IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2006-CA-01930

DEMETRI MARSHALL **APPELLANT**

VS.

LIKITHA HARRIS **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. Demetri Marshall, Appellant
2. Jessie L. Evans, Attorney for Appellant
3. Likitha Harris, Appellee
4. Melvin McFatter, Attorney for Appellee
5. The Honorable George Ward, Claiborne County Chancery Judge

RESPECTFULLY SUBMITTED, this the 12th day of September, 2007.

Jessie L. Evans
Attorney of Record for
Demetri Marshall, Appellant

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Argument

I. WHETHER THE CHANCELLOR PROPERLY APPLIED THE LEGAL PRINCIPLE STATED IN SPARKMAN V. SPARKMAN

As pointed out in Appellant's original brief, the fact that the lower court up front assured the mother, appellee Harris, that she need not be concerned with the possibility of a separation of the two siblings demonstrated the misapplication of the case law and tainted the lower court decision.

> None of the cases cited by the Mother holds that siblings cannot be separated. These cases hold that this is but one factor, usually in the context of Albright, to be considered by the court in matters of custody.

C.A.M.F. v. J.B.M, 2007 So.2d (2005-CA-02227-COA)

Also as pointed out in appellant's original brief, the child Malik, a six year old male, had for all practical purposes been living with his father for the last three years of his life. Appellant had established a close relationship with his son Malik and had made sure that there had been an equally close relationship between other siblings that he fathered and the child Malik, particularly with his half-brother Mario and half sister Assata.

> In the case of *Bell v. Bell,* 572 So.2d 841, 846 (Miss. 1990), this Court affirmed the chancery court decree awarding custody of the divorced couple's seven-year-old son to the mother and custody of the thirteen-year-old son to the father. While noting its general policy of discouraging the separation of siblings, the Court was satisfied that "the decree we approve today makes elaborate provision for assuring that [the children] are together as much as is reasonably practicable given their residence in separate communities and their attendance at different schools." *Bell,* 572 So.2d at 846. Likewise, the chancellor in the case *sub judice* awarded to each parent visitation rights such that Jason and Jeremy would be together during weekends, summers and holidays.

Bowen v. Bowen, 688 So.2d 1374,1382 (1997) The present case did present special circumstances for the lower court's consideration. Here there was a father who had spent a significant amount of time with the minor child Malik and appellant did not want to become a stranger to his son.

Given all other factors, the lower court could have crafted a means by which liberal visitation could have been given to the mother, the appellee herein, so that maximum contact could be given to both parents.

II WHETHER THE LOWER COURT UNDULY CURTAILED THE EXERCISE OF APPELLANT'S VISITATION WITH THE MINOR CHILDREN

The maximum contact was severely curtailed by the lower court's award of visitation to appellant. Standard visitation as carved out by the lower court would be adequate in a lot of cases. However, again as pointed out in appellant's original brief, in the instant case we have a father who has actively participated in the children's lives, particularly with his older son Malik, seeing or visiting with him several days during the week and on weekends, although not on every weekend. *Crowson v. Moseley,* 480 So.2d 1150, 1153 (Miss.1985).

III. APPELLANT SHOULD NOT BE REQUIRED TO PAY APPELLEE'S ATTORNEY'S FEES

While it certainly is within this Court's discretion to award attorney's fees, appellant respectfully contends that there are inadequate grounds for such an award in the present case. Appellee has submitted a twenty page brief in responding to what she calls a frivolous appeal. Appellant believes he should have been awarded custody and/or liberal visitation by the lower court. He believes the court erred in making the separation or seeming to make the separation of siblings the overriding concern in determining custody instead of just one of the factors in awarding custody. Secondly, appellant felt that the court erred in reducing his visitation and thus contact with his children. Because there were other alternatives or remedies available to the lower court, appellee believes these were material issues which the court may have erroneously and/or inadequately addressed in rendering its decision and appellant has properly sought redress in this Court.

> While we recognize that attorney fees may be awarded on appeal and that it is our established practice to award one half the amount awarded in the trial court, we decline to assess them here, given the unusually long time interval between Durr's noncompliance with the judgment of divorce and Hales's assertion of her rights under the judgment of divorce. Were we to determine that Durr's appeal is frivolous, we would be obligated under Rule 38 to grant some attorney fees to Hale. However, we do not find Durr's appeal to be frivolous. Further, we do not find that the cases cited by the CIP-DIP require that the successful party in a contempt action must always be awarded attorney fees on appeal.

Durr v. Durr, 2005 So.2d (2003-CA-01673-COA)

The case at bar is not frivolous and an attorney fee is not mandatory merely on the basis that the appellee in this action was successful before the lower court.

CONCLUSION

Again for the above and foregoing reasons as well as the ones presented in appellant's original brief, appellant would show that the decision below should either be reversed and/or modified.

Respectfully submitted,
Demetri Marshall, Appellant

BY: Jessie L. Evans
JESSIE L. EVANS

CERTIFICATE OF SERVICE

I, Jessie L. Evans, attorney for appellant **Demetri Marshall** hereby certify that I have this day by United States Mail, postage prepaid, forwarded a copy of the above and foregoing *Reply Brief of Appellant* to the following interested persons:

Hon. Melvin McFatter
617 Market Street
Port Gibso, MS 39150

The Honorable George Ward
P. O. Box 1144
Natchez, MS 38121

This the 12th day of September, 2007.

Jessie L. Evans
JESSIE L EVANS

JESSIE L. EVANS, MSB #[redacted]
THE EVANS LAW FIRM
P.O. BOX 528
712 East Peace St.
CANTON, MS 39046