

IN THE SUPREME COURT OF MISSISSIPPI

Case No. 2008-CA-00676

JOEL D. HOLLOWAY

APPELLANT

VERSUS

TWYLA M. HOLLOWAY

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
JONES COUNTY, MISSISSIPPI

APPELLANT'S BRIEF

ORAL ARGUMENT NOT REQUESTED

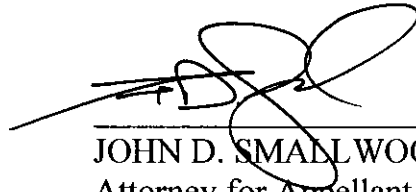
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CERTIFICATE OF INTERESTED PERSONS

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 this Court may evaluate possible disqualification or recusal:

1. Joel D. Holloway, Appellant
2. Thomas T. Buchanan, Esq. and John D. Smallwood, Esq. of TUCKER BUCHANAN, PA (Laurel, MS), Attorneys for Appellant
3. Twyla M. Holloway, Appellee
4. Terry L. Cave, Esq. of CAVES & CAVES (Laurel, MS) Attorney for Appellee
5. Honorable Frank McKenzie, Chancery Court Judge of Jones County, Mississippi



JOHN D. SMALLWOOD
Attorney for Appellant

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STATEMENT OF ISSUES

- I. THE CHANCERY COURT ERRED IN SETTING THE AMOUNT OF CHILD SUPPORT TO BE PAID BY JOEL HOLLOWAY.
- II. THE CHANCERY COURT ERRED WHEN IT AWARDED TWYLA HOLLOWAY ATTORNEY FEES.

STATEMENT OF THE CASE

This is a civil action stemming from a Complaint for Divorce [RE-6] filed by Joel D. Holloway ("Joel") on July 11, 2006. Thereafter, on August 15, 2006, Twyla Holloway ("Twyla") filed her Answer and Counter-Claim for Divorce [RE-7]. During the litigation, the trial court bifurcated the trial, hearing testimony and evidence on grounds for a divorce first, then proceeding to a hearing on all other issues.

The trial court heard testimony and evidence on the grounds for divorce on June 12, 2007. The parties reached an agreement upon custody, visitation and division of personal property. Twyla was awarded primary physical custody of the minor children, Joel was awarded specified visitation and the parties divided their personal properties. On August 7, 2007, the trial court heard testimony and evidence on all issues unresolved by the parties. On August 14, 2007, the trial court entered a Judgment of Divorce [RE-8] granting Twyla a divorce on the grounds of adultery.

On February 7, 2008, the trial court entered a Findings of Facts and Conclusions of Law [RE-9]. On March 11, 2008, the trial court entered a Final Judgment of Divorce [RE-10]. On March 18, 2008, Joel filed a post trial Motion to Reconsider [RE-11]. On April 8, 2008, the trial court heard argument on the Motion to Reconsider. On April 14, 2008, the trial court entered an Order denying the Motion to Reconsider [RE-12]. Aggrieved, Joel timely filed his Notice of Appeal to this Court on April 16, 2008 [RE-13]. Twyla did not file a cross-appeal.

STATEMENT OF THE FACTS

The parties, Joel D. Holloway ("Joel") and Twyla M. Holloway ("Twyla") were married on August 26, 1988. The parties had three (3) children during their marriage, namely, Joelle, born March 26, 1989, Zachary, born November 18, 1990 and Shannon, born November 25, 1992. On or about June 19, 2006, the parties finally separated.

Joel has an 11th grade education with no GED nor vocational training. At the time of the marriage of the parties, he had been working at Georgia Pacific for approximately three (3) years. He continued working there until 1999. Thereafter he had several jobs. In 2005, he began employment with Rowan Companies, Inc. doing off-shore oil field work. At the time of trial, Joel was 40 years old and remained employed by Rowan.

Twyla has a 12th grade education. She also obtained a nursing degree from Jones Junior College in 1995 [Tr. at 95]. She has been working in the nursing profession since. At the time of trial, Twyla was 37 years old and remained employed by Jefferson Medical Associates in Laurel, Jones County, Mississippi.

The parties are both residents of Laurel, Jones County, Mississippi. The parties had no real property and neither had a separate estate. The parties maintained a joint checking account, in which money was deposited and bills were paid, until 2003 [Tr. at 111]. Twyla maintained a retirement account accumulated during the marriage valued at \$20,107.29 [R. at 110]. Joel maintained a retirement account during the marriage valued at \$1,397.68 [R. at 115].

Joelle, the oldest child, has ADD. The children have no other medical/psychological conditions. During the pendency of the litigation, Twyla was granted temporary physical custody of the minor children. At the time of trial, all three children were about to begin the 2007-2008 school year at Heidelberg Academy, a private school, in Jasper County, Mississippi. Tuition for all three for the school year was \$535.00 per month. Twyla enrolled the children in Heidelberg Academy. Joel did not agree with that decision.

SUMMARY OF ARGUMENT

The Chancery Court's calculations of Joel's adjusted gross income, deviation from the statutory guidelines for child support and awarding Twyla Holloway attorney fees was an abuse of discretion, manifestly wrong, clearly erroneous and a misapplication of the appropriate the legal standards in this case.

ARGUMENT

STANDARD OF REVIEW

Findings of the Chancellor will not be disturbed nor set aside on appeal "when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Flechas v. Flechas*, 791 So.2d 295, 299 (Miss. App. 2001), *Sandlin v. Sandlin*, 699 So.2d 1198, 1203 (Miss. 1997). *Denson v. George*, 642 So. 2d 909, 913 (Miss. 1994). "Nonetheless, if manifest error is present or a legal standard is misapplied, this Court will not hesitate to reverse." *Flechas* at 299 (Miss. App. 2001); *Tilley v. Tilley*, 610 So.2d 348, 351 (Miss. 1992). Where there is a question of law, the standard of review is *de novo*. *Morreale v. Morreale*, 646 So.2d 1264, 1267 (Miss. 1994).

I. THE CHANCERY COURT ERRED IN SETTING THE AMOUNT OF CHILD SUPPORT TO BE PAID BY JOEL HOLLOWAY.

A. ADJUSTED GROSS INCOME CALCULATION.

Miss. Code Ann. § 43-19-101 provides the courts of Mississippi with child support award guidelines. There is no question that said statute provides the guideline of 22% of adjusted gross income for setting child support for three (3) children. Miss. Code Ann. § 43-19-101 (3) states:

The amount of "adjusted gross income" as that term is used in subsection (1) of this section shall be calculated as follows:

(a) Determine gross income from all potential sources that may reasonably be expected to be available to the absent parent including, but not limited to, the following: wages and salary income; income from self employment; income from commissions; income from investments, including dividends, interest income and income on any trust account or property; absent parent's portion of any joint income of both parents; workers' compensation, disability, unemployment, annuity and retirement benefits, including an individual retirement account (IRA); any other payments made by any person, private entity, federal or state government or any unit of local government; alimony; any income earned from an interest in or from inherited property; any other form of earned income; and gross income shall exclude any monetary benefits derived from a second household, such as income of the absent parent's current spouse;

(b) Subtract the following legally mandated deductions:

(i) Federal, state and local taxes. Contributions to the payment of taxes over and beyond the actual liability for the taxable year shall not be considered a mandatory deduction;

(ii) Social security contributions;

(iii) Retirement and disability contributions except any voluntary retirement and disability contributions;

(e) Compute the total annual amount of adjusted gross income based on paragraphs (a) through (d), then divide this amount by twelve (12) to obtain the monthly amount of adjusted gross income.

Upon conclusion of the calculation of paragraphs (a) through (e), multiply the monthly amount of adjusted gross income by the appropriate percentage designated in subsection (1) to arrive at the amount of the monthly child support award.

It is undisputed that at the times of the hearings of this matter, Joel was employed doing off-shore oil field work. In determining Joel's adjusted gross income for purposes of considering an amount of child support, the Court stated:

Twyla Holloway presented her 8.05 Financial Statement as Exhibit 1 and Joel presented his statement as Exhibit 20. Joel was employed with Rowan Company, Inc., and his monthly gross income was \$5,396.39 and his net monthly pay was \$4,057.41. However, Joel's 8.05 Financial Statement is not consistent with his wage statement that was marked Exhibit 11 in evidence. According to his wage statement through June 6, 2007, his annual adjusted gross income **projected** (*emphasis added*) over 52 weeks was \$76,840.92. This figure divided by 12 equals \$6,403.41 per month as his adjusted gross income. Child support guidelines for three children calls for 22% which equals \$1,408.75 per month.

R. at 107.

The trial court set the child support at \$1,400.00 [R. at 108]. Exhibit 11, upon which the Court relies upon to calculate Joel's adjusted gross income, is a statement from his employer showing his year to date wages and his weekly wages for the week ending June 6, 2007 and the week ending May 2, 2007 (**Appendix I** attached). This document, which was not contradicted by Twyla, shows that Joel's income varies from week to week. For the week of June 6, 2007, his "Net Pay" was \$1,187.49. For the week ending

May 2, 2007, his “Net Pay” was \$1,164.28. While the differences in these two particular pay periods are not significant, what it reveals is that using only the earnings received by Joel for the June 6, 2007 statement to calculate Joel’s “**projected**” annual adjusted gross income, was clear error. *Lee v. Stewart*, 724 So. 2d 1093, 1096 (Miss. COA 1998) In addition to the documentary evidence, the learned trial judge is well aware from his years on the bench in Jones and Wayne counties, that in the oil field business work time and pay fluctuates.

Using the year to date figures contained in this document, it is clear that from January 1 through June 6, 2007, Joel’s adjusted gross income was \$25,007.35 (This calculation includes the mandatory deductions provided in MCA §43-19-101 (3)(b)) . This time period is 22 weeks. \$25,007.35 divided by 22 weeks equals \$1,136.70. \$1,136.70 multiplied by 52 weeks equals \$59,108.40. The calculations used by the trial court was manifestly wrong, clearly erroneous and a misapplication of the appropriate legal standard warranting this Court to reverse and remand.

B. DEVIATION FROM CHILD SUPPORT GUIDELINES.

Miss. Code Ann. § 43-19-101 (4) provides,

In cases in which the adjusted gross income as defined in this section is more than Fifty Thousand Dollars (\$ 50,000.00) or less than Five Thousand Dollars (\$ 5,000.00), the court shall make a written finding in the record as to whether or not the application of the guidelines established in this section is reasonable.

As shown hereinabove, Joel’s annual adjusted gross income exceeds \$50,000.00. The

trial court found “[t]he Court finds that is it appropriate to deviate from the guidelines in this case based upon the special needs of Joelle, the extra expense of Heidelberg Academy which the parties agreed for the children to attend.” [R. at 108]. The trial court clearly deviated from the Child Support Guidelines set forth in Miss. Code Ann. § 43-19-101.

(i) Findings of Facts Not Supported by Evidence.

To begin, the above stated finding of fact is not supported by the evidence. First and foremost, “the parties” did not agree for the children to attend Heidelberg Academy. In his testimony, Joel was clear that he did not want the children to continue their education at Heidelberg Academy.

Witness: Joel Holloway

Q. Now, you’ve hear your wife state that she wants your children to remain in private school. Would you tell the Court how private school came about, and your feelings?

A. Well, I was off shore one day and called home; and she told me, said, well, I’ve sent the kids to Heidelberg Academy. I said, well, that’s fine and good. It was on a scholarship. I said, whenever it starts costing me, they’re going to have to go back to a public school, ‘cause I can’t pay for a private school. My tax dollars go to the public school. I don’t see no need in paying extra money that’s uncalled for that could go for something else.

The Court: You said they were up there on a scholarship. Which child was it that they were interest in as an athlete?

A. Joelle and Zachary.

The Court: Two children?

- A. I think that's correct.
- Q. Has the scholarship now been taken away?
- A. It has been taken away.
- Q. And so what are you asking the Court to do as far as the children?
- A. I mean, they can go up there as long as they want. But, I don't agree to it.
- Q. Do you have the money to pay for it?
- A. I do not.

Tr. at 126-127.

In addition, the proof before the Court was that Heidelberg Academy does not give its student approved standardized tests and their teachers do not maintain teaching certificates through the State Board of Education.

Standardized testing

Witness: Sherman Livingston, Jr.

- Q. I did notice in the records from Heidelberg the standardized testing marks that are given in the public schools. Do y'all do that ?
- A. Not in high school, no.
- Q. Not in high school.
- A. No.
- Q. So, there is no -- and I forgot California Achievement Test.
- A. Not in high school.
- Q. Do y'all give those standardized tests at all?
- A. Not this year. This was a change from this year.
- Q. Well, can you tell me what the kids -- these kids -- scored on the standardized tests last year ?
- A. No, I can't

Tr. at 108-109.

Teacher Certification

Witness: Sherman Livingston, Jr.

Q. What is your employment?

A. I'm a teacher at Heidelberg Academy.

Q. Yeah. Are you license through the State ?

A. Through the Private School Association, yes.

Q. Is that a state thing?

A. (No response.)

Q. Is that conducted by the State ?

A. No, sir.

Q. And, you do not have a certificate from the State Department of Education?

A. No.

Tr. at 102, 107.

The testimony of Adonna McGill, psychometrist for the Jones County School District reveals the opposite of West Jones, the public school the minor children herein would attend. West Jones is a level 5 school, it has staff trained to work with children with ADD, and the teachers are certified by the State of Mississippi. [Tr. at 116-118].

The issue of whether the parties' children should be in private school versus public school and whom should pay for private school, if there, was before the Court. As shown hereinabove, Joel did not want the children in Heidelberg Academy as he paid Jones County taxes for public education. As shown on cross-examination by Joel's counsel, Heidelberg Academy does not provide standardized testing, board certified teachers nor any special setting for children with ADD.

Additionally, the trial court states that "Twyla testified that Joelle was a special

needs child.” [R. at 108] and further finds that Joelle has “ADD and ADHD” [R. at 109]. These findings are not supported by the evidence. Other than her ADD, Twyla gave no testimony that Joelle was a “special needs child” as described by the Court. Furthermore, Twyla herself testified that “She is ADD. She is not hyperactive. But, she is ADD.” (Tr. at 156).

(ii) Deviation of Guidelines

The trial Court deviated from the statutory guidelines due to “the special needs of Joelle and the extra expense of Heidelberg Academy which the parties agreed for the children to attend.” [R. at 108]. For a Chancellor to consider deviation from the statutory guideline in Miss. Code Ann. §43-19-103, the Court must consider:

- (a) Extraordinary medical, psychological, educational or dental expenses.
- (b) Independent income of the child.
- (c) The payment of both child support and spousal support to the obligee.
- (d) Seasonal variations in one or both parents' incomes or expenses.
- (e) The age of the child, taking into account the greater needs of older children.
- (f) Special needs that have traditionally been met within the family budget even though the fulfilling of those needs will cause the support to exceed the proposed guidelines.
- (g) The particular shared parental arrangement, such as where the noncustodial parent spends a great deal of time with the children thereby reducing the financial expenditures incurred by the custodial parent, or the refusal of the noncustodial parent to become involved in the activities of the child, or giving due consideration to the custodial parent's homemaking services.
- (h) Total available assets of the obligee, obligor and the child.
- (i) Any other adjustment which is needed to achieve an equitable result which may include, but not be limited to, a reasonable and necessary existing expense or debt.

The Supreme Court has noted that the statutory guideline does “not control per se the amount” of a child support award. *Chesney v. Chesney*, 910 So. 2d 1057, 1061 (Miss.

2005); *Clausel v. Clausel*, 714 So. 2d 265, 267 (Miss. 1998). However, for this Court to affirm an award which deviates from the guideline of Section 43-19-101(1), the chancellor must overcome the rebuttable presumption that the statutory award is the appropriate measure of child support by making an on-the-record finding that it would be unjust or inappropriate to apply the guidelines in the instant case. *Id.*

Joelle is not a special needs child, she has ADD. Zachary and Shannon do not. The only proof offered by Twyla to support keeping the children in the private school was that Joelle did better in smaller class sizes. No evidence was presented that Zachary nor Shannon benefited from the private school, though issues regarding the standard of education provided at Heidelberg Academy abound. The trial court's deviation from the statutory guideline was based upon the special needs of Joelle but effectively kept Zachary and Shannon in the same school and held Joel financially responsible. This deviation was an abuse of discretion and was not supported by the evidence. Joel did not agree to it, the school does not have certified teachers and the school does not even provide standardized testing to the students.

At this point in the brief, undersigned counsel will bring to this Court's attention an issue as to the application of Miss. Code Ann. § 43-19-101 (4). It is the undersigned counsel's experience from appearing before Chancery Courts across this state, that when a parent's adjusted gross income is found to be above \$50,000.00, the application of Miss. Code Ann. § 43-19-101 (4) varies from court to court. Some courts deem the \$50,000.00 amount as a hard cap and will set child support based upon that amount and

will only deviate if a party provides a valid reason to do so. In other courts, the judges will apply the child support percentage upon the total adjusted gross income of a party and will deviate only if someone can provide a valid reason to do so. The ambiguity of the statute has left open the various applications by our courts. It would behoove both the bench and the bar of this State for this Court to resolve this ambiguity so that a uniform application could be administered statewide.

(iii) Punishment.

As shown hereinabove, the trial court committed error in the calculations used to determine Joel's adjusted gross income and in the deviation from the statutory guidelines. Based upon the language of the Court in its Findings of Facts and Conclusions of Law [RE-9], this error was caused by the Court seeking to punish Joel. The following supports this:

Through the marriage Joel was financially irresponsible by spending his money on alcohol. [R. at 109]

Joel wasted assets due to his drinking. [R. at 109]

Joel wasted money during the marriage on drinking and on Tracy Pryor. [R. at 110]

The evidence reveals that Joel did not contribute substantially during the marriage but went from job to job, wasted assets on drinking, and mismanaged the parties' finances. [R. at 113]

Joel's denial of his adultery resulted in a substantial increase in Twyla's attorney fees. Being untruthful to the Court has it penalties. [R. at 114]

All of these findings of drinking are based upon the naked allegations of Twyla. Twyla produced no document to support Joel's "irresponsible" spending on drinking nor any perceived waste of marital assets on drinking. On the other hand, the record is clear that from the time the parties married in 1988 until 1999, Joel worked at Georgia Pacific making good income. Thereafter from 2005 to 2008 he worked for Rowan Company, Inc. making good income. For a period of 14 years during the marriage, Joel had 2 employers and brought substantial income to the marriage. The Court's findings that he "did not contribute substantially during the marriage but went from job to job" is simply not supported by the evidence presented at trial.

II. THE CHANCERY COURT ERRED WHEN IT AWARDED TWYLA HOLLOWAY ATTORNEYS FEES.

The Mississippi Supreme Court has historically given great deference to a Chancellor in the award of attorney fees in divorce actions. However, the Court has found, "We follow the general rule that where "a party is financially able to pay her attorney, an award of attorney's fees is not appropriate." *Crowe v. Crowe*, 641 So.2d 1100, 1105 (Miss. 1994), citing, *Martin v. Martin*, 566 So.2d 704, 707 (Miss. 1990); *Carpenter v. Carpenter*, 519 So.2d 891 (Miss. 1988). Furthermore, "[i]n *Cheatham v. Cheatham*, 537 So.2d 435 (Miss. 1988), we held that the chancellor abused his discretion in awarding attorney's fees where there was insufficient evidence in the record to establish the wife's inability to pay. *Crowe* at 1105, citing, *Smith v. Smith*, 614 So.2d 394, 398 (Miss. 1993).

In the case at hand, there was no evidence whatsoever that Appellee could not pay her attorney fees. Furthermore, Twyla did not present sufficient proof to be awarded attorney fees, as is required in *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982). Finally, the trial court awarded Twyla outright, the entire 401(k) account she maintained with Jefferson Medical in the sum \$20,107.29” [R. at 110]. First, her 401(k) was accumulated during the marriage though none of it was given to Joel. Second, the paramount issue in this discussion is her “ability” to pay. With her 401(k) account, she clearly has the ability to pay her attorney fees. As such, this award should be reverse and rendered.

CONCLUSION

Based upon the foregoing, this Court should reverse and render the child support obligation of Joel and reverse and render the award of attorney fees to Twyla. In the alternative, this Court should reverse and remand the issue of child support with further instructions to the trial court as to the application of the proper legal standard.

Respectfully submitted:



THOMAS T. BUCHANAN,
JOHN D. SMALLWOOD,
ATTORNEYS FOR APPELLANT

JOEL D HOLLOWAY
2009 SMITH COUNTY ROAD 27
TAYLORSVILLE MS 39168

EMPLOYEE NO: 101808
TAX STATE: MS
RES STATE: MS
MARITAL: M
FEDERAL EXEMPTIONS: 0

EARNINGS	HOURS	RATE	CURRENT	YEAR TO DATE
REGULAR	84.00	15.850	1,331.40	23,548.14
PREMIUM	56.50	7.232	408.61	7,095.86
OTHER	12.50	5.150	64.38	
OTHER EARNINGS				1,268.00
TOTAL EARNINGS			1,804.39	31,912.00
TAXES				
FEDERAL			151.42	3,558.30
FICA			99.47	1,917.80
MEDICARE			23.26	448.53
STATE			52.53	980.02
TOTAL TAXES			326.68	6,904.65
OTHER DEDUCTIONS				
401K*			90.22	1,532.24
GROUP INSURANCE - PRE TAX*			200.00	980.00
TOTAL OTHER DEDUCTIONS			290.22	2,512.24
NET PAY			1,187.49	

* EXCLUDED FROM FEDERAL TAXABLE EARNINGS

ROWAN COMPANIES, INC.
2800 POST OAK BLVD. SUITE 5450
HOUSTON TX 77056-6127

DATE 06/06/2007

TOTAL DEPOSITED TO THE ACCOUNT OF HOLLOWAY JOEL D

AMOUNT
\$*****1,187.49**

***** NON-NEGOTIABLE *****
***** THIS IS NOT A CHECK *****

APPENDIX I

JOEL D HOLLOWAY
2009 SMITH COUNTY ROAD 27
TAYLORSVILLE MS 39168

EMPLOYEE NO: 101808
TAX STATE: MS
RES STATE: MS
MARITAL: M
FEDERAL EXEMPTIONS: 0

EARNINGS	HOURS	RATE	CURRENT	YEAR TO DATE
REGULAR	84.00	15.850	1,331.40	19,412.31
PREMIUM	53.00	7.407	392.57	5,916.28
OTHER	9.00	5.150	46.35	
OTHER EARNINGS				1,268.00
TOTAL EARNINGS			1,770.32	26,596.59
TAXES				
FEDERAL			146.57	3,057.96
FICA			97.36	1,600.65
MEDICARE			22.77	374.36
STATE			50.82	827.33
TOTAL TAXES			317.52	5,860.30
OTHER DEDUCTIONS				
401K*			88.52	1,266.46
GROUP INSURANCE - PRE TAX*			200.00	780.00
TOTAL OTHER DEDUCTIONS			288.52	2,046.46
NET PAY			1,164.28	

* EXCLUDED FROM FEDERAL TAXABLE EARNINGS

ROWAN COMPANIES, INC.
2800 POST OAK BLVD. SUITE 5450
HOUSTON TX 77056-6127

DATE 05/02/2007

TOTAL DEPOSITED TO THE ACCOUNT OF HOLLOWAY JOEL D

AMOUNT
\$*****1,164.28**

***** NON-NEGOTIABLE *****

***** THIS IS NOT A CHECK *****