was favored on home, school, and community record. The court found it in the child's best interest that custody be modified to her father.

The court of appeals rejected the mother's argument that the chancellor erred by considering evidence that predated the first trial. The fact that the chancellor was instructed to determine custody based on circumstances at the time of the remand did not prevent him from considering facts in evidence in the first trial. Her long history of denying visitation was clearly relevant. Furthermore, the parties stipulated that the chancellor could consider this evidence. The chancellor did not err in finding the factor of employment neutral, even though the mother stayed at home and the father was a surgeon. He worked 8:30 to 4:30 and could take the girl to school and pick her up. Nor did he err in finding that other factors outweighed the benefit of keeping the girl with her half-siblings in Mississippi. The court also rejected her argument that the court was required to appoint a mandatory guardian ad litem because the child's counselor stated that the mother's behavior could be considered emotionally abusive. Chancellors have discretion to determine whether a charge rises to the level of a claim of abuse or neglect.

The dissent argued that the court of appeals' opinion in the first appeal improperly limited the chancellor by dictating his conclusion on two *Albright* factors. While the dissenters agreed that the mother's wrongful conduct should be considered in the *Albright* analysis, they stated that the court should not mandate the disposition of a particular factor, especially when they could not know the evidence that would be provided on remand. The majority disagreed, noting that its opinion made clear that the court would not dictate the chancellor's determination of the child's best interests based on the overall *Albright* analysis.

Garrison v. Courtney, 304 So. 3d 1129 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's award of divorce to a wife based on her husband's habitual alcohol use. When she left the home, her sons remained with their father until she was awarded temporary custody. During the interim months, she went to the house daily to make lunches for the children and take them to school. Photographs of the home during that period showed that the refrigerator was empty or contained molded food, the house was dirty, and the laundry was not done. There was evidence that the father was not attentive to one son's need for insulin injections and that he was dismissive of another son's struggle with bulimia. There was also testimony that he allowed a son who was not licensed to drive on a number of occasions when the father had been drinking.

The court affirmed the chancellor's award of custody to the wife. She was favored on the age, sex, and health of the children, even though they were boys, because she was a nurse and better suited to care for their health problems. Continuity of care did not favor either parent. Even though they lived with the father for nine months she came to the house and cared for them every day. The court did not err in finding for her on the factor of parenting skills, considering the state of the home under the father's care. Because of his drinking, the court

found for the mother on physical and mental health. And, the court did not err in awarding the mother custody in spite of the oldest son's request to live with his father – the chancellor considered his request but found that the father's drinking and allowing his son to drive overrode the request.

Jenkins v. Jenkins, 307 So. 3d 473 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's award of custody of two children to their father. The court rejected the mother's argument that the chancellor placed too much emphasis on her move to Virginia. Prior to their separation, the couple lived with the husband's parents. For a period, they separated as a couple but continued to live in the same house. Eventually, the wife moved out and took a job teaching in Virginia, where she lived with her sister and her family. She applied for only one teaching position in Mississippi. The court held that the chancellor did not err in finding that the children's home, school, and community record and the stability of the home environment favored the father. The children had lived with their grandparents for the last several years, had extended family in Mississippi, attended school there, and were active in church and extracurricular activities. Nor did the chancellor err in finding that the father had greater willingness to provide childcare because he remained in Mississippi while the mother moved to Virginia, leaving the children in Mississippi, after applying for only one teaching job in Mississippi. The chancellor found that the mother was favored on parenting skills based on several incidents of inappropriate anger by the father; however, those incidents did not prevent custody to him. They occurred during a stressful time in which the couple were separated but sharing a bedroom.

Cox v. Upchurch, 301 So. 3d 69 (Miss. Ct. App. 2020). A chancellor properly awarded custody of a four-year old girl to her father. The child and her mother lived with him in his Grenada home for the first two years of her life and he had temporary custody of her for the year prior to trial. He was favored on ability to provide childcare, considering that he had one child and assistance from family, while the mother had two teenagers in addition to the girl. He was also favored on the child's home, school, and community record. The girl had lived in Grenada with him most of her life and was doing well in her daycare. He was also favored on stability of home and employment, having lived in the same place and worked for years in the family business.

Hackler v. Hacker, 296 So. 3d 773 (Miss. Ct. App. 2020). A chancellor did not err in awarding a mother custody of her daughter, who was adopted by her stepfather, and awarding the father custody of the couple's biological child. The father, who had custody of the boy during their separation, was favored on continuity of care. The court of appeals rejected the mother's argument that her superior parenting skills should have weighed strongly in favor of her. While the father displayed poor parenting with regard to his adopted daughter, the boy was doing well in his father's home. The factor of employment responsibilities was neutral even though the mother's employment was more flexible – there was no showing that the father's employment interfered with his ability to care for his son. The chancellor considered the impact of separating the boy from

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his half-sister, but found that their separation was outweighed by other factors.

C. Between parents and nonparents

D.R. v. Bradford, 292 So. 3d 604 (Miss. Ct. App. 2020). A chancellor ruled prematurely that a man's daughter, seeking custody of her younger siblings, overcame the natural parent presumption. The court heard direct testimony from the children's father, at which point the trial recessed and did not resume. The court found that the daughter had overcome the natural parent presumption and awarded her custody without hearing from the father's witnesses or allowing him to conduct an examination on redirect. A nonparent seeking custody must prove by clear and convincing evidence that a parent has abandoned or deserted his children or is unfit to maintain custody.

D. Visitation

Keasler v. Fowler, 308 So. 3d 441 (Miss. Ct. App. 2020). The court of appeals held that a chancellor need not consider the factors set out in *Martin v. Coop,* 693 So. 2d 912 (Miss. 1997) if the grandparent does not provide the court with evidence regarding all of the factors. A paternal grandmother who spent substantial time with her granddaughter prior to and after the joint custodial parents' divorce was limited to several hours a month after custody was modified from joint physical custody to custody in the child's mother. The chancellor treated her petition as a request for visitation under Type 1 – visitation when the grandparent's child has lost custody. The grandmother argued that the chancellor erred by not considering factors set out in *Martin v. Coop* to determine whether grandparent visitation was in the child's best interests. The chancellor found that the grandmother did not provide sufficient proof to determine whether visitation was in the girl's best interest. The court of appeals agreed that a court need not undertake the factor-based analysis in the absence of evidence regarding the factors, noting that there was no evidence presented on several of the factors, including whether visitation would disrupt the child's life and whether the grandparent would interfere with parental discipline and child-rearing.

Wildman v. Wildman, 301 So. 3d 787 (Miss. Ct. App. 2020). A chancellor acted within his discretion in awarding a father additional visitation every other fifth weekend and phone calls three times a week, rather than, as he requested, every fifth weekend, daily phone calls, and a weekday visit in addition to standard visitation. A chancellor has substantial discretion to determine the visitation schedule that best fits the needs of the children. The court noted that the parties had experienced some problems communicating with regard to the children's schedules.

Gerty v. Gerty, 296 So. 3d 704 (Miss. 2020). A chancellor did not err in awarding a noncustodial father one month of summer visitation rather two months, as the parties had agreed in their property settlement agreement. The court of appeals rejected the father's argument that it was error to change their agreement when neither had requested that the court do so. The court's mod-

ification was based on the chancellor's finding that two consecutive months away from the custodial mother was not in the child's best interests. The chancellor also ordered that visitation could be modified to two months in the summer when the child reached the age of twelve, if the child agreed to the extended visitation.

E. Joint legal custody

Wildman v. Wildman, 301 So. 3d 787 (Miss. Ct. App. 2020). A chancellor properly held that a custodial mother should have decision-making rights with regard to the children's education and medical treatment. Evidence showed that the parents had already experienced disagreements during their separation regarding whether the children should attend public or private school and whether they should take certain medications. The court emphasized that joint legal custody does not require that the noncustodial parent have equal decision-making authority. The court quoted *Clements v. Young,* 481 So. 2d 263 (Miss. 1985), which stated, "the custodial parent may determine the child›s upbringing, including his education and health and dental care. Such discretion is inherent in custody. It is vested in the custodial [parent.]"

F. Modification

1. Of joint custody

Smith v. Bellville, 301 So. 3d 678 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's modification of custody from joint physical custody to sole custody in the father after the mother moved from Hattiesburg to Tupelo with her current husband. The court rejected her argument that the chancellor misapplied the legal standard for modification of joint custody by awarding custody to the parent who "lived up to" their joint custody agreement by remaining where they lived. The chancellor found that the mother's moved was a material change in circumstances that made the joint custody arrangement impractical and unworkable and found that remaining with the father was in the child's best interests. The court also found unpersuasive her argument that the chancellor, who found for her on parenting skills, did not give the factor enough weight in the best interest analysis. Nor did the chancellor err in finding the employment factor neutral, even though the mother stayed at home and the father worked. The father was able to take the child to school and pick him up from after care.

Domke v. Domke, 305 So. 3d 1233 (Miss. Ct. App. 2020). A chancellor did not err in declining to modify joint physical custody between parents living in different states. The couple shared joint custody of their five-year-old daughter, alternating two-week custodial periods. During the girl's kindergarten year, the girl attended school in Hattiesburg, even though her father moved to the coast. At the time of trial, the mother had moved to North Carolina but testified that she planned to move back to Mississippi soon. The chancellor found there was no material change in circumstances that warranted modifying joint

custody, since the mother planned to move back to Mississippi and the parties had previously shared joint custody at a distance. However, he did find that the custodial schedule was unworkable, given the mother's current location in North Carolina. He found that the factors of parenting skills, moral fitness, the child's home, school, and community record, ability to provide primary child-care, and stability of home environment and employment favored the father. He held that the father's joint custodial period would be during the school year and the mother's during the summer, spring break, Thanksgiving break, and one-half of Christmas break. The court of appeals rejected the mother's argument that the chancellor's order amounted to sole physical custody in the father. His order provided her with significant periods of physical custody, as required for joint custody.

Phillips v. Phillips, 303 So. 3d 835 (Miss. Ct. App. 2020). The court of appeals reversed a chancellor's modification of custody because it was not based on a finding of a material adverse change in circumstances. The parents, who shared joint physical custody, agreed to a temporary change in custody for one year. They agreed that their two boys would live with their father in New York for one year to study acting. At the end of the year, they would re-evaluate. In effect, if they did not enter a new agreement, custody would revert to joint physical custody. The agreement was approved by the chancellor. Several months into the agreement, the mother filed a petition to terminate the agreement, which the chancellor rejected. The motion was heard approximately one year after the agreement was made. Finding that the boys were successful in their acting careers and wanted to remain in New York, the chancellor modified custody, providing the mother with visitation. She argued that the chancellor's order, more than a year after the temporary modification expired, effectively modified custody from joint physical to sole physical custody in the father. The court of appeals agreed, holding that the chancellor erred in making a permanent modification of custody without first finding that there had been a material change in circumstances that adversely affected the boys, and without conducting an *Albright* analysis.

2. Based on parental interference

Stewart v. Stewart, 309 So. 3d 44 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's modification of custody from the mother to the father based on the mother's interference with her oldest daughter's relationship with the father. She encouraged her daughters to call 911 if they felt afraid at his house, leading to the oldest daughter calling 911 over a dispute regarding brushing her teeth. She refused to allow the girls to visit their father for several weeks following the incident. After being ordered to participate in counseling with the girls' therapist, she secretly recorded her daughter's counseling session. As a result, the therapist withdrew as her daughter's counselor. Two therapists testified that she was not cooperative in trying to improve the girls' relationships with their father. The chancellor also found that the mother was complicit in her daughter's unsubstantiated allegations of abuse by the father. The chancellor found that the mother's conduct was a material change in circumstances that

adversely affected the girls and posed a danger to their emotional and mental health. The court held that the chancellor did not err in finding that the *Albright* factors of continuity of care and emotional bond were neutral, even though the mother provided more care and the older girl was more bonded to her. Her interference was partly responsible for her having more time with the girls and a closer bond. The older girl's expressed preference to live with her mother was regarded as neutral for the same reason. The father was favored on parenting skills, in light of the mother's subjecting the younger child to an unnecessary forensic examination and based on the fact that he had schedules, routines, and discipline while the mother allowed the older girl to act out in her home. He was also favored on stability of home employment since he lived in the same place and had the same job since the divorce while the mother had moved and changed jobs several times. The court also found that the children's community record favored the father because of the mother's conduct that caused the children's established therapist to withdraw from their treatment.

3. The clean hands doctrine

Stewart v. Stewart, 309 So. 3d 44 (Miss. Ct. App. 2020). The court of appeals rejected a mother's argument that the father lacked clean hands to seek custody modification. because he failed to take an anger management course as ordered in the divorce decree. The clean hands doctrine cannot override a chancellor's duty to ensure custody that is in the children's best interest. In addition, his failure was an oversight and not willful.

G. Expert witnesses

Baumann v. Baumann, 304 So. 3d 175 (Miss. Ct. App. 2020). The court of appeals rejected a husband's argument that his wife's expert, a licensed social worker, should have been excluded as an expert witness in child development. She testified that her observations of their oldest daughter were consistent with a child who suffered sexual abuse. The court of appeals held that no separate hearing was required to qualify an expert, so long as the parties had an opportunity to address the issue. The chancellor did not abuse her discretion in admitting the witness – she had a master's degree in social work and had participated in play therapy sessions for a decade.

Stewart v. Stewart, 309 So. 3d 44 (Miss. Ct. App. 2020). The court of appeals rejected a mother's argument that a chancellor erred in admitting the testimony of a family counselor as an expert without conducting an on-the-record review of her qualification. The court appointed the counselor to serve as an expert witness with regard to an incident in which a child called 911 from her father's house during an argument. The court appointed her with the agreement of both parties and outlined her duties in a court order. While the order did not explicitly state that she was designated as an expert, the court stated that it sought her "expertise;" it was clear that she was intended to be an expert witness. She had twenty years of experience and had counseled the family for three years. She was qualified to talk with the girl and the parents regarding the incident and to report to the court.

H. Guardians ad litem

1. Mandatory appointments

Monk v. Fountain, 296 So. 3d 761 (Miss. Ct. App. 2020). An aunt's unsubstantiated allegations of abuse and neglect did not require appointment of a mandatory guardian ad litem. The aunt spent time with her three-year-old niece, including occasional overnights, for approximately a year until the parents limited her contact with the child. The aunt subsequently reported them to DHS for abuse, reported them to Medicaid and to employers for fraud, and sent them multiple text messages. They filed a petition for protection for domestic abuse, which was denied because the aunt's conduct did not fall within the definition of abuse. A week later, the aunt filed a petition seeking custody based on the parent's abuse, alleging medical neglect, that they drove with the child while intoxicated, and Medicaid fraud. The aunt filed a motion to appoint a guardian ad litem but never had the motion set for hearing and did not raise it at trial. By the time of trial, the aunt had not seen the child for almost three years. The chancellor found that the aunt failed to provide any proof of abuse beyond her bare allegations. The court of appeals noted that a chancellor need not appoint a mandatory guardian ad litem based on unsubstantiated allegations – chancellors have discretion to determine whether there is sufficient factual basis to create a legitimate issue of neglect or abuse. The court of appeals rejected the parents' argument that the aunt waived the issue by failing to raise it at trial – a court is required to appoint a guardian in cases of abuse or neglect whether or not the parties raise the issue. The court also held that the aunt was not entitled to visitation under the in loco parentis doctrine. She did not act in loco parentis to the child; she only visited with her occasionally for a year and a half.

Barber v. Barber, 288 So. 2d 325 (Miss. 2020). A chancellor erred in declining to review the report of a mandatory guardian ad litem after hearing evidence in the case and determining that the allegations of abuse were unsubstantiated. In a divorce action, the mother alleged that the father, who had temporary custody, had abused the children. The court promptly appointed an attorney to investigate as a mandatory guardian. Six days later, the guardian submitted a preliminary report stating that the allegations were sufficiently serious that she should be appointed as permanent guardian. In that role, she interviewed witnesses and provided the court with a written report. The court heard three days of testimony, including evidence regarding the parents' fitness and the mother's allegations of abuse. At that point the father objected to the guardian testifying and to the admission of her report, stating that it was based on hearsay and included an *Albright* analysis which the court did not request. The chancellor stated that no testimony was presented in three days that would require appointment of a guardian ad litem. He found that the mother's allegations were unsubstantiated and granted the father's motion to exclude the guardian's testimony and report. The supreme court reviewed the law governing mandatory appointments, noting that when allegations of abuse or neglect arise in custody litigation, the court is required to appoint a guardian ad litem and has an obligation to review and consider the guardian's findings. The su-

preme court held that while the chancellor could direct the guardian's participation in litigation, it was required to make findings regarding the report and to provide reasons for rejecting the guardian's recommendations. Three justices dissented. The dissent noted that a court is not required to appoint a guardian based "merely on an unsubstantiated assertion found in the pleadings of one of the parties.

Hamblin v. Allison, 305 So. 3d 1255 (Miss. Ct. App. 2020). The court of appeals rejected a mother's argument that a court erred in granting custody of two children to their father without requiring the guardian ad litem to provide recommendations regarding custody. A guardian's obligations are governed by the court's order of appointment. The chancellor ordered the guardian to investigate and report regarding abuse allegations but did not request a custody recommendation. The fact that the guardian stated in a pretrial conference that she would recommend custody to the mother did not obligate the court to request a custody recommendation at trial. The chancellor did err in failing to discuss the mandatory guardian's recommendation that the children receive counseling and to state her reason for not following the recommendation. However, because the recommendation had no effect on custody, the issue on appeal, the error was harmless.

2. Mandatory guardians not required in visitation actions

Barton v. Barton, 306 So. 3d 682 (Miss. 2020). The supreme court held that there is no statutory requirement that a guardian ad litem be appointed to investigate allegations of abuse in connection with visitation – only in custody cases. A mother was granted a thirty-day temporary order of protection from domestic abuse in chancery court against her former husband, who lived in Georgia. She then petitioned to suspend his visitation and to appoint a guardian ad litem based on allegations that their son had been abused while visiting him. The chancellor declined to suspend visitation or appoint a guardian ad litem. The court of appeals held that Miss. Code Ann δ 93-5-23 requires appointment of a guardian ad litem when allegations of abuse or neglect arise in a custody proceeding. It does not apply in actions dealing only with visitation. One justice concurred in the majority's reading of the statute but expressed concern that guardians should be required in connection with visitation, where abuse may occur as well as in custody. The court also rejected the mother's argument that the chancellor erred by not granting her a final order of protection. She did not request a final order of protection in the action. The court did hold that the chancellor erred in dissolving the justice court order, but noted that the order had already expired by its own terms.

3. Hearsay in guardian reports

Stewart v. Stewart, 309 So. 3d 44 (Miss. Ct. App. 2020). The court of appeals rejected a mother's argument that a court improperly relied on hearsay in a guardian ad litem's report. Most of the witnesses that the guardian interviewed testified in the trial. The documents on which she relied were introduced in the trial. The court also held that the mother waived any objections to the

guardian's qualifications by failing to object within ten days as required by the court's order of appointment. The guardian was qualified, having been trained and served as guardian in a number of cases. She performed a thorough investigation, interviewing the parties, children, teacher, doctors, therapists, and others, reviewing school and medical records, and attending trial. Nor did the chancellor err in ordering the mother, as the non-prevailing party, to pay seventy percent of the guardian's fees.

In re Adoption of M.R.H., 312 So. 3d 385 (Miss. Ct. App. 2020). The court of appeals rejected a father's argument that a chancellor erred in considering hearsay such as medical and school records in the guardian ad litem's report in a termination of parental rights proceeding. The chancellor's order appointing the guardian as an expert specifically stated that the guardian was to consider medical and school records and to report on them. The father did not object to the appointment order.

4. Adequacy of investigation and report

In re J.K., 304 So. 3d 184 (Miss. Ct. App. 2020). The court of appeals rejected a father's argument that a guardian ad litem's report was inadequate because she never interviewed him or the child. She participated in all of the court hearings and heard testimony from the father. In addition, he did not object to the sufficiency of her investigation at trial. Three judges dissented, stating that the guardian's investigation only repeated what was already available at trial.

I. Guardianships

Mississippi Guardianship and Conservatorship Act (GAP Act) Amendments. The Mississippi legislature made a number of amendments to the 2019 GAP Act. Laws 2020, S.B. 2874, amends Miss. Code Ann. §§ 93-20-102 to -93-20-431. The amendments

> Require that a guardian take an oath at or before the time of appointment, *id.* § 93-20-108(1);
> Clarify that a petition may combine requests for guardianship and conservatorship for the same person and separate actions may be consolidated, *id.* § 93-20-107(2), and that letters of guardianship and conservatorship may be combined if the same person serves both roles, *id.* § 108(6);
> Clarify that a Rule 81(d) summons must be used to provide initial notice of the action and on continuation of an emergency guardianship or conservatorship, while Rule 5 notice may be used for motions in a pending action, *id.* §§ 93-20-105(5), -113(1), -202(3), -203, -207(4), -303, -311, -403, -413(2);
> State that passage of the act does not require that proceedings pending on the effective date be refiled, *id.* § 93-20-125(b);
> Provides chancellors with discretion to apply prior law to petitions filed before the effective date (no longer requiring a finding that applying the

new act would impose a substantial hardship on the estate), *id.* § 93-20-125 (b);

Provide that a guardian need not retain an attorney of record for the guardianship if it would impose an undue burden on the ward's estate, *id.* §§ 93-20-201(3), -302(3); and

Clarify that the act does not apply to durable legal relative guardianships created by a youth court, *id.* § 93-20-104(4).

VIII. Child support

A. Adopting parent's obligation to support

Hackler v. Hacker, 296 So. 3d 773 (Miss. Ct. App. 2020). A chancellor did not err in awarding a mother custody of her daughter, who was adopted by her stepfather, and awarding the father custody of the couple's biological child. However, the chancellor erred in ordering the mother to pay support for her son but not ordering the father to pay support for his adopted daughter. An adoptive parent has the same duties with regard to a child as if she was his biological child. The court remanded the case for the chancellor to address the father's argument that his relationship with the girl was so damaged that his support duty should be terminated.

B. Adjusted income

Williamson v. Williamson, 296 So. 3d 206 (Miss. Ct. App. 2020). A chancellor properly calculated a husband's current income based on his pay stubs for the first thirty-six weeks of the year, including overtime income. The court ordered him to pay $1,720 a month, approximately twenty percent of his adjusted monthly income of $8,617. The court of appeals rejected his argument that the chancellor should have averaged his income over the last several years – his income did not fluctuate up and down, but increased steadily for the last three years. Nor did the chancellor err by including his overtime income, which he had also earned in the previous year, as a regular part of his income.

Dixon v. Olmstead, 296 So. 3d 227 (Miss. Ct. App. 2020). The court of appeals reversed and remanded a chancellor's modification of child support for findings regarding the payor father's current income. DHS testified that based on the father's current income, the statutory guidelines would produce an award of $491 but apparently did not introduce evidence of his income. A chancellor is required to make findings of fact regarding a payor's income in order to apply the statutory guidelines.

C. Credit against support obligation

Williamson v. Williamson, 296 So. 3d 206 (Miss. Ct. App. 2020). The fact that a father's emancipated child lived with him did not require an offset of his support for two younger children. Nor should his support have been reduced by the value of gifts made by his parents to the children prior to the couple's separation – the payments were not in lieu of his support obligation.

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D. High-income payors

Descher v. Descher, 304 So. 3d 620 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's child support award of $7,500 a month for two children, all costs of college, medical insurance and out-of-pocket costs, and a $1 million life insurance policy from a father with adjusted monthly income of $71,000. The father argued that the court erred in awarding $7,500 in child support when the children's expenses were listed as $2,194 a month. The court stated that child support is not capped at the amount of expenses stated in an 8.05 financial statement – a chancellor may consider the family standard of living in determining what is a reasonable amount of child support. A child need not live at a minimal level of comfort while the parent "lives a life of luxury." Two judges dissented, arguing that the court erred in ordering child support that was three times the amount of the children's actual expenses.

Wildman v. Wildman, 301 So. 3d 787 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's child support award below the guidelines for a payor with income exceeding $100,000 a year. He was ordered to pay $1,200 in child support for the remainder of the current school year, while he would be paying private school tuition, and to pay $1,800 a month after that when the children attended public school. The chancellor made the necessary findings to support the amount for a payor with income that exceeded the amount at which the guidelines are presumptively correct.

E. Support for college

Descher v. Descher, 304 So. 3d 620 (Miss. Ct. App. 2020). The court of appeals rejected a father's argument that the court's college support order exposed him to endless unforeseeable costs. He was required to pay "tuition, room and board, meals, laboratory fees, books, sorority or fraternity dues and expenses, automobile expenses, and any other cost generally associated with attendance at a four-year public or private college or university either in-state or -out-of-state". The expenses required were specific – a chancellor is not required to provide a dollar amount for college expenses. The court noted that a child is entitled to attend college in a manner in keeping with the family standard of living. Nor was the chancellor required to provide that basic child support would be modified when the children entered college. There was no way to know whether the children would continue to live with their mother during the summer and holidays.

Anderson v. Anderson, 310 So. 3d 1176 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's order that a husband replace $14,000, with interest, that he removed a college account set up for their son by the maternal grandmother. The wife was unaware of the withdrawals. While the husband stated that he spent the money on marital bills, he did not deposit it into their joint account and provided no explanation for how he used the money.

F. Support for adult disabled child

Burrell v. Burrell, 289 So. 3d 749 (Miss. Ct. App. 2020). A chancellor properly denied a mother's request for child support for her adult disabled son. The son, who received Social Security disability benefits, lived with his mother and paid her $450 a month from his benefits to reimburse her for living expenses. The court stated that because the adult son was not a party to the litigation or under a guardianship or conservatorship, the chancellor property declined to consider an award of support. The court distinguished *Ravenstein v. Ravenstein*, 167 So. 3d 210 (Miss. 2014), in which a father was ordered at divorce to pay lifetime support for his disabled son. In that case, the son was under his mother's guardianship.

G. Modification

1. In actions by DHS

Dixon v. Olmstead, 296 So. 3d 227 (Miss. Ct. App. 2020). The court of appeals reversed and remanded a chancellor's modification of child support for findings regarding the payor father's current income. However, the court noted that support in the DHS action could be modified without a finding of a material change in circumstances. The father petitioned the court to terminate his support for a fifteen-year-old girl that he had not seen for twelve years. DHS petitioned on behalf of the mother to increase his support. DHS presented evidence that the father's obligation for another child had ended, increasing his adjusted income; that the girl was older with additional expenses, and that the father's income had increased. The court ordered the father to pay $491 a month in child support. The court of appeals agreed with DHS that a state agency need not prove a material change to support an increase in child support in its regular three-year review, according to Miss. Code Ann. § 43-19-34(3). Support may be modified if the existing support order differs from the amount that would be due under the guidelines based on current income. However, the court reversed for specific findings regarding the payor's current adjusted gross income.

2. Upon emancipation of one child

Pumroy v. Sisco, 292 So. 3d 290 (Miss. Ct. App. 2020). A chancellor properly modified a father's child support obligation based on the emancipation of his oldest child, reducing support to the guidelines for two children. The couple's support agreement provided that the father would pay $500 a week "until such time as the minor children are emancipated." The mother argued that the agreement required that *all* children be emancipated in order for the amount to be modified. The court of appeals disagreed – support may be modified based on a material change in circumstances. Furthermore, a parent is relieved of support obligations for a child who is emancipated. The court declined to consider the father's argument that the court should have credited him with payments made after the oldest was emancipated – he did not file a cross appeal raising the issue.

3. Based on move to Mississippi; change of guidelines

Cadigan v. Sullivan, 301 So. 3d 779 (Miss. Ct. App. 2020). A mother petitioned to register and modify a Florida child support order in Mississippi. The order required that she pay $428 a month under the Florida guidelines. The parents had agreed to suspend her obligation for several years while they shared custody but had returned to the original arrangement. Both now lived in Mississippi. The mother sought to modify custody and to reduce her support obligation to the appropriate amount under Mississippi guidelines. The chancellor granted the mother's petition to reduce her support obligation to $224 while the action was pending. The court of appeals rejected the father's argument that the court erred in reducing her payments because she failed to show a material change in circumstances. Her petition for modification was not based on income reduction but was a request to conform the support award to the Mississippi guidelines.

4. Material change in circumstances

Best v. Oliver, 296 So. 3d 140 (Miss. Ct. App. 2020). A custodial mother presented sufficient proof of a teenaged child's increased expenses to show a material change in circumstances warranting a $170 a month increase in child support. In addition, the father's income had increased substantially and the mother was no longer living rent free. The court rejected the father's argument that the mother's new husband's income should have been considered – a parent's obligation to a child is not reduced by a custodial parent's remarriage.

H. Termination of support obligation

Ivory v. Aubert, 309 So. 3d 1083 (Miss. Ct. App. 2020). The court of appeals reversed a chancellor's order terminating a father's support obligation for a sixteen-year-old nonmarital child. The father's support obligation was established when the child was five. When she was fifteen, he filed a petition for contempt and to modify his support obligation. The parties entered a 2015 agreed order in which his support obligation was increased. The order also stated that because the teenage girl had no meaningful relationship with her father, the girl was granted "wide discretion" with regard to visiting with him. A year later, he sought to terminate support, alleging that he had tried repeatedly to connect with his daughter since the 2015 order with no success. The daughter admitted that she did not respond to his calls and texts and that she did not want a relationship with him. The chancellor held that the daughter's actions in excluding her father from her life met the "clear and extreme" test for terminating a parent's child support obligation, finding that the failure of visitation was the child's fault and not the father's. The court of appeals reversed, holding that the daughters' actions did not compare to conduct found to be sufficiently extreme, such as accusing a parent of rape, asking to be adopted by a stepfather, or expressing a desire to kill the parent. A child's hostility to a parent or desire not to visit with a parent with whom they have little relationship does not meet the clear and extreme standard. The court noted that termination of support for a college-aged child is governed by a lesser standard.

Davis v. Henderson, No. 2018-CA-01184-COA, 2020 WL5793021 (Miss. Ct. App. Sept. 29, 2020), *cert. granted,* 314 So. 3d 1164 (Miss. 2021). A chancellor erred in terminating a father's support obligation for his son, a high school senior. The son refused to have a relationship with his father for three years and would not respond to his calls and texts. The chancellor terminated the father's support obligation until the son resumed regular visitation and developed a viable father-son relationship. The court of appeals reversed, holding that the son's conduct was based on the father's actions. In an incident that was reported to DHS and found to be abuse, the father forced the boy to hold his hands against the wall for so long that he was in pain and crying and pinned the younger brother to the floor, leaving marks on his neck. The boy was not allowed access to the internet at his father's house and was not allowed to play outside. He stated that his father showed no interest in him, failing to attend any of his football games and attending only two band concerts in years. The court stated, "Estrangement is not an excuse for failing to pay child support." The son's conduct did not meet the level of clear and extreme conduct required for termination of support.

I. Life insurance

Gaskin v. Gaskin, 304 So. 3d 641 (Miss. Ct. App. 2020). The court of appeals rejected a husband's argument that requiring him to maintain a $900,000 life insurance policy was excessive for his child support obligations, which he calculated would be $357,115. Parents may be ordered to pay amounts in addition to support, including health insurance, out-of-pocket medical expenses, life insurance, and college education.

Descher v. Descher, 304 So. 3d 620 (Miss. Ct. App. 2020). The requirement of a $1 million life insurance policy was reasonable to secure the amount of support that a husband was ordered to pay, considering that the order contemplated $765,000 in child support plus college support, health insurance, and medical expenses.

IX. Enforcement

A. Credit against arrearages

Cadigan v. Sullivan, 301 So. 3d 779 (Miss. Ct. App. 2020). The court of appeals held that a mother did not owe arrearages for nonpayment of child support under a Florida order. The parents entered an out-of-court agreement to share physical custody and expenses and to suspend child support payments. The father subsequently requested that DHS enforce the order going forward but submitted an affidavit stating that the mother was current in her payments. The court held that she did not owe support for the period during which she and the father agreed to suspend her payments.

Krohn v. Krohn, 294 So. 3d 680 (Miss. Ct. App. 2020). A chancellor properly credited a father's child support arrearages for ten months in which

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his daughter lived with him pursuant to an out-of-court agreement. However, the chancellor was not required to order the mother to pay support retroactively for the ten-month period.

B. Contempt

Stewart v. Stewart, 309 So. 3d 44 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's finding a mother in contempt for surreptitious taping of her daughter's sessions with a therapist. Both parents were ordered to continue the children's therapy, to refrain from discussing counseling sessions with the children, and not to involve the children in discussions of the litigation. The court rejected the mother's argument that the order was not sufficiently specific because it did not order her NOT to tape her daughter and the therapist without their knowledge. The court found that her intent was to undermine the therapist and accomplish her removal, in direct violation of the order to cooperate with the therapist.

Lindsay v. Lindsay, 303 So. 3d 770 (Miss. Ct. App. 2020). The court of appeals reversed a chancellor's grant of divorce to a wife and held that the property settlement agreement executed by the husband under threat of incarceration was unenforceable. The court reversed the chancellor's finding that the husband was in contempt for failure to comply with a temporary order that he "maintain the status quo" by paying all expenses that he had paid prior to June 13, 2014. The order, which was made orally in June 2014 and reduced to writing more than two years later, did not specify the expenses to be paid or the amount of any expense. The record did not reflect what expenses the husband was paying in June of 2014. The court of appeals held that the order was too vague, ambiguous, and unclear to put the husband on notice of his obligation.

Davis v. Henderson, No. 2018-CA-01184-COA, 2020 WL5793021 (Miss. Ct. App. Sept. 29, 2020), *cert. granted,* 314 So. 3d 1164 (Miss. 2021). The court of appeals reversed a chancellor's finding that a mother was in criminal contempt. The court entered a written order requiring the parents to attend weekly individual counseling sessions to learn to co-parent. The chancellor also entered an oral order that the parents were to follow the counselor's recommendations. The chancellor held the mother in contempt for attending only three sessions and for failing to bring the children to counseling as recommended. The court of appeals held that the bench order was too vague to support a finding of contempt for failure to bring the children to counseling. It did not specify that they were to participate in the sessions. The court remanded for the chancellor to determine whether the mother should be held in civil contempt for violating the written order to attend weekly counseling sessions.

Domke v. Domke, 305 So. 3d 1233 (Miss. Ct. App. 2020). The court of appeals held that a chancellor appropriately declined to hold a husband in contempt for late payment on several mortgage payments. There was no indication that his failure to pay on time was willful, and his wife presented no evidence to support her claim that his actions negatively affected her credit ratings.

Wallace v. Wallace, 309 So. 3d 104 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's finding that a wife was in contempt for failure to execute a quitclaim deed to the marital home within thirty days of the judgment as required. The husband tendered a check for her equity in the home on March 6, the day of the judgment, and provided her with a quitclaim deed. When she had not signed it by April 9, he filed a motion for contempt. The following day, she filed a motion to stay the judgment pending appeal. The court rejected her argument that her motion operated as a stay on the judgment – she was already in contempt when she filed the motion.

Bozant v. Nguyen, 296 So. 3d 254 (Miss. Ct. App. 2020). A chancellor properly held a former husband in contempt for failure to pay 50% of tax preparation fees and 25% of the couple's 2015 tax liability. However, the chancellor erred in finding him in contempt for nonpayment of 2013 and 2014 taxes. The couple's property settlement agreement obligated him to pay 25% of taxes for 2013, 2014, and 2015. The wife had paid the 2015 tax bill and the couple's 2015 tax preparation bill in full. She was entitled to a finding that he was in contempt for failure to meet his obligation with regard to those taxes and to seek direct contribution for payment of his share. However, neither of them had met their obligation to pay 2013 and 2014 taxes. She entered an agreement with the IRS to pay the full amount under a payment plan, but had not yet completed payments on her share. It was error to hold him in contempt when she also had failed to meet her obligation and had not made payments on his behalf at the time of the hearing. The court affirmed the chancellor's award of her attorney's fees in the amount of $6,332 incurred in connection with the contempt action.

Leverett v. Leverett, 309 So. 3d 116 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's finding that a father was in contempt for nonpayment of his son's medical, school, and transportation expenses and several months of child support and for withdrawing $25,000 in CDs intended for his son's college education. The agreement provided that the parents would be responsible for one-half of "the costs of an automobile for the minor child upon the age of sixteen (16) years)." The mother allowed the boy to drive a ten-year-old automobile belonging to her until he was in college and the vehicle became unreliable. At that time, she purchased a one-year-old Honda Accord for him. The father argued that he was not responsible for one-half of the cost because the mother did not consult with him about the purchase and because the agreement only required that the parties provide one vehicle. The court rejected his argument that the provision requiring payment for the costs of an automobile was limited to one vehicle for the duration of the obligation. He was aware the son was of driving age and had obtained a vehicle, and had an obligation to pay one-half of the costs. The court also rejected his argument that the court erred in satisfying a portion of his arrearages by offsetting the mother's obligation to make property division payments to him. He agreed to the arrangement at trial.

X. Termination of parental rights

A. Court-appointed counsel

Mississippi Dep't Child Protection Services v. Bynum, 305 So. 3d 1158 (Miss. 2020). The supreme court affirmed a chancellor's order that DCPS pay $3,750 in attorneys' fees for an indigent father in a termination of parental rights proceeding. The 2016 Termination of Parental Rights Law provides, "The setting of fees for court-appointed counsel and the assessment of those fees are in the discretion of the court." Miss. Code Ann. § 93-15-113(2)(b). When the TPR Law was passed the legislature amended Miss. Code Ann. § 99-18-13 to provide that the State Defender's Office *may* provide representation for indigent parents determined to be in need of representation in termination proceedings. However, the legislature did not provide funding for the state defender to undertake parent representation. Nor did it provide funding for counties to fund the obligation. The court rejected DCPS's argument that the county was responsible for the fees – the statutory authorization for county payment of indigent fees is limited to criminal cases. The chancellor did not abuse his discretion in ordering DCPS, the plaintiff in the action and the agency charged with general expenses for children in its care, to pay the fees. The court emphasized that it was not holding that DCPS has the responsibility to pay indigent parents' fees in all cases.

In re J.K., 304 So. 3d 184 (Miss. Ct. App. 2020). The court of appeals rejected a father's argument that the summons in a termination of parental rights case did not properly inform him of his right to be represented by counsel or to obtain a continuance. The summons stated, "you must be represented by an attorney in this cause unless the right to legal representation is waived." The court held that the summons substantially complied with the statute, noting that there is no requirement that a summons use the exact language of the statute. And, the father did not show any prejudice – the court appointed an attorney to represent him. Three judges concurred in a separate opinion stating that the summons violated due process because it did not meet the requirement of substantial compliance with the statutory form. The form provided by statute states: "You have a right to be represented by an attorney. You are requested to immediately notify the youth court of the name of your attorney. If indigent, the above-named child has a right to have an attorney appointed for [them] free of charge, and should immediately apply to the youth court for such appointed counsel." Miss. Code Ann. § 43-21-503.

B. Effective date of amendments to TPR Law

In re Adoption of M.R.H., 312 So. 3d 385 (Miss. Ct. App. 2020). A chancellor properly applied a 2017 amendment to the Termination of Parental Rights Law to a termination petition that was filed in 2016 but in which the actual termination occurred after the effective date of the amendment. The court stated that the applicable law is the version of the statute "in effect at the time the parental rights were terminated." The court held that sufficient evidence supported the chancellor's finding that the father's parental rights should be

terminated based on two grounds –failure to exercise reasonable visitation or communication with his child and conviction for exploitation of a child. The court rejected his argument that he was not convicted of exploitation of a child because the conviction was based on a police officer posing as a child.

C. Notice to bypass reunification

In re K.M., No. 2019-CA-00149-COA, 2020 WL 7056087 (Miss. Ct. App. Dec. 1, 2020). The court of appeals rejected a mother's argument that DCPS was required to file a written motion to request bypass of reunification efforts based on aggravated circumstances. The child in question was taken into custody as a newborn and found to be neglected and abused under the doctrine of anticipatory neglect, based on serious abuse of older siblings. The court of appeals held that the statute does not require that DCPS provide notice or submit a written motion requesting that the court consider aggravating circumstances. Three judges concurred, urging that the best course would be for the state to file a written motion because of the significant parental rights at stake.

D. Incarcerated parents

In re J.K., 304 So. 3d 184 (Miss. Ct. App. 2020). The court of appeals affirmed a chancellor's termination of an incarcerated father's parental rights. His five-month-old child was taken into DCPS custody in April, 2015 when the parents were arrested for possession of drugs. The DCPS plan for reunification required that the father complete parenting classes and a treatment program, undergo drug screening, and maintain contact with the child. The TPR hearing was set for August 2017 and an attorney appointed for the father. The father had seen his son only six times in two years and not at all for eighteen months due to his incarceration. The court found that the father suffered from habitual drug addiction and failed to successfully complete treatment, that he was unwilling to provide reasonably necessary food, clothing, or shelter, that he failed to exercise reasonable visitation, and that his conduct leading to incarceration caused substantial erosion of the parent-child relationship. The court rejected his argument that he was unable to complete an approved drug program or provide for or visit his son because he was incarcerated. His continuous incarceration was "of his own making." He was free on several occasions with a chance to maintain a stable drug-free life but chose not to do so. Three judges dissented, arguing that DCPS did not make the required reasonable efforts to diligently assist the parent because the service plan was not adjusted to account for his incarceration. DCPS did not recognize that he attended the drug treatment programs available to him in prison because they were not approved programs. The father was unable to meet the requirement of visitation because DCPS will not bring a child to visit in prison and the foster parents were not willing to call him. The dissenters also stated that, given the severity of termination, the right to counsel should attach at adjudication proceedings, which may lead to termination.

E. Abandonment

In re Z.M.J., No. 2019-CA-01083-COA, 2020 WL 7350675 (Miss. Ct. App. Dec. 15, 2020). A chancellor properly terminated the parental rights of a mother who agreed for a couple to raise and support her child from infancy. The mother of twelve agreed before the child's birth to allow her to live with the couple in return for their agreement to provide for her financially. For the first six months, the biological mother cared for the child during the day while the couple worked. After that, the couple paid a sitter to care for the child during the day and later enrolled her in daycare. Although testimony was conflicting, the chancellor found that the mother did not see the child from the time she was six months old until the petition for adoption was filed three years later, with the exception of one possible visit. When the adoption petition was filed, she visited the girls' daycare and tried unsuccessfully to remove her. She testified that she only wanted the girl to know her as her mother, not to take her from the adopting parents. She provided no support for the child at any time and did not send birthday or Christmas gifts. The court of appeals affirmed the chancellor's finding that she had abandoned the child and that reunification was not desirable. The court looked to the termination grounds in Miss. Code Ann. § 93-15-121 as providing eight alternative grounds for finding reunification undesirable. The court found that three were applicable in this case: (1) the parent was unwilling or unable to provide reasonably necessary food, clothing, shelter or medical care: (2) the parent failed to exercise reasonable visitation; and (3) the parent's conduct caused substantial erosion of the parent child relationship.

F. Drug addiction

Chitwood v. Stone County Department of Child Protection Services, No. 2019-CA-00364-COA, 2020 WL 2126713 (Miss. Ct. App. May 5, 2020). The court of appeals affirmed a chancellor's termination of a father's rights based on his failure to comply with a DCPS service plan, ongoing drug addiction, failure to visit with his child, and conduct causing a substantial erosion of their relationship He failed to attend drug treatment, tested positive for methamphetamine on four of his five drug tests, and failed to meet DCPS requirements for proof employment, housing, parenting classes, and visitation. The court rejected his argument that the guardian ad litem's failure to interview him required reversal. He did not respond to the guardian's attempts to contact him by phone or through social media. He did not contact her, although she provided him with her contact information. Her report included sufficient evidence to support her recommendation that his rights be terminated.

XI. Adoption

A. Adoption jurisdiction and procedure

The legislature made several changes to Mississippi adoption statutes. The section providing for jurisdiction based on child abandonment or an emergency related to the child was amended to require that nonresident adopting

parents provide the court with the forms and home study required by the Interstate Compact on the Placement of Children. Miss. Code Ann. § 93-17-3(1)(d). The requirement that a spouse of an adopting parent join in the petition was amended to remove the requirement for joinder (1) of a spouse who does not cohabit or reside with the adopting spouse; and (2) "in any circumstances determined by the court that the adoption is in the best interest of the child." Miss. Code Ann. § 93-17-3(4). The statute was also amended to allow guardians ad litem to provide home studies if trained to do so. Miss. Code Ann. § 93-17-3(6).

B. Actions to set aside

Stacks v. Smith, 291 So. 3d 809 (Miss. 2020). In 2012, a married woman gave birth to a child fathered by the petitioner. When she died five years later, a couple sought to adopt the girl. The mother's former husband consented to the adoption, claiming to be her biological father. Six months and seven days after the judgment of adoption was entered, the biological father filed an action to set aside the judgment based on fraud on the court. He stated that the mother and girl lived with him until the girl was four, at which time he was imprisoned for parole violation. He alleged that the mother's husband and the adopting parents knew the husband was not the child's father. The chancellor dismissed his petition, stating that only the legal father's consent to adoption is required. In addition, he found that the petition was barred by the six-month statute of limitations provided in the adoption statutes.

The supreme court held that a chancery court has inherent power to set aside a judgment for fraud on the court – it does not require that the petitioner cite Rule 60 as the basis for the action. In addition, a chancellor may set aside an adoption for fraud on the court notwithstanding the six-month statute of limitations. The petition clearly alleged facts that, if proven, would constitute a fraud on the court. In addition, jurisdictional defects, including failure to join a child's parent, are an exception to the six-month statute. A biological father who has not established his paternity "has a constitutional right to notice of an adoption proceeding if he 'has attempted to establish a substantial relationship with the child.' " If a chancellor finds that a father did not establish a substantial relationship with the child, the adoption need not be set aside. The court reversed and remanded for the chancellor to make findings regarding whether the father had established a substantial relationship with the child. If he did, he was a necessary party and the adoption must be set aside.

C. Jurisdiction between chancery and youth courts

In re Adoption of C.C.B. and S.R.B., 306 So. 3d 674 (Miss. 2020). In a case of first impression, the supreme court held that a chancery court had jurisdiction over an uncontested adoption even though a youth court had jurisdiction over the matter in an abuse and neglect proceeding. After the youth court found that adoption was in the child's best interests, the maternal grandparents and foster parents filed competing adoption petitions in chancery court. The child's parents executed voluntary releases of their parental rights, which the chancery court accepted. The foster parents' petition for adoption was granted.

The grandparents appealed, arguing that the chancery court lacked jurisdiction. The supreme court distinguished contested adoption cases – a chancery court may not terminate parental rights in a contested adoption if a youth court has previously taken jurisdiction over the matter. However, an uncontested adoption does not involve a petition to terminate parental rights because the parents have already voluntarily relinquished their rights. The court's acceptance of the release eliminated the parents' right to contest the adoption. The court also rejected the grandparents' argument that the chancery court lacked jurisdiction because no home study was performed – the requirement for a home study is not a jurisdictional requirement and cannot be raised for the first time on appeal.

D. Adoption under the Indian Child Welfare Act

In 2018, a Texas federal district court held the ICWA's preference for Native-American parents in adoption and foster care to be unconstitutional, granting summary judgment in an action filed by potential non-Native-American adoptive parents. The court held that the act created a racial classification that could not survive strict scrutiny under the Equal Protection Clause. *Brackeen v. Zinke,* 338 F. Supp. 3d 514 (N.D. Tex. 2018). The Fifth Circuit Court of Appeals reversed the trial court's decision in August 2019, finding that the act established a political classification to be reviewed under the rational basis test. The court held that the act is rationally related to Congress' goal of protecting the best interests of children and preserving tribes. *Brackeen v. Bernhardt,* 937 F. 3d 406, 430 (5th Cir. 2019) In November 2019, the Fifth Circuit granted a request for a rehearing *en banc* and in April issued a 300-plus-page opinion. The *en banc* opinion (which has been referred to by commentators as "incredibly messy and complicated" did not resolve the adoption issue. The court split 8-8 on whether the preference is constitutional, leaving the district court decision in place for now. A majority of the court held that Congress had authority to enact the ICWA and that certain provisions are constitutional, including the right to appointed counsel and the right to intervene in state proceedings. However, a majority also ruled that certain provisions unconstitutionally commandeer states, particularly a provision requiring proof of active efforts to prevent the breakup of Native American families and another requiring expert witness testimony in state actions to remove children from homes based on abuse. *Brackeen v. Haaland*, 994 F. 3d 249 (5th Cir. 2021) (en banc).

https://www.abajournal.com/news/article/in-325-page-opinion-5th-circuit-splits-on-federal-provision-giving-tribes-preference-in-native-american-adoptions#google_vignette

XII. Jurisdiction and Procedure

A. Jurisdiction

McGrew v. McGrew, No. 2019-CA-01487-COA, 2020 WL 6736815 (Miss. Ct. App. Nov. 17, 2020). A chancellor properly found that Mississippi was an inconvenient forum for hearing a divorce and custody action. The wife initially filed for divorce in Mississippi. The parties subsequently moved to California in an attempt to reconcile and start a new life. After several months

there, the mother obtained a restraining order against the father barring him from contact and giving her custody of the children. He subsequently responded to the wife's divorce action in Mississippi. The Mississippi chancellor granted the wife's request to decline jurisdiction based on *forum non conveniens*. The chancellor found that (1) California courts were best situated to address the safety of the family from domestic violence; (2) the children had been living in California for seventeen months and were settled there; (3) the California courts had already heard motions and discovery had begun, while little action had taken place in the Mississippi court; (4) a Mississippi action might cause the children to miss school and the work of a Mississippi guardian ad litem would be made more difficult because of the distance. The parties had also intentionally moved to California, so there was no concern that forum shopping was involved.

B. Pleadings

Stewart v. Stewart, 309 So. 3d 44 (Miss. Ct. App. 2020). The court of appeals rejected a mother's argument that a chancery court lacked jurisdiction because the father's petition for custody modification requested "permanent primary" custody rather than "physical" custody. The rules of civil procedure do not require use of terms of art.

C. Rule 81 summons

Garrison v. Courtney, 304 So. 3d 1129 (Miss. Ct. App. 2020). The court of appeals rejected a father's argument that the court lacked jurisdiction to hear a contempt petition because the summons was deficient. A Rule 81 summons was issued on December 27, noticing a hearing date of January 3, seven days later. The petition for contempt was filed and the husband was served the following day, December 28. The hearing took place on January 4, rather than January 3, as noticed. The husband and his attorney appeared and did not object that service was inadequate. The majority held that, although the hearing was set for six days after the petition was filed rather than seven as required by Rule 81, the husband waived the issue. Furthermore, the actual hearing did not take place until January 4, seven days after he was served, during the trial of the divorce matter. The majority rejected his argument that because the hearing did not take place on January 3, a new Rule 81 summons was required – the motion was in a pending divorce trial, not a matter arising after conclusion of the trial. The motion was heard during the trial of the divorce matter, a hearing to which he had been properly noticed. Four judges dissented on this point, arguing that Rule 81 requires issuance of a new summons if a matter is continued from the date originally set. They agreed, however, that the husband had waived the issue by failure to object at trial.

Wallace v. Wallace, 309 So. 3d 104 (Miss. Ct. App. 2020). A wife waived objections to service of a Rule 81 summons on her attorney under Rule 5 rather than on her, as required by Rule 81. She responded to the motion on the merits without raising the issue of inadequate service of process and participated in the hearing without raising the issue.

Proposal to amend Rule 81. On January 10, 2020, the Supreme Court Advisory Committee on Rules filed a Motion to Amend Rule 81 of the Mississippi Rules of Civil Procedure. The motion includes the following proposals:

- Rule 81(d) should be amended to provide that a counterclaim to a Rule 81 motion is served under Rule 5, not under Rule 81. The court already has jurisdiction over the petitioner so no additional Rule 81 summons is needed.

- Rule 81(d)(4) should be amended to clarify that the defendant in a Rule 81(d) matter should be served with the complaint as well as the summons.

- Rule 81(d)(5) should be amended to clarify that if a party fails to appear at a Rule 81 hearing, no further service of process is required. If a party does appear, all future notices are to be served under Rule 5. The proposal also would change the current procedure for obtaining continuances. It proposes that a continuance may be granted upon a motion to continue a matter to another date and the order need not be signed on the day set for hearing. Notice may be by Rule 5.

- The proposed amendment would clarify that after the court has obtained jurisdiction over the parties in an action, Rule 5 service is sufficient for any temporary matter in a pending action, for cross or counterclaim, and for motion for further proceedings, including contempt of temporary orders.

D. Continuances

Brim-Wright v. Wright, 297 So. 3d 1134 (Miss. Ct. App. 2020). The court of appeals reversed a chancellor's denial of a continuance in a divorce action, holding that the ruling deprived the wife of her ability to present her case, resulting in manifest injustice. The case was tried for one day in April. At that hearing the husband presented his case, calling his wife as an adverse witness. Her counsel chose to defer direct examination of her until her case in chief. The case was set for a second day of hearing in December. On the day set for trial, the wife' counsel informed the court that he had been diagnosed with dementia and accordingly was no longer licensed to practice law. The wife was not in attendance. His request to withdraw was granted but his request for a continuance was denied. The chancellor declined to hear his arguments that the wife was prejudiced by the ruling because he was not licensed to appear as an attorney. The chancellor proceeded with the husband's case in chief, granted him a divorce based on habitual, cruel, and inhuman treatment, and divided the marital assets roughly equally. The court of appeals held that the wife was prejudiced unfairly by denying her a continuance. She was not permitted to testify directly, to present her evidence, or to offer evidence to rebut her husband's case. The court disagreed with the chancellor that the wife's case was fully presented in her testimony on the first day of hearing as an adverse witness.

E. Dismissal for failure to prosecute

Carter v. Spears, 294 So. 3d 1263 (Miss. Ct. App. 2020). A chancellor did not err in dismissing a wife's 2014 contempt petition for failure to prosecute. She took no action for a year, setting a trial date only when threatened with dismissal. She then failed to respond to discovery requests and court orders until a second notice of dismissal was filed a year later, when she again set the matter for trial. She then delayed another year before serving incomplete, unverified responses to discovery. The chancellor found a clear pattern of delay that was unexplained and that prejudiced the defendant because of fading memories regarding dates and payment amounts.

F. Recusal

Hammons v. Hammons, 289 So. 3d 1214 (Miss. 2020). The chancellor to whom a case was initially assigned did not err in recusing himself. During the pendency of the litigation, he was visited in chambers by the father's sister, a former court reporter who worked with him. While nothing inappropriate occurred in their discussion, it was within the judge's discretion to recuse himself to avoid any appearance of impropriety.

Watson v. Watson, 306 So. 3d 800 (Miss. Ct. App. 2020), *cert. denied,* 308 So. 3d 440 (Miss. 2020). The court of appeals rejected a wife's argument that a judge should have recused himself because the wife had filed a complaint against her former attorneys in the action, who were members of the judge's former firm. The judge's first action in the case was to sever the claim against her attorneys to be heard by another judge. Nor was he required to recuse himself because of contentious exchanges between him and the wife, who was also acting as her attorney in the matter.

G. Stipulations

Johnson v. Johnson, 297 So. 3d 342 (Miss. Ct. App. 2020). The court of appeals rejected a husband's argument that a chancellor erred in ordering him to pay $20,000 toward his daughter's college education. The couple agreed to submit the issue of his college support obligation to the court. During the trial, they orally stipulated that his obligation should be $20,000. On appeal, he argued that the oral agreement was unenforceable under the irreconcilable differences divorce statute, which requires a written agreement. The court held that chancellor did not err in accepting the stipulation and entering an order to that effect. The court distinguished an earlier case, *Cook v. Cook,* 725 So. 2d 205 (Miss. 1998), in which a couple submitted issues to the court and then orally submitted an agreement resolving all of the issues but one.

H. Post-trial motions

O'Steen v. O'Steen, 304 So. 3d 697 (Miss. Ct. App. 2020). A chancellor properly denied a husband's motion to set aside a divorce judgment for fraud on the court. On the day of trial, the parties entered a property settlement agree-

ment resolving all issues. The agreement stated that the parties would each keep their own retirement accounts and that they waived all rights to the retirement account of the other. Neither submitted financial statements. The husband petitioned to set aside the judgment under Rule 60(b), claiming that he was unaware of his schoolteacher wife's PERS retirement account. The court of appeals rejected his argument that his wife's failure to submit a financial statement was fraud on the court – the mere failure to file a financial statement does not, in itself, support a finding of fraud. There was no indication that she intentionally concealed the account. The agreement specifically stated that the parties waived their rights to the other's retirement accounts. The court noted that if his argument was accepted, he also committed fraud on the court.

I. Appeals

McChester v. McChester, 300 So. 3d 1035 (Miss. 2020). A pro se litigant's appeal of a divorce judgment was dismissed as untimely. He requested a continuance eight days prior to the scheduled divorce hearing, alleging that he was scheduled for hospitalization on that date. He did not provide documentation to support his request, did not notice the motion prior to trial, and did not follow up with the court prior to trial. The court proceeded in his absence, granted his wife a divorce based on desertion, awarding her the marital home (which she owned prior to the marriage), and awarded him an automobile. Twenty days after the final judgment, he filed a motion for new trial, alleging fraud and that the court erred in denying his request for a continuance. The court treated his motion as one under Rule 60 and denied his request. He filed a notice of appeal 114 days after the divorce judgment and 19 days after the denial of his motion for new trial. The supreme court held that his appeal of the Rule 60 judgment was timely filed, but that the appeal of the divorce judgment was not. While a timely filed Rule 57 motion suspends the time for filing a notice of appeal, his motion was not filed within ten days. The court affirmed the chancellor's denial of his motion, holding that the chancellor acted within her discretion in denying his request for a continuance.

XIII. Attorneys' fees

Oates v. Oates, 291 So. 3d 803 (Miss. Ct. App. 2020). The court of appeals affirmed an award of permanent alimony of $504 a month and lump sum alimony of $2,000 to a wife of thirteen years from a husband with annual income of $33,000 a year. Her expenses were $2,000 a month; his were $2,300 a month. The court also affirmed the chancellor's award of $8,538 in attorneys' fees – the chancellor heard testimony regarding her finances and found that she lacked the resources to pay attorneys' fees.

Alford v. Alford, 298 So. 3d 983 (Miss. 2020). The supreme court affirmed the court of appeals' reversal of an award of $11,000 in attorneys' and expert fees to a wife who received substantial marital assets and was awarded alimony. She failed to present evidence of the amount of her attorneys' fees that

remained owing or that she would be required to liquidate assets to pay that amount.

Krohn v. Krohn, 294 So. 3d 680 (Miss. Ct. App. 2020). A husband argued that he should not have been ordered to pay his wife's attorneys' fees in connection with a finding that he was in contempt, because she was found in contempt for failing to provide him with medical records. The court held that the clean hands doctrine did not bar the fee award – the husband was found in contempt for nonpayment of substantial amounts of support, while she was found in contempt for a minor violation of their agreement. However, the court reversed the award of attorneys' fees for further findings regarding time the wife's attorney spent on the contempt matter and time spent on the modification petition.

Baumann v. Baumann, 304 So. 3d 175 (Miss. Ct. App. 2020). The court of appeals held that a chancellor was within her discretion to deny attorney's fees to a father even though the mother's allegations of sexual abuse were found to be unsubstantiated. The statute requires an award of fees if allegations are found to be "without foundation," which requires an extreme level of conduct.

BELL FAMILY LAW CLE 2021

UPDATE ON ISSUES RELATED TO GUARDIANS AD LITEM AND YOUTH COURT PRACTICE AND PROCEDURES

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I. GUARDIAN AD LITEM APPOINTMENT, ORDERS, AND FEES

A. THE GAL'S DUTIES ARE DEFINED BY THE COURT.

***Hamblin v. Allison*, 305 So. 3d 1255 (Miss. Ct. App. 2020)**

FACTS: Father filed complaint for custody of two children. A little over one year after custody was awarded to children's mother, **mother made allegations that children's paternal grandmother sexually abused one of the children, and father filed complaint for child custody modification.** Following trial, the Chancery Court found that mother was no longer the more fit parent and awarded father custody, granted mother visitation rights, and ordered mother to pay child support. Mother appealed.

HOLDING: The Court of Appeals affirmed, holding that:
(1) The guardian ad litem was not required to make recommendation on child custody at trial;
(2) The absence of child custody recommendation from GAL did not damage mother's case in custody modification trial;
(3) There was no reversible error in chancellor's failure to mention recommendation of GAL that children receive counseling in either her findings or her bench ruling; and
(4) There was no error in allowing reunification therapist to testify.

SIGNIFICANT ISSUES: .

1. THE ORDER OF APPOINTMENT DEFINES THE GAL'S DUTIES - - The Order of Appointment controls the scope of the GAL's duties and the recommendations that the chancery court desires. If the GAL is appointment is mandatory because of allegations of abuse or neglect, the chancellor is required to state on the record the specific reasons that the court relief on, if the GAL's recommendations are rejected.

2. THE GAL IS NOT REQUIRED TO MAKE A RECOMMENDATION AS TO CHILD CUSTODY UNLESS DIRECTED TO DO SO - - Here, the chancery court appointed the GAL to investigate the alleged abuse and neglect matters, and make generalized recommendations concerning those matters. **The GAL did so, and fulfilled her appointed duty when she recommended that the children receive counseling due to the abuse and neglect allegations**. The chancellor did not specifically request that she make a recommendation on custody issues, and the GAL was not required to do so.

3. THE CHANCELLOR IMPLIEDLY REJECTED THE GAL'S RECOMMENDATION - - The trial court failed to include a summary of the GAL's recommendations and qualifications in her "findings of fact and conclusions of law," and "impliedly rejected the GAL's recommendation," but she failed to detail her reasons for

doing so. However, the COA held that even though it is always better to explicitly address a GAL's recommendations and the reasons for rejecting said recommendations, it was **not reversible error in this case because the GAL's recommendation "[had] no bearing on the chancellor's custody determination."**

B. APPORTIONMENT OF GAL FEES

***Carter v. Carter*, ___ So. 3d ___, 2021 WL 344365 (Miss. Ct. App. 2/2/2021)**

FACTS: The divorce decree awarded the **parties joint legal and physical custody** of their children, and provided that the father was allowed to visit his children every weekend. Mother filed a motion to modify the child custody arrangement, alleging father threatened her, and allowed the children to "roam the streets at night" when they were visiting father. The GAL recommended that the father be allowed to continue visitation provided he attended counseling, which essentially recommended **supervised visitation**. The opinion does not indicate whether the chancellor addressed the "material change in circumstances" standard for modification of custody, or the GAL's recommendation for supervised visits. However, the chancellor conducted an **Albright analysis**, found in the mother's favor, and reduced father's visitation to two weekends per month based on the facts and circumstances. Father appealed pro se.

HOLDING: 1. The father's appeal was procedurally barred because he failed to cite any facts or legal authority to support his arguments of error by the trial court.
2. Questions father asked mother in interrogatories were irrelevant as to the issue of whether father put his children in danger, and thus the questions were properly excluded.
3. Chancery court's misstatement that father's stepson voluntarily left his mother's home did not constitute reversible error.
4. Father was required to pay one-half of the guardian ad litem (GAL) fees, which were assessed as court costs.

SIGNIFICANT ISSUES:

1**. FAILURE TO FILE APPELLATE BRIEF** - Father's appeal failed to comply with appellate Rule 28, which procedurally barred his issues on appeal, because he failed to provide the Court with case law and sufficient facts to support his arguments. **Notwithstanding this procedural bar, the Court held that each of his arguments were without merit.** The COA did not discuss the "material change in circumstances" standard that is required for a modification of custody, but apparently deemed the father's threats against the mother and the lack of supervision of the children to be sufficient to

justify modification.

2. GAL RECOMMENDATIONS - The GAL recommended the father continue weekly visitation on the condition that he attend counseling with the children. She essentially suggested that the father's visitation be supervised until counseling was completed.

3. GAL FEES APPORTIONED - The rules of procedure treat guardian ad litem fees as court costs to be awarded against the non-prevailing party. Father was required to evenly split bill with mother for a guardian ad litem (GAL) hearing, where because father was the non-prevailing party, the chancery court was empowered to assess father a portion of the GAL fees, and father admitted that he was the party who requested the hearing.

C. ONCE A MANDATORY GAL IS APPOINTED TO INVESTIGATE ALLEGATIONS OF ABUSE OR NEGLECT, THE CHANCELLOR MUST STATE SPECIFIC REASONS IF THE GAL'S RECOMMENDATIONS ARE REJECTED.

***Barber v. Barber*, 288 So.3d 325 (Miss. 2020)**

FACTS: In the divorce proceeding, the Chancery Court **granted father's motion to limit the testimony of guardian ad litem, and to exclude guardian ad litem report from evidence**, and the court awarded father custody of parties' minor children. Mother appealed.

HOLDING: The Supreme Court reversed and remanded, holding that the chancellor's error in **failing to address report and recommendations of mandatory guardian ad litem, duly appointed to investigate allegations of abuse against ex-husband, required reversal of decision** to award ex-husband custody of parties' minor children.

SIGNIFICANT ISSUES:

1. THE DUTIES OF THE GAL SHOULD BE DEFINED. "The Court encourages chancellors to set forth clearly the reasons a guardian ad litem appointment has been made, and the role the guardian ad litem is expected to play in the proceedings."

2. After the chancery court appointed a GAL, the court later found the allegations were unsubstantiated and received the GAL report without reviewing it. Justice Ishee makes the point that the chancellor appointed the GAL out of an abundance of caution, not because he was required to.

3. The Court of Appeals concluded that **once the GAL appointment was made pursuant to Miss. Code Ann. § 93-5-23, the chancellor was required at least to consider the guardian ad litem's report and recommendations.** Accordingly, reversal

of the judgment and remand of the case was necessary for the chancellor to make findings of fact and conclusions of law taking into consideration the guardian ad litem's report and recommendations.

D. CHANCERY COURT HAS DISCRETION TO DETERMINE WHETHER ALLEGATIONS OF ABUSE OR NEGLECT ARE SUFFICIENT TO WARRANT THE MANDATORY APPOINTMENT OF A GAL.

***Monk v. Fountain*, 296 So.3d 761 (Miss. Ct. App. 2020)**

FACTS: Aunt filed petition for sole legal and physical custody, filed motion to appoint mandatory guardian ad litem (GAL), and requested visitation rights with respect to parents' child. Aunt alleged that child had been abused and neglected while in parents' custody. Parents counterclaimed for a restraining order. The Chancery Court denied aunt's petition for custody, did not appoint GAL, and held that aunt had no right to visitation. Aunt appealed.

HOLDING: The Court of Appeals affirmed, holding that:
1. Aunt did not disclose specific allegations of abuse or neglect, and thus chancellor was not required to appoint GAL, and
2. Aunt never assumed status and obligations of parent, and thus was not entitled to visitation rights under in loco parentis doctrine.

SIGNIFICANT ISSUE:
The chancery court is not required to accept parties mere allegations of abuse or neglect when deciding whether appointment of a GAL is required under Miss. Code Ann. § 93-5-23. **The COA stated: The chancellor has "discretion in determining whether there is a legitimate issue of neglect or abuse even in those situations where one party elects to make such an assertion in the pleadings." ... And the chancellor is not required to appoint a GAL "based merely on an unsubstantiated assertion found in the pleadings of one of the parties."**

***See Carter v. Carter*, 204 So.3d 747, 760–61 (¶ 59) (Miss. 2016):**
The statute requires the appointment of a guardian ad litem only in specific situations. Section 93–5–23 states that "when a charge of abuse and/or neglect arises in the course of a custody action ... court shall appoint a guardian ad litem for the child as provided under Section 43–21–121 ...." Section 43–21–121(1)(e) likewise states that "the youth court shall appoint a guardian ad litem for the child ...[i]n every case involving a[ ] ... neglected child which results in a judicial proceeding ...." Miss. Code Ann. 43–21–121(1)(e) (Rev. 2015) (emphasis added). **In determining whether the child is neglected, a chancellor may, but is not required to, refer to the definition of "neglected child" found in Section 43–21–105(1) of the Mississippi Code.**

E. THE CHANCELLOR IS NOT REQUIRED TO EXPLAIN WHY THE RECOMMENDATIONS OF A "DISCRETIONARY GAL" WERE NOT ADOPTED.

***Domke v. Domke*, 305 So. 3d 1233 (Miss. Ct. App. 2020)**

FACTS: The **parties had joint physical and legal custody** of their daughter. Father received physical custody of the child when he was home from his offshore work, and Mother received custody when father was at work. Custody alternated every twenty-one days. **The agreement also provided that if Father was no longer employed offshore, custody would alternate every fourteen days.**

Mother filed a petition for modification of custody and for contempt. Father counterclaimed for modification of custody and contempt. The Chancery Court **denied both parties' requests for modification of child custody, but modified parties' custodial schedule**, and denied Mother's contempt claim. Father moved for clarification of the judgment, and the Chancery Court granted Father's request for more specific terms. Mother appealed.

HOLDING: The Court of Appeals affirmed, holding that:
1. Chancellor determined that no material change occurred to warrant modification of child custody;
2. Substantial evidence supported chancellor's modification of the custodial schedule for visitation;
3. Chancellor's decision not to hold ex-husband in contempt was not manifestly wrong;
4. Ex-wife was not entitled to a monetary judgment and attorney's fees;
5. Ex-husband filed his motion for relief from judgment under Rule 59, Miss.R.Civ.P. within a reasonable time; and
6. Chancellor did not abuse his discretion in granting ex-husband's motion for relief from judgment.

SIGNIFICANT ISSUES:

1. THE GAL WAS A DISCRETIONARY APPOINTMENT BECAUSE THERE WERE NO ALLEGATIONS OF ABUSE OR NEGLECT, AND THEREFORE, THE CHANCELLOR DID NOT HAVE TO JUSTIFY WHY HE DISAGREED WITH THE GAL ON THE CUSTODY SCHEDULE MODIFICATION.
Although the chancellor was under no obligation to follow the GAL's custody recommendation, **he still provided a sufficient explanation** as to why he reached a different conclusion than the GAL. *See Porter v. Porter*, 23 So. 3d 438, 449 (28) (Miss.

2009).

2. MODIFICATION OF VISITATION UNDER JOINT PHYSICAL CUSTODY ARRANGEMENT.

The **original schedule essentially provided the parents with relatively equal amounts of time with the child**. The chancellor found that there had not been a material change that adversely affected the child, but that the current custody arrangement had to be modified because it was unworkable due to the geographic relocation of both parties.

The chancellor held that **Father would have the child during the school year and for two weeks during the summer while Mother would have the child during the remaining eight weeks of summer and the entirety of Thanksgiving and spring break**. The parties were to divide the time over the Christmas break.

Mother contended that **"the end result" of the chancellor's judgment still amounted to an award of physical custody to Father, while she essentially received visitation**. The COA rejected that argument and held that substantial credible evidence supported the chancellor's determination that no material change adverse to the had occurred, and that joint physical custody continued to serve the child's best interests.

3. FATHER'S POST-TRIAL MOTION WAS TIMELY UNDER RULE 59, MRCP.

Father's motion, first responded to Mother's post-trial motion and then moved "for clarification of the parties' continuing financial obligation" regarding certain expenses for the child, and "for clarification or correction of the judgment regarding travel for long-distance visitation." Although the Father did not specifically cite either Rule 59 or Rule 60, the COA held that the chancellor properly granted his requested relief under that subsection.

II. GUARDIAN AD LITEM DUTIES

A. FAILURE OF GAL TO INTERVIEW THREE YEAR OLD CHILD WAS NOT ERROR.

***Interest of J.K.*, 304 So. 3d 184 (Miss. Ct. App. 2020)**

FACTS: Department of Human Services filed petition for termination of parental rights **based on parent's habitual drug use, failure to complete drug treatment, and neglect, as well as father's incarceration for majority of child's life**. The County Court Youth Court adopted guardian ad litem's recommendation in favor of termination of parental rights, and granted the petition. Father appealed.

HOLDING: The Court of Appeals affirmed, holding:
1. Service of summons was proper, and father was adequately informed of his right to counsel;

2. GAL's alleged failure to interview the father or the child independently did not warrant reversal;
3. Evidence was sufficient to establish that father had failed to DHS Service Plan, which included drug and alcohol treatment, and that father was unwilling to provide reasonably necessary food, clothing, shelter, or medical care for child; and had failed to exercise reasonable visitation or communication with child;
4. The County Court did not commit manifest error in determining that father's absence and lack of communication with child due to incarceration had resulted in substantial erosion of parent-child relationship.

SIGNIFICANT ISSUES:

1. THE GAL FAILED TO INTERVIEW THE CHILD.

There was no error in the GAL failing to interview the minor child, who was three years old at the time of the hearing. Prior case law has held that the GAL's failure to conduct an interview with the child warranted reversal, because the court determined that the GAL could not be fully informed as to child's best interests without an interview. M.J.S.H.S. v. Yalobusha Cnty. DHS, 782 So. 2d 737, 741 (¶16) (Miss. 2001). However, in this case the Youth Court concluded that the GAL submitted a comprehensive report which included an extensive and detailed case history of the court hearings and all visits/communications between the child, natural parents, DHS, and the foster parents. In addition, **the parent's attorney failed to raise the issue of the sufficiency of the GAL's report at trial.**

2. PRACTICE NOTE:

The father's incarceration was not the sole basis for TPR in this case. The substantial erosion of the father's relationship with the child was caused by the father's conduct before he was incarcerated. Father was afforded the opportunity to correct his drug-related behavior, but he failed to do so.

B. THE GAL'S FAILURE TO CONTACT OR INTERVIEW THE FATHER WAS NOT ERROR

***Chitwood v. Stone County DCPS*, ___ So.3d ___, 2020 WL 2126713 (Miss. Ct. App. 5/5/2020)**

FACTS: County DCPS petitioned for termination of father's parental rights. **The Father made no effort to contact the GAL**. The Chancery Court entered an order terminating parental rights. Father appealed.

HOLDING: The Court of Appeals affirmed, holding that:
1. Failure of guardian ad litem (GAL) to personally interview father did not breach GALs duty to protect interests of minor child.

2. Clear and convincing evidence supported the chancery court's finding of more than one statutory ground for termination of father's parental rights.

SIGNIFICANT ISSUES:
1. The COA held that the GAL's failure to personally interview father did not breach the GAL's duty to protect the minor child's interests.

C. THE GAL'S FAILURE TO VISIT THE MOTHER'S HOME IN FLORIDA WAS NOT ERROR.

***Roberts v. Conner*, ___ So.3d ___, 2021 WL 2429490 (Miss. Ct. App. June 15, 2021)**

FACTS: After a divorce action, father had custody of his daughter, but he died unexpectedly. After father's death, his close friends, the Conners filed a petition for emergency temporary custody which was contested by the child's biological mother. Father's mother joined the Conners in asking the chancery court to award custody of the child to the Conners, arguing that the biological mother was unfit to have custody because she had an unstable living environment. The mother traveled with her husband for his employment.

The trial court appointed a guardian ad litem, but the GAL did not visit the mother's home in Florida. The mother filed a motion for continuance and specifically requested that the GAL investigate her living arrangements. However, the trial court denied the motion. Prior to the trial, the mother's Florida residence incurred significant damage due to a hurricane, and mother and her husband temporarily moved to Mississippi. However, she did not provide the trial court nor the GAL the address for her Mississippi rental home. The trial court found that the Conners overcame the natural parent presumption and awarded custody of the child to the Conners. Crystal appealed.

HOLDING: (1) Mother was not prejudiced by the chancery court denial of her motion for a continuance.
(2) The chancery court was provided overwhelming evidence of neglect and evidence of Mother's unfitness in four areas: educational neglect; medical neglect; failure to provide the child with appropriate housing; and the mother's inability to provide for the child's basic needs. This was sufficient to rebut the natural parent presumption, and to support the chancery court's conclusion that mother was unfit.
(3) It was appropriate for the chancery court to consider evidence prior to a divorce for the limited purpose of determining whether Laura had been educationally neglected. The chancery court was not barred by the

doctrine of res judicata from considering this evidence for the limited purpose of determining the best interest of the child.
(4) Because the chancellor relied on the testimony of multiple witnesses and substantial evidence presented at trial in rendering his opinion on custody, the chancery court did not base its findings on mistaken facts or uncorroborated hearsay.
(5) Because there was no evidence of suitable housing in Florida, and because mother had family living in Mississippi with whom she could stay when exercising visitation, the chancery court did not err in imposing geographical restrictions on visitation.
(6) Because GAL fees are considered court costs, the chancery court had authority to apportion the GAL fees between mother and the Conners. Therefore, the Court of Appeals affirmed the judgment of the Calhoun County Chancery Court.

SIGNIFICANT ISSUES:

1. VISITATION IS WITHIN THE CHANCELLOR'S DISCRETION
The terms and conditions for Visitation are matters within the chancellor's sound discretion, and the chancellor is charged with fashioning a visitation schedule that is in the best interests of the child. In this case the COA held that the chancellor properly imposed geographic limitations on the mother's visitation rights.

2. RES JUDICATA DID NOT BAR CONSIDERATION OF CHILD'S SCHOOL RECORDS FROM THE TIME PRIOR TO THE DIVORCE JUDGMENT.
The usual rule is that res judicata prevents a trial court from considering information that was or could have been presented at a prior hearing that resulted in a Final Order. See, e.g., Martin v. Stevenson, 139 So. 3d 740 (Miss. Ct. App. 2014) (noting application of res judicata to divorce proceedings bars domestic violence claims that could have been brought based on pre-divorce conduct, but allows claims supported by evidence of post-divorce conduct). Mother argued that in making the custody determination in this case, the doctrine of res judicata prevented the chancery court's consideration of the child's school records and all other matters the preceded the parent's divorce judgment and the initial custody determination. However, the COA held that the chancery court properly considered evidence of events that occurred prior to a divorce, for the limited purpose of determining whether the minor child had been "educationally neglected."

The COA held: "In considering modification of child custody, the chancellor must allow full and complete proof with respect to all circumstances and conditions directly or indirectly related to the care and custody of the children, existing at the time of the original divorce decree and at the time of the modification hearing."

"When the chancellor's chief concern is to determine the ‘best interest of the child' when faced with child custody issues, limiting otherwise relevant evidence only because it was

already considered by a previous court in a previous proceeding could potentially frustrate the very goal the court is trying to accomplish - - determining the best interest of the child.

3. HEARSAY

The mother argued that the GAL's report was replete with "rank hearsay" and therefore should not be have been considered as substantive evidence. **However, the COA held that the chancellor relied on the testimony of multiple witnesses and substantial evidence presented at trial in rendering his opinion on custody, and not on hearsay in the GAL Report.**

4. TEMPORARY EMERGENCY CUSTODY

The COA held that the chancellor properly granted a Rule 65 TRO without notice that awarded temporary emergency custody of the child to the petitioners. The COA explained that chancellors have broad discretion in considering requests for such temporary orders, and "the law does not protect parental rights to the detriment of the best interest of the child."

5. REBUTTING THE NATURAL PARENT PRESUMPTION

The chancellor held that the natural parent presumption was rebutted due to the mother being "unfit" in four respects: (1) educational neglect; (2) medical neglect; (3) failure to provide the child with appropriate housing; and (4) the mother's inability to provide for the child's basic needs. The chancellor found: "there's been a shocking amount of testimony and other evidence presented to show medical and educational neglect by [mother] and that [she] has made poor life decisions affecting her child. ... Furthermore, [mother] is otherwise unfit as she has failed to provide [the child] with the care that's necessary for her health, morals and well-being. [mother] has no permanent residence that's appropriate for the child. ... [mother] has demonstrated a lack of thoughtful maturity and responsibility requisite to the proper upbringing of the child, rendering her quite unfit to be granted physical custody of [the child].

6. GAL FEES

The COA held that the chancellor properly assessed one-half of the GAL attorney's fees to each of the parties.

D. RESPONSIBILITY FOR ABUSE CAN BE IMPUTED TO THE PARENT WHO HAD CUSTODY OF THE CHILD AT THE TIME THE INJURIES WERE INFLICTED.

***Coulter v. Dunn*, 312 So. 3d 713 (Miss. 2021)**

FACTS: Paternal grandparents of child, who had previously been adjudged to be neglected, filed a complaint for termination of parental rights against child's mother and father. The Chancery Court terminated mother's and

father's parental rights. Mother appealed.

HOLDING: The MSSC affirmed, holding that the chancery court's findings of fact and conclusion of law were supported by the evidence and case law.

SIGNIFICANT ISSUES:

1. ABUSE AS GROUNDS FOR TPR

The chancery court found clear and convincing evidence that the baby was abused during the nine weeks between birth and when the child was taken to the hospital because of traumatic injuries. The chancery court relied on testimony from Dr. Scott Benton, who was a treating physician, along with other treating physicians. **He testified that any repetition of the behavior that caused the "high-force injuries" could prove fatal.** The chancellor found that the baby was the victim of abuse.

2. IMPUTED RESPONSIBILITY FOR ABUSE BASED ON PHYSICAL CUSTODY AT THE TIME OF THE INJURY

The chancellor also found that the **Mother was the custodial parent of the baby at the time of the most significant abuse, the hip fracture**. Mother testified that she left the baby with multiple people during first weeks after birth. But she also testified that she never left the baby alone during the week leading up to the hospital admission, which is when Dr. Benton diagnosed the hip fracture.

The chancery court held that **our law allows a fact-finder to infer responsibility for abuse from circumstantial evidence, such as an inference that the individuals who had custody of a child at the time the abuse occurred bear responsibility for the abuse**. See Aldridge v. State, 398 So. 2d 1308, 1310-11 (Miss. 1981). The chancellor found clear and convincing evidence that Coulter had custody of the baby at the time abuse occurred. As a matter of law, the chancellor imputed responsibility for the abuse to Coulter.

3. REUNIFICATION WITH MOTHER WAS UNDESIRABLE

The chancellor further found that reunification with Coulter was undesirable and would be against the best interests of the child. The court specifically noted that the Mother provided very little in the way of food, clothing, shelter, medical care, or other support to the child despite claiming the child as a full-time dependent on her tax returns. The chancellor terminated Coulter's parental rights based on the guardian ad litem's recommendation.

E. CHANCERY COURTS ARE NOT REQUIRED TO FOLLOW THE YOUTH COURT RULES

Davis v. Davis, **____ So. 3d ____, 2021 WL 672164 (Miss. Ct. App. 2/22/2021)**

FACTS: Mother and father, who agreed to joint physical and legal custody of their daughter in divorce proceedings, filed competing complaints for modification of custody. After a trial, the Chancery Court granted former husband's request for modification and awarded him custody. Former wife appealed.

The chancellor found that mother had falsely accused father of abusing the daughter, and had attempted to interfere with father's parental rights by pursuing paternity testing in an effort to show that another man was the daughter's biological father. Based on those findings, the chancellor found that there had been a material change in circumstances that adversely affected the child. The chancellor also found that a modification of custody would be in the child's best interest. Finally, the chancellor ordered mother to reimburse father for attorney's fees he incurred in defending against the abuse allegations based on **Miss. Code Ann. 93-5-24(9)(c) and Miss. Code Ann. § 93-5-23 which provide that attorney's fees "shall be awarded" if a party makes "completely unfounded" allegations of domestic violence or sexual abuse.** Mother appealed.

HOLDING: The Court of Appeals of Mississippi **reversed and rendered the modification of custody** because the father failed to prove a material, adverse change in circumstances. The Court also affirmed the court's denial of the mother's request for modification of custody. Therefore, the parties returned to their original joint custody arrangement as set forth in the original divorce decree. The Court also reversed and rendered the award of attorney's fees to the father, because the mother had a reasonable basis to pursue the claim of sexual abuse.

SIGNIFICANT ISSUES:

1. CHILD'S DISCLOSURES IN FORENSIC INTERVIEW WERE REJECTED BY THE TRIAL COURT.

Although the chancellor found that mother did not prove her allegation of abuse, there is **no evidence that she concocted the allegation or coached the child** to make the disclosure about the abuse. Rather, the child disclosed to mother that father had abused her, and **the child later repeated the allegation during a forensic interview**.

The DCPS child-family protection specialist testified that she initially believed that the child had been abused based on the consistency of her disclosures of abuse, and

therefore **DCPS "substantiated" the allegation of abuse**. However, the forensic **interviewer ultimately concluded that the child had not been abused**, even though her responses to interview questions were consistent with those of a a child who had been abused. Under those circumstances, the chancellor concluded that the minor child had not been abused.

2. AWARD TO FATHER FOR ATTORNEY FEES INCURRED IN DEFENDING THE SEXUAL ABUSE ALLEGATIONS THAT THE COURT REJECTED WAS REVERSED BECAUSE THE MOTHER HAD A RATIONAL BASIS FOR ASSERTING THE CLAIM.

The COA reversed the chancellor's award of attorney's fees against the mother because **"it cannot be said that the mother's allegation of abuse was completely unfounded."** Under the facts and circumstances presented, the record does not support the chancellor's finding that there was "no rational evidence" to support the mother's allegation of abuse.

3. CHANCERY COURT DID NOT ERR BY FAILING TO FOLLOW YOUTH COURT RULES AND PROCEDURES.

Rule 2(a)(2), URYCP provides that the Youth Court rules apply in **"(2) any chancery court proceeding when hearing, pursuant to section 93-11-65 of the Mississippi Code, an allegation of abuse or neglect of a child that first arises in the course of a custody or maintenance action** ...." Mother argued that the chancellor should have followed the Uniform Rules of Youth Court Practice. **The COA held that the Youth Court Rules do apply to a custody dispute in chancery court in which the court elects to hear and determine an allegation of abuse that arises during the case**. U.R.Y.C.P. 2(a)(2). However, the Mother referenced only a few specific Youth Court Rules, and she did not identify any way in which she was prejudiced by the chancellor's alleged failure to follow any of those rules. Given that the case was reversed on other grounds, the COA held that this sub-argument required no further discussion.

F. DEADLINE FOR CHALLENGING THE GAL'S QUALIFICATIONS AS AN EXPERT WITNESS.

***Matter of Adoption of M.R.H. v. S.L.P.*, ___ So.3d ___, 2020 WL 5793024 (Miss. Ct. App. 9/29/2020)**

FACTS: Mother filed a petition for adoption and termination of father's parental rights so that mother's husband could adopt child. The Chancery Court, terminated father's parental rights and entered a final decree of adoption. Father appealed.

HOLDING: The Court of Appeals affirmed, holding:
1. Father's prior conviction for child exploitation served as a legal basis for termination of his parental rights;
2. Father's argument that chancery court erred in considering hearsay from

guardian ad litem report to support termination of parental rights was procedurally barred; and
3. Clear and convincing evidence supported finding that father failed to exercise reasonable visitation or communication with child, supporting termination of parental rights.

SIGNIFICANT ISSUES:

1. THE ORDER OF APPOINTMENT SET A DEADLINE FOR CHALLENGING THE QUALIFICATIONS OF THE GAL.
The father's objected to the appointment of the GAL and the recognition of the GAL as an expert witness. However, the **Order of Appointment provided: "... any objections to the GAL's appointment or qualifications must be filed within thirty days of the order." The father did not timely raise any objections within that time frame**. Therefore, the COA held that the father's argument was procedurally barred.

2. GAL WAS APPOINTED AS AN EXPERT WITNESS, AND COULD PROPERLY CONSIDER HEARSAY IN THE GAL REPORT IN FORMULATING OPINIONS AND RECOMMENDATIONS.
At the hearing, the father objected to the introduction of the GAL's report, arguing that there was "hearsay" in the report **such as the child's mental health records and school records.** The COA noted that the Order of Appointment provided stated that "[t]o fulfill her duties, the [GAL] shall have immediate access to the minor child in this case, as well as access to all otherwise privileged or confidential information regarding the minor child, **including medical records and school records**." In the order, the court also recognized the GAL as an expert witness under Mississippi Rule of Evidence 706. The court further stated that "the opinions and recommendations offered by the [GAL], and the factual basis for these opinions derived in the course of investigation, shall be governed by [Mississippi Rules of Evidence 702, 703, 803(6), 803(8), and 803(24)-(25)]." Under these circumstances, **the COA held that the Order of Appointment clearly allowed the GAL to consider those records in formulating her opinion.**

3. TPR WAS PROPERLY BASED ON FATHER'S PRIOR CONVICTION FOR EXPLOITATION OF ANOTHER MINOR.

Father argued that even though he was convicted of child exploitation under Miss. Code Ann. § 97-5-33, this did not involve a live child under the age of 18, but rather, a law enforcement officer who was posing as a child online. Therefore, father argued that this did not comply with Miss. Code Ann. § 93-15-103(b), because there was no evidence that the crime he committed involved a real child. As a result, the chancery court erred in terminating father's parental rights pursuant to section 93-15-121(h)(i)(4), which allows for termination of parental rights if a parent has been convicted of exploitation of a child under sections 97-5-31 through 97-5-37.

The COA rejected the father's argument, and held that there is no question that J.H. was convicted under section 97-5-33. "It is inconsequential whether J.H. committed

that crime with a person under the age of eighteen or a law enforcement officer posing as a person under the age of eighteen because either may result in a conviction under section 97-5-33. His intent was nevertheless present."

G. APPOINTMENT OF A GAL IS NOT REQUIRED FOR TEMPORARY VISITATION ISSUES UNDER A REQUEST FOR A DOMESTIC VIOLENCE RESTRAINING ORDER, WHERE THERE WAS NO REQUEST FOR A MODIFICATION OF CUSTODY OR VISITATION OF THE EXISTING CUSTODY ORDER UNDER MISS. CODE ANN. § 93-5-23.

***Barton v. Barton*, 306 So. 3d 682 (Miss. 2020)**

FACTS: Parties agreed to an ID divorce, with father only having supervised visitation. Father then brought petition for contempt and modification, which the chancellor granted, holding mother in contempt for interfering with visitation, and holding that a material change in circumstances had occurred, and that supervised visitation was not working, so the supervised visitation restriction was removed, and a set schedule was established.

Mother obtained a thirty day ex parte domestic abuse protection order against the father in justice court. She then immediately filed an ex parte application in chancery court based on allegations that father had threatened to kill her and had touched the child inappropriately. The mother did not file for modification of the custody order, but asked that father's visitation be suspended and that a guardian ad litem be appointed to investigate the allegations. The chancellor granted the ex parte application for a TRO, but at the hearing on the merits that was conducted a few days later, the trial court rejected the mother's claims and held that a protective order was not warranted.

The child's counselor testified as an expert witness and stated that the child had disclosed inappropriate touching by the father, but the counselor did not report this to DCPS, because she concluded that this was not intended by the father to be "sexual contact" with the child. However, the counselor diagnosed child with PTSD and opined that the child was very anxious about visits with the father.

The chancery court dissolved the domestic violence protective order, after concluding that the mother's allegations of physical and emotional abuse by the father, and inappropriate touching of their minor child were without merit. Mother filed interlocutory appeal, but the MSSC concluded that the trial court has entered a "final order," and therefore, the Court directed that the case proceed as an ordinary appeal.

HOLDING: The MSSC affirmed, holding:
(1) Chancery Court's decision not to enter a final domestic violence protection order was supported by substantial evidence.
(2) Miss. Code Ann. § 93-5-23, which requires the appointment of a guardian ad litem in custody proceedings where abuse or neglect is alleged, did not apply in this case, because the mother only sought a domestic violence protective order, and the temporary suspension of the father's visitation rights.
(3) The **mother's petition failed to ask for a final domestic-abuse protection order under Miss. Code Ann. §93-21-15(2)(a), and only asked for a temporary suspension of father's visitation**, and the appointment of a guardian ad litem to investigate the allegations. (¶8)
(4) The trial court "cannot be put in error on a matter which was not presented to [it] for decision," and mother never sought a final domestic violence protection order. (¶9)
(5) The chancellor was not required to appoint a GAL under MCA as obligated to appoint a guardian ad litem under Miss. Code Ann. § 93-5-23, which only requires the appointment of a GAL in "custody proceedings." Custody was not at issue in this case. Mother testified that she only "sought a temporary suspension of visitation and a temporary no-contact order." (¶10)

SIGNIFICANT ISSUES:

1. DOMESTIC VIOLENCE PETITION
The MSSC found that the mother only asked for temporary suspension of the father's visitation, and did not ask for a permanent domestic violence protective order. The request for temporary relief was denied. **The Petition did not include a Motion for Modification of Custody/Visitation rights under Miss. Code Ann. § 93-5-24, and therefore, the chancellor was not statutorily required to appoint a GAL under Miss. Code Ann. § 93-5-23.** The Court stated: "¶11. What was before the chancery court was a de novo proceeding seeking a temporary suspension of visitation and the appointment of a guardian ad litem in a proceeding not involving custody."

2. Justice Beam noted in her concurring opinion that the request for a domestic violence protective order **necessarily implicated "custody issues" concerning the time that the child would be in the father's care for his periods on visitation**. This is consistent with our custody statute, Miss. Code Ann. § 93-5-24(5)(b), which provides: **"For the purposes of this section, 'physical custody' means those periods of time in which a child resides with or is under the care and supervision of one (1) of the parents."** Our custody statute does not use the term "visitation" in describing the periods of time that a child is with the parent who does not have the child the majority of the time. However, Justice Beam noted that child protection is important for such visits.

3. PRACTICE NOTE: If a domestic violence protective order is sought against a parent who has custody or visitation rights with a child, the Petition should also include a request for modification of the custody order concerning the perpetrator's custody/visitation rights based on the allegations. This would bring § 93-5-23 into play.

H. THE GAL MAY FILE A MOTION TO HOLD A PARTY IN CONTEMPT FOR FAILING TO COOPERATE IN THE INVESTIGATION.

***Williams v. Williams*, 309 So.3d 560 (Miss. Ct. App. 2020)**

FACTS: Wife filed complaint for divorce on ground of habitual cruel and inhuman treatment. Husband counterclaimed requesting custody of couple's minor children. The Chancery Court entered judgment granting wife divorce and awarding wife sole legal and physical custody of parties' children. Husband appealed.

HOLDING: The Court of Appeals affirmed, holding that the evidence supported grant of divorce to wife on grounds of habitual cruel and inhuman treatment.

SIGNIFICANT ISSUES:

1. FAILURE TO COOPERATE WITH THE GAL INVESTIGATION AND THREATS AGAINST THE GAL.

The father refused to cooperate in the GAL's investigation, and repeatedly threatened and harassed the GAL, the guardian ad litem's family, the wife's former counsel, and others involved in the case. At one point the guardian ad litem requested to be discharged due to fears for his and his family's safety. The father also refused to allow the guardian ad litem to meet with the children alone, and refused to have the children psychologically evaluated. He also openly discussed the litigation and his hatred for the mother in front of the children, used racial slurs to describe the chancellor, and made more threats against the guardian ad litem. **The GAL filed several motions to have the father held in contempt, and the father was incarcerated on at least three occasions.** The chancellor placed the children in the sole custody of the mother, and the father was not permitted to contact the children without approval by the counselor and the guardian ad litem.

2. HEARSAY IN THE GAL REPORT.

Father also alleged the chancery court improperly relied on the hearsay contained in the GAL report. However, the COA held that father failed to preserve these issues for appeal, and therefore, these claims were procedurally barred.

I. THE GAL BROUGHT ACTION AND PERFECTED APPEAL FOR CHILDREN IN REGARD TO CLAIMS FOR MISAPPROPRIATION OF LIFE INSURANCE PROCEEDS BY MOTHER/GUARDIAN.

***Samson v. Unum Life Insurance Co.*, 300 So.3d 930 (Miss. 2020)**

FACTS: Guardian ad litem for minor children who were life insurance beneficiaries brought action against life insurer alleging negligence and breach of contract arising from the **misappropriation of life insurance proceeds by mother who had been appointed guardian over children's estates** following death of father, who was the insured. The Circuit Court granted summary judgment for insurer. **Guardian ad litem appealed.**

HOLDING: **In a case of first impression,** the Supreme Court reversed, holding that:
1. Life insurer owed a general duty of care to properly deliver guardianship funds for children, and
2. Genuine issue of material fact existed as to insurer's potential liability in negligence for not abiding by guardianship order's instruction on payment.

SIGNIFICANT ISSUES:

1. While the GAL was at the center of the appeal, there was no dispute or legal discussion as to the role of the GAL. The case mentioned the appointment of the GAL because the mother had misappropriated funds meant for her children, and the GAL was appointed to seek recovery of those funds.

II. YOUTH COURT

A. "ANTICIPATORY NEGLECT" CAN BE IMPUTED TO A PARENT BASED ON PAST HISTORY WITH OTHER CHILDREN.

***Interest of K.M. v. Jackson County Youth Court*, ___ So.3d ___, 2020 WL 7056087 (Miss. Ct. App. 12/1/2020)**

FACTS: The State filed a petition to take a newborn infant into custody under the "theory of anticipatory neglect," based on the mother's history of abusing and neglecting two older children. **Both the GAL and the Prosecutor requested "a bypass of reasonable efforts toward reunification" based on the Mother's history.** The prosecutor filed a petition alleging that K.M. was an abused and neglected child based upon the facts surrounding K.M.'s siblings. Mother denied the allegaions, and after a full evidentiary hearing, the Youth Court **adjudicated the newborn infant "as an abused and neglected child based upon the theory of anticipatory neglect**," **based on the mother's prior history concerning two other children**.

Therefore, the Court found that reunification efforts were not necessary. Mother appealed.

HOLDING: The COA affirmed, holding that:
(1) "Anticipatory neglect" is recognized as a valid theory allowing the Youth Court to take a child into custody.
(2) The evidence was sufficient to support finding of **aggravated circumstances** which was the justification to bypass reunification efforts between mother and infant.

SIGNIFICANT ISSUES:

1. ANTICIPATORY NEGLECT BASED ON FINDINGS CONCERNING OTHER CHILDREN - Based upon the prior finding that the child's two siblings had been abused and neglected by the mother, the COA held that the youth court properly concluded that K.M. was a neglected and abused child under the doctrine of anticipatory neglect. The COA had previously recognized **"anticipatory neglect"** as a valid doctrine in the following cases:

In re N.M. v. Miss. DHS, 215 So. 3d 1007, 1013 (¶ 15) (Miss. Ct. App. 2017)
T.T. v. Harrison County, 90 So. 3d 1283, 1287 (¶ 20) (Miss. Ct. App. 2012)
In re E.S., 567 So. 2d 848, 850-51 (Miss. 1990)

2. BYPASSING REUNIFICATION EFFORTS IN YOUTH COURT - If the youth court finds **aggravated circumstances** based on the neglect and abuse of a child's siblings, reunification efforts with the parent are not necessary. Miss. Code Ann. § 43-21-603(7)(c) & Miss. Code Ann. § 43-21-609(g).

3. Miss. Code Ann. § 43-21-603 (conduct of YC hearing and disposition order):
... (5) If the child has been adjudicated a neglected child or an abused child, **before entering a disposition order, the youth court shall consider, among others, the following relevant factors:**

(a) The child's physical and mental conditions;
(b) The child's need of assistance;
(c) The manner in which the parent, guardian or custodian participated in, tolerated or condoned the abuse, neglect or abandonment of the child;
(d) The ability of a child's parent, guardian or custodian to provide proper supervision and care of a child; and ...

... (7) If the youth court orders that the [child be placed in DCPS custody] ... the youth court shall find and the disposition order shall recite that:

(a) (i) Reasonable efforts have been made to maintain the child within his own home, but that the circumstances warrant his removal and there is no reasonable alternative to custody; or
(ii) **The circumstances are of such an emergency nature that no reasonable efforts have been made to maintain the child within his**

own home, and that there is no reasonable alternative to custody; and

(b) That the effect of the continuation of the child's residence within his own home would be contrary to the welfare of the child and that the placement of the child in foster care is in the best interests of the child; or

(c) Reasonable efforts to maintain the child within his home shall not be required if the court determines that:

(i) The parent has subjected the child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse and sexual abuse; or

(ii) The parent has been convicted of murder of another child of that parent, voluntary manslaughter of another child of that parent, aided or abetted, attempted, conspired or solicited to commit that murder or voluntary manslaughter, or a felony assault that results in the serious bodily injury to the surviving child or another child of that parent; or

(iii) The parental rights of the parent to a sibling have been terminated involuntarily; and

(iv) That the effect of the continuation of the child's residence within his own home would be contrary to the welfare of the child and that placement of the child in foster care is in the best interests of the child.

Miss. Code Ann. § 43-21-609 (Authorized dispositions for neglect or abuse)

... (g) If the court makes a finding that custody is necessary ... the order also must state:

(i) **That reasonable efforts have been made** to maintain the child within his or her own home, but that the circumstances warrant his or her removal, and there is no reasonable alternative to custody; or

(ii) The circumstances are of such an emergency nature that no reasonable efforts have been made to maintain the child within his or her own home, and there is no reasonable alternative to custody; or

(iii) If the court makes a finding in accordance with subparagraph (ii) of this paragraph, the court shall order that reasonable efforts be made towards the reunification of the child with his or her family; or ...

3. PRACTICE NOTES:

The Court held *In the Interest of K.M.* that a **WRITTEN MOTION to suspend reunification efforts because of aggravated circumstances was NOT REQUIRED** in Youth Court. However, it would clearly be the better practice to have a written motion to bypass reunification filed in MYCIDS, as this would provide a more complete record, in case there is an appeal.

For those representing parents in these proceedings, objections should be raised to the entry of form orders that do not include factual findings that are specific to each case. These statutes require specific factual findings about what reasonable efforts DCPS has made to maintain the child within their home prior to removal, and what specific efforts

DCPS has made to assist the parents in correcting the problems that caused removal, so that the child can be returned to their home.

B. YOUTH COURT FINDINGS CONCERNING "REASONABLE EFFORTS" BY DCPS TO ASSIST THE FAMILY IN COMPLYING WITH THE SERVICE PLAN, AND REGAINING CUSTODY OF THEIR CHILD CAN ONLY BE CHALLENGED BY AN APPEAL FROM A YOUTH COURT ORDER.

***R.B. v. Winston County DCPS*, 291 So.3d 1116, 1121–22 (¶¶** 13-14) **(Miss. Ct. App. 2019)**

FACTS: In the chancery court case that was filed to terminate the parental rights of the biological parent and grant an adoption, the parent attempted to challenge the Youth Court's findings that DCPS had exercised "reasonable efforts" to return the child to their custody. A ground for TPR was that the parent had failed to comply with the "service plan" that had been established by DCPS in the Youth Court proceedings. Although the chancellor expressed "considerable doubt" as to whether DCPS had exercised "reasonable efforts" to assist the parent in complying with the service plan, and that the parent failed to substantially comply, and that reunification was not in the child's best interest, the chancellor noted that the Youth Court judge made these findings. Therefore, the chancellor terminated the parent's rights, on this ground.

HELD: The Court of Appeals affirmed, holding:

1. The TPR statute, Miss. Code Ann. Section 93-15-115(c), directs the chancery court to make a finding that a permanency hearing was conducted by the Youth Court, and that the Youth Court made findings that DCPS exercised "reasonable efforts" in assisting the parents in their efforts to regain custody of their child by complying with the "family service plan" that was established by DCPS.

2. Nothing allows the chancery court to go behind the findings of the Youth Court referee concerning whether DCPS exercised "reasonable efforts" in assisting the parent in complying with the "service plan," unless the order of the Youth Court referee is appealed.

3. There was evidence in the record that the Youth Court referee did make findings concerning the reasonable efforts of DCPS to assist the parents. **That finding was not challenged, and the COA held that this issue was res judicata in the TPR proceedings.**

4. In order to proceed with TPR of a parent whose child is in DCPS

custody, under Miss. Code Ann. § 93-15-115, the chancery court must find by clear and convincing evidence that:
(a) The child has been **adjudicated abused or neglected**;
(b) The child has been in DCPS custody for at least six (6) months, and DCPS developed a service plan for the reunification of the parent and the child;
(c) A permanency hearing has been conducted pursuant to the Uniform Rules of Youth Court Practice **and the Youth Court found that DCPS made reasonable efforts over a reasonable period of time to diligently assist the parent in complying with the service plan but the parent has failed to substantially comply with the terms and conditions of the plan and that reunification with the abusive or neglectful parent is not in the best interests of the child;** and
(d) Termination of the parent's parental rights is appropriate on one or more of the grounds set out in Miss. Code Ann. § 93-15-119 or § 93-15-121 because reunification is not desirable toward obtaining a satisfactory permanency outcome for the child.

HELD: The COA Affirmed.

SIGNIFICANT ISSUES:

1. YOUTH COURT FINDINGS ON REASONABLE EFFORTS ARE FINAL. For a child in DCPS custody, Miss. Code Ann. § 93-15-115(c) requires the court hearing a TPR petition to find (1) that the youth court had previously held a permanency hearing or permanency-review hearing and (2) that the youth court had previously found that CPS made "reasonable efforts" to assist the parent in complying with his or her service plan, that the parents failed to substantially comply, and that reunification was not in the child's best interest. Miss. Code Ann. § 93-15-115(c). **The COA held that the chancellor in this case correctly understood section 93-15-115(c) to require him to find that the youth court had held such a hearing and that the youth court had made the necessary findings.**

2. The chancery court cannot re-evaluate the youth court's findings about "reasonable efforts" and the parent's failure to comply with the service plan. The chancery court need only find that the youth court conducted the permanency review hearing and made the findings required in Miss. Code Ann. § 93-15-115.

3. The youth court has exclusive power to make the "reasonable efforts" findings and determine that DCPS complied with this requirement. "Nothing allows the chancery court to go behind the findings of the referee unless, of course, the order of the referee is appealed."

C. APPEALS FROM YOUTH COURT

1. APPEALS FROM FINAL ORDERS OR DECREES

Rule 37, URYCP provides: "**Appeals from final orders or decrees of the court shall be pursuant to the Mississippi Rules of Appellate Procedures.**" " 'The appellate standard of review for youth court proceedings is the same as that which we apply to appeals from chancery court....' " *E.K. v. Mississippi Dept. of Child Protection Services*, 249 So.3d 377, 381 (¶ 16) (Miss. 2018)

2. Miss. Code Ann. § 43-21-651 provides: (1) appeals from Youth Court are to the Supreme Court; (2) Youth Court appeals are "preference cases" in the Supreme Court; and (3) supersedeas must be requested.

3. IFP APPEALS ARE AUTHORIZED.

Miss. Code Ann. § 43-21-651 specifically authorizes in forma pauperis appeals of Youth Court decisions: "If the appellant shall make affidavit that he is unable to pay such costs and filing fee, he shall have an appeal without prepayment of court costs and filing fee"

4. TIME FOR FILING NOTICE OF APPEAL.

Rule 4(a), MRAP, requires that a party's notice of appeal be filed with the clerk of the trial court **within thirty days of entry of the order or judgment from which appeal is taken.** Subsection 4(d) makes the time for appeal begin to run upon the trial court's entry of an order disposing of certain post-trial motions, including motions made pursuant to Mississippi Rules of Civil Procedure 59 and 60. *See In re A.M.A.*, 986 So.2d 999, 1008 (Miss. Ct. App. 2007)

5. EXTENSIONS OF TIME.

Rule 4(g), MRAP, allows the trial court to grant an extension of time to file a notice of appeal upon motion filed before or after the expiration of the thirty-day time period prescribed by subsection 4(a). Motions for extension filed within the initial thirty-day time limit "may be granted for good cause." Motions filed after expiration of the thirty-day time limit "shall be granted only upon a showing of excusable neglect." Id. Pursuant to this rule, a trial court is authorized to grant an extension not to exceed thirty days past the original thirty-day filing period or ten days from the date of the order granting the extension is entered, whichever date is later. MRAP 4(g). *See In re A.M.A.*, 986 So.2d 999, 1008 (Miss. Ct. App. 2007)

6. REOPENING TIME FOR APPEAL.

Rule 4(h), MRAP, provides that the trial court may reopen the time for appeal, if it finds (a) that a party **entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry** and (b) that no party would be prejudiced, may, upon motion filed **within 180 days of entry of the judgment or order** or within 7 days of receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order

reopening the time for appeal. *See In re A.M.A.*, 986 So.2d 999, 1008 (Miss. Ct. App. 2007)

D. ADJUDICATION/DISPOSITION ORDERS MUST BE APPEALED WITHIN THIRTY DAYS AFTER ENTRY OF THE ORDERS.

***Interest of M.M. v. Adams County Youth Court*, ___ So.3d ___, 2021 WL 972502 (Miss. Ct. App. 3/16/2021).**

FACTS: Single father's three children were adjudicated "neglected" based on father's inability to care for them, and the Youth Court placed the children in the custody of the maternal grandfather. **The Adjudication Order and Disposition Order were both entered on December 28, 2017.** The permanency plan established by the Mississippi Department of Child Protection Services (MDCPS) provided for reunification with father, along with a concurrent plan of durable legal custody or legal guardianship with a third party. The Youth Court held a permanency hearing on July 23, 2018, and entered permanency orders for each of the three children which granted maternal grandfather durable legal custody of the children. Father appealed the adjudication order and the permanency orders.

HOLDING: The COA affirmed.
(1) The youth court did not err in refusing to extend the time for appeal of Adjudication Order dated December 28, 2017.
(2) The youth court's permanency orders for the minor children, which changed the placement from reunification with their father to durable legal custody with their maternal grandfather were not improper.

SIGNIFICANT ISSUES:

1. TIMELINESS OF APPEAL OF ADJUDICATION ORDER - - The adjudication order which the father sought to appeal was entered on December 28, 2017. **McCoy did not file his notice of appeal until August 13, 2018, which was 229 days after the entry of the adjudication order.** Further, McCoy did not file his motion to accept notice of an appeal filed out of time until October 31, 2018, 307 days after the entry of the adjudication order. Not only was McCoy's notice of appeal filed grossly outside of the thirty-day window pursuant to Rule 4(a), it was filed **well outside the 180-day window that may be allowed under Rule 4(h).**

2. OUT-OF TIME APPEAL WAS PROPERLY DENIED - - Father failed to comply with not one but two rules as set forth in MRAP 4(a) and 4(h). The time to appeal the order he seeks now to appeal long-since expired, and the youth court did not abuse its discretion in denying the Motion for time to file an out-of-time appeal. **To hold otherwise would allow uncertainty and prevent finality in our system of justice,**

which would prevent the very justice the system seeks to promote.

3. DUE PROCESS RIGHTS AT ADJUDICATORY HEARING WERE NOT DENIED - - Father was represented by counsel at both the adjudication hearing and the disposition hearing. **At no point during either of those two hearings did McCoy's counsel object or make any complaint about the youth court's failure to comply with Miss. Code Ann. § 43-21-557(1)(e)(v) which requires the youth court judge to explain to the parent the "right to appeal."** Father's counsel zealously represented him throughout the hearings by cross-examining witnesses and calling witnesses to testify in his behalf. As such, the error, if any, is harmless and the issue without merit.

4. ALTERNATE GUARDIANS SUCH AS RELATIVES MUST BE SUGGESTED AT THE INITIAL ADJUDICATION AND DISPOSITION HEARING, NOT AT PERMANENCY REVIEW - - The prospective relative custodian must have exercised physical custody of the child for at least six months. Maternal grandfather was the only relative who met that qualification. **Father's argument concerning the consideration of an alternate guardian would have been appropriate at the initial adjudication hearing and the disposition hearing. As a result of father's not filing the notice of appeal within the prescribed period, this Court lacks jurisdiction over an appeal from the adjudication order**. Therefore, the COA refused to consider the issue of alternate guardians asserted by the father.

5. FAILURE TO COMPLY WITH THE DCPS SERVICE PLAN - - Father refused to enter a drug treatment facility as recommended and ordered by the family drug court. Father's non-compliance with the drug court's recommendation and order to receive drug treatment violated his service agreement, wherein he agreed to "cooperate with all agencies that are involved with his family with the safe return of his children to his home." By father's own admission in his brief, he stated that he **"cooperated with CPS in doing ALMOST EVERYTHING that was requested of him …" This admission alone is indicative of his non-compliance with the entirety of the service plan**. The record does not support father's argument that he was ever unaware of his obligations and the expectations pursuant to the MDCPS service plan, and therefore this issue is without merit. The youth court found that **Father was unfit and unable to care for his children as a result of his addiction to opiates**.

6. ISSUES WAIVED. All of the remaining issues in the Father's brief were based on the adjudication order dated December 28, 2017. Because Father did not appeal that Order, the COA held that it did not have jurisdiction to consider those issues.

E. BOTH AN ADJUDICATION ORDER AND A DISPOSITION ORDER ARE REQUIRED FOR A FINAL APPEALABLE ORDER IN YOUTH COURT.

***Interest of C.R. v. Mississippi DCPS*, ___ So.3d ___, 2019 WL 6873730 (Miss. Ct. App. 2019)**

The COA held that although the adjudication and disposition phases of a youth court determination are separate and distinct proceedings, **"both a part of the same overall proceeding for purposes of appeal,"** even though there may be a delay between the entry of an adjudication order and the disposition order.

The Court held that allowing a party to appeal from a youth court's adjudication order prior to the required disposition hearing, and subsequent disposition order, would "effectively deny that court the power to conduct the required disposition hearing and impose [the] appropriate [disposition] until the appeal was decided."

In this case, the youth court did not conduct a separate disposition hearing as required by statute. And although the court entered a disposition order, which noted that the minor children had been adjudicated as "abused children," the order expressly stated that the youth court was **"withhold[ing] disposition," "relinquish[ing] jurisdiction," and "transfer[ring] this matter to chancery court." In other words, when D.R. noticed this appeal, neither the youth court nor the chancery court had completed the statutorily required steps antecedent to a proper appeal. Because there is not yet a final appealable order of disposition in this case, we dismiss this appeal for lack of jurisdiction.**

F. PRIOR CASE LAW FROM THE MSSC HELD THAT AN "INTERLOCUTORY APPEAL" WAS APPROPRIATE AFTER AN ADJUDICATION ORDER.

***E.K. V. Mississippi DCPS*, 249 So.3d 377 (Miss. 2018)**

In this case, the Youth Court entered an Adjudication Order on June 6, 2016 that found the child was a "neglected child." On July 1, 2016, the parents formally entered their appearance and filed two motions. The first motion was to set aside the shelter order, to return the child to the parents, and to stay further Youth Court proceedings. The second motion was for permission to seek "interlocutory appeal" in regard to the adjudication of the child as a neglected child. After a hearing, **the youth court entered an order permitting the parents to pursue an "interlocutory appeal"** of the "Youth Court's June 6, 2016 Adjudication Order."

The parents filed an "interlocutory appeal" with the MSSC, and the MSSC addressed the merits of the issues that were presented in that appeal.

G. THE MSSC HAS PREVIOUSLY HELD THAT APPEALS FROM YOUTH COURT SHOULD ONLY BE BASED ON "FINAL ORDERS."

***In re M.E.V.*, 120 So. 3d 405, 406-07 (Miss. 2013)**

FACTS: After a **"permanency review" hearing**, the Youth Court granted custody of the child to the father on a trial basis. The father lived in Texas. The mother appealed.

HOLDING: The MSSC held:

1. Direct appeals of a lower court's decision "lie only from a final judgment." *LaFontaine v. Holliday*, 110 So.3d 785, 787 (¶ 8) (Miss.2013)

2. Miss. Code Ann. § 43–21–651 governs appeals from youth courts, and only contemplates appeals of "final judgments." Generally, a judgment is final "if it ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." **The youth court granted legal and physical custody to the father on a trial basis only, and pending the results of a home study.**

3. The Youth Court Order "fell well short of ending the litigation on the merits."

H. A RULE 60(b)(4) MOTION MAY BE USED TO SET ASIDE A VOID YOUTH COURT JUDGMENT.

***In the Interest of N.M. v. Miss. DHS*, 215 So.3d 1007 (Miss. Ct. App. 2017)**

The COA held that a Rule 60(b)(4) motion under the Mississippi Rules of Civil Procedure may be used to set aside a void Youth Court Judgment. **In this case, the COA held that the Youth Court did not have subject matter jurisdiction to conduct an adjudication hearing concerning a child who was alleged to be a "child in need of special care" under the Youth Court Act.** There is no specific time limit on filing a Rule 60(b)(4) motion, other than the general requirement that the motion "shall be made within a reasonable time," which is determined on a case-by-case basis. M.R.C.P. 60(b).

PRACTICE NOTE: Since Rule 60 applies to Youth Court matters, it is arguable that Rule 52 (request for specific written findings by the court) and Rule 59 (motion for new trial or "reconsideration") should also apply.

I. STANDARD OF PROOF FOR DELINQUENCY PROCEEDINGS IN YOUTH COURT IS "BEYOND A REASONABLE DOUBT."

***M.B. V. Youth Court of Calhoun County*, ___ So.3d ___, 2020 WL 205300 (¶13) (Miss. Ct. App. 2020)**

Even though Youth Court proceedings are civil in nature, the standard of proof required to show that a minor child is "delinquent" is "beyond a reasonable doubt." Miss. Code Ann. § 43-21-561(1).

III. YOUTH COURT JURISDICTION VERSUS CHANCERY COURT JURISDICTION

A. A COUNTY COURT YOUTH COURT HAS EXCLUSIVE JURISDICTION FOR INVOLUNTARY TPR IF THERE IS A PENDING YOUTH COURT CASE, BUT A CHANCERY COURT MAY ACCEPT A VOLUNTARY SURRENDER OF PARENTAL RIGHTS, AND PROCEED WITH ADOPTION.

***Matter of Adoption of C.C.B. V. G.A.K.*, 306 So.3d 674 (Miss. 2020)**

FACTS: After child was adjudicated as neglected in the Pearl River County Youth Court, the permanency plan was changed from reunification to adoption. The child's maternal grandparents and the foster parents filed competing petitions for adoption in the Chancery Court. The Petitions were consolidated, and the biological parents subsequently executed voluntary surrenders of their parental rights to child. The Chancery Court accepted the executed releases of parental rights and granted the petition filed by foster parents. Maternal grandparents appealed.

HOLDING: The MSSC affirmed, holding:
1. Chancery court had subject matter jurisdiction to accept biological parents' voluntary releases of parental rights to child and to adjudicate adoption, and

2. Chancery court's failure to order home study of foster parents did not implicate its subject matter jurisdiction over adoption proceedings, as would otherwise permit claim to be raised for first time on appeal.

SIGNIFICANT ISSUES:
1. A COUNTY COURT YOUTH COURT HAS EXCLUSIVE JURISDICTION FOR TPR IF THERE IS AN OPEN DCPS CASE.
A County Court Youth Court ordinarily has **exclusive priority jurisdiction** over the abuse/neglect proceedings instituted against the biological parents, and over any termination of parental rights proceedings that may arise out of the child protection

proceedings. Miss. Code Ann. § 93-15-105(1). ***Matter of M.A.S.*, 245 So.3d 410 (Miss. 2018) (the county court youth court where case was pending had exclusive jurisdiction over termination of parental rights issue, and unless and until those rights were terminated, chancery court could not proceed with foster parent's adoption petition over the parents' objection).**

2. VOLUNTARY SURRENDER OF PARENTAL RIGHTS

However, the MSSC held that the MTPRL provides a separate mechanism for termination of parental rights by **written voluntary release** as provided in Miss. Code Ann. § 93-15-107(2). Voluntary surrender of parental rights proceeds not by a petition to terminate parental rights filed against a parent, but by a voluntary release executed by the natural parent, and signed and accepted by the court that operates as a consent to the TPR and adoption. Miss. Code Ann. § 93-15-111. Therefore, the Chancery Court had jurisdiction to accept the voluntary surrenders of parental rights by the biological parents and proceed with the adoption by the foster parents.

3. PRACTICE NOTE:

The statute provides that the voluntary surrender of parental rights by the biological parents **must contain all of the terms set forth in the statute:**

(1) The court may accept the **parent's written voluntary release if it meets the following MINIMUM REQUIREMENTS**:

(a) Is signed under oath and dated at least seventy-two (72) hours after the birth of the child;

(b) States the parent's full name, the relationship of the parent to the child, and the parent's address;

(c) States the child's full name, date of birth, time of birth if known, and place of birth as indicated on the birth certificate;

(d) Identifies the governmental agency or home to which the child has been surrendered, if any;

(e) States the parent's consent to adoption of the child and waiver of service of process for any future adoption proceedings;

(f) Acknowledges that the termination of the parent's parental rights and that the subsequent adoption of the child may significantly affect, or even eliminate, the parent's right to inherit from the child under the laws of Descent and Distribution;

(g) Acknowledges that all provisions of the written voluntary release were entered into knowingly, intelligently, and voluntarily; and

(h) Acknowledges that the parent is entitled to consult an attorney regarding the parent's parental rights.

4. Miss. Code Ann. § 93-15-111(2):

"**The COURT'S ORDER ACCEPTING the parent's written voluntary release terminates all of the parent's parental rights to the child, including, but not limited to, the parental right to control or withhold consent to an adoption**. If the court does not accept the parent's written voluntary release, then any interested person, or any

agency, institution or person holding custody of the child, may commence involuntary termination of parental rights proceedings under Section 93-15-107.

5. PRACTICE NOTE:
When a voluntary surrender of parental rights form is received from a biological parent, **CONSIDER IMMEDIATELY SCHEDULING A HEARING** that requests that the trial court accept the voluntary surrender. Until that occurs, the parent has the ability to withdraw their consent. **This is a major change from prior practice, where the execution of a voluntary surrender of rights was deemed to be irrevocable.**

B. A YOUTH COURT MAY TRANSFER ITS JURISDICTION OVER A MINOR CHILD TO CHANCERY COURT IN ORDER TO ALLOW AN ADOPTION TO PROCEED, SO THAT PERMANENCY CAN BE ACHIEVED FOR THE CHILD.

1. The Youth Court Act specifically provides that a chancery court may not exercise jurisdiction over any abused or neglected child or any proceeding pertaining thereto, if there is already a case pending in Youth Court concerning that same child. *K.M.K. v. S.L.M.*, 775 So.2d 115, 118 (Miss. 2000).

2. Chancery courts have exclusive jurisdiction over adoption proceedings. Miss. Code Ann. § 93-17 -3 (West 2020); *Matter of Adoption of C.C.B. v. G.A.K.*, 306 So.3d 674, 678 (11) (Miss. 2020). However, the chancery court cannot proceed with the adoption if there is a case pending in Youth Court concerning the child.

3. Although an award of durable legal custody is considered a "permanency plan" for placement of the minor child under the youth court statutes, rules and DCPS regulations, the Supreme Court has recognized that "a decision to grant durable legal custody is not permanent and is, therefore, subject to further review and modification by the courts." *In re S.A.M.*, 826 So.2d 1266, 1279 (Miss. 2002). If a Youth Court grants durable legal custody of a child, the Youth Court retains jurisdiction over the child. *In re M.I.*, 85 So.3d 856, 860 (¶15) (Miss. 2012).

4. In *B.A.D. v. Finnegan*, 82 So.3d 608, 613 (¶ 18) (Miss. 2012), the Supreme Court held that a youth court may voluntarily relinquish its priority jurisdiction over claims of abuse or neglect of a minor child to a chancery court when custody issues concerning that child are pending in chancery. This holding was based in part on the fact that the Youth Court "lacked the ability to provide long-term relief to the parties." *B.A.D.*, 82 So.3d at 613 (¶ 18).

5. The Supreme Court warned that Youth Courts cannot simply terminate jurisdiction over matters concerning abuse or neglect that fall within their original jurisdiction in order "to get cases out of their chambers." *B.A.D.,* 82 So.3d at 613 (¶ 20). However, the Court also recognized that where the sole remaining matters concerning the minor child relate to issues of permanent custody, and no issues of abuse or neglect remain, transfer

of jurisdiction to chancery court is proper, so that permanency can be achieved for the child. *B.A.D.*, 82 So.3d at 613 (¶ 20).

6. The decision to transfer jurisdiction to chancery lies within the youth court's sound discretion, and is not mandatory. In the case, *In re M.I.*, 85 So.3d 856, 860 (¶ 16) (Miss. 2012), the Supreme Court held that the youth court did not err in denying a motion to transfer jurisdiction to chancery court. The Court explained that once a child is adjudicated to be abused or neglected, the youth court may retain its jurisdiction over the child until he or she reaches the age of twenty. *In re M.I.*, 85 So.3d at 860 (¶ 16). Since a youth court does not terminate its jurisdiction by granting durable legal custody, the Court held that the decision concerning a motion to transfer jurisdiction to chancery lies within the sound discretion of the Youth Court. Id.

7. Based on the preceding authority, if there is an action pending in both chancery court and youth court concerning a minor child, a Petition should be filed in Youth Court requesting that the Youth Court yield jurisdiction to the Chancery Court, if the proceedings there will provide permanency for the minor child, such as through an adoption. This will insure that there could be no challenges to the Chancery Court's jurisdiction over the minor child.

8. Therefore, under the holding in *B.A.D. v. Finnegan*, 82 So.3d 608, 613 (18-20) (Miss. 2012), it is appropriate for a Youth Court to transfer jurisdiction over the minor child, so that the Chancery Court can proceed with an adoption petition.

IV. MISCELLANEOUS

A. TESTIMONY OF CHILD AS TO PREFERENCE FOR CUSTODY Under Miss. Code Ann. § 93-11-65(1)(a)

***Roley v. Roley*, ___ So.3d ___, 2021 WL 1974064, at *23 (Miss. Ct. App. decided 5/18/2021)**

In a divorce and custody proceeding between the parents, the COA held that in determining what would be in the best interest and welfare of the child, under Miss. Code Ann. § 93-11-65(1)(a), **a chancellor may consider the preference of a child who is twelve years of age or older, as to the parent with whom the child would prefer to live.** However, the COA explained that in order to consider a child's preference, the statute requires that **the trial court must find that two conditions have been satisfied:**

(1) First, the court must find that "both parties are fit and proper persons to have custody of the children."
(2) Second, the court must find that "either party is able to adequately provide for the care and maintenance of the children."

Finally, the COA noted that if a chancellor refuses to allow a child to testify as to their preference for custody, the party seeking to admit such testimony must make an "offer of Proof" under Miss.R.Evid. 103. **If the party fails to preserve the child's testimony in this manner, the issue will be procedurally barred on appeal.**

B. FORENSIC INTERVIEWS OF CHILDREN ARE NOW CONFIDENTIAL YOUTH COURT RECORDS.

1. **Miss. Code Ann. § 43-21-105. Youth Court Act Definitions.**

(u) **"Records involving children"** means any of the following from which the child can be identified:

(i) All youth court records as defined in Section 43-21-251;
(ii) All **forensic interviews** conducted by a child advocacy center in abuse and neglect investigations;
(iii) All law enforcement records as defined in Section 43-21-255;
(iv) All agency records as defined in Section 43-21-257; and
(v) **All other documents maintained by any representative of the state, county, municipality** or other public agency insofar as they relate to the apprehension, custody, adjudication or disposition of a child who is the subject of a youth court cause.

C. PROCEDURES FOR OBTAINING YOUTH COURT RECORDS FROM DCPS AND THE YOUTH COURT FILE (MYCIDS DATABASE)

All Youth Court Records are confidential, and in Order for these records to be released for use in another court proceeding (such as chancery or circuit) the procedures set forth in **Rules 5 and 6 of the Uniform Rules of Youth Court Practice must be followed.** The key provisions governing such release are:

(1) **Youth Court records (including documents filed with the clerk and DCPS records) are only released in response to a subpoena duces tecum ISSUED BY THE JUDGE OF ANOTHER COURT**, so the records can be reviewed in camera, and the other judge can decide if the records should be released to the parties in the parallel litigation. URYCP 6.

(2) The receiving court must insure that anyone who is allowed to review the records maintains confidentiality.

(3) The **Youth Court Judge should sign an Order approving release of the Youth Court records to the other court**, so that a paper trail can be established in MYCIDS showing who received the records. This is essential to allow the enforcement of the confidentiality rules. URYCP 5.

D. ATTORNEYS FEES FOR INDIGENT PARENTS IN TERMINATION OF PARENTAL RIGHTS PROCEEDINGS.

***Mississippi DCPS v. Bynum*, 305 So. 3d 1158 (Miss. 2020)**

FACTS: Mississippi Department of Child Protection Services (MDCPS) sought to involuntarily terminate the parental rights of putative father of a child in MDCPS's custody. The chancery court determined that the putative father was both indigent and entitled to counsel, therefore, was entitled to court-appointed counsel. **The chancellor ordered MDCPS to pay the father's attorney fees of $3,750, and MDCPS appealed.**

HOLDING: The MSSC held that the chancery court did not abuse its legislatively conferred discretion by ordering MDCPS to pay father's attorney fees.

SIGNIFICANT ISSUES:

1. DCPS argued that **Covington County should pay for the father's legal representation**, just as it would if he were an indigent criminal defendant. But the Court rejected that argument because this was not a criminal case. The COA explained that when the legislature adopted MCA § 93-15-113(2) allowing the appointment of counsel for indigent parents in TPR cases, there was no provision requiring the county in which a termination proceeding is initiated to pay for the indigent parent's attorney's fees. **Instead, in involuntary-termination proceedings, the Legislature expressly left the issue of assessing attorney's fees to the trial court's discretion. Miss. Code Ann. § 93-15-113(2)(b).**

2. In affirming the chancery court, **the Court of Appeals emphasized that it is not directing MDCPS to pay for indigent parents' attorney's fees in ALL cases involving Section 93-15-113.** The Legislature is the only branch of government that could mandate such blanket financial responsibility, and there is currently no such requirement in the statutes. Instead, the Legislature has left the issue of setting and assessing court-appointed counsel's fees to the court's discretion. Based on the circumstances in this case, the COA held that the chancellor did not abuse his discretion by ordering MDCPS to pay the father's attorney's fees.

STATE AND MILITARY PENSIONS

MISSISSIPPI PERS

State and Military Pensions

Classification

A state pension is marital to the extent that it was earned during the marriage. *Phillips v. Phillips,* 904 So. 2d 999, 1002 (Miss. 2004); *Mabus v. Mabus,* 890 So. 2d 806, 826 (Miss. 2003).

Division

Mississippi PERS benefits may not be divided through direct payment by the state to the non-owning spouse. *Hodges v. Hodges*, 346 So. 2d 903, 904 (Miss. 1977) (violates the PERS anti-assignment clause); MISS. CODE ANN. § 25-11-129.

MISSISSIPPI PERS

State and Military Pensions

Division options

1. Value and award non-employee a lump sum payment (immediate distribution).

2. Value and award non-employee property equal to the marital portion (immediate distribution).

3. Order employee to pay spouse their share directly upon receipt of PERS benefits (deferred distribution) (not necessary to value).

PAYMENT BY EMPLOYEE SPOUSE

Marital share:

Divide years of service during marriage by total years of service. *Cork v. Cork*, 811 So. 2d 427, 429 (Miss. Ct. App. 2001).

Example: "Mark will pay Carlotta an amount equal to 50% x (10/number of years of service) x salary at retirement."

50% X (10/40) X $60,000= $7,500

Payment of a share of retirement by the employee spouse "is in the nature of alimony." *Aaron v. Aaron*, 147 So. 3d 370, 373-74 (Miss. Ct. App. 2014).

Issues:

Remarriage

Modification

Cohabitation

MISSISSIPPI PERS

PREMARITAL AGREEMENTS

Sullivan v. Sullivan, 302 So. 3d 1280 (Miss. Ct. App. 2020))affirming order that employee pay former spouse 16% of basic benefit and 16% of COLA).

Payment by employee spouse is a form of deferred distribution of property, not an award of alimony.

Spouse of PERS recipient is not entitled to lump sum award rather than deferred distribution.

MISSISSIPPI PERS

State and Military Pensions

Immediate division: Valuation

Expert testimony: Present value of anticipated stream of payments. (based on life expectancy, anticipated date of retirement, investment rate).

It is error to value a stream of payments without reducing to present value. *Lowrey v. Lowrey,* 25 So. 3d 274, 291 (Miss. 2009).

MISSISSIPPI PERS

State and Military Pensions

Valuation alternatives:

Court properly used cash-out value of $43,582 rather than $188,118 present value, where wife had in fact cashed out benefits. *Gaskin v. Gaskin*, 304 So. 3d 641 (Miss. Ct. App. 2020).

Husband's pension properly valued at same as wife's where he failed to provide evidence and they had similar salaries, work history, and type of employment. *Pond v. Pond,* 302 So. 3d 1236 (Miss. Ct. App. 2020).

Valuation not necessary where parties offered no evidence of present value; court considered the income stream from both pensions and awarded each their own pensions. *Inge v. Inge*, 227 So. 3d 1185, 1191 (Miss. Ct. App. 2017).

IMMEDIATE DISTRIBUTION: MARITAL SHARE

Marital portion:

Years service during marriage divided by years of service at divorce (date-of-divorce method of calculation).

Mark's PERS pension: Assume a present value of $360,000.

10 yrs/30 yrs = 1/3

1/3 marital share = $120,000.

Carlotta can be awarded a lump sum payment of $60,000 or offsetting property worth $120,000.

MILITARY PENSIONS

PREMARITAL AGREEMENTS

Limits on division

- Direct payment by military requires ten years of marriage.
- Direct payments cannot exceed 50% of the member's retirement; all payments are capped at 65% of the pay.
- Direct payments end with member's death (shared interest approach).
- Under the National Defense Authorization Act of 2017 (NDAA) only cost-of-living increases may be included in the former spouse's share – increases in benefits based on raises linked to rank or time in service are no longer divisible.

10 U.S.C. § 1408.

DIVISION OF MARITAL SHARE

PREMARITAL AGREEMENTS

Direct payment by servicemember

- A servicemember may be ordered to pay a portion of benefits to a former spouse even if they were married under ten years.
- The 50% cap on an award of benefits does not apply to payments by the member spouse. *Stout v. Stout,* 144 So. 3d 177, 185 (Miss. Ct. App. 2013) (chancellor did not err in awarding a wife 64% of her husband's military retirement).

THE MARITAL SHARE

PREMARITAL AGREEMENTS

National Guard pensions

National Guard pensions are based on a point, rather than a time, system.

However, the court of appeals affirmed a chancellor's division of NG pension based on years rather than points. *Ward v. Ward,* 131 So. 3d 1244, 1251 (Miss. Ct. App. 2014) (chancellor "had more than one option when he calculated an amount") (formula based on years produced 75% marital property; points produced 36%).

DISABILITY BENEFITS

- Courts may not divide military disability benefits.

- In MS (and most states) parties may expressly agree to divide disability benefits. *Mosher v. Mosher,* 192 So. 3d 1118, 1121 (Miss. Ct. App. 2016).

Courts may not order indemnification as a remedy when a member spouse replaces military retirement with disability benefits post-divorce. *Howell v. Howell,* 137 S. Ct. 1400, 1405 (2017); *Mallard v. Burkart*, 95 So. 3d 1264, 1272 (Miss. 2012).

Whether parties can agree to indemnification in advance has not been decided in Mississippi.

RESOURCES

PATRICIA SHEWMAKER & JAMES R. LEWIS, THE COMPLETE QDRO HANDBOOK (4th ed. 2019)

MARK E. SULLIVAN, THE MILITARY DIVORCE HANDBOOK (3D ED. 2019)

PREMARITAL AGREEMENTS

Deborah H. Bell

I. Requirements

A premarital agreement

- must be entered voluntarily;
- must be accompanied by full disclosure of the parties' assets or the party opposing enforcement must have had knowledge of the other's assets;
- must be procedurally fair;
- must be substantively fair; and
- must be in writing.

Mabus v. Mabus, 890 So. 2d 806, 819 (Miss. 2003); *Sanderson v. Sanderson,* 170 So. 3d 430, 435-36 (Miss. 2014); Miss. Code Ann. § 15-3-1(b) (no action on "any agreement made upon consideration of marriage, mutual promises to marry excepted" unless in writing); *see Pardue v. Ardis,* 58 So. 769, 769 (Miss. 1912) (oral prenuptial unenforceable); *Hankins v. Hankins,* 866 So. 2d 508, 511-12 (Miss. Ct. App. 2004).

II. Scope of agreement

Agreements are potentially applicable to

- Rights during marriage
- Rights upon death of a spouse
- Rights upon separation, annulment, or divorce

An agreement should be clear regarding the scope of its application. Agreements that include general waivers that do not specify the scope of the agreement may lead to litigation. For example, a party might argue that an agreement that waived marital rights, then specifically discussed only rights at divorce, did not include a waiver of rights at death.

Determine the client's goals:

- Scope of agreement
- Applicable to premarital property or all property
- Complete or partial waiver
- Specific assets

III. Structure

As an example, an agreement might include

- Recitals
- General statement of intent
- Definitions (separate property; joint property; marital property)
- General statements of waiver
- Specific provisions regarding divorce (i.e., property, alimony, pensions, home, debts)
- Specific provisions regarding death (i.e. spousal share, election against will, will contest, homestead, spousal allowance, intestacy)
- Provisions regarding conduct during marriage (family use, commingling, gifts, transfers)
- Miscellaneous provisions (entire agreement, severability, binding on heirs and assigns, no modification except in writing, effective date)

IV. Recitals

Introductory recitals to premarital agreements often include acknowledgements by the parties setting out facts that would establish a valid agreement. For example, recitals might include

- that the agreement was entered voluntarily;
- that the parties reviewed the attached financial statements;
- that they are aware of the property held by the other;
- that they signed the agreement without coercion or duress;
- that they had sufficient time to review the agreement and to consult with an attorney;
- that they were represented by an attorney or declined representation after being advised to seek counsel;
- that they understand the rights that would accrue to them in the absence of the agreement; and
- that they believe the agreement to be fair.

V. Property provisions

Increase and exchanges. Be sure to address the classification of exchanges of and growth in property intended to be separate. (For example, you may want to insert provisions that separate property includes appreciation on separate assets, no matter the cause, includes income on separate assets, and includes assets acquired in exchange for separate assets).

Pensions. Address all possible pension/retirement/employment benefits. Some spousal retirement benefits can only be waived after marriage -- be sure to include a provision stating that the parties agree to execute any documents necessary to effectuate the agreement.

Substantive conscionability. Discuss with your client potential arguments regarding the fairness of specific provisions, such as a complete waive of all marital rights or a waiver of rights to an asset to which a spouse has contributed substantially without return. The Mississippi Supreme Court has held that an agreement that contains mutual waivers is not unconscionable simply because it continues a substantial premarital disparity in assets. *Sanderson v. Sanderson*, 245 So. 3d 421, 430-31 (Miss. 2018). However, it is possible that the court's approach could change if one spouse is left destitute. Or, the parties might move to a state with a more restrictive view of premarital agreements.

Sample provision: "One party's contribution of funds or efforts to the other's separate property, including the other's separate property business, shall not convert the separate property to marital and does not give rise to a right of reimbursement or other payment for contributions to the property, except as otherwise provided in this Agreement."

Concern: Is this substantively conscionable if one spouse works uncompensated in the other's business?

VI. Alimony provisions

Example: Each party waives any claim to "alimony or spousal support, including but not limited to temporary alimony or support, separate maintenance, periodic permanent alimony, rehabilitative alimony, lump sum alimony, reimbursement alimony, or alimony in the form of payments to third parties such as mortgage, health insurance, automobile, or other payments, or any other form of spousal support."

VII. Drafting to address conduct during the marriage

Parties' conduct during the marriage may appear to be in contradiction to the agreement. Most agreements include provisions stating that the parties' failure to abide by a provision of the agreement or breach of a provision does not affect the validity of the agreement. In Mississippi, attorneys should also consider including provisions to address conduct that arguably converts separate property to marital, such as family use.

Family use and commingling. In Mississippi, family use converts separate assets to marital. While one Mississippi case held that family use did not convert separate property under a premarital agreement, a later case suggested that family use could convert property to marital unless the premarital agreement contained a provision stating that family use did not convert separate property to marital. *Sanderson v. Sanderson,* 170 So. 3d 430, 438 (Miss. 2014) ("Absent a contractual provision that indicates the parties intended familial use monies to be separate . . . we are constrained to hold the parties intended for our law regarding familial use to apply.").

Similarly, commingling of separate and marital assets may convert separate to marital property. Many agreements include a provision stating that contribution of marital funds or contribution of funds by the other spouse to a separate asset does not convert the asset to marital or require reimbursement of the other.

Jointly titled property. Parties may choose to provide that jointly titled property creates marital property, creates equal shares as co-owners, or that they will each own jointly titled property in proportion to their financial contributions to an asset.

Gifts. At divorce, parties may argue that gifts from one to the other or gifts from family are not covered by premarital agreement provisions because the gift was one to the parties jointly. Without a provision addressing the classification of gifts, disputes may arise even if the agreement provides generally that all property acquired during marriage will remain separate.

For example, the parties might agree that a gift from one to the other is considered joint or marital property, or that it is considered separate property, unless the parties provide otherwise in writing.

With regard to other gifts, the parties may want to provide that a gift from one spouse's family is considered a gift to the related spouse alone rather than a joint gift, unless the donor provides otherwise in writing.

An agreement may also include a provision that the parties may make gifts to the other or provide for the other in a will and that doing so does not alter the provisions of the agreement.

VIII. Other

Attorneys' fees. A general waiver of equitable distribution and alimony does not include a waiver of attorneys' fees in Mississippi. The court of appeals held that attorneys' fees are not a form of alimony and are not waived by a provision waiving all alimony rights. *Black v. Black,* 240 So. 3d 1226, 1239-40 (Miss. Ct. App. 2017) (dissenting judges argued that attorneys' fees based on need are a form of support).

Custody and child support. Parties may not enter a binding premarital agreement providing for custody of children upon divorce. As with property settlement agreements, a chancellor has the authority to disregard parties' agreements to make a disposition in the best interests of a child.

IX. Resources

Gary N. Skoloff, Richard H. Singer, Jr., & Ronald L. Brown, Drafting Prenuptial Agreements (Aspen 2021)

Brett R. Turner & Laura W. Morgan, Attacking and Defending Marital Agreements (American Bar Association 2d ed. 2012)

Pet custody: https://apnews.com/article/lifestyle-b18ac76768910c126e508de40388c2ce

Mississippi Premarital Agreement Cases

Black v. Black, 240 So. 3d 1226, 1239-40 (Miss. Ct. App. 2017)
Estate of Cooper, 75 So. 3d 1104, 1107 (Miss. Ct. App. 2011)
Farris v. Farris, 202 So. 3d 223, 233-34 (Miss. Ct. App. 2016)
Gorin v. Gordon, 38 Miss. 205 (Miss. 1859)
Hankins v. Hankins, 866 So. 2d 508, 511-12 (Miss. Ct. App. 2004)
Hensley v. Hensley, 524 So. 2d 325, 328 (Miss. 1988)
In re Estate of Burns, 31 So. 3d 1227, 1231 (Miss. Ct. App. 2009)
In re Johnson's Will, 351 So. 2d 1339, 1341-42 (Miss. 1977)
In re Sadler's Estate, 98 So. 2d 863, 866 (Miss. 1957)
Kirby v. Kent, 160 So. 569, 572 (Miss. 1935)
Kitchens v. Kitchens, 850 So. 2d 215, 217-18 (Miss. Ct. App. 2003)
Long v. Long, 928 So. 2d 1001, 1002 (Miss. Ct. App. 2006)
Mabus v. Mabus, 890 So. 2d 806, 821 (Miss. 2003)
McLeod v. McLeod, 145 So. 3d 1246, 1250 (Miss. Ct. App. 2014)
Pardue v. Ardis, 58 So. 769, 769 (Miss. 1912)
Richardson v. Richardson, 912 So. 2d 1079, 1081-82 (Miss. Ct. App. 2005)
Roberts v. Roberts, 381 So. 2d 1333, 1335 (Miss. 1980)
Sanderson v. Sanderson, 170 So. 3d 430, 437 (Miss. 2014)
Sanderson v. Sanderson, 245 So. 3d 421, 430-31 (Miss. 2018)
Smith v. Smith, 656 So. 2d 1143, 1147 (Miss. 1995)
Steen v. Kirkpatrick, 36 So. 140, 141 (Miss. 1904)
Stevenson v. Renardet, 35 So. 576, 577 (Miss. 1904)
Ware v. Ware, 7 So. 3d 271, 276-77 (Miss. Ct. App. 2008)
Watson v. Duncan, 37 So. 125, 127 (Miss. 1904)
Wiley v. Gray, 36 Miss. 510 (Miss. 1858)
Wyatt v. Wyatt, 32 So. 317, 318 (Miss. 1902)