IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

AMANDA J. (GRESSEL) BERMUDEZ SCHMIDT **APPELLANT**

VS. **CAUSE NO: 2006-CA-00765**

BRIAN S. BERMUDEZ **APPELLEE**

BRIEF OF APPELLEE, BRIAN S. BERUMUDEZ

ON APPEAL FROM THE CHANCERY COURT
OF MARSHALL COUNTY, MISSISSIPPI

(ORAL ARGUMENT IS NOT REQUESTED)

SUBMITTED BY:

JUSTIN S. CLUCK, MSB #[redacted]
SMITH WHALEY, P.L.L.C.
ATTORNEY FOR APPELLEE
Post Office Drawer 849
Holly Springs, Mississippi 38635
Telephone: (662) 252-3003
Facsimile: (662) 252-3006

SARAH J. LIDDY, MSB #[redacted]
ATTORNEY FOR APPELLEE
Post Office Box 40
Olive Branch, Mississippi 38654
Telephone: (662) 890-9394
Facsimile: (662) 890-9880

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

AMANDA J. (GRESSEL) BERMUDEZ SCHMIDT **APPELLANT**

VS. **CAUSE NO: 2006-CA-00765**

BRIAN S. BERMUDEZ **APPELLEE**

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.

1. Honorable Glenn Alderson
   Chancellor
   P.O. Box 70
   Oxford, MS 38655

2. Brian S. Bermudez, Appellee
   3189 South Slayden Road
   Lamar, Mississippi

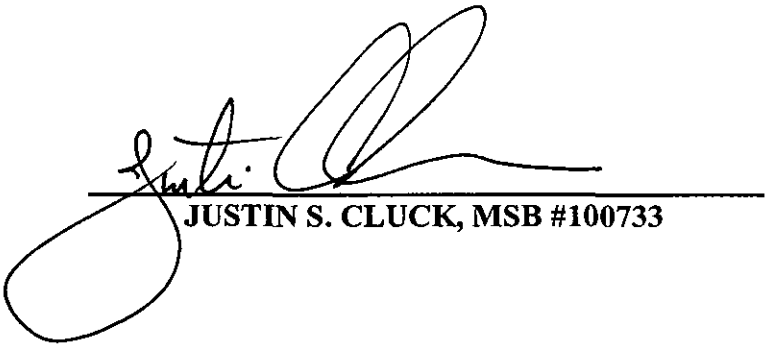
3. Justin S. Cluck, Esq.
   Smith Whaley, PLLC
   P.O. Drawer 849
   Holly Springs, MS 38635

4. Sarah J. Liddy, Esq.
   Attorney At Law
   P.O. Box 40
   Olive Branch, MS 38654 - 0040

5. Amanda J. (Gressel) Bermudez Schmidt, Appellant
   6142 So. Joplin Way
   Aurora, Colorado 80016

6. Joe Morgan Wilson, Esq.
Attorney at Law
210 West Main Street
Senatobia, MS 38668

7. Stephen T. Bailey, Esq.
Evans & Bailey, PLLC
359 North Broadway Street
P.O. Box 7326
Tupelo, Mississippi 38802-7326



JUSTIN S. CLUCK, MSB #100733

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would not be helpful in this case, as it would not aid in offering additional facts, law or argument in support of these issues. The issues before the Court are straightforward issues of law applied to the facts of this case. As such, oral argument would not be of benefit and is not requested.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL ACTS

STATUTES

OTHER SOURCES

STATEMENT OF THE ISSUES

1. The Chancery Court of Marshall County assumed proper jurisdiction over the matter of contempt in regard to the divorce decree and the motion to modify the child custody agreement.
2. The chancellor did not show an extreme bias toward Amanda Schmidt by treating her contrary to judicial custom nor does Amanda Schmidt show good cause for the chancellor erring in not recusing himself in the matter.
3. The chancellor did not err when he refused to qualify Amanda Schmidt's witness as an expert.
4. The court appointed expert did not have a conflict of interest.
5 The guardian *ad litem* did not fail to develop his investigation.
6. The chancellor did not err in requiring Amanda Schmidt to pay reasonable attorney's fees nor did he err in requiring she assume her share of expenses arising from visitation travel arrangements.
7. The chancellor did not base his opinion on facts not in evidence.
8. The chancellor properly determined that a visitation hearing was the proper approach to determining Amanda Schmidt's visitation rights.
9. The chancellor properly found a material change in circumstances had occurred and a change in custody was warranted.

STATEMENT OF THE CASE

Brian Bermudez seeks affirmation of the decision of Chancellor Glenn Alderson on his *Petition and Counter-Petition for Modification of Child Custody and Contempt.* Hearing on this matter was brought, in the Eighteenth Chancery Court District of Marshall County, Mississippi, and resulted in the award of physical custody of Colson Bermudez to his father Brian Bermudez.

On February 4, 2004, a decree was entered granting the termination of matrimonial bonds between Brian Bermudez and Amanda Schmidt. (R.E. – 000001). One child, Colson Bermudez, born September 4, 2001, resulted from the marriage. Brian Bermudez and Amanda Schmidt were awarded joint custody of Colson in the divorce decree. Physical custody was granted to Amanda Schmidt while Brian Bermudez was granted visitation rights. (R.E. – 000001). Shortly after the divorce decree was entered Amanda Schmidt and Colson Bermudez moved from Marshall County, Mississippi, to Shelby County, Tennessee.

During August of 2004, Amanda Schmidt took Colson to a child therapist, Dr. Amy Beebe, to have Colson's behavioral problems analyzed. At this time she accused Brian Bermudez of physically and sexually assaulting his son, Colson. (R.E. – 000031).

On or around August 21st of 2004, Amanda Schmidt sent a letter to Brian Bermudez informing him that she and Colson were moving to Denver, Colorado. Brian Bermudez then petitioned the Chancery Court of Marshall County, Mississippi, on August 25th, 2004, to find Amanda Schmidt in contempt of court for refusing to inform Brian Bermudez of the child's doctor visits, preschool activities, and for making

unfounded accusations of violence by Brian Bermudez towards the child. (R.E. – 000022).

Amanda Schmidt responded to the petition by filing a motion for the Chancery Court of Marshall County, Mississippi, to relinquish jurisdiction to the Circuit Court of the Thirtieth District at Memphis, Tennessee. (R.E. – 000021). The Chancellor of the Chancery Court of Marshall County, Mississippi, denied the motion to relinquish jurisdiction in his *Order* issued on September 2, 2004. (R.E. – 000045). This order also prevented Amanda Schmidt from absconding with Colson to Colorado.

On August 26, 2004, Amanda Schmidt filed a petition in the Circuit Court of Tennessee of the Thirtieth District at Memphis requesting an order for enforcement, modification and requesting a restraining order against Brian Bermudez. (R.E. - 000026). The chancellor acknowledged the pending action in Tennessee and found the action improper since it was filed subsequent to Brian Bermudez's petition dated August 25, 2006. (R.E. - 000045).

Brian Bermudez filed a *Motion for Contempt* on the 5th day of October, 2004. (R.E. - 000033). This motion was in response to Amanda Schmidt's failure to abide by the child visitation provisions of the *Final Decree of Divorce* and the *Order* of September 2, 2004. On November 24th, 2004, Brian Bermudez filed a *Second Motion for Contempt and First Motion for Emergency Relief* in the Chancery Court of Marshall County, Mississippi, in response to Amanda Schmidt's allegations of child abuse and her failure to allow Colson's visitations with his father for most of September and October of 2004.

Amanda Schmidt then filed a Motion in Marshall County, Mississippi, to appoint a Guardian *Ad Litem* to investigate the alleged abuse of the child on December 6th of

2004. (R.E. – 000043). The chancellor issued a *Temporary Order* on the same day. This order appointed Hon. Stephen T. Bailey as the guardian *ad litem* and appointed Dr. Wyatt Nichols as the court psychologist. Also, this order voided the September 2nd order by allowing Amanda Schmidt to take Colson to Colorado. Finally, the order of December 6th outlined the visitation rights of Brian Bermudez with Colson for the month of December.

In January 2005, Amanda Schmidt filed a motion to *Modify the Former Decree of Divorce and Other Relief* also in Marshall County, Mississippi. (R.E. – 000047). This motion sought remuneration for expenses allegedly incurred by Amanda Schmidt for medical bills concerning Colson. On March 8, 2005, Amanda Schmidt petitioned the Marshall County Chancery Court for Emergency Relief concerning the visitation of Colson with his father Brian Bermudez due to her high risk pregnancy and the fact that she was allegedly unable to pay travel costs for these visits even though she is a nurse able to obtain gainful employment and her husband is a doctor. (R.E. – 000051). In response, Brian Bermudez filed an *Emergency Motion to Enforce Visitation.* (R.E. – 000054). The chancellor issued an Order granting Brian Bermudez's *Motion to Enforce Visitation.* (R.E. – 000058).

Brian Bermudez, on June 3, 2005, filed a *Motion for Contempt of Court and For Temporary Custody* in response to Amanda Schmidt's failure to cooperate when trying to schedule Brian Bermudez's summer visitation periods and for ignoring the previous court Order requiring reimbursement for half the travel expenses associated with the visitations. (R.E. – 000059).

Hon. Stephen T. Bailey entered his *Preliminary Report and Recommendation* to the Chancery Court of Marshall County, Mississippi, on June 15th. (R.E. – 000062). In the report, Mr. Bailey concluded it was unlikely Brian Bermudez ever abused Colson. Further, Mr. Bailey recommended Brian Bermudez should be awarded physical custody of Colson due to the unfounded allegations of abuse by Amanda Schmidt. Dr Wyatt Nicholls, the court appointed psychologist submitted his opinion to the chancellor on May 9th, 2005. (R.E. – 000072).

Trial was set for March 27th, 2006. Upon conclusion of the trial, Chancellor Alderson determined that, in the best interest of the child, Brian Bermudez should have physical custody of Colson Bermudez. Furthermore, the court found Amanda Schmidt in contempt ordering payment for Brian Bermudez's attorney's fees. Following this Order from the Chancery Court of Marshall County, Mississippi, Amanda Schmidt filed her Notice of Appeal.

STANDARD OF REVIEW

In domestic relations and child custody cases it is well established that Chancellors are vested with broad discretion and his findings should not be overturned "unless the court's actions were manifestly wrong, the court abused its discretion or the court applied an erroneous legal standard." *Andrews v. Williams*, 723 So.2d 1175, 1176 (Miss.App. 1998). If there is substantial evidence in the record to support the Chancellor's findings, the reviewing court should not reverse. *Wilbourne v. Wilbourne*, 748 So.2d 184, 186 (Miss.App. 1999).

"The chancellor, as the trier of fact, evaluates the sufficiency of the proof based upon the credibility of the witnesses and the weight of their testimony" *Fisher v. Fisher*, 771 So.2d 364 (Miss. 2000), and "has the sole authority for determining the credibility of witnesses." *Yarbrough v. Camphor*, 645 So.2d 867, 869 (Miss. 1994).

SUMMARY OF THE ARGUMENT

Chancellor Alderson's finding that Brian Bermudez should have physical custody of his son, should be awarded attorney's fees, and his decision that a separate hearing was necessary to determine the visitation rights of Amanda Schmidt is proper and is supported by the weight of the evidence presented at trial.

The Chancery Court of Marshall County, Mississippi, had jurisdiction to hear the contempt proceedings which are the subject of this appeal as it had continuous exclusive jurisdiction arising from the original divorce decree issued by that court. Further, the chancery court properly also assumed proper jurisdiction pursuant to Mississippi statute over the child custody modification issue disputed herein. For these reasons, the chancellor's holding is proper and should not be overturned.

At trial, the chancellor, when acting as the trier of fact, acted properly and in accordance with the discretion placed upon the finder of fact and did not treat Amanda Schmidt nor any other person involved in the trial with any bias or prejudice which would warrant his disqualification from the matter or a reversal of his decision on appeal. The chancellor also did not abuse his discretion when determining that a witness should not be qualified as an expert. However, if his failure to qualify the witness was indeed error, it was harmless error as the witness presented her opinion testimony without any objections being raised as to the admissibility of her testimony.

There was no conflict of interest between the parties and the court appointed psychologist, Dr. Wyatt Nichols, therefore his testimony was not biased and is not grounds for vacating the chancellor's judgment. In regard to the child custody modification determination the guardian *ad litem*, Hon. Stephen T. Bailey, was 'zealous'

in pursuing the child's best interest and fulfilled all duties prescribed to him. In rendering his final opinion and subsequent order, the chancellor relied upon evidence introduced to the record, not on facts beyond the scope of the record and his decision was proper.

Due to the allegations of abuse fabricated by Amanda Schmidt, the chancellor's decision to award visitation rights to Amanda Schmidt upon a separate visitation hearing was proper and in the best interest of the child.

Finally, in light of the reports and testimony of interested parties, expert witnesses, and the guardian ad litem, the chancellor properly determined a material change in circumstances regarding Colson Bermudez had occurred and this change was not in the best interest of the minor child. For this reason, modification of the child custody agreement by granting physical custody to Brian Bermudez was proper and warranted under the circumstances.

ARGUMENT AND AUTHORITIES

A. Statement of the Facts Relevant to the Issues Presented for Review.

Brian Bermudez and Amanda Schmidt were divorced on February 4, 2004, after a *Final Decree of Divorce* was entered by Chancellor Glenn Alderson in the Chancery Court of Marshall County, Mississippi. (R.E. - 000001). Pursuant to that decree, the parties shared joint legal custody of their son, Colson Andrew Bermudez. (R.E. – 000004-11). Amanda Schmidt was awarded physical custody with Brian Bermudez having weekly visitation, alternating holiday visitation, and summer visitation. (R.E. – 000004-11).

Amanda Schmidt moved to Shelby County, Tennessee, before the divorce proceedings were completed. She and Colson lived in Tennessee from May of 2003 to November 2004. (R.E. – 000088, 000098). Brian Bermudez, a Memphis Police Officer, purchased a house in Shelby County in October 2003, however he never abandoned his intent to retain his place of domicile in Mississippi. (R.E. – 000119-120). Today Brian Bermudez resides at 3189 South Slayden Road, Lamar, Mississippi in Marshall County, and rents out his home in Collierville, Tennessee. (R.E. – 000118).

On August 25, 2004, Brian Bermudez filed a motion for contempt in the Chancery Court of Marshall County, Mississippi. The *Petition for an Order Holding Respondent in Contempt of Court and for Modification of Final Decree* was filed in response to Amanda Schmidt's repeated violation of the custody order denying Brian Bermudez visitation. (R.E. – 000115).

By November 1, 2004, Amanda Schmidt and her new husband, Dr. Jeffrey Schmidt, absconded with Colson to Denver, Colorado, and set up permanent residence.

These actions violated the *Temporary Order* of the Marshall County Chancery Court, issued on September 2, 2004, which prohibited Colson from being taken to Colorado. (R.E. - 000033). Amanda Schmidt's violation of the court order required Brian Bermudez to file a *Second Motion for Contempt and First Motion for Emergency Relief* to enforce his visitation rights. (R.E. – 000037-42).

Chancellor Alderson appointed a guardian *ad litem* and a psychologist to investigate the relationships between Colson and Brian Bermudez and Colson and Amanda Schmidt. The Chancellor also entered a *Temporary Order* allowing Colson to travel to Colorado but held Amanda Schmidt responsible for transportation to and from visitations, including the costs of such transportation. (R.E. – 000045-46). Colson was interviewed by the guardian *ad litem* in April of 2005. The guardian *ad litem* reported that Colson's behavior was completely normal for a three year old child. (R.E. – 000079-87).

In contravention of the chancellor's previous orders Amanda Schmidt failed to reimburse her portion of the transportation expense for Colson's visit with Brian Bermudez. Upon Colson's return to Colorado, Amanda Schmidt had been uncooperative in scheduling further visitation rights. (R.E. – 000094-000098, 000121 – 134).

Amanda Schmidt also subjected Colson to multiple psychological evaluations and has gone so far as to have Colson hospitalized for alleged behavioral problems due to visits with his father. (R.E. – 000096-111).

Brian Bermudez responded to these actions by filing an *Emergency Motion to Enforce Visitation Rights*. (R.E. – 000054-55). The court determined Amanda Schmidt

and Brian Bermudez would equally share the expense of the March/April visitation. The court also held Amanda Schmidt responsible for transportation for future visitations.

The parties appeared in Chancery Court in Marshall County, Mississippi, from March 27 – 30, 2006, on the petition and counter-petition for modification and contempt and all other pending motions. Upon hearing the evidence presented, the chancellor determined that there was a material change in circumstances which adversely affected the welfare of the minor child and for this reason the chancellor held Colson was to be placed in the sole physical custody of his father, Brian Bermudez, and Amanda Schmidt was held in contempt for violating the court's previous order.

B. The Chancery Court of Marshall County Assumed Proper Jurisdiction Over the Proceedings

"The decision of whether to exercise or decline continuing jurisdiction is left to the chancellor." *Ortega v. Lovell*, 725 So.2d 199, 202 (Miss.1998) (citing *Johnson v. Ellis*, 621 So.2d 661 (Miss.1993)).

1. The Marshall County Chancery Court had Continuing Exclusive Jurisdiction Over the Proceedings

The Marshall County Chancery Court had original jurisdiction at the time of the March 2006 hearing. Exclusive, Continuing Jurisdiction arises from the original divorce decree rendered by the Chancery Court of Marshall County. "As a matter of state law, a court that enters the original custody decree has jurisdiction to subsequently modify the decree separate and apart from the jurisdictional section of the Uniform Child Custody Judgment and Enforcement Act ('UCCJEA')." *Ortega*, 725 So.2d at 201 (citing *Jones v. Starr*, 586 So.2d 788, 790 (Miss.1991); *Stowers v. Humphrey*, 576 So.2d 138, 141 (Miss.1991)).

The UCCJEA, adopted by the State of Mississippi under Mississippi Code Annotated § 93-27 (2004) (which repealed the M.C.A. § 93-23 of 1972), provides for exhaustion of exclusive continuing jurisdiction when the parties move away from the decree state. M.C.A. § 93-27-202 (2004). However, the chancery court has jurisdiction based upon provisions which allow a court outside of the "home state" of the child to make an initial custody claim determination when the "home state" court has declined jurisdiction. M.C.A. § 93-27-201(1)(b) (2004).

The UCCJEA preserves exclusive continuing jurisdiction in the decree state provided that: (1) neither the child, nor the child's parents, moved from the state; (2) the child and a parent of the child have moved away from the state; and (3) there is no longer any substantial evidence available in the decree state. M.C.A. § 93-27-202(1) (2004).

a. Brian Bermudez is Domiciled in Mississippi

It is well established that Amanda Schmidt and Colson were at one time living in Tennessee. Brian Bermudez, however, maintained his domicile in Mississippi, even though he purchased a home in Collierville, Tennessee. (R.E. – 000119-000120). Brian Bermudez testified at trial to the following facts:

Q: Would you state your name and address for the record?
A: Brian Bermudez, 3189 South Slayden Road.
Q: How long you have lived at that address, Brian?
A: Since around August.
Q: 2005 or 2004?
A: 2005

(R.E. – 000117-118).

Later in the questioning:

Q: Do you own any property?
A: I've got a house in Collierville.

(R.E. – 000119).

Then:

Q: And do you have a room there as well?
A: I've got - - I've got a room, yes, ma'am.
Q: Do you ever stay there?
A: Sometimes every - - every once in a while.
Q: Why do you keep the - - this other property in Tennessee?
A: Because according to my job we have to have a residence in Shelby County.
Q: And what is your job?
A: Police Officer.
Q: For who?
A: City of Memphis.
Q: And are they aware of your two addresses?
A: I list both of my addresses on my personal history, yes, ma'am.
Q: So you've given both addresses to the City of Memphis?
A: Yes, ma'am.

(R.E. – 000119-120).

Amanda Schmidt contends that Brian Bermudez is no longer domiciled in Mississippi. This would foreclose the chancery court's right to assume jurisdiction over the matter. However, Mississippi Courts have always maintained that residency is equated to domicile in divorce proceedings. Professor N. Shelton Hand, *Miss. Divorce, Alim. and Child Custody* § 6:7 (6th ed, updated 2006). In *May v. May,* 130 So.52 (Miss. 1939), this Court determined the burden of proving a change in domicile is on the party alleging the change in residency. "A mere change of residence does not constitute a change in domicile." Deborah H. Bell, *Bell on Mississippi Family Law*, 2005, (citing *Bilbo v. Bilbo*, 177 So. 772, 776 (Miss.1938)). This Court required evidence of an intent to abandon the domicile of origin to substantiate an allegation of a change in domicile. *Johnson v. Johnson*, 191 So.2d 840, 842 (Miss.1996). In *Johnson*, a presumption of continued domicile in Mississippi was not rebutted even though the couple acquired a residency in Louisiana for employment purposes. *Id.*

Amanda Schmidt failed to satisfy her burden and did not prove Brian Bermudez abandoned his Mississippi domicile. For the reasons discussed above, Brian Bermudez is a domiciliary of Mississippi even though he purchased a home in Shelby County, Tennessee, for employment purposes.

b. Substantial Contacts Exist between the Case and Mississippi

Mississippi is the state of Brian Bermudez's domicile, Brian's extended family, Colson's relatives as well as Colson's friends. Also, the court issuing the divorce decree is in Mississippi. All of these factors serve as evidence of substantial contacts with the state of Mississippi. M.C.A. § 93-27-202(1) provides for exclusive continuing jurisdiction in this matter based on the substantial evidence within the state coupled with the residency of the father.

2. The Chancery Court of Marshall County may Acquire Jurisdiction Under the UCCJEA and M.C.A. § 93-27 if the Home State Court Declines Jurisdiction

Amanda Schmidt argues that her move to Tennessee with Colson gives Tennessee sole jurisdiction for this case under M.C.A. § 93-23-5 (1972) (which has been repealed) and the UCCJA (which has been replaced by the UCCJEA). If M.C.A. § 93-27-201(1) is not applicable then the Marshall County court can still assume jurisdiction based on M.C.A. § 93-27-202(2) (which allows a Mississippi court to modify a prior determination of that court "only if it has jurisdiction to make an initial determination under M.C.A. § 93-27-201"). If exclusive continuing jurisdiction is exhausted the Marshall County Court can still assume proper jurisdiction based on the Mississippi Supreme Court's holding in *Ortega*, 725 So.2d at 199.

In *Ortega*, the Court determined that the issuance of an original custody decree would not vest jurisdiction in the Harrison County Chancery Court over modifications of that decree when the child had never entered the state and grew up in California. For this reason the court held jurisdiction was proper only in California.

In reaching the conclusion in *Ortega*, the Supreme Court used a three part analysis to determine if a Mississippi court should assume jurisdiction. The court must first determine that it has authority pursuant to M.C.A. § 93-23-5 (1972) (now M.C.A. § 93-27-102 (2004)). *Ortega*, 725 So.2d at 202. If the court determines that it has authority to act, then the court will determine whether it is the more appropriate and convenient forum under the guidelines of M.C.A. § 93-23-13 (1972) (now M.C.A. § 93-27-207 (2004)). *Id.* Finally, if the court decides to accept jurisdiction as the more convenient forum, the court must determine whether the action is foreclosed by an order of judgment of another state. *Id.*

The first step of the analysis requires the court to determine whether it has the authority to act on the action at hand pursuant to the UCCJEA and M.C.A. § 93-27-207. Under the UCCJEA and M.C.A. § 93-27-201, special jurisdictional rules are applied to child custody matters. Traditionally three elements are necessary to create proper jurisdiction: (1) subject matter jurisdiction; (2) personal jurisdiction; and (3) proper service of process. However, the UCCJEA does not require personal jurisdiction when determining jurisdiction. For custody issues service of process must only be "reasonably calculated to give actual notice" to any person entitled to notice or if the party submits to the jurisdiction of the court. Neither of these factors is contested. The only issue

regarding jurisdiction is whether the Marshall County Chancery Court properly exercised subject matter jurisdiction pursuant to the UCCJEA which governs child custody matters.

The UCCJEA creates an interstate enforcement mechanism applying initial child custody actions and modifications of child custody actions. The home state of the child and the state where the child resided with a parent or legal guardian for at least six consecutive months preceding the action, is given priority over subject matter jurisdiction for matters concerning child custody. Deborah H. Bell, *Bell on Mississippi Family Law*, § 18.05. However, if the home state declines to exercise jurisdiction, a court in a state with significant connections to the matter can exercise subject matter jurisdiction if significant connections exist between the child and the state. *Id.* at § 18.05(1). *See also* M.C.A. § 93-27-204(1)(b) (2004).

This Court interpreted the Uniform Child Custody Judgment Act (which was replaced by the UCCJEA) in *Ortega* as providing concurrent jurisdiction, not mutually exclusive jurisdiction. Typically, the two states sharing concurrent jurisdiction will be the state issuing the original divorce or custody decree, and the state where the custodial parent and children have moved." *Ortega*, 725 So.2d at 201. However, a court can decline its continuing jurisdiction over a child custody matter arising from a divorce decree entered by that court if there is a more convenient forum. *Id* (citing *Jones v. Starr*, 586 So.2d at 790). *See also* M.C.A. § 93-27-207 (2004).

Tennessee was the home state of Colson since he and Amanda Schmidt lived in Shelby County for more than six months preceding the commencement of this action. However, Chancellor Alderson conferred with the Tennessee Circuit Judge, John McCarroll, who agreed the most appropriate forum was Mississippi:

> "I conferred with the judge in Tennessee and he agreed that it was a Mississippi case and it would remain in Mississippi."
>
> (R.E. – 000147-148).

M.C.A. § 93-27-201(c) states:

> All courts having jurisdiction under paragraph (a) or (b) of this subsection have declined to exercise jurisdiction on the ground that a court of this state is the more appropriate forum to determine the custody of the child under Section 93-27-207 or 93-27-208; or no other state would have jurisdiction under the criteria specified

M.C.A. § 93-27-201(c) permits the state issuing the initial decree to assume jurisdiction. As Tennessee declined jurisdiction over this case, jurisdiction was proper in the Chancery Court of Marshall County, Mississippi.

Amanda Schmidt does not argue that Mississippi is not the most convenient forum so she has conceded to the convenience of the Marshall County Chancery Court in Mississippi. Deciding he had proper jurisdiction, Chancellor Alderson appropriately allowed the action to commence in his court, properly refusing to relinquish the matter to a foreign court. In light of the foregoing reasons, the chancellor did not abuse his discretion nor commit a manifest error in assuming jurisdiction.

Furthermore, at the time of this appeal, Colson has resided with Brian Bermudez in Mississippi for more than a year. If this Court remands this issue for lack of jurisdiction, then the Chancery Court of Marshall County may exercise jurisdiction over the parties in such instance. This lack of jurisdiction argument would therefore be moot.

C. The Chancellor did not show an Extreme Bias toward Amanda Schmidt

1. The Chancellor did not treat Amanda Schmidt in a Manner Contrary to Judicial Custom

Comments on the evidence before a juror are treated differently from comments made during a bench trial. *Moore v. Moore*, 558 So.2d 834, 839 (Miss.1990). In contempt proceedings, a chancellor sits as both judge and jury. *Id.* He is to weigh the credibility and demeanor of the witnesses while listening to the evidence. *Id.* In contempt proceedings, the chancellor does not have to express his feelings "in a manner pleasing and delightful to the parties' ears." *Id.* at 840. A chancellor must only fulfill his duty by hearing all the evidence and rendering his final opinion at the conclusion of the hearing. *Id.*

Furthermore, it is the responsibility of the attorneys to object when the chancellor makes comments which allegedly exhibit bias towards a witness. *Dorrough v. Wilkes*, 817 So.2d 567, 577 (Miss.2002) (quoting *Walker v. State*, 671 So.2d 581, 597 (Miss.1995); *Hill v. State*, 432 So.2d 427, 439 (Miss.1983)). "If no contemporaneous objections are made then "the error, if any, is waived." *Id.*

In *Moore*, 558 So.2d 834, a wife filed a complaint against a husband for failure to abide by the divorce decree. The chancellor made comments regarding the husband's contempt of a previous order issued by that chancellor. The husband appealed citing comments made by the chancellor as error. The Mississippi Supreme Court determined no reversible error was found where no contemporaneous objections were made. *Id.* at 839.

Although Amanda Schmidt devotes a large amount of her appeal to this issue, her counsel failed to make any objections that pertained to the conduct or character of the chancellor's statements toward her at any point during the trial. However, upon appeal, Amanda Schmidt now claims bias regarding an opinion the chancellor allegedly formed

stemming from interactions during the divorce proceedings, which occurred three years prior to the current action. This appeal is the first mention of any biased actions toward Amanda Schmidt.

By allowing such an argument, the court should be aware of an attempt to "sandbag" the issue for the chance of getting an appellate reversal. *Id.* at 838. For these reasons this issue was not preserved for appeal and is not properly before this court.

2. Amanda Schmidt Failed to Move for Recusal

Amanda Schmidt next argues that the chancellor should have disqualified himself from the case pursuant to obligations under the Canons of Judicial Conduct due to the fact that he was biased toward the parties.

In *McCune v. Commercial Pub. Co.*, 148 Miss. 164 at 172, 114 So. 268 at 279, (Miss.1927), the court stated:

> Courts are not to be trifled with in such matters. Judges do not have any desire to sit in cases where they are disqualified for any reason, and it is only fair that notice be given the judge of any such disqualification before he hears the case so that he may recuse himself. Any other rule might result in an unfair advantage being taken in a case where an attorney, who moves against a judge, might wait until after he could ascertain whether the decision would be for or against him; and, if against him, he would file a motion to recuse, but if for him, he would accept it without complaint.

A number of jurisdictions have indicated that an objection to a judge cannot be raised on appeal if there was no assertion for disqualifying the judge before the appeal. 73A.L.R.2d 1238 § 3. If not raised in a timely manner, then a motion to disqualify a judge based on bias will be waived. *Yazoo & Mississippi Valley R.R. v. Kirk*, 58 So. 710 (Miss. 1912). Consent to waiving this right will be conclusively presumed upon a final judgment. *Id.*

A judge should disqualify himself if he acquires knowledge underlying the cause of action. However, knowledge relating to the credibility of a witness is not sufficient to warrant disqualification of a judge. 32 Am. Jur. 2d Federal Courts § 93. Furthermore, disqualification is required only for knowledge of matters underlying the cause of action, not knowledge of matters relating to credibility. 73A.L.R.2d 1238 § 3. Thus, allegations that a judge may be more disposed to believe in the credibility of one side's witnesses over others does not establish that the judge has personal knowledge of disputed evidentiary facts within the meaning of the statute. *Id.*

In *City of Biloxi v. Cawley*, 332 So.2d 749 (Miss.1996), the chancellor made a comment before the case was tried that evidenced bias toward a party of the case. However, the aggrieved party did not file a motion suggesting the chancellor recuse himself until after the final decree was entered. *Id.* at 750. The Mississippi Supreme Court determined that the chancellor could not be held as having any bias towards one of the parties. *Id.* Furthermore, the Court determined that the party who accused the chancellor of being biased "elected" to proceed to trial without suggesting the recusal; therefore that party is bound by its "election." *Id.*

Failure by aggrieved party to move for recusal in a seasonable fashion prevents the Appellant from raising this issue for the first time on appeal. Furthermore, the appropriate forum for making such allegations against the chancellor would be the Mississippi Committee on Judicial Performance, not in the body of an appeal brief. Accordingly, this argument is without merit.

D. The Chancellor did not err when Refusing to Qualify Schmidt's Witness as an Expert

Schmidt contends that the court's refusal to qualify Dr. Michelle Kelly as an expert while permitting her, as a lay witness, to present opinion testimony is reversible error. During Dr. Kelly's testimony, the only objection made by Amanda Schmidt regarding her testimony concerned facts not introduced into evidence of actions by Bermudez during the marriage. (R.E. – 000116).

Foremost, lack of a contemporaneous objection to testimony at trial will procedurally bar the issue on appeal. *Brown v. State*, 890 So.2d 901, 915 (Miss.2004).

Further, the qualification of an expert witness is left to the sole discretion of the chancellor. *Couch v. City of D'Iberville*, 656 So.2d 146, 152 (Miss.1995); *Sheffield v. Goodwin*, 740 So.2d 854, 857 (Miss.1999); *Seal v. Miller*, 605 So.2d 240, 243 (Miss.1992); *Hall v. State*, 611 So.2d 915, 918 (Miss.1993); *Wade v. State*, 583 So.2d 965, 967 (Miss.1991). If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue; a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. M.R.E. 702. However, it is the responsibility of the trial court to determine whether the expert testimony is relevant and reliable. M.R.E. 702 comment (May 29, 2003).

An appellate court's review of a trial court's exclusion of expert testimony is limited to the clearly erroneous standard. *Puckett v. State*, 737 So.2d 322, 342 (Miss.1999). An appellate court cannot reverse a trial judge's ruling unless its judicial discretion has been abused. *Hall*, 611 So.2d at 918 (citing *Lewis v. State*, 573 So.2d 719, 722 (Miss.1990)).

For a case to be reversed on the admission of such expert evidence, "it must result in prejudice and harm or adversely affect a substantial right of a party." *K-Mart Corp. v. Hardy*, 735 So.2d at 983 (citing *Hansen v. State*, 592 So.2d 114 (Miss.1991)). "To apply the harmless error analysis ... this Court must determine whether the weight of the evidence against [the defendant] is sufficient to outweigh the harm done by allowing admission of [the] evidence." *Fuselier v. State*, 702 So.2d 388, 391 (Miss.1997). Even if the chancellor errs, it is harmless error if there is no indication that admitting the evidence would change the outcome of the case. *Rogers v. Morin*, 791 So.2d 815, 824 (Miss.2001).

Dr. Kelly presented testimony at trial based upon her personal knowledge and personal observations of the minor child.

At trial, Dr. Kelly testified to her:

> The Witness: ... And then the grandfather said, "Did you move far, far away?" And he doesn't answer. Which to me is probably the best example in the whole group of them, is this is something that is really difficult for this young child to do deal with. I mean, he's three years old, yeah, he's moved far away, but I'm here right now. I mean this pulling back and forth, you love your daddy, your mommy. I mean it's too much to put on the child and he can't handle it.
>
> Q: Now, I believe you stated earlier that his mother is his psychological parent, what do you mean by that?
>
> A Well, I mean children can be raised by all sorts of people, grandparents, aunts, an uncle is like a parent, and psychological parent is the parent they go to for their sense of self, security, their basis, the one that's been there you know, through thick and thin. And his mother has been that person for him throughout his life. I mean, when he was younger, this is based on mom's report, but father worked at night. Currently, it's my understanding he works two jobs, I could be wrong about that, but that is my understanding. And he is just often has not been there. And, you know, that's not unusual, in many cases with parents, one parent is working and not there but the mother has always been there. And she is a stay-at-home mom, and that's where Colson gets his basic

sense of self and, you know, in the first three or three-and-a-half years of his life is, you know, really important for a child to have that sense of self, and as they start to explore and go out into the world. They will turn and look, you know, where is mom, can they go back and find her there. And the - - the mom that is - - is there, the lap to sit on, but she is there and she is available, and this is the psychological parent that has always been mom.

(R.E. – 000112-114)

Later in her testimony:

Q What do you think Colson needs for the future?

A Well, I think he needs both parents. I think he needs one primary home residence where he is living the majority of the time. I think that he needs to be with his mother as his psychological parent. And I think the visits to dad, to his father, needs to be a shorter duration. That he needs to be in school, have his time there, and then on breaks come for, say, two weeks return break two weeks. Have open access for daddy to come to Colorado and spend time with him, go to school activities, watch his sports. I think there needs to be, you know, open communication with phone calls. And this is a logistic thing, but I think it needs to be real clear what the dates of his visits are. There has been a lot of conclusion about when he goes, waiting until the last minute to get it set up.

(R.E. – 000115)

Amanda Schmidt maintains that Dr. Kelly, as a lay witness, was not permitted to give opinion testimony and this is reversible error. It is apparent that the witness presented fact testimony and opinion testimony pertaining to the ultimate issue as decided by the trier of fact. M.R.E. 704. For this reason, the chancellor did not err in not permitting Dr. Kelly to testify as an expert witness. Furthermore, the opinion testimony offered by Dr. Kelly pertained to the ultimate issue and is not objectionable. However, if the chancellor erred by failing to qualify Dr. Kelly as an expert then harmless error occurred since her testimony remained intact and the outcome of the case would not have changed. Amanda Schmidt's failure to raise objections to these issues during Dr. Kelly's testimony should procedurally bar this issue from being appealed.

E. The Court Appointed Expert did not have a Conflict of Interest

Amanda Schmidt contends that Dr. Nichols, the court appointed psychologist, was never properly informed of his duties and that the expert had a conflict of interest. In the case *sub judice*, neither counsel objected to Dr. Nichol's qualification as an expert witness. (R.E. – 000135). Dr. Nichols presented a fair recommendation to the court based upon nine (9) sessions with Colson, and several sessions with each of the parents. This error by the court was harmless if there is no indication that the outcome of the case would change if the instructions had been filed with the clerk pursuant to Mississippi Rule of Evidence 706. *Rogers,* 791 So.2d at 824. Accordingly, this argument is also without merit.

F. The Guardian *Ad Litem's* Investigation was Thorough and Complete

Amanda Schmidt contends the guardian *ad litem* failed to perform the duties associated with the position since he failed to interview Dr. Jeffrey Schmidt, the husband of Amanda Schmidt.

A guardian *ad litem* shall be appointed to protect the interest of a child in a termination of parental custody case. *M.J.S.H.S. v. Yalobusha County Dept. of Human Services ex rel*, 782 So.2d 737, 740 (Miss.2001) (citing M.C.A. § 93-5-107 (1994)). The duty imposed on a guardian *ad litem* is to "zealously represent the child's best interest." *Id.* citing *In re D.K.L.,* 652 So.2d 184, 188 (Miss.1995). This court should only reverse and remand if the guardian fails to fully represent the child's best interest. *M.J.S.H.S.*, 782 So.2d at 740.

In *M.J.S.H.S.* the court enumerated the guardian *ad litem's* duties explaining that a guardian *ad litem* should be prepared to testify as to the present health, education, estate and general welfare of the children. *Id.* To do this, the guardian may need to interview the minor child and their current custodians as well as referring to medical and psychological records along with academic and other records pertaining to the child. *Id.*

This Court , in *M.J.S.H.S.,* vacated a decision of the Yalobusha County Chancery Court due to the guardian *ad litem's* failure to protect the best interest of the child. There, the guardian failed entirely in his duty by never even interviewing the children in question. Instead, the guardian *ad litem* deferred entirely to the therapist's opinion instead of making a recommendation of his own. *Id.*

Amanda Schmidt contends that failure by Mr. Bailey, the guardian *ad litem*, to interview her current husband makes his report incomplete and is grounds for reversible error. In his report, Mr. Bailey outlines the effort he has taken in making his recommendation to the court. (R.E. - 000079). First he observed Colson in the care of both parents. He then interviewed both parties outside of Colson's presence. Mr. Bailey also interviewed the court appointed psychologist, Dr. Nichols. Mr. Bailey then proceeded to present his analysis to the court and make a recommendation concerning the custodial rights of Colson. (R.E. – 000079-87). The guardian *ad litem* fulfilled each and every duty required by the court; therefore his report is proper and should stand as such.

G. The Chancellor did not err in Requiring Amanda Schmidt to pay Reasonable Attorney's Fees and Reimbursing the Appellee for Expenses due to her Contempt

The award of attorney's fees is largely within the sound discretion of the chancellor. *Wright v. Stanley*, 700 So.2d 274, 282 (Miss.1997). In a civil contempt

action, the courts have the authority to award reasonable attorney fees. *Hinds County Bd. Pf Sup'rs v. Common Cause of Mississisippi*, 551 So.2d 107, 125 (Miss.1989). This power serves to make the plaintiff whole and enforce compliance with a court decree. *Id.* at 125. In *Hinds County Bd. Of Sup'rs*, the court determined that a chancellor has "broad discretion" in determining the award but the award must be fair and reasonable. *Id.* at 126.

Contempt matters are left to the substantial discretion of the trial court "which, by institutional circumstance and both temporal and visual proximity, is infinitely more competent to decide the matter than [the appellate court]." *Ellis v. Ellis*, 840 So.2d 806, 811 (Miss.App.2003) (citing *Varner v. Varner*, 666 So.2d 493, 496 (Miss.1995)). If an order of the court was ignored or violated, then the finding of contempt is proper. *Id.* The appellate court should not reverse a contempt citation where the chancellor's findings are supported by substantial evidence. *Id.*

A citation for contempt is proper when the contemnor has willfully and deliberately ignored the order of the court. *Strain v. Strain*, 847 So.2d 276, 278 (Miss.App.2003) (quoting *Bredemeier v. Jackson*, 689 So.2d 770, 777 (Miss. 1997)). Mississippi Code § 9-5-87 states:

> The chancery court ... shall have power to punish any person for breach of injunction, or any other order, decree, or process of the court, by fine or imprisonment, or both, ...

It has further been held that, "the chancellor should be allowed wide latitude in the exercise of sound discretion when exerting his coercive powers to enforce his decrees." *Matthews v. Matthews*, 86 So.2d 462 (Miss.1956). This discretion will only permit a reversal of the chancellor's decision upon a clear showing that the chancellor has

"manifestly abused the wide latitude of discretion afforded him in such manners." *Dunaway v. Dunaway*, 749 So.2d 1112, 1115-16 (Miss.App.1999). In child custody matters, a chancellor's orders for contempt will not be reversed "unless manifestly wrong, clearly erroneous, or the proper legal standard was not applied." *Hensarling v. Hensarling*, 824 So.2d 583, 587 (Miss. 2002).

At hearing, the court made the following findings regarding Amanda Schmidt's complete disregard for the courts previous orders:

> Mrs. Schmidt has not followed a single order of this court. She has totally refused to let Mr. Bermudez have visitation rights as ordered by this court on four different occasions. Each time he would have to come back before the court and they would - - they would amend the visitation rights and then he would finally get to see his son, but he would have to come back before the court because of Mrs. Schmidt. And I gave her every opportunity in the world to tell me why she did not follow this Court's orders and she could not.
>
> (R.E. – 000138).

Commentators on the subject have noted that contempt proceedings are designed to achieve compliance with a court's order and can only arise when a valid court order exists, the judgment is final and unambiguous, and there is a violation of that court order. Linda Elrod, Child Custody Prac. & Proc. § 15.4 (November 2006). Furthermore, these commentators maintain that a violation of a temporary order may hold a parent in contempt. *Id.* Other courts have ordered a party in contempt where their actions consistently frustrate another parent's visitation rights and when levying false accusations of sexual and physical abuse against the other parent in an attempt to gain an advantage in the precedings. *Id.* (citing *In re Marriage of Dreesbach*, 875 P.2d 1018 (Mont.1994)). In such instances Mississippi law mandates that "the chancery court shall order the

alleging party to pay all court costs and reasonable attorney's fees incurred by the defending party in responding to such allegations." M.C.A. § 93-5-23.

Amanda Schmidt, as foundation for her attempt to terminate Brian Bermudez's visitation rights, made baseless allegations that Brian Bermudez physically and sexually abused their minor child. The chancellor found no merit in Amanda Schmidt's allegations and made the following finding:

> You have unjustly and falsely accused him of sexual molestation. ... [a]nd in this situation it is not true, and you did it. You charged him with physical abuse of his child, the precious baby that he loves so much, it is not true. Every doctor, every organization that you have gone to, you have charged those allegations. Even the social department in the State of Tennessee found no evidence of it. Even though the pediatric clinics in Memphis found no evidence of it. You continued to charge Mr. Bermudez with that.
>
> (R.E. – 000146-147).

In general, the court must show an inability to pay, due to valid reasons, for attorney's fees to be awarded; however, in contempt actions, even if the contempt deals with domestic relations, the chancellor has the discretion to make the prevailing party whole by awarding attorney's fees without regard to whether the prevailing party is able to pay his fees. *Creel v. Cornacchione*, 831 So.2d 1179, 1184 (Miss.App.2002).

In *Creel*, the father was awarded physical custody of the two daughters and the mother was awarded rights to visitation. *Id.* at 1181. Since the divorce, four motions were filed by the mother to force the father to abide by the divorce decree. Upon finding the mother's allegations were unfounded the chancellor ruled in favor of the father and awarded him reasonable attorney's fees. This Court affirmed the award. *Id.* at 1182-83.

In *Stribling v. Stribling*, 906 So.2d 863 (Miss.App.2005), the chancellor awarded Mr. Stribling partial attorney's fees totaling $24,901.90 for expenses incurred for

enforcing contempt orders due to Mrs. Stribling's failure to abide by court orders. The chancellor determined that a partial award of attorney's fees was appropriate, needed, and equitable. *Id.* This Court found no abuse of discretion in the award where the findings were supported by substantial evidence. *Id.* citing *Anderson v. Anderson*, 692 So.2d 65, 72 (Miss.1997).

In the case *sub judice*, the chancellor determined Brian Bermudez had incurred $1,936.00 in attorney's fees while pursuing contempt actions to force Amanda Schmidt to adhere to the divorce decree. (R.E. – 000139). The chancellor also determined Amanda Schmidt failed to pay travel costs totaling $ 906.90 associated with the visitation rights. (R.E. – 000139). For these reasons, the chancellor awarded $2,842.90 in fees to Brian Bermudez for reimbursement due to Amanda Schmidt's continual disregard of the divorce decree and subsequent decrees rendered by the court. (R.E. – 000149-150).

For the foregoing reasons the chancellor properly assumed continuing jurisdiction over the contempt action arising from Amanda Schmidt's failure to abide by the original decree of the Chancery Court of Marshall County. Furthermore, the allegations brought forth by Amanda Schmidt which attempt to deprive Brian Bermudez of his visitation rights with his son warrant the award of reasonable attorney's fees.

H. The Chancellor Based his Findings on Facts in Evidence

Child custody decisions are indeed difficult issues to prosecute at trial. However, in making these decisions the court is bound by the record before it. *George County Board of Supervisors v. Davis*, 721 So.2d 1101, 1104 (Miss.1998). It is beyond an appellate courts power to disturb a chancellor's ruling if there is substantial evidence

supporting the chancellor's findings. *Anderson v. Watkins*, 208 So.2d 573, 575 (Miss.1968); *Culbreath v. Johnson*, 427 So.2d 705, 707-08 (Miss.1983); *Cheek v. Ricker*, 431 So.2d 1139, 1143 (Miss.1983).

With respect to issues of fact, where the chancellor made no specific finding, this Court should assume the chancellor resolved all such facts in favor of appellee, or at least in a manner consistent with the decree. *Harris v. Bailey Avenue Park*, 32 So.2d 689, 694 (Miss.1947); *Cotton v. McConnell*, 435 So.2d 683, 685 (Miss.1983).

It is vitally important for our trial courts to create a thorough and complete record and to base their decisions on that record and the evidence contained therein. *Rodgers v. Taylor*, 755 So.2d 33, 38 (Miss.App.1999). In this case, the chancellor based his modification of custody on the facts presented before him. It is not error to question whether valuable information could have been gleaned from individuals not brought to testify before him.

Chancellor Alderson did not allow Dr. Beebe to testify on December 4, 2004, when trial matters were discussed. The chancellor did note that Dr. Beebe did not return to testify during the four day trial held in March even though she was only thirty miles away.

The chancellor's opinions regarding the relationship between Amanda Schmidt and her current husband were developed through direct testimony, cross-examination and upon examination by the court. Amanda Schmidt testified that she had developed a relationship with Mr. Schmidt as early as June 2003. (R.E. – 000089). No more than a month after her divorce in February of 2004, she moved in with Mr. Schmidt in Cordova,

Tennessee, which undermined her credibility with the court due to her inconsistent testimony regarding the same. (R.E. – 000088).

The chancellor found ample evidence in the record to develop and support his decision; therefore this Court should not find reason to disturb his findings.

I. The Chancellor Properly Determined that a Visitation Hearing was the Proper Approach to Determining Amanda Schmidt's Visitation Rights

Visitation, and restrictions placed upon it, is within the discretion of the chancery court. *Newsom v. Newsom*, 557 So.2d 511, 517 (Miss.1990); *Clark v. Myrick*, 523 So.2d 79, 83 (Miss.1988); *Cheek v. Ricker*, 431 So.2d 1139, 1146 (Miss.1983). Visitation should be awarded with the best interests of the children as the paramount consideration, keeping in mind the rights of the non-custodial parent and the objective that parent and child should have as close and loving a relationship as possible, despite the fact that they may not live in the same house. *Clark*, 523 So.2d at 83, *Cox v. Moulds*, 490 So.2d 866, 870 (Miss.1986).

In *Cox,* this Court determined that a chancellor must find "something approaching actual danger or other substantial detriment to the children" in order to restrict a parent's visitation rights. *Id.* at 868. The *Newsom* Court held "an appreciable danger of hazard cognizable in our law" was sufficient to restrict visitation rights of a parent, *Id* at 517, while also requiring evidence that standard visitation was likely to cause actual harm to the child for a chancellor to impose limitations on visitation. *Harrington v. Harrington*, 648 So.2d 543, 545 (Miss.1994).

In *Harrington,* this Court reversed a chancellor's decision to limit the visitation privileges of the non-custodial, natural father who had cohabitated with a woman without

the benefit of marriage. *Id* at 547. The court reasoned that, despite the chancellor's findings, there was no evidence in the record that the children were harmed or confused by their father's cohabitation. *Id.* The court concluded that the likelihood of harm to the child must have a concrete, factual basis in order to overcome the presumption that the non-custodial parent is entitled to standard, unrestricted visitation privileges. *Id.*

In the case *sub judice*, the chancellor, based upon the opinions of the court appointed psychologist and prior actions of Amanda Schmidt, determined Amanda Schmidt may not return Colson to Brian Bermudez pursuant to the court's previous visitation orders. Specifically, one of the chancellor's chief concerns was whether Amanda Schmidt would continue to refuse to return Colson from Colorado. (R.E. – 000149). He also took issue with Amanda Schmidt's: (1) failure to provide psychiatric and medical records of Colson to Brian Bermudez; (2) failure to provide educational reports; (3) subjecting Colson to psychiatric hospitalization and medication when several experts have determined him to be a normal healthy four year old; (4) her continued co-habitation with her paramour; (5) making false allegations of physical and sexual abuse; (6) removing Colson from his extended family and friends; and (7) her complete failure to abide by previous court decrees. The chancellor, therefore had ample evidence to prohibit future visitation until Amanda Schmidt petitions the court.

J. The Chancellor Properly Found a Material Change in Circumstances had Occurred and a Change of Custody was Warranted

This Court has taken the view that "a non-custodial parent's right to visitation is a right more precious than any property right." *Ash v. Ash*, 622 So.2d 1264, 1266 (Miss.1993) (quoting and citing *Mord v. Peters*, 571 So.2d 981, 983 (Miss.1990)).

A parent cannot be permitted to "unilaterally deny the other's right to visit with his child," however, a change in custody will not be made simply to reward one parent and punish another. *Id.* (citing *Tucker v. Tucker*, 453 So.2d 1294, 1298 (Miss.1984)). In determining custody modification matters, the most important consideration is 'the best interest and welfare of the child.' *Marascalco v. Marascalco*, 445 So.2d 1380, 1382 (Miss.1984). In *Cheek v. Ricker,* 431 So.2d 1139 (Miss.1983), this court held that relocation of the custodial parent is not in itself a "material change" in circumstances to substantiate a change in custody.

There are two prerequisites necessary to warrant a modification of a child custody agreement. First, the moving party must prove, by a preponderance of the evidence, that a material change in circumstance that adversely affects the welfare of the child has occurred since the original decree. In the ordinary modification proceeding, 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 interests mandate a change of custody. *Buboc v. Boston*, 600 So.2d 951, 955 (Miss.1992).

Second, if such an adverse change has occurred, the moving party must show that the best interest of the child requires a change of custody. *Pace v. Owens*, 511 So.2d 489, 490 (Miss.1987).

The best interest of the child is the "polestar" consideration in all cases dealing with child custody and visitation. *Riley v. Doerner,* 677 So.2d 740, 743(Miss.1996). For a change in custody to be necessitated the chancellor must determine whether the "totality of the circumstances" has materially changed, is likely to remain materially

changed for the foreseeable future and that such a change adversely impacts the child. *Tucker*, at 1298; *Kavanaugh v. Carraway*, 435 So.2d 697, 70 (Miss.1983); *Riley,* 677 So.2d 743 (Miss.1996).

First, to determine if a modification of a child custody agreement is necessary, the chancellor will determine if a material change in circumstances has occurred. A chancellor's findings should be affirmed when they are supported by credible evidence in the record. *Rogers*, 791 So.2d at 826. The chancellor is in the best position to weigh the evidence presented by the witnesses. *Id.* (the chancellor, in *Rogers*, determined the evidence of the witnesses insufficient to show a material change in circumstances had arisen and this Court upheld his ruling).

Here the chancery court determined, first, a material change in circumstances had occurred since the original custody agreement was created. (R.E. – 000140). The court based its determination upon the testimony of the witnesses, finding the depression and anxiety affecting Amanda Schmidt coupled with the move to Colorado and the recent behavioral problems of Colson evidenced a material change in circumstance.

The court then determined that this material change in circumstance adversely affected the child's welfare.

In the third prong of the modification of child custody analysis, the court must consider the factors enumerated in *Albright v. Albright*, 437 So.2d 1003 (Miss.1983), to determine if the best interests of the child would be served by changing physical custody of the child. The factors expressed in *Albright*, at 1005, used when determining whether a modification in custody is warranted, are as follows:

1) the health and sex of the child;

2) a determination of the parent that has had the continuity of care prior to the separation;
3) which parent has the best parenting skills and which has the willingness and capacity to provide primary child care;
4) the employment of the parent and responsibilities of that employment;
5) physical and mental health and age of the parents;
6) emotional ties of parent and child;
7) moral fitness of parents;
8) the home, school and community record of the child;
9) the preference of the child at the age sufficient to express a preference by law;
10) stability of home environment and employment of each parent;
11) and other factors relevant to the parent-child relationship.

If, upon consideration of these factors, the complaining parent successfully shows a material change in those circumstances which has an adverse effect on the child then modification of the child custody agreement is proper. *Sanford v. Arinder*, 800 So.2d 1267, 1272 (Miss.App.2001).

In *Ash*, 622 So.2d 1264, after numerous proceedings to enforce the father's rights to visitation, the chancellor determined it was in the child's best interest to modify the custody agreement. In that case, the chancellor determined the cumulative effect of the mother's disobedience of the court's orders was a material change in circumstances and physical custody by the father would be in the best interest of the child. *Id.* at 1267.

Chancellor Alderson addressed the *Albright* factors as they pertain to the issues of this case. (R.E. – 000141-145). The chancellor determined both parents held equal footing in relation to Factors: 1, 2, 3, 6, and 9. Factor 4, the employment of the parent and responsibilities of that employment, was weighed in favor of Brian Bermudez for his service as an active duty police officer whereas Amanda Schmidt was unemployed. (R.E. – 000142). The chancellor determined the physical and mental health and age of the parents, Factor 5, weighed in favor of Brian Bermudez since Amanda Schmidt suffers

from depression and anxiety. (R.E. – 000142-143). Due to an adulterous relationship that resulted in the termination of the matrimonial bonds between Amanda Schmidt and Brian Bermudez, the chancellor decided Brian Bermudez was more morally fit than Amanda Schmidt and Factor 7 should weigh in his favor. (R.E. – 000143). The stability of the home environment, Factor 10, weighed in favor of Brian Bermudez. This factor weighed for him due to Amanda Schmidt's actions; placing four year old Colson on "mind-altering drugs" and hospitalizing Colson in a psychiatric unit due to alleged behavioral problems. (R.E. – 000144). Under the Factor 11 analysis, other factors relevant to the parent child relationship, the chancellor found in favor of Brian Bermudez since Amanda Schmidt had removed Colson from all of his extended family. (R.E. – 000144-145).

Chancellor Alderson's analysis for a modification of a child custody agreement was in accordance with the procedure outlined by this Court. For this reason his determination should be upheld.

CONCLUSION

Chancellor Alderson's decision to: (1) place Colson Bermudez in the custody of his father, Brian Bermudez, (2) award Brian Bermudez attorney's fees and reimbursement for expenses incurred for Colson Bermudez's travel arrangements, and (3) not making a determination on Amanda Schmidt's child visitation privileges at the time of trial were proper and in accordance with the evidence presented at trial.

Brian Bermudez and Amanda Schmidt were divorced in February of 2004. Since then, Brian has filed numerous motions to enforce his right of visitation enumerated in the *Decree of Divorce* while Amanda Schmidt has gone to extraordinary lengths to prevent Brian Bermudez from seeing his son. The Chancellor, after conferring with the Tennessee Court, determined that the Chancery Court of Marshall County, Mississippi, was a proper venue to hear an action for contempt and modification of the child custody agreement brought by Brian Bermudez.

Prior to trial the chancellor appointed a guardian *ad litem* and a psychologist to make recommendations in the best interest of the child, Colson Bermudez. Upon reviewing these recommendations and hearing the testimony of witnesses at trial, the chancellor issued his order.

Contrary to the Appellants arguments, the chancellor properly assumed jurisdiction over the matter therefore his ruling should be proper. The chancellor did not show bias or prejudice to either a party of the matter or witnesses involved in the hearing. If any actions by the chancellor toward a party or witness of the case did show bias or improper conduct, no objections were made to preserve the issue for appeal. The chancellor properly exercised his discretion by not qualifying a witness as an expert and

by appointing a psychologist to the matter. The guardian *ad litem* acted properly in pursuing the matter 'zealously' with the child's best interests in mind. The award of attorney's fees was proper and well founded in light of Amanda Schmidt's false accusations of physical and sexual abuse of Colson by Brian Bermudez. In making his determination, the chancellor relied upon evidence in the record and not facts beyond the record. The chancellor, being mindful of the best interests of Colson, was acting within his discretion when not addressing Amanda Schmidt's visitation rights at the hearing. The chancellor's determination that a material change in circumstances against the interests of the child had occurred was proper and modification of the child custody agreement was warranted by that finding.

For the reasons given above, the decision of the Chancery Court of Marshall County, Mississippi, should be affirmed in its entirety.

RESPECTFULLY SUBMITTED, this the 30 day of May, 2007

BRIAN S. BERMUDEZ, Appellee

By: _____

HON. JUSTIN S. CLUCK (MSB [redacted])

SMITH WHALEY, P.L.L.C.
Post Office Drawer 849
Holly Springs, Mississippi 38635
Telephone: (662) 252-3003
Facsimile: (662) 252-3006

HON. SARAH J. LIDDY (MSB [redacted])
ATTORNEY AT LAW
Post Office Box 40
Olive Branch, Mississippi 38654
Telephone: (662) 890-9394
Facsimile: (662) 890-9880

CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Smith Whaley, PLLC, that I have this date delivered a true and correct copy of the above and foregoing *Brief of Appellee, Brian S. Bermudez,* to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Honorable Glenn Alderson
Chancellor
P.O. Box 70
Oxford, MS 38655

Hon. Joe Morgan Wilson
Attorney at Law
210 West Main Street
Senatobia, MS 38668

Hon. Sarah J. Liddy
Attorney At Law
P.O. Box 40
Olive Branch, MS 38654 - 0040

THIS, the 30 day of May 2007.

JUSTIN S. CLUCK

CERTIFICATE OF SERVICE

This will certify that the undersigned attorney for Smith Whaley, PLLC, that I have this date delivered a true and correct copy of the above and foregoing *Record Excerpts of Appellee, Bryan S. Bermudez,* to all counsel of record by placing a true and correct copy thereof in the United States Mail, postage prepaid, addressed as follows:

Honorable Glenn Alderson
Chancellor
P.O. Box 70
Oxford, MS 38655

Hon. Joe Morgan Wilson
Attorney at Law
210 West Main Street
Senatobia, MS 38668

THIS, the 30 day of May 2007.

JUSTIN S. CLUCK