

**SUPREME COURT OF MISSISSIPPI  
COURT OF APPEALS OF THE STATE OF MISSISSIPPI  
NO.: 2006-CA-00931**

**LINDY BURGESS PURVIANCE**

**APPELLANT**

**VS**

**STEPHEN CHRISTOPHER BURGESS**

**APPELLEE**

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

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**APPELLANT'S BRIEF  
(Oral Argument Not Requested)**

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**Submitted By:**

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STEPHEN CHRISTOPHER BURGESS

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

I, the undersigned counsel of record certify that the following 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:

LINDY BURGESS PURVIANCE (SPELL)

DEFENDANT/MOVANT/APPELLANT

STEPHEN CHRISTOPHER BURGESS

PLAINTIFF/RESPONDENT/APPELLEE

JOHN R. McNEAL, JR., ESQ.

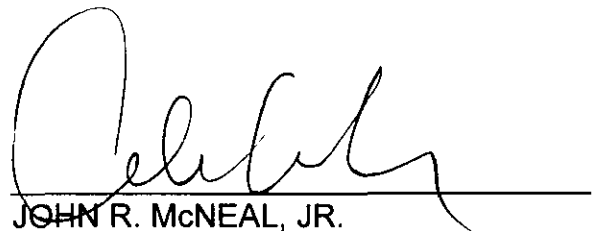
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CHANCELLOR



JOHN R. McNEAL, JR.

## **TABLE OF AUTHORITIES**

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### **STATEMENT OF THE ISSUES**

(1) The Court erred as a matter of law in its finding that Appellant had failed to meet her burden of proof showing that a material and substantial change in circumstances adverse to the interest of "Trettson" had occurred.

(2) The Court abused its discretion and erred as a matter of law by failing to modify its previous order and grant custody of the minor child of the parties to the Appellant herein and to grant other relief requested by Appellant.

(3) The Court abused its discretion and erred as a matter of law by *sua sponte* dissolving Appellant's joint legal custody of the minor child.

(4) The Court abused its discretion and erred as a matter of law by modifying by *sua sponte* and increasing child support obligations of Appellant herein.

## **STATEMENT OF THE CASE**

### **A. NATURE OF THE CASE AND COURSE OF THE PROCEEDINGS**

This is an appeal from an Opinion of the Court and an Amended Opinion of the Court and Final Judgment denying Appellant's Motion entered by this Court on May 3, 2006. It is also an appeal from the Court's denial of Appellant's Motion to Reconsider Judgment, Amend Judgment and/or Grant a New Trial Pursuant to Rule 59 of the Mississippi Rules of Civil Procedure.

In December 2003, the Trial Court modified the original Judgment of Divorce between the Appellant and Appellee and awarded primary physical custody of the minor child, Trettson McClain Burgess, to the Appellee, Stephen Christopher Burgess.

On June 15, 2005, the Appellant, Lindy Burgess Spell filed a Motion for Modification seeking to retain custody of the minor child, Trettson, alleging that there had been a material change in circumstances of Appellee involving his financial ability to adequately support the minor child; that the Appellee intended to move to Alabama and take the minor child with him and that Trettson, the minor child, had begun to suffer frequent and unexplained physical injuries of unknown origin while the child was in the custody of the Appellee and his current wife. Appellant sought the entry of a Temporary Restraining Order immediately removing the child from the Appellee's custody and presented to the Court adequate proof to support her belief that said relief was urgent and necessary. The Restraining Order was entered and a preliminary injunction hearing was scheduled. Several continuances interrupted the progress of the litigation and said matter was finally heard on March 6-7, 2006.

## **B. STATEMENT OF THE FACTS**

This hearing began on March 6, 2006, the Appellant, Lindy Burgess Spell was called as the first witness. Mrs. Spell testified that the minor child, Trettson, was in her primary care and custody from 2001 until 2002 and then again from December 2003 until the date of the Court's rendition of the order in this case. (T. Pg.4, L.11-29; T. Pg 5, L. 1-14) Mrs. Spell further testified that in June 2005 or before then, that she began to have concerns about the child's health and welfare because of bruises to the child's face, neck and back and very bad bruising to the legs and buttocks, also black eyes and hematomas to the fact. (T. Pg. 5, L.15-23; L. 28-29; T. Pg. 6, L. 1-29; T. Pg. 7, L. 1-29; T. Pg. 8, L. 1-4).

Mrs. Spell further testified that she inquired of Mr. Burgess as to the source of the bruises and received several responses. Mrs. Spell's testimony was that Amanda, Mr. Burgess' wife, informed her that the child had butted heads with the dog. (T. Pg. 8, L. 6-29) and was later given an accident report from Willowood that confirmed that story. (T. Pg. 9, L. 4-7). She was also told by Mr. Burgess that the child had run into a weight bench. (T. Pg. 9, L. 7-8). Chris Burgess gave Mrs. Spell different stories as to how the child had become bruised and told her that the bruising was normal for a child of his age. (T. Pg. 9, L. 11-15). Mrs. Spell testified further that she took the child to a doctor in June 2005 and was told that some of the bruises were indicative of abuse. (T. Pg. 9, L. 16-20). After Mrs. Spell regained custody of the minor child, the bruises went away and he had not received any new bruises while in her care. (T. Pg. 11, L. 5-11). Mrs. Spell testified that Trettson' condition requires that he be supervised more closely than a normal child. (T. Pg. 11, L. 15-29; T. Pg. 12, L. 1-10). Mrs. Spell further testified

that Amanda Burgess had submitted an explanation to Willowood Development Center concerning the bruising and stated that the child fell while climbing on a book shelf in his room while under her care and that another bruise was from a head butt with a dog while he was under Mrs. Burgess' care and that the bite happened at the Willowood Center. (T. Pg. 13, L. 26-29; T. Pg. 14, L. 1-16).

The Appellant made numerous efforts to contact Willowood Development Center to determine the nature of the injuries in question herein but was refused access to the information. (T. Pg. 15, L. 9-29; T. Pg. 16, L. 1-12).

After Mrs. Spell regained custody of Trettson in June 2005 she testified that she had taken the child to a doctor for evaluation of his autism and reestablish treatment that had been denied by Appellee, Chris Burgess. (T. Pg. 17, L.12-29; T. Pg. 19, L. 1-27).

From the time the Appellant regained custody in June 2005 through the trial court's order in this matter, the Appellee, Chris Burgess, did not support the child, visit with the child or participate in the child's education, medical treatment or otherwise. (T. Pg. 19, L. 28-29; T. Pg. 20, L. 1-29; T. Pg. 21, L 1-18).

The Appellant testified that the minor child, Trettson, acts frightened and erratic and also in the presence of Amanda Burgess appeared to be frightened. (T. Pg. 25, L. 1-29; T. Pg. 26, L. 1-23).

Since obtaining custody in June 2005 during the period of her exercising the primary physical custody of the minor child, Trettson, before Chris Spell took custody and after Mrs. Spell regained custody, Mrs. Spell testified that she initiated the first steps program for the child and made arrangements to have him admitted to the



University Medical Center children's clinic. (T. Pg. 26, L.27-29; T. Pg. 27, L. 1-29; T. Pg. 28, L. 1-29; T. Pg. 29, L 1-29; T. Pg. 30, L. 1-29; T. Pg. 31, L. 1-29; T. Pg. 32, L. 1-29; T. Pg. 33, L. 1-29; T. Pg. 34, L. 1-29; T. Pg. 35, L. 1-29; T. Pg. 36, L. 1-8). Mrs. Spell went to great lengths to testify about the living conditions in which her son, Trettson, would live and had lived while in her custody. (T. Pg. 37, L. 6-29; T. Pg. 38, L. 1-29). Mrs. Spell testified that she is willing and able to provide and actually participate in all the activities concerning the minor child's evaluation and necessities. (T. Pg. 39, L. 28-29; T. Pg. 40, L. 1-29; T. Pg. 41, L. 1-29; T. Pg. 42, L. 1-29; T. Pg. 43, L. 1-29; T. Pg. 44, L. 1-12). The Court made extensive inquiry to Mrs. Spell about the child's visits with Dr. Kimberly Ray. Mrs. Spell's testimony subsequent to the inquiry by the Court was very extensive and comprehensive and was proof that she had provided adequately for the minor's continued treatment and evaluation. (T. Pg. 45-50; T. Pg. 51, L. 1-12).

Mrs. Spell was cross-examined by Appellee's attorney and asked why she was alarmed and took the child to a doctor concerning his bruising. Mrs. Spell again, reiterated that the doctor had said "these are what we call non-accidental bruises". (T. Pg. 85, L. 15-23; T. Pg. 86, L. 17-29; T. Pg. 87, L. 1-3). Asked on re-direct examination as to why Mrs. Spell never took Trettson back to see Dr. Yung, she responded that the bruises had subsided after January and that they had subsided very rapidly. This gave her cause to believe that the bruises were not just accidental happenings. (T. Pg. 88, L. 21-29).

Next, the testimony of Dr. Kimberly P. Ray was taken out of sequence by the agreement of the parties. Dr. Ray was offered as an expert in the field of clinical

psychology , pediatrics and autism in children. Dr. Ray testified that the minor child fell into the proper range or the likely range of meeting the diagnostic criteria for autism. (T. Pg. 100, L. 8-11).

Dr. Ray further testified that Mrs. Spell was very cooperative in giving her all the information that she needed in order to help Trettson. (T. Pg. 102, L. 7-22).

Dr. Ray further testified that she did a review of Trettson's present level of performance in October 2005 on the basis of where he was right then from having seen him in June 2005 and had determined that his performance in the areas targeted had actually moved ahead of his curriculum matrix. (T. Pg. 102, L. 23-29; T. Pg. 103, L. 1-5). Dr. Ray was asked if Mr. Burgess ever allowed her to contact Mrs. Spell and discuss the child's treatment with her at which Dr. Ray testified that he did not. As a matter of fact, she went on to state that Mr. Burgess had misrepresented the facts to her and told her that he was the primary legal guardian because that's typically a question that I ask, and that he had legal guardianship and that he didn't anticipate much in the way of physical custody or interaction occurring. (T. Pg. 106 L. 13-22). Dr. Ray further testified that in her October 2005 evaluation that she found Trett to have acquired quite a number of skills while in the custody of his mother, more than they would have expected. (T. Pg. 110, L. 7-17). Dr. Ray further testified concerning her report that his targeted skills while in the custody of his mother were one hundred percent (100%) and that he had shown significant improvement in every one of those areas while in her custody. (T. Pg. 111, L. 19-29; T. Pg. 112, L. 1-29; T. Pg. 113, L. 1-29; T. Pg. 114, L. 1-29; T. Pg. 115, L. 1-29; T. Pg. 116, L. 1-29; T. Pg. 117, L. 1-29; T. Pg. 118, L. 1-17).

Laura Mosley, grandmother of the minor child and mother of the Appellant herein testified. Mrs. Mosley testified as to how frequently she would be around Trettson and that she had been around him on a regular basis. (T. Pg. 145 L. 14-28). Mrs. Mosley further testified as to her knowledge of the minor child's learning disabilities. . (T. Pg. 146 L. 1-17). Mrs. Mosley further testified about the loving relationship existing between she and her grandchild, Trettson, and changes in his relationship with her after his father took custody. (T. Pg. 146 L. 20-29; T. Pg. 147, L. 1-17). After the Appellant regained custody of the child in June 2005, Mrs. Mosley had an opportunity to observe the child further and testified as to changes in his demeanor and the relationship which he and his mother, father, and step-mother had after June 2005. (T. Pg. 147 L. 18-29). She also testified as to the Appellant, Mrs. Spell's efforts to continue Trettson's treatment and education. (T. Pg. 148, L. 2-13) . Mrs. Mosley also testified that she understood the needs of the child and was willing to assist in any way possible. (T. Pg. 148, L. 14-29; T. Pg. 149, L. 1-29; T. Pg. 150, L. 1-29; T. Pg. 151, L. 1-17). It is clear from Mrs. Mosley's testimony that there exist a loving relationship between the minor child, Trettson, his mother, the Appellant herein and his grandmother, Mrs. Laura Mosley. Mrs. Mosley's testimony of her observations of Trettson, prior to June 2005 and subsequent to June 2005 clearly indicate that the child is more well adjusted and has acquired a significant degree of control over his cognizance disability, as well as, a marked improvement in his education. Mrs. Mosley gives a very distinct and understandable description of how the child reacts and progresses while in the custody of his mother. The material change in circumstances between the child residing with his father and step-mother as opposed to residing with his mother is very dramatic. The

material change in circumstances that have occurred since the Appellee was awarded custody came about subsequent to the Appellee's remarriage to Amanda Burgess and the subsequent failure of Mr. Burgess to meet the educational and medical needs of the child, as well as, the deteriorating relationship between Amanda Burgess and the minor child are all adverse to the best interest of Trettson. The testimony of the Appellant, Dr. Ray, Mr. Spell, and Mrs. Mosley are all replete with documentation of the material change in circumstances that began upon the remarriage of Chris Burgess to Amanda Burgess and developed over a period of time leading to the withdrawal and decrease in the child's progress in dealing with his cognizance disability. The evidence also strongly states the positive changes in the minor child since the Appellant took custody of him in June 2005.

At this point the Movant has rested and the Respondent began by calling Amanda Burgess to testify. On cross-examination, Amanda Burgess admitted that she regularly talked about her family and love for her family on her website but not once did she mention her step-son, Trettson Burgess, the minor child of the Appellant herein. (T. Pg. 176, L. 26-29; T. Pg. 177, L. 1-19; T. Pg. 178, L. 19-28). Mrs. Amanda Burgess further testified that Chris Burgess had gone to Alabama to live with her and get a job after he was either fired or released from his employment with the Hinds County Sheriff's Department and all of his family had moved to Alabama. (T. Pg. 179, L. 4-17). Mrs. Burgess further testified that the injuries in the photographs admitted into evidence were, in fact, sustained by the minor child and that she tried to reconcile these injuries without contacting the Appellant, who at the time was joint legal custodian of the minor child, and, in fact, led Willowood Development Center that she, Amanda Burgess, was

the child's mother. Mrs. Burgess further testified that she and Chris Burgess asked that the Appellant herein not be contacted by Willowood for anything other than a medical emergency. (T. Pg. 181, L 1-29; T. Pg. 182, L. 1-5). This clearly establishes the fact that the Appellee and his wife, Amanda Burgess, were intentionally interring with the joint legal custodial rights of the Appellant herein in an effort to try and keep her ignorant of the injuries sustained by the minor child, whether they be in Appellee's home or at Willowood Development Center. The reason for this was so that Mrs. Spell, the Appellant herein, would not investigate and discover the injuries to the minor child. This is merely another example of a material change in circumstances since custody was awarded to Appellee, Chris Burgess, the material change being the conspiracy between Chris Burgess and Amanda Burgess to withhold information from the Appellant herein, the withholding of which was adverse to the child's best interest. Mrs. Burgess masqueraded as the child's mother in an effort to deceive Willowood Development Center so that information about the child would not be disseminated to his real mother. (T. Pg. 182, L. 22-29; T. Pg. 183, L. 1-7). Mrs. Burgess testified about these elaborate plans to enroll the minor child in a facility in Alabama but fails to identify this facility and further, states that they did this secretly without consulting with the Appellant herein or even advising her of their plans to remain in Alabama and enroll the child in this unnamed facility in Alabama. (T. Pg. 186, L. 17-29; T. Pg. 187, L. 1-29; T. Pg. 188, L. 1-29; T. Pg. 189, L. 1-23).

In an effort to explain away the unexplained bruises on Trettson Mrs. Burgess testified that they had discovered that Trettson bruised easily but could not produce any medical documentation of this alleged medical problem. (T. Pg. 189, L. 1-29; T. Pg.

190, L. 1-29; T. Pg. 191, L. 1-12).

In view of Mrs. Burgess' allegations of easily bruising, it was obvious that she failed to properly supervise the child by allowing him to climb on the furniture and, in fact, was negligent and failed to properly supervise the child by not informing Willowood Development Center of this alleged bruising problem so that they would be aware of such situation in order to protect the minor child.

Christopher Burgess was called to testify on his own behalf. Christopher Burgess attempted to testify as to the nature and origin of the injuries complained of in this action to the minor son of the parties. (T. Pg. 285, L. 3-29; T. Pg. 286, L. 1-29; T. Pg. 287, L. 1-29; T. Pg. 288, L. 1-29; T. Pg. 289, L. 1-29; T. Pg. 290, L. 1-29; T. Pg. 291, L. 1-29; T. Pg. 292, L. 1-29; T. Pg. 293, L. 1-29; T. Pg. 294, L. 1-29; T. Pg. 295, L. 1-29; T. Pg. 296, L. 1-29; T. Pg. 297, L. 1-29; T. Pg. 298, L. 1-29; T. Pg. 299, L. 1-29; T. Pg. 300, L. 1-25). It is obvious from Mr. Burgess' testimony that the bruising complained of in the initial pleading happened while the child was in his custody, under his supervision and control and that of his wife, Amanda Burgess. They were either the result of activity that the child was allowed to participate in while not being properly supervised or a reasonable inference would be that some of the bruising was a result of over zealous discipline of the minor child. Regardless of the source, it is probative of a material change in circumstances since Mr. Burgess took custody of the child in that he has failed to properly supervise or has been over zealously disciplined to the point that he has suffered bruises to his body, all of which ceased and did not recur after the custody of the minor child was taken over again in June 2005 by the Appellant. The material change in circumstances was obviously adverse to the child's best interest in

that he suffered these injuries needlessly because of his custodial parents' failure to properly supervise or their administration of over zealous disciplinary conduct. Chris Burgess testified that he was extremely concerned about the well-being and treatment of the minor's autistic condition yet he never followed up with Dr. Ray to continue the treatment for the child and, in fact, had stated that he believed the child had regressed as a result of being in the custody of the Appellant herein. (T. Pg. 305, L. 1-29; T. Pg. 306, L. 1-29; T. Pg. 307, L. 1-29). That was not the case. (T. Pg. 308, L. 1-29). The testimony of Chris Burgess is replete with evidence of his inconsistency and failure to properly supervise the minor child and see that the minor child was receiving adequate treatment for his condition. His testimony is also corroborative of all other evidence in this case that he made a concerted effort to disallow the Appellant herein to contribute to or assist in the decisions and the condition of the child had continued on a steady rate of decline from the time Mr. Burgess took custody of the child or accelerated after his marriage to Amanda Burgess. Because of their attempts to isolate the minor child from his natural mother and to proceed on a course of treatment based on their own decisions and without any input from the child's mother, the Appellant herein. The result of this material change in circumstances visited harm upon the child in that the child did not progress as he should have in his treatment, did not develop a normal parent/child relationship with the biological mother, Mrs. Spell, and suffered physical injury as a result of either negligence or a result of over zealous discipline.

### **C. SUMMARY OF THE ARGUMENT**

1. The Trial Court abused its discretion and erred as a matter of law by not granting Appellant's Motion to Modify and transfer custody to Appellant. It is clear from

the testimony of the facts in this case that the material change in circumstances in this case existed from the time Mr. Burgess took custody of the minor child until the Appellant sought relief by way of an injunction in July 2005. It is obvious that this material change in circumstances adverse to the child in that the child was not progressing satisfactorily with his treatment and education and had suffered physical injury as a result of Appellee's failure to properly supervise the child and/or the administration of over zealous discipline. All of which inured to the detriment of the minor child, causing the minor child to withdraw and regress educationally.

2. The Trial Court abused its discretion and committed an error at law by *sua sponte* taking away the Appellant's status as joint legal custodian of the minor child. This relief was not requested and there is absolutely no proof or evidence whatsoever in the record that Appellant's joint legal custody was adverse to the minor child in any way. Contrary, the removal of her rights as joint legal custodian now prevents she from having any say so or input into the child's well-being and further hinders her ability to have and maintain a normal parent/child relationship.

3. The Trial Court abused its discretion and erred as a matter of law by *sua sponte* amending the previous order on child support even though said relief had not been requested by either party. The record does not indicate that the Appellant has the financial ability to pay the increased child support nor is there any evidence in the record that the Appellant herein has any likelihood in the future of being able to pay this increased child support.

#### **D. ARGUMENT**

The Trial Court must provide specific findings with regard to:



1. Whether a material change in circumstances occurred;
2. If said material change in circumstances occurred whether there was an adverse effect on the minor child; and,
3. If there was a material change that was adverse to the child, does it warrant a modification or is a modification of custody in the child's best interest.

If the Court finds there was adverse material change then they must proceed to the best interest analysis and make specific findings with respect to the Albright factors. Sturgis v. Sturgis, 792 So. 2d 1020, 1025 (Miss. Ct. App. 2001).

The burden of proof is on the Petitioner to move that a material change has occurred and that the change is adverse to the child. McCracking vs. McCracking, 776 So. 2d 691, 693 (Miss. Ct. App. 2000); Sanford vs. Arinder, 800 So.2d 1267, 1273 (Miss. Ct. App. 2001). Custody should be modified only on the basis of parental behavior "which clearly poses or causes danger to the mental, physical or emotional well-being of a child", Ballard v. Ballard, 434 So. 2d 1357, 1360 (Miss. 1983); Lambert v. Lambert, 872 So. 2d 679, 684 (Miss. Ct. App. 2003). Clearly in this case the material change in circumstances creates danger to the mental and emotional well-being to the minor child of the parties in that the child's regression and his educational undertakings and his emotional instability while in the custody of Appellee and Appellee's wife are clearly basis for modification in keeping with the Ballard ruling. Modification requires proof of custodial parent conduct that creates a genuine danger to a child. The evidence of this basis for modification is that all throughout the testimony herein whereas all the problems arising with the minor child either occurred while in the custody of the Appellee herein or where the Appellee and his wife were intentionally

withholding information and refusing to seek the assistance and advise of the joint legal custodian, the Appellant herein. The testimony of Dr. Ray 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 herein, between June 2005 and October 2005.

Lack of cooperation by a custodial parent can give rise to a basis to modify custody. For example, a mother's six (6) year interference with visitation of a minor child was a material change justifying an award of primary custody to the father. Ash v. Ash, 622 So. 2d 1264, 1266-67 (Miss. 1993). Similarly modification has also found to be proper when a chancellor found that the custodial mother "embarked on a course of conduct designed to isolate the child from his father." Ferguson v. Ferguson, 782 So. 2d 181, 183 (Miss. Ct. App. 2001). It is clear from the testimony in this case that Chris Burgess and his wife, Amanda Burgess had put forth a concerted effort to isolate the minor child from the mother who was the joint legal custodian and the Appellant herein. Their specific instructions for the educational institutions and the medical providers not to contact the mother and provide her information or seek her input was directly aimed at undermining the relationship and to isolate the minor child from his mother, the Appellant herein. McDonald v. McDonald, 876 So. 2d 296, 297-98 (Miss. 2004).

Ongoing adverse circumstances gives rise to the ultimate test for modification. In 1996, the Supreme Court in Riley v. Doermer, addressed an alternate test for modification. The Court held that custody may be modified when the environment provided by a custodial parent is adverse to a child's best interest and the non-custodial parent had changed positively and can provide a more suitable home. Riley v. Doermer, 677, So.2d 740, 744 (Miss. 1996). The "alternate environment" test applies

when a child is living in genuinely adverse circumstances. For example, the alternate test was properly applied to change custody to a father who showed that the mother has persistently failed to provide proper care for the children and that his home situation had improved since the divorce. Carter v. Carter, 735 So.2d 1109, 1114 (Miss. 1999). Similarly, the Riley test was properly applied to modify custody based on evidence that the custodial mother had persistently failed to care for the child's personal hygiene and medical needs. Hoggatt v. Hoggatt, 796 So. 2d 273, 274 (Miss. Ct. App. 2001). The evidence in this case clearly indicates that the situation existing in Chris Burgess' home created an adverse environment that adversely impacted the minor child of the parties and therefore would warrant modification of custody. Based upon the foregoing case law there is no fact situation in the case *sub judice* that would warrant a *sua sponte* modification of joint legal custody status. This was done totally without evidence or reason and can only further harm the relationship between the Appellant and minor child of the parties. It can only adversely impact the minor child in that it removes an ability Appellant has to influence the child's well-being but instead removes any impediment that Chris Burgess and Amanda Burgess may have in further isolation of the minor child from his natural mother. Joint custodian parents estrangement and resulting failure to communicate was a material change in circumstances adverse to their child, warranting modification of custody to the father. Eason v. Kosier, 850 So. 2d 188, 190 (Miss. Ct. App. 2003). Caples v. Caples, 686 So.2d 1071, 1073 (Miss. 1996), and joint legal custody was modified based on three years of "acrimony, failure to confer, and failure to communicate. Cook v. Whiddon, 866 So.2d, 494, 502 (Miss. Ct. App. 2004) .

The basis for modification for child support must be to show a substantial and material change in circumstances of the child or the parent since the decree awarding support. McEwen v. McEwen, 631 So. 2d 821 (Miss. 1994); Gillespie v. Gillespie, 594 So. 2d, 620, 623 (Miss. 1992). In determining whether a material change has occurred, the Court should consider the following factors: The increased needs of older children; increase in expenses; inflation; a child's health and special medical or psychological needs; the parties relative financial condition and earning capacity; the health and special needs of parents; the payor's necessary living expenses; each party's tax liability; one party's free use of residence, furnishings, or automobile; and any other relevant facts and circumstances. Tedford v. Dempsey, 437 So.2d 410, 422 (Miss. 1983); McEachern v. McEachern, 605 So. 2d 809, 813 (Miss. 1992). It is clear from the record in this case that no relief for increased child support was made nor was any evidence put forth that there had been a material change in circumstances since entry of the first support order. The Court failed to address any of the aforementioned factors in reaching its conclusion to *sua sponte* increase the child support obligations of the Appellant herein. This is clearly an abuse of discretion and error at law as set out in Tedford, and McEachern.

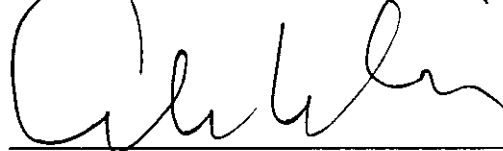
**E. CONCLUSION**

On the basis of the facts and law as set hereinabove the Appellant Court should reverse the trial court herein and render a judgment in favor of Appellant.

Respectfully submitted, this the 15 day of December, 2006.

LINDY BURGESS PURVIANCE (SPELL)

BY:



JOHN R. McNEAL, JR., Appellant's Attorney

**CERTIFICATE OF SERVICE**

I, John R. McNeal, Jr., do hereby certify that I have this day caused to be delivered by United Postal Service, first class prepaid postage or facsimile/electronic transmission and/or by hand-delivery a true and correct copy of the above and foregoing Brief of Appellant as follows:

Honorable William H. Singletary  
Hinds County Chancery Court Judge  
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Jackson, Mississippi 39205-0686

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This the 15 day of September, 2006.

  
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JOHN R. McNEAL, JR.