RACHEL DRISKELL PORTER (SPIVEY) **APPELLANT**

VS **NO. 2006-CA-01592**

TIMOTHY WADE PORTER **APPELLEE**

APPEAL FROM THE CHANCERY COURT
OF MADISON COUNTY

REPLY BRIEF OF APPELLANT

COUNSEL FOR APPELLANT:

RICHARD C. ROBERTS III, [MSB[redacted]
Law Offices of Richard C. Roberts III
599 Highland Colony Parkway, Suite 110
Ridgeland, Mississippi 39157
Mailing Address:
Post Office Box 55882
Jackson, Mississippi 39296-5882
Telephone: 601.607.4144
Facsimile: 601.607.4194

CASES

STATE STATUTES

STATE RULES

refusing to recuse himself.

This Court has consistently held that the proper standard for determining recusal is the objective "reasonable person knowing all of the circumstances". *Dobson v. Singing River Hospital*, 839 So.2d 530 (¶ 9) (Miss. 2003). "[A] Judge is *required* to disqualify himself if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality." *McFarland v. State*, 707 So.2d 166, 180 (Miss. 1997) (emphasis added).

It is clear from the Order entered by the chancellor denying Rachel's *Motion for Recusal* that the chancellor applied a subjective standard, based on his personal feelings and experience regarding Samantha Thomas, rather than the required objective standard. Samantha Thomas is Tim Porter's current wife. Prior to trial, Samantha was holding herself out to the general public as a specialist in family law, including divorce and child custody (CP 000443-444). She routinely practiced before Chancellor Lutz and Chancellor Goree in the Eleventh Chancery District. (CP 000418, 434, 437). Samantha had two estate matters actively pending before Judge Lutz at the time the *Motion for Recusal* was filed. (RE. 41, CP 000454).

The chancellors in the Eleventh Chancery Court District recuse themselves in the personal divorce suits of attorneys who routinely practice before them. (RE. 40, CP 000453). This unwritten rule, which has been commended by our Supreme Court, is based on the premise that a reasonable person, considering such circumstances, would harbor doubts about the chancellor's impartiality.(*Steiner v. Steiner*, 788 So.2d 771, 775 (Miss. 2001); *Robinson v. Irwin*, 546 So.2d 683 (Miss. 1989)). The reasons for the rule apply with no less force in emotionally charged contested custody case such as this, where the opposite party is a lawyer, and is also married to a lawyer who

Instead of addressing this issue with an objective analysis of the circumstances under the reasonable person standard, the chancellor engaged in a subjective, personal analysis of whether Samantha's practice would have an effect on his individual and personal ability to be impartial. Repeatedly in his Opinion the chancellor relied upon his personal observations and feelings: *"I hardly know her". "I do not recall her ever trying a case before me." "I have no opinion as to her credibility, nor as to her trustworthiness." "Samantha...is a stranger to me." "The Court...harbors no preconceived notions about her".* (RE. 40-41, CP 000453-454). This analysis, like beauty, is in the eye of the beholder, and violates the standard which the Court should have used.

There is no way for this Court to review Judge Lutz' personal feelings regarding Samantha to determine if he was correct in his personal conclusion that he could be impartial. That is precisely why this Court requires the objective "reasonable person" standard. Failure to apply the long established "reasonable person knowing all the circumstances" standard, and instead, applying a personal, subjective standard is error as a matter of law.

Rather than recusing himself in this case, the one in which he **had** been asked to recuse himself, Judge Lutz recused himself in the two other cases that Samantha had pending before him, where he **had not** been asked to recuse. This appears to be an obvious and clear recognition by the chancellor that his impartiality might be reasonably questioned.

Tim states in his brief that Judge Lutz simply "did Rachel a favor" (Appellee's Brief, p. 18) to assure Rachel of his continued impartiality. Rachel did not ask for any "favors" nor should judges be in the business of granting "favors". For Appellee to suggest that the chancellor took this unorthodox action "out of an abundance of caution and courtesy to the Appellant", and as a "favor"

The chancellor applied a personal, subjective test, rather than the correct objective legal standard for recusal. This was error as a matter of law and requires reversal.

II. The chancellor committed manifest error by improperly placing the burden of proof on Rachel, by applying the wrong legal standard for modification in this joint custody arrangement where the parties had assigned Rachel "primary physical custody", and, even under the standard applied, was manifestly wrong in concluding that joint custody was impractical.

A. *The Chancellor Improperly Placed the Burden of Proof on Rachel.*

Tim was the party who sought modification of the existing custody arrangement. As the moving party, he had the burden of proof on all elements of his modification claim. *Mabus v. Mabus*, 847 So.2d 815 (¶8) (Miss. 2003).

The chancellor, however, placed this burden squarely on Rachel, and he did so before the first word of testimony had been offered by either party. Moreover, the chancellor prejudged the need for an *Albright* analysis and relieved Tim of his burden of proof on the elements necessary for modification under either the traditional three-part test, or under the "impractical/impossible" test.

Tim claims in his Brief that the chancellor made a "factual finding" during the March 2, 2006, pre-trial motion hearing that "the parties shared joint physical custody", and that once such a finding was made, "neither party had a burden" regarding relocation. (Appellee's Brief, p.22, n.13, 24). Because of this purported "factual finding", it should first be noted that there was no "hearing" on Tim's *Emergency Motion for Temporary Restraining Order and/or Alternative Injunctive Relief.* Instead, the chancellor called the attorneys into his chambers to discuss the motion and then convened the parties in the courtroom to tell them how he intended to handle the case. (T. 2-10). At that point, in spite of the fact that Rachel had "primary physical custody" under the

custody, and in spite of the fact that not one word of testimony or evidence had been offered by either party, the chancellor made the following statement directly to Rachel in the courtroom:

> *[T]his is a joint custody,* ***unless your lawyers can convince me otherwise****. We have never gone through an [Albright] analysis to determine which parent would be the best for the kids as far as the* ***primary parent****. ...That is what I will be doing in this case. ...One parent will be the* ***primary*** *school year parent, the other will be the* ***primary*** *summertime parent. ...That is the way I will resolve this. ... It's not going to be easy I'm sure, as to which parent would be the best to be* ***the primary custodial parent****.* (T.3-4)

Later, during the argument on Rachel's *Motion for Court Appointed Psychologist to Conduct an Independent Custody Evaluation* (again, before any evidence had been presented by either party) the chancellor stated:

> *This thing [the custody arrangement] worked fine until, you know, both parties were living closely together.* ***Now it's not going to work fine*** *because we are going to have, what, some two hundred miles between parents.* (T.21).

These statements by the chancellor made at least three things absolutely clear. First, the chancellor placed the burden on Rachel and her lawyers to prove that she would remain as the parent with "primary physical custody" and that she would continue to have the relocation rights which are ordinarily possessed by the parent with primary physical custody. Secondly, the chancellor prejudged the necessity of an *Albright* analysis even though there had been: (a) no showing of a material change in circumstances adversely affecting the children; and (b) no showing that Rachel's anticipated move to Memphis would make the continued joint custody arrangement impossible or impractical. Thirdly, the chancellor just ignored the fact that by their court approved Agreement, the parties had already clearly and specifically vested Rachel with "**primary physical custody**". (RE 27, CP00019).

Tim's argument, *i.e.*, that these statements by Judge Lutz constituted a "fact-finding that Tim

supported by the facts or the law.

The first and most obvious problem with Tim's argument is that the chancellor's statements cannot be construed as "factual findings" since neither party had presented any evidence when these alleged "findings" were made. These statements simply illustrate that the chancellor had prejudged the critical issues in the case, *i.e.* (1) the burden of proof; (2) the nature of the existing custody arrangement; and, (3) whether Rachel's *anticipated* move to Memphis would have an adverse affect on the children necessitating an *Albright* analysis.

Secondly, Tim's argument that he did not have the burden of proof flies in the face of clear precedent from *Mabus v. Mabus*, 847 So.2d 815 (Miss. 2003). Tim claims that "*Mabus* is only relevant in a sole custodial setting". (Appellee's Brief, p. 25). Tim argues that "Tim and Rachel were joint custodians" and consequently, "*Mabus* should be ignored". (Appellee's Brief, p. 25).

Tim's reading of *Mabus* is in error. In *Mabus v. Mabus*, 847 So.2d 815 (Miss. 2003), the chancellor awarded Ray and Julie Mabus **joint physical custody** of their minor children and awarded sole legal custody to Ray. *Mabus, supra*, (¶2). Julie filed a *Motion for Modification* seeking sole legal and physical custody, or in the alternative, joint legal custody and sole physical custody. *Mabus*, (¶4). The chancellor dismissed Julie's *Motion for Modification* on the basis that Julie had failed to prove a material change in circumstances adversely affecting the children. On appeal, Julie argued that the chancellor should have conducted an *Albright* analysis before denying her motion. *Mabus*, (¶19). The Supreme Court affirmed the dismissal of the *Motion for Modification*. The Court's opinion made it clear that **the rules regarding burden of proof, and the elements necessary to trigger an *Albright* analysis, apply with equal force when a parent with joint**

Mabus, supra illustrate these points:

> The burden of proof is on the Movant to show by a preponderance of the evidence that a material change in circumstances has occurred in the custodial home. *Mabus,* (¶8).
>
> Even though under the totality of the circumstances a change has occurred, the Court must separately and affirmatively determine that this change is one which adversely affects the children. ... *Mabus*, (¶8)
>
> The burden is on Julie to prove a material change in circumstances has occurred in the custodial home... . *Mabus*, (¶19).
>
> In a custody modification proceeding, the question of which parent will better serve the welfare of the children as custodial parent [i.e. an *Albright* analysis] is not reached unless the chancellor has previously found a material change in circumstances detrimental to the child's best interest. *Mabus*, (¶20).

Even if one ignores the fact that Rachel was the "primary physical custodian", the normal rules governing modification of custody clearly apply with equal force in a joint custody arrangement.

Tim was the party seeking modification of the joint custody arrangement and he bore the burden of proof on each element of his claim. The chancellor erred by placing the burden of proof on Rachel, and relieving Tim of his burden under the applicable standard for modification.

B. *The Chancellor Applied the Wrong Legal Standard for Modification in This Joint Custody Arrangement Where Rachel was Designated as the Parent with Primary Physical Custody*

When the parties' negotiated the Child Custody Agreement during their divorce proceedings, they agreed to vest Rachel with "primary physical custody" and Tim with "secondary physical custody". In addition to allocating "primary physical custody" to Rachel, the parties' Child Custody and Property Settlement Agreement also referred to Rachel as the "**custodial parent**" and to Tim as the "**non-custodial parent**". (RE. 37, CP000029). This designation of Rachel as the primary

significance to these parties. Rachel's testimony concerning the meaning of "primary physical custody" went completely unchallenged by Tim in the record evidence. Her understanding was: "That I would be responsible for the children. I would be their primary caretaker. *My home would be the children's home or their home would be with me.*" (T. 103).

Rachel's understanding of the term "primary physical custody" is consistent with the manner in which lawyers and judges have used the term in numerous reported cases. It is consisted with the manner in which Judge Lutz himself used the term *in this case*. It was reinforced throughout the other provisions of the Child Custody Agreement. In their Agreement, Rachel was referred to as "the custodial parent" and Tim was referred to as "the non-custodial parent" (RE 37, CP000029). Under the Agreement, the children's "home" was with Rachel. (RE 28, 35, CP000020, 27). In their Agreement,Tim was given defined periods of time with the children. The children were in Rachel's custody all other times. (RE 28-32, CP000020-24). The Agreement allowed Tim to have additional "visitation" with the children at such times that Rachel agreed. (RE 32, CP000024). Rachel agreed that she would not unreasonably withhold additional "visitation" from Tim. (RE 32, CP000024). Tim, as the "non-custodial parent", paid child support to Rachel as the "custodial parent". (RE 35, 34, CP000026, 27).

The case law has long established that a geographical move by the custodial parent is insufficient to meet the burden of proving **adverse affect**. *Spain v. Holland*, 483 So.2d 318, 320 (Miss. 1986) ("[W]e solve nothing by shifting custody to the parent staying at home for, in theory at least, a ... separation from **either** parent will adversely affect the child. The judicial eye...searches for adverse affects beyond those created...by the geographical separation from one parent."). *Accord*,

relocation rights which normally apply to the "primary physical custodian". Indeed, in the very practical world of domestic relations practice, the primary purpose of negotiating a joint physical custody arrangement, which also designates one parent as the "primary physical custodian", is to allocate the normal relocation rights while still allowing both parties to claim "joint custody".

Clearly, this was the intent under this agreement. The parties' stipulated that prior to accepting the Memphis job offer Rachel called Mark Chinn, the attorney who had represented her during the negotiations of the Child Custody Agreement, to inquire about her ability to move to Memphis without first obtaining a court order. (Stipulation, T. 140). Mr. Chinn reviewed the applicable provisions of the Child Custody Agreement and told Rachel that "the Agreement clearly awarded her primary physical custody of the minor children and that as primary physical custodian of the minor children Mississippi law guaranteed her the right to travel and that she was entitled to relocate with the children without first having to seek a court order." (Stipulation, T. 140).

Tim's attorney, Bettie Ruth Johnson, who drafted the Child Custody Agreement (T. 103) included only one exception to the normal rules governing geographic relocation by the custodial parent - - the agreement provided that if either party moved from the Jackson Metropolitan area, that in itself would constitute "a material change in circumstances".[1] In other words, the **first prong** of the three-prong test would be satisfied by an **actual move** from the Jackson Metropolitan area. The agreement **did not address the second prong**, *i.e.*, whether such geographic move would have an **adverse affect** on the children. Moreover, the language in the Agreement did not specify that an

---

1

Rachel testified that the only conversation she had with Tim about moving from the Jackson area concerned the possibility of her moving to Brookhaven where her parents lived. They agreed that Tim's

In this case, the chancellor recited in passing the three-prong test traditionally used in modification proceedings, but immediately moved to and ***applied*** the "impractical/impossible" standard of *Elliott v. Elliott*, 877 So.2d 450 (Miss.Ct.App. 2004); *Rinehart v. Barnes*, 819 So.2d 564 (Miss.Ct.App. 2002); *Massey v. Huggins*, 799 So.2d 902, 906 (Miss.Ct.App. 2002). (RE 45, CP000557).

Each of those cases involved geographic relocation in a joint physical custody scenario **where neither of the parties was designated as the "primary physical custodian"**. In each of those cases, the Court of Appeals determined that the particular geographical move involved made continued joint custody "impractical or impossible" and thus operated to satisfy the material change in circumstances prong, **and** the adverse affect on the children prong, of the traditional three-prong test.

The impractical/impossible standard is **not applicable** when one parent is the primary physical custodian. This is clear from the case of *Franklin v. Winter*, 936 So.2d 429 (Miss.Ct.App. 2006), which was a relocation case between parents having joint physical custody. In that case, Franklin claimed that even though the divorce decree awarded joint physical custody, she had *de facto* "primary physical custody" under the provisions contained in the parties' divorce settlement agreement. The court stated: **"This is important because, if Franklin had primary physical custody, then Winter had only visitation rights, and we would likely find that Franklin's move is not sufficient grounds for modification of the custody order."** *Franklin*, 936 So.2d 429 (¶10) (Miss.Ct.App. 2006). (Emphasis added)

In his Brief, Tim did not even attempt to distinguish or explain *Franklin*. Instead, he argues

Rachel "cannot proclaim a valid legal meaning for the term". (Appellee's Brief p. 23). Tim cites *Rush v. Rush*, 932 So.2d 794 (Miss. 2006) and *McSwain v. McSwain*, 943 So.2d 1288 (Miss. 2006) in support of his argument. *Rush* and *McSwain* cannot be stretched nearly as far as Tim would like. Neither case "repudiated" the use of "primary physical custody"; in fact, both cases acknowledged that "primary physical custody" is commonly used by the courts and by the attorneys who practice in this field. As a practical matter, if "primary physical custody" has no valid legal meaning, there are hundreds and hundreds of divorced parents in Mississippi with invalid custody decrees.

A brief review of these two cases is in order in light of Tim's claim that they "repudiated" the use of "primary physical custody". If these cases did not repudiate "primary physical custody" then the parties' decision to name Rachel as the parent with primary physical custody requires that this relocation case be governed by the *Spain v. Holland* standard as noted in *Franklin v. Winter, supra.*

In *Rush*, the chancellor granted Charles and Letresa "joint legal and physical custody of Rosie, with Charles having the *primary physical custody* of Rosie." *Rush v. Rush*, 932 So.2d 794 (¶7) (Miss. 2006) (Emphasis added). The Court went on to say: "Although Charles was named *custodial parent* of Rosie, he was ordered to pay the *non-custodial parent*, Letresa, Four Hundred Dollars ($400.00) per month in child support for Rosie... ." *Rush*, (¶7).The Court granted *certiorari* "to consider the issue of whether the Court of Appeals erred in affirming the chancellor's judgment ordering the payment of child support by a *custodial parent* to a *non-custodial parent*." *Rush v. Rush*, 932 So.2d 794 (¶2) (Miss. 2006) (Emphasis added). In analyzing the issue, the Court noted in passing that "although it is a phrase commonly used by lawyers and judges, there is actually no

synonymously with "sole physical custody", and remanded the case to the chancellor to clarify the contradictory language used in the judgment.

In *McSwain v. McSwain,* 943 So.2d 1288 (Miss. 2006), the Court made the same observation (in a footnote) concerning an agreement in which the parties had agreed to joint legal custody with the wife having "primary physical custody". *McSwain*, (¶2), n.2 ("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.")

Neither of these cases "repudiated" the use of "primary legal custody". Neither of these cases support Tim's claim that "primary physical custody" has no valid legal meaning. To the contrary, there are close to one hundred reported appellate decisions in Mississippi where "primary physical custody" is discussed in the opinion.[2] In almost every case, the term is used interchangeably or synonymously with the concept of sole physical custody. *E.g., Franklin v. Winter, supra.* Additionally, the person typically awarded "primary physical custody" is also awarded child support (as Rachel was here); and the other parent's time with the child is referred to as "visitation" (as Tim's time was referred to here). The Court in *Franklin v. Winter* certainly had that concept in mind where, in a joint physical custody situation, the Court opined that if Franklin did in fact have "primary physical custody", then Franklin's geographic move would not be sufficient grounds for modification of the custody order. *Franklin v. Winter*, 936 So.2d 429 (¶10) (Miss. 2006).

In this case, in which Rachel had "primary physical custody" and was also referred to as the "custodial parent," the chancellor erred by not applying the traditional three-prong test to Tim's

those created by the anticipated geographic move of the custodial parent.

C. *Even Under the Legal Standard He Applied, the Chancellor Was Manifestly Wrong in Concluding that Continued Joint Physical Custody Was Impractical or Impossible.*

There is a line of cases which permit the chancellor to proceed with an *Albright* analysis where the parents have joint physical custody, and where neither parent is designated as the primary custody parent, and where continued joint physical custody is made impossible or impractical as a result of a geographic move. *E.g. Elliott v. Elliott*, 877 So. 2d, 450, 455 (Miss.Ct.App. 2004) (Mother's move to Flagstaff, Arizona made continued joint custody "impractical or impossible"); *Lackey v. Fuller*, 755 So.2d 1083 (Miss. 2000) ("Inconceivable" that joint physical custody could be continued when mother moved to New York); *Franklin v. Winter*, 936 So.2d 429 (Miss.Ct.App. 2006) (Mother's move from Jackson County, Mississippi, to Jacksonville, Arkansas, 500 miles away, made continued joint physical custody impractical or impossible).

In each of these cases the parties had not agreed on which of them would be the primary physical custody parent, and the chancellor was *forced* to choose between one parent or the other when continued joint physical custody was virtually impossible as the result of a geographic move.

However, not every geographic move will make continued joint custody impractical or impossible.[3] For example, in *Delozier v. Delozier*, 724 So.2d 984 (Miss.Ct.App. 1998) the court approved the chancellor's award of joint physical custody when the mother moved four hours away from where the parties had previously resided.

3

As stated earlier, the chancellor clearly prejudged the issue of impractical/impossible when he stated

It is axiomatic in our jurisprudence that the party seeking the affirmative of an issue (the plaintiff, or the movant, or the petitioner, or the claimant) bears the burden of meeting the applicable standard of proof. *E.g.*, *Mabus v. Mabus*, 847 So.2d 815 (¶8) (Miss. 2003). If continued joint physical custody was impractical or impossible, it was Tim's burden to prove it. Instead of offering proof that continuation of a joint physical custody arrangement was impractical or impossible, Tim proved exactly the opposite.

It is obvious that Tim (not knowing which way the chancellor would rule), attempted to "hedge his bets" at trial. He testified that if he prevailed, and was awarded sole custody, he would buy Rachel a home in Jackson, provide her a vehicle to use in Jackson, assist with airfare, and make whatever other accommodations were necessary for Rachel to maintain the same schedule of physical custody that she currently enjoyed with the children (with the sole exception being Sunday night, which he wanted). (T. 533, 534, CP 000610-612). In effect, joint physical custody, but not named as such.[4]

On the other hand, Tim testified that if he did not prevail, and the chancellor did not modify custody, and the children were allowed to go to Memphis with Rachel, he wanted, and was capable of exercising, the same periods of visitation he currently enjoyed, including weeknight and weekday visitation. (T. 539-540). He testified that his work schedule was "completely flexible" and that there was really nothing which would prevent him from exercising "exactly the same visitation" that he

---

4

In his post-trial briefs, after the GAL had given her opinion that the children should be allowed to go to

The proof could not be stronger that continuation of the existing custody arrangement was both practical and possible. This was not Rachel attempting to prove that the existing arrangement was practical and possible - - this was Tim's proof!

In his brief, Tim says "appealing to logic alone", it cannot be said that the chancellor erred in concluding that continued joint custody was impractical, because of the travel requirements. (Appellee's Brief, p. 30). In other cases, that may or may not be true. But in this case, the proof presented by Tim established beyond peradventure that continued joint custody was practical and possible, and that he was ready, willing, and able to continue a joint physical custody arrangement in either Jackson or Memphis.

Neither party presented any evidence whatsoever to support the chancellor's conclusion that a continued joint custody arrangement with Rachel as primary physical custodian and Tim as secondary physical custodian was impractical or impossible.[6] The chancellor prejudged the issue, ignored the evidence, and was manifestly wrong in this conclusion that continued joint physical custody was impractical or impossible. The judgment must be reversed.

III. Since the chancellor: (1) found that the existing joint custody arrangement was in the children's best interest; and, (2) modified that arrangement only because

---

5

The original Child Custody Agreement provided Tim with overnight visitation approximately 40% of the time and Rachel with 60% of the time (R.E. 27-32, CP000019-24). Subsequent modifications increased Tim's overnight visitation to 13 of 30 nights, or approximately 43% of the time. The chancellor found that the children spend "approximately 50% (fifty percent) of the time with each parent". (R.E. 47, CP000559). Obviously, the chancellor "rounded up" since Tim's visitation time with the children under the agreement is easily calculated.

6

At the conclusion of the trial, the chancellor specifically stated: "The one thing that will [illegible]

discretion when he failed to set aside the judgment and reinstate joint custody after Rachel's anticipated move was cancelled as a result of her husband's job loss.

The chancellor was quite clear in his Opinion that the existing joint custody arrangement was in the children's best interest. He referred to the arrangement as "*ideal*" (T. 676) and "*best I've ever seen*". (T. 663). He called it a "*blessing*" and "*privilege*" for the children that had served to minimize the impact on the children of their parents' divorce. (R.E. 55, CP 000567). He stated in his Opinion: "*The Court is convinced that there is no equivalent substitute to having both parents available twenty-four (24) hours a day. And that is what the Porter children have enjoyed thus far.*" (R.E. 55, CP 000567).

The **only reason** the joint custody arrangement was changed was because everyone anticipated that Rachel would be moving to Memphis. Rachel's impending move was the sole reason for the court's finding that continued joint custody would be impractical/impossible. The chancellor could not have stated this point any more clearly than when he said: "*Tim and Rachel's present shared custody arrangement will be impractical, if not impossible to maintain* ***with the parties living in two different states.***" (R.E. 45, CP 000556). After finding that joint custody would be impractical/impossible because the parents would be living in different states, the chancellor conducted an *Albright* analysis, which itself was based on the move to Memphis. For example, in his opinion the court stated:

> "*This litigation was necessitated by Rachel's impending 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. The children will be enrolled in new private schools in Memphis, Tennessee. The children have never been involved in social or sporting activities in Memphis*

Indeed, in the post trial proceedings the court stated: **"I based the entire judgment on *the fact* that Rachel and Dan and their family were moving to Memphis."** (T. 672).

As we know now, however, Rachel's intended move to Memphis never occurred because Dan lost his job shortly after trial. The factual assumption that Rachel would be moving to Memphis, upon which the entire trial was based, and which served as the sole reason for modifying the "ideal" joint custody arrangement which the children enjoyed, was suddenly known by everyone to be an erroneous factual assumption. This turn of events is the sort of "extraordinary and compelling circumstance" which justifies invocation of the "grand reservoir of equitable power" provided by Rule 60(b) to restore the children, and Rachel, to the custody arrangement which had been so beneficial for the children during the past six(6) years. *See, Briney v. United States Fidelity & Guar. Co.*, 714 So.2d 962, 966 (Miss. 1998).

It should not go unnoticed by this Court that Tim framed his entire case for modification of custody around his argument that the children would be "traumatized" by being separated from *either* parent, and that this trauma could only be minimized by allowing the children to remain in Jackson with him where they would have established routines and familiar surroundings. Six weeks after being awarded sole custody, however, Tim abruptly changed his tune, arguing that returning to the previously existing custody arrangement would be "damaging to the children" because it would "throw the children into a continuing state of uncertainty" (CP 000716). Tim has been perfectly satisfied that the Judgment provides the children with only four (4) nights per month with their mother and has resisted every effort by Rachel to change custody or even to obtain additional visitation with the children. One must seriously question whether Tim has the children's best interest

in Jackson, and then, after being awarded sole custody, fight at every ditch and hedgerow to limit Rachel to four nights per month with the children.

In his brief, Tim claims that Rachel has "other procedural options", to recover custody of the children, referring to the motions she has filed in the trial court. (Appellee's Brief, p. 38). Granted, Rachel has attempted to seek relief in the trial court while this appeal has been pending, but has been thwarted at every turn by Tim. Exhibit 1 to Appendix B included herewith, includes a true and correct copy of the *Amended Motion for Summary Judgment* Tim filed in response to Rachel's attempt to modify custody. In his Motion for Summary Judgment, Tim argued that as a matter of law Rachel could not prove that there had been a material change in circumstances, occurring in the custodial parent's (Tim's) home, which adversely affected the children. In his motion, Tim claims that "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change." (Amended Motion for Summary Judgment, ¶3).

Next, Tim filed a Motion in Limine (Second) claiming that the principal of *res judicata* precluded Rachel from presenting to Chancellor Brewer any evidence in support of the Motion for Modification which predated Chancellor Lutz' Judgment granting Tim sole physical custody. Of course, Tim did not want any evidence presented about Rachel's role in the children's lives prior to the Judgment. (A true and correct copy of Tim's *Second Motion in Limine* is attached as Exhibit 2 to Appendix B).

Summary Judgment was not granted; however, Chancellor Brewer did grant Tim's *Ore Tenus Motion to Dismiss* because Rachel was unable to prove a material change in circumstances, occurring in Tim's home after the Judgment, that was adverse to the children. The chancellor

request for additional visitation for trial. A true and correct copy of the *Order Granting Motion to Dismiss* is included as Exhibit 3 to Appendix B.

Tim has vigorously opposed Rachel's attempts to obtain additional visitation. Attached as Exhibit 4 to Appendix B is Tim's *Third Motion in Limine* filed in the trial court opposing Rachel's request for additional visitation, and seeking to exclude evidence concerning events related to the trial which occurred in this case on June 12 and 13, or any other evidence preceding the court's *Final Judgment* entered on July 11, 2006.

Attached as Exhibit 5 to Appendix B is Tim's *Motion for Failure to State a Claim.* In this motion Tim claims that Rachel's request for additional visitation "is only a thinly veiled custody modification claim", and sought dismissal of her request for additional visitation.

Ultimately, Chancellor Brewer found her hands tied and that "a change in custody in this case could not be granted" because Rachel could not prove a material change in circumstances occurring in the custodial parent's home subsequent to Chancellor Lutz' Judgment. Obviously, the chancellor was limited in the relief she felt she could grant as a result of the "Catch 22" situation Tim has adroitly orchestrated after gaining sole custody of the children based upon Rachel's anticipated move, which never occurred. Nevertheless, the chancellor felt she was able to modify the visitation schedule based upon her finding that **"the minor children have suffered and continue to suffer negative effects."** (A true and correct copy of the Court's December 11, 2007, Order is attached hereto as Exhibit 6 to Appendix B. At things stand, Tim has effectively gamed the system, and the children are suffering as a result.

In this Court, Tim advances three arguments against granting Rachel (and the three children) relief from the Judgment. They are addressed here in turn.

that such findings preclude relief from the judgment. (Appellee's Brief, p. 34). Once again, Tim is confusing the chancellor's comments during arguments, with "findings of fact". For example, Tim says that the chancellor made a finding of fact that "Dan and Rachel would move again, if a job opportunity presented itself to Dan." (Appellee's Brief, p. 34). During argument on the motion, here is what the court said:

> "*I do not believe for a second that if Dan gets another job offer like this, which I cannot believe he is not trying to find, from someone else, he and Rachel will move again. You know, once again,* ***that is conjecture.***" (T. 676).

This comment by the chancellor certainly did not rise to the level of a factual finding, and even if it did, it is not based on anything other than "conjecture" as the court clearly stated.

Another "factual finding" that Tim claims the chancellor allegedly made was that: "Due to the litigation initiated by Rachel, Tim and Rachel no longer get along well enough to maintain successful joint custody." (Appellee's Brief, p. 34).

From the transcript of the argument, here are the chancellor's actual comments:

> *"I imagine that he [Tim] is a little miffed right now, but my expectation is that he will continue to demonstrate that and* ***he knows that it is best for the children that they see their mother as much as they can.*** *But I am not going to interject something new into these kids' life, at this point.*
>
> ...
>
> ***I would presume that if they were getting along fine that this thing would have already been a fait accompli,*** *what you're asking for. And, Mr. Roberts, if I'm wrong - - if I'm wrong and they are getting along well, then I would anticipate that what you are asking for will happen. So you don't need an Order from me.* (T. 178-179).
>
> ...
>
> *I'm not going to mess with it and* ***if Tim wants to do something that he thinks is in the best interest of the children my impression is that he has always done those things.***" (T. 681)

These comments certainly do not rise to the level of factual findings, but they confirm again the views expressed by the chancellor in his written opinion that the arrangement which existed

seemed to place confidence in Tim to restore the joint custody arrangement voluntarily at some point simply because it would be best for the children; and, if Tim had not been "miffed", he would have already voluntarily restored Rachel to joint custodian status. We know now, however, that Tim has no intention of allowing the children any more time with Rachel then she can force through court order. The question is, why should the children be deprived of their mother's companionship because Tim is "miffed" over the litigation which resulted from Rachel's anticipated move? Why should the children "continue to suffer negative effects" as Chancellor Brewer found to be the case? (Exhibit 6, Appendix B)

The point is, the chancellor made no "findings of fact" to support a denial of Rachel's *Motion for Relief from Judgment.* In fact, the chancellor directed that a simple Order be prepared "just denying both motions" (T. 682). The circumstances of this case, however, clearly call for relieving the parties of the judgment which was based upon a presumed fact which never occurred.

Tim next argues in his brief that two recent cases from the Mississippi Court of Appeals support denial of Rachel's *Motion for Relief from Judgment*. Those cases are *Williamson v. Williamson*, 964 So.2d 524 (Miss. Ct. App. 2007) and *Turner v. Turner*, 824 So.2d 652 (Miss. Ct. App. 2002). Neither case comes even close to the supporting Tim's argument.

Williamson involved a Motion for Relief from Judgment filed pursuant to M.R.C.P. 60(b)(1) which allows a court to grant relief from judgment based on "fraud, misrepresentation or other misconduct of an adverse party." In the case at bar, Rachel's *Motion for Relief from Judgment* was not based on any fraud or misrepresentation. Her motion was based on the fact that the best interest of the children would be served by returning to the "ideal" custody arrangement that had been in existence for six (6) years, and which was modified only because everyone thought she would be

important, because one of the findings necessary to support relief under Rule 60(b)(1) is that "a trial court must find both that a witness intended to misrepresent some fact in order to influence the decision by the finder of fact, and that the finder of fact did rely upon the misrepresentation in its decision." *Williamson v. Williamson*, 964 So. 2d 524 (¶13), *citing Stringfellow v. Stringfellow*, 451 So.2d 219, 221-222 (Miss. 1984).

Turner v. Turner, 824 So.2d 652 (Miss. Ct. App. 2002) is also easily distinguishable. *Turner* was an *original divorce proceeding* in which the father was awarded physical custody of the parties' child. On appeal, the mother challenged the chancellor's findings and conclusions under the ten *Albright* factors. She contended that the chancellor penalized her as a result of her intention to move to Hattiesburg to pursue her education. *Turner*, (¶28). The father testified that if the mother was granted custody of the child and moved to Hattiesburg, "he would do likewise." *Turner*, (¶28). After judgment was entered awarding the father custody, the mother filed a Rule 60(b) motion which was based on the fact that she had decided to enroll in the University of South Alabama, and not move to Hattiesburg as she had originally intended. *Turner*, (¶32). The Court of Appeals affirmed the chancellor's denial of the motion noting that "the potential residences of the parents was one consideration in the initial custody decision, as we have already detailed. **It was not a dispositive one**." *Turner*, (¶33) (emphasis added).

Here we have a modification of custody proceeding, not an original action, which involves an entirely different analysis. Rachel's impending move was the **only** reason for these entire proceedings. When a judgment modifying custody is based entirely upon a presumed fact, which turns out to be an erroneous presumption, then the judgment should be set aside.

The final argument Tim makes in opposition to relief from judgment is that there was not a

> The fact relied upon was that Dan was employed by a Memphis company at the time of trial. 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."

(Appellee's Brief, p. 37).

This convoluted argument has no merit whatsoever. The trial was based on *Rachel's impending move to Memphis*, **not** *Dan's employment status*. The chancellor said, "*I based the entire judgment on the fact that Rachel and Dan and their family were moving to Memphis.*" (T. 672). He **did not say** "*I based the entire judgment on the fact that Dan was employed by a Memphis company at the time of trial.*"

Tim's attempts to distinguish *M.A.S. v. Miss. D.H.S.*, 842 So.2d 527 (Miss. 2003), *Weeks v. Weeks*, 654 So.2d 33 (Miss. 1995), *Briney v. United States Fidelity & Guar. Co.*, 714 So.2d 962 (Miss. 1998) are all based upon the convoluted notion that since Dan was employed at trial and it was only his loss of employment that obviated Rachel's need to relocate, there was no mistaken factual underpinning for the chancellor's modification of custody.

The chancellor found as a fact that the existing joint custody arrangement was in the children's best interest, and that there was no equivalent substitute for the custody arrangement the children had enjoyed prior to Rachel's impending move to Memphis. The only reason the chancellor found the continuation of that custody arrangement impractical or impossible was the impending move, and the impending move formed a substantial part of his *Albright* analysis. Since the impending move did not occur, the continued joint custody arrangement could be and should have been restored. Neither party presented their *Albright* evidence from the standpoint of both of them being in the same geographic location. Of course, Rachel is now prohibited from presenting this *Albright* evidence since she must first prove a substantial and material change in circumstances in

been successful in precluding such an analysis. Justice and equity require that the Judgment be set aside and the "ideal" custody arrangement be reinstated.

IV. The chancellor erred in modifying child support where Tim did not request a modification, the parties submitted no evidence concerning child support, and the chancellor made no findings of fact to support the modification.

Tim apparently concedes that the chancellor erred by awarding child support since he did not address any of the points presented in Rachel's brief, *i.e.*: (1) Neither Tim's nor Rachel's pleadings contained a request for child support; (2) Tim expressly disavowed any request for child support; (3) Neither party submitted any evidence at trial pertaining to child support; (4) Rachel had no notice that child support was being considered by the court; and, (5) the chancellor made no findings of fact to support the modification of child support. Tim simply cited to the statute which grants chancellors the authority to award child support in modification proceedings. The statute itself, however, recognizes that the chancellor has no such authority absent a *petition* and *proof*. Miss. Code Ann. §93-5-23 (Supp. 2006) (emphasis added).

The Judgment should be reversed and Rachel should be reimbursed by Tim for all monies heretofore paid pursuant to the Judgment.

V. Under the particular circumstances existing in this case, the chancellor erred by failing to include a summary of the Guardian's qualifications and report, and his reason's for rejecting the Guardian's recommendations.

Neither party requested the appointment of a Guardian Ad Litem for the children. The chancellor made this appointment on his own initiative. The duties of a GAL are set forth in Section 43-21-121(3) of the Mississippi Code of 1972 which provides:

> "In addition to all other duties required by law, **a Guardian Ad Litem shall have the duty to protect the interest of a child for whom he has been appointed**

child's best interest. **The Guardian Ad Litem is not an adversary party...."**

The chancellor placed unusually severe time constraints on the parties at trial, limiting each party to a total of five hours to present their entire case, including direct and cross-examination, argument, and rebuttal. (T. 51). As a result, each side was limited in the number of witnesses and documents that could be presented at trial, and each side relied heavily on the information they had provided to the Guardian Ad Litem in the weeks preceding trial. The chancellor noted on several occasions that he would place great emphasis on the Guardian's report, and in fact denied Rachel's Motion for a Court Appointed Psychological Expert because of the reliance he intended to place on the GAL's testimony. (T. 22, CP 000513).

In the weeks preceding trial, the Guardian Ad Litem was able to interview numerous witnesses designated by the parties, including grandparents, friends, neighbors and others, which because of the time constraints, neither party could present at trial. She had the unique opportunity of interviewing the children in the homes of both parents and observing the children interacting with both parents and stepparents in their respective homes. She heard every word of testimony presented at trial, but had the additional advantage as guardian for the children, to see, hear, feel, touch and smell evidence that could not have been presented in the courtroom, regardless of the number of days allowed. The attorneys for both parties praised the "great job" and "hard work" she did on this case. (T. 644, 648). The court considered her testimony as that of "an expert witness". (T. 641). She was the only expert who testified in the case, and her opinion was clear - - the best interest of the children was served by remaining with their mother even though she was relocating to Memphis. (T. 627-629).

In this case, because of the justifiable confidence the court placed in the GAL, and the

should have at least stated on the record his reasons for not accepting the Guardian Ad Litem's recommendation that the children be allowed to remain with Rachel when she traveled to Memphis.

CONCLUSION

For all of the foregoing reasons, the Judgment should be reversed. The parties should be restored to the custody, visitation and support obligations which existed prior to the June 12, 2006, trial, and Rachel should be reimbursed for the child support she paid to Tim during the interim.

Respectfully submitted, this the 21st day of December, 2007.

RACHEL SPIVEY, Appellant

By: 

RICHARD C. ROBERTS III [MSB [redacted]
Law Offices of Richard C. Roberts III
599 Highland Colony Parkway, Ste. 110
Post Office Box 55882
Jackson, Mississippi 39296-5882
Telephone: 601.607.4144
Facsimile: 601.607.4194
Attorney for Appellant

CERTIFICATE OF SERVICE

I, Richard C. Roberts, III, Attorney for Appellant, Rachel Driskell Porter (Spivey) certify that I have this day served the above and foregoing *Reply Brief of Appellant* on the following person in the manner shown:

William Wright, Esq. Wright Law Firm, P.A. P.O. Box 5003 Jackson, MS 39296-5003	[X] [ ] [ ]	via U. S. Mail, regular delivery via Hand Delivery via Facsimile
The Honorable Cynthia A. Brewer Chancellor, 11th Chancery District P.O. Box 404 Canton, MS 39046-0404	[X] [ ] [ ]	via U. S. Mail, regular delivery via Hand Delivery via Facsimile

This the 21st day of December, 2007.

RICHARD C. ROBERTS III [MSB [redacted]
Law Offices of Richard C. Roberts III
599 Highland Colony Parkway, Suite 110
Post Office Box 55882
Jackson, Mississippi 39296-5882
Telephone: 601.607.4144
Facsimile: 601.607.4194
Attorney for Appellant