

IN THE SUPREME COURT OF MISSISSIPPI

CHRISTOPHER STEVEN PRINZ

PLAINTIFF
(APPELLEE)

FILED

VERSUS

SEP 10 2007

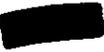
CAUSE NO.: C2401-00-00019(2)
SUPREME COURT NO. 2007-TS-00156

TAMMY (PRINZ) PRUETT

OFFICE OF THE CLERK
SUPREME COURT
COURT OF APPEALS

CA
DEFENDANT
(APPELLANT)

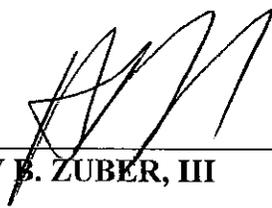
APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT
BRIEF OF APPELLANT/DEFENDANT - (TAMMY (PRINZ) PRUETT)

Henry B."Hank Zuber, III
ZUBER LAW FIRM, LLC
2336 Government Street
Ocean Springs, MS 39564
228-875-1097 - Office
228-875-7891 - Fax
MSB# 

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for, Defendant (Appellant), certifies the following parties have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. Tammy (Prinz) Pruett, Defendant (Appellant)
2. Henry B. Zuber, III, Esq., Counsel for Defendant (Appellant)
3. Michael J. Vallette, Esq, Counsel for Plaintiff (Appellee)
4. Christopher Prinz, Plaintiff (Appellee)



HENRY B. ZUBER, III

STATEMENT REGARDING ORAL ARGUMENT

Appellant, Tammy Prinz Pruett respectfully submits that oral argument is not necessary in this case. This case involves well-settled, straight forward principles of law which are neither close nor complex. The briefs of the parties adequately address the legal issues raised and the Chancery Court's Opinion is concise and well-reasoned. Further, the undisputed facts are abundantly clear from the record and oral arguments would not be of benefit to the Appellate Court.

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STATEMENT OF THE ISSUES

Whether the Trial Court erred in modifying custody of the minor child, Alex Prinz.

STATEMENT OF THE CASE

That the parties hereto were formerly husband and wife but were divorced by Judgment of the Court entered the 30th day of August, 2000, and by Amended Judgment of Divorce entered the day of September 22, 2000. Said Judgment provided for joint legal custody between the parties of two of their minor children, Steven Scott Prinz, a male born on October 13, 1988, and Alex William Clay, a male born on October 2, 1998, and awarded primary physical care, custody, and control of the minor child to Tammy (Prinz) Pruett. The court reserved ruling relating to Amanda Danielle Prinz, a female born on September 26, 1984. Said Judgment also awarded child support in the amount of \$263.00 per month per child to Tammy (Prinz) Pruett to continue thereafter until the children had reached the age of twenty-one (21) years, became self-sufficient, married, or emancipated or until further Order of the Court. Said Order also awarded all three children as dependents for income tax purposes to Tammy after the taxable years of 2000 and 2001.

On October 25, 2000 Christopher Prinz file his Motion for Modification and for Citation of Contempt against Tammy Prinz following Ms. Prinz's relocation out of the state of Mississippi. Said Motion sought a modification of custody of the minor children, or in the alternative, more specific and longer visitation periods. The Motion for Contempt sought to have Ms. Prinz found in contempt of Court for denying him visitation with the minor children.

On September 24, 2001, this Court entered an Order, inter alia, denying Christopher Prinz's request to modify custody. This Court also amended its prior Orders to

include the Court's standard language regarding access to the minor children and exchange of information regarding the minor children, stated that the parties should agree upon visitation modifications and, failing no agreement, that the parties should seek assistance from the Court; and ordered the parties to meet to exchange the minor children for visitation.

On June 3, 2002 Mr. Prinz filed his Motion for Citation of Contempt and Other Relief alleging , inter alia, that Tammy (Prinz) Pruett was in willful contumacious contempt of court for refusing to follow the Court's Orders in the following responses: failing to agree with Mr. Prinz upon visitation modification; failing wholly to meet to exchange the minor children for visitation with the exception of summer visitation; interfering with Mr. Prinz's telephonic and postal access with the children; and failing to provide the Mr. Prinz with all phone numbers at which to reach the children.

On June 25, 2002, Ms. Pruett filed her Special Appearance for Motion for Dismissal of Plaintiff's Motion for Citation of Contempt and Other Relief alleging a lack of both subject matter jurisdiction and in personam jurisdiction.

On September 5, 2002, this Court entered an Order overruling Ms. Pruett's Motion for Dismissal due to the fact that Mississippi had jurisdiction to enforce its court orders, and noting that Mr. Prinz's request for relief was not for modification of custody. This Court also recommended that the Parties try to reach a "global" settlement of all issues, including those of child support, that may be, or may have been raised by Ms. Pruett in the Courts of South Carolina and that said agreement be incorporated into the Judgment of the Court.

Subsequent thereto, to June 24, 2004, a hearing was held where in Mr. Prinz declined to pursue contempt charges against Ms. Pruett by agreement, and the parties entered into an oral

agreement modifying Mr. Prinz's rights to visitation with the minor children, including telephonic visitation. Said agreement, which was sworn to by the parties in open Court but has not been reduced to writing and filed with the Court, provided that, inter alia, Mr. Prinz would have visitation with the minor children for the next consecutive four Easter/Spring holidays to make up for this three years of missed visitation in the past.

Based on the evidence presented at the Ex Parte Hearing, this Court entered a Temporary Ex Parte Order on August 2, 2006, granting Mr. Prinz temporary custody of Alex until August 30, 2006m at which time the Temporary Order was set to expire. The Court also set the matter for a hearing on August 30, 2006.

On August 8, 2006, a hearing was had on Ms. Pruett's objection to the Court's Order for Temporary Relief. The Court entered an Order overruling the request for Mr. Prinz for releif.

On August 8, 2006, Mr. Prinz filed his Amended Petition for Modification of Custody and Petition for Citation for Contempt. In said Amended Petition, Mr. Prinz asked the Court to grant him custody of the minor child Steven Scot Prinz based on Steven's having indicated a preference to live with his father. Steven was in the process of completing boot camp in South Carolina and had recently discovered that his mother had left South Carolina, and he therefore had no home to return to so he could complete his final year of high school. Mr. Prinz also asked that the Court hold Ms. Pruett in contempt of court of violating this Court's Orders and Chancery Court Rule 8.06 for failure to keep him and the Court advised of her current address and phone number.

Ms. Pruett filed her Counter-Claim for Complaint for Modification on December

1, 2006; asking to be reimbursed for her expenses in defending the action should the Court find Mr. Prinz's Complaint for Modification not warranted.

STATEMENT OF THE FACTS

Alex Prinz was born on October 2, 1998 to Christopher Prinz and Tammy Pruett. (TR. 76) The mother and father were divorced on August 30, 2000 with the mother being given primary physical custody. (TR. 5) There were three children born of the marriage, namely Amanda who was 21 at the time of hearing, Steven, who was 17 at the time of hearing, and as mentioned before Alex. (TR. 5-6) In September of 2000, the mother married a Mr. James Pruett and moved to Gaffney, South Carolina. (TR. 74) Of the union with Mr. Pruett, the mother had one child, namely Jamison Pruett born on February 28, 2003. (TR. 74-75) The mother separated from Mr. Pruett in late June of 2006. (TR. 74) The reason the mother left Mr. Pruett was because of mental and physical abuse (TR. 101) Mr. Pruett pushed the mother against a wall and also threatened to kill her. Id. The mother testified that Mr. Pruett was a manic depressive and bi-polar. Id. More specifically, the mother said that she left Mr. Pruett because he pushed her against a wall in the presence of her son, Alex Prinz. (TR. 101) Shortly after that incident, the mother and Alex move away from Mr. Pruett. (TR. 102) From South Carolina, the mother moved to Ardmore, Oklahoma with her sister. (TR. 73) Then on or about the 15th or 16th of August, the mother moved to Littleton, Colorado. (TR. 73) The mother moved from Oklahoma to Littleton, Colorado because she got a promotion and a transfer to Littleton. (TR. 73) The company that the mother worked for flew her back to Littleton due to a promotion transfer. Id. At the time of hearing on the Entry for the Temporary Ex Parte Order, the Court interviewed the minor child, Alex on August 2, 2006. During that interview the Court inquired as to how often

the mother called Alex during his summer visitation with the father. (TR. 22) Alex stated that my mother keeps telling me that she is going to come and get me but actually unh-unh- because I am going to stay here with my daddy. (TR. 22) Once again, Alex at such a young age stated that, "I am going to stay here with my daddy." The Court responded by saying, "who told you that? Your daddy?". Alex responded by saying, "yeah". Obviously, from the very beginning, the father was coaching Alex on what to say to the Court and was also advising and discussing the litigation with his minor son.

Concerning the relationship between Alex and his step-father James Pruett, Alex got along with James. (TR. 24) However, even though Alex got along with James, Alex did testify that his mother did not get along with James. (TR. 24) As previously mentioned, the mother and Mr. Pruett had one child, namely a daughter, Jamie Pruett. In describing the relationship between Jamie and her step-brother Alex, the mother stated that:

It is a very close relationship. She is constantly asking for him when he is gone for visitation. They even, when I do telephone visitation on Sunday nights, which is what is Ordered, she has conversations with him on the phone. I mean, when she spotted him today for the first time after eight weeks being gone, they immediately run after each other. I love you. They would definitely miss each other if they were separated. (TR. 61-62)

Jamison or Jamie's date of birth is February 28, 2003. (TR. 75)

Upon reviewing the transcript the father's attorney tried to imply that the mother was having an affair with a Mr. Ken or Kenneth Davis shortly after moving to Colorado. The mother testified that she knew a Ken Davis because he was her boss' son. (TR 81) The mother went on the state that Mr. Davis does not live with you. (TR. 82) Furthermore, Mr. Davis has never spent the night at her house. (TR. 83) Concerning a photograph on a DVD of Mr. Davis at

the front of the house at approximately 7:16 am. on November 27, 2006, the mother testified that Mr. Davis would pick her up and bring her and some other co-workers to work. (TR. 87-88) Concerning the video, the mother stated that Mr. Davis was scrapping the windows because of snow. (TR. 90) The mother explained by saying it is a constant thing with it snowing there was two inches of snow and he is helping with Jamie. Id. Additionally, the mother testified that on some mornings Mr. Davis does help her out by bringing Jamie to school. (TR. 92) At the end of the video, the attorney for the father tried to introduce the DVD into evidence. The attorney for the mother, the Honorable Hank Zuber objected due to the fact that the DVD was not properly authenticated. Specifically, Mr. Zuber stated that number one, the authenticity of it is very questionable. I don't know if that is part of a longer period of surveillance if there was any exculpatory evidence that was deleted, so on and so forth. (TR. 93) In general, the mother reasonably stated that you can clear your windows off and five minutes later you are going to have to clear them again and that Mr. Davis goes to her house to help her with bringing her child to school. (TR. 94) In general, the mother has stated that Mr. Davis is a good friend. Id. This happens a couple of times a week in terms of Mr. Davis coming over in the morning to help her. (TR. 97) Although the minor child, Alex does call Mr. Davis Daddy Ken, Alex knows that the Plaintiff, Mr. Prinz is his dad. (TR. 98) Furthermore, the mother has never told Alex anything different or otherwise. Id.

While living in South Carolina, the mother's oldest daughter, Amanda who turned 21 on September of 2005 lived with her. Amanda's boyfriend at the time did live in the house with them but he had a bed set up in the mother's other son's room. (TR 107) Specifically, Amanda's boyfriend had his bed set up and was sharing a room with Steven. Id. The mother

testified that she was not sure what went on between Amanda and her boyfriend after she went to sleep. Id. Moreover, Amanda and her boyfriend knew her rules and they were not to be in the same bedroom. (TR. 108) In general, Amanda's boyfriend, Matt was to share a room with Steven and Steven's room had two beds. (TR. 110) Also while living in South Carolina, the mother testified that she took Alex to and from school and set him down every night to do his homework. (TR. 119) Additionally, the mother testified that she regularly watched Alex and keep him out of trouble and mischief. Id.

Of extreme importance and at the crux of this case is that fact that since moving to Colorado, Alex is pretty healthy. (TR. 122) More specifically, the mother testified that Alex is "actually doing better in the altitude and everything up in Denver than he was here because when he was an infant, he had tubes in his ears. And his allergies and all, knock on wood that he has not been sick this year so far because of the difference in the climate". (TR. 122) Also of extreme importance is the fact that Alex was performing at a satisfactory grade level and had a perfect attendance in Colorado. (TR. 134) He was in the second grade and the mother attended at least one parent-teacher conference. (TR. 134) Concerning extracurricular activities, the mother stated that Alex as of the date of the hearing was not involved in any outside of the school. However, the mother testified that she does plan on hopefully getting him into Karate and possibly football because they missed the sign up for football this year. (TR. 134) Following up on Alex's health, the mother said that his health was good and that he is doing fine in Colorado. (TR. 136) The mother stated that Alex does suffer from allergies. (TR. 137) However, since moving to Colorado, Alex doesn't need anything. (TR. 137) To the contrary, Alex had sinus problems and things when he lived in South Carolina. Id. There was a lot of testimony

concerning the Albright factors. However, the attorney for the mother would respectfully submit to this Honorable Court that such evidence is not relevant because the father never proved that the material change in circumstances adversely impacted Alex. This will be discussed in detail in the argument section of this brief. Because the veracity of the mother was questioned by the lower court it is also important to discuss the veracity of the father which was not mentioned in the lower court's judgment. Specifically, the father was charged with shoplifting while working at K-Mart. (TR. 180) Additionally, the father was terminated from K-Mart because of the shoplifting charge. (TR. 181) In describing the relationship between Alex and his half-sister Jamie, the father, Mr. Pruett testified that Jamie and Alex are very close. (TR. 205)

Concerning the DVD, the father incurred a bill of \$1,000.00 from the private investigator. (TR. 205-206) The portion of the DVD that was showed at trial was for approximately an hour and a half or two hours for one morning. (TR. 206) In reality the father had surveillance commence on November 24, the day after Thanksgiving. (TR. 208) In referencing the invoice that was admitted as an exhibit, the father stated that he paid for approximately 11 hours of surveillance. (TR. 209) However, it is important to note at this time that the trial judge over the objection of the mother's attorney allowed the DVD admitted into the evidence which was only an hour and a half or two hours at the most. The entire original DVD was never provided nor introduced into evidence. This is important because pursuant to the Rules of Evidence this portion or an edited portion of the original should not have been introduced. Just the hour and a half and the maximum of the two hour tape which was introduced was all that was sent to the father. (TR. 209) The rest of it approximately 11 hours was just left out whenever it was sent to the father. (TR. 209) Concerning the Albright factors,

the Court took testimony from the father's mother, namely Robella Prinz. In general, Robella was very specific in stating that if her son got custody she would be the primary care giver. (TR. 263)

In discussing Exhibit No. 4, the mother described the exhibit as his report card, progress report and his school work. (TR. 280) In general, the exhibit shows that Alex's report card shows that he is satisfactory and on grade level. (TR. 280) As stated before, the mother said that Alex was not involved in any extracurricular activities in Colorado because of the short time being in that state. (TR. 281) However, the mother did say that Alex attended skating parties and things like that. Id. The mother testified that she goes through Alex's book bag on a daily basis to make sure that there is no paperwork that needs to be signed and to make sure that he doesn't have any homework because there some days that he does not have homework. (TR. 282) If he had homework, the mother goes over the homework with him along with his reading. (TR. 283) The mother has reading time with Alex every night so that he continues improving his reading grade level. Id. Additionally, the mother has him practice his handwriting because of his bad handwriting. Id. The mother is also able to assist Alex with his computer programs and computer activities. Id. Even though Alex has only been in Colorado for a short period of time, he has probably a half a dozen to a dozen friends. (TR 284) The mother invited Alex's entire class to his birthday party and over half of them came to his party. Id. Alex had about seven male friends who are regular friends and he has the neighbors around the school that are in different grades and different schools that he plays with. Id. In general, the school records and progress report identified as Exhibit No. 4 shows how conscience Alex is about his homework. (TR. 284) Alex's teacher stated how he loves his Math and he enjoys getting better in writing

and things like that. (TR. 285) Also contained in Exhibit No. 4 is a picture of the kids that were at his birthday party. (TR. 285) As stated before, over half of Alex's class showed up for his birthday in Colorado. (TR. 285) While in Colorado, the mother has been to every parent-teacher meeting, awards program or anything that he has had. (TR. 286) Also contained in Exhibit No. 4 is Alex's prefect attendance certificate. (TR. 287) Typically, Alex has not missed a day of school or anything for the first nine week period. (TR. 288) Alex and his half-sister have a very close relationship. (TR. 289) In describing that relationship the mother stated:

They are very loving siblings. As a matter of fact, he is even trying to teach her how to play his Play Station and X-Box as well as the computer. She is three years old and he sits her down with the other controllers and try to teach her. As a matter of fact, since we left Denver to come here for this, he has spoken with her four times telling her that he loves her and misses her. (TR. 289-290).

Once again the only evidence concerning any detrimental or adverse effect on Alex due to the move was discussed on page 293 of the transcript. The mother testified that there has been no detrimental effect whatsoever on Alex due to the move to Colorado. (TR. 293) Alex is very happy, very adjusted. Actually, Alex's health has gotten better since moving to Colorado. He has not had the colds or the sinus problems that he was having in Mississippi or in South Carolina. (TR. 293) Usually by this time of the year, the mother testified that Alex would be taking Claritin or Zertec if he was still living in South Carolina or Mississippi. Id. Now, since moving to Colorado, Alex has not even had to see a doctor. Id. During the testimony of Alex in chambers by the Judge, Alex stated that Ken Davis does play with him. (TR. 305) Alex went on to say that Ken does not keep him sometimes. Id. Concerning whether or not Mr. Ken stays at the mother's house in Colorado, Alex said no. (TR. 306) In response to that answer, the Court inquired are you sure and Alex nodded obviously that he was sure. Id. Alex did say that Mr.

Ken would take him to school some times along with Jamie. Id. However, Alex said that this was not an every day event. (TR. 306) Alex stated that Mr. Ken would take him and Jamie to school maybe three days a week and that Mr. Ken was a pretty nice man. (TR. 306) Alex further testified that he likes Mr. Ken a lot. Id. Additionally, Alex testified that he likes Colorado better than Mississippi because of the snow. (TR. 306-307) In responding to whether or not he likes his room at his mother's house or his father's house, Alex said that he likes the room at his mother's house the best because it was down stairs in a basement. (TR. 307) Alex further testified that he also likes his school in Colorado and that he liked it better than the one in South Carolina. (TR. 308) In responding to the Court's question, Alex said that he did indeed have a chance to talk to his Dad on the telephone. (TR. 308) Concerning what Alex calls Mr. Davis, Alex went into detail and stated that he calls Mr. Davis Daddy whenever is Mr. Davis' children are not present and whenever is children are present then Alex would call him Ken. (TR. 311)

SUMMARY OF THE ARGUMENT

The standard for appellate review and modification actions is that the Trial Court must be manifestly wrong, clearly erroneous or failed to apply the proper the legal standard. Hensarling v. Hensarling, 824 So. 2d 583, 587 (Miss. 2002). Then the father, as the non-custodial parent in this case must prove that there has been a material change in the child's or family's circumstances; that it is adverse to the best interests of the child; and it is in the child's best interest that custody be changed. Polk v. Polk, 589 So. 2d 123, 129 (Miss. 1191). In this case the Chancellor found and the mother's attorney would agree that the two moves by the mother to Oklahoma and Colorado did constitute a material change in circumstances. However, the Chancellor found that there was an adverse impact on Alex. However, the mother respectfully submits that the record is totally void of any adverse or detrimental impact to Alex. In discussing the detrimental impact, the Trial Judge just glossed over this prong of the three prong test and stated that the evidence presented clearly showed that Alex should be in the custody of his father. (Page 20 of the Judgment and page 115 of Vol I) The Judge went on to say that custody with the father is a more stable and suitable environment. *Id.* In addition to the moves, the Judge discussed the alleged permission by the mother of her daughter to sleep with her boyfriend in the presence of the minor child. Also discussed was the fact that Alex was exposed to fighting and arguments between the mother and Mr. Pruett. *Id.* Lastly, the Judge stated that the mother is most likely engaged in unlawful cohabitation in Colorado. *Id.* As stated before, the mother admits that the changes to Oklahoma and Colorado were a material change in circumstances. However, Mrs. Pruett, the mother specifically denied allowing her minor daughter to sleep with her boyfriend. Concerning exposing Alex to domestic violence, the

mother testified that this took place on one occasion and was the reason why she moved to Oklahoma and then to Colorado. Lastly, concerning the alleged and as the Judge put it “most likely engagement in unlawful cohabitation”, the mother would state that the DVD was only one and a half to two hours of a total of 11 hours of surveillance and does not show any over night cohabitation.

The DVD which the Trial Judge so heavily relied upon should not have been admitted into evidence because it was not the original in violation of Mississippi Rule of Evidence Rule 1002 and there was no proper authentication pursuant to Rule 901 of the Rules of Evidence.

Lastly, it was a manifest error for the Trial Judge to not address at all and at the very least to adequately address the issue of the separation of the siblings before modifying custody. Specifically, there was no addressing the separation of Alex and his sister Jamie by the Judge in the Judgment.

ARGUMENT

- (I) The Trial Court erred in modifying custody without a specific finding of an adverse impact on the minor child

This Court is very familiar with the legal issues at hand and the law in this state regarding modification is quite clear. Specifically, in cases involving modifications, the Chancellor's duty is to determine if there has been a material change in any circumstances since the award of initial custody which has adversely effected the child and which, in the best interest of the child requires a change in custody: **which has adversely effected the child** (Emphasis added). Sanford v. Arinder, 800 So. 2d 1267, 1271 (Miss. CT. APP. 2001). As such, the father who was the non-custodial parent must pass a three part test: "a substantial change in circumstances of the custodial parent since the original custody decree, the substantial changes adverse impact on the welfare of the child, and the necessity of custody modification for the best interest of the child. Brawley v. Brawley, 734 So. 2d 237, 241 (Miss. CT. APP. 1999)

In this case, the Chancellor found that there had been a change in circumstances and that the mother subsequent to the date of divorce had moved to South Carolina and then to Colorado. At this time it is important to note that Mississippi Law holds that a "mere moving of the custodial parent is not sufficient to warrant a change in custody." Lambert v. Lambert, 872 So. 2d 679, 685 (Miss. APP CT. 2003) Furthermore, the fact that the custodial parent has moved does not by itself necessitate a change in custody. Cooley v. Cooley, 574 So. 2d 694, 699 (Miss. 1991) (Overruled on other grounds) The mother would respectfully submit unto this Honorable Court that the father has failed to prove and that the Judgment Modification is totally void of any evidence concerning any adverse impact on the subject child. At best, the second prong of the

three part test has not been met to modify the custody. It is important to remember that this Honorable Court has held in the past that “while numerous factors may go into the initial consideration of a custody award, only parental behavior that poses a clear danger to the child mental or emotion health can justify a custody change.” Lambert at 684. To the contrary, the evidence in this case shows that the child’s present custodial environment in Colorado was actually beneficial to his health and that he was doing exceptionally well in school and had numerous friends.

At this time it is important to review the Chancellor’s Judgment filed on January 19, 2007. The pertinent part of the Judge’s decision is under the caption Analysis and Conclusions of Law beginning on page 19 of the Judgment and ending on page 21 of the Judgment. In the Judgment, the Court correctly states that in order to prove modification there must be an adverse effect on the welfare of the child. (Page 19 of the Judgment) In applying this Rule, the lower court found that a material change in circumstances had occurred which was detrimental to the best interest of Alex. (Page 20 of the Judgment) The Court then generally stated that the evidence presented clearly shows that Alex should be in the custody of this father. Id. From there the Judge discusses Tammy’s moves to South Carolina and Colorado; allegedly allowing her daughter to sleep with her boyfriend; exposing Alex to fighting and arguments; and allegedly “most likely engage in” unlawful cohabitation. (Page 20 of the Judgment) As stated before, the mother admits that the move to South Carolina and then Colorado is material change in circumstances. However, the mother addressed the issue of allowing her daughter to sleep with her boyfriend in very detailed statements. Specifically, the mother denied allowing such behavior and also had the house set up for the boyfriend to be sleeping in the same room with her

son and not her daughter. Concerning exposing Alex to fighting, the mother admitted that Alex did experience her getting pushed on one occasion. However, as discussed in detail previously, this was the reason or reasons why the mother left and moved away from South Carolina to Oklahoma and then Colorado. Concerning the most likely engagement in unlawful cohabitation, this was only supported by a small segment of a DVD which was improperly admitted as discussed later. Also, the DVD does not prove any overnight cohabitation and was explained in detail by the mother as previously discussed. The DVD was not the original in violation of the Rules of Evidence and was not properly authenticated. After discussing those previous issues, the Court went on to address the Albright factors beginning on page 21 of the Judgment. As you can see, the Judgment is totally void and there is no mention at all concerning the adverse impact on the child. This is the case because in reality, the only evidence introduced at the hearing concerning the impact on the child was that the move actually had a positive impact on the child. Specifically, as previously discussed, Alex's health improved and his grades improved. Additionally, Alex went to school functions and had a birthday party where over half of his classmates attended. Consequently, it was shown that Alex adjusted well to the move to Colorado both mentally and emotionally. This is an easy case to decide because the record is totally void and there is no mention whatsoever in the Judgment supporting an adverse effect on the child. If there is, please point to the paragraph or sentence out to me in the Judgment.

On page 21 of the Judgment, the Chancellor analyses the Albright factors.

However, the Chancellor was in error and was manifestly wrong in discussing the Albright factors since this second prong of three prong test was not met. Specifically, evidence concerning or showing the adverse impact on Alex.

- (II) The Chancellor was in error to admit the DVD showing Mr. Davis' vehicle in front of the mother's house into evidence.

The Court relied heavily on this DVD in stating that the mother was most likely engaged in unlawful cohabitation outside of the marriage with a married man in the presence of both of their children. (Page 20 - 21 of the Judgment) Discussing the Albright factor of the moral fitness of the parent, the Judge specifically stated that the mother was living with a married man. All the evidence concerning this alleged cohabitation with Mr. Davis was based upon the DVD that was admitted into evidence. The Chancellor committed manifest error in admitting this DVD for two reasons. First, Rule 1002 mandates that the original recording is required. Mississippi Rules of Evidence, 1002. It was easily shown that this was not the case at hand. The father admitted that he received an edited version of the original surveillance tape. Specifically, he received only a one and a half to two hour portion of the original 11 hour surveillance which he was charged for. At best, by way of the father's admission it was proven that the DVD was not the original. Secondly, the DVD was not properly authenticated. It must be noted at this time that the attorney for the mother, the Honorable Henry B. Zuber, III made a strenuous objection to the admission of the DVD. Rules 901 of the Rules of Evidence requires authentication or identification of the condition precedent for admissibility. The mother did admit that the DVD did show Mr. Davis' car and that it was indeed in front of her house. As previously discussed under the facts of the case the mother stated in detail and explained why the car was there. Additionally as the mother's attorney pointed, only a small portion (only one and a half to two hours) of the total 11 hours of surveillance was provided and introduced into evidence. The admission of this small portion was manifest error because the remaining portion

could have contained exculpatory evidence which the original would have provided. Thus, the admission of the DVD was in violation of Rule 901 and Rule 1002 of the Mississippi Rules of Evidence.

- (III) That the Court committed manifest error in not addressing at the separation of Alex from his sister Jamie.

As in the case of Holmes v. Holmes, 958 So. 2d 844 (Miss. CT. APP. 2007), it is the mother's position that the lower court did not address the separation of the children and specifically Alex and his half-sister Jamie. It is well established Mississippi Jurisprudence that the Courts in deciding modification cases favor keeping siblings intact in the same household Sellers v. Sellers, 638 So. 2d 481, 484 (Miss. 1994) Specifically, "the absence of some unusual and compelling circumstances dictating otherwise, it is not in the best interest of the children to be separated". Id. In using this dictate, it is important to look at the lower court's Judgment. On page 26 of the Judgment, the Chancellor briefly mentions that the relationship involving Jamie and Alex. The Judgment states that "the Court recognizes that Jamie, Alex's very young half-sister is still living with Mrs. Pruett. And Mrs. Pruett's allegations of violence by Jamie's father are true commenting that Alex would be safer with Mr. Prinz." As one can see, there is no discussion at all addresses the relationship between the two children and the separation the children. Under the section of this brief titled Facts of the Case, it can be seen and it is evident by testimony by the mother and by the father showing admission that Jamie and Alex are very close, have a loving situation, and miss each other due to the separation. Once again, there is no discussion concerning this relationship and the effect it would have on Alex in the Judgment. Furthermore, the lower court states that if the allegations of violence by Jamie's father are true

then Alex would be safer with Mr. Prinz. However, the court deletes the fact that the reason the mother is leaving South Carolina is to get away from the violence by Jamie's father. In this case should the mother be punished for her attempt to get away from Jamie's father and start a better life in Colorado wherein the mother received a job promotion. Conclusion, the lower court failed to consider any detrimental effect the division would have had on the two siblings.

CONCLUSION

The evidence presented during the trial of this matter clearly shows that the trial court erred in finding that there was a material change in circumstances detrimental to the best interest of Alex. As stated in this brief there are basically three reasons for this position. First and foremost, the Judgment and Finding by the Chancellor is totally void of any evidence that the move by the mother ultimately to Colorado detrimentally effected or had an adverse impact to the best interest of the child. Quite to the contrary, the only evidence introduced at trial indeed shows that Alex is benefitting from the move both physically and mentally. His health has improved and he is no longer exposed to alleged violence by his half-sister's father in South Carolina. In responding to questions by the Judge in chambers, Alex by his own testimony stated that he preferred Colorado. Furthermore, Alex is performing exceptionally well in school and has been excepted by his friends evidenced by a great turnout to his birthday party. There is no evidence whatsoever of any detrimental or adverse impact on Alex due to the material change in circumstances. Thus, the second prong of the three prong test has not been met and there was no need for the Judge to discuss the Albright factors. For a change in custody, the preponderance of the evidence must show a change in circumstances **and an adverse effect by the change** (Emphasis added). Cooper v. Ingram, 1814 So. 2d 166, 167 (Miss CT. APP. 2002)

Secondly, the admission of the DVD was reversible error for the aforementioned reasons. Based upon the father's own admission, the DVD that was admitted into evidence had been altered and more specifically shorted and was not the original. Thus, the admission of the DVD into evidence by the Judge violated the Mississippi Rules of Evidence. There was a timely objection by the mother's attorney to the admission of the DVD. Also, the admission of the DVD was improper because it was not properly authenticated. Once again by the own admission of the father, the DVD that was admitted was only a small portion and more specifically an hour and a half to two hours worth of a 11 hour surveillance. As the attorney for the mother stated, there is no way to know whether or not the remaining portion contained exculpatory evidence and the trustworthiness due to the editing of the DVD is questionable at best. The main purpose of the Rules of Evidence is to guarantee the trustworthiness of any all types of evidence that are admitted by the Judge. Here, it is obvious from the father's own admission that the DVD that was admitted into evidence had been edited and only contained a small of the total surveillance tape. Due to the DVD not being properly authenticated and not being the original, the admission thereof was reversible error.

Lastly, the lower court did not properly address the separation issue between Alex and his half-sister Jamie. The Court did not discuss the relationship and the detrimental effect that a separation would have on the relationship between Jamie and Alex. The Court only mentions that Jamie, Alex's very young half-sister is still living with Mrs. Pruett and then the Court goes on to say that if the allegation of violence by Jamie's father are true, then Alex would be safer with Mr. Prinz. There is no other discussion concerning the relationship between Jamie and Alex and therefore without such a decision, the lower court's decision to grant the

CERTIFICATE OF SERVICE

I, HENRY B. ZUBER, III, do hereby certify that I have this day hand delivered, a true and correct copy of the foregoing to Michael J. Vallette, at his usual mailing address of 900 Washington Avenue, Ocean Springs, MS 39564.

SO CERTIFIED this the 10th day of September, 2007.



HENRY B. ZUBER, III

HENRY B. ZUBER, III
ZUBER LAW FIRM, LLC
2336 Government Street
Ocean Springs, MS 39564
228-875-1097 - Office
228-875-7891 - Fax
MSB# 9534

modification was reversible error. The Appellant and the mother prays that this Honorable Court will reverse the trial court in this cause and order that the custody of Alex be transferred to his mother.

SIGNED THIS 10th day of September, 2007.



HENRY B. ZUBER, III, Attorney for
Appellant

Prepared by:

ZUBER LAW FIRM, LLC
Henry B. Zuber, III
2336 Government Street
Ocean Springs, MS 39564
228-875-1097 - Office
228-875-7891 - Fax
MSB#: 