IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

HOLLY KATHLEEN JENKINS MCKNIGHT — APPELLANT

VS. — NO. 2011-CA-00206

WALTER CALVIN JENKINS — APPELLEE

BRIEF OF APPELLEE WALTER CALVIN JENKINS

APPEAL FROM THE CHANCERY COURT
OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUESTED

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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.

1. Holly Kathleen Jenkins McKnight, Appellant.
2. Walter Calvin Jenkins, Appellee.
3. Perry, Winfield & Wolfe, P.A., Counsel for Walter Calvin Jenkins, 224 East Main Street, Post Office Box 80281, Starkville, Mississippi 39759.
4. Law Offices of Meacham and Jackson, Counsel for Walter Calvin Jenkins, Post Office Box 566, Hernando, Mississippi 38632.
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6. J. Wesley Hisaw, Holland Law, P.C., Counsel for Holly Kathleen Jenkins McKnight, Post Office Box 256, Horn Lake, Mississippi 38637.
7. Kimberly Jones, Austin Law Firm, P.A., Guardian Ad Litem, 6928 Cobblestone Drive, Suite 100, Southaven, MS 38672.
8. Honorable Percy Lynchard, DeSoto County Chancery Court, 2535 Highway 51 South, Hernando, Mississippi 38632.

SO CERTIFIED this the 22th day of September, 2011.

Respectfully submitted,

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II. STATEMENT OF THE CASE

A. Nature of the Case and Disposition Below

This appeal arises from the Chancellor's rulings related to the Petition for Contempt, Modification of Visitation, and Temporary Relief filed by Walter Calvin Jenkins ("Mr. Jenkins"), the Counter-Petition for Contempt, Modification of Visitation, Modification of Custody, and Temporary Relief filed by Holly Kathleen Jenkins McKnight (hereinafter "Ms. McKnight") and the Amended Counter-Petition for Contempt, Modification of Visitation, Modification of Custody, Modification of Child Support, and Temporary Relief filed by Holly Kathleen Jenkins McKnight. (Record at 369-74; 588-92 (hereinafter R. 369-74; 588-92).

Following a trial on August 27, 2010, the Chancellor issued the Opinion of the Court on October 12, 2010 ("Opinion"), holding Ms. McKnight in contempt for her failure to pay certain expenses, awarding Mr. Jenkins attorney's fees, assessing the guardian ad litem fees against Ms. McKnight, instituting certain requirements for the resumption of visitation by Ms. McKnight and declining to modify custody, to hold Mr. Jenkins in contempt or to award Ms. McKnight attorney's fees. (R. 657-74; Appellant's Record Excerpts at 25-42 (hereinafter MRE 25-42)). An Order incorporating that Opinion was entered on October 22, 2010 ("Order"). (R. 680-85; MRE 19-24). Ms. McKnight filed a Motion for Reconsideration on October 22, 2010.[1] (R. 675-77). The Chancellor denied the Motion for Reconsideration except for the issue of child support, which was not addressed in the original Opinion and Order. (R. 686; MRE 18). On June 1, 2011, the Chancellor entered an Amended Opinion denying the request for modification of child support. (Supplemental Record at 3-5 (hereinafter SR 3-5); MRE 15-17). Ms. McKnight's

[1] Ms. McKnight's Motion for Reconsideration did not seek reconsideration of the denial of her request for a modification of custody. (R. 675-77).

Motion for Reconsideration was denied by Order dated June 10, 2011. (SR 6-7; MRE 13-14). From these rulings, Ms. McKnight filed a notice of appeal (R. 708-09).[2]

B. Statement of Facts Relevant to Appeal

The parties were married on April 24, 1972, and were divorced by order of the Chancery Court of DeSoto County, Mississippi on June 3, 2004. (R. 11, 103-25; MRE 118-40). The parties' daughter, Kimberly Marie Jenkins ("Kimberly"), was born on April 26, 1996. (R. 104; MRE 119). Pursuant to the original divorce decree, the parties shared joint legal custody of Kimberly, with Ms. McKnight having primary physical custody and Mr. Jenkins having visitation. (R. 104-109; MRE 119-24). In 2007, Ms. McKnight remarried and, in the summer of 2008, she moved out of DeSoto County, Mississippi. (Trial Transcript at 11 (hereinafter T. 11)). Mr. Jenkins sought and obtained a modification of the custody decree by order dated October 13, 2008 and filed October 16, 2008. (R. 356-63; MRE 110-17). Pursuant to the modified custody order, Mr. Jenkins was granted primary physical custody, and Ms. McKnight was granted visitation rights consisting of every other weekend and certain holidays, together with one weeknight visitation per week, consisting of the period from 3:00 p.m. to 7:00 p.m. on a weeknight. (R. 357-59; MRE 111-13). Between entry of the order modifying custody and December 2008, Ms. McKnight exercised visitation with Kimberly only sporadically. (T. 15-17; Appellee's Record Excerpts Tab 1 (hereinafter JRE Tab 1)). Moreover, she **never** exercised her mid-week visitation rights. (T. 15-17; JRE Tab 1).

On December 29, 2008, Mr. Jenkins filed a Motion for Temporary Restraining Order and his Petition for Contempt, Modification of Visitation, and Temporary Relief. (R. 369-74; 375-80; MRE 59-65). In support of his Motion for Temporary Restraining Order, Mr. Jenkins relied on certain events that transpired during Kimberly's Christmas visitation with Ms. McKnight and

[2] Ms. McKnight appeals all aspects of the Chancellor's ruling except the requirements imposed on her in order to allow her to resume visitation with Kimberly.

a pattern of behavior during Kimberly's visitation with Ms. McKnight. (R. 375-80; MRE 59-65). The Temporary Restraining Order was entered on December 30, 2008. (R. 382; MRE 58). On January 5, 2009, the parties signed an Agreed Preliminary Injunction, which states that "both parties agree that . . . Holly Kathleen Jenkins' Court ordered visitation that she currently has with the minor child, Kimberly Marie Jenkins, shall immediately be suspended and shall so remain until further orders of this Court." (R. 385-86; MRE 66-67). That **agreed** order remained in place until the trial.

At the trial on the Petition for Contempt, Modification of Visitation, and Temporary Relief and the Amended Counter-Petition for Contempt, Modification of Visitation, Modification of Custody, Modification of Child Support, and Temporary Relief, the Court heard testimony from both parties and Kimberly, along with various other witnesses. In order to avoid duplication, the specifics of that testimony will be discussed below as it relates to each issue on appeal. However, at the conclusion of the trial, the Chancellor, having had the opportunity to consider all of the testimony and the credibility of each witness, determined that Kimberly's best interest would be served by allowing custody to remain with Mr. Jenkins and reinstating Ms. McKnight's visitation under a gradual approach that included counseling (as recommended by the guardian ad litem), that Ms. McKnight was in contempt of certain court orders, that Ms. McKnight should pay Mr. Jenkins's attorney's fees related to the defense of her contempt action and her unfounded abuse allegations, that Ms. McKnight should pay the guardian ad litem fee because her abuse allegations that necessitated the appointment of the guardian ad litem were unfounded and that Mr. Jenkins was not in contempt of any order and should not be required to pay Ms. McKnight's attorney's fees. (R. 657-74; MRE 25-42). The Chancellor subsequently entered an Amended Order denying Ms. McKnight's request for a modification of her child

support obligations. (SR 3-5; MRE 15-17). From those rulings, except as they relate to the visitation issue, Ms. McKnight appeals.

III. SUMMARY OF THE ARGUMENT

The Chancellor's Opinion, Order and Amended Order should be affirmed in all respects because Ms. McKnight has failed to demonstrate that any of the decisions about which she complains were the result of the application of an improper legal standard, were manifest error, clearly erroneous or an abuse of discretion. The Chancellor's Opinion, Order and Amended Order are supported by the testimony and evidence presented at the trial of this matter and should not be disturbed on appeal.

The Chancellor correctly determined that, based on the evidence presented at trial, Ms. McKnight failed to demonstrate any material change in circumstance adverse to Kimberly's best interest. The Chancellor further acted within his discretion in denying Ms. McKnight a modification of child support where she came into the court with unclean hands and further failed to show any decline in her lifestyle in spite of her reported decrease in earnings. Furthermore, the Chancellor properly reviewed the facts related to the parties' respective motions for contempt and found that Mr. Jenkins demonstrated that Ms. McKnight was in clear violation of a prior court while Ms. McKnight failed to make such a showing. With respect to guardian ad litem and attorney's fees, Ms. McKnight has not demonstrated any abuse of discretion, particularly where the Chancellor operated under the mandate imposed by Mississippi Code Annotated Section 93-5-23. Finally, Ms. McKnight's evidentiary complaints are not well-taken and do not constitute grounds for reversal of the Chancellor's decision.

For all of these reasons, and as set forth more fully below, Ms. McKnight has failed to bear her burden of demonstrating that the Chancellor's Opinion, Order and Amended Order should be reversed.

IV. STANDARD OF REVIEW

A Chancellor's findings regarding child custody or child support will be reversed on appeal only if "the decision is manifestly wrong, clearly erroneous, or the [C]hancellor applied an erroneous legal standard." *Norman v. Norman,* 962 So. 2d 718, 720 (Miss. Ct. App. 2007) (citing *Roberson v. Roberson,* 814 So. 2d 183, 184 (Miss. Ct. App. 2002)); *Bosarge v. Bosarge,* 879 So.2d 515, 518 (Miss. Ct. App. 2004) (holding that decisions regarding child support will be reviewed under manifest error rule).

A Chancellor's decision to award or deny attorneys' fees is one left to the discretion of the Chancellor and should not be reversed on appeal absent a showing of abuse of that discretion. *In re Spencer,* 985 So.2d 330, 336-37 (Miss. 2008) (noting that appeals court will reverse award of sanctions under Rule 11 or the Litigation Accountability Act only in the event of a finding that the Chancellor demonstrated a "clear error of judgment"); *Young v. Young,* 796 So. 2d 264 (Miss. Ct. App. 2001) (stating that award of attorney's fees in divorce is matter of Chancellor's discretion); *Rogers v. Morin,* 791 So.2d 815, 829 (Miss. 2001) (holding that award based on Miss. Code Ann. § 93-5-23 is reviewed for abuse of discretion). Similarly, in reviewing a Chancellor's determination on a motion for contempt, this Court recognizes that those matters "are committed to the substantial discretion of the chancellor." *Showers v. Norwood,* 914 So.2d 758, 761-62 (Miss. Ct. App. 2005).

Finally, in determining whether a Chancellor's evidentiary rulings at trial warrant reversal, this Court also applies an abuse of discretion standard. *Prestridge v. City of Petal,* 841 So.2d 1048, 1061 (Miss. 2003); *see also Gray v. Pearson,* 797 So.2d 387, 394 (Miss. Ct. App. 2001) (holding that party who failed to make "a record of the evidence she would have presented" without the Chancellor's rulings cannot complain of those rulings on appeal).

Therefore, Ms. McKnight has a heavy burden on appeal to demonstrate that the Chancellor committed manifest error or otherwise abused his discretion in reaching his decision. For the reasons contained in this brief, as supported by the record from the trial court, she has failed to satisfy that burden, as she has not demonstrated that the Chancellor abused his discretion or committed manifest error in reaching any of his conclusions. Therefore, the Chancellor's ruling should be affirmed in all respects.

V. ARGUMENT

A. The Chancellor's Decision Regarding Modification of the Custody of the Minor Child Was Not Manifest Error Or Clearly Erroneous Nor Did the Chancellor Apply an Incorrect Legal Standard.

1. The Chancellor considered the correct legal standard in determining that custody of the minor child should remain with Mr. Jenkins.

An order changing the custody of a minor child shall be entered only upon a showing of a material change in circumstances affecting the minor child, together with evidence that the change is detrimental to the welfare of the child and that a change of custody would be in the minor child's best interest. *Arnold v. Conwill*, 562 So.2d 97 (Miss. 1990). The *Albright* factors, which are central to an initial custody determination, are not applicable in the absence of a finding that there has been a material change in circumstances that has a detrimental effect on the minor child. *Albright v. Albright,* 437 So.2d 1003 (Miss. 1983); *McGhee v. Upchurch,* 773 So.2d 364 (Miss. Ct. App. 1999); *Clark v. Clark,* 739 So.2d 440 (Miss. Ct. App. 1999). The Chancellor explicitly finds in his Opinion that "the Court would be far reaching to find any substantial or credible evidence which would justify a finding of a substantial or material change in circumstance since the last order of custody in 2008 which would trigger a consideration further for modification purposes." (R. 663; MRE 31). Therefore, Ms. McKnight cannot demonstrate that the Chancellor applied an erroneous legal standard to the determination of the custody modification requested in this matter.

2. The Chancellor's application of the legal standard was not manifest error or clearly erroneous.

Because the Chancellor applied the proper legal standard to the request for modification of custody in this matter, Ms. McKnight must demonstrate that the Chancellor was manifestly wrong or clearly erroneous in his analysis of the legal standard. This she cannot do.

At trial, Ms. McKnight made numerous allegations concerning Mr. Jenkins and the alleged "change in circumstance" that warranted a change in the custody order; however, those allegations were not supported by the guardian ad litem, by the Department of Human Services investigation or by Kimberly's own testimony. Moreover, many of the items about which Ms. McKnight (or her witnesses) testified were matters that had been raised during the hearing that resulted in the 2008 change in custody. Those matters, under established Mississippi law, cannot support a change in custody in a subsequent dispute between the parties. *See, e.g., McDonald v. McDonald,* 39 So.3d 868 (Miss. 2010).

Ms. McKnight, and her sister, testified that following the change of custody in 2008, Kimberly appeared to have poor hygiene, appeared disshelved, withdrew from her friends and activities and suffered from illnesses that were not properly addressed. (T. 125, 130-31; 137-38). However, that testimony related only to the period immediately following the entry of the order, (T. 128), and the evidence of Kimberly's current condition painted a very different picture. Kimberly testified that she was "very healthy," that living with Mr. Jenkins was "absolutely wonderful," and that she was doing well in school. (T. 216). Moreover, the guardian ad litem appointed by the Chancellor in this case reported that Kimberly's school counselor reported no hygiene issues with Kimberly and that Kimberly had indicated to the counselor that she preferred to live with her father "because his house was calmer." (Trial Exhibit 7; JRE Tab 2). The guardian ad litem found no basis for any claim that Kimberly was abused or neglected by Mr. Jenkins and, in fact, found that Kimberly's best interest would be served by remaining in Mr. Jenkins's custody. (Trial Exhibit 7; JRE Tab 2; T. 192). Finally, the guardian ad litem noted that Kimberly was "appropriately dressed, clean and presentable" at every meeting and that Kimberly reported that she had friends her age and still enjoyed activities such as horses. (Trial Exhibit 7; JRE Tab 2; T. 208). Furthermore, the Department of Human Services report found no

basis for any allegations of abuse or neglect. (Trial Exhibit 7; JRE Tab 2). Furthermore, as the Chancellor stated in his Opinion, it is not unusual for teenagers, such as Kimberly, to go through changes in friends, interests and appearance. (R. 662; MRE 30). It cannot be said that the Chancellor was clearly erroneous in his determination that Kimberly's physical and mental well-being did not amount to a material change in circumstance sufficient to warrant consideration of a change in custody. The Chancellor had the opportunity to view and hear testimony from Kimberly and to hear testimony from an independent guardian ad litem. After hearing the testimony of all witnesses, the Chancellor made his findings. Those findings, which are supported by credible evidence, should not be disturbed on appeal.[3]

Furthermore, to the extent that Ms. McKnight attempts to rely on the undeniable demise of her relationship with Kimberly to support her claim that there should be a change in the custody order, her argument is again not supported by the evidence at trial. While it is clear from the testimony at trial that Kimberly has virtually no relationship with Ms. McKnight, it is also clear that Mr. Jenkins is not responsible for the breakdown of that relationship. In fact, the guardian ad litem – an objective witness – testified that she did not feel that Mr. Jenkins did anything "overtly . . . to discourage" the relationship between Kimberly and Ms. McKnight. (T. 203). Instead, the guardian ad litem testified that the demise in the relationship had been caused by "a number of things." (T. 204). She opined that causes include "the complete devastation that Holly exhibited over losing custody of her daughter," Ms. McKnight's continued desire to "fight for the custody of her daughter even when doing so alienates her further from her," Kimberly's feeling "that her mother caused the DHS investigations that so embarrassed her at

[3] Moreover, although Ms. McKnight alleges that Mr. Jenkins interfered with her visitation with Kimberly, the fact remains that Ms. McKnight elected not to exercise all of her visitation rights after the entry of the 2008 custody order and voluntarily signed an agreed order waiving her visitation rights in January 2009. (R. 385-86; MRE 66-67; T. 19). Therefore, Mr. Jenkins could not have been interfering in those rights.

school," and "that her mother lied to her." (T. 204; Trial Exhibit 7; JRE Tab 2). So, while there may have been a change in the condition of the relationship between Ms. McKnight and Kimberly and while Mr. Jenkins might have "played a part in the demise," there is no evidence to suggest that Mr. Jenkins alienated Kimberly from her mother to such a degree that a change in custody is warranted.[4] (T. 204; Trial Exhibit 7; JRE Tab 2). In fact, the only objective testimony before the Chancellor found that Ms. McKnight was responsible – in large part – for that demise and found that Kimberly's best interests would be served by remaining in the custody of Mr. Jenkins. (Trial Exhibit 7; T. 204; JRE Tab 2). The Chancellor should not be reversed because his determination that there has been no change of circumstance is not manifest error or clearly erroneous and is based on credible evidence. *See, e.g., Whittington v. Whittington,* 724 So.2d 922, 924 (Miss. Ct. App. 1998) (holding that in bench trial judge "has the sole authority for determining the credibility of the witnesses").

B. The Chancellor's Decisions Regarding Findings of Contempt, Award of Attorney's Fees and Assessment of Guardian Ad Litem Fees Were Proper.

Ms. McKnight appeals from the Chancellor's ruling requiring her to pay Mr. Jenkins's attorney's fees for prosecuting his contempt action and for defending against her allegations of abuse that were determined to be unfounded. She further appeals from the ruling that she be required to pay the outstanding fees due to the guardian ad litem, who was appointed, as required by statute, to investigate her allegations of abuse against Mr. Jenkins. Finally, she appeals the Chancellor's finding that Mr. Jenkins was not in contempt of court and denying her request for attorney's fees. None of Ms. McKnight's arguments are meritorious, and the Chancellor's findings should be upheld.

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[4] In order to justify a modification of custody, the change in circumstance must affect the custodial parent's home. *See, e.g., Beasley v. Beasley,* 913 So.2d 358, 361 (Miss. Ct. App. 2005). Ms. McKnight's alleged distress over her relationship – or lack thereof – with her daughter does not constitute evidence of any change with respect to Mr. Jenkins's home.

1. The Chancellor properly found Ms. McKnight in contempt of the prior court order requiring payment of one half of all medical expenses and awarded Mr. Jenkins attorney's fees for his prosecution of the contempt action.

The Decree of Divorce required the parties to equally divide all medical expenses that were incurred on behalf of the minor child that were not paid by insurance. (R. 111; MRE 126). Mr. Jenkins sought to recover $1,200, representing one half of a bill due to Dr. Rutledge in connection with an evaluation performed on Kimberly in connection with the prior custody lawsuit. (T. 31-32). Ms. McKnight acknowledged that she was aware of the bill but that she had not "agreed to pay it." (T. 32). In fact, Ms. McKnight did not have to agree to pay any individual bill – she was under Court order to pay one half of all medical expenses that were not covered by insurance. (R. 111; MRE 126). If she felt an expense was not "reasonable or necessary" she could have sought relief from the Court, but she could not unilaterally refuse to pay the amount due under the Decree of Divorce. This type of behavior is clearly contemptuous. *Weeks v. Weeks,* 29 So.3d 80 (Miss. Ct. App. 2009) (holding that contempt must be shown by clear and convincing evidence). Therefore, the Chancellor properly held Ms. McKnight in contempt for her refusal to pay the invoice. His finding should not be reversed.

Having found Ms. McKnight in contempt of court, the Chancellor acted within his discretion in awarding Mr. Jenkins's his attorney's fees incurred in order to pursue the contempt action. *Varner v. Varner,* 666 So.2d 493, 498 (Miss. 1995); *see also Bounds v. Bounds*, 935 So.2d 407, 412 (Miss. Ct. App. 2006) (noting that attorney's fees for contempt are awarded to make plaintiff whole). Mr. Jenkins's fees were documented before the Chancellor, and his finding that the entire amount should be awarded was not an abuse of discretion and should be upheld on appeal. (Trial Exhibit 1; T. 43; JRE Tab 3).

2. The Chancellor properly denied Ms. McKnight's request for a finding of contempt against Mr. Jenkins.

The Chancellor also found that Ms. McKnight failed to prove that Mr. Jenkins was in contempt of any court order. (R. 659-60; MRE 27-28). The Chancellor noted that Ms. McKnight wanted to penalize Mr. Jenkins for a "course of conduct" related to alienation of Kimberly from Ms. McKnight. (R. 659-60; MRE 27-28). The Chancellor found that Ms. McKnight had failed to bear her burden of demonstrating any contemptuous conduct because the conduct about which she complained – even if it occurred, which Mr. Jenkins denies – was not sufficient to show that Mr. Jenkins acted willfully to disobey any clear court order. (R. 660; MRE 28). Ms. McKnight's vague accusations – which as noted above are discredited by the testimony presented at trial – are not of such a nature that will sustain a motion for contempt. *See, e.g., Switzer v. Switzer,* 460 So.2d 843, 846 (Miss. 1984) (holding that party must have high degree of certainty what conduct is prohibited before he can be held in contempt); *Allred v. Allred,* 735 So.2d 1064 (Miss. Ct. App. 1999) (holding that contempt must be shown by clear and convincing evidence). Therefore, in the absence of any clear showing that Mr. Jenkins acted willfully to violate a court order, the Chancellor properly denied Ms. McKnight's request for contempt. This decision was not an abuse of discretion and should be upheld on appeal.

3. The Chancellor properly assessed the guardian ad litem's fees against Ms. McKnight.

In June 2009, Ms. McKnight moved for a continuance of the scheduled trial (less than two weeks prior to trial) and petitioned the Court for the appointment of a guardian ad litem because of allegations that Kimberly was being abused by Mr. Jenkins. (R. 495-96; 508-10). The Chancellor granted the motion for continuance and, in accordance with Mississippi Code Annotated Section 93-5-23, requested that Ms. McKnight provide all relevant information regarding her claim to the Department of Human Services. (R. 526-27; JRE Tab 4). The Court

specifically stated in its order granting the continuance that it was continuing the matter pursuant to Mississippi Code Annotated Section 93-5-23 so that the Department of Human Services could investigate "the allegations that the Defendant/Petitioner, Walter Calvin Jenkins, has abused and/or neglected the minor child." (R. 526; JRE Tab 4). The Chancellor also appointed a guardian ad litem to review the claims of abuse. (R. 524-25). The Department of Human Services and the guardian ad litem determined that there was no evidence of abuse. (T. 192, 195-96; Trial Exhibit 7; JRE Tab 2). Therefore, in accordance with the statutory language, the Chancellor assessed all of the guardian ad litem's fees to Ms. McKnight. (R. 673-74; MRE 41-42). She requested the appointment of the guardian ad litem, she made the unfounded allegations of abuse, and she was properly assessed with the costs associated with those allegations. Miss. Code Ann. § 93-5-23 (stating that if "allegations of child abuse are found to be without foundation, the chancery court **shall** order the alleging party to pay all court costs and reasonable attorney fees incurred by the defending party in responding to such allegation" (emphasis added)); *see also Foster v. Foster,* 788 So.2d 779 (Miss. App. 2001) (allocating guardian ad litem fees as court costs under Miss. Code Ann. § 93-5-23). The Chancellor did not abuse his discretion in assessing the fees against Ms. McKnight. His decision should be affirmed.

4. The Chancellor properly awarded Mr. Jenkins his attorney's fees incurred in connection with the defense of Ms. McKnight's unfounded allegations of abuse.

As discussed above, and as set forth in the Court's Opinion, Ms. McKnight requested the appointment of a guardian ad litem because of allegations of abuse that were determined by both the Department of Human Services and the guardian ad litem to be unwarranted. (R. 673-74; MRE 41-42) The Chancellor, therefore, was bound by the terms of Mississippi Code Annotated Section 93-5-23 in awarding Mr. Jenkins his attorney's fees incurred in connection with defending against those allegations of abuse. Miss. Code Ann. § 93-5-23; *see also Rogers*, 791

So. 2d at 829 (holding that husband was entitled to award of attorney's fees under statute even where custody was ultimately agreed to by the parties).[5] The statute is clear that Mr. Jenkins was entitled to his reasonable attorney's fees for defending against the unfounded allegations of abuse. The Chancellor expressly found, pursuant to *McKee v. McKee*, 418 So.2d 764 (Miss. 1982), that those fees were reasonable.[6] The Chancellor was required pursuant to the statute to award attorney's fees – his decision should not be reversed on appeal.[7]

5. The Chancellor properly denied Ms. McKnight's request for attorney's fees.

Ms. McKnight alleges that she should have been awarded her attorney's fees. The Chancellor denied her request, finding that the only basis for such an award would be an inability to pay those fees and that Ms. McKnight's lifestyle, as testified to by her at trial, revealed that she was able to pay her own attorneys. (R. 668; MRE 36; T. 161, 169, 183).

On appeal, Ms. McKnight claims that she should be awarded attorney's fees pursuant to Mississippi Code Annotated Section 93-5-23. However, that statute, which is discussed in detail above, is wholly inapplicable to her claim because Mr. Jenkins took no action to cause that statute to apply – he did not seek a continuance, he did not seek a Department of Human

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[5] Notably, in *Rogers,* the award of attorney's fees under the statute was upheld as mandatory in spite of the fact that the appellate court also affirmed the chancellor's denial of attorney's fees to the wife (under a theory other than Miss. Code Ann. § 93-5-23) based on an evaluation of the *McKee v. McKee* factors, noting that the chancellor had found that both parties "were basically bankrupt [and] neither party is financially able to pay their separate attorneys fees, much less those of the other." *Id.*

[6] Mr. Jenkins produced a copy of an itemized bill for defending against the unfounded abuse allegations and testified regarding those fees. (T. 144; Trial Exhibit 2; JRE Tab 5). Contrary to Ms. McKnight's apparent allegation on appeal, Mr. Jenkins was awarded fees for only one attorney.

[7] The Chancellor noted that sanctions would be appropriate under the Litigation Accountability Act, and Mr. Jenkins argues that such a finding was proper. However, the Chancellor did not attribute a particular amount of its award as sanctions and appears to base its award of attorney's fees on the application of Section 93-5-23 to this case. Nevertheless, given Ms. McKnight's testimony that the alleged statements made by Kimberly concerning improper conduct by Mr. Jenkins, his attorney and the previous chancellor and "a plan" to keep Ms. McKnight from visiting with Kimberly had "actually happened," (T. 179) without any evidence of judicial misconduct or wrongdoing on the part of any person and in the face of an **agreed** order giving up her visitation rights, it is clear that sanctions under the Litigation Accountability Act would be properly within the discretion of the Chancellor and should be updheld on appeal.

Services investigation and he did not seek the appointment of a guardian ad litem. Ms. McKnight took all of those actions. (T. 206-08; R. 526-27; 495-96; 508-10). Ms. McKnight cannot now be heard to complain that she should be able to recover her attorney's fees based on her own unfounded allegations of abuse.[8]

The Chancellor properly denied Ms. McKnight's claim for attorney's fees. She has failed to demonstrate an inability to pay – given her testimony concerning out-of-country vacations and the support she receives from her husband – and is not entitled to an award under Mississippi Code Annotated Section 93-5-23. The Chancellor's decision should be upheld on appeal.

C. The Chancellor's Denial of Ms. McKnight's Request for Modification of her Child Support Obligations Was Proper.

The Chancellor denied Ms. McKnight's request for a decrease in the amount of child support she paid because he determined that the "clean hands doctrine" applied to prevent Ms. McKnight from obtaining relief. *See, e.g., Corkern v. Corkern,* 58 So.3d 1229 (Miss. Ct. App. 2011). Based on the reasons set forth above, Ms. McKnight was in contempt of prior orders of the court and should not be allowed to avail herself of the court's equitable powers; therefore, the Chancellor properly denied the request for modification, and his decision should be affirmed on appeal.

Even if the "clean hands doctrine" did not prevent Ms. McKnight from obtaining a modification in her child support obligations, she has failed to demonstrate that she is entitled to such a reduction. Ms. McKnight argues that she is unemployed and, therefore, cannot pay the previously ordered child support. However, Ms. McKnight testified that she took vacations

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[8] Furthermore, Ms. McKnight failed to provide evidence of the fees incurred in defending against the alleged "unfounded allegations" of abuse she claims were made by Mr. Jenkins, rather she merely provided a flat fee contract for the entire litigation (including her request for contempt, her request for modification of child support, etc.) This will not support a claim for attorney's fees, even if she could prevail on her claim. Miss. Code Ann. § 93-5-23 (stating that "reasonable attorneys fees incurred . . . in responding to [unfounded abuse] allegation[s]" shall be awarded). (T. 156, 172-73; Trial Exhibit 6).

outside the continental United States, that she attended concerts and that her husband paid "all the bills." (T. 161, 169). Furthermore, she testified that she had "always wanted to be a full-time mom" and that her current husband "encouraged" her to stay home full-time. (T. 139). Therefore, it appears that Ms. McKnight is not seeking new employment and that she is living a lifestyle that does not suggest a decline in her standard of living that would support a modification of child support. *See, e.g., Lane v. Lane*, 850 So.2d 122, 126 (Miss. Ct. App. 2002) (holding that party trying to show an inability to pay court ordered support must show "that he earned all he could [and] that he lived economically"); *Holcombe v. Holcombe,* 813 So.2d 700 (Miss. 2002) (finding that decrease in income did not amount to change of circumstances sufficient to support modification of court ordered support payments because payor's "lifestyle and spending habits indicate the loss in business had no effect on his purchasing decisions"). Ms. McKnight should not be allowed to draw unemployment benefits, refuse to look for comparable work and continue to live a lavish lifestyle and still seek relief from the court with respect to her child support modifications. The Chancellor's denial of her request for modification should be upheld. *See Self v. Lewis,* 64 So.3d 578, 585 (Miss. Ct. App. 2011) (holding that "[o]n appeal, this Court may affirm a chancellor's decision on alternate grounds if we determine that the right result was reached").

D. The Chancellor's Evidentiary Rulings Were Proper.

Ms. McKnight alleges that the Chancellor improperly excluded evidence of events occurring prior to October 13, 2008. (Brief at 45-47 (hereinafter B. 45-47)). However, in spite of this contention, Ms. McKnight correctly acknowledges that a prior judgment is res judicata as to anything that might have been litigated at the time of that judgment. (B. 45-46); *see, e.g., Leiden v. Leiden,* 902 So. 2d 582 (Miss. Ct. App. 2004). Ms. McKnight contends that the Chancellor's application of this fundamental principal of Mississippi law requires reversal

because it "had the effect of completely disallowing the court-appointed expert to testify." (B. 46). This is simply not supported by the record. In fact, it is not known whether the expert to whom Ms. McKnight is referring – Dr. Zinkus – would have been affected by the Chancellor's ruling because Ms. McKnight elected **not** to present his testimony to the court. (R. 227). In fact, in her brief Ms. McKnight states that she "chose not to call the Court appointed expert." (B. 46).[9] In the absence of any effort to produce the testimony of the expert, Ms. McKnight cannot be granted relief on appeal for what she assumes would have been the impact of the Chancellor's application of settled law. *See, e.g., Gray v. Pearson,* 797 So.2d 387, 394 (Miss. Ct. App. 2001) (holding that "if there is no evidence offered as to what a litigant would have presented but for the trial court's restrictions, there is no legitimate basis for complaining on appeal"). The Chancellor's decision in this regard should be upheld.

Similarly, the Chancellor's decision to limit the testimony of certain witnesses to those areas identified in discovery responses is not reversible error. *See, e.g., Prestridge v. City of Petal,* 841 So.2d 1048, 1061 (Miss. 2003) (holding that exclusion of evidence based on violation of discovery rules is matter within chancellor's discretion). Ms. McKnight argues that Rule 26 of the Mississippi Rules of Civil Procedure only requires that parties provide the identity and location of witnesses. (B. 47). This is not correct. Rule 26 does, in fact, provide that the "identity and location of persons . . . who may be called as witnesses at the trial" falls within the scope of permissible discovery; however, those are words of inclusion rather than limitation. The Rule does not prohibit the parties from seeking other information regarding those witnesses. Where, as here, the opposing party requests additional information regarding the testimony of those witnesses, it is not an abuse of discretion for the Chancellor to limit the testimony to those

[9] Ms. McKnight had the record on appeal supplemented to include Dr. Zinkus's report; however, that report was never introduced into evidence at trial.

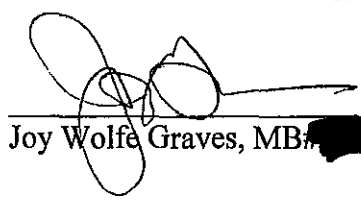
matters identified in response to the discovery requests.[10] As the Chancellor noted, Mr. Jenkins "filed the appropriate interrogatory asking for a detailed statement of [the witnesses'] proposed testimony" (T. 90) and "the purpose of the rules of discovery is to prevent trial by ambush." (T. 117). Furthermore, the Chancellor correctly stated that an "interrogatory asking for the names and addresses of witnesses proposed to be admitted or proposed to be called at trial and a synopsis of their testimony is certainly reasonable in its request and would require at the minimum the basis of his testimony, facts and circumstances in general that he would testify to." (T. 117). The Chancellor, therefore, was within his discretion in refusing to allow Ms. McKnight's witnesses to testify to matters that were not identified in discovery responses and should be affirmed by this court.

VI. CONCLUSION

Ms. McKnight has failed to bear her burden on appeal. The Chancellor's decisions were made in accordance with Mississippi law and do not constitute abuses of discretion. Therefore, for the reasons set forth herein, the Chancellor's ruling should be affirmed in all respects, and Mr. Jenkins should be granted all other relief to which he may be entitled.

Respectfully submitted,

WALTER CALVIN JENKINS



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[10] It does not appear from the record that Ms. McKnight objected to the interrogatory requesting information regarding the testimony of her witnesses. Indeed, she answered the interrogatory.

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CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that this day a true and correct copy of the foregoing instrument has been delivered to the following persons:

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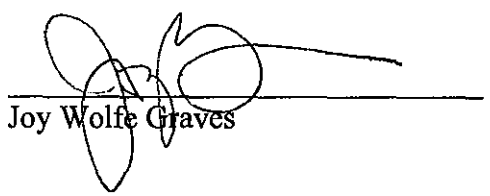
So certified, this the 19th day of September, 2011.



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