ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI

EWARD E. SHELNUT — **APPELLANT**

VS. — **CAUSE NO. 2007-CA-02157**

MISSISSIPPI DEPARTMENT OF HUMAN SERVICES — **APPELLEE**

APPELLANT'S BRIEF TO COURT

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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, Appellee
3. Mississippi Department of Human Services, Appellee's agent
4. Margaret Anne Kern, child of the parties
5. Patricia Peterson Smith, attorney for the Appellant
6. Jason Bayles, attorney for the Mississippi Department of Human Services
7. Hon. Dewayne Thomas, chancellor
8. Ms. Toni Matlock, court reporter

Certified, this the 28th day of May, 2008.

Attorney of Record for Edward E. Shelnut

IN THE SUPREME COURT OF MISSISSIPPI

EDWARD SHELNUT **APPELLANT**

VS. **NO. 2007-CA-02157**

DEPARTMENT OF HUMAN SERVICES **APPELLEE**

APPELLANT'S BRIEF TO COURT

STATEMENT OF THE ISSUES

All citizens have a fundamental right to notice and an opportunity to be heard in any court within its jurisdiction. In order for full faith and credit of a foreign judgment to be granted in any attempt to register and enforce a foreign judgment, whether from another state or another country, the first questions that the sitting trial court must answer as to the foreign judgment are *whether*:

1) Personal jurisdiction attaches for all legal actions when it attaches in one action.

2) The Defendant was noticed or given an opportunity to be present for any hearing on the merits in the foreign state in a second action before the foreign judgment was entered.

3) The statue of limitations in registration of a foreign order is three years against a Mississippi resident, when there is a domestic relations order for child support;

a) The original attempt to register and enforce the divorce decree of 1999 was nine years after the entry of the foreign judgment order in Canada;

b) the statute of limitations of the child can be used by the parent when the child was emancipated under Canadian law before the current original pleadings were filed by the Department of Human Services on behalf of the parent Plaintiff, and reached her majority over three years ago and she is not a party in this action;

Until those questions are answered in the affirmative, there can be no further proceeding to enroll and enforce the foreign judgment. There are many other issues and sub-issues of law in this case which must be defined and addressed, including, but not limited to:

9. Whether an "amended" Notice of Registration of Foreign Support Order filed several years after the original pleading which was not prosecuted upon remand could relate back to the original, especially:

   a. When the requirements of Mississippi Rules of Civil Procedure, Rules 15 and 19, are ignored, the Court finds that the hearing is a new hearing for all purposes (T. at7);

   b. The trial court only rules that the Notice of Registration of Foreign Support Order Amended as it relates back in his memorandum opinion;

   c. The original pleading was filed six years before the attempted Amended Pleading and the personal jurisdiction issue in the previous filing to register has previously been addressed by the Supreme Court.

10. Determination of the statute of limitations deadline when statutes and case law are either silent, contradictory or confusing, as to how the statute of limitations is determined in a domestic relations case which involves minor children and enrollment of foreign orders. Additionally, whether the statute of limitations of the custodial parent's own individual right to seek enforcement of a foreign judgment extends an additional three years after the child is emancipated, when the statute of limitations for the adult would normally have expired three years after the entry of the original foreign order in the issuing state.

11. Whether the foreign law, which finds the child to be emancipated for child support purposes at 16, may be lengthened by the issuing or hearing court or the administrative child support agency of either country, without first addressing the due process requirements of this state and affording a Defendant the opportunity to object to extending the term for obligation of child support in either country.

12. Whether the child *must* be joined as a party if the pleading seeking relief for the child's benefit is filed after the child reaches her majority under the issuing foreign court's law and the child does not participate in the litigation.

13. Whether Gaye Lynn has committed a fraud upon the court or otherwise through the attempt to enforce a foreign judgment which is a different cause number from the foreign complaint which this honorable court has previously found that personal jurisdiction attached to Ed, not realizing that there were two actions and not one, with the proceedings in the first action being attributed to the second action.

14. Whether the trial court erred in finding that there was only one action when the evidence is clear there were two actions filed: a separate and distinct action for custody support and another one which was a divorce action, and that Ed's participation was limited to the first action. (Memorandum Opinion of Court, page 22-23).

15. Whether Ed's due process rights were provided when the evidence presented to the trial court failed to show that he was served, answered or had notice or opportunity to contest the second action under which the final judgment of divorce was entered.

16. Whether the attachment of personal jurisdiction in the first cause number is extended to the second cause under which the actual divorce judgment was entered, when Ed does not recall being served with process, he did not have notice of a hearing of any kind; there was no hearing on the merits as the Canadian Divorce Decree from the second cause number which clearly states that there were no attorneys or parties present when it granted the Judgment of Divorce administratively, and there was no evidence presented to the trial court that Ed had notice and opportunity to be heard at a hearing on the merits in either action, but especially the second action (for divorce).

17. Does Ed's fundamental right to have a relationship and visitation with his child under both Canadian and Mississippi law render the Canadian order unenforceable and invalid as to its child support order and lack of a visitation provision?

18. Was the conduct of the mother such that it gives rise to alienation of the father and the child to the degree that child support should be waived and/or reduced and/or not enforced if the judgment was a valid order?

19. Finally, but most importantly overall, can any court, especially a foreign court, issue a valid financial judgment against an individual when that individual had no notice or opportunity to be heard on those financial issues and must the receiving court enforce such an order?

STATEMENT OF THE CASE

This appeal involves several matters of law and equity regarding an attempt to register and enforce a foreign judgment for child support, but most importantly, the trial court's failure to adhere to or recognize fundamental due process protections afforded a Defendant in any legal proceeding under our state laws and Constitution and the Constitution of the United States. This appeal also addresses the calculation of a statue of limitations claim, ability of a receiving trial court to arbitrarily extend the age of emancipation for child support purposes, and the trial court's authority to allow an amendment to a pleading in violation of the rules. During this lengthy litigation, all the attorneys and chancellor have changed. The history of this action was lost in the change of the sitting Chancellor in this instant litigation.

The laws of Mississippi and the Canadian Divorce Act are the controlling laws.

PROCEDURAL HISTORY OF THIS CASE

1. Gaye Lynn took their daughter, Margaret Anne and left the state of Mississippi in April of 1989 without notice to Ed or his attorney, in the midst of a irreconcilable differences divorce action and moved to Canada. (T at 41-42).

2. Five days after Gaye Lynn absconded with their child, Ed filed a custody action and Gaye Lynn was served with process at her parent's home by certified mail sent May 8, 1989.

3. On October 17, 1989, in her first Canadian action, Gaye Lynn filed for custody and support. The Cause number for that case was U.F.C. 1033 of A.D. 1989. (Exhibit 10-11)

4. On November 22, 1989, Ed responded with an answer to the Canadian pleadings contesting personal jurisdiction and contesting the issues of custody and child support. (Exhibit 5). (This issue of personal jurisdiction was the subject of the previous appeal in this case when the appeals court used the facts of proceedings in the first action to determine personal jurisdiction. However, the judgment being contested in the trial court was actually from the second action.)

5. The record shows that Ed was properly noticed for a temporary hearing set on November 10, 1989. A Canadian *temporary* order was entered on December 4, 1989 (Exhibit 5). The temporary maintenance order required Ed to pay $300.00 per month child support but failed to provide visitation. Another child support order was entered on January 19, 1990, which ordered Ed to pay $325.00 per month. There is no evidence Ed was served with notice of any a final proceeding in the first case, especially any hearing which led to the second child support order.

6. There were no other known proceedings in Cause No. U.F.C. 1033 of A.D. 1989.

7. On May 9, 1990, Gaye Lynn filed her second action, a petition numbered U.F.C. 456 of A.D. 1990, requesting divorce, custody and support (Exhibit 6).

8. Gaye Lynn obtained a divorce under the second action on June 28, 1990, in Canada (Exhibit 18). The Judgment shows the judge in that case was Madam M.Y. Carter; however, the Judgment is not signed by her, but by Diane L. Barber, Local Registrar. The judgment states it was entered without any hearing to contest any issues in controversy and that neither the parties nor their attorneys were present. There was no evidence presented in this litigation showing that:

   a. There was actual service of process on Ed in the second action;

   b. Ed answered the second complaint; or

c. Ed had knowledge or opportunity to be heard at any hearing on the merits in the second action.

9. The actions on file in Mississippi (Complaint for Custody and Complaint for Divorce) were consolidated and dismissed when the Hinds County Chancery Court entered an Order on January 8, 1991, which merely acknowledged the Canadian Court had jurisdiction to grant a divorce and that no useful purpose would be served in pursuing another divorce in Mississippi.

10. A letter from Ed's attorney to Ed, dated January 23, 1991 (Exhibit 13), acknowledged that the trial Court stated to the attorneys that the judge would not enter any order enforcing a child support decree from Canada unless Gaye Lynn subjected herself to the jurisdiction of his court. The Court entered an Order stating that the issues of the validity and enforceability of the Canadian divorce decree were deferred to a later time until the issue of Canada's personal jurisdiction over Ed was settled. There is no evidence that anyone realized during that time there were actually two separate and distinct Canadian actions which Gaye Lynn and the Department of Human Services were representing to the trial court (and eventually the appeals court) as being one action.

11. Eight years later, on January 25, 1999, Gaye Lynn, through the Mississippi Department of Human Services, attempted to register the Canadian judgment for enforcement.

12. On July 8, 1999, the Chancery Court of Hinds County entered an order that only the issue of the divorce had been settled and the issues of enforceability of the child support would be deferred until such time as the issue of Canada's personal jurisdiction over Ed was settled. That order was not appealed.

13. On August 10, 1999, the Chancery Court entered an order dismissing the attempt to enforce the foreign judgment as it regarded child support citing Canada's lack of personal jurisdiction over Ed. This Order was appealed to the Supreme Court of Mississippi. It is clear from a

reading of the ruling, that the appeals court did not realize there were actually two actions. The facts the Supreme Court used to find personal jurisdiction over Ed in the second action were actually those facts which occurred in the first action.

14. On December 14, 2000, the Supreme Court of Mississippi reversed the August 10, 1999, order and remanded it for further proceedings on the validity and enforceability of the Canadian decree, finding that Canada had personal jurisdiction over Ed to grant a divorce. *The Supreme Court further found that Ed had a right to litigate the issue of child support enforcement of the Canadian decree.*

15. On May 18, 2001, the hearing on the remand from the Supreme Court was held and then recessed when the air conditioning malfunctioned. The attorney for the Department of Human Services promised the court that he would reschedule the hearing "expeditiously". That hearing was never rescheduled or finished.

16. Over two years later, on September 16, 2003, Ed filed a Motion to Dismiss for want of prosecution, since the Department of Human Services failed to reset the hearing for over two years. When the Department of Human Services failed to answer within 30 days, a judgment of dismissal was entered.

17. On November 14, 2003, two months after the final judgment of dismissal was entered, the Department of Human Services filed a Motion to Set Aside the Judgment of Dismissal order.

18. On March 29, 2005, almost another two years later, a hearing was held and an Order Setting Aside the Judgment of Dismissal was entered.

19. There was still no other activity in this matter until September 26, 2005, when the Department of Human Services filed another Notice of Registration Amended. It was contested by Ed with an answer on October 14, 2005.

20. A hearing was set for May 1, 2007; however, it was continued when the court found that it could not be heard in the time allotted.

21. Ed filed a Motion to Dismiss on May 2, 2007, citing among other reasons the failure to join Margaret Anne as a party.

22. A hearing was held on September 27, 2007, on the Notice of Registration Amended and Ed's contest of the Registration. The court ruled at the beginning of the hearing that for purposes of the hearing, it would be entered as a new hearing for all purposes, and the court would not consider anything not entered in the record that day (T At 4). At the conclusion of the hearing, the court ruled from the bench that the order would be enrolled; however, he would give the attorneys for the parties 30 days in which to file briefs addressing the issues to be considered in his findings of fact and conclusions of law.

23. On November 6, 2007, the trial court entered a Memorandum Opinion of the court.

24. On November 16, 2007, Ed filed a Motion for Reconsideration or for a New Trial.

25. On November 19, 2007, the trial court entered an Amendment to Memorandum Opinion of the court which changed the trial court's determination of the age of emancipation for the child for child support purposes.

26. On November 28, 2007, Ed filed a Notice of Appeal.

FACTS OF THE CASE

Ed Shelnut and Gaye Lynn Kern were married on June 20, 1981, Saskatoon, Saskatchewan. Ed is very hard of hearing. He teaches at the Mississippi state school for the Blind. Gaye Lynn is self employed.

Gaye Lynn left the state of Mississippi with Margaret Anne, the couple's only child, in March or April, 1989, without notice to Ed or his attorney, in the midst of an irreconcilable differences divorce action with negotiation already begun here. Testimony of the witnesses shows that Gaye Lynn's family came to Mississippi approximately 3-4 weeks before Gaye Lynn's flight and assisted her with moving preparations (T. at 38). About the time of their arrival, Gaye Lynn requested that Ed meet her at their counselor's office where she requested he temporarily move out of the marital

home. The record is clear that Ed did not know of the moving preparations until the day he went to the house and found it packed up (T. at 132). Gaye Lynn left later that night.

For approximately six months prior to the separation, the couple attended counseling with their priest and Ed believed the marriage and counseling were going very well. Ed and other witnesses testified that Ed moved out of the marital home at Gaye Lynn's request so she could reflect upon the marriage (T. at 37). Uncontroverted testimony was that while Gaye Lynn was telling Ed she wanted him out of the house, her family was placing Ed's clothing in his vehicle in the church parking lot (T. at 120). Both parties testified that Gaye Lynn's parents came from Canada just prior to Gaye Lynn's request for Ed to temporarily move out of the house; and, that within 3-4 weeks, the house was packed up and Gaye Lynn moved to Canada (T. at 36-37).

Gaye Lynn testified that Ed could have visitation with his child whenever he wanted, but that he never asked. Gaye Lynn further testified that she wanted Ed to have supervised visitation with Margaret Anne. She gave no reason for her refusal to allow Ed unrestricted visitation (T. at 35-36). Ed's testimony and that of the other witnesses was consistent that Gaye Lynn refused to allow Ed any visitation with Margaret Anne during the separation. Sometimes Ed took his grandfather with him to try to see Margaret Anne. Ed did not get to see his daughter except when his stepfather picked up Margaret Anne and took her to Ed's grandmother's house.

Ed testified that Gaye Lynn changed the telephone number at the marital home to an unlisted number when he called attempting to see Margaret Anne. Since the telephone was in his name and he could not know the number, Ed had the telephone disconnected (T. at 37, 69).

Further uncontroverted testimony was that Ed went to the house about 3-4 weeks after the separation to see what was going on. He found the entire house packed up for moving and the front door locks changed by Gaye Lynn; Ed removed the front door lock. Until he found the house packed up, Ed had paid all bills for the family. Ed testified that after finding the house packed up, he realized the marriage was over. Ed testified that he told Gaye Lynn he would have the utilities cut off if Gaye

Lynn did not allow him to see Margaret Anne (T. at 132-134). Gaye Lynn testified that she left because Ed *planned* to have the electricity cut off (T. at 39). There was no evidence or testimony presented during the hearing that Ed intended to disconnect the utilities until he saw Gaye Lynn packed and ready to leave. Both parties testified that:

1) Gaye Lynn moved out immediately afterward;

2) The electricity was not cut off at the time Gaye Lynn left (T. at 39) and Ed testified that he moved back in the house for a while after Gaye Lynn left (T. at 113);

3) Gaye Lynn moved out of the house later that same Friday night without telling Ed she was leaving or where she was going (T. at 42).

After Gaye Lynn moved to Canada, she allowed some telephone visitation between Ed and Margaret Ann only for a few alternating Saturdays after the divorce, but then the calls stopped (T. at 43). Ed testified that Gaye Lynn would not get Margaret Anne to the telephone (T. at 122). Gaye Lynn testified that the calls "just stopped".

Ed testified that he did not go to Canada because he could not afford to do so, and that Gaye Lynn threatened to have him jailed if he traveled to Canada to see Margaret Anne (T. at 123). Ed testified that he had already been falsely accused of all types of violent acts. Based on Gaye Lynn's past behavior, Ed believed her threats were serious. He further testified that he had no funds or friends to help him if he were arrested in Canada. Gaye Lynn denied the threats.

Depositions of Joel Gill, Velma Webb and Max Harrison were admitted by stipulation for the Court's consideration in this matter. Max, Velma, Gaye Lynn and Ed all testified regarding an event in June, 1999, where Gaye Lynn came to Mississippi and went to see Velma with Margaret Anne and "someone else." Gaye Lynn testified that Margaret Anne insisted on going to see "Momma" before she died (T. at 51). Gaye Lynn testified that she got Ed's father to pay for the plane tickets and that she visited with Ed's father and step-mother in Senatobia (T. at 53). Gaye Lynn testified that

she and Margaret Anne were in Jackson, Mississippi, for approximately five days and went to visit "Momma" and spent one afternoon there.

Gaye Lynn admitted that she had notified Ed's sister she was coming, but no one else. She further admitted that she was told by the sister no one wanted to see her because of a rift in the family (T. at 53). Ed and other witnesses testified that at the time of Gaye Lynn's visit, his step-father was in the hospital and that neither Velma ("Momma") nor Ed knew of the impending visit; had he known, he would have begged to see Margaret Anne. None of the witnesses confirmed Gaye Lynn's testimony that there was any rift in the family. Gaye Lynn testified that she never contacted Ed to tell him she and Margaret Anne were coming to Mississippi; she further testified she did not tell anyone she wanted Margaret Anne to see Ed during the trip (T. at 51).

Ed, Max and Velma all testified that they did not know Gaye Lynn was coming to Mississippi. Max and Velma testified that as Max was delivering muffins to Velma's house, a woman drove up and went to the door (Dep. MH at 6, Dep. VW at 7-8). Velma answered, not recognizing Gaye Lynn (Dep. VW at 7). Max testified that Gaye Lynn's appearance had changed a lot over the years (Dep. MH at 7). Gaye Lynn asked if Ed was there; when she found out he wasn't, she said it was "ok to go inside" (Dep. MH at 7, Dep. VW at 8). Gaye Lynn then took Margaret Anne into the house to visit Velma (Dep. VW at 8). During the time the two were visiting, Gaye Lynn went all through the house investigating (Dep. MH at 7, Dep. VW at 8), then told Velma they had to catch a plane (Dep. MH at 8-9, Dep. VW at 8). Max and Velma testified that the visit was less than 30 minutes (Dep. VW at 9), if that long. Max testified that the visit lasted maybe 10 minutes (Dep. MH at 7); that he tried to talk to Gaye Lynn but she wouldn't talk with him (Dep. MH at 8). Ed testified that he knew nothing of the visit until he returned from work that day. Velma further testified that during the separation, Gaye Lynn refused to let her or Ed see Margaret Anne (Dep. VW at 4, 5, 6) and that she was the one who told Ed his telephone number had been changed (Dep. VW at 10).

The uncontroverted testimony of Joel Gill, was that he was friends of both Gaye Lynn and Ed. Joel stated that during the time before Gaye Lynn left, he would act as a liaison between the two and that Gaye Lynn would not allow Ed any contact with Margaret Anne (Dep. JG at 4). Even after the separation, Joel would try to get Gaye Lynn to allow Ed visitation and she was unresponsive (Dep JG at 5). Joel even offered her cash if she would allow the visitation; she refused (Dep. JG at 5). After Gaye Lynn moved to Canada, he attempted to keep the channel of communication open and even bought Gaye Lynn a ticket to go to Las Vegas with him and his wife in 1991 (Dep. JG at 6, 8). When Joel broached the matter of Ed obtaining some visitation, Gaye Lynn told him she would not discuss it and that Ed was to have nothing to do with Margaret Anne (Dep. JG at 6-7). Joel testified that Gaye Lynn was "unusual"; she claimed to be super sensitive to various things; she liked to be the center of attention (Dep. JG at 7-8); that Gaye Lynn never asked him to help get child support or "anything else" from Ed (Dep JG at 8-9).

Frank Inman, Ed's step-father, testified that though he was not "blood kin" to Margaret Anne, he had a close relationship with both Ed and Margaret Anne (T. at 81) and wanted to continue it after the divorce. He testified that he and his wife often babysat with Margaret Anne before the separation (T. at 82). Frank also testified that during the separation, though he could see Margaret Anne without restriction, Gaye Lynn made it clear Ed was not to see Margaret Anne (T. at 82-83). Frank was the one who found that Gaye Lynn and Margaret Anne had moved that Saturday morning when he went to take the child to the zoo. The neighbor told him that they left during the night (T. at 82-84).

Frank testified that in order for him and his wife, Jean, to maintain a relationship "of sorts" with Margaret Anne, they went to Canada during the 1991 Christmas season (T. at 84); that they made at least two other trips to see Margaret Anne. Frank attempted to encourage Gaye Lynn to allow Ed to have a relationship with Margaret Anne (T. at 85-86). Frank offered to pay for Margaret Anne to come to Mississippi to visit, but that Gaye Lynn never accepted the offer (T. at

86). During various visits with Margaret Anne in Canada, the rendezvous always occurred at Gaye Lynn's parents' home. For a significant period Frank sent $100.00 each month to Margaret Anne, but sent the funds to the Kerns' home (T. at 87).

Frank testified that Ed was very interested in Margaret Anne's condition and status (T. at 88). Frank visited Margaret Anne when she was about 4 or 5 years old, she asked the Inmans, "Is my mean old daddy still sick in the head?" He testified that he had never known Ed to be mean or violent (T. at 88-89, 91).

Frank had never known Gaye Lynn to hold back her opinion and if Ed had been abusive to her, she definitely would have said so, and Frank would have done something about it (T. at 93). Ed testified he had never been abusive or violent toward Gaye Lynn or Margaret Anne, and that if he had been, Gaye Lynn would have had him put in jail; that she would have contacted Ed's step-father or grandfather because they would not have condoned it.

Frank believed Ed attempted to maintain a relationship with Margaret Anne after the move to Canada; that no one told Gaye Lynn they didn't want to see her during the trip in 1999; that Ed's sister may have told Gaye Lynn because of Frank's prostate surgery, it might not be a good time to visit (T. at 95). No one in the family ever refused to provide contact information for Ed's whereabouts (T. at 95). A few times Ed had been briefly unavailable, but always had contact through Frank or his mother-in-law, Velma Webb ("Momma"). Further, Gaye Lynn never asked him for Ed's contact information (T. at 96). Frank testified that Ed was never invited to accompany him and his wife on their trips to Canada because of the restrictions Gaye Lynn placed on Ed. When questioned as to whether he or his wife had ever been threatened with jail by Gaye Lynn if they went to Canada, Frank answered "No." When asked if he would have gone if they had been threatened, he said the last place he wanted to go is a Canadian jail (T. at 100).

Jean Inman is Ed's mother. Until the separation, she and Frank spent a lot of time with Margaret Anne, who was a delightful child. After the separation, the visitation was restricted and they

were not to share Margaret Anne with Ed (T. at 102). Ed attempted to see Margaret Anne after he moved out of the house. He would take his grandfather with him to attempt to see her. Frank was the only one whom Gaye Lynn allowed to take Margaret Anne to see her great-grandmother or grandmother (T. at 102). Ed was never allowed a regular visitation after the separation (T. at 103). Jean did not invite Ed on the trips to Canada because she knew if Ed came she (Jean) wouldn't be welcomed (T. at 103). She believed Ed was afraid to go. After the trips they would share what had happened, but it was painful for Ed (T. at 103). She believed that Ed would have gone to Canada to see Margaret Anne if he thought he could safely and effectively do so (T. at 104). During the trips to Canada, Jean and Frank were never allowed to be alone with Margaret Anne (T. at 105).

Jean testified to the statement Margaret Anne made about her father "being sick in the head" when she was about 4 years old (T. at 106). Mr. Kern, the other grandfather, overheard the comment, and attempted to explain that Margaret Ann had not been taught that statement; Jean did not believe Mr. Kern (T. at 106). She believed it was still unsafe for Ed to go to Canada (T. at 106). Jean said they gave up attempting to have a relationship with Margaret Anne after 1993, until 1998, when they tried to rekindle the relationship (T. at 107).

Jean next got to see Margaret Anne in 2001 after the hearing when Gaye Lynn brought Margaret Anne to her house for a short time (T. at 108). She believes Gaye Lynn kept Margaret Anne from Ed on purpose. When Ed would call to talk with Margaret Anne, Gaye Lynn would not make Margaret Anne available for conversation (T. at 109).

Jean testified that she never saw Gaye Lynn afraid of Ed; that Gaye Lynn never expressed any concern Ed might be abusive or violent (T. at 109). When questioned by the court, Jean stated that she never invited Ed to go on the trips because she did not want to have try to get him out of jail (T. at 111).

Gaye Lynn testified that she never received any child support from Ed (T. at 12-15). She confirmed the Inmans' testimony regarding their trips to Canada (T. at 16-18). Gaye Lynn testified

that she married her current husband in December, 1992, but then said the reason she made no visits to Mississippi between 1989 and 1998 was because she was a single mother for most of that time and did not have the money to make the "very expensive" trip. She testified that she received government assistance for the first year she was in Canada (T. at 21). When questioned later by the court, she testified that she and Margaret Anne made several trips to Jackson. When asked if Ed could have or did see Margaret Anne during those visits, she testified that he saw Margaret Anne in 2001 after the hearing (T. at 18). Then, again she testified that the only time she returned to Mississippi before 2001 was in 1999 (T. at 17-18). Gaye Lynn's overall testimony is consistently contradictory.

Gaye Lynn testified that she called the family at Easter 1999 and learned members of the family were ill, so at Margaret Anne's urging and at Ed's father's expense, they came to Mississippi to visit in June (T. at 51). It was during this visit that Gaye Lynn took Margaret Ann to see Velma (T. at 53).

Gaye Lynn addressed the divorce settlement agreement during the Mississippi divorce proceedings. She previously presented a settlement agreement to Ed as a requirement of possibly holding the marriage together. Among other things, the proposed order required Ed to get in-house treatment for various perceived problems, ranging from drug and alcohol abuse to deviant sexual behavior; to convey his equity and title in the marital home to Gaye Lynn; to seek counseling; to convey all rights and title to the Honda to her; to place $10,000 in an irrevocable blind trust for Margaret Anne; to convey all his travelers checks and foreign money to her; to execute a settlement agreement that gave custody of Margaret Anne to Gaye Lynn along with child support. There was no mention of any requirements that Gaye Lynn do anything to accomplish the settlement to hold the marriage together. There was no mention of any contact, access or visitation between Ed and Margaret Anne. When questioned, Gaye Lynn testified that she never saw the counter-proposal presented to her attorney because she left the state.

During his testimony, Ed identified the counter proposal sent to Gaye Lynn's attorney during the divorce negotiations in Mississippi. This proposal answered Gaye Lynn's proposal by agreeing both would undergo a psychiatric examination. Except for transferring the title of the Honda and setting up the blind irrevocable trust, he materially agreed to all of the other requirements. Ed stated he could not afford the $10,000 trust, but he proposed an alternative. However, Ed stipulated any agreement must include liberal contact and interaction with his child (T. at 117-118).

Gaye Lynn testified that she was living in fear before she left for Canada; that she wanted Ed to get counseling. Ed testified that the two of them had been seeing a counselor for about six months before the separation; that he believed the counseling was successful. None of the other witnesses could testify as to any violent behavior by Ed. There was no other evidence presented which supported any allegations of violence by Ed against Gaye Lynn.

Gaye Lynn testified that she allowed Ed to see Margaret Anne anytime he wanted, but that he never asked (T. at 35-36). Gaye Lynn further testified that she began preparing to move at least a week before the night she did (T. at 40). She also testified that she did not contact Ed after she moved, but instead contacted his parents (T. at 42). She did not give Margaret Anne her father's telephone number since she was "too young" and since Ed initiated the phone calls to her. She and Margaret Anne lived with her parents for two years ; this was the location Ed would call (T. at 47). Gaye Lynn later testified that she lived with her parents for only four months (T. at 48), but she kept her mailing address at her parents' house for the first 4-5 years, though she did not continue to live there.

Gaye Lynn introduced several envelopes in Ed's handwriting addressed to Margaret Anne. They were dated 1993, 1994, 1995, 1997, 1998, 1999, and 2002. Gaye Lynn testified that Ed always knew where Margaret Anne was; however she never stated how he knew.

Gaye Lynn testified that in 2001 she did not mention a visitation provision in the divorce complaint in Canada because Ed had not responded to the divorce papers (second action). She was

correct. Ed had responded to the papers in the first action for custody and child support and hired an attorney to contest the Canadian jurisdiction. Gaye Lynn's testimony is true that Ed made no response to the second action which was for divorce. Gaye Lynn presented no evidence that Ed was ever served with process and he does not remember being served. Gaye Lynn testified that she told Jean the divorce was settled civilly; however, when she wrote Jean, she said the requests (pleadings) were very civilized. The record shows that the first Canadian complaint for custody and child support was based on non-cohabitation. (Petition of October, 1989) There was no mention of domestic violence in this complaint or in the second action where the divorce decree was entered. In fact, the Canadian judgment which was entered under the second cause number, did not mention any grounds for the divorce.

Additionally, Gaye Lynn testified that she never asked Frank and Jean for money, but they offered to pay for plane trips several times; that instead of threatening Ed with jail if he came to Canada, she told him that if he did not pay child support he risked being thrown in jail; that she did not attend the hearing in July, 1999. Coincidently, Gaye Lynn's trip to Mississippi occurred at the very same time her attorney was fighting to allow her to testify by telephone from Canada.

Ed testified that after the separation, he was never allowed by Gaye Lynn to have visitation; that he always took his grandfather when he went to the house to try to see Margaret Anne so there would be a witness to anything which might happen (T. at 120). Ed was only able to see Margaret Anne when she was at his grandmother's. He even offered Gaye Lynn money to see Margaret Anne; Gaye Lynne refused (T. at 121).

The last time Ed saw Margaret Anne before 2001, was in 1989. Ed testified that he was at his grandmother's (Velma's) playing with Margaret Anne; Gaye Lynn came in and went into hysterics, scaring Margaret Anne (T. at 121). Gaye Lynn then grabbed the child, left Velma's, then left the country (T. at 122). Ed testified that he was frantic with concern for the child. Finally, after the divorce, Gaye Lynn allowed him to call every other Saturday for a month or two, but then began

saying Margaret Anne was playing. Gaye Lynn would put the phone down and walk away. Ed would patiently wait; after about a half hour of silence Ed would eventually hang up the telephone (T. at 122).

Ed testified that during this time, he asked if Gaye Lynn would let him see Margaret Anne if he came to Canada; she told him that if he came she would have him arrested and put in jail and nobody in Canada would get him out (T. at 122-123). He believed Gaye Lynn had the power to file charges against him, that she could call the authorities and say Ed was beating her and they would take her word for it. He said that she was a very convincing woman; that she would hit herself to have a few bruises to show them (T. at 127). He testified that if he thought he could have gone to Canada and had visitation with Margaret Anne safely he would have tried.

Ed testified that he was served with the original complaint and hired an attorney to contest jurisdiction, paying $10,000.00 American for services (T. at 124). He knew about the temporary hearing in December, 1999, and knew his attorney was at the hearing. Ed did not receive any notice of any other hearing until he received the June, 1990, divorce decree only two business days before the deadline to appeal the decision (T. at 123). He attempted to hire an attorney to appeal; however, he did not have the $16,000.00 retainer required. There is no evidence Ed knew at the time that the divorce decree had been entered under another cause number (T. at 125).

Ed testified that his permanent address remained with his grandmother until he moved to Vicksburg to teach, because one of his employers required him to move about the country on a regular basis. He also testified that he never asked anyone to keep his whereabouts a secret (T. at 116).

Ed testified that he never filled out a financial statement for the Canadian action; that his take home pay in 1989 was about $1,200.00-1,500.00 per month; his mortgage was over $700.00 per month. He testified that he is now a teacher at the Mississippi School for the Blind; currently, his take home pay is about $1800.00 per month (T. at 135-136).

Ed testified that had he not feared for his own safety and had the money, he would have fought the divorce in Canada. However, his testimony also indicates that Gaye Lynn systematically did everything she could to destroy his relationship, or the possibility of a relationship, with his child. The uncontroverted testimony was that Ed had very limited financial or other resources and that he had realistic fears for his safety in Canada even if he had the resources to travel there.

All other testimony was in complete conflict with Gaye Lynn's testimony.

SUMMARY OF THE ARGUMENTS

For economy's sake, the many issues presented in the Statement of the Issues section have been condensed into the following Arguments:

1. **Were Ed's due process rights 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?**

2. **Does Canada's personal jurisdiction over Ed, as found by the Supreme Court of Mississippi, in the first appeal to the complaint (U.F.C. 1033 of A.D. 1989) extend to personal jurisdiction over Ed in the second cause (U.F.C. 456 of A.D. 1990) when the facts represented in the previous appeal ruling were in error as to the number of actions filed and the actions made within each?**

3. **Did the trial court err in its ruling that the Amended Notice of Registration of Foreign Support Order could relate back to the original Notice filed in 1999 and that there was only one Canadian action, rather than two?**

4. **Can the three year statute of limitations on registration of a foreign judgment be stretched by the mother and child support enforcement agency until the minor child has been emancipated more than three years when the Amended Notice was filed?**

5. **Must the child be made a party to an action for child support enforcement after he/she has been emancipated?**

6. **May a court of this state reset the age of emancipation for a minor child under an order entered in another state or country?**

7. **Did Gaye Lynn's conduct rise to a level that would waive any right she had to obtain child support under a valid judgment?**

8. **Did the trial court's personal bias against Ed and the trial court's assumption of the role of another prosecution destroy any possibility of a fair hearing?**

DISCUSSION

Were Ed's due process rights 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?

Does Canada's personal jurisdiction over Ed, as found by the Supreme Court of Mississippi, in the first appeal to the complaint (U.F.C. 1033 of A.D. 1989) extend to personal jurisdiction over Ed in the second cause (U.F.C. 456 of A.D. 1990) when the facts represented in the previous appeal ruling were in error as to the number of actions filed and the actions made within each?

The Canadian divorce decree was entered approximately one year and two months after Gaye Lynn moved back to Canada. The judgment was missing several constitutional elements regarding due process with respect to Ed's obligation to support his child and his right to have a relationship and visitation with his child: most importantly, notice of the second action which was for divorce and an opportunity to be heard at a hearing on the merits.

In any litigation, notice and opportunity to be heard are the framework of our constitutional right to due process. Notice requires the Defendant be properly served with process of the complaint and also any proceedings within the litigation. In this instant case, it is unclear whether Ed was served with one complaint or two. There is no doubt he was served the first complaint filed October 17, 1989, for custody and child support, and that he answered and contested personal jurisdiction. Although this Court previously ruled in Paragraph 3 of its 2000 ruling that Ed was served the Complaint filed May 9, 1990, there is no evidence in the instant record to corroborate that finding, and the Appeals Court did not mention the first action under which all Ed's participation described in the 2000 ruling took place. Ed testified that he did not remember any process served upon him in the second action filed by Gaye Lynn which was for divorce. (T. at 123). He did remember service of process in the first action (T. at 123). In that same ruling the Supreme Court further did not realize

in Paragraph 12 that the affidavit and responsive pleading Ed filed were in a different case (first action) from that in which the Judgment of Divorce was entered in Canada (second action).

In any legal action, the second necessary component of due process requirement is the opportunity to be heard. The Department of Human Services presented no evidence to show Ed was served or provided any opportunity to be heard in the Canadian Courts in the second action (for divorce). Ed clearly was given the opportunity to be heard in the temporary hearing and to contest jurisdiction in the first action as found in the Order entered December 4, 1989, under Cause No. U.F.C. No. 1033 of A.D. 1989. (Exhibit 5). The Judgment entered in the second action on June 28, 1990 under Cause No. 456 No. 456 of A.D. 1990, (Exhibit 7) states in its first paragraph that the proceeding came before the court in the absence of the parties and counsel. It further states that the judgment is made on the pleadings and the evidence presented, but it does not state what the pleadings or evidence are. There is no evidence or testimony that Ed had notice or opportunity to participate in the second proceeding in any manner. Further, it is clear that there was no hearing on the merits where he could have contested the complaint. In fact, Ed testified that he did not know or hear anything after the temporary hearing in the first action, and that he did not have any notice or opportunity to be heard in the second action. The service of process he remembered was in the first action (T. at 123). Gaye Lynn presented no evidence that Ed was served or answered in the second action. In fact, Gaye Lynn testified that he didn't answer the complaint for divorce.

Failure to give notice and opportunity to Ed to be heard at a hearing on the merits is evidenced by the clear wording in the first paragraph of the Canadian divorce decree. In both Canada and the United States, there must be notice and opportunity to be heard at a hearing which makes a judgment against a person. Both the Reciprocal Enforcement of Maintenance Orders Act, 1996, Canada and the Canadian federal Divorce Act require notice and opportunity to be heard in regard to any final order. In the Reciprocal Enforcement Act a 'final order' means an order made in a proceeding of which the claimant and the respondent had proper notice and in which they had an

opportunity to be present or represented. Further, under this law - all orders whether provisional, confirmation, variation or recision of orders or registration of an order - all must be accomplished with notice of the proceeding and an opportunity to appear. Sections 6(2), 8(6)(d), 8(7)(d),8(9)(b). Ed received no notice of any proceedings in the second action.

The first action was filed under the provisions of Section 8 of the Divorce Act, though it did not state that in the judgment in the second action. The provisions of Section 8 clearly contemplate that there is a joint application and that all outstanding issues are resolved, including those of child support and custody. An appearance in court is generally not required in an uncontested or settled case. *Divorce Law in Canada*, Kristen Douglas, Law and Government Division. Revised 27 March, 2001 (on the Canadian government website).

The Final Judgment of Divorce in Canada, which carries the second action number, clearly states, "This proceeding coming on before the Court this day at Saskatoon, Saskatchewan, in the absence of the parties and counsel, and upon considering the pleadings and the evidence presented." What pleadings? What evidence? Had Ed participated in the second action, his pleadings would have raised numerous issues which could not have been decided without a hearing on those issues. Based on Ed's activity in the first action, it is unrealistic to think he would not have participated in the second action, had he been served. The Judgment was entered and signed by a registrar, not the judge. This violates our Constitutional right to due process. Mississippi also requires notice and opportunity to be heard before any judgment is issued in a contested action. Rule 40 (b) MRCP. Rule 81 provides the framework for service of process in other special matters. *This right to notice and opportunity to be heard is the bedrock of our due process rights in the United States*. Furthermore, Mississippi requires that if there is no signed agreement of the parties regarding custody and child support issues, there must be a hearing in order for the judge to rule.

Powell v. Powell concerned a Rule 81 action, the Court found that the failure to properly notice a party for a specific court date prohibits the entry of a judgment against them. In that case,

the Plaintiff's testimony concerning the Defendant's income was insufficient evidence to support a ruling of child support. *Powell v. Powell*, 644 So.2d 269. That Court cited *Hammett v. Woods*, in that there must be substantial evidence to support a child support award or increase. *Id*, citing *Hammett v. Woods*, 602 So.2d at 828-829 (Miss. 1992).

In *Morrison v. Mississippi Department of Human Services*, the Court found that there must be evidence that the party was actually served in order to obtain a judgment. When a Defendant raises the defense that he was not served with process for a hearing, it becomes the Plaintiff's burden to produce evidence that controverts the defense raised. *Morrison v. Morrison*, 863 So.2d 948 (Miss. 2004). In both cases, there was no evidence presented that either Ed or his Canadian attorney in the first action had any notice of a final hearing under either cause number which would address child support and other issues.

Further, it is certainly clear that Ed's attorney in the first action was not present at the entry of the final divorce decree which had the second action. It is also clear that Ed was not in agreement with the pleadings that Gaye Lynn filed in the first action and probably would have been against the pleadings in the second action. The judgment itself is clear that no hearing was held and the parties did not sign an agreement on the custody and child support and visitation issues.

In *Hamm v. Hall*, a divorce action, the out-of-state Defendant was served by publication and a copy of the summons mailed to his supposed out-of-state address. He did not file an answer and did not enter an appearance. A judgment was entered against him for child support. *Hamm v. Hall*, 693 So.2d 906 (Miss. 1997). In *Hamm*, the court found that the original judgment was void as to the child support. The *Hamm* court also discussed *Reichert v. Reichert*, which addressed a notice of hearing issue. *Id.*, citing *Reichert v. Reichert*, 807 So.2d 1282 (Miss. Ct. App. 2002).

Personal jurisdiction depends on the presence of reasonable notice to a Defendant and an opportunity to be heard. In this instant case, Ed was served with the original pleadings in the first action and also a notice of hearing on the temporary matters in the first action and he was represented

there. There was personal jurisdiction over Ed in the first cause number. It is required that once having entered an appearance in a matter, the defending party must be given a notice of any subsequent hearing which might adversely affect his status. Rule 40 (b). In this instant case, though there is a notice of hearing on the temporary hearing entered into evidence from the first action (which is not the action being registered), there was no evidence presented by Gaye Lynn to show any notice on a final hearing in the first cause. Clearly by the wording of the final judgment in the second action, there was no final hearing on the divorce action, and there is no evidence that Ed received notice of any proceedings in that second action (which is the one at issue).

The *Morris* court found that before making an order for child support, the person being asked to pay that support must have fair notice that the matter was under consideration and that a full and complete hearing must be held after due notice of the purpose of the hearing before an order may be entered. *Morris v. Morris*, 359 So.2d 1138.

Even if a Defendant is aware of a suit, the failure to comply with rules for the service of process, coupled with the failure of the Defendant voluntarily to appear, prevents a judgment from being entered against him. *Sanghi v. Sanghi*, 759 So.2d 1250 (Miss. 2000). See also *Vincent v. Griffin*, 872 So.2d 676 (Miss. 2004).

In the *Fortenberry* case, the wife had moved to another state taking the minor child of the marriage with her. The father filed for divorce and did not plead any requests regarding child support. The trial court ordered the father to pay child support without any due notice or full and complete hearing at which the parties had the opportunity to call witnesses. The Supreme Court reversed the trial court finding that the father was denied due process. *Fortenberry v. Fortenberry*, 338 So.2d 806.

In *Floyd v. Floyd*, the Defendant answered the complaint and appeared in court for the first hearing. Subsequently, notices were sent for other hearings, but the notices were not "Notice of Hearing" documents. *Floyd v. Floyd*, 870 So.2d 677 (Miss. 2004). The Court found there must be strict compliance in giving notice and opportunity to be heard for a hearing in its reversal. *Id.* There

was no evidence presented to the trial court to show Ed was given notice of any hearing in either cause after the Notice of Hearing in the first cause. There was no notice or opportunity to be heard, which would determine the final outcome of the first complaint. There was also no evidence presented showing notice and opportunity to be heard in the second action where the divorce decree was entered. The second cause states on its face that no one was present when the judgment was signed by the registrar.

In *Edwards v. James*, the Court found that every Defendant or Respondent has the "right to notice in a court proceeding involving him and a right to introduce evidence at the hearing." *Edwards v. James*, 453 So.2d 684 (Miss. 1984). In this instant case, Ed does not take issue with the in rem divorce entered by the Canadian Court even though he was not afforded the right to argue against the divorce, however he does argue that because he had no notice and opportunity to be heard at a final hearing under either cause number, the child support provisions of this foreign order are void and unenforceable under the laws of this state.

In *Stinson v. Stinson*, the husband failed to answer the complaint for divorce and wife was granted divorce after proving allegations in complaint. *Stinson v. Stinson*, 738 So.2d 1259. The Court of Appeals found that once an answer to a complaint has been made, Rule 40 (b)MRCP requires that a notice of hearing be sent to the parties or their representatives. *Id.* The comment to the Rule states that the purpose of the rule is to assure "that the parties receive appropriate notice at important stages of the process." *Id.* Mississippi requires that a judgment of child support be accompanied by a finding of evidence supporting the award. *Id.* In the *Stinson* case, as in this case, the Canadian decree is silent as to any evidence supporting the amount of child support ordered. The Court of Appeals in *Stinson* remanded for a hearing on the issue of child support. *Id.*

In another case, the Mississippi Department of Human Services intervened as a statutory assignee of a former wife's child support payment to enforce an Alaskan ex parte modification order. The court refused to enforce the order as the information contained in the affidavit may have been

obtained from other sources, nor could the litigation inspired document be considered public record, and the husband was not afforded a reasonable opportunity to be heard in opposition to the motion. *Mississippi Department of Human Services v. Fargo*, 771 So.2d 935 (Miss. 2000).

The trial court in this instant case has already commented that the amount of the child support assessed in the Canadian decree was too high. (T. at 153-154). Because there is no evidence that Ed received any notice of a final hearing on either Canadian action, or that any evidence was presented to provide a guideline for the assessment of child support, the Court must find that he had no notice and opportunity to be heard on the issue of child support. This Court must reverse the trial court's decision to enforce the foreign order. Ed has a valid defense to the enforcement of the foreign judgment as it regards child support on the basis of extrinsic fraud and lack of due process as required under our own laws and those of Canada under the Divorce Act. He further has a defense that the three year statute of limitations had run on the registration of a foreign order prior to the filing of the Notice of Registration.

The first appeal resulted in this Court's applying its erroneous knowledge of the facts to find that Ed could not attack the issue of personal jurisdiction because the Canadian courts had found that they had personal jurisdiction over him and the issue was res judicata. The Court cited *American Sur. Co. v. Baldwin*, "that decision will be res judicata on that issue in any further proceedings." *American Sur. Co. v. Baldwin*, 287 U.S. 156, 166 (1932). This begs the question as to whether Canada has personal jurisdiction over Ed in another legal action, or what is meant by "further" proceedings? If, in a subsequent different legal action, a Defendant previously found to be under the personal jurisdiction of that court for the previous action, does the personal jurisdiction automatically attach as to the next separate action? Was there personal jurisdiction in the second action where there is no evidence that the Defendant was served with process?

Working within a lack of information as to the fact that there were two legal proceedings, not one, and that Ed was responsive in the first action, but not the second, under which the Supreme

Court believed to be the fact, the Court acknowledged Ed's participation in the temporary hearing under the first action. However, the Court did not realize there was a second action (the one mentioned in the appeal), but instead used the facts from the first action in its consideration.

In Paragraphs 25 and 26 of its 2000 appeal ruling in this litigation, this Court found that although the 1991 order of dismissal, in and of itself, did not preclude Ed's litigating the jurisdictional issue before the chancery court, the Canadian judgment did preclude re-litigation of the jurisdictional issue. Would the same conclusion be reached had the Court known the jurisdictional defense made by Ed in the Canadian court was in a different legal action from that in which the divorce was actually granted?

So again, the court must look at the personal jurisdiction over Ed as to the second action. The Supreme Court's ruling in *Department of Human Services v. Shelnut*, 772 So.2d 1041 (Miss. 2000), recited a procedural history which did not include the original complaint for custody and child support filed against Ed on October 17, 1989, in which he attempted to defend and contest jurisdiction in his affidavit dated November 22, 1989, *six months* before Gaye Lynn filed her divorce petition on May 9, 1990. There is no evidence in this instant action that Ed was served with process in the second action, and it is clear that he did not answer or participate in the second divorce proceeding. The Supreme Court mistakenly found in Paragraph 4 of its ruling that Ed filed an affidavit contesting personal jurisdiction in the complaint filed in May, 1990, by Gaye Lynn. The affidavit and pleading contesting jurisdiction were filed in the first action and not the second. Ed would concede that if the facts as stated in the *Department of Human Services v. Shelnut* case were accurate, personal jurisdiction over him would have been decided correctly. However, there now remains the question of personal jurisdiction under the now known facts of the two Canadian proceedings and the lack of due process afforded Ed in the prosecution of both actions, but especially in the second one.

In this case, there was certainly a contest. Notice to appear in a final hearing would have been required in the first action. Section 16(10) requires that the court, in making custody and access

orders, give effect to the principle that a child of the marriage should have as much contact with each parent as is consistent with that child's best interest, and, therefore, each parent's willingness to facilitate the exercise of access by the other *must* be considered." *Divorce Law in Canada*, Kristen Douglas, Law and Government Division. Revised 27 March, 2001 (on the Canadian government website)

Did the trial court err in its ruling that the Amended Notice of Registration of Foreign Support Order could relate back to the original Notice filed in 1999 and that there was only one Canadian action, rather than two?

Can the three year statute of limitations on registration of a foreign judgment be stretched by the mother and child support enforcement agency until the minor child has been emancipated more than three years when the Amended Notice was filed?

Must the child be made a party to an action for child support enforcement after he/she has been emancipated?

May a court of this state reset the age of emancipation for a minor child under an order entered in another state or country?

On September 26, 2005, the Department of Human Services filed its "amended" Notice of Registration of Foreign Support Order, attempting to amend the first Notice filed in 1999 and never concluded. The Department of Human Services did not include Margaret Ann as a party, though she had reached her majority age of 16 over three years prior under Canadian federal law. The original Notice had been abandoned by the Department of Human Services after the remand from the Supreme Court in 2000, and at one point, the trial court dismissed it for failure to prosecute, though it set aside the dismissal in 2005. Even after the order setting aside the dismissal was entered, it was several months before the Department of Human Services filed an "amended" notice, more than three years after Margaret Anne's emancipation for purposes of child support in Canada. The trial court erred in expanding the original litigation after its trip to the Supreme Court and back and then languishing for several years. By the time the latest Amended notice was filed, both Gaye Lynn and Margaret lost any standing to continue a child support enforcement claim outside the original

pleadings filed in 1999. The only means of attempting enforcement of the Canadian order for child support for monies accumulating after the original petition was filed would have to have been made by Margaret Ann and such attempts must have been made before July 31, 2005.

Rule 15, Miss. Rules of Civil Procedure, requires any attempt to file an amendment to an original order must be made under certain restrictions. Permission from the trial court must be obtained once an answer to the original pleading has been filed and opposing party must be given an opportunity to be heard in opposition. "Otherwise, a party may amend a pleading only by leave of court or upon written consent of the adverse party.... A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading... " Rule 15. (d) of Rule 15 addresses supplemental pleadings which may be filed under certain conditions. In this instant case, Department of Human Services could have filed a supplemental pleading to its original, but did not do so. Rule 15 requires a leave of court to amend a pleading if no written consent is given by opposing party. Ed contested the Department of Human Services' filing of an amended notice in his objection to the registration of the Canadian order. In its opening remarks, on September 27, 2007, the trial court said that the hearing was for all purposes a new hearing. The court then found in its Memorandum Opinion that the new pleading would relate back to the 1999 pleading.

This court has previously found that a putative amended complaint could not have been more than an attachment to the motion to amend until the court had ruled on that motion. *Wilner v. White*, 929 So.2d 315 (Miss. 2006)... in this instant case, the Department of Human Services did not even file the motion necessary to obtain permission to amend its 1999 pleadings. Further, allowing any amendment at this late hour would have prejudiced Ed even more: applications to amend pleadings should be promptly filed. *Webb v. Braswell*, 930 So.2d 387 (Miss. 2006). The Department of Human Services filed no motion requesting leave to amend its 1999 pleadings. It simply put "Amended" after the Notice of Registration pleading. Ed objected to the attempt to amend the 16 year old pleadings.

The "amended" pleadings filed by Department of Human Services failed to join Margaret Anne as a party and she did not participate in this litigation. The trial court made no formal ruling before the hearing on whether the 1999 pleadings could be amended. The instant litigation must either be for the remanded pleadings filed in 1999, or they must be on a new pleading, filed 2005. The court opened the hearing with the statement that this was a new hearing for all purposes. (T. at 4). Ed would assert that the hearing could not be for both pleadings, and that the hearing and ruling now being appealed would be on the new Notice of Registration "Amended" or on the "old" 1999 pleadings. Ed was given no opportunity to object to the attempt to amend the old pleadings until this appeal because the trial court did not formally rule on the acceptance of the amendment until the Memorandum Opinion. The trial court's discussion of a statute of limitations argument was a confusing finding that an amended complaint related back to the original and neglected to recognize Rule 15 was not followed by the Department of Human Services where there was no motion to amend the 1999 pleadings which could be heard in court where Ed could be given an opportunity to be heard and to object.

Rule 19 requires all necessary parties be joined in any litigation. In this instant action, Margaret Ann was emancipated under Canadian law on July 31, 2002, which sets a child of the marriage as a child of two spouses or former spouses which is under the age of 16. (Exhibit 18 - Chapter 3 (2nd Supp.) Canadian Divorce Act). Margaret Anne was not joined as a party, nor was she present nor did she participate in the "new" action.

In determining whether a foreign judgment should be enrolled in this state, after jurisdiction, the first question which must be answered is whether the foreign judgment comes within our statute of limitations. The statute of limitations on registration of a valid foreign order in Mississippi is three years against a Mississippi resident. *Brown v. Brown*, 822 So.2d 1119 (Miss. 2002); *Davis v. Davis*, 558 So.2d 814 (Miss. 1990); *Magallanes v. Magallanes*, 802 So.2d 174 (Miss. 2001). At worst, the Statute of Limitations as against Ed if he were a non-resident would be seven years and this action

was filed *nine* years later. *Miss. Code §15-1-45; 11-7-301; 11-7-305; 15-1-59* must be used together to determine what the statute of limitations on the registration and enforcement of a foreign judgment for child support under Miss. Code §93-25-93.

§ 15-1-45. Actions founded on foreign judgments

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.* Emphasis added.

§ 15-1-59. Person under disability of infancy or unsoundness of mind

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.

§ 11-7-305. Notice of filing

(1) At the time of the filing of the foreign judgment, the judgment creditor or his lawyer shall make and file with the clerk of the circuit court, as the case may be, an affidavit setting forth the name and last known post office address of the judgment debtor and the judgment creditor.

(2) Promptly upon the filing of the foreign judgment and the affidavit, the clerk shall mail notice of the filing of the foreign judgment to the judgment debtor at the address given and shall make a note of the mailing in the docket. The notice shall include the name and post office address of the judgment creditor and the judgment creditor's lawyer, if any, in this state. In addition, the judgment creditor may mail a notice of the filing of the judgment to the judgment debtor and may file proof of mailing with the clerk. Lack of mailing notice of filing by the clerk shall not affect the enforcement proceedings if proof of mailing by the judgment creditor has been filed.

(3) No execution or other process for enforcement of a foreign judgment filed hereunder shall issue until twenty (20) days after the date the judgment is filed.

Gaye Lynn is not under a disability, nor was she under one when she originally filed to register and enforce the Canadian judgment nine years after its entry in Canada. In all proceedings to date, Gaye Lynn has been the Plaintiff, using the Mississippi Department of Human Services as her legal representation avenue. The Department of Human Services is not the actual Plaintiff, Gaye Lynn is. Under the laws of this state, it is clear that Gaye Lynn had three years to enroll the Canadian divorce

decree for enforcement of child support by any means. Instead, she waited approximately nine years. In order to meet the three year threshold, Gaye Lynn could have gone back to court in Canada and filed a contempt action to bring the order to be enforced within the statute of limitations on foreign judgments in this state. In *Davis v. Davis*, the court found that even in child support enforcement cases, the enrollment process is the same as for other foreign judgments. *Davis*, at 818. In that case, Mr. Davis had not been a resident of Mississippi when the foreign judgment was originally entered in Texas, so the seven year statute of limitations applied. This case did not identify the age of the children and they were not parties to the action. The *Davis* court found that for full faith and credit to a foreign judgment to apply, the foreign court must have addressed the merits of the case in rendering its judgment. If the foreign judgment was obtained as a result of some false representation without which the judgment would not have been rendered, it cannot be enforced. *Davis*, at 818. That court addressed the difference in fraud involving the merits and fraud which enables a party to obtain a judgment he otherwise would not have obtained:

> Extrinsic fraud is defined as any fraudulent conduct of the successful party which was practiced outside of an actual adversary trial directly and affirmatively on the defeated party whereby he was prevented from presenting fully and fairly his side of the cause. A defense of extrinsic fraud ... may be interposed in a suit on a foreign judgment, not for the purpose of reviewing, setting aside, modifying, or annulling the judgment of the sister state, but to prevent its enforcement in the collateral court.

Davis, citing *Reeves Royalty Co. Ltd. v. ANB Pump Truck Service*, 513 So.2d 595 (Miss. 1987).

The evidence above that Ed was not afforded due process in Gaye Lynn's obtaining her divorce decree certainly rises to the level of extrinsic fraud, by the fact she filed two separate actions to achieve her goals. Gaye Lynn has litigated an attempt to enforce a foreign judgment for seventeen years which was based on a fraud upon this court. She filed a petition, had Ed served, obtained a temporary order without any evidence that he could pay the amount, waited until later, filed a new action under a different cause number, did not obtain service over him or provide an opportunity to be heard and obtained a divorce without his knowledge.

That evidence, in and of itself should be enough to find the foreign order unenforceable; however, in case more evidence is necessary, the following analysis may suffice.

The *Vice v. Department of Human Services* case conflicts with that of *Davis* because the mother was represented by the Department of Human Services instead of a private attorney. *Vice v. Department of Human Services*, 702 So.2d 397 (Miss. 1997). That Court found that Mrs. Smith had three years to seek enforcement of the child support order. The tolling as to the children's right is to three years after their majority is reached. In a special concurrence, the court said that the child support arrearage belongs to the child, not the mother, and that the child was the only party who could bring the suit. *Vice*, citing *Williams v. Rembert*, 654 So.2d 26 (Miss. 1995). The courts have held that a custodial parent has no standing to bring an action or seek additional support for a child after the child attains majority. *Taylor v. Taylor*, 478 So.2d 310 (Miss. 1985). Justice Lee dissented from the majority in the *Vice* case, finding that the judgment for back child support was unenforceable because the filing of the judgment was barred by the statute of limitations. He opined that the court had misconstrued *Wilson v. Wilson*, 464 So.2d 496, Miss. 1985) because the statute of limitations is tolled *only* for those under a disability. He further opined that the children should have filed for enforcement or been joined as necessary and proper parties. We would agree that Gaye Lynn was not under a disability and that granting her personal use of the savings clause is contrary to its intent and clear wording. Had Margaret Anne been the Plaintiff and had she appeared at this hearing, the argument may have been different, though it is clear that the "amended" notice was filed more than three years after she reached her majority and the trial court ruled on the bench that this was a new hearing for all purposes, before finding in his Memorandum Opinion that the "Amended" Notice related back to the original one.

In *Brown v. Brown*, the court found that in a domestic (Mississippi) case, emancipation of a child who was the subject of a child support order does not bar an action to recover unpaid child support, but the claim of the parent is

> ...derivative and she must show proof from which an approximation can be made of sum that she paid in support of the child(ren) that compensated for the failure of their father to provide support. That derivative entitlement can come only from the child who still has the claim.

Brown, at 1123.

There have been three attempts to enroll and enforce the Canadian order, the first coming nine years after the entry of the order being enrolled. There has been no enforcement on any of the three. The last attempt to register the foreign judgment for enforcement occurred in September, 2005, when Margaret Anne was 19 years old, more than three years past her majority in Canada for child support purposes. In order for the court to consider the foreign order for enforcement, if it is valid, Margaret Anne must have been the Plaintiff, not Gaye Lynn. Gaye Lynn could only be a derivative recipient and only if she had produced evidence of her expenditures. In this instant case, Gaye Lynn produced no evidence of her expenditures at all. Once she reached her majority, Margaret Anne had the same statute of limitations placed on her which had been on her mother: three years. At the time the final Notice of Registration was filed, Margaret Anne was more than three years past her emancipation age of 16 under Canadian federal child support law. She is now 21, five years past the Canadian age of majority for child support; her claim also would be barred by the three-year statute of limitations.

It is inequitable for the courts to find that if the Mississippi Department of Human Services is the Plaintiff's representative, that they be allowed to present Gaye Lynn as their client when the client is clearly Margaret Anne, who though not present, should have been the plaintiff. It is further inequitable that Gaye Lynn and the Mississippi Department of Human Services be allowed to prosecute the enforcement of a foreign judgment under a statute which is clearly not applicable to them, but only to Margaret Anne. In any event, the attempt to enforce this last registration of the 17-year-old divorce decree and order was made by Gaye Lynn at least three years after Margaret Ann reached her majority under Canadian law and Gaye Lynn and the Mississippi Department of Human Services failed to join Margaret Ann as a necessary party.

The only Notice of Registration that the trial court could have possibly entertained was the original one from 1999, and the one filed in 2005 on behalf of Gaye Lynn should have also been barred by the statute of limitations.

The *Magallanes* case addressed enforceability of a foreign judgment quoted the statute that

> all actions founded on any judgment or decree rendered by any court of record shall be ... if the person against whom such judgment was or shall be rendered was a resident of this state, such action, founded on such judgment shall be commenced within three years next after the rendition thereof, and not after.

Miss. Code § 15-1-45. The primary purpose of statutory time limitations is to compel the exercise of a right of action within a reasonable time. These statutes of repose apply with full force to all claims and courts cannot refuse to give the statute effect merely because it seems to operate harshly in a given case. *Magallanes*, at 176, citing *Mississippi Dept. of Public Safety v. Stringer*, 748 So.2d 662 (Miss. 1999). In that case, the Defendant did not file a timely response; however the court found that it was irrelevant as the judgment was unenforceable because it was not timely filed within the statute of limitations. *Id.*

In its Memorandum Opinion of the Court, the trial court correctly found that Margaret Anne reached her age of majority for purposes of child support on July 31, 2002, and that the age of majority under the Divorce Act is 16. After a Motion for Reconsideration or for a New Trial was filed by Ed, the trial court changed its finding, and instead said the age of majority under the Divorce Act is 18 which is contrary to what the Divorce Act actually states. (Exhibit 18, Chapter Three of the Divorce Act). Even if the trial court were correct, Gaye Lynn's standing to attempt to prosecute the registration of the foreign judgment had expired under any worst-case scenario over a year before the "Amended" Notice was filed without including Margaret Anne as a party, instead of 1993, which was three years after the judgment was entered in Canada.

The Mississippi Department of Human Services has argued to the court that Margaret Ann is still considered a minor and that Ed's obligation to pay child support remains and is accruing,

though Margaret Ann is five years past the legal age of majority for child support purposes in Canada. The definition of a child of the marriage in Chapter Three of the Divorce Act found in the record excerpts placed into evidence is:

> 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 obtain the necessities of life;

It is clear under the Canadian Divorce Act a child is emancipated for child support purposes at 16 unless she is ill or disabled. The definition of "other cause" is too vague for Mississippi's enforcement . Margaret Ann is not disabled as per the common definition. Black's Law Dictionary defines "disability" as the "inability to perform some function; an objectively measurable condition of impairment, physical or mental." The record is clear that Margaret Ann is a bright, healthy person who happens to still be in school. Under the Canadian Divorce Act, there is no definitive ending date for the obligation of child support on the paying parent if the Department of Human Services argument is to be believed; theoretically, child support could continue forever if the court made a literal interpretation, using the "other causes" reason. Under Mississippi law, still being in school is not a reason for continuing child support after the certain date of emancipation, which is set in Mississippi at 21. Under the law of the Divorce Act and any collateral laws, Mississippi must read the age of emancipation at 16, because to do otherwise would result in an unjust result, especially when the law provides no provision for Ed or any other parent to contest the continuance of child support past the 16th birthday.

Under the laws of this state, even if the Canadian judgment of divorce were valid as to the original child support issue, there must be a specific ending to the obligation. There must also be notice and opportunity to be heard given to Ed in order to contest the continuance of any legally ordered child support past Margaret Anne's 16th birthday. Ed received no notice of any attempt to continue child support. Mississippi law sets a final date at which a child is emancipated and provides

that emancipation may occur sooner. The intention is that there must be some definitive point at which a child becomes emancipated and the parent's responsibility to provide for support ends.

> Mississippi has long held even if a child is still in school on the "magic" date, the parent's obligation ends. *Nichols v. Tedder*, 547 So.2d 766 (Miss. 1989). In that case, the court cited *Watkins v. Watkins*, 337 So.2d 723 (Miss. 1976), which held that the duty of care and maintenance is not extended to adult children and the duty imposed on parents to provide for their children ceases when the child reaches the age of majority. See also: *Miss. Code* §§93-5-23 and 93-11-65.

According to our statutes, emancipation of a child occurs thus eliminating any further support obligations when the child:

> (a) Attains the age of twenty-one years,
> (b) Marries, or
> (c) Discontinues full-time enrollment in school and obtains full-time employment prior to attaining the age of twenty-one (21) years, or
> (d) Voluntarily moves from the home of the custodial parent or guardian, and establishes independent living arrangements and obtains full-time employment prior to attaining the age of twenty-one (21) years.
> Miss. Code Ann. § 93-5-23 (Supp.2000).

Mississippi does not recognize school as a reason to continue child support past the date certain. In fact, Mississippi does not recognize any reason for continuing a parent's obligation to support a child post majority even if the child is disabled.

Under the plain reading of the Canadian Divorce Act, there is no set date of emancipation for child support other than the 16th birthday and there seems to be no provision for a paying parent's contest of continuing child support past the child's 16th birthday. This law flies in the face of long-held law in Mississippi and would be not only unenforceable here, but also would be against public policy. The only way a Mississippi child can receive child support past the age of majority is that the parents agree to it. The Canadian law is completely opposite from the Mississippi law and would shock the conscience of a Mississippi court.

The trial court found that though the issue was raised that there must have been two separate actions when Ed found that the facts of the first action's cause number were being used under the second action's cause number, it was reversible error to find that there was only one action, not two. (Memorandum Opinion of the Court, p. 22). Though the trial court correctly found that there were two cause numbers and that the Canadian court must docket and file each pleading like most chancery courts in this state, it found there was only one divorce, child support and custody action filed in Canada. *Id.* In reviewing the record to render its opinion, the trial court neglected to review Exhibit 3 of the trial court which is a Petition filed October 17, 1989, Number U.F.C. No. 1033 of A.D. 1989. There is NO claim for a divorce in that petition. The Supreme Court found in its 2000 ruling that the divorce petition was filed on May 9, 1990. *D.H.S. v. Shelnut*, 772 So.2d 1041 (Miss. 2000), at 1043. The process that the Supreme Court mistakenly said was served on Ed in what was the second action (divorce) in its ruling, was actually the process served in the first action (custody). It is clear there were two separate actions and that Ed was only served in the first action. The trial court erred in finding that there was only one action and that Ed's participation in the first action bound him in the second.

Did Gaye Lynn's conduct rise to a level that would waive any right she had to obtain child support under a valid judgment?

Did the trial court's personal bias against Ed and the trial court's assumption of the role of another prosecution destroy any possibility of a fair hearing?

In *Brown*, the Court cited *Cole* and found that had Mr. Brown shown that his former wife had intentionally interfered with his contact with his children, the father's obligation to make the child support payments could have been waived. *Brown*, at 1124.

Gaye Lynn's actions materially destroyed Ed's relationship with his child through her refusal to allow Ed visitation while concurrently allowing his relatives visitation if he were not present. Her denial of his contact with the child started at the separation and continued uninterrupted after Gaye Lynn's move to Canada. Testimony of the witnesses in court and the deposition of other witnesses

show that Gaye Lynn took intentional actions to prohibit Ed from seeing his child. Gaye Lynn further threatened Ed with jail if he attempted to go to Canada to see his child. Finally, Gaye Lynn changed the use of the child's last name from that of Shelnut to use of her own maiden name, Kern, in an effort to erase Ed from the child's life. This is the only consistent fact among Gaye Lynn's actions and testimony.

Under the Canadian Divorce Act, applications for custody of or access to a child are made under Section 16 of the Act. Section 16(10) requires that the Court, in making a custody and access order, to give effect to the principle that a child of the marriage should have as much contact with each parent as is consistent with the child's best interests, and that each parent's willingness to facilitate the exercise of access by the other must be considered. This is often called the "friendly parent rule." It is based on the premise that it is in the child's best interest to maintain close contact with both parents, and that any conduct on the part of a parent who interferes with the other's relationship with the child is to be discouraged. *Divorce Law (Canadian government website).*

Here, Gaye Lynn clearly testified that she was willing to let Ed see his daughter only if he agreed in entirety to her terms for reconciliation in the Mississippi reconciliation proposal (T. at 29); yet, she did not put any terms for visitation, contact or access to the child in that proposal and she did not request any such terms in her first Canadian action. Through the divorce judgment, she failed to provide Ed any access to his child, while gaining a child support award in the divorce decree. The second time she testified to her position on Ed being able to see his child occurs on T. at 35. She clearly stated that Ed could see Margaret Anne with his parents and grandparents (T. at 36). The parents and grandparents testified that if they were going to see Margaret Anne it had to be without Ed around. Their testimony is pertinent because they had something to lose by testifying this way - what little contact they were allowed with Margaret Anne balanced with their love and care for their son/grandson.

Next, Gaye Lynn avoided the question of whether she allowed Ed any alone time with Margaret Anne by stating that she allowed contact whenever "they" wanted to have her, "they" could have her (T. at 35). Finally, her last piece of testimony clearly sums up her pattern of behavior in regard to her refusal to allow Ed any visitation with his child. On page 66 of the transcript of the hearing, she is referred back to her testimony in the 2001hearing. She testified then and in the 2007 hearing that "I chose not to apply for visitation when he chose not to respond to the divorce papers (T. at 62)." She was correct about the second divorce proceeding, but not the first. It is ironic that not only did Ed respond to the first set of papers, he actively participated in that proceeding until she abandoned it to file the second action: clearly an example of "her way" or "no way". This is precisely summed up by Ed's testimony, "if you weren't 'for her', you were 'against her' in her mind." (T. at 126). Joel's testimony confirms Gaye Lynn's attitude when he attempted before and after the move to Canada to help facilitate some visitation between Ed and Margaret Ann, and Gaye Lynn refused (Dep. JG at 5). When Gaye Lynn made her application for the first action, she had no knowledge of whether or not Ed would respond. She violated a core requirement in Canadian divorce law which contemplates best interest of the child as being accessible to both parents.

It is clear that Gaye Lynn wanted no contact between the child and her father, and she did not consider at any point in time that contact with the father was in the child's best interests. She had no willingness to facilitate the exercise of access by the other parent. She did not care that it is in a child's best interest to maintain close contact with both parents. Six witnesses clearly refuted Gaye Lynn's testimony that she would have allowed visitation at any time after she got Ed to move out of the house. Nothing which was presented showed Ed would be a danger to his child. Since there was wrongfully no hearing on this issue, the Canadian Court was not able to determine if there was any conduct on the part of one parent interfered with the other's relationship with the child and therefore discourage it.

In Canada and under the Divorce Act, where the parents are not able to settle the custody and access issues regarding their child(ren) themselves, the determination will be made by the Court. The Divorce Act, section 16(8), requires the Court to take into account the best interests of the child of the marriage. The "best interests" test is the one that generally applies to the determinations across Canada, whether under provincial family law or the Divorce Act. The factors of best interest in Canada are similar to Mississippi's *Albright* factors. *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983). In Canada, under the Divorce Act, the non-custodial parent is generally granted access to the child, which comprises both visitation privileges and a right to certain information about the decisions being made by the custodial parent. Whenever one parent is awarded custody of a child, the other will generally be awarded access to the child. Again, the test applied is the best interest of the child. Ed received neither visitation or information rights in the divorce.

Ed's Canadian attorney was present for the temporary hearing to contest jurisdiction in the first action. There is no record of any other actions or notices of actions that Ed might have responded to after that time, and Ed testified that he received no other services of process or notices after the one for the December, 1989, temporary hearing (T. at 123). He also testified that he did not remember executing or filing any financial document similar to our form 8.05 (T. at 135). In reviewing the record, at the end of the trial court hearing in September, 2007, it was finally confirmed that there were two Petitions filed by Gaye Lynn in Canada. The first one was filed October 17, 1989 for custody and child support and that is the one that Ed was served with and answered. Another was filed May 9,1990. This is the divorce petition/judgment that was addressed by the Supreme Court with the facts and information which were actually from the first action. There was no evidence presented that Ed was ever served with process on that petition for divorce. Since the divorce was granted on the second petition, then there can be no child support order enforced because Ed was again given no notice or opportunity to answer or appear. Had the judgment been granted based on the October, 1989 petition, then there still can be no enforcement because he answered the petition

contesting the child support, custody, etc., which firmly gave him the right to contest the issues in a court hearing on the merits.

In this case, there was no final hearing in either action to determine any of these things, the Canadian court did not address these issues in any form or fashion and Gaye Lynn intentionally did not ask the Court to address them either. The Canadian court and Gaye Lynn both failed in their duties in determining what was in Margaret Anne's best interest. Since there was never a hearing in relation to the divorce, or permanent custody, or visitation, or child support, Ed never had notice or opportunity to be heard on these very important issues. It is clear that the amount of child support ordered by the Canadian Court was excessive in respect to Ed's income at the time. Under Mississippi guidelines, he would have been ordered to pay $168.00 to $210.00 a month at the most if he had been afforded an opportunity to argue his case before that court. The chronology presented in the *Divorce Law* memorandum found on the Canadian government website shows that it was not until 1995 that the Canadian government Family Law committee made the recommendation that child support guidelines be implemented.

Further, Gaye Lynn's intentional inaction, intentional deprivation of contact between Margaret and her father, threats of jail and other actions, all clearly show that she did not have her daughter's best interest in mind. She had only her own selfish desires in mind. We need to look past her words and through to her actions, which are consistent in denying Ed contact with his child.

In addition to the specific denials of access above, Gaye Lynn made it very clear that Ed was never to have any contact with his child. The only people she allowed to see the child were Ed's mother and stepfather, his father and stepmother and his grandmother. All parties testified, either in the 2007 hearing or in a deposition, that they knew that Gaye Lynn did not want Ed around Margaret Anne and if they brought Ed around or allowed him around, then they would not be able to see or visit with Margaret Anne. She allowed his family finite contact only if Ed were not involved. She had them by the throat and unfortunately they fell in with her demands. Also unfortunately from the

beginning, Ed fell in with her demands as well and believed she would follow through with her threats of incarceration with allegations of domestic violence if he attempted to see Margaret Anne or went to Canada. Without the financial resources to fight Gaye Lynn, Ed was left with no means of pursuing a legal remedy to his loss in a foreign country.

At the same time that she came with her daughter to Mississippi in June, 1999, Gaye Lynn's attorney was filing a motion that she be allowed to testify by telephone as Gaye Lynn could not afford to come to Mississippi for the hearing scheduled in July, 1999. Gaye Lynn did not attend her Mississippi hearing in July, 1999. She did not tell anyone she was coming until she was here in June, 1999. The one person in the family that she visited was the great grandmother of Margaret Anne, Velma Webb, who was surprised and shocked by the 10 minute visit. Velma testified in her deposition, and other witnesses verified her testimony that Gaye Lynn hid Margaret Anne outside Velma's home until she ascertained that Ed was not there. Only then did she tell the child to come out of hiding to visit with her great grandmother. These are the actions of a woman who has hidden the child from the father in plain sight; and even 19 years after she left Mississippi is still hiding the child from the father.

Although Margaret Anne is now five years over the age of majority in Canada for child support purposes, she did not attend the 2007 hearing and has not been joined as a party. In 2001, when Gaye Lynn came to Mississippi for the first time for a hearing, she testified (T. 21) that she telephoned to arrange for a family visit and she believed that Ed's lawyer had cautioned Ed against it. This is false, as it is clear that Ed petitioned during the hearing directly to Judge Robinson to be able to talk to and see his child. Judge Robinson agreed (T. at 131).

According to her own testimony, Gaye Lynn was in touch with everyone except Ed. And every one of these people knew that if they brought Ed into the picture, that is if they allowed Ed to be around Margaret Anne, then their own limited access to the child would be revoked. Gaye Lynn

also testified that she sent pictures, fridge photos, birthday cards and remembrances from Margaret Anne to everyone in the family except Margaret Anne's own father. This is alienation in plain sight.

Gaye Lynn in her own words (T. at 23) stated that "She (Margaret Anne) did not come into this world with one parent. She had two parents and I would like to see that she receive or I receive the child support for her." Gaye Lynn's only focus is that she get that child support. Even though there are two parents, the only thing Ed is good for is paying child support - he is not good enough to have ANY visitation with his child. Her way or the highway - pay child support but you may not have any visitation with your own flesh and blood.

Ed testified that since Gaye Lynn left the country, in March, 1989, he has only seen Margaret Anne once in May, 2001, when Gaye Lynn was ordered by Judge Robinson to allow a brief visitation (T. at 131). Although Gaye Lynn technically complied with this ruling, the visitation was minimal in length, lasting for maybe two or three hours, and she refused to allow Ed or his family to visit privately with Margaret Ann (T. at 132). Margaret Ann has been emancipated since she was 16 under the Canadian child support laws. Margaret Anne has made no attempt to contact her father or begin working on a parental relationship with him.

The Canadian Court failed to give Ed even the most basic of rights under their own law and under Mississippi law:

1) notice and opportunity to be heard at a hearing on the merits;

2) The right to have open communication between himself and the child;

3) the right to foster a feeling of affection between his daughter and himself;

4) the right of the parents to consult with each other with regard to their daughter's education, illnesses, medical/dental needs, operations, sporting and extra curricular activities, and other matters of similar importance affecting her; and

5) the right to know about her well-being, education and development. Gaye Lynn intentionally did many things to estrange and alienate Margaret Anne from her father and she

definitely injured Margaret Anne's opinion as to her father as evidenced by the testimony of both the Inmans when Margaret Anne asked them "is my mean old daddy still sick in the head?" (T. at 88, 106).

Gaye Lynn's actions clearly hampered the free and natural development of Margaret Anne's love and respect for her father. Gaye Lynn did nothing to keep Ed informed of Margaret Anne's school programs, school grades and report cards, church activities, music recitals, parents day and sporting events so as to afford him an opportunity to attend and participate or to even have this knowledge and information. He did not have access to Margaret Anne's school and medical records.

Gaye Lynn has contumaciously, continuously, wilfully, intentionally, and completely alienated the child from her father, knowing he had no financial or other means to go to Canada in an attempt to further a relationship with his child. Gaye Lynn has waived her right to any child support payments, if the child support order were valid.

In *Cole v. Hood*, the mother had gotten the children from their father on the pretense of taking them to church. It was eight years later before he saw them again. (*Cole v. Hood*, 371 So.2d 861 (Miss. 1979). Once the father discovered the children's whereabouts, the mother made a demand for child support payments. The Court dismissed her suit. *Id.* The court also found that

> the doctrine did not have to be pleaded by the Defendant in order to receive relief, although it will require a plainer case if it is not so pleaded, for if at any time during the progress of the case, it becomes evident that the facts exist which call the maxim into use, it is the duty of the court to apply it, on the basis of sound public policy. Courts of equity do not countenance iniquity nor give it sanctuary, and to do so will not be forced upon the court because the Defendant fails to raise the question.

Id.

In *Cole*, the mother had actually hidden the children from the father. In this instant case, though Ed knew generally where Margaret Anne was, he had no viable means of communicating with her or having a relationship since Gaye Lynn had removed her to another country and threatened to have Ed jailed for abuse if he came to Canada and attempted to see Margaret Anne.

Gaye Lynn must also have some responsibility for visitation; it does not all fall solely on Ed, as the trial court opined from the bench. Any mother who has the best interest of her child at heart is going to encourage an appropriate relationship between the father and child. Gaye Lynn did everything in her power to alienate Ed from his daughter, and she accomplished this in plain sight of both the family and the court. She put barriers around the child which no one could or dared to breach, for fear they would lose what little contact remained with Margaret Anne. Gaye Lynne has bullied family and friends for over 18 years; unfortunately, they had little choice and gave in to her demands. Gaye Lynn should not be allowed to unilaterally dictate the relationship between father and daughter and still be able to collect an unfair windfall from Ed; this long standing situation is one without equity for the father. Since she so severely restricted Ed's access to Margaret Anne, Gaye Lynn should be restricted in kind with relation to child support, if the court finds that the due process requirements were met in order for the Canadian judgment to be valid for enforcement.

The doctrine of "unclean hands" has been available to Mississippi courts for a long time and is considered one of the oldest and most universal of principles required to be observed by the court of chancery that, when a party seeks the interposition and aid of that court, such a party must show that in good faith and to the best of his/her ability and understanding he on his part has rendered unto the opposite party all the rights to which the latter is entitled in respect directly to the subject matter of the suit or petition. *Taliaferro v. Ferguson*, 38 So.2d 471 (Miss.1949).

Being more familiar with the entire history of this case during the 17 years of litigation, the previous trial court recognized Gaye Lynn's unclean hands even without the due process arguments. That court was emphatic that due to Gaye Lynn's actions in deliberately failing to allow Ed any relationship with Margaret Anne, they would not enforce the foreign judgment. Ed relied upon the former court's statements and actions as a defense. Gaye Lynn played no small role in the delays that she, through the Mississippi Department of Human Services, instigated through the failure to prosecute her case in a timely manner. A delay of over four years to re-set a hearing date to continue

a case "expeditiously" is unconscionable. Also, requesting and obtaining a Judgment to Set Aside Judgment of Dismissal over 30 days after the Judgment of Dismissal was entered is unconscionable when there had been no action for over two years before Ed asked for the Judgment of Dismissal.

Ed does not have the ability or finances to visit the foreign country. Gaye Lynn knew this when she left in the middle of the night and got her divorce in Canada. Both Gaye Lynn and Ed testified as to their hardships, except several times Gaye Lynn was offered by the paternal grandparents air fare to Mississippi for herself and the child, Margaret Anne. She also utilized the services of the Mississippi Department of Human Services to represent her at Mississippi taxpayers' expense, while forcing Ed to attempt to find and pay for a private attorney to defend himself.

Other examples of Gaye Lynn's alienating conduct are that she changed her telephone number while still in Mississippi and did not give it to Ed. (T. at 37). He was trying to contact his daughter to get visitation. She said he was being harassing and she disconnected the phone, unlisted it and gave him no way to visit or have access to his daughter (T. at 37). This pattern started early and only got worse as time went on.

Gaye Lynn intended to leave Mississippi well before she actually did and she did not tell anyone. She began packing at least a week before the conversation over the electric service and did not tell anyone she was leaving with Margaret Anne. (T. at 39-40). Gaye Lynn had Ed's clothes packed up and put in his car while they were supposed to be having a meeting with their preacher/counselor to discuss Margaret Anne's discipline and money (T. at 120).

Gaye Lynn did not let Ed know where she and her daughter were or when they got to their destination. She eventually let members of his family know, members who already knew that they were not to allow Ed anywhere near his daughter if they wanted to maintain any contact with Margaret Anne. When asked point blank, "And what efforts did you make to help Ed maintain a relationship with his daughter after you moved up there and before you filed for divorce?", there was no response at all. She made none.(T. at 43). She divided the family and the grandparents against

Ed. And they chose to see their granddaughter even though it meant completely excluding Ed from his daughter's life.

Gaye Lynn did allow Ed phone access to Margaret Anne every other Saturday, for a short time after the divorce, but testimony from Ed and the Inmans shows that this was an empty attempt because Margaret Anne was never available for these twice per month telephone calls. Gaye Lynn would e-mail the rest of the family, but not Ed. Gaye Lynn states that she was denied Ed's address, but the Inmans testified that they never refused that information to her, that she simply did not ask for it. (T. at 95-96). Jean testified about the restrictions that Gaye Lynn placed not only on them but also on Ed when trying to see his daughter, "..that we were to keep her just ourselves. That weren't – we weren't to share her." (T. at 102). When asked if Gaye Lynn expressed that she did not want Ed around his daughter, Jean replied "Yes. It was - - it was just we knew that we couldn't - that we had to keep her to ourselves. That we were not to share her with her father (T. at 102-103)." She further stated that Ed tried to go and see his daughter and that Ed was not allowed to have any visitation with his daughter (T. at 103).

Gaye Lynn's campaign of alienation was so specific that Jean and the rest of the extended family knew that "I wouldn't be welcome if he was with me." Jean stated that Ed did not ask to go to Canada with them because "I think he was afraid to go. I think he felt that - as I recall, he had been told that if he ever came across the border that he would be picked up (T. at 103)." Jean stated that Ed did not handle this well and that it was painful to him to not see his daughter, especially when other family members were allowed to see her as long as Ed was not around. Jean stated that Ed would have gone to Canada to see his daughter if he could have found a safe way to do it (T. at 104). The Inmans also had restrictions on their access to Margaret Anne, even while they were in Canada visiting under Gaye Lynn's control. The Inmans could never be alone with Margaret Anne, there was no private time (T. at 105-106). The Inmans did not complain because they were trying to hold onto a relationship

with Margaret Anne and it was obvious that if they balked, they would lose what little contact they had with Margaret Anne.

Gaye Lynn testified that she told Ed when he tried to make arrangements to go to Canada to see his daughter, that he was going to go to jail if he came to Canada because he had not paid child support. Ed testified that Gaye Lynn had told him she would have him jailed for abuse and she would have gone to great lengths to bruise herself to make it look good. (T. at 127). Mrs. Inman's testimony supported this testimony as well. (T. at 115).

The Inman's testimony carries great weight due to the fact that they had much to lose by telling the truth, in that they would most certainly be barred from contact with Margaret Anne if they included Ed in their visits with Margaret Anne and they knew that each time they failed to include Ed they hurt and distanced themselves from him in order to see Margaret Anne. The Inmans clearly testified that they could see Margaret Anne, "but there were restrictions on others." "She didn't especially want Ed to be... to see her. And that was basically it." They could visit with Margaret Anne, ".. it was pretty well specified, okay, if Ed is not there." When asked how clear Gaye Lynn made this to him, Frank stated, "Well, that should have been clear enough, don't take her to see Momma and Pop if Ed is there." (T. at 83). Before Gaye Lynn spirited Margaret Anne away to Canada, she was enforcing her "no contact with Ed" rule. Frank testified that Margaret Anne, Ed and parts of Ed's family were at Velma's house. Ed was trying to visit with his daughter and Gaye Lynn came in and got very upset that Ed was there seeing his daughter (T. at 91).

These actions belied her words that Ed could see his daughter any time he wanted, but that he just did not ask for this privilege. Gaye Lynn took Margaret Anne away and was angry because "Ed was there and wasn't supposed to be there." (T. at 91). On this same page of the transcript and others, even in Gaye Lynn's own testimony, Ed was not violent to her or his daughter and she had no fear of Ed. She just did not want Margaret Anne to have a relationship with her father and she poisoned her daughter's mind against her father. What 4 year old who had not seen her father in almost 2 years

would ask out of the blue, "is my mean old daddy still sick in the head?" It is Gaye Lynn's fault that a bullet proof barrier was put between Margaret Anne and her father. Frank clearly stated that Gaye Lynn was vocal about her opinions and feelings and the most clear one is that there is to be no contact between Ed and Margaret Anne. Frank confirmed that if Ed had hurt Gaye Lynn or Margaret Anne, he would have heard about it. (T. at 93). Both Gaye Lynn and Frank clearly stated that if anything like that were going on, all she had to do was tell Frank and Ed's father and they would take care of it. There was obviously nothing of the sort happening. The Inmans testified that Ed tried to keep a relationship with his daughter but that Gaye Lynn had hog tied everyone and everyone knew that Gaye Lynn would not allow Ed to be around his daughter. (T. 96-99)

ACCOUNTING

Gaye Lynn introduced an affidavit of accounting which tried to enforce a temporary order under the first action number. There is no full faith and credit to such temporary orders. The judgment entered under the second cause number divorcing Ed and Gaye Lynn did not include any alleged monies owed under the temporary order and the $1625.00 cannot be included for full faith and credit purposes. Further, the judgment clearly states that the child support would be $325.00 per month until the child was emancipated under the meaning of "child" in the *Divorce Act*. That age is 16, and Gaye Lynn has attempted to collect for an extra five years. Gaye Lynn has attempted to misrepresent Canadian law and what Margaret Anne's arrearage would be if the child support order were valid. Her misrepresentation of alleged arrearage constitutes another instance of a fraud upon this court and should not be rewarded.

RESPONSE TO COURT'S PERSONAL CONCERNS

It is easy to believe that if confronted by the dilemma presented to Ed in this case, we would most assuredly risk life and limb to travel into a foreign country without any financial or human resources to protect us and somehow establish a relationship with our child while fighting an order entered without due process. In reality, that would be a most dangerous thing to do. While in a perfect

world a parent may be strong, brave and wealthy enough to go to a foreign country and risk his own freedom and he may know enough of the law to take such a chance; but in reality a deaf person, teaching at the state school for the blind, living from paycheck to paycheck, could not reasonably be expected to place himself in peril of jail, huge financial damage, and the loss of what little second-hand knowledge he has of his child by attempting to re-establish a relationship poisoned before the child left Mississippi. When faced with the threat of jail in a foreign country by someone who always carries out their threats, normal people cannot move forward, but back down and look for other avenues. Reality is very different from the trial court's sincere belief when the child and legal action are in another country and not just in another city or state and a parent has no reasonable means of fighting back.

Ed is very sympathetic to the trial court judge's personal tragedy in the death of his son. Ed's own attorney has lost a son through a tragic accident. Ed's loss is different, but no less a tragedy; although his child lives, he has no reasonable means of ever seeing or establishing a relationship with her. Throughout the hearing, the trial court acted more as another attorney questioning rather than attempting to clarify any questions he may have had with the testimony presented. (T. at 70, 110, 141, 142, 143 et seq.). The trial court made it clear in his questioning that he was not impartial and that Ed and the other witnesses' testimony was not credible to him (T. at 143).

The trial court's personal prejudice against Ed was made perfectly clear when the court said that it did not believe him and that it was not impressed with his testimony and that it was self-serving. (T. at 143-146). Although the court was adamant as to what the Chancellor would have done had the Chancellor been in Ed's shoes, the court was not in Ed's shoes; had the Chancellor really been in Ed's shoes, the court may have had a different perspective as to Ed's options.

CONCLUSION

As a matter of law, Ed did not receive the basic due process rights guaranteed to him under both Canadian and Mississippi law, which requires:

1. A Defendant is entitled to notice of an action filed against him. If a Defendant answers a complaint against him, he is entitled to notice of any hearing which affects his rights and standing in the action.

2. Mississippi cannot enforce an ex parte administrative judgment of divorce when the pleadings clearly show that:

a) There were contested issues in the first action number;

b) Ed was provided no opportunity to defend the charges against him in a hearing on the merits in the second action;

c) The Judgment in the second action was entered without the parties or their attorneys present;

d) The judgment was signed by a registrar/clerk rather than a judge as an administrative function in a second case number where he was never served.

When the last attempt to enroll and enforce the Canadian divorce decree was made in 2005, Margaret Anne was more than three years past the age of majority for child support purposes in Canada. She was never joined as a party and she did not appear in court. Gaye Lynn's statute of limitations for enrolling a foreign judgment against Ed is three years. Gaye Lynn has used Margaret Anne's own statute of limitations as a crutch; furthermore, Gaye Lynn failed to pursue any further litigation in the foreign court or Mississippi courts to enforce the child support judgment in Canada and failed to make Margaret Anne a necessary party of the proceedings in Mississippi after Margaret Anne was emancipated.

The age of termination of child support in Canada is sixteen. The exceptions are vague and arbitrary. Mississippi cannot be expected to interpret and enforce such a vague and arbitrary law, it goes against public policy and judicial finiteness. We cannot be expected to rule on a moving target of a law. If we are to enforce their law, it must be with certainty, not a moving line that arbitrarily changes to suit each person who comes into the jurisdiction of this Court. There must be a finality to

the date, otherwise it puts Ed and others in jeopardy forever. Further, the law must provide Ed an opportunity to contest the extension of child support past 16, and it doesn't.

The Mississippi Department of Human Services has continuously failed to properly register and prosecute this case since 1999. Margaret Anne Kern reached her majority under the laws of Saskatchewan, Canada, on July 31, 2002; Gaye Lynn failed to join Margaret Anne as a necessary party once she reached her majority as it regards child support. The child was emancipated under Canadian law over three years before the current original pleadings were filed. Current pleadings to register and enroll the original foreign order were filed 16 years after the entry of that foreign order in Canada.

On September 26, 2005, Mississippi Department of Human Services filed an amended Notice of Registration of Foreign Support Order without first requesting permission to do so as required by Rule 15, Rules of Civil Procedure, and further failed to join Margaret Anne as a party, as required under Rule 19, MRCP. The trial court failed to address the issues of Rule 15 amendments and Rule 19 joinder until his Memorandum and Opinion, though the objection had been raised by Ed in his response to the Notice to Register Amended.

The testimony and evidence was clear that Gaye Lynn began a successful, systematic process to terminate Ed's relationship with his child before she left Mississippi and followed through with it in her divorce and subsequent actions. As parents we can stoutly state that we would never have countenanced Ed's failure to enter a foreign country, risk jail and all his possessions and his other family, we were not in Ed's shoes and, until we are, we cannot prejudice his case for personal reasons.

This IS a tragic case. Ed and Margaret Anne have lost forever the relationship he so cherished and anticipated at her birth. Margaret Anne has failed to contact Ed even though she is now grown. The Canadian divorce decree should not be enforced because of all the reasons stated above.

Ed respectfully requests and prays that this court reverse the trial court .

a) For the foreign court's failure to provide Ed his fundamental due process rights in the judgment for divorce;

b) Because the Notice of Registration of Foreign Support Order Amended is barred by the statue of limitations;

c) For allowing the pleading filed September 25, 2005, to relate back to the original pleading filed in 1999;

d) For extending the Canadian age of emancipation for child support purposes from 16 to 18;

e) For failing to require joinder of the child as a party when she reached 16 years of age;

f) For failure to waive enforcement of the child support judgment due to Gaye Lynn's alienation of the child from Ed;

g) For the trial court's failure to remain unbiased and for inappropriate participation in the hearing, as if the court were a third attorney.

h) for the trial court's failure to recognize that there were two actions, not one in Canada and that the facts of the first could not be attributed to the second.

Respectfully submitted, this the 28th day of May, 2008.

EDWARD SHELNUT

By: Patricia Sullivan Smith
His Attorney

CERTIFICATE OF SERVICE

I, the undersigned attorney for Edward Shelnut, do certify that I have this day mailed a true and correct copy of the foregoing Appellant's Brief and Appellant's Record Excerpts to Jason Bayles, attorney for the Department of Human Services at P. O. Box 11677, Jackson, MS 39283, Honorable DeWayne Thomas, P.O. Box 686, Jackson, Mississippi 39205, and Ms. Toni C. Matlock, P.O. Box 686, Jackson, Mississippi 39205.

Dated, the 28th day of May, 2008.

Patricia Sullivan Smith

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I, the undersigned attorney for Edward Shelnut, do certify that I have this day mailed a true and correct copy of the foregoing Appellant's Brief and Appellant's Record Excerpts to Jason Bayles, attorney for the Department of Human Services at P. O. Box 11677, Jackson, MS 39283, Honorable DeWayne Thomas, P.O. Box 686, Jackson, Mississippi 39205, and Ms. Toni C. Matlock, P.O. Box 686, Jackson, Mississippi 39205.

Dated, the 28th day of May, 2008.