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, MISSISSIPPI

APPELLEE'S SUPPLEMENTAL BRIEF ON NOTICE OF WRIT OF CERTIORARI

COUNSEL FOR THE APPELLEE:

WILLIAM R. WRIGHT ([redacted]
W. BENTON GREGG ([redacted]
TRHESA B. BARKSDALE [redacted]
WRIGHT LAW FIRM, P.A.
Post Office Box 5003
Jackson, Mississippi 39296-5003
Telephone: (601) 366-8090
Facsimile: (601) 366-3080

DEBORAH H. BELL ([redacted]
UNIVERSITY OF MISSISSIPPI
155 County Road 418
Oxford, Mississippi 38655
Telephone: (662) 915-6867
Facsimile: (662) 234-9266

COMES NOW the Appellee, Timothy Wade Porter ("Tim"), and submits his *Supplemental Brief on Notice of Writ of Certiorari* pursuant to MISS. RULE APP. PRO. 17(h).

I. SUMMARY OF FACTS

The facts and legal positions of this case have been thoroughly briefed by counsel for both parties. Nevertheless, MRAP 17 affords each party one final opportunity to express his and her position by submitting a supplemental brief upon notice that this Court has granted writ of certiorari.

Since Tim filed his ten-page *Response to Appellant's Petition for Writ of Certiorari* on May 9, 2009, nothing has occurred that changes Tim's position. So, here, we simply present a condensed summary of facts in a little different light and comment on the issues raised not only by the Appellant but by the dissent in the opinion handed down by the Court of Appeals.

Back in 2000, when the parties divorced, they agreed to a joint custody arrangement for their three children. Under their custody arrangement, both parties had significant periods of custody with the children consistent with our statute defining joint physical custody. MISS. CODE ANN. §93-5-24(5) (2007). Both parties remarried. Rachel married Dan Spivey and has two children as a result of the marriage. Tim married Samantha Thomas, but no children were born to that marriage.

The parties had several custody related disputes after the divorce. However, in late December of 2005, Dan Spivey was offered a position with George White, a hedge fund manager in Memphis, Tennessee. The job offer required Dan to move to Memphis. A few days later Dan took Rachel and all of the children to Memphis to tour the city. Upon their return, Dan accepted the position. The job was with a new company that had promise to make Dan a wealthy man, but no assurances of job security.

After returning from Memphis, Rachel immediately began secretly organizing the move that

she believed would include the three Porter children. In keeping with her clandestine approach to the impending move, Rachel enrolled Tim's children in private schools in Memphis. Rachel intentionally declined to inform Tim, the joint physical and legal custodial parent of the children, that his children had been enrolled in schools 200 miles away. In fact, to cover the secret and add insult to injury, Rachel falsified school application documents. Where the applications required the names of both parents, she listed "Dan Spivey" as the Porter children's father. Tim's name did not appear on any of the school applications. In late January of 2006, Rachel finally called Tim to tell him about her plans to move to Memphis with Dan and the children. The children had already been told.

Because Rachel had already taken the children to Memphis to become familiar with the area and be tested, Tim filed a petition for injunctive relief to prevent Rachel from taking the children to Memphis until the chancery court decided where the children would live. The court granted Tim's requested relief.

On February 28, 2006, Rachel filed her petition seeking an order which would allow her to move with the children and somehow maintain the joint custody arrangement she had with Tim.

Tim filed his responsive pleading on April 19, 2006, asking the court to modify the parties' joint custodial relationship and award him sole physical custody of the children. On June 12-13, 2006, the case was heard on the merits. During the trial, evidence showed that Dan and Rachel had purchased a $1 million home in the Memphis suburbs. Also, Rachel displayed a contract to sell her Jackson home to a friend. We learned Rachel's idea of maintaining joint custody was to eliminate the weekday access to the children that Tim had enjoyed for years. Throughout the trial, Rachel was consistent in her attempt to convince the chancellor that the move was imminent, and that the only thing holding her up was the chancery court proceeding. In fact, Rachel was emphatic in her

testimony: she would move to Memphis despite the outcome of the trial.

On July 11, 2006, Chancellor Lutz rendered his opinion and granted physical custody to Tim. Rachel filed a flurry of post judgment motions, all the while Dan continued to work in Memphis, and Rachel was firmly entrenched in her Eastover home in Jackson.

On August 4, 2006, twenty four days after the lower court's custody decision, Rachel filed her *Motion to Stay Operation of Final Judgment*. In that motion, Rachel took a remarkable stance that not only contradicted her trial testimony, but is significant to the factual history of this case: "Rachel intends to remain in Jackson until such time that she secures a favorable ruling on her Motion . . . to . . . Amend Judgment, or until the appeal is decided on the merits." *Motion to Stay Operation of Final Judgment*, dated August 4, 2006, paragraph 7.

Dan resigned his job in Memphis just days later. At the time Rachel made her stunning about-face with the words appearing in her motion, Dan Spivey had not yet resigned his job in Memphis. Rachel, only two months earlier, had stated under oath that she was moving regardless of the outcome of the case. Rachel was not forthright in court, and in her post judgment pleadings, she was not honest about why "the intended move never took place." There is only one explanation: Rachel decided not to move to Memphis because she did not prevail in the custody proceeding.

On August 8, 2006, Dan resigned his job in Memphis. There is not a record of the circumstances of his resignation. We do know that it came only four days after Rachel announced to the court through her pleading that she was not moving to Memphis. We don't know if the resignation was prompted by the outcome of the trial. We don't know whether to resignation was forced or voluntary. However, we are confident that had Rachel prevailed in her suit, she, the children and Dan would have been occupying the $1 million home in Memphis shortly after the court

ruled in July of 2006.

Would Dan have still resigned had Rachel prevailed? If he had lost his job, would the Spiveys have returned to Jackson? In that case, would Rachel have filed a Rule 60(b) motion to put things back where they were before she moved to Memphis? We know these are hypothetical questions, but this Court should consider them when reviewing the proceedings in this case.

II. SUMMARY OF ARGUMENT

The following is a summary of Tim's arguments in his *Response to Appellant's Petition for Writ of Certiorari*:

(1) *The Majority Opinion addressed Rachel's Motion for Relief from Judgment.*

The Majority Opinion addressed Rachel's *Motion for Relief from Judgment* in the following two sentences: "We find that the chancellor should have conducted an *Albright* analysis after the *Rule 60(b)* motion was filed to re-evaluate the factors in light of the mother's change in circumstances. However, we recognize that the [*Rule 60(b)*] decision was within the chancellor's discretion and find this error to be harmless". Opinion,¶10.

Judge Lutz was within his discretion to deny Rachel's request for Rule 60(b) relief. A few months prior to the *Rule 60(b)* hearing, Judge Lutz conducted an extensive *Albright* analysis, outlined in his *Opinion*. As a result of the analysis, it was clear that it was in the best interests of the children for Tim to have physical custody.

Rachel agrees with the Court of Appeals finding that the chancellor should have conducted a second Albright Analysis after the Rule 60(b) relief was sought "to evaluate the factors in light of the mother's change in circumstances." However, Mississippi law is consistent that the change in circumstances must have taken place in the custodial parent's (Tim's) home and not in the non-

custodial parent's (Rachel's) home. So, Rachel's position is unfounded in the law.

Even if the court had been required to conduct a second *Albright* analysis, it could not have favored Rachel, move or no move. The trial court was thoroughly aware of the facts and equities of this case. The *Opinion* was circulated just four weeks before Rachel stated she would not leave Jackson until she had secured "a favorable ruling" and just four and a half weeks before Dan's experimental employment in Memphis ended.

A review of the record reveals the court considered its *Albright* analysis carefully before its *Rule 60(b)* ruling. Further, the court made explicit findings supporting the denial, as outlined in "Points of Fact" above. The court was within its discretion to deny the requested relief.

Interestingly, Rachel has not challenged the Chancellor's detailed findings regarding the *Albright* factors.

Rachel argues that the best interests of the children require a return to joint custody because joint custody worked before Rachel filed her petition to change it. With this assertion, Rachel ignores two crucial elements of this case: 1) The chancellor denied *Rule 60(b)* relief because of the evidence presented to him at the modification hearing, which was initiated by Rachel; and 2) the contentious litigation to follow Rachel's request to modify custody destroyed the parties' ability to have a successful joint custody relationship, as required by the joint custody statute.

In sum, the Court of Appeals addressed *Rule 60(b)* relief and found that the trial court was within its discretion to deny Rachel's request. The issue does not require additional review.

(2) *The Majority Opinion addressed the parties' anticipated material change.*

The Court of Appeals framed the issue of an anticipated material change as follows: Should a parent bring a request to modify custody before relocation or after relocation?

This question is framed by the very facts of this case. The notion that the Court of Appeals did not address the ripeness of a material change in the context of this case is nonsense. The appellate court stated: If it was required that relocation have already taken place, then, "Tim would have been obliged to wait until Rachel moved with the children to Memphis before filing for modification". Moreover, "Rachel would then have been required to return to Jackson to respond and defend. For the foregoing reasons, we reject a blanket ban on all modifications based on anticipated adverse material change". (Opinion, ¶¶9-10).

The Court of Appeals decision is in direct keeping with Supreme Court precedent. In *Spain v. Holland*, 483 So. 2d 318 (Miss.1986), a seminal relocation case in the sole physical custody context – as opposed to this joint physical custody context – the mother brought her petition to modify custody *before* the father moved to England. The issue was ripe, and the Court affirmed the decision on the merits.

(3) *The chancellor was clearly within his discretion to deny Rule 60(b) relief.*

A chancellor is not required to conduct an *Albright* analysis before deciding a *Rule 60(b)* motion. There is not one case to support this argument.

Yet, a great deal of precedent requires a chancellor to conduct an *Albright* analysis before modifying custody. That is exactly what Judge Lutz did in his *Opinion* of July, 2006 – two months before the *Rule 60(b)* hearing . His analysis was extensive.

The key distinction is this: A *Rule 60(b)* consideration is not a custody decision. It is a decision whether to provide relief from judgment. *See Briney* v. *U.S. Fid. & Guar. Co.*, 714 So. 2d 962 (Miss.1998). The decision is based on the *Briney* factors and is well within the discretion of the trial court, the trier-of-fact. *See id.*

Were this Court to change its policy for determining *Rule 60(b)* relief in the custody modification context, the door would be open for a litigant to move for custody in anticipation of relocation, and then, were she to lose, suddenly change her circumstances and expect a reversal of the judgment. This would not benefit the children subject to such litigation, nor the parents who must endure it. Further, such a policy would have a corrosive effect on joint custody relationships throughout the state.

(4) *The chancellor applied the correct legal standard for recusal.*

After Rachel and Tim appeared numerous times before Judge Lutz over seven years, Rachel requested that the judge recuse himself because Tim's wife practiced before Madison County chancellors. Rachel did not ask Judge Lutz to recuse until the chancellor stated that he would honor the parties' divorce agreement and, specifically, the parties' joint custodial arrangement.

Rachel attempted with her motion to stretch an "unwritten rule" that judges do not hear the divorce cases of lawyers who practice before them *regularly*. Rachel argued that Judge Lutz should recuse because Tim's wife had exactly two ex parte estate matters before the chancellor.

As is obvious from the record, Judge Lutz applied the objective, reasonable person standard when he denied Rachel's motion. The chancellor offered this information, *inter alia*, in support of the denial: Not only did Tim's wife not practice in front of Judge Lutz *regularly*, but Judge Lutz did not have any idea who she was.

The Court of Appeals properly affirmed the chancellor's denial. An objective person, knowing all the circumstances, could not doubt the judge's fairness and impartiality.

(5) *The court applied the correct test for modification of joint custody.*

Rachel and Tim shared joint physical custody of their three children before Rachel requested

a change in custody. The parties specifically set out in their Agreement that a relocation would constitute a material change in circumstances. In other words, a relocation would spark a custody dispute. Even if Tim had to show adverse effect to the children, the chancellor's opinion on pages 12-15 identifies several adverse effects on the children if they moved, *e.g.*, no extended family, new schools and church, unstable employment situation, and loss of one parent's presence. Moreover, Dan's anger issues and parenting style on a daily basis would create a serious adverse effect on the Porter children.

Rachel's continued attempts to twist "primary physical custody" into a right to relocate with the children within a joint custody relationship is nonsensical.

The Court of Appeals properly affirmed the trial court's decision. Moreover, the decision is in keeping with *McSwain v. McSwain*, 943 So. 2d 1288, 1290 (Miss. 2006).[1]

As to Rachel's argument about impossible/impractical joint custody modification standards, the trial court, in its discretion, determines when joint custody would be impractical, given the geographical distance. The court properly found that joint custody in this context could not work. Rachel admitted the same in her February, 2006, request to modify custody.

(6) *A Custody Change May Require an Award of Child Support.*

Under MISS. CODE ANN. § 93-5-23, a chancellor may modify support upon a change of custody. Following entry of a divorce decree and upon petition from a party, a chancellor may

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[1]Rachel cites *Franklin v. Winter*, 936 So. 2d 429 (Miss. Ct. App. 2006) for the proposition that "primary physical custody" should impart a right to relocate. This dicta from *Franklin* has been dismissed by *McSwain*, 943 So. 2d at 1290 (quoting *Rush v. Rush*, 932 So. 2d 794, 797 (Miss. 2006)). "Although it is a phrase commonly used by lawyers and judges, there is no provision under MISS. CODE ANN. § 93-5-24 for 'primary' physical custody". The phrase has no legal meaning and imparts no right to relocate.

"make from time to time such new decrees as the case may require" and "where proof shows that both parents have separate incomes or estates, the court may require that each parent contribute to the support and maintenance of the children". MISS. CODE ANN. § 93-5-23 (2007).

This issue does not merit successive review.

(7) *An Optional Guardian ad litem's Recommendations are not Dispositive.*

Caselaw regarding a chancellor's right to accept or reject recommendations of a voluntarily appointed guardian *ad litem* is undisputed. Where a chancellor is not required by statute to appoint a guardian *ad litem*, there is no requirement that the chancellor defer to her findings. *Passmore v. Passmore*, 820 So. 2d 747, 751 (Miss. Ct. App. 2002) (citing *S.N.C. v. J.R.D., Jr.*, 755 So. 2d 1077 (Miss. 2000)). "Such a rule would intrude on the authority of the chancellor to make findings of fact and apply the law to those facts." *Id.*

WHEREFORE, PREMISES CONSIDERED, Timothy Wade Porter respectfully requests that the Court deny the *Petition for Writ of Certiorari* filed by Rachel Driskell Porter (Spivey). The *Petition* does not meet the standards required for Supreme Court review, pursuant to *Mississippi Rules of Appellate Procedure*.

RESPECTFULLY SUBMITTED,

Timothy Wade Porter,
Appellee

BY: William R. Wright ([redacted]
Attorney for the Appellee

CERTIFICATE OF COMPLIANCE

I, William R. Wright, Attorney for Timothy Wade Porter, certify that I have this day served the above and foregoing *Response to Appellant's Petition for Write of Certiorari* on the following persons in the manner shown:

Richard C. Roberts, III Law Office of Richard C. Roberts III Post Office Box 55882 Jackson, Mississippi 39296-5882	[x] [ ] [ ]	via U.S. Mail via Hand Delivery via Facsimile
The Honorable Cynthia A. Brewer Chancellor, 11th Chancery District Post Office Box 404 Canton, Mississippi 39046-0404	[x] [ ] [ ]	via U.S. Mail via Hand Delivery vis Facsimile

THIS the 7th day of July, 2009.

WILLIAM R. WRIGHT
WILLARD BENTON GREGG
TRHESA B. PATTERSON