IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KIM LASHAN GILLILAND — APPELLANT

VS. — APPEAL NO. 2006-TS-02110

ROGER NEAL GILLILAND — APPELLEE

APPEAL FROM THE CHANCERY COURT OF OKTIBBEHA COUNTY

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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

The Parties:

Kim Lashan Gilliland

Roger Neal Gilliland

Trial and Appellate Counsel for Kim Lashan Gilliland:

J. Mark Shelton

Jana L. Dawson

Jak M. Smith (Trial Only)

Trial Counsel for Roger Neal Gilliland

George Mitchell

Appellate Counsel for Roger Neal Gilliland

Richard C. Roberts, III

David Bridges

Chancellor:

Hon. Kenneth M. Burns

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STATEMENT OF THE CASE

A. Nature of the Case, Course of the Proceedings and Disposition Below

Kim Lashan Gilliland ("Kim") and Roger Neal Gilliland ("Roger") were divorced by the Chancery Court of Oktibbeha County, Mississippi on July 22, 2005. (C.P. 20) The *Final Judgment* awarded Roger the primary physical care, custody and control of the parties' two children Shawn Neal Gilliland ("Shawn") and Brandon Reed Gilliland ("Brandon"). At the time of divorce, Shawn was 7 years old; Brandon was 5. Kim was awarded visitation with Shawn and Brandon as set forth in the *Final Judgment*.

Kim appealed from the *Final Judgment*. The Mississippi Court of Appeals affirmed, noting that the award of custody to Roger was based in large measure on the chancellor's finding that Kim suffered from "serious emotional problems" and that she inflicted discipline on the children that "nears physical and mental child abuse." The Court of Appeals found these findings were supported by substantial evidence. *Gilliland v. Gilliland*, — So.2d —; 2007 WL 968912 (¶¶45, 46) (Miss.Ct.App. 2007)

Kim filed a *Motion for Rehearing* with the Court of Appeals on April 17, 2007, which was denied on August 21, 2007.

While that appeal was pending, Kim filed 3 separate complaints to modify custody. The first, filed only 2 months after entry of the *Final Judgment*, was denied on October 21, 2005. (C.P. 26) Kim appealed from this denial, but later dismissed her appeal voluntarily. (C.P. 3)

The October 21, 2005 *Order* which denied Kim's first complaint to modify custody modified the parties' visitation schedule as follows:

a. The exchange of the children for visitation was ordered to take place at the Oktibbeha County Sheriff's Department. (C.P. 27);

b. Kim's telephone contact with the children was to take place on Monday and Thursday evenings, and the calls were not to exceed 15 minutes. (C.P. 27);

c. The Court ordered that neither party was to "visit with the children at school more than once per week unless called to school by a teacher or administrator or attending a school program." (C.P. 27);

d. The Court prohibited Kim and Roger from contacting "the other at home or work, absent an emergency or scheduled telephone visit." (C.P. 28)

On February 3, 2006, 105 days after the first complaint to modify custody was denied, Kim filed her second complaint to modify custody. This second complaint was denied in an *Opinion and Judgment* entered July 27, 2006. The appeal *sub judice* is from that *Opinion and Judgment.*

At the trial of Kim's second complaint to modify custody, Roger moved for a directed verdict at the close of Kim's case in chief. The Chancellor granted this motion. Obviously, Roger presented no additional evidence, since a verdict had been directed in his favor. In his *Opinion and Judgment*, however, the Chancellor not only granted Roger's motion for a directed verdict, but also modified the judgment of divorce in two

particulars:

a. The place of exchange for the children was changed from the Oktibbeha County Sheriff's Department to "a place that is mutually convenient," and, in the absence of an agreement, at a local McDonald's restaurant in Starkville; and

b. The Court added the provision that "[w]hile school is in session, Kim may exercise her visitation by taking custody of the children at school at the conclusion of the school day and returning the children to the school on the day next succeeding the termination of her visitation." (C.P. 56)

The parties, through their attorneys, agreed on the record to the first modification, providing for an exchange of visitation at a mutually convenient place or at the local McDonald's restaurant. (T. 319) However, Roger's counsel strenuously objected to the second modification, since Kim's motion for modification had been dismissed, and Roger had presented no evidence to support any modification of the Judgment. (T. 319-23)

Kim and Roger have different interpretations of this last provision of the *Opinion and Judgment*, which they have been unable to reconcile. These differences are discussed below. To resolve the issue, Roger filed a motion for clarification of the *Opinion and Judgment*. (C.P. 57) Kim filed a motion to reconsider. (C.P. 62)

In an *Order* entered October 6, 2006, the Chancellor ordered that Kim would not have Wednesday night visitation during the months of June and July. However, since the order did not address the ambiguities raised by Kim's Wednesday night visitation, Roger

filed a second motion for clarification of order, on October 16, 2006. (C.P. 110) Kim filed a response to this motion, again denying that the *Opinion and Judgment* should be clarified. (C.P. 114)

Kim filed her *Notice of Appeal* on November 30, 2006. (C.P. 123) On December 6, 2006, Kim also filed a motion to dismiss Roger's motion for clarification. Roger filed his *Cross Notice of Appeal* on December 13, 2006, asserting that the Chancellor abused his discretion by granting Kim the relief of additional visitation after he had dismissed Kim's complaint for modification and without Roger presenting his case-in-chief.

On November 29, 2006, the Court entered an *Order* which provided, without explanation: "All post trial motions are overruled." (C.P. 130)

Kim filed her third complaint to modify custody on June 1, 2007, 10 months after the denial of her second complaint, and 45 days after the Court of Appeals handed down its April 17, 2007 decision. As of this writing, Kim's third complaint is still pending before the Oktibbeha County Chancery Court. Also pending is Roger's motion for clarification of the Court's visitation orders, and request that the Court enter one "omnibus" visitation schedule that elucidates, once and for all, the parties' respective periods of custody of the minor children, (hopefully) ending future disagreements about these matters.

B. Statement of Facts

Because Kim has challenged whether the Chancellor erred in granting Roger's motion for a directed verdict, the facts of this case are discussed in substantial detail in the body of the Argument submitted below. For the sake of brevity, rather than reiterate all of these facts in this Section, Roger refers this Court to the discussion of the facts in the following sections of this Brief.

Standard of Review

This is an appeal from an order granting what at trial was described as a motion for directed verdict. To be technically accurate, the motion was for dismissal "on the ground that upon the facts and the law the plaintiff has shown no right to relief." Miss.R.Civ.P. 41(b); *Aronson v. University of Mississippi*, 828 So.2d 752, 755 (¶11) (Miss. 2002) Review of a Rule 41(b) order of dismissal "is limited to ascertaining whether the record reveals substantial evidence to support the trial court's findings in support of its decision." *Singing River Elec. v. State, DEQ*, 693 So.2d 368, 371 (Miss. 1997)

"When a judge considers a motion to dismiss under Rule 41(b) of the Mississippi Rules of Civil Procedure, the judge must consider the evidence fairly and not in the light most favorable to the plaintiff. If he would find for the defendant, the case should be dismissed." *Century 21 Deep South Properties, Ltd. v. Corson*, 612 So.2d 359, 369 (Miss. 1992) "This Court applies the substantial evidence/manifest error standards to an appeal of a grant or denial of a motion to dismiss pursuant to M.R.C.P. 41(b)," and can

reverse only if the trial court abused its discretion. *Id.*, at 369; *Zinn v. City of Ocean Springs*, 928 So.2d 915, 919 (¶8) (Miss.Ct.App. 2006)

"When reviewing a trial court's decision to dismiss under Miss. R. Civ. P. Rule 41(b), the Court may reverse only if it finds the trial court was manifestly wrong. The standard for reviewing a trial court's decision of involuntary dismissal under Rule 41(b) is abuse of discretion." *Dinet v. Gavagnie*, 948 So.2d 1281, 1283 (¶4) (Miss. 2007) (citations omitted)

Otherwise, this Court reviews child custody determinations under the abuse of discretion standard. *Mabus v. Mabus*, 890 So.2d 806, 818 (¶51) (Miss. 2003) This Court will not disturb the findings of a chancellor unless he was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *McNeil v. Hester*, 753 So.2d 1057, 1063 (¶21) (Miss. 2000) Under this Court's standard of review, great deference is accorded to the chancellor's findings of fact, which may not be disturbed on appeal if they are supported by substantial evidence. *Brooks v. Brooks*, 652 So.2d 1113, 1124 (Miss. 1995) An appellate court does not re-examine the evidence to see if it agrees with the chancellor's ruling; rather, its duty is merely to determine whether the chancellor's ruling is supported by credible evidence. *Lenoir v. Lenoir*, 611 So.2d 200, 203 (Miss. 1992)

The polestar consideration in child custody cases is the best interest and welfare of the child. *Crider v. Crider*, 904 So.2d 142, 144 (¶6) (Miss. 2005).

SUMMARY OF THE ARGUMENT

1. Since the parties' divorce in July, 2005, Kim has filed three (3) complaints to modify custody, and three (3) appeals to this Court. Judge Burns has repeatedly found that the children are properly in Roger's care. With each additional chapter of renewed litigation, it becomes more and more clear that Kim is not seeking to rectify any alleged "material changes in circumstances" or "adverse effects". She is simply grasping at straws to gain custody of the children.

In layman's terms, the law will not allow Kim to have custody of the children unless she can prove something is terribly wrong at Roger's house. As long as the children are thriving, and her relationship with Roger is peaceful, Kim cannot gain custody. Thus, Kim has a vested interest in her relationship with Roger being as tumultuous as she can make it, and in the children being upset by their parents' purported "inability" to cooperate. Kim has an extensive history of sacrificing the short-term benefit of a peaceful co-existence with Roger for the long-term goal of getting custody of the children.

Kim's suit is based upon nothing more than petty disagreements over visitation and telephone contact with the children – the only aspects of Roger's custody which she can affect. Judge Burns properly dismissed Kim's complaint when she rested her case.

2. Only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change. Kim has not shown that Roger's behavior poses a clear danger to the children's mental or emotional health. Her evidence at trial proved, at most, that she continues to argue with Roger about the ending time of visitation and her telephone contact with the boys. Although she has attempted to conflate a few isolated events into a larger controversy, the evidence does not remotely approach proof of a material change in the circumstances of Roger's home.

3. Kim also has not shown that the children have been adversely affected. At most, she alleged that the parties' visitation disputes "must" have affected the children. However, other than testifying that the children sometimes cried when she argued with Roger about visitation, Kim proved no adverse effects.

To the contrary, the children are at the top of their respective classes in school, are popular with their peers, and are active in sports and racing. Shawn is an A/B student, while Brandon is "at the top of his class." Dr. Fred Drummond, the only expert who met with the children and their teachers, testified at length about the children's progress.

Although Kim alleges this is a case where *Riley v. Doerner* is applicable (proof of an adverse effect is not required where such effect is "reasonably foreseeable" if custody is not changed), none of the evidence in this case comes even close to the horrific circumstances of the children in *Riley* and its progeny. Kim presented proof only that:

a. Parents getting along will have a beneficial effect on children, while parents not getting along will have a detrimental effect;

b. Shawn gained 11 pounds in the 9 months between October, 2005 and July, 2006. At one time he had also had bowel problems and a body odor, although his teacher testified that these problems were resolved. Kim offered no proof that the bowel problems and body odor originated while Shawn was in Roger's care;

c. In November, 2005, Shawn was somewhat depressed and anxious because he was being picked on by other boys in his school. This problem was resolved by January, 2006 (six months before trial);

d. Kim's counselor, who had not interviewed Roger or the children – and who admitted he knew nothing other than what Kim told him – thought Roger used the children to punish Kim for divorcing him; and

e. The children slept with Roger in his bed, although Roger moved to a separate bed once they had fallen asleep.

Judge Burns properly concluded Kim did not prove any "adverse effect" upon the children.

4. At most, what Kim demonstrated at trial, as the Court found, was that she and Roger continue to have a "volatile relationship." This is not grounds for modification of custody. If it were, then any non-custodial parent could gain custody just by stirring up

trouble with the custodial parent – as Kim continues to do. *Touchstone*, *Mixon*, *Grissom* and *Creel* all find that mere arguments between parents do not constitute grounds for modification of custody.

5. Kim has also appealed from Judge Burns' denial of her complaint to have Roger found in contempt of court. There are two kinds of contempt, civil and criminal. A petitioner for contempt is not permitted to appeal the court's finding that a respondent is not in *criminal* contempt, any more than the prosecution can appeal a not-guilty verdict.

The petitioner for contempt may appeal the court's finding that the respondent is not in *civil* contempt. However, the standard of review is high: a trial court, due to its temporal and physical proximity to the parties, is "infinitely more competent" to decide the matter.

The remedy Kim was seeking for Roger's purported civil contempt was unclear. Kim's pleadings asked for a "civil monetary sanction," but presented no evidence showing any amount of monetary losses or attorney's fees. When Judge Burns asked Kim's attorney what she wanted him to do to Roger, she responded that she wanted a finding that there had been a material change in circumstances. For the reasons described herein, there was no material change in circumstances.

On appeal, Kim requested "make-up" visitation, for those times when Roger allegedly denied her visitation. However, Judge Burns never found that Roger denied her visitation. All that he found was that Roger let his feelings of animosity interfere with his

judgment. He also found there was no remedy for this, and there is none. What could he order? He could hardly order Roger to be incarcerated until he no longer let his animosity for Kim interfere with his judgment. In light of the high standard of review, and the evidence supporting his findings, Judge Burns' dismissal of Kim's complaint for contempt should be affirmed.

5. Although Judge Burns correctly dismissed Kim's complaint pursuant to Rule 41(b), he inappropriately proceeded to modify visitation:

a. Neither party asked for a modification of visitation in their pleadings. Kim requested only *enforcement* of the Court's visitation orders, not modification.

b. Even if Roger was on notice that the Court was considering a modification of visitation, no such modification should have been ordered until Roger had the opportunity to present his case. The case was tried over the question of whether custody should be modified. If Roger had been on notice that modification of visitation was on the Court's agenda, he would have presented evidence showing whether and how visitation should (or should not) be modified.

c. No evidence was presented showing that the visitation schedule as written was "unworkable or inappropriate," as is required before it can be modified. If either party was not in compliance with the Court's order, this did not

render it "unworkable," but simply un-enforced. Each party recognized this by asking for the other to be held in *contempt*, and not for *modification*.

d. The modification of visitation has caused considerable conflict between the parties. The modification intended to award Kim only a couple of Wednesday-evening visits with the children each month, but Kim has interpreted the Court's order in such a way that she awards herself Spring Break, the Fall Holiday and other visitation not contemplated in the order. Roger finds himself in the impossible position of either surrendering to Kim's demands or involving the children in yet more conflict instigated by Kim.

e. The visitation ordered by Judge Burns had no relationship to the visitation disputes described at trial. It simply provided Kim with additional time with the children – without addressing any of the conflict between the parties.

The provision of the Chancellor's order that awarded Kim an additional right to "return the children to the school on the day next succeeding the termination of her visitation" should be reversed. Otherwise, the Chancellor's orders should be affirmed in all respects.

ARGUMENT

1. KIM WILL NEVER ACCEPT ROGER'S CUSTODY OF THE CHILDREN

Based on its lengthy history, some opening observations about this case should be made before reviewing the evidence and law raised by Kim's appeal. This history began on January 17, 2002, when Kim sued Roger for divorce and for custody of the children. (C.P. 6) These children have been in litigation ever since.

On July 22, 2005, this Court entered its *Final Judgment* which, in relevant part, awarded Roger the primary physical care, custody and control of the children. Since the entry of said *Final Judgment*, Kim has in every conceivable manner contested Roger's custody, including, but not limited to, the following activities:

a. filing an appeal from said *Final Judgment*, which was denied by the Mississippi Court of Appeals on April 3, 2007;

b. filing a motion for rehearing from said decision by the Mississippi Court of Appeals, on April 17, 2007;

c. filing a complaint to change custody in September, 2005, which was denied by the Chancery Court on October 21, 2005;

d. filing an appeal with the Mississippi Supreme Court from said November 18, 2005 denial, which Kim ultimately dismissed;

e. filing a second complaint to change custody on February 3, 2006, which was dismissed by the Chancery Court on July 27, 2006;

f. filing an appeal with the Mississippi Supreme Court from said July 27, 2006 dismissal of Kim's complaint (the appeal *sub judice*); and

g. filing yet another *Complaint* on June 1, 2007, the third such complaint to modify custody in the 23 months since this Court entered the aforesaid *Final Judgment.*

At some point during this endless litigation, it has become obvious that Kim is not seeking to redress any changed circumstances in Roger's home which are adversely affecting the children.[1] Kim is simply grasping at straws to gain custody.

After five years in the courtroom, Kim has become a veteran of custody litigation. She undoubtedly knows the *Breidemeier* factors by heart. More to the point, she recognizes this corollary to *Breidemeier*: if custody cannot be changed unless there has been a material change in circumstances in the custodial parent's home which adversely affects the children, then peace, harmony and tranquility are the enemies of custody modification.

In layman's terms, to prove she is entitled to custody, Kim must first prove that something has gone badly wrong; as long as Roger and Kim are able to work together for the good of the children, she can never get custody. **Thus, Kim has a vested interest in her relationship with Roger being as chaotic as possible.**

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[1] *Breidemeier v. Jackson*, 689 So.2d 770 (Miss. 1997) (change in custody requires proof of a material change in the circumstances in the home of the custodial parent, causing an adverse effect upon the children, and that the requested modification is in their best interests)

In her brief, Kim raises a number of petty disagreements with Roger, mostly centering on his purported abuse of her telephone privileges. Roger testified that his conversations with Kim usually turned into arguments. Rather than talk with her, he would either hang up, or just hand the telephone to one of the boys. Kim claimed that this "put the children in the middle", although it is difficult to see what else Roger could have done when Kim was ringing the phone off the hook.

Kim also claims that Roger will not work with her on visitation conflicts, although Roger testified at length that Kim was chronically late with the children, and would have the children call at the end of Kim's scheduled visitation to ask for more time with her – effectively making him the "bad guy" for saying no, and Kim the "good guy" for wanting more time with the children. Kim said sometimes the children would cry, either because Roger said "no," or because they knew before they called that he was going to say no. If this is true, why would Kim continue to put the children in this situation instead of simply bringing them home on time?

Kim concluded long ago that crying children and visitation conflicts provide grist for her custody trials. Judge Burns' 2006 judgment found that Kim raised "substantially the same issues" as those addressed in the Court's 2005 judgment. (C.P. 53) They are again the focus of her third modification complaint. (C.P. 53) Judge Burns also found that Kim and Roger have "a volatile relationship." (C.P. 55) Unless and until Kim realizes that "a volatile relationship" with Roger will not gain custody, she will

undoubtedly see to it that their relationship remains volatile.

It would exceed the Miss.R.App.P. 28(g) 50-page brief limit to provide a blow-by-blow account of the controversies between Kim and Roger just in the 8 months between Judge Burns' 2005 judgment and his 2006 judgment. These disagreements are both picayune and sordid – a discussion of them here makes them seem more significant than they were at the time. Roger had his own side of these stories, one not reflected in the appellate record because Kim's case was dismissed before Roger testified on direct examination or presented his case-in-chief. Suffice it to say that Kim presented all of her evidence and, having listened to it all, Judge Burns dismissed her case. For the reasons discussed below, his decision should be affirmed.

2. THERE HAS BEEN NO MATERIAL CHANGE IN CIRCUMSTANCES

In *Giannaris v. Giannaris*, 960 So.2d 462 (Miss. 2007) (¶9) this Court reviewed the *Bredemeier* factors for changing custody, and reiterated that "[a]ll courts must be consistent, diligent, and focused upon the requirement that 'only a parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change.'" (quoting *Morrow v. Morrow*, 591 So.2d 829, 833 (Miss. 1991), and citing *Tucker v. Tucker*, 453 So.2d 1294, 1297 (Miss. 1984) and *Ballard v. Ballard*, 434 So.2d 1357 (Miss. 1983)) The Court noted "[*b*]*efore custody should be changed, the chancellor should find that the overall circumstances in which a child lives have materially changed and are likely to remain materially changed for the foreseeable future* and, of course, that

such change adversely impacts upon the child." *Giannaris*, 960 So.2d at 467 (¶10) (emphasis in the original)

Kim has not shown any "parental behavior that poses a clear danger" to Shawn or Brandon's "mental or emotional health" as required by *Giannaris* and *Morrow*. At most, Kim has offered evidence only that she is still in conflict with Roger when she exercises visitation and when she calls the boys on the telephone. This hardly constitutes a change in the parties' circumstances.

Even before the divorce was final, Kim's "mental and emotional stability was questionable."[2] By the time the parties were divorced, the Starkville Police had reported that Kim was "completely out of control," and exhibited "bizarre behavior" when they had been called to the Gilliland household on repeated occasions. Once, Kim "almost wrecked her car trying to stop Roger and then jerked Shawn out of the car." This instability culminated in Kim's being arrested after hitting Roger and the children. *Gilliland*, 2007 W.L. 968912 (¶¶40, 43-47)

If either parent's conduct has jeopardized the children's physical or mental health, it has been Kim's. For the reasons noted in the preceding section, Kim has a vested interest in maintaining quarrels over visitation and, unfortunately, she has successfully fanned a number of petty disputes. The particulars of these disputes are discussed in greater detail below. However, as with the petitioner in *Giannaris*, Kim has only

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[2]A finding made by the Chancellor after the divorce trial and which the Court of Appeals found was supported by substantial evidence. *Gilliland*, 2007 W.L. 968912 (¶¶40, 46)

"conflated isolated events" to suggest a material change in circumstances. *Giannaris*, 960 So.2d at 465 (¶2) As the Chancellor found, Kim did not prove material changes in Roger's household justifying a change in custody.

3. THE CHILDREN HAVE NOT BEEN ADVERSELY AFFECTED; IN FACT, THEY ARE THRIVING

Before custody can be modified the chancellor must find an adverse impact upon the children's welfare. *Giannaris*, 960 So.2d at 467 (¶10) Kim correctly argues that she need not prove an *existing* adverse impact upon the children if such an impact is "reasonably forseeable" if the children remain in a dangerous environment. *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996); *Savell v. Morrison*, 929 So.2d 414 (Miss.Ct.App. 2006) In *Riley*, the mother had a succession of live-in boyfriends, and her home was the site of illegal drug use. *Id*, at 742. In *Savell*, the mother's new husband by his own admission yelled at the child on an almost daily basis, fantasized about tying the child to a chair with duct tape, "peppering" her with paint balls and agreed he was willing to go to jail if he "snapped" and whipped the child. *Id*, at 416-17 (¶6)

Similarly, in *Hill v. Hill*, 942 So.2d 207 (Miss.Ct.App. 2006) the Court found an adverse effect was reasonably foreseeable where the mother moved 4 times in 3 years, was intimately involved and introduced the child to at least 4 men, was dating a married man, was arrested for stalking a boyfriend's ex-wife and was involved in pornography. In *Jernigan v. Jernigan*, 830 So.2d 651 (Miss.Ct.App. 2002), adverse effects were reasonably foreseeable where the mother moved several times, didn't hold a job, falsely

accused the father of sexually molesting the child and refused to cooperate with visitation.

None of the evidence in the case *sub judice* comes even close to the horrific circumstances of the children in *Hill*, *Savell*, *Jernigan* and *Riley*. At worst, Kim can recite only that Roger's treatment of *her* – as opposed to the children – is inappropriate. She claims that Roger hates her, refuses to talk to her and has made disparaging remarks to her in front of the children. However, she recites no evidence that the children have been adversely affected. Instead, she rehearses her disagreements with Roger, and supposes that the children "must" have been adversely affected by them.

Kim marshals these conclusions in the portion of her brief labeled "The Children Have Been Adversely Affected." *Appellant's Brief*, pp. 24-30

1. Roger admitted the children had suffered "a detrimental effect." A clear reading of Roger's testimony on this point was that Roger agreed, not that the children had suffered a detrimental effect, but that Dr. Fred Drummond had testified earlier at trial that parents getting along will have a beneficial effect on children, while parents not getting along will have a detrimental effect. (T. 176)[3]

This was not Roger's testimony but Dr. Drummond's, although Roger agrees with the proposition that it is better for the children when parents cooperate. Roger did not "admit" that the children had in fact been adversely affected.

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[3]"Q: You heard Dr. Drummond testify a little while ago that getting along will have a beneficial effect on the children? A: Yes, sir. Q: And not getting along will have obviously a detrimental effect, right? A: Absolute. [sic] Yes, sir."

2. Shawn has symptoms which are "almost certainly" related to anxiety and stress caused by Roger's mistreatment of Kim. These "symptoms" were Shawn's gaining 11 pounds in the 9 months between October, 2005 and the trial in July, 2006; bowel problems and body odor. (T. 21-23, 198, 205) Roger testified that Shawn would not eat school lunches and that Kim would bring him hamburgers, fries and candy to eat so that he would not miss a meal. (T. 145-148) Kim did not provide any evidence that Shawn's weight gain was unusual (he was 8 years old at the time of trial) or that it was related to anxiety and stress.

The only evidence of Shawn's bowel problems was Kim's testimony that Shawn's teacher, Bambi Bagwell, had told her about Shawn having bowel problems shortly after Christmas, 2005. (T. 205) No evidence was presented to prove the nature or extent of these problems, their cause, or their purported relationship to "anxiety and stress." Certainly, nothing was presented to provide a causal connection between bowel problems and *Roger*'s conduct.

The only evidence of Shawn's body odor was Ms. Bagwell's testimony that she noticed that he had an odor, and that Kim told her "Shawn has this thing with cleaning himself and this thing with toilet paper. She said I'm just going to take him to the bathroom and we will just have a talk. So she took him to the restroom, and she had noticed the odor, too. And after that, I didn't - - I have not noticed the odor there anymore." (T. 22) The source of Shawn's body odor was obviously something other than

"anxiety and stress."

3. Shawn was depressed and anxious. Dr. Fred Drummond testified that in November, 2005, Shawn said he was being picked on by other boys in his school, and that he said he was never going back to school. Dr. Drummond noted at the time that Shawn's mood remained "somewhat depressed and anxious." (T. 100-102) Although Kim seizes upon this isolated occurrence as evidence of an adverse effect on Shawn, the fairer reading of Dr. Drummond's testimony was that Shawn's mood related to his problem at school with the other boys. In any event, Dr. Drummond noted that by January, 2006, Shawn was getting along well with his peers in school. (T. 92) Kim offered no evidence to show that Shawn's short-term "depression and anxiety" had anything to do with Roger.

4. George Beals believed Roger uses the children to punish Kim. Mr. Beals is the counselor who has testified for Kim at each of her custody trials. He admitted that he'd had no contact with the children since October, 2005. (T. 75) He also admitted that he had not performed a custody evaluation and was not qualified to do so. (T. 76) Finally, he admitted his testimony was based on what Kim told him and that he believed her. (T. 76) In other words, the only thing Mr. Beals knew about the case was what Kim told him. Under these circumstances the chancellor was certainly not obligated to base his decision on Mr. Beals' ill-informed opinion.

5. The children do not sleep in their own beds. Roger testified that he lived alone with the boys in a large house, and that their bedrooms were on the other side of the house from his. He said that the boys were scared to sleep alone on the far side of the house. He had 2 beds in his bedroom; a small bed next to the large one where the boys slept. Roger would let the boys sleep in his large bed, and when they fell asleep he would get into the small bed. The boys were too heavy for him to carry to their own beds on the other side of the house, and it was easier to just sleep in the small bed next to them. Roger said that when they moved (and they now have, to Ackerman), they would be in a smaller house and the boys would sleep in their own rooms. (T. 148-52)

Rather than proving the children had been adversely affected, the evidence shows that Shawn is an A/B student, while Brandon is "at the top of his class." (T. 8, 48) Shawn's teacher Bambi Bagwell said that he "was functioning well and was a happy child at the end of the year, getting along with his friends and all." (T. 31) Brandon's teacher Clara Jones described "marvelous progress with Brandon." (T. 49) She testified: "He likes to excel. He enjoys doing his work. I have never seen a student so eager to learn ... he has made lots of friends. ... He is a very compassionate child. ... He is a caring, loving little boy." (T. 48)

Dr. Fred Drummond testified that Brandon had actually *improved* since the time of the parties' divorce: "Brandon was actually doing quite well in terms of his behavior. He no longer was oppositional. ... Frankly, I was a bit surprised at how well adjusted he was

in kindergarten, not totally surprised but pleasantly surprised. His teacher described him as a good citizen. He just wasn't having behavior problems, and neither parent was describing that Brandon was having those kind of behavior problems where he was oppositional ... both of [the boys] were functioning well. ... They were not having behavior problems. They were doing – both doing well in school. ... [When they came to his office] They were always well dressed, you know, from top to bottom. They were well groomed and well dressed. ... both boys were performing well academically. Both boys were performing well, I guess you could say, or doing well, adjusting well, socially in the classroom, interacting with adults as well as their peers, with other students. (T. 89-92)

In its *Opinion and Judgment*, the Court found, in relevant part:

"3. Shawn has recently completed the second grade. According to his teacher, Bambi Bagwell, he does well in school although he was tutored to bring him up to level in language and math skills. He had all A's and B's on his report card. ...

"4. Ms. Clara Jones, Brandon's teacher, described Brandon as 'marvelous' and at the top of his class. He has many friends and is compassionate. Ms. Jones says that Roger always asked what he can do to help Brandon.

"Brandon has seen a psychologist, Dr. Freddie Drummond, for outpatient child therapy. Brandon was initially diagnosed with oppositional defiant disorder. Dr. Drummond said he was pleasantly surprised at the progress Brandon has made."

The Court also noted *Riley* "provides that 'there will occasionally be cases ... in which the strict application of the [traditional] tests [for modification of custody] produces a result clearly contrary to the children's best interests.' The Court does not believe that this case is factually or legally consistent with *Riley.*

"This Court does not address the *Albright* factors because there has not been a material change in circumstances that adversely affects the children." (C.P. 54-55) (Emphasis added)

In summary, to modify custody, the law requires proof that the children either have been adversely affected, or that an adverse effect is reasonably foreseeable. Kim provided evidence of a limited number of controversies, but no actual evidence of an adverse affect upon the children. She certainly did not provide any evidence showing the children were in circumstances even remotely similar to those described in *Riley*, *Hill* and *Savell.*

To the contrary, the evidence showed that the children are thriving. The Chancellor recognized that the children are performing well and have not been adversely affected. This Court should affirm the Chancellor's *Opinion and Judgment* because it is supported by the record.

4. MINOR DISPUTES ARE NOT GROUNDS FOR CHANGING CUSTODY

At most, what Kim demonstrated at trial, as the Court found, was that she and Roger continue to have a volatile relationship. (C.P. 55, ¶9.) A volatile relationship between the parents does not constitute grounds for modification of custody. If it did, then every non-custodial parent would have incentive to continue and stir controversy between them (as Kim continues to do).

The parents in *Touchstone v. Touchstone*, 682 So.2d 374 (Miss. 1996) were involved in "vicious, profanity-laden accusations and insults between the parties" during the visitation exchanges and in the presence of the child. In upholding the chancellor's refusal to modify custody, this Court found that "it appears that the incidents complained of are more the result of the parties' animosity toward each other rather than a reflection of either's fitness as parents." *Id*, at 378. Later in its opinion, the Court concluded "Although young Wesley has been subjected to some gross unpleasantries between his parents, the record does not remotely suggest that these episodes are characteristic of the overall circumstances in which he lives. ... Dr. Wood Hiatt, a child psychiatrist, admitted that Wesley appeared to be a secure child with advanced verbal skills. We find therefore that there is substantial evidence in the record to support the chancellor's finding that there was no material change in circumstances affecting the minor child's best interests." *Id*, at 379.

In *Mixon v. Sharp*, 853 So.2d 834 (Miss.Ct.App. 2003) the parents divorced and the father was awarded custody of the parties' daughter. Six years later, the mother sued for custody, claiming, in relevant part, that the father interfered with her visitation. The chancellor agreed and modified custody. The Court of Appeals reversed, noting that if the father had interfered with visitation, the appropriate remedy was punishment for contempt. "Changing child custody is not appropriate punishment for contempt." *Id.*, 853 So.2d at 838 (¶10) Similarly, in *Grissom v. Grissom*, 952 So.2d 1053 (Miss.Ct.App. 2007), the parties were unable to communicate with one another or work together for the children's benefit. Although the children were experiencing anxiety, the chancellor found, and the Court of Appeals affirmed, that modification of custody was inappropriate.

In *Creel v. Cornacchione*, 831 So.2d 1179 (Miss.Ct.App. 2002) the father was awarded custody of the parties' daughters in the divorce decree. From there the case followed a trajectory remarkably similar to the case *sub judice*: within 2 years, the mother had filed 4 separate actions, the last 2 requesting custody on the basis that the father had "harassed and vexed her, demeaned and degraded her in the presence of the children, interfered with telephone calls between her and the girls, refused to inform her of the girls' extracurricular school-related activities, and refused to allow her to attend those activities." *Id.*, at 1181 (¶4)

The trial court denied the mother's complaint, and she appealed. The Court of Appeals' opinion – changing only the parties' names – could have been pasted word-for-word in Judge Burns' *Opinion and Judgment* without missing a beat: "Sandra's proof centered around Joseph's alleged denial of visitation and interference with telephone communications as reasons why the custody should change. Thus, specific findings of fact were unnecessary since Sandra did not present evidence of any material change in circumstances, much less any change which was arguably adverse to the best interest of the children." *Id.*, at 1183 (¶16) In other words, proof of "denial of visitation and interference with telephone communications" is not proof of a material change in circumstances adversely affecting the children. At most, Kim presented only a case for contempt of court.

Finally, in *Ortega v. Lovell*, 725 So.2d 199 (Miss. 1998), this Court reversed a change in custody which was based solely upon the mother's denial of the father's visitation rights. In reaching its decision, this Court found that "[t]he record in this case is completely devoid of any findings of fact other than that Mercedes was in contempt of court below – a fact which says nothing about Kristina and whether or not she is being properly cared for." The Court ended its opinion by stating: "Absent a showing that Katrina has been, at the hands of her mother, abused, mistreated or neglected in some way this Court has said a custody order may not be modified. Therefore, this case should be reversed and rendered." *Id.*, at 204 *Ortega* involved a mother who had denied visitation

for *eleven years*. Nevertheless, the Court found that the appropriate remedy to be considered was contempt, not modification.

In her motion for rehearing, Kim's attorney summarized her grounds for modification: "But the main thing that want [sic] to hit on today is that we feel there has been a material change **because Mr. Gilliland has not gone by these Court's Orders: to amicably confer, to not put the children in the middle, to not be disrespectful in the presence of the children.**" (T. 302, Emphasis added) Later, she said "But I think in my feeling is that **the material change is Mr. Gilliland's refusal to abide by your court's Orders.**" (T. 314, Emphasis added) The law in Mississippi is clear that Kim's grounds for modification are more appropriately contemplated by the chancellor in terms of enforcement of the order in question, not by modification of custody.

5. ROGER WAS NOT IN CONTEMPT OF COURT

Kim's complaint alleged that Roger was in contempt of court, and prayed that the Chancery Court "[f]ind that the Defendant is in willful, intentionally [sic] and contumacious contempt of Court and order that he be sanctioned according to law, including but not limited to civil monetary sanctions." (C.P. 37, ¶3.) Kim appeals from the chancellor's finding that Roger was not in contempt.

It is axiomatic that there are two different kinds of contempt, civil and criminal. This Court has previously held it is without authority to reverse a finding that a party is *not guilty* of criminal contempt, any "more than could this Court reverse a jury's verdict

that an accused stand acquitted of a criminal charge." *Hinds County Bd. of Sup'rs vs. Common Cause of Mississippi*, 551 So.2d 107, 121 (Miss. 1989) In construing Miss. Code Ann. (1972, As Amended) §11-51-11 (Appeal from criminal contempt judgment), this Court found that only a defendant convicted of criminal contempt had the right to appeal. "There is no statute authorizing an appeal by the petitioner when the trial court has dismissed a petition for criminal contempt." *Common Cause of Mississippi vs. Smith*, 548 So.2d 412, 414-15 (Miss. 1989)

The Court in *Common Cause* did find that Miss. Code Ann. (1972, As Amended) §11-51-11 (the statute generally authorizing appeals in civil cases) authorized the plaintiff to appeal from denial of a judgment of *civil* contempt. Thus, to the extent Kim has perfected a valid appeal, it can only be from the chancellor's finding that Roger is not in civil contempt of court.

The standard of review of civil contempt judgments was recently summarized by this Court in *R.K. v. J.K.*, 946 So.2d 764, 777 (¶39) (Miss. 2007) "A chancellor has substantial discretion in deciding whether a party is in contempt. Contempt is an issue of fact to be decided on a case-by-case basis. Regarding a determination of contempt, a trial court due to its temporal and physical proximity to the parties is infinitely more competent to decide the matter." (Citations omitted)

It is difficult to discern from Kim's complaint just what she was seeking in her prayer for a finding of contempt. She asked "that he be sanctioned according to law, including but not limited to civil monetary sanctions." (C.P. 37, ¶3.) The trouble is, as the chancellor found, there is no such thing as a "civil monetary sanction." The Court can impose a civil fine in the amount of "the injured party's proved losses and litigation expenses, including counsel fees." *Morris v. Walden*, 856 So.2d 705, 708 (¶10) (Miss.Ct.App. 2003) This is not the same thing as a fine in the criminal sense of the word, a sanction paid to the Court. *Id.*, at 708 (¶10).

Moreover, the contempt of which Kim complained was Roger's alleged noncompliance with the Court's orders regarding visitation. She did not plead or prove any monetary losses, nor attorney's fees or other costs.

Judge Burns found that Roger lets his feelings of animosity for Kim interfere with his judgment, but also found there was no appropriate remedy -- and there is none. What could he order? That Roger be incarcerated until he no longer let his animosity for Kim interfere with his judgment?

During the hearing on Kim's motion for reconsideration, Kim's attorney reiterated her belief that Roger had not amicably conferred with Kim, had "put the children in the middle" and had been disrespectful in the presence of the children. (T. 302) When Judge Burns asked Kim's attorney "what would you have me do to Mr. Gilliland", she responded that he should find there had been a material change in circumstances. (T.

303)

Now, on appeal, Kim argues that the Court could have awarded Kim "make up" visitation for those times when Roger disputed or hindered her visitation. The only trouble with this argument is that the chancellor never found that Roger disputed or hindered her visitation. Kim alleges this, but the Court never found it. Kim also suggests the Court could have awarded attorney's fees, but, again, she did not prove she had incurred attorney's fees, and the Court made no findings of the amount of her attorney's fees, if any. In view of the substantial discretion afforded to Judge Burns on this issue – and this Court's pronouncement that he is "infinitely more competent to decide this issue" – his finding that Roger is not in contempt should be affirmed.

6. THE COURT'S MODIFICATION OF VISITATION SHOULD BE REVERSED

When Kim concluded her case in chief, Roger made a motion for "a directed verdict" (more appropriately denominated a motion for dismissal pursuant to Miss.R.Civ.P. 41(b)). (T. 290-91) Judge Burns granted the motion, and dismissed Kim's complaint. He then conducted a chambers conference with the parties' attorneys. (T. 294) After the conference, Judge Burns announced that he was soliciting from the parties comments, suggestions and proposals as to how the Court "might make this situation between the parties a little better." (T. 297)

No such comments, suggestions or proposals appear in the record, but three weeks later the Court issued its *Opinion and Judgment* which amended the visitation schedule, in relevant part, by adding the provision that "[w]hile school is in session, Kim may exercise her visitation by taking custody of the children at school at the conclusion of the school day and returning the children to the school on the day next succeeding the termination of her visitation." (C.P. 56) During hearing of the parties' post-trial motions on September 14, 2006, Roger's attorney objected to this modification. (T. 319-23)

The Court overruled the parties' respective post-trial motions in an order entered October 6, 2006. (C.P. 108) It confirmed its previous order concerning where the children would be exchanged for visitation, and also lifted an injunction restraining the parties from being within 100 feet of each other, listed the beginning and ending times of holiday visitation and eliminated Kim's Wednesday night visitation during the months of June and July. Finally, the Court ordered that all other orders "would remain in full force and effect." (C.P. 109)

Most of the modifications made by the chancellor are agreeable to Roger, and he does not appeal from them. However, for the reasons discussed below, he does ask this Court to reverse that portion of the *Opinion and Judgment* which provides that Kim can "return the children to the school on the day next succeeding the termination of her visitation."

At the outset, it should be noted that **neither party requested a modification of visitation orders.**[4] (C.P. 31-48) **Neither party presented evidence showing that visitation should be modified.** The only proof at trial relating to visitation was that Roger and Kim had conflicts relating to: (a) telephone visitation; and (b) Kim keeping the children after they were due to be returned to Roger. The award to Kim of an additional right to "return the children to the school on the day next succeeding the termination of her visitation" did not address either of these issues.

There is no question that a chancellor may modify a visitation provision if there is a showing that the prior decree for reasonable visitation is not working. *Cox v. Moulds*, 490 So.2d 866, 869 (Miss.1986). The problem in this case is that: (a) there was no notice that the Court was considering a modification of visitation; (b) Roger was not provided an opportunity to submit evidence as to how or if visitation should be modified; and (c) the Court's modified visitation schedule bears no relationship to the problems discussed at trial, and is therefore not supported by substantial evidence.[5]

Kim's pleadings simply requested modification of custody. She did not request that, if custody were not modified, she be awarded additional visitation with the children.

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[4]After requesting a change of custody Kim did request that the Court "Establish reasonable and specific visitation rights to be awarded to the Defendant [Roger]." (C.P. 36, ¶2.) This request was mooted when the Court granted Roger's Rule 41(b) motion at the conclusion of Kim's case in chief.

[5]On appeal, this Court will affirm the chancellor's modification of a visitation provision if the decision was supported by substantial evidence. *Bratcher v. Surrette*, 848 So.2d 893, 897 (¶21) (Miss.Ct.App.2003)

Although she alleged that Roger was not in compliance with the Court's orders, she did not allege that the problem was with the visitation orders themselves – that they needed to be modified – she simply asked that they be enforced. (C.P. 31-38) Roger asked only that Kim be held in contempt. (C.P. 45-46) In short, there was no pleading placed before the Chancellor by either party requesting modification of visitation.

In the present case, Roger had no notice *until the trial had been concluded* that the Court was even considering modifying the visitation. Even when Judge Burns conducted his post-trial conference in chambers, he solicited only *agreements* from the parties on how the visitation schedule might be improved. Judge Burns said "I am just at a loss to understand why it has to be still, after this period of time, this much friction between these parties. And let's go back and talk about what we might can do to make this go a little bit smoother, if we can." (T. 296) Later, Judge Burns opined "I just noticed Mr. Gilliland didn't - - got to the point we are talking about that, he was reluctant to agree to something, and I don't want him to be on the spot. I want him to be free - - ." (T. 318) A moment later Judge Burns asked "Do you have an understanding about what you are going to agree to the change on?" (T. 318-19) (Emphasis added)

In other words, the Court did not notify the parties that it was going to unilaterally impose new visitation guidelines on the parties – it simply inquired into whether the parties could find common ground on some of the visitation issues that had vexed them. In fact, they did reach one agreement, to fix the place of exchange of the children. (T.

319) However, they did not agree to an award to Kim of an additional right to "return the children to the school on the day next succeeding the termination of her visitation." The Court awarded this right, even though no notice was given and no hearing on the issue of modification of visitation was conducted.

In *Fortenberry v Fortenberry*, 338 So. 2d 806, 807 (Miss. 1976), the chancellor modified custody and also modified child support, even though there were no pleadings requesting the modification of child support. The Mississippi Supreme Court reversed, noting that although a chancery court has the power and duty "to make such orders and decrees from time to time as will protect and promote the best interest of the children ... due process required that appellant have fair notice from an appropriate pleading that an increase in the amount of the support award was being sought and was under consideration ... ." *Fortenberry, supra* at 807, *citing Wansley v Schmidt*, 186 So. 2d. 462, 465 (Miss. 1966). *See also Barnes v Barnes*, 317 So. 2d 387 (Miss. 1975).

In *Massey v Huggins*, 799 So. 2d 902 (Miss. Ct. App. 2001), the Mississippi Court of Appeals held:

> Mrs. Massey was not provided notice that she 'might be required to defend a claim of child support' nor was there a 'suggestion in the record that support payments from [Massey] were even being contemplated by the court on its own or asked for by' Huggins.
>
> We reverse the award of child support. *Massey v Huggins*, 799 So. 2d 902, 904, 910 (¶32-33) (Miss. Ct. App. 2001).

In the case at bar, it was error for the Chancellor to modify visitation when it was not requested in the pleadings, Roger had no notice that the issue was under consideration by the Court, and no evidence was presented on the issue by either party.

Obviously, *Fortenberry, Barnes* and *Massey* involve child support instead of visitation. That distinction aside, the principle remains that before a final judgment can be entered – in this case, a modification of visitation – a party is entitled to present his evidence. If that were not the case, then even though Judge Burns had ruled in his favor and dismissed Kim's suit, Roger would have been required to demand leave to present his case-in-chief – an absurd result.

Finally, Roger's appeal of this issue is not based upon a desire to reduce Kim's time with the children. The modification ordered by Judge Burns, although well-intended, has created significant conflict.

For example, Kim **claims** that if a Friday or Monday holiday (e.g., Good Friday, Memorial Day, Labor Day) falls immediately before or after her weekend of visitation, the modified *Opinion and Judgment* awards her that holiday as well, even though the divorce decree awarded her visitation during Labor Day and Memorial Day only in even-numbered years. (C.P. 73, ¶III; C.P. 21.)

As another example, the divorce decree awarded Kim Wednesday-evening visitation from 3:00 p.m. until 6:00 p.m. (C.P. 21) Kim **claims** that the language in the modified *Opinion and Judgment* extends this visitation from 3:00 p.m. Wednesday until

the beginning of school the following Thursday morning.

More significantly, Kim **claims** that if school does not resume the following Thursday morning, she was awarded visitation until school resumes. (C.P. 73, ¶III) Thus, although Roger was awarded custody of the children during their Spring Break and Fall Holiday vacations, Kim now claims that during the week-long Spring Break and the Fall Holiday vacations, the *Opinion and Judgment* "clearly" terminated Roger's custody of the children at 3:00 p.m. on Wednesday, and that the Court intended that she have custody of the children until school resumed after said vacations on the following Monday. (C.P. 21; 73, ¶III.) For Roger, the question is anything but clear. Language apparently intended to merely award Kim a couple of Wednesday nights with the children each month has (in Kim's mind, at least) been twisted to cancel his Spring Break and Fall Holiday vacations with the children.

Thus, Roger has been put in a position of having to either accede to Kim's strained interpretation of the *Opinion and Judgment*, or else refuse her the visitation to which she considers herself entitled, thus spawning another round of litigation.

In summary, the Chancellor modified visitation (a) without notice that the Court was considering a modification of visitation; (b) without providing Roger an opportunity to present his case-in-chief; and (c) in a manner that bears no relationship to the issues discussed at trial, and which is therefore not supported by substantial evidence.

Judge Burns had every right to direct the parties to "go back and talk about what we might can do to make this go a little bit smoother, if we can." (T. 296) He committed error when he unilaterally granted Kim additional rights which have made the children's visitation anything but "a little bit smoother." That portion of the *Opinion and Judgment* which awards Kim the right to "return the children to the school on the day next succeeding the termination of her visitation" should be reversed.

CONCLUSION

This case involves a mother who did not get custody of the children at her divorce. She has relentlessly pursued custody ever since. With each new lawsuit or appeal, it becomes clearer and clearer that Judge Burns correctly decided that the children should be with Roger, and that Kim will grasp at any straw to sue for custody, no matter how many times she has to do so. Unfortunately, to gain custody, Kim has a vested interest in keeping her relationship with Roger as tumultuous as possible.

This is an appeal of another of Kim's complaints, making a great ado over a few visitation and telephone arguments, and a hodge-podge of complaints about Roger. Judge Burns properly dismissed the complaint at the earliest opportunity, since the evidence fell far short of showing a material change in circumstances or an adverse effect upon the children. The children are, in fact, thriving.

Unfortunately, his decision is marred by a well-intentioned award of additional visitation rights to Kim, which have caused considerable upheaval. This award was entered without notice to Roger, and without the opportunity for Roger to show why it should not have been granted. That portion of the *Opinion and Judgment* which awards Kim the right to "return the children to the school on the day next succeeding the termination of her visitation" should be reversed. Otherwise, the *Opinion and Judgment* should be affirmed in all respects.

Respectfully submitted this the 4TH day of September, 2007.

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CERTIFICATE OF SERVICE

I, DAVID BRIDGES, do hereby certify that I have this day served via U. S. mail, a true and correct copy of the above and foregoing *Brief of Appellee* to the following:

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This the 4TH day of September, 2007.

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