

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TIMOTHY SEAN CRAFT

APPELLANT

VERSUS

NO. 2009-CA-00204

DONNA GAYLE COOPER CRAFT

APPELLEE

APPELLEE'S BRIEF

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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.

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ABBREVIATIONS

CR = Court Record

TR = Trial Record

EX = Exhibits

STATEMENT OF THE CASE

Procedural Posture, Nature of the Case and Course of the Proceedings Below.

This matter is on appeal from a Final Judgment rendered on the 8th day of January, A.D., 2009 (CR 195-199), a Denial of a Motion for Reconsideration rendered on the 21st day of January A.D., 2009 (CR 207), and the chancellor's Findings of Fact and Conclusions of Law rendered on the 22nd day of January, A.D., 2009 (CR 208-213), in the First Judicial District of the Chancery Court of Jones County, Mississippi, Nineteenth Chancery District, the Hon. Franklin C. McKenzie, Jr., Chancellor, presiding.

Plaintiff/Appellee, Donna G. Craft, (hereinafter "Donna"), filed a Complaint for Divorce and Motion for Temporary Relief in the Chancery Court of Forrest County, Mississippi, on the 11th day of February, A.D., 2005, in an action entitled *Craft v. Craft*, No. 2005-0067-GN-D, the Hon. Sebe Dale, Jr., Chancellor, presiding, against Defendant/Appellant, Timothy S. Craft (hereinafter "Tim"), alleging as grounds Habitual Cruel and Inhuman Treatment, Adultery, and, in the alternative, Irreconcilable Differences (this pleading is not included in the record submitted to the Court). Tim, as Plaintiff, filed for divorce in the First Judicial District of the Chancery Court of Jones County, Mississippi, on the 22nd day of February, A.D., 2005 (CR 11-17), then being represented by the late Hon. Penny Jones Alexander, against Donna, as Defendant, alleging as grounds therefore Habitual Cruel and Inhuman Treatment and Uncondoned Adultery and, in the alternative, Irreconcilable Differences. Tim filed in response to Donna's initial filing a 'Motion to Dismiss' in the Forrest County action on the 8th day of March, A.D., 2005, alleging lack of subject-matter jurisdiction. The Forrest County action was

dismissed by agreement of the parties on the 29th day of March, A.D., 2005, said Agreement being filed for record on the 4th day of April, A.D., 2005. Donna filed an Answer and Counterclaim for Divorce and a Motion for Temporary Relief in the instant action on the 31st Day of March, A.D., 2005 (CR 19-32), asserting as grounds Uncondoned Adultery, Habitual Cruel and Inhuman Treatment and, in the alternative, Irreconcilable Differences and requesting the temporary custody of the parties' minor children and support. Tim filed an Answer to Defendant's Counterclaim and Response to the Motion for Temporary Relief on the 7th day of April, A.D., 2005 (CR 33-37).

A Temporary Order was entered on the 21st day of April, A.D., 2005 (CR 38-41), awarding the temporary custody of the children to Donna and, due to Tim's being arrested by the Sheriff's Department of Jones County, Mississippi, and charged with four counts of child exploitation, in violation of Miss.Code Ann. § 97-5-33, allowed Tim only supervised visitation with the children with said visitation to take place at the Department of Human Services, Office of Family and Children's Services (DHS) for one hour every other week, and further ordering Tim to pay child support to Donna.

Tim filed a Motion to Enlarge Visitation on the 10th day of June, A.D., 2005 (CR 42-44). Counsel Alexander filed a Motion to Withdraw as counsel on the 22nd day of June, A.D., 2005 (CR 48-49), and an order allowing said withdrawal was entered on the 11th day of August, A.D., 2005 (CR 69). Appellant's present counsel filed an Entry of Appearance on the 13th day of September, A.D., 2005 (CR 70).

Tim filed a Motion to Modify Temporary Order on the 21st day of September, A.D., 2005 (CR 71-74), with the Motion to Enlarge still pending. In his new motion he requested an adjustment of his support obligation and establishment of unsupervised visitation alleging that he was not a threat to his children. An Agreed Order was entered on the 8th day of December, A.D., 2005 (CR 75-77), in response to Tim's Motion, and was consolidated with a Petition to Establish Grandparent's Visitation filed against Donna by Tim's parents Ralph and Cecile Craft, in an action entitled *Craft, et al, v. Craft*, No. 2005-0087-E (a copy of which is not included in the record submitted to the Court), filed in the same court, said order establishing visitation for Tim, under supervision of and at the home of his parents, precluding the children to be exposed to any immoral or illegal conduct, precluding any negative comments by any party to the action against any other party to the action in the presence of the children, and allowing any party to petition for a review of the order after ninety (90) days. On the 11th day of May, A.D., 2006, Tim filed a Motion for Review of the order (CR 78-80), requesting the removal of all restrictions on his visitation, that summer and holiday visitation with the children be scheduled and claiming that Donna had interfered with his visitation. A new Temporary Order was issued by the Court on the 23rd day of June, A.D., 2006 (CR 85-87), awarding joint legal custody of the children to the parties, awarding Tim standard unsupervised visitation with the children, removing all previous restrictions on visitation and allowing Tim to provide the children with a cell phone for their communication with Tim and his parents.

A Trial on the merits was held on the 22nd day of August, the 6th day of September, and the 11th day of October, A.D., 2006, (TR 1-345). A Final Judgment of Divorce was entered on the 31st day of October, A.D., 2006 (CR 115), awarding Donna a divorce on the grounds of Uncondoned Adultery and all other matters being taken under advisement.

Tim filed another motion, this time an Emergency Motion to Modify Temporary Order and for Citation for Contempt on the 21st day of November, A.D., 2006 (CR 116-121), alleging that he had been allowed no visitation and alleging Donna's interference with phone contact. An Order was entered on the 5th day of December, A.D., 2006 (CR 124-125), establishing holiday visitation for Tim with children. Tim then filed a Motion to Reopen Evidence on the 30th day of January, A.D., 2007 (CR 126-128), including, again, allegations of interference with visitation and requesting that Tim be allowed to claim children as dependents on his income tax. An Order was entered on the 7th day of March, A.D., 2007 (CR 131-132), granting the motion to reopen evidence, finding the evidence insufficient to find Donna in contempt, designating time for phone visitation with the children and establishing spring break visitation for Tim with children and specifically denying any other requested relief.

Donna filed a Motion to Reopen Evidence on 22nd day of October, A.D., 2007 (CR 133-141), showing that Tim was arrested on 5th day of October, A.D., 2007, by the Lamar County Sheriff's Department, and was again charged with four counts of child exploitation, and, sexual battery involving a minor child, in violation of Miss.Code Ann. § 97-3-95(1)(d) (CR 137). An Order was entered on the 14th day of November, A.D., 2007 (CR 144), finding the matter should be rescheduled for a hearing on the prior Motions and further ordering that Tim's and his parents' visitations with the children should be supervised at DHS every-other Friday from 3:30 through 5:00 p.m. Tim filed a Response to Donna's Motion to Reopen Evidence and included a Counter-Motion to Reopen Evidence (which had previously been granted on the 7th day of March, A.D., 2007, and not acted upon) and another Motion for Modification of Temporary Order on the 14th day of January, A.D., 2008 (CR 147-151).

An Order was entered on the 11th day of April, A.D., 2008 (CR 154-156), finding Tim less than credible, finding his arrests, his charges and the allegations against him very serious, continuing supervised visitation, again holding Donna not to be in contempt, further ordering Tim to pay Donna's attorney fees to date of four-thousand, four-hundred thirty-seven and ninety-six one-hundredths (\$4,437.96) dollars and specifically denying all other relief requested.

Tim filed another Motion for Modification of Temporary Order on the 1st day of May, A.D., 2008 (CR 157-161), requesting the children's attendance at his wedding to his latest wife and to reduce his support obligation further due to his being fired from another job. On the same date he filed a Motion for the Court to Make Specific Findings of Fact and Conclusions of Law and to Enter a Final Judgment in the matter (CR 162-166). Donna filed her Response to Motion for Modification of Temporary Order and Response to Motion for Court to Make Specific Findings of Fact and Conclusions of Law and to Enter A Final Judgment on the 9th day of May, A.D., 2008 (CR 167-172).

An Order was entered on the 21st day of May, A.D., 2008 (CR 173-175), allowing that the Court will enter Specific Findings of Fact and Conclusions of Law and a Final Judgment and allowing the children's attendance at Tim's latest wedding. Tim filed a Mississippi Rules of Appellate Procedure Rule 15(a) Notice on the 14th day of October, A.D., 2008 (CR 176-191), submitting his proposed Findings of Fact, Conclusions of Law and Final Judgment of Divorce (the divorce already having been granted October 31, 2006).

Chancellor McKenzie submitted his notice to the Supreme Court of a decision being rendered on the 18th day of November, A.D., 2008 (which decision, including the Findings of

Fact and Conclusions of Law, for reasons unknown, was not filed for record with the Clerk until the 22nd day of January, A.D., 2009), and the Supreme Court dismissed the Petition for Writ of Mandamus as moot on the 26th day of November, A.D., 2008 (CR 192). The Chancellor's Findings of Fact and Conclusions of Law held that Tim's written admissions of abuse of the minor child amounted to an admission against interest that he had committed sexual battery upon a child and, thus, he was statutorily disqualified from physical custody of the minor children, that his visitation should continue to be supervised by DHS, that he pay support pursuant to statute, that he pay Donna permanent periodic alimony of one-hundred (\$100.00) dollars per month and that Donna be awarded all previously identified and submitted attorney's fees. The Final Judgment was filed on the 8th day of January, A.D., 2008, reflecting the chancellor's holding in the Findings of Fact and Conclusions of Law and establishing the total amount of Donna's accumulated attorney's fees to be twenty-two thousand, two-hundred ninety-seven (\$22,297.00) dollars (CR 195-199). Tim filed a Motion to Enter Final Judgment on the 8th of December, A.D., 2008 (CR 193-194).

Tim filed a Motion to Reconsider, for a New Trial or to Alter and Amend Judgment on the 14th day of January, A.D., 2009 (CR 200-203), alleging that he should have been awarded custody of the minor children or, alternatively, been awarded unrestricted visitation with the children, alleging that Donna should not have been awarded alimony or attorneys fees, that the chancellor was in error in finding that Tim had possession of child pornography, and that the chancellor should have held Donna in contempt and should have awarded Tim attorney's fees. Donna filed her Response to Tim's Motion to Reconsider on the 21st day of January, A.D., 2009 (CR 204-206).

The chancellor entered his Order denying Tim's Motion for Reconsideration on the same date (CR 207). The Chancellor filed his Findings of Fact and Conclusions of Law on the 22nd of January, A.D., 2009 (CR 208-213) Tim filed a Notice of Appeal on the 3rd of February, A.D., 2009 (CR 214-215).

Subsequent to the filing of his Notice of Appeal, and not represented in the record submitted to this Court, Tim filed yet another Complaint for Modification of Final Judgment on the 15th day of June, A.D., 2009, alleging material changes in circumstances justifying modification of the Final Judgment as to custody of the children and/or Tim's visitation and, again, alleging contempt on the part of Donna. Donna has had to file an Answer including a general denial and a Counter-Complaint for Contempt on the 23rd day of June, A.D., 2009. Tim filed his Answer to said counter-complaint, a Motion to Stay an Order for Withholding, and again, filing another Motion for Temporary Hearing asking for temporary custody of the minor children or, in the alternative, full visitation privileges, on the 25th day of June, A.D., 2009. Tim also filed a Motion for Order of Release of Records on the 30th day of June, A.D., 2009, requesting the release of evidence in his pending criminal case and the DHS records of its investigation. Tim filed his Appellant's Brief on the 30th day of July, A.D., 2009, and still pursues all of his lately filed Motions.

Statement of Relevant Facts.

Tim and Donna were married in 1991. Of the marriage three children were born, Sean Luke Craft, a male child born on the 3rd day of March, A.D., 1993, now sixteen years of age, Alayna Gayle Craft, a female child born on the 31st day of December, A.D., 1994, now fourteen years of age, and Lance Elijah Craft, a male child born on the 14th day of August, A.D., 1997,

now twelve years of age. Except for a short stay in Texas and some traveling required through work or military service requirements the family has resided in the State of Mississippi throughout the marriage.

During the marriage Tim secured a B.S. Degree and completed two years of graduate school and he has served eight years in the U.S. Navy. Donna attended three years of college and also served in the U.S. Navy Reserve. The marriage was tumultuous at times. During the marriage Tim indulged in taking photographs of Donna in revealing situations, sometimes engaged in sexual activities, sometimes including another woman and, Tim's own brother. Tim testified at trial that he had photographed numerous other women, nude and sometimes engaged in sexual activities, during the marriage.

Tim was fired from his management job as a petroleum engineer at Delphi after alleged pornographic photographs of a co-worker and a female child were found downloaded and stored on his work computer at his corporate office. The photographs were turned over to authorities and Tim was arrested by the Jones County Sheriff's Department and charged with four counts of child exploitation. The co-worker, Lola Hulsey, with whom Tim had been having an uncondoned adulterous affair since 2000, was also arrested on serious charges. Subsequent investigation revealed that some of the alleged activities occurred in Lamar County, Mississippi, and Lola Hulsey was also charged in Lamar County.

In March of 2006, Tim entered into an immunity agreement with the District Attorney of Jones County, Mississippi, with the consent of the Lamar County District Attorney, agreeing to turn over evidence against Lola Hulsey in exchange for a dismissal of the charges against him.

Tim personally took authorities to a rural location to dig up and retrieve photographs and videotapes portraying various explicit scenes of Lola Hulsey engaged in sexual abuse of the child which had been buried and hidden for a considerable amount of time. Facing this evidence Lola Hulsey subsequently pled guilty to charges and was sentenced to prison. The charges of child exploitation against Tim were dismissed in Jones County without him having to testify under oath.

Subsequent evidence and information surfaced from Tim's co-defendant that gave indication that, aside from the exploitation charges, there were potentially more serious circumstances involving Tim and the child in the photographs. That subsequent information, the statement of Lola Hulsey and copies of the hand-written notes from the La Quinta Hotel in Texas of his alleged confessions of sexually abusing the child and allegedly forcing Lola Hulsey to abuse the child, and led to Tim being subsequently arrested and incarcerated in October of 2007, and charged with child exploitation and sexual battery of a child. These allegations and evidence were not known to the District Attorney's offices at the time of the immunity agreement. Tim has steadfastly denied any such conduct on his part and claims that he wrote the notes under duress at the behest of Lola Hulsey while he was intoxicated and high on drugs. Based on this evidence, and Tim's other conduct during the proceedings, the chancellor restricted his visitation with the children to one day a week, supervised by DHS.

At the trial on the merits, covering three days and including the testimony of ten witnesses and covering five-hundred, sixty-four (564) pages of court record, there was extensive evidence presented as to the history of their marriage; their respective financial circumstances,

including their income and expenses both separate and marital; the ages, health and earning capacity of the parties; their debts, obligations and assets; their respective needs; the presence of their three children; their standards of living, both during the marriage and after the separation; the fault and misconduct of the parties; and, the wasteful dissipation of assets. The major part of marital property, the marital home, was lost to foreclosure during the pendency of this matter. The parties stipulated during the trial to a division of marital property. The chancellor granted Donna a divorce on the grounds of uncondoned adultery and took all other issues under advisement.

Subsequent to the filing of this appeal, this matter has contentiously continued with Tim filing motions and forcing Donna to defend said motions. The Chancellor entered a Final Judgment and Findings of Fact and Conclusions of Law and awarded Donna custody of the children and ordered support from Tim; ordered Tim to pay Donna's attorney fees and to pay her periodic alimony; and, also continued the supervised visitation. In his Findings of Fact and Conclusions of Law the Chancellor addressed the history of the marriage, the age, health and earning capacity of the parties, the presence of the children; and, the fault and misconduct of the parties.

At the time of the Final Judgment Tim's charges in Lamar County were still pending. Since this appeal has been filed the District Attorney of Lamar County has dismissed Tim's latest charges, without prejudice, due to the alleged victim being unable to cooperate in the investigation at this time. The District Attorney has stated that the charges will be re-filed if and when the alleged victim is able to assist in the investigation and to testify. There is no statute of limitation on a charge of sexual battery of a child. Miss.Code Ann. § 99-1-5.

SUMMARY OF THE ARGUMENT

1. The chancellor did not err in awarding alimony. The parties stipulated to a division of marital property precluding the chancellor from making the usual *Ferguson* findings before considering an award of alimony and the testimony of the parties and the evidence presented at the trial on the merits sufficiently covered the information necessary for a consideration of the *Armstrong* factors for the chancellor to make his decision to award alimony.
2. The chancellor did not err in awarding attorney's fees. The testimony of the parties and the evidence submitted during the trial on the merits sufficiently covered the *McKee* factors required to be considered by the chancellor prior to making an award of attorney's fees.
3. The chancellor did not err in restricting Appellant's visitation. The testimony of the parties and the evidence submitted during the pendency of this matter was sufficient to convince the chancellor, due to Appellant's readily-apparent moral turpitude during and after the marriage; Appellant's conduct during the pendency of this matter and the unresolved serious circumstances surrounding Appellant's arrests and charges, that it was not in the best interest of the children for the Appellant to have unfettered, unsupervised visitation with the minor children at this time.

4. The chancellor did not err in refusing to find Appellee in contempt of court. The numerous motions filed and hearings held during the pendency of this matter gave the chancellor several opportunities to hear the testimony of the parties and see the evidence submitted regarding Appellant's allegations of contempt and the chancellor correctly found the Appellee not in contempt.

ARGUMENT

Issue 1. The chancellor did not err in awarding alimony.

Rule of Law

The scope of review of an alimony award is familiar and well-settled. Alimony awards are within the discretion of the chancellor and his discretion will not be reversed on appeal unless the chancellor was manifestly wrong or abused his discretion. *Armstrong v. Armstrong*, 618 So.2d 1278, 1280 (Miss. 1993); citing *McEachern v. McEachern*, 605 So.2d 809, 814 (Miss. 1992); and *Voda v. Voda*, 731 So.2d 1152, 1154 (Miss. 1999).

When considering an award of alimony, the chancellor is to consider the following factors: income and expenses of the parties; health and earning capacities of the parties; needs of each party; obligations and assets of each party; length of the marriage; presence of minor children in the home; age of the parties; standard of living of the parties during the marriage and at support determination; tax consequences of the spousal support order; fault or misconduct; wasteful dissipation of assets by either party; and, any other equitable factors. When an award of alimony is appealed, we presume the chancellor considered all factors in making his decision. When the chancellor fails to address all factors on-the-record, we are not required to remand the case, and should not, so long as all facts are available to us so as to allow an equitable

determination to be made. Thus, a lack of an on-the-record consideration of the *Armstrong* factors by a chancellor in making his determination of the appropriateness of an alimony award will only be reversed if, after review of all facts and application of the *Armstrong* factors, it appears that the chancellor's failure to make findings of fact and corresponding conclusions of law constitutes manifest error. An appellant's claim under these facts will have merit only if the record lacked those facts that would allow this Court to determine if the award of alimony was inequitable. *Roberson v. Roberson*, 949 So.2d 866, 868-869 (Miss.Ct.App. 2007).

Relevant Facts

Tim alleges the chancellor is in error due to a failure to make an on-the-record recital of the *Armstrong* factors before awarding alimony to Donna and that this error mandates a reversal of the award.

During the trial on the merits Tim and Donna stipulated to a division of marital property, thereby precluding the court from having to make a determination of the status and value of property and precluding the court from having to equitably divide such property pursuant to the *Ferguson* factors (TR 161). *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994). There was evidence presented which gave the chancellor sufficient available information necessary to perform an evaluation of the *Armstrong* factors. This evidence, covering the testimony of ten (10) witnesses, including that from Sean Craft, the oldest child of the parties (TR 1-42, 365-378, 532-543), Alayna Craft, the daughter of the parties (TR 42-61, 350-365), Richard Moore, a co-worker of the parties from their navy service (TR 61-69), Donna (TR 70-74, 242-339, 505-531), Tim (TR 74-75, 111-162, 172-242, 339-345, 384-398), Cecile Craft, mother of Tim (TR 75-100, 378-384, 428, 451-505, 543-555), Ralph Craft, father of Tim (TR 100-111), Bailey Cooper, father of Donna (TR 162-172), Becky Hehn, friend of and baby-sitter for Donna (TR 398-411),

and Kimberly Archer, latest girlfriend and most-recent wife of Tim (TR 442-451), covers some five-hundred, sixty-four (564) pages of the court record and discusses the factors of income and expenses of the parties (TR 9, 17, 54), (EX 4 (3/8/07), 5 (3/8/07), 4 (3/4/08)); health and earning capacities of the parties (TR 9, 10); needs of each party (TR 110-161, 243-336); obligations and assets of each party (TR 282, 281-300, 320-336); length of the marriage (TR 71, 74); presence of minor children in the home (TR 72, 74, 89); age of the parties (TR 110, 243); standard of living of the parties during the marriage and at support determination (TR 17, 84, 86, 89, 92, 93, 94, 95, 96, 102, 205, 282, 283, 317); tax consequences of the spousal support order (TR 501-502); fault or misconduct (TR 70, 72, 73, 74, 264-265, 300); wasteful dissipation of assets by either party (TR 107, 108, 150); and, other equitable factors (TR 93, 94, 102-110, 174, 205, 227, 282, 283).

The gist of the evidence is that, during the terminal years of the marriage, the family had a reasonably comfortable middle-class standard of living with Tim making upwards of ninety-thousand (\$90,000) dollars per year, and more. The parties bought a house and Donna was able to be a stay-at-home mother. The parties were both in good health and in their mid to late thirties or early forties; that Tim had a college degree and was working on a graduate level degree and has training and experience and the opportunity to secure a high-paying job as a petroleum engineer while Donna has been struggling to pay bills and feed the three children of the parties. The evidence showed that Donna now makes only about fourteen-hundred (\$1,400) dollars per month, has had to depend on assistance from family and her church to make ends meet and is having rummage sales and making loans to pay her bills and attorney fees. Tim alleges that he now is only able to secure a truck driving job which pays decidedly lower than he

was making while married to Donna. The evidence reveals that Tim is remarried and his latest wife does computer-related work and contributes considerably to his standard of living. Tim also has benefitted from the benevolence of his family in paying his bills for him prior to and during the pendency of this matter (TR 493, 494-495). The evidence also shows that the break-up of the marriage was the fault of Tim and that he dissipated presumptively marital property during the pendency of this matter.

Having this evidence at his disposal during the trial on the merits and the subsequent hearings, the chancellor was able to deliberate and evaluate the *Armstrong* factors and make a determination that Tim was in a much more favorable financial position than Donna, has the education and opportunity to secure a high-paying job and has more assets available to address his needs than she does. It also shows that Donna and the children have borne the financial brunt of the divorce and Tim's misconduct only with the assistance and benevolence of others while Tim continues to deny any responsibility. The chancellor's only error in awarding alimony to Donna was the small amount awarded and there is substantial credible evidence in the record to support the chancellor's determination. *Roberson*.

Issue 2. The chancellor did not err in awarding attorney's fees.

Rule of Law

Factors to be considered in an award of attorney's fees include the relative financial ability of the parties; the skill and standing of the attorney employed; the nature of the case and novelty and difficulty of the questions at issue; the degree of responsibility involved in the

management of the cause; the time and labor required; the usual and customary charge in the community; and, the preclusion of other employment by the attorney due to the acceptance of the case. *McKee v. McKee*, 418 So.2d 764, 767 (Miss. 1982). In determining an appropriate amount of attorney's fees, a sum sufficient to secure one competent attorney is the criterion by which we are directed. *Rees v. Rees*, 194 So. 750 (Miss. 1940).

"We have consistently held that the chancellor has broad authority and discretion in setting appropriate attorney's fees and unless the chancellor is manifestly wrong we will not disturb his award of attorney's fees." *Walters v. Walters*, 383 So.2d 827, 828 (Miss. 1980). The trial court is the appropriate entity to award attorney's fees and costs. Therefore, a trial court's decision regarding attorney's fees will not be disturbed by an appellate court unless it is manifestly wrong. The word 'manifest', as defined in this context, means "unmistakable, clear, plain, or indisputable." The controlling factor is "what is reasonable". Unless we determine that the trial judge abused his discretion in the amount of attorney's fees assessed, we are duty-bound to affirm. *Mabus v. Mabus*, 910 So.2d 486, 488 (Miss. 2005). The failure to cite controlling authority in rendering an attorney's fees award is not grounds for reversal unless the failure to make sufficient findings of fact and conclusions of law constitutes manifest error. *Pool v. Pool*, 989 So.2d 920, 928 (Miss.Ct.App. 2008).

Relevant Facts

Tim alleges the chancellor erred in awarding attorney fees to Donna since the bills were not produced prior to trial; Donna's counsel did not record her own time; Donna was allegedly able to pay her own bills; Tim was in dire financial circumstances; and, the chancellor failed to make an on-the-record evaluation of the *McKee* factors and that failure is reversible error.

The chancellor had the opportunity to hear and evaluate the evidence identified in the relevant facts of Issue No. 1, which outlined evidence is included herein as if specifically set out, and which evidence also addresses the factors to be considered by a chancellor in a determination of the awarding of attorney fees and the chancellor was able to make a determination of the necessary factors. The evidence reveals that Tim was then, and is now, in a much more favorable economic situation than Donna and has the higher relative financial ability to pay the fees. Donna was able to pay some of the fees but she was able to do so only with the assistance of family, friends, her church and others (TR 165, 317-336, 520, 526). Although the matter is not specifically addressed, it is obvious that the chancellor is familiar with the counsel representing the parties. The Court's own records reveal that both counsel are in good standing, that Donna's counsel has been in practice since 1982 and Tim's counsel since 1983. This case has spanned a period of nearly five years to date (TR 580), four years of which Donna's counsel was involved in, has been very contentious, and has involved considerable work, preparation and appearances by counsel for both parties.

Donna's counsel operates a sole-practitioner office while Tim's counsel operates out of a family-founded practice. Besides the initial pleadings, Tim has filed numerous motions alleging numerous issues to be researched and addressed by Donna's counsel and also included numerous extra appearances in court to respond to and address those motions and issues. Donna's counsel's participation in this matter has spanned over four years and numerous hours of work and preparation, which considerable work and preparation on this matter obviously must have precluded her participation in other matters.

The chancellor discussed the attorney's fee bill and the parties' relative ability to pay bills on the record (TR 323, 325, 327, 328, 336, 506-520, 563-564), and the parties themselves discussed different parts of the relative attorney's fees bills submitted by Donna's counsel (TR 317-336, 563-564), (EX 13 (3/8/07), and 6 (3/4/08)), spanning thirty-nine (39) pages and a period from February 2, 2005, through February of 2008, and list nothing for any work done after that date even though the parties appeared before the court several times afterwards. The amount of fees assessed, in excess of twenty-two thousand dollars, covering a period of over four years, equals just over five-thousand dollars average per year. Tim's counsel himself stated on the record that the amount charged per hour was reasonable (TR 508, 563-564). Except for Tim's numerous contentious filings and delays in responding to discovery requests this matter could have been concluded much sooner and at a much lower cost than that accumulated, and yet the matter continues today. The chancellor was not in error in holding Tim for Donna's legal fees.

Issue 3. The chancellor did not err in restricting Tim Craft's visitation to an hour and one-half one day per week in the office of the Department of Human Services in Laurel, Mississippi.

Rule of Law

A chancellor's power to issue orders concerning visitation in a divorce action is legislatively authorized by statute which holds, in pertinent part, "[w]hen a divorce shall be decreed from the bonds of matrimony, *the court may, in its discretion, having regard to the circumstances of the parties and the nature of the case, as may seem equitable and just, make all orders touching the care, custody and maintenance of the children of the marriage....*" Miss.Code Ann. § 93-5-23. (Emphasis mine)

The best interest of the child is the main concern in determining visitation. The chancellor has discretion to fashion a visitation order to suit the child's best interest. An appellate court will afford great deference to the chancellor's visitation decision. *Rogers v. Morin*, 791 So.2d 815, 820 (Miss. 2001), cited in *McDuffie v. McDuffie*, 2008-CP-00033-COA (Miss.Ct.App. 2009).

The chancellor is charged with the responsibility of protecting children and determining both custody and visitation based on the child's best interest. *R.L.N. v. C.P.N.*, 931 So.2d 620, 624 (Miss. 2005). Child visitation, and its limitations, is awarded at the chancellor's broad discretion. The chancellor must keep the best interest of the child as a paramount concern, while being attentive to the non-custodial parent's rights. The court should be concerned with the need for the non-custodial parent and child to maintain a healthy and loving relationship. It is within the chancellor's power to restrict visitation in situations that present an appreciable danger of hazard cognizable in our law, but these restrictions should be imposed on a limited basis. When restrictions are placed on visitation there must be evidence that the particular restriction is necessary to avoid harm to the child. A lack of this evidence will render the chancellor's restrictions on the non-custodial parent's visitation manifest error and an abuse of discretion. As with the divorce, if the record contains substantial, credible evidence to support the chancellor's decision, this Court may affirm. *Cassell v. Cassell*, 970 So.2d 267, 272-273 (Miss.Ct.App. 2007). Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion or to put it simply, more than a mere scintilla of evidence. *R.L.N.*, 931 So.2d at 624.

Relevant Facts

Tim alleges the chancellor was in error in restricting his visitation. He bases this claim on his assertion that he has never presented a threat to his own children. Tim's brief boldly alleges that "[t]he chancellor even found that there was no evidence of abuse by Tim. (T. 269, 479-480)" This statement is absolutely false and misleading. A simple review of those pages of the trial record reveals that was not a finding of the chancellor, but Donna's responses to Tim's counsel's questions regarding whether the children were ever spanked, the alleged social stigma regarding corporal punishment in modern days and Donna's answer to Tim's counsel's question as to whether Tim loved his children (TR 269), and Tim's self-serving responses to his counsel's questions regarding whether Tim, himself, thought he was a danger to his children (TR 479-480).

It is illustrative for this argument how Tim responds to his counsel's question, beginning on line 28 of page 479 and ending on line 1 of page 480 of the trial record, as to whether anything occurred, with regard to the children during a visitation period that would have been against the children's best interests. Tim responds "[i]n my beliefs, no, sir." (TR 480 at 2).

The record is replete with evidence of Tim's 'beliefs'. There is substantial evidence in the record that Tim believes it acceptable conduct to engage in numerous affairs during marriage (TR 70, 72-73, 74, 119, 128-129, 194, 198, 300); to engage in taking risque' photos of numerous women disrobed and sometimes engaged in sexual acts (TR 191-192); to want to take photos of Donna, naked, with their naked child (TR 309); to take numerous photos of Donna, naked, and engaged in sexual acts with others, including his own brother (TR 191-192), to claim that he had destroyed all photos and pornography in his possession (TR 226), then admit he had a compact

disk containing those risque' photos of Donna that he buried on his parent's property (TR 227), to threaten to use the photos as evidence to discredit Donna and destroy her reputation and welfare (TR 311, 389); to photograph Donna's cousin, naked, while holding her child (TR 311); to disrespect Donna to the children (TR 57, 124, 132, 175, 223, 444); to manipulate and encourage the children to spy on Donna for his benefit (TR 176, 308); to cohabit with a woman he is not married to while his children are in his home (TR 443); for his latest girlfriend and wife to purchase for and dress a twelve year-old girl in risque' adult-oriented underwear (TR 444-446), to bathe with a child she is not related to (TR 448) and to teach a pre-pubescent female child how to shave her pubic hair (TR 447, 465-467).

Further, there was undisputed evidence that Tim was arrested for child exploitation when risque' photographs of one of his numerous paramours were discovered on his work computer (CR 137). Although he steadfastly denies engaging in any illegal conduct, he turned state's witness and negotiated an immunity agreement with prosecutors protecting himself from prosecution and delivered evidence against his co-defendant. News reports state that the evidence had been buried in a rural site for some time and Tim personally took police directly to the hidden site to recover the evidence. This evidence included videos of his co-defendant having sex while her child was present and numerous other photographs, including his naked co-defendant in the company of her child. Even after turning state's witness, Tim continued his relationship with Lola Hulsey after the arrests and into 2006, and had the children in her presence (TR 98-99, 458, 463).

Tim was later arrested for sexual battery of the same child of his paramour, Lola Hulsey, and readily admits to writing the notes used as evidence in that arrest (CR 138-141), (EX 2, 3/4/08) wherein he confesses to forcing the same five to six year-old child to perform oral sex on him until he climaxes and details the child's response (TR 452-458), although he now claims that the statements were false and coerced out of him by his co-defendant (TR 457-469). He further admits to abusing alcoholic drinks and prescription drugs to excess (TR 459-460, 477).

The chancellor, in his rulings on the matter (TR 155, 555-561); his Final Judgment (CR 195-199) and, his Findings of Fact and Conclusions of Law (CR 208-213), found Tim to be a less-than-credible witness (CR 155) and that he was disqualified by statute to be considered for custody of the children due to his admission against interest and ordered continued supervised visitation (CR 196-197). The chancellor further expressed his concern regarding the seriousness of the circumstances surrounding Tim's criminal charges (CR 209-209, 212), his adulterous relationships (CR 209), his photographing naked women and Donna, and that he had placed those photos on an internet site (CR 209), identified Tim's contradictory testimony regarding his possession of pornography and the photos of Donna (CR 209), and Tim's manipulation of the children during the proceedings (CR 210-211) as his foundation for continuing the supervised visitation.

The chancellor is in error in finding that Tim was statutorily precluded from consideration for custody of his children. While the chancellor did not specifically identify the statute, there are several relevant statutes, one on Termination of Rights of Unfit Parents holds that parental rights will be terminated "[w]hen a parent has been convicted of any of the following offenses against any child:...(ii) sexual battery of a child under the provisions of Section 97-3-95(c)..." Miss.Code Ann. § 93-15-103(3)(g).

Another, Miss.Code Ann. § 97-5-42, entitled 'Protection of children from parents convicted of felony child sexual abuse' holds, in pertinent part,

(1)(a) "For purposes of this section, a conviction of felony parental child sexual abuse shall include any nolo contendere plea, guilty plea or conviction at trial to any offense enumerated in Section 93-15-103(3)(g) or any other statute of the State of Mississippi whereby a parent may be penalized as a felon on account of sexual abuse of his or her own child".

(3) "No person who has been convicted of felony parental child sexual abuse shall be entitled to have parental or other visitation rights as to that child who was the victim...."

Both statutes require a conviction for one of the enumerated crimes. As of the filing of this brief Tim has not, yet, been convicted of any charge which could be the foundation for the termination of his parental rights or preclusion of his parental rights of visitation although that possibility remains a viable consideration for the chancellor. Miss.Code Ann. § 99-1-5.

The chancellor has not completely stopped Tim's visitation with the children and clearly intoned in his ruling that the visitation provisions were temporary pending further developments in the matter and a review of Tim's circumstances (TR 560). Considering the copious evidence, which presents an appreciable danger of hazard cognizable in our law, showing Tim to be a confessed sexual deviant; the fact that he finds no problems in his girlfriend/latest wife teaching his pre-pubescent child adult-related grooming habits; his blatant conduct in disrespecting the children's mother to them; his complete disregard for any personal responsibility for the predicament he has placed himself, and his children, in; his arrests for heinous molestation crimes involving a five to six year-old minor child; and, his contested confession to the same, the restrictions are reasonably necessary to protect the children.

Although in error in holding Tim statutorily precluded from consideration for custody the chancellor still had the responsibility and the statutory authority to fashion a visitation order to protect the best interests of the minor children of Tim and Donna and, considering the evidence he has been presented, he has done so. Miss.Code Ann. § 95-5-23, *R.L.N.* The visitation provisions do address and further Tim's relationship to the children and are limited and based on substantial credible evidence. *Cassell* As it presently stands, the possibility of Tim regaining some form of unsupervised visitation with the children in the future has not been foreclosed. *R.L.N.*

Issue 4. The chancellor did not err in refusing to find Donna Craft in contempt of court for her alleged willful and malicious interference with Tim Craft's visitation with their children.

Rule of Law

Contempt matters are committed to the sound discretion of the trial court, and this Court will not reverse where the chancellor's findings are supported by substantial credible evidence. A citation for contempt is determined upon the facts of each case and is a matter for the trier of fact. *Weston v. Mounts*, 789 So.2d 822, 826 (Miss.Ct.App. 2001). A citation for contempt is proper when the contemnor has willfully and deliberately ignored the order of the court. The factual findings of the chancellor in civil contempt cases are affirmed unless manifest error is present. With respect to issues of fact where the chancellor made no specific finding, this Court proceeds on the assumption that the chancellor resolved all such fact issues in favor of the appellee, or at least in a manner consistent with the decree. *Jones v. Jones*, 878 So.2d 1061, 1064 (Miss.Ct.App. 2004).


Relevant Facts

Tim filed motions claiming contempt by Donna on several occasions during the pendency of this matter (CR 78-80, 116-119, 126-128, 147-151 (wherein Tim alleges a Motion for Contempt was filed on November 6th, 2007, yet, there is no such motion in the court record), 200-202). The chancellor held hearings wherein he heard the testimony of the parties and witnesses and had an opportunity to evaluate the evidence submitted and the credibility of the witnesses (CR, complete). The chancellor found Tim to be a less-than-credible witness (CR 155) and found that Donna had not willfully or deliberately ignored an order of the court (CR 131, 155, 410). There is nothing in the record to indicate an abuse of discretion or manifest error on the part of the chancellor and there is substantial credible evidence in the record to support the chancellor's findings. *Weston*. Certainly more than a mere scintilla of evidence. *R.L.N.* As the chancellor had an opportunity to see the witnesses, hear their testimony and make an evaluation of their credibility and made a specific finding in the record the presumption of *Jones* does not apply.

CONCLUSION

Based on the authorities identified and cited above and the substantial credible evidence presented and available to the chancellor at the trial and hearings on the merits of this matter the Court should find that the chancellor was not manifestly erroneous and did not abuse his broad discretion in any of his rulings on any of the four issues appealed by Tim Craft and there is substantial credible evidence in the record to support the chancellor's rulings. The chancellor's rulings should be affirmed and the Appellant, Tim Craft, should be held for all costs of this appeal.

Respectfully Submitted,


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CERTIFICATE OF SERVICE

I Hereby Certify that I have served a true and correct copy of the above and foregoing Appellee's Brief on the Hon. Franklin C. McKenzie, Jr., Chancellor, P.O. Box 1961, Laurel, Mississippi 39441-1961, and the Hon. Terry L. Caves, P.O. Drawer 167, Laurel, Mississippi 39441-0167, by placing a copy thereof, postage prepaid and properly addressed, in the first-class U.S. Mail, and/or by hand delivery, facsimile, or other electronic media, this 17th day of November, A.D., 2009.



Harry R. Lane