RACHEL DRISKELL PORTER (SPIVEY) — APPELLANT

VS — NO. 2006-CA-015952

TIMOTHY WADE PORTER — APPELLEE

APPEAL FROM THE CHANCERY COURT OF MADISON COUNTY

BRIEF FOR APPELLEE

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VS CASE NO. 2006-CA-01592

TIMOTHY WADE PORTER APPELLEE

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 this Court may evaluate possible disqualification or recusal.

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

SO CERTIFIED this the 22 day of October, 2007.

William Wright

WILLIAM R. WRIGHT

STATE STATUTES

STATE RULES

(1) Whether the chancellor's failure to recuse himself was reversible error because he did not apply an objective, reasonable-person standard.

(2) Whether the chancellor placed a burden of proof on Rachel, the joint custodian assigned "primary physical custody" under the parties' 2000 divorce agreement, to show that she had a right to relocate with the Porter children.

(3) Whether the chancellor applied the wrong legal standard for modification of joint custody.

(4) Whether the chancellor committed manifest error by finding Rachel's move to Memphis made joint custody impractical.

(5) Whether the chancellor committed manifest error by denying Rachel relief from judgment.

(6) Whether the chancellor improperly awarded Tim child support.

(7) Whether the chancellor erred by failing to state reasons for rejecting the guardian ad litem's recommendations.

Madison County Chancery Court Judge William Lutz granted Tim Porter ("Tim") and Rachel Porter Spivey ("Rachel") an irreconcilable differences divorce on October 4, 2000. Judge Lutz incorporated the parties' Child Custody, Child Support and Property Settlement Agreement into the *Final Judgment of Divorce*.

Under the Agreement, Tim and Rachel committed to share joint physical and joint legal custody of their children from the marriage: Madeline, Harrison, and Carlisle.

The parties contractual definition of "joint physical custody" mimicked MISS. CODE ANN. § 93-5-24(5)(c). Joint physical custody meant "each of the parents shall have significant periods of physical custody and it shall be shared by the parents in such a way as to assure a child frequent and continuing contact with both parents".[1] (RE. 000019).

In December of 2005, joint custody became impractical when Rachel's husband, Dan Spivey ("Dan"), accepted employment in Memphis, Tennessee, approximately two hundred miles from the parties' residences. This was Dan's fourth job in four years. He moved to Memphis in January of 2006, while Rachel planned to relocate with the three Porter children at the end of the school year.

As part of her relocation planning, on February 28, 2006, Rachel petitioned Judge Lutz to modify Tim's periods of physical custody. Specifically, Rachel testified that it would not be practical for the children to spend weeknights with Tim once they lived in Memphis. (T. 240-41).

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[1]During the custody modification proceedings, Judge Lutz made a fact-finding that Rachel and Tim shared joint physical custody. He further found that the Porter children spent "approximately fifty percent (50%) of the time with each parent". (RE. 000559).

physical custody" to her, she had a right to relocate with the Porter children, despite the fact the parties shared joint physical and legal custody.

Mrs. Spivey's premise was fatally flawed. The Agreement did not define "primary physical custody".[2] By contrast, it specifically prohibited either party from relocating without legal consequence: Under Section XIX, the parties agreed that "[i]n the event either part[y] moves from the Jackson Metropolitan area, that move shall constitute a material change in circumstances".[3] (RE. 000024).

On April 19, 2006, in response to Rachel's petition to modify, Tim counter-petitioned for sole physical custody.

The parties appeared before Judge Lutz for trial on June 12 and 13, 2006. Judge Lutz issued his *Opinion* on July 11, 2006. The chancellor found the relocation to Memphis to be a material change in circumstances, adverse to the minor children because joint custody was no longer practical. Finding an adverse material change, the chancellor conducted an *Albright* analysis.

Under *Albright*, Judge Lutz found the children's best interests served by awarding sole physical custody to Tim. All other factors being equal, Tim exhibited better parenting skills; had a better home, school and community record; had more stable home and employment; and, under

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[2]The appellant admits the Agreement did not define the term. (Appellant Brief 4).

[3]In *McSwain v. McSwain*, 943 So. 2d 1288, 1290 (Miss. 2006) (quoting *Rush v. Rush*, 932 So. 2d 794, 797 (Miss. 2006)), the Court ruled, "Although it is a phrase commonly used by lawyers and judges, there is no provision under MISS. CODE ANN. § 93-5-24 for 'primary' physical custody". In the light of *McSwain* and *Rush*, Rachel can not effectively argue a valid legal meaning for the term, "primary physical custody".

the factors favored Tim. Tim received physical custody of the Porter children.

On August 8, 2006, exactly four weeks after the entrance of *Final Judgment*, Dan Spivey lost his Memphis job.

On August 30, 2006, Rachel filed a *Motion for Relief from Judgment* based on the fact that Dan lost his job and the need to relocate no longer existed. At the September 7, 2006, Rule 60(b) hearing, the chancellor gave six reasons for keeping the minor children in Tim's custody: (1) based upon the judge's *Albright* analysis, Tim should be the custodial parent; (2) the termination of Dan's job does not change the fact that Tim should be the custodial parent; (3) Dan and Rachel would move again, if a job opportunity presented itself to Dan; (4) joint custody worked in the past because Tim and Rachel put the children's interests first; (5) Dan and Rachel have placed an emphasis on Dan's employment; (6) following the litigation initiated by Rachel, Tim and Rachel no longer get along well enough to maintain successful joint custody. (T. 675-82). On September 13, 2006, the trial court denied Rachel's *Motion*.

On September 15, 2006, Rachel filed her *Notice of Appeal*.

On appeal, Mrs. Spivey argues the following: The chancellor's failure to recuse himself was reversible error because he did not apply an objective recusal standard; the chancellor placed a burden of proof on Rachel, the joint custodian assigned "primary physical custody", to show that she had a right to relocate with the Porter children; the chancellor applied the wrong legal standard for modification of joint custody; the chancellor committed manifest error by finding Rachel's relocation made joint custody impractical; the chancellor committed manifest error by denying Rachel relief

Each of these arguments is without merit. Specifically, the chancellor properly denied Rachel's recusal motion; as a joint custodian, Rachel had no right to relocate and was under no burden to prove otherwise; the chancellor applied the proper standard for joint custodians; the chancellor properly found a joint custodian's move to Memphis, Tennessee, from the Jackson, Mississippi, area makes continued joint custody impractical; the chancellor properly denied Rachel relief from judgment; as sole custodian under the *Final Judgment*, Tim was entitled to an award of child support; and no law supports the appellant's contention that the chancellor was under a duty to give reasons for rejecting the guardian ad litem's recommendations.

B. Course of Proceedings Below and Statement of Facts

Tim Porter and Rachel Driskell married on May 23, 1992. Madison County Chancery Court Judge William Lutz granted Tim and Rachel Porter a divorce on irreconcilable differences grounds on October 4, 2000.

Under the parties' Agreement, incorporated into the *Final Judgment of Divorce*, Tim and Rachel agreed to share joint physical and joint legal custody of the Porter children: Madeline Adelle ("Madeline"), a female born August 9, 1995; Harrison Scott ("Harrison"), a male born April 20, 1997; and Carlisle Grady ("Carlisle"), a male born May 1, 2000.

In the Agreement, the parties defined "joint physical custody" and "joint legal custody" according to the MISS. CODE ANN. § 93-5-24(5) definitions. The Agreement described "joint physical custody" as "significant periods of physical custody . . . shared by the parents in such a way as to assure a child frequent and continuing contact with both parents". (RE. 000019). The

The Agreement did not define "primary physical custody". What was defined was that "a move outside of the Jackson area" by either joint custodian would amount to "a material change in circumstances". (RE. 000024).

From October of 2000 to July of 2006, Tim and Rachel shared joint legal and physical custody. (RE. 000019-24, 000555). Tim and Rachel both handled the duties of care that come with full-time parenting, such as fixing meals, getting the children ready for bed, providing emotional support, instructing the children, taking care of the children during illnesses. (T. 476-83). With a farm only thirty minutes from Jackson, Tim also had – and continues to have – the opportunity to teach the children how to fish, garden, and enjoy outdoor life. (T. 435, 509-10).

Based on actual time spent with the children, including time above overnight custodial periods, Judge Lutz found that the children spent "approximately fifty percent (50%) of the time with each parent". (RE. 000559). As the judge found, "Tim regularly attends the children's extracurricular activities including sports practices and games. While the children may only spend the night at his house during his 'regularly scheduled visitation' it is obvious these children have almost daily interaction with their father. These parties have exercised true joint physical custody". (RE. 000555).

Rachel and Tim are also fortunate to have a large extended family. Tim has a brother with three children in Brookhaven. (T. 260). Rachel has two sisters living in Jackson and one brother living in Brookhaven with three children. (T. 260-61). Madeline, Harrison, and Carlisle visit their

Six months after the divorce was granted, Rachel married Dan Spivey. On November 28, 2001, Rachel gave birth to her fourth child, Lydia Spivey. Rachel's fifth child, Barnabus Spivey, was born in 2003.

In November of 2004, Tim married Samantha Thomas ("Samantha"). Samantha has sole physical custody of Savannah Thomas, her daughter from a previous marriage. (T. 578-79). Savannah and Madeline are only a year apart in school and very close. (T. 568-71). Rachel testified that Madeline and Savannah were good friends. (T. 263).

During her marriage to Tim, Samantha has placed the needs of the children first. Samantha respects her role as the Porter children's stepparent; she does not try to overstep that boundary. (T. 573).

The children love Samantha. (T. 463) In an illustrative chart of her family, Madeline referred to Samantha as her "hero". (T. 285). Samantha and the Porter boys, Harrison and Carlisle, are also very close. Samantha tucks them in at night and participates in their afternoon activities, such as kickball, golf, and swimming. (T. 567-68).

By contrast, Dan has not respected his role as a stepparent. He has spanked the children, even after Tim asked him to leave corporal punishment to the parents. (T. 455). Not long after Rachel and Dan married, Dan became confrontational with Tim, yelling at him and attacking him personally. (T. 455-65).

Dan has become excessively angry in public as well. At trial, Dan admitted to being thrown out of a soccer game for yelling at a teenage referee over one of her calls. (T. 390-91). Dan also

Dan's confrontational attitude has influenced Rachel's behavior toward Tim. Rachel avoids speaking to Tim in front of the children. (T. 464).

In his *Opinion*, Judge Lutz wrote, "The Court is convinced that Dan is intense, direct and can cause fear in the children with his demeanor". (RE. 000566). He further noted, "Dan labeled himself as the 'head of the household', and he expects his other family members to be subservient to him". (RE. 000566).

Concerning parenting skills, Judge Lutz found, "Dan tends to undermine Tim's role as the children's father. The Court is convinced that Rachel does little, if anything, to deter Dan's behavior". (RE. 000562).

In March of 2005, Dan, working at the time as a self-employed stock analyst, began doing limited consulting work for Wellspring Management, a Memphis financial investment firm. (T. 78, 90). The company was run by George White. At trial, Mr. White testified Dan was one of maybe ten people in the world who could engage in a specialized form of stock analysis. (T. 75, 84, 88).

On May 10, 2005, Rachel filed a petition before Judge Lutz to end Tim's weekday time with the children. Rachel wrote, "It would be in the children's best interest for the court to scrap the entire visitation schedule and institute a visitation schedule that is consistent with the visitation schedules that the court has expressed approval of in similar cases. Such a visitation schedule would

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[4]Dan has been diagnosed with Obsessive Compulsive Disorder (OCD). (T. 302). He was taking prescribed psychiatric medication at the time of trial. (T. 415).

On December 22, 2005, while Rachel's May 10, 2005, request to end Tim's weekday custodial periods was pending, Wellspring Management offered Dan a full-time job. (T. 256, 392). The Memphis firm, in existence since 2004, made the offer conditional upon Dan moving to Memphis. (T. 80, 95, 254).

Shortly after Christmas, Dan and Rachel took the Porter children to Memphis to look at the area and consider the offer. (T. 392). Rachel and Dan did not tell Tim about the Memphis offer, or the Christmas trip to Memphis with the children.

Without consulting Tim, Rachel and Dan decided to relocate to Memphis with the Porter children. (T. 269, 393). This was to be Dan's fourth job in four years. (T. 243-44, 427).

While requiring Dan to relocate, the financial firm offered Dan no job security or guaranteed severance. (T. 89-92, 394). Nevertheless, Dan planned to move the Porter children into a million dollar Memphis home and "hope for the best". (T. 396-97). As the chancellor noted in his *Opinion*, "Dan's employer testified that Dan is terminable at will and would not be entitled to a severance package. The company/entity for which Dan works is only two (2) years old". (RE. 000566).

Again, without consulting Tim, in January of 2006, Rachel filed an application to enroll Madeline in Memphis-based Hutchison School. (T. 272-73). She applied to enroll Harrison in Memphis-based Presbyterian Day School. (T. 275). As joint legal custodians, Tim and Rachel were obligated by law to make choices about school decisions together.

Even more shocking, On Madeline's application, Rachel listed Dan Spivey as the "father/guardian". (T. 272-73). She left the children's full-time, joint custodial father completely

the application, Rachel stated, I didn't tell the schools Tim Porter was the father because "I didn't want [the schools] to call [Tim] and he to find out that way". (T. 275). While Rachel was busy enrolling the children in Memphis schools, Tim remained completely out of the loop. This was a total disregard of Tim's role as a joint custodial father.

Rachel called Tim at the end of January to notify him that she would be moving to Memphis with his children. Tim immediately filed for a restraining order to prevent the children from visiting Memphis and to prevent Rachel from discussing relocation with them. Attached to Tim's motion for emergency relief was his affidavit stating the following: after learning of the move to Memphis on January 22, 2005, Tim learned that Rachel had taken the children to Memphis to get them involved in the community, Rachel told the children they would be moving to Memphis and would be having "going away" parties, the children were promised cell phones if they agreed to move to Memphis, and the children were told that they would spend the same amount of time with their father after the move. (RE. 000287).

Realizing the current joint custody schedule could not work once the Spiveys moved to Memphis, Rachel filed her February 28, 2006, *Petition to Modify Defendant's Periods of Physical Custody*, due to her impending relocation with Dan to Memphis. (RE. 000296). On April 19, 2006, Tim filed a *Counter-Petition for Modification of Physical Custody* seeking sole physical custody. (RE. 000412).

Chancery Court District 11. (RE. 000367). The motion was denied on May 2, 2006. (RE. 000453).

Even after the chancellor made a joint custody fact-finding, Rachel continued to assume the Porter children would relocate with her. Her attorney's opening statement at trial encapsulated this attitude: "Tim is a great father. There is no questioning that. Tim loves his children. Tim wishes that he did not have to spend less time with his children because they're moving with their mother, but that is just the way it is". (T. 54).

At trial, Rachel stated that she did not believe moving the Porter children roughly two hundred miles from their homes would be adverse to the children's best interests. Instead, Rachel contended such a move would be merely "sad for them". (T. 257-58). She also acknowledged that her husband Dan testified that but for a good job in Memphis, he never would have left Jackson. (T. 269). When asked if this was a "money move", Rachel replied, "Well, that is how it started". (T. 269).

At trial, Rachel affirmed that she would move to Memphis even if Tim was awarded sole custody, that she and Dan had sold her house in Jackson, and that the couple had purchased a home in Memphis. (T. 287, 599-600). When asked if she would travel from Memphis and exercise weekday visitation in Jackson in the event that Tim was awarded custody, Rachel stated, "You know, I wouldn't . . . I wouldn't be able to do it". (T. 294). Later she clarified, "I mean, what I'm trying to say is I can't be a full time Mom in Memphis and in Jackson". (T. 296).

Tim contended at trial that Dan and Rachel's move to Memphis – a move to allow Dan to work as a specialized stock analyst at a firm that had been in business only two years – was an

children and moving them to out of a – into a strange environment where he is not guaranteed job success". (T. 460).

Following the two-day custody modification hearing, Judge Lutz issued his *Opinion*. The chancellor found that Rachel's move, as a result of Dan's new job, constituted a material change in circumstances. The material change was adverse because continued joint custody would no longer be practical. The judge therefore, as required by law, conducted an *Albright* analysis to determine how custody should be modified to serve the best interests of the Porter children. (RE. 000554).

Other factors being neutral, the court found that Tim exhibited better parenting skills[5]; was strongly favored in the home, school and community record category; was favored in the stability of home and employment factor[6]; and was favored in the category referred to as "any other factors relevant to the parent-child relationship".[7]

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[5]Concerning parenting skills, Judge Lutz wrote, "Dan tends to undermine Tim's role as the children's father. The Court is convinced that Rachel does little, if anything, to deter Dan's behavior". (RE. 000562).

[6]"The Court is convinced that Dan is intense, direct and can cause fear in the children with his demeanor", found Judge Lutz. "Dan labeled himself as the 'head of the household', and he expects his other family members to be subservient to him". (RE. 000566). Moreover, the judge found that there was instability in Dan's work life: "Dan's employer testified that Dan is terminable at will and would not be entitled to a severance package. The company/entity for which Dan works is only two (2) years old". (RE. 000566).

Dan was terminated from this job four weeks after the chancellor entered the judgment.

[7]The chancellor opined, "The Court is convinced that the best interests of these children requires them to stay among the community, extended family, familiar surroundings and constants. . . ." (RE. 000567-68).

Four weeks after the court entered its *Final Judgment*, Dan lost his Wellspring Management job. Rachel filed her motion from relief from judgment on August 30, 2006. (RE. 000733). The motion was denied, following a hearing on the merits, on September 13, 2006. (RE. 000757).

On September 15, 2006, Rachel filed her *Notice of Appeal*.

STANDARD OF REVIEW

An appellate court will not disturb the findings of a chancellor unless the chancellor was "manifestly wrong, clearly erroneous, or an erroneous legal standard was applied". *West v. West*, 891 So. 2d 203, 209 (Miss. 2004).

Legal standards receive de novo examination. *Morgan v. West,* 812 So. 2d 987, 990 (Miss. 2002). Factual findings based on substantial evidence undergo manifest error review. *Id.* An appellate court defers to the factual findings of a chancellor because the trier-of-fact hears the evidence first-hand and is in the best position to evaluate evidence and witness credibility. *Rogers v. Morin,* 791 So. 2d 815, 826 (Miss. 2001).

SUMMARY OF THE ARGUMENT

(1) The appellant's argument that the chancellor ought to have recused himself from the custody modification proceedings because Tim's wife had practiced before Judge Lutz is without merit. Samantha was not a party but a potential witness whom the chancellor referred to as "a stranger". Under *McFarland v. State*, 707 So. 2d 166, 180 (Miss. 1997) and *Dodson v. Singing River Hospital*, 839 So. 2d 530, 533 (Miss. 2003), the chancellor applied the objective, reasonable-person-

(2) Mrs. Spivey's premise that being assigned "primary physical custody" granted her a right to relocate with the Porter children is factually flawed under the parties' Agreement and legally repudiated in *McSwain v. McSwain*, 943 So. 2d 1288, 1290 (Miss. 2006) (quoting *Rush v. Rush*, 932 So. 2d 794, 797 (Miss. 2006)). As joint physical and legal custodians under MISS. CODE ANN. § 93-5-24(5)(c), neither party had a special custodial right, such as a right to relocate with the children. Therefore, the appellant's contention that she was under a burden to prove a right to relocate is without merit. Accordingly, the appellant's argument that Tim should have carried this burden is meritless.

(3) Rachel's argument that the chancellor applied "the wrong legal standard" for modification of joint custody is not supported by Mississippi law. The trial court properly applied the legal standard from *Elliott v. Elliott*, 877 So. 2d 450, 455 (Miss. Ct. App. 2004) (holding move by joint custodial parent was material change adversely affecting children as move made joint custody impractical). The *Spain v. Holland*, 483 So. 2d 318, 320 (Miss. 1986) (holding geographic relocation by custodial parent insufficient to prove adverse affect when only non-custodial parent's visitation altered) is not applicable because Tim and Rachel were joint custodians. *Spain* only applies to situations involving a sole custodial parent and a non-custodial parent.

(4) Rachel's contention that the judge committed manifest error by determining joint custody to be impractical in light of her relocation is not supported by logic or law. The Spiveys were moving roughly two hundred miles away. This would mean that Tim or Rachel would have had to travel 400 miles round trip at least twice a week to see the children. The parties submitted proposals

is I can't be a full time Mom in Memphis and in Jackson". (T. 296). Other chancellors have found similar distances made joint custody impractical.

(5) According to Rachel, Judge Lutz committed manifest error by denying Rachel relief from judgment after Dan lost his Wellspring Management position. At the Rule 60(b) hearing, the trier-of-fact found, among other things, that: (1) after conducting an *Albright* analysis, Tim should be the custodial parent; (2) the termination of Dan's job does not change the fact that Tim should remain the custodial parent; (3) Dan and Rachel would move again, if a job opportunity presented itself to Dan; and (4) due to the litigation initiated by Rachel, Tim and Rachel no longer get along well enough to maintain successful joint custody. The judge properly denied Rachel's motion under *Williamson v. Williamson*, No. 2004-CA-02519-COA, 2007 WL 738760 (Miss. Ct. App. June 19, 2007) (affirming lower court denial of Rule 60(b) motion concerning father's relocation) and *Turner v. Turner*, 824 So. 2d 652 (Miss. Ct. App. 2002) (noting with approval trial court denial of Rule 60(b) motion based upon post-trial fact mother no longer had need to relocate).

(6) The chancellor did not err by modifying child support. Under MISS. CODE ANN. § 93-5-23, a chancellor may modify support upon a change of custody.

(7) No Mississippi case or statute supports Rachel's argument that the chancellor was in error when he did not "itemize the recommendations of the guardian ad litem in his *Opinion* and [*] state the reasons in his findings of fact and conclusions of law for not adopting the Guardian's recommendation". (Appellant Brief 49). Where a chancellor is not required to appoint a guardian ad litem by statute, the chancellor has no duty to defer to the guardian's findings. *Passmore v.*

recommendation).

ARGUMENT

I. Whether the chancellor's failure to recuse himself was reversible error.

A few months before the custody modification hearing, Rachel asked Judge Lutz to recuse himself.[8] Mrs. Spivey urged the court to stretch an unwritten rule, cited in *Robinson v. Irwin*, 546 So. 2d 683, 685 (Miss. 1989), encouraging chancellors "not [to] hear the personal divorce suit of lawyers who routinely practice before their Court" to include the following: Chancellors should also not hear the modification cases of the *spouses* of lawyers who have practiced before them in the past.[9] (RE. 000418-19).

Specifically, Rachel argued that the chancellor ought to recuse himself from the custody modification proceedings because Tim's wife since November of 2004, Samantha Thomas, had practiced before Judge Lutz.[10]

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[8]Rachel filed her *Motion for Recusal of the Judges in Chancery Court District 11* on April 13, 2006. (RE. 000367). The appellant filed a *Memorandum Brief in Support of Motion for Recusal* on April 20, 2006. (RE. 000418).

[9]Rachel could not rely on a recusal rule. Instead, she asked to extend the unwritten rule regarding lawyers as parties to include lawyers as witnesses. (RE. 000418-19). Such an extension would suddenly prohibit lawyers from appearing as witnesses. Prohibiting our chancery courts from hearing cases in which lawyers appear as witnesses would be against public policy. A license to practice law does not prohibit a professional from appearing as a witness.

[10]The chancery clerk assigned the incarnations of *Porter v. Porter*, from the 1999 filing date to Rachel's 2006 modification petition, to Judge Lutz. The chancellor was familiar with the case and the parties. Neither Tim nor Rachel was a stranger to the judge, unlike Samantha Thomas.

appellant argued that "[a] judge is required to disqualify himself if a reasonable person, knowing all circumstances, would harbor doubts about his impartiality".[11] (RE. 000419). As the appellant noted in her *Memorandum Brief in Support of Motion for Recusal*, a judge's decision to recuse is discretionary. When making a recusal decision, a trial judge acts with the presumption of impartiality. *See McFarland*, 707 So. 2d at 180 ("presumption exists that the judge, sworn to administer impartial justice, is qualified and unbiased").

Judge Lutz, acting within his discretion, denied Rachel's motion. In the *Order Denying Motion for Recusal*, the chancellor applied the *McFarland* reasonable person standard. (RE. 000453-54). The chancellor stated, based upon his docket review, Samantha Thomas had appeared before him on a handful of ex parte matters. (RE. 000453). He did not recall Tim's wife "ever

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Also, Mrs. Spivey presented her recusal motion seventeen months after Tim married Samantha. After the marriage and before the recusal request, Rachel filed two petitions to modify Tim's custodial periods (RE. 000254, 000296), two agreed orders (RE. 000262, 000295), and a motion to compel (RE. 000275). All matters were assigned to Judge Lutz. Under UNIFORM CHANCERY COURT RULE 1.11, a recusal motion should be "filed with the judge who is the subject of the motion within 30 days following notification to the parties of the name of the judge assigned to the case". Abusing the time limitation has constituted a waiver. *Ryals v. Pigott*, 580 So. 2d 1140, 1175 (Miss. 1991) (holding party failing to reveal recusal reason in timely manner waived right).

[11] The next sentence in *McFarland* reads as follows:

> A presumption exists that the judge, sworn to administer impartial justice, is qualified and unbiased, and where the judge is not disqualified under the constitutional or statutory provisions, the propriety of his or her sitting is a question to be decided by the judge and is subject to review only in case of manifest abuse of discretion.

McFarland, 707 So. 2d at 180 (quotations omitted).

Moreover, the judge clarified Samantha's role in the case. Samantha was not a party but a potential witness. (RE. 000454). Judge Lutz reminded Rachel and Tim that "[t]he only mention of a material witness in the Judicial Code of Ethics is Canon 3(E)(1)(d)(iv), which refers to a judge's family member or relative as a material witness". (RE. 000454). Samantha, a potential witness, was not the chancellor's family member nor his relative. To a reasonable person, it was plain that Canon 3 of the Code of Judicial Conduct did not apply. (RE. 000454).

Out of an abundance of caution and courtesy to the appellant, Judge Lutz reassigned two estate matters on his docket where Samantha served as counsel. (RE. 000454). He took this precaution to ensure Samantha would remain a stranger to him until the custody modification proceedings were resolved. He took this precaution to assure the parties of a continued impartiality.

On appeal, Rachel argues, "By recusing himself in Samantha's other cases, Judge Lutz clearly recognized that his impartiality might be reasonably questioned". (Appellant Brief 26). Further, Rachel contends that the reassignment of two files "magnified the appearance of impropriety". (Appellant Brief 26).

With due respect, the simple reassignment, which Rachel refers to as "procedural gymnastics", was a courtesy Mrs. Spivey now attempts to bend into error. Judge Lutz had no duty to assure Rachel of a continued impartiality. He did Rachel a favor. As Rachel admitted in her

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[12]The Judge's comments are in keeping with Samantha Thomas' affidavit attached to the appellee's *Response to Defendant's Motion for Recusal of the Judges in Chancery Court District 11.* (RE. 000410-11). Samantha stated, "Over a six year period, I have only presented ex parte orders to Judge Lutz on seven different occasions". (RE. 000410). In fact, Samantha admits that she is soon to retire. (CP. 000411).

000419).

Not surprisingly, Rachel now argues Judge Lutz applied an incorrect standard. The appellant contends the chancellor applied a subjective standard instead of the reasonable person standard cited with approval in *Dodson v. Singing River Hospital*, 839 So. 2d 530, 533 (Miss. 2003) (declaring recusal "required when the evidence produces a reasonable doubt as to the judge's impartiality"). Mrs. Spivey wants the appellate court to believe that Judge Lutz "relied on his personal feelings and experiences regarding Samantha" instead of the circumstances surrounding the case. (Appellant Brief 26).

The record does not support her argument. Judge Lutz stated he had no feelings at all about Samantha Thomas; indeed, she was a practical stranger to him. Moreover, Samantha was not a party to the proceedings. Judge Lutz made a reasonable person determination about recusal, then went to the courteous length of informing the parties of the circumstances. (RE. 000453-54).

The appellant cites *Dodson* to support her argument. In *Dodson*, the Mississippi Supreme Court found recusal proper only after evidence that counsel for the defendant-appellee served as treasurer of the trial judge's election campaign, served as an attorney of record in the estate proceedings of the trial judge's mother, and represented the trial judge in a four-year defective residential construction case without charge. *Dodson*, 839 So. 2d at 534. Moreover, the trial judge had recused himself in a separate case after campaign connections came to light. *Id.*

and was not a party to the proceeding does not come close to creating doubt about impartiality.

The chancellor acted within his discretion and under the presumption of impartiality. He applied the proper standard of the reasonable person, knowing all the circumstances. The issue has no merit.

II. Whether the chancellor placed a burden of proof on Rachel, the joint custodian assigned "primary physical custody", to show that she had a right to relocate with the Porter children; the chancellor applied the wrong legal standard for modification of joint custody; the chancellor committed manifest error by finding Rachel's relocation made joint custody impractical.

In Section II of her Argument, the appellant apparently combines Issues #2, #3, and #4 from her Statement of the Issues. The incorporation makes it difficult to address each contention.

Next, Mrs. Spivey bases many of her Section II arguments on the factually flawed and legally repudiated premise that being assigned "primary physical custody" granted her a right to relocate with the Porter children.

To effectively address the issues, the appellee will discuss Rachel's reliance on "primary physical custody", then address burden of proof (Appellant Issue #2), the legal standard for modification of joint custody (Apellant Issue #3), and manifest error (Appellant Issue #4).

A. The Appellant improperly relied and continues to rely on the factually flawed and legally repudiated premise that being assigned "primary physical custody" granted her a right to relocate with the children.

Rachel's contention that having "primary physical custody" under the Child Custody, Child Support and Property Settlement Agreement granted her a right to relocate with the Porter children is wrong factually and wrong legally.

Judge Lutz granted Tim and Rachel an irreconcilable differences divorce, incorporating the parties' Agreement on October 4, 2000. The parties contracted to share joint physical and joint legal custody of the Porter children. (RE. 000019).

The "joint physical custody" definition mimicked MISS. CODE ANN. § 93-5-24(5)(c). Joint physical custody meant "each of the parents shall have significant periods of physical custody and it shall be shared by the parents in such a way as to assure a child frequent and continuing contact with both parents". (RE. 000019).

The proof that Rachel bore no special relocation right is set out in the divorce contract. The Agreement prohibited either party from relocating without legal consequence: Under Section XIX, the parties agreed that "[i]n the event either part[y] moves from the Jackson Metropolitan area, that move shall constitute a material change in circumstances", a provision consistent with a joint custodial arrangement, not a sole custodial arrangement. (RE. 000024).

While Rachel's attorney has, at times, challenged the validity of the parties' pre-July, 2006, joint custody arrangement, Rachel has only consistently argued that she bore a particular right to relocate. In fact, this is why Mrs. Spivey petitioned the chancery court to modify Tim's "periods of physical custody". (RE. 000296). Had Rachel believed she was a sole custodial parent, she would have – improperly – requested a modification of visitation. Moreover, chancellor made a fact-

In his *Opinion*, the trial judge addressed the character of the parties's custody agreement. Judge Lutz wrote,

> The] Child Custody, Child Support and Property Settlement Agreement has been dissected by the[*] attorneys. Specific words were credited with having great meaning. For example, throughout the parties' Child Custody, Child Support and Property Settlement Agreement, the following phrase is used, "returning them *home*" (emphasis added). The Court finds the use of the word "home" when referring to Rachel's residence to have little import. The fact that the word, 'home' was used instead of Rachel's house or Rachel's home does not indicate to the Court that Rachel or Tim's house is any more or any less of a "home" to these children.

(RE. 000555-56). The chancellor continued,

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[13]During a March 2, 2006, pre-trial motion hearing, Judge Lutz stated,

> Now, one thing I think there is a misconception, perhaps, Rachel, on your part. Don't presume these children are going to be moving to Memphis. That is a – that is a – this is a joint custody, unless your lawyers can convince me otherwise. We have never gone through an analysis to determine which parent would be the best for the kids as far as the primary [sole custodial] parent. We haven't gone through that analysis. What y'all gave to me[,] and you did a good job on it[,] [i]t was [a] hard fought, hard negotiated agreement that y'all gave to me and I'm proud of you for it. But I have never gone through what is called an *Albright* analysis to determine what is in the children's best interest. That is what I will be doing in this case. So, it could well be that after this is over that the children will be spending the school year in Memphis and the summer time here. It could just as well be the other way around.

(T. 3-4). Shortly after Judge Lutz made his fact-finding that the Agreement, overseen by Judge Lutz and incorporated into the parties' divorce judgment, granted true joint physical custody, Rachel filed her April 13, 2006, *Motion for Recusal of the Judges in Chancery Court District 11.*

Even after the chancellor specifically found the Agreement to impart joint custody, Rachel continued to assume she could relocate the children. Her attorney's opening statement at trial encapsulated this attitude: "Tim is a great father. There is no questioning that. Tim loves his children. Tim wishes that he did not have to spend less time with his children because they're moving with their mother, but that is just the way it is". (T. 54).

> have exercised joint legal and physical custody since the time of their divorce. Any wording in the parties' Child Custody, Child Support and Property Settlement Agreement, that might lend credence to Rachel's position has been trumped by their actions over the past five (5) years.

(RE. 000556). Therefore, the trial court concluded that since their 2000 divorce, Tim and Rachel "continuously exercised joint legal and physical custody of their children". (RE. 000556).

Second, the law. Legally, Rachel's emphasis on "primary physical custody" cannot stand. The term has been repudiated by the Mississippi Supreme Court.

In *McSwain v. McSwain*, 943 So. 2d 1288, 1290 (Miss. 2006) (quoting *Rush v. Rush*, 932 So. 2d 794, 797 (Miss. 2006)), the Court stated,

> Although it is a phrase commonly used by lawyers and judges, there is no provision under MISS. CODE ANN. § 93-5-24 for "primary" physical custody. That section sets forth the various combinations of physical and legal custody, but with regard to physical custody, it only provides for joint physical custody, and physical custody in one parent or another.

In light of *McSwain* and *Rush*, Rachel can not proclaim a valid legal meaning for the term, "primary physical custody". The appellant can not effectively argue that the term granted a right to relocate with the children. The Court has put these spurious proclamations to rest.

In summary, the parties agreed to joint physical custody, they maintained joint physical custody, and the trial court specifically found the Agreement established joint physical custody.

B. The chancellor did not place a burden of proof on Rachel, the joint custodian assigned "primary physical custody", to show that she had a right to relocate the Porter children.

Mrs. Spivey argues two things about burden of proof. First, she alleges she was burdened with a responsibility to prove "primary physical custody" granted her "the rights that go with it

with the children". (Appellant Brief 30).

The appellant is wrong. Neither party had a burden to prove a right to relocate. As joint custodians, no special right to relocate existed for either party. *See McSwain*, 943 So. 2d at 1290. Thus, once the court made a fact-finding of joint custody, the court did not give weight to the appellant's arguments about a right to relocate.

When parents are joint custodians, one parent's relocation can constitute a material change in circumstances, adverse to the child's best interest, requiring the court to conduct an *Albright* analysis to determine which parent should be awarded sole custody.[15] *See Elliott v. Elliott*, 877 So. 2d 450, 455 (Miss. Ct. App. 2004) (affirming award of sole custody to father following former joint custodial mother's move out-of-state) ; *Rhinehart v. Barnes*, 819 So. 2d 564 (Miss. Ct. App. 2002) (modifying joint custody necessary when father moved from Desoto County, Mississippi, to Cordova, Tennessee); *Massey v. Huggins*, 799 So. 2d 902 (Miss. Ct. App. 2001) (finding joint custody award unworkable after parties moved from same town to different parts of same state).

Following the law of joint custodians, the trial court did not assign a burden of proof to Rachel. As true joint custodians, neither party held any extra right. (RE. 000556). As true joint

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[14]It appears Rachel equates having "primary physical custody" with being the "primary custodial parent". As Judge Lutz stated, that was an incorrect equation: [T]hese parties have exercised joint legal and physical custody since the time of their divorce. Any wording in the parties' Child Custody, Child Support and Property Settlement Agreement, that might lend credence to Rachel's position has been trumped by their actions over the past five (5) years". (RE. 000556).

[15]The Agreement provided, "It would be a material change in circumstances for either one of the parents to move outside of the Jackson area". (RE. 000024).

For this reason, the sole custodial case cited by the appellant, *Mabus v. Mabus*, 847 So. 2d 815 (Miss. 2003) (affirming lower court denial of joint legal custody), is inapplicable. *Mabus* holds that a non-custodial party seeking a change in custody carries the burden of proof. *Mabus* is only relevant in a sole custodial setting. *Mabus*, 847 So. 2d at 820 (citing *McGehee v. Upchurch*, 733 So. 2d 364, 369 (Miss. Ct. App. 1999) ("As the Court of Appeals has correctly held, in a modification hearing, the chancellor will only apply the *Albright* factors after the non-custodial parent has proven a material change in circumstances".)); *see also McCracking v. McCracking*, 776 So. 2d 691, 694 (Miss. Ct. App. 2000) (holding non-custodial father failed to prove change in circumstance detrimental to children's interest). Tim and Rachel were joint custodians. *Mabus* should be ignored.

Under the reasoning above, Rachel's assertion that Tim had a duty to prove Rachel did *not* have a right of relocation is misguided. Tim and Rachel were joint custodians; under *Elliott*, *Rhinehart*, and *Massey* neither party had a burden to prove or disprove a relocation right.

The issue is without merit.

C. The chancellor applied the proper legal standard for modification of joint custody.

The appellant's argument regarding "application of the wrong legal standard" is fairly straightforward. Mrs. Spivey would like this Court to find the chancellor improperly applied the legal standard from *Elliott v. Elliott*, 877 So. 2d 450, 455 (Miss. Ct. App. 2004) (holding move by joint custodial parent was material change adversely affecting children as move made joint custody impractical), when he should have applied the legal standard from *Spain v. Holland*, 483 So. 2d 318,

Here is the *Elliott* standard: Where a joint custodial parent relocates, a judge can find (1) the relocation to be a material change in circumstances that (2) makes the continuation of the joint custodial arrangement impractical and therefore adverse to the children's best interests. *See Elliott*, 877 So. 2d at 455-56. After the trial court has made these findings, the law requires the court to conduct an *Albright* analysis to determine which parent should be awarded sole physical custody.[16] *Id.*; *see also Rhinehart*, 819 So. 2d at 566-67; *Massey*, 799 So. 2d at 906. In prior decisions where a joint custodial parent's relocation made joint custody unworkable, the court modified custody. *Lackey v. Fuller*, 755 So. 2d 1083, 1089 (Miss. 2000); *Riley v. Doerner*, 677 So. 2d 740, 743 (Miss. 1996); *Franklin v. Winter*, 936 So. 2d 429, 431-32 (Miss. Ct. App. 2006); *McRee v. McRee*, 723 So. 2d 1217, 1219 (Miss. Ct. App. 1998).

Here is the *Spain* standard: Relocation *by a custodial parent* is insufficient to meet the burden of proving adverse affect when a non-custodial parent's visitation is altered. The *Spain* court applied the modification test for one custodial parent and one non-custodial parent. *Spain*, 483 So. 2d at 320 ("[W]e recognize today that a custodial parent's taking his or her children to a foreign nation does not *per se* visit an adverse impact upon the children so as to require a change of custody to the parent remaining stateside".).

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[16]The *Elliott* test is an adaption of the *Sanford v. Arinder*, 800 So. 2d 1267, 1272 (Miss. Ct. App. 2001) modification test for a non-custodial parent. In *Sanford*, the non-custodial parent must show (1) a substantial change in the circumstances of the custodial parent since the original custody decree and (2) the substantial change's adverse impact on the welfare of the child. *Id.* Once the movant has established these two elements, the trial court will conduct an *Albright* analysis to determine the necessity of custody modification for the best interest of the child . *Id.*

modification of child custody, those cases involved visitation" of a non-custodial parent. *Elliott*, 877 So. 2d at 455 (affirming relocation of joint custodian is sufficient to prove adverse affect because it makes joint custody impractical or impossible).

Upon review of *Elliott* and *Spain*, the chancellor applied the proper modification test for Tim and Rachel, two joint custodial parents faced with the hard reality of relocation. Rachel's contention that the trial judge applied the wrong legal standard is meritless.

D. The chancellor was not manifestly wrong in concluding joint custody was impractical.

Mrs. Spivey contends the trial court committed manifest error by finding that a continued joint custodial arrangement would be impractical. Rachel supports her argument with the following propositions: first, joint custody does not have to mean equal time; second, both parties submitted proposals for joint custody; third, Tim did not attempt to prove he would be unable to exercise joint physical custody; and fourth, Tim stated that if the parties continued to share custody and the children remained in Jackson, then he would make efforts to help Rachel maintain her pre-modification custody schedule. (Appellant Brief 35-36).

To quickly touch on each proposition, first, no one disputes the fact that joint custody by statute does not necessarily equal "fifty-fifty" time with each parent. This was not the judge's concern; in his *Opinion*, the chancellor focused on quality time with each parent:

> This is one of those rare occasions where, until now, the children have felt little impact from the divorce. These children were fortunate in that they experienced two full-time parents who were fully committed to them. Due to Rachel's move, this is no longer a privilege that these children will enjoy. Regardless of the Court's

> school lunches and so forth. . . This Court is convinced that there is no equivalent substitute to having both parents available twenty-four (24) hours a day.

Because of Rachel's relocation to Memphis, the children were going to have life-altering adjustments, not just a change in a visitation schedule. Counsel for the appellant echoed this sentiment before trial:

> [T]here had been some argument made that it would be best if the stepfather just did the going back and forth and the family, you know, the wife and the children stay here. That is not going to happen, Your Honor. What we have to understand is there is going to be a separation from the mother and the father of these children regardless of which one the children go with.

(T. 21).

Second, it is true that both parties submitted proposals for a continued joint custody, with Rachel in Memphis and Tim and Jackson. They did so because the judge requested each party submit creative ways to continue joint custody. Judge Lutz stated, "It is a Hobson's choice. Damned, if you do; damned, if you don't . . . . I don't need any legal briefs . . . . What I need is, I need some creativity. If somebody – if somebody can find the rainbow, then distribute it to us". (T. 643).

It is obvious that the court, having reviewed the proposals submitted by both parties concluded, as have judges faced with similar circumstances, that joint custody between parents in different states was not workable. *See Rhinehart v. Barnes*, 819 So. 2d 564 (Miss. Ct. App. 2002) (modifying joint custody where father moved from Desoto County to Cordova, Tennessee); *Massey v. Huggins*, 799 So. 2d 902 (Miss. Ct. App. 2001) (modifying joint custody where Jones County-

Jackson County to Little Rock, Arkansas);and *McRee v. McRee*, 723 So. 2d 1217 (Miss. Ct. App. 1998) (modifying custody where Jackson-based mother moved to Houston, TX).

Moreover, Rachel's court testimony is not in keeping with her appellate argument. She argued one thing in court and now argues another on appeal: When asked if she would travel from Memphis and exercise weekday visitation in Jackson in the event that Tim was awarded custody, Rachel stated, "You know, I wouldn't . . . I wouldn't be able to do it". (T. 294). Later she clarified, "I mean, what I'm trying to say is I can't be a full time Mom in Memphis and in Jackson". (T. 296).

Further, Rachel's contention that it was Tim who wanted a change in custodial status, while Rachel wanted only a change in Tim's "physical custodial periods", is a semantics exercise. Rachel wanted to end Tim's time with the children during the week because the schedule would be unworkable once she moved to Memphis.[17]

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[17]Rachel's purpose in her *Petition to Modify Defendant's Custodial Periods* was to remove Tim's weekday visitation. Rachel states this in her testimony:

> Counsel for the Appellant: Tell the Court what you would propose as Tim's visitation schedule if you're allowed to keep the children as their primary custodial parent.
>
> Rachel Spivey: You know, he could have the first, third, and fifth weekend. A lot of months have that. And then, you know, January and February, May several of the months have, you know, holidays, where it's a three-day weekend. And in those weekends, most of them fall on the first and third, and he could have the three-day weekend. . .
>
> Counsel for the Appellant: What about over night visitation during the week?
>
> Rachel Spivey: . . . You know, we have had problems with it and with them being

See Elliott, 877 So. 2d at 455-56. Moreover, it was Rachel who brought this legal proceeding upon the family due to her inflexible decision to move to Memphis.

Finally, Tim testified that if the parties continued to share custody and the children remained in Jackson, then he would help Rachel maintain her custodial periods. The statement was conditioned on the hypothetical that Judge Lutz would decide to maintain joint custody. After a thorough *Albright* analysis, Judge Lutz did not decide to maintain joint custody. Therefore, the contention is without merit.

Appealing to logic alone, the argument that Judge Lutz committed manifest error by finding that it was impractical for Tim or Rachel to travel approximately four hundred miles several times a week to see the children cannot stand. As Judge Lutz wrote, "Tim and Rachel's shared custody arrangement between parents of school age children will be impractical, if not impossible to maintain with the parties living in two different states". (RE. 000557).

The issue is without merit.

After the chancellor found continued joint custody impractical, he conducted an *Albright* analysis. Other factors being neutral, Tim exhibited better parenting skills[18]; was strongly favored

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> going to a new school. . . . I would say, you know, probably the first year it wouldn't be good. (T. 240-41).

[18]Concerning parenting skills, Judge Lutz wrote, "Dan tends to undermine Tim's role as the children's father. The Court is convinced that Rachel does little, if anything, to deter Dan's behavior". (RE. 000562).

parent-child relationship"[21].

In review, the majority of the *Albright* factors favored Tim. Therefore, Tim received sole physical custody of the minor children. The chancellor found that the award was in Madeline, Harrison, and Carlisle Porter's best interests.

III. Whether the chancellor committed manifest error by denying Rachel relief from judgment.

On July 11, 2006, Judge Lutz entered the *Final Judgment* following the June 12-13, 2006, custody modification hearing. Exactly four weeks later, Dan lost his job. On August 30, 2006, Rachel requested relief from judgment.[22]

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[19]"The guardian ad litem testified that this factor did not favor either parents as both parents live in the Jackson area", wrote the chancellor. "The court disagrees. This litigation was necessitated by Rachel's impending move to Memphis, Tennessee. In Memphis, the children have no home, school or community record". (RE. 000564-65).

[20]"The Court is convinced that Dan is intense, direct and can cause fear in the children with his demeanor", found Judge Lutz. "Dan labeled himself as the 'head of the household', and he expects his other family members to be subservient to him". (RE. 000566). Moreover, the judge found that there was instability in Dan's work life: "Dan's employer testified that Dan is terminable at will and would not be entitled to a severance package. The company/entity for which Dan works is only two (2) years old". (RE. 000566).

Dan was terminated from this job four weeks after the chancellor entered the judgment.

[21]The chancellor opined, "The Court is convinced that the best interests of these children requires them to stay among the community, extended family, familiar surroundings and constants. . . ." (RE. 000567-68).

[22] Mrs. Spivey seeks relief from the judgment under subsections (5) and (6). MISS. R. CIV P. 60(b) reads in pertinent part:

receiving the ruling on this motion, Rachel filed a motion to stay the judgment, stating that she was not moving until after the appeal was decided – or her motion was granted. This statement directly contradicts her averments at trial that she was moving to Memphis no matter what.

Also, even though Rachel learned that Dan was fired on August 8, 2006, neither Tim nor the Court was informed of the termination until Rachel filed the Rule 60(b) motion. Interestingly, Rachel waited to inform the trial court and Tim until after the court denied Rachel's motion for a new trial. (RE. 000713).

At the Rule 60(b) hearing, Rachel's counsel argued the same points made on appeal. (T. 663-70). Appellant's counsel ran through a list of Rule 60(b) factors to be considered. (T. 666-69). In response, the chancellor made clear that he believed that Tim should maintain sole custody notwithstanding Dan's termination:

> (b) On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application;
>
> (6) any other reason justifying relief from the judgment.

Relying on the Fifth Circuit construction of the federal rule, the Supreme Court has held that "any other reason" from subsection (6) refers to any other reason than those contained in the five enumerated grounds. Relief under Rule 60(b)(6) should be reserved for extraordinary and compelling circumstances. *Briney v. United Stated Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998) (authorizing set aside of wrongful death payments upon discovery that putative husband and decedent were never married).

[Dan's employer] gave us from the witness stand. He was saying, Hey, we really believe in him, but we don't – there is no parachute here. If he produces, then he'll have a job. If he doesn't, he won't.

(T. 675-76). To summarize, the chancellor was letting parties know that he had taken Dan's unstable employment into consideration during the *Albright* analysis. Judge Lutz continued as follows:

> But let me tell you something, even with that [Dan's job uncertainty], my primary concern, first of all, is once I got the evidence in this case – I have been conflicted over this thing until the trial. Once the evidence was all in, I was convinced that these children staying here with Tim was the best thing for them. And that's – I laid that out in the *Opinion* and I don't need to go over it again.

(T. 676). The trial judge concluded:

> I do not believe, for a second, that if Dan gets another job offer like this, which I can not believe that he is not trying to find, from someone else, he and Rachel will [not] move again. You know, once again, that is conjecture. But they have already – demonstrated performance is what I go on. That is evidence. The evidence, that we have on record, shows me that that is where their focus is. Doesn't make them bad people. But, then what happens in 60, 90, 120 days or six months? If we go back to the same thing, to that same kind of thing they had, which was ideal, then the kids – they have already been – their lives have already been changed, through the change in custody. So, then we do that to them again? And, you know, that is something that is foreseeable, that he [Dan] could get another job, whether it happens or not.

(T.677). Directly before denying the motion, Judge Lutz found,

> And, quite frankly, the reason that the prior thing [joint custody] worked so well was that Tim and Rachel, at least where the kids were concerned, they were focused on the same thing. I – the impression I get [is] that is not necessarily the case now and that is the only way that something like that would work.

(T. 677). In closing, Judge Lutz made the following hypothetical remark:

in that position.

(T. 681-82).

To recap, Judge Lutz made the following fact findings at the Rule 60(b) hearing: (1) after conducting an *Albright* analysis, Tim should be the custodial parent; (2) the termination of Dan's job does not change the fact that Tim should be the custodial parent; (3) Dan and Rachel would move again, if a job opportunity presented itself to Dan; (4) joint custody worked in the past because Tim and Rachel put the children's interests first; (5) Dan and Rachel have placed an emphasis on Dan's employment; (6) due to the litigation initiated by Rachel, Tim and Rachel no longer get along well enough to maintain successful joint custody. (T. 675-82). On September 13, 2006, the trial court denied Rachel's *Motion*.

Turning now to Rachel's Rule 60(b) argument on appeal, the appellant contends the trial judge made "no additional factual findings regarding his decision to deny the motion". (Apellant Brief 41). As shown above, the record does not support the allegation.

An appellate court searches a denial of a Rule 60(b) motion for an abuse of discretion. *Lowrey v. Lowrey*, 919 So. 2d 1112 (Miss. Ct. App. 2005) (setting aside property settlement under Miss. R. Civ. P. 60(b)(1)); *see also Briney v. United Stated Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998) (declaring the Court "will not reverse unless convinced that the Circuit Court has abused its discretion"); *Burkett v. Burkett*, 537 So. 2d 443, 445 (Miss. 1989) (advising "a balance . . . be struck between granting a litigant a hearing on the merits with the need and desire to achieve

The fact of *Porter v. Porter* closely resemble to two recent Mississippi Court of Appeals cases, *Williamson v. Williamson*, No. 2004-CA-02519-COA, 2007 WL 738760 (Miss. Ct. App. June 19, 2007) (affirming lower court denial of Rule 60(b) motion concerning father's relocation) and *Turner v. Turner*, 824 So. 2d 652 (Miss. Ct. App. 2002) (noting with approval trial court denial of Rule 60(b) motion based upon post-trial fact mother no longer had need to relocate).

In *Williamson*, a non-custodial mother filed a petition for sole physical custody two years after a divorce agreement granted custody to the father. At the time of trial, both parties lived in the same Mississippi neighborhood. In February of 2003, the chancellor denied the mother's petition to modify. In March of 2003, the father obtained employment in Alaska. Based on the sudden change in circumstances, the mother immediately filed for relief from judgment, citing among other things misrepresentation of an intention to relocate. The chancery court denied the motion, after the father produced his application for Alaska employment dated March 3, 2003. *Williamson*, No. 2004-CA-02519-COA at ¶¶ 2-12 (noting trial court found facts occurring after February 2003 hearing were not proper ground for Rule 60(b)(1) motion).

Upon review, the court of appeals restated the trial court's finding that "while there had been misrepresentations . . . they were not intentionally aimed at altering the outcome of the proceedings, nor had the chancellor relied on them". *Id.* at ¶ 15. The appellate court concluded, "We cannot say the chancellor abused her discretion as to these misrepresentations". *Id.*

of Rachel as well, though with opposite affect. Rachel maintained at trial that she was moving to Memphis. When Dan lost his job, Rachel suddenly decided to stay in Jackson. While the appellant does not argue misrepresentation, the same basis for denial exists as it did in *Williamson*. A Rule 60(b) motion should not be based on new facts arising after the entrance of judgment.

Next, *Turner* applies to the case at bar. During a divorce trial, a mother maintained she would be leaving the Mississippi Gulf Coast to relocate to Hattiesburg for school. When she was not awarded custody, the now non-custodial mother filed a Rule 60(b) motion, stating she would not be moving to Hattiesburg as originally planned. *Turner*, 824 So. 2d at 659 (affirming *Albright* analysis and finding appellant not entitled to modification of chancellor's decision based on post-judgment change in circumstance).

Affirming the denial, the appellate court wrote, "The chancellor denied Mrs. Turner's [Rule 60(b)] motion. The chancellor stated that 'the Court has fully gone through the custody factors developed in the decision of custody at the time of the original ruling. The chancellor stated that his analysis should stand". *Id.* (quoting statement that mother's move was one consideration among others). The review court further noted, "The chancellor, having been alerted to the change in Mrs. Turner's plans, found no reason to change his decision". *Id.*

The facts of the present case trace *Turner*. Rachel maintained that she was moving. When she was not awarded custody, she did not move. She requested relief from judgment just as Mrs. Turner did, and the chancellor in this matter properly denied the motion.

sole physical custody to Tim was in the children's best interests. As in *Turner*, having been alerted to post-trial factual changes, the judge found no reason to set aside the judgment.

To put a blunt point on it, Rachel initiated litigation to change custody because Dan got a job in Memphis. The chancellor applied the *Elliott* legal standard for modification of joint custody. Finding continued joint custody impractical, the chancellor conducted an *Albright* analysis. Once he looked at the evidence, the chancellor found the children's best interests served by sole custody to Tim. After Dan lost his job, the chancellor did not change his mind.

The appellant would like this Court to view Rachel's relocation as some fact relied on at trial and later found to be erroneous. That would be a mistake. The fact relied upon was that Dan was employed by a Memphis company at the time of trial. Four weeks after judgment and approximately two months after trial, he was fired. What was true during trial was not an erroneous belief. Dan was employed. That is true. Then, after trial, Dan was not employed. This is also true. No "fact" was later found to be an erroneous belief.

Thus, the appellant's primary Rule 60(b) argument that the Court ought to set aside a judgment because the "central factual underpinning" proved to be erroneous is wholly misguided.

Rachel cites three cases where erroneous factual underpinnings gave rise to relief from judgment. The first is *M.A.S. v. Miss. Depart. of Human Serv's*, 842 So. 2d 527 (Miss. 2003). In *M.A.S.*, the supreme court approved setting aside a judgment of paternity against a man who learned years later that he was not the child's father. *Id.* at 531. The Court called these circumstances the

had procedural opportunities afforded under other rules and who without cause failed to pursue those procedural remedies". *Id.* at 530.

M.A.S. does not apply to present circumstances for two reasons. First, in *M.A.S.*, it was never true that the defendant was the father of the child, not during trial and not after. By contrast, Dan was employed during trial. This remains incontrovertibly true. Then, after trial, he was not employed. Because Dan lost his job, Rachel no longer needed to relocate. The precipitating factor causing the move – Dan's employment – suddenly disappeared. Second, unlike the appellant in *M.A.S.*, Rachel has other procedural options, of which and she has taken full advantage.[23]

The next two cases, *Weeks v. Weeks*, 654 So. 2d 33, 36-37 (Miss. 1995) (upholding set aside of judgment for separate maintenance against putative husband who later found out marriage was void) and *Briney*, 714 So. 2d at 966 (reversing payment of wrongful death proceeds to putative husband where marriage discovered invalid), do not pertain. Like *M.A.S.*, the appellate court overturned a judgment based on a "fact" found fallacious after trial. *Porter* does not fit this mold. Dan's employment caused the Spivey family to buy a home in Memphis, enroll the Porter children in Memphis schools, and sell their home in Jackson. Dan's employment caused Tim to seek

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[23] Rachel filed multiple post-trial motions. Rachel filed a motion for a new trial and/or to alter or amend the judgment and a motion to stay the judgment before filing her Rule 60(b) motion. On December 12, 2006, Rachel filed in the chancery court a *Petition for Modification of Final Judgment and for Temporary Relief*, requesting a custody modification and, in the alternative a change in visitation. On January 18, 2007, Rachel filed an *Amended Petition for Modification of Final Judgment and for Temporary Relief.*

On August 28, 2007, the trial court dismissed Rachel's claim for modification of custody. Her petition for modification of visitation is pending.

As a practical matter, to adopt Rachel's position would destroy the finality of custody judgments. The appellant states that "final judgments concerning custody are always subject to modification based upon the interests of the children". Certainly, the appellant's counsel realizes that Mississippi courts have spent decades crafting custody modification tests to provide procedural opportunities to protect the best interest of the child. Moreover, Judge Lutz reiterated after Dan lost his employment that awarding Tim custody served the children's best interests.

In conclusion, the chancellor made findings of facts at the Rule 60(b) hearing. These findings reiterated the *Albright* analysis: sole physical custody to Trim was best for the Porter children. Moreover, the chancellor did not base his original determination upon a fallacious factual underpinning. Dan was employed at the time of trial. After trial, Dan lost his employment. The trial court ruled properly and in keeping with *Williamson* and *Turner*. Finally, the judgment should not be disturbed because Rachel has other procedural avenues.

The issue is without merit.

IV. Whether the chancellor improperly awarded Tim child support.

Mrs. Spivey argues the chancellor's award of child support to the sole physical custodian, Tim Porter, was in error. Specifically, the appellant contends that (1) Tim did not request a modification of child support in his pleadings, (2) the parties submitted no evidence concerning child support; and (3) Judge Lutz made no findings of fact to support the modification.

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

The issue is without merit.

V. Whether the chancellor erred by failing to state reasons for rejecting the guardian ad litem's recommendations.

The appellant would like to circumvent undisputed law to convince the Court that Judge Lutz was in error when he did not "itemize the recommendations of the guardian ad litem in his *Opinion* and [*] state the reasons in his findings of fact and conclusions of law for not adopting the Guardian's recommendation". (Appellant Brief 49).

No Mississippi case or statute supports this argument.

Where a chancellor is not required to appoint a guardian ad litem by statute, there is no requirement that the chancellor defer to the guardian's findings. *Passmore v. Passmore*, 820 So. 2d 747, 751 (Miss. Ct. App. 2002) (citing *S.N.C. v. J.R.D., Jr.*, 755 So. 2d 1077 (Miss. 2000)) (finding chancellor not required to detail reasons for rejecting guardian recommendation). "Such a rule would intrude on the authority of the chancellor to make findings of fact and apply the law to those facts". *Id.*

In the present case, Judge Lutz appointed a guardian ad litem, Debra L. Allen, "for the purpose of advising the Court in determining the best interests of the children". (CP. 000455). Ms.

for example, the trier-of-fact stated:

> The guardian ad litem testified that this factor did not favor either parents as both parents live in the Jackson area. The court disagrees. This litigation was necessitated by Rachel's imending move to Memphis, Tennessee. In Memphis, the children have no home, school or community record. The children have never lived in Memphis, Tennessee. The children have no extended family in Memphis, Tennessee. The children will be required to attend a new church in memphis, Tennessee. The children will be enrolled in new private schools in memphis, Tennessee. The children have never been involved in any social or sporting activities in Memphis, Tennessee. The Court finds this factor strongly favors Tim.

(RE. 000564-65).

Nonetheless, Judge Lutz was under no obligation to give written reasons for not following recommendations.

This issue has no merit.

CONCLUSION

In closing, Rachel initiated litigation to change Tim's custodial periods because Dan got a job in Memphis. When asked to recuse himself from the custody modification proceedings, the chancellor properly denied the motion. Following a fact finding that the parties shared joint custody, the chancellor applied the *Elliott* legal standard for modification of joint custody. Finding Rachel's relocation a material change in circumstances and continued joint custody impractical, the chancellor conducted an *Albright* analysis.

Having considered the evidence, the chancellor found the children's best interests served by sole physical custody to Tim. The judge properly awarded Tim some financial support to which Tim

this day served the above and foregoing Brief of Appellee on the following person in the manner shown:

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THIS the 23 day of October, 2007.

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