IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA K. (LAMMEY) CONNELLY

APPELLANT

V. **No. 2006-CA-02093**

DAVIN HOWELL LAMMEY **APPELLEE**

BRIEF OF APPELLEE

(ORAL ARGUMENT NOT REQUESTED)

Appeal from the Chancery Court of DeSoto County, Mississippi

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal:

1. Hon. Mitchell Lundy, Jr., Chancellor
2. Sandra K. (Lammey) Connelly, Appellant
3. Davin Howell Lammey, Appellee
5. H. R. Garner, Attorney for Appellant
4. Gerald W. Chatham, Sr., Attorney for Appellant
5. Martin Zummach, Attorney for Appellee
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STATEMENT OF ISSUES

There is only one real issue in this case: Whether the chancellor committed manifest error when he changed the paramount physical custody of couple's two sons (aged 14 and 11) from the mother to the father, where the proof showed that the mother's relocation to Law Vegas, Nevada, had, in fact adversely affected the welfare of the children and that their best interests required the change.

The mother contends that there are two issues, to wit: (1) whether the proof was sufficient to support the chancellor's conclusion that a material change in circumstances adversely affecting the best interests and welfare of the children had occurred and (2) that even if such a change of circumstances has occurred, whether the chancellor's *Albright* analysis was flawed.

Accordingly, the *Brief of Appellee* will address the two issues identified by the mother.

STATEMENT OF THE CASE

NATURE OF CASE:

This is a domestic relations case involving the decision of a chancellor to

modify a 1998 divorce decree and award paramount physical custody of couples' two sons, aged 14 and 11, to their father. The mother's suspect decision to relocate to Las Vegas, Nevada, 1500 miles away from the father of the children and the only home that the children had ever known and its devastating impact upon the children were the catalysts for this litigation.

COURSE OF THE PROCEEDINGS:

Following her 1998 divorce from Davin Lammey, Sandra Lammey Connelly[1] sought to relocate herself and the couple's two minor sons to Las Vegas, Nevada. She filed a *Petition For Modification* on May 6, 2005, requesting permission to move and for modification of the child support and visitation provisions of the 1998 decree. Davin Lammey responded to the *Petition* and filed a counter-suit seeking paramount custody of the children.

Preliminarily, on July 5, 2005, an order was entered by the chancellor removing restrictions in the 1998 decree on Sandra's "moving". Sandra moved to Las Vegas, with the children August 8, 2005.

On September 22, 2005, a *Temporary Order* was entered to accommodate

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[1]On April 19, 2005, there is a docket entry "Order Allowing Petitioner's Former Maiden Named Restored". CP I:5 This explains, to some extent, Sandra's use of the last name "Connelly" instead of "Lammey"(the last name of her two sons) in the current proceedings.

Davin's visitation rights while the children were in Las Vegas and pending final adjudication of custody. [2]

In the interim before trial, each party filed several motions or petitions seeking to cite the other for contempt of court. The allegations related primarily to accusations that one or the other had made derogatory remarks to the children or interfered with telephone calls to and from the children, in contravention of the court's orders.

The matter was set for trial and tried on August 16, 2006. The chancellor took the case under advisement and requested each party to submit proposed findings. On October 12, 2006, he rendered his opinion in open court.

DISPOSITION IN COURT BELOW:

Finding a material change in circumstances which had, in fact, adversely affected the best interests and welfare of the minor children, the Chancellor determined that it was in the best interests of the children that a change in paramount custody be ordered. He awarded paramount physical custody of the two (2) children to the father.

The mother's *Motion For Reconsideration*, except as to minor adjustments

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[2]CP I:67, et.seq.

to accommodate the children's school schedule, was heard on November 14, 2006 and denied.

The mother, Sandra, has appealed the chancellor's decision to this Court.

STATEMENT OF FACTS

Sandra and Davin Lammey married and divorced twice. A son was born to each union. The last divorce was by decree of the Chancery Court of DeSoto County in September of 1998. At that time, the eldest son was six(6) years of age and the youngest was two(2) years and nine(9) months of age

A chronology of significant events of this relationship is as follows:

July 6, 1991— First marriage

April 3, 1992— Son, Dean, born

June 21, 1993— First divorce

December 19, 1994— Second marriage

December 12, 1995 — Son, Matthew, born

September 8, 1998— Second divorce

The 1998 irreconcilable differences divorce decree provided for Sandra to have

paramount physical custody of the boys, with substantial, liberal visitation provided to Davin. It provided for "joint legal custody". [3]

On May 5, 2005, Sandra filed a sworn *Petition For Modification* of the September 1998 decree.[4] In it she asserted that she was about to lose her job, that she had diligently sought employment in the Memphis, Tennessee area but was unable to locate anything "suitable". She asserted that she had been "promised suitable employment" in Las Vegas, Nevada, where her parents lived and where she and the boys could live "free of charge". Sandra sought to have the chancellor give her permission to move to Las Vega and adjust Davin's visitation accordingly.[5]

Sandra filed similar *Petitions* in March of 1999 and March of 2002, always seeking to move to Las Vegas because she claimed she could live rent free and get a better job.[6] The 1999 Petition was dropped when Davin agreed to forgive a $6,100 debt Sandra owed him for his equity in the former marital home.[7] The 2002 Petition does not appear to have ever been resolved by any order of the

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[3]CP I:24

[4]See *Petition For Modification*, CP I: 10-13

[5]See *Petition For Modification*, CP I: 10-13

[6]See Docket Sheets, p 4-5 and Exhibit 19, Deposition of Sandra Connelly, pages 53, 60.

[7]*Ibid.*

court.[8]

Permission of the court to move was sought by Sandra because of ambiguous provisions of the 1998 divorce decree, which provided, pursuant to the agreement of the parties on this "hot" issue, that:

> ...Wife shall not move more than 100 miles away from her present residence without either Husband's consent or first obtaining a Court Order allowing such move. However, if wife does not seek such an order then Husband is not precluded from seeking custody of the children. [9]

Davin answered Sandra's petition, denying the material allegations and counter-petitioned for custody of their sons.

On July 5, 2005, the chancellor ruled that the restriction on Sandra's right to move was "unconstitutional".[10] An order removing the restriction was entered accordingly.

Without preparing her sons in any way for this major change in their lives, Sandra actually moved to Las Vegas on or about August 8, 2005. [11]

Subsequent to her move, both parties filed several petitions seeking to cite

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[8] Exhibit 19, Deposition of Sandra Connelly, pages 53- 60 ; and T I:50

[9] CP I: 25

[10] CP I: 55

[11] T II:242

the other party for contempt, related primarily to accusations that one or the other had made derogatory remarks to the boys about the litigation or the other parent and interference with telephone calls to and from the boys.[12]

The matter came on for hearing before the chancellor on August 16, 2006. After a trial on the merits, the chancellor stated that "both parties" had been in contempt of the court's prior orders. He directed the parties to submit briefs and took the matter under advisement.[13] On October 12, 2006, he rendered his opinion in open court.[14] He awarded paramount physical custody of the two boys, Dean and Matthew, to their father. He did not adjudicate Sandra to be in contempt. He did adjudicate Davin to be in contempt and ordered him to pay $1,500.00 in "attorneys fees" to Sandra.

Dean and Matthew were very young children when their parents were last divorced in 1998. At the time of the hearing in the case at bar, they were 14 and 10. They had spent all of their lives in and around DeSoto County, Mississippi where they had friends and family and strong school and community ties.

Throughout the almost 15 years of their relationship, Sandra had threatened

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[12] CP I: 61, 70, 80, 86, 102 and 180

[13] T: 340-341

[14] T: 341-355

Davin with leaving and taking herself and their two sons to Las Vegas, Nevada, where her parents resided.[15] When they divorced the last time, the importance of the Las Vegas threat was of such significance that language was placed in the 1998 settlement agreement of the parties attempting to restrict Sandra's right to move beyond 100 miles of her DeSoto County residence without Davin's agreement or court approval. The language of the provision attempted to give Davin the right to revisit the custody issue in the event Sandra moved without Davin's agreement or court approval. As previously stated, the language restricting Sandra's right to move was declared unconstitutional by the chancellor in this case, prior to the actual trial of the case on the other issues joined. Sandra actually moved to Las Vegas, with the boys, around August 8, 2005.

Before their move to Las Vegas, both Dean and Matthew are variously described by those who knew them as bright and outgoing. Both love hunting, fishing, sports and outdoor activities. Dean is described as exceptionally bright. He is apparently large for his age, wearing a size 14 shoe. [16] While both boys were good students, Dean excelled in all of his academic endeavors.

While on vacation with their father in Myrtle Beach, South Carolina, Dean

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[15] T I:50

[16]T. 264

received a call from a friend at home in DeSoto County. He was told that his mother was having a yard sale and that they (he, his brother and his mother) were moving to Las Vegas the following Sunday. Upon their return to their mother's home, they learned that this was all true. Both boys were devastated.

They were uprooted from the only home they had ever known , with little or no preparation or prior warning. They were supposed to have lived with their maternal grandparents, who they only knew from infrequent visits in the past. Because their maternal grandmother suffered allergies, they had to leave their much beloved dog, Oreo, behind. On the trip to Las Vegas, Sandra took away Dean's cell-phone— a phone he had earned doing chores for his father. She did not want him talking with his father. The moving event, itself, including the secrecy of it, was unnecessarily traumatic for both boys.

The effects of their relocation to Las Vegas have not been good. At school, their grades have suffered. Dean described his experience with school in Las Vegas and had nothing positive to say about it. Both boys expressed that anyplace would be better than what they had experienced in school in Las Vegas. They were not happy. When they returned to Mississippi for visits with their father, friends and relatives noticed a difference and testified regarding what they perceived to be changed demeanor and attitudes. They were sad and unhappy.

Even after spending over a year in Las Vegas, Dean testified and willingly expressed his strong desire and preference to live with his father. Dean was 14 years old at the time. He is a bright young man. He is physically and mentally mature for his age. He knows what he wants. He exercised his right to express his preference. This took a great deal of courage on his part, since there is no doubt that he loves both his parents. No reason can be suggested as to why his preference should not be accorded significant weight in determining his future.

Dr. L.D. Hutt, a licensed clinical psychologist with over 30 years of experience was called to testify on behalf of Davin. Counsel for Sandra stipulated to Dr. Hutt's qualifications to give expert opinion testimony in the case.[17] His *Curriculum Vitae* and written report were admitted into evidence, without objection, and appear as Exhibits 1 and 2 in the Record.

Dr. Hutt first interviewed the boys October 29, 2005, when they were brought to him, accompanied by their mother. They had been in Las Vegas for approximately three months. They were both unhappy. The move to Las Vegas was "highly traumatic and disruptive" for the boys. They expressed "bewilderment and resentment" toward their mother for keeping the August 2005 move a secret and for frustrating their contact with their father. Their perception

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[17]T 8-9

that their mother resents contact between the boys and their father is a continuing source of bewilderment and agitation. They both "desperately" missed their father and wanted to return to their life in Mississippi.

Dr. Hutt interviewed the boys and their parents during October, December and November of 2005. He interviewed the boys again on August 3, 2006, shortly before the trial of this case and after the boys had been in Las Vegas for a year.[18] He testified that the move to Las Vegas was and remained "absolutely" harmful to the boys, both mentally and emotionally.[19] He testified that the boys' perception of their mother's resentment of contact with their father, since their move to Las Vegas, also continued to adversely impact the boys and their welfare.[20]

These children were abruptly and inexplicably (to them) uprooted from the only home and environment they had every known. It was a home and environment in which they had thrived and done well both in school and outside of school. They were denied any meaningful involvement with their father– something they both desperately wanted and needed. They were required to live

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[18]T 11

[19]T 29-30

[20]T 44-46

in a place which, for them, was an educational and extra-curricular wasteland. Dr. Hutt's evaluation was that the boys were and remained mentally and emotionally traumatized by the move.

The chancellor determined that, based upon the totality of the circumstances, the relocation of the children to Las Vegas by their mother was a material change in circumstances which had, in fact, adversely affected both children. After carefully applying the *Albright* factors, he determined that the best interests and welfare of the children required a change of custody to their father.

SUMMARY OF ARGUMENT

At the conclusion of the trial on its merits on August 16, 2006, the chancellor took this matter under advisement. He invited both sides to submit proposed findings. On October 12, 2006, he rendered his opinion in open court. Having heard the testimony and considered all of the evidence, he was persuaded that the mother's relocation of herself and two sons to Las Vegas, was a material change in circumstances which had, in fact, adversely affected the best interests

and welfare of the children. He then undertook an "on the record" analysis of the *Albright* factors and determined that, considering those factors, the totality of the circumstances and the pole-star best interests and welfare of the children, custody should be changed to the father.

The chancellor clearly and meticulously articulated the correct legal standards that should be and were followed by him in making his decision. His findings and conclusions are supported by substantial and mostly uncontradicted evidence. Reversal of the chancellor, under the state of the record in this case, would require this Court to substitute its own "contrary" assessments of the evidence and substitute its own "contrary" conclusions. This is not permitted under our law governing the solemnity accorded to a chancellor's decision in child custody cases.

ARGUMENT

PROPOSITION I

Chancellor's finding of a material change in circumstances which adversely affected best interests and welfare of the children is amply supported by the record in this case.

In contested modification hearings, our court has developed a three-part test. Before custody can be changed, the party seeking the change must show:

1) a material change in circumstances since rendition of the last decree regarding custody;

2) that the change adversely affects the best interests and welfare of the child; and

3) that the polestar consideration, to wit: the best interests of the child, requires a modification or change.

Giannaris v. Giannaris, 960 So. 2d 462 (Miss. 2007); *Floyd v. Floyd*, 949 So. 2d 26 (Miss. 2007); *Jones v. Jones,* 878 So.2d 1061 (Miss. C. App. 2004) In making a decision, the chancellor should look at the "totality of the circumstances." *Ash v. Ash*, 622 So.2d 1264 (Miss. 1993) The guiding principle or "polestar consideration in child custody cases is the best interest and welfare of the child." *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983) This has been the mantra of our Supreme Court since at least 1906. *Glidewell v. Morris*, 89 Miss. 121, 42 So. 537 (Miss. 1906)

In the case at bar, the mother decided to move or relocate from DeSoto County, Mississippi, to Las Vegas, Nevada, taking her two sons with her. The

boys had spent their entire lives in DeSoto County, including the (9) nine years since rendition of the 1998 decree giving paramount custody to their mother. The circumstances and consequences of the move greatly impacted and adversely affected both their mental and emotional well-being. The children were aged 13 and 10 at the time of the move and did not want to be separated from their father or the life thet had known in DeSoto County. The chancellor found that the move was a material change of circumstances which the proof showed adversely affected the children and their welfare.

The law is well settled in this state that a move or relocation by a custodial parent, even to a foreign country, is not, in and of itself, a sufficient material change of circumstances to justify invocation of the *Albright* analysis and subsequent modification of custody. *Spain v. Holland*, 483 So. 2d 318 (Miss. 1986) This is particularly so when the custodial parent's motivation for the move is to pursue "...a reasonable professional or economic opportunity." *Spain, supra* at 318. However, where it can be shown that the move, has, in fact, adversely impacted the children, a change of custody can be considered. *Marter v. Marter*, 914 So. 2d 743 (Miss. App. 2005)

In the case at bar, the chancellor correctly articulated and applied the law. He clearly did not base his decision on the sole grounds that the move was a

But material change has to adversely affect at any time to get change. Some one can't be "me" by itself. What does Mom + "me" give b/c "me" has to have anything?

material change in circumstances. Instead, he clearly found that the move had adversely affected the children. He based his opinion on the testimony of friends and family who recounted the changed mental and emotional status of the children, reflected in their demeanor and attitudes, the testimony of a clinical psychologist who attested to the devastating impact that was had upon the children— not just a drop in their academic performances– but the impact upon their mental and emotional health and, the testimony of fourteen year old Dean Lammey, who gave voice to his preference,– indeed his need, to reside with and benefit from his father's presence in his life. Further, it was not just the move that adversely impacted the children. The children's perception of their mother's reasons for the move and her attitude of resentment of their contact with their father was a serious source of agitation and bewilderment to them. In short, the new environment in Las Vegas, was unhealthy for the children's mental and emotional well-being.

Additional factors influenced the chancellor's ruling. He found that the children's grades had suffered; that they were denied not only their close relationship with their father, but also, their relationship with a grandfather who had been a "major player" in their lives and other extended family and friends; the fact that they had been in DeSoto County most all of their lives and that the eldest

child, 14 years of age, had clearly expressed his desire to reside with his father.

Of substantial significance, also, is the fact that the chancellor clearly questioned Sandra's underlying motivation for moving. Noting that Sandra had claimed in her initial petition that she could not find work in DeSoto County and that she had a good job offer in Las Vegas and could live rent free with her parents, the chancellor found "(T)hose things proved not to be the case in this case when testimony came out." [21] He further found that she had incurred "...a house mortgage out in Las Vegas that she can neither afford nor should she afford."[22] Sandra's asserts that the chancellor "...found that (she) Sandy had moved from DeSoto County, Mississippi area for the purposes of finding suitable employment and to be near her parents who had health problems in Las Vegas, Nevada." This is not entirely accurate. The chancellor's ruling was:

> Their mother, Sandra Lammey Conley decided to move to Las Vegas, Nevada to be closer to her mother and father who were in failing health. She filed a motion to allow the move on June 29, 2005, which was granted. In the (sic) her motion for the move, stated that Sandra has made diligent searches and inquiry in the Memphis area and has been unable to locate suitable employment. She, also, stated that she has a house in which she can live in free of charge with her parents, and has promises of suitable employment. Those things proved to not be the case in this case when testimony came out.

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[21]T III: 344

[22]T III:353

> The Court notes that Sandra testified that if she was going to look for suitable employment, it was going to be in /SRAEU (sic) Vegas, and that she did not, in fact, make a diligent inquiry as to jobs in this area, and in fact has no job offers waiting on her Las Vegas. But this court is very aware, and the Supreme Court has said numerous times that a move in and of itself is not a material change. And certainly not– it may be a material change, but is not necessarily adverse affect.[23]

Professor Bell, in her work, *Mississippi Family Law*, states:

> A number of factors have been suggested as guidelines for evaluating whether custody should be modified because of a move: whether the relocation is in good faith; whether the move is in the child's best interests; the extent of a child's involvement with the relocating parent and the nonrelocating parent; the child's preference; the likely impact on the child; and whether the non-custodial parent will realistically be able to maintain a full relationship with the child.
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> Bell, *Mississippi Family Law*, (1st Ed.) § 5.11[5] [b], at 142.

The holding in *Spain v. Holland, supra*, is that, absent any other circumstances, our courts should not interfere with a custodial parent's move, even to a foreign country, where the move is for the purpose of pursuing "...a reasonable professional or economic opportunity." A lack of good faith on the part of the relocating custodial can be considered in determining whether a change of custody should be considered. *Pulliam v. Smith*, 872 So. 2d 790 (Miss. Ct. App. 2004)

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[23] T III:343-4

Pulliam involved modification of custody where a mother agreed to liberal visitation by the father, knowing that she was about to move five hundred miles away. Her bad faith, alone, was sufficient grounds for changing custody. See also *In re E.C.P*, 918 So.2d 809 (Miss. App. 2005), where a mother's move to Atlanta was found to have been motivated, in part, by a desire to distance herself and children from the father.

A case which is of significant relevance and strikingly similar to the case at bar is *Marter v. Marter*, supra. There, a move to Nashville, Tennessee, was found by the chancellor to have adversely affected the welfare of the involved children. The chancellor called it a "close case", but based upon all of the circumstances, he concluded that the children were adversely affected and, following an *Albright* analysis, he determined that custody should be changed to the father. This Court affirmed the chancellor, finding that he was in the best position to weigh the evidence and make the difficult decisions required, citing *Rogers v. Morin*, 791 So.2d 815 (Miss. 2001) and *Bredemeier v. Jackson*, 689 So. 2d 770 (Miss. 1997). *Marter, supra* at 749.

In her brief, Sandra makes light of the facts that her sons were traumatized by her decision to uproot them from the life that they had always known and that

they remain unhappy, even after over a year in Las Vegas. She argues that this is just a normal reaction to a move. Perhaps, if these children were still six and two years old, (their ages at the time of the last custody decree), her argument would have greater weight. However, it ignores several facts. These are not small children who have yet to have developed ties with their community. A clinical psychologist testified that both boys, not just Dean, are unhappy, remain mentally and emotionally devastated and "desperately" want the influence of their father in their lives. Is their happiness of such little or no consequence? Does not their happiness necessarily impact their mental and emotional health and well-being? Given the passage of almost a year in Las Vegas, what evidence was offered that the situation was likely to improve?

In support of her argument that the evidence was insufficient to support a conclusion that a material change in circumstances had occurred which adversely affected the children, Sandra cites the cases of *Thompson v. Thompson*, 799 So. 2d 919 (Miss. Ct. App. 2001) and *Bredemeier v. Jackson*, 689 So. 2d 770 (Miss. 1997)[24] Except to the extent that these cases are authority for the legal proposition that the party seeking a change in custody has the burden of proof, these cases are not factually or legally supportive of Sandra's position. Both cases affirmed the

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[24] Appellant's Brief, p. 24

chancellor's findings and decisions. In *Breidemeier*, (involving joint legal and physical custody), the chancellor's decision that a material change had occurred was affirmed. In *Thompson*, the chancellor's decision that such a material change had not occurred was affirmed. In the case at bar, the chancellor's decision should also be affirmed.

The rule is that "Unless the evidence demands a finding contrary to the chancellor's decision, this Court will not disturb a custody ruling." *Copeland v. Copeland*, 904 so. 2d 1066, 1074 (Miss. 2004) (Emphasis supplied)

Sandra also cites the cases of *Morrow v. Morrow*, 591 So. 2d 829 (Miss. 1991) and *Ballard v. Ballard*, 434 So. 2d 1357 (Miss. 1983), asserting that "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change."[25] When taken out of context, as this quote is, the conclusion is that there can never be a custody change in any case unless the grounds for changing are allegations of parental abuse. Such is not the holdings of these cases. Both of these cases deal with the issue of what conduct or behavior of parents is sufficient grounds (alone) for changing or denying physical custody to a parent. In *Morrow*, the chancellor's refusal to modify custody based upon a mother's improper sexual activity was affirmed. In *Ballard*, a chancellor

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[25] Appellant's Brief, p. 25

awarded a change of custody to the father on the grounds that the mother had engaged in immoral activity by having an overnight guest in her home, with the child present, on three occasions. He did so with strong reservations because he found that the child had been very well cared for by his mother since birth. Our Supreme Court reversed and rendered, restoring the custody of the child to the mother, pointing out that the conduct in question was insufficient grounds for changing custody because "(I)t is only that behavior of a parent which clearly posits or causes danger to the mental or emotional well-being of a child...which is sufficient basis to seriously consider the drastic legal action of changing custody." Id. 360

In other words, the *Morrow* and *Ballard* cases deal with an entirely different issue than what is presented by the case at bar. In the case at bar, the conduct or behavior of the parent is not the basis upon which modification of prior custody decree was sought. The cases have no application or relevance to the case at bar.

The only issue before this Court is whether the chancellor's conclusions are supported by the record. On appeal, the findings of a chancellor will not be disturbed when supported by substantial evidence "...unless the chancellor abused

his discretion, applied an erroneous legal standard, was manifestly wrong, or was clearly erroneous". *Spain v. Holland*, 483 So. 2d 318 (Miss. 1986) Stated differently, does the evidence in this case, involving a custody ruling, demand a finding contrary to the chancellor's decision? *Copeland, supra.* It is respectfully submitted that it does not.

PROPOSITION II

Substantial evidence supports chancellor's analysis of *Albright* factors and conclusion that best interests of children required a change of paramount physical custody.

Having found the requisite material change of circumstances adversely affecting the best interests and welfare of the children, the chancellor undertook an "on the record" *Albright* analysis of the facts to determine whether a change of paramount physical custody was in the best interests of the children. His conclusions are amply supported by the evidence.

The *Albright* factors, in abbreviated form, and following Sandra's restatement of them[26], are:

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[26] Appellant's Brief, 26-28

#1. Health, Sex and Age of the children.

#2. Continuity of care

#3. Parenting skills

#4. Willingness and capacity to provide primary care

#5. Employment of parents and the responsibilities of that employment

#6. Physical and mental health of parents

#7. Age of parents

#8. Existing emotional ties

#9. Moral fitness

#10. Home, school and community record of children

#11. Preference and desire of child

#12. Stability of home environment and employment

#13. Other factors relevant to the parent-child relationship.

NEUTRAL FACTORS

The chancellor found the following four(4) factors to be either neutral or favoring neither party over the other: (#3) Parenting skills; (#4) Willingness and capacity to provide primary care; (#6) Physical and mental health of the parents

(#9) moral fitness.

#3 Parenting skills

In her brief, Sandra challenges only one of these findings. It is claimed that #3, the "best parenting skills" factor should have favored her because she " ... had raised the children since birth and that Davin was gone a lot of the times with the military and other matters before and after the periods that the parties were married."[27]

There is no question but that Sandra has had the paramount physical custody of the children after each divorce. The chancellor credited the "continuity of care" factor to Sandra, because of this.[28] Parenting skills and who has, in fact, had paramount physical custody are different considerations.

The record in this case reflects that Davin is a good father. Even Sandra admitted this to be the case.[29] He did and does all the things a father usually does with his children. The record also reflects that Davin loves his children and is involved in their activities and interests. Given the boys' predisposition toward outdoor activity, hunting and fishing, and their approaching young adult manhood,

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[27] Appellant's Brief, p 26

[28] T III: 346

[29] Exhibit 19, Deposition of Sandra Connelly, pgs. 30-31

one could argue that Davin's skills in this are superior to Sandra's. Nevertheless, the chancellor found that neither party's skills in this arena were superior to the other's. The evidence supports this conclusion.

FACTORS FAVORING SANDRA:

The chancellor found the following factors to favor Sandra:

(#2) Continuity of care

(#3) Employment and responsibilities of that employemnt

FACTORS FAVORING DAVIN:

(#1) Health, sex and age of children

(#8) Emotional ties

(#10) Home, school and community record of the child

(#11) Preference of the child at the age sufficient to express a preference by law

(#12) Stability of the home environment

Sandra takes issue with all of the above findings of the chancellor in favor of Davin, except his finding as to the sex and age of the children being in Davin's favor.[30] Discussion of her argument follows.

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[30]Appellant's Brief, p 26-28

8 Emotional ties: It is argued that the chancellor erroneously based his conclusion that this factor favored Davin based upon the "testimony of the children" since only one of the children actually testified. It is true that only Dean actually testified. The evidence in this case was that both boys' mental and emotional health and well-being were and continued to be adversely affected by the move to Las Vegas. Their mother did not consider their feelings to be relevant to her decision to uproot them. She did not prepare them for the move and even up to the day of trial and after a year in Las Vegas, she had not explained to them in a way they could understand why all of their best interests required the move. The boys remained bewildered and resentful of their mother's actions.

Dr. Hutt testified that both boys had very strong ties to their father and "desperately" wanted to be with him. The record is devoid of any evidence that the boys' emotional ties to their mother exceeded that of their ties to their father. The exact words of the chancellor were: "The emotional ties of the parent and the child, favors Mr. Lammey, based upon the testimony of the children." [31] One can argue the use of the "plural" vs. the "singular"; but, the meaning of the chancellor's statement is clear. He concluded, based upon all of the evidence, that the boys' emotional ties with their father were strong and that this factor

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[31] T 349

supported his decision to place physical custody with Davin. The argument that "only one boy " actually testified is sophistry.

10 Home, school and community record of the children

The record clearly supports the chancellor's conclusion that this factor favored Davin. De Soto County, Mississippi is where these children were reared. They have deep roots in the community. They have family, friends, school and extra-curricula activities and involvements that are significant to and for them. The fact that they were unhappy in Las Vegas after a year testifies to this as much as anything. There is scant evidence of their home and school life in Las Vegas. There is evidence that Dean did not enjoy the gang atmosphere at his school and restrictions on the very color of the clothes he could wear. There is no evidence of the children being involved in their community or having made the strong friendships and relationships they have forged in DeSoto County.

The chancellor was imminently correct in his conclusion that this factor favored Davin. Sandra's argument that Davin did not make a special trip 1500 miles away to Las Vegas has no relevance to this factor. He had and exercised his visitation with his sons in accordance with the Court's order.

#11 Preference of child

Our statutory and case law requires that a fourteen (14) year old child's preference be considered by a chancellor. § 93-11-65, Miss. Code of 1972, as amended; *Bell v. Bell* 572 So.2d 841 (Miss. 1990)

Dean Lammey testified that his preference was to live with his father. Dean was well above the age of twelve, when our statute gives the chancellor authority to consider a child's preference "in determining what would be in the best interest and welfare of the child." § 93-11-65, Miss. Code of 1972, as amended

In addition to testifying that both boys desperately wanted their father in their lives, Dr. Hutt testified that both children were "highly motivated" to return home to Mississippi. He described both boys as "articulate" and "very bright".[32]

The chancellor can not be faulted or placed in error for finding this factor to "favor" Davin. No issue is taken with Sandra's statement of the law that the chancellor is not required to follow the child's stated preference.[33] The chancellor's decision in this case nowhere reflects (as suggested by Sandra's brief) that he felt compelled to follow the children's stated preference. He merely concluded that this particular *Albright* factor favored Davin. For him to have concluded otherwise would have been contrary to the overwhelming weight of the

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[32]T 27, 42

[33]Appellant's Brief, p. 27

evidence.

#12 Stability of home environment and employment of each parent

It is the stability of the home environment–not just the environment- that is at the crux of this factor, together with the stability of the employment of each parent. The chancellor found that "obviously" these factors favored Davin who has lived in the "same location for many years" and "maintained the same employment for many years." In her brief, Sandra complains that there was no "evidence whatsoever that the home environment of Sandy was detrimental to either of the children." [34]

This suggestion misinterprets the meaning of this factor. Stability is the key word. Sandra first went to live in her parents' home but then bought a house and moved out of her parent's home. She has had two different jobs since leaving DeSoto County. She has a mortgage which the chancellor found to be unaffordable by her, based upon her earnings. On the other hand, Davin (and Sandra, until she moved) has lived in Desoto County since 1992, shortly after the

[34] Ibid. p. 29

birth of Dean, in the same house for the last 6 years.[35] He has been employed first in the armed services and for the last several years as an aircraft mechanic, with Federal Express, earning in excess of $75,000 per year.[36] The paternal grandfather who has been a care-giver and very significant "player" in the life of the children, from the time of their births, lives in close proximity. Davin and a friend, who also has two sons, own 120 acres and a cabin in Abbeyville, Mississippi, where the boys enjoy hunting, fishing and socializing with their peers. The home environment provided by Davin in DeSoto County, is stable. It provides these two young men with that sense of stability and security that is so vital to them and their development at this time of their lives. It explains, in large part, their desire to live with their father.

Other factors relevant to the parent-child relationship.

Sandra asserts that the chancellor did not take into consideration his finding that Davin was in contempt of court when he (the chancellor) considered this factor. With all due respect, this is an inaccurate assertion. The chancellor

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[35] CP I: 91

[36] T I: 47,57

specifically stated, in his opinion:

> "...Mr. Lammey is in contempt for making derogatory remarks concerning the children's mother... The Court thought about this when deciding whether or not to change custody of the minor children, but to deny change of custody because of the father's remarks would be to hurt the boys because of something they had no control over."[37]

This is clearly consistent with precedent. Decisions regarding custody "... should never be made for the purpose of rewarding one parent or punishing the other." *Tucker v. Tucker*, 453 So. 2d 1291, 1297 (Miss. 1984) Where the relief granted is "for the benefit of the parties' minor children" there is "...no reason to penalize the children..." for one parent's failure to abide by a judgment of the court. *Jurney v. Jurney*, 921 So. 2d 372, 377 (Miss. App. 2005)

It is important to note, also, that immediately after the conclusion of the presentation of all of the evidence in this case, the chancellor made the following statement:

> Without a doubt, no question, that both parties have been a part of contempt of court several times. Contempt of what they agreed upon, contempt of what the orders of this Court.(sic) And I've seen it time and time again, this is probably a little bit worse of tit for tat than I've seen in a while. And it kind of gets out of hand, and it might even get

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[37] T II:199, Excerpts 49

trivial at some time, and I think it has in this case.[38]

To the extent that Sandra's argument in this regard may be interpreted as raising the doctrine of "unclean hands", it is submitted that this issue was not raised during trial nor has it been directly raised on appeal. Accordingly, it is waived. *Crowe v. Smith*, 603 So.2d 301 (Miss. 1992); *Jurney v. Jurney, supra.*

Moreover, as a "factor" to be considered by the chancellor, it was duly considered and rejected by him as a reason to deny a change of custody.

Matters of contempt are within the broad discretionary powers of the court both as to adjudication and penalties. *Lahmann v. Hallmon*, 722 So.2d 614 (Miss. 1998); *Elllis v. Ellis*, 840 So.2d 806 (Miss. Ct. App. 2004) In the case at bar, the chancellor did not abuse his discretion in concluding that the nature, extent and magnitude of the contempt was of insufficient significance to justify denial of a change in custody that he had concluded was in the best interests of the two children.

The chancellor correctly analized and applied the *Albright* factors. His findings and conclusions are amply supported by the evidence presented. Sandra's arguments are not unlike that of "Kelly's" in *Copeland v. Copeland*, 904 So. 2d

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[38]T III: 340

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CERTIFICATE OF SERVICE

I, Peggy A. Jones, one of the attorneys of record for Appellee, do hereby certify that I have, this day mailed, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF APPELLEE, to:

Hon. Mitchell Lundy, Jr.
P.O. Box 471
Grenada, MS 38901 — Presiding Chancellor

and

Gerald W. Chatham, Sr., Esq.
Chatham, Damare, Pittman, PLLC
291 Losher Street
Hernando, MS 38632 — Attorney for Appellant

and

H.R. Garner, Esq.
283 Losher Street
P.O. Box 443
Hernando, MS 38632 — Attorney for Appellant

This the 16th day of November, 2007.

Peggy A. Jones

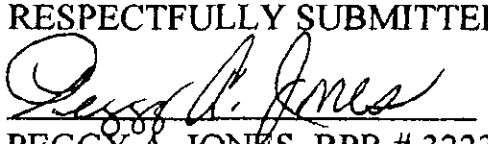
1066 (Miss. 2004). There our Supreme Court stated, at 1077:

> Kelly's arguments, in their best light, simply take issue with the conclusions the chancellor drew from the evidence. Our review of the record convinces us that there is substantial credible evidence to support the findings and conclusions of the chancellor. Were this Court to disturb those findings on the present state of this record, we would merely be substituting our own assessment of the evidence for that of the chancellor. In accord with *Ash* and *Yates*, this is not within our authority.[39]

CONCLUSION

The decision of the Chancery Court of DeSoto County should be affirmed, with all costs herein assessed against Appellant.

RESPECTFULLY SUBMITTED,



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[39] *Ash v. Ash*, 622 So.2d 1264 (Miss. 1993); *Yates v. Yates*, 284 So. 2d 46 (Miss. 1973)