IN THE SUPREME COURT OF MISSISSIPPI

EDWARD E. SHELNUT — APPELLANT

VS. — CAUSE NO. 2007-CA-02157

MISSISSIPPI DEPARTMENT
OF HUMAN SERVICES — APPELLEE

APPELLEE'S BRIEF TO COURT

ORAL ARGUMENT NOT REQUESTED

JAMES JASON BAYLES
ATTORNEY FOR THE APPELLEE
MISSISSIPPI DEPARTMENT OF HUMAN SERVICES
POST OFFICE BOX 11677
JACKSON, MS 39283
MBN:[redacted]
TELEPHONE: 601 432 1200
FAX 601 432 1201

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VS. — NO. 2007-CA-02157

DEPARTMENT OF HUMAN SERVICES — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Edward E. Shelnut, Appellant
2. Gaye Lynn Kern, custodial parent
3. Mississippi Department of Human Services
4. Margaret Anne Kern, child of Edward Shelnut and Gaye Lynn Kern
5. Patricia Peterson Smith, attorney for the Appellant
6. Jason Bayles, attorney for the Appellee
7. Hon. Dewayne Thomas, Chancellor
8. Ms. Toni Matlock, court reporter

Certified, this the 23rd day of June, A.D., 2008.

Attorney of Record for the Appellee

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STATEMENT OF THE ISSUES

1. A. Ed's due process rights were not denied to such an extent in the various proceedings in Canada that those denials would provide him a defense against a registration and attempt to enforce a foreign judgment in this state.

   B. The Court did not err in finding that Canada had personal jurisdiction over Ed.

2. The trial court did not err in its ruling that the amended notice of registration of foreign support order related back to the original notice filed in 1999.

3. The three year statute of limitation in Miss. Code Ann. §15-1-45 when read in conjunction with Miss. Code Ann §15-1-59 and applied to this case allows for the order to be properly confirmed by the trial court.

4. In the present action the child did not need to be made a party due to the fact that the child had not emancipated when the case was registered.

5. The Chancellor did not err when the age of emancipation was determined to be 18 as opposed to 16 years of age.

6. Gaye-Lynn's conduct did not rise to a level that would waive any right she had to obtain child support under a valid judgment.

7. The trial court did not act improperly when questioning Ed or through any comments made by the trial court during the proceeding.

STATEMENT OF THE CASE

On June 28, 1990, Gaye Lynn Kern and Edward Shelnut were divorced by a Judgment under U. F. C. 456 of A.D. 1990 in Canada. On January 25, 1999, the Mississippi Department of Human Services attempted confirmation of the registration of the Canadian judgment. On August 10, 1999, the Chancery Court of Hinds County, Mississippi entered an order dismissing the attempt by DHS to confirm registration of the Canadian judgment. This order was appealed to the Mississippi Supreme Court and on December 14, 2000, the Mississippi Supreme Court reversed the trial court's decision and remanded the action to the Chancery Court of Hinds County for further proceedings on the validity and enforceability of the Canadian judgment. The hearing on remand was finally concluded on September 27, 2007. At the conclusion of the hearing the trial court ruled that the Canadian judgment would be enrolled and gave the attorneys 30 days to brief additional issues. On November 6, 2007 the trial court entered a Final Judgment Registering and Confirming A Foreign Judgment of Child Support For Enforcement which assessed a Judgment in the amount of $54,600.00 against the Defendant Edward Shelnut. On November 19, 2007 the trial court entered an Amendment to Memorandum Opinion which corrected the age of emancipation from 16 to 18 years of age. The trial court's decision was appealed to this Court on November 28, 2007.

SUMMARY OF THE ARGUMENT

Ed's due process rights were not denied to such an extent in the various proceedings in Canada that those denials would provide him a defense against a registration and attempt to enforce a foreign judgment in this state, and the Court did not err in finding that Canada had personal jurisdiction over Ed. Ed's testimony and a letter from Ed's attorney to Ed showed that Ed was aware of the divorce proceeding. The jurisdictional issue was discussed in *Department of Human Services v. Shelnut*, 772 So.2d 1041, and this Court rejected Ed's argument that the Canadian judgment should not be enforced due to lack of jurisdiction.

The trial court properly ruled that the amended notice of registration of foreign support order related back to the original notice filed in 1999. The trial court registered the Canadian judgment on July 8, 1999. The enforcement proceeding based upon that order was later dismissed and subsequently reinstated. The Judgment issued by the trial court was based upon the order registered in 1999 since it was still active.

The statute of limitations had not run, and the foreign judgment was properly confirmed by the trial court. The child in this action, Margaret Anne, was not quite 13 years old when the Chancery Court of Hinds County registered the Canadian decree in this cause. Applying Miss. Code Ann. § 15-1-45 in conjunction with the savings clause under Miss. Code Ann. §15-1-59, the three year statute of limitations on foreign judgments would not run against a Mississippi resident until three years after the child emancipates. If you apply this section to the present action the statute clearly had not run by the time this action was filed in the Chancery Court of Hinds County due to the fact that the child in this action had not quite reached the age of 13 when the case was registered.

In the present action the child did not need to be made a party due to the fact that the child had not emancipated when the case was registered. In *Brown v. Brown,* 822 So.2d 1119 (Miss. Ct. App. 2002) the youngest child had emancipated, but the statute of limitations had not run. The Court went on to state that the daughter should be made a party for these purposes, or affirmatively waive participation. *Brown* at 1123. In the present case the child was only 13 years of age when the Canadian decree was registered, so there was not a need for the child to be joined as a party when the attempts were made to enforce the decree.

The Chancellor did not err when the age of emancipation was determined to be 18 as opposed to 16 years of age. According to Miss. Code Ann. § 93-25-87 the law of the issuing state governs the nature, extent, amount and duration of current payments under a registered support order. Therefore Mississippi has to abide by Canada's laws regarding the emancipation age of the child in this action. The version of the Canadian Divorce Act used by the appellant states under (b) of the "child of the marriage" section that the child could still be considered under the parent's charge beyond the age of 16 for "other cause." The Chancellor made a determination that the child emancipated at the age of 18 in 2004. The Chancellor did not err in this determination due to the fact that "other cause" under section (b) quoted above could reasonably be determined to be a situation where the child is still in school and living with the custodial parent. If the child support order is under the federal law, The Divorce Act, the obligation to pay support may also continue beyond the child's eighteenth birthday in Saskatchewan if that person:

> a. remains under the parent's charge; and
> b. is unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.
> In either situation, provided adequate proof of the ongoing dependency is

provided to the office, the Office will continue to collect the child support.

(www.justice.gov.sk.ca/MEO-FAQ)

Gaye-Lynn testified that she is still in contact with her local maintenance office. [Transcript 15, lines 3-5] Therefore, Margaret-Anne should have emancipated no earlier than the age of 18.

Gaye-Lynn's conduct did not rise to a level that would waive any right she had to obtain child support under a valid judgment. Gaye-Lynn has been accused of threatening Ed with jail if he attempted to visit Margaret-Anne. Gaye-Lynn testified when asked if she had a conversation with Ed in which she told him if he came to Canada she would have him jailed that she told him in Canada if a person does not pay child support that person risks being thrown in jail. [Transcript 67, lines 27-29] [Transcript 68, lines 1-8] In *Cole v. Hood,* 371 So.2d 861 (Miss. 1979) Mrs. Cole hid the children for eight years and kept her address secret from Mr. Hood so that he could not see the children or effectively make child support payments. The Court held that due to the actions of Mrs. Cole it was inequitable for Mr. Hood to have to pay support for that time period. *Cole* at 864. The Cole case can be distinguished from our present case due to the fact that Ed knew where the child was, sent numerous cards and letters over the years, never made an attempt to see the child and never sent any payments for the support of the child. Therefore, Gaye-Lynn by her actions and the evidence presented did not waive any right she had to obtain child support under the Canadian decree.

The trial court did not act improperly when questioning Ed or through any comments made by the trial court during the proceeding.

The Appellee did not find the actions of the trial court to be improper. The appellant was given ample opportunity and adequate time to properly make a case before the Court.

ARGUMENT

STANDARD OF REVIEW

The findings of fact of the chancery court, particularly in the areas of divorce and child support, will generally not be overturned by this Court on appeal unless they are manifestly wrong. *Nichols v. Tedder*, 547 So.2d 766, 781 (Miss. 1989). Findings of the chancellor will not be disturbed or set aside on appeal unless the decision is manifestly wrong and not supported by substantial credible evidence, or unless the wrong legal standard was applied. *In re Guardianship of Savell*, 876 So.2d 308, 312 (Miss.2004); *Tinnin v. First United Bank of Miss.*, 570 So.2d 1193, 1194 (Miss.1990); *Bell v. Parker*, 563 So.594, 596-97 (Miss.1990).

1. A. Ed's due process rights were not denied to such an extent in the various proceedings in Canada that those denials would provide him a defense against a registration and attempt to enforce a foreign judgment in this state.

B. The Court did not err in finding that Canada had personal jurisdiction over Ed.

The jurisdictional issue was discussed at length during the previous appeal of this case to the Mississippi Supreme Court. At that time Ed was attempting to collaterally attack the Canadian judgment and the Court stated in *Shelnut* that

> There is no requirement that for res judicata to bar this collateral attack, the Canadian Court must list the evidence upon which it found jurisdiction over Shelnut or that the Canadian court hold a full evidentiary hearing on the issue. Shelnut submitted himself to the jurisdiction of the Canadian court for the purposes of contesting jurisdiction. The Canadian court, of necessity, ruled against him on the issue. Shelnut made no attempt to appeal the judgment of the Canadian court, waiting instead ten years for Kern to attempt to enforce the support decree in Mississippi before collaterally attacking the judgment. Shelnut testified at the hearing before the chancery court that he did not appeal the Canadian judgment because his lawyer advised him that it would cost more money and Shelnut would almost assuredly be ruled against. Shelnut's assertion that the

Canadian judgment should not be enforced for want of jurisdiction is rejected.

Shelnut at 1047.

The Appellant argues that there were two cause numbers in the Canadian action, and Ed failed to get notice of the divorce action. The Court in the first appeal was aware that there was an interim action in addition to the final Canadian decree of divorce. In the first appeal the issue about problems with notice were not addressed, and as the above selection from the first appeal mentions, the decree was not appealed in Canada.

Through Ed's own testimony and the appellant's exhibit 13 from the September 27, 2007 hearing it can be shown that Ed received notice of the proceedings in Canada. In exhibit 13 Reeves Jones, Ed's attorney at the time of the first Hinds County Chancery proceeding, wrote to Ed and stated

> "Judge Robinson then asked who was actually served first on the two separate complaints for divorce – the Hinds County and the Canadian– and the record reflected that you were personally served with her complaint for divorce before she was personally served with your complaint for divorce." [Exhibit 13]

Exhibit 18 from the September 27, 2007 hearing contains the appellee's record excerpts from the first appeal in this case to the Mississippi Supreme Court. In Exhibit 12 of that record on page 33 of the excerpted transcript there is the dialogue of the direct examination of Edward Shelnut. The transcript reads:

> Q. (By the attorney for Edward Shelnut)
>
> Okay. Now we've all been over the fact of the separation. You filed a complaint for custody. That was subsequently followed by a complaint for divorce. Gaye-Lynn filed a complaint for divorce in Canada. You were personally served were you not?
>
> A. (Answer by Edward Shelnut) Yes.

[Exhibit 18 citing Exhibit 12 page 33]

Both examples from the appellant's record excerpts show that Ed knew of the divorce proceedings. Therefore, this Court should find that Ed was properly noticed, and he should not be allowed to relitigate the issue of notice or jurisdiction in this appeal.

2. The trial court did not err in its ruling that the amended notice of registration of foreign support order related back to the original notice filed in 1999.

A child support order or an income-withholding order issued by the tribunal of another state (issuing state) may be registered in this state for enforcement. Miss. Code Ann. § 93-25-81 A support order issued in another state is registered when the order is filed in the registering tribunal of this state, and it is enforceable as an order issued in a tribunal of this state. Miss. Code Ann. § 93-25-85 The Chancery court order in this cause dated July 8, 1999 states "that the Canadian divorce decree sought to be registered in cause no. U99-1 be, and same hereby is registered in the chancery court of the second judicial district of Hinds County, Mississippi." Registration of the order does not require commencement of litigation; however, a petition or pleading for modification may be filed at the same time as the registration or after registration.

Grumme v. Grumme, 871 So.2d 1288, 1290 citing Miss. Code Ann. 93-25-97

On August 10, 1999 the Chancery court dismissed the attempt to enforce the foreign judgment. On December 14, 2000 the Supreme Court of Mississippi reversed the August 10, 1999 order and remanded it for further proceedings, finding that Canada had personal jurisdiction over Ed to grant a divorce. In 2003 the remand hearing was dismissed in chancery due to a lack of prosecution. In 2005 the action to confirm the registration of the Canadian order was reinstated after being dismissed, and the amended notice was filed to give Edward Shelnut notice that the

proceeding had once again been put on the docket. The Chancery court would not allow the case to go forward unless some type of notice was filed stating that the case was moving forward. Since the order was registered in 1999, and this was a continuation of the same action, this amended notice should not be seen as a new registration. The Canadian order was registered by the Chancery Court of Hinds County in 1999, and when the amended notice was filed the case was still active and the registration was valid under the statute.

3. The three year statute of limitation in Miss. Code Ann. §15-1-45 when read in conjunction with Miss. Code Ann §15-1-59 and applied to this case allows for the order to be properly confirmed by the trial court.

The child in this action, Margaret Anne, was not quite 13 years old when the Chancery Court of Hinds County registered the Canadian decree in this cause. According to Mississippi Code Ann. §15-1-45:

> All actions founded on any judgment or decree rendered by any court of record without this state shall be brought within seven years after the rendition of such judgment or decree, and not after. However, if the person against whom such judgment or decree was or shall be rendered, was, or shall be at the time of the institution of the action, a resident of this state, such action, founded on such judgment or decree, shall be commenced within three years next after the rendition thereof, and not after.

The appellant is arguing that since the order was registered nine years after the Canadian decree was entered, the statute of limitations has run on this case, and the order cannot be enforced.

In *Strack v. Sticklin,* 959 So.2d 1, 7 (MS 2006) this Court cites *Wilson v. Wilson,* 464 So.2d 496, 498 (Miss.1985) stating that the Miss. Code Ann. §15-1-59 (Rev.2003) savings clause applies in child support cases. Section 15-1-59 reads:

> If any person entitled to bring any of the personal actions mentioned shall, at the time at which the cause of action accrued, be under the disability of infancy or unsoundness of

> mind, he may bring the actions within the times in this chapter respectively limited, after his disability shall be removed as provided by law. However, the saving in favor of persons under disability of unsoundness of mind shall never extend longer than twenty-one (21) years.

If you apply this section to the present action the statute clearly had not run by the time this action was filed in the Chancery Court of Hinds County due to the fact that the child in this action had not quite reached the age of 13 when the case was registered.

4. In the present action the child did not need to be made a party due to the fact that the child had not emancipated when the case was registered.

In *Brown* this Court held that the " mother's claim for support was derivative; mother required to submit daughter's agreement to divide arrearage or prove amount actually expended to compensate for father's failure to provide support." *Brown* at 1122. In the Brown case the youngest child had emancipated, but the statute of limitations had not run,

and the Court went on to state that the daughter should be made a party for these purposes, or affirmatively waive participation. *Brown* at 1123. In the present case the child was only

13 years of age when the Canadian decree was registered, so there was not a need for the child to be joined as a party when the attempts were made to enforce the decree.

5. The Chancellor did not err when the age of emancipation was determined to be 18 as opposed to 16 years of age.

According to Miss. Code Ann. § 93-25-87 the law of the issuing state governs the nature, extent, amount and duration of current payments under a registered support order. Therefore

Mississippi has to abide by Canada's laws regarding the emancipation age of the child in this action. The version of the *Canadian Divorce Act* used by the appellant states that:

> "Child of the marriage" means a child of two spouses or former spouses who, at the material time, (a) is under the age of sixteen years, or
> (b) is sixteen years of age or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life; (Exhibit 18 appellant's record exceprts)

The child in this case, Margaret Anne, was still in college and 21 years of age at the time of the September 27, 2007 hearing. [Transcript 54, lines 13-14] She began university in the fall of 2003 and is under the care of Gaye-Lynn and is working part time to help with expenses. The Chancellor made a determination that the child emancipated at the age of 18 in 2004. The Chancellor did not err in this determination due to the fact that "other cause" under section (b) quoted above could reasonably be determined to be a situation where the child is still in school and living with the custodial parent. Opposing counsel argues Mississippi law in this instance, but the law as applied in this instance is the Canadian law listed above.

Margaret Anne and Gaye-Lynn reside in Saskatchewan and according to the government of Saskatchewan website:

> If the child support order is under the federal law, The Divorce Act, the obligation to pay support may also continue beyond the child's eighteenth birthday in Saskatchewan if that person: a. remains under the parent's charge; and
> b. is unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life.
> In either situation, provided adequate proof of the ongoing dependency is provided to the office, the Office will continue to collect the child support.
>
> (www.justice.gov.sk.ca/MEO-FAQ)

Gaye-Lynn testified that she is still in contact with her local maintenance office. (Transcript 15,

lines 3-5] Therefore, Margaret-Anne should have emancipated no earlier than the age of 18.

6. Gaye-Lynn's conduct did not rise to a level that would waive any right she had to obtain child support under a valid judgment.

In *Cunliffe v. Swartzfager*, 437 So.2d 43 the mother did not give the father their exact address and chose to communicate with him through their relatives. The son made calls to the father, and the father knew where the mother's relatives were, and it is indicated that he knew generally where his former wife and child resided. *Cunliffe* at 45. The Court held that the father was not in contempt of the court for failure to make the payments but that, since the payments had become fixed as they were due, the mother is entitled to a judgment against the father in the sum of $7140.00. *Id.*

Ed testified that Gaye-Lynn stated she would have him put in jail and nobody in Canada would be able to get him out. [Transcript 123, lines 1-2] Ed also testified he did not make any attempts to visit or see Margaret-Anne. [Transcript 126, lines 16-20] Ed seemed to be scared he may end up in jail, but since he never made an attempt to see his only child, there is no proof before the Court that anything would have happened to him. Several letters from Ed to Margaret-Anne were put into evidence showing that he had information concerning their whereabouts at least from 1989-2002. [Transcript 75-80] Ed sent cards and letters from 1989 to 2002, but he did not send any support. [Transcript 16, lines 1-4] According to Ed's testimony he did not pay any support under the Canadian divorce decree. [Transcript 139, lines 4-11]

Gaye-Lynn has been accused of threatening Ed with jail if he attempted to visit Margaret-Anne. Gaye-Lynn testified when asked if she had a conversation with Ed in which she told him if he came to Canada she would have him jailed, that she told him in Canada

if a person does not pay child support that person risks being thrown in jail. [Transcript 67, lines 27-29] [Transcript 68, lines 1-8] Gaye-Lynn was further asked if she told Ed that if he set foot in Canada that she would have him put in jail, and she replied "no." [Transcript 68, lines 5-8]

According to the testimony of Frank Inman, Ed knew of the trips Frank took to Canada, but Ed never asked to go on any of the trips. [Transcript 98, lines 1-12] Frank also testified that he went on these trips to maintain a relationship and that Ed could have gone on these trips even if he had invited himself. [Transcript 98, lines 28-29] [Transcript 99, lines 1-5] Frank further testified that Gaye-Lynn did not threaten to have he or his wife jailed if they went to Canada. [Transcript 100, lines 4-16]

In *Cole,* Mrs. Cole hid the children for eight years and kept her address secret from Mr. Hood so that he could not see the children or effectively make child support payments. *Cole* at 864. The Court held that due to the actions of Mrs. Cole it was inequitable for Mr. Hood to have to pay support for that time period. *Id.* The Cole case can be distinguished from our present case due to the fact that Ed knew where the child was, sent numerous cards and letters over the years, never made an attempt to see the child and never sent any payments for the support of the child. Additionally, Ed testified that he did not attempt the change the order to add visitation. [Transcript 140, lines 1-5] [Transcript 145, lines 19-29] Due to the foregoing, Gaye-Lynn's conduct did not rise to such a level that she waived her right to child support.

7. The trial court did not act improperly when questioning Ed or through any comments made by the trial court during the proceeding.

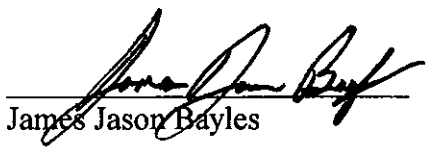
The Appellee did not find the actions of the trial court to be improper. The trial court allowed the appellant on numerous occasions to attempt to develop a case when it appeared that

relevance was in doubt and that the appellant was trying to relitigate the divorce proceeding. [Transcript 24, lines 26-29] [Transcript 25, lines 1-2] [Transcript 27, lines 18-29] [Transcript 29, lines 17-26] [Transcript 34, lines 22-29] [Transcript 35, lines 1-5] [Transcript 44, lines 9-27] [Transcript 44, lines 28-29] [Transcript 45, lines 1-29] [Transcript 46, lines 1-26] The trial court was also well within its rights to ask questions to clarify certain issues. Therefore, the Appellee does not agree with the Appellant's contention that the trial court acted improperly and believes that the manner in which the issue was brought to this Court is highly improper.

CONCLUSION

In all respects, the Appellee requests that the Chancellor's order be affirmed.

Respectfully submitted,



James Jason Bayles

Attorney for Appellee

Senior Attorney, James Jason Bayles
MS Bar No. [redacted]
P. O. Box 11677
Jackson, MS 39283
601 432 1283

CERTIFICATE OF SERVICE

I, the undersigned attorney of record for Appellee, Mississippi State Department of Human Services, in the above styled and numbered cause, hereby certify that I have this day mailed, United States Mail, postage prepaid, a true and correct copy of the foregoing Brief of the Appellee to:

Honorable DeWayne Thomas
Chancellor, 5th Chancery District
P. O. Box 686
Jackson, Mississippi 39205

Patricia Peterson Smith, Esq.
P. O. Box 589
Vicksburg, MS 39181

This the 23rd day of June, A.D., 2008.

James Jason Bayles, Attorney for Appellee
MS Bar No. [redacted]

State of Mississippi
Department of Human Services
P. O. Box 11677
Jackson, MS 39283
Phone No. 601 432 1283

CERTIFICATE OF FILING

I, James Jason Bayles, Attorney for the Appellee, do hereby certify that I have this day hand delivered the original and three copies of this, the Brief of the Appellee to:

Betty Sephton
Supreme Court Clerk
P. O. Box 249
Jackson, MS 39205

This the 23rd day of June, A.D., 2008.

James Jason Bayles, Attorney for Appellee