IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

RACHEL DRISKELL PORTER (SPIVEY)	**APPELLANT**
VS	**NO. 2006-CA-01592**
TIMOTHY WADE PORTER	**APPELLEE**

APPEAL FROM THE CHANCERY COURT
OF MADISON COUNTY

BRIEF OF APPELLANT

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VS CASE NO. 2006-CA-01592

TIMOTHY WADE PORTER APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Rachel Driskell Porter (Spivey), Appellant, and Dan Spivey, Spouse;
2. Timothy Wade Porter, Appellee, and Samantha Thomas Porter, Spouse;
3. William C. Bell, Esq., counsel for Appellant;
4. Richard C. Roberts, III, Esq., counsel for Appellant;
5. William R. Wright, Esq., Trial counsel for Appellee;
6. W. Benton Gregg, Esq., trial counsel for Appellee;
7. Deborah Hodges Bell, Esq., trial counsel for Appellee;
8. Debra L. Allen, Esq., Guardian Ad Litem;
9. William J. Lutz, Chancellor (Retired);
10. Cynthia Brewer, Chancellor (current) 11th Chancery Court District.

SO CERTIFIED this the 6th day of July, 2007.

RICHARD C. ROBERTS, III

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(2) Did the chancellor err by placing the burden of proof on Rachel (rather than on Tim as the party seeking modification), to prove that she had primary physical custody and the rights that go with it regarding relocation by the primary custodial parent?

(3) Did the chancellor err by not applying the traditional 3-part legal standard for modification, and holding Tim to his burden as the moving party to satisfy each element of the 3-part test?

(4) Under the "impractical/impossible" legal standard that the chancellor employed for modification, was the chancellor manifestly wrong in concluding that joint custody was "impractical/impossible" when both parties submitted proposals for continued joint custody and Tim's proof was that he could continue to exercise joint custody in Memphis and Rachel could exercise continued joint custody in Jackson?

(5) Did the chancellor err in denying Rachel's Rule 60(b) motion to set aside the judgment, when, (a) the chancellor found as a fact that the best interests of the children were served by the existing joint custody arrangement; (b) he modified the existing joint custody arrangement based solely upon Rachel's anticipated move to Memphis; and (c) the move to Memphis never occurred as a result of events which transpired after trial, and over which Rachel had no control?

(6) Did the chancellor err by modifying the previously existing judgment of child support where neither party in their pleadings requested modification, where Tim expressly disavowed any claim for child support, where neither party presented any evidence on the issue of child support, and where the chancellor made no factual findings to support a child support award?

(7) Did the chancellor err by failing to give his reasons for rejecting the Guardian Ad Litem's recommendation that the children be allowed to remain in Rachel's primary custody?

STATEMENT OF THE CASE

a. *Nature of the Case.*

These parties were divorced in October, 2000. In their divorce settlement, the parties agreed to a joint legal and physical custody arrangement for their three young children with Appellant, Rachel Spivey, being awarded "**primary physical custody**" and Appellee, Tim Porter, "**secondary physical custody.**"

Rachel remarried. She and her husband, Dan Spivey, have a son and a daughter together. In January, 2006, Dan accepted a job and moved to Memphis. Rachel remained in Jackson so that the children could finish the school year. In anticipation of the move she thought would occur in the Summer, Rachel filed a Petition to modify Tim's periods of physical custody with the three Porter children. Tim filed a Counter-Petition, claiming that the move to Memphis would adversely affect the children, and asked that he be awarded sole physical custody.

The entire trial was based on the premise that Rachel would be moving to Memphis. Based upon Rachel's impending move, the court concluded (contrary to the recommendation of the court-appointed Guardian Ad Litem) that the children should not be allowed to remain in Rachel's primary custody. Rather than shifting primary custody to Tim, the court terminated the joint custody arrangement and awarded Tim sole physical custody. As events unfolded shortly after the trial, however, Dan's position in Memphis was eliminated, and Rachel's anticipated move to Memphis **never took place.**

This is an appeal from the Judgment which terminated Rachel's primary/joint physical custody rights and awarded sole physical custody of the children to Tim, based solely upon Rachel's **anticipated** move from Jackson to Memphis – which never actually occurred – and from the court's denial of Rachel's post-trial motion to set aside the Judgment after Dan's job loss extinguished the reason for the anticipated move.

Rachel contends that the chancellor erred in a number of ways, including his failure to recuse himself, his application of the wrong legal standard in reaching his modification decision, his rejection of the Guardian Ad Litem's recommendation that the children remain in Rachel's primary custody when she moved, his conclusion that joint physical custody would be impractical, his award of monetary relief to Tim that was not requested in the pleadings, and his failure to reinstate the joint custody arrangement when it became clear that the anticipated move, which precipitated the petitions for modification, and upon which the case was tried, would not occur.

b. *Course of Proceedings Below and Statement of Facts.*

Rachel and Tim were married on May 23, 1992. Rachel was 22 and Tim was 23. Rachel, who has a B.A. in Accounting, worked as a substitute teacher and as a bank teller while Tim completed his last year of law school. (T.98). After Tim graduated, the couple moved to Jackson where Tim went to work for a local law firm and Rachel took a job as a staff accountant for LDDS. (T.98).

Their first child, Madeline, was born on August 9, 1995. At that time, Rachel quit work and has been a stay-at-home Mom ever since. Harrison, their second child, was born on April 20, 1997.

On September 21, 1999, Rachel filed her Complaint for Divorce against Tim charging him with adultery and other fault grounds. At that time, Rachel was pregnant with their third child, Carlisle, who subsequently was born on May 1, 2000.

On October 4, 2000, Rachel withdrew her fault grounds for divorce and consented to the entry of a Judgment of Divorce on the ground of Irreconcilable Differences which incorporated by reference the parties' Child Custody, Child Support and Property Settlement Agreement. (RE.,CP.000004).

Pursuant to the Agreement, child custody was awarded as follows: "The parties shall have **joint physical custody** with Wife awarded **primary physical custody** of the minor children; Husband shall have **secondary physical custody** of the minor children; the parties shall have joint legal custody of the minor children." (RE.,CP.000019) (Emphasis added).

The Agreement defined joint physical custody exactly as it appears in §93-5-24 of the Mississippi Code , *i.e.,* "joint physical custody means that each of the parents shall have significant periods of physical custody and it shall be shared by the parents in such a way so as to assure a child of frequent and continuing contact with both parents." (RE.,CP.000019). "Primary physical custody" and "secondary physical custody" were not defined in the Agreement.

Under the terms of the Child Custody Agreement, Tim's visitation with the children during the school year was every other weekend, and after Rachel's weekend, Monday night and Wednesday night. After Tim's weekend, he had the option of substituting Tuesday or Thursday for his Monday visitation. Tim's periods of physical custody provided him with overnight visitation approximately 40% of the time. (RE.,CP.00019-24).

This schedule proved particularly unwieldy in its implementation, and the parties returned to court several times on clarification, modification, and enforcement issues, which resulted in various changes in Tim's visitation schedule. At the time of the modification trial, Tim's visitation was Wednesday at 12 until Friday at 12, unless it was his weekend, in which case the children remained with him until Sunday at 5. (RE.,CP.000555). The parties split or alternated holidays and summers. Under this visitation arrangement, Tim had overnight visitation with the children approximately 43% of the time.

Both parties remarried. Rachel married Dan Spivey. Rachel and Dan have two (2) children as a result of their marital union – Lydia, born November 28, 2001 (who was 4 at the time of the hearing), and Barnabas, born January 9, 2003 (who was 3 at the time of the hearing). Tim continued to date Samantha Thomas, whom he married in November, 2004. Samantha has a child from a previous marriage. Tim and Samantha have no children together.

In late December, 2005, Rachel's husband, Dan Spivey, who was self-employed in the securities industry, was offered a once-in-a-lifetime job opportunity to work as the Options Strategist for Wellspring Management, Inc., a private investment firm in Memphis,

Tennessee. The position provided an annual compensation package between Five Hundred Thousand Dollars ($500,000) and One Million Dollars ($1,000,000). (T.79). One of the non-negotiable conditions of employment, however, was that Dan had to work in Wellsprings' headquarters in Memphis.[1] (T.80). Rachel contacted her attorney, Mark Chinn, who advised Rachel that under the terms of the Child Custody Agreement she had the right to relocate with the children. (Stipulation, T.140). Thereafter, Dan accepted the position and commuted between an apartment the company leased for him in Memphis and the family home in Jackson.[2] Rachel remained in Jackson with the five children to make arrangements for the move to Memphis once the children's school year ended in May, 2006. As facts turned out, however, **Rachel and the children never moved from their home in Jackson.**

In January, 2006, upon learning that Rachel planned to move to Memphis, Tim filed an *Emergency Motion for Temporary Restraining Order and/or Alternative Injunctive Relief.* (CP000282). After hearing the parties' attorneys' arguments in Chambers, the court entered a Temporary Restraining Order which prohibited Rachel: "from taking the children to Memphis to become involved in community activities such as church and school; ... from showing the children potential houses in Memphis that may be purchased; ... [and] from

[1]At the time of this offer, Dan's business venture was failing and he had no other immediate employment prospects. (T.80, 135).

[2]Dan's employer, George White, testified that as a short-term accommodation for Dan and his family, Dan was permitted to work Monday through Thursday in Memphis, returning to Jackson Thursday night to be with his family on Friday, Saturday and Sunday. (T.91). He testified that this was an interim accommodation, and if the court required the children to stay in Jackson, Dan's continued permission to commute "would not work." (T.92).

taking the children to visit any schools in the Memphis area." (RE., Supplemental CP.000001-2).

On February 28, 2006, **in anticipation of the move to Memphis**, Rachel filed her *Petition to Modify Defendant's Periods of Physical Custody.* In her Petition, **Rachel did not seek a change in the custodial arrangement**, only a revision of the parties' custodial/visitation periods. She asked the court to "modify the custodial/visitation periods in light of the logistical change in circumstances, and to provide Tim with frequent and continuing contact with the minor children in light of the circumstances." (CP.000296-299). On April 19, 2006, Tim filed his *Answer to Petition to Modify Defendant's Periods of Physical Custody and Counter-Petition for Modification of Physical Custody.* (CP.000412). In his Counter-Petition, Tim requested sole physical custody and asserted the classic 3-prongs to support his claim: that Rachel's move from Jackson would constitute a material change in circumstances;[3] that the move would be detrimental to the children; and, that it would be in the children's best interest to remain in Jackson rather than move to Memphis. (CP.000414).

The court, on its own initiative, appointed Debra L. Allen, Esq., a local attorney with extensive experience in the field of family law, as Guardian Ad Litem for the children. (RE.,CP.000455). The Guardian Ad Litem was ordered to conduct "a thorough and expeditious inquiry into all matters which in her judgment touch on the best interest of the

[3]The parties' *Child Custody Agreement* provided that a move from the Jackson metropolitan area by either parent would be "a material change in circumstances." (CP.000132). The question of "adverse affect" was not addressed in the Agreement.

children relative to the parties' petitions." (RE.,CP.000456). As directed, the Guardian Ad Litem conducted an extensive investigation of the facts prior to trial by interviewing the children, witnesses, and family members, reviewing hundreds of documents and emails, and visiting with the children and both parties in their homes and in her office. The GAL testified: "I don't think that I missed anything that they wanted me to see, hear, or read." (T.605).

At the commencement of the trial, the Judge allocated five (5) hours for each side to present their entire case, including cross-examination. (T.51). The court reserved three (3) hours for the Guardian Ad Litem's report and the examination of the Guardian Ad Litem by both sides. (T.51). The court frequently referred to the Guardian Ad Litem as the "star" witness and noted the substantial reliance he would place upon her report and testimony. (T.366, 19, 20, 22, 36-39, 41, 458). Rachel filed a Motion requesting the chancellor to appoint an independent psychological expert to conduct a psychological custody evaluation of the children and both parties. (CP.000490). The chancellor denied the motion and stressed the confidence he reposed in the Guardian Ad Litem: "I know that separation has an effect on children. And I really think that the guardian ad litem we've got is going to be competent to deal with those issues. ... The last thing I need is some semi-shrink getting up here and giving a bunch of academic psychobabble. ... I think we always do better getting a lawyer that we know does a good job and really cares about the children." (T.22).

This case was tried on June 12 and 13, 2006. **The entire trial** was based upon the premise that Rachel would be moving to Memphis to be with her husband. As the chancellor

stated post trial: "**I based the entire judgment on the fact that Rachel and Dan and their family were moving to Memphis.** (T.672). That was the only reason for Rachel's Petition for modification of the visitation periods, and that was the only reason asserted by Tim in his Counter-Petition for modification. (CP.000414-416). Indeed, that was the only reason for the trial.

Rachel's position was that Tim's visitation with the children could be substantially the same in Memphis as he currently enjoyed in Jackson as a result of his substantial wealth,[4] his completely flexible work schedule (T.537), and the reasonable proximity of Memphis to Jackson. Tim was clear in his testimony that if the children moved to Memphis, he would want to continue his same schedule with the children and would be able to do so. (T.537-540).

Even though Tim requested sole physical custody, he emphasized in his testimony to the court that he considered the joint custody arrangement under which the parties had been operating to be in the children's best interest, and repeatedly expressed his desire to continue the same schedule whether the court kept joint custody in place or awarded him sole custody. ("I would have no problem allowing Rachel to maintain custodial periods during the week. I ... would buy her a home here, that she could do that." (T. 533). "Absolutely ... I would keep the same arrangement with sole physical custody granted to me.") (T.534).

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[4]In his UCCR 8.05 Financial Declaration dated January 20, 2006, Tim listed his gross income as $219,000.00 per month, or $2,630,40.00 per year. Tim did not file his 8.05 Form in the Chancery Court records, but he did provide a copy to Rachel in accordance with Rule 8.05 on January 24, 2006. (CP.000281). Tim concurred at trial that he had the financial ability to exercise exactly the same custody schedule if the chancellor allowed the children to go to Memphis with Rachel. (T.540).

In addition to her independent investigation, the Guardian Ad Litem attended the entire trial and listened to all of the evidence presented. Called as the court's witness after both parties had rested, the GAL testified that in her opinion the best interest of the children would be served by allowing the children to move to Memphis with Rachel, and giving Tim substantial periods of time to visit with the children. (T.627-629). The Guardian Ad Litem was quite clear in her testimony that the children were happy, well-adjusted, and doing extremely well in the existing custody arrangement. She lamented the fact that any change had to be made. (T.628, 629, 637). She concluded, however, that with Rachel in Memphis, and Tim in Jackson, the children would be better served living in Memphis with Rachel. (T.627-629).

At the conclusion of the trial, even before either party had submitted a proposed custody/visitation schedule, the chancellor was apparently convinced that continued joint custody was both practical and in the children's best interest. During closing argument, Judge Lutz stated: "Look, the one thing – I hate to interrupt you – but should it turn out as the guardian ad litem has recommended, the one thing that will stay, *this will be a joint – a joint physical custodial relationship.* ***Whichever way it goes, that is going to remain intact*** ...." (T.647).

Following trial, the court requested both parties to submit proposed custody schedules. Both Rachel and Tim submitted proposals which provided significant periods of physical custody, shared by the parents in such a way so as to assure the children of frequent and

continuing contact with both parents. (In other words, "joint physical custody" as defined by Miss. Code Ann. §93-5-24, and as originally agreed upon by the parties).[5]

Rachel submitted a very detailed joint physical custody proposal which addressed the issue from the standpoint of "parenting time," defined as the non-school/non-sleeping time available for each parent to spend with the children. (CP.000584). Of the available parenting time, Rachel's proposal awarded Tim 46.09% and Rachel 53.91%. (CP.000586). In terms of days, Rachel's proposal allocated 159 days to Tim (43.80%) and 204 days to Rachel (56.20%). (CP.000586, 000587-000600, 000627-000679). The submission letter accompanying Rachel's proposal stated: "[T]he custody schedule we are proposing comes as close as possible to duplicating the actual parenting time both Rachel and Tim have had with their children." (CP.000582).

Tim also proposed a joint custody, 50/50 schedule consisting of two options – one with Tim providing a home in Jackson for Rachel's use, and one without the home in Jackson. (CP.000610-612). Under Option One, Tim proposed Rachel having 7 nights out of 14 during the school year, 6 weeks in the Summer (with Tim getting 5 weeks), and splitting the holidays. (CP.000610). Under Option Two, Rachel received slightly less days during the school year, but the holidays were split and Rachel was to get 7 weeks in the Summer. (CP.000611). In the letter from Tim's attorney to the court containing this proposed schedule, it was stated that Tim's proposal "reflects the importance that he places

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[5]After the GAL testified that the children should be allowed to remain with Rachel when she relocated to Memphis, Tim apparently abandoned his claim for sole custody. Not once in his numerous post-trial briefs and submissions prior to the *Opinion* did Tim argue for sole custody. His post-trial position was that the children should remain in Jackson with Tim as "**primary custodial parent.**" (CP.000604. *See also* CP.000609, 610-12, 626).

upon the children having a loving and close relationship with their mother and her family." (CP.000612).

On July 11, 2006, the chancellor issued his *Opinion* and entered a *Final Judgment*. In his *Opinion*, the court stated:

> *Tim and Rachel's present shared custody arrangement between parents of school aged children will be* ***impractical, if not impossible*** *to maintain, with the parties living in two different states. The consequences of this move will be real. The relationship with one of these two parents will suffer because of the location of the children. For example, if the children move to Memphis, Tennessee, with Rachel,* ***Tim will inevitably be unable to exercise his current visitation****. Likewise, if the children remain in Jackson, Mississippi,* ***Rachel will inevitably be unable to exercise her current visitation.*** *...*
>
> *Therefore the court finds,* ***Rachel's move to the state of Tennessee*** *has made the present joint legal and physical custody arrangement impractical and as such constitutes a material change in circumstances adverse to the children's best interest.* (RE.,CP.000557-558).[6]

After summarily concluding that Rachel's **anticipated** move made the joint physical custody arrangement impractical, the court conducted an analysis under *Albright v Albright*, 437 So. 2d 1003 (Miss. 1983), based upon Rachel's **anticipated** move to Memphis and the **anticipated** effect on the children.

Throughout his *Opinion*, the chancellor repeatedly recognized Rachel's dedication to her children and her abilities as a mother. For example, the court stated:

> *Rachel is a professional mother. She has devoted her life to the children. She has sacrificed a career and even daily social activities, always putting her*

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[6]The chancellor referred to no evidence to support his boot strap conclusion that the parties would "inevitably" be unable to exercise their current custodial periods other than the fact that one would be living in Memphis and the other in Jackson. The chancellor also failed to address the fact that *both parties* had submitted proposals that, although slightly different from the present schedule, would have provided joint custodial periods of approximately 50/50 after Rachel moved to Memphis, *regardless* of which parent assumed the role of primary custodial parent.

children's needs first. Rachel is organized and efficient. It was clear that Rachel keeps the children's calendar. She schedules, she plans, she is on time. ***Take all of the activities a mother might do; and Rachel does them all, with perfection.*** *She is the class mom, the volunteer on field trips, the organizer of Girl Scouts, the team mom, the substitute teacher, and much more. She accomplishes more in a day than most working professionals.* ***She has truly made being a mother a profession.*** (RE.,CP.000559-560).

Throughout his *Opinion*, the court made it clear that the existing joint physical custody arrangement was in the best interest of the children, and that the impending move was the sole reason for modifying this preferred arrangement. A few statements from the court's *Opinion* which illustrate this point are as follows:

The court's decision was difficult in this case, as the children have, until Rachel's impending move, been blessed with having two full-time parents. This is one of the rare occasions where, until now, the children have felt little impact from the divorce. These children were fortunate in that they experienced two full-time parents who were fully committed to them. Due to Rachel's move, this is no longer a privilege that these children will enjoy. Regardless of the court's decision, the Porter children will lose one full-time parent. Regardless of airplanes, cell phones or creative visitation schedules, the Porter children will have less interaction with one of their parents. These children won't see one of their parents every day. They won't have one of their parents at their practices, games, plays, school lunches, and so forth. One parent won't be able to run forgotten homework assignments to school. They won't be eating half their dinners at mom's, and half at dad's. The court is convinced that there is no equivalent substitute to having both parents available twenty-four (24) hours a day. And that is what the Porter children have enjoyed thus far. (RE.,CP.000566-567).

After conducting the *Albright* analysis, the court concluded, contrary to the recommendation of the Guardian Ad Litem, that the children should remain in Jackson. The essence of the court's rationale was stated as follows:

What is best for these children? What will impact their lives the least [as a result of Rachel's impending move]? The only part of these children's lives that would be disrupted if they remained in Jackson, Mississippi, is their relationship with their mother. In other words, the children would no longer

> *be able to see Rachel on a daily basis. They will, however, attend the same schools, sleep in the same beds, have extended family nearby ... participate in the same activities ... attend the same church, and have the same friends.* ***Won't the adjustment of losing one full-time parent be easier surrounded by the security of constants they have grown up among as part of their everyday lives?*** *The court is convinced that the best interest of these children requires them to stay among the community, extended family, familiar surroundings and constants that will provide greatly needed security and comfort during this difficult time of transition.*[7] (RE.,CP.000567-568) (Emphasis added).

Rather than continuing the joint custody arrangement (as the Chancellor emphasized at trial that he would do), shifting primary physical custody to Tim, and adopting either of the joint physical custody proposals which had been submitted by the parties, the court terminated joint physical custody and awarded sole physical custody to Tim. The court awarded Rachel only limited visitation with the children, which was, inexplicably and remarkably, **substantially less than either party had proposed** in their respective visitation schedules. The court's schedule relegated Rachel to the "part-time mom" with "standard visitation" which the chancellor had denounced earlier in its *Opinion*. (RE.,CP.000557). During the school year, Rachel was given the first and third weekends of every month (while Tim was given the second, fourth, and fifth weekends of each month). Rachel was given six (6) weeks in the Summer, interrupted by Tim's two-week period in June, Father's Day weekend, and Tim's two-week period in July. Tim also received the last week of Summer prior to school. (RE.,CP.000568-572). The major holidays were either divided, or alternated, but all other holidays, including the three day weekends which typically occur during the school year, were awarded to Tim by default. **Under the court's schedule, the**

[7]The chancellor completely omitted from his analysis the fact that his decision was also separating the three older children from their 4 year old sister and their 3 year old brother, with whom they were extremely close. (T.119-123). At the time of trial, Madeline was 10, Harrison was 9, and Carlisle was 6.

children's time with their mother plummeted from approximately 17 nights per month to 4 nights per month. (RE.,CP.000568).

The court also modified the child support provisions of the Judgment even though **neither** party in their pleadings had requested modification of child support and **neither** party presented any evidence on the issue of child support.

The chancellor imposed substantial support obligations on Rachel (such as requiring her to pay ½ of the private school expenses for each of the three children through high school), but made no factual findings regarding the cost of these obligations or Rachel's ability to pay.

On July 21, 2006, Rachel filed her *Motion for New Trial and/or to Amend or Alter Final Judgment.* (CP.000691). This motion was denied without opinion on August 17, 2006. (RE.,CP.000713).

On August 4, 2006, while her motion for a new trial was still pending, Rachel filed a *Motion to Stay Operation of Final Judgment.* In that motion, Rachel notified the court that she had made arrangements to stay in Jackson temporarily, pending the outcome of her motion for a new trial, or her appeal, if the motion was denied.[8] (CP.000708). Tim vigorously contested the Motion to Stay. Abandoning his prior position that the children were best served by spending equal time with both parents, Tim began treating the children as spoils of war, insisting that a return to the previous joint custody arrangement would be "damaging to the children" who were now attempting to "adjust" to the new schedule. (CP.000721).

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[8]The court summarily denied the *Motion to Stay* without opinion.

While the Motion to Stay and the Motion for New Trial were pending, Dan's employment with Wellsprings Management, Inc., was involuntarily terminated. (CP.000743). As a result, Rachel filed a *Motion for Relief from Judgment* pursuant to Rule 60(b) of the Mississippi Rules of Procedure. (CP.000731). In her motion, Rachel requested the court to set aside the Final Judgment and reinstate the joint custody arrangement since the loss of Dan's job meant that **Rachel would not be moving to Memphis as everyone had expected.**[9]

Rachel's *Motion for Relief from Judgment* was denied without opinion in an *Order* entered September 14, 2006. (RE.,CP.000757). Rachel filed her *Notice of Appeal* the following day, September 15, 2006. (CP.000758).[10]

STANDARD OF REVIEW

"As to the findings of fact, the chancellor, as fact-finder, 'is entitled to substantial deference when his determinations are subjected to attack on appeal and appellate review searches only for abuse of discretion.'" *Marter v Marter*, 914 So. 2d 743 (¶6) (Miss. Ct. App. 2005); *citing Rogers v Morin,* 791 So. 2d 815, 826 (¶39) (Miss. 2001). Under this deferential

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[9]Tim also vigorously opposed Rachel's *Motion for Relief from Judgment*. Tim argued that since the court awarded him sole custody, Rachel is now limited to seeking modification under the traditional 3-part test, requiring that she prove a material change in circumstances occurring *in the custodial home* (his), adversely affecting the children, before the court can proceed to a best interest analysis under *Albright*. (CP.000751).

[10]Rachel has filed a *Motion for Modification* in the Chancery Court asking the chancellor to modify custody. (See Certified Chancery Court Docket Sheet, certified June 22, 2007, showing post appeal filings attached as Appendix A). Tim is contesting the modification by claiming that as a matter of law Rachel cannot prove the requisite change of circumstances occurring in the custodial home adversely affecting the children. At the time of filing this Brief, the Motion is set for hearing on November 13, 2007, before the newly elected chancellor, Honorable Cynthia Brewer.

standard of review, the chancellor's factual findings will not be reversed unless manifestly wrong or clearly erroneous. *E.g., Mabus v Mabus*, 847 So. 2d 815, 818 (¶8) (Miss. 2003).

As to questions of law, "an appellate court reviews *de novo* whether the trial court applied the proper legal standard." *Marter v Marter*, 914 So. 2d 743 (¶6); *citing Morgan v West*, 812 So. 2d 990 (¶8) (Miss. 2002).

Articulating the correct legal standard is not in itself sufficient, and the Court must determine whether the chancellor applied the standard appropriately. *Marter, supra* (¶8).

"Where a lower court misperceives the correct legal standard to be applied, the error becomes one of law, and we do not give deference to the findings of the trial court. ... Instead, this Court reviews questions of law *de novo*." *Brooks v Brooks*, 652 So. 2d 1113, 1117 (Miss. 1995). *Accord, Bean v Brossard*, 587 So. 2d 907, 913 (Miss. 1991) ("Where the court has exercised its discretionary authority in such a way that it misperceives the correct legal standard, the deference customarily afforded trial courts is pretermitted because the error has become one of law."); *S.N.C. v J.R.D.*, 755 So. 2d 1077, 1080 (¶7) (Miss. 2000) ("However, 'where on review it is apparent the court below has misapprehended the controlling rules of law or has acted pursuant to a substantially erroneous view of the law, we will proceed *de novo* and promptly reverse.'"); *citing, Ethredge v Yawn*, 605 So. 2d 761, 764 (Miss. 1992); *3M Co. v Johnson*, 2005 WL 107134 (Miss. 2005).

SUMMARY OF THE ARGUMENT

A. The polestar consideration in any child custody case is the best interest of the children. These children are currently being deprived of the love and companionship of their Mother for no good reason.

In their divorce settlement, the parties agreed on a joint custody arrangement with Rachel having "primary physical custody." Under this arrangement, the children have been able to spend substantial amounts of time with both parents. The chancellor called it "a beautiful combination for the children," which was clearly in their best interest. (T.638).

This arrangement was modified by the chancellor based solely on his assumption – which was well grounded at the time, but which ultimately proved to be erroneous – that Rachel and her husband, Dan, and their other two children would be moving to Memphis. The anticipated move, however, never occurred because Dan's job was terminated. This turn of events happened shortly after trial, and was based on events solely beyond Rachel's control.

The children, ***who have never been separated from either parent*** in spite of their parents' divorce, ***are now being separated from their Mother*** by the chancellor's modification of the original Judgment and his failure to set aside the modification after the anticipated move to Memphis never materialized.

B. Chancellor Lutz should have recused himself from hearing this case. The practice in the District was for judges not to hear the personal divorce suits of lawyers who routinely practice before them. This rule, which has been commended by the Mississippi Supreme Court, promotes confidence in the judiciary and our court system, since the non-lawyer spouse may understandably harbor doubts about the chancellor's impartiality. The reasons for the rule should apply with no less force in contested custody cases such as the this where a lawyer party is also married to a lawyer who routinely practices domestic relations law before the chancellor.

In addressing a Motion for Recusal, the trial court is required to use the *objective*, "reasonable person knowing all the circumstances" standard set forth in Canon 3 of the Code of Judicial Conduct and addressed in numerous cases from the Mississippi Supreme Court. In this case, however, Chancellor Lutz utilized a *subjective* standard based on his personal feelings that he harbored no preconceived notions which would interfere with his ability to be fair.

Judge Lutz implicitly recognized that his impartiality might be reasonably questioned when he took the unusual step of recusing himself *from the other cases* Tim's wife was handling as an attorney. This magnified the appearance of impropriety.

The chancellor's use of the wrong legal standard, the appearance of impropriety, and the chancellor's refusal to recuse himself, require reversal.

C. Tim, as the party who was seeking modification of the existing custody arrangement, had the burden of proof on all issues. As part of this burden, it was up to him to prove that the parties' designation of Rachel as the parent with "primary physical custody" did not confer upon her the right to relocate which normally attends the parent with primary physical custody.

The chancellor, however, placed this burden squarely on Rachel. He temporarily enjoined her from taking the children to Memphis, and expressly told her that he would treat this case as joint custody case "unless your lawyers can convince me otherwise." He refused to recognize that the parties had conferred "primary physical custody" on Rachel, and did not even address the issue is his *Opinion*. Placing the burden on Rachel to prove that she had the right to relocate which normally attends the parent with primary physical custody, was error.

D. The chancellor did not require Tim to prove "adverse affect" beyond that created by the geographical move. This is a necessary element in the well known 3-part standard for modification of custody. The chancellor's failure to employ the correct legal standard, and his failure to require Tim to meet this standard, was error.

Rather than requiring Tim to prove adverse affect, the chancellor proceeded directly to the "impractical/impossible" analysis which has been allowed in those cases where the chancellor is forced to choose between one parent or the other. In the facts presented in this case, however, the chancellor was not forced to choose between Rachel and Tim.

E. There was no proof presented by either side that continued joint custody was impractical or impossible. Tim had the burden to prove that joint custody was impractical or impossible. His proof, however, was just the opposite. His proof was that he could continue to exercise the exact same custody if the children relocated to Memphis, and that he could provide Rachel with almost the exact same custody schedule if the children remained in Jackson. Both parties submitted proposals for custody after the move, and both proposals provided for joint physical custody.

The chancellor erred in employing the "impractical/impossible" standard; however, under this standard, the proof was unequivocable that continued joint custody was possible and practical. The chancellor was manifestly wrong in his conclusions to the contrary.

F. The existing joint custody arrangement was in the children's best interest. The existing arrangement provided the children with what the chancellor called the "blessing" and "privilege" of having two full-time parents. (RE.,CP.000567). The chancellor found that as a result of the existing arrangement, "the children have felt little impact from the

divorce." (RE.,CP.000567). The chancellor referred to the joint custody arrangement as "ideal" (T.676) and "Best I have ever seen." (T.663).

Tim argued that the children would be "traumatized" by being separated from either parent. He argued that the only way to minimize that "trauma" was to have the children remain in Jackson where they would at least have familiar surroundings. Tim's attorney put it this way: "*[These children] have, actually, been the lucky children of divorce, who post-divorce have been able to live with both parents. They didn't have to separate from one parent. ... There is no way to avoid the trauma of them ... separating from one parent. But, you [the court] can minimize the trauma if you award custody to Tim and leave them in the place where they have real stability.*" (T.65).

The chancellor accepted this argument and based his *Opinion* on it. He stated: "*Won't the adjustment of losing one full-time parent be easier surrounded by the security of constants they have grown up among as part of their everyday lives? The court is convinced that the best interest of these children requires them to stay among the community, extended family, familiar surroundings and constants that will provide greatly needed security and comfort during this difficult period of transition.*" (RE.,CP.000567-568).

The "trauma" that the chancellor sought to minimize was that of the children being separated from either parent. He found separation to be "inevitable" as a result of Rachel's anticipated move to Memphis. (RE.,CP.000557). But, when the need for the move vanished, restoring the children to the "ideal" arrangement they had enjoyed – having two full-time parents – was in their best interest.

The children are now being "traumatized" by being separated from their mother, solely as a result of the judgment which sought to minimize the "trauma" of separation.

Everyone assumed that Rachel would be moving to Memphis. As a result of events beyond her control, everyone was mistaken in this factual assumption. A change in the single circumstance upon which the entire case was tried and decided, which occurred after trial and prior to appeal, is the sort of "extraordinary and compelling circumstance" justifying invocation of the "grand reservoir of equitable power" provided by Rule 60(b). *Briney v United States Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998).

Having found that the children's best interest was served by the existing joint custody arrangement, the chancellor abused his discretion by failing to reinstate that arrangement after the single factual assumption upon which the modification was based turned out to be a mistaken factual assumption.

G. Neither party requested modification of the child support provisions in the existing judgment. Tim expressly represented to the court that he sought "no child support whatsoever." (CP.000424).

Neither party presented any evidence at trial pertaining to the issue of child support. The case law is clear that in the absence of a pleading seeking modification of child support, and in the absence of evidence to support appropriate findings of fact for an award of child support, a chancellor lacks authority to modify an existing child support judgment.

In the case at bar, it was error for the chancellor to modify child support when it was not requested in the pleadings, Rachel had no notice that the issue was under consideration,

no evidence was presented on the issue by either party, and the chancellor did not make any findings of fact to support the modification of child support

H. The chancellor appointed the Guardian Ad Litem for the children on his own initiative. Throughout these proceedings the chancellor repeatedly emphasized the confidence he had in the GAL and the substantial reliance he would place upon her report and testimony. The chancellor denied certain pretrial motions based upon the responsibility he imposed upon the Guardian Ad Litem. The chancellor substantially limited the evidence the parties were able to present at trial because of his intended reliance on the guardian's extensive pretrial investigation of the facts. The court referred to the Guardian Ad Litem as the "star witness" and as to her testimony that of "an expert witness." The GAL was the only expert who testified regarding the best interest of the children in the entire trial.

Admittedly, the chancellor has the discretion of varying from the recommendation submitted by a Guardian Ad Litem. But in this particular case, since the chancellor found it necessary for the parties to incur the substantial time and expense of addressing custody issues with the Guardian Ad Litem whom he appointed on his own initiative, and whose sole responsibility was to determine and make recommendations on what was best for the children, then those recommendations should have been at least addressed on the record in the chancellor's findings. This is particularly true in this case where the guardian had the unique opportunity to hear, see, read and observe things that could not be presented at trial as a result of the time constraints the court placed upon the parties.

ARGUMENT

I. The chancellor applied the wrong legal standard and abused his discretion by refusing to recuse himself.

Prior to trial, Rachel filed a Motion for Recusal requesting that the chancellor recuse himself based on the fact that Tim's wife, Samantha Thomas Porter, routinely practiced in the field of family law before both chancellors and was known to be an important witness in the custody determination. In denying the Motion, the chancellor applied the wrong legal standard and abused his discretion.

In *Robinson v. Irwin*, 546 So. 2d 683 (Miss. 1989), the Mississippi Supreme Court observed that: "Most chancellors adhere to an unwritten rule not to hear the personal divorce suits of lawyers who routinely practice before their court." The Court went on to state: "This Court commends such a practice, and it would be wise for appointing authorities and local lawyers to adhere to such a practice." *Id.* at 685; quoted with approval in *Steiner v. Steiner*, 788 So. 2d 771 at 775 (Miss. 2001). In this case, the chancellor specifically noted that the "[Chancery Court of Madison County] adheres to this practice." (RE.,CP.000453).

This "unwritten rule," which has been commended by our Supreme Court, promotes confidence in the judiciary and our court system in divorce cases by the non-lawyer spouse who may understandably harbor doubts about the chancellor's impartiality in such circumstances. The reasons for the rule apply with no less force in emotionally charged contested custody cases such as this where the lawyer party is also married to a lawyer who routinely practices in this particular Chancery Court District before both chancellors.

The record in this case clearly established that Samantha Thomas Porter was routinely practicing before both chancellors in the District. In her law firm's website she represented

to the general public that her firm "specialized" in family law and that her particular practice areas included: (1) Family Law; (2) Divorce; (3) No Fault/Contested Divorce; and (4) Child Custody. (CP.000443-444). The record shows that in the three years preceding the Motion, she was listed as attorney of record in twenty-three cases on the Chancery dockets of Madison and Yazoo Counties. (CP.000418, 434, 437). According to Samantha's own Affidavit, fourteen (14) of the cases were assigned to Judge Lutz and nine (9) were assigned to Judge Goree. (CP.000434). Two (2) estate matters were actively pending before Judge Lutz at the time the *Motion for Recusal* was filed. (RE.,CP.000454). Most practitioners would certainly consider this to be an active Chancery practice in the District. In fact, Samantha's twenty-three cases closely approximated the combined Madison County caseload of the two lead attorneys for both parties in the preceding three years. (CP.000434).

The standard for judicial recusal has been clearly set forth in the Code of Judicial Conduct and the Mississippi Supreme Court cases addressing the issue. Canon 3, subdivision E, of the Code of Judicial Conduct states: "Judges should disqualify themselves in proceedings in which their impartiality *might be questioned* by a *reasonable person* knowing all the circumstances ..." (Emphasis added). In *Dobson v Singing River Hospital*, 839, So. 2d 530 (¶9) (Miss. 2003), the court stated, "we have held consistently that the objective 'reasonable person knowing all of the circumstances' is the proper standard" for determining recusal. So long as the judge applies the correct legal standard, the decision is discretionary, but "a judge is *required* to disqualify himself if a reasonable person, knowing all the circumstances, would harbor *doubts* about his impartiality." *McFarland v State*, 707 So. 2d 166, 180 (Miss. 1997) (Emphasis added).

In this case, the chancellor deviated from the objective reasonable person standard and instead relied on his personal feelings and experiences regarding Samantha. The chancellor opined that since he did not know Samantha personally, and because her practice before him was primarily *ex parte* rather than contested, he would not harbor any preconceived notion that might interfere with his impartiality. (RE.,CP.000453-454). In other words, he felt he could be fair. He went on to state that he might feel differently if the two lead lawyers were similarly situated since he had formed personal opinions of respect and trustworthiness for them. (RE.,CP.000453-454).

Then, rather than recusing himself in this case, Judge Lutz recused himself in the two (2) other cases that Samantha had pending before him, and ordered the clerk to assign Samantha's future cases to Judge Goree during the pendency of this action. (RE.,CP.000454).

By recusing himself in Samantha's other cases, Judge Lutz clearly recognized that his impartiality might be reasonably questioned. Instead of resolving this appearance of impropriety by recusing himself in the case at bar, he attempted to "solve the problem" of the appearance of impropriety by disqualifying himself from hearing Samantha's other cases. This did not address the issue. In fact, it magnified the appearance of impropriety. Although certainly unintended, these procedural gymnastics could certainly lead a reasonable non-lawyer spouse to question why the judge would employ such unorthodox measures to continue handling the case.

Moreover, the chancellor's reliance on the fact that Samantha's practice had been primarily *ex parte* does not diminish the fact that she was routinely practicing in the District.

To the contrary, courts are required to place even greater reliance upon the integrity and trustworthiness of lawyers in *ex parte* matters.

Neither the *Motion for Recusal* filed in the trial court, nor the presentation of this issue on appeal, is meant to question the integrity of Chancellor Lutz. The Motion asked for the recusal of both judges in the District because of Samantha's routine practice before them. In fact, Judge Lutz' personal integrity may have impeded his ability to understand how a reasonable non-lawyer person, in a custody case, facing her lawyer ex-spouse and his lawyer wife who routinely practices in the District, could doubt his impartiality.

In conclusion, if it was the practice in the District for the judges not to hear the personal divorce suits of lawyers who routinely practice before them – *and it was*; and if this commendable practice should logically extend to a lawyer litigant's spouse, who routinely practices before them and who will be an important witness – *and it should*; then a reasonable person would harbor doubts about the impartiality of the judge and the judge should recuse himself.

The chancellor applied a personal, subjective test, rather than the correct objective legal standard for recusal. This was error as a matter of law. The chancellor also abused his discretion by refusing to recuse in this case. The case should be reversed.

II. The chancellor committed manifest error by improperly placing the burden of proof on Rachel, by applying the wrong legal standard for modification in this joint custody arrangement where the parties had assigned Rachel "primary physical custody," and, even under the standard applied, was manifestly wrong in concluding that joint custody was impractical.

A. *The Burden of Proof and the Traditional Standard for Modification.*

To change an existing custody order, the party seeking such change has the burden of proof. *Mabus v Mabus*, 847 So. 2d 815 (¶7) (Miss. 2003); *McCracking v McCracking*, 776 So. 2d 691 (¶5) (Miss. Ct. App. 2000). The burden is met only when the movant shows by a preponderance of the evidence: "(1) that a substantial change in circumstances *has transpired* since issuance of the custody decree; (2) that this change *adversely affects* the child's welfare; and (3) the child's best interests *mandate* a change of custody." *Mabus, supra* (¶8). (Emphasis added). If a court concludes under the totality of circumstances that a change *has occurred*, "the court must separately and affirmatively determine that this change is one which adversely affects the children." *Id.*, citing *Bredemeier v Jackson*, 689 So. 2d 770, 775 (Miss. 1977). Lastly and most importantly, "**[T]he polestar consideration in any child custody matter is the best interest and welfare of the child.**" *Id.*, citing *Albright v Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) (Emphasis added). *See also, Riley v Doerner*, 677 So. 2d 740 (Miss. 1996).

The traditional 3-part test is equally applicable to joint physical custody cases, as shown by the Supreme Court's decision in *Mabus v Mabus* (where the parties had equal periods of alternating physical custody, first alternating six month periods, and then alternating calendar month periods). *Mabus*, 847 So. 2d 815 (¶2), (¶6) (Miss. 2003). In such cases, only after the movant meets the burden of proving a material change in circumstances which is detrimental to the children does the court move to an *Albright* analysis to assist in its determination of what is in the child's best interest. *Mabus* (¶20); *McCracking v McCracking*, 776 So. 2d 691, 694 (Miss. Ct. App. 2000).

B. *Geographic Relocation Cases.*

The case law has long established that a geographical move by the custodial parent is insufficient to meet the burden of proving adverse effect. *Spain v Holland*, 483 So. 2d 318, 320 (Miss. 1986) ("[W]e solve nothing by shifting custody to the parent staying at home for, in theory at least, a ... separation from *either* parent will adversely affect the child. The judicial eye ... searches for adverse effects beyond those created ... by the geographical separation from one parent."). *Accord, Pearson v Pearson*, 458 So. 2d 711 (Miss. 1984).

Where the parents have joint physical custody, and one of the parents relocates, there are cases where the Court has approved the chancellor's deviation from the traditional three-part test. *E.g., Franklin v Winter*, 936 So. 2d 429 (¶9) (Miss. Ct. App. 2006). This exception to the normal rule is simply judicial recognition that in **those cases** the facts clearly demonstrated that continued joint custody was impractical or impossible, and the chancellor was **forced** to choose between one parent or the other. *Franklin, supra* (¶8) (Separation of 500 miles made the present arrangement "impractical and economically prohibitive"). *Accord, Lackey v Fuller*, 755 So. 2d 1083 (¶27) (Miss. 2000) (chancellor's error in applying the modification test was overcome by the fact that the mother's move to New York made it "**inconceivable**" that the four year old child and the sixteen month old child could be shuttled back and forth every two weeks). (Emphasis added).

C. *The Chancellor's Errors.*

(1) *The Burden of Proof.*

In the case at bar, the chancellor wrongfully placed the burden of proof on Rachel and pre-judged the necessity of an *Albright* analysis without the requisite showing by Tim of adverse effect.

In the initial motion proceeding in which the chancellor enjoined Rachel from taking the children to Memphis, before any evidence had been offered by either party, Judge Lutz made the following statement directly to Rachel in the courtroom:

> *[T]his is a joint custody,* ***unless your lawyers can convince me otherwise****. We have never gone through an analysis to determine which parent would be the best for the kids as far as the* ***primary parent****. ... That is what I will be doing in this case. ... One parent will be the* ***primary*** *school year parent, the other will be the* ***primary*** *summertime parent. ... That is the way I will resolve this. ... In this case, my impression is that both parents are good parents ... It's not going to be easy I'm sure, as to which parent would be the best to be* ***the primary custodial parent****.* (T.3-4)

The chancellor totally ignored the fact that the parties' Child Custody Agreement which had been approved by the chancellor and incorporated by reference into the *Final Judgment of Divorce*, had already clearly and specifically vested Rachel with **"primary physical custody**," and had given Tim "**secondary physical custody**." (RE.,CP.000119). It was not up to Rachel and her lawyers to prove that she had primary physical custody and the rights that go with it regarding relocation by the primary custodial parent. Tim was the party seeking modification of custody. Therefore, he bore the burden to prove that Rachel was *not* entitled to relocate with the children, just as he bore the burden of proof on every other issue. The chancellor clearly erred in placing this burden on Rachel.

The chancellor pre-judged the issue of any adverse effect caused by the geographic move, and the impracticality of continuing joint custody. In Rachel's pre-trial motion for a court appointed psychologist to conduct an independent custody evaluation, the chancellor stated: "*This thing [the joint custody arrangement] worked fine until, you know, when both parties were living closely together.* ***And now it's not going to work fine*** *because we're going to have, what, some 200 miles between parents.*" (T.21). Since Tim had not presented any evidence whatsoever at that point to meet his burden of showing that continued joint custody would be impractical, the chancellor had clearly pre-judged the issue.

(2) *Application of the Wrong Legal Standard.*

Within their joint custody arrangement, the parties specifically assigned "primary physical custody" to Rachel. Although they agreed that a move outside the Jackson Metropolitan Area would be a "material change in circumstances" (RE.,CP.000024), they did not agree that such move would have an adverse effect on the children. As the person seeking modification of custody, Tim bears the burden of proving adverse affect. *Mabus v Mabus*, 847 So. 2d 815 (¶20) (Miss. 2003). Tim recognized this burden in his *Counter-Petition for Modification of Custody.* (CP.000414). The chancellor, however, ignored it. There is no reason to vary from the established standard for modification of custody when the parties have, by agreement, established one parent as the "primary physical custody" parent within a joint custody arrangement. This would include the long established rule that geographic relocation by the custodial parent is insufficient to meet the burden of proving adverse affect. *Spain v Holland*, 483 So. 2d 318, 320 (Miss. 1986).

This was recognized in *Franklin v Winter*, 936 So. 2d 429 (Miss. Ct. App. 2006), which was a relocation case between parents having joint physical custody. In that case, Franklin claimed that even though the divorce decree awarded joint physical custody, she had *de facto* "primary physical custody" under the visitation provisions contained in the parties' divorce settlement agreement. The Court stated: "This is important because, if Franklin had **primary physical custody**, then Winter had only visitation rights, and we would likely find that Franklin's move is not sufficient grounds for modification of the custody order." *Franklin*, 936 So. 2d 429 (¶10) (Miss. Ct. App. 2006).[11] (Emphasis added).

In the case at bar, the Agreement was clear. Rachel was vested with **primary physical custody** and Tim had **secondary physical custody**. The fact that Rachel had agreed to joint custody with Tim having substantial amounts of visitation with the children, does not alter the fact that the parties themselves agreed that Rachel would have "primary physical custody."

Rachel's role as "primary" physical custodian was reinforced in a number of ways throughout the Child Custody Agreement. The Agreement made it clear that the children would reside primarily with Rachel, and that the children's "home" was with Rachel. (RE.,CP.000020, 27). Although Tim was given specific periods of time with the children, the children were to be in Rachel's physical custody at all times not specified in the visitation schedule. (T.105). The Agreement provided for Tim to have additional visitation "at such other times agreed upon by the parties and while Husband shall not make unrealistic requests

[11]In *Franklin*, the Court was unable to determine the nature of the custody because the parties' divorce settlement was not part of the appellate record. *Franklin*, ¶10.

for additional visitation, Wife shall not unreasonably withhold visitation from Husband." (RE., CP.000024).

In fact, the Agreement specifically referred to Rachel as the "custodial" parent (RE.,CP.000027) and Tim as the "non-custodial" parent. (RE.,CP.000029).

Primary physical custody meant something to these parties when they put it in their Agreement. Rachel gave specific testimony concerning the meaning of "primary physical custody" in the Agreement. She testified that her understanding was: "That I would be responsible for the children. I would be their primary caretaker. My home would be the children's home or their home would be with me." (T.103). Rachel's testimony regarding the parties' agreement to designate Rachel as the "primary physical custodian" went completely unchallenged by Tim in the record evidence.

Tim gave no explanation in his testimony for the fact that the parties had agreed for Rachel to have "primary physical custody." Tim just ignored this portion of the parties' Agreement. Clearly, the Agreement gave both parties joint physical custody. But it also gave Rachel "primary physical custody." **It was Tim's burden to prove by a preponderance of the evidence that Rachel did not have the relocation rights which are normally attendant to "primary physical custody."** Tim failed to meet his burden.

The chancellor did not apply the traditional legal standard for modification, nor hold Tim to his burden to meet it. Instead, the chancellor moved directly to the "impractical/impossible" analysis that the Court has permitted in cases of pure joint custody. The chancellor simply refused to directly address the fact that the Agreement specifically vested Rachel with "primary physical custody." The court concluded that since the parties

had been "flexible" and "worked together" so that Tim could see the children more often than that set forth in the visitation schedule, the parties had exercised "true joint physical custody." (RE.,CP.0000555). (Of course, this was consistent with the opinion the chancellor expressed before one word of testimony was presented that "*this is joint custody unless your lawyers can convince me otherwise.*"). (T.3-4). The court reasoned that other language in the Agreement (such as the parties' designation of Rachel as the "custodial parent," and the designation of Rachel's "home" as the children's "home") was "trumped by their actions over the past five (5) years." (RE.,CP.000556).

In other words, the court found that as a result of Rachel's cooperation and devotion to co-parenting with her ex-husband for the benefit of the children, she had abdicated her role as "primary physical custody" parent. In effect, the chancellor penalized Rachel legally for doing what he found praiseworthy and commendable. This, too, was an abuse of the chancellor's discretion.

The chancellor should have analyzed the anticipated move under the traditional 3-part test, with Rachel as the primary physical custodian, having the rights normally attending the primary custodial parent upon geographic relocation. His failure to apply the correct legal standard was error.

(3) *Continued Joint Custody was not Impractical/Impossible.*

If one ignores the fact that Rachel had primary physical custody (and the attendant rights regarding relocation), and proceeds with an analysis under the "impractical/ impossible" line of true joint physical custody cases, then it is clear **in this case** that the

chancellor was manifestly wrong in concluding that Tim met his burden of proving that joint custody was impractical.[12]

First, joint physical custody does not mean "equal" periods of physical custody. "'[J]oint physical custody' means that each of the parents shall have **significant** periods of physical custody." Miss. Code Ann. §93-5-24(5)(c). (Emphasis added). In the original Child Custody Agreement, Tim enjoyed physical custody approximately 40% of the time. That percentage had been increased slightly via modifications so that at the time of trial he enjoyed physical custody approximately 43% of the time (approximately 13 nights out of 30).

Secondly, **both parties** submitted proposals for joint custody – Rachel for joint custody in Memphis,[13] and Tim for joint custody in Jackson. (CP.000582-600, 000610-612). At the conclusion of trial, the chancellor specifically stated that regardless of the children's geographic location, the parties would retain joint physical custody. (T.647). The schedules each party presented were workable joint custody arrangements.[14]

Thirdly, **Tim did not even attempt to prove** that he would be unable to exercise joint physical custody if the children moved to Memphis with Rachel. In fact, his proof was just the opposite. Tim made it clear that if the chancellor allowed the children to go to Memphis with Rachel, he was ready, willing and able to continue exercising his same periods of

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[12]Again, it appears that the chancellor prejudged this issue based upon his comments before receiving any testimony that: "*This thing worked fine, until you know, when both parties were living closely together. And now it's not going to work fine because we're going to have, what, some 200 miles between the parents.*" (T.21).

[13]Even though Rachel offered a written plan to support joint custody with the children in Memphis, it was not her burden to prove that joint custody **was practical**, since she was not seeking a change in custody; the burden of proof was on Tim to prove that it was **not practical**.

[14]Memphis and Ridgeland (where Tim lives and works) are less than 200 miles apart. As the Guardian Ad Litem stated in her testimony: "Memphis is not Cairo." (T.633).

physical custody. Tim testified that he would want "basically, the same thing I have now." (T.539). Tim testified unequivocally that there were "no financial restrictions" on his ability to exercise the exact same visitation if the court placed the children with Rachel in Memphis. (T.540). He testified that he was "financially able to rent or even buy a place in Memphis so that [he] could have **exactly** the same custody" that he currently enjoyed. (T.540). He testified that his work schedule was "completely flexible" (T.537), that on any given day he can do "basically whatever I want to do" (T.537), and that there was really nothing which would prevent him from exercising "exactly the same visitation" that he currently enjoyed. (T.539). Clearly, Tim did not meet his burden of proving that continued joint custody with the children in Memphis was "impractical/impossible"; in fact, he proved exactly the opposite.

Fourthly and on the other side of the equation, Tim stated that if the children remained in Jackson, he would buy Rachel a home, provide her a vehicle to use in Jackson, assist with airfare, and make other accommodations so that Rachel could maintain the same schedule of physical custody (with the one exception being Sunday night) that she currently enjoyed with the children. (T.533, 534; CP.000610-612).[15] In other words, Tim's proof was that continued joint custody **was practical** with the children remaining in Jackson.

In conclusion on this point, if one applies the "impractical/impossible" standard for modification of joint physical custody – *and the chancellor did*; and if Tim had the burden of proving that joint physical custody is "impractical/impossible" – *and he did*; and Tim's

[15]Tim has since changed his tune dramatically. He is now quite satisfied that the children only get to spend 4 nights per month with their mother, and has resisted every attempt by Rachel to get the Judgment modified. (See Appendix A attached hereto).

only proof was that he could exercise joint custody in Memphis and Rachel could exercise joint custody in Jackson – *and it was*; then the chancellor was manifestly wrong in concluding that joint custody was impractical and consequently changing the joint custody arrangement.

III. Since the chancellor: (1) found that the existing joint custody arrangement was in the children's best interest; and, (2) modified that arrangement only because it would be impractical with Rachel living in Memphis; the chancellor abused his discretion when he failed to set aside the Judgment and reinstate joint custody after Rachel's anticipated move was canceled as a result of her husband's job loss.

Throughout his *Opinion*, the chancellor praised the existing joint custody arrangement and the many benefits and advantages **the children enjoyed** as a result of that arrangement. The following quotes from the chancellor's *Opinion* illustrate the point:

> *Both Rachel and Tim are exceptional parents. They have different parenting styles which has only made the current joint custody arrangement that much more unique. These children have enjoyed the best of both parenting styles.* (RE.,CP.000559).
>
> *The court's decision was difficult in this case, as the children have, until Rachel's impending move, been blessed with having two full-time parents. This is one of those rare occasions where, until now, the children have felt little impact from the divorce.* (RE.,CP.000567).
>
> *These children were fortunate in that they experienced two full-time parents who were fully committed to them. Due to Rachel's impending move, this is no longer a privilege that these children will enjoy.* (RE.,CP.000567).
>
> ***The court is convinced that there is no equivalent substitute to having both parents available twenty-four (24) hours a day. And that is what the Porter children have enjoyed thus far.*** (RE.,CP.000567).

In Rachel's post-trial motion hearing, the chancellor referred to the joint custody arrangement as "**ideal**" (T.676) and "**Best I have ever seen.**" (T.663).

Throughout the trial, Tim repeatedly lauded the benefits to the children of the existing custody arrangement, and repeatedly emphasized the "trauma" that the children would be forced to suffer by being separated from either parent. Tim's attorney told the court:

> *They [the children] have two homes with routines, with special places, with rooms, with pets. They have special things that they do with their parents.*
>
> ***They have, actually, been the lucky children of divorce, who post divorce have been able to live with both their parents. They didn't have to separate from one parent.*** *And I think the evidence that you're going to hear will show that they have really thrived under this circumstance. So, now, they're not going to be able to do that any more, and the reason they won't be able to is because Rachel has made a choice to move with her husband.* (T.59-60).

Tim framed his entire case around his argument that the children would be "traumatized" by being separated from either parent, and that this trauma could only be minimized by allowing the children to remain in Jackson with him where they would have established routines and familiar surroundings. Tim's attorney told the court:

> *So, no matter what happens in this action, the children will lose one custodial parent. That is the end result of this. There is no way to avoid the trauma of them, after having adjusted post divorce,* ***not having to deal with really separating from one parent,*** *now they're going to have to separate from one parent. And there is very little way to minimize that loss. If custody is awarded to Rachel, everything in the children's lives changes, including their relationship with Tim. Either way, the children lose a custodial parent, they stop living with one of their parents. But you can minimize the trauma if you award custody to Tim and leave them in the place where they have real stability.* (T.65)
>
> *[A]n award of custody to Tim clearly minimizes the trauma, whereas, an award of custody to Rachel is actually going to exacerbate the trauma.* (T.67-68).

In his *Opinion*, this is exactly the approach the chancellor followed in his decision to transfer custody to Tim as a result of Rachel's anticipated move to Memphis. (RE.,CP.000567). Under the circumstances then existing (Rachel's anticipated move), the

court found that the "ideal" arrangement was no longer available and he was forced to make a change. As he put it in his *Opinion*, he had to decide: "What will impact their lives the least?" (RE.,CP.000567). He answered his question as follows: *"Won't the adjustment of losing one full-time parent be easier surrounded by the security of constants they have grown up among as part of their everyday lives? The court is convinced that the best interest of these children requires them to stay among the community, extended family, familiar surroundings and constants that will provide greatly needed security and comfort during this difficult period of transition."* (RE.,CP.000567-568).

Ironically, and tragically, the children are now being "traumatized" by being separated from their mother (and stepfather, and brother and sister) solely as a result of the judgment which sought to minimize that trauma. They are being "traumatized" by the court ordered separation, which they have never known or experienced in their lives, and which is no longer necessary since everyone is living in Jackson!

It must be remembered that the parties never presented evidence, and the court never considered, whether custody should be changed if everyone continued to live in Jackson. As the chancellor said, **"I based the entire judgment on *the fact* that Rachel and Dan and their family were moving to Memphis."** (T.672). This factual assumption, however, turned out to be erroneous.

With Dan's termination, and return to Jackson, the reason for Rachel's intended relocation vanished. Dan's involuntary termination, after trial and judgment, prior to appeal, and while post-trial motions were pending, presented the quintessential set of circumstances for Rachel's Rule 60(b) motion.

Rule 60(b) of the Mississippi Rules of Civil Procedure provides in relevant part as follows:

> **(b) Mistakes; Inadvertence; Newly Discovered Evidence; Fraud; etc.** On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order or proceeding for the following reasons:
>
> > (5) ... it is no longer equitable that the judgment should have prospective application;
> >
> > (6) any other reason justifying relief from the judgment.

The Mississippi Supreme Court has repeatedly referred to Rule 60(b) as "a grand reservoir of equitable power to do justice in a particular case." *Briney v United States Fid. & Guar. Co.,* 714 So. 2d 962, 966 (Miss. 1998); quoted in *Telephone Man, Inc. v Hinds County*, 791 So. 2d 208 (Miss. 2001).

Courts in Mississippi routinely use Rule 60(b) to set aside judgments where a central factual underpining is determined after trial to be erroneous. *E.g., M.A.S. v Miss. DHS*, 842 So. 2d 527 (Miss. 2003) (Judgment of paternity set aside nine years later when DNA tests proved defendant was not the father); *Weeks v Weeks*, 654 So. 2d 33 (Miss. 1995) (Judgment for separate maintenance set aside when it was later determined that the marriage was void); *Briney v United States Fid. & Guar. Co.*, 714 So. 2d 962 (Miss. 1998) (Judgment authorizing payment of proceeds in wrongful death suit set aside after discovery that no valid marriage actually existed between purported husband and decedent).

Here, everyone assumed as fact that Rachel would be moving to Memphis. As it turned out, everyone was mistaken in this factual assumption. Surely, a change in the single circumstance upon which this entire case was tried and decided, which occurred after trial

and prior to appeal, is the sort of "extraordinary and compelling circumstance" justifying invocation of the "grand reservoir of equitable power" provided by Rule 60(b). *See Briney*, 714 So. 2d 962 (¶12) (Miss. 1998).

The factors to be considered when deciding if relief should be granted under Rule 60(b) are as follows:

> (1) the final judgment should not lightly be disturbed; (2) that the Rule 60(b) motion is not to be used as a substitute for appeal; (3) that the rule should be liberally construed in order to achieve substantial justice; (4) whether the motion was made within a reasonable time; (5) [relevant only to default judgment]; (6) whether – if the judgment was rendered after trial on the merits – the movant had a fair opportunity to present his claim or defense; (7) whether there are intervening equities that would make it inequitable to grant relief; and (8) any other factors relevant to the justice of the judgment under attack.

Briney v United States Fid. & Guar. Co., 714 So. 2d at ¶20, *citing, Batts v Tow-Motor Forklift Co.*, 153 F.3d 103, 109 (N.D. Miss. 1994).

The chancellor made no additional factual findings regarding his decision to deny the motion. The only findings of fact are contained in the *Opinion* and they unequivocally support a return to the joint custody arrangement which was so beneficial for the children. The facts are summarized in the transcript at pages 662-675. Dan's Affidavit detailing his termination is found at CP.000742-744. These facts, when applied to each of the Rule 60(b) factors, clearly demonstrate that the *Judgment* should be set aside and the joint custody arrangement reinstated.

(1) Final judgments should not lightly be disturbed. But final judgments concerning child custody are always subject to modification based upon the best interests of the children. The chancellor specifically found that the existing joint custody arrangement

was in the children's best interests, and only modified that arrangement as a result of Rachel's anticipated move. (T.672).

(2) Rachel's Rule 60(b) motion was not used as a substitute for appeal. It was based on an event occurring after trial (Dan's involuntary termination) which obviated Rachel's planned move. Since it occurred after trial and entry of the Final Judgment, it could not serve as the basis for an appeal. Nor could it serve as the basis for a new trial since Dan's termination occurred after the ten day limit specified in Rule 59. Consequently, the only procedure available to bring the issue before the court was a Rule 60(b) motion.

(3) If ever there was an occasion to liberally construe Rule 60(b) in order to achieve substantial justice, this would be the case. The chancellor clearly determined that the existing joint custody arrangement was in the children's best interest. He called the existing joint custody arrangement "ideal" for the children. (T.676). That arrangement was modified only as a result of Rachel's anticipated move, which never occurred. Rachel's expected move presented the only barrier to continuing the "ideal" custody arrangement which the children had enjoyed after their parents' divorce. Substantial justice requires that the best interests of the children be served by reinstating joint custody.

(4) There really can be no question as to whether the motion was filed within a reasonable time.

(5) Not applicable.

(6) Obviously, Rachel never had a fair opportunity to present the fact that she would not be moving when the case was tried. As things stood at trial, Rachel was moving to Memphis – or at least that was her good faith assumption. The parties did not present their

evidence for modification based upon Rachel being in Jackson and Tim being in Jackson. The evidence was presented by the parties, and ruled upon by the court, on the basis that Rachel would be living in Memphis and Tim would be living in Jackson. (T.672).

(7) There certainly were no intervening equities which would trump what the chancellor called the children's "privilege" and "blessing" of enjoying "two full-time parents who are fully committed to them." (RE.,CP.000567).

(8) And, finally, there is no "justice of the judgment." These three children are now separated from their mother, stepfather, brother and sister for all but approximately four (4) nights per month. The very thing the Chancery Court said it wanted to avoid – separating the children from either parent – is now the very thing that is being forced on the children as a result of the judgment.

In summary, if the chancellor found as a fact that the existing joint custody arrangement was in the children's best interests – *and he did*; and if the court found as a fact that there was no equivalent substitute for the custody arrangement the Porter children had thus far enjoyed – *and he did*; and if the only reason for modification of the existing custody arrangement was Rachel's anticipated move which the chancellor said made joint custody impractical – *and it was*; and if the anticipated move was canceled because of events beyond Rachel's control after trial – *and it was*; then the best interests of the children are served by restoring the children to the advantages they have enjoyed of having two full-time parents. The chancellor abused his discretion in failing to do so.

IV. The chancellor erred in modifying child support where Tim did not request a modification, the parties submitted no evidence concerning child support, and the chancellor made no findings of fact to support the modification.

Rachel's *Petition to Modify Defendant's Periods of Physical Custody* contained no request for modification of child support. (CP.000296). Tim's *Counter-Petition for Modification of Custody* made no request for modification of child support. (CP.000412).

Prior to trial Rachel issued subpoenas to obtain a copy of Tim's tax returns and financial statements. Rachel argued she was entitled to the information to demonstrate that Tim had the ability to share custody in Memphis without any financial strain. Tim resisted Rachel's discovery concerning his finances by expressly claiming that child support was not in issue and disavowing any request for modification of child support. Tim stated:

> This is a custody action only. **There are no financial issues pending**. Rachel has asked the court to modify Tim's 'periods of custody' **not child support**. Tim has asked the court to modify physical custody, ***with no prayer for child support whatsoever***. (CP.000424). (Emphasis added).

The chancellor agreed (T.25-27) and denied Rachel's requested discovery. (CP.000514).

No evidence was submitted by either party at trial pertaining to the issue of child support. The only information available to the court was Rachel's Uniform Chancery Court Rule 8.05 financial declaration which had been filed in November, 2005. (CP.000264).

Despite the fact that neither party sought modification of child support, and neither party submitted evidence supporting a modification of child support (or even dealing with the issue), the chancellor modified child support and placed substantial support obligations on Rachel. (RE.,CP.000573). The chancellor also took the dependency exemptions away from Rachel, and awarded them to Tim, without addressing the standards for an award of exemptions set forth in *Louk v Louk*, 761 So. 2d 878, 884 (Miss. 2000), and *Laird v*

Blackburn, 788 So. 2d 844, 852 (¶17) (Miss. Ct. App. 2001). The court terminated Tim's child support obligations and relieved him of his responsibility to pay the expenses associated with the children's extra-curricular activities. (RE.,CP.000573).

In *Fortenberry v Fortenberry*, 338 So. 2d 806, 807 (Miss. 1976), the chancellor modified custody and also modified child support, even though there were no pleadings requesting the modification of child support. The Mississippi Supreme Court reversed, noting that although a chancery court has the power and duty "to make such orders and decrees from time to time as will protect and promote the best interest of the children ... due process required that appellant have fair notice from an appropriate pleading that an increase in the amount of the support award was being sought and was under consideration ... ." *Fortenberry, supra* at 807, *citing Wansley v Schmidt*, 186 So. 2d. 462, 465 (Miss. 1966). *See also Barnes v Barnes*, 317 So. 2d 387 (Miss. 1975).

In *Massey v Huggins*, 799 So. 2d 902 (Miss. Ct. App. 2001), the Mississippi Court of Appeals held:

> Mrs. Massey was not provided notice that she 'might be required to defend a claim of child support' nor was there a 'suggestion in the record that support payments from [Massey] were even being contemplated by the court on its own or asked for by' Huggins.
>
> We reverse the award of child support.

Massey v Huggins, 799 So. 2d 902, 904, 910 (¶32-33) (Miss. Ct. App. 2001).

In the case at bar, it was error for the chancellor to modify child support when it was not requested in the pleadings, Rachel had no notice that the issue was under consideration by the court, and no evidence was presented on the issue by either party.

Moreover, the chancellor's *Opinion* did not make any findings of fact to support the modification of child support. At a minimum, the court should have addressed the following issues/facts: (a) Rachel's adjusted gross income;[16] (b) whether a subtraction from Rachel's adjusted gross income was appropriate under Miss. Code Ann. §43-19-101(3)(d) (for supporting her other two minor children in her residence); (c) Tim's adjusted gross income; (d) the cost of the insurance policy Rachel was ordered to provide, or the need for it in light of Tim's income which exceeds $200,000 per month; (e) the cost of the educational expenses Rachel was ordered to pay; (f) whether application of the child support guidelines was reasonable, as required by Miss. Code Ann. §43-19-101(4);[17] or (g) the availability and cost of the children's health insurance, as required by Miss. Code Ann. §43-19-101(6). Since neither party offered any evidence on these "non-issues," the chancellor had nothing on which to make any findings.

An award of child support must be supported by appropriate findings of fact and substantial evidence supporting those findings. *Dufour v Dufour*, 631 So. 2d 192, 193-195 (Miss. 1994) (Reversing judgment awarding child support where the chancellor provided no findings of fact concerning the payor's income, the child's needs, and whether it applied the statutory guidelines); *Ellzey v White*, 922 So. 2d 40, 42 (Miss. Ct. App. 2006) (award of child

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[16]The court found Rachel's UCCR 8.05 financial declaration reflected gross income of Six Thousand Nine Hundred Fifty and No/100 Dollars ($6,950.00) per month. However, since $2,550.00 of this amount was Tim's payment of child support, which the court eliminated, it is unclear whether the court based the child support award on a gross income of $6,950.00, or $4,400.00. In any event, no finding was made regarding Rachel's adjusted gross income under either figure.

[17]The court ordered Rachel to pay Tim 22% of her adjusted gross income (RE.,CP.000572). The chancellor went on to state, however, that in lieu of paying this amount, Rachel would pay one-half of the private school expenses for the three children from elementary school through high school. There is absolutely no finding regarding the amount of these expenses, and whether they are now or will in the future be more or less than 22% of Rachel's adjusted gross income.

support reversed for lack of substantial evidence supporting the court's determination of the payor's income).

In summary, if neither party requested modification of child support in their pleadings – *and they did not*; and if neither party presented any evidence on the issue of child support – *and they did not*; and the chancellor made no findings of fact to support the award of child support – *and he did not*; then the chancellor abused his discretion by modifying child support and the judgment must be reversed. This Court should also order that Rachel be reimbursed for the monies heretofore wrongfully paid under the Chancellor's Judgment.

V. Under the particular circumstances existing in this case, the chancellor erred by failing to include a summary of the guardian's qualifications and report, and his reasons for rejecting the guardian's recommendation.

In this case, neither party requested the appointment of a Guardian Ad Litem. The chancellor appointed the Guardian Ad Litem for the children on his own initiative. (T.3). The chancellor apparently concluded that a Guardian Ad Litem for the children was appropriate under the mandatory requirements of Miss. Code Ann. §43-21-121(1)(f), which requires such appointment where the court finds "appointment of a guardian ad litem to be in the best interest of the child."

Throughout these proceedings the chancellor repeatedly emphasized the confidence he had in the GAL and the substantial reliance he would place upon her report and testimony. (T.19,20,36-39, 41,366,458). The chancellor based several pretrial rulings on the confidence he placed in the GAL and the information that she would be able to provide to the court. For example, the chancellor denied Rachel's motion for an independent custody evaluation by a court appointed psychologist on the basis that "the guardian ad litem we've got is going to

be competent to deal with those issues." (T.22, CP.000513). The chancellor granted the plaintiff's motion to strike psychological expert, stating: "That is why I appointed a guardian ad litem so we could do away with dueling experts." (T.19, CP.000512). The chancellor allowed the Guardian access to Dr. Mark Webb, and his medical records, even though that information was privileged. (T.36-41, CP.000516). Prior to the guardian's testimony, Judeg Lutz referred to her as the court's "star witness." (T.366).

In this contested custody case the court placed unusually severe time constraints on the parties. Each party was limited to a total of 5 hours to present their entire case, including cross-examination and argument. (T.51). The court reserved 3 hours for the Guardian Ad Litem's report and the examination of the Guardian Ad Litem by both sides. (T.51). Because of these time constraints, each side was limited in the number of witnesses and documents that could be presented at trial, and each side relied heavily on the information they had provided to the Guardian in the weeks preceding trial. The Guardian Ad Litem interviewed numerous witnesses designated by both parties, including grandparents, friends, neighbors, and others. (T.605). She reviewed countless documents and spent many hours with the parties and their attorneys discussing the facts. The Guardian Ad Litem testified that she did a lot of "prying, snooping [and asking] intrusive questions." (T.604). She testified: "I don't think that I missed anything that they wanted me to see, hear, or read." (T.605).

The GAL was indeed the "star witness" since she had the opportunity to see, hear, read, and observe things that could not be presented at trial. She interviewed witnesses (such as Jackson City Council member Ben Allen, and local surgeon, Dr. Anke Petro), who were unavailable for trial. She had the unique opportunity of interviewing the children in the

homes of both parents (which the chancellor did not). She observed the children interacting with both parents in their respective homes (which the chancellor did not). She was in a particularly unique position, as the Guardian for the children, to testify and make recommendations regarding the children's best interest. The court referred to her testimony as that of "an expert witness." (T.641). This was the only expert opinion offered in the case, and the opinion was clear – she preferred the existing arrangement of joint custody with both of them in Jackson (T.636), but given Rachel's anticipated the move to Memphis, the children were best served by going to Memphis with Rachel. (T.627-629).

The chancellor, having given the Guardian for the children such substantial responsibility, having limited the parties' presentation of witnesses as a result of the work he expected from the Guardian, and having limited the parties in the time provided to present their evidence at trial, abused his discretion when he did not accept the Guardian's recommendation and did not detail the reasons for his refusal to accept her recommendation.

If this was a mandatory appointment, pursuant to the requirements of Miss. Code Ann. §43-21-121(1)(f), the chancellor was required to itemize the recommendations of the Guardian and to state the reasons in his findings of fact and conclusions of law for not adopting the Guardian's recommendation. *S.N.C. v J.R.D.*, 755, So. 2d 1077, 1082 (Miss. 2000); *Passmore v Passmore*, 820 So. 2d 747 (¶13) (Miss. Ct. App. 2002).

Even if this was not a mandatory appointment, however, the chancellor is required to "include **at least** a summary review of the qualifications and recommendations of the guardian ad litem in the court's findings of fact and conclusions of law." *S.N.C. v J.R.D.*, 755 So. 2d 1077 (¶18) (Miss. 2000) (Emphasis added). The chancellor failed to follow this

requirement. This requirement just makes good sense. If the chancellor in this case found it necessary for the parties to incur the time and expense[18] of addressing custody issues with a court appointed Guardian, whose sole responsibility was to determine and make recommendations on what was best for the children, then those recommendations should certainly be addressed on the record in the chancellor's finding. In this case, because of the justifiable confidence the court reposed in the GAL, more than the minimum should be required. Under the circumstances of this case, the chancellor's refusal to accept the Guardian's recommendation, or state his reasons for not accepting the recommendation, requires reversal.

CONCLUSION

Our courts should never be in the business of separating children from their parents when there is no good reason to do so. Tragically, that is what we have in this case. The joint custody arrangement, with Rachel having primary physical custody, worked "beautifully" for these children. They had the privilege of spending substantial amounts of time with both parents, even though their parents were divorced. The chancellor modified this arrangement only because Rachel intended to move to Memphis. Rachel submits that the chancellor erred in the legal standards he employed in modifying the judgment, his improper allocation of the burden of proof, his conclusion that continued joint custody was impractical, his imposition of child support, and his failure to follow the recommendation of the GAL.

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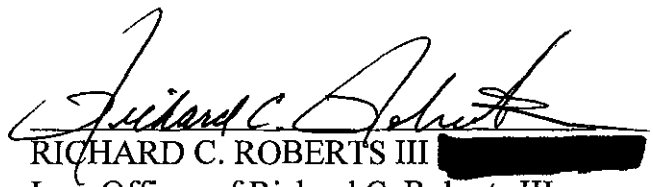
[18]In this case, the GAL charged the parties $11,333 for the services performed in connection with her investigation and report. (T.644).

But in the final analysis, the inexplicable error, indeed the tragedy, is that the chancellor left in place his judgment of modification, which forces the children to be separated from their mother, after it was obvious that the forced separation was not necessary.

The judgment should be reversed and the joint custody arrangement which existed at the time of trial reinstated.

Respectfully submitted, this the 6th day of July, 2007.

RACHEL SPIVEY, Appellant

By: 

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