IN THE SUPREME COURT OF MISSISSIPPI

LINDA BURGESS PURVIANCE — APPELLANT

VS. — NO. 2006-CA-00931-SCT

STEPHEN CHRISTOPHER BURGESS — APPELLEE

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APPEAL FROM THE CHANCERY COURT OF THE SECOND JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

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BRIEF OF APPELLEE STEPHEN CHRISTOPHER BURGESS

(ORAL ARGUMENT NOT REQUESTED)

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BRIEF OF APPELLEE STEPHEN CHRISTOPHER BURGESS

CERTIFICATE OF INTERESTED PARTIES

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 refusal:

1. Lindy Burgess Purviance Spell, Appellant;
2. Stephen Christopher Burgess, Appellee;
3. John R. McNeal, Jr., Attorney for Appellant;
4. E. Michael Marks, Trial and Appellate attorney for Appellee;
5. Julie Ann Epps, counsel for Appellee on appeal;
6. Honorable William H. Singletary, Chancery Court Judge;

This, the 19th day of March, 2007.

COUNSEL FOR APPELLEE

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STATEMENT OF THE CASE

This case arises out of the denial of a Motion to Modify child custody filed by Appellant Lindy Burgess Purviance [Lindy]. CP 120-21. On April 5, 2001, Lindy and Stephen Christopher Burgess [Chris] were granted a divorce on the grounds of irreconcilable differences. CP 1-18. The two were given full joint physical and legal custody of the minor child, Trettson, born December 2, 1999. Lindy was given primary physical custody with Chris receiving reasonable visitation. CP 6.

At some point following the divorce, it became apparent that Trettson's development was slower than average. On December 4, 2003, the Court awarded primary physical care to Chris. The Chancellor based his decision on evidence that Lindy had been working at three jobs, during which time Chris had taken care of Trettson, that Lindy had failed to take Trettson's developmental delays "seriously" and her "lackadaisical attitude regarding Trettson's [physical]

health" problems. CP 25-26, 29-31. The Chancellor found that Trettson's "critical and serious developmental problems" required "**aggressive intervention** for the child's sake [emphasis added]." CP 26.

Based on Lindy's adjusted gross income of $1,250.00, the Chancellor directed Lindy to pay $175.00 a month to Chris for child support. CP 28, 29-31.

After receiving custody, Trettson went to preschool at Willowood School. However, this school did not work out because he was with more severely developmentally delayed children than he was.[1] T. 243. Chris then consulted Dr. Kimberly Ray, a psychologist specializing in the treatment of children with developmental problems, who was the first to actually diagnose Trettson as autistic. [2] She began to treat him in July of 2004. Chris enrolled Trettson in special classes for autistic children at Clinton Park Elementary School. In addition to those special classes, Dr. Ray and her staff provided specialized treatment for four to five hours a week. T. 98, 120-21, 123.

Chris's wife Amanda, who was pregnant, suffered sudden kidney failure and was operated on in Alabama where her family lived. In June of 2005, Chris notified the Court that he would be moving to Alabama. CP 33. Chris and his wife Amanda had made arrangements for Trettson to continue his treatment at a school in Alabama designed strictly for autistic children from grades K through the 12th grade. T. 186.

After learning of Chris's plans, in June of 2005 Lindy filed a motion for a temporary restraining order alleging that since Trettson had been in his father's custody, he consistently

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[1] Initially, there was some difficult in pinpointing the exact problem with Trettson because he was so young. T. 17.

[2] Dr. Ray was stipulated to be an expert in clinical psychology for behavioral patterns of children with an overview in autism. About 95% of her practice is related to autistic children. T. 98. Dr. Ray was the only expert who testified at trial.

displayed bite marks, bruises, abrasions and other injuries which Lindy believed to be indicative of possible abuse. CP 38. In addition, she alleged that Chris no longer was employed, planned to move to Alabama and had failed to provide the appropriate therapy for Trettson for his developmental delays. CP 38-39. She asked for a TRO preventing Chris from contact with Trettson and for permanent physical custody of Trettson. CP 42.

She attached a letter to her motion from Dr. Kenneth A. Yung, a doctor whom she had asked to examine several photographs she had taken in 2003 and early 2004 which she claimed showed abuse Trettson had suffered while in Chris's care. *See,* Addendum A to this Brief for a copy of this letter.

Yung was not Trettson's regular physician. He opined that some of the bruising "appears to be non-accidental"; however, he stated he needed more information and Trettson's past medical records to provide a more definitive diagnosis of abuse. *Id.*

On June 23, 2005, out of an abundance of caution, the Chancellor granted the temporary restraining order and granted Linda temporary physical custody pending a hearing that he anticipated would be held on July 7th. However, for some unexplained reason, the hearing did not materialize, and Trettson remained in Lindy's custody for almost nine months. CP 46, 123.

While the proceedings were pending, at Chris's request and over Lindy's objection (CP 62-69), the Court directed Dr. Ray to examine Trettson to determine his present developmental condition. CP 78, T. 95. As previously noted, prior to the TRO, Trettson had been under Dr. Ray's care for treatment for his autism. Lindy, however, had removed him from Dr. Ray's care at the time she received temporary custody T. 98. She also refused to allow him to continue his special classes at Clinton Park Elementary and enrolled him in "inclusive classes" at Gary Road

Elementary School where they did not utilize the principles of behavioral analysis and teaching methods that Dr. Ray testified had been shown to be effective with autistic children. T. 121, 306.

In terms of securing any other alternative behavioral treatment for Trettson, as far as the record reflects, Lindy took Trettson for evaluation by Dr. Douglas Byrd in September of 2005, having been referred there after Dr. Glenda Scallorn had prescribed Adderall, which had failed to improve Trettson's behavior. Dr. Byrd suggested drugs for his hyperactivity and suggested that she bring him back in two weeks. The record does not reflect whether she did so. Exhibit 7. In the meantime, rather seek any professional treatment, Lindy elected to try to provide the "treatment" herself.

Several continuances delayed the trial of Lindy's motion for modification, and the Court finally heard the motion on February 6-7, 2006. CP 95. On March 15, 2006, the Chancellor denied Lindy's motion to modify. Instead, he gave full physical and legal custody of Trettson to Chris and awarded him child support of $250.00 a month—an increase of $75.00 a month over what Lindy had previously been ordered to pay. CP 108. Lindy filed a motion to reconsider. CP. 109-18. The Court subsequently entered an "Amended Opinion of the Court on June 15, 2005, Motion for Modification" but still awarded full physical and legal custody to Chris and $250.00 a month child support.[3] CP 122-27.

SUMMARY OF THE ARGUMENT

Lindy argues that the Chancellor erred both legally and factually in not removing custody from Chris and giving it to her. Lindy's arguments challenge the sufficiency of the evidence to support the Chancellor's decision; however, the Chancellor's decision is supported by substantial evidence and is not legally erroneous, so this Court should affirm the Chancellor's ruling.

[3] Amended Judgment Regarding Modification entered on May 17, 2006. CP 120-21.

Lindy makes the same arguments regarding the Chancellor's decision to give full legal and physical custody to Chris and to increase her child support obligations because of the additional costs associated with Trettson's treatment for developmental problems. Here too, the Chancellor's decision is supported by evidence showing that the best interests of the child required one primary decision maker and that Chris should be that person. Moreover, the evidence demonstrates that since the divorce, Trettson had been diagnosed as autistic and that treatment was "[a]bsolutely necessary" for him to improve and warranted an increase in Lindy's child support.[4] T. 104.

ARGUMENT

A. *Standard of Review on All Issues:*

On appeal, the Supreme Court must consider the entire record before it and accept all those facts and reasonable inferences which support the Chancellor's ruling. *Madden v. Rhodes,* 626 So.2d 608, 616 (Miss. 1993). The Chancellor's findings will not be disturbed, be they on evidentiary facts or ultimate facts, unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or unless he applied the wrong legal standard. *Id.*

I. THE CHANCELLOR DID NOT COMMIT MANIFEST ERROR OR AN ERROR OF LAW IN FINDING THAT LINDY BURGESS PURVIANCE FAILED TO MEET HER BURDEN OF PROOF IN SHOWING A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES ADVERSE TO THE INTERESTS OF THE MINOR CHILD, TRETTSON BURGESS, HAD OCCURRED.

II. THE CHANCELLOR DID NOT COMMIT MANIFEST ERROR; NOR DID HE ABUSE HIS DISCRETION, IN GRANTING CUSTODY OF TRETTSON AND OTHER RELIEF TO CHRIS BURGESS.

[4] Dr. Ray, the only expert who testified, was adamant that treatment was "a]bsolutely necessary" for Trettson to improve. T. 104.

Lindy lists four propositions in her statement of issues; however, Numbers I and II appear to be essentially the same, so Appellee will discuss them together. Lindy recognizes that in order to prevail on her motion to modify custody, she had the burden to show (a) that a material change of circumstances has occurred; and (b) that it was adverse to the child; and (c) if there was an adverse material change, that it was in the best interests of the child to modify custody. Appellant's Brief, p. 13. The law regarding modification of custody is not, therefore, in dispute in this respect.

At trial and on appeal, Lindy relies on three factors which she argues constituted material adverse changes since Chris had been given physical custody. Those were that Trettson had been abused while in Chris's custody; that Chris was not providing treatment for Trettson's developmental problems and that Chris was not able to provide necessities for the child. After the trial on the merits, the Chancellor correctly stated what Lindy had to prove in order to modify custody and held that "Lindy has failed to meet her burden of showing that a material and substantial change in circumstances adverse to the interests of Trettson has occurred." CP. 125. The record supports that finding.

a. **The abuse allegation**:

As the Chancellor noted, Lindy never in so many words accused Chris of abuse, and she admitted that she had never seen him behave violently toward Trettson. T. 24. Rather her evidence consisted of a number of photographs she had taken in 2003 and early 2004 that showed some "minor injuries" to Trettson and her speculations as to how the bruises might have occurred.[5]

[5] The Chancellor described the bruises and scratches depicted in the photographs as "minor injuries." C.P. 125. The photographs depict only minor bruising and cuts and scratches. *See,* Photographs, Exhibits 1 and 2.

As for the bruising Lindy noted in 2003 and 2004, long before she filed her emergency motion for TRO, the Chancellor found that Lindy had failed to show it was caused by abuse. C.P. 124-125. Specifically, he found that Trettson suffers from autism, and that the record shows he also suffers from attention deficit hyperactivity disorder which includes an inability to sit still or focus. CP. 125. The Chancellor found that Trettson's developmental problems caused him to be far more active than a "rambunctious six-year-old boy, which makes his frequent minor injuries far more understandable." C.P. 125.

He also found that Exhibit 5, a compilation of "incident reports" from Willowood, Trettson's preschool, documented the injuries--most of which occurred in the classroom or playground. C.P. 124. The Chancellor further opined that Chris presented other "credible" evidence and testimony that plausibly explained the likely causes of any of the other injuries. CP 124. Significantly, during the year she saw Trettson, Dr. Ray saw no evidence that Trettson had ever been "inappropriately disciplined" by Chris or Amanda. T. 131.

In short, the Court specifically found that the "injuries to Trettson were accidental in nature", and the record provides record support for that finding. C.P. 124.

By contrast, Lindy's evidence supporting her abuse claim consisted merely of the photographs and her unsubstantiated opinions as to the cause of the injuries and Dr. Yung's letter she had attached to her motion for TRO in which he found that the bruises might indicate "**possible** abuse [emphasis added]." *See,* Addendum A. As the Chancellor pointed out in his opinion, however, other evidence from Dr. Yung indicated that Yung believed most of the bruises appeared to be the result of "*everyday accidents consistent for a boy of his (Trettson's) age.*" C.P. 124.

In an additional letter found in Exhibit 6, Dr. Yung recounted his examination of Trettson that led to the original letter which Lindy had attached to her motion for TRO. In his subsequent letter, attached as Addendum B to this Brief, Dr. Yung notes that he had not previously seen Trettson when Lindy brought Trettson to see him on June 14, 2005. Upon arrival, Lindy "immediately voiced her concern" that Trettson was being abused while at Chris's house. She "urgently wanted" Yung to write a letter to the judge so she could keep Trettson in her custody. She produced several pictures of bruising she claimed occurred while at his father's house. Dr. Yung opined that although most of the bruising in the photographs appeared "to be secondary to everyday accidents consistent for a boy his age, there are a few bruising that appeared to be non-accidental in nature." Addendum B.

The doctor noted that because he was unfamiliar with Trettson's history, he "was uncomfortable write [sic] a letter stating that there were definite signs of physical abuse." He made it clear to Lindy that day that he needed more information and past medical records to give a more definitive diagnosis of abuse. He also told Lindy to have the child's records sent to him; however, Lindy never did; nor did she bring him back for follow up. *Id.*

Given the dearth of credible evidence supporting Lindy's abuse allegations, it is unsurprising that the Chancellor chose to credit Chris's evidence from the school records and his witnesses. The Court's finding that the "minor" injuries shown on the photographs were not the product of abuse has substantial record support.

Lindy also speculates in her brief, however, that Chris instructed the school not to contact her except in the case of a medical emergency because he did not want her to "investigate and

discover the injuries to the minor child."[6] Appellee's Brief, p. 9. Obviously, the Chancellor chose not to credit Lindy's imaginings but instead credited Amanda and Chris's testimony that the instructions not to contact Lindy were because Lindy had previously been a disruptive influence at school. For example, Chris told of one time when Lindy and her mother had gone to Chris's school and caused a "ruckus." As a result, Chris was told that Trettson could no longer attend the school. T. 316-18.

Lindy next speculates that the bruising of Trettson, if not caused by abuse, must have been caused by Amanda's negligence in "allowing him to climb on the furniture" and injuring himself when he fell off. Appellant's Brief, p. 10. Trettson, however, is an autistic child, and Dr. Ray opined in her report that such children were more likely to injure themselves because of their condition.[7]

Lindy presented no evidence that Trettson's injuries were either so numerous or serious that they caused any danger to his well-being. In the fact, as this Court can plainly see, the pictures in Exhibits 1 and 2, which were introduced by Lindy, show the bruising to be minor and entirely consistent with normal childhood activity as the Chancellor found. *See,* Exhibits 1 and 2; T. 131. Lindy's allegations against Chris and Amanda are totally unfounded.

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[6] Lindy makes much of Amanda's signing preprinted forms at the school which identified her as the child's "mother" claiming that Amanda wanted to "deceive Willowood Development Center so that information about the child would not be disseminated to his real mother." Appellant's Brief, p. 9. On the other hand, Lindy admits that she went to the school and paid half of the child's tuition fees and identified herself as the child's mother. T. 390. It therefore hardly seems likely that the school would have been deceived when Amanda signed a preprinted form as Trettson's mother. Moreover, Lindy's claim that Amanda attempted to pass herself off as the child's mother is contradicted by Lindy's own claim that Chris and Amanda told the school not to contact the child's mother, Lindy. In short, Lindy's claims are not even logically consistent and may be one reason why the Chancellor chose to discredit them.

[7] According to Dr. Ray, children with such disabilities have 400% more serious injuries and 300% more accidents than individuals without them. In addition, the leading cause of death for such persons under the age of 44 is accidental trauma. *See,* Dr. Ray's report, p. 23, Exhibit 9.

Moreover, the Chancellor's refusal to credit Lindy's speculative accusations of negligence and abuse against Amanda and Chris was not an abuse of discretion. The Chancellor is the finder of fact. As a finder of fact, it is his job to resolve matters of credibility. Obviously, the Chancellor accepted as more credible the testimony of Chris and his witnesses. This Court will not reverse unless the Chancellor's findings are manifestly erroneous. *Peters v. Ridgely,* 797 So.2d 1020, 1023 (Miss. App. 2001) and cases cited therein.

b. **Chris's alleged failure to properly treat Trettson's learning disability.**

Lindy accused Chris of failing to provide treatment for Trettson's developmental problems. She presented no evidence that would justify a finding that Chris had failed to do so. Lindy, however, presented no evidence that Trettson had suffered developmentally as a result of Chris's custody.

In fact, the overwhelming evidence belies Lindy's claim that Chris was not having Trettson treated. After obtaining custody from Lindy, Chris enrolled Trettson in preschool at Willowood. When that did not work out, he took him for testing by Dr. Ray who diagnosed autism. From July of 2004 until June of 2005, when Lindy obtained temporary custody, Dr. Ray had been treating Trettson for several hours a week. At the time Lindy discontinued treatment, Dr. Ray was seeing him for four hours a week. T. 98, 121. In addition, Chris had enrolled Trettson at Clinton Park Elementary School in a class specific to children with autism and which was approved by Dr. Ray. T. 123. In other words, Chris was providing Trettson with the treatment recommended by Dr. Ray, a psychologist whom Lindy stipulated to be an expert in behavioral problems of children with autism. T. 95.

Moreover, according to Dr. Ray, Chris was "very interested" in Trettson's treatment and "routinely" brought him to treatment and discussed the child's treatment program with her. T. 105.

By contrast, when Lindy obtained custody in 2005, she removed him from Clinton Park and enrolled him in an "inclusion program" at Gary Road Elementary and discontinued Dr. Ray's treatment. T. 46, 121. An "inclusion program" is apparently one where children with developmental problems attend classes with children without such difficulties but then receive some additional assistance. Dr. Ray testified that continued behavioral "treatment" of Trettson was critical and that she had conveyed her opinion to Lindy in October of 2005. T. 102, 104. Lindy, however, had not consulted her since the October evaluation.[8] T. 103. Moreover, the record reflects no attempts by Lindy thereafter to obtain any professional behavioral treatment for Trettson other than what he was receiving at the school.[9]

When asked to contrast the programs at the two schools, Dr. Ray, who was familiar with both, stated that although Gary Road was a "great school", she would prefer that Trettson not be in an inclusion program. T. 121, 128. Her problem was that although the teachers were competent, they generally had no specific training in autism. According to her, they "don't necessarily utilize the principles of behavioral analysis and the teaching methods that have been proven effective for children with autism to remediate the skill deficits." T. 121. She testified that at Gary Road Trettson was not getting the specific skill deficit training she felt necessary if

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[8] Before she lost physical custody of Trettson in December of 2003 because of her "lackadaisical" attitude toward his developmental problems, Lindy had apparently made some move to have Trettson tested at UMC; however, when Chris obtained custody, he cancelled the appointment and subsequently engaged Dr. Ray. T. 17.

[9] Although in September of 2005, Lindy had taken Trettson to see Dr. Byrd after Dr. Scallorn's drug therapy had failed, it is unclear, what, if any, drugs had been prescribed by Dr. Byrd for Trettson of if Dr. Byrd had suggested any form of behavioral therapy.

he was to improve and not regress. T. 121, 111. Importantly, Dr. Ray felt that with the appropriate therapy, Trettson could one day attend regular classes unsupported. T. 129.

According to Dr. Ray, the American Academy of Pediatrics and the National Institute of Health, among others, believe that the single scientifically documented effective treatment for children for autism comes under the umbrella of behavioral analysis which is why she recommends it above others. T. 107. She felt Trettson was not receiving such treatment at Gary Road but was at Clinton Park Elementary. T. 111. In his opinion, the Chancellor noted that he was "very favorably impressed with the testimony of Dr. Kimberly Ray." CP. 127.

The only evidence put forth by Lindy to support her claim of a decline in Trettson's abilities while in Chris's custody came from Lindy and her mother who claimed the child was withdrawn and was more verbal now that Lindy had him. T. 30, 148. Dr. Ray's testimony contradicts that notion.

Lindy also makes much of testimony from Dr. Ray that when she tested Trettson in October of 2005, four months after Lindy gained custody, she saw marked improvement in his skills since her initial testing when she first saw Trettson in July of 2004. Appellant's Brief, p. 14, T. 101. Lindy claims that this shows a marked improvement in Trettson's condition "**while the child was in the custody of the Appellant** herein, between June 2005 and October 2005 [emphasis added]." *Id.*

Dr. Ray's testimony, however, does not support Lindy's claim that Trettson's improvement came about either during that four months or as a result of her custody. Trettson was not tested in June of 2005; therefore, there was no base level in June for Dr. Ray to compare with Trettson's level in October. T. 116. Therefore, Lindy's claim that Dr. Ray's testimony "clearly states that the child's condition had improved beyond what she would have expected

while the child was in the custody of the Appellant [emphasis added]" is logically flawed. Appellant's Brief, p. 14.

In fact, when asked by Lindy's attorney to opine that Trettson had acquired the skills during the time he was with his mother, Dr. Ray specifically declined to do so:

> I'm not completely certain that that was the only time he acquired them. Obviously, he was able to maintain them while he was with her, but these were not skills that I had even previously assessed. Like if I had known in June that he was leaving, I could have checked him then to see what his level of performance was then as compared to his current performance.

T. 116.

Moreover, Dr. Ray's further testified that "while he is making progress and while he does seem to progress just as a mere passage of time, he is pretty significantly behind in a number of different areas." T. 104. She was afraid that he would fall further behind without "some pretty intensive services." T. 119.

The record, therefore, does not support Lindy's assertion that Dr. Ray documented a "decrease in the child's progress in dealing with his cognizance disability" while in Chris's custody and a "marked improvement" while in her custody. Appellee's Brief, p. 8. Interestingly, Lindy's claims of a marked lessening of fits and tantrums while under her care is belied by her own evidence of the evaluation made by Dr. Doug Byrd which was made on September 29, 2005, at Lindy's request. Dr. Byrd reported as to Trettson's mental status:

> Vital signs are unable to be taken, as patient was uncooperative. Appearance is normal grooming. Patient was quite impulsive and hyperactive. He became extremely angry and upset when he could not receive a certain request. He rolled on the floor and flapped his hands and yelled but without clearly spoken words. While answering questions he would answer with one or two word answers but he was very difficult to understand. He was also difficult to redirect, very distracted. He frequently pointed to things he wanted instead of saying the word. Sometimes he would make a sound that represented the object and this his mother reported was related to his computer program he uses at home. He is also reportedly left handed.

Exhibit 7.

The Chancellor did not err in failing to accept Lindy's and her mother's testimony. *Peters v. Ridgely,* 797 So.2d at 1023.

c. **Allegation that Chris was unable to provide for Trettson's necessities:**

Again, Lindy failed to shoulder her burden on this issue. While it is true that at the time she filed her motion for TRO in June of 2005, Chris and Amanda were undergoing financial difficulties due to the loss of their jobs and her illness, by the time of the hearing in March of 2006, Chris and Amanda had moved back to Mississippi. Both were employed with a total income of approximately $3400.00 a month although their expenses were about the same. However, there was testimony that Amanda's insurance policy at her new job, as well as Chris's policy, would become effective shortly and would likely cover a major portion of Trettson's treatment. Medicaid would pay some, and now that Trettson had been officially diagnosed with autism, so would SSI. T. 192-98 244, 267, 340. Chris intended to obtain a second job to help with expenses. T. 267.

There was also testimony from Chris's mother and from a friend of hers that they would voluntarily contribute to support Trettson if necessary. T. 239, 378.

By contrast, Lindy presented evidence that she had income of at least $1200.00 as a result of her employment at Jackson Automotive. CP 72-73, T. 34. Her new husband, Scott Spell, was also employed. T. 139. They had no house or car note. T. 37. Although Lindy, together with Scott, may have had more money than Amanda and Chris, Lindy failed to show that this constituted a material change in circumstances which adversely affected Trettson's well-being. As this Court is well aware, that Lindy may have had more money is not the determining factor in determining an initial award of custody. Much less is it a justification for altering custody

where there is no showing that Chris's financial condition had deteriorated to the point that continued custody in Chris's home was harmful to Trettson. As the Chancellor found "the Court has no doubt that Chris will afford Trettson with as much of that advantage [treatment] as possible." CP 127.

Alternatively in her brief, Lindy argues that Amanda and Chris had a concerted plan to isolate her from her child and that this calls for a change of custody. She cites *Ash v. Ash,* 622 So.2d 1254 (Miss. 1993) as her primary authority. Chris and Amanda, however, emphatically denied this allegation and explained that Lindy would not return their calls and made trouble at school and that, contrary to what Lindy claimed, they did notify Lindy of Trettson's treatment and had invited her to participate. T. 181-82, 305, 319. The Chancellor was entitled to believe this testimony as the record factually supports it. *Peters v. Ridgely, supra.*

Moreover, *Ash v. Ash, supra,* provides little support for Lindy's argument. In that case, which involved two prior chancellors and six attorneys and more than ten (10) court proceedings over six years, Cathy Ash refused to allow visitation with the father despite numerous court orders directing her to do so. Finally exasperated, the special chancellor found that the case had long since passed contempt considerations and gave custody to the father. The Supreme Court noted that "this case should not be considered as establishing precedent for the taking of such drastic action in visitation disputes"--stating that in custody matters the best interests of the child rather than punishment of a contemptor generally should prevail. In this case, however, the Court approved the Chancellor's action because of Cathy's willful and persistent defiance of specific court orders regarding visitation. Moreover, in that case, the Chancellor specifically found that her actions had adversely affected the child and that her interference with the father's visitation

has been a material change of circumstances that could not be corrected by contempt. *Id.* 1267. There was no such finding in this case.

The same is true of the case of *Ferguson v. Ferguson,* 782 So.2d 181, 183 (Miss. Ct. App. 2001) which is also cited by Lindy. In that case, the Chancellor credited the husband's testimony that the mother purposefully kept the child from contacting him. Again, there is no such finding here; nor does the evidence support any finding that Chris ever interfered with any visitation with Trettson. On the contrary, Lindy and her family made visitation difficult for Chris. T. 319-26. Chris testified that although he visited with Trettson about twice a week since Lindy obtained a TRO, he only saw him for about five minutes at a time. T. 324, 327. Lindy's refusals to return telephone calls and her confrontational attitude and that of her family made visitation difficult. T. 326, 328. For example, Chris had not attended Lindy's birthday party for Trettson because Lindy would not allow him to bring his mother, and he did not want to take a chance of getting into a confrontation with her or her family when he was the only person from his family there.[10] T. 328.

At most, the evidence shows that Chris told the preschool not to contact Lindy unless there was a medical emergency and that this instruction came about because she went to the school at odd times and disrupted Trettson's classes. T. 316. Moreover, both Amanda and Chris denied that they had failed to tell Lindy that Dr. Ray was treating Trettson or that they had excluded her from the treatment process. T. 319. They both testified that part of the problem with

[10] Chris tried to take his mother or someone else with him when he visited so that he would have a witness in the event of a confrontation. T. 324, 328. Lindy attempts to make much of Chris's failure to attend the party or to see Trettson on Christmas Day at her house and to give Trettson birthday and Christmas presents at her house. Chris, however, plausibly explained that he kept the presents to give to Trettson at his house because he did not want Lindy to put them away and not allow Trettson to play with them. T. 329. He further testified that he had asked Lindy if Chris

communicating with Lindy is that frequently refused to answer her phone, return calls, or to discuss treatment options when given an opportunity. T. 181, 319. The Chancellor was entitled to resolve this credibility in favor of Chris.

Finally, Lindy cites cases dealing with the "alternative environment" test to support her motion to modify. Under that doctrine, the Chancellor may modify custody "when the environment provided by the custodial parent is found to be adverse to the child's best interest *and* that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable . . . [emphasis in original]." *Riley v. Doermer,* 677 So.2d 740, 744 (Miss. 1996). In that case, the custodial parent's home was the site of illegal drug use. Clearly, the Chancellor made no finding that Chris's home was unsuitable in any way; nor did the evidence support one. The Chancellor, therefore, did not err in failing to apply the alternative environment test to find that custody should be removed from Chris.

III. THE CHANCELLOR DID NOT COMMIT MANIFEST ERROR, ABUSE HIS DISCRETION OR ERR AS A MATTER OF LAW IN *SUA SPONTE* DISSOLVING APPELLANT LINDA BURGESS PURVIANCE'S JOINT LEGAL CUSTODY OF TRETTSON.

In his final decree, the Chancellor not only awarded physical custody to Chris, but awarded full legal custody as well. Lindy argues that the Chancellor erred for two reasons. First, she argues, without citing any legal authority, that Chris had not asked for sole legal custody, and, therefore, the change was error. Next, she argues that the evidence did not support the change.

As for Lindy's first argument, §93-5-23, Miss. Code Ann., provides that in a divorce proceeding, the Chancellor may make all orders touching the care, custody and maintenance of

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needed anything and offered to get it for him, but Lindy had always said no. T. 353. Lindy did not contradict Chris's testimony.

the children as are equitable and just. The statute further provides that the "court may afterwards, on petition, change the decree, and make from time to time such new decrees as the case may require" and "may require that each parent contribute to the support and maintenance of the children of the marriage in proportion to the relative financial ability of each." Furthermore, Rule 15(b), M.R.C.P., provides that "when issues not raised by the pleadings are tried by expressed or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." M.R.C.P., Rule 54(c) allows the chancellor to grant relief which the proof shows the party is entitled to despite a failure to request the relief in the pleadings.

For example, in *Queen v. Queen*, 551 So.2d 197 (Miss. 1989), the husband challenged the lower court's award of alimony even though the wife had not requested it in her initial pleading. In that case, the Court held that the failure of the husband to object when alimony was first raised at trial, constituted a waiver of the issue on appeal. *See also, Lee v. Stewart ex rel. Summerville,* 724 So.2d 1093 (Miss. App. 1998) [where a party offers no timely objection, the Court treats the issue as having been tried by implied consent].

In *Pope v. Pope,* 803 So.2d 499 (Miss. App. 2002), the Court held that the court in a post-divorce contempt proceeding did not abuse its discretion in requiring the husband to pay compensation to his ex-wife for the cost of an insurance policy he had not obtained although directed to by the divorce decree. The ex-wife had not requested that relief; however, the Court found that the obligations under the judgment in that regard were before the court, the issues were vigorously asserted, and the parties were on notice that the court would be asked to resolve the issue of the parties respective rights. In support, the Court cited Rule 54(c), MRCP, which provides that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled by the proof and which is within the jurisdiction of the court to grant, even if

the party has not demanded such relief in his pleadings. *Id.* at 503. *See also,* 93-5-23, Miss. Code Ann.

Here the issue before the Chancellor was always who should have custody of the child and what support should be paid. Lindy herself put those questions in issue with her pleadings. Lindy presented evidence that she was the proper person and claimed that Chris was not. Chris did likewise. Lindy did not object to the adjudication of custody and was not prejudiced by any failure of Chris to specifically ask for the relief in question. The Chancellor determined that the best interests of the child dictated that Chris be awarded full legal custody. The Chancellor did not abuse his discretion. *Pope v. Pope, supra.*

As for Lindy's second argument for reversal—that the record does not support the Chancellor's judgment—again, there was ample evidence to support the Court's decision. The Chancellor noted the inability of the parties to agree over what was best for the child. He expressed concern that given the degree of Trettson's developmental problems, it was important that "his stability and successful development" be given "paramount concern." CP. 126. The Chancellor felt that given the parties' history, "it is best that one person have the authority to make all decisions regarding the child and [the Court] finds that Chris is suitable and fit for that purpose." CP. 126.

The Chancellor's findings are supported by evidence showing that Lindy had refused to allow Trettson to be treated at Clinton Park Elementary after she obtained custody in June. T. 306. There was evidence that she had previously interfered with Trettson's classes. T. 316. During the almost nine months that she had custody, she had failed to provide Trettson with the intensive behavioral treatment Dr. Ray had told her was necessary if his skills were to improve and not regress. T. 101-02, 119. Instead, she attempted to teach him herself and to control his

behavior with drugs. There is ample factual support for the Chancellor's finding that it was in best interests of Trettson to have one stable decision maker in charge of his education and treatment and that that person was Chris who throughout had given Trettson ongoing treatment recognized as effective by an expert in the field.

Moreover, there is ample legal support for the Chancellor's decision to make Chris Trettson's sole custodian. Here, Chris put on evidence showing that Lindy refused to communicate with him about Trettson's treatment and disrupted him at school and would not cooperate generally. Dr. Ray's testimony provided the Chancellor with ample evidence to conclude that Trettson's best interests were not being served by denying him critical specialized behavioral treatment. In such a case, it is not an abuse of discretion to award sole custody to one parent. *Eason v. Kosier,* 850 So.2d 188, 190 (Miss. App. 2003). *Caples v. Caples,* 686 So.2d 1071, 1073 (Miss. 1994) [Chancellor did not abuse discretion in modifying joint custody decree where it was in the best interest of the child even though the child had experienced no direct harm]; *Cook v. Whiddon,* 866 So.2d 494, 502 (Miss. App. 2004) [Terminating joint custody where "over a period of three years the parties have had nothing but acrimony, disagreements, failure to confer, and failures to communicate"].

The Chancellor's decision to give Chris full legal authority to make decisions regarding Trettson's treatment was not an abuse of discretion and was in Trettson's best interests.

IV. THE CHANCELLOR DID NOT COMMIT MANIFEST ERROR, ABUSE HIS DISCRETION OR ERR AS A MATTER OF LAW IN INCREASING LINDY'S CHILD SUPPORT OBLIGATIONS.

Again, Lindy argues that the Chancellor's decision to *sua sponte* increase her child support obligations to $250.00 a month was error. For the same reasons Chris has cited in the

foregoing proposition, it was likewise not error to do so even though he had not specifically asked for that relief. *Pope v. Pope, supra.*

In the instant case, Lindy in her case in chief put on evidence of her income, that of her husband, and her ability to support Trettson. Therefore, not only did she not object to evidence on child support, she herself introduced the subject and put on proof of her ability to support Trettson. The gist of her testimony in fact was that she was in a better position to support him than was Chris. She suffered no prejudice, therefore, from the Chancellor's decision to take her at her word and raise her child support obligations. *Id.;* M.R.C.P., Rule 54(c).

In *Weiss v. Weiss,* 579 So.2d 539 (Miss. 1991), the complaint was for separate maintenance rather than alimony and was never formally amended. The Court there held that the husband could not object on appeal to an award of alimony where he put on evidence as to alimony and failed to object. The same is true here; Lindy consented to having the Chancellor determine child support. *See,* additional authority in preceding proposition.

As for the merits of the Chancellor's decision, that too is clearly supported by the law. There can be no doubt that in considering the amount of child support, the Chancellor may consider the child's health and special medical or psychological needs. *Tedford v. Dempsey,* 437 So.2d 410, 422 (Miss. 1983); *McEachern v. McEachern,* 605 So.2d 908, 813 (Miss 1992). In his opinion, the Chancellor specifically noted the extraordinary costs of Trettson's treatment which had increased since his prior support determination. CP 127. He found that Lindy had income of at least $1250.00.[11] *Id.* He, therefore, increased her child support payments from $175.00 a month to $250.00 a month. CP. 121.

[11] Lindy filed a financial statement so showing. CP. 72-77.

The increase was amply justified by evidence showing that since the last support award, Trettson had been diagnosed as autistic, a diagnosis which ideally called for treatment costing approximately $700 a week. Recognizing that "few parents could afford that expense," the Chancellor found that Lindy should contribute to help "defray that burden." CP. 127. In view of her testimony that she had no house note, no car note or any other exceptional expenses, requiring Lindy to pay an additional $75.00 to help her son receive treatment deemed by Dr. Ray to be "critical" to his development can hardly be said to constitute an abuse of discretion by the Chancellor. A Chancellor does not abuse his discretion in increasing child support where the child's expenses have increased. *Tedford v. Dempsey,* 437 So.2d at 419.

CONCLUSION

The Chancellor's judgment in favor of Mr. Burgess is not manifestly erroneous or otherwise incorrect. The record shows that making his decision the Chancellor considered the totality of all the circumstances and kept in mind this Court admonition that the "polestar consideration [is] the best interest and welfare of the child." *Ash*, 622 So.2d at 1266. This Court should affirm the judgment.

RESPECTFULLY SUBMITTED,
STEPHEN CHRISTOPHER BURGESS,
APPELLEE

BY: _____
ATTORNEY FOR APPELLEE

CERTIFICATE

I, Julie Ann Epps, Attorney for Appellee, do hereby certify that I have this date mailed, by United States Mail, first class postage prepaid, a true and correct copy of the above and foregoing to John R. McNeal, Jr., Esquire, Attorney for Appellant, at PO Box 690, Jackson,

Mississippi 39215 and to the Honorable William H. Singletary, Hinds County Chancery Court Judge, PO Box 686, Jackson, Mississippi 39205-0686.

I do further certify that I have this date mailed, by United States Mail, first class postage prepaid, the original and four copies of the above and foregoing to the Clerk of this Court at P. O. Box 249, Jackson, MS 39205-0249.

This, the 19th day of March, 2007.

JULIE ANN EPPS

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June 14, 2005

TO WHOM IT MAY CONCERN:

I have examined Trettson Burgess for the first time today in the clinic. Trettson is a 5 year old male with history of autism.

Mother of child brought Trettson to my clinic today with concern of abuse/neglect while he was in custody of his father. Mother presents to my clinic with several pictures of strange unexplained bruising on Trettson dating from 2003 to present. Mother found these bruises after Trettson return from his father's residency. Some of these bruising appears to be non-accidental in nature that may indicate possible physical abuse in my professional opinion. I will need more information, and Trettson's past medical records to provide a more definitive diagnosis.

If you have any questions regarding this situation, please feel free to give me a call.

Sincerely,

Kenneth A. Yung, M.D.

ADDENDUM A

000043

Ex. "A"

To whom it may concern:

I have been asked to give an account of Trettson Burgess's visit to my office on June 14, 2005.

Trettson Burgess was seen accompanied by his mother in my office on the afternoon of June 14, 2005. The visit was for a 5 year old check-up. This is the first time that I have seen this patient.

Upon entering the examination room, Trettson's mother immediately voiced her concern that Trettson may be abused while at his biological father's residence. Mother told me that Trettson has autism and stays part time in custody of Trettson's father in Alabama. She would notice several deep tissue bruises on him after he returned from his father's residence.

Trettson's mother then produced several (~10-15) color pictures taken within the past year of the bruisings and abrasions on his body. While most of the bruising appears to be secondary to everyday accidents consistent for a boy his age, there are a few bruising that appeared to be non-accidential in nature. Mother states that she found these bruising everytime Trettson return from his father home.

I inquired if mother has contacted the authorities regarding her concerns. Trettson's mother told me that she had contacted the Child Protection Agency and had a lawyer involved. Mother stated that Trettson is scheduled to return Alabama in the next few day, and she urgently wanted a letter to give to the judge to temporarily keep Trettson in her custody until all the investigation is complete.

I examined Trettson in the examination room, the exam was fairly normal with no signs of trauma, and he behavior suggestive of autism.

I then asked mother why she did not take Trettson to his regular doctor so hat he can be evaluated by someone who knew his past history. Trettson's mother told me that that she was not able get an appointment to see his regular MD in time to prevent him from going back to his father's residence.

Because I was unfamilar with Trettson's past history, I was uncomfortable write a letter stating that there were definite signs of physical abuse. With the best interest of the child's safty and in order to prevent him from going into a possible dangerous situation, I drafted a letter stating my observation of the bruising in the pictures. In the letter, I may it clear that this was the first time I had seen Trettson, and that I will need more information and his past medical records to give a more definitive diagnosis regarding to possibility of actual physical abuse.

I told Trettson's mother to take him to his regular pediatrician for an examination or have his pediatrician send me Trettson's medical records so I can examine him again. However, Trettson's mother have yet provided me with those records or brought Trettson back for a follow-up examination.

If you have any questions please feel free to contact me. Hope this letter will clarify things.

Kenneth A. Yung, M.D.

Exhibit 6

ADDENDUM B-