

**FILED**

**JUN 30 2015**

CHOCTAW SUPREME COURT  
BY:   
COURT CLERK

IN THE CHOCTAW TRIBAL SUPREME COURT OF THE  
MISSISSIPPI BAND OF CHOCTAW INDIANS

Isaiah Rashad Mingo

Appellant

vs.

SC 2013-04

Alexis Dawn Mingo

Appellee

PER CURIAM (Chief Justice Kevin Briscoe and Associate Justices Brenda Toineeta  
Pipestem and Edwin R. Smith)

OPINION AND ORDER

Isaiah Rashad Mingo appeals in part the Choctaw Civil Court's March 5, 2013, Divorce Judgment prohibiting the girlfriend of Isaiah from being present during overnight visitation with his minor child; finding Isaiah in contempt of court for violating the court's temporary order prohibiting his girlfriend from being present during visitation with his minor child and ordering Isaiah to be incarcerated; and granting Alexis Dawn Mingo full legal custody. For the reasons stated herein, the Court reverses on the first two issues, but upholds the decision to grant Alexis full custody.

**FACTS**

1. The parties Isaiah Rashad Mingo (Isaiah) and Alexis Dawn Mingo (Alexis) were legally married on May 8, 2010. One child was born, Jaliah Rashad Mingo d/o/b 9-03-2005. Parties lived together as husband and wife until February 26, 2012, when they finally separated.
2. Alexis filed a Complaint for Divorce on September 6, 2012.

3. Alexis filed a Motion for Temporary Relief contemporaneous with her filing for divorce on September 6, 2012.
4. A hearing was held on September 19, 2012, wherein a Temporary Custody and Child Support Order ("Temporary Order") was issued. The Temporary Order included the requirement that Isaiah return to the home of Stella Willis with his minor child for overnight visitations, and that Isaiah's girlfriend not be allowed to be present during his visitation with his minor child.
5. Alexis filed a Motion for Contempt and Other Relief ("Motion for Contempt") on November 2, 2012, alleging, among other issues, a violation of the Temporary Order visitation requirements:

"[t]he Defendant has willfully violated the Temporary Order by not returning with the minor child to Stella Willis' house during his overnight visitations.... and such conduct places the Defendant in contempt.... 11. Execution and appropriate process should issue for the collection of all amounts and the accomplishment of all things requested herein. THEREFORE, Alexis requests this Court enter a judgment against the Isaiah adjudicating, finding and ordering the relief prayed for hereinabove and any other relief as may be necessary."

6. The summons to appear and defend against the Motion for Contempt was personally served upon Mr. Mingo on November 7, 2012.
7. According to the record, the Motion for Contempt scheduled to be heard on November 20, 2012, was continued to January 30, 2013, and then further continued to February 25, 2013, by agreement of the Parties.
8. The court issued a Divorce Judgment on March 5, 2013.
9. On March 15, 2013, Mr. Mingo filed a Motion to Amend or Reconsider Final Judgment, and a Motion to Recuse Trial Judge and Vacate Judgment.

10. Alexis' Response to Isaiah's Motion to Recuse Trial Judge and Vacate Judgment was filed on April 3, 2013.
11. The court heard and denied Isaiah's March 15, 2013 motions on April 3, 2013. The court issued its Memorandum Opinion on Isaiah's Motion to Recuse Trial Judge and Vacate Judgment ("Memorandum Opinion) on April 23, 2013.
12. Isaiah filed this appeal on May 3, 2013.

#### ANALYSIS AND DISCUSSION OF ISSUES

Where the laws of the Mississippi Band of Choctaw Indians Code are silent, the Court is directed to look to the Federal laws and the laws of Mississippi for guidance. Although the laws of the state of Mississippi are not controlling, these laws do provide guidance. Therefore, the Court looks to the laws of Mississippi to help resolve the issues before the Court.

**I. Whether the Trial Judge committed manifest error or abused its discretion in prohibiting the girlfriend of Isaiah Mingo from being present during his visitation with his minor child.**

The first issue before the Court is whether the court committed manifest error or abused its discretion when the trial judge prohibited the girlfriend of Isaiah from being an overnight guest during Isaiah's visits with his minor child. The court has "broad discretion when determining appropriate visitation and the limitations thereon. . . . This Court will not reverse a [trial court's] findings of fact so long as they are supported by substantial evidence in the record. . . . However, this Court will reverse when [the trial court] is manifestly in error in [its] finding of fact or has

abused his discretion.” Harrington v. Harrington, 648 So.2d 543, 545 (Miss.1994) (citations omitted).

The Court’s review of the record finds the Trial Judge’s explanation for the restriction against Isaiah having overnight guests in the April 23, 2013, Memorandum Opinion to be dispositive of the issue before us. Specifically, the Trial Judge states in the Memorandum Opinion that “[t]his requirement was placed on the Defendant specifically because he willfully ignored the Court’s [T]emporary [O]rder mandating that his new girlfriend not be present during the visitation.” The court’s justification for prohibiting Isaiah’s girlfriend from being present during overnight visitation with his minor child is punitive and clearly an abuse of discretion.

The Court does not address whether the Trial Judge committed manifest error. However, the Court is concerned that that the record does not include a written opinion to support the orders in the Divorce Judgment.

The Court reverses and renders the trial court’s prohibition on Isaiah from having overnight guests during his visitation with his minor child. However, the Court does not remove the restriction that Isaiah shall, until he obtains his own home, exercise overnight visitation with his minor child at his biological mother’s residence or the home of Stella Willis.

**II. Whether the trial court committed manifest error or abused its discretion by ordering Isaiah Mingo to be incarcerated for violating the prohibition against his girlfriend being present during his visitation with his minor child, as ordered by trial court’s temporary order.**

The second issue before the Court is whether the lower court violated Isaiah's rights of due process by finding him in willful contempt for his failure to comply with the September 19, 2012, Temporary Order's visitation requirements and ordering him incarcerated. The Divorce Judgment is silent as to the specific visitation orders violated by Isaiah. According to the transcript, the trial court ruled from the bench and ordered Isaiah held in willful contempt for failure to comply with the "temporary order of this [c]ourt, which required the minor child to stay in the home of Stella Willis during visitation **and** his girlfriend was not allowed to be present during his visitation, not just overnight, just not present." TR, at p.71 [emphasis added]. Isaiah does not appeal the trial court's order finding him in willful contempt for violating the Temporary Order's visitation requirement that Isaiah return with his minor child to the home of Stella Willis for overnight visitations.

The Court takes judicial notice that the bench ordered detention period for the contempt cited above was from 4:30pm Sunday until the following Tuesday at 4:30pm for four consecutive weeks. TR, at 71-72. However, the detention order in the Divorce Judgment was for three consecutive weeks from 4:30pm Sunday until the following Tuesday at 4:30pm. The Divorce Judgment included no explanation for the reduction in sentence for its finding of willful contempt. *Id.* at p. 3. The Trial Judge should take better care in putting his bench rulings to written judgments.

Although Isaiah continues his arguments challenging the language of the Temporary Order prohibiting his girlfriend from being present at all times during

visitation with his minor child, that issue is moot as a final order has been made in the divorce and custody action before the trial court in regard to visitation.

#### A. Standard of Review

The proper standard of review for contempt is determined by whether the contempt is civil or criminal. "If the contempt is civil, the proper standard utilized for review is the manifest error rule. If the contempt is criminal, then we will proceed ab initio and determine on the record whether the person in contempt is guilty of contempt beyond a reasonable doubt." Dennis v. Dennis, 824 So.2d 604, 608 (Miss. 2002) (citing Purvis v. Purvis, 657 So.2d 794,797 (Miss. 1994).

#### B. Type of Contempt

In regard to determining whether the contempt charges under review are civil or criminal, the Court must make its own determination. "On appeal, the trial court's classification is not conclusive. Thus, the determination should focus on the character of the sanction itself and not the intent of the court imposing the sanction." *In re: Thomas Corey McDonald and Edwin Cheshire, In Re: Guy Jernigan*, 2010-CA-01099-SCT, 2010-CA-01100-SCT (Miss. 2012). "This Court has explained that civil contempt is to coerce action while criminal contempt is to punish for violation of an order of court:

If the purpose of the proceedings is to coerce action or non-action by a party, the order of contempt is characterized as civil. This type of contempt proceeding is ordinarily instituted by one of the parties to the litigation who seeks to coerce another party to perform or cease performing an act. The order of contempt is entered by the court for the private benefit of the offended party. Such orders, although imposing a jail sentence, classically provide for termination of the contemnor's sentence upon purging himself of the contempt. . . . Consequently, it is said that the contemnor 'carries the key to his cell in his own pocket.' [citations omitted] On the other hand, a criminal contempt proceeding is maintained solely and simply to vindicate

the authority of the court or to punish otherwise for conduct offensive to the public in violation of an order of the court.”

MOULDS, 791 So.2d 220 (Miss. 2001) (citations omitted).

The record clearly indicates that the court found Isaiah in criminal contempt. The finding of contempt and court ordered incarceration did not compel compliance with the Temporary Order, but rather was punishment for violating the Temporary Order.

In regard to criminal contempt, the location of the contempt action itself will determine whether the contempt is direct or constructive and thereby determine the due process protections afforded contemnor.

Direct criminal contempt involves words spoken or actions committed in the presence of the court that are calculated to embarrass or prevent the orderly administration of justice. Punishment for direct contempt may be meted out instantly by the judge in whose presence the offensive conduct was committed. . . .

Unlike direct contempt, constructive contempt involves actions which are committed outside the presence of the court.... [and] defendants must be provided with procedural due process safeguards, including a specification of [criminal] charges, notice, and a hearing.”

Dennis, at 607-608 (quoting Moulds v. Bradley, 791 So.2d 220, 224-25 (Miss. 2001)). Even though Appellant admitted in court that his girlfriend was present during his visitation with his minor child, the act of allowing his girlfriend to be present happened outside the presence of the court. “The acts complained of herein were committed outside the presence of the court; therefore the acts constituted constructive criminal contempt and procedural due process safeguards attached.” Id., at 609.

“Criminal penalties may not be imposed on someone who has not been afforded the protections that the Constitution requires of such criminal

proceedings.” Id. (citing Hicks v. Feiock, 485 US. 624, 632, 108 S.Ct. 1423, 99 L.Ed.2d 721 (1988)). “A defendant in contempt proceedings is entitled to notice and is entitled to be informed of the nature and cause of the accusation, of his rights to be heard, to counsel, to call witnesses, to an unbiased judge, to a jury trial, and against self-incrimination, and that he is presumed innocent until proven guilty beyond reasonable doubt.” Dennis, at p. 610 (citing Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 798-99, 107 S.Ct. 2124, 95 L.Ed.2d 740 (1987); *see also* Moulds, 791 So.2d at 225; Ramsay v. Ramsay, 125 Miss. 715, 88 So. 280 (1921)). In this case, Isaiah argues, and Alexis agrees, that Isaiah was not informed by written motion of any charge of criminal contempt for violating the Temporary Order’s prohibition against having the girlfriend present during visitation, nor of the request for incarceration for such contempt. Isaiah’s Brief, at p.16, and Alexis’ Reply Brief, at 19.

However, notwithstanding the lack of notice for criminal contempt, Alexis argues that Isaiah “waived his rights of due process by knowingly appearing and defending himself against the allegations of contempt and because he did not object to any deficiency in process during the trial he should be prohibited from raising the issue here.” Alexis Brief, at 19. Alexis relies on Davis v. Davis for the proposition that in a criminal contempt case “[t]he due process rights to notice and hearing prior to a civil judgment are subject to waiver.” 824 So.2d 604 (Miss. 2002). Alexis also asserts that the contempt notice provided for the violation of the Temporary Order’s requirement to return to the home of Stella Willis also provided implicit



notice to Isaiah that he would have to defend himself against allegations of contempt on other issues in the Temporary Order.

In Dennis, the Court held that the appeal for defective service of process and due process protections of notice, hearing and right against self incrimination were waived in the criminal contempt proceeding where notice of civil and criminal contempt included a specific request for incarceration was served on Appellant's attorney instead of Appellant directly; Appellant addressed and denied all contempt allegations; Appellant called adverse witnesses; and, where Appellant had previously been warned by the court "that he would be incarcerated if he did not obey the court's orders." Dennis, at 609-610. The Court finds Dennis distinguishable from the facts in the case before us.

Although both courts had on-going jurisdiction over the parties, a review of the record shows distinct differences with the facts in Dennis. First and foremost, Isaiah was not under prior instruction from the court that he would be held in contempt for not following court orders. The Motion for Contempt provided by Alexis regarding alleged violations of the Temporary Order did not specify whether the contempt allegations were civil or criminal and did not specifically request the court to order incarceration for a finding of guilt, but asked for "any other relief as may be necessary." Further, unlike the Appellant in Dennis, Isaiah did not deny allegations against himself, but admitted to having his girlfriend present when he was visiting his minor child. TR, at p.9.

The Court, recognizing the specific due process protections provided for criminal contempt actions and that these protections do not allow for implicit

notice, finds that the lower court committed manifest error by finding Isaiah guilty of criminal contempt and ordering him to be incarcerated for violating the Temporary Order prohibiting his girlfriend from being present during visitation with his minor child. Isaiah was not provided notice of his alleged criminal contempt, nor was he informed of the consequences for a violation of criminal contempt.

The Court reverses the Divorce Judgment in part by vacating the finding of willful contempt for Isaiah's failure to comply with the Temporary Order's visitation requirement that prohibited his girlfriend from being present during visitation with his minor child. The court's sentence in the Divorce Judgment for finding Isaiah in "willful contempt for his failure to comply with the visitation order" is hereby reduced by half, from 6 days to 3 days. Isaiah shall report to the Choctaw Detention Center at 4:30pm on Sunday and serve until 4:30pm on Monday for three consecutive weeks for failure to spend overnight visitations at the home of Stella Willis. The lower court's instructions in regard to sentencing for contempt are not further altered.

**III. Whether the trial court committed manifest error or abused its discretion by not awarding joint legal custody of the parties' minor child.**

The issue before the Court is whether the trial court committed manifest error or abused its discretion by not awarding joint legal custody of the parties' minor child. Isaiah alleges that the trial court abused its discretion in not awarding joint legal custody because "[t]he trial court judge did not give any valid reasons for

denying the award of joint legal custody... [and] [t]he ruling was without basis on the matters contained in the record.”

Isaiah is correct in that the trial court’s Divorce Judgment denying joint legal custody is without explanation of the factors that led to the court’s decision. The guidance provided by the Court in Bacon, the seminal case on child custody in separation or divorce cases, specifies that “[t]he trial judge must make specific written findings in regard to such testimony in the court’s decision.” Id., at 3. The Trial Judge must always remember to include his findings of fact in written opinions not only because it is his responsibility as the trier of fact, but also to enable the Court to properly review the case on appeal.

Regardless of the Trial Judge’s error in omitting written findings in the final order, the Court in this case is able to review the Choctaw Code, case law and the record to determine whether the decision of the trial judge constituted an abuse of discretion resulting in manifest injustice. Bacon v. Bacon CS 2003-1, at 3 (March 21, 2005).

It is the opinion of this Court that Choctaw Code section 9-3-3 provides the rule for granting both the legal and physical custody of minor child(ren) in a separation or divorce.<sup>1</sup> “The presumption stated in 9-3-9 is an express legal declaration that reflects the history and culture of the Mississippi Band of Choctaw Indians as a matriarchal and matrilineal society. The presumption is therefore not

---

<sup>1</sup> The Court interprets the law to include both legal and physical custody unless or until the Mississippi Band of Choctaw Indians Tribal Council amends the law to reflect a different view of preference in regard to legal custody.

inadvertent and must be closely adhered to. However, the presumption is *not* irrefutable[sic] and may be overcome only if there is clear and convincing evidence that the mother is not capable or fit to discharge her responsibilities as the [legal or physical] custodial parent.” Bacon v. Bacon, CS 2003-1, at 3 (March 21, 2003).

Choctaw Code section 9-3-9 states:

In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved, the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining [legal and physical] custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties and the natural presumption that the mother is best suited to care for the young children. The court may inquire of the Children’s desires regarding the future custody; however, such expressed desires shall not be controlling and the court, may nevertheless, determine the children’s custody otherwise.

Therefore, Court finds that the presumption for legal custody lies with the mother unless overcome by clear and convincing evidence that the mother is not capable or fit to discharge her responsibilities as the legal custodial parent.

Although the Divorce Judgment is silent on the judge’s rationale for denying legal custody to Isaiah, a review of the record provides no evidence or testimony challenging the presumption of legal custody in favor of Alexis, the mother. The Court also notes, that the parties agreed that Alexis would be given physical custody of their minor child. Therefore, the Court affirms the lower court decision granting legal custody to the Alexis.

#### CONCLUSION

On issue one, the Court finds that the Trial Judge committed manifest error and abused his discretion in restricting Isaiah from having overnight guests until he obtained his own home. Therefore, the court order is reversed and the prohibition against Isaiah having overnight guests is removed.

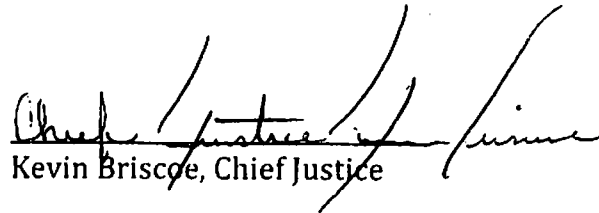
On issue two, the Court finds that the Trial Judge abused its discretion in finding Isaiah in criminal contempt of court and ordering him incarcerated for three

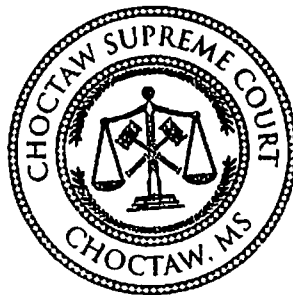
days. Therefore, the time ordered for incarceration for violating the Temporary Order's visitation requirement is reduced by half, from six days to three days.

On the third and final issue, the Court upholds the decision granting legal custody to Alexis.

SO ORDERED THIS THE 30<sup>th</sup> DAY OF JUNE, 2015.

For the Court

  
Kevin Briscoe, Chief Justice



CERTIFICATE OF SERVICE

I do hereby certify that I have this, the 1st day of July, 2015, caused to be forwarded by the United States Mail, a true and correct copy of the above and foregoing document to the below listed counsel of record.


Hon. Steven D. Settlemires  
Attorney At Law  
410 East Beacon St.  
Philadelphia, Mississippi 39350

Hon. J. Andrew Hammond  
Choctaw Legal Defense  
Post Office Box 6255  
Choctaw, Mississippi 39350

Hon. K. Lee Stribling  
Stribling Law Firm, PLLC  
Post Office Box 260  
Sebastapol, Mississippi 39359

Hon. Kiley C. Kirk  
Law Office of Kiley C. Kirk  
Post Office Box 387  
Louisville, Mississippi 39339

Judge Jeffrey Webb  
Choctaw Tribal Court  
Choctaw, Mississippi 39350  
(Hand Delivery)

  
Jane Charles, Supreme Court Clerk  
