27TH ANNUAL • 2023

FAMILY LAW

CONTINUING LEGAL EDUCATION

Seminar Leader

DEBORAH HODGES BELL

Guest Presenters

DAVID CALDER

MICHAEL MCCAULEY

6 Hours CLE Credit • 1 Hour Ethics Credit

Oxford, MS • Jackson, MS • Gulfport, MS

Online On Demand

FAMILY LAW

CONTINUING LEGAL EDUCATION

6 Hours CLE Credit • 1 Hour Ethics Credit

Jackson, MS • Oxford, MS • Gulfport, MS

Online On Demand

2023
BELL FAMILY LAW CLE
SUMMARY OF CONTENTS

FAMILY LAW DEVELOPMENTS

TABLE OF CONTENTS

FAMILY LAW DEVELOPMENTS 2022

I. MARRIAGE

A. Same-sex marriage recognition

*In 2022, Congress repealed the Defense of Marriage Act and enacted the Respect for Marriage Act. The new act provides that no person acting under color of state law may deny full faith and credit to a marriage recognized in another state based on the sex of the spouses. Nor may a person acting under color of state law refuse to enforce a right available to spouses because that state would not recognize the marriage. The act provides for enforcement by the Attorney General in federal court as well as providing a private right of action. The act further provides that to determine marital rights under federal law, a marriage will be recognized if it was valid in the state in which it was entered. Public Law No. 117-228 (H.R. 8404).

B. Separate maintenance

Baughman v. Baughman, 350 So. 3d 271 (Miss. Ct. App. 2022). A chancellor denied a husband's petition for separate maintenance, finding that his abusive conduct was the cause of the parties' separation. The court of appeals affirmed, rejecting his argument that his wife's affair caused their separation. He did not learn of the affair (and she testified it did not begin) until after they separated. The evidence supported the wife's position that her husband's conduct caused the separation.

C. Partition of homestead

**Land v. Land,* 334 So. 3d 1245 (Miss. Ct. App. 2022). A wife whose petition for divorce was denied was not entitled to partition the couple's jointly owned homestead property. She argued that the statute prohibiting partition of homestead property did not apply because only her husband continued to live in the house. The court of appeals disagreed. Spouses may not partition jointly owned homestead property except by agreement. However, she was entitled to partition jointly owned commercial property.

D. Tort actions between spouses

Dew v. Harris, 343 So. 3d 387 (Miss. Ct. App. 2022). The court of appeals reversed and remanded a circuit court's grant of summary judgment to the defendant in an alienation of affection action. The defendant presented affidavits by the plaintiff's ex-wife and teenaged children to support his claim that the couple's marriage was effectively "dead" years prior to his 2017 affair with the plaintiff's ex-wife. The ex-wife and children testified that the couple lived

in separate bedrooms for over a decade and showed no affection for each other. The wife testified that she and her husband had not been intimate for almost ten years. The husband's affidavit stated that the couple were intimate in 2016 and that his wife showed affection for him until 2019, shortly before she filed for divorce. He testified that they attended counseling in 2018. He produced an email from his wife stating that "if counseling works there is no need [to divorce]" as well as 2016 and 2017 emails stating that she loved him.

A plaintiff in an alienation of affection action must prove wrongful conduct, the loss of a spouse's affection, and a causal connection between the defendant's conduct and the loss of affections. The court of appeals held that the case involved a classic split in testimony regarding the state of the couple's marriage, presenting a genuine issue of material fact.

II. Domestic violence

A. Constitutionality of gun possession restrictions

**U.S. v. Rahimi,* 61 F.4th 443 (5th Cir. 2023). The Fifth Circuit held that 18 U.S.C. § 922(g)(8), which prohibits gun ownership by a person subject to a domestic violence restraining order, is unconstitutional. The court's ruling was based on *N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111 (2022). In 2020, Rahimi's partner obtained a protective order prohibiting him from contacting her and from possessing a firearm. Two years later, he was involved in multiple shootings and convicted of possession of a firearm under § 922(g)(8). He appealed, arguing that the statute is unconstitutional.

In *Bruen*, the Supreme Court restated the test for constitutionality of firearms prohibitions under the Second Amendment. To pass muster, "the Government bears the burden of "justify[ing] its regulation by demonstrating that it is consistent with the *Nation's historical tradition of firearm regulation.*" Prior to *Bruen*, a restriction outside of the historical regulation of firearms could be valid nonetheless if it was part of a narrowly tailored effort to "minimize lawless violence." According to the Fifth Circuit, *Bruen* discarded the "narrowly tailored" exception. Now, the government must show that there were "relevantly similar" historical regulations that imposed a comparable burden on the right to possess firearms. *Rahimi,* 61 F. 4th at 455 (quoting *Bruen*, *supra*, at 2132-33).

The court rejected the government's argument that certain colonial era limitations were analogous. Restricting classes of persons deemed "dangerous" (slaves, Native Americans, and political dissidents) was not similar because the purpose was maintaining civil and political order and not protecting individuals. Early state laws allowing courts to seize guns from persons who put others "in terror" or breached the peace were not sufficiently similar – they involved criminal proceedings and were directed at protecting the public, not individuals. The closest analogy was early surety laws, in which someone who had "just cause" to fear injury from another could obtain a financial surety or bond from that person or, in lieu of a surety, their weapons would be seized. The Fifth Circuit agreed that the surety laws are similar to domestic violence protection orders in that

they sought to protect an individual through a civil proceeding. However, the restriction was only partial – one that could be avoided by posting a surety. The court stated, "we conclude that § 922(g)(8)'s ban on possession of firearms is an 'outlier[] that our ancestors would never have accepted.' " *Id.* at 461.

B. Rule 65 injunctive relief

**Shannon v. Shannon,* 357 So. 3d 1043 (Miss. Ct. App. 2022), *cert. granted,* 346 So. 3d 460 (Miss. 2022), *cert. grant dismissed*, (Miss. March 9, 2023). An elderly husband suffering from dementia was granted a divorce from his wife of a year based on spousal domestic abuse. The husband was granted a permanent injunction under Miss. R. Civ. Proc. 65, preventing the wife from approaching or contacting him. A majority of the court of appeals affirmed, distinguishing cases holding that it is error to award Rule 65 relief in cases filed under the Domestic Abuse Protection Act. In this case, relief was requested under Rule 65. The majority acknowledged that Rule 65 injunctive relief is available only if the petitioner shows an independent cause of action supporting relief. The grant of divorce based on habitual, cruel, and inhuman treatment provided the independent basis. One judge dissented, arguing that the proof did not show a need for injunctive relief – there was no evidence the wife had attempted to contact her husband after they separated.

.

III. DIVORCE GROUNDS

A. Adultery

**Guinn v. Claiborne*, 352 So. 3d 646 (Miss. Ct. App. 2022). A chancellor properly denied a pro se litigant's petition for divorce based on adultery or irreconcilable differences. The plaintiff did not testify on the issue of adultery. His only witness, his son, stated simply that his mother was "in a relationship with" a man and that he thought they were living together. He also stated that his mother lived in Chicago, although she was served in another city. The complaint did not list any children of the marriage. In response to the chancellor's questions, the plaintiff stated that while several children were born to his wife during the marriage, they were not his biological children. The complaint did not mention marital property even though the plaintiff admitted that he had acquired property during the marriage. The court of appeals agreed that the plaintiff failed to prove adultery by clear and convincing evidence and that his petition failed to meet the statutory requirements for a divorce complaint.

B. Habitual, cruel, and inhuman treatment

***Baughman v. Baughman,* 350 So. 3d 271 (Miss. Ct. App. 2022). The court of appeals reversed and rendered a chancellor's judgment denying a wife's request for divorce based on habitual, cruel, and inhuman treatment. She testified that the couple's seventeen-year marriage ended because of her husband's abusive behavior, including fits of rage, threats, verbal and physical intimida-

tion, and destruction of property (including family keepsakes). She stated that he broke down doors to argue with her, threatened to publish nude photographs of her, and sexually assaulted her after their separation. Her testimony was supported by counseling record references to threats, rage, escalating violence, and fear for her safety. She testified that after they separated, he threatened to publish nude photographs of her unless she came to his house to discuss whether she was dating someone. When she did, he forced her to have sex against her stated wishes. The husband testified that their encounter was consensual. The wife stated that she experienced anxiety, depression, stomach problems, and hair loss because of his conduct. Her counseling records contained notes recounting ongoing panic stemming from the sexual assault. The chancellor found there was no evidence of physical abuse other than the alleged incident after their separation. The chancellor also questioned that she stayed the night after the incident and did not report it. The chancellor held that one could reasonably conclude that she did not fear her husband since she went voluntarily to his house on that occasion.

The court of appeals reversed. First, the court held that a single incident of physical violence may be sufficient to grant divorce under the spousal domestic abuse ground. The court further stated that spousal domestic abuse may be proved by physical menace that puts the plaintiff in fear of imminent serious bodily harm. The wife testified to multiple incidents in which her husband threatened her in connection with destruction of property and to one in which he threatened her with "revenge porn." The court emphasized that chancellors should apply a subjective test to determine the impact of abuse on a spouse, not an objective reasonable person test. Rather than assuming what might be reasonable for a person to feel, a court should ask what the wife herself feared. The court also stated that the chancellor's skepticism about the wife's failure to report the assault was inconsistent with documented facts about spousal abuse – few victims of partner sexual assault report the crime.

**Shannon v. Shannon,* 357 So. 3d 1043 (Miss. Ct. App. 2022), *cert. granted,* 346 So. 3d 460 (Miss. 2022), *cert. grant dismissed*, (Miss. March 9, 2023). The court of appeals affirmed a chancellor's grant of divorce to a seventy-seven-year-old man with Alzheimer's, based on spousal domestic abuse. Eleven witnesses, including friends, family members, a housekeeper, the husband's physician, and a social worker, testified that his wife of one year constantly berated him, threatened to leave him, and humiliated him in public by shouting about his incontinence. They testified that she isolated him from friends and family. One witness stated that their visits with him dropped from twice a week before the marriage to less than once a month. His mental and physical health declined rapidly after the marriage and improved dramatically when they separated. Her attorney presented no evidence other than calling the husband as an adverse witness. The court of appeals held that the evidence showed a pattern of behavior of emotional or verbal abuse and forced isolation supporting a grant of divorce under spousal domestic abuse. The court emphasized that the two-fold inquiry is on the defendant's conduct and the impact of her conduct on the defendant, using a subjective test.

NOTES

**Moss v. Moss,* No. 2021-CA-00452-COA, 2022 WL 19036778 (Miss. Ct. App. Sept. 20, 2022). The court of appeals affirmed a chancellor's grant of divorce to a wife based on habitual, cruel, and inhuman treatment. She testified that over their thirty-year marriage her husband constantly humiliated and belittled her, shamed her, and controlled what she wore and who she associated with. He accused her of unfaithfulness and questioned their daughter's paternity. He criticized her housekeeping and attacked her as un-Christian. The family was forced to return to the states from a mission assignment because of his inappropriate relationship with a fifteen-year-old Malaysian girl. The husband admitted that he "crushed" his wife's spirit. During their separation he stalked her, knocked on her windows at night, and threatened suicide. She was treated for depression and briefly took medication. She also testified that she suffered from anxiety, lost sleep, and developed trichotillomania because of his abuse.

The court of appeals stated that habitual accusations, threats, insults, and verbal abuse may be sufficient to prove habitual, cruel, and inhuman treatment. The plaintiff must show a negative impact, either though mental or physical symptoms. The impact on the plaintiff is tested using a subjective standard. False accusations of infidelity, controlling behavior, and constant belittling are behaviors that can support a grant of divorce. The court of appeals affirmed, emphasizing that the conduct continued throughout the long marriage and that the wife proved that she was impacted by it. The court also noted that the wife's testimony alone was sufficient to establish the divorce ground of spousal domestic abuse, which does not require corroboration.

**Montgomery v. Montgomery,* 339 So. 3d 819 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's grant of divorce to a husband against his wife of twenty-five years, who appeared at trial *pro se.* He testified that before their separation she began taking Adderall and Ambien and exhibited bizarre behavior. She refused to let his family come to their house, threatened to kill him, attempted to file rape charges against him, threw objects at him, and insisted that he leave their home. When he sought help from her family, the wife would not allow her mother in the house. He stated that he feared for his life because of her behavior. A neighbor corroborated the husband's testimony, stating that the wife told her she wished that she could shoot her husband. The court of appeals held that the wife had waived her objections to the grant of divorce by failing to present legal authority to support her challenge on appeal. Furthermore, the court held that there was sufficient evidence to support grant of a divorce based on habitual, cruel, and inhuman treatment.

C. Defenses to divorce grounds: Condonation

Baughman v. Baughman, 350 So. 3d 271 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's denial of a wife's request for divorce based on adultery but granted divorce based on habitual cruelty. The wife condoned the husband's admitted affair by going to counseling with him and continuing the marriage for another twelve years. Although she alleged that he was currently having an affair, she did not provide evidence of an uncondoned affair.

D. Constitutionality of Mississippi divorce statute

**Watson v. Watson,* 2022 WL 18688901 (S.D. Miss. March 3, 2022). The federal district court for the southern district of Mississippi rejected a husband's argument that the Mississippi divorce statute violates the Due Process Clause of the Fourteenth Amendment by requiring his wife's consent to divorce. The court held that the claim was barred by res judicata because it was not raised until the parties' fourth divorce action. In addition, the court found the statute to be constitutional. The court began by rejecting the notion that there is any fundamental right to divorce. No-fault divorce, which was not available until the 1970s, is not "deeply rooted" in our traditions. The court did not find support for his arguments that the requirement of consent violated his right to privacy or association. Regarding the impact on his right to marry, the court noted that he did not assert that he intended to `marry and did not present any argument that the right to marry included the right to multiple marriages.

Applying the rational basis test, the court found that the state asserted legitimate interests in support of the statute, including "protecting children by making divorce more thoughtful by both parents, protecting economically dependent spouses, encouraging amicability and settlement of disputes in divorce actions, incentivizing spouses to make decisions during the relationship that will increase the likelihood it will be successful, and preventing premature divorce actions."

IV. PROPERTY DIVISION

A. Classification

1. Failure to classify

Brown v. Brown, 350 So. 3d 1169 (Miss. Ct. App. 2022). The court of appeals reversed property division for failure to classify a couple's Mazda, fifteen-year-old tractor, personal clothing, four-wheeler, tools and equipment, bank accounts, and the wife's mother's wedding ring as separate or marital. The court also reversed for failure to value various assets. Three judges dissented, arguing that the chancellor's findings should have been affirmed. The dissent noted the marital estate was small and most of the assets in question, including the business, had little or no value or were clearly separate property.

B. Marital property cutoff date

Case v. Case, 339 So. 2d 796 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's use of the parties' temporary support order as the demarcation date for ending marital property accumulation, even though the chancellor used some values closer to the trial date. Chancellors have discretion to set the date as early as separation or as late as divorce.

NOTES

C. Separate property: Family use

Warner v. Warner, 341 So. 3d 152 (Miss. Ct. App. 2022). A husband argued that the court erred in classifying a wife's golf cart and jet skis as her separate property based on her testimony that they were a gift from him. The wife testified that their grandchildren used the golf cart and jet skis. The court acknowledged that family use may convert separate property to marital but concluded "we cannot say that the chancellor erred."

D. Valuation

1. Failure to value

**Brown v. Brown,* 350 So. 3d 1169 (Miss. Ct. App. 2022). The court of appeals reversed a chancellor's division of marital assets for failure to classify and value specific assets. The parties' lists of assets were not consistent and provided different values for various items. The court rejected the husband's argument that the chancellor's valuation of the home and furnishings was error – the assigned values were close to an average of the values submitted by the parties. However, the court held that it was error to value the couple's boat, lawn mower and tools collectively at $3,300 and assign the lawnmower to the wife and the boat and tools to the husband. The manner of valuation made it impossible to determine the actual division. The court also erred in failing to value the couple's used-car business, truck, four-wheeler, tractor, personal clothing, tools and equipment. On remand, the chancellor could determine the business value from evidence in the record, require the parties to provide additional evidence of value, or appoint a valuation expert to be paid by the parties. Three judges dissented, arguing that the chancellor's findings should have been affirmed. The dissent noted that the marital estate was small and that most of the assets in question, including the business, had little or no value or were clearly separate property.

Denham v. Denham, No. 2020-CA-00675-COA, 2022 WL 290890 (Miss. Ct. App. Feb. 1, 2022), *reversed in part*, 351 So. 3d 954 (Miss. Dec. 1, 2022) (reversing custody but not property division). The court of appeals rejected a husband's argument that a chancellor erred in considering that the husband had a substantial FERS retirement account without valuing the account as part of the property division. The chancellor repeatedly ordered the husband to provide a valuation statement, which he failed to do.

2. No basis in record for valuation

**Warner v. Warner,* 341 So. 3d 152 (Miss. Ct. App. 2022). The court of appeals reversed and remanded a chancellor's division of assets for improper valuation of several items, failure to include debt in the *Ferguson* analysis, and failure to consider the couple's separate property in the division. The chancellor divided the marital property roughly equally, awarding the wife $21,884 in mar-

ital assets and the husband $59,060 and giving the wife an offsetting payment from the sale of their home.

The court of appeals rejected the husband's argument that the chancellor's failure to value lamps and pictures required reversal – a chancellor is not required to value every asset. Neither party provided values for these items. However, the court agreed that the chancellor's valuation of other items was without basis and required remand. The chancellor improperly valued a grandfather clock based on a price she had seen at an estate sale. A chancellor may not look outside the record for evidence of value. In addition, the chancellor reduced the value of a cabinet and a vehicle based on the wife's testimony that the value in the couple's stipulated marital balance sheet was too high. The wife did not provide an alternative valuation and the court did not provide a reason for the reduction in value.

3. Valuation of land as part of business

**Case v. Case,* 339 So. 2d 796 (Miss. Ct. App. 2022). A chancellor did not err in valuing a marital home based on the amount for which it sold during the proceedings, rather than the higher value included in the wife's financial statement. Nor did the court err in valuing 183 acres owned by the husband's business as an asset of the business. The court rejected the wife's argument that the land should have been valued separately at $818,520, the value assigned to the land in the parent company report. The report used book value, not fair market value. The chancellor properly included the land in the overall valuation of the parent company.

4. Valuation based on tax appraisal

**Herron v. Herron,* 338 So. 3d 662 (Miss. Ct. App. 2022). A chancellor did not err in taking judicial notice of a tax assessor's valuation of the marital home as the measure of value when the parties presented substantially varying values. The husband offered a valuation $10,000 lower than the 1997 purchase price of the property. The wife presented a much higher local bank appraisal connected with a remodeling of the house. Under those circumstances, the court did not err in looking to independent evidence in the form of tax appraisals, which fell between the valuations offered by the spouses. Nor did the court err in valuing the self-employed mechanic husband's shop, tools, and equipment at $205,000. The husband's $55,000 valuation did not include his tools or major equipment, including two trucks, two wreckers, a forklift, and a flatbed truck. The court found the wife's testimony regarding valuation more reliable, based on the husband's failure to provide values and misstatements regarding financial matters.

NOTES

E. Division: The *Ferguson* factors

1. Failure to consider separate property and marital debt

**Warner v. Warner,* 341 So. 3d 152 (Miss. Ct. App. 2022). A husband argued that a chancellor should have considered in dividing marital property that he was ordered to pay $10,000 of the wife's medical debt. The court of appeals agreed, holding that chancellors must consider marital debt as part of the *Ferguson* analysis. The chancellor erred by dividing assets pursuant to the factors and then assigning debt without giving reasons for the division of debt. The court also agreed that the chancellor erred by failing to address the wife's separate property diamond ring, valued at $14,000, as part of the *Ferguson* analysis. The court remanded property division for the chancellor to value the items discussed and to address debt and separate property as party of the division.

2. Marital fault

Alves-Hunter v. Hunter, 351 So. 3d 468 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's roughly even division of property between a couple divorcing after thirteen years of marriage. The wife received $65,982 in assets and the husband received $70,945. The chancellor rejected the wife's argument that the court erred in failing to consider her husband's adultery in making the division. She presented no evidence that his adultery impacted the marriage. The chancellor considered the wife's significant dissipation of assets as a factor in the division, assigning her $20,000 that she had withdrawn from an account after separation.

3. Contribution to accumulation of assets

**Shannon v. Shannon,* 357 So. 3d 1043 (Miss. Ct. App. 2022), *cert. granted,* 346 So. 3d 460 (Miss. 2022), *cert. grant dismissed*, (Miss. March 9, 2023). A chancellor properly awarded the marital home to an elderly man who was granted a divorce based on habitual cruelty against his wife of one year. He owned the home free of debt when they married. The chancellor found that his wife was not entitled to a division of the home based on the short marriage, her lack of contribution to home equity, and her marital fault. Nor did she make homemaker contributions of significance – the husband hired a housekeeper and lawn service and they ate out twice a day. The wife was awarded her vehicle and $26,000 in lump sum alimony, which the chancellor noted would support her for thirteen months, the length of the marriage. The court of appeals affirmed, rejecting her argument that she was entitled to a portion of director's fees that her husband earned during the marriage. The fees were deposited into a checking account that was used to pay household bills. The account was closed, and she presented no evidence that funds remained after payment of expenses.

4. Liquid vs. debt-burdened assets

Garner v. Garner, 343 So. 3d 1097 (Miss. Ct. App. 2022). A chancellor did not err in awarding a husband of eight years earning $42,000 a year 48% of the marital assets and $508 in rehabilitative alimony for two years. His wife, who earned $600,000 a year, was granted custody of their children. The court of appeals rejected his argument that the chancellor erred in awarding him assets burdened with debt that he could not service while awarding his wife liquid assets. Nothing prevented him from selling assets to lower his debt burden. He was awarded 48% of marital assets even though his wife made more significant financial contributions, and his physical and verbal abuse ended the marriage.

5. Omitted assets

Wooten v. Wooten, 333 So. 3d 610 (Miss. Ct. App. 2022). The court of appeals reversed and remanded a court's equitable distribution, instructing the chancellor to divide the wife's retirement account. She admitted at trial that her $15,018 account was accumulated during the couple's four-year marriage. The chancellor found that the account was marital property but assigned no value to it, noting that the husband had not specifically requested a share of the account. The court of appeals reversed for the chancellor to "revise the distribution of [the] retirement account."

F. Third-party rights: Constructive trusts

**Herron v. Herron,* 338 So. 3d 662 (Miss. Ct. App. 2022). A divorcing wife's mother was properly awarded a constructive trust for life in a home she built on the divorcing couple's property. She built the house with her funds and with the understanding that she would leave the home to the couple at her death. It was undisputed that they encouraged her to build the home, that she used $100,000 of her savings for construction, and that she paid all expenses, utilities, and repairs on the property except for property taxes. Her son-in-law agreed that he considered the house hers until divorce proceedings began and that he did not have access to it. The court of appeals rejected the husband's argument that a constructive trust must be based on abuse of a confidential relationship. A court may impose a constructive trust for various reasons, including fraud, duress, abuse of a confidential relationship, commission of a wrong, unconscionable conduct or questionable means, or conduct "against equity and good conscience." The mother-in-law presented clear and convincing evidence that allowing the husband to retain the home would be against equity and good conscience and was necessary to prevent unjust enrichment.

G. Modification and enforcement

* *Archie v. Archie,* 337 So. 3d 698 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's order modifying a property division judgment because the former wife was financially unable to comply with the order. In

the first appeal of the case, the court of appeals reversed and remanded a 2010 divorce judgement to reconsider alimony and to clarify equitable distribution. After retrial in 2019, the chancellor awarded the marital home to the wife and ordered that she make the remaining six months of mortgage payments. After six months, she was to refinance the home and pay her husband $20,000 in equity. However, the disabled ex-wife was unable to secure a loan to refinance the home. She asked that the court allow her to pay the judgment at the rate of $100 a month. The court refused and ordered the property sold and the husband paid from the proceeds. The court of appeals rejected the wife's argument that because neither party requested sale as a form of relief, the chancellor exceeded her authority. A general request for relief includes any relief to which a party is entitled based on the evidence. Both parties petitioned the court to enforce the provision for payment of the husband's equity and both requested general relief.

H. Enforcement of out-of-state property division judgments

**Ellis v. Ellis,* 334 So. 3d 1148 (Miss. 2022). A chancery court lacked jurisdiction to divide a couple's marital assets after dismissing their divorce petitions with prejudice. After the couple separated, the husband moved to Texas. The wife filed for divorce in Mississippi based on desertion. He counterclaimed for divorce based on habitual, cruel, and inhuman treatment. The court entered a temporary order for sale of the marital home and awarded the wife $16,000 from the sale, leaving the remaining funds in the court registry. At trial, the chancellor found that the wife did not prove desertion and dismissed her petition with prejudice. The court dismissed the husband's petition with prejudice because he did not appear and offered no proof of grounds. Neither party appealed.

The husband then obtained a divorce in Texas, where the wife was served with process but did not appear. The Texas court awarded the husband the remaining $69,000 from the sale of the marital home, held by the Mississippi court. The wife appealed, arguing that the Texas trial court lacked jurisdiction to divide marital assets because she lacked minimum contacts with the state. The Texas Court of Appeals affirmed, holding that she waived her argument by failing to appear at trial to challenge personal jurisdiction.

While the Texas appeal was pending, the wife petitioned the Mississippi court to divide the remaining sale proceeds and other marital property. The husband argued that the Mississippi court lacked jurisdiction and sought enforcement of the Texas judgment. The chancellor found that the Texas court lacked personal jurisdiction to divide the parties' marital assets. The chancellor awarded the wife the remaining sale proceeds, ordered the husband to pay her $833 a month in alimony, and awarded her $20,000 in attorneys' fees. The husband appealed.

The Mississippi Supreme Court held that the chancery court lost jurisdiction to address property division when it dismissed both parties' divorce petitions with prejudice. At that point, the court should have returned the remaining marital funds to the spouses. Any action to distribute the sale proceeds or for other recovery should have been brought in an independent action based on a right to relief other than the Mississippi divorce action. Although the husband sought to

enforce the Texas judgment, he did not enroll it as required for the enforcement of a foreign judgment. The court cited *N. Dallas Bank & Trust Co. v. Mabry*, 271 So. 3d 629 (Miss. Ct. App. 2018) which discusses the Uniform Enforcement of Foreign Judgments Act, Miss. Code Ann. δ 11-7-301.

V. ALIMONY

A. Permanent alimony: Characteristics

**Phang v. Phang,* 350 So. 3d 1154 (Miss. Ct. App. 2022). The court of appeals reversed and remanded an alimony award because the order did not state that alimony would terminate upon the husband's death. The order provided for termination upon the wife's remarriage or death but omitted termination on the husband's death.

B. *Armstrong* factors: Separate property of spouses, debt

**Warner v. Warner,* 341 So. 3d 152 (Miss. Ct. App. 2022). A chancellor awarded a wife of thirty-four years $1,000 a month in alimony until the marital home sold and $3,500 a month after the sale. The sixty-year-old husband's net income was $6,459 per month. He had additional resources through employment benefits, including an automobile, gasoline, meals, and phone. The wife, who had been a homemaker for fifteen years of the marriage, earned between $20,000 and $25,000 a year. She was being treated for anxiety and depression and was in remission from cancer. The court of appeals reversed – the chancellor failed to consider the wife's four separate property items (golf cart, ring, piano, and jet skis) in determining alimony and did not consider the $10,000 debt assigned to the husband.

C. Permanent alimony affirmed

**Phang v. Phang,* 350 So. 3d 1154 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's award of $2,700 a month in permanent alimony to an unemployed sixty-two-year-old wife of thirty-four years. She had a high school degree and had been a homemaker or employed at low-wage jobs during the marriage. She suffered from diabetes and high blood pressure and was no longer employed. Her husband's net monthly income was $7,997. Both were awarded $606,000 in marital assets. The award left the husband with a $913 deficit in his ability to meet his stated expenses and the wife with a $530 deficit.

The court of appeals rejected the husband's argument that the court should have reduced the wife's award because she could have drawn Social Security at sixty-two. The court stated: "We know of no precedent under which a party to a divorce can be required to apply for Social Security benefits." Similarly, the fact that he might retire in two years did not require reversal. He could petition for modification when she began receiving benefits or when he retired. Chancellors are to focus on the parties' current financial situation in awarding alimony.

The court also held that the chancellor erred in ordering the husband to provide the wife with his annual tax returns when she was not required to do the same. There was no evidence that he had concealed income. If either filed a modification action, they would be able to request tax returns at that point.

D. Rehabilitative alimony affirmed

**Case v. Case,* 339 So. 2d 796 (Miss. Ct. App. 2022). A chancellor did not err in awarding a forty-year-old wife of fourteen years who planned to return to school $2,500 in rehabilitative alimony for four years. Rehabilitative alimony is not intended to replicate the marriage standard of living – it is awarded to assist a spouse to become self-sufficient. The award would allow her to transition through college to the workforce. She received significant marital property and was not required to pay child support to the custodial father for four years.

**Denham v. Denham,* No. 2020-CA-00675-COA, 2022 WL 290890 (Miss. Ct. App. Feb. 1, 2022), *reversed in part*, 2022 WL 17350494 (Miss. Dec. 1, 2022) (reversing custody but not reversing alimony). The court of appeals affirmed a chancellor's award of $350 a month in rehabilitative alimony for two years to a wife. The husband's income was higher, the wife had a greater share of marital debt, and she needed additional financial security for a short period of time. The court rejected the husband's argument that rehabilitative alimony was inappropriate because the wife was already employed. Rehabilitative alimony may be awarded to an employed spouse when there is a disparity in the parties' incomes.

Garner v. Garner, 343 So. 3d 1097 (Miss. Ct. App. 2022). The court of appeals affirmed an award of two years of rehabilitative alimony of $508 to a husband of eight years earning $42,000 a year. His wife, who earned $600,000 a year, was granted custody of their children. He received forty-eight percent of the marital assets. The chancellor found that the husband's earning capacity exceeded his current income. He was trained as an engineer and could complete the requirements for licensure and increase his salary. The court also noted that the custodial mother would have additional expenses for the children and that the husband's physical and verbal abuse led to the end of the marriage.

E. Lump sum alimony

Shannon v. Shannon, 357 So. 3d 1043 (Miss. Ct. App. 2022), *cert. granted,* 346 So. 3d 460 (Miss. 2022), *cert. grant dismissed*, (Miss. March 9, 2023). A wife of one year, whose elderly husband was granted a divorce based on habitual cruelty, was awarded her vehicle and $26,000 in lump sum alimony. The chancellor found that this amount would support her for thirteen months, the length of the marriage. The court of appeals affirmed.

F. Life insurance to secure alimony

**Phang v. Phang,* 350 So. 3d 1154 (Miss. Ct. App. 2022). The court of appeals reversed a chancellor's order that a husband provide a $91,000 life insurance policy to secure unpaid alimony in the event of the husband's death. A policy of that amount would cover a default in thirty-three monthly payments of the $2,700 alimony award. While admitting that there is no rule of thumb as to the amount of life insurance that should be ordered, the court held that the amount was error – the evidence showed that the husband regularly paid any court-ordered support. The court remanded the award for the chancellor to determine whether any insurance was necessary and if so to set a lower amount appropriate to the husband's obligations.

VI. AGREEMENTS

Montgomery v. Montgomery, 339 So. 3d 819 (Miss. Ct. App. 2022). The court of appeals rejected a wife's argument that a chancellor's division of marital assets was unfair – the division was based on the parties' agreement. At trial, the husband offered a division of assets. The pro se wife considered his offer during a break, discussed the terms with her mother, and made a counterproposal that he accepted. The court incorporated the agreed settlement into the judgment of divorce. There was no indication that the wife was under duress at the time that she entered the agreement.

VII. CUSTODY

A. Presumption against custody: History of family violence

**Lambes v. Lambes,* 345 So. 3d 592 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's grant of sole physical custody to the father of two boys based on the recommendation of counselors and the guardian ad litem. Although both spouses initially requested divorce based on irreconcilable differences, the wife withdrew her consent after 3½ years of high-conflict litigation. Subsequently, the chancellor asked whether either of them would admit to habitual, cruel, and inhuman treatment to move the case forward. The chancellor stated that doing so would not negatively impact them regarding custody. The father agreed that the mother would be granted a divorce. The court of appeals rejected the mother's argument that his agreement barred him from custody unless he overcame the presumption against custody to a violent parent. He admitted to habitual cruelty to move the case forward – he did not admit to a history of family violence. Furthermore, even if she did prove a pattern of violence, there was sufficient evidence to rebut the presumption. The father completed parenting classes. There was no evidence of family violence during the five years of litigation. And there was evidence that the mother's mental condition affected her ability to care for the children.

NOTES

Alves-Hunter v. Hunter, 351 So. 3d 468 (Miss. Ct. App. 2022). The court of appeals rejected a wife's argument that a father should not have been awarded regular visitation with their adopted son because of the boy's special needs and because of an incident of domestic violence. She obtained a protection order in Massachusetts based on an incident of violence during the couple's separation. She alleged that her husband punched and tried to choke her when he learned she had removed $20,000 from their accounts. The chancellor found that one incident did not amount to a history of violence that would trigger the domestic violence presumption against custody.

B. Legal custody

Garner v. Garner, 343 So. 3d 1097 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's award of sole legal and physical custody to a mother. She was favored on parenting skills, moral fitness, and physical and mental health. The father exhibited violent temper outbursts, abused her verbally in front of the children, abused alcohol, and once pointed a gun at his head in front of his daughter. Videos showed the children crying during his outbursts and asking him to stop. The chancellor did not err in awarding the wife sole legal custody even though the guardian ad litem recommended joint legal custody. The evidence supported the chancellor's finding that the father could not work cooperatively with the mother.

C. Joint vs. sole custody

Lamy v. Lamy, No. 2021-CA-00770-COA, 2022 WL 17259752 (Miss. Ct. App. Nov. 29, 2022). The court of appeals disagreed with a chancellor's interpretation of a couple's custody agreement, finding that it provided for joint physical custody rather than sole physical custody in the mother. In 2019, the parents agreed to share joint legal custody of three children "with primary physical custody to the mother . . . with custody for the father . . . as set out herein." The father had "custody with the minor children every other week" from Friday to Friday. The agreement used the word visitation to describe both parents' holiday and special occasion time. The agreement also provided that because the parents had closely equal time, neither would pay child support. The order stated that the parents "have equal opportunity in decisions affecting the children."

In 2020, the father petitioned for modification and contempt, alleging that the mother unilaterally altered their schedule from March 2020 to May 2020, made decisions about education without his input, and kept the children from communicating with him. The mother argued that the schedule change was necessary to ensure that the children were properly home-schooled during Covid. She testified that they unsuccessfully attempted schooling at both homes for two weeks before she made the change. Based on interviews with the children, the guardian ad litem recommended a traditional schedule with the mother having the children during the week. The chancellor held that the agreement provided for sole physical custody to the mother and that the father failed to prove

a material change in the mother's home to justify modification. She modified the father's visitation to every other weekend, finding that the current visitation schedule was not working.

The court of appeals reversed, holding that the agreement created joint physical custody. The court noted that there is no provision in the Mississippi statutes for "primary physical custody." In some cases, the phrase has been interpreted to mean sole physical custody. However, in this case, other language in the agreement suggests this was a joint physical custody agreement. The word custody was used to refer to both parents' time; the word visitation was used only to refer to the parents' holiday times; no child support was ordered; the parents' time with the children was equal; and they had equal decision-making authority. The court remanded for the chancellor to apply the legal standard appropriate for modifying joint physical custody rather than sole physical custody.

D. *Albright* factors

1. No factors favored parent awarded custody

***Lambes v. Lambes,* 345 So. 3d 592 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's grant of sole physical custody to the father of two boys even though none of the *Albright* factors favored him. Two judges dissented, arguing it was error to award custody to a parent who was not favored on any custody factors. The parents were married for three high-conflict years before litigating divorce and custody for five years. The proceedings included cross-allegations of abusive behavior, grandparent involvement on both sides, multiple hearings, several guardian ad litem reports, and the reports of doctors and counselors. The wife and her mother filed multiple unsubstantiated reports of child abuse by the father. She also alleged that her husband was physically abusive to her while he characterized their altercations as self-defense on his part. The guardian ad litem and court-appointed co-parenting expert both recommended custody to the father, based on concerns about the mother's ongoing allegations of abuse, her animosity toward the father, and the impact of her stress levels on the children. The expert who conducted psychological testing reported that the mother possibly suffered from PTSD and personality disorder but that she posed no threat to the children.

The chancellor found that most of the *Albright* factors were neutral. The mother was favored on continuity of care because she provided more care for the children during the marriage. She was also favored on physical and mental health and moral fitness – the father did not attend church and had anger issues during their marriage. However, the chancellor found that it was in the boys' best interest to be with their father. Because the chancellor relied on the totality of evidence including expert reports, the court of appeals affirmed despite the chancellor's *Albright* findings.

2. Findings on each factor

**Case v. Case,* 339 So. 2d 796 (Miss. Ct. App. 2022). A chancellor properly awarded custody of three- and four-year-old girls to their father. The chancellor did not err in finding the age and sex of the girls to be neutral. They were no longer of tender years and the parents had shared joint custody during the proceedings. The chancellor also found continuity of care to be neutral. The mother stayed home but, according to the father, relied on caregivers for the children. The chancellor expressed concern about the mother's parenting based on her record with her three older children. The court of appeals rejected the mother's argument that she should have been favored on capacity for childcare and employment responsibilities. The father's schedule was flexible, and he had family assistance while the mother did not. The chancellor did not specify who was favored on several factors, including physical and mental health, stability of the home environment, moral fitness, and the children's home, school, and community record. The court rejected the mother's argument that the chancellor was required to state who won on each factor. The chancellor considered the evidence under each factor, which was sufficient to support the award of custody to the father. The chancellor did not find for either party on the issue of moral fitness. The court of appeals agreed, stating, "where both parties engage in extramarital affairs, neither should get the benefit of a finding of moral fitness."

3. Home, school, and community record

**Wooten v. Wooten,* 333 So. 3d 610 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's award of custody of two boys to their mother. The court rejected the father's argument that he should have been favored on the age and sex of the children. The fact that the mother had experienced one or more panic attacks did not require a finding against her on health and fitness – the panic attacks did not affect her ability to care for the children. Nor did her pre-separation affair require a finding for him on moral fitness. There was no evidence that her affair affected the children. In addition, he had a child with his girlfriend while the couple were still married. The chancellor properly found that the children's home, school, and community record was a neutral factor even though the mother had moved from Clay County, where they had lived, to Monroe County. The distance did not prevent the mother and boys from spending substantial time in Clay County with friends and family.

4. Moral fitness

**Denham v. Denham,* No. 2020-CA-00675-COA, 2022 WL 290890 (Miss. Ct. App. Feb. 1, 2022), *reversed in part*, 351 So. 3d 954 (Miss. Dec. 1, 2022). The court of appeals held that a chancellor erred in limiting a husband's cross-examination in a custody hearing. The husband sought to question the wife regarding an affair, in connection with the custody factor of moral fitness. The chancellor limited his questions because he did not plead adultery in the divorce action. The court of appeals affirmed. The supreme court reversed the custody

award on other grounds and instructed the chancellor to allow the testimony on remand. The husband's failure to plead adultery as a divorce ground did not bar the evidence – he sought to introduce it for purposes of custody, not divorce grounds.

5. Continuity of care

**Schmidt v. Schmidt,* 339 So. 3d 163 (Miss. Ct. App. 2022). A chancellor properly modified joint physical custody based on parents' inability to cooperate and awarded custody to the mother. The father argued that the chancellor erred in finding for the mother on continuity of care since they shared custody evenly. However, the mother had full custody while the father was deployed for six months. In addition, because he worked in New Orleans, she was significantly involved in childcare during his custodial periods. She dealt more with the children's teachers and doctors and was more involved in their activities. The chancellor also properly found that she was favored on parenting skills and stability of the home environment. She had a routine for the children, while they were less structured in his home and did not get eight hours of sleep. In addition, the father recorded the children discussing their mother and talked with them about the litigation. The children's home, school, and community record favored the mother. In her care, the children were engaged in extracurricular activities and their grades improved.

E. Visitation

**Alves-Hunter v. Hunter,* 351 So. 3d 468 (Miss. Ct. App. 2022). The court of appeals rejected a wife's argument that a father should not have been awarded regular visitation with their adopted son. She argued that visitation should be restricted because of the boy's special needs (post-traumatic stress disorder and developmental delays). She testified that the boy became distressed when the parents attempted to meet for a visitation exchange. The court emphasized that regular time with a noncustodial parent is important – visitation should not be restricted except to prevent harm to a child. The chancellor found that the mother was encouraging the boy to be afraid of his father rather than facilitating visitation. The court also rejected the mother's argument that a single incident of domestic violence during the couple's separation triggered the presumption against custody to a violent parent.

Kelley v. Zitzelberger, 342 So. 3d 499 (Miss. Ct. App. 2022). A chancellor did not err in ordering that a sixteen-year-old girl visit her father in New Jersey at Christmas and in the summer but limiting once-a-month weekend visitation to Mississippi for the present. The father and daughter had a strained relationship. The girl testified that she was afraid of her father and did not want to go to New Jersey. The chancellor found that the two needed to rebuild their relationship before ordering regular visitation at the father's home.

F. Modification of custody

1. No material change or adverse impact

**Wall v. Wall*, 350 So. 3d 620 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's Rule 41 dismissal of a father's petition to modify custody of his eleven-year-old son. The fact that the mother briefly dated a convicted sex offender was not a material change – she ended the friendship, and the boy barely mentioned the man in his testimony. Nor was her one-time use of marijuana months prior to the petition a material change. The chancellor was concerned that the boy had excessive tardies and absences, that the mother frequently left him alone in the evening, and that she made inappropriate social media postings. The chancellor noted, however, that there were reasons for some of the absences, including precautions to keep the boy home with fever during Covid. He also found that the boy was supervised even if technically alone in their house – extended family lived in houses located from six to fifty feet from the mother's house and the boy often stayed with them when she was away. The chancellor did not find a material change under these combined circumstances.

The chancellor further found that even if these circumstances were a material change, there was no showing that the boy was adversely impacted. He was engaged in sports and outdoor activities and liked living in the country with his mother. His grades had not dropped. The only evidence of a negative impact were two statements indicating a desire to self-harm, one by text shortly after his parents' divorce and another using a video game messaging system. The parents removed his access to the video game and engaged a therapist with whom the boy met regularly. His statements, though concerning, were more likely related to his parents' divorce and ongoing litigation than conditions in his mother's house.

2. Custodial parent's remarriage

**Kreppner v. Kreppner,* 341 So. 3d 132 (Miss. Ct. App. 2022). A non-custodial mother failed to prove that her ex-husband's wife's negative attitude toward her was a material change in circumstances that adversely affected her nine-year-old daughter. The mother alleged that the child's stepmother hated her, showed scorn for her, and attempted to interfere with her relationship with the girl. The court-appointed psychologist observed the stepmother's "rage" and stated that he believed it interfered with the child's relationship with her mother. He opined that coparenting would be unlikely unless the mother had custody. The guardian ad litem also expressed concerns. However, he observed that the child was healthy, happy, doing well in school and adapted to living with her father. The chancellor found there was no material adverse change in circumstances.

The court of appeals affirmed. The court noted that remarriage qualifies as a material change of circumstances only in extreme situations. There was no evidence that the stepmother's attitude had adversely affected the child or her relationship with her mother. While the appointed psychologist observed that

the girl appeared to be anxious and sad "below the surface," the court stated, "it takes more than occasional unhappiness in a child to warrant modification."

The court rejected the mother's argument that the *Riley v. Doerner,* 677 So. 2d 740 (Miss. 1996) adverse environment test should apply. The *Riley* test allows modification without proof of a material change when a child has been living in adverse circumstances that create a genuine risk to the child. The *Riley* test should be applied only when the child's health and welfare are truly at risk.

**Blagodirova v. Schrock,* No. 2020-CA-01162- COA, 2022 WL 16568602 (Miss. Ct. App. Nov. 1, 2022), *cert. granted,* 2023 WL 3779445 (Miss. 2023). In a 5-4 decision, the court of appeals reversed and rendered a chancellor's modification of custody, holding that there was insufficient evidence that a boy was negatively impacted by his mother's marriage to an undocumented immigrant. In 2018, the stepfather was stopped at a roadblock and arrested for having an illegal license. He was deported for a short period but returned to live with the mother and son without securing citizenship.

The father alleged that the mother and stepfather had been abusive to the boy. The mandatory guardian ad litem testified that the mother had once used a belt to spank the boy but that the incident was isolated and remote in time. There was conflicting testimony about whether the stepfather hit the boy in the chest. There was also evidence that the mother instructed the boy not to tell his father about the stepfather's arrest. The guardian ad litem found no evidence of abuse. The boy was doing well in school, had a good relationship with all parties, and appeared to be happy.

The chancellor found that a material change in circumstances had occurred, including the mother's marriage to an undocumented man who could be deported again; the boy's preference to live with his father; the mother's twenty-plus dogs in their home; and that she preferred for the boy to stay with his stepfather when she was working. The chancellor held that the boy was adversely affected by the incident of abuse by his stepfather.

The court of appeals agreed that a material change had occurred but disagreed that the boy was adversely affected. The stepfather's undocumented status did not affect him. Any incidents of physical contact were isolated. The boy was in good health, doing well in school, with no behavioral issues. Four judges dissented, emphasizing the standard of review and the deference given to the chancellor's decision.

Stuckey v. Stuckey, 341 So. 3d 1030 (Miss. Ct. App. 2022). A father was properly awarded custody in a modification action. The mother abused prescription drugs and cohabited with a married man who abused alcohol and had a violent temper. Their daughter had numerous absences and tardies and had witnessed the boyfriends' alcohol abuse and violent outbursts. On several occasions, the child hid when the boyfriend was angry. She experienced stomach aches while living with her mother that disappeared when her father was given temporary custody. The chancellor found that the overall circumstances constituted a material change in circumstances and that the child was adversely affected.

NOTES

In the *Albright* analysis, the chancellor found that the father was favored on continuity of care, parenting skills, mental health, moral fitness, stability of the home and the child's home, school, and community record. In addition to the mother's drug use and cohabitation, the court considered that the mother kept the child from her father for a significant period, inappropriately discussed the case with the girl, moved regularly and was sporadically employed. The court of appeals rejected the mother's argument that the chancellor erred in ordering her to submit to ongoing quarterly drug tests after she tested negative five times. She had a history of taking unprescribed narcotics.

3. Advance agreement on modification

**Schmidt v. Schmidt,* 339 So. 3d 163 (Miss. Ct. App. 2022). The court of appeals refused to enforce a couple's attempt to define material change in circumstances by agreement. Their custody agreement provided they would share joint physical custody until the earlier of August 1, 2018 (when the youngest started school) or when one of them moved over 100 miles away. The occurrence of either was described as a material change in circumstances adverse to the children, warranting modification. In June of 2019, both parents sought modification to sole physical custody in themselves. The chancellor held that their attempt to define material change by agreement was void and against public policy but found that a material change in circumstances had occurred.

4. Modification of joint custody

Schmidt v. Schmidt, 339 So. 3d 163 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's modification of joint physical custody between parents based on their inability to work cooperatively. At divorce, the parents agreed to share joint legal and joint physical custody. In June of 2019, both parents sought sole physical custody. The father alleged that the mother medically and emotionally neglected the children and filed a complaint with CPS. CPS found no merit to the complaint. The mother alleged that the father berated her, called her abusive names, and recorded the children's conversations with him. The chancellor found that the parents' inability to co-parent, verbal altercations, and failure to agree on medical treatment and education was a material change in circumstances. The chancellor also found that the children were adversely affected. The court awarded custody to the mother, finding that she was favored on continuity of care. However, the chancellor ordered that they continue to exercise joint legal custody and share in decisions related to their health and education. The father appealed, arguing that the chancellor erred in finding a material change based solely on their inability to cooperate. The court of appeals affirmed. The most important requirement for joint custody is the parents' ability to cooperate – something both parents agreed they could not do.

G. Guardians ad litem

1. Failure to file a report

**Gibson v. Gibson,* 333 So. 3d 103 (Miss. 2022). The court of appeals rejected a noncustodial father's argument that a guardian ad litem's failure to file a written report required reversal. The child's parents separated when he was four. Over the next five years, custody alternated between the mother, the paternal grandmother, and a maternal aunt. The father was imprisoned after receiving several DUIs. The mother was incarcerated for fraud for eighteen months, during which time the child lived with his grandmother or aunt. The chancellor appointed a guardian and ordered that he investigate and provide a written report. The guardian did a home study of the grandmother and aunt and met with the child. The father did not provide the guardian with an address even though he had requested a home study. One year later, the guardian was relieved from his duties after closing his law office. He testified regarding his investigation but did not provide a written report. At the time of trial, the mother had been out of prison for a year and visited regularly with the child. She was employed and married. The father had been arrested again for DUI. The chancellor awarded custody to the mother with visitation to the father.

The court rejected the father's argument that the guardian's failure to provide a written report was reversible error. The appointment was discretionary – there were no allegations of abuse or neglect. The guardian's failure to visit the father's home was not error, particularly since the father did not cooperate by providing an address. Nor was the chancellor required to appoint a new guardian when the first was dismissed. The chancellor had discretion to determine whether a guardian was required in the absence of allegations of abuse or neglect.

2. Documents attached to report

**Lamy v. Lamy,* No. 2021-CA-00770-CAO, 2022 WL 17259752 (Miss. Ct. App. Nov. 29, 2022). A father argued that a chancellor erred in admitting a guardian ad litem's report with attached documents and records that the mother did not provide in response to discovery requests. He received the report the night before trial. The court of appeals rejected his argument. A guardian ad litem is charged with investigating and reporting all relevant information to the court. The information was not introduced into evidence and most of the documents were not referenced in the guardian's testimony. The court also emphasized that the father's attorney indicated to the court that he did not need additional time to review the report.

H. Parental decision-making

1. Medical care

***Nowell v. Stewart,* 356 So. 3d 1217 (Miss. Ct. App. 2022). The noncustodial father of a girl with autism spectrum disorder argued that the custodial

mother should not have sole authority to choose the girl's psychiatrist because the parents shared joint legal custody. The court of appeals rejected his argument, stating that custodial parents "may determine the child's upbringing, including his education and health and dental care. Such discretion . . . is vested in the custodial parent."

2. Designated decision-maker

***Bryant v. Bryant,* 348 So. 3d 309 (Miss. 2022). The supreme court held that a chancellor had power to override a father's decision regarding his children's education without finding a material change in circumstances, even though he was granted decision-making authority at divorce. When the couple divorced, their twins were preschool age. Section 11 of their agreement provided for joint legal and physical custody but stated that the father had final decision-making authority if they could not agree. Section 17 stated that each parent would pay for one-half of the older child's private school tuition. If either party was financially unable to afford tuition for the twins, the court "will reevaluate this matter upon Motion of either party." The agreement was later amended to modify physical custody to the mother, but legal custody remained the same. When the twins were of school age, the father notified the mother that he planned to enroll all three children in the Lake Cormorant public school where his current wife taught. The mother petitioned the court to order that they be enrolled in the Hernando public schools where she and the children lived. The chancellor found that neither party could afford private school and that it was in the children's best interests to attend school where they lived. The court of appeals affirmed. The supreme court granted *certiorari* and affirmed the court of appeals' decision.

The father argued that the chancellor's authority under Section 17 was limited to determining *whether* the parties were able to pay for private school and did not extend to ordering *what* public school they should attend. He argued that the chancellor had no authority to override his decision regarding the children's education, citing U.S. Supreme Court decisions regarding parents' fundamental rights to make education decisions for their children.

The majority held that chancellors, as the guardians of children of divorce, can override a parent's educational choices that are not in their child's best interest. It is not necessary that the chancellor find a material change in circumstances. The court cited *Wisconsin v. Yoder,* 406 U.S. 205 (1972), which held that parents' education decisions may be limited if their decision is not in a child's best interest and if the decision will jeopardize the child's health or safety or create significant social burdens. The parents' agreement designating the father as decision maker "cannot usurp, supplant, or compromise the chancellor's authority."

Three justices dissented, stating that courts can modify provisions related to children only if there is a material change in circumstances. In this case, the chancellor made no finding of a material change to justify limiting the father's decision-making authority. The dissenters pointed out that *Yoder* allows courts to override parents' educational decisions only if their decision is not in the child's best interest *and* the parent's decision threatens the child's health or safety. One

dissenter stated that the decision "stretched the superior guardian concept too far" and "has potential to diminish parental rights in favor of court intervention."

VIII. CHILD SUPPORT

A. Income

1. Proof of income

Stuckey v. Stuckey, 341 So. 3d 1030 (Miss. Ct. App. 2022). A chancellor ordered a noncustodial mother to pay child support, retroactive to a temporary custody order, in the amount of 14% of her income as reflected on her 8.05 Financial Statement. She argued on appeal that the court erred in basing support on a year-old financial statement. However, she failed to provide the court with an updated financial statement at the final hearing even though the custodial father updated his.

2. Imputing income to low-income payors

*The Mississippi Legislature amended Miss. Code Ann. δ 43-19-101, the child support guidelines, to address child support orders involving low-income payors. The amendments require that a court take into consideration the basic subsistence needs of payors with limited resources. The amendment also provides that a court may not automatically impute income to an unemployed or under-employed payor at a standard amount. Imputed income should be based on facts applicable to the payor, including their work history, "assets, residence, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers, and record of seeking work," as well as the local job market and earnings in the local community. Laws 2022, Chp. 365 (H.B. 1067), δ 1, eff. July 1, 2022.

B. Child support guidelines: Deviation based on shared parenting

**Wooten v. Wooten,* 333 So. 3d 610 (Miss. Ct. App. 2022). The court of appeals rejected a father's argument that a chancellor should have deviated from the guidelines because he would have visitation with the children approximately 40% of the time. The court stated that it would not find an abuse of discretion when the amount of support ordered is "equal to the amount that is presumptively correct under the child-support guidelines."

C. Extracurricular activities

Denham v. Denham, No. 2020-CA-00675-COA, 2022 WL 290890 (Miss. Ct. App. Feb. 1, 2022), *reversed in part,* 2022 WL 17350494 (Miss. Dec. 1, 2022). The court of appeals affirmed a child support award based on the husband's current income rather than, as he requested, future income. The court rejected his argument that the evidence did not support an award of $250 a month for the children's extracurricular activities. The wife provided an exhibit listing expenses that the parties had historically shared, on which the chancellor relied

in making the award. The supreme court reversed and remanded the chancellor's custody award and the court of appeals' decision affirming the award. However, the court did not reverse the child support award.

.

D. Modification of child support

1. Foreseeability

* *Nowell v. Stewart,* 356 So. 3d 1217 (Miss. Ct. App. 2022). A chancellor properly modified child support for a teenaged girl with autism spectrum disorder, based on proof that her expenses had increased and were not foreseeable when her parents divorced. The eleven-year-old girl was diagnosed in 2010, three years prior to their divorce. They agreed that the father would pay $590 in child support for three years, then $1,000 a month until the girl was twenty-one. The mother sought an upward modification in 2016, alleging that the girl was older, with increased expenses and activities. At the 2020 trial, the chancellor found that a material change had occurred based on the child's age, increased need for medical and psychiatric care, and the cost of her activities. The chancellor increased the award to $2,000 a month, made the order retroactive for three years, and ordered the father to pay $30,000 in back child support.

On appeal, the father argued that the expenses related to her autism spectrum disorder were foreseeable because she was diagnosed prior to the agreement. The court of appeals held that while her diagnosis was known at divorce, the extent of her future expenses was not. The mother provided specific information regarding the costs and importance of psychiatric treatment, special services such as a driver, expenses for the girl's therapeutic pets, and the cost of private school. The court of appeals affirmed the three-year award of back support based on the chancellor's finding that the four-year litigation dragged out in part due to the father's claims that delayed the proceedings.

2. Voluntariness/bad faith loss of income

*In 2023, the Mississippi Legislature enacted a statute providing, "The court may not consider incarceration as intentional or voluntary unemployment or underemployment when establishing or modifying a child-support order." Senate Bill 2082, eff. July 1, 2023.

Tolliver v. Tolliver,* 334 So. 3d 1228 (Miss. Ct. App. 2022).** A father was not entitled to a reduction in child support when his job was terminated for violation of company policy. The noncustodial father was ordered to pay $1,000 a month in child support. At the time, he was working full-time for Ice Industries and had several part-time jobs or businesses. In July 2020, he contracted Covid and was quarantined for fourteen days according to company policy. When the fourteen-day period ended, he did not return to work, stating that he was still experiencing at least two Covid symptoms. He was terminated based on his failure to report to work or report his absences and because he engaged in other work during his quarantine period in violation of Ice Industries policies. The chan-

cellor found that the father's job loss was in bad faith, based on his violation of company policy. The court of appeals affirmed. To obtain a reduction in support, a payor must prove a material, unforeseeable change and that the change was not caused by bad faith. The court stated that bad faith is a voluntary act that reduces income – it does not require an intent to harm the child's interests.

3. Out-of-court agreements to modify

**Kelley v. Zitzelberger,* 342 So. 3d 499 (Miss. Ct. App. 2022). A chancellor properly refused to enforce parents' out-of-court agreement to reduce the father's child support. The noncustodial father sought to reduce his monthly $800 support obligation based on a five-year-old agreement to reduce his support to $550 a month and to pay the daughter's cheerleading and orthodontic expenses. He also sought reduction based on loss of income upon retiring from the military. The court of appeals held that the chancellor properly refused to recognize the agreement and ordered him to pay $8,750 in arrearages. Child support is for the benefit of the child, not the parents – an out-of-court agreement between parents is not enforceable.

4. Modification to Mississippi guidelines

**Kelley v. Zitzelberger,* 342 So. 3d 499 (Miss. Ct. App. 2022). An out-of-state father sought modification of child support based on income loss and an out-of-court agreement. On appeal, he argued that because the mother and child now lived in Mississippi, the chancellor should have reduced his support to the Mississippi guidelines regardless of whether he proved a material change in circumstances. The court distinguished *Cadigan v. Sullivan*, 301 So. 3d 669 (Miss. Ct. App. 2020). In that case, the parent did not seek reduction based on reduced income, as the father here did. She sought to conform the award to the Mississippi guidelines.

5. No reduction in standard of living

**Hornsby v. Hornsby,* 353 So. 3d 507 (Miss. Ct. App. 2022). A chancellor properly refused to reduce an attorney father's child support based on fluctuation of income in his two-person practice. The court noted that a self-employed attorney's practice is likely to fluctuate, and the father had access to credit to address cash flow. In addition, the father's lifestyle did not reflect a reduction in income. He had recently build a new home, purchased a new BMW, and enjoyed an "upscale lifestyle." Some of the expenses listed on his 8.05 financial statement were shared equally with his current wife. While a court may not look to a payor's spouse's income purposes of child support, the court may consider the extent to which the spouse assists with living expenses.

**Kelley v. Zitzelberger,* 342 So. 3d 499 (Miss. Ct. App. 2022). A chancellor properly refused to reduce a father's child support. The noncustodial father sought to reduce his monthly $800 support obligation based on an out-of-court agreement and on his mandatory retirement from the military, which reduced his pay from $5,000 to $1,736 a month. The court of appeals agreed with the chancellor that the father's retirement from the military and resulting income reduction did not warrant modification. The forty-year-old father could have worked or attended school on the G.I. Bill (with a living stipend) and had chosen to remain unemployed. Although the father stated that he was diagnosed with PTSD after serving in Iraq, he was not declared disabled and had served several tours of duty after that time. In addition, his standard of living had increased after his retirement, including purchasing a home and two new vehicles.

6. Modification of tax exemptions

Wallace v. Wallace, 336 So. 3d 1151 (Miss. Ct. App. 2022). A chancellor did not err in declining to modify a couple's divorce agreement giving the custodial mother the right to claim both children as dependents, even though the court later modified custody to joint physical custody. There is no requirement that a chancellor make specific findings of fact to support tax exemption awards – the court of appeals will assume that the chancellor made determinations of fact to sufficient to support the judgment.

7. Retroactivity

******Ponder v. Ponder*, 349 So. 3d 212 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's increase of child support retroactive to a date eighteen months prior to the mother's petition for modification. When the parents changed from joint custody to custody in the mother, they agreed that the unemployed father would pay no support for ninety days. At the end of the period, he was to notify the mother of his employment status, which he failed to do. Eighteen months later she petitioned for support. The chancellor ordered him to pay $451 a month retroactive to the date on which the ninety-day suspension ended. The father appealed, arguing that the court lacked authority to increase support prior to the date of filing. The court of appeals disagreed. A chancellor has discretion to make an order retroactive prior to the filing date based on Miss. Code Ann. δ 43-19-34 (allowing upward modification retroactive "to the date of the event justifying the upward modification"). While the supreme court has suggested the better practice is to make orders retroactive to the date of filing, the earlier date was appropriate in this case. The order contemplated that after the ninety-day suspension, the father would begin to pay child support.

*Retroactivity in DHS orders. On August 5, 2022, MDHS policy was revised to prevent making modifications retroactive prior to the date of filing. Division of Child Support Enforcement Bulletin No. 7033. This change was to comply with federal regulation 45 CFR § 303.106 which provides that every child support installment becomes a judgment by operation of law as it comes due and is not subject to retroactive modification.

E. Termination of support

1. Clear and extreme test

**Davis v. Henderson,* 332 So. 3d 837 (Miss. 2022). The supreme court reversed a court of appeals decision and reinstated a chancellor's order terminating a father's child support obligation for one of his two sons. The parents had been involved in custody litigation for fourteen years when the father filed his sixth contempt petition and a petition to terminate support for his teenaged sons. The older son had refused to visit his father for three years. The chancellor found that the primary reason for the estrangement was the boy's desire not to see his father and that the boy's conduct met the "clear and extreme" test to terminate support. The chancellor suspended support temporarily for the family to attend reunification counseling. A year later, the older son still had not visited his father, would not respond to his text messages or calls, and did not want a relationship with him. The chancellor found that the son's hostility warranted suspending support until he resumed regular visitation. He ordered continued support for the younger son, reducing support to one-half of the prior order. The court of appeals reversed, finding that the father's conduct was the primary reason for the estrangement. He was involved in a physically abusive incident four years earlier when he forced his son to hold his hands over his head for so long that he cried. He did not attend the son's band concerts or show an interest in his plans. He would not allow his son to use the internet at his house, go outside, or cook at his house.

The supreme court reversed, holding that the court of appeals failed to apply the abuse of discretion standard to review the chancellor's finding that the son's conduct caused the estrangement. Instead, the court of appeals made its own finding that the father was responsible. There was testimony that the boy would not respond to texts or phone calls, said he would rather go to jail than visit his father, and stated that he hated his father. When substantial evidence supports a chancellor's decision, an appellate court must affirm.

Two justices dissented, arguing that the evidence relied on by the chancellor fell far short of previous cases in which child support was terminated. Those cases involved children who accused parents of rape, filed petitions to terminate their parenthood, or wished them dead. The son in this case participated in court-ordered reunification counseling with his father, said that he loved his father but did not want to visit him, and brainstormed about ways to improve the relationship.

2. Support for remaining children

**Davis v. Henderson*, 332 So. 3d 837 (Miss. 2022). The supreme court reversed the court of appeals and reinstated a chancellor's termination of a father's support obligation for his oldest son. However, the court reversed the chancellor's child support modification, which divided the existing support award in half. When determining support for a remaining child, the court should look to

the child support guidelines to determine the proper amount of support for one child, rather than dividing the existing support award in half.

F. Reimbursement for overpayment of support

Miss. Dep't Human Servs v. Reaves, 350 So. 3d 285 (Miss. Ct. App. 2022). The court of appeals reversed a chancellor's order requiring DHS to reimburse a father for overcollection of child support. The mother was granted custody in the couple's 2013 divorce and the father ordered to pay child support. In 2016, custody was transferred to the father with the court reserving ruling on child support until the parties provided financial information. Two years later, the matter of child support had still not been resolved. At that point the court suspended the father's support obligation. The chancellor found that the prior order did not account for payments made by the father through tax refund and Covid grant seizures. Rather than owing arrears, DHS owed the father $4,115 for overcollection of support. The court of appeals reversed, holding that child support is vested when due and cannot be modified or forgiven. DHS has a right to collect support pursuant to a valid court order. However, the court of appeals recognized that in some cases a parent may be credited with direct support of a child. The court remanded for the chancellor to determine whether the father was entitled to credit against the arrears for specific payments.

IX. Enforcement

A. Credit against arrearages: Change in custody

**Wallace v. Wallace,* 336 So. 3d 1151 (Miss. Ct. App. 2022). A chancellor properly found a father in arrears for nonpayment of child support for two years, even though the parents divided custodial time equally under an out-of-court agreement. The mother agreed to divide custody but did not agree to reduce child support. Furthermore, their divorce settlement agreement stated that "no action by the parties will be effective to reduce the amount of child support, . . . and court approval must be obtained before child support can be reduced." The chancellor properly ordered that the father pay arrearages for the period of informal joint custody. The court also affirmed the chancellor's order terminating the father's support obligation from the date of judgment and giving him credit against the support obligation from the date he petitioned the court to modify custody.

B. No credit for voluntary payments

**Kelley v. Zitzelberger,* 342 So. 3d 499 (Miss. Ct. App. 2022). A chancellor denied a father's request to offset arrearages by the amount he paid for his daughter's cheerleading pursuant to an out-of-court agreement. The parents agreed that the father's support obligation would be reduced in return for his payment of cheerleading expenses and orthodontic treatment. The court of ap-

peals refused to enforce the agreement. The court also refused to give him credit against arrearages for direct payment of the cheerleading expenses. The payment was a voluntary undertaking on his part and did not entitle him to a credit.

C. Custodial parent's failure to present receipts for expenses

**Wallace v. Wallace,* 336 So. 3d 1151 (Miss. Ct. App. 2022). A father was ordered to pay his 50% share of his children's daycare expenses even though the mother did not provide him with receipts for eight years. He agreed to pay one-half of daycare expenses and was aware the children were in daycare. The provision regarding submission of expenses was unclear as to whether the mother had thirty days to present receipts or the father had thirty days to pay. The chancellor held that the mother's failure to provide receipts for many years, while unreasonable, did not excuse the father from paying his share of daycare costs. However, because of the ambiguity, the father was not in contempt for nonpayment and mother was not in contempt for failure to provide receipts.

D. Contempt

1. Interference with visitation

Lamy v. Lamy, No. 2021-CA-00770-CAO, 2022 WL 17259752 (Miss. Ct. App. Nov. 29, 2022). A joint custodial mother was not in contempt for withholding children for two months during Covid to provide schooling at home. She testified that it was clear after two weeks that home schooling at both homes would not work. The guardian ad litem reported that the children agreed that the altered schedule worked better. The court of appeals stated that the chancellor did not abuse her discretion to deny a contempt judgment "especially during this time of a global pandemic." Four judges dissented, with a fifth joining the dissent in part. The dissenters argued that parents may not defy a court order based on their personal belief that an order is not in the children's best interest. The mother's remedy was to seek emergency relief, which was available during Covid.

Kay v. Kay, 352 So. 3d 198 (Miss. Ct. App. 2022). A father was properly held in contempt for failure to provide visitation to the noncustodial mother, failure to encourage their daughters to visit with her, and for failing to inform her of medical procedures and school events. However, the court held that the chancellor erred in ordering the girls, who were not parties to the proceeding, to report to the Rankin County Detention Center without a hearing if they chose not to participate in visitation. While the chancellor's order was intended to encourage visitation, a court has no power, except in limited circumstances not present here, to issue orders to one who is not a party to a lawsuit.

NOTES

2. Ambiguity

Warner v. Warner, 341 So. 3d 152 (Miss. Ct. App. 2022). The court of appeals reversed and rendered a chancellor's finding that a husband was in contempt for failure to pay expenses under a temporary order, including the costs of a cancer policy, glasses for his wife, repairs to their home, and lawn maintenance. The order stated that he was required to pay "bills needed to operate the [marital] household, including but not limited to AT&T, utilities, and medical bills." The order did not specify lawn maintenance or repairs. The husband could reasonably have been confused as to whether glasses and insurance policies were considered "medical bills." The order was too vague and confusing to be enforceable. And, because he was not in contempt, the court also reversed the chancellor's award of attorneys' fees in connection with the contempt.

Archie v. Archie, 337 So. 3d 698 (Miss. Ct. App. 2022). A chancellor awarded a wife the marital home and ordered that she make the remaining six months of mortgage payments. After six months, she was to refinance the home and pay her husband $20,000 in equity. When the disabled wife was unable to secure a personal or home equity loan because of poor credit, the court ordered the property sold and the husband paid from the proceeds. The court denied the husband's petition to hold her in contempt – she was unable to comply with the judgment.

3. Civil and criminal contempt

**Seals v. Stanton,* 350 So. 3d 1051 (Miss. 2022). The supreme court addressed differences in the types of contempt proceedings in a case involving attorneys' failure to attend a hearing. A father's action for paternity, custody, and child support was set for hearing on March 1, 2018, but was continued by agreement of the parties to April 7, 2020. On April 6, two new attorneys entered appearances for the wife and requested a continuance, which the court denied. They informed the court administrator that they would not attend the hearing the following day. The wife's former attorney responded to an email from the court, stating that the wife had discharged him; however, he did not seek a discharge from the court. The chancellor held all three attorneys and the wife in contempt for failure to appear and for violating a temporary visitation order. The court fined the attorneys $250 a day and awarded the father attorneys' fees. Upon the wife's motion for reconsideration, the court entered a final judgment of contempt and clarified that the attorneys were fined $3,000 jointly and individually.

The supreme court reiterated well-established law that while civil contempt seeks to secure compliance with court orders, criminal contempt punishes past conduct. Contempt for failure to appear at a hearing is criminal contempt – the wrong is in the past. The court then discussed the difference in direct criminal contempt, which takes place in the presence of the court and requires no notice or hearing, and constructive criminal contempt, which takes place outside of court

and requires notice and a hearing. Ordinarily, failure to appear for a hearing is constructive criminal contempt. However, when an attorney informs a court that they will not appear the conduct occurs in the court's presence and is direct contempt. The majority cited *Wyssbrod v. Wittjen,* 798 So. 2d 352 (Miss. 2001) (attorney who called judge on morning of hearing stating he would not appear was guilty of direct contempt). Applying this exception, the court held that the two newly hired attorneys committed direct criminal contempt because they informed the court by email that they would not attend the hearing. In contrast, the former attorney simply did not appear, making his conduct constructive criminal contempt. The court affirmed the chancellor's finding of contempt regarding the two newly hired attorneys but reversed the judgment against the former attorney, ordering that he be provided with notice and a hearing. The court reversed the amount of fines, holding that under Miss. Code Ann. δ 9-1-17 fines may not exceed $100.00 per offense.

Three justices dissented, arguing that in most states, an emailed communication is considered constructive criminal contempt since a judge may not know whether the defendant wrote the email. They argued that all three should have been charged with constructive criminal contempt and given notice and a hearing. The dissenters relied on *Donaldson v. Cotton*, 336 So. 3d 1099 (Miss. 2022) (treating a letter as constructive rather than direct criminal contempt) (also emphasizing that in unclear cases, contempt should be treated as constructive).

X. Termination of parental rights

A. Jurisdiction and procedure

1. Jurisdiction over termination of parental rights

*****The Mississippi Legislature amended Miss. Code Ann. δ 93–15–105(1), which provides that youth courts have exclusive jurisdiction over termination of parental rights when the youth court has acquired jurisdiction in an abuse or neglect proceeding. The provision was amended to clarify that the youth court's exclusive jurisdiction extends to both voluntary and involuntary termination of parental rights actions. This amendment presumably overrides the supreme court's 2020 decision, *In re Adoption of C.C.B. and S.R.B*., 306 So. 3d 674, 679 (Miss. 2020). The court there held that a chancery court may hear an adoption action if the parents have executed voluntary releases of their parental rights following a youth court action for abuse and neglect. The court stated that an adoption based on consent does not involve a petition to terminate parental rights because the court's acceptance of the release eliminated the parents' right to contest the adoption.

2. Jurisdiction over durable legal custody awards

*The legislature amended Miss. Code Ann. δδ 43-21-609 and 43-21-613 to provide that youth courts retain exclusive jurisdiction over durable legal custody orders, including but not limited to modification of durable legal custody.

3. Parties to DCPS actions

*The legislature amended Miss. Code Ann. δ 43-21-201 to provide that a child in an abuse and neglect proceeding is a party to the proceedings and is entitled to an attorney at all stages. Courts are to appoint an attorney for an unrepresented child. The guardian ad litem may act in a dual role as guardian and as the child's attorney; however, if a conflict arises, the guardian must report the conflict to the youth court. The guardian should continue to serve in that role and the court should appoint a new attorney to represent the child. The amendment also provides that DCPS is a necessary party at all stages of the proceedings. The amendment provides that involuntary termination of parental rights cases must be docketed as priority cases. The court must hold a hearing within 120 days of service on the parents to terminate parental rights.

4. Notice of rights

**C.P. v. Lowndes County Dep't of Child Protection Services,* 349 So. 3d 1209 (Miss. Ct. App. 2022). The court of appeals rejected parents' argument that a chancellor erred by failing to advise them of their rights at the beginning of a termination of parental rights hearing. The parents were represented by counsel throughout the proceeding and exercised the rights of which they should have been advised.

Kevin v. Miss. Dep't Children Protective Servs, 341 So. 3d 1014 (Miss. Ct. App. 2022). A mother challenged a court's decision to place her children in durable legal custody rather than pursue reunification efforts. She argued that the youth court erred in failing to ascertain whether the notice requirements for adjudicatory hearings had been met. The court of appeals rejected her argument, noting that she was represented and participated in the hearing without objecting, waiving the argument of lack of notice.

B. Private termination

**Middlebrook v. Fuller,* 349 So. 3d 816 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's termination of a sixty-year-old father's rights regarding a three-year-old girl. The mother met him when she was seventeen and procured drugs through him. When she was twenty, he provided her with drugs in return for sex with him and other men. The child was conceived during this time. The father sought paternity and custody when the mother entered a treatment facility a year after the child's birth. The court awarded temporary custody to the maternal grandmother and appointed a guardian ad litem. The case was tried two years later. Witnesses testified that the father maintained an "open house" where multiple people stayed including persons using drugs, convicted felons, and persons with mental illness. The mother testified to an incident in which the father's girlfriend, an admitted drug user, was holding the baby minutes before she was violently attacked by a man in the house. She once found the child in the house with a broken syringe in her mouth. The guardian ad litem testified that a young child would not be safe in the father's home overnight but

did not recommend termination of parental rights. The court of appeals held that the evidence supported the chancellor's decision to terminate the father's rights based on two grounds: (1) The father was unfit under Miss. Code Ann. δ 93-15-119(1)(a), based on his conduct that showed a substantial risk of endangering the child and because reunification was not desirable. In addition, termination was proper under δ 93-15-119(1)(b) because the child was conceived because of the father's unlawful sexual act against the other parent under Miss. Code Ann. δ 97-3-65 (intercourse without consent by administering a substance that prevents resistance).

C. DCPS termination; no reunification required

**C.P. v. Lowndes County Dep't of Child Protection Services,* 349 So. 3d 1209 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's termination of parents' rights based on the mother's mental disability and the father's unwillingness or inability to provide adequate care for their newborn. The child was taken into protective services soon after birth – the youth court had already ordered termination of the parent's rights with regard to an older child. A psychologist testified that the mother had a severe mental disability with an IQ of 46. She functioned on the level of an eleven-year-old child and could not read, cook, dress, or care for herself. The parents lived in a mobile home that lacked heat, air, or a working stove, was molded, and had rotted floors. The social worker testified that the father did not appear to comprehend the need to provide the child with adequate food and shelter. The psychologist testified that he appeared to be "borderline intelligence." The court-appointed expert did not believe the mother was capable of caring for the child and was not sure whether the father could do so.

Reunification not required. The court of appeals affirmed the chancellor's holding that reunification attempts were not appropriate because of the parents' mental limitations. Miss. Code Ann. δ 43-21-603(7)(c) provides that no reunification attempt is necessary if (i) The parent "has subjected the child to aggravated circumstances, *including, but not limited to*, abandonment, torture, chronic abuse and sexual abuse." The court of appeals stated that, ordinarily, mental limitations should not be treated as an aggravating circumstance along with abuse. However, the statute indicates that it is not limited to the listed circumstances. In this case, it was appropriate to consider the parents' severe intellectual disability as an aggravated circumstance.

Grounds. Termination of the mother's rights was appropriate based on a mental disability that made her unable to care for the child under δ 93-15-121(a). The father's rights were properly terminated because he exhibited an ongoing pattern of behavior that showed that he was unwilling to provide for his child under δ 93-15-121(d). His behavior placed the child at risk on several occasions. Termination for both parents was also property based on δ 93-15-121(f) (conduct of the parents caused substantial erosion of the parent-child relationship).

Bullock v. Miss. Dep't Child Protective Servs, 343 So. 3d 1079 (Miss. Ct. App. 2022). A youth court properly terminated a mother's parental rights to

NOTES

four children, the eldest of whom was subjected to ongoing torture and abuse by the mother's husband. The youth court held that the mother had subjected the children to aggravated circumstances and that reunification efforts were not required. The oldest child reported being hit in the face, locked in a closet, scratched, burned with a lighter, cut with a knife, punched, thrown to the floor, and her mouth taped shut. She stated that her mother did nothing to stop the stepfather's abuse. She also reported that her mother hit her in the face with a belt and forced her to sit in a cold bathtub. The mother and her husband would force her to stand on one foot and hit her with a belt when she put her foot down. A social worker testified the girl suffered from post-traumatic stress disorder, nightmares, and did not want to see her mother. All four siblings were doing well in foster care placement. The social worker and guardian ad litem both recommended termination.

The court of appeals affirmed, holding that termination was appropriate on three separate grounds. First, reunification was not appropriate because the mother had subjected the girl to aggravated circumstances, including chronic abuse. Second, the mother was mentally and morally unfit because she demonstrated a substantial risk of endangering the child's safety. Third, the mother's conduct had caused extreme and deep-seated antipathy by the child. Termination was proper with regard to the younger children based on the mother's physical abuse of the oldest child.

D. Durable legal custody

Kevin v. Miss. Dep't Children Protective Servs, 341 So. 3d 1014 (Miss. Ct. App. 2022). The court of appeals affirmed a youth court's decision to place a four-year-old boy with grandparents rather than pursue reunification with his mother, who had threatened to harm his younger half-brother. She sent a threatening video to his half-brother's father, showing her holding a butcher knife against the infant's leg. She had previously threatened to kill herself and the infant. CPS removed both the infant and the four-year-old. The mother underwent inpatient treatment for twelve days and followed up with outpatient treatment and medication for depression. The mother, who was represented, informed the court that she would not contest the finding that the children were abused. CPS recommended a plan of reunification, based on the mother's progress. However, the guardian ad litem testified that the mother's conduct made her fear for the boy's safety in her custody.

The court of appeals rejected her argument that the court erred in bypassing reunification in favor of durable legal custody. Her conduct posed a serious threat of harm to both children. Under Miss. Code Ann. δ 43-21-603(7) a court may place a child who has been adjudicated abused with a nonparent based on a finding that reasonable efforts to maintain the child in the parent's home are not required because "[t]he effect of the continuation . . . would be contrary to the welfare of the child and that placement of the child in foster care is in the best interest of the child." *Id.* (7)(c)(iv).

E. Guardians ad litem

C.P. v. Lowndes County Dep't of Child Protection Services, 349 So. 3d 1209 (Miss. Ct. App. 2022). The court of appeals rejected parents' arguments that a guardian ad litem's report in a termination proceeding was inadequate because she did not interview the child, parents, or visit the parents' home. The report was consistent with the evidence in the case, which supported the court's decision.

Bullock v. Miss. Dep't Child Protective Servs, 343 So. 3d 1079 (Miss. Ct. App. 2022). The court of appeals rejected an argument that a guardian ad litem's report in a termination proceeding was insufficient because she did not interview the mother. She spoke with the mother individually prior to the proceedings, visited with all the children, attended the hearing, and watched the forensic interviews.

XI. Adoption

**Haaland v. Brackeen,* – S.Ct. – (June 15, 2023). The United States Supreme Court upheld the adoption provisions of the Indian Child Welfare Act in a 7-2 decision authored by Justice Amy Coney Barrett. The ICWA provides preferences for placing children in foster care and adoption – first with extended family, then with other members of the tribe, then with members of other tribes. Foster and adopting parents challenged the law as violative of the Equal Protection Clause. The Court held that federal law did not impermissibly intrude on the traditionally state-regulated area of family law. Congress has broad authority to legislate matters related to tribes, including family law matters.

*The Mississippi Legislature amended Miss. Code Ann. ∆ 93-17-3 to remove the prohibition against adoption by couples of the same gender. The amendment also authorized chancellors to dispense with procedural requirements of the adoption statutes, such as a doctor's certificate and home study, for adult adoptees who consent to the adoption. Laws 2022, Chp. 425 (S.B. 2263), δ 1, eff. July 1, 2022.

XIII. Jurisdiction

**Smith v. Banks,* 350 So. 3d 1191 (Miss. Ct. App. 2022). A chancellor properly dismissed a mother's petition for custody of her eight-year-old son for lack of jurisdiction under the UCCJEA. According to the father, the boy had lived in Louisiana since his birth. The father submitted records to verify Louisiana school attendance and the boy's Louisiana Medicaid benefits. He testified that three weeks prior to the hearing, the mother brought the boy to Mississippi, enrolled him in school, and filed for custody. The chancellor properly found that

NOTES

Louisiana was the boy's home state under the Uniform Child Custody Jurisdiction and Enforcement Act, having lived for more than six months in Louisiana within six months of the mother's filing.

XIV. Procedure

A. Rule 81 summons

**Seals v. Stanton,* 350 So. 3d 1051 (Miss. 2022). Attorneys held in contempt for failure to appear at an April 7, 2020 hearing argued that the court lacked jurisdiction to hear the matter. A father's action for paternity, custody and child support was set for hearing on March 1, 2018 and continued to August 28. On that date, the court entered a temporary order of custody and support and ordered that if the parties could not resolve the matter, they should contact the court to set a final hearing. The parties agreed to a hearing on April 7, 2020. On April 6, two new attorneys entered appearances for the wife and requested a continuance of the April 7 hearing. The court denied their request for continuance. The wife and her attorneys did not attend the hearing. On April 8, the court entered an order holding them in contempt for failure to appear. The attorneys argued that the court lacked jurisdiction over the hearing because there was no Rule 81 summons. The supreme court disagreed. The court had jurisdiction over the parties and attorneys, who agreed to the hearing date. The court stated, "because all had actual notice, failure to issue an additional Rule 81 summons after continuing and resetting the hearing by agreement does not divest a court of jurisdiction over the parties or their attorneys."

B. Pleadings

Wallace v. Wallace, 336 So. 3d 1151 (Miss. Ct. App. 2022). The court of appeals rejected a father's argument that a chancellor erred in ordering the father to pay for health insurance because the issue was not raised in the pleadings. The mother sought an increase in child support, which includes health insurance. Miss. Code Ann. δ 43-19-101(6) provides that all orders involving child support shall include reasonable medical support and that the court shall make appropriate provisions for health insurance for the children.

C. Rule 8.05 Financial Statements

Blagodirova v. Schrock, No. 2020-CA-01162- COA, 2022 WL 16568602 (Miss. Ct. App. Nov. 1, 2022), *cert. granted,* 2023 WL 3779445 (Miss. 2023). The court of appeals rejected a mother's argument that a chancellor should have required the father to complete his 8.05 financial statement. Neither party submitted full financial statements – failure to do so is not in itself evidence of fraud on the court.

D. Sealed records

**Nowell v. Stewart,* 356 So. 3d 1217 (Miss. Ct. App. 2022). The court of appeals rejected a mother's request that a court unseal records in an action to modify child support. The chancellor sealed the record mid-trial based on reports that a nonparty was attempting to influence the court. On appeal, the mother sought to unseal the record. In response to a request from the court of appeals, the chancellor stated that he sealed the record based on allegations of interference that were not substantiated. He had no objection to unsealing the record.

While the law favors public access to court records, a chancellor may seal a record after balancing the public right with the need for confidentiality. The court of appeals noted that the chancellor did not engage in the balancing analysis in this case. However, Rule 48 of the Mississippi Rules of Appellate Procedure allows an appellate court to seal a record if disclosure will cause substantial harm to a child or the record contains sensitive information that could be damaging to the child. The court held that the record should remain sealed because it contained sensitive medical records and testimony related to the child, so that public disclosure could cause her substantial harm.

E. Continuances

Denham v. Denham, No. 2020-CA-00675-COA, 2022 WL 290890 (Miss. Ct. App. Feb. 1, 2022), *reversed in part*, 351 So. 3d 954 (Miss. Dec. 1, 2022) (reversing custody award). The court of appeals held that a chancellor did not err in refusing to grant a continuance when the husband's attorney withdrew two weeks before a hearing. The hearing was for the limited purpose of hearing the guardian ad litem's testimony. The husband appeared and questioned the guardian extensively. The matter was continued for two weeks, and the husband was represented during the remainder of the trial.

F. Request to testify remotely

Shannon v. Shannon, 357 So. 3d 1043 (Miss. Ct. App. 2022), *cert. granted,* 346 So. 3d 460 (Miss. 2022), *cert. grant dismissed*, (Miss. March 9, 2023). The court of appeals affirmed a chancellor's denial of a wife's day-of-trial request to participate remotely. The trial had been scheduled for months. On the day of trial, her attorney presented her request to testify remotely based on financial constraints, a possible storm, and Covid concerns. He did not provide any specifics such as a physician's recommendation about Covid risks or any evidence of limitations caused by a storm. Her 8.05 financial statement showed that she had sufficient resources to travel.

G. Evidence: Testimony of children

**Denham v. Denham,* 351 So. 3d 954 (Miss. 2022). A chancellor erred in refusing to allow a couple's children to testify and in failing to record an in-camera interview with the children. The father sought to have his fifteen- and

eleven-year-old children testify in the couple's divorce and custody action. The chancellor stated that she would not allow them to testify because it was not in their best interest. She did interview the children in chambers with attorneys present but denied the father's request to record the interview.

The supreme court emphasized that calling children to testify in divorce proceedings is "highly disfavored." However, because of the due process right to call witnesses, children cannot be automatically excluded from testifying. The court outlined the process to follow when a parent requests that children testify: The court must first determine through an *in camera* interview whether the child is competent to testify, the competency of any evidence the child may offer, and whether the child's best interest will be served by allowing them to testify. The chancellor must make a record of the interview and, if testimony is not allowed, state the reasons for denying the request, including the information gleaned from the interview that the chancellor would consider.

The dissent argued that a child of fifteen may not be prohibited from testifying, citing *Powell v. Powell*, 22 So. 2d 160 (Miss. 1945) (rule against permitting children of tender years to testify had "no application" to fifteen-year-old). The majority held, however, that the statutes on which the court relied in *Powell* are no longer in effect. While concerns of competency lessen with a child's age, a chancellor still must determine whether testifying is in the child's best interest.

H. Agreed judgments

**Hardin v. Hardin,* 335 So. 3d 1088 (Miss. Ct. App. 2022). A chancellor properly enforced a couple's oral agreement that was dictated into the record in a separate maintenance action. The parties agreed to certain matters prior to the hearing. The chancellor dictated the agreement into the record with no objection from them. After the chancellor entered judgment awarding the wife separate maintenance but denying her request for attorneys' fees, she appealed. She argued that the chancellor erred by including the oral pre-trial agreement in the judgment because it was not reduced to writing. The court of appeals noted that Rule 3.09 of the Mississippi Chancery Court Rules provides that oral agreements of counsel must be recorded by a court reporter, included in an order approved by counsel, or reduced to writing and filed in the case. Open-court announcement of a settlement is proof of the parties' intent to be bound and is enforceable even though it is not reduced to a formal writing. There was no showing that the court's order varied from the parties' announced agreement.

I. Appeals

1. Dismissal for mootness

Wise v. Broom, No. 2020-CA-01316-CAO, 2022 WL 213322 (Miss. Ct. App. Jan 25, 2022). The court of appeals dismissed a noncustodial father's appeal of his petition to modify custody of his seventeen-year-old daughter. The court heard testimony in November of 2017, but no further steps were taken until the petition was dismissed for lack of prosecution in April 2019. The mother

then filed a contempt petition for nonpayment of child support to which the father responded with a request that the court consider his motion for custody. The chancery court denied the father's petition and found that he was not in arrears. The court of appeals dismissed the father's father appeal as moot – the girl was now twenty-three years of age.

2. Interlocutory appeals

Williams v. Williams, 347 So. 3d 178 (Miss. 2022). The supreme court dismissed a wife's appeal as interlocutory. After a two-day settlement conference, the spouses signed an agreement to irreconcilable differences divorce that included a property settlement agreement. The following day, the wife attempted to withdraw her consent. The chancellor found that she had withdrawn her consent to irreconcilable differences divorce in a timely manner but that the remainder of the agreement was binding regardless of divorce. The supreme court held that the judgment was interlocutory because it did not dispose of all claims – it did not address divorce, only matters related to property and custody. The chancellor's order was styled "Final Judgment" but did not include language to certify an interlocutory order as final under Rule 54.

Crawford v. Richmond, 337 So. 3d 1164 (Miss. Ct. App. 2022). The court of appeals dismissed an appeal from a chancellor's interim orders in a guardianship proceeding as interlocutory. An elderly Mississippi woman moved to live with her daughter in Minnesota, who was appointed as her guardian there. When the mother planned to return to Mississippi, her daughter sought transfer of the guardianship to Mississippi. Another daughter living in Mississippi sought to have guardianship transferred to her. The chancellor entered an interim order accepting the transfer and denying the Mississippi daughter's motion for recusal and transfer of venue. She appealed the interim order and denials of her motions. The court of appeals held that all three orders were interlocutory and not subject to appeal. The court denied the guardian sister's request to dismiss the appeal as moot because their mother died shortly after moving back to Mississippi. The death of a ward does not automatically end a guardianship – the guardian must account for funds.

J. Waiver of argument

Scott v. Rouse, 348 So. 3d 345 (Miss. Ct. App. 2022). A husband and his mother were procedurally barred from appealing a chancellor's divorce judgment and subsequent motion rulings. The chancellor awarded the wife a divorce based on adultery against the husband, who raped and impregnated her fourteen-year-old daughter. The husband did not appeal the judgment. When the wife sought to enforce the property division he withdrew funds from his retirement account, faked his death, and fled the state. He was later found in Oklahoma. He and his mother filed several motions seeking return of property that his former wife allegedly had in her possession. They appealed the chancellor's denial of their motions but did not designate transcripts of the hearings as part of the re-

NOTES

cord. The court of appeals held that the issues designated for appeal had been waived either because they related to the divorce action which was not appealed or to motions for which the appellants failed to provide an adequate record on appeal.

**Green v. Green*, 349 So. 3d 1187 (Miss. Ct. App. 2022). A pro se wife who participated in pretrial discovery and hearings but failed to appear for trial was barred from raising issues related to the grant of divorce but not from raising issues related to property division and child support. The wife filed for divorce based on habitual, cruel, and inhuman treatment and sought custody and division of assets. Her husband requested divorce based on habitual, cruel, and inhuman treatment, alleging that she repeatedly told people, including work colleagues, that he was mentally ill and abusive, injuring his reputation and causing him to change employment. The wife was properly notified of the hearing but failed to appear. The chancellor awarded the husband a divorce based on habitual, cruel, and inhuman treatment, divided the parties' assets, awarded the wife custody of their children, and ordered the husband to pay child support. The wife appealed pro se.

The court of appeals held that she did not waive her right to challenge division of assets. She challenged the husband's property division allegations in pleadings and motions. The court also held that she did not waive her right to challenge the court's award of child support even though she presented no arguments regarding support during the trial proceedings. A child should not be penalized because a parent does not preserve issues for appeal. Two judges dissented, arguing that the mother waived the issue of child support by failing to raise an objection during trial or in post-trial motions. The court held that she did waive her right to challenge the grant of divorce by failing to address divorce grounds in pretrial proceedings. The only arguments she presented were in a letter to the judge and in a temporary hearing unrelated to the issue of divorce.

Reading v. Reading, 350 So. 3d 1195 (Miss. Ct. App. 2022). An incarcerated husband's pro se appeal from his wife's divorce action was procedurally barred. The couple's eighteen-year-marriage ended when he was arrested for sexually assaulting their daughter. The husband was served with process but did not attend trial. The state of Florida refused the chancellor's request to transport him to trial. The chancellor granted the divorce, awarded the wife sole physical and legal custody of their five children, and awarded her the marital home. The husband appealed, stating that the proceedings violated due process, incorrectly quoting the Fourteenth Amendment. He argued that he was not notified of an "order of extradition" and that the court failed to respond to his request to investigate criminal activity. The court of appeals stated that it was not possible to discern his arguments because there was no meaningful argument and no citation of legal authority.

XV. Wrongful death actions

**In re Estate of Randle,* 345 So. 3d 569 (Miss. 2022). The supreme court held that a chancellor and the court of appeals erred in determining beneficiaries of wrongful death proceeds under inheritance statutes rather than the wrongful death statutes. A husband and father died intestate, leaving few assets other than a potential wrongful death claim. His widow petitioned the chancery court to determine heirs to his estate including the wrongful death claim. Four persons claimed to be heirs – two children born during his first marriage, one born during his second marriage, and a nonmarital child. The chancellor ordered DNA testing of the claimants. The results showed that the child of his second marriage and the woman claiming to be a nonmarital child were half-siblings. However, they showed a high probability that the children of his first marriage were not related to either of the half-siblings. The chancellor found that the nonmarital child's claim was barred by the statute of limitations in the heirship statutes, Miss. Code Ann. δ 91-1-15(3). The chancellor also found that the children of his first marriage were not heirs under the inheritance statutes and ordered that the estate, including the wrongful death proceeds, be distributed to the widow and her child. The children of his first marriage appealed. The court of appeals affirmed.

The supreme court reversed and remanded. The court cited *Long v. McKinney*, 897 So. 2d 160 (Miss. 2004), which held that wrongful death claims are not a part of a decedent's estate – they are to be distributed to persons listed as beneficiaries in the wrongful death statutes. Although the statutes are similar, they are not identical. For example, a nonmarital child's right as an heir is time-barred if not brought within a certain period. The same limitation does not appear in the wrongful death statutes. However, because the nonmarital child did not appeal the court's ruling that issue was not before the court.

Both the inheritance and wrongful death statutes provide rights to a deceased's "children." However, the inheritance statute sets out a procedure for determining the paternity of children, a procedure which is not included in the wrongful death statutes. The supreme court stated that the wrongful death statute "does not appear to allow [the administrator] to contest [the children's] status as Lester's legitimate children." The court remanded the case to the chancery court to determine wrongful-death beneficiaries under Miss. Code Ann. δ 11-7-13.

XVI. Conservatorships

Atkins v. Moore, 352 So. 3d 217 (Miss. Ct. App. 2022). The court of appeals agreed that a woman who petitioned for conservatorship of her sister should have send notice of the proceeding to her son, as her sister's closest relative living in Mississippi. However, the failure did not require reversal. The son learned of and participated in the proceedings after the initial hearing. The court agreed that the conservator sister failed to adequately report expenditures. The statute requires that the conservator provide an annual accounting that details each expenditure through a voucher showing a receipt or canceled check. The chancellor found, however, that there was no misuse of funds. The conser-

vator's uncontradicted testimony established that the funds were used for the benefit of the ward. In addition, although the conservator paid herself prior to court authorization on at least on occasion, the chancellor ratified the payment. The court rejected the son's argument that the chancellor erred in accepting the conservator's final accounting and allowing her to be discharged of her duties. Three judges concurred, emphasizing the importance of ensuring that conservators comply with the statutory duties of reporting and accounting.

XVII. Attorneys' fees

Hardin v. Hardin, 335 So. 3d 1088 (Miss. Ct. App. 2022). A chancellor properly denied a wife's claim for attorneys' fees in a separate maintenance proceeding. Her attorney presented an itemized statement and testified that the wife paid a $7,000 retainer. However, it was not clear from the testimony whether the $7,000 was applied to the bill or how much remained unpaid. The chancellor also found that the attorney failed to provide testimony regarding whether his fee was usual and customary in the community.

Wallace v. Wallace, 336 So. 3d 1151 (Miss. Ct. App. 2022). A chancellor properly awarded a mother $10,000 of her $25,000 in attorneys' fees in an action for contempt and arrearages. The court ordered the father to pay arrearages in basic child support, daycare expenses, and MPACT contributions and found him in contempt for nonpayment of MPACT contributions. The court awarded the father $1,000 in attorneys' fees based on his finding that the mother was in contempt for violation of a morals clause in their divorce agreement.

**In re L.T.,* 335 So. 3d 599 (Miss. Ct. App. 2022). The court of appeals reversed and rendered a youth court's award of Rule 11 attorneys' fees against DCPS. Four children in CPS custody were placed with their maternal aunt in Florida. Based on a report to a Florida caseworker that the aunt had slapped, spanked, and yelled at the children, the Mississippi youth court held a shelter hearing. However, after further communication with Florida caseworkers, the youth court found no reason for concern and ordered that the children remain with their aunt. Two weeks later, the county prosecutor filed an abuse petition against the aunt. At the hearing there was confusion as to why the petition had been filed. CPS was unaware of the filing.

The court dismissed the petition as frivolous and ordered CPS to pay the aunt's attorneys' fees and expenses under Rule 11. The court of appeals agreed with CPS that Rule 11 sanctions were not appropriate because CPS did not file or request the filing of the petition. Rule 11 applies against a party "who files a motion or a pleading." The petition was filed by the prosecutor on behalf of the children, not by CPS.

Blagodirova v. Schrock, No. 2020-CA-01162- COA, 2022 WL 16568602 (Miss. Ct. App. Nov. 1, 2022), *cert. granted,* 2023 WL 3779445 (Miss. 2023). A chancellor did not err in denying a custodial mother attorneys'

fees related to the father's allegations of abuse and neglect. Although they were not substantiated, the chancellor did not find that they were frivolous.

Hornsby v. Hornsby, 353 So. 3d 507 (Miss. Ct. App. 2022). The court of appeals affirmed a chancellor's finding that a noncustodial father's contempt petition was without substantial justification and for the purpose of harassment. The father alleged that the mother failed to communicate with him regarding the children and failed to reimburse him for one-half of the children's travel expenses. The mother explained that they agreed to alternate paying for the children's travel. She presented evidence that she had paid for several trips without seeking reimbursement and that he never requested reimbursement until he filed a contempt proceeding. The court also found no evidence that the mother had failed to comply with any of her obligations to inform the father regarding the children. The chancellor properly awarded her fees under Rule 11 and the Litigation Accountability Act.

CLASSIFICATION OF ASSETS: A REFRESHER COURSE

I. Introduction

A. The title system

Until the end of the 20th century, Mississippi (and all common law states) used the title system of marital property to divide assets at divorce. Spouses were awarded assets based on who held title or who had earned or acquired an item. The system favored men, who tended to hold property titles and be wage-earners. Financial inequity at divorce was addressed through alimony, which was linked to fault. The impact of the title system on women and children was recognized as a social problem when divorces soared in the 1970s and 1980s and women and children fell into poverty in increasing numbers. Title states responded by creating a new marital property regime – equitable distribution – fashioned after, but distinct from, community property.

In 1994, Mississippi was the last title state to fully convert to equitable distribution, after chipping away at the edges of the title system for a decade. In *Ferguson v. Ferguson*, 639 So. 2d 921 (Miss. 1994), the court abandoned the title system and a new era of property division began.

B. Equitable distribution

1. allows division of marital assets regardless of who holds title.
2. applies only to marital assets – separate property may not be awarded to the other spouse.
3. does not require equal division – only equitable, or fair division.
4. begins with the presumption that all assets held by the spouses are marital.
5. replaced alimony as the primary financial tool in divorce.
6. is not a comprehensive marital property system, like community property.

The court in *Ferguson* outlined the steps to follow in equitable distribution:

1. Classify each asset as separate or marital.
2. Value each item.
3. Divide marital property equitably, based on factors set out in *Ferguson*.
4. If one spouse is "left with a deficit" consider awarding alimony.

This presentation covers the basics of equitable distribution and provides a framework for analyzing property division. It does not fully cover complex topics such as division of retirement benefits or valuation of closely held businesses.

C. Definitions

The Mississippi Supreme Court has defined marital property as "[a]ssets acquired or accumulated during the course of a marriage [unless] such assets are attributable to one of the parties' separate estates prior to the marriage or outside the marriage." *Hemsley v. Hemsley*, 639 So. 2d 909, 914 (Miss. 1994). Based on appellate cases that expand on the phrase "outside the marriage," the author defines marital property as "any property acquired or value created through the efforts of one of the spouses during the marriage."

Separate property includes

1. pre-marital property
2. property acquired after the marital property cutoff date
3. gifts and inheritances
4. passive appreciation on separate property
5. property excluded by agreement

II. Is an asset initially separate or marital?

A. Was the asset acquired before the marriage date?

To be marital, an asset must be acquired "during the marriage." The beginning date in Mississippi is the date of the marriage. *Bunyard v. Bunyard,* 828 So. 2d 775, 777-78 (Miss. 2002). (*Note:* The court in *Bunyard* recognized in dicta that some states classify property acquired in contemplation of marriage as marital. *Id.* at 778).

B. Was the asset acquired after the cutoff date for marital property?

Since 2013, chancellors have discretion to set the ending date as early as the date of separation or as late as the date of divorce. *Collins v. Collins,* 112 So. 3d 428, 432 (Miss. 2013).
The degree of financial interdependence between the spouses appears to be one of the most significant factors in determining the proper cutoff date. Limited financial entanglement during separation suggests an early cutoff date, see *Randolph v. Randolph*, 199 So. 3d 1282, 1285 (Miss. Ct. App. 2016), while ongoing financial interdependence during separation suggests a later cutoff. See *Williams v. Williams*, 303 So. 3d 824, 832 (Miss. Ct. App. 2020) (demarcation properly set at divorce complaint filing rather than separation many years earlier).

Prior to *Collins*, marital property accumulation ended upon the entry of a temporary support order or separate maintenance order. *Collins* clearly overruled prior cases regarding temporary support but did not address separate maintenance orders. A 2016 case suggests that marital property still ends when a separate maintenance order is entered. *Dykes v. Dykes,* 191 So. 3d 1287, 1291, (Miss. Ct. App. 2016) (citing *Godwin v. Godwin,* 758 So. 2d 384, 386 (Miss. 1999)).

Not all assets acquired after the cutoff date are separate – assets acquired after the cutoff but with marital funds are classified as marital.

C. Was the asset acquired through the efforts of a spouse?

Any asset acquired through a spouse's efforts during the marriage will be classified as marital. "Spousal efforts" includes contributions of cash earned by one of the spouses, whether through wages or self-employment, and includes employment benefits such as retirement accounts, profit-sharing plans, *Parker v. Parker*, 641 So. 2d 1133, 1137-38 (Miss. 1994), severance packages, *Wheat v. Wheat,* 37 So. 3d 632, 637-38 (Miss. 2010), and employee stock ownership plans, *Owen v. Owen,* 798 So. 2d 394, 400 (Miss. 2001).

For an asset to be classified as marital, only ONE spouse must have expended efforts to acquire or create the asset. The non-owning spouse need not contribute directly to the asset. *Rhodes v. Rhodes*, 52 So. 3d 430, 436 (Miss. Ct. App. 2011).

1. Assets acquired with loan funds

An asset acquired through loan proceeds in one spouse's name is marital if the owner uses marital funds to repay the loan, the loan is secured by marital property, *or* the non-owner is liable on the loan. See Hankins v. Hankins, 866 So. 2d 508, 511-12 (Miss. Ct. App. 2004). If only separate funds are used for repayment, no marital assets are used for collateral, *and* the other spouse is not liable on the loan, the asset is the separate property of the owner. Langdon v. Langdon, 854 So. 2d 485, 493 (Miss. Ct. App. 2003) (wife did not use marital funds to make payments on vacant lot secured by separate property). It is also possible that an asset acquired with loan funds will be a mixed asset subject to the commingling rules discussed below.

2. Value created by appreciation

The value of an asset may be based in part on appreciation rather than a direct contribution of funds. Early in equitable distribution, the Mississippi Supreme Court adopted the majority approach to classifying appreciation. The court held that appreciation of a separate asset caused by a spouse's efforts (called active appreciation) is marital. Appreciation of a separate asset caused by forces other than a spouse's efforts (called passive appreciation) is separate. *Carrow v. Carrow*, 642 So.2d 901, 907 (Miss. 1994). The marital assets most likely to include value based on appreciation are investments accounts, retirement accounts, businesses, and real property.

Passive appreciation on separate property. The most common examples of passive appreciation are real property and retirement and investment accounts. Premarital real property that increases in value during the marriage because of the real estate market remains separate. The appreciation was passive, not caused by the owner's efforts. Similarly, the passive growth of a separate retirement account will be separate. Passive growth on a mixed-asset account can be more complicated to sort out. A good example of separating the growth in a mixed account can be found in *Geno v. Geno*, 2021 WL 1184583, at *3-4 (Miss. Ct. App. March 30, 2021) (husband proved that $322,403 of $1,000,000 growth of account during marriage was appreciation on premarital share); *see also Haney v. Haney,* 788 So. 2d 862, 865 (Miss. Ct. App. 2001).

Active appreciation on separate property. Active appreciation most often occurs when one spouse's business increases in value during the marriage as result of their work in the business. If the business was a premarital asset, the value at the time of marriage is separate property. The appreciated value is marital, producing a mixed asset. *Sandoval v. Sandoval,* 89 So. 3d 77, 81 (Miss. Ct. App. 2011) (appreciation in businesses in which husband worked was marital; appreciation in business in which he did not work was passive and separate).

Note: It is possible to prove that the increase in value of a business was caused by market forces even though a spouse actively worked in the business. See *Fleishacker v. Fleishacker*, 39 So. 3d 904, 913 (Miss. Ct. App. 2009) (growth in husband's business caused by increase in market prices, not efforts).

Note: In one case, the court held that the substantial appreciation in a husband's premarital retirement account appreciation was caused by his efforts in managing the account and was therefore marital. *Pettersen v. Pettersen*, 269 So. 3d 466, 473 (Miss. Ct. App. 2018) (also based on commingling and husband's active involvement in investment).

D. Is the asset mixed, partly separate and partly marital?

For some assets, the answers to the previous questions may be "in part." If so, the asset has mixed classification, partly marital and partly separate (unless, as discussed below, it is converted to marital). Examples of mixed assets include assets

- acquired with payments made before and during marriage .
- acquired with both marital funds and separate funds.
- a separate asset (such as a business) that actively appreciates during marriage.

The burden of proof is on a spouse seeking mixed-asset classification to trace the separate property funds. *Dauenhauer v. Dauenhauer,* 271 So. 3d 589, 598 (Miss. Ct. App. 2018).

This analysis is complicated in Mississippi by conversion rules that transform separate property into marital. It also becomes more complicated when an asset has passively appreciated during the marriage.

III. Has a separate or mixed asset been converted to marital?

A. Conversion by family use

In 1999, the Mississippi Supreme Court held that a separate property asset that is used "for family purposes" is converted to marital. To prevent conversion, the separate property owner should place it in a location that only she has access to or obtain the other's agreement that family use will not convert the asset. *Pittman v. Pittman*, 791 So. 2d 857, 862, 866-67 (Miss. Ct. App. 1999) (wife's inherited furniture and dishes converted by family use).

Marital homes. The doctrine has been applied regularly – but not consistently – to the marital home. *See Parish v. Parish*, 245 So. 3d 519, 523 (Miss. Ct. App. 2017) (error to classify husband's premarital home as 25% his separate property; family use converted the home to marital). Although the majority of cases find that a separate or mixed asset home is converted by family use, there are exceptions. These include cases that

1. classify a premarital home as separate, without discussion of the family use doctrine, *Duncan v. Duncan,* 915 So. 2d 1124, 1127 (Miss. Ct. App. 2005).
2. treat the home as a mixed asset, allowing the separate property owner to trace the separate portion, *Brock v. Brock,* 906 So. 2d 879, 887-888 (Miss. Ct. App. 2005).
3. Classify a home as marital but award the owning spouse most of the equity*, Kimbrough v. Kimbrough,* 76 So. 3d 715, 720 (Miss. Ct. App. 2011) (husband awarded all but $4,400 of equity in his premarital home).
4. disregard family use because of the short length of the marriage, *Doyle v. Doyle,* 55 So. 3d 1097, 1109 (Miss. Ct. App. 2010); *Neely v. Neely,* 305 So. 3d 164, 171 (Miss. Ct. App. 2020) (two year's use of wife's home, after children left, did not convert it to marital).

Other assets. The doctrine has been applied to vacation homes. See *Rhodes v. Rhodes*, 52 So. 3d 430, 436 (Miss. Ct. App. 2011) (vacation home converted by extensive family use); *Griner v. Griner*. 235 So. 3d 177, 187 (Miss. Ct. App) (25% interest in separate vacation home converted by use once a year). It has also been applied to household furnishings. *Pittman v. Pittman*, 791 So. 2d 857, 862, 866-67 (Miss. Ct. App. 1999) (wife's inherited furniture and dishes converted by family use).

Minimal use. Proof that family use was minimal will prevent conversion. *Dean v. Dean*, 304 So. 3d 156, 158 (Miss. Ct. App. 2020) (wife's land not converted to marital because family occasionally rode four-wheelers on the property).

Family use of funds from a separate account. An interesting issue is whether a separate property account or retirement fund is converted to marital when the owner withdraws funds to use for family purposes but does not otherwise commingle the account. With one exception, the appellate courts have held that the use of withdrawn funds does not convert the underlying account to marital. See *McKissack v. McKissack*, 45 So. 3d 716, 720 (Miss. Ct. App. 2010); *Oates v. Oates,* 291 So. 3d 803, 808 (Miss. Ct. App. 2020).

One outlier case held to the contrary, affirming a chancellor's finding that a husband's separate property investment account was converted to marital in part because he used withdrawals for family purposes. *Pettersen v. Pettersen*, 269 So. 3d 466, 473 (Miss. Ct. App. 2018) (also based on commingling and husband's active involvement in investment).

B. Conversion by commingling

In Mississippi, commingling converts some, but not all, assets. Separate property owners are allowed to trace separate funds in some such as retirement accounts. For other assets, commingling converts the entire asset to marital.

Retirement benefits and businesses. The Mississippi appellate courts recognize mixed asset classification of retirement benefits and businesses. See *Arthur v. Arthur,* 691 So. 2d 997, 1003 (Miss. Ct. App. 1997) (retirement benefits as mixed asset); *Geno v. Geno*, 2021 WL 1184583, at *3-4 (Miss. Ct. App. March 30, 2021) (investment accounts and retirement benefits); *Sandoval v. Sandoval,* 89 So. 3d 77, 81 (Miss. Ct. App. 2011) (businesses as mixed assets).

Note: The method of determining the separate and marital portions of retirement accounts is beyond the scope of this presentation. Different methods are used depending on the type of retirement account, whether the account can be divided between the parties or requires a buy-out, and what information is available on value. Please see 2021 Family Law CLE materials for an in-depth treatment of retirement accounts (also available on request).

Real and personal property and bank accounts. The Mississippi Supreme Court has – for the most part – followed a minority rule in which commingling of separate and marital funds or efforts converts an asset to marital. In contrast to most states, the separate property owner is not allowed to identify and trace separate portions of the asset. *Gutierrez v. Bucci,* 827 So. 2d 27, 38 (Miss. Ct. App. 2002) (husband's use of salary to pay mortgage payments on separate commercial property converted the property to marital); *Oswalt v. Oswalt,* 981 So. 2d 993, 998 (Miss. Ct. App. 2007) (separate property inheritance deposited in joint bank account converted account to marital). As with the family use doctrine, the commingling rule is frequently applied to convert a mixed asset marital home to all marital property.

However, some cases disregard the commingling rule and allow tracing. *Delk v. Delk*, 41 So. 3d 738, 740 (Miss. Ct. App. 2010) (premarital value of home treated as separate); *Dorsey v. Dorsey* 972 So. 2d 48, 52 (Miss. Ct. App. 2008) (marital funds used to pay one year of taxes on separate property land were easily traceable and did not convert husband's separate property to marital); *Brock v. Brock*, 906 So. 2d 879, 887-88 (Miss. Ct. App. 2005) (recognizing tracing in marital home); *Oliver v. Oliver*, 812 So. 2d 1128, 1134 (Miss. Ct. App. 2002) (briefly depositing inheritance in bank account with marital funds did not convert it to marital).

C. No conversion by joint titling

In most states, a presumption of marital property arises when a person conveys separate property into joint title with their spouse. The Mississippi Supreme Court abandoned the joint title presumption for purposes of equitable distribution, based on the understanding that title is not controlling in equitable distribution. *Pearson v. Pearson,* 761 So. 2d 157, 163 (Miss. 2000).

In a recent case, the court of appeals expanded this ruling to cohabitants, holding that a man's conveyance of property to himself and his girlfriend/cohabitant did not raise the presumption of a gift to her of a one-half interest in the property. *Jones v. Graphia,* 95 So. 3d 751, 755 (Miss. Ct. App. 2012).

IV. Summary

1. When was an asset acquired – prior to the marriage, during the marriage, after the marriage? Identify the periods during which value accumulated.

2. If the asset was acquired during the marriage, was it acquired with spousal efforts?

3. Does the asset include appreciation during the marriage? If so, determine whether it is active or passive.

4. Is the asset mixed, party separate and partly marital? Identify the separate and marital portions.

5. If the asset is mixed, has it been converted to marital by commingling?

6. If the asset is separate or mixed, has it been converted to marital by family use?

THE QUADRENNIAL REVIEW

Every four years, DHS must

- review economic data, including the cost of raising a child, education levels, and employment.
- analyze case data (defaults, imputation, deviations).
- provide meaningful opportunity for input by low-income persons.
- produce a public report.

MS DEVIATION FACTORS

The rebuttable presumption . . . may be overcome [based on the following criteria]

- . . .
- (h) Total available assets of the obligee, obligor and the child.
- . . .
- (j) Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt. MISS. CODE ANN. δ 43-19-103.

MS DEVIATION FACTORS

The rebuttable presumption . . . may be overcome by a . . . finding [that the guidelines produce an unfair result based on] the following criteria: . . .

(g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent [or spends significantly less time, increasing expenditures.] MISS. CODE ANN. δ 43-19-103.

BASIC SUBSISTENCE NEEDS

In 2022, the Mississippi Legislature added the following to the child support guidelines:

"The court shall take into account the basic subsistence needs of the obligated parent who has a limited ability to pay." MISS. CODE ANN. δ 43-19-101.

Number of children	Current MS CSG	Proposed CSG	Proposed CSG: Low-income payors*
1	14%	16%	14%
2	20%	24%	22%
3	22%	28%	26%
4	24%	31%	29%
5 or more	26%	34% for 5 + 2% for each additional child	32%

* Defined as payors with less than $1,500 a month net income (SNAP eligibility)

MS GUIDELINES: ADDITIONAL CHILDREN

According to economist Dr. Jane C. Venohr:

"[T]he percentage increases for more children are larger under [the leading study] and most studies of child-rearing expenditures than the implied percentages under the existing Mississippi guidelines."

Report at 21.

IMPUTING INCOME TO LOW-INCOME PAYORS

Income may not be imputed to an unemployed or under-employed payor at a standard amount.

Imputed income should be based on facts applicable to the payor, including their work history, "assets, residence, job skills, educational attainment, literacy, age, health, criminal record and other employment barriers" as well as the local job market.

MISS. CODE ANN. δ 43-19-101 (2022).

ARREARAGES DURING INCARCERATION

When arrearages build for incarcerated payors without resources, the debt burden may

- discourage employment upon release.
- force payors into an underground economy.
- increase the likelihood that children lose support over the long term.

OCSE Guidance Letter, Quadrennial Review Report, Exhibits, P. 98

MODIFICATION DURING INCARCERATION

In 2022, the Mississippi Legislature enacted a statute providing,

"The court may not consider incarceration as intentional or voluntary unemployment or underemployment when establishing or modifying a child-support order."

Senate Bill 2082.

SUPPORT FOR ADULT DISABLED CHILDREN

- The DHS Committee and the Family Law Task Force recommended a statute that would create a rebuttable presumption that support should continue past majority for a child
- whose disability continues from childhood into adulthood, and
- who is unable to support themselves;
- except when the child is a long-term patient in a facility owned or operated by the state.

RAVENSTEIN V. RAVENSTEIN, 167 SO. 3D 210 (MISS. 2014)

Justice King's concurrence (joined by four other justices) states that

- in MS, a child is *presumed* emancipated at twenty-one.
- the presumption may be rebutted by proof that a disabled child who has reached twenty-one is incapable of self support.
- chancellors have discretion to award support to an adult disabled child under current MS law.

DHS CASES: DUTY TO SUPPORT ADULT DISABLED CHILDREN

Sections 43-19-31 to -61 (which govern the DHS Child Support Unit) provide for paternity establishment through a notarized acknowledgement of paternity.

Section 43-19-33(3) provides that "[I]n the case of a child who, upon reaching the age of twenty-one (21) years, is mentally or physically incapable of self-support, the putative father shall not be relieved of the duty of support unless said child is a long-term patient in a facility owned or operated by the State of Mississippi."

RAVENSTEIN V. RAVENSTEIN, 167 SO. 3D 210 (MISS. 2014)

Justice King's concurrence in *Ravenstein* addressed δ 43-19-33(3), stating that

- Classifications based on legitimacy are unconstitutional.
- Providing support to nonmarital adult disabled children -- while denying it to adult disabled children of divorce – is unconstitutional.

LAW REFORM EFFORTS: ETHICS ISSUES

A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.

As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients; employ that knowledge in reform of the law.

Mississippi Rules of Professional Responsibility, Preamble

WHO DOES DHS REPRESENT?

Any attorney authorized by the state to initiate any action pursuant to Title IV-D . . . shall be deemed to represent the interest of the State Department of Human Services exclusively; no attorney-client relationship shall exist between said attorney and any recipient of services pursuant to Title IV-D of the federal Social Security Act for and on behalf of a child or children, regardless of the name in which the legal proceedings are initiated."

MISS. CODE ANN. δ 43-19-35(3)

LAW REFORM: ETHICS RULES

"A lawyer may serve as a director, officer or member of an organization involved in reform of the law or its administration notwithstanding that the reform may affect the interests of a client of the lawyer."

MISS. R. PROF. RESP. 6.4

A lawyer participating in law reform efforts "should be mindful of obligations to clients under other Rules, particularly Rule 1.7".

MISS. R. PROF. RESP. 6.4, Comments

RULE 1.7

Rule 1.7 of the Mississippi Rules of Professional Responsibility states

"A lawyer shall not represent a client if the representation of that client may be materially limited . . . *by the lawyer's own interests* . . . ."

MISS. R. PROF. RESP. 1.7 (emphasis added)

WHEN DO CLIENT INTERESTS CONTROL?

"In general, a lawyer may publicly take personal positions on controversial issues without regard to whether the positions are consistent with those of some or all of the lawyer's clients. Consent of the lawyer's clients is not required."

However, a lawyer's right to freedom of expression is modified by the lawyer's duties to clients. Thus, a lawyer may not publicly take a policy position that is adverse to the position of a client that the lawyer is currently representing if doing so would materially and adversely affect the lawyer's representation of the client *in the matter*."

RESTATEMENT OF THE LAW, THE LAW GOVERNING LAWYERS, § 125, Comment (e) (emphasis added)

WHEN DO CLIENT INTERESTS CONTROL?

[A]lawyer's right to freedom of expression is modified by the lawyer's duties to clients. Thus, a lawyer may not publicly take a policy position that is adverse to the position of a client that the lawyer is currently representing if doing so would materially and adversely affect the lawyer's representation of the client in the matter."

RESTATEMENT (THIRD), THE LAW GOVERNING LAWYERS, § 125, Comment (e) (emphasis added)

LAW REFORM THAT BENEFITS A CLIENT DIRECTLY

"When the lawyer knows that the interests of a client may be materially benefitted by a decision in which the lawyer participates, the lawyer shall disclose that fact but need not identify the client."

MISS. R. PROF. RESP. 6.4

PATERNITY: DISESTABLISHMENT SUITS AND PATERNITY FRAUD

For most of the history of family law, paternity suits have focused on establishing paternity. In the last twenty years, partly due to readily available DNA testing, suits to disestablish paternity have become a regular part of family law litigation. Courts, legislators, and commentators struggle to reconcile the competing interests in these suits, trying to balance rights of a defrauded legal father, a biological father, a custodial mother, and the child caught in the middle.

These materials discuss three questions that arise in this scenario:

1. Should a legal father who learns he is not the child's biological father (nonbiological legal father) be allowed to disestablish his paternity over the mother's objection?
2. If a nonbiological legal father is entitled to disestablish paternity, should he be permitted to recover damages, including child support, from the mother or biological father based on fraud?
3. Should a nonbiological legal father who wants to maintain his status as parent be permitted to do so, and if so, under what circumstances?

I. Disestablishment by legal father

Until 2011, Mississippi courts allowed a man (married or unmarried) who learned he was not his child's biological father to disestablish his paternity, so long as he had not voluntarily assumed a duty of support knowing the child was not his. In 2011, the Mississippi Legislature amended the paternity statutes, providing different rules depending on how the father' paternity was established.

A. Legal fatherhood through the marriage presumption

Under the amendments, a man whose paternity was established through the marriage presumption (without a court action or acknowledgment) may disestablish paternity if

- newly discovered evidence after the child's birth shows he is not the child's father;
- he did not adopt the child and the child was not conceived by artificial insemination during the marriage;
- he did not prevent the biological father from having a relationship with the child; and
- he did not voluntarily assume the duty of support knowing the child was not his.

Miss. Code Ann. δ 93-9-10(2)(3).

Under this rule, a man who agreed at divorce that his child was a child of the marriage and agreed to provide support, but without knowledge of his nonpaternity, could disestablish the relationship. However, if he acknowledged the child at divorce as his, knowing that was not true, he is bound by the agreement and cannot disestablish. *Lee v. Lee,* 12 So. 3d 548, 551 (Miss. Ct. App. 2009) (predating statutory amendment; based on prior case law preventing disestablishment after assumption of the support duty with knowledge of nonpaternity).

B. Legal fatherhood through paternity acknowledgments

Under the 2011 amendments, a man who signs an out-of-court, notarized acknowledgement of paternity has one year to withdraw the acknowledgement. After one year, he may withdraw the acknowledgement only if

- he proves fraud, duress, or mistake;
- he did not prevent the biological father from having a relationship with the child; and
- he did not cohabit with the mother and voluntarily assume a duty of support knowing the child was not his.

Miss. Code Ann. §§ 93-9-9, 10(3).

The statute does not define fraud or mistake. However, several states courts have held that a man's mistaken belief that he was a child's father is sufficient to prove a mistake of fact under similar statutes. *See, e.g.*, *Dep't of Human Servs. v. Chisum*, 85 P.3d 860, 862 (Okla. Civ. App. 2004) (legal father allowed to set aside acknowledgement based on mistake of fact; he believed that he was the child's father) (rejecting a best interests analysis); *Monmouth County Div. Soc. Servs. V. R.K.,* 757 A. 2d 319, 324 (N.J. Sup. Ct. 2000) (finding mistake of fact but requiring proof that disestablishment was in child's best interest); *In re Neal,* 184 A.3d 90, 95 (N.H. 2018) (father's delay did not prevent rescission). See Jeffrey A. Parness, *No Genetic Ties, No More Fathers: Voluntary Acknowledgment Recissions,* 39 John Marshall L. Rev. 1295 (Summer 2006).

C. Fatherhood established through paternity action

A man whose paternity is established through a paternity suit in which he declined or did not appear for DNA testing, or in which he entered an agreed order of paternity, may not disestablish his paternity. Miss. Code Ann. § 93-9-10(3). He waives the right to do so by failing to insist on a DNA test.

D. Other states

Some states require a court to find, in addition to factors listed above, that disestablishment is in the child's best interest. Courts may look to such factors as the length of the relationship, the importance of the relationship to the child's emotional well-being, the child's need for support, and whether the biological father is active in the child's life and providing financial support. *Monmouth County Div. Soc. Servs. V. R.K.,* 757 A. 2d 319, 324 (N.J. Sup. Ct. 2000) (applying best interest test to deny disestablishment, primarily because biological father was unknown); Ann M. Haralambie, Handing Custody, Abuse, and Adoption Cases, § 3.14 (discussing range of alternatives used by states).

The Uniform Parentage Act also requires that courts consider the child's best interests in suits to disestablish parentage (whether brought by the legal father, the mother, or the biological father). See Uniform Parentage Act §§ 608, 613 (2017).

In addition, the UPA and some states place a short time limit on suits to disestablish paternity, typically requiring that suit be filed within two years of the time at which the legal father's paternity was established. See Uniform Parentage Act ∆ 608 (2017).

II. Paternity fraud suits

In 2023, the Mississippi Supreme Court heard an appeal involving a legal father's suit against his former wife and the biological father of his two adult children, for fraud and intentional infliction of emotional distress. After the children reached adulthood, the plaintiff learned that his two adult children were not his biological children. He alleged that his wife's former employer, with whom she had an affair during the time of conception, was the father of both children. The plaintiff sued the mother and employer for fraud and intentional infliction of emotional distress and the employer for alienation of affection. He sought damages for the costs of raising two children, putting on expert proof that the cost of raising one child is $396,000.

The jury awarded him $700,000 in damages against the mother and biological father jointly and severally, returning the verdict on the jury verdict form for alienation of affection. The supreme court reversed and rendered, holding that the statute of limitations on alienation of affection had run and that a former spouse cannot be sued for alienation of affection. The court rejected the plaintiff's argument that the verdict rendered on the alienation of affection form applied to the fraud and intentional infliction of damages claim as well. *Davis v. Davis*, 2023 WL 2533266 (Miss. March 16, 2023). The court did not address the paternity fraud issues on the merits.

The case raises significant public policy issues regarding whether a legal father should be permitted to sue for paternity fraud, and if so, whether he should be permitted to recover damages for previously paid child support.

A. Mississippi law

Two Mississippi cases discuss paternity fraud in dicta. In addition, the 2011 statute on disestablishment of paternity addresses recovery of child support upon disestablishment. In a 2002 case, a nonbiological legal father sought to recover child support payments from the child's mother as part of disestablishing paternity. The supreme court affirmed the chancellor's finding that child support could not be recovered from the mother because support belonged to the child, was vested, and could not be modified or forgiven. The supreme court noted that the father had the option of seeking child support reimbursement from the biological father or could "pursue a possible claim against the natural mother for fraud." *McBride v. Jones,* 803 So. 2d 1168, 1170 (Miss. 2002). Six years later, the court of appeals heard a case involving a claim of paternity fraud. The court reversed a chancellor's award of $23,128 in child support reimbursement to a father who paid child support for nineteen years for a child who was not his. The court found that the father was not defrauded because he was aware that the child might not be his. The court cited *McBride* for the proposition that "a non-biological father is not entitled to reimbursement from a child's biological mother *for vested child support payments absent a showing of fraud." Department of Human Services v. Ray*, 997 So. 2d 983, 990 (Miss. Ct. App. 2008) (emphasis added).

Three years later, the 2011 paternity statute was enacted. In addition to codifying the right to disestablish paternity under certain circumstances, the statute provides, "Relief granted pursuant to this section is limited to the issues of prospective child support payments, past-due child support payments, termination of parental rights, custody, and visitation privileges as otherwise provided by law. *This section shall not be construed to create a cause of action to recover child support paid before the filing of the petition to disestablish paternity*." Miss. Code Ann. ∆ 93-9-10(5) (emphasis added).

Current Mississippi law, at least on the recovery of child support, is unclear. A reading of *McBride* suggests that the supreme court prohibited recovery of child support but suggested that a defrauded father might recover tort damages. However, the court of appeals in *Ray* interpreted *McBride* as allowing recovery of child support if the father proves fraud. The 2011 statute states that allowing a man to disestablish paternity does not create a cause of action to recover already paid child support. This could be interpreted to mean that child support cannot be reimbursed under any circumstance. Or, it could mean that the child support cannot be based on disestablishment alone – it must be based on some other cause of action, such as fraud. In addition, one could argue that because *Ray* was based on a misreading of *McBride*, the issue of allowing paternity suits at all has not been resolved.

McBride also suggests that the nonbiological legal father could recover child support from the biological father. It should be noted that the biological father's support obligation is limited to retroactive support of one year prior to the filing of a paternity action against him. Miss. Code Ann. δ 93-9-11; see *R.E. v. C.E.W.*, 752 So. 2d 1019, (Miss. 1999) (recognizing biological father's obligation for support for one year prior to filing, but ordering support paid to child rather than legal father; legal father was aware of nonpaternity when he agreed to pay support).

B. Other states

1. Tort damages. Other states are divided on whether a man should be allowed to bring a suit for paternity fraud and recover tort damages. Several courts have held that public policy bars a nonbiological legal father from any recovery – including tort damages. A California court stated that "allowing a nonbiological parent to recover damages for developing a close relationship with a child misrepresented to be his and performing parental acts, is not a 'damage' which should be compensable under the law." *Nagy v. Nagy,* 258 Cal. Rptr. 787 (Ct. App. 2d Dist. 1989). The South Dakota Supreme Court similarly held: "We are not unsympathetic for Paul because of the embarrassment and humiliation he suffered. Any attempts to redress this wrong, however, may do more social damage than if the law leaves it alone." *Pickering v. Pickering,* 434 N.W. 2d 758 (S.D. 1989). *See also Truong v. Truong*, 564 S.W. 3d 761, 768 (Mo. Ct. App. 2018) ("Missouri's public policy prioritizing children's needs . . . should preclude a non-biological father from bringing a common law action for fraud against a mother who is alleged to have misrepresented the child's parentage after years of rearing the child as his own"); *Day v. Heller,* 653 N.W. 2d 475, 482 (Neb. 2002) ("[F]orced to choose between adopting a tort that carries all the detrimental effects of a custody battle or asking a plaintiff to go uncompensated for his emotional pain, we choose the latter.").

Other states permit recovery of tort damages. In *G.A.W., III v. D.M.W*., 596 N.W.2d 284, 290 (Minn. 1999) the Minnesota Supreme Court held "there is no recognized legal barrier preventing a person from bringing fraud, misrepresentation, or infliction of emotional distress claims against his or her current or former spouse [for misrepresentation of paternity]. An Illinois appellate court rejected a mother's argument that permitting suit would be damaging to the child, stating: "We find that public policy does not serve to protect people engaging in behavior such as that with which plaintiff's complaint charges defendant, and we will not allow defendant to use her daughter to avoid responsibility for the consequences of her alleged deception." *Koelle v. Zwirin,* 672 N.E.2d 868, 876 (Ill. App. 3d 1996).

2. Reimbursement for child support. The majority of states to address the issue prohibit recovery of previously paid child support – some by statute, see Ark. Code Ann. § 9-10-115(f)(1)(D) (previously paid child support not subject to refund); . Del. Code Ann. Tit. 13, 8-638 (no right to reimbursement for child support or medical expenses); Fla. Stat. Ann. § 742.18(5) (similar to Mississippi statute – disestablishment does not create a cause of action to recover previously paid support), and some by judicial decision, see *Hilaire v. DeBlois*, 721 A. 2d 133, 136 (Vt. 1998) (allowing recovery of child support in tort suit would "visit considerable financial instability and hardship upon the custodial parent and the dependent children"); *Dier v. Peters*, 815 N.W. 2d 1, 7 (Iowa 2012) (barring recovery of past-due court-ordered support, which is vested, but permitting recovery of an unmarried man's voluntary payments to the mother); *DiMichele v. Perrella,* 51 Conn. L. Rptr 750 (Conn. Sup. Ct. 2011) (allowing tort action against biological father of child who knew of his paternity for a decade but disallowing recovery of child support for policy reasons and to protect the best interests of the child).

Two states permit recovery of previously paid child support. In *Denzik v. Denzik,* 197 S.W. 3d 108 (Ky 2006) the supreme court of Kentucky allowed a man to recover child support from the child's mother in addition to terminating his obligation for future support. The court held that the circumstances presented a classic case of fraud and that recovering child support paid because of the fraud was an appropriate element of damages. The Tennessee Supreme Court held in *Hodge v. Craig*, 382 S.W. 3d 325, 341-42 (Tenn. 2012) that allowing a presumed father to recover child support from the child's mother did not violate Tennessee public policy. The court noted that a Tennessee statute provides that suits against a child's mother are not prohibited. *See* Tenn. Code Ann. § 36–2–309(b) which states, in part, that "[n]othing in this subsection (b) shall preclude the issuance of a judgment against the mother or actual biological father of the child or children in favor of the person subsequently found not to be the father of the child or children." The Tennessee court held that recovery of child support was appropriate upon a showing of fraud, stating that, given the broad reach of common law actions for fraud. His pecuniary damages included the child support that he paid.

III. Mother or biological father's attempt to disestablish paternity

A. Mississippi

In Mississippi, the rights of a nonbiological father who wants to preserve legal parenthood varies depending on the biological father's presence or absence. In 2004, in *Griffith v. Pell,* the Mississippi Supreme Court held that a presumed father who acts in loco parentis – assuming the status

and obligations of a parent – may have parental rights. Interestingly, the court directed that trial courts should first determine biological paternity and then determine the rights of the presumed and biological fathers in a separate action, based on the child's best interests. The court stated, "Merely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship." *Griffith v. Pell,* 881 So. 2d 184, 186. (Miss. 2004). Following *Griffith*, several in loco parentis fathers were awarded custody over a child's biological mother. The supreme court applied the doctrine to affirm a chancellor's award of custody to a divorcing husband, even though genetic testing showed that he was not the child's father. *J. P.M. v. T.D.M.,* 932 So. 2d 760, 770 (Miss. 2006) (en banc) (rejecting his argument that the court should use the equitable fatherhood doctrine).

In 2014, the supreme court reversed this line of cases, holding that a presumed father's in loco parentis status did not give him rights equal to the child's mother and biological father. The court distinguished earlier cases on the basis that the biological fathers did not seek custody. However, the court also held broadly that custody may not be granted to a father who acts in loco parentis unless he first overcomes the natural parent presumption by proving abandonment, desertion, or unfitness. *In re Waites,* 152 So. 3d 306, 314 (Miss. 2014*); see also Miller v. Smith,* 229 So. 3d 100, 104-105 (Miss. 2017).

In 2019, the supreme court modified this rule for cases in which the biological father is not seeking custody. The court held that in the absence of a biological father, a man who acted in loco parentis to a child is entitled to parental status equal to the child's mother in a custody action. *Ballard v. Ballard,* 289 So. 3d 725, 730-31 (Miss. 2019).

B. Other states

States vary in their responses to suits to disestablish against a legal father's wishes. Some states require that a court hold a best interests hearing to determine whether a paternity action to determine the child's biological father should proceed. *See In re Marriage of Ross*, 783 P.2d 331, 338-39 (Kan. 1989); *McDaniels v. Carlson,* 738 P.2d 254, 261 (Wash. 1987) (en banc). Some states set a time limit on challenges – in California, a legal father's paternity may not be challenged by any party after a child reaches the age of two. Cal. Fam. Code § 7541(b). States also vary on who can challenge the paternity of a husband in an intact marriage; some states allow challenges only by the husband or wife. Jeffrey A. Parness, *Faithful Parents: Choice of Childcare Parentage Laws,* 70 Mercer L. Rev. 325, 341 (Winter 2019) (good review of various approaches). The Uniform Parentage Act also requires that suit be brought within two years of a child's birth. In addition, the act requires a best-interest analysis. UPA, 608(b).

Some states will grant parental rights to the mother, legal father, and biological father if the child has established a relationship with all three. At least in the context of adoption, the Mississippi Supreme Court has expressed reluctance to adopt doctrines that result in a child having three parents. *See In re Adoption of D.D.H.,* 268 So. 3d 449, 455 (Miss. 2018).

TERMINATION OF PARENTAL RIGHTS: GROUNDS UNDER THE 2016 TPR LAW

In 2016, the Mississippi Legislature completely replaced the statutes governing termination of parental rights. The new act provides additional protection for parents in termination proceedings and sets up additional requirements for termination in CPS proceedings.
These materials discuss the three categories of terminations under the act and the requirements for each.

I. Types of termination

The act distinguishes between

1. DCPS terminations in which reunification is required
2. DCPS terminations in which reunification is not required
3. Private terminations

II. Relevant statutes

The grounds and required findings for termination are set out in the following statutes:

Miss. Code Ann. δ 93-15-103 (defines abandonment and desertion)
Miss. Code Ann. δ 93-15-115 (DHS cases where reunification efforts are required)
Miss. Code Ann. δ 93-15-117 (DHS cases where reunification efforts are not required)
Miss. Code Ann. δ 93-15-119 (grounds for termination)
Miss. Code Ann. δ 93-15-121 (grounds for termination)
Miss. Code Ann. δ 43-21-603(7) (grounds for bypassing reunification efforts and a ground under 93-15-121)

III. Grounds for termination: Applicable to all actions

The grounds for termination in Miss. Code Ann. δδ 93-15-119, -121 (and as defined in Miss. Code Ann. δδ 93-15-103 and 43-21-603) are available in both DCPS and private actions. They include

1. Abandonment or desertion (as defined in δ 93-15-103). Abandonment is defined as conduct that "evinces a settled purpose to relinquish all parental claims and responsibilities to the child" and can be established by failure to contact a child under the age of three for six months, or a child over the age of three for one year. Desertion is defined as "any conduct by the parent over an extended period of time that demonstrates a willful neglect or refusal to provide for the support and maintenance of the child" or failure to demonstrate "within a reasonable period of time after the birth of the child, a full commitment to the responsibilities of parenthood."
2. Unfitness, which "shall be established by showing past or present conduct of the parent that demonstrates a substantial risk of compromising or endangering the child's safety and welfare"

3. Parent committed against the other parent a sexual act that is unlawful under Section 97-3-65 or 97-3-95, or under a similar law of another state, territory, possession or Native American tribe where the offense occurred, and the child was conceived as a result. (NOTE that this ground does not require a finding that reunification was not desirable.)

Miss. Code Ann. δ 93-15-119.

1. A parent has "a severe mental illness or deficiency that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, makes the parent unable or unwilling to provide an adequate permanent home for the child."
2. A parent has "an extreme physical incapacitation that is unlikely to change in a reasonable period of time and which, based upon expert testimony or an established pattern of behavior, prevents the parent, despite reasonable accommodations, from providing minimally acceptable care for the child."
3. A parent suffers from habitual alcoholism or other drug addiction and has failed to successfully complete alcohol or drug treatment.
4. A parent is unwilling to provide reasonably necessary food, clothing, shelter, or medical care for a child.
5. A parent failed to exercise reasonable visitation or communication with the child.
6. A parent's abusive or neglectful conduct has caused, at least in part, "an extreme and deep-seated antipathy by the child toward the parent, or some other substantial erosion of the relationship between the parent and the child."
7. A parent has committed an abusive act for which reasonable efforts to maintain the children in the home would not be required under 43-21-603 or a series of physically, mentally, or emotionally abusive incidents, against the child or another child, whether related by consanguinity or affinity or not, making future contacts between the parent and child undesirable.
8. A parent has been convicted of specified crimes against a child.

Miss. Code Ann. δ 93-15-121.

1. The parent has subjected the child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse and sexual abuse; or
2. 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
3. The parental rights of the parent to a sibling have been terminated involuntarily;

Miss. Code Ann. δ 43-21-603(7) (listed as a ground in 93-15-121).

Findings regarding reunification. All grounds require proof by clear and convincing evidence. All but one require a finding that reunification is not desirable. Termination based on a parent's commission of a sexual crime that resulted in the child's birth does not require this finding.

IV. DHS/reunification efforts required: Additional requirements

Miss. Code Ann. δ 93-15-115 sets out additional requirements for termination when a child is in DCPS custody and reunification efforts are required.

Termination is permitted if the court finds by clear and convincing evidence that

1. The child has been adjudicated abused or neglected;
2. The child has been in DCPS custody for 6 months and DCPS developed a reunification plan;
3. A permanency hearing was held in which the court found that (1) DCPS developed a reunification plan; (2) DCPS made reasonable efforts to diligently assist the parent in complying; (3) the parent failed to substantially comply; and (4) reunification is not in the child's best interest; AND
4. Termination is appropriate because reunification is not desirable based on one of grounds in 119 or 121 (see listing above).

V. DHS/reunification efforts not required: Additional requirements

Miss. Code Ann. δ 93-15-117 sets out additional requirements for termination when a child is in DCPS custody and reunification efforts are not required.

Termination is permitted if the court finds by clear and convincing evidence that

- the child has been adjudicated abused or neglected;
- the child has been in DCPS custody for 60 days and reunification efforts are not required under Miss. Code Ann. δ 43-21-603(7), which includes the following:
  (1) The parent has subjected the child to aggravated circumstances, including, but not limited to, abandonment, torture, chronic abuse and sexual abuse; or
  (2) 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
  (3) The parental rights of the parent to a sibling have been terminated involuntarily; AND
  (4) continuing the child in his own home would be contrary to the child's welfare.
- a permanency hearing was held in which the court found reunification efforts are not in the child's best interest;
- termination of parental rights is appropriate because reunification is not in the child's best interest based on grounds in Miss. Code Ann. δ Miss. Code Ann. δ 43-21-603(7), 93-15-119, or 93-15-121.

V. Court discretion

Courts have discretion to deny termination if the child's safety and welfare is not endangered and termination is not in the child's best interest, based on one or more of these factors:

1. DCPS has documented compelling and extraordinary reasons why terminating the parent's parental rights would not be in the child's best interests;
2. There is a likelihood that continuing reasonable efforts for achieving reunification will be successful;
3. Terminating the parent's parental rights would inappropriately relieve the parent of support obligations to the child; or
4. The child is being cared for by the other parent, or a relative, guardian, or custodian, in a residence not occupied by the abusive or neglectful parent and terminating the parent's parental rights would not expedite the process for obtaining a satisfactory permanency outcome.

Miss. Code Ann. δ 93-15-123.

VI. Issues

Interplay between Miss. Code Ann. δ *93*-15-*119 and -12*. It appears that -119 and -121 establish separate and independent grounds that can be the basis for termination in any action. It does not appear that private actions are limited to -119, or that findings are required under both sections.

Burden of proof. Santosky v. Kramer, 455 U.S. 745, 769-70 (1982) requires that termination be based on clear and convincing evidence. Miss. Code Ann. δ 93-15-115 and -117 provide that the court in the termination hearing must find that in the permanency hearing, the court found (among other things) that reunification was not in the child's best interest. In a 2019 case, the court of appeals held that the youth court's determinations under this section are binding on a chancellor and may not be questioned by the chancery court hearing a petition for termination. *In re R.B.,* 291 So. 3d 1116 (Miss. Ct. App. 2019) (chancellor could not question the finding that DCPS exercised reasonable efforts to assist the family). The standard for the permanency hearing is the preponderance of the evidence. Is that finding sufficient, or must the court in the termination hearing make an independent finding, by clear and convincing evidence, that reunification is not in the child's best interest?

BELL FAMILY LAW CLE 2023
UPDATE ON GUARDIAN AD LITEM CASES,
TERMINATION OF PARENTAL RIGHTS,
AND 2023 LEGISLATION AFFECTING CHILDREN

David L. Calder
University of Mississippi Child Advocacy Clinic
481 Chucky Mullins Drive, University, MS 38677
phone (662) 832-1354; fax (866) 474-0923
e-mail: davidcalder23@gmail.com

TABLE OF CONTENTS

I. RECENT CASES

A. GUARDIANS AD LITEM

1. GIBSON V. GIBSON, 333 So. 3d 103 (Miss. Ct. App. 2022).
Discretionary appointment of GAL; Duty of Parent to Cooperate with the GAL; Standard of Appellate Review if Appellee Fails to file a Brief

FACTS: Wife brought action against husband for divorce, and the chancery court appointed a guardian ad litem (GAL) for child. The Husband alleged that the Wife was a habitual drug user, and the court granted him temporary custody and appointed a GAL for the child. The decision does not indicate whether the GAL appointment Order stated that it was mandatory or discretionary. Husband had a history of alcohol abuse and he had been committed to a treatment facility. During the proceedings Wife served two years in jail after being convicted for grand larceny. **The child was placed in the custody of relatives for over four years.**

At a temporary hearing, ***(and after a change in chancellors)*** **the GAL testified, but did not submit a written report. The trial court then *relieved the GAL of any further responsibilities* and refused Husband's request to appoint a new GAL.** The court entered judgment of ID divorce based on the parties' consent, and **reserved the issue of custody.** At the final hearing to determine custody, the court awarded **paramount physical custody to Wife, and visitation rights to Husband,** and he appealed. **Wife failed to file a brief on appeal.**

HOLDINGS: The Court of Appeals affirmed, holding that:
(1) **Failure to file a brief is "tantamount to confession of erro**r." "However, reversal is not automatic nor required [and] **"[w]here issues of child custody are involved, we are 'compelled to review the record,' notwithstanding the appellee's failure to file a brief."**
(2) GAL's failure to submit written report did not constitute reversible error, and
(3) Chancery Court was not obligated to appoint another GAL after the first GAL was relieved of his duties because ***there were no allegations of abuse or neglect of the child.***

PRACTICE NOTES:

1. Father argued that he was not interviewed by the GAL. But the Court noted that he was ***initially uncooperative with the GAL,*** **and the COA stated that the GAL was not required to "track down" the Father in order to conduct a home visit or interviews. The Father had a duty to cooperate with the GAL.**
2. If no abuse or neglect is alleged, appointment of GAL is discretionary.
3. The Order appointing the GAL should specify whether the GAL is mandatory or discretionary.

2. LAMY V. LAMY, ___ So.3d ____ , 2022 WL 17259752 (Miss. Ct. App. No. 2021-CA-00770-CAO, decided Nov. 29, 2022), rehearing denied May 09, 2023. Hearsay; GAL Reports; Contempt; Modification of Custody.

FACTS: Following entry of Agreed Order for joint legal and physical custody of the children, **Father filed complaint against Mother for modification** of order and contempt, alleging that mother had denied father access to their three children in violation of the order, and seeking physical custody of the children, as well as child support. **Mother filed counterclaim for modification**. The Chancery Court denied father's motion and awarded physical custody of children to mother. Father appealed.

HOLDINGS: The Court of Appeals, en banc, affirmed in part, reversed in part and remanded:
(1) Chancery Court did not err in denying father's motion to exclude evidence attached to guardian ad litem's (GAL's) report that was not disclosed in discovery;
(2) Agreed custody order was not a temporary order;
(3) Father and Mother were awarded joint legal custody and joint physical custody by agreed child custody order;
(4) Remand was required for reconsideration under the correct legal standard of decisions regarding modification, changes in periods of custody or visitation, and child support;
(5) Chancery Court did not abuse discretion by failing to hold Mother in contempt for retaining children during father's custody periods; and
(6) Chancellor did not err by failing to hold children's mother in contempt for failure to notify children's father of children's therapy.

PRACTICE NOTES:

1. The COA noted: "In strict compliance with the caselaw already discussed, the GAL attached to her report everything that she looked at and considered throughout her investigation." ***The Information attached to the GAL's Report was not subject to production during discovery***. The Father denied the trial court's offer for additional time to review the information attached to the Report.
2. COA held that trial court failed to address the applicable standard for modification of an existing child custody Order, so the case was remanded.
3. Contempt is an issue committed to the sound discretion of the trial court.

3. ROACH V. PHILLIPS, ___ So.3d ___, 2023 WL 3474814 (Miss. Ct. App. No. 2022-CA-00159-COA, Decided May 16, 2023). Reversible Error if trial court fails to state reasons for r*ejecting GAL's recommendations* in a TPR action.

FACTS: The mother consented to the termination of her parental rights as to three children. The Father was the biological father of one child, and the legal (birth certificate) Father of another child. **Although the *Father had physically abused the children in the past,* he claimed he had reformed** and wanted to re-establish his

relationship with the children "in order to make things right." At the initial hearing, the ***GAL recommended that the Father's parental rights not be terminated.*** The chancery court delayed ruling on the claim for TPR until the children had additional counseling, ***but at that point the trial court discharged the GAL from any further responsibilities.*** At the subsequent hearing the chancellor terminated the parental rights of the Father, and he appealed.

HOLDINGS: The Court of Appeals reversed and remanded, holding that:
(1) Because the GAL recommended that the Father's rights not be terminated, the **chancery court was required to include in the final judgment a summary of the court-appointed GAL's qualifications, findings, and recommendation, as well as the chancellor's reasoning for not following the GAL's recommendation.** The chancellor's failure to state reasons was reversible error.

PRACTICE NOTES:

1. The trial court appointed a ***mandatory GAL*** based on the allegations of abuse and neglect that had been raised. Miss. Code Ann. § 93-5-23. At the initial hearing, the chancellor noted that the adoptive parents had "checked all the boxes and ... presented a case that would" justify termination of the Father's parental rights. **Although the court acknowledged the GAL's recommendation not to terminate the Father's rights, *the court delayed issuing a final decision until the children received additional therapy from their counselor.***
2. **After a GAL is appointed to investigate allegations of abuse or neglect and make recommendations about TPE, the trial court cannot avoid the issue of addressing the GAL's recommendations by relieving the GAL of any further responsibilities.** *Barber v. Barber*, 288 So.3d 325, 332 (¶30) (Miss. 2020).
3. The trial court is not bound to follow the recommendations of a GAL in a case involving abuse or neglect. *Borden v. Borden*, 167 So. 3d 238, 241 (Miss. 2014) (citing *S.N.C. v. J.R.D.*, 755 So. 2d 1077, 1082 (Miss. 2000)). However, if the court elects not to follow the GAL's recommendations, ***the court must address the specific recommendations made the the GAL, and the court's reasons for not following those recommendations.*** *Barber v. Barber*, 288 So.3d 325, 332 (Miss., 2020) (emphasizing the serious and vital role that guardians ad litem play in safeguarding the welfare of children).
4. "[T]he guardian ad litem is the only participant in a child custody proceeding whose sole interest is identifying and protecting the rights of the children and reporting its findings to the court. ***Therefore, a chancellor's failure to consider a mandatorily appointed guardian ad litem's findings is an error of the utmost seriousness."*** *Barber v. Barber*, 288 So.3d 325, 332 (¶29) (Miss. 2020).
5. In ***Summers v. Gros*, 319 So.3d 479, 486 (¶25) (Miss. 2021)** the MSSC held that the chancellor properly advised the GAL of her duties in the Order of Appointment. **The trial court was authorized to remove the designation of the GAL as an "expert witness," and allowing her to *"testify as guardian ad litem."*** In *Summers*, the chancellor was aware of guardian ad litem's recommendations

and the reasons for them, but he did not err when he rejected the GAL's recommendations, because the chancellor explained the reasons that he reached a different conclusion than the GAL recommended.

6. ***If the trial court fails to make the necessary findings on the Record, consider a Motion under Rule 54, Miss.R.Civ.P.*** which provides: "(a) Effect. In all actions tried upon the facts without a jury the court may, and shall upon the request of any party to the suit or when required by these rules, find the facts specially and state separately its conclusions of law thereon and judgment shall be entered accordingly. ***A Rule 54 Motion must be filed within ten (10) days after the judgment.***

4. LAMBES V. LAMBES, 345 So.3d 592 (Miss. Ct. App. 2022)
GAL Reports; Albright Factors; *custody to parent even though he was not favored under a single Albright factor.*

FACTS: Father and Mother filed competing complaints for divorce on grounds of habitual cruel and inhuman treatment and irreconcilable differences, **each seeking sole custody of their two children.** The Chancery Court entered final judgment, **granting Mother a divorce on the grounds of HCIT, and *awarding sole custody to Father, visitation to Mother, joint legal custody to both parents***, and ordered mother to pay child support. Mother appealed.

HOLDINGS: The Court of Appeals affirmed, holding that that:
(1) Substantial and credible evidence supported trial court's decision to grant sole custody of children to father;
(2) ***Father's admission to habitual cruel and inhuman treatment of Mother did not preclude him from being awarded sole custody of children;*** and
(3) Guardian ad Litem's investigation was not inadequate and resulting report did not contain misrepresentations warranting reversal.

PRACTICE NOTES:

1. **The chancellor awarded sole physical custody of the children to the Father, *even though not a single Albright factor weighed in his favor* in the Albright analysis.** The COA held that the Albright analysis is not a mathematical formula, and the Court was required to assume that the Chancellor's statement that he awarded custody to the Father based on "total consideration" of all the evidence presented at trial, which included the GAL's recommendation that Father be given sole physical custody. **See Pittman v. Pittman, 195 So.3d 727 (¶15) (Miss. 2016) (evidence of child abuse may support divorce based on HCIT).**
2. The ***GAL's report was not received as "substantive evidence"*** but instead as "an officer of this court," having been appointed by the previous chancellor in 2016, and to detail her work throughout her representation of these two children.
3. Here, the GAL spent more than three years interviewing the parties, the children's teachers, counselors, and the children's physicians. Her last report was thirty-eight

pages. Therefore, the COA found nothing inadequate about the GAL's investigation.

4. The COA affirmed the chancellor's decision that **the statutory ground for a presumption against custody if a parent has committed acts of domestic violence, had been rebutted by a preponderance of the evidence,** without addressing the specific grounds set forth in the statute.

B. TERMINATION OF PARENTAL RIGHTS

5. ***MIDDLEBROOK V. FULLER*, 349 So. 3d 816 (Miss. Ct. App. Oct. 18, 2022).** Intervention by grandparent; ***TPR based on the parent's lifestyle which posed a substantial risk of harm to the child under MCA 93-15-119;*** rejection of GAL recommendations and stating the reasons for rejection.

FACTS: Putative father brought action to establish paternity and for temporary custody, and mother moved to terminate putative father's parental rights. The father had a questionable lifestyle, including having convicted felons living in his home, having drug addicts in his home and allowing drug deals there. The Chancery Court entered judgment adjudicating putative father to be child's father, but terminating his parental rights. Putative father appealed.

HOLDINGS: The Court of Appeals, affirmed, holding that:
(1) Evidence was sufficient to support finding that **father's lifestyle and living arrangements could compromise two-year-old child's safety and welfare**, and
(2) recommendation of guardian ad litem (GAL) that father's parental rights not be terminated did not preclude decision to terminate father's rights.

PRACTICE NOTES:

1. In order to terminate a parent's rights, the petitioner must show by clear and convincing evidence that **the father is "unfit" because his past or present conduct "demonstrates a substantial risk of compromising or endangering the child's safety and welfare ...." Miss. Code Ann. § 93-15-119(1)(a)(i).**
2. Mother had a serious drug addiction problem, and was unable to attend the initial hearing because she was in a residential drug treatment facility. However, the Court allowed the maternal grandmother to intervene and seek custody of the child. Mother appeared at subsequent hearings and testified that she feared for her daughter's safety if she was allowed to remain in the Father's custody.
3. On July 3, 2019, the chancery court entered an order transferring the case to the Jackson County Youth Court (a county court) for investigation into the allegations of abuse and neglect of the minor child. **In February 2020, the Youth Court sent a letter to the chancery court stating that there were "no options available through Youth Court for this matter."**
4. The problem in this case is that the TPR action was already pending in Chancery, and if the County Court Youth Court had assumed jurisdiction over the abuse and

neglect allegations, ***the County Court Youth Court would have acquired exclusive priority jurisdiction over any claims for TPR that would have conflicted with the Chancery Court's jurisdiction.*** **It is unclear whether the Chancery Court could have transferred jurisdiction over the entire case, including the TPR claims to the County Court Youth Court.**

6. C.P. V. LOWNDES COUNTY DCPS, 349 So.3d 1209 (Miss. Ct. App. 2022). TPR based on severe intellectual disability; reasonable efforts to reunify family not required because of "aggravated circumstances."

FACTS: Background: Following adjudication of child as neglected, County Department of Child Protection Services (CPS) filed petition seeking to terminate parental rights. The County Court Youth Court granted the petition. Parents appealed.

HOLDINGS: The Court of Appeals affirmed, holding that:
(1) Mother's ***severe intellectual disability constituted "aggravated circumstances"*** such that **reasonable efforts for reunification between parents and child was not required** prior to termination of parental rights;
(2) Clear and convincing evidence supported termination of parents' parental rights;
(3) **Failure of GAL to meet with child, parents, foster parents, or child's older sibling before submitting report and recommendation was harmless error**;
(4) Any error created by Youth Court's failure to explicitly inform parents of their rights caused no harm to parents; and
(6) Any error by Youth Court's failure to make specific findings of fact on record before adopting CPS' proposed order verbatim was harmless.

PRACTICE NOTES:

1. At the time of the child's birth, hospital personnel contacted DCPS because of their concern the Mother was unable to properly care for the child.
2. Mother, who had I.Q. of 46, had severe mental limitations and deficiencies that limited her functional capacity to that of an eleven-year-old. She had difficulty comprehending and expressing herself, and was unable to read.
3. The YC held that **this was an emergency situation, so that DCPS was not required to use reasonable efforts to maintain the child in the parent's home**, or reunify the family.
4. The YC held that **"aggravated circumstances" existed in this case because of the intellectual limitations of the parents, and the fact that their older child had been in DCPS custody for over one year, and that TPR proceedings had been initiated in regard to that child.** Therefore, the YC Ordered that TPR proceedings were to be initiated immediately concerning the minor child in this case.
5. ***DOCTRINE OF ANTICIPATORY NEGLECT*****:**
In re N.M. v. Miss. Dep't of Human Servs.**, 215 So. 3d 1007 (Miss. Ct. App.**

2017): The Court acknowledged the doctrine or anticipatory or potential neglect as a valid basis for taking a child into DCPS custody, based on prior abuse or neglect of other children.
***Interest of K.M. v. Jackson Cnty. Youth Court*, ___ So.3d ____, 2020 WL 7056087 (Miss. Ct. App. 2020)**: The YC properly found an infant to be a neglected and abused child under the doctrine of "anticipatory neglect," and found that reunification efforts were not necessary, because the parents had other children in DCPS custody.

6. Failure of the GAL to meet with the infant child, the parents, foster parents, or the child's older sibling before rendering recommendation and report was harmless error. The GAL had not attended all the hearings or heard testimony from the parties and all the witnesses, but the GAL's report stated that recommendations were based on review of pleadings, interview with social worker, review of department of child protection services case file involving the child, and review of pertinent case and statutory law. The trial court was presented with other sufficient evidence to support TPR.

7. BULLOCK V. MISS. DCPS, 343 So. 3d 1079 (Miss. Ct. App. 2022).
TPR factual findings are required under *both MCA § 93-15-119* (parent's conduct conduct demonstrated "a substantial risk of compromising or endangering the child's safety and welfare") a*nd MCA § 93-15-121* (specific factors - - substantial erosion of relationship, and abusive acts against a child).

FACTS: DCPS sought to terminate mother's parental rights as to four children. The fathers either consented to TPR or were not in the picture. **In view of the "aggravated circumstances, including, but not limited to ... torture [and] chronic abuse," the YC held that DCPS was not required to use reasonable efforts to reunify the children with the family.** MCA 43-21-603(7)(c). The YC adjudicated one child (designated as the "target child") who was abused, and the other three children were neglected. The County Court sitting as a YC then conducted the TPR hearing, and terminated the Mother's parental rights on the following grounds: (1) The parent's abusive or neglectful conduct has caused, at least in part, an extreme and deep-seated antipathy by the child toward the parent, or some other substantial erosion of the relationship between the parent and the child; and (2) The parent has committed an abusive act for which reasonable efforts to maintain the children in the home were not required, and a series of physically, mentally, or emotionally abusive incidents, against the child or another child, whether related by consanguinity or affinity or not, making future contacts between the parent and child undesirable.

HOLDINGS: The COA affirmed, holding that:
(1) Substantial credible evidence supported youth court's decision to terminate mother's parental rights;
(2) The fact that the GAL for children did not interview the mother before making

recommendations to the court did not render GAL's investigation unfair or biased.

PRACTICE NOTES:

1. The facts in this case depict the *failure that sometimes occurs in our child protection system when a child is being physically abused*. The initial report of physical abuse of Lucy was made by her school nurse on January 18, 2017, and *she made six additional reports of physical injuries that the nurse observed concerning injuries that Lucy suffered because of physical abuse by her mother's boyfriend.* ***DCPS finally took action after the seventh report.***
2. The opinion graphically describes the physical abuse and torture that the Lucy suffered that prompted the first six reports to the DCPS hotline. However, the DCPS caseworker did not take any action to ask the YC to remove Lucy and the other children from the home until the seventh report by the school nurse on September 7, 2017.
3. The youth court held a TPR hearing on July 21, 2020. *Nurse Tingle testified in great detail about all seven reports she had filed with CPS regarding Lucy's abuse.*
4. The trial court held that under MCA 93-15-119, the parent was "mentally, morally, or otherwise unfit to raise the child, because *the conduct of the parent demonstrated "a substantial risk of compromising or endangering the child's safety and welfare,"* and *"reunification between the parent and child is not desirable toward obtaining a satisfactory permanency outcome."*
5. **The Youth Court also found that termination grounds existed based on the following factors in MCA §93-15-121(f)-(g).**

   (f) The parent's abusive or neglectful conduct has caused, at least in part, an extreme and deep-seated antipathy by the child toward the parent, or some other substantial erosion of the relationship between the parent and the child;

   (g) The parent has committed an abusive act for which reasonable efforts to maintain the children in the home would not be required under Section 43-21-603, or a series of physically, mentally, or emotionally abusive incidents, against the child or another child, whether related by consanguinity or affinity or not, making future contacts between the parent and child undesirable ....
6. **The COA held that "*[a] court may find that if one child is abused, the child's siblings are neglected.* The basis is that a sibling has been harmed, and the potential harm to the other child is sufficient to warrant both children being removed from the harmful environment."** *T.T. v. Harrison Cnty. Dep't of Hum. Servs.*, 90 So. 3d 1283, 1287 (¶19) (Miss. Ct. App. 2012) (citation omitted) (quoting *S.C. v. State*, 795 So. 2d 526, 532 (¶27) (Miss. 2001)).
7. ***Abuse of one child is sufficient to terminate parental rights as to the child's siblings.*** *H.D.H. v. Prentiss Cnty. Dep't of Hum. Servs.,* 979 So. 2d 6, 12 (¶17) (Miss. Ct. App. 2008).
8. Although there may be instances in TPR cases where the GAL should have some contact with the biological parents, ***there is no blanket requirement that the GAL always contact or interview the natural mother in TPR cases.***

9. ***Mother failed to appeal YC decision at Adjudication Hearing.***
Mother argued that DCPS presented no evidence that the minor child's siblings were abused or neglected. However, the YC had adjudicated the minor child Lucy to be abused, and the other three children to be neglected.

10. ***The COA held that Mother never appealed the Youth Court's adjudication of neglect as to Lucy's siblings or any of the disposition orders***. Thus, the COA has no jurisdiction over any issues stemming from the adjudication order. The COA relied on *In re M.M.*, 319 So. 3d 1188, 1191 (¶2) (Miss. Ct. App. 2021). ***(Parent must appeal adverse decision in Adjudication/Disposition Hearing within thirty days after the decision is rendered by the YC. Any subsequent effort to challenge that decision will be untimely under the MRAP.)***

8. DENHAM V. LAFAYETTE COUNTY DCPS, 356 So.3d 173 (Miss. Ct. App. 2023)
Termination of parental rights; court-appointed counsel for indigent parent

FACTS: DCPS filed petition to terminate mother's parental rights on grounds that mother had addiction to alcohol or other drug and had failed to successfully complete treatment programs, and that mother was unwilling to provide reasonably necessary food, clothing, shelter, or medical care. Following hearing, the Chancery Court, terminated mother's parental rights. Mother appealed.

HOLDINGS: The Court of Appeals affirmed, holding that:
(1) Sufficient evidence supported termination of mother's parental rights;
(2) Alleged failure of mother's court-appointed counsel to subpoena her medical records did not prejudice mother, and, thus, was not ineffective assistance of counsel;
(3) Alleged failure of Mother's counsel to object to testimony that her boyfriend "was suicidal" and that he was convicted felon, did not prejudice Mother and, thus, was not ineffective assistance of counsel;
(4) Alleged failure of Mother's court-appointed counsel to object to hearsay testimony of foster parent that child was afraid of Mother did not prejudice Mother, and, thus, was not ineffective assistance of counsel;
(5) **Alleged failure of Mother's court-appointed counsel to object to hearsay testimony of guardian ad litem regarding child's statements about adoption and placement was not basis for claim of substantial harm or error**, and, thus, was not ineffective assistance of counsel; and
(6) GAL zealously represented child's best interests.

PRACTICE NOTES:

1. **TPR may be appropriate *if a parent fails to comply with the family service plan established by DCPS and approved by the Youth Court*.**
2. The burden of proving abuse or neglect in a Youth Court Adjudicatory and Dispositional Hearing is a **"preponderance of the evidence." This finding can be used later as a basis for terminating parental rights. This arguably**

conflicts with the U.S. Supreme Court's holding in *Santosky v. Kramer*, 455 U.S. 745, 747-49 (1982) that "... the Due Process Clause of the Fourteenth Amendment demands [that] [b]efore a State may sever completely and irrevocably the rights of parents in their natural child, ***due process requires that the State support its allegations by at least clear and convincing evidence."***

C. DURABLE LEGAL CUSTODY

9. ***KEVIN V. MISS. DCPS*, 341 So. 3d 1014 (Miss. Ct. App. 2022).**
Durable Legal Custody; Standard of Review on Appeal.

FACTS: After child was adjudicated abused, at a disposition hearing the Youth Court, awarded durable legal custody of child to paternal grandparents. Mother appealed.

HOLDINGS: The Court of Appeals affirmed, holding that:
(1) Youth Court adequately complied with notice requirements, and
(2) Evidence supported Youth Court decision to ***bypass reunification between mother and child and to award paternal grandparents durable legal custody of child.***

PRACTICE NOTES:

1. Youth Court **Adjudication Hearing** - - determines whether a child has been abused or neglected under the Miss. Youth Court Act; Mississippi Rules of Evidence apply in Youth Court Adjudication Hearing. In Disposition Hearing, Youth Court determines custody - - where a child will be placed. Appeals must be perfected within 30 days after the YC Decision on Adjudication/Disposition.
2. If the evidence in an abuse case is such that, **beyond a reasonable doubt, reasonable minds could not have reached the Youth Court's conclusion**, the appellate court must reverse; however, if the evidence in the record supports the Youth Court's adjudication, considering the reasonable-doubt standard, then the appellate court must affirm.
3. Abuse occurred when Mother got into an argument with child's Father, who was living in Texas at the time. **After their argument, Mother sent Rather a video of her "brushing" a butcher knife against the child's leg**. At the time of this incident, the older child was four years old, and the younger child who was in the knife video was two months old.
4. **Miss. Code Ann. §§ 43-21-609 & 43-21-613 (West 2022) authorized the YC to award durable legal custody to a third party, subject to any terms or conditions established by the Court.** The Youth Court may terminate the monitoring and service responsibilities of DCPS.
5. **In re S.A.M., 826 So.2d at 1274, 1279 (Miss. 2002)**
   Under Durable Legal Custody, the parent retains some form of residual rights and

responsibilities. A decision to grant durable legal custody is not permanent and is, therefore, subject to further review and modification by the court.

6. **Miss. Code Ann. §§ 43-21-609 & 43-21-613 (West 2022).**
Youth Court may award **Durable Legal Custody** of a child to a third party, subject to any terms or conditions established by the Court. The Youth Court may thereafter terminate the monitoring and service responsibilities of DCPS. Youth Court may award **Durable Legal Relative Guardianship** to a relative or fictive kin licensed as a foster parent. Miss. Code Ann. § 43-21-609(c)(i).

D. SEALED COURT RECORDS

10. NOWELL V. STEWART, 356 So.3d 1217 (Miss. Ct. App. 2022)

FACTS: Mother petitioned for modification of father's child-support obligation for their daughter who was diagnosed with autism (Asperger's syndrome). The Chancery Court sealed the case during trial, and ultimately granted mother's petition. Mother filed a motion to lift the seal, but failed to set a hearing. Father appealed the increase in his child support obligations.

HOLDINGS: The Court of Appeals affirmed, holding that:
(1) Mother met her burden of proving a material change in circumstances since the original child-support order, thus warranting an increase in Father's child support obligation. Sufficient evidence supported chancellor's finding that mother established a material and unforeseen change in circumstances warranting modification of father's child-support obligation;
(2) The increase in child support obligations was made retroactive to the date the case was filed because the Father had prolonged the litigation; and
(3) Sealing the case was warranted.

PRACTICE NOTES:

1. During the June 2018 trial, the chancellor sua sponte **suspended the trial due to an "outside influences" issue**. *The following day, June 8, 2018, the chancellor ordered the case to be sealed.* The chancellor's order explained that the trial would be suspended until further order so that the court could investigate "outside attempts at seeking to influence the [c]ourt[.]" **The order stated the pleadings would be sealed, and the chancellor also instituted a "gag order" providing that the parties "shall not discuss the facts surrounding this matter with anyone in the public."**
2. Two years later, the parties submitted an agreed order listing the issues that were to be addressed by the chancellor. The chancellor retroactively increased Father's monthly child support obligation from $1,000 to $2,000, and he ordered Father to pay Mother a lump sum of $30,000 in back child-support payments.
3. On November 12, 2020 after the case was on appeal, Cynthia moved to unseal

this case. Michael filed a motion in opposition. The MSSC passed the motion to unseal for consideration with the direct appeal, and the appeal was later assigned to the COA. **On September 13, 2021, the COA entered an *en banc* order remanding this matter to the Chancery Court for thirty days, to allow the chancellor to state his reasons for sealing this case.** On September 29, 2021, this Court received a response from the chancellor explaining his reasons for sealing the case. *The chancellor also stated that those reasons were moot, and he had no objection to the seal being lifted.*

4. **However, the *COA noted that it also had authority to seal the case.*** Regardless of whether the chancellor's decision to seal this case was proper, Mississippi Rule of Appellate Procedure **48(A)(b) provides the appellate courts with the authority to seal this case at the appellate level.** The COA held that because the case contained significant confidential medical records and testimony relating to the child, ***the child's privacy interest in maintaining the confidentiality of her medical records outweighs the public's right of access.*** Therefore the COA held that the case file would remain sealed, and treated as confidential.
5. **The COA lifted the "gag order" that the trial court had entered.**

E. GUARDIANSHIPS

11. CRAWFORD V. RICHMOND, 337 So. 3d 1164 (Miss. Ct. App. 2022). Guardianship/Conservatorship of Adult; Transfer of foreign guardianship to Mississippi under UGPPJA.

FACTS: In 2018, Carol Smith filed a Petition in Quitman County Chancery to establish a guardianship over her Mother, Virginia Crawford. No further action was taken in that case until 2020. **In 2019, Crawford moved to Minnesota where her other daughter, Dasie Richmond, lived. Richmond had a guardianship and conservatorship established for Crawford in Minnesota, and Richmond was appointed as her mother's limited guardian.**

Pursuant to the directive of the Minnesota court in the provisional transfer order, and the Mississippi and Minnesota Uniform Adult Guardianship Acts, **Richmond then filed a request to accept the transfer of the Minnesota guardianship, and related relief, in the Quitman County Chancery Court proceeding.**

Richmond also filed an "answer and counterclaim" in the Quitman County Chancery court proceeding, responding to Smith's emergency petition seeking her own appointment as guardian/conservator of her mother.

Although she was not Crawford's guardian, **Smith, also filed a petition in the chancery court proceeding requesting that she be appointed as her mother's "temporary substitute" guardian.** The Chancery Court entered interim order accepting the transfer from Minnesota, ***but denying Smith's request.*** The chancellor noted that there were numerous outstanding issues that needed to be addressed, and she explained that all issues would be addressed in future hearings.

Smith appealed that ruling, and Crawford moved to dismiss the appeal because the Order was not final, and to strike allegedly scandalous and disrespectful language in the record.

During the pending appeal, Crawford died, and Richmond filed a "motion to dismiss case as moot [or] as an impermissible appeal filed prematurely. Richmond also asked the Court to strike alleged "scandalous and disrespectful language" in the Record, and to award appellate attorney's fees and costs.

HOLDINGS: The Court of Appeals dismissed the appeal, holding that:

(1) Chancery Court's **interim order** accepting transfer of the Minnesota Guardianship and Conservatorship, but denying Smith's request to be appointed as substitute guardian was **not a final, appealable judgment**;

(2) Order denying motion to set aside interim order was not a final, appealable judgment;

(3) Appeal from denial of Smith's motion to recuse chancellor was procedurally improper;

(4) Court of Appeals lacked jurisdiction over appeal from denial of Smith's motion to change jurisdiction;

(5) The Court denied Crawford's request to strike allegedly scandalous and defamatory material and remarks stricken from the record, without prejudice to her filing a proper motion under MRAP Rule 27; and

(6) The Court denied Crawford's request for attorney's fees and costs of appeal without prejudice to file an appropriate Motion pursuant to MRAP 27 before the mandate issued.

PRACTICE NOTES:

1. The provisional transfer order entered by the Minnesota Court pursuant to the UCGPPJA provided in part: **"After Mississippi issues a provisional order accepting transfer of guardianship and conservatorship, the Guardian shall move this Court for a final order confirming the transfer and terminating the guardianship and conservatorship.** ... The current Guardian and Conservator shall not be discharged in Minnesota until a Final Order is issued and this Court has approved the Conservator's Final Account."
2. While there are exceptions to the final-judgment rule—including obtaining permission to pursue an interlocutory appeal under Mississippi Rule of Appellate Procedure 5 or appealing from a Mississippi Rule of Civil Procedure 54(b)-certified final judgment—none were applicable in this case.
3. The Mississippi Chancery Court properly accepted the transfer of the Minnesota Guardianship, and properly denied Smith's Motion to be appointed as Guardian.

12. ATKINS V. MOORE, 352 So.3d 217 (Miss. Ct. App. 2022)
Guardianship and Conservatorship hearing conducted Post-GAP Act, but trial court and parties proceeded under the Pre-GAP Act Statutes.

FACTS: Moore was the sister of assisted-living facility resident, Atkins, who had dementia. Moore and Atkins' son, Mark, were designated as Atkins' attorneys-in-fact under a general power of attorney. Moore pursued a conservatorship on the advice of an investigator from the Attorney General's office, who told her that nurses and others at the assisted-living facility had complained that Julius was "harassing" Atkins. Moore was appointed conservator of Atkins' estate and person in 2019. Moore served process on one the resident's sons, Mark, who resided in California, but the Petition did not mention the other son, Julius.

At the initial hearing, Moore testified that Mark had joined in the Petition, and that Julius "was not local," but that he had received "thousands of dollars" from the ward, and Atkins wanted to be sure that the ward was protected from any further efforts by Julius to get money without an Order from the Court.

The resident's other son, Julius, later filed notice of appearance, and moved to set aside the conservatorship, and to compel sister to account for her actions as conservator, alleging that sister had: (1) failed to serve him with petition for conservatorship, (2) falsely accused him of a crime against his mother (exploitation of a vulnerable adult), (3) filed annual and final accountings were that were insufficient, (4) violated a court order by failing to increase her bond.

The chancellor noted on the record that he had been advised at the outset that there was concern that Julius had improperly removed funds from Atkins' account. After lengthy proceedings, a series of pretrial hearings, and bench trial, the Chancery Court entered final judgment approving sister's final accounting and finding that she had not misspent or converted any of resident's funds. The court also granted sister's request to be discharged as conservator and closed the estate. Julius appealed.

HOLDINGS: The Court of Appeals affirmed, holding that:

(1) **Sister was required to serve resident's son with process;**

(2) **Chancellor's error in failing to require sister to serve resident son with process did not require reversal;**

(3) Son failed to establish that sister **falsely accused him** of felony exploitation of vulnerable adult;

(4) Chancellor did not abuse his discretion by declining to compel sister to produce more complete annual and final accountings; and

(5) Issue regarding sister's failure to increase her bond per chancellor's order was moot.

PRACTICE NOTES:

1. Moore filed the petition on December 13, 2018, and she was appointed as Guardian and Conservator for Atkins on January 22, 2019. Julius entered his appearance on February 25, 2019. ***The trial was conducted on February 4, 2021. However, there is no indication in the Record that the parties or the trial court addressed Miss. Code Ann. § 93-20-125,*** **which provides: "(b) This chapter *applies to all guardianship and conservatorship proceedings commenced before January 1, 2020*, unless the court, in its discretion, determines that the superseded law should apply."**
2. *Julius pled guilty to felony exploitation of a vulnerable adult for withdrawing $3,000.00 from his mother's account,* but the circuit court withheld acceptance of the guilty plea and placed him on probation. At the final hearing in the conservatorship, *Julius elected not to attend the trial or testify*, and therefore, the COA held that there was a "lack of proof presented on his behalf" at trial that this did not constitute a "conviction." In regard to Julius's allegations in his appellate brief that the exploitation charges were false, the COA concluded that there was no evidence to support that claim, and no grounds for reversing the trial court's judgment.
3. The COA Held: ***"We do not condone Moore's failure to serve process on Julius, her failure to maintain adequate records and produce a full and complete accounting, or her failure to increase her bond in response to a court order."*** However, *the COA concluded that substantial evidence supported the chancellor's findings that Moore did not convert or misspend any of Atkins's funds or commit any other wrongdoing while serving as conservator*. Once Moore had been removed as conservator, the chancellor did not abuse his discretion in determining that Julius was not entitled to any further relief.
4. During the appeal, *Moore filed a Motion to have her attorney's fees for the Appeal paid by the estate,* but that request was denied by the MSSC, as she had been discharged as the Guardian. **So Moore discharged her attorney and did not file an appellate brief.** The COA noted that this ordinarily amounted to a "confession of error." However, in spite of this general rule, the COA affirmed the trial court's judgment in this case because the Record was clear, and **Julius's brief on appeal did not "make out any apparent case of reversible error."**

F. ATTORNEY'S FEES MAY BE AWARDED IN YC UNDER RULE 11, MRCP

13. In Re L.T. v. YOUTH COURT OF WARREN COUNTY, 335 So. 3d 599 (Miss. Ct. App. 2022).

Youth Court received **telephone testimony from an out-of-state child protective services representative;** the **County Attorney did not act as a representative of DCPS** by filing the Petition to declare the children abused or neglected; ***Rule 11, Miss.R.Civ.P. may apply to allow attorney fee awards for frivolous filings in Youth Court.***

FACTS: The Warren Youth Court placed four children in the legal custody of DPCS, and the physical custody of a maternal aunt who lived in Florida. On August 21, 2020, a Florida Dept. of Family and Children's Services (DFCS) case manager reported allegations of abuse by the aunt to the Warren County Youth Court's intake unit. After a preliminary investigation, **the case was referred to the county prosecutor, who filed a formal Petition alleging children were being abused.** ***The Youth Court dismissed the petition with prejudice, and ordered Miss. DCPS to pay for the aunt's attorney's fees and expenses. DCPS appealed.***

HOLDING: The Court of Appeals reversed and rendered, holding that:
(1) The trial court should not have ordered CPS to pay for maternal aunt's attorney's fees and expenses because ***the Petition was filed by the County Attorney who did not represent DCPS***.
(2) The Appellee, the Youth Court of Warren County, failed to file an appellate brief, which can amount to a **"confession of error."** The COA held: "Thus, we must analyze the appellant's argument to determine whether it "create[s] enough doubt in the judiciousness of the trial court's judgment that this Court cannot say with confidence that the case should be affirmed."

PRACTICE NOTES:

1. Under Miss. Code Ann. § 43-21-451: "All proceedings seeking an adjudication that a child is a ... neglected child or an abused child shall be initiated by the filing of a petition. **Upon authorization of the youth court, the petition shall be drafted and *filed by the youth court prosecutor* unless the youth court has designated some other person to draft and file the petition.**
2. Under Rule 9(5), URYCP, the Youth Court may refer a child protection case to the "youth court prosecutor for consideration of initiating formal proceedings, whereupon the youth court prosecutor must:
   (i) file a petition;
   (ii) make a written request for the court to handle the matter informally, which may include an appropriate recommendation to the court for consideration; or
   (iii) make a written request that the court dismiss the proceedings."
3. The County Prosecutor, filed the formal petition on behalf of the minor children on September 23, 2020, requesting that the Youth Court inquire into the allegations of abuse, and the Adjudication Hearing was held on December 20, 2020.
4. At the Adjudication Hearing, the Youth Court judge contacted a representative with **Florida DFCS who *"testified by telephone in open court,"*** and reported that "she had seen nothing in the aunt's home requiring the youth court's action."
5. The Mississippi Youth Court dismissed the petition with prejudice, and concluded in its order that the ***Petition was "utterly frivolous" and had "no basis in fact." The Youth Court relied on Rule 11, Miss.R.Civ.P. and Ordered DCPS to pay the aunt's attorney's fees.***

5. This holding on attorney's fees is distinguishable from ***Mississippi DCPS v. Bynum*, 305 So.3d 1158, 1160 (¶3) (Miss. 2020) where the chancery court appointed counsel to represent an indigent parent in a termination of parental rights action that DPCS initiated with representation from the Miss. Attorney General's Office.** The Chancellor ordered DCPS to pay the parent's attorney's fees, and the MSSC affirmed, holding that the agency was assessed the fees "based on its role as plaintiff in the involuntary-termination proceeding, which is consistent with this Court's precedent."
6. **The COA noted that Rule 81(a) of the Mississippi Rules of Civil Procedure specifies that the rules "apply to all civil proceedings but are subject to limited applicability" in certain enumerated actions, including "proceedings pursuant to the Youth Court Law." M.R.C.P. 81(a)(3).** "Statutory procedures specifically provided for each of the above proceedings shall remain in effect and shall control to the extent they may be in conflict with these rules; otherwise these rules apply." M.R.C.P. 81(a). Thus, where "the controlling statutes are silent as to a procedure, the M.R.C.P. govern." M.R.C.P. 81 advisory committee notes.
7. ***The COA concluded that in this case, nothing in the statutes or the Uniform Rules of Youth Court Practice would limit the applicability of Rule 11.*** Interest of L.T., 335 So.3d 599, 601, n. 3 (¶5) (Miss. App. 2022).
6. T**he unanswered question in this case is whether the Youth Court judge could have properly ordered the County to pay the aunt's attorney's fees under Rule 11,** since the County Prosecutor was employed by the County, even though the County was not a party to the case. It is the general practice that the Counties pay for the Guardian ad Litem Services in Youth Court Proceedings, and some Counties now pay for the cost of court-appointed counsel for indigent parents.

G. INCARCERATION FOR CONTEMPT

14. MCPHAIL V. MCPHAIL, 357 So.3d 602 (Miss. 2023) (five-to-four decision) Interlocutory appeal; civil contempt; incarceration for failure to pay child support and failure to submit to psychological examination.

FACTS: Following parties' divorce which granted parties joint physical and legal custody of their minor child, Mother filed motion for modification, and asked that Father be required to submit to a psychological evaluation. The trial court entered an ***Order holding Father in civil contempt for failure to pay child support, and failure to submit to psychological testing, and ordered incarceration until he complied with the court's order.***

Father filed motion asserting his inability to pay child support, and that he substantially complied with the requirement that he submit to a psychological evaluation, because he completed part of the exam, and therefore, he asked to be released from incarceration. Following denial of his motion, Father appealed.

The MSSC remanded the case and directed the chancery court to hold a

hearing and issue written determinations, findings of fact, and conclusions of law. ***The Chancery Court entered an Order specifying Father's purge conditions, so he could be released.*** Father refused to comply and filed a petition for interlocutory appeal, which MSSC treated as a timely notice of appeal.

HOLDINGS: The Supreme Court affirmed and held that:

(1) Father's motion claiming chancery court's order requiring that he submit to psychological evaluation was unconstitutional, was a prohibited collateral attack on the underlying Order, so as to warrant denial of motion to proceed in the Mississippi Supreme Court, and

(2) **Record unmistakably showed Father willfully and purposely defied the chancery court's orders, and thus chancery court was within its discretion in holding former husband in civil contempt with incarceration and specific purge conditions.**

PRACTICE NOTES:

1. In a custody action, a parent's mental condition is not protected by the medical privilege. Miss.R.Evid. 503(d)(4) (The confidentiality rule afforded by the medical privilege does not apply to medical records *"... regarding a party's physical, mental, or emotional health or drug or alcohol condition when relevant to child custody, visitation, adoption, or termination of parental rights."*

2. The **Dissent** noted that from 2013 through 2017, Mother filed four petitions requesting modification of custody and contempt. The first three Petitions were unsuccessful, and ***no hearing had been conducted on the fourth petition for modification of custody.*** **At the most recent hearing in 2021, the minor child was 17 years of age, and Father had not shared custody for over five years, and he had been incarcerated on civil contempt charges for almost five years, "with no end in sight."**

4. The Dissent noted that the chancellor had other less severe means for holding Justin in Contempt, such as granting the Mother full custody of the child, as she requested. The Dissent was also of the opinion that no person should remain in jail for five years on civil contempt.

2023 NEW LEGISLATION

A. SB 2082 - - NO REFERENCE TO A SPECIFIC OLD OR NEW STATUTE. *CHILD SUPPORT OBLIGATIONS ARE AUTOMATICALLY SUSPENDED AFTER 180 DAYS OF INCARCERATION*, UNLESS PARENT IS OTHERWISE ABLE TO PAY. EFFECTIVE July 1, 2023

SECTION 1. The court may not consider incarceration as intentional or voluntary unemployment or underemployment when establishing or modifying a child-support order.

B. SB 2376 - - DISCLOSURE OF CERTAIN YOUTH COURT RECORDS IN CRIMINAL MATTERS DOES NOT REQUIRE YOUTH COURT APPROVAL. EFFECTIVE UPON PASSAGE March 21, 2023.

SECTION 1. Section 43-21-261. ADDS SUBSECTION (23)
(23) Nothing in this section or chapter shall require youth court approval for disclosure of records involving children as defined in Section 43-21-105(u), if the disclosure is made in a criminal matter by a municipal or county prosecutor, a district attorney or statewide prosecutor, pursuant to the Mississippi Rules of Criminal Procedure ***and the records are disclosed under a protective order issued by the Circuit Court presiding over the criminal matter which incorporates the penalties stated in Section 43-21-267.***

PRACTICE NOTES:

1. There is an internal inconsistency here because any Youth Court records used by a municipal court or justice court prosecutor, would have to be subject to a protective order issued by a circuit court judge presiding over the matter. Since there could be no such Order, it appears that any disclosure of confidential YC Records in justice or municipal courts would have to follow the procedures set forth in Rules 5 & 6, URYCP.

C. HB1318 - - BABY DROP-OFF AND SAFE HAVEN LAW; *Expands time for drop-off to 45 days after birth.*
EFFECTIVE UPON PASSAGE April 19, 2023

1. SECTION 1. Section 43-15-201.
(1) **Expands the time allowed for baby-drop-off with an emergency medical services provider (EMSP)** ***from seven (7) days to forty-five (45) days after birth.***

(a) Baby must be delivered to EMSP, or
(b) Baby can be placed in a *"baby safety device"* that is sponsored by an EMSP and meets the requirements in subsection (2), or
(c) Baby can be delivered to EMSP in response to an emergency call from the parent who expressed an intent to surrender the child, and
(d) Baby may be surrendered by a person designated by the parent

(2) Requirements for a "baby safety device"

(a) Designed to permit parent to anonymously drop-off the infant in a climate controlled device with the intent to leave the 43 infant for an EMSP to take custody of the infant;
(b) Installed in a conspicuous location with dual alarm system that is tested regularly, and that is monitored 24 hours a day ...

(3) A licensed adoption agency is prohibited from installing and maintaining a baby safety device.
(4) Drop-off can be anonymous
(5) Mother can drop-off at the hospital and state her intent not to retain custody. If birth mother is known, her name shall not be placed on the birth certificate.
(6) No court order is required for EMSP to take custody of the child.

2. SECTION 2. Section 43-21-203.
(1) The EMSP must notify MDCPS.
(2) MDCPS shall immediately take custody of the child.
(3) MDCPS shall notify local law enforcement and the Miss. Dept. of Public Safety to determine whether the infant is a missing child in this state or another state.

3. SECTION 3. Section 43-15-205.
(1) It shall be an absolute affirmative defense to prosecution under Sections 97-5-1, 97-5-3 and 97-5-39 if the parent or a person designated by the parent voluntarily delivers the child unharmed to an emergency medical services provider pursuant to this act.

4. SECTION 4. Section 43-15-207
(1)(a) **EMSP means a *hospital, a licensed adoption agency, any county or municipality that sponsors a baby safety device*** that meets the requirements of this act, a state or local law enforcement agency or fire station or mobile ambulance staffed full-time. **EMSP *does not include* the offices, clinics, surgeries or treatment facilities of private physicians or dentists.** No individual licensed healthcare provider, including physicians, dentists, nurses, physician assistants or other health professionals shall be deemed to be an EMSP under this article unless such individual voluntarily assumes responsibility for the custody of the child.
(b) "Surrender" or "Surrenders" means the action of a parent in leaving an infant on the premises of an EMSP, with a facility employee or member of the professional medical community at the facility, or in a newborn safety device, ***without expressing an intention to return for the infant.***

5. SECTION 5. Section 43-15-209. Immunity.
Any person, entity, county or municipality taking custody of the child is immune from any civil liability, unless the act or omission was the result of the person's or entity's gross negligence or willful misconduct, or failure to meet any other requirements of this Act.

6. SECTION 6. Creates a new section codified as 43-15-211.
EMSP ***must post signs approved by MDCPS about any "baby safety device"*** that explains:
(a) The maximum age of an infant who may be surrendered.
(b) That the infant must not have been subjected to abuse or neglect.
(c) That by placing an infant in the newborn safety device, a parent is foregoing all parental responsibilities with respect to the infant and is giving consent for the state to

take custody of the infant.

7. SECTION 7. Section 93-15-103. *Definition of Abandonment in MTPRL*
(a) Definition of "Abandonment" under the MTPRL statute is amended to include "drop-off" of the child under the Baby Drop-Off Law, Section 43-21-201, et seq.

D. HB 510 - - FOSTER PARENTS' BILL OF RIGHTS AND RESPONSIBILITIES; EFFECTIVE JULY 1, 2023.

SECTION 1. Section 43-15-13: Adds Subsection (11), (12), (13) & (14).
(11) Rights and Duties must be *provided to all Foster Parents during MDCPS training*.

a. **clear understanding of the roles** of Foster Parents, Agency, and Birth Parents in respect to the child in care.
b. **Respect, consideration, trust, and value of the foster family** in making an important contribution to the Agency's objectives.
c. Notification of benchmarks to be met by foster parent such as appointments, home visits, visiting child at school and meetings with Agency personnel and child's family;
d. ***Advanced notice of scheduled meetings, appointments, court hearings*** concerning foster child, except Agency inspection of Foster Family's home
e. **Opportunity to communicate with professionals working with child**, including therapists, physicians, and teachers
f. **Opportunity to communicate and collaborate *without threat of reprisal***, with DCPS representatives when additional educational services for the child are needed, including developing an IEP plan, tutoring, occupational therapy, speech therapy, and after-school programs.
g. **Opportunity to attend all IEP meetings at school**, along with DCPS caseworker, as long as child in custody and receiving special educational services.
h. ***Opportunity to communicate with the Guardian ad Litem of the child*.**
i. **Opportunity to attend all Youth Court hearings without being a party** to the action, unless they YC determines that any foster parent should not be present. Foster Parent may have legal counsel if the permanent plan is adoption by the foster parents, unless the YC court decides that they should not be present. **Foster Parents may communicate with the Guardian ad Litem in writing at any time. Foster Parents may ask to be heard by the YC concerning the best interest of the child at any Dispositional or Permanency hearing.**
j. When **dates of permanency and permanency reviews** have been set the youth court, if necessary to fulfill the notice requirements, **the YC shall order clerk of court to issue a *Summons to foster parents to appear* personally at the hearings, as provided in Miss. Code Ann. § 43-21-501.**
k. Opportunity to request from the youth court ***permission to communicate*** **with the birth family, other foster parents, prospective adoptive parents *without threat of reprisal*. However, does not require those folks to communicate with foster parents. However, the birth parents, other foster parents, or adoptive parents are not obligated to communicate with the foster parents.**

l. **Involvement in all Agency crucial decisions** regarding the child, **including involvement in case planning, individual service planning meetings, foster care review, individual educational planning meetings, and medical appointments.**

m. **Opportunity to *participate in planning of visitation*** with siblings, parents, former guardians, and other biological family members that have been authorized by the YC. Visitations should be scheduled at times and places that when meet the needs of all, including the child, the biological family, and the foster family. Recognizing that visitation with family members is an important right of children in foster care, foster parents shall be flexible and cooperative with regard to family visits, but shall retain the right to ***reasonable advance notice of all scheduled visitations*;**

n. **The ability to *communicate with Agency personnel* or representatives *twenty-four (24) hours a day, seven (7) days a week,*** for the purpose of aiding the foster parent.

o. **A *comprehensive list of all resources* available to the foster parent and child,** including dental providers, medical providers, respite workers in the area, day cares, and methods for submitting reimbursements.

p. **Support from the Agency caseworkers** in efforts to do a better day-to-day job in caring for the child and in working to achieve the agency's objectives for the child and the birth family through provision of:

(i) Copy of "Foster Child Information Form" and *all pertinent information about child including behavioral problems, medical and dental history, behavioral health history, psychological information, educational status, cultural and family background*, and *any other information known to the department prior to the time of placement*. The department shall make reasonable efforts to gather and provide additional **current medical, dental, behavioral, educational and psychological information reasonably available from the child's service providers within fifteen (15) days of placement.** When the department learns of such information after fifteen (15) days of placement, the department shall communicate such information to the foster parent as soon as practicable.

(ii) An *explanation of the plan for placement* of the child in the foster parent's home and the ongoing and timely communication of any necessary information which is relevant to the care of the child, including any changes in the case plan.

(iii) Help in using appropriate resources to meet the child's needs, including counseling or other services for victims of commercial sexual exploitation or human trafficking.

(iv) Direct interviews between the family protection worker or specialist and the child, previously discussed and understood by the foster parents.

(v) Information regarding whether the child experienced commercial sexual exploitation or human trafficking.

(vi) Information related to the Healthy, Hunger-Free Kids Act of 2010. Foster parents shall protect the confidentiality of the child by working directly with a designated school official to complete the application for free lunches.

q. Opportunity to develop confidence in making day-to-day decisions in regard to the child;

r. Opportunity to learn and grow in their vocation through planned education in caring for the child.

s. *Opportunity to be heard regarding agency practices they may question*.

t. **Information related to all costs eligible for reimbursement**, including:
(i) Reimbursements that are appropriate under DPCS regulations.
(ii) Reimbursement for property damages caused by children in the DCPS in an amount not to exceed $500.00.

...

(12) **DCPS shall require the following responsibilities** from participating persons who provide foster care and relative care: ...

(i) Attending dispositional review hearings and termination of parental rights hearings conducted by a court of competent jurisdiction, **or providing their recommendations to the guardian ad litem in writing.**

(13) DCPS **shall develop a grievance procedure for foster parents** to raise any complaints or concerns regarding the provisions of Section 43-15-13(11) or (12).

(14) Nothing in this section shall be construed to create a private right of action or claim on the part of any individual, the department, or any child-placing agency.

PRACTICE NOTES:

1. **It appears certain that t*hese requirements will substantially increase the workload of DCPS caseworkers,* so hopefully the Legislature will increase MDCPS funding so they can meet this mandate.**

E. HB 1115 - - DURABLE LEGAL CUSTODY; CLARIFY YC JURISDICTION. EFFECTIVE July 1, 2023. *YC has exclusive priority jurisdiction.*

SECTION 1. Section 43-21-609. Amends subsection (b):

(b) "... After granting durable legal custody of a minor child, the *youth court shall retain original and exclusive jurisdiction of all matters related to durable legal custody*, including, but not limited to, *petitions to modify the durable legal custody*."

PRACTICE NOTES:

1. This will require active monitoring of the cases where the YC has granted durable legal custody, even if the YC relieves DCPS from any further service or monitoring responsibilities**. This may make release of DCPS from the case less likely.**
2. This will require ***all petitions for custody modification of durable legal custody to be presented to the Youth Court,*** because the ***Chancery Courts will not have jurisdiction*** **to modify a YC Order for durable legal custody.**
3. This will also require coordination between the attorney-referee Youth Courts and the Chancery Courts ***when there is a petition for TPR or Adoption filed***, since the referees would not have jurisdiction to consider the TPR claims. It is unclear whether it would be appropriate in these cases for the Youth Court to ***conditionally transfer jurisdiction*** to the Chancery Court, so that if the TPR or Adoption is denied, the case would be transferred back to the Youth Court, and the original durable legal custody could be restored.
4. **There is currently no Youth Court Rule that would allow for such transfer, but the**

***MSSC has judicially recognized a method to achieve such transfe*rs**. *See, e.g.*, *B.A.D. v. Finnegan*, 82 So.3d 608, 613 (¶18) (Miss. 2012), where the Supreme Court held that a Youth Court may voluntarily relinquish its child protection jurisdiction to a Chancery Court where custody issues are pending, based on a finding that the Youth Court "lacked the ability to provide long-term relief to the parties." *See also*, *In re S.A.M.*, 826 So.2d 1266, 1279(¶39) (Miss. 2002); and *In re M.I.*, 85 So.3d 856, 860 (¶¶15-16) (Miss. 2012).

F. HB 1149 - - SUBSTANTIAL REVISIONS TO YOUTH COURT STATUTES; PATH TO PERMANENCY; PROVIDE FOR CHILDREN IN CHILD PROTECTION SERVICES (191 pages).
EFFECTIVE July 1, 2023.

1. **SECTION 1**. Miss. Code Ann. 43-21-201, amends subsections (1)(a), (c) and (7):
(1)(a) Parties shall now have the **right to be represented by an attorney *at the Shelter Hearing***, as well as at other stages.

(1)(c)
- ***Child who is alleged to be abused or neglected is a party* to the proceedings and shall be *represented by an attorney at all stages*.**
- The Court shall appoint an attorney for unrepresented child.
- The ***GAL may serve a dual role as the child's attorney in regard to the "child's preferences," and the child's "best interest" attorney, so long as no conflict of interest arises*.** If a conflict in those roles arises, the court shall appoint another lawyer as counsel for the child's preferences as required by URYCP 13(f), in addition to the GAL who is the "best interest" attorney.

...

(7) ***DCPS shall be a necessary party* at all stages of the YC proceedings** involving a child in the Department's custody, including, but not limited to, shelter, adjudicatory, disposition, permanency hearings and termination of parental rights.

2. **SECTION 2. Section 43-21-501, Summons in YC - - this adds subsection (c):**
(c) ***Requires the YC to issue a summons to MDCPS*, because the Agency is now a necessary party at all stages of child protection cases.**

PRACTICE NOTE:
1. The Foster Parent Bill of Rights, HB 510 (*supra*) also amends Miss. Code Ann. §43-21-501, because Miss. §43-15-13(1)(j) requires the service of a **summons on the Foster Parents for all permanency and permanency review hearings, even though the Foster parents are not technically a party to the case.**

3. **SECTION 3. Section 43-21-701. Re-establishes the *Mississippi Commission on a Uniform Youth Court System and Procedures*.**
EFFECTIVE July 1, 2023

(1) **Reconstitutes the prior *Commission on a Uniform Youth Court System* and Procedures, now with 21 designated members, adding an MDCPS person. Commission must Report and findings to the legislature by October 1, 2024. *Members of the Commission* are:**

a. 1 Circuit Judge
b. 1 Chancellor
c. President of the MS Council of Youth Court Judges or designee;
d. 2 County Court Judges appointed by Pres. of MS Council of Youth Court Judges
e. 2 Youth Court Referees appointed by the Pres. of MS Council of Youth Court Judges
f. 1 member of the House appointed by Speaker of the House
g. 1 member of the Senate appointed by the Lt. Governor
h. Directors of MDHS and MDCPS or their designees
i. Director or designee of the Governor's Office of Federal-State Programs
j. 2 employees of MDCPS, other than the Commissioner, who are supervisors of social workers assigned to youth cases appointed by the Governor
k. 1 employee of MDCPS, other than the Commissioner, who is experienced with the legal process of youth court cases, appointed by Governor
l. 1 Police Chief, appointed by the Governor
m. 1 County Sheriff appointed by the Governor
n. 2 lawyers experienced in youth court work, app by the Governor
o. 2 prosecuting attorneys who prosecute cases in Youth Court, appointed by the Governor

(2) Members shall be appointed within 15 days of the effective date, July 1, 2023, and shall serve until October 1, 2024.

(3) The Commission may elect officers and create an organizational structure.

(4) The commission shall adopt rules and regulations governing times and places for meetings and governing the manner of conducting its business. Twelve (12) or more members shall constitute a quorum for the purpose of conducting any business of the commission. **However, a vote of not less than fourteen (14) members shall be required for any recommendations to the Legislature.**

(5) Members serve without compensation, but state and county employees shall receive any appropriate per diem for service. All members may be compensated for expenses, including mileage at the state rate.

(6) The Commission may select and employ a research director, and any other employees that the Commission may approve, with salaries approved by the State Personnel Board. Commission may also employ consultants to prepare demographic data that may be required. ....

4. SECTION 4. Section 43-21-703. Commission will Study the Youth Court System.

(1) The Commission shall study the current Youth court system and submit to the Legislature a Report including any proposed changes in the youth court system and/or its procedures by October 1, 2024.

(2) In formulating its report, the Commission shall take into consideration the following:
(a) Whether a ***uniform statewide youth court system*** would be desirable;
(b) How to *best meet the service needs of the state* in relation to the taxing and resource capacity of various multi-county districts now existing or proposed;
(c) Whether *multi-county services* can be provided in a given service area for district-wide shelters, detention centers, and diagnostic centers; and
(d) What proposals or alternatives would update or modernize the system to provide staffing for all counties and citizens. ....

5. SECTION 5. Section 93-15-107. MTPRL Statutes Amended to add Subsection (5) ***making TPR Actions "Priority Cases" with trial scheduled within 120 days.***

(1) (a) **Involuntary termination of parental rights proceedings** are commenced upon the filing of a petition under this chapter.
...
(5) The clerk shall docket cases seeking relief under this chapter as priority cases. ***The assigned judge shall be immediately notified when a case is filed in order to provide for expedited proceedings.***

6. SECTION 6. Section 93-17-3. Amended Subsection (1)(d) and added (10). ***Waiver of home study in certain cases*****; priority of adoptions.**

(1)(d) "(1) Except as otherwise provided in this section, a court of this state has jurisdiction over a proceeding for the adoption or re-adoption of a minor commenced under this chapter if: (d) ... and if the prospective adoptive parent or parents, if not residing in Mississippi, have completed and provided the court with a satisfactory Interstate Compact for Placement of Children (ICPC) home study and accompanying forms, ***unless the court determines that the home study is not necessary*** **in the case of an adoption by a stepparent or a relative or in the case of an adoption in a foster-to-adopt placement ...."**
...
(10) The clerk shall docket cases seeking relief under this chapter as priority cases. The assigned judge shall be immediately notified when a case is filed in order to provide for expedited proceedings. Once the petition for termination of parental rights is filed with the court of competent jurisdiction, ***the court shall hold a hearing on the petition within one hundred twenty (120) calendar days of the date the petition is filed. For purposes of this section, the one hundred twenty (120) calendar day time period will commence when perfected service is made on the parents.***

PRACTICE NOTE:

1. There is an *internal inconsistency in paragraph 10*, as the date the Petition is filed will rarely be the same day that service of process is completed on the parents. ***As written, it would appear that the requirement for a hearing within 120 days should run from the date that the Parents are served with process.***

SECTION 7. Section 43-26-1. Amended to separate/create the Mississippi Department of Child Protection Services.

...

(6) The Department of Child Protection Services shall be responsible for the development, execution, and provision of services in the following areas:

(a) Protective services for children;
(b) Foster care;
(c) Adoption services;
(d) Special services;
(e) Interstate compact;
(f) Licensure;
(g) Prevention services; and
(h) Such other services as may be designated. Services enumerated under Section 43-15-13 et seq., for the foster care program shall be provided by qualified staff with appropriate case loads.

REPEALER CLAUSE:
(10) This section shall stand repealed on July 1, 2028.

PRACTICE NOTE:
It is not clear why the statutes creating MDCPS have this repealer clause.

8. **SECTION 8. Creates Section 43-26-5. Uniform Intake and referral procedures for calls to the MDCPS hotline.**
(1) This section requires a ***uniform record-keeping procedure*** to ensure that all referrals of neglect and/or abuse are accurately and adequately maintained.
(2) This section requires uniform procedures for intake and referral of hotline calls to the appropriate agency.

9. **SECTION 9. Creates Section 43-26-7.**
This statute authorizes MDCPS to use the services and resources of the State Department of Education, the State Department of Health, the State Department of Human Services, the State Department of Mental Health, Division of Medicaid, and all other appropriate state departments, agencies, institutions or political subdivisions as will aid in carrying out the purposes of this chapter. It also requires all such state departments, agencies and institutions to make available such services and resources to MDCPS.

10. **SECTION 10. Creates Section 43-26-9.**
"It is the intent of the Legislature that the resources devoted to family and children's services and to public assistance programs be clearly delineated and that all resources

intended for child protection and other related purposes be expended in service of that goal.

11. **SECTION 11. Creates Section 43-26-11.**
(1) ***MDCPS shall establish locations throughout the state*** as determined by the commissioner. It shall be the duty of the board of supervisors of each county in which a local office is located to provide office space for the local offices.

PRACTICE NOTE:
This appears to allow branches of the State MDCPS Office to be created throughout the State, presumably to handle matters such as TPR and Adoptions. These offices will be in addition to the DPCS offices that are already required in each county.

12. **SECTION 12. Creates Section 43-26-13.**
Local governing authorities are authorized to (a) match any state, federal or private funds available for any program administered by MDCPS, or (b) make a voluntary contributions to any such program.

13. **SECTION 13. Creates Section 43-26-15.**
The Department of Finance and Administration shall furnish office space for the Department of Child Protection Services in the City of Jackson and is authorized to rent suitable quarters in the city if there is not sufficient room in one of the state office buildings.

14. **SECTION 14. Creates Section 43-26-17.**
The Department of Child Protection Services shall cooperate with the federal government, its agencies and instrumentalities, in carrying out the provisions of any federal acts concerning public welfare for children, including the adoption of such methods of administration as are found by the federal government to be necessary for the efficient operation of plans for public assistance and welfare services for children in accordance with the provisions of the federal Social Security Act, as amended.

15. **SECTION 15. Creates Section 43-26-19. Allows destruction of DCPS Records after three years.**
The Department of Child Protection Services **may, in its discretion, destroy or cause to be destroyed, or otherwise disposed of, any and all abandoned applications, closed case files, communications, information, memoranda, records, reports, paid checks, and files**, in the office of the Department of Child Protection Services ***when and as they become three (3) or more completed fiscal years old*** **and which, in the opinion of the department, are no longer useful or necessary.**

PRACTICE NOTE:
This policy allowing for the destruction of DCPS records could result in the intentional

destruction of relevant information concerning how a child may have suffered maltreatment while in DCPS custody. That could impair a child's ability to bring appropriate civil claims against MDCPS.

16. **SECTION 16. Creates Section 43-26-21, Mississippi Code of 1972:**
All political subdivisions of the state, or combinations of political subdivisions, are **authorized to employ assistant prosecutors to prosecute for the crimes under Section 97-19-71 (WELFARE FRAUD)** and MDCPS is authorized to contract with any political subdivision to subsidize payment for the reasonable and necessary cost of prosecutions and investigations in any program where federal matching funds are available.

17. **SECTION 17. Creates Section 43-26-23, Mississippi Code of 1972:**
(1) **This statute creates a *financial obligation owed to MDCPS* for any sums paid to or on behalf of any person, entity or subgrantee or the value of any aid or benefit or *services obtained or received* under any state or federally funded assistance program for children *as a result of any false statement, misrepresentation, concealment of a material fact, or failure to disclose assets*.** The amount of value of any assistance shall be recoverable from the recipient or his or her estate in a civil action brought by MDCPS pursuant to this section. If such action is brought, **the department shall be entitled to recover, in addition to the amount of assistance, a reasonable amount of attorney's fees and its cost incurred therein.** Where an attorney from the county attorney's office represents the department in such action, the attorney's fee awarded shall be for the use and benefit of that particular office and shall be orwarded to that office upon receipt by the department.
(2) In any civil action for the recovery of the amount of value of any aid or benefits or services improperly paid to the recipient, **proof of a conviction or guilty plea on a misdemeanor or felony charge under Section 97-19-71 shall be deemed prima facie evidence** that such assistance was improperly obtained under the provision of this section.
(3) **Repayment of the assistance improperly obtained pursuant to this section shall not constitute a defense to or ground of dismissal of criminal charges brought under Section 97-19-71**.

18. **SECTION 21. Section 27-104-203**. Amended to add Subsection (g).
(g) From and after July 1, 2016, no state agency shall charge another state agency a fee, assessment, rent, audit fee, personnel fee or other charge for services or resources received. *The provisions of this section shall not apply ...* (g) to charges between the Department of Human Services and the Department of Child Protection Services for services or resources received by either department from the other.

19. **SECTION 28. Section 41-101-1. Amended to add Subsection (g)**
The Commissioner of MDCPS (or a designee) is added as a member of the Mississippi Council on Obesity Prevention and Management.

20. SECTION 29. Section 43-1-9.

Provides for a Department of Human Services to be created in each county, to administer within the county all forms of public assistance and welfare services, ***with the exception of child welfare services administered by the Department of Child Protection Services.***

21. **SECTION 30. Section 43-1-101.**

The statute creating the Mississippi Interagency Council on Homelessness is amended to add the Commissioner of Child Protection Services or a designee to the Council.

22. **SECTION 31. Section 43-14-1.**

This statute created the ***Mississippi interagency system of necessary services and care*** for children and youth, called the ***Mississippi Statewide System of Care*****,** up to age twenty-one (21) with serious emotional/behavioral disorders including, but not limited to, conduct disorders, or mental illness who require services from a multiple services and multiple programs system, and who can be successfully diverted from inappropriate institutional placement. The amendment added the Commissioner of MDCPS as a member of the **Interagency Coordinating Council for Children and Youth** (referred to as the "ICCCY").

23. SECTION 57. Section 43-18-3. Amends the ICPC.

Article III of the Interstate Compact for the Placement of Children was amended to provide: 43-18-3. The "appropriate public authorities" as used in Article III of the Interstate Compact on the Placement of Children shall, with reference to this state, means the Department of Child Protection Services, **or with the approval of the Commissioner of Child Protection Services, any regional or local office of the Department of Child Protection Services shall be authorized to receive and act with reference to notices required by Article III.**

PRACTICE NOTE:
This appears to be a move toward providing ICPC authority to local DCPS offices rather than a central state-wide office.

24. SECTION 58. Section 43-18-5. Amends the ICPC.

This section amended Article V of the Interstate Compact on the Placement of Children, so that the phrase "appropriate authority in the receiving state" with reference to this state shall mean the Department of Child Protection Services, or with the approval of the Commissioner, ... any regional or local office of the department.

25. SECTION 63. Section 43-21-603. YC Disposition Hearings may consider the "*family's*" *need for assistance as well as the "child's" need for assistance.*

The statute governing Disposition Hearings in YC was amended to provide:
(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 *or family's* need of assistance; ...

26. **SECTION 74. Section 43-51-3.** Deleted subsection (b) and re-numbered.
This Amendment **deleted subsection (b) "Home Ties Program"** which means a program under the State Department of Human Services of family preservation and family support services. The remaining sections were re-numbered.

26. **SECTION 75. Section 43-51-5.** Deleted subsection (2) and re-numbered.
This Amendment **deleted subsection (2): "The Home Ties Program** which was developed as a pilot program for a period of five (5) years in accordance with federal guidelines promulgated by the United States Department of Health and Human Services. The State Department of Human Services shall oversee development of requests for proposals, contracting for services and program evaluation." The remaining section were re-numbered.

27. **SECTION 78. Section 57-13-23.**
The amendment revises the Mississippi Automated Resource Information System (MARIS) Policy Committee.

28. **SECTION 97. Section 93-21-307.**
Technical corrections to the Children's Trust Fund statutes.

29. SECTION 104. Section 93-17-11. Added Numbered paragraphs and *amended the adoption Statutes to allow waiver of home studies in certain cases.*
(1) ... and shall require in adoptions **except as provided in subsection (4) of this section**, other than those in which the petitioner or petitioners are a relative or stepparent of the child, that a home study be performed of the petitioner or petitioners by a licensed adoption agency or by the Department of Human Services, at the petitioner's or petitioners' sole expense and at no cost to the state or county.
...
(4) The court *may determine that a home study in an adoption is not necessary* in the case of an adoption by a stepparent or a relative or in the case of an adoption in a foster-to-adopt placement.

30. SECTION 105. Section 93-17-25. Confidentiality of Adoptions - - adds *"testimony and exhibits"* to the confidentiality rule.
All proceedings under this chapter shall be confidential and shall be held in closed court without admittance of any person other than the interested parties, except upon order of the court. **All pleadings, reports, files, *testimony, exhibits* and records pertaining to adoption proceedings** shall be confidential and shall not be public records and shall be withheld from inspection or examination by any person, and **shall not be disclosed by any person** except upon order of the court in which the proceeding was had on good

cause shown.

31. **SECTION 106. This Section does not mention a specific statute to be amended or created.**
The appropriate court, through its clerk, ***shall notify the Office of the Attorney General within seven (7) business days whenever a permanency plan changes to termination of parental rights or an adoption*.**

32. **SECTION 107. Repeals Department of Family and Children's Services. Sections 43-1-51, 43-1-53, 4701 43-1-57, 43-1-59, 43-1-63, 43-51-1 and 43-51-9, Mississippi Code of 1972, which created the Division of Family and Children's Services within the Department of Human Services, provides the title for the Family Preservation Act, and requires an ongoing evaluation and report on family preservation services, are repealed.**

33. **SECTION 108.**
This act shall take effect and be in force from and after July 1, 2023.

G. SB 2073 - - AGE OF MAJORITY LOWERED TO 18 FOR SECURING HOME LOANS AND ENTERING CONTRACTS FOR PERSONAL OR REAL PROPERTY. EFFECTIVE July 1, 2023.

SECTION 1. Section 93-19-13.
1. Amended to **lower to age 18** the right to enter into contracts for utilities, leases, purchases of real property, etc. The age had been lowered to 18 for individuals who had been in DCPS custody, and this effectively extends to all at age 18.
2. Maintains minority at 21 but defines a minor as under 18 for the purposes of entering into contracts affecting personal or real property.

SECTION 2. Section 1-3-27. Definition of minor.
1. If a statute refers to the **ability to enter into a contract affecting personal property or real property, "minor" shall mean any person, male or female, under eighteen (18) years of age.**

SECTION 3. Section 15-3-11. Age for Ratification of Contracts
1. The full age of **ratification of a contract shall be eighteen (18) years of age**.

SECTION 4. Section 11-5-115. Time to object to sale of minor's property.
1. The time for objecting to the sale of a minor's property is one year after the minor reaches the age of 18.

SECTIONS 5 to 11. Amend various statutes that lower to age 18 the power to enter into contracts related to real or personal property.

H. SB 2079 - - CREATES "THE MISSISSIPPI SCHOOL PROTECTION ACT" codified at 45-9-181; *Enacted to allow armed educators in schools*.

SECTION 1. Codified as Section 45-9-181. This Act authorizes schools to designate school safety guardians who are authorized to **carry firearms on school premises, and who can be paid extra for assuming this role.**

I. **SB 2384 - - FOSTER CARE AND ADOPTION TASK FORCE; CREATE. EFFECTIVE AFTER PASSAGE April 19, 2023.**

Designates persons to be appointed to the Task Force, which will draft ***proposed revisions to Adoption Statutes***. In addition, the Task Force will review YC statutes and procedures, and draft proposed amendments or revisions, including:

- The **"reasonable efforts" and "diligent search" requirements in child protection proceedings in YC**, and propose uniform definitions, if needed.
- The definition of what constitutes **"compelling and extraordinary reasons why termination would not be in best interest of child."**
- **The definition of neglect as "willful" or "non-willful" with different courses of action for each.**
- Review ***the role of GAL, and how they should be paid***, and if Title IV-E funds can be used to pay the GAL
- Review ***whether court-appointed attorneys should be provided to all indigent parents*** in all YC proceedings, and how to pay them, including use of Title IV-E funds
- **Review timelines once child is in DCPS custody**, and how to balance deadlines with the best interest of child and biological family.
- Review requirement to have **concurrent permanency plans**, to assess if taking place and what needs to be done to ensure courts and CPS were pursuing them.
- Review requirement of **psychological assessment and evaluation** for each child coming into DCPS custody; assess the necessity, whether these evaluations are always needed, and how to address shortage of medical providers to do work.
- Review **diagnostic and evaluation shelters**, whether we have sufficient number, and whether children are staying too long before placement.
- Review **course of action when a parent tests positive for drugs or alcohol**, including when mother test position during labor and delivery.
- Review to see if Mississippi is **maximizing the use of Title IV-E funding**.
- Review and **compare laws and procedures in other states**.
- Review the **"fatherhood initiative"** proposals and how to increase father participation.
- Report the Task Force findings and recommendations to the legislature **annually before Dec 1st of each year.**
- **Effective from and after passage, April 19, 2023.**

III. RESOURCES FOR TERMINATION OF PARENTAL RIGHTS AND ADOPTIONS

A. The Adoption statutes, MCA § 93-17-1, et seq. must be read in conjunction with the "Mississippi Adoption Confidentiality Act," MCA § 93-17-201, et seq. **These statutes prohibit naming in the Adoption Decree the biological parents whose rights have been terminated.** In addition, the Termination of Parental Rights Law contemplates that the TPR proceedings will be distinct from the Adoption proceedings, even if both claims are filed in the same case.

Therefore, when we have combined TRP and Adoption claims in the same case, we have elected to propose that the trial court use a **Memorandum Opinion to make the necessary findings of fact and conclusions of law for both TPR and Adoption, and enter separate Final Judgments for Termination of Parental Rights and Adoption.**

I will post on Debbie's Family Law web site these forms and checklists for termination of parental rights and adoptions, in case they can be of use. Please let me know if you see any problems, or have ideas about additional terms that should be included. These forms include:

1. **"MEMORANDUM OPINION ESTABLISHING FINDINGS FOR TERMINATION OF PARENTAL RIGHTS AND ADOPTION"**

2. **"FINAL JUDGMENT TERMINATING PARENTAL RIGHTS"**

3. **"FINAL JUDGMENT GRANTING ADOPTION"**

4. **Checklist for Termination of Parental Rights and Adoptions**

5. **Forms for Exhibits.**

B. I will also post forms and checklists for filing complaints for termination of parental rights in the following circumstances:

1. Forms for Voluntary Surrender of Parental Rights based on surrender of parental rights and consent by the biological parents.

a. **Form for Voluntary Surrender of Parental Rights**. The requirements for voluntary surrender of parental rights are statutory, MCA 93-15-111, and any form used for the parent's affidavit should strictly comply with the statutory requirements. **See, e.g., Matter of Adoption of C.C.B. v. G.A.K.,** 306 So.3d 674, 676 (Miss., 2020) (chancellor held that the voluntary surrender of parental rights forms executed by the natural parents were void because the forms did not comply with Miss. Code Ann. §93-15-111). However, the COA has held that a clerical error in the form was not a fatal defect. **Simmons v. Harrison Cnty. DHS, 228 So.3d 347, 353 (¶27) (Miss. Ct. App. 2017).**

b. The statutory terms for surrender of rights may be combined with terms for waiver of service of process, so the parent only has to execute one document.

c. Form Motion and Order for Acceptance of Voluntary Surrender. The execution of the form for voluntary surrender of rights is not binding, and can be revoked or withdrawn by the parent any time before the surrender is formally accepted by the trial court. **Adoption of A.M., 323 So.3d 509, 516 (¶¶37-40) (Miss. 2021)**. Therefore, it is recommend that if a voluntary surrender is received from a parent, this should be presented to the Court for "acceptance" as soon as possible, even if the matter is not ready for final hearing on all claims.

d. Form for Involuntary termination of parental rights by private party.

e. Another practice tip concerns **"Summons by Publication."** We typically file a Motion supported by our affidavit of the reasonable efforts we have employed to personally serve the parent, and ask the Court to enter an Order approving in advance the use of a Summons by Publication. This is a precaution against having our reasonable efforts to locate the parent rejected after the client has paid for the publication. We also ask the Court to enter an Order of the "return day" documenting that the parent failed to appear or respond, and finding that no further notice need be provided to that parent. I will also post these forms

i. Copy of Motion and Order requesting permission to serve Summons by Publication.

ii. Copy of Order to be entered on the return day, if the parent fails to appear.

C. RELEVANT CASES CONCERNING FORMS ADOPTIONS.

1. **Matter of Adoption of C.C.B. v. G.A.K., 306 So.3d 674, 681 (¶22) (Miss., 2020)** Failure to attach doctor's certificate and home study were not jurisdictional defects and did not deprive the chancery court of jurisdiction to consider the petition for adoption

2. **The Guardian ad Litem may perform a home study.** Matter of Adoption of C.C.B. v. G.A.K., 306 So.3d 674, 681 (¶22) (Miss. 2020)We note that the guardian ad litem did perform a home study in this case and that Section 93-17-3(6) was amended after the trial to allow the chancellor to direct that the home study may be completed "by a court-appointed guardian ad litem that has knowledge or training in conducting home studies." H.B. 1134, Reg. Sess., 2020 Miss. Laws ch. ___, § 1 (effective July 1, 2020

CASE NAME	LENGTH OF MARRIAGE	AGE & CHILDREN	FAULT	INCOME	PROPERTY DIVISION	ALIMONY	CHILD SUPPORT	APPEAL	COMMENTS
I. Marriages over 20 years									
A. Permanent alimony awarded									
Williamson v. Williamson, 296 So. 3d 206 (Miss. Ct. App. 2020)	21	2 minor children (wife)	Irreconcilable differences	Husband: $8,617./mo; Wife: $1,384/mo	Wife: Approx $230,000	$1200/mo 22% of disparity	$1,720	Husband, aff'd	Wife unable to meet expenses; marriage ended with his affair; Husband had $180,000 in separate property
Phang v. Phang, 350 So. 3d 1154 (Miss. Ct. App. 2022)	34	Adult children; Wife 62	Irreconcilable differences	Husband: $7,997/mo; Wife: $0/month	Both: $606,000	$2,700/mo (34% of disparity)	NA	Husband, aff'd	Long marriage, great disparity in incomes
D. All alimony denied									
Coleman v. Coleman, 324 So. 3d 1204 (Miss. Ct. App. 2021)	20	Husband: disabled; No children	Irreconcilable differences	Husband: $1,500 Soc. Sec./mo; Wife: $2,781/mo	Equal	Denied	NA	Husband, aff'd	Property division provided adequately for both
Neely v. Neely, 305 So. 3d 164 (Miss. Ct. App. 2020)	42	Children emancipated	Irreconcilable differences	Unclear; incomes equal	Unclear	Denied	NA	Husband, aff'd	Equal incomes; neither had debt; parties kept finances separate during marriage
II. Marriages 10 - 19 years									
A. Permanent alimony awarded									
Oates v. Oates, 291 So. 3d 803 (Miss. Ct. App. 2020)	16	Wife, disabled; No children	H: Adultery Wife: disabled	Husband: $33,000/yr; Unclear		$504/mo (18% of disparity)	NA	Husband, aff'd	Wife unable to work; could not meet expenses
Gaskin v. Gaskin, 304 So. 3d 641 (Miss. Ct. App. 2020)	18	Wife; disabled; 2 minor children (wife)	H: Adultery	Husband: $12,085; Wife: $500/mo	Equal; Wife received $786,521	$1,000/mo (11% of disparity)	$2,417	Husband, aff'd	Wife disabled; substantial disparity
Ewing v. Ewing, 301 So. 3d 709 (Miss. Ct. App. 2020)	15	4 children (wife)	Irreconcilable differences	Husband: $4,752; Wife: $3,115/mo	Wife: $44,000	$500/mo (71% of disparity)	$938/mo	Husband, aff'd	Wife unable to meet expenses; custody of four children
Descher v. Descher, 304 So. 3d 620 (Miss. Ct. App. 2020)	17	2 children (wife)	Irreconcilable differences	Husband: $71,377/mo; Wife: $2,000/mo earning capacity	Equal: $1.5 million	$7,500/mo (12% of disparity)	$7,500/mo	Husband, aff'd	Extreme income disparity; standard of living of marriage
Wildman v. Wildman, 301 So. 3d 787 (Miss. Ct. App. 2020)	15	H: 39: Wife: 38; 2 children (wife)	Irreconcilable differences	Husband: $10,049; Wife: $1,726/mo higher earning capacity	Equal: $198,277	$3,000/mo (46% of disparity)	$1,800/mo	Husband, rev'd	Affirming permanent alimony but reversing amount as excessive; wife could increase earnings by working full-time
B. Rehabilitative alimony awarded									
Warren v. Rhea, 318 So. 3d 1187 (Miss. Ct. App. 2021)	15	1 child (husband)	W: Habitual cruelty	Husband: $4,795; Wife: $2,115	Unclear	$750/mo for 4 yrs (28% of disparity)	None	Husband; rev'd on other grounds	Disparity in incomes
Case v. Case, 339 So. 3d 796 (Miss. Ct. App. 2022).	14	H: 40; Wife: 40; 2 children (husband)	H: Adultery	Unclear	Unclear	$2,500/mo for 4 yrs	NA	Wife; aff'd	Rehabilitative alimony appropriate for wife in 40s returning to school; husband had custody and wife's support for children was suspended for four years
Denham v. Denham, 2022 WL 290890 (Miss. Ct. App. Feb. 1, 2022), reversed in part, 354 So. 3d 954 (Miss. 2022)	15	3 children (wife)	H: Adultery	Unclear	Wife: 60%; Husband: 40%	$350/mo for 2 yrs	$1,736/mo	Husband, aff'd	Husband's income was greater; wife had greater share of debt; reversed on other grounds
D. All alimony denied									
Pace v. Pace, 324 So. 3d 369 (Miss. Ct. App. 2021)	14	Wife: 43; 1 child (wife)	H: Adultery	Both currently unemployed; both with earning capacity	Wife: $720,000	Denied	$1,200	Wife; aff'd	Wife was young with earning capacity as Dietician; physician husband relinquished license after treatment for addiction
III. Marriages under 10 years									
B. Rehabilitative alimony awarded									
Garner v. Garner, 343 So. 3d 1097 (Miss. Ct. App. 2022).	8	2 children (wife)	Irreconcilable differences	H: $42,000; W: $600,000	H: 48%; W: 52%	$508/mo for 2 yrs (.1% disparity)	H: $508/mo	Husband, aff'd	Husband could earn more; Wife had care of children; Husband's abuse ended the marriage
C. Lump sum alimony awarded									
Shannon v. Shannon, 357 So. 3d 1043 (Miss. Ct. App. 2022)	1	None	W: Habitual cruelty			$26,000 lump sum alimony	NA	Wife, aff'd	Elderly man with Alzheimers granted divorce against wife based on habitual cruelty; award would support her for 13 months, the length of the marriage
IV. Reversals; type required not clear									
Hammond v. Hammond, 327 So. 3d 173 (Miss. Ct. App. 2021)	25	Wife: 47; 1 child (wife)	Husband: Adultery	Husband: $12,150/mo plus bonus; Wife: $646/mo	Wife: 55%	$500/mo for 2 years (5% of disparity)	$1167/mo	Wife, rev'd	Grossly inadequate considering marriage length, great disparity in incomes; husband's affair ended marriage