IN THE SUPREME COURT OF MISSISSIPPI

HOLLY KATHLEEN JENKINS MCKNIGHT — APPELLANT

VS. — NO. 2011-CT-00206-SCT

WALTER CALVIN JENKINS — APPELLEE

APPELLEE'S SUPPLEMENTAL BRIEF ON CERTIORARI REVIEW

APPEAL FROM THE CHANCERY COURT
OF DESOTO COUNTY, MISSISSIPPI

Joy Wolfe Graves, MB #[redacted]
PERRY, WINFIELD & WOLFE, P.A.
224 East Main Street
Post Office Box 80281
Starkville, Mississippi 39759
Telephone: (662) 323-3984
Telecopier: (662) 323-3920

Malenda Harris Meacham, MB #[redacted]
LAW OFFICES OF MEACHAM AND JACKSON
Post Office Box 566
Hernando, Mississippi 38632-0566
Telephone: (662) 429-9339
Telecopier: (662) 429-3239

Attorneys for Appellee Walter Calvin Jenkins

For the reasons set forth below, as well as those in the opinion of the Court of Appeals and Walter Calvin Jenkins's ("Mr. Jenkins") prior filings, the Chancellor's rulings below, as affirmed by the Court of Appeals, should not be disturbed.

I. BACKGROUND AND PROCEDURAL POSTURE

Holly Kathleen Jenkins McKnight ("Ms. McKnight") and Mr. Jenkins were married in 1972 and divorced in 2004. (Record at p. 11, 103-25 (hereinafter R. 11, 103-25); McKnight Record Excerpts 118-40 (hereinafter MRE 118-40)). The parties' daughter, Kimberly Marie Jenkins ("Kimberly"), was born in 1996. (R. 104; MRE 119). In 2008, after Ms. McKnight moved out of Mississippi, the Chancellor modified the previous joint custody arrangement (under which Ms. McKnight had primary physical custody and Mr. Jenkins had visitation) and awarded Mr. Jenkins primary physical custody. (R. 104-109, 356-63; MRE 110-17, 119-24; Trial Transcript 11 (hereinafter T. 11)). Between that October 2008 order and December 2008, Ms. McKnight exercised her visitation rights only sporadically and never exercised her mid-week visitation rights. (T. 15-17; Appellee's Record Excerpts Tab 1 (hereinafter JRE Tab 1)).

After Mr. Jenkins filed the petition, which ultimately gave rise to this appeal, the parties signed, on January 5, 2009, an Agreed Preliminary Injunction, through which "both parties agree[d] 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. 369-80, 385-86; MRE 59-67). That **agreed** order remained in place until the trial.

Following the trial on Mr. Jenkins's petition and Ms. McKnight's amended counter-petition, the Chancellor declined to modify custody, reinstated Ms. McKnight's visitation under a gradual approach that included counseling, found Ms. McKnight in contempt of court, ordered Ms. McKnight to pay Mr. Jenkins's attorney's fees for both his contempt action and defending

against unfounded abuse allegations, assessed Ms. McKnight with guardian ad litem fees because of her unfounded abuse allegations, and found that Mr. Jenkins was not in contempt and should not be required to pay Ms. McKnight's attorney's fees. (R. 657-74; MRE 25-42).[1] Ms. McKnight appealed all the Chancellor's rulings, except as they related to visitation.

On March 13, 2012, the Court of Appeals affirmed the Chancellor and held that his findings were supported by substantial evidence and did not constitute an abuse of discretion.

II. ARGUMENT

A. The Decision Not to Modify Custody is Not Reversible Error

The Chancellor heard substantial testimony related to Ms. McKnight's request for modification of custody, including testimony from Kimberly and from a court-appointed guardian ad litem. At the conclusion of testimony, the Chancellor explicitly found 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); *see also Arnold v. Conwill*, 562 So.2d 97 (Miss. 1990). The Chancellor did not abuse his discretion or otherwise err in reaching this conclusion and, thus, his findings should be upheld on appeal.

On appeal, Ms. McKnight alleges that Mr. Jenkins engaged in inappropriate conduct, including "alienating" Kimberly from her. These claims are not supported by the testimony of the guardian ad litem, by an investigation undertaken by the Department of Human Services, or by Kimberly's own testimony. As noted above, Ms. McKnight elected not to exercise all her visitation rights after the entry of the 2008 custody order and voluntarily signed an agreed order waiving her visitation rights in January 2009. She cannot now claim, as a basis for modification

[1] The Chancellor subsequently entered an Amended Order denying Ms. McKnight's request for a modification of her child support obligations, which had not been addressed in the original Order. (SR 3-5; MRE 15-17).

of custody, that she was inappropriately prevented from visiting Kimberly. Ms. McKnight, by agreement, did not see her daughter for a period of almost 20 months. This is not the fault of Mr. Jenkins. The guardian ad litem agreed, testifying that she did not feel that Mr. Jenkins did anything "overtly . . . to discourage" the relationship between Kimberly and Ms. McKnight. (T. 203). The guardian ad litem testified that the causes of the demise in the relationship included "the complete devastation that [Ms. McKnight] 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 school," and "that her mother lied to her." (T. 203-04; Trial Exhibit 7; JRE Tab 2). Furthermore, Ms. McKnight's regrets or concerns regarding her relationship (or absence thereof) with Kimberly do not justify a change in custody because those concerns do not affect the custodial parent's home. *See, e.g., Beasley v. Beasley,* 913 So.2d 358, 361 (Miss. Ct. App. 2005).

Ms. McKnight also makes a number of allegations regarding neglect and similar offenses against Kimberly by Mr. Jenkins; however, the only objective evidence at trial painted a far different picture. 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). 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 participating in extracurricular activities.[2] (Trial Exhibit 7; JRE Tab 2; T. 208). The Department of Human Services report found no evidence of abuse or neglect. (Trial Exhibit 7; JRE Tab 2).

[2] The guardian ad litem also reported that Kimberly's school counselor indicated no hygiene issues with Kimberly and that Kimberly had told the counselor that she preferred to live with her father "because his house was calmer." (Trial Exhibit 7; JRE Tab 2).

Additionally, 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).[3] The Chancellor is the judge of credibility of witnesses at trial, *see, e.g., Whittington v. Whittington,* 724 So. 2d 922, 924 (Miss. Ct. App. 1998), and after hearing all the testimony, he found that Ms. McKnight had not demonstrated a substantial change in circumstances affecting Kimberly's well-being. It cannot be said that this finding, which was supported by significant evidence, was an abuse of discretion. The Chancellor's finding should be upheld on appeal.

B. The Decisions Regarding Contempt, Award of Attorney's Fees, and Assessment of Guardian Ad Litem Fees Are Not Reversible Error.

The Court of Appeals correctly affirmed the Chancellor's rulings related to the parties' allegations of contempt, the parties' requests for attorneys' fees, and the assessment of guardian ad litem fees. These findings should not be disturbed on certiorari review.

1. Ms. McKnight Was in Contempt of the Court Order Regarding Medical Expenses.

The Decree of Divorce required the parties to equally divide all medical expenses, not covered by insurance, that were incurred on Kimberly's behalf. (R. 111; MRE 126). Ms. McKnight acknowledged that she was aware of a disputed bill from a doctor, who evaluated Kimberly for purposes of the prior custody matter, but argued that she had not "agreed to pay it." (T. 31-32). Ms. McKnight, however, 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. She was not entitled to simply ignore the requirement imposed by the Decree of Divorce. This type of behavior is clearly contemptuous. *Weeks v. Weeks,* 29 So.3d 80

[3] In contrast, Ms. McKnight offered conflicting testimony alleging that Kimberly had withdrawn from friends and activities and that she had reportedly displayed poor hygiene in the period immediately after the 2008 custody order. (T. 125, 128, 130-31; 137-38).

(Miss. Ct. App. 2009) (holding that contempt must be shown by clear and convincing evidence). Therefore, the Chancellor properly held Ms. McKnight in contempt and correctly awarded Mr. Jenkins his documented attorney's fees. (Trial Exhibit 1; T. 43; JRE Tab 3); *Varner v. Varner,* 666 So.2d 493, 498 (Miss. 1995); *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). These findings should not be reversed on appeal.

2. Mr. Jenkins Was Not in Contempt of Any Court Order.

Ms. McKnight sought a finding of contempt against Mr. Jenkins. The Chancellor observed that Ms. McKnight wanted to penalize Mr. Jenkins for a "course of conduct" related to alleged alienation of Kimberly from Ms. McKnight. (R. 659-60; MRE 27-28). As noted above, there was no evidence that Mr. Jenkins "alienated" Kimberly – in fact, the guardian ad litem testified that he did not "overtly" act to damage the relationship and instead its demise was largely due to Ms. McKnight's actions. (T. 203). Furthermore, even if such conduct occurred, which Mr. Jenkins denies, the evidence was not sufficient to show that Mr. Jenkins acted willfully to disobey any clear court order. (R. 660; MRE 28); *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). 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. Ms. McKnight Should Be Assessed With the Guardian Ad Litem's Fees.

Less than two weeks before the June 2009 trial date, Ms. McKnight moved for a continuance and petitioned the Court for the appointment of a guardian ad litem, alleging that Kimberly was being abused by Mr. Jenkins. (R. 495-96; 508-10). The Chancellor granted the

request for a continuance and specifically stated in the order that the trial was being continued pursuant to Mississippi Code Annotated § 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). Pursuant to Ms. McKnight's request,[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). The Chancellor assessed Ms. McKnight with the fees charged by the guardian ad litem. (R. 673-74; MRE 41-42). Mississippi Code Annotated § 93-5-23, which was cited in the Chancellor's order, states 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 allegations." Miss. Code Ann. § 93-5-23 (emphasis added); *see also Foster v. Foster,* 788 So.2d 779 (Miss. App. 2001) (allocating guardian ad litem fees as court costs under statute). Thus, the Chancellor acted in accordance with mandatory statutory language and should be affirmed.

4. Mr. Jenkins Was Entitled to His Attorney's Fees.

Ms. McKnight alleged that Mr. Jenkins was abusing Kimberly and requested appointment of a guardian ad litem and a DHS investigation. (R 683; MRE 22). Those allegations were determined by both DHS and the guardian ad litem to be unwarranted. (R. 673-74; MRE 41-42). The Chancellor was bound by the terms of § 93-5-23 to award Mr. Jenkins his attorney's fees incurred in defending against those allegations. Miss. Code Ann. § 93-5-23; *see also Rogers v. Morin,* 791 So. 2d 815, 829 (Miss. 2001) (holding that award is mandatory even

[4] Ms. McKnight alleges that Mr. Jenkins made "false allegations of abuse." Mr. Jenkins denies such, but it is undisputable that the guardian ad litem was appointed only after the allegations of Ms. McKnight. (R 683; MRE 22).

where parties "were basically bankrupt [and] neither party is financially able to pay their separate attorneys fees, much less those of the other"). The Chancellor expressly found, pursuant to *McKee v. McKee*, 418 So.2d 764 (Miss. 1982), that the fees were reasonable.[5] The Chancellor was required pursuant to the statute to award attorney's fees – his decision should not be reversed on appeal.[6]

5. Ms. McKnight Was Not Entitled to Her Attorney's Fees.

Ms. McKnight, while denying that Mr. Jenkins is entitled to his attorney's fees pursuant to Miss. Code Ann. § 93-5-23, attempts to rely on that statute for an award of her own fees. The Chancellor correctly denied her request. It is clear that Ms. McKnight requested the DHS investigation and the guardian ad litem. (R. 495-96, 524-26; JRE Tab 4). Ms. McKnight was not entitled to fees under the statute.

Ms. McKnight was also not entitled to an award of fees based on an inability to pay her own fees. Ms. McKnight's lifestyle, which included the ability to fulfill her long-time desire to be a stay-at-home mom and allow her husband to pay the bills and still continue to take trips out of the country, demonstrates that she had the means to pay her own attorneys.[7] (R. 668; MRE 36; T. 139, 161, 169, 183). The Chancellor properly denied Ms. McKnight's request for an award of attorney's fees.

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[5] Mr. Jenkins produced an itemized bill for defending against the unfounded abuse allegations and testified regarding those fees. (T. 144; Trial Exhibit 2; JRE Tab 5).

[6] Ms. McKnight attempts to rely on *Gregory v. Gregory*, 881 So. 2d 840 (Miss. Ct. App. 2003), to support her claim that fees should not have been awarded. *Gregory*, however, involved evidence of abuse from "reputable doctors and specialists," which the Chancellor decided was not sufficient to justify a finding of abuse by the father. *Gregory*, 881 So. 2d at 845. The only allegations of abuse in this case came from Ms. McKnight and lay witnesses directly linked to her. She offered no expert to support her claims – both the guardian ad litem and DHS found no evidence of abuse. The claims were unfounded.

[7] Ms. McKnight also failed to provide sufficient 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 contempt and child support. This is not adequate. 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).

C. The Decision Not to Modify Child Support Is Not Reversible Error.

Ms. McKnight sought a reduction in child support allegedly because she was unemployed and unable to meet her responsibilities. However, at trial, Ms. McKnight 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). Furthermore, she testified that she took vacations outside the continental United States, that she attended concerts and that her husband paid "all the bills." (T. 161, 169). This testimony does not suggest that Ms. McKnight was "earn[ing] all she could and liv[ing] economically" as would be required to modify her child support obligation. *Lane v. Lane*, 850 So. 2d 122, 126 (Miss. Ct. App. 2002); *see also Holcombe v. Holcombe,* 813 So. 2d 700 (Miss. 2002) (finding that decrease in income did not to support modification because payor's "lifestyle and spending habits indicate the loss in business had no effect on his purchasing decisions"). The Chancellor did not abuse his discretion in refusing to modify Ms. McKnight's child support obligations, and his opinion should be affirmed.

D. There Were No Reversible Evidentiary Rulings.

Ms. McKnight alleges that the Chancellor's ruling prohibiting testimony about events occurring prior to the 2008 custody order resulted in "completely disallowing the court-appointed expert to testify." (Appellant's Brief at p. 46 (hereinafter B. 46)). This is incorrect. In fact, Ms. McKnight elected **not** to present this expert's testimony to the court. (R. 227). Ms. McKnight admits that she "chose not to call the Court appointed expert." (B. 46). Ms. McKnight cannot be granted relief on appeal for what she assumes would have been the impact of the Chancellor's ruling because she failed to attempt to call the expert at trial. *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 well-supported rulings to limit the testimony to events occurring since the prior custody order should be affirmed.

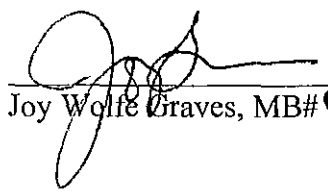
Similarly, the Chancellor's decision to limit the testimony of certain witnesses to areas identified in discovery responses is not reversible error. *See, e.g., Prestridge v. City of Petal,* 841 So.2d 1048, 1061 (Miss. 2003) (holding that exclusion of evidence based on violation of discovery rules is within chancellor's discretion). As the Chancellor noted, 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.

III. CONCLUSION

The Chancellor's decisions, which were made in accordance with Mississippi law and which were affirmed by the Court of Appeals, should be upheld by this Court.

Respectfully submitted,

WALTER CALVIN JENKINS



Joy Wolfe Graves, MB# [redacted]

Of Counsel:

Joy Wolfe Graves (MB# [redacted]
PERRY, WINFIELD & WOLFE, P.A.
224 East Main Street
Post Office Box 80281
Starkville, MS 39759
Telephone: (662) 323-3984
Telecopier: (662) 323-3920

Malenda Harris Meacham (MB [redacted]
LAW OFFICES OF MEACHAM AND JACKSON
Post Office Box 566
Hernando, Mississippi 38632-0566
Telephone: (662) 429-9339
Telecopier: (662) 429-3239

ATTORNEYS FOR WALTER CALVIN JENKINS

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, by U.S. Mail, postage paid:

J. Wesley Hisaw
Holland Law, P.C.
P.O. Box 256
Horn Lake, Mississippi 38637

James R. Franks, Jr.
William R. Wheeler, Jr.
Wheeler & Franks Law Firm, P.C.
P.O. Box 681
Tupelo, Mississippi 38802

Honorable Percy Lynchard
DeSoto County Chancery Court
2535 Highway 51 South
Hernando, Mississippi 38632

So certified, this the 19th day of October, 2012.

Joy Wolfe Graves