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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

AMANDA J. (GRESSEL) BERMUDEZ SCHMIDT : APPELLANT

VS. CAUSE NO.: 2006-CA-00765

BRIAN S. BERMUDEZ APPELLEE

FILED

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BRIEF FOR APPELLANT

Joe Morgan Wilson
Attorney for Appellee
210 West Main Street
Senatobia, Mississippi 38668
(662) 562-4477
MSB #[redacted]

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

AMANDA J. (GRESSEL) BERMUDEZ SCHMIDT : APPELLANT

VS. CAUSE NO.: 2006-TS-00765

BRIAN S. BERMUDEZ APPELLEE

CERTIFICATES 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 this Court may evaluate possible disqualification or recusal.

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

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

Brian S. Bermudez
Appellee

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

Amanda J. (Gressel) Bermudez Schmidt
Appellant

JOE MORGAN WILSON

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STATEMENT OF THE CASE

The parties to this action were divorced on the 2nd day of February, 2004. There was one child born to the parties, Colson Bermudez, born September 4, 2001. In August 2004 the Appellee sought to have the Appellant held in contempt of court, since she had previously filed precedings against him in the State of Tennessee for a Temporary Restraining Order and Restriction Of Visitation. Several hearings were scheduled for September 2, 2004, October 14, 2004 and finally December 6, 2004. At that hearing the Court appointed as psychologist, Dr Wyatt Nichols and as guardian ad litem Stephen Bailey were appointed and temporary visitation was set up.

There were several hearings scheduled during 2005 concerning visitation and exchange of the child all of which were resolved without the necessity of a hearing. It was hoped to have the case heard during the calendar year of 2005 but unfortunately the Appellant's pregnancy and inability to travel prevented that from happening, and the matter was re-set for January 2006, but the Court had a conflict and it was ultimately and finally scheduled to be heard March 27th. The hearings lasted the entire week and the Chancellor rendered his opinion on Friday, March 31, 2006.

The Court found that there was a material change in circumstances adverse to the parties' minor child necessitating a change in custody from the Appellant to the Appellee. He did not allow visitation for the Appellant but instructed her to present a petition before him with a person who he would accept for them to allow visitation within the State of Mississippi. The Appellant sought an appeal due to the Chancellor's bias toward her from the very beginning of the proceeding and her failure to get a fair hearing before him. She prosecutes this appeal in the hopes of having her child returned to her.

ARGUMENT

I
THE CHANCELLOR WAS IN ERROR FOR FAILING TO RELINQUISH JURISDICTION TO TENNESSEE, WHICH WAS THE HOME STATE OF THE CHILD

The Appellant would show this Court on the 2nd day of September 2004 that her Response To Petition To Modify and Petition For an Order Relinquishing Jurisdiction To the Circuit Court of The Thirtieth Judicial District at Memphis (RE-94) was filed asking the Chancery Court of Marshall County, Mississippi to relinquish jurisdiction from the original state of Mississippi to that of Shelby County, Tennessee. Under §93-23-5 of the 1972 Mississippi Code, Annotated as Amended the jurisdiction portion of the Uniform Child Custody Jurisdiction Act which determines which state is competent to decide such child custody matters is as follows:

> (1) A court of this state which is competent to decide child custody matters has jurisdiction to make a child custody determination by initial or modification decree if:
>
> > (a) This state (i) is the home state of the child at the time of commencement of the proceeding, or (ii) had been the child's home state within six (6) months before commencement of the proceeding and the child is absent from this state because of his removal or retention by a person claiming his custody or for other reasons, and a parent or person acting as parent continues to live in this state; or
> >
> > (b) It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one (1) contestant, have a significant connection with the state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships; or . . .
> >
> > (d)(i) It appears that no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

This case originally was heard before the Chancery Court of Marshall County, Mississippi and a decree entered on February 2, 2004 granting a Decree of Divorce to the parties on the grounds of Irreconcilable Differences(RE-67). Prior to that date however, both parties had moved from the state of Mississippi, the Appellant in May, 2003 and the Appellee in October 2003 (Tr-3). Neither party had been a resident of the state of Mississippi for a year at the time this preceding was begun. The child was living in Tennessee with the Appellant and under §93-23-5 (a) this state was not the home state of the child at the time the preceding began, nor had it been the home state for more than six months prior to that.

It appears that §93-23-5 (b) grants another alternative when it indicates:

> It is in the best interest of the child that a court of this state assume jurisdiction because (i) the child and his parents, or the child and at least one (1) contestant, have a significant connection with the state, and (ii) there is available in this state substantial evidence concerning the child's present or future care, protection, training and personal relationships

On August 24, 2004 the Appellant filed her Petition To Register Order For Enforcement, For Modification, And For Restraining Order and Permanent Injunctive Relief against the Appellee with the Circuit Court Of Tennessee For The Thirtieth Judicial District At Memphis (RE 100). The allegations in the Tennessee petition were that the evidence and the witnesses were all in Tennessee and the Appellee has set forth no evidence that indicated a reason for this case to remain in Mississippi other than that he wanted it to remain there.

Finally, §93-23-5 (d)(i) indicates that:

> no other state would have jurisdiction under prerequisites substantially in accordance with paragraphs (a), (b) or (c), or another state has declined to exercise jurisdiction on the ground that this state is the more appropriate forum to determine the custody of the child, and (ii) it is in the best interest of the child that this court assume jurisdiction.

It is not available to us for the record the conversation that the Chancellor had with Judge

John McCarrol of the Tennessee Circuit Court, but it does appear from the available orders and the many comments of the Chancellor that he wanted to keep the case, and apparently Judge McCarroll did not argue with him. The Appellant submits that such is not the law, and because this Chancellor wanted to keep the case does not satisfy the requirements of §93-23-5 of our Mississippi Code Annotated as amended.

> . . . But I'm going to look at this thing, I know what the law is. I'm well familiar with the law. And if it was just modification I would have already transferred it. But there's more issues to it than that. (Tr-19)

ARGUMENT
II

THE CHANCELLOR ERRED IN SHOWING AN EXTREME BIAS TOWARD THE APPELLANT

The Chancellor from the beginning showed a pre-disposition against the Appellant by believing she and her husband were guilty of perjury: prior to the beginning of the trial and prior to the current attorney's involvement, there was a hearing on October 14, 2004. Although no testimony was given there was interaction between the court and the two respective attorneys as follows:

> The Court: - - Well, let me tell you what troubles me. I remember this case and I remember a doctor, he is in this courtroom today. He took the witness stand and denied emphatically under oath that he was having an affair with your client. He is now married to her. That's perjury. This thing has really got me concerned. And I'm telling you lawyers now, I'm not rendering an opinion today. I'm going to have the court reporter to transcribe some of these hearings, and my main concern is the welfare of this child and the environment this child is in. If this child - - if this child is in the home of somebody that takes an oath and perjures themselves that child shouldn't be there. I'm going to look at it and I'm going to look and see, and if I determine it has been then I'm going to turn it over to the grand jury. But I'm going to look at this thing, I know what the law is. I'm well familiar with the law. And if it was just modification I would have already transferred it. But there's more

issues to it than that. (Tr 18-19)

The Court, after dialogue between the two attorneys further said:

THE COURT: I'm just concerned - - I'm just concerned as to whether or not the people have been playing with this court.
MR. ZUMACH: I can - - I can absolutely say that I won't ever let a client play with this court.
THE COURT: Well, I know a doctor that lied to this court, in my opinion, and I'm going to look at it
MR. ZUMACH: Yes, your honor.
THE COURT: And that has really got me disturbed.

(Tr 22)

THE COURT: . . . I'm going to make my ruling, when I make my ruling, if I retain the jurisdiction, I will address it at that time. If she has wrongfully withheld him she might have visitation.

(Tr 24)

The Appellant would further show that on the first day of trial, approximately one and one half years later, which was March 27, 2006 the following took place:

Q: And shortly thereafter you moved in with Dr. Schmidt?
A: It wasn't shortly after that.
Q: Well, when was it?
A: We moved in into a house in March of '05.
Q: You didn't move into together in March of 2004?
A: (No audible response.)

MS. LIDDY: May I approach?
THE COURT: Yes, ma'am.
MS. LIDDY: May I have this marked as an exhibit for identification?
THE COURT: Well, let's identify it first. And Mrs. Schmidt - -

A: That's correct, it's 2004.
THE COURT: Mrs. Schmidt?

THE WITNESS: Yes, sir.

THE COURT: You listen to me, I want you to hear me. You committed perjury in this court and your now husband committed perjury in this court. Now, if you commit perjury during in this trial you are going to leave this courtroom in handcuffs, do you understand me?

THE WITNESS: Yes, sir.

THE COURT: You've lied to this Court before. Now, she just asked you when did you move in with Dr. Schmidt, and you said March of 2005, and she said wasn't it 2004. Now, let me tell you, your memory is not that bad. So don't - - you wait and you let me finish. Now, don't you start playing games with this Court, you have lied to this Court for the last time. I'm giving you fair warning. Now, go forward.

(Tr 36-37

The Court claimed that the Appellant committed perjury during a hearing which was not transcribed, and there is no record that the Court in the one and one half years since ever chose to have such testimony transcribed. If he had wished to charge her with perjury then he could and should have done so, and she would have had the opportunity to defend herself. Since he did not charge her with perjury he could continue to allege that she had committed perjury with no opportunity whatsoever for the Appellant to defend herself, since he gave her no opportunity to do so either in his court or in the Circuit Court of Marshall County, Mississippi.

The Court returned to the issue as follows:

THE COURT: Well, let me ask you something. In one of the hearings before this Court when you brought Dr. Schmidt down to testify, and it was testified as to y'all calling each other so much on your cell phones, as much as 20 to 30 times in one day, do you remember that?

THE WITNESS: Yes, sir, I do.

THE COURT: All hours of the day and night. And your testimony at that time - - your testimony and his testimony, you were just friends and you was leaning on his

shoulder. Was that the truth then or not?

THE WITNESS: It was the truth, your Honor. We started - - we did start dating in July 2003 before the divorce was final. And I admitted that in the discovery.

THE COURT: Later you did. But on the stand, I'm talking about when you was on the stand, and if I have to transcribe it I will transcribe it. You testified you were friends.

THE WITNESS: Correct.

THE COURT: All right. Go ahead.

(Tr 38)

The Court continued to believe that she was a liar from the hearing of October 14, 2004 up to and including the hearing beginning March 27, 2006, yet he never had the hearing transcribed, which he could have easily had done by his own court reporter. She has transcribed all of the hearings thus far, yet he did not have her transcribe it, although he had numerous opportunities to do so. Still, the Chancellor treated the Appellant throughout the hearing as at best a liar, and at other times, more or less, a lunatic.

The Court interjected numerous times as follows:

THE COURT: Do you expect me to believe that:

THE WITNESS: Yes, sir . . .

THE COURT: Well, I'm going to be honest with you, in reading the file it appears to me that you have schemed every way you can to keep this child away from the father from the very beginning up to this present date.

THE WITNESS: No. sir.

THE COURT: Well, you are not helping yourself unless you can give me a better answer than what you just gave me.

(Tr 50-51)

Further the Court questioned:

THE COURT: Why a psychologist for a three-year-old child?

THE WITNESS: I'm not sure that was just her recommendation.
THE COURT: It sounds like she needs a psychologist. Go ahead.

(Tr 63-64)

Further:

THE COURT: Do you have a pediatrician that is going to testify as to the abuse of your son?
THE WITNESS: No, a psychologist.
THE COURT: Well, they are a dime a dozen some of them, some of them are good. Do you have a pediatrician?
THE WITNESS: No, sir. Mostly the bruises and everything has been come to a halt since we have been in court. The direct words from Brian's mouth to me was, I know how it hurt you, the bruises - -
THE COURT: - - Well, you know, I didn't ask you that. You are letting your mouth run away. I wish you would answer the questions I asked you. I'm wanting to know about medical proof. Do you have any? I'm concerned about this child.
THE WITNESS: I have - - I have - -
THE COURT: - - Because if this child. Just a moment. I'm concerned, if this man has been abusing this child I will stop him seeing this child, because this is a baby and this baby is not going to be abused. But if you've got fantasies in your head about the abuse you've got a problem.

(Tr 81-82)

Further:

THE COURT: Well, you aren't prepared for this trial then if you have not got that information with you. Go ahead. I will take it that you denied it. Go ahead.

(Tr 90)

Further the Court continued to be abusive with the Appellant and basically cross examined her:

THE COURT:	Now, you listen to me for a minute. I've got to make a decision on the welfare of this child, and when you say "I'm not sure" I'm taking it as no.
THE WITNESS:	Okay.
THE COURT:	Now, then, this is 2006, you know. Now, then, you can either testify or not testify. Now, then, answer her question if you can.

(Tr 91)

When the Appellant testified as to her financial vulnerability:

THE WITNESS:	. . . I don't have the money to fly him to and from three-round trip tickets every single month for visitation.
THE COURT:	Did you think about that when you moved to, where is it Colorado?
THE WITNESS:	No, sir, I didn't because I expected to work. And then when we moved shortly thereafter I got pregnant and was very sick with the pregnancy. And now - -
THE COURT:	- - Well, did you address the Court, have you petitioned the Court and tell the Court that you was financially not able to do it?
THE WITNESS:	I thought we had petitioned the Court that I was not financially able to do it. And I thought my attorney did file the petition.
THE COURT:	The thing that troubles me, is you have been doctor, and you have been judge through this whole ordeal.
THE WITNESS:	I'm sorry, sir.
THE COURT:	You have been playing the role as judge and doctor. You have been diagnosing the injury, so-called injury to your son, but yet - - yet you have no doctors here to testify. You have been interpreting the judge's orders to your satisfaction.
THE WITNESS:	Your Honor, I'm doing - - I'm doing to the best of my ability to get this child the help that he needs, and the visitation with his father that can be afforded.
THE COURT:	But you are not respecting the Court orders and never have. That's what is troubling to me. Why?
THE WITNESS:	I'm very concerned about my son.
THE COURT:	I'm very concerned about you. I'm going to be

honest with you, I really am.

(Tr 94-95)

Further:

THE COURT: Lady, something is wrong. I have seen something is wrong with you.

(Tr 96)

Additionally:

THE COURT: How old is this child?

THE WITNESS: Three, he was three-and-a-half at the time. He took the headboard of his bed and banging his head on it -- and I was 17 approximately weeks pregnant at the time - - banging his head, hitting me, throwing things at me, uncontrollable. And she had told me if that happened take him to the emergency room, so I did exactly what she suggested. I took him to the emergency room, on the way to the emergency room I had to pull over the car, because the child was in the back seat trying to choke himself with the seat belt.

THE COURT: It appears you have a very disturbed young man.

THE WITNESS: He is, and he needs some help. And that's what I'm trying do.

THE COURT: Well, he's been living with you all this time.

(Tr 100-101)

Q And you are saying that his post-traumatic stress disorder is because of Mr. Bermudez?

A Yes.

Q Has nothing to do with you moving him hundreds of miles away to Colorado ripping him away from his father and extended family?

A No. Because his behavior problems started before we moved, and the abuse started before we moved.

THE COURT: Well, just a moment. Why under God's green earth did you ever sign that Separation Agreement and that Property Settlement Agreement and that Child Custody Agreement and that Visitation Agreement if

all of this was happening? Why?

THE WITNESS: Your Honor, I regret that every single day.

THE COURT: I didn't ask you, I asked you why?

THE WITNESS: I wanted - - I was afraid for my whole life.

THE COURT: You wanted out of a marriage to marry your sweetie and get out of dodge, and that's what it boiled down to.

THE WITNESS: No, sir. I did not.

(Tr 112)

And once again the Court assumed facts never presented into evidence, never testified to in any hearing as his theory of why she divorced the Appellee and accepted the Property Settlement Agreement and Child Custody Agreement.

The Judge further berated and insulted the Appellant as follows:

THE COURT: Lady, Lady, you get diarrhea of the mouth when I ask you a simple question. Now, then, tell me in simple terms why you signed that agreement, knowing that this man had all of those propensities, why did you sign it?

THE WITNESS: I just wanted out.

THE COURT: So he was that bad, and so you are telling the Court that you are willing to sacrifice the sanity and the safety of your child to this brutal beast to get out of that situation, is that what you are telling the Court? Go ahead.

(Tr 113)

He gave her no further opportunity to respond to his accusations.

Again, later in her testimony:

THE COURT: What do you mean by that?

THE WITNESS: I mean that when he is with them he knows how not to behave and how not to get in trouble, so he's like a little puppet, a toy soldier over there.

THE COURT: How do you know that?

THE WITNESS: Because the psychologist in the hospital and the psychiatrist have told me that. When he goes there he can pull it together and hold it together until he comes home and let's it all out, because he's been

holding it in for so long.

THE COURT: I think you've got a psychologist with a yo-yo head. Go ahead.

(Tr 102-121)

The Court further commented on the witness when:

THE COURT: Why?
THE WITNESS: Because, again, I'm worried about my son.
THE COURT: Playing doctor.
THE WITNESS: Sir?
THE COURT: Playing doctor again.
THE WITNESS: I'm listening to his doctors.
THE COURT: Go ahead.

(Tr 126)

Again:

THE COURT: Well, tell me - - what makes you suspect sexual abuse?
THE WITNESS: Well, I don't suspect necessarily sexual abuse.
THE COURT: Well, you said he could - - could happen.
THE WITNESS: Well, anything could happen, but, you know, he said, I want to get in the bed with you naked like I do with my daddy. He said that to Ginger Giles.
THE COURT: I think you are sick right now, the way you are doing.

(Tr 131)

Further when the Court was questioning the Appellant about allowing her mother, who was an alcoholic to keep the child during the day time she states:

THE WITNESS: I know. I - - I trust my mother because I know her, and I know that I'm going to get Colson before it's her time. She drinks at night.
THE COURT: You hope you get him. Go ahead.

(Tr 144)

Further the Court stated:

THE COURT:	Lady, it appears that you poisoning - - that you are taking poison and pouring it on your child - -
THE WITNESS:	- - No, sir.
THE COURT:	- - against his paternal family.
THE WITNESS:	No, sir.
THE COURT:	I - - wait, now you let me talk for a minute. Everything that's come out this morning and this afternoon has been venom from you, and you cannot give me any foundation for it. I want you to give me some foundation.

(Tr 147)

The Court further stated:

THE COURT:	Do you realize that going from pediatric center to pediatric center, giving all of this information, which the Court considers to be totally false at this point, because everything before the Court does not substantiate what you have said here. Do you realize what that does to a child, much less the father?
THE WITNESS:	Yes, sir.
THE COURT:	Are you the one that has the problem?
THE WITNESS:	No, sir.
THE COURT:	Have you - - Well, what type of medication are you on again?
THE WITNESS:	Anti-anxiety and antidepressants.
THE COURT:	You are playing the role very well.

(Tr 169-170)

It was very clear that the Judge was showing that he did not believe the Appellant initially because of his continuing belief of her perjury. He did not believe in her sincerity, her sanity or her truthfulness and no matter what she said, and no matter what evidence she presented before the Court, this Judge would not have believed her.

Further, the Court behaved in such a manner as to make any witness feel completely ill at ease and impossible to testify with a full memory. That if the opposing counsel had asked

questions and berated the Appellant in such a manner, that such behavior would have been objectionable as badgering or intimidating the witness, but the Appellant's attorney could make no such objection when the Court itself was doing it. That from the very beginning of the trial on March 27th she was told that she was a perjurer and that if the Court believed that she lied "again" that she would be taken from the courtroom in handcuffs. That the Judge, further along, changed his tactics, and while not believing anything she said, then berated her as being anywhere from incompetent to ridiculous. That no person attempting to properly present their case could do so in the face of such unrelenting and insulting comments, interjections, hostility and actual cross examination from the Chancellor.

Justice Randolph, writing for the Court in Mississippi Commission On Judicial Performance v. Judy Case Martin, 2005 So.2d ___ (2005-JP-00504-SCT) stated;

> We believe our judicial system is more just and fair than any legal system which presently exists, or for that matter, which has ever existed in the history of civilization preceding our experiment in democracy. Yet at the same time, the system is not perfect. Judges are human, and as such, do on occasion err. Ultimately, it is this Court's constitutional duty to separate honest errors of the Judge from wilful misconduct, wrongful use of power, corruption, dishonesty or acts of moral turpitude, which negatively reflect upon the judicial branch of government.
>
> (Page 3 of their opinion)

They further attempted to distinguish between wilful misconduct, bad faith, and moral turpitude and discussed Canon 3 (B) (4) of the Code of Judicial Conduct which states:

> Judges shall be patient, dignified, and courteous to the litigants, jurors, witnesses, lawyers, and others with whom they deal under an official capacity and shall require similar conduct of lawyers, and of their staffs, court officials and subject to their direction and control.

While this writer feels that there was no wilful misconduct or ill intent it is clear from the

several pages of quotes from the transcript that when the Appellee's attorney took the Appellant as an adverse witness at the beginning of the trial that not only was said attorney her adversary, but the Chancellor also became her adversary in cross examining, berating and at times actually insulting her.

On the face of the record the Chancellor did not honor the requirements of Canon 3 (B) (4) as he was not patient, dignified or courteous to her and in fact was the very opposite of such requirements. He was also discourteous and insulting to her child's psychologist, Dr. Michelle Kelly from Colorado.

The Appellant has alleged bias. A discussion of bias immediately goes to the issue of Canon 3 (E) of the Code of Judicial Conduct, disqualification:

Canon 3 (E) (1), Judges should disqualify themselves from proceedings in which their partiality may be questioned by a reasonable person knowing all of the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law including but not limited to instances where:

> (a) the Judge has a personal bias or prejudice concerning the party, or personal knowledge of disputed evidentiary facts concerning the proceeding . . .

The Appellant would acknowledge that if at the beginning of the trial, which began March 27, 2006 she and her attorney had known of the Judge's true feelings as were expressed throughout the whole trial, a Motion For Recusal would have been appropriate. Unfortunately, prior to the trial this was not known and could not have been alleged without hearing entire proceedings. The Appellant hoped that the Court would listen to her explanation and no longer believe that she had committed perjury. However the proceeding ended as it had begun with his thinking that she was a liar, had emotional problems, and that she was incapable of maintaining custody of her child, although she had had his primary physical custody since birth.

ARGUMENT

III

THE CHANCELLOR ERRED IN FAILING TO QUALIFY HER PSYCHOLOGIST AS AN EXPERT AND SHOWING AN EXTREME BIAS TOWARD THE APPELLANT'S WITNESS DR MICHELLE KELLY

The Chancellor further exhibited hostility toward the Appellant's expert witness. The Court did not allow Dr. Michelle Kelly a well recognized expert in the field of child psychology and child abuse from the University of Colorado Health Science Center and Department of Pediatrics at Kemp Children's Center to be qualified as an expert. The following was stated:

MS. LIDDY:	I would object to her being qualified as an expert.
THE COURT:	Well, just a moment, do you have any questions, sir?
MR. BAILEY:	Your Honor, I don't have any questions regarding her qualifications.
THE COURT:	All right. Ms. Liddy ?
MS. LIDDY:	I do object to her being qualified as an expert.
MR. WILSON:	I haven't heard any basis, your Honor, she has got a long string of credentials and degrees, she's answered every question.
THE COURT:	She's answered them all. I'm going to allow her to testify, but I'm not going to qualify her as an expert. And this is why, she has only talked with the maternal side in this case. She has diagnosed a three-year-old boy with post-traumatic stress syndrome caused by the action of the paternal father. The paternal side of the family. She has not discussed anything with them. She has not asked for a meeting with them. She has not anything to try and equalize the testimony. And further if this child at age three was taking Risperdal and Tenex, mind-altering drugs prescribed and - - I'm going to let her testify, but I'm not going to qualify her as an expert. (Tr 259-260)

The Court then allowed her to testify as if she were an expert providing her opinions, testifying to what would be heresay by a fact witness as opposed to a medical professional and the

Court allowed her to continue to do so. The Appellant would submit that Dr. Kelly was either a fact witness or an expert witness, and although she certainly knew some facts she was primarily tendered as an expert witness to express her opinion as to what was the problem with this child. That such should constitute reversible error, that one cannot be a fact witness yet still testify as an expert. Yet the Court created the situation and allowed her to testify as an expert, while at the same time he refused to qualify her as such.

Then the Court further showed hostility toward the Appellant in responding to her witness:

THE COURT: And Mrs. Schmidt has never abided by any of the Court orders. She has totally ignored the Court orders, and there's four or five contempts that filed against her because of her ignoring the Court orders, because of deep-seated fears that she had. (Tr 277)

THE WITNESS: I'm not making that up.

THE COURT: No, ma'am, you are not making it up, you are stepping over the line.

THE WITNESS: And how so, sir? Your Honor?

THE COURT: You are - - you are becoming adversarial in this thing. You are not putting the best interest of your client there when I ask you a question.
(Tr- 278)

THE COURT: Well, I know that, that is what disturbs me with you, is that you will justify anything when it would be a lot easier to come out and say, Yes, he was holding on to him tight. That doesn't mean that much to me.
THE WITNESS: But clinging - -
THE COURT: But here you are - -
THE WITNESS: - - Clinging to dear life.
THE COURT: If I told you the sun was shining outside you would say, No, it's raining. That's - - that's what I can't understand about

you.

(Tr-288)

Further she testified specifically in the following:

A: - - And I've seen it in terms of statements he has made, Daddy tries to kill me, he want to kill me. I've seen Colson hit himself. I've seen him kick his mother. I've seen reports from the school him hitting children, and I've also seen him behave very well. (Tr 305)

Further the Court berated, insulted and actually threatened the witness when she indicated that she had to make her flight back to Colorado:

A: I don't mean to be rude, but I have ten more minutes, and I'm going to have to leave for the airport. So I just want - -

THE COURT:	- - No, ma'am, you are a witness, you are testifying.
THE WITNESS:	Okay. Well, I have a flight that leaves at 4:30 from the airport.
THE COURT:	Yes, ma'am, but you will leave when testimony is through.
THE WITNESS:	Even though we didn't start at - - I wasn't the first one this morning?
THE COURT:	Get me a deputy. Get me a deputy, I'm not going to put up with this. Get me a deputy.
MS. LIDDY:	Your Honor, I will just ask one more question.
THE WITNESS:	It's an expensive plane ticket, and that's my concern. Thank you.

(Tr 310- 311)

The Court additionally showed extreme prejudice against both the Appellant and the psychologist from Colorado, Dr. Michelle Kelly. Again, no opposing attorney could have behaved in such a manner without objections being made and sustained by the Court, if an attorney had treated a witness in that manner. However, the Court could do so but it made it impossible for a medical professional, such as Dr. Kelly to be able to properly testify with not only the interruptions but his obvious disdain and disagreement for her testimony.

The Appellant would further show that under Canon 3 (b) (4) of the Code of Judicial

Conduct which states:

> Judges shall be patient, dignified, and courteous to the litigants, jurors, witnesses, lawyers, and others with whom they deal under an official capacity and shall require similar conduct of lawyers, and of their staffs, court officials and subject to their direction and control.

The Canon requires not only such dignity and courteous behavior to the parties but to witnesses as well and Dr. Michelle Kelly, whether or not she was qualified as an expert witness was a witness nevertheless, and therefore entitled to be treated with courtesy and respect. She had traveled from Denver, Colorado to testify on behalf of her patient, the little child Colson Bermudez, and she certainly never bargained to be threatened with being placed under arrest simply because she needed to arrive at the airport on time in order to catch her plane back to Colorado.

ARGUMENT
IV

THE COURT FAILED TO PROPERLY APPOINT THE EXPERT UNDER RULE 706 OF THE MISSISSIPPI RULES OF EVIDENCE AND THE EXPERT HAD A CONFLICT OF INTEREST

The Appellant would show that on the 6th day of December, 2004 when the motion was made an order was provided that the Court would have a court appointed psychologist. That Rule 706 of the Mississippi Rules of Evidence reflects:

(a) Appointment:

> The Court may on its own motion or the motion of any party may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The Court may appoint any expert witnesses agreed upon by the parties , and may appoint expert witnesses of its own selection. An expert witness shall not be appointed by the court unless he consents to act.

Further under section (a) of the rule states:

A witness so appointed **shall** be informed of his duties by the court in writing, a copy of which shall be filed with the clerk, or at a conference in which the parties shall have the opportunity to participate.

This appears to be presented as an alternative that either such a witness will be informed of his duties in writing, or at a conference in which the parties can participate. The record is totally devoid of either of these having been done, and the Court violated a portion of Rule 706 (a) by doing neither of these.

Secondly, the Court appointed an expert who had a conflict of interest. The following interrogation occurred on cross examination by the Appellant's attorney and the Court appointed psychologist Dr. Wyatt Nichols:

Q You indicated that before being appointed in this case, and I believe in December of 2004 that you had previously either met or talked with Brian, is that correct?

A Correct. I had his initial session in September of 2004.

Q Right. And I am just wondering if at that point when the Court called you, would you not have seen that as, we would regard it as a type of conflict of interest that you had already interviewed one of the parties. What are your rule of ethics about that type of situation?

A Well as I had mentioned to you on the phone call about that, that to let you know that I had seen him, as long as I had conducted the evaluation, I definitely was not involved with him in any type of treatment or anything of that nature. It was just a matter that he came in initially, because of the fact, I think you told me when we talked about this on the phone that somebody had got to come in for the first session anyway. So it just happened that he - - he came in for the first session. It was about three months prior to my seeing Mom, and I did not see him - - and the next time I saw him was for what I considered a second session, which would have been with Colson, it would probably have been better for him if I had not seen him closer in time, my memory would have been a lot better. I don't know that I remember having seen him.

Q Uh huh, how did you become aware that you had?

A I had the name and - - my office manager reminded me that there was a file in that name . . .

(Tr 700-701)

A So it would have been a problem if I continued on with an evaluation involved with any other kind of treatment, or if I evaluated him for some other issue that was not related in this matter, yes, then I could not have done this. Somebody helped me for the first session.

Q Did you have any independent memory of the man when you say him the second time?

A Well, I - - he looked familiar, I mean, I recognized him. I read - - my notes in the first session, so - -

(Tr 701-702)

The Appellant would submit that under any type of ethical conflict of interest, if this expert had interviewed one of the parties prior to his court appointment as an expert, that he should have declared this to the Court in the meeting that (was not held) and should have been held. He would then have been subject to cross examination long before concluding his position as court appointed expert, and the conflict of intrest could have been resolved and another expert would have been chosen. However, this was not brought to the attention of the court or of the attorneys until the attorney for the Appellant discovered it and later asked about it through his cross examination.

Dr. Nichols had the duty of testifying at the conclusion of the trial, which testimony ultimately revealed his professional opinion that the child should be removed from the Appellant and placed with the Appellee, which made his service highly suspect. The Appellee who hired him fully three months prior to his court appointment, amazingly was recommended to have custody. This could have easily been avoided by the meeting with the court appointed expert as provided for by Rule 706 (a) of the Rules of Evidence, and he could have been forthright from the very beginning. Consequently his entire service as court appointed expert has been tainted and thus should be disregarded.

ARGUMENT

V

THE GUARDIAN AD LITEM FAILED TO COMPLETELY DEVELOP HIS INVESTIGATION

By appointment of the Court of December 6, 2004, attorney Stephen T. Bailey was appointed guardian ad litem on behalf of the parties' minor child Colson Bermudez. Although Mr. Bailey did extensive interviews with numerous people and secured many documents, he never spoke with Dr. Jeffery Schmidt, husband of the Appellant, Amanda Schmidt and step father of the child. That he was the primary male in the life of the child other than the Appellee from the date of their marriage in 2004 until the trial began March 27, 2006. There is nothing in the record to show that the guardian ad litem or the court appointed psychologist ever sought to interview in person or by telephone Dr. Jeffery Schmidt. That the Judge himself rather sarcastically (it appeared) wanted to know why he was not in court to testify. This writer can only ponder if the guardian ad litem and court appointed psychologist chose not to interview him if they sensed a strong sense of animosity in the mind of the Judge toward Dr. Schmidt. Regardless of why they did not interview him, such failure should constitute reversible error because his testimony and input as to the relationship that he had with the child for those two years and his observation of the physical, mental and emotional condition of the child was crucial; but no one seemed interested in speaking with him. Under the obligations of the guardian ad litem it was incumbent upon him to interview Dr. Schmidt and he failed to do so.

§ 93-5-23 states in part:

> The court may investigate, hear and make a determination in a custody action when a charge of abuse and/or neglect arises in the course of a custody action as provided in Section 43-21-151, and in such cases the court shall appoint a guardian ad litem for the child as provided under Section 43-21-121, who shall be an attorney.

The guardian ad litem accepted the appointment on December 4, 2004 and was required to fully investigate the matter since he had accepted the solemn duty of representing the minor child, Colson Bermudez. He was negligent in that duty by failing to interrogate in any way the step father, Dr. Jeffrey Schmidt. Consequently, his report could not possibly be complete and therefore was inadequate to make a proper and full report and recommendation before the court.

ARGUMENT

VI

THE CHANCELLOR ERRED IN HIS FINAL OPINION IN CLAIMING THE APPELLANT WAS GUILTY OF CONTEMPT OF COURT WITHOUT ONE HEARING AND/OR FINDING HER IN CONTEMPT

The Original Petition For An Order Holding Respondent In Contempt of Court And For Modification Of Final Decree Of Divorce And Other Relief was filed on the 25th day of August, 2004 (RE-87) A Response To Petition To Modify and Petition For An Order Relinquishing Jurisdiction To The Circuit Court Of the Thirtieth Judicial District At Memphis was filed on September 2, 2004 (RE-94) and an Order was entered on the same date (RE-129). A Motion To Reconsider was filed September 8, 2004 (RE-131) and then another Motion For Contempt was filed on October 5, 2004 by the Appellee (RE-134) and there was no order and the hearing was set for October 14, 2004. The Court made no ruling and then the Appellee filed his Second Motion for Contempt and First Motion for Emergency Relief on or about the 24th day of November , 2004.(Re-141) A response was filed on December 6, 2004 (RE-149) and a Temporary Order was entered on December 6, 2004.(RE-161)

On or about March 24, 2005 the Appellee filed an Emergency Motion To Enforce Visitation Rights (RE-181) and on June 3, 2005 filed a Motion For Contempt of Court and For Temporary Custody. (RE-186)

The Appellant would submit that, first of all, there were no hearings ever held on any of the motions for contempt. No testimony was ever offered and what happened, as the orders reflect on their face, either the parties worked out an arrangement or the Court gave guidance and instructions in chambers, and an order was then entered. At no time was the Appellant found in contempt of court, but the Court continually made reference to these so called acts of contempt throughout the over four days of trial.

In his decision the Chancellor stated:

I am going to award Mr. Brian Bermudez $1,936.00 in attorney fees, which he had to extend to enforce the Court orders of this Court. I'm going to award him $906.90 the he extended for airline tickets that you were to pay for. (Tr 778-779)

It was as if, although the contempt issues were raised and resolved without hearings, the Appellant was still punished regardless as if she were found in contempt, with the final result that she was required to pay attorney fees (Tr-778) as a partial result and lost custody and even visitation rights with the parties' minor child as an ultimate result.

In Howard v. Howard, 2005 So. 2d (2003-CA-01129-COA) this Court stated:

Whether a party is in contempt of court is left to the Chancellor's substantial discretion.

In Cumberland v. Cumberland 564 So.2d 839, 845 (Miss. 1990) They continued to say:

However, clear and convincing proof is required.

The Appellant would submit that it is required by Mississippi Law that a finding of a person to be in contempt of court (though it is in the Chancellor's substantial discretion), must be based upon clear and convincing proof. Such proof can only come by witnesses testifying to the contempt as alleged in the petition. Not only was such testimony not presented in any of these matters, but there can be no clear and convincing proof when no evidence was presented upon which the Court could base proof.

ARGUMENT

VII

THE CHANCELLOR COMMITTED REVERSIBLE ERROR BY PARTIALLY BASING HIS DECISION ON FACTS NOT IN EVIDENCE

Apparently the Court felt that the Appellant had made a calculated effort to divorce the Appellee to marry Dr. Jeffrey Schmidt and then scheme to remove the minor child Colson Bermudez from his father's life. Early in the trial the Judge commented as follows:

THE COURT: You wanted out of a marriage to marry your sweetie and get out of dodge, and that's what it boiled down to. (Tr-112)

In the decision of the Court five days later he stated the following:

The divorce was granted, as I said, on February 4, 2004. On March 6, 2004 Mrs. Schmidt moved in with Dr. Schmidt, the man who had broken up their marriage.

(Tr 754)

From the date of the divorce to the present date Mrs. Schmidt has not abided by that decree.

(Tr 756)

The Judge further stated later in his final decision:

After she could not get medical evidence she went to Dr. Beebe, a psychologist, and Dr. Beebe found that he probably was being abused, and he probably was being sexually molested. Dr. Beebe did not testify down here, she's 30 miles away. I don't know why she was not called, and I don't know why she didn't come. So the Court is not going - - there's - - the Court is not going to consider her testimony or the letter that was written by Dr. Bebee as a part of the file since she did not come, and this Court is only 30 minutes away from her. (Tr 754-755)

The Court neglected to mention that Dr. Beebe was at the hearing on December 4, 2004 and the Chancellor disallowed any hearing of testimony that day.

MR. ZUMMACH: Your Honor, there is one child psychologist that is here and prepared to testify as it relates to physical abuse on the part of Mr. Bermudez to include severely bruising this child.

(Tr-23)

It is extremely unfair for the Court to make such a comment when she was fully willing and ready to testify on that earlier occasion, and he chose not to allow anyone to present testimony.

> 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 separate occasions . . . 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. She just didn't agree with them,
>
> (Tr 759)

He further referred to the man that he threatened to have locked up for perjury:

> But the strangest thing is why Dr. Schmidt was not here for this five-day trial. I don't believe, if I was married to Mrs. Schmidt I don't believe the Atlantic Ocean would keep me from being beside my wife at a most important time like this. And if I had the medical expertise, and this poor young child, Colson, had been abused as has been alleged for the last two years, I would be here telling the Court all about it, because I would have the expertise to do it. But, yet, he's not. The Court finds that is strange.
>
> (Tr 761-762)

The Court found it strange that Dr. Schmidt was not there. Yet on previous occasions he had accused him of perjury, and stated that he was going to transcribe his testimony from an earlier hearing, and consider whether or not to have him bound over to the action of the Marshall County Grand Jury. Incredibly, the Judge found it strange that he did not appear to give his expertise. It is obvious that Dr. Schmidt would have been submitted to additional abuse if he had appeared and testified. His telling the truth one hundred times would never have convinced the Court that he was not a liar, regardless of his professional qualifications that he had as a pediatrician who uniquely worked with abused children.

The Judge determined facts not in evidence from the entire four day proceeding. There was no evidence whatsoever before the Court other than his previously determined opinion, based upon his memory of a hearing that had happened several years prior to this case, of his belief that the Appellant and her husband, Dr. Schmidt lied before the Court. They have never had the opportunity to show that they were being truthful at that time, and it was useless to present anything further to

the Judge in this regard, because he clearly had already made up his mind and nothing would change it. It was his assumption that the divorce was caused by Dr. Schmidt and there was the desire to remove the Appellee from the life of the minor child, Colson Bermudez. That was not shown by any testimony, but the Judge treated it as if it were true.

> The father is more morally fit than the mother. The mother started an adulterous relationship which ended her marriage, which broke up the family. So that the father gets that one.
>
> (Tr 772)

Again the above statement is based on facts not in evidence.

The Chancellor finally stated:

> I will be honest with you, Mrs. Schmidt, I think from the very day that you decided that you were going to divorce Mr. Bermudez you had decided you were going to marry Dr. Schmidt. You had begun to make plans and calculate plans to get the Bermudez, Brian and his family, out of Colson's life. And everything you have done points in that direction, and I firmly believe you meant it.
>
> (Tr 775)

> I think that I would be derelict in my duty, and I truly believe that I should be removed from the bench if I allow this child to remain in your home. There is absolutely no way I would let this child go back into that situation.
>
> (Tr 777)

In Rodgers v. Taylor, 755 So.2d 33 at 38 (Miss. 1999) No. 98-CA-00647-COA the Court found much the same scenario. There was a new husband of the Appellant:

> The Chancellor's repeated reference to the fact that Ken did not testify and what he would or would not have offered is mere speculation and conjecture and not part of the record on which the chancellor could base his decision. Further, we find reckless the chancellor's following assertion: "The real concern the Court has, though, is Ken. The Court is not convinced that he is not the culprit in the sexual allegations made by the child and, again, without his testimony, has to draw such

conclusions from the evidence it has before it." We find no substantial basis in the record even remotely suggesting that Ken may have perpetrated the alleged sexual abuse in this case, with the exception of the testimony of Karen that Rodney, Jr. is modest around Ken. It is evident that the chancellor wanted to hear from Ken. But, it is not the chancellor's job to present Karen's case. For whatever reason, she chose not to call Ken as a witness. However, the chancellor's suggestion that because Ken did not testify that he then may have perpetrated the alleged sexual abuse is a quantum leap which had no factual basis in the record, and which we find reveals that chancellor's **bias** resulting in his abuse of discretion.

In the present case much was made of the fact that both the Appellant and her new husband Dr. Jeffrey Schmidt were perjurers. He then pondered in his final opinion why an expert such as Dr. Schmidt did not come and testify to present his case. He further questioned why Dr BeeBe was not there although she had been there to testify on December 6, 2004 and he did not allow her to do so. In Rodgers the chancellor's bias was shown. In this case in a very similar situation his bias is also shown, again "resulting in his abuse of discretion". In Rodgers the case was reversed and rendered due to said abuse of discretion. The Appellant submits that the same should be done here, as follows:

> We will not reverse a chancellor's findings of fact where they are supported by substantial evidence in the record. Tedford v. Dempsey, 437 So.2d 410, 417 (Miss. 1983).
>
> However, we will not hesitate to "reverse when he is manifestly in error in his finding of fact or has abused his discretion." Hammett v. Woods, 602 So. 2d 825, (Miss. 1992).

ARGUMENT
VIII

THE CHANCELLOR IMPROPERLY CUT OFF ALL VISITATION OF THE APPELLANT WITH THE PARTIES' MINOR CHILD AFTER DIVESTING PHYSICAL CUSTODY FROM HER

The Appellant acknowledges :

Visitation and restrictions placed upon it are at the discretion of the Chancery Court.
Newson v Newson, 557 So. 2d, 517 (Miss. 1990)

Further:

. . . Visitation should be set up with the best interest 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.

White v Thompson, 569 So. 2d 1181 at 1185 (Miss. 1990)

The Appellant would show that when the Chancellor determines visitation, he must keep the best interest of the child as his paramount concern while always being attentive to the rights of the non custodial parent, recognizing the need to maintain a healthy, loving relationship between the non custodial parent and her child.

In the Chancellor's opinion he stated as follows:

As to visitation the Court is not going to address visitation at this time. I have some grave concerns, you have not followed the Court orders to this date. And I'm not going to give you an opportunity to get this young man in the state of Colorado and not return him. The Court is going to not address visitation at this time. You will need to petition the Court for visitation, and the visitation that I will allow will be supervised visitation with somebody like the Giles family. But they will have to join in your petition for visitation, so that they will be a party to this Court and they will be answerable to this Court, if they will not follow the Court's directions. You have a lot to prove, Mrs. Schmidt, before you get all of your rights back to your child. As the old saying goes, Actions speak louder than words. And your actions have spoken when it comes to Court orders and you abide by them. (Tr- 778)

This action of the Chancellor basically cut off any and all of the Appellant's right for visitation with the parties' minor child, and in Dunn v Dunn, 609 So. 2d, 1277,1286 (Miss. 1992) the Mississippi Supreme Court stated that:

> Chancellors' imposition of a restriction on a non custodial parents visitation without substantial evidence that the restriction is necessary to avoid harm to the child is "manifest error and an abuse of discretion." Therefore, this Court is cognizant that a restriction on visitation should be imposed on a limited basis.
>
> Fields v Fields, 830 So. 2d 1266, 1267-68 (Miss. CT APP 2002)

The Court, based upon his belief that there was something mentally wrong with the Appellant for her sincere belief that the parties' minor child had been abused either physically and/or emotionally, not only divested child custody from her, but in effect cut off her visitation rights altogether, since he would not allow her any visitation until she approached him with an acceptable person with whom she could have supervised visitation in the State of Mississippi. The Chancellor showed no end in view for when he might loosen the restrictions, and allow her to have the child with her in her home in Colorado. That such restriction was not necessary to avoid harm to the child and therefore constitutes "manifest error and an abuse of discretion." Fields at 1267-1268.

ARGUMENT
IX
THE CHANCELLOR WAS IN ERROR IN FINDING A MATERIAL CHANGE IN CIRCUMSTANCES JUSTIFYING A CHANGE OF CUSTODY

The Mississippi Supreme Court has stated:

> There are in our law two prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which *adversely* affects the welfare of the child. Second, *if* such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody.
>
> Pace v. Owens, 511 So.2d 489, 490 (Miss. 1987). Recently, the Mississippi Supreme Court reaffirmed the rule in Pace and provided further guidance: "The change in circumstances is one in the overall living conditions in which the child is found. The totality of the circumstances must be considered." Riley v. Doerner,

677 So.2d 740, 743 (Miss. 1996). Page 36

> We are unable to locate in the chancellor's opinion his identification of a material change in circumstances that had adversely affected Rodney, Jr.'s well-being. Pace and Riley both plainly require a finding that a material change in circumstances has occurred since the original custody agreement that would affect the minor child's best interests and well-being in order to warrant a modification. Absent such a finding, no modification is appropriate. Page 38 of the decision.

Assuming for the purposes of argument that the Appellant's behavior was such that she was found in contempt of court for refusing visitation, in Ash vs Ash the Court reflects on such an individual:

> Whether Cathy's attitude and actions would have changed had she previously been held in wilful contempt and house in the county jail, will forever remain unknown. The better rule would be for a chancellor to enforce contempt orders through incarceration, when necessary, to insure compliance with custody provisions rather than resorting to a change of custody. Ash v. Ash, 622 So. 2d 1264,1266 (Miss.)

Unfortunately the chancellor in this case never found the Appellant in contempt of court because there was never a hearing where testimony was presented to determine whether she was in contempt of court or not. Allegations of abuse, etc. were offered but there were no hearing therefore neither side presented their case. Regardless, the Court did not articulate what the material change of circumstances was. First, there was the impression that the material change was supposedly the move to Colorado and then that did not truly appear to be the material change but the allegations, though unproven, that the Appellant refused the Appellee visitation when in effect any visitation that he was granted and missed was abundantly made up. Finally, although the Court never did state what he believed the material change of circumstances was it seemed to be a hybrid between refusing to allow visitation and the fact that the child had mental and emotional problems that the child had in Colorado that apparently he did not have in Mississippi.

In Ash the Special Chancellor found:

> The Special Chancellor stated that he reviewed the totality of the circumstances and found that Matthew had been adversely affected. The evidence showed the chronic visitation dispute subjected the child to repeated confrontations, at least one extremely physical. . . Further, the evidence showed it was frequently necessary to summon a member of the sheriff's department to assist Michael in having Matthew brought from the house and into his vehicle. The Special Chancellor expressly found " it's the cumulative effect of willful disobedience of Court Orders [by Cathy Ash Vead] that's so important." Chancellor Warner, in allowing the custody to remain with the father, as changed, expressly stated:
>
> I find upon clear and convincing evidence that the mother's interference with the father's visitation has been a material change of circumstances that cannot be corrected by contempt; that it is and does adversely affect the child and that it is in the child's best interest that he live with his father. Ash at 1267

In that case the Chancellor considered every possibility other than a change of custody. He found that there were violent confrontations, willful contempt of court orders and that the mother's interference with visitation could not be corrected by contempt and that he therefore took the extreme measure of changing custody.

In the present case we have a Chancellor who did not believe in the truthfulness of the mother and therefore did not believe any allegations of any type of abuse to be true, but in fact called them blatant lies. He found facts never testified to in evidence and treated her as if she had been found in willful contempt at least four times when she had actually never once been found in contempt of court. That he could not punish her for contempt without having found her to be in willful contempt of court. At the same time the end result was the same. He removed the child from her as if she had been in willful contempt of court time and again when she was crying out for help from the court and alas never received it.

In 1983 Justice Armice Hawkins, speaking for the entire Court held in Ballard v Ballard, 434 So. 2d 1357, 1360 (Miss. 1983) that:

> It was manifest error to hold that the facts and circumstances of this case supported any modification of this child's custody. It must be recognized that uprooting a child from his mother, school, and environment was a jolting, traumatic experience.

> It is only that behavior of a parent which clearly poses or causes danger to the mental or emotional well being of a child (whether such behavior is immoral or not) which is of a sufficient basis as to seriously consider the drastic legal action of changing custody. This case does not remotely reach any such proportion.
>
> Ballard, at 1360

The Chancellor apparently took the professional opinion of the court appointed psychologist, Dr. Wyatt Nichols to indicate that the behavior of the mother, Appellant herein, in attempting to have her child treated for his emotional difficulties was "abusing" him to the extent that custody should be taken from her. The record will show that although the Chancellor accused her of going from "pediatric center to pediatric center" (Tr -169-170) that the record reflects that in fact she had one pediatrician and one psychologist in Memphis, Tennessee, Dr. BeBee and when she moved to Colorado, it was recommended by Dr. Wyatt Nichols in his report that therapy continue. She then took the child to Dr. Michelle Kelly who was the only psychologist that treated the child for the entire course of this case. For the purposes of prescribing medication it was necessary to see a child psychiatrist, a Dr. Schaeffer, also of Denver, Colorado. The statement of the Chancellor that she went from doctor to doctor is purely unfounded by any record whatsoever. It was the Chancellor's position that she was going to take the child to medical professionals until she found someone that agreed with her that there was abuse. This opinion assumes that such medical professionals would completely believe anything that she told them and would not derive their own opinion and make their own findings. Such a belief by the Chancellor and his subsequent ruling constitutes an abuse of discretion. Admittedly, medical professionals disagreed and the medical professional who was the court appointed expert, Dr. Wyatt Nichols disagreed with Dr. Michelle Kelly but in his testimony he admitted she could be right. He acknowledged that this was not some unqualified, uneducated person but she was on the world renowned child protection team of the Kemp Institute of Denver, Colorado and he knew better than to make light of this because of their high reputation.

> Q Right. Right. Now, although she testified fully you understood, I believe you understood that the Court did not qualify her as an expert?
>
> A Correct. That's my understanding in at least in forensic psychology she's a fact witness, she's not an expert. She's a fact witness because she's a

therapist, she's not Court appointed. And I'm not trying to be a lawyer, I'm trying to be a psychologist.

Q Right. Okay. But apparently the two of you spent a great deal of time with this case and with the child and come to rather different conclusions?

A Correct.

Q Is her conclusion impossible, unlikely, or just off the wall?

A It's definitely not impossible, it's definitely possible. I think that she came to the conclusion based on the information she was provided.

(Tr-708, 709)

Regardless, the Chancellor took everything Dr. Nichols stated as "gospel" and removed the child from the mother where absolutely no behavior which "clearly poses or causes danger to the mental or emotional well being of a child" took place. Certainly the child had difficulties when he returned to Colorado but several medical professionals differed as to the reason for it. Dr. Nichols felt that it was because of the anxiety exhibited by the mother, Appellant herein. Dr. Beebe and Dr. Kelly felt that such was done by the possible physical and/or emotional abuse of the child by his father. There was certainly no proof that could be presented to satisfy a criminal court of the father's child abuse, but also there was no proof in the same sense that the mother had done anything to harm her child. In fact the, Appellee himself agreed that she was a good mother but had always been a good mother and his only objection was her interfering with his visitation as evidenced by the following offered by Dr. Nichols:

Q . . . Where you stated that Mr. Bermudez did not express any direct concerns about Mrs. Schmidt's parenting ability?

A Correct.

Q Is it your understanding that he continued to feel that way, or has he changed his mind?

A I don't remember hearing anything from Mr. Bermudez as far as Mrs. Schmidt's parenting ability as far as taking care of Colson, he has some issues of what he perceives of her trying to remove him from Colson's life, separate that out, but as far as her role as a mom, no, he hasn't mentioned - - I can't remember him mentioning anything that I would consider significant.

(Tr 703)

The record has no comment from any medical professional that believed that the Appellant was not a good mother but had the child's best interest at heart at all times. The Chancellor having already concluded her to be a perjurer found nothing she said as truthful but believed that she was either lying or crazy, and he told her so on numerous occasions throughout the trial. That this writer submits that no evidence of any kind submitted by the Appellant would have ever convinced the Court because he, by his behavior and his words, had already made up his mind and the record abundantly reflects that fact.

ARGUMENT
X

THE CHANCELLOR WAS IN ERROR IN FINDING INITIALLY THAT A MOVE FROM MEMPHIS, TENNESSEE TO DENVER, COLORADO WAS A MATERIAL CHANGE IN CIRCUMSTANCES AND LATER CHANGING TO AN UNSPECIFIED CHANGE

The Chancellor apparently held it against the Appellant that she moved to Denver, Colorado. He further said in his opinion:

> Mrs. Schmidt has moved to Colorado. Colson - - the only family he has there is Mrs. Schmidt, his biological mother and his half sister. (Tr-774)

He seemed to be criticizing or punishing the Appellant for the fact that she moved to Colorado.

Whether this is the material change of circumstances the Chancellor referred to is unclear by his opinion but Spain v Holland posed the question:

> Should the Chancery Courts of this state interfere with a divorced custodial parent's planned movement of minor children to a foreign nation as to that parent's pursuit of a reasonable professional or economic opportunity?
>
> Spain v Holland 483 So. 2d 318

Spain further says:

> Even though under the totality of the circumstances a change has occurred, the Court must separately and affirmatively determine that this change is one which adversely effects the children.
>
> Spain v Holland 483 So. 2d 320

In their referring to when the custodial parent moves away they further stated:

> Where such occurs we solve nothing by shifting custody to the parent staying at home for, in theory at least, transcontinental separation from either parent will adversely effect the child. The judicial eye in such cases searches for adverse effects beyond those created (a) by the divorce and (b) by the geographical separation from one parent.
>
> Spain v Holland 483 So. 2d 320, 321

They cited three other cases in Spain in which a move was not found to be a material change. And finally:

> We regard as legally irrelevant to the matter of permanent custody the fact that taking the children to a distant state effectively curtails the non custodial parent's visitation rights.
>
> Spain v Holland 483 So. 2d 321

From the very beginning of this proceeding the move to Colorado was alleged by the Appellee as a material change adversely affecting the child.

In the Petitioner's Petition For An Order Holding Respondent In Contempt Of Court And For Modification Of Final Decree Of Divorce And For Other Relief of August 2004 it was stated:

> 5.
>
> Petitioner would show that since the entry of the Court's decree , there has been a material change in circumstances that adversely affects the best interest of the child. Petitioner would show that Respondent has married her paramour and recently announced that she is moving to Denver, Colorado. Petitioner would show that this is not in the child's best interest as it will remove the child from the family environment he has always known and it will prohibit weekly visit's with the child's father. Furthermore, it will prohibit weekly contact with the child's extended

family, including his paternal grandparents who live in Mississippi. Petitioner would show that it is in the child's best interests that he be placed in the custody of his father, or, in the alternative, that Petitioner's visitation rights should be changed to allow the child extended periods of visitation with him throughout the year.

(Tr-88)

It was clearly alleged by the Appellee's attorney that the material change was the removing of the child from the State of Mississippi to live in Colorado with Appellant and her husband.

Further evidence of this claim of material change is shown in the Court order of September 2, 2004 which stated in part:

3.

The Respondent shall not permanently remove the child COLSON BERMUDEZ, to Colorado per her announced relocation plans until further order of the Court.

(RE - 129, 130)

In the Temporary Order of December 6, 2004 the Court stated:

(5) The restriction the Court's order of September 2, 2004, concerning removal of the child to Colorado is hereby removed.

(RE 162)

From that Order it appeared that the Court thought better of placing a restriction that was not lawful upon the custodial parent's right to re-locate. Although he showed by said order that such was not "the" material change of circumstances, the move to Colorado was continually referred to in a negative manner numerous times throughout the trial as if it were "the material change."

THE COURT:	Did you think about that when you moved to, where is it Colorado?
THE WITNESS:	No, sir, I didn't because I expected to work. And then when we moved shortly thereafter I got pregnant and was very sick with the pregnancy. And now - -
THE COURT:	- - Well, did you address the Court, have you petitioned the Court and tell the Court that you was

financially not able to do it?

THE WITNESS: I thought we had petitioned the Court that I was not financially able to do it. And I thought my attorney did file the petition.

THE COURT: The thing that troubles me, is you have been doctor, and you have been judge through this whole ordeal.

THE WITNESS: I'm sorry, sir.

THE COURT: You have been playing the role as judge and doctor. You have been diagnosing the injury, so-called injury to your son, but yet - - yet you have no doctors here to testify. You have been interpreting the judge's orders to your satisfaction.

THE WITNESS: Your Honor, I'm doing - - I'm doing to the best of my ability to get this child the help that he needs, and the visitation with his father that can be afforded.

THE COURT: But you are not respecting the Court orders and never have. That's what is troubling to me. Why?

THE WITNESS: I'm very concerned about my son.

THE COURT: I'm very concerned about you. I'm going to be honest with you, I really am.

(Tr 94-95)

Q And you are saying that his post-traumatic stress disorder is because of Mr. Bermudez?

A Yes.

Q Has nothing to do with you moving him hundreds of miles away to Colorado ripping him away from his father and extended family?

A No. Because his behavior problems started before we moved, and the abuse started before we moved.

THE COURT: Well, just a moment. Why under God's green earth did you ever sign that Separation Agreement and that Property Settlement Agreement and that Child Custody Agreement and that Visitation Agreement if all of this was happening? Why?

THE WITNESS: Your Honor, I regret that every single day.

THE COURT: I didn't ask you, I asked you why?

THE WITNESS: I wanted - - I was afraid for my whole life.

THE COURT: You wanted out of a marriage to marry your sweetie and get out of dodge, and that's what it boiled down to.

THE WITNESS: No, sir. I did not.

(Tr 112)

From the beginning of this case the Appellant was being punished by the Court for her moving with her husband for a better position in his career as a medical doctor, for having done so as if she had a choice to either stay in Mississippi and separate from her husband, or remain with him and go to Colorado. This writer knows of no court that has ever required such a choice to be made.

Little was ever said about the fact that the Appellee could visit Colorado at any time and visit the child but all of the Court ordered visitation was to have taken place in Mississippi at the full expense of the Appellant which clearly punished the Appellant for her moving with her husband to the State of Colorado. That it was well known that she was not working full time particularly after her pregnancy and birth of a premature baby on September 11, 2005 and that she had no income whatsoever and that unless her husband consented to pay for three plane tickets every month it would be impossible for the visitation to take place in accordance with the Court's decrees.

The Court itself began to compound the problem of the move from the beginning when on December 4, 2004 it ordered:

> 6. The child shall be in the custody of Brian S. Bermudez from December 13th until December 23, 2004, and then for ten (10) days each month thereafter beginning on the first Monday of each month. Amanda J. Schmidt is responsible for providing transportation of the child to and from visitation.

7. The parties shall cooperate with each other concerning the arrival and departure times of the child's flight when determining pick up and drop off times.

(RE-162)

The Court did not specify except by implication whether it would be by rail, bus or by air and left the parties to fight over how it would be done. That when the child began to have emotional problems, rather than relax the visitation, any visit that was missed had to be made up, and the visits went from ten days per month to twenty days and finally a full thirty days of one month. The Court never thought that these lengthy visits with the father and away from his mother could have any adverse effect on the child, but he was always lamenting the fact that the father had

not had his proper visitation. If the days of visitation received from December 13, 2004, are calculated the Appellee received much more visitation under the Temporary Order than he was getting under the original decree of divorce.

The Court appeared to drop all comments as to the move to Colorado being a material change that was adverse to the parties' minor child when in its opinion recognizing that that was not a material change under the law in Mississippi found.

> The Court finds that there has been a material change of circumstances existing now that did not exist at the time of the rendition of the final decree. Now, then, does the change in those circumstances justify the Court, or would it be in the best interest of Colson because of those change of circumstances for the Court to change custody? (Tr-769)

The Court at this time does not specifically state what the material change was. For a great portion of these proceedings the material change appeared to be the Appellants' move to Colorado and taking the child with her, but then at the trial it appeared that the theory had changed. Since Colson was having problems the Court stated:

> It appears to the Court that Colson's problems is because of the environment that he is living in now. (Tr-769)

The Court then goes right into the Albright factors with continual comments as to the problems of the mother. Under the physical and mental health and age of the parents:

> The mother is not in good mental health. She has depression; she has anxiety. And I truly believe that you have got deeper problems than that, for you to put Colson through what you put him through. I would give the father a check on that. (Tr 771-772)

Further, under stability of home environment:

> . . . The home environment of Brian Bermudez, from all of the evidence before the Court today, has a very stable home environment. (Tr 772)

The Chancellor further stated:

> . . . As far as I know the home environment up there is stable, other than the mental problems of the occupants of the home. (Tr 773)

The Court never considered the fact that its own order of such extended visitation could have been a serious part of causing problems in the life of this little boy. That this child did not need to be away from his mother (from whom he had never been separated) for ten days per month, twenty days or certainly not thirty days at a time. That if both parents were wonderful, loving, giving and understanding parents there would have been adverse effects on such a young child being gone from his mother for such a lengthy period of time, but the Court always blamed any behavioral problems on the Appellant and never looked elsewhere for a solution. This again considering the totality of the circumstances and the other assignments of error coupled together constitute manifest error and should require reversal.

CONCLUSION

For many reasons this case should be reversed and rendered. First of all the Court erred in failing to surrender jurisdiction to the state of Tennessee. He then having previously determined that the Appellant and her husband were perjurers showed extreme bias against her and her expert witness Dr. Michelle Kelly. He failed to properly appoint the expert as required under Rule 706 (a) of the Mississippi Rules of Evidence and appointed an expert that had a conflict of interest and should have never served. The guardian ad litem, failed in his duties to interrogate Dr. Jeffrey Schmidt, the step father of his client, minor child Colson Bermudez, therefor not having the benefit of the one male in said child's life who spent more time with him than any other including the Appellee. The Court further erred in finding of facts of things never in evidence. He indicated the Appellant was in contempt of court though never having found her in contempt of court since there was never a hearing. Finally he found a material change of circumstances where there was none after having originally believed the material change was the Appellant's move to Colorado and later

of the one male in said child's life who spent more time with him than any other including the Appellee. The Court further erred in finding of facts of things never in evidence. He indicated the Appellant was in contempt of court though never having found her in contempt of court since there was never a hearing. Finally he found a material change of circumstances where there was none after having originally believed the material change was the Appellant's move to Colorado and later through the proceeding apparently changed his mind and determined that there was another material change. He pondered about the testimony of Dr. Schmidt who did not testify and speculated on what that testimony might have been. He showed extreme bias, found facts not in evidence and predetermined that there was a material change one way or the other that was going to cause the Appellant to lose her child and custody be placed in the Appellee. For all of the forgoing reasons this case should be reversed and rendered and the child returned to the Appellant.

Respectfully submitted this the 28th day of February, 2007.

JOE MORGAN WILSON
Attorney for Appellant
210 W. Main Street
Senatobia, MS 38668
(662) 562-4477
MSB # 7300

CERTIFICATE OF MAILING

I, Joe Morgan Wilson, Attorney for Appellant Amanda J. (Gressel) Bermudez Schmidt, certify that I have this day mailed by United States Mail, postage pre paid, the original and three copies of the forgoing attached brief for Appellant to the following:

Hon. Betty Sephton
Supreme Court Clerk
P. O. Box 117
Jackson, MS 39205

This the 28th day of February, 2007.

JOE MORGAN WILSON
Attorney At Law
210 W. Main Street
Senatobia, MS 38668
MS Bar [redacted]
662-562-4477

CERTIFICATE OF SERVICE

I, Joe Morgan Wilson, attorney for Appellant, Amanda J. (Gressel) Bermudez Schmidt , certify that I have this day mailed by first class mail, postage prepaid, a true and correct copy of the foregoing and attached Brief For Appellant.

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

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

This the 28th day of February, 2007.

JOE MORGAN WILSON
Attorney for Appellant
210 W. Main Street
Senatobia, MS 38668
(662) 562-4477
MSB #[redacted]