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**MISSISSIPPI SUPREME COURT DECISIONS – APRIL 5, 2018*****SUPREME COURT - CIVIL CASES***

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**MISSISSIPPI COURT OF APPEALS DECISIONS – APRIL 3, 2018*****COURT OF APPEALS - CIVIL CASES*****BAUMBACH V. BAUMBACH****CIVIL - DOMESTIC RELATIONS**

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - In determining an award of custody of a child, the factors to consider are: (1) health and sex of the child, (2) determination the parent has had continuity of care prior to the separation, (3) which parent has the best parenting skills and willingness and capacity to provide care, (4) employment of the parent and responsibilities of that employment; physical and mental health and age of the parents, (5) emotional ties of parent and child; moral fitness of parents, (6) the home, school, and community record of the child and the preference of the child at the age sufficient to express a preference by law, and (7) stability of the home environment and employment of each parent; and other factors relevant to the parent-child relationship

**FAMILY LAW - CHILD SUPPORT - PRE-COLLEGE TUITION** - Pre-college tuition is considered part of child support, not an extraordinary expense; the court may not require a parent to pay tuition in excess of the percentage of monthly income allowed by Miss. Code Ann. § 43-19-101(1) without a specific finding as to the deviation

**FAMILY LAW - DIVORCE - ALIMONY** - The decision to award rehabilitative alimony is not considered during equitable distribution; thus, an award of rehabilitative alimony supported by evidence can be affirmed notwithstanding error in the division of marital assets

**FACTS**

Jennifer Baumbach filed for divorce from her husband, Robert Baumbach. At the time, Jennifer lived in Columbus, Mississippi and did not work. Robert lived in Atlanta and worked as an airline pilot. During proceedings, Jennifer was awarded temporary physical custody of the couple's children, and Robert was ordered to temporarily pay alimony, child support, the mortgage on the couple's home, and all other joint debts. The parties consented to entry of divorce based upon irreconcilable differences. Jennifer was awarded sole custody of the couple's children, the marital residence, half of the proceeds from any sale of the residence, all of her 401(k) and Roth IRA, twenty-five percent of Robert's 401(k), and a portion of Robert's military pension. Robert was awarded the remaining real property having a negative value, half equity in the marital residence, and assumed all debt associated with the couple's real property. In accordance with the statutory guidelines, Robert was ordered to pay child support equal to twenty percent of his monthly income. In addition, Robert was ordered to pay the children's tuition and fees for private school and the mortgage on the marital residence, and to maintain a life insurance policy benefiting Jennifer. Jennifer was awarded over \$250,000 in marital assets. Because Robert was assigned over \$700,000 in marital debts, Robert's award in marital assets was less than zero. Robert filed a motion to alter or amend the judgment alleging numerous errors in awards and equitable division of marital assets, which was denied. Robert appealed.

**ISSUES**

Whether the chancery court erred in (1) awarding Jennifer physical custody of the children; (2) ordering Robert to pay the children's tuition and fees in addition to child support; (3) dividing the marital property; (4) awarding Jennifer rehabilitative alimony; (5) awarding Jennifer attorney's fees; and (6) awarding payment of temporary support in excess of Robert's monthly income and in refusing to credit Robert back during distribution of marital assets.

### **HOLDING**

(1) Because the chancery court in child custody cases must consider factors for the child's best interest, and because the majority of relevant factors weighed in favor of Jennifer, the chancery court did not err in awarding Jennifer physical custody of the children. (2) Because child support is determined by a percentage of monthly income statutorily prescribed unless specific factual findings are made by the chancellor, and because the chancellor gave no reasons for ordering Robert to pay tuition above twenty percent his monthly income, the chancery court erred in ordering Robert to pay the children's tuition and fees. (3) Because the equitable distribution of marital property requires that one spouse cannot disproportionately benefit from the sale of the marital residence while the other pays all of the equity debt, and because Jennifer was awarded half equity in the marital residence while Robert assumed the entire mortgage, the chancery court erred in distributing marital property. Further, because debts acquired during the course of marriage are also subject to equitable distribution, and because Jennifer was awarded over \$250,000 in marital assets while Robert was assigned approximately \$700,000 in liabilities, the chancery court erred in equitably distributing the marital property. (4) Because rehabilitative alimony is not considered in equitable division of marital property, and because Jennifer's award was supported by the evidence, the chancery court did not err in awarding Jennifer rehabilitative alimony. (5) Because an award of attorney's fees is based on the equity consideration of a party's ability to pay such fees without liquidation of assets, and because the chancellor failed to consider whether Robert would be forced to liquidate assets to pay Jennifer's attorney's fees, the chancery court abused its discretion in awarding Jennifer attorney's fees. (6) Because the chancellor has broad discretion finding contempt of court and awarding temporary support-payments, and because Robert made no efforts to pay any portion of the payments ordered, the chancery court did not err in awarding Jennifer temporary support. Therefore, the Court of Appeals affirmed in part and reversed in part the judgment of the Lowndes County Chancery Court.

### **PARTIAL CONCURRENCES & DISSENTS**

Judge Fair argued that the judgment should have been affirmed in its entirety. Further, although the settlement agreement disproportionately favored Jennifer, the chancery court applied the correct legal standard and arranged a settlement that followed the Mississippi Supreme Court's jurisprudence by eliminating the need for periodic alimony.

Judge Tindell argued that equitable distribution of marital property and alimony awards are interconnected and should be considered together to prevent inequity. Further, because the issues regarding equitable distribution of marital property were remanded, the issue of rehabilitative alimony should have been remanded as well.

#### **Affirmed in Part, Reversed & Remanded in Part - 2016-CA-00978-COA (Apr. 3, 2018)**

En Banc Opinion by Judge Barnes - Partial Concurrences/Dissents by Judge Fair & Judge Tindell

Hon. Dorothy Winston Colom (Lowndes County Chancery Court)

Tiffany Alayne Yates & Rachel Lee Hodges for Appellant - Carrie A. Jourdan for Appellee

Briefed by [Marilyn Higdon](#)

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## **HEISINGER V. RILEY**

### **CIVIL - CUSTODY**

**FAMILY LAW - CUSTODY - MODIFICATION** - To modify custody, the non-custodial party must prove (1) that a substantial change in circumstances has transpired since issuance of the custody decree, (2) that this change adversely affects the child's welfare, and (3) that the child's best interest mandates a change in custody

**FAMILY LAW - CUSTODY - ALBRIGHT FACTORS** - Equity dictates that where an *Albright* factor favors and rewards one parent because of that parent's malfeasance, the chancellor should consider that *Albright* factor to be neutral in considering whether to modify child custody

**FAMILY LAW - CUSTODY - ATTORNEY'S FEES** - The matter of awarding attorney's fees is largely entrusted to the sound discretion of the chancellor; when a party is held in contempt for violating a valid judgment of the court, attorney's fees should be awarded to the party that has been forced to seek the court's enforcement of its own judgement

### **FACTS**

Adam Heisinger and Priscilla Riley had a daughter, B.H., in Iowa in 2012. In September 2013, the Iowa court entered a decree awarding joint custody, with Riley having physical custody and Heisinger having visitation rights. Heisinger was also ordered to pay child support. The Iowa court later amended B.H.'s visitation schedule in November 2014, after Riley was found in contempt of court for denying Heisinger visitation. In August 2015, Heisinger discovered three burn marks on B.H.'s arm during visitation. B.H. said she got them at Riley's home in Meridian, MS when she touched the stove or oven. Heisinger took B.H. to the emergency room and had the marks documented. Riley and her husband Shawn picked B.H. up that month. Also seeing the burns, Riley took B.H. to the local police department to file a report about the burns. She also reported her suspicions of abuse or neglect to Mississippi Department of Child Protective Services. Riley denied Heisinger's next visitation request, and she told Heisinger that she wanted MDCPS to complete their investigation before allowing visitation. MDCPS found that any allegation of abuse was unsubstantiated. Riley petitioned the Lauderdale County Chancery Court to enroll the Iowa judgment and to suspend and/or modify Heisinger's visitation and increase his child support. Heisinger answered and counterclaimed to enforce the Iowa judgment, to modify custody, and for contempt. A guardian ad litem was appointed based on the abuse allegation. The chancellor found that Heisinger had proven a material change in circumstances, but denied his petition to modify custody based upon B.H.'s best interest. Riley's petition was denied. The chancellor also found Riley in contempt and awarded Heisinger attorney's fees. Both parties appealed.

### **ISSUES**

Whether the trial court (1) erred by not modifying custody; (2) abused discretion in awarding only \$1,950 in attorney's fees; (3) erred by finding Riley in contempt; (4) erred in denying the petition to increase child support; and (5) erred by finding that Riley failed to prove allegations of abuse and neglect.

### **HOLDING**

(1) Because equity dictates that where an *Albright* factor favors and rewards one parent because of that parent's malfeasance the chancellor should consider that *Albright* factor to be neutral in considering whether to modify child custody, and because the chancellor did not consider the "continuity of care" and "emotional ties" factors to be neutral, the trial court erred in considering whether to modify custody. (2) Because a trial judge has broad discretion in awarding attorney's fees as the result of a finding of contempt, and because the chancellor based the award only on Heisinger's knowledge of the attorney's invoices, the trial court did not err in awarding attorney's fees. (3) Because a finding of contempt must be supported by substantial evidence, and because Riley's objection to visitation rights was supported by a frivolous interpretation of Iowa's court order, the trial court did not err in finding Riley willfully violated the Iowa court order. (4) Because child support modifications are governed by Mississippi law and Riley's petition failed to develop the factors relevant to modification of child support under the law of the issuing state, the trial court erred in denying the petition to increase child support. (5) Because Riley waived the issue of abuse or neglect by failing to brief it, and because the issue was without merit, the trial court did not err in finding that Heisinger did not abuse or neglect B.H. Therefore, the Court of Appeals affirmed in part and reversed and remanded in part the judgment of the Lauderdale County Chancery Court.

**Affirmed in Part/Reversed & Remanded in Part - 2016-CA-01718-COA (Apr. 3, 2018)**

Opinion by Judge Wilson

Hon. Jerry G. Mason (Lauderdale County Chancery Court)

J. Douglas Ford for Appellant - Leslie C. Gates & William Stacy Kellum III for Appellee

Briefed by [D. Hunter V. Robertson](#)

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## IN RE ESTATE OF SAGET V. SAGET

### CIVIL - WILLS, TRUSTS, & ESTATES

**APPELLATE PROCEDURE - STANDARD OF REVIEW - FACT-FINDING** - It is the duty of the chancellor, as the trier of fact, to determine what evidence presented is credible, and where a chancellor does not make explicit findings, the appellate court will assume all disputed issues were resolved in favor of the appellee

**WILLS & ESTATES - UNDUE INFLUENCE - BURDEN OF PROOF** - When asserting undue influence, the initial burden is on the complainant to show by clear and convincing evidence the existence of a confidential relationship between a grantor and a defendant-grantee

**WILLS & ESTATES - UNDUE INFLUENCE - CONFIDENTIAL RELATIONSHIP** - When determining the existence of a confidential relationship, factors to consider include: (1) a person's dependence upon another, (2) a person's close relationship with another, (3) a person's reliance upon transportation and medical treatment by another, (4) a person's joint bank account with another, (5) a person's physical and mental condition, (6) a person's advanced age or poor health, and (7) another's status as power of attorney of a person

### FACTS

Rae Saget died in January 2014 in Vicksburg, MS. Her two surviving heirs were her two daughters Kappi and Korri. In 2006, Rae had opened four investment accounts with Morgan Stanley. All four accounts were to be split evenly between Kappi and Korri upon Rae's death. In August 2012, Rae removed Kappi as a beneficiary from all four accounts. That same day, Rae signed the required paperwork to divest Kappi of the four accounts. Upon Rae's death, Korri filed a petition to probate Rae's will. Kappi answered the petition with a counter-complaint to set aside Rae's will and instruments divesting Kappi from the investment accounts on the grounds that Rae lacked testamentary capacity and was unduly influenced in executing the instruments divesting Kappi from the investment accounts. The chancellor denied Kappi's complaint to set aside the conveyance of personal assets in Rae's investment accounts. Kappi appealed.

### ISSUES

Whether the chancellor erred in (1) finding that Kappi had the burden of proving undue influence; (2) not finding that once a confidential relationship was found between Korri and Rae, a presumption of undue influence arose; and (3) applying an incorrect legal standard regarding the presumption of undue influence.

### HOLDING

(1) Because the complainant carries the initial burden of showing the existence of a confidential relationship, and because Kappi failed to shift the burden of proof to Korri with clear and convincing evidence of the existence of a confidential relationship, the chancellor did not err in finding that Kappi carried the initial burden of proof. (2) Because the complainant must show a confidential relationship exists, and because evidence failed to demonstrate with clear and convincing evidence that Rae maintained a confidential relationship with Korri, the chancellor did not err in concluding that a presumption of undue influence did not arise. (3) Because the court looks to several factors when determining the existence of a confidential relationship, and because the chancellor discussed those factors and concluded Rae was sound of mind, despite being poor in health, the chancellor did not err in applying the legal standard regarding the presumption of undue influence. Therefore, the Court of Appeals affirmed the judgment of the Warren County Chancery Court.

**Affirmed - 2017-CA-00591-COA (consolidated with 2015-CA-01280-COA) (April 3, 2018)**

Opinion by Judge Greenlee

Hon. Marie Wilson (Warren County Chancery Court)

David M. Sessums for Appellant - Wren Carrol May for Appellee

Briefed by [D. Kirkwood Palmer](#)

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## ***COURT OF APPEALS - POST-CONVICTION RELIEF***

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## ***COURT OF APPEALS - CRIMINAL CASES***

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### **HIGGINBOTHAM V. STATE**

#### **CRIMINAL - MISDEMEANOR**

**APPELLATE PROCEDURE - NOTICE OF APPEAL - JUDGMENT OF ACQUITTAL** - Miss. R. App. P. 4(e) states that if a defendant makes a timely motion under the Uniform Rules of Circuit and County Court Practice (1) for judgment of acquittal notwithstanding the verdict of the jury, or (2) for a new trial under Rule 10.05, the time for appeal for all parties shall run from the entry of the order denying such motion

**APPELLATE PROCEDURE - NOTICE OF APPEAL - DATE OF ENTRY** - A notice of appeal filed after the court announces a decision, sentence, or order but before it disposes of any of the above motions, is ineffective until the date of entry of the order disposing of the last such motion outstanding, or until the date of the entry of the judgement of conviction, whichever is later

#### **FACTS**

Officer Vernon Eichelberger arrested Keith Higginbotham on charges of public profanity and disorderly conduct after Higginbotham approached him in a Walmart parking lot, shouting racial slurs and using profane language. The Winston County Circuit Court found Higginbotham guilty of both charges and ordered him to pay a fine of \$246.25 for each charge, plus court costs. Higginbotham appealed.

#### **ISSUE**

Whether the circuit court erred by failing to rule on a post-trial motion for a new trial.

#### **HOLDING**

Because Higginbotham filed his notice of appeal before the circuit court disposed of his motion for a new trial, the notice of appeal is ineffective. Therefore, the Court of Appeals lacked jurisdiction and the appeal was dismissed.

**Dismissed - 2016-KM-01755-COA (consolidated with 2016-KM-01755-COA) (Apr. 3, 2018)**

Opinion by Judge Carlton

Hon. George M. Mitchell Jr. (Winston County Circuit Court)

*Pro se* for Appellant - Taylor Tucker for Appellee

Briefed by [Maggie Vinzant](#)

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### **PARKER V. STATE**

#### **CRIMINAL - FELONY**

**EVIDENCE - EXPERT TESTIMONY - PRESERVATION FOR APPEAL** - In order to argue on appeal that the trial court erred in allowing expert testimony, trial counsel must make a timely objection at trial

**CRIMINAL PROCEDURE - DUE PROCESS - MENTAL EVALUATION** - A trial judge abuses his discretion in denying an indigent defendant's request for expert assistance only "when denial of such assistance would render the trial fundamentally unfair," and the accused gives concrete reasons for requiring an expert

**CRIMINAL PROCEDURE - DOUBLE JEOPARDY - CUMULATIVE PUNISHMENTS** - Criminal sentencing statutes intended to authorize cumulative punishments for the same offense do not violate double jeopardy

### **FACTS**

On January 28, 2016, Eric and Edna Burkett were in front of their home in Hattiesburg when a white pickup truck stopped in the street in front of their home. An unknown man came out of the truck, and they asked if they could help him. The man mumbled a few words, opened the truck's back door, took out a rifle, and shot Eric in the stomach. He also shot at Edna, but missed. A few minutes later and less than half a mile away, police found Shannon Parker in his truck, which was in a ditch with the tires spinning. The Burketts identified Parker in photo lineups and at trial as the man who shot Eric. At trial, the State tendered Carl Fullilove as an expert in the field of firearms and toolmark identification. After an opportunity to voir dire Fullilove outside the presence of the jury, Parker's counsel said he had "no objection" to Fullilove's testimony. Fullilove testified at trial that the shell casing found in front of the Burketts' home was fired from the rifle found in Parker's truck. Prior to trial, Parker also filed a *pro se* motion for mental examination, pointing to his unusual behavior at the scene, his prescriptions for depression and anxiety, and a previous suicide attempt. The court gave Parker the opportunity to present his motion, and offer any additional information that might warrant a mental evaluation. Finding "no rational basis" for appointing a psychologist for mental examination, the court denied Parker's motion. Parker was convicted of aggravated assault, and sentenced to twenty years in MDOC custody with an additional consecutive sentence of five years for using a firearm during the commission of the crime. Parker appealed.

### **ISSUES**

Whether (1) the trial court abused its discretion by allowing an expert in firearms and toolmark identification to testify; (2) Parker's trial attorney rendered ineffective assistance by failing to object to the expert testimony; (3) the trial court abused its discretion by denying Parker's *pro se* motion for a mental evaluation; and (4) Parker's five-year sentence enhancement for using a firearm during the commission of the crime violates double jeopardy.

### **HOLDING**

(1) Because trial counsel failed to object to the expert's testimony at trial, this issue was procedurally barred. (2) Because the decision not to object to the expert's testimony fell within the scope of trial strategy, the attorney's actions did not rise to the level of ineffective assistance. (3) Because denial of Parker's motion for mental evaluation did not render the trial fundamentally unfair, and because Parker presented no concrete evidence relevant to his ability to know right from wrong at the time of the offense, the trial court did not abuse its discretion in denying Parker's motion for a mental evaluation. (4) Because the firearm enhancement statute was intended to authorize cumulative punishments, Parker's enhanced sentence does not violate double jeopardy. Therefore, the Court of Appeals affirmed the judgment of the Forrest County Circuit Court.

### **DISSENT**

Judge Tindell argued that, in denying Parker's motion for mental evaluation, the trial court was focused on Parker's competency to stand trial rather than his sanity at the time of the incident. When Parker showed his sanity on the date of the alleged crime was questionable and that his insanity may have provided him a defense, the need for a mental examination was apparent, and denying the motion stripped the defendant of the ability to build an effective defense.

**Affirmed - 2016-KA-01502-COA (Apr. 3, 2018)**

En Banc Opinion by Judge Wilson - Dissent by Judge Tindell

Hon. Jon Mark Weathers (Forrest County Circuit Court)

Hunter Nolan Aikens (Pub. Def. Office) for Appellant - Laura Hogan Tedder (Att'y Gen. Office) for Appellee

Briefed by [Daniel Tankersley](#)

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