

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

SANDRA K. LAMMEY (CONNELLY)

APPELLANT

V.

DOCKET NO.: 2006-CA-02093

DAVIN HOWELL LAMMEY

APPELLEE

APPELLANT'S BRIEF

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT IS NOT REQUESTED

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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.

The Appellant:

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The Trial Judge:
Chancellor Mitchell Lundy, Jr.
P.O. Box 471
Grenada, MS 38902

SO CERTIFIED, this the 5 day of September, 2007.



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STATEMENT OF THE ISSUES

The issues presented by the Appellant in this appeal are:

ISSUE I: The Chancellor erred in his findings that there had been a material and substantial change in circumstances of the parties that adversely affected the best interest and welfare of the minor children prior to analyzing whether a change of custody was warranted.

ISSUE II: The evidence does not support the Chancellor's finding that the best interests of the minor children would best be served a change in custody.

STATEMENT OF THE CASE

Nature of the Case and Proceedings :

This appears to stem from the decision of the Chancery Court of DeSoto County, Mississippi, which modified child custody of the parties' two minor children from the Appellant, Sandra K. Lammey (Connelly), to the Appellee, Davin Howell Lammey. The Opinion of the Chancellor granting the modification of child custody being rendered from the bench on October 12, 2006, and the Order being entered by the Court on November 14, 2006 recorded in Chancery Court Minute Book 428, Page 437 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP II:183). A Motion for Reconsideration or to Alter or Amend the Judgment being filed by the Appellant. (CP I:111). A Motion to Amend Judgment filed by the Appellant. (CP II:177). Order Overruling Motion for Consideration or To Alter or Amend Judgment being entered on the 15th day of November, 2006 in Chancery Court Minute Book 428, Page 767 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP II:204).

The background of the parties and their children is that the parties were divorced by a Judgment of Divorce entered in the Chancery Court of DeSoto County, Mississippi on the 8th day of April, 1998 recorded in Chancery Court Minute Book 244, Page 406 of the Official Chancery Court minutes of DeSoto County, Mississippi. The Judgment of Divorce contained the following provision :

“Further, 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. Further if Husband moves more than 100 miles from his present residence then the restriction placed upon Wife’s place of residence shall no longer exist”

On May 6, 2005, the Appellant filed a Petition for Modification requesting the Court permission to permit her to move more than 100 miles from her present residence to Las Vegas, Nevada. A Counter-Petition for Modification was filed by the Appellee requesting the custody of both of the parties' children on the 25th day of May 2005. An Order was entered by the Court on the 5th day of July 2005 Striking Mileage Restriction from Decree of Divorce recorded in Chancery Court Minute Book 392, Page 456 of the Official Chancery Court Minutes of DeSoto County, Mississippi. A Petition to Cite for Contempt was filed by the Appellee on the 12th day of September, 2005. A Temporary Order was entered by the Court on the 22nd day of September, 2005, recorded in Chancery Court Minute Book 397, Page 771 in the Official Chancery Court Minutes of DeSoto County, Mississippi. A Petition to Cite for Contempt was filed by the Appellant on the 12th day of October, 2005. A Second Petition to Cite for Contempt was filed by the Appellant on January 25, 2006. An Answer to Petition to Cite for Contempt and Counter-Petition for Contempt was filed by the Appellee on February 3, 2006. A Petition to Cite for Contempt was filed by the Appellee on May 17, 2006. An Administrative Order setting cause for trial on August 16, 2006 was entered by the Court on May 30, 2006.

The Case was heard on August 16th, 2006, and fully litigated by the parties. The Court entered an Opinion on October 21, 2006 modifying child custody from the Appellant to Appellee. (RE 14-32; CP II: 185-203). The Order being entered on November 14, 2006. (CP II: 183-203; RE 33-53).

Subsequent thereto, the Appellant's Motion for Reconsideration or to Alter or Amend being overruled by the Court entered on the 15th day of November, 2006 in Chancery Court Minute Book 428, Page 767 of the Official Chancery Court Minutes of DeSoto County, Mississippi. (CP II:204)

On December 6th , 2006 , Appellant, Sandra K. Lammey (Connelly) , filed a timely Notice of Appeal by which she asserted error on the part of the Chancery Court. (CP II:206).¹

FACTS AND CIRCUMSTANCES OF THE CASE

The Appellant, Sandra K.Lammey (Connelly) , hereinafter called "Sandy" and Appellee, Davin Howell Lammey , hereinafter called "Davin" were married to each other twice. The first marriage was consummated on July 6, 1991, and one child was born of that marriage , namely: Dean Howell Lammey, a male child born April 3rd , 1992. The first marriage ended in divorce with Judgment having been entered on June 21, 1993. The parties then remarried on December 19, 1994 in Shelby County, Tennessee. One child was born of the second marriage, namely: Matthew Cross Lammey, a male child born December 12th , 1995. The parties were then again divorced by a Judgment of Divorce entered on the 8th day of September, 1998 in the Chancery Court of DeSoto County, Mississippi.

That contained in the Judgment of Divorce was a provision that provided as follows, to-wit:

" Further, 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 . Further if Husband moves more than 100 miles from his present residence then the restriction placed upon Wife's place of residence shall no longer exist"

That the Appellant, Sandra K.Lammey (Connelly) , was informed by her employer that it was shutting down or going out of business and she was to lose her job. Sandy made diligent search and inquiry in the Memphis area to find suitable employment and she was unable to do so.

1

1 "T references are to pages of the transcript . CP are references to Clerk's Papers. RE is for Record Excerpts. The Volume Number should also be given, i.e. (T 6:115; CP 2:120)."

That both of her parents and the maternal grandparents both lived in Las Vegas, Nevada, and that she had a house to live in Las Vegas, and had been promised suitable employment.

Appellant, Sandra K. Lammey (Connelly) , filed a Petition for Modification with the Court requesting permission to move more than 100 miles away with the children, and asked the court to modify or adjust visitation as well as make orders adjusting child support, visitation , etc as equity would find fair and appropriate.

Appellee, Davin Howell Lammey, filed a Counter-Petition for Modification, asserting the provisions of the Judgment of Divorce, asking for child custody to be modified and that he be awarded child custody and support from the Appellant, Sandra K. Lammey (Connelly). In the Judgment of Divorce the Appellant , Sandra K. Lammey (Connelly) , was awarded the physical custody of the parties' minor children, namely Dean Howell Lammey, a male child born April 3rd, 1992 and Matthew Cross Lammey, a male child born December 12th , 1995.

On June 29, 2005 the Appellant, Sandra K. Lammey (Connelly), filed a Motion to Allow her to move. An Order was entered by the Court Allowing Psychological Custody Evaluation of the children by the Court on July 5, 2005. Also, entered on that same day was an Order Striking Mileage Restriction from the Decree of Divorce. The Court finding that the provision was unconstitutional.

On July 5, 2005 an Order was entered by the Court Allowing a Psychological Custody Evaluation of the parties' children by Dr. L.D. Hutt, Clinical Psychologist.

The Appellant, Sandra K. Lammey (Connelly) , and the parties' minor children moved to Las Vegas, Nevada on August 8, 2005, and notified the Appellee, Davin Howell Lammey, of their change of address pursuant to Rule 8.06 of the Mississippi Uniform Chancery Court Rules.

On the 12th day of September, 2005, which was little over a month after the Appellant and the parties' children had moved to Las Vegas, Nevada to live with the maternal grandparents, the Appellee filed a Petition for Contempt alleging therein that the Appellant had interfered with his visitation rights with the children.

On September 22, 2005, a Temporary Order was entered by the Court setting forth the manner and method of calls from the Appellee to the parties' children, and defining visitation on the part of the Appellee with the children.

On the 12th day of October, 2005, the Appellant filed a Petition to Cite for Contempt against the Appellee alleging that he should be cited for contempt for violation of the Temporary Order regarding calls to the children, and letters from the paternal grandfather to the children.

On January 25, 2006, a Second Petition to Cite for Contempt was filed by the Appellant against the Appellee, concerning derogatory remarks in violation of the Court's Order made by the Appellee to the parties' children over the telephone.

On the 3rd day of February, 2006, an Answer to Petition for Contempt and Counter-Petition for Contempt was filed by the Appellee against the Appellant, alleging that the Appellant interfered with the telephone conversations between the children and Appellee.

On May 8th, 2006, the Appellant filed a Notice of Change of Address of Children pursuant to Rule 8.06 of the Mississippi Uniform Rules of Chancery Court Practice notifying the Appellee of the change of address of the children.

On May 9, 2006, Appellant filed a Motion to Suspend Telephone Visitation between the Appellee and the parties' children alleging that he continued to berate the mother in his telephone conversations with the children in violation of the Court's previous Order.

On May 17, 2006, the Appellee filed a Petition to Cite the Appellant for Contempt of Court that the Appellant was interfering with his phone visitation rights with the children.

This cause was set for trial on August 16, 2006 in the Chancery Court of DeSoto County, Mississippi for a one day trial .

On August 7, 2006 the Appellee filed a child's preference affidavit from the parties' oldest child, Dean Lammey.

The Trial was commenced on August 16, 2007 before Chancellor Lundy.

Davin went first in this trial on his petitions and called a total of six witnesses. Sandy called a total of five witnesses. The following witnesses were called by Davin and a brief synopsis of their testimony is presented as follows, to wit;

Dr. Lenley David Hutt, Jr. (T I:8-46).

Dr. Hutt testified as follows :

That he was a a licensed psychologist, who had performed a custody evaluation pursuant to Court Order. That Davin was required to pay Dr. Hutt for these services. Dr Hutt opined that both parents were fit persons to have the care, custody and control of the minor children and spent most of his time advising the Court that both boys were upset with their mother because of her not telling them that they were moving to Las Vegas until shortly before they were to leave. Dr. Hutt depicted Sandy as aloof, distant, rigid and opinionated. He further testified that she tends to react with self-indignation and makes exaggerated complaints that she has been wronged. She tends to project and externalize blame. She has difficulty accepting responsibility for her problems and tends to blame others. He testified further that there were significant indications of a paranoid predisposition. He made no findings in his evaluation that raised any questions about the prudence of the boys assuming full primary residential time with their father

and having appropriate physical visitation and other contact with the mother. It should be noted that later in the trial the people that have known Sandy for the last ten years all testified that they did not agree with the opinions of Dr. Hutt concerning Sandy.

Davin Howell Lammey hereinafter call Davin, the Appellee . (T I:46-97).

Davin testified as follows:

He gave the history of the couple's marriage and that Sandy had told him before that she intended to move to Las Vegas. Once the parties reconciled she dropped those plans

Davin further testified that he is on deployment now with the Air National Guard and stated that some time in the future he is going to be retired from the Air National Guard. He was very vague about the issue. The net upshot of Davin's testimony is that he misses his boys and wants to spend more time with them. However, the children have been gone for over one year and he has made no efforts to visit them in Las Vegas even though he has the capability of making those visits, but has chosen not to schedule them. Davin did not bring forward any evidence that shows that there has been a material change in circumstances adversely affecting the best interests of the children. His only issue is that his former wife has moved and taken the boys with her. Other than the move itself he offered no evidence for which the Court could warrant a change of custody. Davin showed an adjusted gross income of \$54,433.32 making child support due \$886.00 per month. He currently paid \$735.00 per month.

Cullen Cross Lammey, the paternal grandfather of the children. (T I:97-126).

Cullen Cross Lammey testified as follows:

He admitted to sending the cards introduced as Exhibit "6" to the minor children of this marriage. These cards again serve as examples of the disdain and contempt that Davin and his relatives have for Sandy in violation of this Court's Orders. Making reference to "low lifes in Sin

City” was another attempt to poison the minds of the children against where their mother has moved. Insinuating that the grandparents in Las Vegas and other relatives don’t love and respect the two boys is clearly communications that are not in the best interests of the children.

Referring to themselves as true relatives insinuating that because Sandy is adopted that the grandparents, aunts and uncles and cousins in Las Vegas are not true relatives, again attempting to undermine the love and affection that these people have for the children and is clearly not in the best interest of the children. The Court had found these type of communications to be derogatory remarks and specifically entered an Order against this type of communication and language. Davin and his family should both be held in contempt.

Earl Doherty , a friend. (T I:126-133).

Earl Doherty testified as follows:

He testified testified that Davin did things with the children.

Kerri Lammey, wife of Davin and stepmother of the children. (T I:133-150; T II:151-158).

Kerri Lammey testified as follows:

That she admitted to calling Sandy and telling her that she had trust issues with Davin. She has two other children by a previous marriage in the home and that they all get along very well. She testified she knew Davin moved around a lot as a child and admitted that she had moved a lot. She also screamed and yelled at Sandy in front of the children at a ball game.

Dean Howell Lammey, the parties' oldest son, who testified in Chambers. (T II:158-173).

Dean Howell Lammey testified as follows:

The parties' eldest child, Dean Lammey, was questioned by the Court in Chambers and the Court ruled that the child knew the difference between right and wrong and could testify.

Dean Lammey's sole purpose for testifying was to testify that he wanted to live with his father and that he was upset with his mother for not telling him about the move to Las Vegas. He also testified he had lots of friends in Las Vegas and was doing well in school and had lots of awards in sports and math.

The Appellant, Sandra K. Lammey (Connelly), hereinafter called Sandy, called five witnesses and a brief synopsis of their testimony is presented as follows, to wit:

Rosemary Hajostek, a family friend. (T II:173-188).

Rosemary Hajostek, testified as follows:

She had known the Lammey family since Dean was two years old. She lived next door and testified concerning the activities and the involvement of Sandy in the lives of her children. She testified that Davin was gone most of the time during the marriage either with his job at Fed Ex or in the Air National Guard. She testified that Sandy was the one that provided the stable home environment and took the children to church. She further testified about the incident at Sandy's home when the children returned from summer time visitation in 2005. She testified about Davin calling Sandy names in front of the children and that the grandfather, Cullen Lammey, also called her names and Kerri, Davin's wife, calling the entire group assembled, a bunch of "church freaks". She also testified she called the police.

Cynthia Wiseman, a family friend. (T II:188-213).

Cynthia Wiseman testified as follows:

Ms. Wiseman told the Court about how long she had known the Lammey family. She testified that she had known the family since Dean was five years old. She testified that they met at a ball field when Dean was five and how she and Sandy talked on the phone a lot. Her children and the Lammey children played sports together all of these years. Every other weekend

they would get together at each other's home. She further testified that Davin was an absent parent and that Sandy was the primary responsible parent. She testified that Davin's mental health was questionable and that Sandy had high morals and was a Christian person. She testified that Sandy was a moral person and that Davin had committed immoral acts at the baseball field in the presence of the children by kissing and hugging on other women. She testified that Sandy provided a stable home environment and that she has always had stable employment. Ms. Wiseman further testified that the report and testimony by Dr. Hutt was not an accurate description of Sandy Connelly. When asked if she agreed or disagreed with Dr. Hutt's report that showed Sandy as aloof, distant, rigid and opinionated, she said that she disagreed. Further, when asked if she agreed or disagreed or if it was accurate in Hutt's report where he describes Sandy as self-righteous, making exaggerated complaints and tends to blame others for her own problems, Ms. Wiseman testified that it was totally inaccurate. When further asked that Hutt's report had stated that Sandy was of a paranoid disposition, Ms. Wiseman said that was totally inaccurate and she disagreed completely with that report.

Ms. Wiseman corroborated the incident testified to by Mrs. Hajostek when the police were called and stated she heard Cullen Lammey call Sandy Connelly a "cunt" as well as other names. She also testified that Kerri called all of them "church freaks".

Terry (sic) Terri Gowen , a family friend. (T II:213-229).

Terry (sic) Terri Gowen testified as follows:

She met Sandy ten years ago when she moved in next door and that the families had been close ever since. In 2003, she moved down the street but the families remained close until Sandy moved to Las Vegas. She was in Sandy's house or yard daily until the move. She testified that Sandy had been the primary care giver and was the parent that took the children to and from all

of their activities including church, etc. She further testified that Davin was an absent parent who worked at Fed Ex and in the Guard. He was always away on one of these trips by his own choice. Davin was very self-centered and all about Davin. She never saw Davin do anything that the children wanted to do or what needed to be done. Davin did all the fun stuff with the kids and Sandy was left with the responsibility of rearing the children. She testified that Sandy was always sacrificing for her children and her children were foremost and first with her. Terri Gowen further testified that the report and testimony by Dr. Hutt was not an accurate description of Sandy Connelly. When asked if she agreed or disagreed with Dr. Hutt's report that showed Sandy as aloof, distant, rigid and opinionated, she said that she disagreed. Further, when asked if she agreed or disagreed or if it was accurate in Hutt's report where he describes Sandy as self-righteous, making exaggerated complaints and tends to blame others for her own problems, Ms. Gowen testified that it was totally inaccurate. When further asked that Hutt's report had stated that Sandy was of a paranoid disposition, Ms. Gowen said that was totally inaccurate and she disagreed completely with that report.

Laura Connelly, mother of Sandy and maternal grandmother of the children .

(T II:229-242).

Laura Connelly testified as follows:

Laura Connelly testified that she was the mother of Sandy Connelly. She testified about the children and how well adjusted they were in the Las Vegas area. She testified about Dean joining the tennis club and testified as to the support that she has from her family. She further testified that all the Connelly family lives now in the Las Vegas area and that Sandy has plenty of support there.

Sandra K.Lammey (Connelly) , "Sandy", the Appellee. (T II:242-300; T III:301-336).

Sandy Connelly testified as follows:

She testified that since the last modification was entered on child support in 2001 there have been increased financial obligations placed on her. She further testified that the needs of the children had increased and that there were increased costs due to inflation and because they were getting older. There were several exhibits introduced detailing the accomplishments of the children since they have been in Las Vegas. Dean was in the Mathematics, Engineering and Science Achievement Program (MESA); his letter from George Bush congratulating him on receiving the President's Education Award; the Spring 2006 Baseball schedule; the progress reports for both children showing outstanding grades; Matthew received a certificate of attendance which showed outstanding attendance in school as well as outstanding grades. Sandy further testified that Davin continuously violated the September 22, 2005 order by calling and making derogatory remarks to Sandy. This conduct commenced soon after the move and necessitated her obtaining a Court Order against said behavior. This was repeated by Davin and his father's family on more than one occasion. Sandy testified that Davin had no respect for the court order and neither did his wife or father. Davin has further violated the court order by purchasing airline tickets that are almost double what the tickets could have been purchased for. The September 22, 2005 Order states clearly "the parties shall investigate the cost of airline tickets for all the above visitation and should Davin be able to get cheaper tickets through his employer, Fed Ex, then he should purchase tickets for the children and Sandy should reimburse him for the cost of her ticket and ½ the cost of the children." It is clear from this order that the intent of the order is for Davin to purchase the cheapest tickets available and not the most expensive. This is another example of the extreme hostility and disdain and contempt that Davin holds for Sandy and the orders of this Court.

Sandy further testified concerning the constant harassment by Davin and his family to her and her family about her being adopted. Sandy testified that this was not in the best interest of the children and was an attempt by Davin to further harass and make derogatory remarks. She testified that Davin was all about control. He wanted complete control over her and the children even though the parties are divorced.

Sandy testified that Kerri, the current wife of Davin, called her and shared with her the issues that she had with Davin about trust, lying and not telling her the truth about things. While the content of the conversation was denied by Kerri, the fact that she admitted making the call to Sandy is indicative of the content of the conversation.

Both parties then rested their respective cases, and the Court requested a proposed findings of fact and conclusions of law be submitted by both parties attorney to the Court. After which the would render its decision.

On October 12 , 2006, the Court rendered its opinion orally from the bench.
(T III:341-355).

The Court found Appellee, Davin Howell Lammey, and his father, Cullen Lammey in contempt of Court for the derogatory remarks concerning mother, which the Court found that the father's remarks about the mother hurt the children. The Court ordered Davin Howell Lammey to pay \$1,500.00 in attorney's fees to Appellant, Sandra K. Lammey (Connelly). (T III:352-353).

The Court found the Appellant, Sandra K. Lammey (Connelly) , not to be found in contempt and not ordered to reimburse Appellee , Davin Howell Lammey, expense for the plane tickets. (T III:353).

The Court then went on its Opinion to modify child custody awarding the care, custody and control of the parties' two minor children to the Appellee. The Chancellor in his Opinion

found that the Appellee had met the burden of proof in finding in order to modify child custody the Appellee had prove to three distinct prerequisites must be satisfied: (1) the party seeking the change bears the initial burden of proving there has been a material change in circumstances; (2) the change must be adverse to the child's welfare; and (3) the Chancellor must find a change in custody is in the best interest of the child. *Thompson v. Thompson*, 799 So. 2d 919, 922 (¶8) (Miss. Ct. App. 2001) (citing *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997). The totality of the circumstances must be examined in order to determine if a material change in circumstances has occurred. *Id.* The Chancellor found that when the children lived in Hernando that they were well adjusted making good grades and involved in sports. That when the Appellant, Sandra K. Lammey (Connelly) , filed a motion to move to Las Vegas , Nevada to be with her mother and father who were in ill health. Alleging that she had exercised diligent search to find suitable employment in Memphis. Allegedly to move into a house with her parents free of charge. The Court finding that these things proved not to be the case.

The Court finding that there were no job offers awaiting the Appellee, Sandra K. Lammey (Connelly) , in Las Vegas. The Court finding that the move “may be a material change, but is not necessarily adverse effect.”

The Chancellor went on to find in his decision that the expert testimony of Dr. Hutt, which he referred to in Exhibit 2. With respect to the parties' son , Dean H. Lammey, found that the child was unhappy living in Las Vegas and wanted to return to live with his father. That the child was “traumatized by his move, and “misses the things that he enjoyed in DeSoto County.” That the child was “bewildered and agitated by the move.” He went on to state in his opinion that Dr. Hutt said with reference to the parties' younger child, “Matthew C. Lammey , he missed his father, he did not like Las Vegas, and was saddened by being uprooted.” He relied upon the

testimony of Dr. Hutt that “the boys experienced some indifference to the school environment in Las Vegas.” Also, to “the secrecy of the move - the Move itself and the results thereof have adversely affected the boys.”

The Court noted that “ the children’s grades have dropped since the change in school, albeit not a whole lot, but they have dropped.” That the children do not have “regular contact with their paternal grandfather, Cullen Lammey, “who was a major player in the boys lives.” He noted that a neighbor testified that” he saw the affect on Dean and that Dean was sad.” He noted Dr. Hutt testified that the “ mother’s interference between the boys and the Lammey Family had adversely affected them.” (T III: 345).

The Chancellor went on to find that “ Considering the totality of the circumstances , “ this Court finds that there has been a substantial material change in circumstance that adversely affects the welfare of the minor children.” (T III:345).

The Court went on further in its opinion to make a determination as to which parent should be awarded custody by applying the Albright facts citing the case of *Albright v. Albright*, 437 So.2d 1003 (Miss.1983) finding as follows:

1. Health and sex of he children: The Court found both children were healthy and the children were male. Citing the testimony of Dean growing up and becoming a man and hunting and fishing with his father . The Court held that factor favored the Appellee, Davin Howell Lammey .

2. Determination of the parent that has had the continuity of care; The Court held that factor favored the mother, Appellant, Sandra K.Lammey (Connelly) .

3. Determination of which parent has the best parenting skills: The Court found those skills to be equal.

4. The parent with the willingness and capacity to provide primary child care: The Court found that both equally have the willingness and capacity to provide primary child care .

5. The employment of the parent and responsibility of employment: This factor favored the mother, appellant, Sandra K.Lammey (Connelly) .

6. The physical and mental health and age of the parents: The Court found these to be non factors to be equal.

7. The emotional ties of the parent and the child: The Court found that factor to favor the father, Davin Howell Lammey , based upon the “Testimony of the children”. (T III:349).

8. The moral fitness of the parents: The Court found both parents to be morally fit and found that factor to be equal.

9. The home, school, and community record of the children: The Court found that this factor favored the father, Appellee, Davin Howell Lammey . The Court finding based upon the testimony of Davin Howell Lammey, and his father (Paternal Grandfather), Cullen Lammey, and the overall view of the case , that this factor favored Appellee, Davin Howell Lammey . He noted “as a general overview of the case all of the above was considered good by all in the DeSoto County” . The Court went on to find “ this factor favors the father because the children have done good in DeSoto County . Church, school, extracurricular activities . Hunting and fishing with friends and family and all other activities were good for the children in DeSoto County.” (T III:349).

10. The preference of the child at the age sufficient to express a preference by law: The Court found that this factor favored the father, Davin Howell Lammey, Appellee, in that the parties' child ,Dean Lammey , had expressed his preference to live with father and having been found to be above the age of 12 years old. (T III:350).

11. The stability of the home environment, and employment of each parent: The Court found that this factor favored the father, Davin Howell Lammey, Appellee. The Court found that he "had lived in this location for many years and maintained the same employment for many years . (T III:350).

The Court in concluding that portion of his opinion found after considering the *Albright* Factors and " noting *Riley v Dorner*, 677 So2d 740 (Miss. 1996). That the "Polestar Consideration " being the best interest of the minor children. The Court went on to find "that in the best interest of these two boys is served by placing the primary custody with their father, Davin Howell Lammey, Appellee.(T III: 350).

SUMMARY OF THE ARGUMENT

The argument of Appellant, Sandra K. Lammey (Connelly), is summarized as follows:

ISSUE I: The Chancellor erred in his findings that there had been a material and substantial change in circumstances of the parties that adversely affected the best interest and welfare of the minor children prior to analyzing whether a change of custody was warranted.

The Chancellor did not define the specific material change which had an adverse impact upon the children . The Opinion of the Court does specifically identify the material change. Other than the fact that the Appellant, Sandra K. Lammey (Connelly), moved with the children to Las Vegas, Nevada , her home town, for purposes of employment and to be near to her parents who were in failing health. The parties' children were unhappy about the move. The Court erred in finding these facts alone to be a material change in circumstances adverse to the best interest and welfare of the parties' children. (CP II:185-203; RE 14-32).

“When considering a modification of child custody , the proper approach is to first identify the specific change in circumstances , and then to analyze and apply the Albright factors in light of that charge. Where there is no specific identification of the alleged change in circumstances, this Court is placed in the position of attempting to guess what the chancellor determined was a proper basis for change in custody.”

Sturgis v Sturgis, 792 So2d 1020, 1025 (Miss. Ct. App. 2001).

The Appellant argues that there were no “Substantial and Material Changes” that were adverse to the best interest and welfare of the parties' children which trigger the basis for modification of child custody presented by the Appellee, Davin Howell Lammey.

ISSUE II: The evidence does not support the Chancellor’s finding that the best interests of the minor children would best be served a change in custody.

The Chancellor improperly applied the *Albright* factors in finding that the custody of the parties' minor children should be modified and changed from the Appellant, Sandra K. Lammey (Connelly), to the Appellee, Davin Howell Lammey .

The Court completely ignored the evidence that the Appellee, Davin Howell Lammey, and the paternal grandfather, Cullen Lammey. In violation of the Court's prior order prohibiting same did call on countless occasions and discuss the case with the children, spoke despairingly about the Appellant , Sandra K. Lammey (Connelly) to the children, wrote them all for the express purposes of alienating the children against the Appellant, Sandra K. Lammey (Connelly)

That the Court found Davin Howell Lammey in contempt of Court for his violation of the Court's order prohibiting such action on the part of either party, but failed to take that factor into consideration when the Court applied the *Albright* factors in the award of custody of the children unto the Appellee, Davin Howell Lammey .

"The Burden of proof is on the Movant to show by a preponderance of the evidence that a material change of circumstances has occurred in the marital home." *Johnson v Gray*, 859 So2d 1006, 1014 (Miss. 2003).

The Chancellor has applied an inappropriate legal stand and has abused his discretion. *Cavett v Cavett*, 744 So2d 372 (Miss. Ct. App. 1999).

ARGUMENT

A. STANDARD OF REVIEW

The standard of review is well settled in that the Chancellor's findings will not be disturbed when supported by substantial evidence, unless the Chancellor abused his discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard. *Williams v. Williams*, 656 So2d 325, 330 (Miss. 1995).

B. ISSUE I: The Chancellor erred in his findings that there had been a material and substantial change in circumstances of the parties that adversely affected the Best Interest and welfare of the minor children prior to analyzing whether a change of custody was warranted.

The Law

For a moving party to obtain a change in custody "the moving party must prove by a preponderance of the evidence that since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child. Second, if such an adverse change has been shown, the moving party must show by the like evidence that the best interest of the child requires the change of custody." *Ash v. Ash*, 622 So.2d 1264, 1265 (Miss.1993) (quoting *Pace v. Owens*, 511 So.2d 489, 490 (Miss.1987)).

For the Chancellor's ruling on modification of child custody it must be supported by substantial evidence in the record *Weigand v. Houghton*, 730 So.2d 581 (Miss.1999).

Argument

The Chancellor found that Davin and his father, Cullen Lammey, for both of them making despairing remarks about Sandy over the telephone and otherwise to the children and ordered the payment of one thousand five hundred dollars (\$1,500.00) to Sandy. The Chancellor also found that Sandy was not in contempt of the Court's prior orders.

The Chancellor was cognizant of the fact that the Court before modifying child custody must find that the moving party has shown that there has been a material change in circumstances, which adversely affects the welfare of the child and that the best interest of the child requires a change in custody. Citing *Brocato v Brocato*, 731 So2d 1138, 1141 (Miss. 1999), quoting *Smith v Jones*, 654 So2d 080, 486 (Miss. 1995) . (T III: 342).

The Chancellor in his opinion found that Sandy had moved from the 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. The Court in its opinion that to move to another location by the custodial parent in and of itself is a material change, but not necessarily adverse. (T III:344).

The Court then went on to rely substantially upon the testimony of Dr. L. D. Hutt, a psychologist employed by the father, Davin. He referred to the report as Exhibit 2 as to psychological evaluation, findings and conclusions.

Now what exactly did Dr. Hutt find and testify to at the trial can be summarized as follows :

A. That the children were unhappy about having moved to Las Vegas, Nevada, leaving their home, friends, school in Hernando. In particular, Dr. Hutt testified about his interview with Dean H. Lammey, whom he said was "Traumatized" by his move to Nevada and wanted to return to the Hernando area to live with his father and the things that he had left. That he did not like Las Vegas. That in reference to the school environment he testified that both boys expressed indifference in the Las Vegas Schools. Dr. Hutt testified that the secrecy of the move by the mother had adversely affected the children.

B. That the mother's interference between the children and the Lammey Family had adversely affected the children.

The Court went on to note that the children's grades have dropped but not a "whole lot" and the children "don't have regular contact with their paternal grandfather, Cullen Lammey." *He called W to court*

The Court finding from the "totality of the circumstances" that it was of the opinion a substantial material change in circumstances which adversely the welfare of the children.

The move apparently was the change in circumstances of the parties, had Sandy chosen to remain in Hernando, would there have been a substantial change in the parties? The evidence is clearly shown at the trial that Las Vegas, Nevada was Sandy's home, and that the children's maternal grandparents lived there, and she went there for suitable employment and to be near her family with the children. That she had made her intent known before she moved to Davin that she was planning on moving there with the children there. This is undisputed in the evidence presented at trial. The fact that custodial parent, by taking children to a distant state, will effectively curtail noncustodial parent's visitation rights is irrelevant as to the question of which parent should have permanent custody. *Spain v. Holland*, 483 So.2d 318 (Miss. 1986). Also, the move in itself should not be the basis for modification of child custody. *Brocato v. Walker*, 220 So.2d 340 (Miss. 1969) ; *Pearson v. Pearson*, 458 So.2d 711 (Miss .1984) .

How was the move in and of itself detrimental or adverse to the best interest of the children? According to Dr. Hutt , the children were sad about moving. Which is submitted that this is a common occurrence when parents even when not divorced with their children on the part of the children to another state. The children's grades fell slightly. Again when a child changes school it is not uncommon for their grades to fall slightly until they become use to the new school system . The children were traumatized by the move, which is not consistent with the

evidence at trial regarding their grades and activities at the Nevada School . That Sandy constantly interfered with the visitation of the children with the Lammey Family. The evidence at the trial clearly revealed that Sandy did not interfere with the visitation of the children with the Lammey Family. In fact the evidence revealed that Davin Lammey and his father were the ones who did not visit one time to Las Vegas , Nevada in over a year to see the children. They were the ones who violated the Court order by the disparaging remarks over the phone and letters to the children and were cited for contempt. Dr. Hutt made no mention of the action on the part of Davin and his father with the children. Further the mother, Sandy, testified that she had told the children about her move. The testimony also revealed that the parties' child , Dean Lammey, was an honor student in classes in Las Vegas. That the children were involved in extra curricular activities in the Las Vegas and are doing well as documented in the record.

Was there a change? Sure, it was. Was it substantial? Yes, any time one relocates to another state it is a substantial change. Was the change in and of itself adverse to the best interest and welfare of the parties' minor children? No, the children just experienced the same problems in any split or divorced family where the custodial parent moves to another state.

Dr. Hutt nowhere in his testimony gave any opinion that the either child was suffering from some kind of mental disorder, attributed to the move or to Sandy 's actions.

The evidence presented at the trial clearly fails to meet the burden of proof by a preponderance of material and substantial evidence of a material and substantial change in circumstances of the parties that is adverse to the best interest and welfare of the parties' minor children. *Thompson v. Thompson*, 799 So. 2d 919, 922(Miss. Ct. App. 2001) (citing *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997)).

All courts must be consistent, diligent, and focused upon the requirement that "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change." *Morrow v. Morrow*, 591 So. 2d 829, 833 (Miss. 1991). See also *Ballard*, 434 So. 2d at 1360. ("It is only that behavior of a parent which clearly poses or causes danger to the mental or emotional well-being of a child (whether such behavior is immoral or not), which is sufficient basis to seriously consider the drastic legal action of changing custody.").

C. ISSUE II: The evidence does not support the Chancellor's finding that the best interests of the minor children would best be served a change in custody.

THE LAW

If a material change has occurred, then the Chancellor will make a separate assessment to determine if the change is adverse to the child. Then, if there is a finding of adverse material change in circumstances, the Chancellor may determine whether the best interest of the child requires a change in custody. *Thompson v. Thompson*, 799 So. 2d 919, 922 (¶8) (Miss. Ct. App. 2001) (citing *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997)). (citing *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984). If the chancellor reaches the best interest of the child analysis under the above prerequisites, he is then required to make on-the-record findings for each of the *Albright* factors. *Sturgis v. Sturgis*, 792 So. 2d 1020, 1025 (¶21) (Miss. Ct. App. 2001) (citing *Powell v. Ayers*, 792 So. 2d 240, 249 (¶33) (Miss. 2001).

Argument

The Chancellor having found there was a material and substantial change in circumstances adverse to the best interest of the children, then made an on the record finding on each of the *Albright* Factors.

1. Health ,Sex and Age of the children: The Chancellor found for Davin, the father due to the fact that both children were male, and about growing up and hunting by the parties son, Dean.

2. The continuity of care of the children, this factor favored Sandy, the mother.

3. Which parent has the best parenting skill- this factor was found to be equal by the Court , although the testimony at trial clearly showed that Sandy 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. This factor should have clearly favored Sandy based upon the evidence adduced at the trial .

4. The parent has the willingness and capacity to provide primary child care- this factor to be equal as to both parties .

5. The employment of the parent and the responsibilities of that employment- The Court found that this factor favored Sandy, the mother.

6. The physical and mental health of the parents- the Chancellor found both equal .

7. The age of the respective parents - The Chancellor did not consider this factor in his opinion.

8. The existing emotional ties between the child and the respective parents- The Chancellor held that this factor favored Davin, the father, “based on the testimony of the children”. The Chancellor was clearly in error, in that the parties 'youngest child, Matthew C Lammey, a male child age 9, never testified. At most the Court had before it was the hearsay interview of Dr. Hutt of his interview on one occasion of the child.

9. The moral fitness of the respective parents- The Chancellor found both parents to be morally fit.

10. The home, school and community record of the child- The Chancellor found this factor favored Davin, the father. The Chancellor based this on the "Testimony of the children, Davin and his father, Cullen Lammey." and a general overall view considered "good" in DeSoto County. The fact while in DeSoto County they did good in school, involved in church and other activities, hunting and fishing . The Chancellor again was in error in stating that based upon the testimony of the children. the parties' youngest child, Matthew C. Lammey, a male child age 9, never testified. The court completely ignored the evidence at the trial of the children during the one year period that they were with Sandy and her parents in Las Vegas, Nevada. The Court failed to consider that the evidence adduced at trial revealed that all the activities so testified occurred when Sandy and the children lived in Hernando, before she moved. The fact that not one time for over a year did Davin or his father, Cullen Lammey, ever visit the children in Las Vegas , Nevada.

11. The preference and desire of the child when he is above the age of 12- The Court found that the eldest child, Dean H. Lammey , over the age of 12 and indicated a preference to live with Davin, his father. However, that alone is not sufficient to modify custody of one child let alone two. Miss. Code Ann Section 93-11-65 was revised in 2006 effective July 2006, which was prior to the trial in August 2006. The statute now reads that if the court shall find the two parties fit and proper, then a child twelve years of age or older may have his parental preference for custody taken into consideration by the Chancellor. However, the trial court is not required to follow the child's stated preference. *D.A.P. v. C.A.P.R.*, 918 So. 2d 809, 824 (¶62) (Miss. Ct. App. 2005). *D.A.P.* notes Mississippi case law does not support the contention that a child's preference to live with the non-custodial parent, standing alone, will satisfy the material

change of circumstance requirement. *Id.* Further, the child's preference is but one factor in considering the ultimate issue of what is in the best interest of the child. *Brown v. Brown*, 764 So. 2d 502, 505 (¶8) (Miss. Ct. App. 2000) (citing *Westbrook v. Oglesbee*, 606 So. 2d 1142, 1147 (Miss. 1992)).

12. The stability of home environment of each parent and stability of employment of each parent- The Chancellor found that this factor favored Davin , the father. The Court finding that he had lived in the same location for many years, and maintained the same employment. There was not evidence whatsoever that the home environment of Sandy was detrimental to either of the children. In fact, the Chancellor relied upon geographical location and continuity of employment.

12. The other factors relevant to the parent-child relationship- The Chancellor did not address this issue, which we contend is a fatal error in the application of the *Albright* factors in determining the best interest and welfare of the children.

The Chancellor saw it but failed to use it. A Temporary Order was entered on September 22nd, 2005 , concerning visitation, etc. of the children and the parties from Las Vegas, Nevada. (CP I : 67-69). It contained the following prohibited behavior on the part of each party:

"IT IS FURTHER ORDERED, ADJUDGED AND DECREED that neither party shall make derogatory remarks to the children concerning the other party in any form of communication with the children, be it telephone, letters, e-mails, or any other form of communication or discuss with the children this pending litigation" (emphasis added) (CP I:69).

A Petition to Cite for Contempt was filed by Sandy on October 12, 2005 , against Davin which contained as Exhibits copies of correspondence from Cullen Lamme to the children.

(CP I:70-79). A Second Petition to Cite for Contempt was filed by Sandy on January 25, 2006 against Davin . (CP I:80-85). A Motion to Suspend Telephone Visitation, and a Third Petition to Cite for Contempt was filed by Sandy against Davin on May 9, 2006. (CP I:100-108).

The Contempt citations were heard with the trial in August 2006.

The evidence clearly showed that Davin, the father violated this Order as well as the paternal grand father, Cullen Lammey. Offered as Exhibits were the recorded telephone conversations between Davin and the children , as well as letters written by Cullen to the children. (Exhibit 12: Tape 1 and Tape 2).

The Expert Witness, Dr. Hutt , was unaware about Davin Lammey talking to the children "countless times" about helping him in Court. (T I:31-32) He was unaware of the restricted telephone visits with the children imposed upon Davin by the Court . (T I: 32-33) He never looked at the school records and report cards (T I:36-39)

Davin Howell Lammey , Davin , admitted under cross examination admitted he talked to the children about moving back to Mississippi , and only admitted same after being confronted with tape recordings of the conversations between him and the children over the telephone. (T I: 67-70). Davin admitted seeing the letters written by the paternal grandfather to the children. (T I : 70-75). That he admitted he never visited his children in Las Vegas. (T I: 75-77).

Cullen Lammey , the paternal grandfather, identified the letters and notes sent by him to the grandchildren in Las Vegas , admitting that he told them about "lowlife's in Las Vegas." Telling the children that they belong with their father, Davin . Other derogatory remarks and matters concerning the case were sent to the children by him. (T I : 110-121).

Sandra K.Lammey (Connelly) , Sandy, testified about the effect that the telephone calls , letters and other derogatory remarks made about her to the children by Davin and Cullen had on the children, and upset them. (T II: 247-255).

It is submitted that the Court totally ignored these factors in the Opinion. There can be no doubt that Sandra K.Lammey (Connelly) was blameless and clearly followed the Court Order which was for the best interest and welfare of the parties' children. By the same token, Davin Howell Lammey, the father; and Cullen Lammey, the paternal grandfather, totally ignored the Court Order and violated same repeatedly, which clearly not in the best interest and welfare of the parties 'children. The Court finding him in contempt, but did not consider this factor in the application of the *Albright* Factors in awarding custody of the children to Davin Howell Lammey, the father and wrong doer, who did not have the best interest and welfare of his children first in his priorities.

CONCLUSION

Davin Howell Lammey failed to prove a material and substantial change in circumstances having an adverse effect on the children. The Court failed to apply all the *Albright* factors and erroneously concluded that the best interest and welfare of the parties' children would be served by a change of custody from Sandra K.Lammey (Connelly) to Davin Howell Lammey .

Therefore, Sandra K.Lammey (Connelly) requests that the Judgment of the Chancery Court of DeSoto County, Mississippi, modifying custody of the minor children be reversed and rendered.

Respectfully submitted,



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(Connelly)

(X)

CERTIFICATE OF SERVICE

I, H.R. Garner, attorney for Appellant, Sandra K. Lammey (Connelly), certify that I have this day served a copy of this Appellant's Brief by United States Mail, postage prepaid on the following persons at these addresses:

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This the 5th day of September, 2007.



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