

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TIMOTHY SEAN CRAFT

APPELLANT

VERSUS

NO. 2009-CA-00204

DONNA GAYLE COOPER CRAFT

APPELLEE

APPEAL FROM THE CHANCERY COURT OF
JONES COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
CAUSE NO. 2005-0032E

THE HONORABLE FRANKLIN C. MCKENZIE, JR., CHANCELLOR, PRESIDING

BRIEF OF APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal:

Timothy Sean Craft

Appellant

Terry L. Caves

Attorney for Appellant

Donna Gayle Cooper Craft

Appellee

Maura McLaughlin

Trial Attorney for Appellee

Honorable Franklin C. McKenzie, Jr.

Chancellor

This the 30th day of July, 2009.

Respectfully submitted,


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I.

STATEMENT OF ISSUES ON APPEAL

1. The Chancellor erred in awarding alimony.
2. The Chancellor erred in awarding attorney's fees.
3. The Chancellor erred 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.
4. The Chancellor erred in refusing to find Donna Craft in contempt of court for her willful and malicious interference with Tim Craft's visitation with their children.

II.

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings and Disposition Below

Tim Craft filed his Complaint for Divorce on February 22, 2005. The Chancellor entered temporary orders in this case on April 22, 2005, December 8, 2005, June 23, 2006, and December 5, 2006. (CP 85, 124, 131, 144, 154)¹ The Court conducted three days of trial on August 22, 2006, September 6, 2006, and October 11, 2006.

On November 2, 2006, the Chancellor entered his Final Judgment granting a divorce and taking under advisement all other issues. (CP 115) (RE 8) The issues before the Court consisted of custody and visitation, claiming the parties' children as dependents on tax returns, child support, medical expenses for the children, equitable division of property, equitable division of debt, alimony, and attorney's fees.

On June 5, 2006, the Chancellor granted joint legal custody of the parties minor children namely, Sean Craft, Alayna Craft, and Lance Craft. (RE 5-6) The Chancellor also awarded Tim Craft full visitation with his children. (CP 85-86) From June 5, 2006 until October 18, 2007, Tim had joint legal custody and full visitation with his children and with the Court ordering that he have telephone contact with the children each and every night. In addition, the grandparents were awarded the right to have reasonable telephone contact with their three grandchildren. (CP 86) (RE 5-6)

On October 18, 2007, Donna filed her Motion to Reopen Evidence. On November 6, 2007, Tim filed his Motion for Contempt of Court asserting that Donna violated the temporary

¹References to (RE __) are references within the record excerpts; references to (Ex. __) are references to exhibits within the records; references to (CP __) are references to the clerk's papers.

orders, refused visitation, refused telephone contact, refused to allow holiday visitation and asked the Court to modify the temporary order to reduce his child support obligation. The Court entered a Temporary Order on November 14, 2007 denying Tim visitation on a temporary basis and limiting his visitation with his children to only an hour and one half on Fridays at the Department of Human Services in Laurel, Mississippi. (CP 144) (RE 13) The Court even restricted the visitation of the grandparents, Ralph and Cecile Craft, to the same time period. (CP 144) The Court left Tim with only an hour and one-half of visitation once per week with his children.

Tim filed his motion for the Court to reopen the evidence on March 7, 2007. A hearing was conducted with the Court entering its Order on March 21, 2007. In said order the Court agreed to take into consideration additional evidence that was presented at the hearing on March 7, 2007. (RE 11-12) The Court had this case under advisement for 16 months from November, 2006 and then an additional 12 months from the March 7, 2007 hearing on Tim's Motion to Reopen the Evidence.

The Court entered another Temporary Order on April 11, 2008 and did not address all of the issues that the Court had taken under advisement. The Court only addressed the issues raised in the Motions to Reopen and Motions for Contempt. (CP 154-156) Tim filed his Motion for the court to make specific findings of fact and conclusions of law and to enter a Final Judgment. (CP 162-166) Tim filed his MRAP 15(a) Notice with the Administration of Courts and attached thereto his proposed Findings of Facts and Conclusions of Law and Final Judgment of Divorce. (CP 176) A copy was mailed to all attorneys of record and the Chancellor on October 18, 2008.

The Chancellor entered his Final Judgment on January 8, 2009. Tim filed his Motion for Reconsideration for a New Trial, or to Alter and Amend Judgment on January 14, 2009. The Chancellor denied Tim's motion and entered his Order on January 21, 2009. (CP 207) (RE 19)

On January 22, 2009, the Court entered his Findings of Fact and Conclusions of Law. (CP 208-213) (RE 20-25) Tim timely filed his Notice of Appeal with this Court on February 3, 2009. (CP 214)

B. Statement of Facts

Tim and Donna Craft were married on June 21, 1991. (T. 111) They separated on December 28, 2004 when Donna cleaned out the house and hid the children from Tim. (T. 111) During the marriage, three children were born namely, Sean Craft, whose date of birth is March 3, 1993, Alayna Craft, whose date of birth is December 31, 1994, and Lance Craft, whose date of birth is August 14, 1997. (T. 112-113) Both parties are in good health and the children are in good health. (T. 112, 258) Tim was born on November 10, 1964. (T. 111) Donna was 35 years of age at the time of trial. (T. 243)

Both parties during the marriage served in some capacity in the Navy and/or Naval Reserve. (T. 117-119, 261-263) At the time of the divorce hearing, Tim was employed with B. J. Services and was earning an income as reflected on his 8.05 Financial Statement. (T. 115, Ex. 4) Donna was employed at Jones County Junior College as a secretary and her earnings are also reflected on her 8.05 Financial Statement. (Ex. 5)

During the early years of their marriage, the parties resided in Hattiesburg, Mississippi. They moved to Laurel for one year and then moved to Brandon, Mississippi for 15 months. (T. 116-119) The parties lived in Texas and finally settled in Moselle, Mississippi where they built their home. Tim was a good father to his children. He was very involved with his children and their activities from the time they were born until the separation in December, 2004. (T. 117-119) He enjoyed a wonderful relationship with his children prior to the separation. (T. 124)

Ralph and Cecile Craft were the paternal grandparents to the three children. The Crafts were heavily involved in the rearing of the three children. Cecile Craft babysat and spent time

with the children approximately two to three days per week while the children lived in Hattiesburg and Laurel. (T. 76-79) Ralph and Cecile also kept the children every other week during the summer months. (T. 79) Cecile helped carry the children to the doctor and provided substantial assistance both physically and financially for the children prior to the separation. (T. 78-80) Ralph and Cecile kept the children while Tim and Donna were on their weekend Naval Reserve duty. (T. 83) In addition to spending substantial time with the children, Ralph and Cecile provided substantial financial support. They paid off Tim and Donna's loan at Hancock Bank. (T. 86) They loaned thousands of dollars to Tim and Donna to help them with their bills. (T. 101-104, Ex. 7)

On June 23, 2006, the Chancellor entered his Temporary Order granting Tim Craft joint legal custody and full visitation with his three children and every other week in the summer. He granted full telephone contact by Tim with the children every evening. (CP. 85-86)

However, circumstances abruptly changed when Donna filed her Motion to Reopen Evidence on October 22, 2007. (CP 133-136) Tim was arrested on October 5, 2007 and charged with child exploitation arising from an alleged incident that occurred on July 21, 2006. Tim was accused of sexual battery of a child whose mother was Lola Hulsey. Lola Hulsey pled guilty to child exploitation of her own daughter. Tim has denied these charges and has never been convicted. Tim admits that he wrote a fabricated statement while under the influence of intoxication and prescription medication related to these charges. There is absolutely no other evidence of any wrongdoing by Tim.

On March 7, 2007, the Chancellor heard the testimony of Tim relating to the statement that he wrote on July 21, 2006 and based solely on this information, restricted Tim's visitation to an hour and one-half one time per week at the Department of Human Services in Laurel, Mississippi. Tim denied that the statements in the handwritten note were true. The Chancellor

refused to allow the children to see their grandparents, Ralph and Cecile Craft, except for the same time period.

During the time frame from July 21, 2006 to October, 2007 (15 months), Tim had full visitation with his children. Donna Craft admitted that Tim was a good father. (T. 263-274) There is no dispute that Tim Craft was a good father. Donna admitted that Tim substantially participated in the rearing of the three children. She admitted he kept the children while she was gone on Naval Reserve training. He kept the children for two months when she was mobilized, and he kept the kids while she was in Colorado. (T. 264) She admitted he was involved in all aspects of the children's activities. (T. 265-268) She admitted that Tim never abused the children, and the Court found there was no evidence of any abuse by Tim Craft of the three children. (T. 268-269) She admitted the children loved their father and that the grandparents, Ralph and Cecile Craft, were good people and loved their grandchildren. (T. 269-270) She admitted that the children spent substantial amounts of time with Ralph and Cecile Craft. (T. 269-270) All of Donna Craft's testimony about Tim's good parenting skills and his good relationship with his children was elicited on October 11, 2006, which was three months after the alleged incident giving rise to Tim's charges.

Although the Court stipulated that Tim never abused his children and all of the evidence was undisputed that Tim was a wonderful father, the Court restricted his visitation to an hour and a half with the Department of Human Services in Laurel, Mississippi. (T. 268-269)

With regard to the award of alimony by the Chancellor, he devoted one sentence to the alimony issue by stating: "on the issue of permanent alimony, the Court awards Donna \$100.00 per month in periodic alimony." (CP 212) (RE 24) With regard to the award of attorney's fees, the Court devoted one sentence to the attorney's fees issue by stating: "Donna is also awarded her attorney's fees as submitted by her attorney." (CP 213) (RE 24-25)

Before addressing alimony, the Court did not address or consider the *Ferguson* and *Hensley* factors, the division of property, nor the debt of the parties. Although the parties stipulated that each party would keep the property in their possession, the Court did not consider the property nor the value of the property before determining whether alimony was needed. In addition, the Court never considered or mentioned the substantial debt incurred by the parties nor did he divide any of the parties' marital debt. None of the *Armstrong* factors or the *McKee* factors were addressed or even mentioned by the Chancellor in awarding alimony and attorney's fees.

The Court failed to consider Donna's willful and contumacious contempt in interfering and denying Tim visitation and telephone contact with his children. Tim was required to file numerous motions for contempt and for enforcement of his visitation privileges. (CP 116-118, 126-128, T. 384-386) Although Tim voluntarily provided the children with a cell phone, Donna persistently refused to allow them to talk to their father. (T. 384-388)

Although the Court heard no evidence of Tim's mistreatment of his children and even though the evidence was undisputed that Tim was a good father, the Court severely restricted his visitation. (T. 269) The Court also heard testimony from two of the children that were over the age of 12, Sean Craft and Alayna Craft. Both Sean and Alayna testified that they wanted to live with their father who was asking for physical custody. (T. 20-21, 43) Sean and Alayna testified again on March 7, 2007 and again expressed their preference to live with their father. (T. 350, 366-370) Sean corroborated that his mother had refused to allow them to talk on the telephone with their father. (T. 367) The children desperately want to spend time with their father. (T. 20-24)

Tim also requested that he be allowed to claim the children as a dependent on his income tax returns. (T. 145) The Chancellor never commented or considered this request for relief.

C. Summary of the Argument

The Chancellor erred in awarding Donna Craft alimony in this case. The Chancellor did not take the initial step of making an equitable division of debt nor did he take the stipulation of property division into consideration. The Chancellor should have addressed the debt and property division before reaching the issue of alimony. In considering alimony, the Chancellor never considered any of the facts or the factors set forth in *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993).

The Chancellor erred in awarding attorney's fees to Donna Craft in the sum of \$22,297.00. The Chancellor's award of attorney's fees was not supported by any testimony addressing the *McKee* factors. Donna's itemization of attorney's fees, which consisted of 33 pages, was not produced until the last day of trial. Tim's attorney was not given an opportunity to cross-examine the information contained within the attorney's fee statement. Donna had the ability to pay attorney's fees as evidenced by her payment of \$12,202.85.

The Chancellor erred in restricting Tim Craft's visitation with his children to an hour and a half per week at the office of the Department of Human Services in Laurel, Mississippi. The record is devoid of any conduct by Tim Craft toward his children that adversely impacts their welfare or could remotely be considered to be dangerous to the children.

The Chancellor should have found Donna Craft in contempt for interfering with Tim Craft's visitation with his children. Donna's refusal to allow the children to talk to Tim on the telephone and hiding the children so that Tim could not see his children should not be condoned.

D. Legal Argument

1. The Chancellor erred in awarding alimony.

In *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), the Supreme Court recited the principle that spousal support should be considered only after division of marital property. The

Chancellor should first consider the parties' marital property and marital debt before addressing any award of alimony. *Ferguson v. Ferguson*, 639 So.2d 921 (Miss. 1994), *Marsh v. Marsh*, 868 So.2d 394, 398 (Miss. Ct. App. 2004). The Chancellor is required to identify marital property and marital debt, value marital property and marital debt and effectuate an equitable division of marital property and marital debt all before even considering any request for alimony.

In this case, the Chancellor never commented upon or considered the marital property, marital debt and the value of those items. The parties submitted their Rule 8.05 Financial Statements. (Ex. 4, 5) Although the parties stipulated that each party would maintain ownership of the property in their possession, the testimony revealed there was substantial debt and the value of the property was never considered. (T. 161)

The Mississippi Supreme Court has instructed Chancellor's to support their financial award with findings of fact tied to the specific factors set forth in *Armstrong v. Armstrong*, 618 So.2d 1278 (Miss. 1993). Failure to provide an on-the-record discussion of the factors governing permanent alimony is manifest error. *Henderson v. Henderson*, 703 So.2d 262, 266 (Miss. 1997).

In *Henderson v. Henderson*, 703 So.2d 262, the Court emphasized that all property division, lump sum or periodic alimony payments, and obligations for child support should be considered together.

Since the Court did not discuss any of the *Ferguson*, *Hemsley*, and *Johnson* factors with regard to marital property and marital debt and did not mention or consider any of the alimony factors set forth in *Armstrong*, Tim is unable to determine how the Court arrived at an alimony award of \$100.00 per month in this case.

There are several factors that must be considered in determining the proprietary of an alimony award:

1. The income and expenses of the parties;
2. The health and earning capacity of the parties;
3. The needs of each party;
4. The obligations and assets of each party;
5. The length of the marriage;
6. The presences or absences of the minor children in the home;
7. The age of the parties;
8. The standard of living of the parties;
9. The tax consequences of spousal support;
10. Fault or misconduct;
11. Wasteful dissipation of assets;
12. Any other factor bearing unjustice and equity.

Armstrong v. Armstrong, 618 So. 1278, 1280 (Miss. 1993). Where the division of marital assets in conjunction with nonmarital assets will adequately provide for a party, alimony need not be awarded. *Johnson v. Johnson*, 650 So.2d 1281, 1287 (Miss. 1994).

The last day of the trial of this divorce action occurred on October 11, 2006. At that time, Tim's 8.05 Financial Statement was admitted into evidence as Exhibit 4. At the time of the trial, Tim's net monthly pay was \$3,622.00 (Ex. 4) However, on March 4, 2008, at a hearing on the parties' motion to reopen the evidence, Tim's undisputed net monthly pay was \$1,000.00 per month. Tim lost his previous job. Tim's expenses had not changed since the last day of trial and reflected total monthly expenses of \$3,205.70. Tim's net monthly loss is \$2,205.70. (Ex. 4, T. 489)

Tim currently has no benefits from his employer as he did when he testified on the last day of the trial nor does he have any medical insurance. Tim has made significant efforts to try to find a better job. (T. 490-492) Tim brought to the Court's attention the material difference in his income that he was earning on the last day of trial on October 6, 2006 and at the hearing on March 4, 2008. However, the Court never considered any of this evidence when he entered his opinion. (CP. 208, T. 492-494) Tim further testified about his lack of assets to pay support. (T. 494)

When Tim deducts the child support as ordered by the Court in the amount of \$243.00, he is only left with \$757.00 a month to pay bills. (CP. 195) His monthly bills are \$3,205.70. Since the Court made no analysis of any of the financial facts in this case, an award of \$100.00 per month alimony taking into consideration Tim's income, expenses, debt, and child support award together with his responsibility for one-half of the medical expenses appears on its face to be unreasonable and manifestly erroneous. Both parties are in good health and the children are in good health. (T. 112, 258)

Each party has his or her respective financial needs as set forth in the Rule 8.05's. (Ex. 4, 5) Otherwise, no special needs are apparent by either party. The parties had substantial debts that were incurred during the marriage. Tim had debts totaling approximately \$65,941.00 as reflected on his 8.05. (Ex. 4) The debts listed on Donna's 8.05 Financial Statement totaled \$42,178.00. Tim's monthly obligations on his debts alone totaled \$540.00 using the minimum payments. After paying his child support of \$243.00 a month and his minimum debt payments of \$540.00 per month, Tim was left with only \$217.00 a month to provide for his own financial support. (1000 – 243 – 540 = 217)

The parties were married for 15 years. Donna was awarded physical custody of the parties' three minor children and Tim was only awarded an hour and a half of visitation restricted and supervised by the Department of Human Services once per week. Although 22% of Tim's income was \$220.00 per month, the Court ordered Tim to pay \$243.00 per month for child support without any explanation of how he arrived at that figure. (CP 197)

Tim was 42 years of age at the time of the divorce trial. (T. 111) Donna was 35 years of age at the time of the divorce trial. (T. 243)

The record reveals that the parties, both before and after the marriage, maintained a very low standard of living. The tax consequences of the Court's alimony award was not addressed by the Chancellor.

Donna was granted a divorce on the statutory grounds of adultery. Although the Court granted Donna the divorce, the Court never considered Donna's admission of committing adultery and other sexual encounters with females. Both parties were at fault in causing the demise of the marriage. (T. 245-250)

Donna cleaned out the house except for a few items of furniture while Tim was out of town. The record does not reflect any other factors used to determine the Chancellor's award in this case.

Based upon the evidence set forth above, the Chancellor should not have awarded alimony in this case. This Court should reverse and render the Chancellor's award of alimony. In the alternative, this Court should reverse and remand the alimony award for the Chancellor to make specific findings of fact with regard to the factors set forth in *Ferguson, Hemsley, Armstrong, and Johnson*.

2. The Chancellor erred in awarding attorney's fees.

The Chancellor entered his Final Judgment on January 8, 2009 and awarded Donna attorney's fees in the sum of \$22,297.00. The Chancellor, in his Findings of Facts and Conclusions of Law, devoted one sentence to his consideration of attorney's fees as follows: "Donna is also awarded her attorney's fees as submitted by her attorney." (CP 213)

On the last day of trial on October 11, 2006, Donna's attorney, without producing any attorney's fees statement prior to the third day of trial, submitted Exhibit 13 over the objection of Tim's attorney. Exhibit 13 purports to be an itemized attorney's fee statement. Although the bill reflects time beginning February 9, 2005 through October 11, 2006, Donna failed to produce this

document prior to admitting the document into evidence on October 11, 2006. Tim's attorney explained to the Court the difficulty in being able to cross-examine Donna's attorney with regard to time entries consisting of 33 pages without any prior notice. (T 325, 330) In addition, Donna's attorney did not record her own time but left this important duty to her secretary who obviously was not present in Court and subject to cross-examination. (T 325-331) In order for the Court to award attorney's fees in a divorce action, the party requesting fees must prove an inability to pay and must prove that those fees were reasonable and necessary.

In *McKee v. McKee*, 418 So. 2d 764, 767 (Miss. 1982), the Supreme Court stated that an award of fees should be fair, should compensate only work actually performed, and should be based on the finding that the work was reasonably required and necessary. The Court established the following factors for consideration in determining the proper amount of fees to be awarded:

1. The parties' relative financial ability;
2. The skill and standing of the attorney;
3. The novelty and difficulty of the questions;
4. The degree of responsibility involved in the management of the case;
5. Time and labor;
6. The usual and customary charge of the community; and,
7. Preclusion of other employment as a result of accepting the case.

No evidence was offered in support of any of the *McKee* factors. Donna's attorney did not testify to explain the work that was performed or her experience in handling domestic relation cases, the usual customary charges in the community or preclusion of other employment as a result of accepting the case.

A Chancellor's award or denial of a fee should be supported by findings of fact regarding the *McKee* factors. The Chancellor never mentioned that he even reviewed the bill nor did he comment on the rates to be reasonable or the difficulty of this domestic case. Before a litigant should be assessed with over \$22,000.00 in attorney's fees, the litigant's attorney should be

provided a copy of the itemized bill prior to the trial. The itemized bill should contain a list of the work performed by the opposing attorney.

Rule 34 of the Mississippi Rules of Civil Procedure is clear in that a party has thirty (30) days to produce documents that are requested in a request for production of documents. MRCP 34. Rule 37 (b)(2)(B) allows the Chancellor to exclude such evidence that does not comply with MRCP 34.

In this case, Donna did not produce her attorney fee statement until the third day of trial, which is a clear violation of Rule 34. (T 325-331) Donna presented Tim's attorney thirty-three pages of her itemized attorney fees on the third day of trial. Tim's attorney was not allowed to examine these statements during his preparation for trial, therefore he was not given an adequate amount of time to prepare a defense for the amount of her claim for attorney fees. Tim is fully aware that a complete bill could not be produced prior to trial, because preparation for trial would generate additional fees. However this litigation was ongoing for an extended period of time prior to the third trial date, and the bulk of Donna's attorney fees could have been produced in a timely manner prior to the day of trial. Due to Donna's violation of Rule 34 of the Mississippi Rules of Civil Procedure, Donna's attorney fee statement should not have been admissible at trial, and accordingly her claim for attorney fees.

The bill admitted into evidence also reflects that Donna had paid \$12,202.85 which clearly illustrates her ability to pay attorney's fees. (Ex. 13) Because Donna's attorney did not testify and explain the fee request, and because the Court made no findings of fact nor explanation for awarding such a large fee, this Court should reverse the award of attorney's fees.

At the hearing on March 4, 2008, Donna once again submitted an attorney's fee statement without any explanation, identification or corroboration as to whether or not the work was performed and whether it was reasonable. There was no testimony that she was unable to pay

those fees. Tim's attorney was once again presented with a statement at the time of trial without any opportunity to review the statement or cross-examine counsel. (T. 506-509) None of the *McKee* factors were presented by Donna's attorney nor did the Court comment on whether the fee was reasonable or if any of the *McKee* factors had been proven.

3. The Chancellor erred 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.

Tim Craft and his children have been deprived of visitation with each other for 22 months. They have been severely restricted from seeing each other except an hour and one-half one day per week in the presence of the Department of Human Services since October 5, 2007. This highly restrictive visitation was ordered despite undisputed testimony that Tim was a good father and never created any apprehension of harm toward his children. The Chancellor even found that there was no evidence of abuse by Tim. (T. 269, 479-480)

The Mississippi Supreme Court has stated in no uncertain terms that a non-custodial parent has a right to continue significant contact with their children under circumstances that foster a close relationship. *Herrington v. Herrington*, 648 So.2d 543, 545 (Miss. 1994). Except in unusual circumstances, a non-custodial parent is entitled to unrestricted, standard, or liberal visitation. *Cox v. Moulds*, 490 So.2d 866, 870 (Miss. 1986). The Mississippi Supreme Court defines standard visitation as two weekends a month from Friday until Sunday afternoon and at least five weeks of summer visitation plus some holiday visitation. *Messer v. Messer*, 850 So.2d 161, 167 (Miss. Ct. App. 2003), *Chalk v. Lentz*, 744 So.2d 789, 792 (Miss. Ct. App. 1999).

Visitation rights of the non-custodial parent should be tantamount to custody with respect to the place and manner of exercise of same, except in the most unusual circumstances that is something approaching actual danger or other substantial detriment to the children is required before a Chancellor may restrict visitation. *Cox v. Moulds*, 490 So.2d 866, 868 (Miss. 1986).

The Chancellor in this case has severely restricted Tim's visitation as if Tim had been convicted of a felony. Tim has never been convicted of a felony. Although Tim has been charged with sexual battery, these charges have been denied and these charges were made by the Lamar County District Attorney's Office in violation of an immunity agreement. (Ex. 5) Even convicted felons who are incarcerated in a penitentiary have been granted visitation with their children. Jurisdictions which have reached the question of visitation rights for incarcerated parents generally express that incarceration, alone, is not sufficient to preclude visitation. *Christian v. Wheat*, 876 So.2d 341 (Miss. 2004)²

Tim was awarded full visitation and joint legal custody on June 23, 2006. At the time the Court awarded him full visitation and joint legal custody, the same charges that are currently pending against Tim were also pending in Jones County for child exploitation. (T. 480-481) Those charges arose out of the same subject matter and the same set of facts as those charges that were mentioned by the Court in his Findings of Fact and Conclusions of Law. (T. 481) These charges have nothing to do with Tim's children. The charges in Jones County from June 23, 2006 when the Court awarded full visitation were pending more than a year. In other words, the same charges that the Court referenced in his Opinion, had been pending in Jones County for 2 ½ years while he was exercising full visitation and had joint legal custody with his children. (T. 481)

The Courts which have denied visitation most often have done so where the incarcerated parent has been convicted of a violent crime particularly if the crime was committed against the

²See *Nicholson v. Choctaw County*, 498 F.Supp. 295 (S.D.Ala. 1980); *Valentine v. Englehardt*, 474 F.Supp. 294 (D.N.J. 1979); *O'Bryan v. County of Saginaw*, 437 F.Supp. 582 (E.D.Mich. 1977); *Mabra v. Schmidt*, 356 F.Supp. 620 (W.D.Wis. 1973); *Michael M. v. Arizona Dept of Econ. Security*, 202 Ariz. 198, 42 P.3d 1163, 1165 (Ct. App. 2002); *In re Smith*, 112 Cal.App.3d 956, 169 Cal.Rptr. 564 (1980); *Hoversten v. Superior Court*, 74 Cal.App.4th 636, 88 Cal.Rptr.2d 197 (1999); *Smith v. Smith*, 869 S.W.2d 55, 57 (Ky.App. 1994); *Nielsen v. Nielsen*, 217 Neb. 34, 348 N.W.2d 416 (1984); *Hervieux v. Hervieux*, 603 A.2d 337, 338 (R.I. 1992); *Suttles v. Suttles*, 748 S.W.2d 427, 429 (Tenn. 1988).

child, and there is evidence that the parent will be a threat to the children. *Christian v. Wheat*, 876 So.2d 341, 346 (Miss. 2004), *Schmidt v. Bermudez*, 5 So.3d 1100 (Miss. Ct. App. 2008).

Not only has Tim been deprived of maintaining a significant relationship with his children, his children have equally been deprived from having a relationship with their father. Sean and Alayna both testified on two separate occasions during the course of this contentious litigation that they not only wanted to visit with their father but they wanted their father to have their custody and to live with him. (T 1-21, 42-54, 350, 365) There has been no evidence that Tim's poor choices in life have adversely impacted his children in any way.

The Chancellor ignored the testimony of the two children and ignored all of the undisputed evidence that Tim Craft was a good father. The Court's sole focus was on charges that have no relationship to what kind of father Tim is to his children. These charges are suspect at best in light of both Lamar and Jones County District Attorney's agreeing to dismiss the same charges under an immunity agreement.

This Court has emphasized that there is a presumption that parents are entitled to overnight visits, and that the restrictions should be imposed only to prevent harm to a child. *Fulk v. Fulk*, 827 So.2d 736, 743 (Miss. Ct. App. 2002). In *Dunn*, the Mississippi Supreme Court stated that there "must be evidence presented that a particular restriction on visitation is necessary to avoid harm to a child before a Chancellor may improperly impose a restriction." *Dunn v. Dunn*, 609 So.2d 1277, 1286 (Miss. 1992). Otherwise, the Chancellor's imposition of a restriction on a non-custodial parent's visitation is manifest error and an abuse of discretion." *Fulk v. Fulk*, 827 So.2d 736 (Miss. Ct. App. 2002). The Chancellor's imposition of a hour and a half one day per week restriction on Tim Craft's visitation is manifest error and an abuse of discretion.

Of significance in this case is the fact that Tim Craft had full visitation privileges with his children for approximately three months after the alleged incident occurred. Tim was granted full visitation privileges and exercised those privileges with his children from June 23, 2006 until October 5, 2007. These children were also blessed during that period of time with being able to visit with their grandparents, Ralph and Cecile Craft. Not only has Tim been denied visitation since October 5, 2007, but Ralph and Cecile Craft have also been deprived of enjoying their grandchildren. It also should not be overlooked that the children have been deprived of a relationship with their father. The children's relationship with their father has been all but terminated because of the stringent visitation schedule set by the trial court.

In examining the facts of this case, no compelling evidence was presented that the children were in any way threatened or placed in harms way by visiting in the home of Tim Craft and their paternal grandparents. In *Fulk v. Fulk*, 827 So.2d 736 (Miss. Ct. App. 2002), the Mississippi Court of Appeals reversed a Chancellor who restricted a mother's visitation with her child to a public restaurant during the early morning hours on a Sunday. *id* at 742.

The Chancellor further found that Tim was disqualified by statute to be the primary physical custodian of the minor children, however, the Court did not cite a particular statute referenced in his judgment. Further, the Court did not delineate the evidence to support his almost complete denial of visitation with the parties' minor children. (CP. 196)

The record and the Chancellor's decision is devoid of any such evidence that would support a restriction against overnight visitation and visitation with the father of these children. Therefore, the Chancellor's decision should be reversed and Tim Craft awarded full and standard visitation privileges with his children.

4. **The Chancellor erred in refusing to find Donna Craft in contempt of court for her willful and malicious interference with Tim Craft's visitation with their children.**

A finding of contempt is proper when one party has willfully and deliberately disobeyed an order of the Court. *Bredemeier v. Jackson*, 689 So.2d 770, 777 (Miss. 1997). Contempt matters are committed to the sound discretion of the trial court and their resolution will not be disturbed absent a showing of the finding of contempt was not based on substantial credible evidence. *McDonald v. McDonald*, 850 So.2d 1182 (Miss. Ct. App. 2002). Intentionally interfering with a non-custodial parent's visitation with his children is grounds for finding of contempt. *Chalk v. Lentz*, 744 So.2d 789, 792 (Miss Ct. App. 1999).

Since Tim Craft was awarded full and standard visitation privileges with his children, Donna Craft has fought to interfere and disrupt Tim's relationship with his children. This Court entered its temporary order granting Tim full and liberal visitation privileges and joint legal custody on June 22, 2006. (CP. 85-86).

At the trial on September 6, 2006, Tim testified about the specific acts that Donna had committed to interfere with his visitation. She moved and refused to tell Tim where the kids were located. She refused to keep him informed about the children's activities. She refused to accept his telephone calls. She constantly showed up late for visitation. She refused to allow Tim to talk to his children on the telephone. Tim bought cell phones for the children so that he could have telephone access to them. However, Donna continued to prevent them from using the cell phones. (T. 133-134) She refused to allow Tim to have the children on holidays. She refused to allow Tim to come to the school programs for the children. She would go so far as to take the children out of school.

Donna's intentional interference with his visitation privileges did not stop before September 6, 2006. Tim was required to file an emergency motion for citation and for contempt

on November 21, 2006. (CP. 116-118) After the hearing on September 6, 2006, Donna took the children's cell phone from them and refused the children to contact Tim. Although the Court did not find Donna in contempt of court for interfering with telephone calls, the Chancellor entered his order on March 21, 2007 designating the specific time period that Tim was allowed to talk to his children at night. (CP. 131-132)

Not only did Donna interfere with Tim's visitation but she also withdrew the children from school for a full week and disappeared on the coast so Tim could not see his children. (T. 483) Even after the Court limited Tim's visitation to an hour and one-half per week, Donna refused to allow him to have visitation for that hour and one-half. (T. 483) In addition, Donna refused to inform Tim about medical issues involving the children. (T. 487)

In reaching his decision to restrict visitation, the Chancellor incorrectly found that Tim was terminated from his employment as an industrial engineer at Delphi when his employer discovered sexually explicit photographs of a child downloaded on Tim's company owned computer. There is absolutely no evidence in the record that there was sexually explicit photographs of a child on Tim's computer. Also devoid of record, was the Chancellor's statement that Lola Hulsey was apparently charged with a felony in Lamar County, Mississippi either as a result of the photographs found on Tim's computer or from an investigation of her which was triggered by those photographs. Once again, facts supporting this finding is not in the record. (CP. 209)

The Chancellor should have found Donna Craft in contempt for her deliberate interference with Tim's visitation privileges. The Court should reverse and remand for the Chancellor to find Donna in contempt of the Court and to determine the amount of attorney's fees that should be awarded to Tim.

E. Conclusion

The alimony award to Donna Craft should be reversed and rendered since the evidence is undisputed that Tim Craft's net monthly income of \$1,000.00 per month is not sufficient to support an award for alimony. None of the *Armstrong* factors were considered in determining if an alimony award was appropriate. Furthermore, the Court failed to employ the first step of equitable division of assets and debts before even considering the need for alimony.

Before awarding such a large amount of attorney's fees, the Chancellor should have considered *McKee* factors to determine if the attorney's fees were reasonable. Also, Donna failed to prove that she had an inability to pay attorney's fees in light of the fact that she had already paid her attorney over \$12,000.00 in fees.

The Court erred in restricting Tim's visitation to an hour and one-half per week with his children. Absent a showing that the three children were in danger, Tim should have been granted full standard visitation with his children.

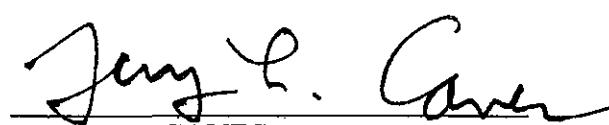
Donna should have been held in contempt of court for her interference with Tim's visitation privileges and telephone contact with his children.

Therefore, Tim respectfully requests that this Court reverse the Chancellor's award of alimony, attorney's fees, restrictive visitation privileges, and his decision not to find Donna Craft in contempt of court.

Respectfully Submitted,

TIMOTH SEAN CRAFT

BY:

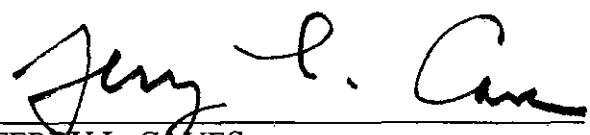

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CERTIFICATE

I, Terry L. Caves, Attorney for Timothy Sean Craft, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing document to Donna Gayle Cooper Craft, Post Office Box 365, Ellisville, Mississippi 39437; Honorable Maura D. McLaughlin, Post Office Box 18138, Hattiesburg, Mississippi 39404; and, Honorable Franklin C. McKenzie, Jr., Chancellor, Post Office Box 1961, Laurel, Mississippi 39441, their usual post office address.

This the 30th day of July, 2009.



TERRY L. CAVES