IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2018-CA-00278-COA

ARMOND ALBERT KAISER **APPELLANT**

v.

MELANIE JANAE KAISER **APPELLEE**

DATE OF JUDGMENT:	01/17/2018
TRIAL JUDGE:	HON. JENNIFER T. SCHLOEGEL
COURT FROM WHICH APPEALED:	HANCOCK COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	GEORGE W. HEALY IV
ATTORNEY FOR APPELLEE:	PATRICK T. GUILD
NATURE OF THE CASE:	CIVIL - CUSTODY
DISPOSITION:	AFFIRMED - 06/11/2019
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

BEFORE CARLTON, P.J., LAWRENCE AND C. WILSON, JJ.

C. WILSON, J., FOR THE COURT:

¶1. Armond Albert Kaiser ("Al") appeals the chancellor's award of "primary physical custody"[1] of his two minor children to his ex-wife, Melanie Janae Kaiser ("Melanie"). We find no error and affirm.

FACTS AND PROCEDURAL HISTORY

¶2. Al and Melanie were married in December 2010. Prior to their marriage, Al and

[1] As this Court has noted, "there is actually no provision under the statute for 'primary' physical custody." *Shows v. Cross*, 238 So. 3d 1224, 1227 n.2 (Miss. Ct. App. 2018) (quoting *Rush v. Rush*, 932 So. 2d 794, 796 (¶9) (Miss. 2006) (discussing Miss. Code Ann. § 93-5-24 (Rev. 2004)). But lawyers and judges commonly use the phrase. "As in this case, the phrase 'primary physical custody' is often meant to describe physical custody in one parent, with the other having specified visitation rights." *Id.*

Melanie had one child, Katie,[2] born in 2007. Their second child, Avery, was born in 2014. In March 2015, Al and Melanie separated. Following their separation, Al remained in Diamondhead, Mississippi, with the children, and Melanie moved to Louisiana.

¶3. Al subsequently filed for divorce in Mississippi, and Melanie filed a separate divorce action in Louisiana. Jurisdictional issues arose after the separate filings. Ultimately, the Louisiana court retained jurisdiction over the divorce action and the Mississippi chancery court retained jurisdiction over all matters related to the custody of the two minor children.

¶4. In July 2015, Melanie's then boyfriend, John Pullen, was arrested for simple assault/domestic violence and resisting arrest. According to the police report, Melanie contacted the police due to "problem[s] with her intoxicated (live-in) boyfriend." Once the police arrived, Melanie advised that Pullen was "extremely intoxicated" and "started to take punches at her but was so intoxicated it gave her an opportunity not to be hit because he fell onto the floor." The police had to "physically take [Pullen] to the floor and wrestle him in order to handcuff him." The police then took Pullen into custody and transported him to the police station. Melanie had the two children in her care on this date, but the children are not mentioned in the police report.

¶5. From August to November 2015, Melanie did not see her children despite numerous requests and efforts to see and speak to them. On one occasion, Al agreed to meet Melanie to exchange custody, but Al failed to appear at the agreed-upon time and location. When Melanie inquired about her children, Al responded that "[t]he children [we]re fine" and that

[2] We substitute the names of the minor children in order to protect their privacy.

he was "going out of town to stay with people [Melanie] d[id] not know." Al then took the children to a casino where they stayed for a few nights. Thereafter, Al sent Melanie an email proposing a visitation schedule "contract" that required Melanie to pay to see her children.

¶6. On Katie's birthday, Melanie called Al but was not allowed to speak to Katie. When Melanie went to Katie's school to inquire about lunch, Al checked Katie out of school for the sole purpose of preventing Melanie from seeing her. Al then called law enforcement and alleged that Melanie was stalking Katie. Al subsequently obtained an order of protection against Melanie despite no arrest or charges filed against Melanie.

¶7. In December 2015, Al filed a motion for emergency temporary relief wherein he expressed his concern for his children's safety due to Pullen's history of alcohol abuse and domestic violence. Thereafter, the chancellor entered an order enjoining Melanie from allowing the children to be in the presence of Pullen.

¶8. In May 2016, Melanie filed a motion to appoint guardian ad litem and to modify the court's temporary custody order. Melanie requested the court modify its temporary order to allow her visitation to occur in her new apartment rather than in her parents' home. Melanie also requested, "[g]iven the allegations made by [Al] in this cause," that the Court "[appoint] a Guardian Ad Litem to investigate said allegations and make a report to [the] Court on the date of trial regarding the custody of the minor children of the parties[.]" Al did not join Melanie's request or otherwise file a response to her motion.

¶9. The chancellor appointed a guardian ad litem ("GAL") on June 27, 2016. Pursuant to the chancellor's order:

> [T]he Guardian Ad Litem shall assist the court in this matter by taking any steps necessary to investigate this case, including, but not limited to, interviewing all parties and minor children, making a home visit of the parties, attending the deposition of the parties, and make her reports and findings to the Court before the review date set below, specifically as concerns [Melanie's] visitation with the minor child[ren]. That the parties shall have the opportunity to depose the Guardian Ad Litem if either party [chooses] to do so, and in the event a deposition of the Guardian Ad Litem is taken, the same shall be made available to the Court as soon as possible prior to the trial of this matter. That it is understood that the Guardian Ad Litem will not be available for the actual trial of this matter, but she may be reached by telephone if the Court so desires to speak with the Guardian Ad Litem.

Following her appointment, the GAL interviewed the parties and the two minor children, attended the parties' depositions, conducted a home visit, and provided a letter-report to the chancellor on November 11, 2016. In her report, the GAL gave a preliminary recommendation that Al should be awarded "primary physical custody" of the children and that Melanie should be awarded visitation to include alternating weekends and holidays as well as generous visitation during the summer months.

¶10. The trial in this matter took place over approximately eleven days, beginning in November 2016 and ending in January 2018. The GAL testified at trial consistent with her November 2016 report, but the GAL neither completed her testimony nor attended the entire trial. Soon after the GAL testified at trial, she filed a motion to withdraw, and the chancellor granted the GAL's request. The GAL did not make a final recommendation to the chancellor either within her November 2016 report or at trial. On January 17, 2018, the chancellor entered a detailed final judgment and awarded physical custody of the two minor children to Melanie and regularly scheduled visitation to Al.

¶11. In the final judgment, the chancellor found that the GAL's appointment was

discretionary and did not specifically include in her findings the reasons for rejecting the GAL's initial custody recommendation:

> The GAL did not finish her testimony at trial and moved the Court to allow her withdrawal shortly thereafter. The Court granted her relief without appointing a substitute, because the Court determined that the services of a GAL were no longer necessary. The Court initially appointed the GAL due to Al's allegations during the period of time in which Al wrongfully withheld contact between Melanie and the children from August to October 2015. Neither the Court nor the GAL found that the children were in danger in Melanie's care. There were no allegations of abuse that mandated the appointment of a GAL in the first instance. The appointment [of the GAL] was in fact discretionary and made for investigative purposes.

¶12. Al now appeals and contends: (1) The chancellor erred in not finding it was in the best interest of the minor children to be kept in the custody of Al from August to November 2015; (2) the chancellor erred in finding that the appointment of the GAL was discretionary and in allowing the GAL to withdraw during trial without rendering a final recommendation; (3) the chancellor erred in awarding physical custody of the two minor children to Melanie; and (4) the chancellor erred in failing to continue the trial after Al retained new counsel.

STANDARD OF REVIEW

¶13. A chancellor's factual findings "will not be disturbed unless she was manifestly wrong, clearly erroneous, or applied an erroneous legal standard." *Blakely v. Blakely*, 88 So. 3d 798, 801 (¶3) (Miss. Ct. App. 2012). Questions of law are reviewed de novo. *Id.* "As long as substantial evidence supports the chancellor's findings, [we are] without authority to disturb them, even if [we] would have found otherwise as an original matter." *Id.*

ANALYSIS

I. Whether the chancellor erred in not finding it was in the best interest

of the minor children to be kept in the custody of Al from August to November 2015.

¶14. The chancellor's final judgment found that "[f]rom August [to] November[] 2015, when Al kept the children from Melanie, none of [the] extended family saw the children . . . which was not in the best interest of the children." The record contains substantial evidence to support the chancellor's finding. Accordingly, Al's contention that the chancellor erred in "failing to find" the opposite—i.e., that it was in the best interest of the children to be kept in the custody of Al from August to November 2015—is without merit.

II. Whether the chancellor erred in finding that the appointment of the GAL was discretionary and in allowing the GAL to withdraw during trial without rendering a final recommendation.

¶15. As part of a motion to modify restrictions on her visitation with the children, Melanie requested that the chancellor appoint a GAL to investigate allegations Al made about concerns for the children's safety when the children were in Melanie's care. The chancellor granted Melanie's request and instructed that the GAL "assist the [c]ourt in this matter by taking any necessary steps to investigate this cause, including, but not limited to, interviewing all parties and minor children, making a home visit of the parties, attending the deposition of the parties, and mak[ing] her reports and findings to the [c]ourt . . . , specifically as [it] concerns [Melanie]'s visitation with the minor child[ren]."

¶16. Following her investigation, the GAL did not find that the children were in danger while in Melanie's care. But in her November 2016 report, the GAL made a preliminary recommendation that Al should be awarded "primary physical custody" of the children. At trial, the GAL explained as follows:

> [Avery] seemed to be happy and content with her mother in Louisiana and with her father in Diamondhead, whereas [Katie] seemed more comfortable and relaxed in Mississippi.
>
> . . . .
>
> The main reason I would—I mean I probably—my primary factor with [Katie] would be that she is doing well in school, she does love the school she's in, she loves her friends, she loves both of her parents, but she is — and I know that she won't be 10 even at this point, so at 12 she can more or less voice her opinion, make her opinion known. But I believe that she's very comfortable going to school in the custody of her dad.

¶17. Following the GAL's testimony, the chancellor excused the GAL. The GAL did not submit a final recommendation or report because the GAL's investigation was only preliminary. Al now claims the chancellor erred in finding that the GAL's appointment was discretionary and in allowing the GAL to be excused without submitting a final recommendation.

¶18. Pursuant to Mississippi Code Annotated section 93-5-23 (Rev. 2009), when a charge of abuse or neglect arises in the course of a custody action, the court shall appoint a guardian ad litem for the child. "[U]nder Mississippi Code Section 93-5-23, the chancellor is provided discretion to determine if issues of abuse or neglect have sufficient factual basis to support the appointment of a guardian ad litem." *Carter v. Carter*, 204 So. 3d 747, 759 (¶51) (Miss. 2016). When there is not a charge of abuse or neglect, a chancellor may still appoint a GAL for investigative assistance. Outside of section 93-5-23, the scope of the GAL's assignment is within the chancellor's discretion, and the assignment need not include making a

recommendation as to custody.[3]

¶19. In the final judgment, the chancellor discussed the appointed GAL and found that "the appointment was . . . discretionary" because "[t]here were no allegations of abuse that mandated the appointment of a GAL." Upon reviewing the record, we find that the chancellor's determination—that the GAL's appointment was discretionary based on the evidence before the chancery court—was within the chancellor's discretion.

¶20. While we recognize that Al raised concerns regarding the safety of his children, those concerns related to Melanie's former boyfriend, Pullen. But Melanie, not Al, requested appointment of the GAL. Al never joined or filed any response to Melanie's motion. Moreover, prior to the GAL's appointment, and on Al's motion, the court entered an order prohibiting any contact between Pullen and the children. Thus, any concerns Al had regarding Pullen were addressed by the court by the time the GAL was appointed.

¶21. Because allegations of abuse mandating the appointment of a GAL were not present in this case, the chancellor's appointment of the GAL was discretionary and not statutorily mandated pursuant to section 93-5-23. When an appointment of a GAL is discretionary, the

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[3] The supreme court has provided that "[i]n Mississippi jurisprudence, the role of a guardian ad litem historically has not been limited to a particular set of responsibilities." *S.G. v. D.C.*, 13 So. 3d 269, 280 (¶47) (Miss. 2009). "In some cases, a guardian ad litem is appointed as counsel for minor children or incompetents . . . . In others, a guardian ad litem may serve as an arm of the court—to investigate, find facts, and make an independent report to the court." *Id.* "Furthermore, the guardian ad litem's role at trial may vary depending on the needs of the particular case." *Id.* at 281 (¶47). But chancellors are encouraged "to set forth clearly the reasons an appointment has been made and the role the guardian ad litem is expected to play in the proceedings." *Id.* at (¶48). Here, the chancery court's order indicates that the GAL was appointed to investigate "[Melanie]'s visitation with the minor child[ren]" as an arm of the court.

chancellor is not required to include his or her reasons for rejecting the GAL's recommendation. *See Porter v. Porter*, 23 So. 3d 438, 449 (¶28) (Miss. 2009) ("[O]nly when a chancellor's ruling is contrary to the recommendation of a *statutorily required* [GAL] should the reasons for not adopting the [GAL]'s recommendation be stated by the court in the findings of fact and conclusions of law."). Moreover, the scope of the GAL's appointment did not include making a final recommendation regarding custody of the minor children. Instead, the chancellor appointed the GAL to assist in investigating the case in general and, more specifically, in investigating Melanie's visitation with the children. The chancellor did not err in finding that the GAL's appointment was discretionary and in allowing the GAL to withdraw without submitting a final custody recommendation.

III. Whether the chancellor erred in awarding "primary physical custody" of the children to Melanie.

¶22. "As with all child-custody cases, 'the polestar consideration is the best interest and welfare of the child.'" *Webb v. Webb*, 78 So. 3d 933, 936 (¶8) (Miss. Ct. App. 2012) (quoting *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)). In *Albright*, the Mississippi Supreme Court outlined several factors to be considered when determining which parent should be granted custody. *Albright*, 437 So. 2d at 1005. These factors include: (1) the age, health, and sex of the child; (2) the continuity of care prior to separation; (3) the parenting skills of each parent; (4) the willingness and capacity to provide primary child care; (5) the employment and employment responsibilities of each parent; (6) the physical and mental health and the age of the parents; (7) the emotional ties between the parent and child; (8) the moral fitness of the parents; (9) the home, school, and community record of the child;

(10) the preference of a child twelve years of age or older; (11) the stability of the home environment; and (12) other relevant factors in the parent-child relationship. *Edwards v. Edwards*, 189 So. 3d 1284, 1286 (¶7) (Miss. Ct. App. 2016) (citing *Albright*, 437 So. 2d at 1005).

¶23. "While the *Albright* factors are extremely helpful in navigating what is usually a labyrinth of interests and emotions, they are certainly not the equivalent of a mathematical formula." *Lee v. Lee*, 798 So. 2d 1284, 1288 (¶15) (Miss. 2001). The factors are simply a guide in reviewing evidence relevant to custody. *Id.* The chancery court's decision regarding child custody is guided by many additional considerations other than the *Albright* factors, such as "[t]he credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation." *Johnson v. Gray*, 859 So. 2d 1006, 1013-14 (¶36) (Miss. 2003).

¶24. Al asserts that the chancellor "failed [to] consider[] the best interests of the minor children" and that the chancellor's *Albright* analysis was flawed. Yet Al fails to point to any factor(s) the chancellor purportedly misapplied. Instead, it appears Al's sole issue related to the chancellor's custody award concerns Melanie's former boyfriend, Pullen. Al claims "it was not in the best interest of the children to be subjected to the abusive behavior of John Pullen in the fall of 2015 [and beyond]." But Al recognizes that Pullen is no longer in the picture. Indeed, as the chancellor noted, the children did not have any meaningful exposure to Pullen after July 2015, and Melanie's relationship with Pullen ultimately ended in April 2016. Additionally, in December 2015, on Al's motion, the chancellor entered an order

prohibiting any contact between Pullen and the children.

¶25. The record also shows the chancellor addressed Pullen in her *Albright* analysis and considered Melanie's relationship with him in making her overall custody determination. In her *Albright* analysis, the chancellor noted Pullen's alcohol and domestic violence issues and found that Melanie's relationship with Pullen "did not demonstrate sound judgment on Melanie's part." As a result, the chancellor determined that the "moral fitness" *Albright* factor favored Al. Yet the chancellor found all other factors favored either Melanie or were neutral.

¶26. Regarding additional considerations, the chancellor noted Al's parental interference and the fact that Al "denied Melanie access to the children for nearly three (3) months, with no court order, . . . when [Avery] was merely fourteen (14) months old." During that time, Al "hid the children in casinos and the second floor of [his] Diamondhead residence." Al subsequently proposed an arrangement to Melanie whereby Melanie would be required to pay to see her children.

¶27. The chancellor further noted that Al purposefully "began a process changing the children's health insurance from Louisiana to Mississippi without informing Melanie[,]" which resulted in the children "nearly [losing] all healthcare coverage." On at least one occasion, Al failed to take Avery to the doctor for four days despite a high fever but, instead, researched her symptoms online and determined her illness to be croup. Yet, when Melanie took Avery to the doctor, the doctor diagnosed Avery with pneumonia.

¶28. The chancellor determined that these findings, coupled with Al's lack of credibility

and controlling behavior, showed a lack of consideration for the children's best interests. Thus, while Al takes issue with Melanie's relationship with Pullen, the record shows the chancellor's custody decision was based on more than that one issue. The record indicates that the chancellor considered the totality of the circumstances in her determination of custody.

¶29. The chancellor dedicated much of her detailed final judgment to the *Albright* factors in determining the best interests of the children. The chancellor's decision was guided by many other considerations in addition to the *Albright* factors. We have reviewed the record and do not find that the chancellor's findings were clearly erroneous or manifestly wrong. Instead, the chancellor's findings are supported by substantial evidence, and we therefore affirm her decision.

IV. Whether the chancellor erred in failing to continue the trial once Al retained new counsel.

¶30. On April 6, 2017, after approximately seven days of trial, the chancellor recessed and ordered the parties to secure two additional trial dates. The parties were apparently unable to agree on dates, which resulted in a motion for trial setting. In October 2017, the motion for trial setting was heard along with a motion to withdraw filed by Al's counsel. The chancellor allowed Al's counsel to withdraw and advised Al that he may proceed pro se or hire another attorney. During the hearing, the following exchange occurred:

The Court: Maybe I could get (the trial) done before the end of the year if I pushed it like that, but I don't know.

Melanie's Counsel: We would like that to happen, Judge, so we can have finality in this case.

The Court: Mr. Kaiser, you want to respond to that?

Al: I'm absolutely in favor of the sooner, the better.

As a result, the chancellor set the remaining trial dates for November 16, 17, and 30, 2017, and January 8–9, 2018.

¶31. On November 9, 2017, almost a month after the hearing, Al filed a motion to continue the trial to February 2018. The chancellor granted Al's motion in part and continued the trial to November 30, 2017.

¶32. On November 29, 2017, Al retained new counsel. Al's new counsel moved for a continuance due to a previously scheduled matter. The court denied this motion for continuance. Al argues "manifest injustice occurred by requiring [him] to participate pro se over his objections and requests for a continuance."

¶33. "The grant or denial of a continuance is within the discretion of the trial court." *Henderson v. Henderson*, 952 So. 2d 273, 277 (¶7) (Miss. Ct. App. 2006). "The only time an appellate court will overturn the denial for a continuance is when manifest injustice has occurred." *Id*. "Prejudice must result from the denial in order to have that decision reversed." *Id*.

¶34. The record shows no manifest injustice or prejudice resulted from the denial of Al's motion for continuance. At the time Al filed a motion for continuance, his case-in-chief was concluded. In other words, Al's former counsel had presented all evidence and rested his case.

¶35. At the conclusion of Melanie's case-in-chief, Al, acting pro se, moved ore tenus for

a continuance in order for his newly retained counsel to present rebuttal evidence. The record shows Al's counsel was present for rebuttal. Yet Al chose not to present rebuttal testimony or evidence. Thus, Al had counsel throughout his entire case-in-chief as well as for rebuttal. The fact that Al acted pro se during Melanie's case-in-chief does not give rise to manifest injustice. Indeed, the record shows Al extensively cross-examined Melanie.

¶36. Having examined and considered the record, we do not find the chancellor abused her discretion in denying Al's second motion for trial continuance.

V. Whether attorney's fees should be awarded to Melanie.

¶37. In her appellate brief, Melanie requests "that this Court award her, at minimum, one-half of the amount of attorney's fees previously awarded to her for her costs as a result of this appeal, the same being $7,362.50." On May 23, 2019, Melanie filed a separate motion for appellate attorney's fees in accordance with the supreme court's opinion in *Latham v. Latham*, 261 So. 3d 1110, 1115 (¶23) (Miss. 2019) (requiring parties to file a separate motion for attorney's fees as set forth in Mississippi Rule of Appellate Procedure 27(a)). In her motion, Melanie requests this Court award her "the full amount of attorney fees and costs expended on this appeal in the amount of $12,786.30."

¶38. Pursuant to Mississippi Rule of Appellate Procedure 36(a), "[i]f a judgment is affirmed, costs shall be taxed against the appellant unless otherwise ordered." Because we affirm the trial court's judgment, costs shall be taxed against Al pursuant to Rule 36(a). However, we decline to award any additional attorney's fees or costs.

¶39. As Melanie acknowledges in her motion, "[g]enerally, attorney's fees on appeal are

awarded 'in the amount of one-half of what was awarded in the lower court.'" *Dailey v. McBeath*, 151 So. 3d 1038, 1045 (¶20) (Miss. Ct. App. 2014) (quoting *Makamson v. Makamson*, 928 So. 2d 218, 222 (¶18) (Miss. Ct. App. 2006)). But in *Dailey*, this Court declined to award attorney's fees on appeal when the trial court awarded attorney's fees "due to the finding of contempt . . . , not the [party]'s inability to pay[,]" and the appellant "ha[d] not challenged the order of contempt" on appeal. *Id.* at 1045 (¶¶21, 22); *cf. Riley v. Riley*, 196 So. 3d 1159, 1165 (¶27) (Miss. Ct. App. 2016) (awarding appellate attorney's fees in a contempt matter after explaining that "*Dailey* is distinguishable . . . because, as this Court expressly noted, Gregory Dailey did not challenge the [chancery] court's finding of contempt" on appeal).

¶40. Here, similar to *Dailey*, the chancellor awarded Melanie $14,725.00 in attorney's fees due to Al "delay[ing] and protract[ing] the litigation unnecessarily" and for Melanie's extended trial preparation "due to Al's less than credible testimony and manipulative tactics." The final judgment contains no discussion about Melanie's inability to pay her attorney's fees. On appeal, Al has not challenged these findings or the chancellor's award of attorney's fees. Therefore, we deny Melanie's motion for appellate attorney's fees and decline to award Melanie attorney's fees on appeal.

CONCLUSION

¶41. We find the chancellor did not err in (i) finding that it was not in the best interest of the children to be kept in the custody of Al from August to November 2015, (ii) finding that the appointment of the GAL was discretionary and allowing the GAL to withdraw during the

trial without rendering a final recommendation, or (iii) awarding "primary physical custody" of the children to Melanie. The record reflects that chancellor's findings were not clearly erroneous or manifestly wrong; to the contrary, the record includes substantial evidence to support the chancellor's findings. The chancellor further acted within her discretion in denying Al's second motion to continue the trial.

¶42. **AFFIRMED.**

BARNES, C.J., CARLTON AND J. WILSON, P.JJ., GREENLEE, WESTBROOKS, TINDELL, McDONALD, LAWRENCE AND McCARTY, JJ., CONCUR.