FAMILY LAW

CONTINUING LEGAL EDUCATION

6 Hours CLE Credit • 1 Hour Ethics Credit

JACKSON, MS • OXFORD, MS • GULFPORT, MS

ONLINE ON DEMAND

2024
BELL FAMILY LAW CLE

AGENDA

8:00 – 9:00	REGISTRATION
9:00 – 10:30	Family Law Update: Part I (Bell)
10:30 – 10:45	Break
10:45 – 11:45	Nonparent visitation (Bell, Calder, Patterson)
11:45 – 12:30	Family Law Update: Part II (Bell)
12:30 – 1:45	Lunch
1:45 – 2:45	Child support modification and enforcement: A Refresher (Bell)
2:45 – 3:00	Break
3:00 – 4:00	Ethics hour (Bell, Campbell, Calder, Carpenter-Sanders, Gobert, Patterson)
4:00 – 4:45	Family Law Update: Part III (Bell)
4:45	Adjourn

2024
BELL FAMILY LAW CLE

SUMMARY OF CONTENTS

FAMILY LAW DEVELOPMENTS

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FAMILY LAW DEVELOPMENTS 2023

I. Marriage rights: Premarital agreements

**Estate of Bell v. Estate of Bell,* 372 So. 3d 1008 (Miss. Ct. App. 2023). A premarital agreement precluded a husband from taking from his deceased wife's estate. The couple married in their early sixties. The husband had children by a prior marriage. The wife had no children but was close to her niece and nephew. Their premarital agreement provided that all property owned by them, whether acquired prior to or after marriage, "shall, for testamentary disposition, be free from any claim of the other . . . by reason of their contemplated marriage." It stated that they had "unrestricted right to dispose of such separate property . . . as if no marriage had been consummated between them." In addition, they waived any right "to elect to take against the other's will" and agreed that the provision was a waiver of "the right of election" under Miss. Code Ann. δ 91-5-25.

Seventeen years after their marriage, the wife executed a will leaving her assets to her sister, niece, and nephew. When she died, her husband challenged the premarital agreement. First, he argued that the agreement was a will – superseded by her later will – because it used the term "testamentary disposition" and because two people witnessed it. The court of appeals disagreed. The agreement did not purport to transfer property at death. Second, he argued that the agreement waived his right to revoke her will based on inadequate provision for him under Miss. Code Ann. δ 91-5-25 but did not prevent the automatic revocation under Miss. Code Ann. δ 91-5-27 that occurs when a decedent leaves a spouse nothing. The majority held that the couple clearly intended that neither would be able to assert a claim to the other's estate. The agreement provided they could dispose of their property "as if no marriage had been consummated" and stated that each waived "any rights as surviving spouse." Three justices dissented, arguing that by listing only the statute for elected revocation, the agreement failed to waive automatic revocation.

The court also rejected the husband's argument that the agreement was unconscionable because he received nothing in return for his waiver. Although his estate may have been smaller than his wife's, their promises were mutual – both benefitted by preserving their assets as their separate property. Furthermore, marriage itself is consideration for promises in a premarital agreement.

II. Tort actions

**Davis v. Davis*, 360 So. 3d 196 (Miss. 2023). The Mississippi Supreme Court heard an appeal of a legal father's paternity fraud suit against his former wife and the biological father of his two adult children. Long after he and his wife divorced, the plaintiff learned that his two adult children were not his biological children. He alleged that his wife's former employer, with whom she was having an affair when the children were conceived, was the father of both children. The plaintiff sued the mother and her employer for fraud and inten-

tional infliction of emotional distress. He also sued the employer for alienation of affection. In addition to damages for pain and suffering, he sought damages for the cost of raising two children, putting on expert proof that the cost of raising one child to adulthood 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. The court declined to apply the discovery rule to alienation of affection actions. The three-year statute begins to run when the alienation or loss of affection "is finally accomplished" – the plaintiff's discovery of the affair is irrelevant. Furthermore, the joint verdict was error as to his former wife – a 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. The only form that included instructions on damages was the alienation of affection form, which was "incredibly specific" to that cause of action. The plaintiff's failure to request damages instructions for fraud and intentional infliction of emotional distress "does not warrant that he get a second bite at the apple." Two justices concurred, urging abolition of the "antiquated" tort of alienation of affection.

Herbert v. Herbert,* 374 So. 3d 562 (Miss. Ct. App. 2023).** The court of appeals affirmed a circuit court's grant of summary judgment to a wife who was sued by her former husband in tort. The husband's claim for intentional infliction of emotional distress, based on his wife leaving the marriage, did not meet the requirements of the tort. A plaintiff must show that the defendant's conduct is of a type that "evokes outrage or revulsion in society" – conduct that is "beyond all possible bounds of decency." An adult's choice to leave a relationship is not actionable under this standard. His claim for the tort of "verbal abuse" was properly denied – the tort does not exist in Mississippi law. The claim that his wife made fraudulent misrepresentations by stating that she loved him was properly denied as well – he cited no authority that a spouse saying "I love you" could, under any circumstances, constitute fraudulent misrepresentation. His claim for slander, based on alleged statements to family and friends, did not meet the requirements for pleading slander. A plaintiff must specifically identify the remarks, the person to whom they were made, when they were made, and how the statements caused him concrete harm. Finally, his argument that she breached an agreement that she would decorate his condominium, even if true, was unenforceable. Miss. Code Ann. δ 93-3-7 provides that contracts for labor between spouses are void.

**Cornell v. Mississippi Dep't of Human Servs.,* 374 So. 3d 1217 (Miss. Ct. App. 2023). The court of appeals held that a circuit court should not have dismissed an adopted child's suit against MDHS. He alleged that DHS' negligence contributed to sexual abuse by his foster father in two ways. First, a DHS

employee failed to report allegations of possible abuse of two other children in the home, which might have led to earlier discovery of his abuse. Second, the social workers assigned to his case failed to make the minimum number of foster home visits required by the DHS manual. The trial court held that the plaintiff failed to prove that DHS had actual or constructive knowledge that his foster father abused him – allegations about abuse of other foster children were too remote to make the plaintiff's abuse foreseeable. And DHS' failure to make all the required visits was not a proximate cause of his injury. The plaintiff consented to adoption by his foster parents and did not report the abuse until after he was removed from their home (following abuse of another child). He explained that he was afraid to report the abuse while he was living in their home.

The court of appeals disagreed – a jury could conclude that it was reasonably foreseeable that failure to report abuse of two children might result in continued abuse of other children in the home. Furthermore, DHS employees "are not at liberty to choose whether or not to adhere to the minimum contact requirements" of the DHS Manual. DHS' failure to comply with its own procedures for protecting children was evidence of duty and foreseeability. The court of appeals agreed with the circuit court that DHS has statutory immunity from its conduct in licensing foster homes under Miss. Code Ann. δ 43-15-125.

Four judges would have affirmed the trial court's dismissal of the negligence claim based on failure to visit. They noted that two counselors made at least thirty-two visits over a three-year period. The plaintiff did not reveal the abuse to them during any of the visits. There was nothing to suggest that, had they conducted more visits, they would have discovered the abuse.

III. Grounds for divorce

**Johnson v. Johnson*, 357 So. 3d 1168 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's grant of divorce to a wife based on her husband's regular outbursts of anger. He screamed at her for extended periods in front of their small children, prevented her from leaving the house during the arguments, destroyed property, punched holes in walls, and broke glass. She testified that he would keep her and the girls in a room with him for hours while he raged. He cursed at her in front of their children, accused her of infidelity, and threatened to kill himself and others. Her testimony of the abuse and its emotional toll on her was corroborated by her mother.

**Cannon v. Cannon*, 375 So. 3d 697 (Miss. Ct. App. 2023). A chancellor properly granted a husband a divorce against his wife of two years based on habitual, cruel, and inhuman treatment – her treatment of his children constituted "unnatural and infamous" conduct that made the marriage repugnant to him. Prior to the marriage, he had a close relationship with his three children and shared custody with his former wife. His new wife stated that she hated his children. She belittled them, embarrassed them in front of family, and became angry with them over insignificant incidents. She criticized his eight-year-old daughter's weight and eating habits, taking food away from her and destroying her self-confidence. She intentionally interfered with the father's time with his

daughter. The girl began seeing a counselor at school and developed a habit of pulling out her eyebrows and eyelashes. Several witnesses testified to the wife's jealousy of the children, her unreasonable treatment of them, and her statements that she hated them. The father testified that the stress of the relationship caused him to develop high blood pressure. Witnesses testified about his depression over the damage to his relationship with his children. The court of appeals affirmed, noting that abuse of a spouse's child may constitute cruelty to the parent.

Moss v. Moss, 361 So. 2d 140 (Miss. Ct. App. 2022) (modified opinion on rehearing). 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 whom 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 as a result of his conduct. She also testified that she suffered from anxiety, lost sleep, and developed trichotillomania because of his abuse.

The court of appeals affirmed – habitual accusations, threats, insults, and verbal abuse may be sufficient to prove habitual, cruel, and inhuman treatment. False accusations of infidelity, controlling behavior, and constant belittling are behaviors that can support a grant of divorce. The court of appeals emphasized that the conduct continued throughout the long marriage and that the wife proved that she was impacted by the abuse. 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.

IV. Property division

A. Property acquired during cohabitation

**Chambliss v. Chambliss,* 2023 WL 7317109 (Miss. Ct. App. Nov. 7, 2023). The court of appeals rejected a wife's argument that assets accumulated by her husband while they lived together between marriages were marital assets. The couple lived separately for only two months after their first divorce, cohabited for fourteen years, had a second child, and then remarried. During their cohabitation, the former husband accumulated $132,520 in retirement accounts. The court held that assets accumulated by a former spouse during a period of post-divorce cohabitation are not subject to equitable distribution. The court distinguished cases involving post-divorce cohabitation in which both parties worked and contributed to the accumulation of assets. Because the wife in this case made no financial contributions, there was no basis for treating the cohabitation as a business partnership. The court stated, "there is simply no

support for the assertion that cohabitation vests marital rights in parties who were previously married."

B. Classification

1. Failure to classify or value assets

**Davis v. Davis,* 361 So. 3d 725 (Miss. Ct. App. 2023). The court of appeals reversed and remanded a chancellor's property division for failure to classify certain assets as separate or marital and for failure to value certain assets. The unclassified items included the separate portion of the husband's PERS account, guns, and debts including credit card, personal, and mortgage debt. Prior to the marriage, the husband served for two years in the military. His military retirement funds were transferred into his PERS account; however, he presented no evidence of the amount of the transferred funds. The court remanded for the parties to provide evidence that would allow the chancellor to classify these items.

The parties valued some items without dispute (the marital home, their respective PERS accounts, and several vehicles). For some items – furnishings, tools, and two vehicles – their values varied. For others (guns, a trailer) they provided no value. In addition, the parties did not value the wife's part time hair styling business or the husband's part time auto repair business. The court divided the parties' assets and stated a total value for each person's share but did not provide values for each individual asset. The court of appeals reversed. Without values for these items, the court was unable to determine whether the division was an abuse of discretion. The court noted, however, that the fault was not the chancellor's – the parties are responsible for providing evidence of value. Because property division was remanded, the court declined to rule on the chancellor's award of $1,500 in permanent alimony to the wife, which should be reconsidered based on the final property division.

**Johnson v. Johnson*, 357 So. 3d 1168 (Miss. Ct. App. 2023). The court of appeals reversed and remanded a chancellor's division of marital assets for findings of fact. The chancellor assigned each party certain assets and debts that the court deemed marital. However, the judgment did not explain the reasons for marital property classification, provide values for the items, or make findings regarding the *Ferguson* factors for property division.

2. Demarcation line

**Lewis v. Lewis,* 360 So. 3d 298 (Miss. Ct. App. 2023). A chancellor did not err in setting the ending date for the accumulation of marital property on the date of a temporary order rather than a year later at the time of divorce. The court of appeals rejected the husband's argument that the earlier date was unfair because his wife used temporary alimony to pay the mortgage until the date of divorce. The value of the home increased after the cutoff date because of the payments. The court noted that the husband paid only $6,100 in temporary

alimony during the pendency of the divorce and that the alimony was intended to assist his wife in paying all expenses, not just the mortgage. Chancellors have substantial discretion in setting the date of demarcation to end the accumulation of marital property.

3. Separate property: Conversion through commingling

**Davidson v. Davidson,* 369 So. 3d 607 (Miss. Ct. App. 2023). A chancellor properly classified a wife's premarital, debt-free home as marital even though the marriage only lasted sixteen months. The husband contributed $28,000 of separate funds to improve the home, built an extra bedroom and workshop behind the house, made repairs, and secured a line of credit in his name to pay the wife's premarital delinquent property taxes. The chancellor properly classified the home as marital, considering family use and the husband's contributions, and awarded him $30,000 of the $77,690 in equity.

Cannon v. Cannon, 375 So. 3d 697 (Miss. Ct. App. 2023). The court of appeals rejected a wife's argument that she was entitled to trace separate property funds from her premarital home into the couple's home. When they married, the husband sold his house and moved into her home. She subsequently sold her house and used the proceeds for a down payment on a larger home. The court of appeals held that the funds were commingled and became marital – both parties contributed substantially to the new home.

**Johnson v. Johnson,* 376 So. 3d 362 (Miss. Ct. App. 2023). A chancellor properly found that a husband's one-half interest in a rental home was marital property, based on proof that he used marital funds to repair and maintain the home.

**Cannon v. Cannon*, 375 So. 3d 697 (Miss. Ct. App. 2023). A chancellor erred in classifying a husband's premarital business as separate property because the wife failed to prove that it was marital. All property is presumed to be marital – the burden was on the husband to prove that the business was separate, which he failed to do. Claiming that the asset was acquired prior to marriage is not enough. His business owned at least four properties with substantial equity – he did not put on proof that these properties were acquired prior to the marriage. In addition, the couple bought one property together as an investment, which they agreed would be part of the husband's business. They later sold the property and divided the proceeds. This property, which was part of the business, was acquired through the husband's active efforts. The court reversed and remanded for the chancellor to consider the business as part of the marital estate.

C. Valuation

Williams v. Williams, 359 So. 3d 217 (Miss. Ct. App. 2023). A chancellor properly valued a marital home awarded to the wife at $150,000, based on the wife's testimony and a closing document for a construction loan. The husband's appraisal – inadmissible for failure to provide it in discovery – valued the house at $189,000. His 8.05 Financial Statement included a value of $168,000. The court of appeals held that there was sufficient evidence in the record to support the chancellor's finding.

Latham v. Latham, 357 So. 3d 1157 (Miss. Ct. App. 2023). A chancellor properly awarded the only marital asset – a mobile home – to a husband who was granted custody of his daughter. He testified that the home was valued at $75,080, with debt of $71,097. The wife, who wanted to move the mobile home, testified that it would cost $5,000 to move it. The court properly valued the home based on the husband's figures, awarded the home to him and ordered him to pay his wife $2,500 for her share of the equity.

D. Division of marital assets

1. *Ferguson* factors for lump sum alimony

**Johnson v. Johnson,* 376 So. 3d 362 (Miss. Ct. App. 2023). The court of appeals rejected a husband's argument that a chancellor should have used the *Armstrong* alimony factors in awarding his wife $67,000 in lump sum alimony. The lump sum award was used to accomplish a fair division of the couple's marital assets – it was not awarded as true alimony. The chancellor properly used the *Ferguson* factors for equitable distribution.

2. Contribution to accumulation of assets

**Chambliss v. Chambliss,* 2023 WL 7317109 (Miss. Ct. App. Nov. 7, 2023). A chancellor properly awarded a wife 30% of the $204,863 in retirement funds accumulated by her husband during their second marriage. He provided all financial support for the family. The wife testified that she was unable to work but provided no medical evidence of disability. Her husband testified that she could work but refused to do so. She dissipated assets by purchasing marijuana four to five times a week. The court of appeals affirmed, noting that equitable division does not require equal division. The chancellor divided their personal property equally, with each receiving assets valued at approximately $49,000.

McGovern v. McGovern, 372 So. 3d 138 (Miss. Ct. App. 2023).The court of appeals rejected a husband's argument that he should have been awarded a greater share of the marital home equity because he used separate property to renovate and expand the house. The house was marital based on family use – it was bought shortly before the couple married and was renovated to accom-

modate a larger family. The husband paid the mortgage during the marriage and the wife contributed to the accumulation of assets by caring for the children and the home.

3. Division of debt

Davidson v. Davidson, 369 So. 3d 607 (Miss. Ct. App. 2023). A chancellor properly found that credit card debt in a husband's name was marital – the charges made prior to their separation were for family expenditures, including gas, utility bills, and insurance, and benefitted both parties. However, the court reversed and remanded for the chancellor to clarify an order that each party pay one-half of the expenses occurred prior to separation. Because a portion of the debt had already been paid by the husband, it was unclear exactly what amount of debt the parties were to divide.

E. Military benefits

**Johnson v. Johnson,* 372 So. 3d 362 (Miss. Ct. App. 2023). On remand of this case, the chancellor properly awarded a wife 45% of her husband's National Guard pension. They were married for twenty-five of his twenty-eight years of service, making 89% of the pension marital. She cared for their home and children during his service. Nor did the chancellor err in awarding the wife 45% of his military survivor's benefits, which amounted to 55% of his base annuity.

**Manley v. Manley*, 378 So. 3d 390 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's finding that an agreement to divide a husband's military retirement benefits included his disability pay. When the couple divorced in 2012, they agreed to "equally divide (50/50) George's *military retirement*." The agreement acknowledged that his current "retirement pay" was $1,643 and that the wife was entitled to $821.50. In 2019, the wife filed a petition for contempt, arguing that her former husband failed to pay the agreed retirement benefits. The chancellor rejected the husband's argument that "military retirement" referred to "disposable military pay," which does not include disability benefits. At the time of their agreement, the $1,643 payment that they agreed to divide included his disability pay. He had previously signed a VA waiver substituting disability benefits for a portion of his retirement benefits. The chancellor ordered the husband to pay arrears of $65,377. The court of appeals agreed that their property settlement agreement included disability benefits.

The dissent argued that the Uniformed Services Former Spouses' Protection Act precludes a state court from dividing a serviceperson's military disability benefits. The dissent would limit the wife's share to 50% of the disposable military pay, which was approximately half of the total benefit. The majority held that the court of appeals was not required to address a non-jurisdictional issue that the husband did not raise in the trial court or brief on appeal.

NOTES

F. Equitable liens

**West v. West,* 371 So. 3d 145 (Miss. 2023). The Mississippi Supreme Court reversed and remanded a dispute between a former wife and her former husband's business over priority of their liens on the husband's certificates of stock. The appeal was the third in thirty years of post-divorce litigation. When the couple divorced in 1994, their property settlement agreement stated that the husband made "a present transfer to Wife of a one-half vested equitable interest" in his businesses and provided that the agreement "constitutes an existing equitable lien" to the wife.

Five years later, the wife sought a judgment for past-due alimony and property payments. The trial court awarded the wife a judgment, which she sought to collect through a writ of judgment on the husband's stock in the corporations. Rather than respond to the writ, the corporations filed motions to quash them. While the motions were pending, the husband sold his stock back to the corporations. The corporations offset the amount due him by the amount of his outstanding loans from the company. The trial court found that the sale of stock mooted the wife's writs of execution and abated the writs. She appealed. The supreme court held that the sale did not moot her attempt to collect – she had a valid lien pursuant to the court's judgment. The supreme court reversed and remanded for the trial court to determine rights to the stock sale proceeds based on the priority of liens between the corporations and the wife.

On remand for the second time, the trial court held that the West corporations' 1981 and 1987 bylaws created a security interest in the husband's stock to secure any loans to him. The court found that the security interest was perfected by possession of the stock certificates before the wife's 2008 judgment was entered. Thus, the wife was a subsequent lienholder and not entitled to the proceeds subject to the corporation's security interests. She appealed again.

The supreme court reversed and remanded again, holding that a security interest created in corporate bylaws has priority over subsequent lienholders only if the lien is noted on the stock certificate. Because it was unclear whether the certificates in question contained the required notation, the court reversed and remanded for the trial court to make that determination. The court held that the corporations should have priority with respect to certificates with a notation of the lien; the wife's equitable lien should have priority with regard to certificates that did not.

The supreme court also disagreed with the trial court's finding that the 1994 property settlement agreement did not create an enforceable lien in favor of the wife. Correcting a statement in its *West II* opinion, the supreme court held that an equitable lien created by contract need not be enrolled as a judgment or executed to be an enforceable lien – an equitable lien is good against all persons with notice of the lien. The West corporations knew or should have known of the lien because the husband was an officer in the company and the PSA was kept in the business offices. Furthermore, the divorce judgment incorporating the PSA was a matter of public record.

The supreme court did not address other issues raised by the appeal, finding that those issues had not yet been addressed by the trial court. Those include whether the West entities owed statutory penalties for failure to provide a response to the writs of execution and whether the husband was entitled to retroactive child support.

V. Property settlement agreements

A. Construction

**Harrison v. Harrison*, 2023 WL 6419116 (Miss. Ct. App. Oct. 3, 2023). The court of appeals rejected a husband's argument that a couple's property settlement agreement (PSA) was void. The wife asked her husband to come to her home to sign the PSA, which awarded her most of the marital property. He signed the agreement without reading it. The following day, he attempted to set it aside based on unconscionability, misrepresentation, and duress. He also argued that the agreement was based on irreconcilable differences and was therefore void when divorce was granted based on his adultery. The court of appeals held that the PSA, taken as a whole, was based on fault, not irreconcilable differences. Both parties filed on fault-based grounds and neither withdrew the grounds. They did not file a mutual consent to irreconcilable differences divorce. One provision outlined remedies in the event "either party stops or unduly delays the timely dissolution of the marriage on the ground of irreconcilable differences." However, another provision stated that the husband "admits that Kim has grounds for divorce due to his uncondoned adultery." The court noted that, to avoid confusion, a PSA should specify whether it is limited to divorce based on irreconcilable differences or is binding in the event of fault-based divorce (or even in the absence of divorce).

Blanchard v. Blanchard, 368 So. 3d 374 (Miss. Ct. App. 2023). The court of appeals reversed and rendered a chancellor's decision interpreting a couple's property settlement agreement regarding the marital home. The agreement provided that the wife would occupy the home and pay all expenses; that, at the latest, she would sell the home when the youngest child reached eighteen; and that when she did, "the current mortgage is to be paid in full and the net proceeds will be divided equally between the Parties." The wife also agreed to attempt to refinance the mortgage and to be solely responsible for payment of the loan if she could not refinance. Several years later the wife refinanced the mortgage and attempted to sell the home. The sale fell through, but the spouses asked the court to resolve a dispute over the meaning of the provision for division of proceeds. The wife argued that her refinancing extinguished the husband's right to share in the equity because the provision referred only to net proceeds after payment of the "current" (i.e., then-existing) mortgage. The chancellor held that the agreement was ambiguous and heard testimony from the wife and her attorney. The chancellor agreed with the wife that the refinancing extinguished the husband's equity interest.

The court of appeals reversed, holding that the agreement was not ambiguous, and that the chancellor erred in looking to extrinsic evidence. The agreement clearly provided for the husband to have a share in the equity upon sale of the home. The separate refinancing provision was to ensure that the husband was no longer responsible for the mortgage payments. The court disagreed with the wife's complaint that the provision gave her husband a windfall because he would share in the equity created by her payments. She was free to sell the house prior to the date set in the agreement. And, if she waited until the youngest child was eighteen to sell the house, he would have no access to his share of the funds for fourteen years. The agreement was not so one-sided as to be inequitable.

B. Duress

**Harrison v. Harrison*, 2023 WL 6419116 (Miss. Ct. App. Oct. 3, 2023). The court of appeals rejected a husband's argument that a property settlement agreement was void based on duress or unconscionability. At his wife's request, the husband came to her home to sign a property settlement agreement, which awarded her most of the marital property. He signed the agreement without reading it. He testified that he was suicidal after learning that his wife wanted a divorce and that he had been awake for two days at the time he signed. He also testified that he had difficulty reading but could understand a document if someone read it to him. The court emphasized that agreements are enforceable in the absence of fraud, mistake, overreaching, or unconscionability. The husband could have secured an attorney to review the document and explain it – his wife did not prevent him from doing so or misrepresent the terms to him. She had no obligation to explain the agreement to him. The court refused to set the agreement aside based on unconscionability even though the wife was heavily favored by the agreement. An agreement is enforceable unless it is so one-sided that no one in his right mind would agree to it. Furthermore, written communications between the spouses after signing the agreement show that he intended for his wife to have his business and promised to give her "everything."

VI. Alimony

A. Reimbursement alimony

**Whittington v. Whittington,* 373 So. 3d 1060 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's order that a wife of ten years repay her husband for $125,879 in separate property funds that he used to pay off her student loans. Two years after the couple married, the wife moved from their home to pursue a two-year master's degree in nursing. Her post-degree earnings were three times that of her husband's. The couple subsequently agreed to pay off her student loans with an annuity the husband received as a result of an injury. Five years later, she sought a divorce and custody of their two children. The court divided their marital assets of $248,000 equally and ordered the wife to repay her husband for the funds used to pay her student loans. She appealed.

The court of appeals affirmed, citing *Guy v. Guy*, 736 So. 2d 1042 (Miss. 1999), in which the supreme court recognized "reimbursement alimony" – a lump sum award to one who supports a spouse through school, and whose spouse seeks divorce before the payor realizes the benefit of the investment. The wife and dissenters distinguished *Guy* because the payor's spouse filed for divorce a few months after completing school, while in this case the husband benefitted from his wife's increased earnings for four years. The majority disagreed, pointing out that in *Guy,* the payor supported his spouse with marital earnings, whereas here, the husband used property that – but for his payment – would have been his separate property upon divorce.

B. Payment for health insurance

**Chambliss v. Chambliss,* 2023 WL 7317109 (Miss. Ct. App. Nov. 7, 2023). A chancellor properly awarded a wife 30% of the $204,863 in retirement funds accumulated by her husband during their second marriage and divided their personal property equally, with each receiving assets valued at approximately $49,000. The chancellor also ordered the husband to pay the wife $1,800 a year for twelve years to allow her to purchase health insurance. The court denied her request for alimony, finding that her claimed inability to work was not supported by the evidence.

C. Award of permanent alimony

Lewis v. Lewis, 360 So. 3d 298 (Miss. Ct. App. 2023). The court of appeals affirmed an award of $2,000 a month in permanent alimony to a fifty-one-year-old wife of twenty years whose husband had an affair that was ongoing at the time of divorce. He earned at least $100,000 a year, with a possible $25,000 annual bonus. He listed expenses of $6,000 a month and stated that he hoped to reduce his housing expense. His wife earned $3,470 a month and listed expenses of $5,273 a month. The court rejected his argument that he was financially unable to pay the award – he would have to reduce expenses, but it was not financially impossible. The court also rejected his argument that the chancellor erred in failing to discuss each *Armstrong* factor – she discussed the relevant factors, and the evidence supported the award.

D. Award of lump sum and rehabilitative alimony

**Gussio v. Gussio,* 371 So. 3d 734 (Miss. Ct. App. 2023). A chancellor properly awarded a thirty-five-year-old wife of nine years – and mother of four children – $250,000 in lump sum alimony (payable in a lump sum of $125,000 and sixty installments of $2,083) and rehabilitative alimony of $1,500 a month for thirty months. He was also ordered to pay $2,000 a month in child support and $200,000 in attorneys' fees. As a result of the couple's premarital agreement, most of the couple's property remained with the husband as his separate property, including the marital home. The wife received 50% of their personal

property. She had no income, having stopped work at her husband's request. Prior to the marriage, she earned $35,000 a year. Her monthly expenses for herself and her children were $7,300. She was granted a divorce based on her husband's emotional and verbal abuse.

The court rejected his argument that the chancellor should have imputed income to his wife based on her parents' support during the divorce. In contrast to the cases he cited, her parents did not provide her with a standing monthly allowance or pay benefits related to her employment. They had no obligation to assist her. She testified that their assistance strained her parents financially. The court agreed that she was entitled to alimony based on the disparity in their incomes, her need, his fault, and her contribution to the marriage.

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E. Modification based on cohabitation

**Gillenwater v. Redmond*, 359 So. 3d 232 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's order modifying – but not terminating – a wife's alimony based on her cohabitation. At divorce, the higher-earning husband was ordered to pay his wife of twenty-two years, who earned $534 a month, $700 a month in permanent alimony. Three years later he sought to terminate alimony based on his loss of employment and her cohabitation. The chancellor properly refused to modify based on his loss of employment – he presented no evidence of his income, inability to work, or his attempts to find employment. However, the chancellor modified alimony to $400 a month based on her finding that the cohabitation reduced, but did not eliminate, the wife's need for alimony. The cohabitant shared some expenses, such as utilities, and provided some in-kind work that reduced her expenses. However, without alimony the ex-wife would still struggle to pay her expenses. The court of appeals rejected the former husband's argument that the court should have terminated the alimony. Upon proof of cohabitation, there is a presumption of mutual support, which the alimony recipient must rebut. If it is not rebutted, the chancellor should consider the *Armstrong* factors to determine whether alimony should be modified or terminated. It was appropriate to modify rather than terminate alimony upon a finding that the alimony reduced but did not eliminate the need for financial support.

VII. Custody

A. Jurisdiction

**Daly v. Raines,* 2023 WL 7143115 (Miss. Ct. App. Oct. 31, 2023). A chancellor had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to modify its order of paternity and custody. On May 6, 2019, the father, who now lived in Maryland, filed a petition for emergency custody and to modify custody, alleging that the mother had moved to Florida, was diagnosed with a mental illness that required inpatient treatment, and had been arrested for domestic violence and felony battery. The child was

living in Mississippi with the maternal grandparents, who brought her back to Mississippi after she lived with the mother in Florida for eight months. The chancellor found that a material change in circumstances adverse to the child had occurred and that it was in the child's best interest to be in her father's custody. On appeal, the mother argued that the court lacked jurisdiction to modify the order after all parties had moved from the state. The court of appeals rejected her argument. The child was living in Mississippi with her grandparents when the petition was filed. Furthermore, the mother testified that the child's life "has been here in Mississippi." The court also noted that the mother did not raise the issue at trial.

B. Temporary custody as de facto permanent order

**Hendrix v. Whitt,* 373 So. 3d 778 (Miss. Ct. App. 2023). The court of appeals reversed and remanded a custody award, holding that the chancellor improperly applied the custody modification test rather than the best interest test applicable to original custody awards. The unmarried parents informally shared custody during the first four years of their child's life, although the child spent more time with the father. In 2019, they signed an out-of-court agreement stating that the father would be the child's primary custodian until September of 2020 when the mother graduated from school. Six months later, in April 2020, the father sought an adjudication of paternity, custody, and temporary custody. The court entered an order giving the father temporary custody, based on the parents' agreement to continue that arrangement. At the final hearing thirteen months later, the chancellor found that the temporary agreement had become permanent based on the passage of time and that it was in the child's best interest to remain with the father. The mother appealed, arguing that the chancellor should have considered the *Albright* custody factors to determine the child's best interest.

The court explained the difference in custody tests for original awards and modification awards. To establish custody initially, a court determines the child's best interest by analyzing and discussing factors set out in *Albright*. In contrast, to determine whether an existing order should be modified, a court applies the material adverse change/best interest test. That test places the burden on the noncustodial parent to prove that there has been a material change in the custodial parent's home that has adversely affected the child. In most cases, an award of temporary custody does not affect the custody test at the final hearing. However, a court may find that a long-standing temporary custody order has become final by the passage of time. In that case, the noncustodial parent must prove a material change in circumstances since entry of the temporary order. The court of appeals distinguished those cases, which involved orders in place for three or more years, and which all involved court-established temporary custody. The parents' out-of-court agreement could not be converted to a permanent order. And the court-approved custody order was in place for only thirteen months, too short a time for the order to be considered permanent. The appropriate test in this case was the *Albright*/best interest test for original orders.

NOTES

C. *Albright* factors

Latham v. Latham, 357 So. 3d 1157 (Miss. Ct. App. 2023). A chancellor did not err in awarding a husband sole physical custody of his four-year-old daughter after finding that the factors of moral fitness, home, school, and community record, and stability of the home environment favored him. The father was favored on moral fitness – the mother had three nonmarital children with different fathers. He also took the child to church more frequently. The child's home, school, and community record was in his favor because he was took more initiative to help with her education and because there were concerns about the school district where the mother lived. The child had her own room in her father's house. Her mother lived with the maternal grandparents, where the girl shared a bedroom with her mother and sister. The chancellor properly considered that an award of custody to the father would separate the girl from her half-siblings but found that the award was in her best interest. The court of appeals noted that she would be with them during her visitation time with her mother.

D. Joint legal custody: Decision-making authority

**Litton v. Litton*, 2023 WL 6417245 (Miss. Ct. App. Oct. 3, 2023). The court of appeals affirmed a chancellor's decision that a custodial father's right to determine extracurricular activities in the event of a dispute applied to decisions regarding summer camp. The divorce agreement's child support provision stated that the parties would equally divide the cost of the children's extracurricular activities, "including summer camp." After disputes arose regarding the children's activities, the couple entered an agreement providing that in the event of disputes regarding extracurricular activities, the father would have the tie-broker vote. The agreement specifically excluded "church" as an extracurricular activity. In March of 2022, the father proposed that their son attend a camp that would impact fourteen days of his time with the boy and fourteen days of the mother's time. He proposed that their daughter attend a camp that impacted seven of his days with her and five of the mother's. The mother did not consent.

The court of appeals rejected the mother's argument that the father's right to determine extracurricular activities did not apply to summer camp. The child support provision referred to camps as an extracurricular activity. The parties could have excluded camp from the tie-breaker agreement as they did church attendance. The court also noted that the chancellor's order provided that if the father's choice of camps interfered with the mother's time with the children, she should be provided with additional visitation to make up the lost days.

Hills v. Manns, 2023 WL 8591991 (Miss. Ct. App. Dec. 12, 2023). The court of appeals rejected a father's argument that a chancellor erred in modifying the parents' custody agreement to provide that the custodial mother would have final decision-making authority in the event of a dispute. Parents who share joint legal custody have shared decision-making authority; however, a chancellor may allocate authority to one parent. Caselaw favors the custodial parent having that authority.

E. Modification

1. Adverse impact

Grantham v. Ginn, 372 So. 3d 1047 (Miss. Ct. App. 2023). A father's request to modify custody was properly denied. The father filed a petition to modify custody based on the mother's drug use and her boyfriend's conduct. After she tested positive for cocaine, the mother agreed to temporary custody in the father to avoid CPS custody. The mother again tested positive for drugs a few months later. She subsequently enrolled in a month-long drug rehabilitation program and continued to attend counseling after the program ended. CPS closed the case, leaving custody with the father. The mother filed a petition for emergency relief based on the father's repeated refusals to allow her to see her son. The chancellor ordered visitation and random drug tests, both of which the mother passed. The chancellor denied the father's petition for modification, finding that although the mother's drug use, choice of boyfriends, and frequent moves were a material change, there was no evidence that the boy was adversely affected. The court also found that it was in his best interest to continue in his mother's custody. The court of appeals affirmed – there was no evidence of actual harm to the boy. In fact, his behavioral problems appeared to stem more from his father's actions than his mother's temporary drug use. The mother was sober and remarried to a stable and mature man. The child's therapist testified that she saw no indication that the boy had suffered trauma except because of his long separation from his mother.

Blagodirova v. Schrock, 368 So. 3d 1261 (Miss. 2023). The supreme court reversed the court of appeals and reinstated a chancellor's judgment modifying custody from a mother to a father. The father sought custody based primarily on the mother's marriage to an undocumented immigrant. The nurse mother, who worked night shifts, relied on her husband to transport the boy to and from school. The stepfather – who had an illegal license – was arrested during a stop with the boy in the car and was later deported. The boy testified that his stepfather once drove erratically while he and the mother were fighting, frightening him. He also stated that his stepfather called him names, belittled him, and struck him in the chest during an argument in Walmart. He testified that his mother instructed him not to mention the fight or the arrest to his father. The chancellor found that the circumstances were a material change that had adversely affected the boy and modified custody. The court of appeals reversed, holding that the evidence did not show an adverse impact on the boy. He was

happy and healthy and doing well in school.

The supreme court reversed the court of appeals, holding that the record supported the chancellor's conclusion that the boy was adversely affected. He was frightened by his stepfather's arrest and erratic driving; he did not like being called names; he was instructed to lie; his stepfather could potentially be arrested again in his presence; and he preferred to live with his father. A child's resilience in the face of an unhealthy environment should not prevent a court from modifying custody to a better environment.

**Young v. Neblett,* 372 So. 3d 497 (Miss. Ct. App. 2023). A chancellor properly modified custody of two girls from their mother to the father after finding that the mother's home environment was adversely impacting the girls. After their divorce, both parents remarried and were living with stepchildren in their home. The parents were involved in ongoing litigation within a year of their divorce, arguing over visitation and holiday schedules. The mother withheld visitation from the father for a year, alleging that he was exhibiting manic and paranoid behavior. Two psychological evaluations stated that the father was struggling with acute stress disorder in reaction to being separated from his children. During this time the oldest daughter was diagnosed with adjustment disorder with anxiety. The father was provided with supervised visitation, followed by twenty-four hour visits. The GAL's initial report concluded that the father did not pose a threat to his children; as a result, the chancellor expanded visitation to weekend visits. A subsequent evaluation of the older child revealed that she was struggling with suicidal thoughts. She reported to her counselor that she was treated badly by her stepfather and stepbrothers. When the mother and stepfather learned of the report, they responded by punishing her for a month, isolating her from family meals, TV nights, and games. She was not permitted to talk to her stepbrothers. Her mother told her that they wanted her to understand what it was like not to have a family. The GAL's final report also discussed the stepfather's controlling behavior, which included installing video and audio surveillance in and outside of the family home. The mother also cut off the girl's communication with her paternal grandmother, with whom she was close. The chancellor held that both girls were adversely impacted by the mother's punishment of the older girl, the older girl's mistreatment by her stepfamily, cutting off contact with their grandmother, and the stepfather's monitoring. The chancellor particularly noted that the mother and stepfather "badly mishandled" the girl's report to her counselor. As a result, the girl's mental health deteriorated and ruined her trust in her mother, stepfather, and her counselors. The older girl was afraid of their stepfather and uncomfortable around his children. She was comfortable in her father's home and had a good relationship with her stepmother and stepsiblings. The court rejected the mother's argument that the chancellor applied the wrong modification test by finding that there had been a material change that impacted the girls (as opposed to adversely affected). The test is not so rigidly applied as to require that the chancellor use the exact words to explain adverse effect.

2. Relocation

**Culver v. Culver*, 371 So. 3d 726 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's modification of custody from a mother who was relocating to the father who remained in the children's home community. After the parents' 2018 divorce, the mother had physical custody. The father had extensive visitation of fourteen days a month. Three years later, the mother remarried and planned to move to Virginia where her military husband would be stationed. The father sought modification of custody, arguing that the agreement created joint physical custody. He did not appeal the chancellor's finding that the agreement was for sole custody with extensive visitation. The chancellor found that moving the boys from their community, home, activities, friends, and extended family was a material change in circumstances that adversely affected them. The chancellor found most of the *Albright* factors to be neutral, with some slightly favoring the mother and some the father. However, on a "razor-thin" margin, he felt that the boys' best interest would be served by remaining in their home. The court of appeals acknowledged that a custodial parent's move is not, in itself, a material change in circumstances. However, a chancellor may consider the impact of the move on the children and on the custody arrangement. Because the chancellor considered the totality of circumstances and because the decision was supported by substantial evidence, the court of appeals affirmed.

Scott v. Le, 373 So. 3d 1067 (Miss. Ct. App. 2023). A chancellor did not err in modifying joint physical custody to sole custody in the father when the mother moved to Virginia. The parents shared custody until the mother moved to New Orleans with her boyfriend and agreed that the girl would stay with her father in Mississippi to attend school. Nine months later, in December 2020, the mother and her boyfriend moved to Virginia where he was stationed. The girl spent the summer of 2020 with her mother in Virginia. They did not see each other again until the following summer. In 2022, both parents sought physical custody, arguing that there had been a material change in circumstances that made the joint custody arrangement unworkable.

The court of appeals agreed with the chancellor that the mother's relocation was a material change in circumstances and that the child's best interest was to be with her father. The chancellor properly found that the girl's age (eight) and sex was neutral and that the parents' capacity to provide childcare and their emotional bond with the girl were neutral factors. The father was properly favored on continuity of care and parenting skills – he had primary care for the girl for the last two years. He was also favored on the child's home, school, and community record and stability of employment and home environment. He had lived with his parents for five years, where the girl had lived and attended school. He had extended family close by and a stable work schedule. The mother held four jobs in eighteen months and had moved to Virginia where she had no extended family.

**Scott v. Boudreau*, 375 So. 3d 688 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's modification of a couple's joint physical custody schedule when the military father was assigned to a unit in Colorado. Both parents served in the Air Force from the time of their marriage in 2013 until their divorce in Maryland in 2019. During their marriage the children lived with their father in Maryland for a year while the mother was stationed in Korea. The parents agreed at divorce to share joint physical and legal custody. Shortly after their divorce, both parents moved to Mississippi where the father was stationed at Keesler Air Force base. Both remarried prior to 2022 when the father sought sole physical custody based on his upcoming relocation to Colorado. The mother counterclaimed for physical custody. The chancellor found that both parents were involved, active parents, but that the father and his wife were more involved in the children's activities and sports. In addition, the stepmother was involved in the daughter's therapy and treatment for adjustment disorder while the children's stepfather had more limited involvement in their lives.

The chancellor found that it was not in the children's best interest to modify custody. Instead, he modified the joint physical custody schedule, ordering that the children live with their father during the school year and that the mother exercise her custodial periods during the summer and holidays. The father was granted tie-breaking authority in the case of disputes about major life decisions. The court rejected the mother's argument that the move would be disruptive to the children – the father indicated he would be stationed in Colorado for at least eight years, providing the children with stability. In contrast, the mother, who had left the military, had already moved twice in Mississippi and worked at two different schools. The opinion discussed both the custody modification/material change test and the visitation modification/"not working" test without specifically stating which governed. The chancellor found that the father was favored on the *Albright* factors of parenting skills and stability of the home environment because he and his wife were more involved in the children's lives. The home environment factor also favored the father because of the anticipated stability of his assignment. The mother was rated negatively on moral fitness because of an argument with her mother that resulted in the grandmother's absence from the children's lives for months, while the father gave up his spring break with the children so that the maternal grandmother could see them.

**Fox v. Fox,* 381 So. 3d 391 (Miss. Ct. App. 2023). The court of appeals held that a chancellor erred in granting a father's Rule 41 petition to dismiss a mother's request for modification. The parents agreed to joint legal and physical custody, with alternating weeks of custody. The mother later began working in a friend's Florida veterinarian clinic during her noncustodial weeks. Three years later, she filed a petition to modify joint custody, stating that she had an opportunity to buy the veterinary practice, which would require her to be in Florida full-time. The son, who was now twelve, filed an affidavit stating his wish to move to Florida to live with her and his maternal grandparents. The chancellor found that there was no material change in the father's home that would justify modifying custody. He stated also that no new circumstances had arisen since a 2020 contempt hearing, at which time the mother was living in Florida.

The court of appeals reversed, noting that relocation by one joint custodial parent will usually make the arrangement unworkable and constitute a material change in circumstances. The mother's permanent move to Florida was an adverse material change that made the week-to-week custody arrangement impractical. The court also held that the chancellor failed to consider the totality of the circumstances, including the impact on the child. The court reversed and remanded for the chancellor to consider the *Albright* factors to determine the custody arrangement that was in the child's best interest.

3. Joint legal custody modification

**Moreland v. Moreland,* 368 So. 3d 333 (Miss. Ct. App. 2023). A chancellor properly modified joint legal custody to sole legal custody in a girl's mother and limited the father's visitation. The father's obsessive behavior was a material change in circumstances that negatively affected the eleven-year old girl. Multiple witnesses testified to the father's increasingly controlling behavior over the seven years since the parents' divorce. He insisted that his daughter go through time-consuming rituals in his home, including removing socks in a certain way, changing clothes before sitting on furniture, reviewing multiple clothing options before he chose her clothes, and sitting outside the bathroom to instruct her on bathing. He took her on extended (six hour) trips to Wal-Mart while he compared the cost of items. He forced her to eat expired food. She reported that his kitchen was piled with "years" of dishes. His driving frightened her – he was often late because of the time it took to complete the rituals and drove in an erratic and aggressive manner that she felt was unsafe. The girl's teachers and principal testified that she cried and would not eat at school after visits to her father. One teacher reported that the girl told her that her father was abusive. Her therapist testified that the father's behavior was a serious stress factor for the girl, who was afraid, humiliated, and depressed. She recommended limiting overnight visitation. The mother testified that the father refused to work with her on the girl's schedule to accommodate activities or overnight parties with friends and that he texted her multiple times daily about his phone calls to the girl, even when he had already seen her. The chancellor found a material adverse change based on the father's increasingly controlling behavior and lack of cooperation combined with the girl's age and increasing awareness of his behaviors. After reviewing the *Albright* factors, he determined that it was in the girl's best interest to change joint legal custody to sole legal custody in the mother. Based on the counselor's recommendation, the chancellor ordered no overnight visitation for at least six months, followed by restricted overnight visitation. The court of appeals affirmed. The court agreed with the father that lack of cooperation between parents is not alone a sufficient basis to modify custody, but it may be one reason among others.

NOTES

F. Visitation

1. Clarification

**Hills v. Manns,* 2023 WL 8591991 (Miss. Ct. App. Dec. 12, 2023). A mother's petition to modify visitation, made four months after her first petition was denied, was not barred by res judicata. Custody and visitation orders are never final – they may always be modified based on new circumstances. The provision at issue stated that the father would return the pre-school-age children on Monday morning after his weekend visitation. The mother presented evidence of additional disputes and confusion over the meaning of the provision since the previous petition, including disagreement over what constituted "morning." The chancellor properly modified and clarified the order after finding that the order was not working and that there was confusion regarding the terms.

2. Restricted visitation

**Moreland v. Moreland,* 368 So. 3d 333 (Miss. Ct. App. 2023). A chancellor properly modified joint legal custody to sole legal custody in a girl's mother and limited the father's overnight visitation. The father's obsessive behavior was a material change in circumstances that negatively affected the eleven-year-old girl. Multiple witnesses testified to the father's increasingly controlling behavior over the seven years since the parents' divorce. Based on the girl's counselor's recommendation, the chancellor ordered no overnight visitation for at least six months, followed by restricted overnight visitation.

The court of appeals affirmed. The court acknowledged that as a general rule, noncustodial parents should have unrestricted visitation, except to avoid harm to a child. The court held that the restriction on overnight visitation was warranted – limiting overnights would limit some of the difficult interactions, including meals, bathing, changing clothes, and transportation.

G. Grandparent visitation

1. Findings of fact

**Hutson v. Hutson,* 2023 WL 6418777 (Miss. Ct. App. Oct 3, 2023). The court of appeals rejected a grandfather's argument that a chancellor should have examined the *Martin v. Coop* factors to determine whether grandparent visitation was in the child's best interest. A chancellor is not required to determine best interests unless he first finds that the grandparent had a viable relationship with the child and that visitation was unreasonably denied. The chancellor properly found that the child's parents acted reasonably in denying the petitioner's request for visitation.

2. Reasonableness of denial

**Hutson v. Hutson,* 2023 WL 6418777 (Miss. Ct. App. Oct 3, 2023). The court of appeals affirmed a chancellor's finding that a girl's parents reasonably denied visitation with her paternal grandfather. The couple had three children. The youngest girl was their biological child. The older two were the wife's children but the husband considered them to be his family. The grandfather had been involved in the youngest child's life since she was six, picking her up from daycare, providing financial support, and having overnight visits. The two older children often joined them. In 2019, the parents denied visitation based on the grandfather's preferential treatment of his biological grandchild over the other two children. They testified that he admitted that he did not love them or consider them family. He provided his grandchild with gifts and support that he did not provide for the others and allowed her to do things that the others were denied. They stated that his preferential treatment was causing problems within their family. They also testified that he behaved childishly and erratically in response to their decision, becoming confrontational and making threats. In addition, they testified that the grandfather and his wife allowed the girl to sleep with them even though the mother requested that they not do so.

The chancellor found that the grandfather had a viable relationship with the girl but that the parents acted reasonably in denying visitation. The court of appeals affirmed, stating that parents have a paramount right to control their children's environment. Their decisions are given special weight – whether they have unreasonably denied visitation is "not a contest between equals." The chancellor properly found their denial was reasonable because the grandfather's favoritism was causing problems and emotionally impacting the two older children. The parents made it a requirement for visitation that the grandfather treat their children equally and he refused to do so.

3. Standing under Type 1 visitation

**Poole v. Poole,* 2023 WL 5922110 (Miss. Ct. App. Sept. 12, 2023). The court of appeals affirmed a chancellor's award of visitation to a grandmother who had been a child's guardian from shortly after her birth until she was four years old. The chancellor found that the father was a fit guardian and terminated the guardianship but granted the paternal grandmother every-other-weekend visitation, Wednesday night visitation, alternating holidays and breaks, and two weeks in the summer. The court rejected the father's argument that his mother did not qualify for visitation under Miss. Code Ann. δ 93-16-3(1). That statute once provided that when one parent of a child is awarded custody, one parent's rights are terminated, or one parent dies, "either parent of the child's parent who lost custody" could seek visitation. The statute was amended to delete the last three words. When the chancellor awarded the father custody because the child's mother died, his mother was entitled to seek visitation as "either parent" of the child's parents.

4. Attorneys' fees

**Hutson v. Hutson,* 2023 WL 6418777 (Miss. Ct. App. Oct 3, 2023). The court of appeals affirmed a chancellor's award of $8,317 in attorneys' fees to parents who were defendants in a grandparent visitation petition. They were financially unable to pay their fees. The court rejected the grandfather's argument that an award of attorneys' fees was improper because the parents did not file their request until after the hearing. The visitation statute, MISS. CODE ANN. δ 93-16-3, was amended in 2019 to provide that a parent may request an award of fees "at any time" (replacing a requirement that fees be requested prior to any hearing.)

H. Visitation based on *in loco parentis* status

***Brownlee v. Powell,* 368 So. 3d 1268 (Miss. 2023). The Mississippi Supreme Court reversed and remanded a chancellor's dismissal of a woman's petition for visitation with the children of her former same-sex partner. The women lived together in a romantic relationship for almost six years. The defendant had a seven-year-old son when their relationship began and gave birth to a daughter shortly after it began. The boy's biological father was unknown. The daughter's legal and biological father was an active parent and supported her. The chancellor held that Mississippi law does not recognize *in loco parentis* visitation for a person who cohabits with a biological mother. The cohabitant appealed. The biological mother argued that nonparent visitation is limited to (1) grandparents (by statute); and (2) spouses of a biological mother who believed that the child was their biological child. The plaintiff cohabitant argued that *in loco parentis* visitation is not limited to these categories.

The supreme court agreed – the plaintiff's complaint stated a claim on which she could be awarded visitation, if she could prove she that she came within certain narrow, unique circumstances that rebut the natural parent presumption. The court discussed cases that have met this requirement, including *Griffith v. Pell,* 881 So. 3d 184 (Miss. 2004). The court noted that the factors in those case included the following: (1) a petitioner stood *in loco parentis* to a child; (2) he supported, cared for, and treated the child as his own; (3) he could have been required to pay child support; and (4) the biological father of the child was not in the picture. The court emphasized, however, that rights under the doctrine "are inferior to those of a natural parent." Nonetheless, the court recognized that special circumstances exist in which "the child's well-being demands a relationship with a person who has stood *in loco parentis* in his or her life." Four justices joined in a concurring opinion urging that persons acting *in loco parentis* should not have to overcome the natural parent presumption when they seek visitation rather than custody. Instead, they should be required to prove that a viable relationship exists between them and the child as the result of a parent-like relationship and that visitation is in the child's best interest.

I. Guardians ad litem

*_Daly v. Raines,_ 2023 WL 7143115 (Miss. Ct. App. Oct. 31, 2023). The court of appeals agreed with a mother that a chancellor erred in quashing her subpoena duces tecum to the child's guardian ad litem in a custody modification action. The mother sought discovery of all GAL records related to the child and all correspondence with the child's doctors, therapists, and teachers. The court held that the documents she sought came squarely within Rule 26, which provides for discovery of any matter relevant to the issues raised. To grant the GAL's motion to quash, the chancellor was required to identify one of four exceptions listed in Rule 45(d), including that the request required disclosure of privileged or otherwise protected material. The court reversed and remanded.

Young v. Neblett, 372 So. 3d 497 (Miss. Ct. App. 2023). The court of appeals rejected a mother's argument that a chancellor's failure to include the guardian's qualifications and recommendations in the final judgment required reversal. The guardian's recommendations were adopted and discussed in the bench opinion and final judgment. Omission of the guardian's qualifications from the final judgment, in and of itself, did not require reversal.

Roach v. Phillips, 361 So. 3d 174 (Miss. Ct. App. 2023). The court of appeals reversed and remanded a chancellor's termination of a father's parental rights because the chancellor did not summarize the guardian ad litem's qualifications and recommendations or explain the reasons that she did not follow the guardian's recommendations. Failure to do so in a case involving a mandatory guardian is reversible error. The court declined to address the merits of the decision.

In re Adoption of Jane, 360 So. 3d 286 (Miss. Ct. App. 2023). The court of appeals rejected a grandmother's argument that a chancellor erred in relying on hearsay testimony from the guardian ad litem in making his decision. The grandmother failed to object to admission of the evidence at trial. Furthermore, the chancellor's decision was based on substantial non-hearsay testimony and evidence and was supported by the record.

J. Guardianships

*_In re B.P.,_ 2023 WL 5358081 (Miss. Ct. App. Aug. 22, 2023). A chancellor properly denied a father's petition to terminate his daughter's guardianship, leaving custody with his cousin and her wife. Three children were taken from their parents and placed in guardianship based on the condition of the parents' home – it lacked heat, running water, was filthy, had broken windows and was unsafe. The youngest child, B.P., was placed with the father's cousin and his wife in March 2018 when she was only a few months old. The father exercised some visitation with the child during that year. When the guardians asked the father to visit the girl at their home during Christmas, rather than taking her to his house, he devised a plan to take the child from their home. The father and

his girlfriend exited their home with the child and placed her in their car. The father and his cousin fought while the cousin's wife prevented their exit. Confronted by his uncle, who had a raised board in his hand, the father reached for a concealed weapon. The chancellor found that the natural parent presumption was overcome by the father's conduct on this one occasion, stating that his actions showed extremely poor judgment, lacked regard for the child's safety, and that he was unfit to have custody. The father was awarded some visitation.

VIII. Child support

A. Imputed income

**Gussio v. Gussio,* 371 So. 3d 734 (Miss. Ct. App. 2023). The court of appeals rejected a father's argument that a chancellor erred in ordering him to pay $2,000 a month in child support (the equivalent of 22% of net income of $9,091) when his 8.05 Financial Statement showed net income of $4,347 a month. His testimony about his income was not credible and his 8.05 Financial Statement was inconsistent with information that he provided to banks during the same time period. In addition, his reported income was inconsistent with his spending. He listed over $10,000 in monthly expenses, not including temporary support and his attorneys' fees, yet there was no evidence that he incurred debt to pay his expenses.

B. Deviation from the support guidelines

**McGovern v. McGovern*, 372 So. 3d 138 (Miss. Ct. App. 2023). The court of appeals reversed and remanded a chancellor's child support award that exceeded the statutory guidelines. The noncustodial father's monthly adjusted net income was $13,500, which would produce a child support award of $2,970. The chancellor ordered that he pay basic support of $2,500 a month, plus pay for the children's private school tuition, book fees, after school care, and activity and sports fees. The father argued that the award of school-related expenses would increase the monthly award to $4,815. The mother disputed the amount. The court of appeals noted that for payors whose adjusted annual income exceeds $100,000 a year, a chancellor must make a finding as to whether application of the statutory guidelines is reasonable. The court held that the amount of support awarded was not clear and could be far in excess of the guidelines. The court remanded the case for the chancellor to reconsider the school-related expenses and to order support in light of those expenses.

**Capocaccia v. Capocaccia,* 372 So. 3d 1106 (Miss. Ct. App. 2023). The court of appeals reversed and remanded an order that a father pay $1,500 in child support for three children. Support under the guidelines, based on his stated income of $3,572 a month, would have been $786 a month. A chancellor's deviation from the statutory guidelines must be accompanied by written findings of fact that application of the guidelines would be unjust or inappropriate under the circumstances of the case, based on deviation criteria set out in the statute.

C. College support

*_Capocaccia v. Capocaccia,_ 372 So. 3d 1106 (Miss. Ct. App. 2023). The court of appeals reversed and remanded an order that a father of three pay one half of the reasonable expenses of his children "attending and completing" college. The chancellor should have made findings of fact regarding the children's aptitude for college, the father's ability to pay, and the children's relationship with him. The father alleged that he lacked the ability to pay and that his sons refused to have a relationship with him. The court also held that the chancellor lacked authority to extend the father's duty for college support past majority in the absence of his agreement. (Note that the court also ordered that he provide health insurance until it was no longer available – not appealed).

D. Agreement to end support at 18

*_White v. White_, 357 So. 3d 1165 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's order finding a father was in contempt for nonpayment of child support and orthodontic expenses in the amount of $53,825. The couple's property settlement agreement, incorporated into the judgment of divorce, ended support when the youngest child turned eighteen. The father argued that the chancellor erred in finding that he was obligated to pay support until the youngest was twenty-one. The court of appeals affirmed, holding that parents may not contract away the duty to support a child until majority. The fact that an agreement was judicially approved is given great weight. However, an agreement ending support prior to twenty-one is against public policy and unenforceable.

E. Order of back support

*_Ndicu v. Gacheri,_ 381 So. 3d 371 (Miss. Ct. App. 2023). The court of appeals rejected a father's argument that a chancellor is required to order child support retroactive to a year prior to the filing of the support petition. The parents of two children separated in 2006 and the husband filed for divorce. Without a court order giving him custody, the father took the children to Kenya. A divorce decree was subsequently entered in Pennsylvania, where the mother lived and attended medical school, but no order for custody or child support was included. The mother traveled to Kenya and made multiple attempts to reach a custody arrangement through the Kenyan court system, with no success. In 2013, the father moved to Starkville while the children remained with their maternal grandparents in Kenya. They moved to live with their father in 2014. The mother petitioned for custody in 2016. The father counterclaimed for custody and child support. The court entered a temporary ex parte order giving the father custody, the mother visitation, and restraining the father from leaving the country with the children. The case was continued eight times and was finally tried in 2021. By this time both parents lived out of state. The eighteen-year-old child wanted to live with his father until he graduated. The father was given

custody, and the mother was ordered to pay child support of $1,000 a month, a downward adjustment from the $2,275 that the child support guidelines would produce. The chancellor explained that the mother would have to travel out of state to visit the children.

The father appealed, arguing that the chancellor erred in failing to order retroactive support based on Miss. Code Ann. δ 93-11-65(b). That statute provides, "(b) An order of child support shall specify the sum to be paid weekly or otherwise. In addition to providing for support and education, the order *shall also provide* for the support of the child prior to the making of the order for child support, and such other expenses as the court may deem proper." (emphasis added). The court of appeals held that an award of back support is discretionary, not mandatory, citing several cases holding to that effect. The chancellor did not abuse his discretion – the father took custody without the benefit of a court order, he did not provide proof of expenditures prior to filing the order; some of the lengthy delays were due to his actions; and he never sought temporary support while the action was pending.

F. Waiver of support

**Scott v. Boudreau*, 375 So. 3d 688 (Miss. Ct. App. 2023). The court of appeals rejected a mother's argument that a chancellor erred in ordering her to pay child support when the father testified that he was not seeking support. Child support belongs to the child, not the parent, and cannot be waived by the parent. When the father was stationed in Colorado, the chancellor modified their joint physical custody schedule. The children would live with their father in Colorado during the school year and with their mother in Mississippi during summers and holidays.

G. Life insurance

**Talley v. Talley*, 366 So. 3d 901 (Miss. Ct. App. 2023). The court of appeals rejected a father's argument that a chancellor should have terminated his agreed obligation to maintain $150,000 in life insurance for his children until they reached the age of twenty-five. He provided no information regarding the cost of the policy or his ability to pay the premiums. Marital contracts will be enforced, absent fraud or overreaching.

H. Effective date

The legislature amended Miss. Code Ann. δ 43-19-34(4), applicable to DHS actions, to comply with federal law and DHS policy. The statute provides that "Any order for the support of minor children, whether entered through the judicial system or through an expedited process, shall not be subject to a retroactive modification except from the date that notice of such petition to modify has been given, either directly or through the appropriate agent, to the obligee or to the obligor where the obligee is the petitioner."

IX. Enforcement

A. Judgment liens

**West v. West,* 371 So. 3d 145 (Miss. 2023). The supreme court reversed a chancellor's finding that a wife's 2008 judgment was barred by the statute of limitations because she did not renew the judgment within seven years. The supreme court agreed with the wife that her ongoing litigation to enforce the judgment, filed within seven years of the judgment, tolled the statute of limitations. A judgment lien creditor who files a garnishment proceeding before the statute runs is not required to otherwise renew the underlying judgment.

B. Credit for direct payments

**Manley v. Manley*, 378 So. 3d 390 (Miss. Ct. App. 2023). The court of appeals affirmed a chancellor's finding that a father was $10,000 in arrears in child support. The court rejected his argument that he should be credited for payments toward his children's car notes, insurance, and tags, and for $3,621 toward his son's rent. He voluntarily paid the expenses, which were not included as child support in their agreement. A parent is entitled to credit for direct payments when the money is used for purposes contemplated by the support order. Allowing a noncustodial parent to deduct voluntary payments for items not included in support would "usurp from the custodial parent the right to determine the manner in which support money should be spent." Furthermore, if the father wanted to make support payments directly to his son who was in college, he should have petitioned to modify the decree.

C. Contempt

**McPhail v. McPhail*, 357 So. 3d 602 (Miss. 2023). The supreme court affirmed a chancellor's order incarcerating a father who was in arrears on child support and who refused to comply with an order to complete a psychological examination. The parents shared joint custody after their divorce. In 2015, the mother sought modification, alleging that the father was suffering from mental health issues. The father initially refused to comply with the court's orders for drug testing and psychological evaluation. The chancellor found him in contempt for noncompliance and for nonpayment of child support and ordered him incarcerated. The father subsequently agreed to submit to testing. The court-appointed psychologist reported that after an hour the father refused to continue and terminated the interview. The father stated that the psychologist terminated the interview. At a January 2021 hearing, the chancellor again found that the father had not met the conditions for release. The father appealed only from the 2021 contempt hearing.

On appeal, he argued that the order for mental health examination was an unconstitutional invasion of his privacy. The supreme court declined to consider the claim, which was not raised at trial. Accordingly, the only issue before

the court was whether the father willfully violated the order. The majority held that he did – he defied the chancellor's order to complete the mental health examination and failed to prove inability to pay child support. A defendant may be incarcerated indefinitely until he complies with a court's order. The majority agreed with the four dissenting justices that the father's incarceration for five years was not in anyone's best interest but noted that it was the father who put himself there and who held the key to his release.

Four justices dissented, urging that contempt should be enforced using the least possible power to accomplish the desired result. The result the mother sought – modification of custody – could have been accomplished by making a negative inference from the father's refusal to be evaluated and modifying custody as a result. The dissenters also argued that the father substantially complied with the order by submitting to an interview which led to a nine-page report with recommendations.

Moreland v. Moreland, 368 So. 3d 333 (Miss. Ct. App. 2023). The court of appeals rejected a father's argument that a chancellor should have held a mother in contempt for withholding visitation in March of 2020. She stated that her daughter was afraid to visit her father after he learned she had recorded his erratic driving to show her mother. The court noted that unilateral modification is unacceptable in most cases – the appropriate action is to file a petition for temporary modification. However, the incident occurred during the Covid shutdown at time when there was a court backlog. The mother's attorney advised her not to file a motion since they had a June 1 trial date. Acting on the advice of an attorney does not excuse a party from following a court order, but it may be taken into consideration in determining whether contempt was willful.

**Talley v. Talley*, 366 So. 3d 901 (Miss. Ct. App. 2023). A chancellor properly found that a father was in contempt for nonpayment of $48,786, representing one half of his children's medical expenses, automobile expenses, college expenses, and extracurricular activities. He argued that the mother failed to provide him with information regarding many of the expenses. She testified that he insisted that she not send bills by mail and refused to give her an email address. The court also noted that he was aware of many of the expenses and made no effort to determine the amount that he owed. Although he stated that he lacked funds to pay the expenses, he was able to pay for improvements to his home. The chancellor declined to order him to pay one half of private school tuition and one half of the cost of one son's farm animals.

**Covin v. Covin*, 2023 WL 5026261 (Miss. Ct. App. Aug. 8, 2023). A chancellor properly held a husband and wife in contempt for failure to comply with their obligations under a property settlement agreement. The wife failed to allow her husband to retrieve personal property from the marital home, placing the items that she considered his personal property outside the residence. The court of appeals rejected the wife's argument that the agreement did not allow the husband to enter the marital home to retrieve his belongings. However, the chancellor declined to find her in contempt for failure to provide specific items

– the agreement was not specific as to the items that were awarded to him. The agreement provided that the husband was entitled to retrieve "certain firearms kept in the marital residence," "certain tractor implements and tools," and "certain personal possessions known by both parties to belong to Matthew." The court of appeals held that the provision failed to identify precisely the items to which the husband was entitled, and that the chancellor appropriately clarified the ambiguous provision by looking to the agreement as a whole. The court also found the wife in contempt for failure to refinance the home and provide her husband with his share of the equity within ninety days as provided in the agreement. The husband was in contempt for failing to pay the wife $10,380.

X. Paternity

*The Mississippi Legislature enacted a statute providing posthumously conceived children of a deceased a partial right of inheritance. The statute provides that a child who is born through assisted reproduction within forty-five months of a biological parent's death is entitled to a child's share of the parent's personal property, if the following conditions are met:

- The deceased and the person intending to use the genetic materials signed a document stating that the decedent consented to posthumous conception;
- Within six months of the decedent's death, the decedent's representative and the court were notified of, or had actual knowledge of, the intent to use the decedent's genetic material in assisted reproduction;
- The embryo was in utero within 36 months of the decedent's death;
- The child was born within 45 months of death;
- The child lived for at least 120 hours after birth.

If more than one child is born posthumously, they share a child's share. The court, upon notification within six months, is to set aside a child's share and distribute the rest of the estate. If no child is born within 45 months that lives for 120 hours, the set-aside share is to be distributed to other heirs.

The statute also provides, "It is the intent of the Legislature that a person who is deemed to be living at the decedent's death under this statute shall be eligible for a child's benefits under Title 41, Chapter 7, of the U.S. Code. NOTE: The section should refer to Title 42, Chapter 7, which deals with Social Security benefits.

XI. Termination of parental rights Legislation

2024 Miss. Laws S.B. 2793. In 2024, the legislature made significant changes to the 2016 Termination of Parental Rights Law and the Youth Court Act.

A. Parties

1. *Children* who are twelve or older at the time of the hearing must receive a summons. Miss. Code Ann. δ 93-15-107(1)(c). The style of the case shall not include the child's name unless the child is the party plaintiff or petitioner. *Id.* δ 93-15-107(1)(e). If the child is fourteen years or older at the time of the hearing, the child's preferences regarding termination of parental rights shall be considered by the court.

2. DCPS. The bill expanded DCPS' role as a necessary party to detention and adoption hearings. Miss. Code Ann. δ 43-21-201(7) now provides that DCPS shall be a necessary party at all stages of the proceedings involving a child for whom the department has custody, including, but not limited to, *detention,* shelter, adjudicatory, disposition, permanency, termination of parental rights and *adoption hearings*.

B. Right to counsel

1. Children

Children are entitled to counsel throughout TPR proceedings. Miss. Code Ann. δ 93-15-107 was amended to state that "The court shall appoint an attorney for any minor child who is unrepresented, so the court has the benefit of knowing the child's stated interest." Miss. Code Ann. δ 43-21-201(4) states that attorneys for all parties, including the child's attorney, owe their client "the duties of undivided loyalty, confidentiality and competent representation."

2. Parents

Termination proceedings. Miss. Code Ann. δ 23-21-201(2) was amended to provide that "All parents have the right to be appointed counsel in termination of parental rights hearings, and the court shall appoint counsel if the court makes a finding that the parent is indigent and counsel is requested by the parent. For purposes of this section, indigency shall be determined pursuant to Section 25-32-9 and Rule 7.3 of the Mississippi Rules of Criminal Procedure."

Youth court proceedings. The bill amends Miss. Code Ann. δ 43-21-201 to state that "when a party first appears" a youth court judge must determine whether the parent is represented. If they are not, and the court determines they are indigent, the court "shall" appoint counsel for a custodial parent and for a noncustodial parent who demonstrates "a significant custodial relationship with the child." The amendments clarify that all indigent parents who request counsel have a right to appointed counsel in termination proceedings.

Determining indigency. The procedure for determining indigency under Miss. Code Ann. δ 25-32-9 requires the filing of an affidavit "stating that such person is an indigent and unable to employ counsel" The statement should be

under oath and list all assets available to the indigent to pay attorney's fees, including ownership of any real or personal property. The affidavit should also describe the person's employment status, number of dependents, income from any source, the ability of his parents or spouse to pay attorney's fees, and any other information which might prove or disprove a finding of indigency. If the court finds from a review of the affidavit, statement or other appropriate evidence, that the defendant is not indigent, the court shall terminate the representation of the defendant. Rule 7.3 of the Mississippi Rules of Criminal Procedure states that a party may be examined under oath by the court in lieu of filing an affidavit.

Funding. The bill amends Miss. Code Ann. δ 43-21-201 to provide that a financially able parent may be ordered to pay reasonable attorneys' fees for court-appointed representation after court review of an affidavit provided by the parents. Those payments are to go into a fund that may be used to pay for attorneys for indigent parents in dependency-neglect hearings. If there are insufficient funds to pay for indigent counsel and no state funds are available, the court may order the county to pay for the costs of counsel.

3. DCPS

The amendment clarifies that DCPS has the right to be represented by counsel at all stages of proceedings involving a child in DCPS custody, including detention, shelter, adjudication, disposition, permanency, termination of parental rights, and adoption. Miss. Code Ann. δ 43-21-201(8).

C. Procedure

1. Permanency hearings. For children who have been adjudicated abused or neglected, (except in cases in which reunification is bypassed under Miss. Code Ann. δ 43-21-603(7)) the youth court shall conduct a permanency hearing within one hundred twenty days or every sixty days for children under three years of age. Miss. Code Ann. δ 43-21-613(3). Previously, a hearing was required within twelve months.

2. Termination of parental rights. The court must hold a hearing in TPR cases within ninety days from the date of perfected service on the parents, unless the court makes specific findings that the best interest of the child is served by delaying past the ninety-day period. Miss. Code Ann. δ 93-15-107(6)(a).

3. Adoption. The amendments removed the requirement that adoption hearings should be held within 120 days of service on the parents. The provision now states, "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."

4. Chancery court jurisdiction over neglect matters. Miss. Code

Ann. δ 43-21-151(1)(c) was amended to provide that a chancery court hearing a custody matter in which allegations of neglect first arise (and of which the chancery court had no notice prior to the proceedings) may make a determination regarding neglect. The proceedings must be confidential as provided under the Youth Court Act.

D. Grounds for termination

1. ***Voluntary termination of rights.*** The bill amended Miss. Code Ann. δ 93-15-111 dealing with voluntary surrender of parental rights. The amendment provides that a court "shall accept the parent's written voluntary release" if it meets the requirements set forth in the statute and that the release "shall serve as a waiver of the parent's right to have a hearing on acceptance of the release."

2. Neglect redefined. The Youth Court Act definition of neglect based on failure to provide was amended to state that a neglected child is one whose parents fail to provide food, clothing or shelter necessary to sustain life or health, excluding "failure caused primarily by financial inability unless relief services have been offered and refused and the child is in imminent risk of harm." Miss. Code Ann. δ 43-21-105(l)(iv). The bill also amended Miss. Code Ann. δ 43-21-301(3)(a) to provide that a youth court may not take custody based on neglect caused primarily by financial inability, unless relief services have been offered and refused.

3. Parent's mental illness. Miss. Code Ann. δ 93-15-21(a) was amended to add the italicized language: "(a) The parent has been medically diagnosed by a qualified mental health professional with 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, *prevents the parent, despite reasonable accommodations, from providing minimally acceptable care* for the child." The italicized language replaced "makes the parent unable or unwilling to provide an adequate permanent home for the child."

4. Reasons not to terminate. Miss. Code Ann. δ 93-15-123 was amended to add additional reasons when termination may not be appropriate:

Compelling and extraordinary reasons why termination of parental rights would not be in the child's best interests *may* include, but are not limited to:

(a) When a child is being cared for by a relative and that relative, who is otherwise an appropriate, safe and loving placement for the child, is unwilling to participate in termination of parental rights proceedings;

(b) Guardianship is available;

(c) When the natural parent(s) are incarcerated but subject to be released within a reasonable time and could be given an opportunity to work a service plan toward possible reunification;

(d) When a natural parent is terminally ill and unable to care or provide for the child;

(e) The absence of the parent is due to the parent's admission or commitment to any institution or health facility or due to active service in State or Federal armed forces;

(f) A child twelve (12) years or older objects to the termination of parental rights;

(g) The child is placed in a residential treatment facility and adoption is unlikely or undesirable or the child is not in an adoptive placement or it is likely the child will age out of the Department of Child Protection Services' custody rather than be adopted;

(h) For compliance with the Indian Child Welfare Act;

(i) The Mississippi Department of Child Protection Services has not provided services within the timeframes indicated in the case plan and there is evidence that the family may achieve reunification within six (6) months or there is a finding that reasonable efforts were not made.

E. Appeals from youth court

The act amended Miss. Code Ann. δ 43–21–651(1)(a) to clarify orders from which appeals must be taken. The provision states that final orders in youth court include grants of durable legal custody or durable legal relative guardianship, orders that transfer jurisdiction to another court (such as for an adoption) or otherwise terminate youth court jurisdiction over the child. "All factual findings, legal determination, and adjudication of issues" prior to the time the final order is entered "are preserved for appellate review and any common law to the contrary is expressly abrogated. Any matters adjudicated by the youth court through interim orders such as adjudication/disposition orders, or permanency review orders, may be only appealed through the interlocutory appeal process."

XII. Termination of parental rights

A. Youth court jurisdiction

***In re Adoption of Jane,* 360 So. 3d 286 (Miss. Ct. App. 2023). The court of appeals held that a chancery court had jurisdiction to hear an action to terminate parental rights and adopt a child, even though proceedings were pending in youth court. The exclusive jurisdiction of youth court applies only to county courts sitting as a youth court. It does not apply to youth court proceedings presided over by a youth court referee. The court also held that the child's grandmother, who had been granted custody by the youth court, lacked standing to object to termination of the parents' rights. Only the parents – who did not appear in the hearing or appeal the termination – have standing to challenge termination of their parental rights.

B. Personal jurisdiction

**Clark v. Tippah County Department of Child Protection Services,* 369 So. 3d 76 (Miss. Ct. App. 2023). The court of appeals rejected a mother's argument that an order terminating her parental rights was void because the court lacked personal jurisdiction to enter the adjudication of neglect on which the termination was based. The child was removed from her home when the mother was arrested for domestic violence. The summons for the adjudication hearing erroneously stated that the hearing would be held in Tippah, rather than Benton, County. The mother appeared in Tippah but did not have funds for gas to drive to Benton County. The youth court judge adjudicated the child neglected and found that the mother had failed to comply with the reunification plan. She also had threatened to kill CPS staff and the youth court judge. The court held that based on the mother's behavior and mental health issues, CPS was not required to work with the mother. At a subsequent hearing to restrain the mother from contacting CPS, the mother cursed at the judge, stormed out of the hearing, and attempted to avoid arrest by driving her car into a police car. She continued to make threats in spite of the restraining order. The court found that she was "mentally, morally, and otherwise unfit" and was unwilling or unable to provide reasonably necessary care for her child.

The court of appeals agreed that the adjudication hearing summons was defective. However, the mother waived the argument – she did not seek to set aside the order or appeal it and did not raise the issue at the termination proceeding. The court also held that it was not required to address the court's findings regarding termination because the mother did not raise issues regarding the termination in her appellate brief.

D.K. v. Youth Court of Lincoln County, 377 So. 3d 991 (Miss. Ct. App. 2023). Defendants in a termination of parental rights proceeding waived the issue of proper notice of hearings by appearing and participating in the hearings. The court also held that notice was proper. They were served with notice of the initial hearing date. Throughout multiple continuances – mostly at their request – each continuance order stated that previous process continued in effect and that all persons served to attend the previous hearing were ordered to attend the next hearing. The court also rejected their argument that the youth court lacked sufficient evidence to terminate parental rights. Multiple witnesses, including their children, testified regarding the parents' ongoing sexual abuse of all five children.

C. Venue

**Doe v. Adams Cty. Dep't of Child Prot. Services,* 361 So. 3d 1282 (Miss. 2023). A pregnant mother's temporary presence in a residential facility in Hinds County did not constitute "residence" for purposes of venue in a termination of parental rights proceeding. The mother, who was homeless, was arrested in Adams County on charges of possession and sale of drugs. Given the choice of jail in Adams County or going to a Hinds County substance abuse treatment facility

for pregnant women, she chose the facility. Her child was born there. Shortly after, she was negatively discharged and transported back to Adams County. The child was taken into custody by the Adams County CPS and placed in a foster home. The youth court found that it was in the child's best interest to change the plan from reunification to adoption and found that the mother's rights should be terminated.

On appeal, the supreme court rejected the mother's argument that venue was in Hinds County because her daughter was born there and because she planned to return to Hinds County. Her choice to be in Hinds County was not voluntary but an alternative to jail. She listed Adams County on the child's birth certificate as her residence, returned to Adams County when released, rented an apartment there, and entered a drug program there. Venue for youth court neglect and abuse proceedings lies in the county where the child's custodian resides or where the child is present when the report is made. Miss. Code Ann. δ 43-21-155(2). The supreme court noted that, while "residence" has not been interpreted in this statute, it is considered synonymous with "domiciled" in divorce statutes, meaning that the person must reside in a location with an intent to remain indefinitely. Temporary absences do not change a person's domicile.

D. Abandonment

Rogers v. Kresse, 365 So. 3d 1047 (Miss. Ct. App. 2023). A chancellor properly granted a father's petition to terminate parental rights of the mother of his two children. After their divorce, he was granted temporary custody in an emergency hearing. The mother was given restricted visitation during the day on Saturdays. He presented proof that she was using illegal drugs and exposing the children to unsafe conditions in the home she shared with her boyfriend, father, and father's girlfriend. A subsequent order provided her with supervised visitation every other Saturday and the option for supervised weekend visitation. The order also gave the father discretion to suspend all visitation if he suspected that she was using drugs. According to the father, she only exercised one supervised visitation after the order was entered. He denied visitation six months later when she admitted that she was using drugs. He later offered to allow visitation if she passed three drug tests and paid his attorneys' fees. According to the father, the mother called her son a month late for his birthday and was confused about the boy's birth date. Believing that she was using drugs, he told her that he would not permit any other visitation.

Neither parent brough the issue to court until several years later when the mother petitioned for visitation, alleging that she was sober. The father filed a petition to terminate her parental rights. The chancellor found that the mother had abandoned the children under Miss. Code Ann. δ 93-15-103(a)(ii), having failed to have contact with them for a period of over one year. The court of appeals affirmed – she had not seen the children in five years and had made only a few contacts by phone or letter. For at least two years she made no contact

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at all. The court held that reunification was not in the children's best interest. The younger child did not know her mother at all. The older boy did not want a relationship with his mother and wanted to be adopted by his stepmother, who he considered his mother.

The court acknowledged the mother's argument that the children's father should not have been given unlimited discretion to end visitation but stated that the order establishing that right was not the subject of the appeal. Furthermore, chancellors have broad discretion to restrict visitation to prevent an "appreciable danger of hazard."

**S.F. v. Lamar County Department of Child Protection Services*, 373 So. 3d 985 (Miss. 2023). The Mississippi Supreme Court affirmed a youth court judge's termination of a mother's parental rights with regard to her eighteen- and fourteen-year-old daughters. The court agreed that the mother's conduct after learning of her husband's sexual abuse of the girls amounted to "mental abandonment" and that her conduct had caused a substantial erosion of the relationship. The girls reported in 2018 that their adoptive father had sexually abused them but then recanted their charge. The older girl, who had a child prior to the first report, again reported abuse in less than a year. She alleged, and DNA testing proved, that the child she gave birth to at fifteen was her adoptive father's child. The court found that the mother failed to protect her daughters after learning of the abuse by continuing the relationship with the adoptive father. When she was told that her daughter's child was her husband's she did not believe her and slapped the girl. She subsequently violated an order that she not contact her older daughter by using the younger girl to pass messages to her sister. The majority held there was substantial evidence to support the determination that the mother had abandoned her daughters by failing to take steps to protect them after learning of the abuse, and that it was in their best interest to terminate her rights.

Two justices dissented, arguing that the evidence did not support the finding of abandonment or erosion of the relationship. The mother was a disabled veteran who was wheelchair-bound at the time she learned of the abuse and who was physically and financially dependent on her husband. She terminated the relationship after four months, long before he was incarcerated. The dissenters also pointed out that the girls exposure to their father shortly after they were removed was the fault of the custodial grandparents, not the mother. Both girls wanted to be with their mother – the elder, who was over eighteen at the time of the decision, was living with her at the time of trial. She appealed the termination along with her mother. The mother completed parenting courses, was in therapy, ended the relationship with her husband, exercised all visitation that she was given, and sent the girls gifts and financial support.

The dissenters agreed with the majority that the youth court had jurisdiction over the termination with regard to the older daughter, who was two months short of eighteen at the time the petition was filed. However, they argued that the court should have considered the wishes of one who was over eighteen by the time the decision was made.

E. Compliance with service plan

**Denham v. Lafayette County Dep't of Child Protection Services*, 356 So. 3d 173 (Miss. Ct. App. 2023). A chancellor correctly found that CPS made reasonable efforts over a reasonable time to diligently assist a mother in complying with the service plan. She did not show up for most of her drug screens and failed the two she did take. She refused to allow CPS workers to enter her home on numerous occasions, allowing them only one visit over the three years in which they worked with her. She did not complete the required mental health assessment and her home was unsafe and unsanitary. She was arrested for assault, domestic violence, disturbing the peace, felony shoplifting, and trespassing. The evidence supported a finding that she failed to comply with the plan and that she was unwilling or unable to provide necessary care for her child.

F. Assistance of counsel

Denham v. Lafayette County Dep't of Child Protection Services, 356 So. 3d 173 (Miss. Ct. App. 2023). The court of appeals rejected a mother's argument that her court-appointed attorney's alleged ineffective assistance of counsel required reversal. Mississippi appellate courts have held in other contexts that the Sixth Amendment right to effective assistance of counsel does not apply in civil proceedings. Furthermore, even if the right applied, the mother failed to demonstrate prejudice because of her attorney's performance. She complained that the attorney did not subpoena her prescription drug records; however, she could have obtained the records and provided them to the attorney. She also argued that her attorney failed to object to hearsay in the GAL's report; however, the hearsay she referenced was corroborated by other testimony.

G. Recusal

**Doe v. Adams Cty. Dep't of Child Prot. Services,* 361 So. 3d 1282 (Miss. 2023). The supreme court rejected a mother's argument that a youth court judge should recuse himself because, as the judge adjudicating neglect, he determined that termination and adoption, rather than reunification, was in the child's best interest. The legislature has granted youth court judges authority to hear both adjudication and termination proceedings.

XIII. Jurisdiction and procedure

A. Jurisdiction

**Daly v. Raines,* 2023 WL 7143115 (Miss. Ct. App. Oct. 31, 2023). A chancellor had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to modify its order of paternity and custody. On May 6, 2019, the father, who now lived in Maryland, filed a petition for emergency custody and to modify custody, alleging that the mother had moved to Florida, was diagnosed with a mental illness that required inpatient treatment,

and had been arrested for domestic violence and felony battery. The child was living in Mississippi with the maternal grandparents, who brought her back to Mississippi after she lived with the mother in Florida for eight months. The chancellor found that a material change in circumstances adverse to the child had occurred and that it was in the child's best interest to be in her father's custody. On appeal, the mother argued that the court lacked jurisdiction to modify the order after all parties had moved from the state. The court of appeals rejected her argument. The child was living in Mississippi with her grandparents when the petition was filed. Furthermore, the mother testified that the child's life "has been here in Mississippi." The court also noted that the mother did not raise the issue at trial.

B. Service of process: Void and voidable orders

**Mississippi Dep't of Human Services v. Johnson*, 2023 WL 8592891 (Miss. Ct. App. Dec. 12, 2023). The court of appeals held that a 2002 judgment of paternity and child support was void for lack of proper service of process under Rule 81(d). The putative father was served on January 21, 2002, with a Rule 81(d) summons setting a hearing for February 19, 2002. He did not appear. The court entered a judgment of paternity and an order requiring that he pay $285 a month in child support. When his driver's license was suspended for nonpayment a year later, he contacted DHS and signed a stipulated agreement of support setting a schedule for payment. The court approved the agreement and entered a new order. Soon after, the defendant was incarcerated in Arkansas, where he remained until June 2021. In 2020, pursuant to a new policy regarding incarcerated payors, DHS and Johnson entered an agreement suspending his support during his incarceration. When he was released, he filed a pro se petition to reduce his obligation. He then obtained counsel, who petitioned to set aside the original judgment as void because it was served twenty-nine days prior to the hearing rather than thirty days as required by Rule 81(d). The chancellor agreed, set aside the 2002 order, and ordered DHS to return funds obtained under the void order.

The court of appeals noted that under Rule 60(b)(4), a party may seek to set aside a void judgment at any time – "no amount of time or delay may cure a void judgment." A judgment of child support is void if the court did not have personal jurisdiction over the defendant. Under Rule 81(d), a paternity action is triable thirty days after service of process is completed. Because service was not proper and the defendant did not appear, the court lacked jurisdiction to enter the order. The father did not waive the issue by signing two stipulations regarding his arrearages. Waiver occurs when a party appears and defends the case on the merits without preserving the issue of jurisdiction. Johnson's agreements did not amount to defenses on the merits of the case, which had already proceeded to judgment. The court also held that equitable doctrines such as laches do not apply to void judgments. Four judges dissented. First, they disagreed that the court failed to acquire personal jurisdiction, arguing that the defendant was properly served – the fact that he was served a day late was not a defect that made the judgment void for lack of service of process. Second, the

dissent urged that by entering into two agreements acknowledging the judgment without raising the issue, he waived the objection of lack of jurisdiction.

**Harrison v. Howard*, 356 So. 3d 1232 (Miss. Ct. App. 2023). A father waived the issue of personal jurisdiction by appearing and defending a Rule 81 contempt matter. Four years after a couple's divorce, the wife filed a petition for contempt. The husband was served with a Rule 81 summons and filed a response and counterclaim. The mother moved for a continuance of the April 12, 2017, hearing but no new summons was issued. The father appeared at the rescheduled November 8, 2017, hearing at which he stated that he agreed to the proposed order and that no issues remained to be resolved. He did not move to set the order aside, ask to alter or amend the order, or appeal. One year later, the mother filed another petition for contempt. At the hearing, the father asserted that the November 2017 agreed order was void because he was not served with a Rule 81 summons. The chancellor rejected the argument and found him in contempt. The court of appeals held that the father should have been served with a new Rule 81 summons when the matter was continued without an order setting a specific date for a hearing. However, he waived the issue of personal jurisdiction by answering and appearing in the action without raising the issue.

He also argued that the November 2017 agreed order was void because he did not consent to it. He did not appeal the order and first raised the issue in the March 2019 contempt hearing. The court of appeals discussed the difference in void and voidable defects. A void order may be attacked in a collateral action even if the party did not appeal the issue. A voidable order may not be attacked collaterally. The father's argument that he did not agree to the order raised a voidable defect. He was barred from raising the issue for the first time in a collateral attack on the judgment. Nonetheless, the court addressed his contention, holding that one who consents in open court to entry of an order indicates his agreement even without signing the order.

C. Rule 81 or notice of hearing

**Bolivar v. Bolivar,* 378 So. 3d 433 (Miss. Ct. App. 2024). The court of appeals reversed a judgment of contempt, holding that a petition for contempt for violation of a temporary support order in a pending action must be noticed through a Rule 81(d) summons. The court acknowledged that the caselaw on this issue is unclear, dating back to *Sanghi v. Sanghi,* 759 So. 2d 1250 (Miss. Ct. App. 2000). That case distinguished between the summons required for new matters that arise post-litigation and the notice required for hearings in pending litigation. Subsequent cases interpreted *Sanghi* as allowing notice of contempt proceedings in pending litigation through a Rule 5 Notice of Hearing. The court overruled those cases, holding that a contempt action for failure to comply with a temporary order in pending litigation must be noticed through a Rule 81(d) summons.

**Urban v. Urban,* 2023 WL 5695670 (Miss. Ct. App. Sept. 5, 2023). The court of appeals rejected a pro se appellant's argument that his ex-wife's Rule 59 motion should have been served through a Rule 81 summons. A Rule 81 summons is used when a filing – no matter how it is titled – seeks to revive a dormant action. For example, petitions to modify a judgment or to enforce a judgment through contempt require a new Rule 81 summons. However, a Rule 59 motion is a motion within pending litigation. A timely Rule 59 motion suspends a judgment until the court rules on the motion. The chancellor properly determined that an error of law had occurred and revised the judgment to provide custody to the mother rather than the father.

Schaubhut v. Schaubhut, 2023 WL 7316990 (Miss. Ct. App. 2023). The court of appeals held that a husband who did not appear in court was properly served with process. He argued that he was improperly served because he was in a hospital recovery room and impaired and because his wife assisted the process server to gain access to the room. The court held that because he cited no authority to support his argument, he waived the argument. In addition, he admitted that he took the summons home with him from the hospital but did not look at it. The chancellor viewed a video of the service and found that he was competent at the time he was served.

D. Motions

Capocaccia v. Capocaccia, 2023 WL 6819437 (Miss. Ct. App. Oct. 17, 2023). The court of appeals affirmed a chancellor's denial of a father's motion for continuance of a post-trial contempt hearing. Six days before the hearing, his attorney emailed the request for continuance to the wife's attorney and placed the motion in the mail to the court. His attorney filed the petition with the court the morning of the hearing. The court affirmed the denial, based on unexplained delay in filing the motion and because the father presented no valid defense to the contempt petition.

E. Affirmative defenses

**Herbert v. Herbert,* 2023 WL 3069523 (Miss. Ct. App. April 25, 2023). The court of appeals affirmed a circuit court's grant of summary judgment to a wife who was sued by her former husband in tort. The chancellor found that the couple's prenuptial agreement waived all claims arising out of their marriage. The husband argued on appeal that his wife waived the affirmative defense of waiver and release because she did not include it in her answer. The supreme court agreed that she waived the defense but affirmed the chancellor's decision on other grounds.

**West v. West,* 371 So. 3d 145 (Miss. 2023). The supreme court reversed a chancellor's order that a wife's 2008 judgment was barred by the statute of limitations because she did not renew the judgment within seven years. The supreme court agreed with the wife that her ongoing litigation to enforce the judgment, filed within seven years of the judgment, tolled the statute of limitations. The court also agreed that the husband waived the statute of limitations argument by failing to raise it as an affirmative defense.

F. Recusal

Doe v. Adams Cty. Dep't of Child Prot. Services, 361 So. 3d 1282 (Miss. 2023). The supreme court rejected a mother's argument that a judge's statements of facts about her drug use in a pretrial hearing required recusal under Canon 3 of the Mississippi Code of Judicial Conduct (requiring recusal when a judge has "personal knowledge of disputed evidentiary facts"). The court distinguished cases in which a judge effectively became a witness by making fact statements about disputed facts in a case – here, the judge simply mentioned undisputed facts regarding the mother's prior drug use in response to the mother's petition to transfer venue.

G. Evidence, testimony of children

**Daly v. Raines,* 2023 WL 7143115 (Miss. Ct. App. Oct. 31, 2023). The supreme court held that a chancellor erred in denying a mother's request to call a seven-year-old child as a witness without conducting an *in camera,* recorded interview to determine the child's competency as a witness, as well as the competency of any evidence the child would provide. The court should determine whether it is in the child's best interest to testify and state the reasons for allowing or disallowing the testimony, including the factual information which would be included if the child testified.

H. Appeals

1. Record of proceedings

Schaubhut v. Schaubhut, 2023 WL 7316990 (Miss. Ct. App. 2023). The court of appeals rejected a husband's claim that his wife obtained an unfair division of assets through fraud. He claimed that the failure to create a transcript of the hearing in his absence was error. However, there is no requirement of a transcript in an uncontested divorce hearing. In order to prove his allegation of fraud, he should have attempted to learn what happened in the hearing, presented his understanding to his wife, and requested that the chancellor resolve any conflict regarding the hearing under Rule 10 of the rules of appellate procedure. Because he did not use this procedure to create a record for appeal, there was no evidence to review his claim of fraud.

2. Waiver of argument

**Poole v. Poole,* 2023 WL 5922110 (Miss. Ct. App. Sept. 12, 2023). The court of appeals rejected a father's argument that a chancellor should have reviewed the *Martin v. Coop* factors to determine the amount of grandparent visitation. The court held that the issue was waived because the father's attorney did not object to the court's bench ruling, orally agreed to the amount of visitation ordered, and drafted the visitation order. Four dissenters disagreed. They argued that an attorney is not required to object to a court's bench ruling. In addition, they did not view the attorney's comments during the ruling as agreement to the order but rather a request for clarification. Nor did the fact that the attorney, at the court's instruction, drafted and signed the order "as to form only" constitute an agreement. The dissenters would reverse for findings under *Martin* regarding the amount of visitation, particularly since the visitation equaled the usual parent visitation.

McGovern v. McGovern, 372 So. 3d 138 (Miss. Ct. App. 2023). A chancellor erred in declining to consider a husband's contempt petition based on failure to serve the wife with a Rule 81 summons in the matter. The wife waived the issue by responding to the motion and addressing the matter at trial without raising the issue of lack of service of process.

3. Fugitive dismissal rule

Gillen v. Gillen, 2023 WL 5028132 (Miss. Ct. App. Aug. 8, 2023). The court of appeals dismissed a husband's appeal based on the fugitive dismissal rule. He used his check-signing authority as an employee of his wife's business to transfer $350,000 to himself, deposited the checks into the couple's account, wired over $1 million from the account to his father, and left the state. The wife filed for divorce and sought temporary relief ordering him not to transfer assets. The chancellor ordered him to deposit $1,000,000 into the registry of the court after he testified at the hearing that he had $800,000 hidden. The court held him in criminal and civil contempt when he failed to comply with the order or to appear in court. Three attorneys who represented him withdrew as counsel. The court of appeals declined to address his appeal of the contempt judgment, based on the fugitive dismissal rule – he had removed himself from the state to avoid incarceration and compliance with the court's orders.

4. Order to stay time for appeal

Capocaccia v. Capocaccia, 2023 WL 6819437 (Miss. Ct. App. Oct. 17, 2023). The court of appeals declined to hear a father's argument that he was improperly held in contempt during divorce proceedings for failure to pay $50,000 in temporary support. The contempt order was entered on December 7, 2021. On December 16, 2021, the court entered another order in the matter. The December 16 order stated that the court would soon enter a final order and that any

motions or appeals related to the order "entered herein on this date" would be stayed. It appears from the record of the December 7 hearing that the father's attorney intended that a stay apply to the December 7 order as well as the December 16 order. However, the court's order, drafted by the attorneys, did not include that provision. Furthermore, a court has no authority to extend the time for filing Rule 59 motions.

I. Orders on remand

**Johnson v. Johnson,* 376 So. 3d 362 (Miss. Ct. App. 2023). On remand of this case, the chancellor properly awarded a wife 45% of her husband's National Guard pension. They were married for twenty-five of his twenty-eight years of service, making 89% of the pension marital. The court rejected the husband's argument that the chancellor lacked authority to make the pension award retroactive to the date of their divorce. The court noted that there is precedent for making alimony awards on remand retroactive to the date of the original divorce decree, citing *Monroe v. Monroe*, 745 So. 2d 249 (Miss. 1999).

XIV. Attorneys' fees

A. Based on agreement

**Rawlings v. Rawlings*, 374 So. 3d 1261 (Miss. Ct. App. 2023). A wife was not entitled to attorneys' fees in her former husband's unsuccessful attempt to modify alimony based on income loss. She argued that fees were required by their Tennessee Property Settlement Agreement, which stated that the prevailing party would be entitled to attorney's fees "should litigation be necessary to enforce any provision of the Agreement." The court of appeals held that the provision was inapplicable – she was not required to bring suit to enforce the agreement. Her husband was not in breach, having made all alimony payments. He was entitled to seek a modification of alimony when he lost his employment.

B. Frivolous litigation

**Herbert v. Herbert,* 374 So. 3d 562 (Miss. Ct. App. 2023). The court of appeals reversed a circuit court's denial of a wife's request for attorneys' fees under Rule 11 and the Mississippi Litigation Accountability Act. The court affirmed the trial judge's summary judgment for the wife, holding that several of the husband's claims were without a legal basis. Because several of his claims were frivolous, the trial court erred in denying attorney's fees. The court remanded for a determination of the amount of fees related to frivolous claims.

C. Based on dilatory tactics

Capocaccia v. Capocaccia, 372 So. 3d 1106 (Miss. Ct. App. 2023). A chancellor erred in awarding a wife $16,000 of her $31,119 in attorneys' fees based on the husband's lack of candor, without making findings regarding the

additional costs that were necessitated by his actions. There was no evidence to show that half of her fees were caused by his conduct.

D. Amount of award

Chambliss v. Chambliss, 2023 WL 7317109 (Miss. Ct. App. Nov. 7, 2023). The court of appeals affirmed a chancellor's award of $3,500 of the wife's $13,047 in attorney's fees, noting that the case was "simple" – involving admitted grounds for divorce, few assets, and only one marital account to divide. The award provided the wife with sufficient funds to pay the remainder of her fees.

**Gussio v. Gussio,* 371 So. 3d 734 (Miss. Ct. App. 2023). The court of appeals divided equally with regard to the appropriateness of an award of attorneys' fees. The majority opinion held that the chancellor properly awarded $200,000 in attorneys' fees (less than half of the fees submitted by the wife's two attorneys). The trial spanned five years, fifteen days of hearings, ninety-one motions, and multiple attorney changes by the husband . The chancellor found that the case required extensive research and discovery, prevented the attorneys from taking other work, and that the fees were reasonable, necessary, and reflected the actual work done.

The dissenting judges would reverse for additional findings on attorneys' fees. They argued that documentation of the lead attorney's work was a summary document that included lump sums and the date on which the sums were paid but did not include a description of the work performed. It was not possible to determine whether a particular charge was for work done by the lead attorney, another attorney, or a paralegal or what portion of the work was expended on an unsuccessful attack on the prenuptial agreement. In addition, it was not possible to determine whether any of the work of the two attorneys was duplicative. The majority held that an itemized statement is not necessary – a chancellor may determine reasonableness of fees based on the court's experience and observation of the litigation.

NONPARENT VISITATION: RECENT DEVELOPMENTS

I. Grandparents' visitation rights

The Mississippi grandparent visitation statute has been in place for over forty years. It includes two provisions for visitation, referred to as Type 1 and Type 2. It is the primary source of nonparent visitation rights in Mississippi. The scope and application of the statute has been significantly changed and clarified by appellate court decisions in the last few years.

A. Type 1 expanded

Type 1 visitation applies when one parent of a child has died, lost custody, or had their rights terminated. For decades, the Type 1 subsection provided that when one parent lost custody, died, or had their rights terminated, *"either parent of the parent who lost custody"* could seek visitation.

The statute was amended in 2009. It now provides, "Whenever a court of this state enters a decree or order awarding custody of a minor child to one (1) of the parents of the child or terminating the parental rights of one (1) of the parents of a minor child, or whenever one (1) of the parents of a minor child dies**, *either parent of the child's parents*** may petition the court in which the decree or order was rendered or, in the case of the death of a parent, petition the chancery court in the county in which the child resides, and seek visitation rights with the child." Miss. Code Ann. δ 93-16-3(1).

The first case to interpret the change was *Poole v. Poole,* 2023 WL 5922110, at *4-5 (Miss. Ct. App. Sept. 12, 2023). In that case, after a child's mother died and the father took custody, he denied his mother visitation, even though she had been the child's guardian for several years. The court held that the petitioner could seek visitation as "either parent" of the child's parents. The court also noted that courts should not consider Type 2 unless Type 1 is unavailable.

B. The *Martin v. Coop* factors

In addition to finding that a grandparent meets the statutory requirements set out above, a court must consider the factors in *Martin v. Coop* to determine whether visitation is in a child's best interests, whether the action is brought under Type 1 or Type 2. The factors include

- potential disruption in the child's life;
- suitability of the grandparents' home;
- the child's age;
- the age and physical and mental health of the grandparents;

- the emotional ties between grandparent and child;
- the grandparents' moral fitness;
- physical distance from the parents' home;
- any undermining of the parents' discipline;
- the grandparents' employment responsibilities; and
- the grandparents' willingness not to interfere with the parents' rearing of the child. *See*

Martin v. Coop, 693 So. 2d 912, 916 (Miss. 1997).

These factors were set out in 1997 to guide courts in determining the appropriate amount of visitation that should be awarded. In *Zeman v. Stanford,* 789 So. 2d 798, 803 (Miss. 2001), the Mississippi Supreme Court held that the factors should also be considered in determining whether visitation should be awarded at all.

C. Persons who qualify as "grandparents" under Type 1 and 2

The court of appeals held in 2014 that great-grandparents have no standing to seek visitation with a child under the grandparent visitation statute. The term "grandparent" is used throughout the statute; the term "great-grandparent" does not appear. The statute is strictly construed – third parties have no right to custody or visitation at common law. *Lott v. Alexander,* 134 So. 3d 369, 374 (Miss. Ct. App. 2014).

Similarly, in 2019, the court of appeals held that courts may not award visitation to step-grandparents, noting that the statute refers to visitation given to a "parent of a child's parent." *Garner v. Garner,* 283 So. 3d 120, 141 (Miss. 2019). Three judges dissented, arguing that the step-grandfather had acted *in loco parentis* as a grandparent. *Id.*

D. Type 2 visitation

1. The statute

Subsection (2) provides that any grandparent not authorized to petition for visitation rights under Type 1 may petition the chancery court and seek visitation rights with his or her grandchild, and the court may grant visitation rights to the grandparent, provided the court finds that:

- The grandparent of the child had established a viable relationship with the child;
- The parent or custodian of the child unreasonably denied the grandparent visitation rights with the child; and
- Visitation rights of the grandparent with the child would be in the child's best interests (applying the *Martin v. Coop* factors).

Subsection (3) defines viable relationship as one in which

- "the grandparents or either of them have voluntarily and in good faith supported the child financially in whole or in part for a period of not less than six (6) months before filing any petition for visitation rights with the child, *and*
- the grandparents have had frequent visitation including occasional overnight visitation with said child for a period of not less than one (1) year, *or*
- the child has been cared for by the grandparents or either of them over a significant period of time during the time the parent has been in jail or on military duty that necessitates the absence of the parent from the home."

Miss. Code Ann. δ 93-16-3(2),(3).

2. Viable relationship

The statutory requirements must be met with respect to each child with whom the grandparent seeks visitation. A chancellor erred in awarding a grandmother visitation with three children, including a ten-month-old with whom she did not meet the test for a viable relationship. The grandmother was entitled to visitation with the two older children but not with the younger. *Greer v. Akers,* 364 So. 3d 662, 669-70 (Miss. Ct. App. 2021) (but rejecting parents' argument that the rule against separating siblings should prevent visitation since the younger child was not included); *see also Sims v. Sims,* 337 So. 3d 1085, 1095-97 (Miss. Ct. App. 2021) (grandfather did not establish viable relationship with two younger grandchildren; his son stopped visitation shortly after the twins were born).

Attempts to establish a viable relationship with a child do not meet the statutory criteria, even if the attempts are thwarted by the child's parents. The court of appeals reversed an award of visitation to grandparents who sent gifts that were returned and whose requests to visit were denied by the parents. The court emphasized that there is no inherent right to grandparent visitation. The right depends on proof of narrow, statutory criteria designed to protect parents' rights. The desire to have a viable relationship with a child is not sufficient under the statute. *Vermillion v. Perkett,* 281 So. 3d 925, 932 (Miss. Ct. App. 2019) (rejecting argument that grandmother who only saw child twice after her birth attempted to establish a viable relationship; an actual viable relationship is a prerequisite to an award of visitation); *Aydelott v. Quartaro,* 124 So. 3d 97, 103 (Miss. Ct. App. 2013).

3. Unreasonable denial

Hutson v. Hutson, 2023 WL 6418777 (Miss. Ct. App. Oct 3, 2023). The court of appeals affirmed a chancellor's finding that a girl's parents reasonably denied visitation with her paternal grandfather. The couple had three

children. The youngest girl was their biological child. The older two were the wife's children but the husband considered them to be his family. In 2019, the parents denied visitation based on the grandfather's preferential treatment of his biological grandchild over the other two children. He admitted that he did not love them or consider them family. They stated that his preferential treatment was causing problems within their family. The chancellor found that the grandfather had a viable relationship with the girl but that the parents acted reasonably in denying visitation. The court of appeals affirmed, stating that parents have a paramount right to control their children's environment.

The court of appeals also rejected the grandfather's argument that the chancellor should have examined the *Martin v. Coop* factors to determine whether grandparent visitation was in the child's best interest. A chancellor is not required to determine best interests unless he first finds that the grandparent had a viable relationship with the child and that visitation was unreasonably denied.

E. Attorneys' fees

Subsection (4) of the statute provides that, upon a showing of financial hardship for the parents, "the court shall on motion of the parent or parents direct the grandparents to pay reasonable attorney's fees to the parent or parents at any time, including before a hearing, without regard to the outcome of the petition." Miss. Code Ann. δ 93-16-3(4).

The supreme court held in 2021 that subsection (4) applies only in Type 2 visitation. The supreme court reversed a chancellor's award of attorneys' fees to a mother in a visitation action brought against her by the paternal grandmother. The court noted that subsection (4) of the statute refers to "petitions for visitation rights under subsection (2)." No similar provision refers to subsection (1) visitation. *Battise v. Aucoin,* 311 So. 3d 588, 590-92 (Miss. 2021).

II. Visitation rights of other nonparents

A. General rule

The traditional rule is that parents are presumed to be the best guardians of their children. To obtain custody, a nonparent must rebut that presumption by proving that the parent has abandoned or deserted the child or is unfit.

The Mississippi Supreme Court has stated that nonparent visitation is not permitted at common law, and that it is the role of the legislature to extend visitation rights to persons other than parents. For example, the court affirmed the denial of a girl's petition to visit with her half-brother after their mother died, stating that extension of visitation is a matter for the legislature. *Scruggs v. Saterfiel,* 693 So. 2d 924, 926 (Miss. 1997). Similarly, the court of appeals held that foster parents have no right to visitation with a child. *In re S.L.B.,* 122 So. 3d 1239, 1241 (Miss. Ct. App. 2013).

B. Persons acting *in loco parentis*

The Mississippi Supreme Court has defined *in loco parentis* as follows: "[A]ny person who takes a child of another into his home and treats it as a member of his family, providing parental supervision, support and education, as if it were his own child, is said to stand *in loco parentis*." *Griffith v. Pell,* 881 So. 2d 184, 186 n.1 (Miss. 2004) (quoting *Logan v. Logan,* 730 So. 2d 1124 (Miss. 1998)); *see also J.P.M. v. T.D.M.,* 932 So. 2d 760 (Miss. 2006).

1. Legal fathers

The supreme court recognizes custody and visitation rights in nonbiological, legal fathers who act *in loco parentis* to a child they believed to be their own. In *Griffith v. Pell*, 881 So. 2d 184 (Miss. 2004), the court recognized custody and visitation rights in a man who believed that his wife's child was his own. The biological father joined his petition that he continue as the child's legal father. The supreme court held that a presumed father who acts *in loco parentis* – assuming the status and obligations of a parent – may have parental rights: "Merely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship." *Id.* at 186; *see also J.P.M. v. T.D.M.,* 932 So. 2d 760, 770 (Miss. 2006) (nonbiological legal father awarded custody – the biological father was not seeking rights, the husband had a strong father-daughter relationship with the girl, and it was not in her best interest to exclude him from her life).

In 2014, the supreme court appeared to overrule this line of cases, holding broadly that one who acts *in loco parentis,* including a legal father, must prove abandonment, desertion, or unfitness to obtain custody. It is significant that in *Waites*, the biological father was seeking custody. *In re Waites,* 152 So. 3d 306 (Miss. 2014).

In 2019, the supreme court clarified the rule, retreating from its position in *Waites*. In *Ballard v. Ballard,* a chancellor awarded custody of three children to the mother's husband. He was not the biological father of the youngest child but had acted as her father. The court distinguished *Waites* on the basis that the biological father sought custody in *Waites* but not in the instant case. "The chancellor was within his discretion in finding that Marshall's *in loco parentis* status entitled him to be on *equal footing with Candice in the custody determination* about Jill." *Ballard v. Ballard,* 289 So. 2d 725, 733 (Miss. 2019) (emphasis added).

The court in *Ballard* held that the natural-parent presumption had been rebutted based on these factors, originally set out in *Smith v. Smith,* 97 So. 3d 43 (Miss. 2012):

- the husband stood *in loco parentis* to the child;

- he had supported, cared for, and treated the child as his own;
- he could have been required to pay child support; and
- the biological father was not in the picture.

The court of appeals applied the same approach in a 2024 case, affirming a chancellor's grant of joint physical custody to a mother and the child's legal father. The court of appeals rejected the mother's argument that the legal father was not entitled to custody, applying the four-factor test of discussed in *Ballard. Horn v. Seeden*, 2024 WL 1519335, at *3 (Miss. Ct. App. April 9, 2024).

2. Other nonparents

In 2006, the supreme court distinguished persons such as grandparents who acted *in loco parentis* from legal fathers: "We find the instant situation [a legal father seeking custody] distinguishable from the cases on which [the mother] relies and note that the third parties seeking custody in *Sellers* and *Keely* were an aunt and a grandfather, respectively, whereas [the husband] has been Catherine's 'legal father' since her birth. Thus, he has existing legal rights and obligations that the third parties in *Sellers* and *Keely* did not." *J.P.M, supra* , at 768.

In 2012, the supreme court rejected a grandmother's argument that she should be treated equally in the custody analysis based on *in loco parentis*. The court stated, "Grandparents who stand *in loco parentis* have no right to the custody of a grandchild, as against a natural parent, unless the natural-parent presumption is first overcome by a showing of abandonment, desertion, detrimental immorality, or unfitness on the part of the natural parent. Thus, the Smiths' standing as *in loco parentis* is insufficient to overcome the natural-parent presumption." *See also Davis v. Vaughn,* 126 So. 3d 33, 37 (Miss. 2013) (denying custody to a grandmother who had raised her granddaughter for most of her life; *in loco parentis* standing alone did not rebut the natural parent presumption).

All of the *in loco parentis* cases prior to *Brownlee* involved petitions for custody. There was no discussion of a right to visitation apart from custody. In one case, *Davis v. Vaughn,* 126 So. 3d 33 (Miss. 2013), a grandmother sought custody based on *in loco parentis* status. She was denied custody but awarded visitation – presumably under the grandparent visitation statute – because it was in the child's best interest. In another case, a stepfather who had acted *in loco parentis* was awarded visitation based on the biological father's agreement that he have custody. *In re Waites,* 152 So. 3d 306, at n.10 (Miss. 2014). Neither award of visitation was appealed.

C. *Brownlee v. Powell*

In 2023, the Mississippi Supreme Court remanded a chancellor's dismissal of a woman's petition for visitation with the children of her former same-sex partner. The women lived together in a romantic relationship for almost six years. The defendant had a seven-year-old son when their relationship began

and gave birth to a daughter shortly after it began. The boy's biological father was unknown. The daughter's legal and biological father was an active parent and supported her. The chancellor held that Mississippi law does not recognize *in loco parentis* visitation for a person who cohabits with a biological mother. The cohabitant appealed.

The biological mother argued that nonparent visitation is limited to grandparents (by statute); and legal fathers who believed that a child was their biological child. The plaintiff cohabitant argued that visitation is not limited to these categories. The supreme court agreed that visitation for person who act *in loco parentis* is not necessarily limited to legal fathers.

1. The *Brownlee* test

The test for visitation under *Brownlee* is open to question. Attorneys have argued for a more narrow four-factor test and a broader, best interests test.

The four-factor test. The court stated that the plaintiff's complaint stated a claim on which she could be awarded visitation, if she could prove she that she "came within limited, unique circumstances described below." The court then discussed cases in which legal fathers were granted custody rights based on the *Smith* and *Ballard* factors that rebut the natural parent presumption: (1) a petitioner stood *in loco parentis* to a child; (2) the petitioner supported, cared for, and treated the child as their own; (3) the petitioner could have been required to pay child support; and (4) the biological father of the child was not in the picture. *Brownlee v. Powell,* 368 So. 3d 1268, 1272-73 (Miss. 2023).

One view is that the decision requires proof of these factors for visitation. However, the decision does not explicitly state that they are requirements. Furthermore, the third and fourth factors are more applicable to legal fathers than to other nonparents. And, the factors were developed to rebut the natural parent presumption for the purposes of custody – ordinarily one who seeks visitation does not have to rebut the natural parent presumption. On the other hand, four concurring judges read the majority decision as requiring that the natural parent presumption be rebutted. Four justices joined in a concurring opinion urging that persons acting *in loco parentis* should not have to overcome the natural parent presumption when they seek visitation rather than custody. Instead, they should be required to prove that a viable relationship exists between them and the child as the result of a parent-like relationship and that visitation is in the child's best interest. *Id.* at 1276.

The best interest test. A broader reading of the case comes from the court's language toward the end of the decision, stating that visitation rights may be granted "in very limited, unique situations, in which justice so requires and the child's wellbeing demands a relationship with a person who has stood *in loco parentis* in his or her life." *Id.* at 1274.

2. Rights inferior to parents' rights

The court emphasized throughout *Brownlee* that rights under the doctrine are inferior to those of a natural parent.

- "Although this doctrine grants third parties certain parental rights, such rights are inferior to those of a natural parent. Giving preference to natural parents, even against those who have stood in their place, honors and protects the fundamental right of natural parents to rear their children."

- "While there are "very limited, unique situations" in which in loco parentis can be used to help rebut the natural parent presumption, the fundamental rights of natural parents remain top tier."

- "Nature gives to parents that right to the custody of their children which the law merely recognizes and enforces. It is scarcely less sacred than the right to life and liberty, and can never be denied save by showing the bad character of the parent, or some exceptional circumstances which render its enforcement inimical to the best interests of the child."

3. Questions

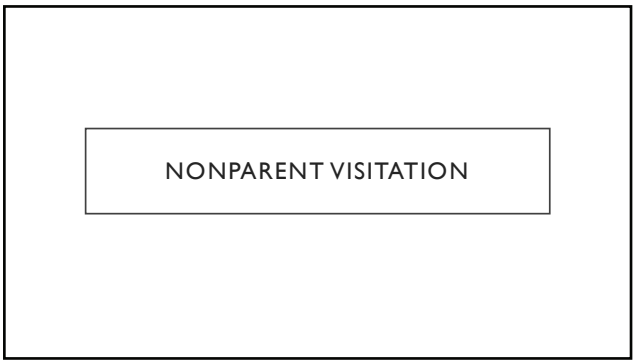
Brownlee leaves open several questions. What it does make clear is that persons who act *in loco parentis* may be awarded visitation in unique circumstances, and that visitation is not limited to legal fathers who act *in loco parentis*. Questions include:

- whether *Brownlee* opens the door to custody by other nonparents or is limited to visitation;

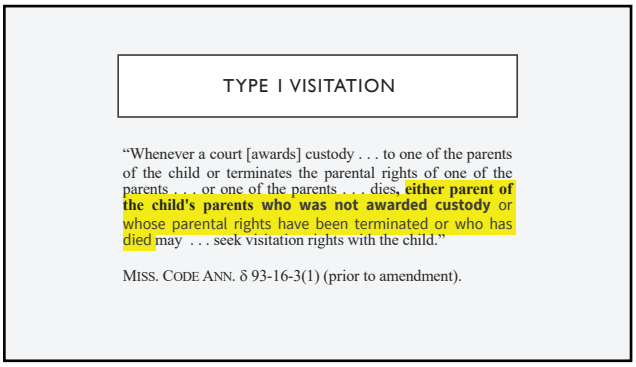
- whether the test is the four-factor test of *Smith* and *Ballard* or a broader best-interest test;

- whether – if the four-factor test applies – the requirement that the biological father is absent will be met if either parent is absent and someone – regardless of gender – acts to fill that role; and

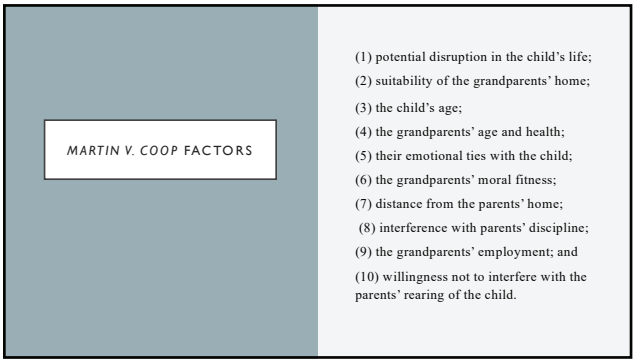
- whether the requirement that the petitioner could have been ordered to pay child support applies to nonparents other than legal fathers.


NONPARENT VISITATION

1


TYPE I VISITATION
"Whenever a court [awards] custody . . . to one of the parents of the child or terminates the parental rights of one of the parents . . . or one of the parents . . . dies, either parent of the child's parents who was not awarded custody or whose parental rights have been terminated or who has died may . . . seek visitation rights with the child."
MISS. CODE ANN. δ 93-16-3(1) (prior to amendment).

2


MARTIN V. COOP FACTORS
(1) potential disruption in the child's life;
(2) suitability of the grandparents' home;
(3) the child's age;
(4) the grandparents' age and health;
(5) their emotional ties with the child;
(6) the grandparents' moral fitness;
(7) distance from the parents' home;
(8) interference with parents' discipline;
(9) the grandparents' employment; and
(10) willingness not to interfere with the parents' rearing of the child.

3

TYPE I AS AMENDED

- "Whenever a court [awards] custody . . . to one of the parents of the child or terminates the parental rights of one of the parents . . . or one of the parents . . . dies, either parent of the child's parents ~~who was not awarded custody or whose parental rights have been terminated or who has died~~ may . . . seek visitation rights with the child."
- MISS. CODE ANN. § 93-16-3(1).

4

POOLE V. POOLE

A grandmother who had been a child's guardian for four years was awarded visitation under Type 1 after the guardianship was terminated and her son took custody. The child's mother was deceased.

The court held that a grandparent whose own child has custody and denies them visitation has standing under Type 1 as "either parent of the child's parents."

5

PERSONS WHO QUALIFY AS "GRANDPARENTS"

Great-grandparents are not entitled to visitation. *Lott v. Alexander,* 134 So. 3d 369, 374 (Miss. Ct. App. 2014).

Step-grandparents are not entitled to visitation. *Garner v. Garner,* 283 So. 3d 120, 141 (Miss. 2019).

Visitation is limited to the "parent of a child's parents."

MISS. CODE ANN. § 93-16-3.

6

VIABLE RELATIONSHIP

To establish a viable relationship, a grandparent must show that they

(1) supported the child financially in whole or in part for not less than six (6) months before filing, AND

(2) Had frequent visitation including occasional overnight visitation with the child for not less than one (1) year, OR

cared for the child for a significant period of time while the parent was in jail or on military duty.

7

ESTABLISHING A VIABLE RELATIONSHIP

A chancellor erred in awarding a grandmother visitation with a ten-month-old with whom she did not have a viable relationship. The requirements must be met with respect to each child with whom the grandparent seeks visitation. *Greer v. Akers,* 364 So. 3d 662 (Miss. Ct. App. 2021)

Thwarted attempts to establish a viable relationship with a child do not meet the statutory criteria. Grandparents whose gifts were returned and whose requests to visit were denied were not entitled to visitation. *Aydelott v. Quartaro,* 124 So. 3d 97 (Miss. Ct. App. 2013).

8

HUTSON V. HUTSON

Parents reasonably denied a grandfather visitation with his biological granddaughter – he refused their request to treat the girl's step-siblings equally. His disparate treatment of the children caused disharmony in their home.

A court need not examine the *Martin v. Coop* factors unless it finds that there is a viable relationship AND that the parents unreasonably denied visitation.

9

ATTORNEYS' FEES

Subsection (4) of the grandparent visitation statute applies only in Type 2 visitation. *Battise v. Aucoin,* 311 So. 3d 588, 590-92 (Miss. 2021).

(4) Any petition for visitation rights under subsection (2) of this section shall be filed in the county where an order of custody as to the child has previously been entered. . . . . Upon a showing of financial hardship for the parents, the court shall . . . direct the grandparents to pay reasonable attorney's fees to the parent or parents . . . . without regard to the outcome of the petition.

10

VISITATION FOR OTHER NONPARENTS

Prior to *Brownlee*, nonparent visitation appeared to be limited to

- Grandparents (by statute)
- Legal fathers who learned they were not biological fathers (based on acting *in loco parentis*)
- Nonparents who agreed to be a coparent with a biological mother through IVF with anonymous donor sperm (under the equitable parenthood doctrine)

11

NATURAL PARENT PRESUMPTION

Traditional rule: In order to gain custody a nonparent must overcome the natural parent presumption by proving that the parent

- Abandoned the child.
- Deserted the child, or
- Is unfit to have custody.

12

GRIFFITH V. PELL

A legal father who learned during divorce that he was not his child's biological father was awarded custody. Because he acted *in loco parentis* to the child, he was treated equally with the mother in the custody analysis.

The supreme court emphasized that the biological father did not seek a relationship with the child.

13

SMITH V. SMITH

"In loco parentis can—in very limited, unique situations—sometimes be used to help rebut the natural-parent presumption.

(1) the husbands stood *in loco parentis;*

(2) they had supported, cared for, and treated the child as their own; (3) they could have been required to pay child support; and

(4) the biological fathers were not really in the picture."

14

SMITH V. SMITH

"**Grandparents who stand *in loco parentis* have no right to the custody of a grandchild, as against a natural parent, unless the natural-parent presumption is first overcome** by a showing of abandonment, desertion, detrimental immorality, or unfitness on the part of the natural parent. Thus, the Smiths' standing as *in loco parentis* is insufficient to overcome the natural-parent presumption."

15

BALLARD V. BALLARD

A man who acted *in loco parentis* to his stepdaughter was entitled to be treated equally with the mother under the *Albright* custody analysis. The biological father was not seeking rights of custody or visitation.

However, IF THE BIOLOGICAL FATHER IS IN THE PICTURE., a legal father who has acted *in loco parentis* is treated as any other third party and must overcome the natural parent presumption by proving abandonment, desertion, or unfitness.

16

BROWNLEE V. POWELL

"Pam argues that the doctrine of *in loco parentis* is not limited to [legal fathers who believed themselves to be biological fathers and to grandparents by statute.] We agree."

We have never said it is applicable only in these two situations, but we have said it is only applicable in "very limited, unique situations[.]"

17

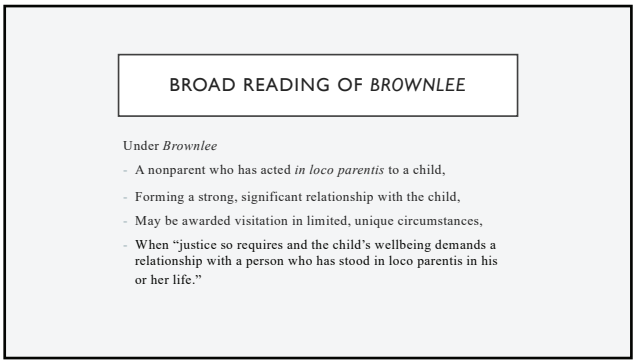
THE EXCEPTION

"If Pam can prove that she falls within this Court's carved out exception of the "very limited, unique situations" below, her claim succeeds."

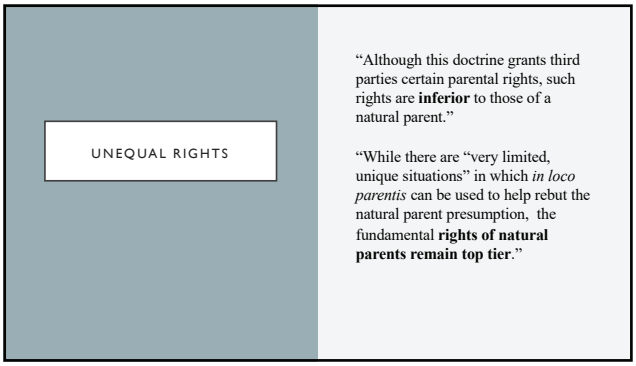
The court then discusses the facts of *Griffith v. Pell* and *J.P.M* and the four-factor test for rebutting the natural parent presumption for custody.

The decision does not specifically say that the four-factor test applies to determine ILP visitation.

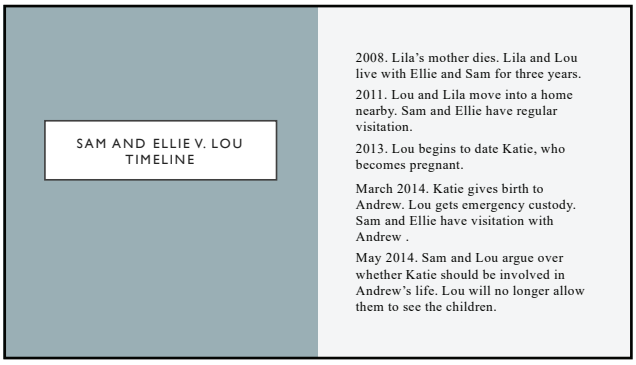
18


BROAD READING OF *BROWNLEE*
Under *Brownlee*
- A nonparent who has acted *in loco parentis* to a child,
- Forming a strong, significant relationship with the child,
- May be awarded visitation in limited, unique circumstances,
- When "justice so requires and the child's wellbeing demands a relationship with a person who has stood in loco parentis in his or her life."

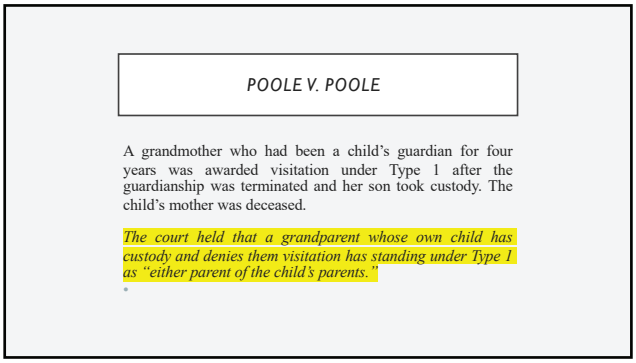
19


UNEQUAL RIGHTS
"Although this doctrine grants third parties certain parental rights, such rights are **inferior** to those of a natural parent."
"While there are "very limited, unique situations" in which *in loco parentis* can be used to help rebut the natural parent presumption, the fundamental **rights of natural parents remain top tier**."

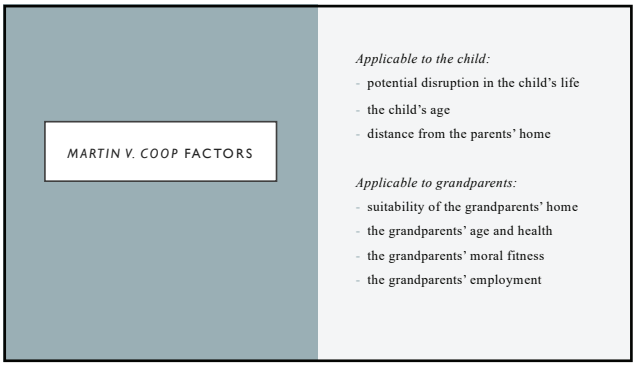
20


SAM AND ELLIE V. LOU TIMELINE
2008. Lila's mother dies. Lila and Lou live with Ellie and Sam for three years.
2011. Lou and Lila move into a home nearby. Sam and Ellie have regular visitation.
2013. Lou begins to date Katie, who becomes pregnant.
March 2014. Katie gives birth to Andrew. Lou gets emergency custody. Sam and Ellie have visitation with Andrew .
May 2014. Sam and Lou argue over whether Katie should be involved in Andrew's life. Lou will no longer allow them to see the children.

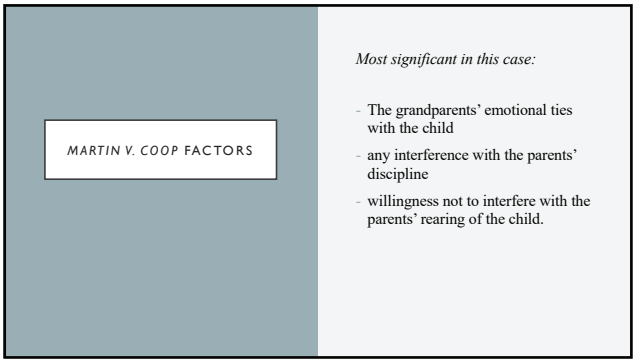
21


POOLE V. POOLE
A grandmother who had been a child's guardian for four years was awarded visitation under Type 1 after the guardianship was terminated and her son took custody. The child's mother was deceased.
The court held that a grandparent whose own child has custody and denies them visitation has standing under Type 1 as "either parent of the child's parents."

22


MARTIN V. COOP FACTORS
Applicable to the child:
potential disruption in the child's life
the child's age
distance from the parents' home
Applicable to grandparents:
suitability of the grandparents' home
the grandparents' age and health
the grandparents' moral fitness
the grandparents' employment

23


MARTIN V. COOP FACTORS
Most significant in this case:
The grandparents' emotional ties with the child
any interference with the parents' discipline
willingness not to interfere with the parents' rearing of the child.

24

TYPE I VISITATION

"Whenever a court [awards] custody . . . to one of the parents of the child or terminates the parental rights of one of the parents . . . or one of the parents . . . dies, either parent of the child's parents may . . . seek visitation rights with the child."

MISS. CODE ANN. δ 93-16-3(1).

25

MARTIN V. COOP

FACTOR 10:

- "The willingness of the grandparents to accept that the rearing of the child is the responsibility of the parent, and that the parent's manner of child rearing is not to be interfered with by the grandparents."

26

TYPE II VISITATION

Type II requires

Proof of a viable relationship (financial support for at least six months and significant visitation, including overnights) for one year

AND

The parents unreasonably denied visitation.

27

HUTSON V. HUTSON

Parents reasonably denied a grandfather visitation with his biological granddaughter – he refused their request to treat the girl's step-siblings equally. His disparate treatment of the children caused disharmony in their home.

A court need not examine the *Martin v. Coop* factors unless it finds that there is a viable relationship AND that the parents unreasonably denied visitation.

28

BROAD READING OF *BROWNLEE*

Under *Brownlee*

- A nonparent who has acted *in loco parentis* to a child,
- Forming a strong, significant relationship with the child,
- May be awarded visitation in limited, unique circumstances,
- When "justice so requires and the child's wellbeing demands a relationship with a person who has stood in loco parentis in his or her life."

29

SUMMARY

Brownlee v. Powell recognizes that nonparents other than legal, nonbiological fathers may have visitation rights.

It is unclear whether the test is the four-factor test used to rebut the natural parent presumption for legal fathers or a broader "unique situations" test.

If the four-factor test does apply, the requirements for the biological father's absence and the duty to pay child support will need refining.

30

IN THE SUPREME COURT OF MISSISSIPPI

NO. 2022-CA-00196-SCT

PAMELA BROWNLEE
v.

JESSICA LAUREN POWELL, RYAN LOWERY, AND THOMAS WAYNE POWELL

DATE OF JUDGMENT:	10/20/2021
TRIAL JUDGE:	HON. BILLIE J. GRAHAM
TRIAL COURT ATTORNEYS:	SHERRY L. LOWE DANA LEIGH BUMGARDNER DIANNE HERMAN ELLIS
COURT FROM WHICH APPEALED:	JONES COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	DIANNE HERMAN ELLIS
ATTORNEYS FOR APPELLEES:	SHERRY L. LOWE RYAN LOWERY (PRO SE) THOMAS WAYNE POWELL (PRO SE)
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
DISPOSITION:	REVERSED AND REMANDED - 08/10/2023
MOTION FOR REHEARING FILED:	
EN BANC.	

BEAM, JUSTICE, FOR THE COURT:

¶1. Aggrieved by the chancellor's decision, Pamela Brownlee (Pam) appeals to this Court, averring that the chancellor erred by failing to extend in loco parentis visitation rights to her as a former live-in romantic partner.

FACTS AND PROCEDURAL HISTORY

¶2. In 2007, Jessica Powell's son, A.M.P., was born. While A.M.P.'s natural father is unknown, A.M.P.'s legal father is Thomas Wayne Powell by marriage. Thomas maintains no relationship with A.M.P. In 2014, Jessica's daughter, E.R.L., was born. E.R.L.'s natural and legal father is Ryan Lowery, who has been an active parent in her life and assumed all responsibilities of parenthood.[1]

¶3. Pam and Jessica began their romantic relationship in early 2014, just before E.R.L.'s birth, and the couple lived together throughout their relationship until their breakup in 2019. Even though Pam and Jessica cohabited from 2014 to 2019, they did not marry. On
December 19, 2019, approximately two months after the couple's breakup in October 2019, Pam filed her

[1] In Cause Number 2015-0208 in the Chancery Court of the Second Judicial District of Jones County, Mississippi, Ryan was adjudicated E.R.L.'s father and, in a subsequent order, Jessica was awarded primary custody, and Ryan was given standard visitation and is required to pay child support.

Petition to Establish Custody and Visitation,[2] in which Pam initially sought custody[3] of E.R.L. and visitation with A.M.P.

¶4. At the initial hearing on October 6, 2020, Pam withdrew her request for custody of E.R.L. Pam revised her position, seeking only visitation with Jessica's children under the doctrine of in loco parentis. Although the chancellor did not find any legal basis for Pam's request, given her status as an unmarried nonparent and former live-in partner to the children's natural mother, the chancellor allowed Pam to brief her position and granted Jessica the opportunity to file a rebuttal.[4]

¶5. After a hearing, the chancellor issued a temporary order on November 17, 2020, denying Pam's request for temporary visitation with either of Jessica's children pending final resolution. On January 7, 2021, the chancellor set a trial date for May 19, 2021. ¶6. Shortly thereafter, on February 25, 2021, Jessica filed a motion to dismiss, renewing her objections raised in her responsive pleading based on Mississippi Rule of Civil Procedure 12(b)(6) for failure to state a claim. She included a motion for temporary restraining order urging the chancellor to dismiss Pam's complaint. Additionally, Jessica attached an exhibit of Facebook messages and FaceTime records purportedly from Pam to Jessica's son, A.M.P. A Zoom hearing was held on April 8, 2021. On April 14, 2021, the chancellor entered a judgment both dismissing Jessica's motion for temporary restraining order and denying all requests for relief by Pam.

¶7. The issue of whether to award attorneys' fees to Jessica was heard on May 19, 2021, and on October 20, 2021, the chancellor entered a final judgment awarding Jessica $4,000 in attorneys' fees. On October 26, 2021, Pam filed a motion to reconsider and a motion for recusal. Jessica followed suit and filed her responsive motion on November 8, 2021, and on December 7, 2021, the chancellor entered an order denying Pam's motion for recusal. In an order entered on February 10, 2022, the chancellor denied Pam's motion for reconsideration and Jessica's request for additional attorneys' fees.

ISSUES

¶8. Pam timely filed a second[5] notice of appeal with this Court on March 2, 2022. Before this Court, Pam raises the following issues:

I. Whether the chancery court incorrectly determined that there is no common law right to in loco parentis visitation by a third party.

II. Whether the chancery court erred by considering text messages attached as an exhibit to a pleading as evidence and by not allowing testimony or evidence.

III. Whether the chancery court incorrectly determined that Pam's petition was filed in bad faith and incorrectly awarded attorneys' fees to Jessica.

---

[2] Pam named Jessica, Ryan, Thomas, and unknown putative fathers in her petition. Neither Thomas nor Ryan responded to Pam's initial filing; thus, the Court consolidated their interests with Jessica's. Ryan, however, was present at the initial hearing on Pam's petition on October 6, 2020.

[3] Pam initially advanced unsubstantiated allegations in her petition for custody of E.R.L. that neither Jessica nor Ryan was fit to maintain custody of E.R.L.

[4] Pam's brief was filed on October 7, 2020; Jessica's rebuttal was filed on October 26, 2020.

[5] Pam first filed a notice of appeal with this Court on April 21, 2021, although the chancellor had not yet entered a final judgment. On November 29, 2021, this Court entered an order granting Pam's unopposed Motion to Dismiss and to Refile. Order, Brownlee v.
Powell, No. 2021-CA-00433 (Miss. Nov. 29, 2021).

DISCUSSION

I. Whether the chancery court incorrectly determined that there is no common law right to in loco parentis visitation by a third party. ¶9. This Court has recognized third party visitation for those standing in loco parentis "in very limited, unique situations[.]" Wells v. Smith (In re Smith), 97 So. 3d 43, 47 (Miss. 2012). While typically, the natural parent presumption must be overcome, certain circumstances have required a different outcome in light of justice and for the child's wellbeing. See Griffith v. Pell, 881 So. 2d 184 (Miss. 2004); J.P.M. v. T.D.M., 932 So. 2d 760 (Miss. 2006). As such, in loco parentis status can sometimes be used to help rebut the natural parent presumption in these "limited, unique situations[.]" In re Smith, 97 So. 3d at 47. ¶10. Here, Pam initially sought custody and visitation of A.M.P. and E.R.L. but later dropped her pursuit of custody and only sought visitation. Pam's counsel acknowledged that she could not overcome the natural parent presumption but asked the court for an opportunity to brief the issue of in loco parentis visitation.

¶11. The chancellor found that Pam did not have a legal basis for her request, given her status as an unmarried nonparent and former live-in partner to the children's natural mother but still allowed Pam to brief her position and granted Jessica the opportunity to file a rebuttal.

¶12. Jessica filed a motion to dismiss, renewing her objections raised in her responsive pleading based on Rule 12(b)(6) for failure to state a claim and averring that Pam lacked standing and lacked evidence of unfitness to warrant granting her visitation. Jessica contends that the only cases that have permitted third party visitation absent a finding that the natural parents are unfit fall into two categories: the cases of spouses who believed a child was theirs biologically and were married to the mothers and thus enjoyed in loco parentis standing and grandparents, whose rights are addressed by statute.
¶13. Pam argues that the doctrine of in loco parentis is not limited to these two situations. We agree. We have never said it is applicable only in these two situations, but we have said it is only applicable in "very limited, unique situations[.]" In re Smith, 97 So. 3d at 47. ¶14. The chancellor dismissed Pam's claims, holding that the only question that remained was whether Pam had standing to request visitation based on in loco parentis. The chancellor reasoned: "With Jessica's decision to drop the claim that the parents of the children are unfit, there is no question regarding the fitness of Jessica and Ryan who are the involved parents of the children."

¶15. The chancellor's judgment on its face concluded that visitation was not in the best interest of the child, which reads like a judgment on the merits of Pam's claim rather than addressing Jessica's standing or Rule 12(b)(6) arguments.

¶16. We find two issues with the chancellor's judgment. First, the chancellor wrote that Pam lacked standing but did so without citing Mississippi law concerning a plaintiff's standing. Second, if the motion was being disposed of under Rule 12(b)(6), this was incorrect because Pam's complaint states a claim for relief. We cannot say that she cannot present any set of facts that could lead to her success. Leaf River Forest Prods., Inc. v. Deakle, 661 So. 2d 188, 195 (Miss. 1995). As such, we reverse and remand. On remand, if Pam can prove that she falls within this Court's carved out exception of the "very limited, unique situations" below, her claim succeeds.

> In both Pell and J.P.M, a husband learned during the pendency of divorce proceedings that he was not the biological father of a child born of, or just prior to, the marriage. In those cases, we reasoned that the natural-parent presumption had been overcome based on several facts: (1) the husbands stood in loco parentis; (2) they had supported, cared for, and treated the

> child as their own; (3) they could have been required to pay child support ("[w]ith the burden should go the benefit"); and (4) the biological fathers were not really in the picture: the one in Pell had disclaimed any interest in the child and had agreed to relinquish his parental rights, while the one in J.P.M. could not even be determined conclusively.
>
> . . . .
>
> [i]n Pell, we reversed the chancellor's termination of the husband's parental rights and remanded the case for a best-interest Albright analysis; thus, we implicitly found that the natural-parent presumption had been overcome. And in J.P.M., we relied on Pell to affirm the chancellors decision to award physical custody to the husband. In doing so, we specifically rejected the wife's argument that the chancellor had not had the authority to award custody to the husband without first finding that she had abandoned the child, that her conduct was immoral as to be detrimental to the child, or that she was mentally or otherwise unfit for custody.

Waites v. Ritchie (In re Waites), 152 So. 3d 306, 312 (Miss. 2014) (alteration in original) (emphasis omitted) (footnote omitted) (quoting In re Smith, 97 So. 3d at 46).

¶17. Unlike Pell and J.P.M., this Court in In re Waites overruled the judgment of the Court of Appeals finding that the presumed father's in loco parentis status did not rebut the natural parent presumption. Id. at 313. There, we found the "unique facts" of Pell and J.P.M. were distinguishable because the biological father pursued custody when he confirmed he was the father. Id. at 313 (internal quotation marks omitted).. The presumed father knew for two years prior to his and his wife's divorce proceedings that he was not the father when they actively purported his paternity to the court. Id. We reiterated that in loco parentis status will not alone rebut the natural parent presumption. See Smith, 97 So. 3d at 47.

¶18. The Waites Court cited its decision in Davis v. Vaughn, 126 So. 3d 37 (Miss. 2013), in which a maternal grandmother, who raised the child from infancy after her daughter had died and the father was no longer in the picture, sought custody but could not overcome the natural parent presumption. Davis, 126 So. 3d at 39. The chancery court, recognizing the grandmother's in loco parentis status awarded her visitation, finding that it would be in the best interest of the child. Id. at 37.

¶19. In affirming that ruling, we emphasized that "[a]lthough this doctrine grants third parties certain parental rights, such rights are inferior to those of a natural parent." Id. "Giving preference to natural parents, even against those who have stood in their place, honors and protects the fundamental right of natural parents to rear their children." Id. (citing Vance v. Lincoln Cnty. Dep't of Pub. Welfare, 582 So. 2d 414, 417 (Miss. 1991)). This concept is hardly new:

> Nature gives to parents that right to the custody of their children which the law merely recognizes and enforces. It is scarcely less sacred than the right to life and liberty, and can never be denied save by showing the bad character of the parent, or some exceptional circumstances which render its enforcement inimical to the best interests of the child.

Id. at 37-38 (Miss. 2013) (quoting Moore v. Christian, 56 Miss. 408 (1879)).

¶20. While there are "very limited, unique situations" in which in loco parentis can be used to help rebut the natural parent presumption, In re Smith, 97 So. 3d at 47, the fundamental rights of natural parents remain top tier. Davis, 126 So. 3d at 37. Parents have the right to "rear their children and to control the environment . . . to which their children are exposed."

Stacy v. Ross, 798 So. 2d 1275, 1280 (Miss. 2011).

> The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.

Troxel v. Granville, 530 U.S. 57, 69, 120 S. Ct. 2054, 147 L. Ed. 49 (2000) (citing Parham

v. J.R. 442 U.S. 584, 602, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979)).

> Accordingly, so long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.

Id. at 58; see, e.g., Reno v. Flores, 507 U.S. 292, 304, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993).

¶21. We want to make clear that "parents are the natural guardians of their children, and 'it is presumed that it is in the best interest of a child to remain with the natural parent as opposed to a third party.'" Davis, 126 So. 3d at 37 (citing Pendleton v. Leverock (In re Dissolution of Marriage of Leverock and Hamby), 23 So. 3d 424, 429 (Miss. 2009)).

¶22. But we also recognize that special circumstances exist, i.e., "in very limited, unique situations," In re Smith, 97 So. 3d at 47, in which justice so requires and the child's wellbeing demands a relationship with a person who has stood in loco parentis in his or her life. Davis, 126 So. 3d at 37; see Pell, 881 So. 2d at 184; J.P.M., 932 So. 2d at 760. The floodgates are not open for any third party visitation if the circumstances do not rise to this level, but Pam deserves an opportunity, at least, to provide proof of whether she meets this "very limited, unique situation[.]" In re Smith, 97 So. 3d at 46-47.

II. Whether the chancery court erred by considering text messages attached as an exhibit to a pleading as evidence and by not allowing testimony or evidence. [OMITTED]

CONCLUSION

¶31. We reverse the chancellor's judgment and remand the case for the chancellor to determine whether Pam falls into the exception carved out by this Court. We also reverse the award of attorneys' fees to Jessica.

¶32. REVERSED AND REMANDED.

RANDOLPH, C.J., COLEMAN, MAXWELL, CHAMBERLIN AND ISHEE, JJ., CONCUR. KITCHENS, P.J., CONCURS IN RESULT ONLY WITH SEPARATE WRITTEN OPINION JOINED BY KING, P.J., AND GRIFFIS, J.; ISHEE, J., JOINS IN PART.

KITCHENS, PRESIDING JUSTICE, CONCURRING IN RESULT ONLY:

¶33. With respect, I concur in result only. While I agree that this case should be reversed and remanded for further proceedings and that the trial court erred by awarding attorneys' fees to Jessica Powell, I write separately concerning the doctrine of in loco parentis.

¶34. This Court has recognized that

> In loco parentis means "in the place of a parent." [Favre] v. Medders, 241 Miss. 75, 81, 128 So. 2d 877, 879 (1961). It is defined as "one who has assumed the status and obligations of a parent without a formal adoption." Id. More specifically, "[a]ny person who takes a child of another into his home and treats it as a member of his family, providing parental supervision, support and education, as if it were his own child is said to stand [in loco parentis]." Logan v. Logan, 730 So. 2d 1124, 1126 (¶ 8) (Miss. 1998) (citation omitted). Whether in loco parentis status exists is "a matter of intention and of fact to be deduced from the circumstances of the particular case." [Favre], 128 So. 2d at 879 (citation omitted).

Miller v. Smith, 229 So. 3d 100, 104 (Miss. 2017) (alterations in original).

¶35. In Griffith v. Pell, 881 So. 2d 184, 186 (Miss. 2004), this Court said that "[m]erely because another man was determined to be the minor child's biological father does not automatically negate the father-daughter relationship held by Robert and the minor child."
The Griffith Court recognized also that

> A parent has a constitutionally protected liberty interest in the "companionship, care, custody and management of his or her children." Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). However, parental status that rises to the level of a constitutionally protected liberty interest does not rest solely on biological factors, but rather, is dependent upon an actual relationship with the child where the parent assumes responsibility for the child's emotional and financial needs. [Citation omitted.] . . . As Justice Stewart observed in Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979): "Parental rights do not spring full-blown from the biological connection between parent and child. They require relationships more enduring." Id. at 397, 99 S. Ct. 1760 (J. Stewart, dissenting).

Id. at 186-87 (alterations in original) (quoting A.J. v. I.J., 677 N.W.2d 630, 636 (Wis. 2004)).[6] Whether there is a biological, blood, or marital relationship between the third party and the natural parent(s) does not matter as long as a connection similar to a parent-and-child affinity has been established between a nonparent and a child, and the continuation of that relationship would be in the child's best interest.

¶36. Most Mississippi case law about the doctrine of in loco parentis concerns claims for custody, not visitation rights. See J.P.M. v. T.D.M., 932 So. 2d 760 (Miss. 2006); Logan, 730 So. 2d at 1124; Wells v. Smith (In re Smith), 97 So. 3d 43 (Miss. 2012). Unlike a claim for custody, when an individual is pursuing a claim for visitation on the basis of in loco parentis status, he or she is not required to overcome the natural parent presumption. For example, in Davis v. Vaughn, this Court affirmed the lower court's award of visitation rights to an in loco parentis third party, despite the trial court's determination that the in loco parentis third party was not entitled to custody rights because of her failure to rebut the natural parent presumption. Davis v. Vaughn, 126 So. 3d 33, 36 (Miss. 2013). The Davis case demonstrates that an in loco parentis third party is not required to rebut the natural parent presumption in order to be granted visitation rights. Similarly, a requirement that the natural parents be found unfit also is absent from Mississippi's statute regarding grandparents' visitation rights. See Miss. Code Ann. § 93-16-3(2) (Rev. 2021). Pursuant to Section 93-16-3(2), a grandparent may receive visitation rights provided the court finds that (1) the grandparent has "established a viable relationship with the child and the parent or custodian of the child unreasonably denied the grandparent visitation rights with the child[,]" and (2) visitation rights "would be in the best interests of the child." Miss. Code Ann. § 9316-3(2). While the Legislature has not yet extended this statute to include all third parties, the statute illustrates the difference between the seeking of custody rights versus visitation

[6] The Griffith majority approved and adopted Justice Stewart's rationale from his dissent in Caban, 441 U.S. at 397.

rights on the basis of in loco parentis status: a third party is not required to rebut the natural parent presumption when pursuing a visitation claim, as a third party is required to do when pursuing a claim for custody.

¶37. It is true also that, even though that statute applies exclusively to grandparents, the test can be useful in determining whether other third parties who stand in loco parentis, i.e., stepparents, aunts/uncles, former domestic partners, should receive visitation rights. The situation at hand seems more akin to grandparent visitation, since neither a grandparent nor Ms.

Brownlee's goal ordinarily would be to visit a child to the exclusion of the natural parent(s). ¶38. "Mississippi case law has clearly declared time and time again that the polestar consideration in all cases dealing with child custody and visitation is the best interest and welfare of the child." Crider v. Crider, 904 So. 2d 142, 144 (Miss. 2005) (citing Brekeen v. Brekeen, 880 So. 2d 280, 283 (Miss. 2004)). Thus, if a third party seeks to obtain visitation rights on the basis of an in loco parentis relationship, that person is required to present sufficient evidence that there is a bond between him or her and the child that arose from a custodial or parent-like relationship. If there is a viable and wholesome relationship with the child, the trial court must ascertain whether visitation is in the child's best interest. If so, visitation rights should be granted.

KING, P.J., AND GRIFFIS, J., JOIN THIS OPINION. ISHEE, J., JOINS THIS OPINION IN PART.

CHILD SUPPORT MODIFICATION AND ENFORCEMENT: A REFRESHER COURSE

I. Modification of child support

A. Jurisdiction

Modification within the state. A petition to modify a family law judgment must be filed in the court that issued the decree. The issuing court's jurisdiction is exclusive, precluding other courts in the state from exercising jurisdiction over the case. *Ladner v. Ladner,* 206 So. 2d 620, 624-25 (Miss. 1968) (family court had no authority to modify custody established in Hinds County chancery proceedings). However, if the issuing court finds that adjudication in another court would be more efficient, jurisdiction may be transferred to that court. *Reynolds v. Riddell*, 253 So. 2d 834, 837 (Miss. 1971) (transferring custody modification does not conflict with statute barring transfer of divorce case).

Interstate modification – exclusive jurisdiction of issuing state. A court that issues a child support order has continuing exclusive jurisdiction under the Uniform Interstate Family Support Act (UIFSA) to modify the order so long as the payor, the payee, or the child continue to live in the state. Miss. Code Ann. § 93-25-205(1); *see Evans v. Dep't of Human Servs*., 36 So. 3d 463, 469 (Miss. Ct. App. 2010). A North Carolina court lacked jurisdiction to modify a Mississippi child support order while the mother and child continued to reside in Mississippi. *Thrift v. Thrift,* 760 So. 2d 732, 735 (Miss. 2000). Parties may file a written consent with the court that has continuing exclusive jurisdiction requesting that another court assume jurisdiction to modify a support order. The court assuming jurisdiction must have jurisdiction over at least one party or must be in the child's state of residence. Miss. Code Ann. § 93-25-205(a)(2).

When all parties move from the issuing state. If the parties move to different states, the payor must seek modification in the payee's state of residence. The payee must seek modification in the payor's state of residence. Miss. Code Ann. § 93-25-611(1)(c). California no longer had exclusive jurisdiction to modify after a mother and child moved to Mississippi and the father to Maryland. Maryland, not Mississippi, was the state with jurisdiction to hear the mother's petition to increase child support. *Nelson v. Halley*, 827 So. 2d 42, 48 (Miss. Ct. App. 2002) (but finding that father consented to jurisdiction in Mississippi).

The question of which state's law applies depends on the issue.

- Duration of support (the age of majority) is governed by law of the state that issued the original order. Miss. Code Ann. § 93-25-611(c); *Nelson v. Halley*, 827 So. 2d 42, 51 (Miss. Ct. App. 2002).
- Child support guidelines and procedure. A modifying state applies its own law regarding requirements, procedures and defenses applicable to

modification, and its own support guidelines. Miss. Code Ann. § 93-25-611(b); *Heisinger v. Riley,* 243 So. 3d 248, 262 (Miss. Ct. App. 2018).

Interstate enforcement. An issuing state that loses jurisdiction to modify may continue to enforce the order. Miss. Code Ann. § 93-25-612. However, if the order has been modified in another state, the modified order must be registered in the state that issued the original order before it may be enforced. A Mississippi court lacked jurisdiction to enforce a Georgia child support order modifying a Mississippi order because the mother failed to register the Georgia order in Mississippi. *Williams v. Smith,* 915 So. 2d 1114, 1116-17 (Miss. Ct. App. 2005).

- The amount and duration of payments and computation and payment of arrearages and interest are governed by the law of the state that issued the order. Miss. Code Ann. § 93-25-604(a).
- The statute of limitations to enforce arrearages is the longer of the statute in the issuing state or the registering state. Miss. Code Ann. § 93-25-604(b).
- The procedures for enforcement and remedies for enforcing support orders are governed by the law of the enforcing state. Miss. Code Ann. § 93-25-604(c).

B. The test for modification

The traditional test. The traditional test for modification requires that a court find a substantial, material, and unforeseeable change in the circumstances of the child or parents occurring since the last decree awarding support. *McEwen v. McEwen,* 631 So. 2d 821, 823 (Miss. 1994). In addition, if the payor is seeking a reduction in support based on income loss, they must prove that the loss was not voluntary. See I.D. below.

Non-DHS actions. Today in private actions, chancellors still must consider factors to determine whether a material change in circumstances has occurred under the traditional test. Those include the increased needs of older children; an increase in expenses; inflation; a child's health and special medical or psychological needs; the parties' relative financial condition and earning capacity; the health and special needs of the parents; the payor's necessary living expenses; each party's tax liability; one party's free use of residence, furnishings, or automobile; and any other relevant facts and circumstances. *Tedford v. Dempsey,* 437 So. 2d 410, 422 (Miss. 1983). A change in a payor's income alone does not constitute a material change – it is only one of several factors to be considered. *Pipkin v. Dolan,* 788 So. 2d 834, 838-39 (Miss. Ct. App. 2001). A chancellor erred in granting modification based on proof that a father's income had increased and that the children were older, without specific proof of the children's increased expenses.

McNair v. Clark, 961 So. 2d 73, 80 (Miss. Ct. App. 2007); *see also Blevins v. Wiggins*, 284 So. 3d 808 (Miss. Ct. App. 2019) (parent seeking modification must specifically prove the items and amounts of increased expense).

Exception: Modification from foreign state guidelines to Mississippi guidelines. In a 2020 case, the Mississippi Court of Appeals held that a noncustodial mother who moved to Mississippi was entitled to have her support obligation changed to conform to the Mississippi child support guidelines, without a showing of a material change in circumstances. *Cadigan v. Sullivan*, 301 So. 3d 779 (Miss. Ct. App. 2020) (reducing the mother's Florida-based support order from $428 to $224). But see *Kelley v. Zitzelberger,* 342 So. 3d 499 (Miss. Ct. App. 2022) (rejecting a payor father's request to reduce his California support order to conform to the Mississippi guidelines when the mother and child moved to Mississippi; distinguishing *Cadigan* because in that case, the parent did not seek reduction based on reduced income, as the father here did; she only sought to conform the award to the Mississippi guidelines.)

DHS actions. Every three years, DHS may seek modification of a support order that differs from the amount that would be required by current application of the guidelines. The statute states that "[no] proof of a material change in circumstances is necessary in the three-year review for adjustment." Miss. Code Ann. § 43-19-34(3).

C. Foreseeability

The Mississippi Supreme Court has recently refined the requirement of foreseeability. Prior cases focused on the foreseeability of an *event.* For example, at divorce, a military father who planned to leave service was ordered to pay child support based on his current income. His future income was unknown. When he retired from the military, he was denied modification (even though he was unable to find employment at a similar salary) because his retirement from the military was foreseeable. *Dill v. Dill,* 908 So. 2d 198, 202-03 (Miss. Ct. App. 2005). This created a catch-22 for payors since support must be based on a payor's current income and not future income.

In 2020, the Mississippi Supreme Court explained that foreseeability refers to whether the impact of an event on the payor's finances is foreseeable – not whether the event itself was known at the time of the prior order. The court rejected a divorcing man's argument that in setting alimony, the court should consider that his wife would receive social security in two years (to avoid the result in *Dill*). The question was not whether it was foreseeable that the wife would receive Social Security – it was – the question was whether the impact of Social Security on her future finances was foreseeable. *Alford v. Alford,* 298 So. 3d 983 (Miss. 2020).

In 2022, the court of appeals used the *Alford* approach in a child support modification case. The court held that a child's increased expenses linked to

autism spectrum disorder were not foreseeable at the time of the original child support order. Although the diagnosis was known, the extent of her future expenses was not. *Nowell v. Stewart,* 356 So. 3d 1217, 1222 (Miss. Ct. App. 2022) .

D. Imputed income: Voluntariness/Good faith

A payor who has lost a job or had income reduced must prove that the income loss was not voluntary. The test is sometimes described in terms of good faith – the payor must prove that the loss was not "in bad faith." Recent cases have explained that a "bad faith" loss of income means that it was voluntary.

Bad faith. Some older cases suggested that bad faith meant that the payor acted for the purpose of avoiding child support. *See Parker v. Parker*, 645 So. 2d 1327, 1328-31 (Miss. 1994). In a 2022 case, the court of appeals explained that bad faith is a voluntary act that reduces income and does not require an intent to harm the child's interests. *Tolliver v. Tolliver,* 334 So. 3d 1228, 1231-32 (Miss. Ct. App. 2022) (father violated company policy by working other jobs while on health leave for Covid).

Voluntary choices resulting in income loss. In some cases, courts find that a payor's choices (although not intended to reduce income) were voluntary because they led to an income loss. For example, a father's choice to violate company policy led to his firing – he was not entitled to modification. *Tolliver v. Tolliver,* 334 So. 3d 1228, 1231-32 (Miss. Ct. App. 2022). In contrast, an ophthalmologist father sought reduction of child support based on his substantial income loss, occasioned in part by in-patient treatment for addiction and subsequent mandated four-day work week. The chancellor found that his income loss caused by drinking was voluntary and not a material unforeseeable change in circumstances. The court of appeals reversed – to follow the chancellor's logic, "no modification could be granted to a person whose reckless behavior leads to a loss of income." *Braswell v. Braswell*, 336 So. 3d 1121 (Miss. Ct. App. 2021) (some income loss caused by Covid shutdown).

Incarceration. Some states have held that a payor's incarceration is a voluntary loss in income because it was based on a voluntary, wrongful act. Mississippi law on the issue was not clear. In 2023, the Mississippi Legislature enacted a new statute providing, "The court may not consider incarceration as intentional or voluntary unemployment or underemployment when establishing or modifying a child-support order." Miss. Code Ann. δ 43-19-105.

E. Modifiable aspects of the order

Parents occasionally argue that certain aspects of child support may not

be modified because they are "contractual" or because they are not a part of basic support. However, almost all forms of child support can be modified, including

- agreed support orders, *Woodfin v. Woodfin*, 26 So. 3d 389, 394 (Miss. Ct. App. 2010);
- private school tuition, *Davis v. Davis*, 983 So. 2d 358, 361 (Miss. Ct. App. 2008);
- college tuition, *Stasny v. Wages,* 116 So. 3d 195, 199 (Miss. Ct. App. 2013);
- extracurricular activities, *Bell v. Bell,* 206 So. 3d 1254, 1259 (Miss. Ct. App. 2016);
- dependency exemption awards, *Neelly v. Neelly,* 213 So. 3d 539, 542-43 (Miss. Ct. App. 2016);
- health insurance and medical expenses, *H.L.S. v. R.S.R.,* 949 So. 2d 794 (Miss. Ct. App. 2006);
- terms of an escalation clause, *Short v. Short,* 131 So. 3d 1149, 1152 (Miss. 2014).

F. Effective date of modification

Decrease in support. An order reducing child support "shall not be subject to a downward retroactive modification." Miss. Code Ann. § 43-19-34(4). The Mississippi Supreme Court reversed a chancellor's order making a reduction retroactive to the date the petition was filed. Child support payments that become due while a petition for modification is pending are vested and cannot be forgiven or modified. *Thurman v. Thurman*, 559 So. 2d 1014 (Miss. 1990).

Increase in support. Until ten years ago courts had discretion to make an increase in support retroactive to the date the modification petition was filed. The statute was amended to provide that an upward modification "may be ordered *back to the date of the event justifying the upward modification.*" Miss. Code Ann. § 43-19-34(4) (emphasis added). In two recent cases, the court of appeals has affirmed orders making support increases retroactive prior to the date of filing the modification petition. *See Ponder v. Ponder,* 349 So. 3d 212, 216-17 (Miss. Ct. App. 2022) (award made retroactive eighteen months prior to filing); *Nowell v. Stewart,* 356 So. 3d 1217 (Miss. Ct. App. 2022) (chancellor properly made increase retroactive for three years after finding that the four-year litigation dragged out in part due to claims advanced by the father that delayed the proceedings).

DHS limit on retroactive modification. Effective August 5, 2022, DHS orders may not be retroactive prior to the date of filing. MDHS Bulletin No. 7033 states, "Effective immediately, MDHS policy has been revised to prevent modifications from starting prior to the date of filing. This change is to comply with federal regulation 45 CFR § 303.106. Federal law provides that every child support installment becomes a judgment by operation of law as it comes due and is not subject to retroactive modification." The legislature amended Miss.

Code Ann. δ 43-19-34(4), applicable to DHS actions, to comply with the new DHS policy.

G. Escalation clauses

In 2014, the Mississippi Supreme Court overruled prior cases requiring that child support escalation clauses be tied to the payor's income, the payee's income, the child's needs, and inflation. *Short v. Short,* 131 So. 3d 1149 (Miss. 2014). The court held that the father's agreement to pay $4,166 a month in support for one child, to be reduced to 15% of his income when the child entered kindergarten, but "in no circumstances . . . to fall below $36,000 per year" was an enforceable agreement. *Id.* (also holding that escalation clauses may be modified based on a material change in circumstances).

II. Enforcement: Credit against arrearages

Child support is vested when each payment is due. The general rule is that child support arrearages, once accrued, may not be forgiven. The rule applies even though a payor had a good reason for nonpayment and would have been granted a petition for modification if he had petitioned. There are, however, some exceptions to the rule. In addition, a payor may in some cases be allowed a credit against arrearages.

A. Change in custody

A payor may be entitled to forgiveness of arrearages and possibly a refund of pre-filing payments when the parents informally modify custody. The appellate courts hold that to require payment of support would create a windfall for the former custodial parent.

Arrearages forgiven. In *Krohn v. Krohn*, 294 So. 3d 680 (Miss. Ct. App. 2020), the court held that a chancellor properly credited a father's child support arrearages for ten months in which his daughter lived with him pursuant to an out-of-court agreement and prior to the court's final judgment. *See also Braswell v. Braswell*, 336 So. 3d 1121, 1132 (Miss. Ct. App. 2021) (chancellor erred in failing to suspend a father's child support obligation for a period of months in which his son lived with him prior to court's final order).

Reimbursement ordered. The court of appeals affirmed a chancellor's order that a mother reimburse her ex-husband for one-half of the support that he paid after one of his two daughters came to live with him. *Nelson v. Nelson*, 271 So. 3d 613, 617-18 (Miss. Ct. App. 2018) (requiring that the mother pay support to the father retroactive to the date he filed a petition for modification).

B. Emancipation

Similarly, courts have allowed credit against arrearages and reimbursement for payments that were due after a child was emancipated prior to the age of twenty-one.

Arrearages forgiven. If a child support order provides for a certain amount of support per child, the payor is entitled to a pro rata forgiveness of arrearages for the period after one child is emancipated. A father's $500 per child obligation was modified when one child was emancipated. However, his obligation for the remaining minor child was modified from $500 to $583, 14% of his adjusted income. *Morris v. Morris,* 8 So. 3d 917, 919 (Miss. Ct. App. 2009). The credit dates from the date of emancipation, not from the date of the filing of the petition. *Howell v. Turnage,* 56 So. 3d 593, 596-97 (Miss. Ct. App. 2011).

If the order provides for payment of a single amount for multiple children, the credit against arrearages should be based on the amount of support for the remaining number of children. An order for two children should have been reduced to an amount equaling 14% of the payor's net income at the time the oldest was emancipated. *Houck v. Houck,* 812 So. 2d 1139, 1143 (Miss. Ct. App. 2002); *see also Andres v. Andres,* 22 So. 3d 314, 319-20 (Miss. Ct. App. 2009) (father properly credited with payments made after one of two children was emancipated; support amount should have been 14% of adjusted gross income); *Bryant v. Bryant,* 924 So. 2d 627, 631-32 (Miss. Ct. App. 2006) (award for remaining child based on 14% of payor's income at time of hearing).

Reimbursement ordered. The court of appeals held that a father was entitled to reimbursement from the custodial parent for payments made after his eighteen-year-old daughter entered full-time military service during their pending modification action. *Ratliff v. Ratliff*, 271 So. 3d 697 (Miss. Ct. App. 2018). And a chancellor properly ordered a custodial mother to reimburse a payor for one-third of the payments made after one of three children was emancipated, where the order provided for support of $100 a month per child. *Ligon v. Ligon,* 743 So. 2d 404, 408 (Miss. Ct. App. 1999) (reimbursement included several months prior to filing the petition).

C. Credit for direct payments

A noncustodial parent is not entitled to credit for voluntary payments directly to children unless the payments are for items ordinarily covered by basic child support.

Credit denied. For example, no credit was allowed to a father who gave his sons cash; the funds were not available to the custodial mother for basic expenses such as food and clothing. We*sson v. Wesson,* 818 So. 2d 1272, 1280-81 (Miss. Ct. App. 2002). Similarly, a noncustodial father was properly denied

a credit for purchasing automobiles for his children. It was the sort of expenditure that a father should make in addition to court-ordered support, not as a substitute for basic support. *Wiles v. Williams,* 845 So. 2d 709, 712 (Miss. Ct. App. 2003). A father was not entitled to credit for private school tuition when the payment was a voluntary undertaking on his part. *Cook v. Whiddon,* 866 So. 2d 494, 500-01 (Miss. Ct. App. 2004); *see also Wilkinson v. Wilkinson,* 281 So. 3d 153, 163-64 (Miss. Ct. App. 2019) (father not entitled to credit against arrearages for voluntary payments of private school tuition); *White v. Dep't of Human Servs.,* 39 So. 3d 986, 990-91 (Miss. Ct. App. 2010) (father properly denied credit for expenditures, including sports equipment, school pictures, and activity fees).

Credit allowed. A father who reduced support for two children when the oldest entered college was properly credited with payments made directly to, or on behalf of the daughter attending college. *Williamson v. Williamson,* 296 So. 3d 206, 209-10 (Miss. Ct. App. 2020); *see also Wilkinson v. Wilkinson*, 281 So. 3d 153, 163 (Miss. Ct. App. 2019) (father entitled to a small credit against arrearages for direct payments for clothing and dental care).

D. Credit for third-party payments

Under some circumstances, a child support payor may be credited with payments made by a third party. In one case, a father was credited for sums provided by his parents to his son. *Johnston v. Parham,* 758 So. 2d 443, 446 (Miss. Ct. App. 2000); *see also* C*arter v. Davis,* 235 So. 3d 106, 110 (Miss. 2017), *reversed in part on other grounds*, 241 So. 3d 614 (Miss. 2018) (father credited with payments made by his mother). On the other hand, a chancellor erred in crediting a father with payments made by a grandfather from an account in the joint names of the child and grandfather. The funds already belonged to the child and could not be used to reduce the father's support obligation. *Mizell v. Mizell,* 708 So. 2d 55, 60 (Miss. 1998). And a father was not entitled to a reduction in support arrearages based on his parents' gifts to his children prior to the couple's separation – the payments were not in lieu of his support obligation. *Williamson v. Williamson,* 296 So. 3d 206, 209-10 (Miss. Ct. App. 2020).

E. Credit for benefits available to child

A disabled payor is entitled to an offset against arrearages when a child receives a lump sum payment based on the payor's disability. Miss. Code Ann. § 93-11-71(6). A disability payor's future child support obligation is also offset dollar-for-dollar by the amount of monthly payments received by the child based on the payor's disability. In 2019, the court of appeals clarified that the credit is limited to the portion of a lump sum that represents benefits due in months in which the payor was in arrears. In that case, the twenty-seven months for which the children's lump sum was awarded coin-

cided with only five months of the payor's months of arrearages, most of which accrued after the lump sum was received. The payor was entitled to a credit for the portion of the lump sum applicable to those five months only. *Thomas v. Thomas,* 281 So. 3d 1191, 1210 (Miss. Ct. App. 2019); *cf.* Neville v. Blitz, 122 So. 3d 70, 74 (Miss. 2013) (military father should have been fully credited for military educational benefits transferred to his daughter pursuant to the Post 9/11 GI Bill).

A payor is not entitled to credit for payments that a child receives from Social Security because of the child's own disability. *Hammett v. Woods,* 602 So. 2d 825, 828-29 (Miss. 1992).

III. Defenses to enforcement

A. Statute of limitations

The seven-year judgment statute of limitations applies to actions to collect child support arrearages. However, the period does not begin to run until a child reaches the age of twenty-one. The Mississippi savings statute provides that a statute of limitations is tolled if any person entitled to bring the action is "under the disability of infancy." Miss. Code Ann. § 15-1-59; *see Strack v. Sticklin,* 959 So. 2d 1, 7 (Miss. Ct. App. 2006) (statute begins to run seven years from the date of the child's emancipation).

If the statute of limitations runs on the claim of one of several children covered by a support order, the claim is barred as to that child's pro rata share. A court properly awarded 25% of a $475 support award for four children; the statute of limitations had run on the claims of all but the youngest child. *Ladner v. Logan,* 857 So. 2d 764, 770-71 (Miss. 2003) (distinguishing arrearages when one child is emancipated but the statute of limitations has not run).

B. Laches and estoppel

Ordinarily, enforcement of a child support order is not barred by the payee's delay in seeking a judgment or requesting payment. A payor was not relieved of his obligation to pay medical and orthodontic bills simply because the custodial mother failed to present the bills in a timely fashion. *Davis v. Davis,* 761 So. 2d 936, 941-42 (Miss. Ct. App. 2000) (but limiting payment for braces to amount charged for standard braces); *see also Durr v. Durr,* 912 So. 2d 1033, 1038 (Miss. Ct. App. 2005) (even if equitable estoppel applied to suits for child support arrearages father could not show how he was harmed by delay).

In some cases, however, a delay in presenting medical bills that disadvantages the payor may limit recovery. A mother was barred from reimbursement for medical bills that she submitted after the right to claim insurance reimbursement expired. *Milam v. Milam,* 509 So. 2d 864, 866 (Miss. 1987); *see also Holloway v. Mills,* 872 So. 2d 754, 757 (Miss. Ct. App. 2004) (timely submission is re-

quired if payor's insurance would have paid the bills). And in a 2019 case, the court of appeals suggested that a mother's long delay in submitting thousands of dollars in medical bills might constitute a lack of good faith, even though their agreement did not require submission within a specific time period. The case was reversed for the court to consider whether the mother's documentation of expenses was sufficient and whether the bills were timely submitted. *Jones v. Jones,* 265 So. 3d 195, 200 (Miss. Ct. App. 2019).

C. Res Judicata

A judgment is res judicata as to all matters that were considered or could have been raised in an action. A wife's request for payment of medical bills was barred by res judicata because the bills were outstanding at the time of a previous contempt petition and were not brought to the court's attention. *Russell v. Russell,* 724 So. 2d 1061, 1064 (Miss. Ct. App. 1999) (chancellor erred in ordering payment of medical bills not included in prior contempt action).

D. Out of court agreements

Out of court agreements to modify support are not, as a general rule, enforceable. An agreement between parents to end a child's support at eighteen was unenforceable. *Lawrence v. Lawrence*, 574 So. 2d 1376, 1378-79 (Miss. 1991). Similarly, a mother's agreement to forego support in return for a transfer of land was void as a matter of public policy; a custodial parent receives support as a fiduciary and cannot waive a child's right to support. *Calton v. Calton,* 485 So. 2d 309, 311 (Miss. 1986); *see also* Strack v. Sticklin, 959 So. 2d 1, 5 (Miss. Ct. App. 2006) (agreement between parties to replace support with in-kind contributions not necessarily binding).

E. Clean hands doctrine

Against the custodial parent. As a general rule, a custodial parent's breach of obligations or misconduct does not prevent an award of arrearages for child support, which belongs to the child. A mother in violation of a provision of the couple's divorce decree was not barred by the clean hands doctrine from seeking an increase in child support. *Jurney v. Jurney*, 921 So. 2d 372, 377 (Miss. Ct. App. 2005) (support is for the benefit of children); *see also Artz v. Norris*, 163 So. 3d 983, 988 (Miss. Ct. App. 2015) (wife's failure to reimburse ex-husband for transportation costs was not a defense against contempt for nonpayment). However, a mother who hid children from their father for eight years was barred from recovering support. *Cole v. Hood,* 371 So. 2d 861, 863 (Miss. 1979); *cf. Brown v. Brown,* 822 So. 2d 1119, 1124-25 (Miss. Ct. App. 2002) (recognizing exception, but finding that payor had information that could have located child); *see also Dep't of Human Servs. v. Marshall,* 859 So. 2d 387, 390 (Miss. 2003) (refusing

to forgive arrearages based on mother's refusal of visitation for twelve years).

IV. Enforcement of obligations without fixed amounts

Enforcing basic support under the guidelines is fairly straightforward – the amount owed is set by the order and the date payment is due is clear. There is often less clarity around the "add-ons" to basic support – extracurricular activities, medical expenses, support for college, and life insurance. The provision may be ambiguous, the event triggering a duty to pay unclear, or the obligation may be based on agreement of the parties. This section discusses cases dealing with these issues and some potential solutions.

A. Extracurricular activities

A father agreed at divorce to pay 100% of the activities "mutually agreed upon by the parties in advance." After the parents disputed the father's obligation for certain activities, the chancellor modified his obligation to a maximum of $6,000 a year per child. The court of appeals affirmed, based on the chancellor's finding that the provision was unworkable because the parties could not agree on activities. *Smith v. Smith,* 318 So. 3d 484, 496-97 (Miss. Ct. App. 2021).

Parties are permitted to cap their obligation under add-on provisions. Consider adding a provision capping the payor's total obligation for extracurricular activities.

In a 2016 case, the court of appeals clarified the meaning of "extracurricular activities," holding that the term refers to activities linked to school. A couple's agreement to pay for extracurricular activities required the father to pay for school volleyball expenses but not for a traveling competitive volleyball team. *Thomas v. Crews*, 203 So. 3d 701, 706 (Miss. Ct. App. 2016) (the court looked to the definition of "extracurricular" as "those sponsored by and usually held at school but that are not part of the standard academic curriculum").

If a child's activities involve out-of-school programs, lessons, or sports, consider referring generally to extracurricular and non-school-related activities.

B. Private school tuition

A father was obligated to pay the costs of higher tuition at a school chosen by the custodial mother for a child with special educational needs – he had agreed at divorce to pay the costs of any private school that his children "may later attend." The court acknowledged that the mother's choice must be reasonable but also noted that his agreement did not limit the costs of private education. *Smith v. Smith,* 318 So. 3d 484, 496-97 (Miss. Ct. App. 2021). In contrast, a father's obligation to pay for private school terminated.

Consider limiting the costs of private school tuition to costs comparable to the child's current school or setting a cap on the amount to be paid.

C. Support for college

Parents may limit college support to the basics. The supreme court held that a daughter's flying lessons, required for her commercial aviation degree, were not covered by the parents' agreement. The agreement stated, "all costs are to be based on the average costs of meals, tuition, books, and room." The supreme court held that the agreement was clear and unambiguous on its face, limiting costs to the enumerated items. *Zweber v. Zweber,* 102 So. 3d 1098, 1099, 1101-02 (Miss. 2012) (en banc).

Parents disagreed on whether the payor should be responsible for college expenses such as football tickets, parking tickets, lockout charges, clothing, personal and hair expenses, and sorority dues. Because they agreed that college support would include "any costs as *may be necessary*" for the children's college education, the expenses were not included. They were not "reasonable and necessary" costs of college education. *Cossitt v. Cossitt,* 975 So. 2d 274, 280-81 (Miss. Ct. App. 2008).

Consider specifically listing the items included in college support, limiting the amount of support to in-state tuition, or excluding certain items.

A chancellor properly denied a father's request that his college support obligation be modified to require that his children maintain a 2.0 grade point average. The parties' agreement did not include that requirement. Modification of the agreement requires a material change in circumstances not foreseeable at the time of the decree. *Stigler v. Stigler*, 48 So. 3d 547, 556 (Miss. Ct. App. 2009); s*ee also Wilson v. Stewart,* 171 So. 3d 522 (Miss. Ct. App. 2014) (son's poor performance did not justify terminating support under agreement that was not dependent on academic performance).

A father was not entitled to a reduction in basic support when his oldest child attended college. Their agreement provided for college support but did not provide for a reduction in basic support. Because they anticipated that the child would attend college, there was no unforeseeable material change that would allow modification of the basic support award. *Dix v. Dix*, 941 So. 2d 913, 918 (Miss. Ct. App. 2006).

Limitations such as modification of basic support during college, academic performance requirements, or requirements for full-time attendance should be included in the original agreement.

The Mississippi Supreme Court has vague college support provisions as agreements to pay post-majority college expenses. For example, agree-

ments to pay "all reasonable college expenses." Crow v. Crow, 622 So. 2d 1226, 1227 (Miss. 1993), and "all educational expenses of [the children]," Mottley v. Mottley, 729 So. 2d 1289, 1290 (Miss. 1999), were interpreted as agreements for post-majority support. The court of appeals reached a similar result in a 2014 case. A father's agreement to "provide for the funding of the full costs of all college education expenses of the minor children" obligated him to provide post-majority college support for his children. The court noted that "vague college support provisions have been routinely construed to include post-majority support." The chancellor did not err in ordering him to pay support until his children graduated or reached the age of twenty-three. *Wilson v. Stewart,* 171 So. 3d 522 (Miss. Ct. App. 2014); *see also Vincent v. Rickman*, 239 So. 3d 501, 506-07 (Miss. Ct. App. 2017) (father's agreement to pay "one half of the costs of a college education for the minor children" did not terminate when the children turned twenty-one).

If college support is intended to end when the child turns twenty-one, or after four years of college, include a provision to that effect.

D. Life Insurance

A parent may agree to provide life insurance for a child apart from security for child support. They may also agree to provide life insurance beyond majority. See *Talley v. Talley*, 366 So. 3d 901, 905-06 (Miss. Ct. App. 2023) (enforcing a father's obligation to provide life insurance until his children were twenty-five).

If a payor's life insurance obligation is for the purpose of securing an award for child support, state the purpose and provide for termination of the obligation when support ends.

CHECKLIST

Modification

1. Does the court have jurisdiction to modify?
    a. In state jurisdiction is in the court that issued the order unless the court transfers the case.
    b. Interstate jurisdiction lies with the court that issued the order until all parties move.
    c. Interstate – after all parties and the child move, the state in which the defendant resides has jurisdiction to modify.

2. What is the test for modification?
    a. In private actions, was there a material change, with an unforeseeable impact, and was any income loss by the payor voluntary?
    b. In DHS actions, do the guidelines applied to current income produce a different result?

3. May an order be made retroactive?
    a. A *decrease* in support may only be from the date of judgment (except when emancipation or change in custody is the material change).
    b. Courts have discretion to make support *increases* retroactive to the event justifying the modification, except in DHS cases. Modification may not be made retroactive prior to the date of filing in DHS cases.

Enforcement

1. Does the court have jurisdiction to enforce?
    a. If another state has modified the order, it must be registered to be enforced.

2. Is the payor entitled to a credit against arrearages?
    a. Because a child lived with the payor or was emancipated prior to filing,
    b. For direct payments for items covered by child support,
    c. For payments by third parties, or
    d. For social security benefits payable to the child on the payor's account,

3. Are there defenses to enforcement?
    a. Statute of limitations
    b. Laches or estoppel
    c. Res judicata
    d. Based on out-of-court agreements
    a. Because of the child's or custodial parents' conduct?

ETHICS HOUR

1

ETHICS OPINION NUMBER 166
OF THE MISSISSIPPI BAR
RENDERED JUNE 23, 1989

Question:

An attorney represented a party in a divorce proceeding which culminated with entry of a divorce decree in February 1980. The attorney has had no contact with either party since 1980. The attorney asks whether he is accountable to the parties years later for any subsequent dealings or litigation between the parties.

2

ETHICS OPINION NUMBER 166
OF THE MISSISSIPPI BAR
RENDERED JUNE 23, 1989

Answer:

As in Opinion Number 138, the Committee can discern no ethical requirement for continued representation of a client once the attorney-client relationship has terminated. Therefore, the Committee concludes that the attorney is not accountable to a client for any subsequent dealings or litigation, and no Court permission is required to end an attorney's duty once the case is over.

3

PROVISIONS REGARDING TERMINATION

Consider:

- Making an engagement letter more precise.
- Perhaps state specifically what the representation does NOT include, such as appeal.

Limitation:

The point at which representation is terminated must be reasonable and must be designed to protect the client's interests. (M. R. Prof. Resp. 1.2, 1.16).

4

M. R. PROF. RESP. 1.16

Rule 1.16(d):

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

5

RULE 1.2

Rule 1.2(c): "A lawyer may limit the objectives or scope of the *representation if the limitation is reasonable* under the circumstances *and the client gives informed consent."*

Comment to Rule 1.2(c): "For example, lawyers may provide counsel and advice and may draft letters or pleadings. Lawyers may assist clients in preparation for litigation with or without appearing as counsel of record."

6

ETHICS OPINION NUMBER 261 OF THE MISSISSIPPI BAR
RENDERED JUNE 21, 2018

(1) A lawyer may provide limited scope representation on behalf of a client. Such limits can involve merely drafting a document or advising a client on how to proceed in a matter without undertaking a full representation.

(2) If the answer to question 1 is yes, is the preparing lawyer required to disclose either the name of the preparer or that the document was prepared by a lawyer? No.

7

ADVICE UPON TERMINATION: CUSTODY AND VISITATION

Documentation

When post-judgment conflicts over custody and visitation lead to litigation, documentation is critical to proving contempt, a material change in circumstances, or the need to limit visitation.

Advise high-conflict clients of the need for contemporaneous documentation.

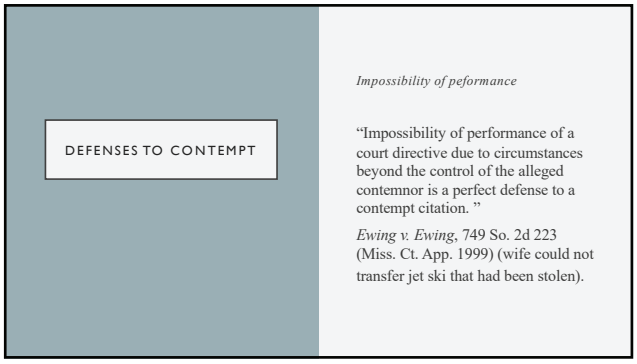
8

DETAILS ARE CRITICAL

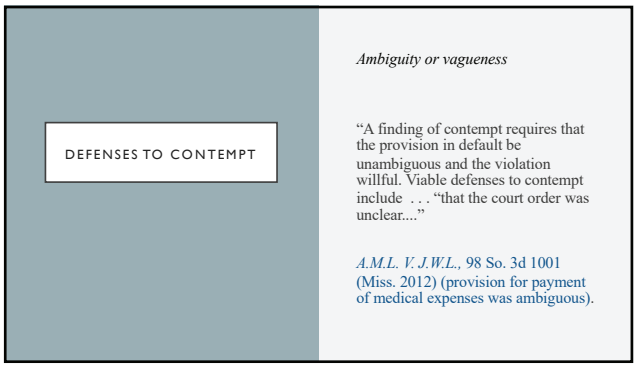
When asked what weekends he was denied visitation, Thomas responded he did not have actual dates but that it occurred on "numerous occasions. . . . Additionally, Thomas was unable to specify which years he did not get the children for Thanksgiving. He ultimately acknowledged that he "should have been writing [it] all down all the years."

Jones v. Jones, 265 195 (Miss. Ct. App. 2019).

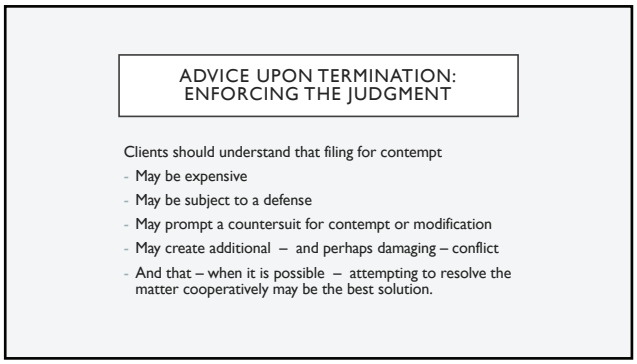
9


DEFENSES TO CONTEMPT
Impossibility of peformance
"Impossibility of performance of a court directive due to circumstances beyond the control of the alleged contemnor is a perfect defense to a contempt citation. "
Ewing v. Ewing, 749 So. 2d 223 (Miss. Ct. App. 1999) (wife could not transfer jet ski that had been stolen).

10


DEFENSES TO CONTEMPT
Ambiguity or vagueness
"A finding of contempt requires that the provision in default be unambiguous and the violation willful. Viable defenses to contempt include . . . "that the court order was unclear...."
A.M.L. V. J.W.L., 98 So. 3d 1001 (Miss. 2012) (provision for payment of medical expenses was ambiguous).

11


ADVICE UPON TERMINATION: ENFORCING THE JUDGMENT
Clients should understand that filing for contempt
- May be expensive
- May be subject to a defense
- May prompt a countersuit for contempt or modification
- May create additional – and perhaps damaging – conflict
- And that – when it is possible – attempting to resolve the matter cooperatively may be the best solution.

12

OUT-OF-COURT MODIFICATION

"The modification relieving Houck of any obligation to pay child support to a custodial parent is null and void. . . . . The child's right to his parent's support cannot be bargained or contracted away by his parents."

Houck v. Ousterhout, 861 So. 2d 1000 (Miss. 2003) (father ordered to pay $89,000 in arrears).

13

ADVICE UPON TERMINATION: CUSTODY AND SUPPORT

Clients need to understand that

- A judgment will not force the other parent to be involved in the child's life
- Their obligations are independent of the other parent's
- An out-of-court modification is not enforceable
- Delaying for years to enforce custody rights may permanently damage their relationship with a child.

14

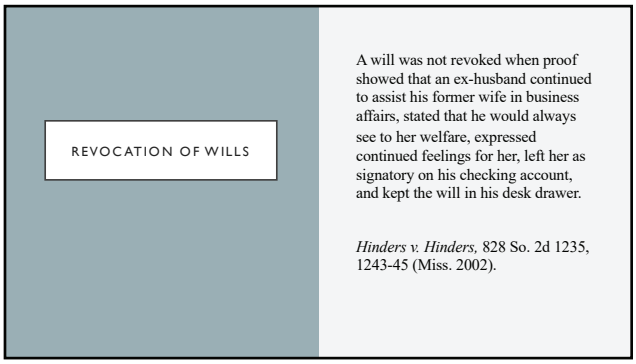
JOINT TENANCY

A couple's agreement to divide mineral rights in one property and that the husband would be entitled to mineral rights in another property showed their intent to sever a joint tenancy in mineral rights.

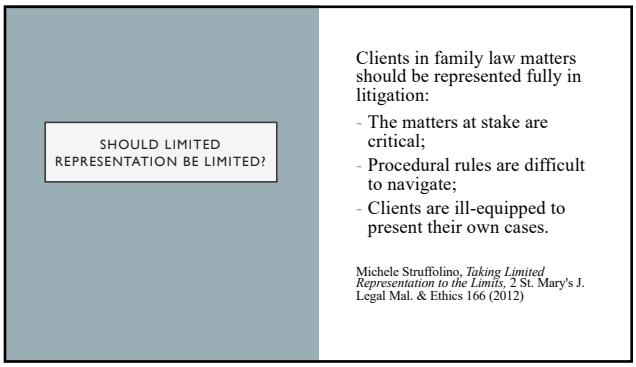
In re Estate of Callender, 309 So. 3d 131, 137-38 (Miss. Ct. App. 2020).

But – better to specifically state that the parties intend to hold as tenants in common than to invite litigation over intent.

15


REVOCATION OF WILLS
A will was not revoked when proof showed that an ex-husband continued to assist his former wife in business affairs, stated that he would always see to her welfare, expressed continued feelings for her, left her as signatory on his checking account, and kept the will in his desk drawer.
Hinders v. Hinders, 828 So. 2d 1235, 1243-45 (Miss. 2002).

16


SHOULD LIMITED REPRESENTATION BE LIMITED?
Clients in family law matters should be represented fully in litigation:
- The matters at stake are critical;
- Procedural rules are difficult to navigate;
- Clients are ill-equipped to present their own cases.
Michele Struffolino, *Taking Limited Representation to the Limits,* 2 St. Mary's J. Legal Mal. & Ethics 166 (2012)

17

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
Lewis v. Lewis, 360 So. 3d 298 (Miss. Ct. App. 2023)	20	2 Adult children: Wife 51 Husband 52	H: Adultery	Husband: $125,000/yr; Wife: $3,470/mo		$2,000/mo (29% of disparity)	NA	Husband, aff'd	Husband's ongoing affair; disparity; marriage length supported award.
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
Gussio v. Gussio, 371 So. 3d 734 (Miss. Ct. App. 2023)	9	4 children (wife); Wife 35	W: Habitual cruelty	H: Unclear; W: $0	W: 50% personal property; remaining excluded by prenuptial agreement	$250,000 lump sum $1,500 rehabilitative for 30 mo	H: $2,000/mo	Husband, aff'd	H net value of separate property: $4,721,000; wife had no income and limited assets; husband was at fault
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