

RT

IN THE SUPREME COURT OF THE
STATE OF MISSISSIPPI

HOLLY KATHLEEN JENKINS MCKNIGHT, APPELLANT

VS.

WALTER CALVIN JENKINS, APPELLEE

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ARGUMENTS AND DISCUSSION OF LAW

A. The chancellor erred in finding that the best interest of the minor child was to allow her to remain in the custody of the father.

The brief of the Appellee, Walter Calvin Jenkins, adds nothing to the discussion of the law and facts regarding the chancellor being in error for failing to modify custody. All the brief really does is make a blanket assertion that the chancellor's decision should not be disturbed. Mr. Jenkins engaged in a gross case of parental alienation which the appellee just glosses over. Mr. Jenkins had alleged Holly was a child abuser for the entire litigation which was the basis of the temporary restraining order that he filed and opposed any modification of said order by alleging Holly was a child abuser. As the Court of Appeals has noted, it is neither logical nor proper for a parent to have an advantage in a custody case due to the other parent's malfeasance. *Story v. Allen*, 7 So.3d 295, 298-299 (Miss. Ct. App. 2008).

The chancellor erred in allowing custody to stay with Mr. Jenkins. Therefore, the judgment of the Chancery Court of DeSoto County regarding the chancellor's custody determination must be reversed and rendered or alternatively reversed and remanded for an *Albright* analysis on the record.

B. The chancellor's decision regarding contempt, attorney's fees, and guardian ad litem fees were improper.

1. The finding of contempt against Holly was not proper.

In his brief, Mr. Jenkins does not even dispute the fact that, as outlined by Holly in her brief, his claim for contempt was not even properly before the trial court. Mr. Jenkins merely jumps to the conclusion that Holly was in contempt for nonpayment. Mississippi Rule of Civil Procedure Rule 81(d)(3) provides that contempt actions are to be initiated via complaint or petition rather than by motion. *Young v. Deaton*, 766 So.2d 819, 821 n.1 (Miss. Ct. App. 2000). *See also Sanghi v. Sanghi*, 759 So.2d 1250, 1252 (¶10) (Miss. Ct. App. 2000). In *Carroll v.*

Carroll, 976 So. 2d 880, 885 (¶9) (Miss. Ct. App. 2007), the Mississippi Court of Appeals state “A summons under M.R.C.P. 81 serves to provide due process and notify a party of a new dispute.” (citing *Sanghi v. Sanghi*, 759 So. 2d 1250, 1254 (¶16) (Miss. Ct. App. 2000)). As such, the issue of contempt was never properly before the trial court which violated Holly’s due process.

Even if the issue was properly before the trial court, the testimony at trial, as noted even in the chancellor’s opinion, was that Holly believed it was for Mr. Jenkins expert witness fees from prior litigation. As contempt can only be willful, Holly cannot be in contempt for the nonpayment of a bill that she genuinely believed was for expert witness fees. *See Cossitt v. Cossitt*, 975 So.2d 274, 279 (Miss. Ct. App. 2008) (A party who genuinely misinterpreted a provision for health insurance was not in contempt despite noncompliance). As such, the findings of contempt were not proper, and nor was the award of attorney’s fees.

For all of the above reasons, the chancellor erred in finding Holly in contempt. It necessarily follows that the trial court erred in awarding attorney’s fees to Mr. Jenkins. Since the trial court erred in awarding attorney’s fees, Holly should receive a judgment from Mr. Jenkins in the amount of Two Thousand Five Hundred Dollars (\$2,500.00) for the attorney’s fees erroneously ordered by the trial court to be paid to Mr. Jenkins, along with reversing and rendering chancellor’s finding of contempt against Holly.

2. Mr. Jenkins was in contempt of court.

Mr. Jenkins is correct that a court order needs a high degree of certainty before a contempt can be found by the court. However, the order of the court only needs to be reasonably specific. Bell, Deborah H., *Bell on Mississippi Family Law* (2005) §11.05(c). Words have meaning. If the language from Holly’s divorce decree has any meaning, this is a situation where Mr. Jenkins, molested, harassed, and interfered with Holly. She had visitation rights under the

orders of the Court. Mr. Jenkins then obtained a temporary restraining order by alleging that Holly was abusing Kimberly during every visitation, had left red marks on Kimberly, and that Holly's had dragged Kimberly down the stairs by her hair. (Tr. 375-377). The Temporary Restraining Order was signed by a chancellor to whom the case was not assigned. The same chancellor also signed the Agreed Preliminary Injunction until Holly could obtain counsel. (R. 385-386). Holly filed numerous motions to resume her visitation which were constantly opposed by Mr. Jenkins on the basis that Holly was a child abuser. (R. 415-429, 543-544). Mr. Jenkins **denied** at trial that he was alleging Holly was a child abuser although he stipulated that he said Holly dragged Kimberly down the stairs by the hair and left red marks on her, which were essentially claims of domestic violence. (Tr. 50-54). This was after he had opposed Holly having any visitation for twenty (20) months with no recourse. Because of these blatant contradictions under oath, it is apparent that at some point Mr. Jenkins committed perjury.

The clause contained in the divorce was not so hard to understand that the above conduct precludes a finding of contempt. For those words to have any meaning, Mr. Jenkins conduct certainly fits in the definition of what the original divorce order was striving to prevent.

Mr. Jenkins was in gross and willful contempt of court and the chancellor should have found as such. As a result, the judgment of the trial court should be reversed and rendered with the trial court being ordered to find Mr. Jenkins in contempt along with awarding appropriate attorney's fee at the trial court for the enforcement of the prior orders.

3. The chancellor improperly assessed the guardian ad litem's fees against Holly.

Mr. Jenkins only makes conclusionary statements regarding Mississippi Code Annotated § 93-5-23. He utterly fails to note that his accusations are what triggered a temporary restraining order to be filed and why the court would not allow Holly visitation for twenty (20) months. The guardian ad litem as noted in Holly's original brief found no basis to Mr. Jenkins repeated claims

of abuse. As noted from Holly's original brief, a manifest injustice is worked against Holly if she is responsible for all guardian ad litem fees. When a manifest injustice occurs in apportioning costs, it is proper for the Appellate Court to remedy it when one is found. *Ashburn v. Ashburn*, 970 So.2d 204, 217(¶ 34) (Miss.Ct.App.2007).

Therefore the judgment of the trial court must be reversed and rendered with regard to the attorney's fees awarded to Mr. Jenkins and with all guardian ad litem fees also being accessed against Mr. Jenkins.

4. The trial court erred in not granting Holly attorney's fees.

In an interesting twist, Mr. Jenkins in his brief completely fails to note his own course of conduct which resulted in Holly incurring a large amount of attorney's fees. He once again denies that he made abuse allegations despite the fact they had to be investigated by the guardian ad litem. (Ex. 7). Mr. Jenkins wants to have his proverbial cake and eat it too by alleging that Holly made abuse accusation against him such that he is entitled to attorney's fees but that he is not responsible for attorney's fees despite his twenty (20) months of allegations of abuse against Holly.

Attorney's fees have been awarded for causing prolonged litigation which increased the other's expense. See *Chesney v. Chesney*, 849 So. 2d 860, 863 (Miss. 2002); *Russell v. Russell*, 733 So.2d 858, 862-63 (Miss. Ct. App. 1999)("[W]here a party's intentional misconduct causes the opposing party to expend time and money needlessly, then attorney fees and expenses should be awarded to the wronged party."). See *Corporate Mgmt., Inc. v. Greene County*, 23 So.3d 454, 466 (Miss.2009).

Holly incurred twenty-five thousand dollars (\$25,000.00) in attorney's fees as a result of Mr. Jenkins repeated accusations and his course of conduct. Mr. Jenkins conduct and Mississippi Code Ann. § 93-5-24 mandate the Holly receive her attorney's fees. Holly is

entitled to have her attorney's fees paid, and the chancellor should have found as such.

Therefore, the judgment of the trial court must be reversed and rendered with Holly being awarded all of her attorney's fees from trial and a judgment entered against Mr. Jenkins for the same with a timetable set up for the payment of them within sixty (60) days.

C. It was improper for the chancellor to deny Holly a modification of child support.

Mr. Jenkins appears to concede in his brief that the clean hands doctrine did not bar Holly from relief. Instead he tries to say that Holly's lifestyle did not support a reduction. There was zero evidence at trial presented that Holly was acting in bad faith to evade her support obligation. In fact, the undisputed evidence at trial was that she had lost her job through no fault of her own. Income can only be imputed where a child payor voluntarily worsens their financial position. If a payor's position is worsened with no bad faith motive, it is not proper to impute income. *See Wells v. Wells*, 35 So.3d 1250 (Miss. Ct. App. 2010)(no income imputed to mother who voluntarily cut her work hours with no bad faith motive to evade child support).

Holly is entitled to a reduction of child support and the chancellor should have found as such. Therefore, the judgment of the Chancery Court of Desoto County must be reversed and remanded on this issue to determine the appropriate amount of child support for Holly to pay in light of her unemployment and bankruptcy.

D. The chancellor's evidentiary rulings were not proper.

A. Exclusion of Dr. Zinkus.

The chancellor's ruling had the effect of completely disallowing the court-appointed psychologist to testify. Mr. Jenkins does not even address in his brief Holly's contention regarding Rule 703 of the Mississippi Rules of Evidence. Dr. Zinkus was the court-appointed psychologist in this matter. (R. 569-570). The family history of the Jenkins family, the McKnight family, and various actions from the prior divorce were necessary in order for Dr.

Zinkus to make a proper diagnosis of the current situation. Contrary to Mr. Jenkins assertion in his brief, Holly was not trying to re-litigate the prior case, but it was necessary for those activities to be discussed with Dr. Zinkus.

Rule 703 of the Mississippi Rules of Evidence states that an expert's opinion may be based off of inadmissible evidence, such as hearsay, if it is the type reasonably relied upon by experts in the particular field. M.R.E. 703. The chancellor's ruling violated Rule 703 of the Mississippi Rules of Evidence. Additionally, with this ruling coming on the eve of trial he severely prejudiced Holly's trial preparation and case in chief.

Mr. Jenkins seems to think that Holly should have called an excluded expert to the stand to offer testimony in court which the chancellor stated he was not going to hear. (R. 652). As Dr. Zinkus' expert opinion was partially based on items prior to the last court order, it had the global effect of excluding his entire opinion as noted by the chancellor's ruling. As such, the court disqualified its own appointed psychologist. Holly has proffered Dr. Zinkus testimony through this report that was provided to the guardian ad litem and was originally part of her report, which is all that is required.

The failure of the chancellor to consider this information along with disallowing the expert's testimony must be reversed and rendered or at the minimum a new trial should be ordered to consider these circumstances in the context of custody modification and an *Albright* analysis.

B. Limiting the testimony of certain witnesses.

Mr. Jenkins seems to argue in his brief that Mississippi Rule of Civil Procedure 26 is meant to be words of inclusion rather than limitation. That is simply not supported by the law nor logic. The first two paragraphs of comments to Rule 26 provide:

With two important exceptions MRCP 26 is identical to Miss. Code Ann. § 13-1-266 (1972); subdivision 26(b)(1) narrows the scope of permissible discovery, although it does permit the discovery of the identity and location of persons who may be called as

witnesses at the trial; a new subdivision (c) is added and the original subdivisions are renumbered accordingly.

Sweeping and abusive discovery is encouraged by permitting discovery confined only by the "subject matter" of a case -- the language of Miss. Code Ann. § 13-1-226(b) (1972) -- rather than limiting it to the issues presented. Discovery should be limited to the specific practices or acts that are in issue. Determining when discovery spills beyond "issues" and into "subject matter" will not always be easy, but M.R.C.P. 26(b)(1) is intended to favor limitations, rather than expansions, on permissible discovery. Accordingly, "admissible evidence" referred to in the last sentence of 26(b)(1) must be limited by the new relevancy which emerges from the term "issues, " rather than from the more sweeping term "subject matter.

Contrary to Mr. Jenkins assertion, as the comments note, Rule 26 is meant to be a limitation of discovery to prevent discovery abuses. Additionally Rule 26(b)(3) protects an attorney's thoughts, mental impressions, strategies, and analysis from discovery by opposing counsel even if the party seeking discovery shows a substantial need and an undue hardship. M.R.C.P. 26(b)(3) and *Hewes v. Langston*, 853 So.2d 1237 (Miss. 2003).

Mr. Jenkins did not explain how he was surprised by the witness in any way and did not object to the witness taking the stand. In fact, as shown at trial, Mr. Jenkins had the information concerning each witness for over a year and never bothered to contact any of them. Holly is not required to do Mr. Jenkins' discovery nor investigation of the case for him. The failure of the chancellor to consider this information is an abuse of discretion, and the judgment must be reversed and rendered or at the minimum a new trial should be ordered to consider these witnesses in the context of custody modification and an *Albright* analysis.

CONCLUSION

The chancellor's Judgment entered in this cause on October 25, 2010 is not supported by the law, the facts presented, clear and convincing evidence in the record, Mississippi case law, or public policy concerns upon which Mississippi precedent is based. The facts in this case demonstrate this Court must reverse the chancellor's denial of a custody modification. It is

clearly erroneous and is going to continue to allow the father to destroy the minor child's relationship with her mother if not reversed.

WHEREFORE, PREMISES CONSIDERED, Holly Kathleen Jenkins McKnight respectfully prays to this Court to reverse and render the judgment of the Chancery Court of DeSoto County, Mississippi and order the Appellee, Walter Calvin Jenkins, to repay the attorney's fees awarded as a result of the contempt, the attorney's fees awarded as a result of the erroneous interpretation of the child abuse statute, and all expenses herein. The Appellant further requests the Court to reverse the chancellor's denial of a custody modification as clearly erroneous and to award the mother custody of the parties' minor child. Additionally, Holly Kathleen Jenkins McKnight moves that the failure to find Mr. Jenkins in contempt at trial be reversed and remanded for a determination of attorney's fees owed to her from trial for his contempt. Furthermore, the Appellant moves that the judgment of the chancery court be reversed and rendered with regard to a denial of her modification of child support. Holly Kathleen Jenkins McKnight further respectfully prays to this Court award her attorney's fees and court costs both from trial and on appeal and any and all other relief as this Court may deem just and proper.

This the 23rd day of September, 2011.

Respectfully submitted,

HOLLY KATHLEEN JENKINS MCKNIGHT

By:


JERRY WESLEY HISAW (MSI [REDACTED])

CERTIFICATE OF SERVICE

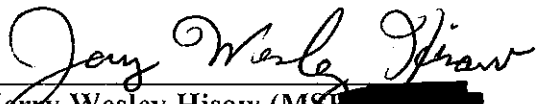
I, Jerry Wesley Hisaw, hereby certify that I have this day served by United States first-class mail, postage prepaid, a true and correct copy of the foregoing Brief of Appellant to:

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SO CERTIFIED, this the 23rd day of September, 2011.


Jerry Wesley Hisaw (MSB [REDACTED])
Certifying Attorney