

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CA-00575

BRADLEY J. SUDDUTH

APPELLANT

vs.

MELISSA MOWDY

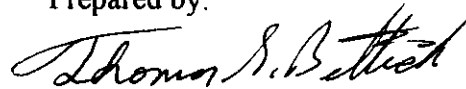
APPELLEE

On Appeal from the Chancery Court of the Twelfth Chancery Court District,
Lauderdale County, Mississippi

**BRIEF OF APPELLANT,
BRADLEY SUDDUTH**

(ORAL ARGUMENT NOT REQUESTED)

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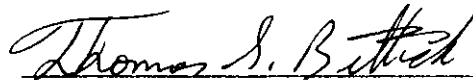
CERTIFICATE OF INTERESTED PERSONS

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 of Mississippi and/or the Judges of the Court of Appeals Mississippi evaluate possible disqualification or recusal.

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STATEMENT OF THE ISSUES

ISSUE ONE:

Whether the chancellor's finding that Hannah Sudduth was not adversely affected by her mother's unstable home was manifestly wrong and clearly erroneous, where in her Mother's care, among other things: Hannah's teeth were allowed to rot; Hannah was given a powerful anti-psychotic drug not FDA approved for children; Hannah witnessed her mother being abused while Hannah and her mother lived with her mother's boyfriend; and where after Hannah had lived with her father for twenty months, her mother caused Hannah great stress by violating court orders and keeping the young child from visiting her father for up to six weeks at a time.

ISSUE TWO

Whether the trial court abused its discretion in denying Brad Sudduth's Rule 59 motion for a new trial on the grounds of newly-discovered evidence, where Hannah's report card for the semester reflected a dramatic downturn in school performance, such that Hannah could not pass the first grade; and where the trial court had relied on prior report cards, over Brad and his wife Kathleen's testimony that Hannah was not doing well in school.

STATEMENT OF JURISDICTION

This honorable Court has jurisdiction of this case pursuant to *Article 6, Section 146 of the Mississippi Constitution* and *Miss. Code Ann. 9-4-3 (2007)*.

STATEMENT OF THE CASE

A. Procedural History

Brad Sudduth and Melissa Mowdy were married on March 6, 1999. Hannah Renee Sudduth was born to the couple on October 2, 1999. Brad and Melissa were divorced pursuant to a judgment rendered on September 20, 2000. Following the divorce, the parties shared joint legal custody of Hannah, with Melissa having physical custody. Pursuant to the agreement, Brad enjoyed very liberal visitation, including “[a]ll days that [Brad] [had] off from work.”

In December, 2003, the parties agreed that Hannah should live with Brad, and a Joint Motion to Modify Child Support and Other Relief was agreed to, approved by the trial court and rendered on December 31, 2003. The agreement provided that it “did not modify the physical custody of the minor child,” but did terminate Brad’s child support obligation.

On August 8, 2005, Melissa filed a Petition for Writ of Habeas Corpus, which was granted by the trial court on August 11, 2005, and Hannah was returned to Melissa. On August 9, 2005, Brad initiated this action with a Complaint to Modify Custody and Other Relief, in which he alleged that there had been a material change of circumstances since the September, 2000 judgment that adversely affected Hannah, and that the best interests of the child required a change of custody.

On August 17, 2005, Brad filed a Complaint for Contempt, Modification, and Other Relief. On September 6, 2005, Melissa filed an Answer and Counterclaim for Contempt, and also filed an Answer and Counterclaim. On March 2, 2006, Melissa filed a Complaint for Contempt and Modification. The trial would ultimately decide the issues arising from these five petitions.

On September 6, 2005, an interim order was approved by both parties and rendered by the trial court; on October 6, 2005, an agreed temporary settlement was agreed upon; an Agreed Temporary Judgment was approved and rendered on November 18, 2005; and on March 6, 2006, another approved order was rendered.

On May 1, 2006, Chancellor Sarah P. Springer rendered an Agreed Order of Recusal on May 1, 2006, and Chancellor Jerry G. Mason accepted the case for final adjudication. On June 19, 2006, the trial court set a pretrial conference for August 18, 2006, where the trial was scheduled for September 13, 14, and 15, 2006. The trial was not completed after three days, and a fourth and final day of trial was completed on December 11, 2006. On February 2, 2007, the trial court issued a fifty-three-page memorandum opinion, which found a material change of circumstances, but asserted that Brad had failed to show that change adverse to the welfare of his child, Hannah.

On February 6, 2007, Brad filed a Motion for Relief Pursuant to Rule 60 and Rule 59, which asserted that Hannah's report card for the Fall, 2006 semester. Brad argued that the report card, which showed that Hannah was failing the first grade, amounted to newly-discovered evidence that warranted a new trial under Rule 59. On March 9, 2007, the trial court denied Brad's motion. Aggrieved, Brad filed this appeal.

B. Statement of the Facts

Following the parties' divorce, Brad married Kathleen Sudduth, who he has remained with to the present day. (R. at 398) (RE 5) Melissa, on the other hand, saw a succession of men. Identified at trial were her stepbrother, Rod (R. at 402) (RE 73) who Melissa may or may not have been engaged to; Ray Beaudoin, who Melissa was engaged to marry, and abused Melissa in Hannah's presence during the nine months Melissa cohabitated with him (R. at 403-404) (RE

7-8); Rod, again (R. at 403) (RE 7); Julio (R. at 404) (RE 8); Robert (R. at 404) (RE 8) , who Melissa was also engaged to marry; James (R. at 405) (RE 9); and T-Bone (R. at 405) (RE 9).

Following the divorce, the parties lived very close to each other in Meridian. (R. at 398) (RE 5) Owing to the liberal terms of his visitation, Hannah spent “usually every weekend from Thursday night to Sunday” with Brad, as well as holidays, and any other day Brad had off from work. (R. at 413) (RE 14). This pattern of visitation was not interrupted when Melissa suddenly moved from Meridian to Oxford, taking \$30,000 from a joint bank account she shared with Ray Beaudoin. (R. at 303-304) (RE 1-2). In Oxford, Melissa spent the money quickly and remained unemployed for six months; when Ray’s money ran out, she lived off Brad’s child support, and began working one night a week at a local restaurant. (Tr. IV, 592-94).

When Hannah’s teeth began coming in, Melissa noticed that the child’s teeth had “little chunks missing.” (Tr. V, 638). However, she never took the child to the dentist. The decay advanced, and when Brad and Kathleen confronted Melissa about it, Melissa told them that no dentist in Meridian would accept Medicaid. (Tr. IV, 582-83). Brad and Kathleen secured an appointment for Hannah in Jackson, scheduled at the first available date, which was several months later; but sometime between December, 2002, and April, 2003, Melissa allowed Hannah’s Medicaid coverage to lapse. (Tr. IV, 582). Brad and Kathleen were forced to cancel the first appointment because of the coverage lapse, but Melissa did not reinstate it in time for the second appointment, which Brad and Kathleen paid for out of pocket because of the advanced state of Hannah’s tooth decay-- the teeth were described as black, rotten, and broken off like fangs. (Tr. I, 35, Tr. II, 264). After Brad personally delivered the Medicaid papers to Melissa, Hannah’s coverage was restored and the child’s teeth-- with ten cavities in all-- were finally restored when Brad and Kathleen took her to the dentist. (Tr. II, 268-71).

A few months after Hannah's teeth were repaired, and about ten months after Melissa's flight to Oxford, a series of events transpired that led to Hannah returning home to Meridian to live with Brad in December, 2003. Depending on whose version of events is followed, Hannah either got out of control and attacked Melissa in a J.C. Penny's, after which Brad agreed to take her full time (Tr. III, 308); or Melissa decided to go back to school and the J.C. Penny's event was a simple misunderstanding where Melissa accidentally "slung" the child across the floor while trying to reprimand her for biting¹ (Tr. V, 610). The facts are undisputed, however, that shortly thereafter, Melissa gave Hannah Risperdal, a potent anti-psychotic drug, intended for adults, that's been recognized as useful in controlling out-of-control children. (Tr. V, 679-80.)

After this, Hannah came to live with Brad and Kathleen for the next twenty months. (Tr. III, 411-13). Melissa enjoyed regular visitation with her daughter, with the longest such visit lasting one week. (R. at 412) (RE 13). Brad and Kathleen never asked Melissa for child support (R. at 411) (RE 12), even when they kept Melissa's other daughter, Destiny, for the summer of 2005 (R. at 411) (RE 12).

After the Habeas Corpus proceedings on August, 11, 2005, Brad returned Hannah to Melissa. (Tr. III, 413-14). Melissa kept Hannah from seeing Brad for a month after that, because she insisted on a more limited visitation agreement. (R. at 415) (RE 18). Melissa again denied Brad's visitation on November 11, 2005 (R. at 416) (RE 19). She also stopped answering his phone calls except when required to do so by the new visitation agreement. (Tr. V, 660-61). When Melissa would allow Hannah visitation with her father, the child would hysterically resist being returned to Melissa (R. at 422-23) (RE 23-24), and Melissa began sending Hannah to a counselor (R. at 420-21) (RE 21-22). Melissa's response to Hannah's

¹ In fairness, Melissa did return to school about six weeks later. (R. at 410.) (RE 11).

stress was to keep her from seeing her father for six weeks, denying Hannah visitation on February 17, 2006, and March 3, 2006.

The trial court did not permit Hannah to testify, and testimony was proffered for her (*see* Tr. III, IV, 444-58). The trial court subsequently found a material change of circumstances, but no adverse effect upon the child. A few days after the trial was concluded, Hannah's report card for the first half of her first-grade year was issued, and it showed a dramatic decline in her academic performance. (R. at 476) (RE 36). Among other bad marks, Hannah received a 42% for the semester in Reading-- making a 70% average for the year (as is required to advance to the next grade) nearly impossible. (R. at 476) (RE 36). The final comment asked Melissa to "Please make sure that she is doing what is expected of her to do at home." (R. at 476) (RE 36).

SUMMARY OF THE ARGUMENT

The Court rightly found that a material change of circumstances had occurred, but that the Court decision that the material change was not adverse to the child was clearly erroneous or a manifestly wrong. This is especially true when one considers that the child's teeth had been allowed to rot under the watch of the custodial parent – her mother. It is also true that the decision was clearly erroneous or manifestly wrong when one considers that the child was witness to months of abuse of her mother at the hands of one of the many men that her mother had cohabitated with. It was also error considering that the child was given a powerful anti-psychotic in that interim period. Finally the ruling was in error when one considers that the child, after having lived for twenty consecutive months with her father, was caused considerable harm by her mother's refusal to comply with Court ordered visitation without any justifiable reason – which caused the child such anxiety and stress that she had to undergo counseling.

The Court's ruling that the Rule 59 motion for a new trial was denied was an abuse of discretion. The Rule 59 motion centered around the fact that new evidence had come to light after the close of the trial. This evidence meets all four parts of the test for consideration since it could not have been discovered in time for the trial, but was found in time to be considered for a rule 59 motion. Further, the information was material and the contribution to this case would have such that a new trial would have produced a different or new result.

ARGUMENT AND AUTHORITIES

ISSUE ONE:

THE CHANCELLOR'S FINDING THAT MELISSA'S UNSTABLE HOME ENVIRONMENT DID NOT ADVERSELY IMPACT THE CHILD WAS MANIFESTLY WRONG AND CLEARLY ERRONEOUS.

A. General law

Our Supreme Court summarized the applicable law for custody modification proceedings as follows:

[T]he non-custodial party must prove: (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody.

Bubac v. Boston, 600 So. 2d 951, 955 (Miss.1992).

B. The lower court's findings

Relevant to this assignment of error, the chancellor found a material change of circumstances, including that:

[Brad] is married to Kathleen Sudduth, [Melissa] lived with Ray Beaudoin in 2002 and early 2003 in the same mobile home park in which [Brad] lived, [Melissa] moved to Oxford, Mississippi, in February 2003, Hannah lived with [Brad] and Kathleen from December, 2003, to August, 2005 [Melissa] has had a relationship with the several boyfriends and/or male companions as previously summarized in the Opinion.

(R. at 433-34) (RE 26). The chancellor nonetheless found this material change of circumstances was not adverse to the welfare of Hannah:

[Melissa] denies that she has participated in a sexual relationship with any of the boyfriends in the presence of Hannah, except for Ray Beaudoin. [Brad] did not initiate any action to remove Hannah from the environment in which Hannah lived with her mother and Ray Beaudoin.² [Melissa] recognizes that she should not expose Hannah to any inappropriate relationship with a male person. Her previous actions are not condoned by this Court. Notwithstanding that [Brad] and [Melissa] have different positions about the Agreed Order Modifying Child Support rendered on December 31, 2003, the adjudication relevant to child custody is definite. The physical custody of Hannah was not changed. Although [Brad] had complaints about [Melissa] as a competent mother before August, 2005, the evidence is undisputed that they communicated and coordinated well about matters relevant to Hannah. That mutual communication and coordination terminated in August, 2005. Hannah has manifested stress since August, 2005, and her conduct has sometimes been inappropriate, especially at the time of exchange in April, 2006. Although Hannah received counseling for some undetermined length of time in early 2006, the diagnosis and treatment, if any, were not developed. The evidence does not develop the reason for Hannah's inappropriate conduct from January 2006, through April, 2006.

(R. at 434) (RE 27). The lower court concluded that "[Brad] has failed to prove by a preponderance of the evidence a material change in circumstances . . . that are [sic] adverse to the welfare of Hannah Sudduth." (R. at 435) (RE 28)

C. Standard of review

Mississippi law sets a generally high bar for appellate review of a chancellor's decisions on modification of custody; such decisions are not to be upset "unless the chancellor abused his direction, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." Denson v. George, 642 So. 2d 909, 913 (Miss. 1994). This Court should not sit as reviewing chancellors, but "[that] does not mean [it] should leave [its] common sense at home." Kavanaugh v. Carraway, 435 So. 2d 697, 700 (Miss. 1983).

² This is a curious comment for the lower court to make, as cohabitation "in and of itself" is not considered an adverse material change in circumstances. Sullivan v. Stringer, 736 So. 2d 514, 517 ¶ 17 (Miss. Ct. App. 1999). The trial court even cited Kavanaugh v. Carraway, 435 So. 2d 697, 700-701 (Miss. 1983), for substantially the same proposition. (R. at 426-27.) (RE 25-25A).

Unlike the more usual issues in a custody modification review, this Court is not today asked to review a chancellor's balancing of eleven factors to decide the best interest of a child. Nor is it asked to undertake an intensive review of just what makes a change of circumstances "material." This assignment of error hinges instead on the relatively straightforward question of whether the material change of circumstances that the trial court found was adverse to the child, an issue that lends itself better to the "common sense" review that this Court must undertake.

D. The child, Hannah, was adversely affected by Melissa's unstable home

The evidence presented at trial, including Melissa's admissions, establishes well beyond a preponderance of the evidence that Hannah suffered emotional, mental, moral, and even physical harm as a result of her mother's unstable household. The chancellor's finding that Hannah suffered no such adverse effects was manifestly wrong and clearly erroneous.

In determining whether a material change of circumstances warrants modification of custody, adverse effects must be shown. Bubac v. Boston, 600 So. 2d 951, 955 (Miss. 1992). In Forsythe v. Akers, the Court of Appeals discussed just which effects must be considered:

[T]here are many things looked at in deciding whether or not a material change has occurred, such as health, willingness of the parent, employment, parenting skills, moral fitness, physical and mental health of the child, school record of the child, and . . . those factors are to be looked at in a totality of circumstances.

768 So. 2d 943, ¶11 (Miss. Ct. App. 2000) (citing Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983) and Riley v. Doerner, 677 So. 2d 740, 743 (Miss. 1996)). At trial, Brad proved numerous adverse effects upon Hannah by a preponderance of the evidence, many of which were acknowledged in the lower court's recitation of the facts or by Melissa's own admissions at trial.

i. Hannah was adversely affected by Melissa's numerous inappropriate relationships since the divorce

Following the parties' divorce and the initial adjudication of custody on September 20, 2000, Melissa began an intimate relationship with her stepbrother, Rod. (R. at 402) (RE 73). The length of the initial affair was not developed at trial, but Rod did on some occasions stay with Melissa while Hannah was present, including at least one occasion where Melissa and her stepbrother slept in the same bed. (R. at 402) (RE 73). After Rod moved to Florida, Melissa traveled to Florida and stayed with him four or five times. (R. at 402) (RE 73). Melissa denied allegations that she and Rod were ever engaged to be married. (R. at 403) (RE 7).

After Rod, Melissa cohabitated with Ray Beaudoin, who she was engaged to marry (Tr. IV, 572), for eight or nine months beginning in 2002; Hannah lived with them as well.³ (R. at 403) (RE 7). Ray was physically and emotionally abusive to Melissa while Hannah was present. (R. at 403) (RE 7). Melissa eventually left Ray's home, suddenly taking \$30,000 from a joint bank account and moving three and one-half hours from Meridian to Oxford. (R. at 403-404) (RE 7-8). Upon arriving in Oxford, Melissa spent much of the money on a car and prepaid rent. (R. at 404.) (RE 8). Ray later filed a civil suit to recover his money, which Melissa, having spent the money, settled for \$6000 to be repaid starting in 2007. (R. at 404) (RE 8). After moving to Oxford, Melissa resumed her relationship with her stepbrother Rod; though she visited him twice in Florida, it apparently did not rise to the level of "dating." (R. at 403) (RE 7).

Melissa was unemployed for six months after arriving in Oxford in February, 2003. (R. at 406-07) (RE 74-75). Melissa then began working one night a week at a restaurant; during this time, she sustained herself and her family with Brad's child support and the remnants of the money she had taken from Ray. (Tr. IV, 592-94). After moving to Oxford, Melissa saw a

³ According to the trial court's recitation of the facts, Hannah "usually" stayed with Brad on weekends (R. at 403) (RE 7), but Melissa testified that Brad had her "every weekend" during the eight or nine months she was cohabitating with Ray, and that Brad would also take Hannah "when he would get off" during the workweek (Tr. IV, 574).

succession of men. First was Julio, who she saw for “one to two months.” Melissa stayed overnight with Julio and he stayed overnight with her, but Melissa testified that Hannah was not present except on a single occasion, where she, Hannah, and Melissa’s daughter Destiny slept over after a “fiesta” birthday party. (R. at 404) (RE 8). Next came Robert, who Melissa was also engaged to marry; the relationship lasted five or six months. (R. at 404) (RE 8). Melissa then briefly dated a man named James for approximately one month; she admitted staying the night at his apartment but denied a sexual relationship. (R. at 405 (RE 9); Tr. V, 622.)

In late May of 2006, she began seeing “T-Bone.”⁴ By June of the same year, Melissa and T-Bone slept together, alone, in a tent while on a camping trip in which Hannah, Destiny, and T-Bone’s children were present; but Melissa denied that anything sexual happened that night. (R. at 405) (RE 9). The chancellor’s take on the facts at this point is confusing; he acknowledges that “[Melissa] did acknowledge that she has spent the night in [T-Bone’s] home and that Hannah has spent the night in his home” (R. at 405) (RE 9) but later recites that “[Melissa] further denied that she had stayed the night with any male while Hannah was present after November 18, 2005, except for the camping trip.” (R. at 406) (RE 74). Melissa admitted that at the time of trial she was staying every other weekend with T-Bone, when Hannah was with Brad,⁵ and that the dog she got for the children is kept at T-Bone’s house (Tr. V, 703).

The evidence at trial establishes beyond a preponderance of the evidence that Melissa’s improper relationships with these men adversely affected Hannah. At trial, Melissa admitted that it was not in Hannah’s best interest to see her with so many men (Tr. V, 627) and that she was

⁴ T-Bone’s real name is James Allen, not to be confused with the other James Melissa dated. (R. at 405) (RE 9).

⁵ The lower court considered it irrelevant what Destiny, Melissa’s other daughter, was exposed to during Melissa’s relationships with these various men. (Tr. IV, 575, *see also* Tr. II, 258-59.) This is very unfortunate, as the trial court later opined that “[Melissa] recognizes that she should not expose Hannah to any inappropriate relationship with a male person.” (R. at 434 (emphasis added)) (RE 27).

not setting a good example for her daughter (Tr. V, 628). But Mississippi law holds that “the relationships or indiscretions of the mother are never enough *by themselves* to constitute a material change of circumstances.” Forsythe v. Ackers, 768 So. 2d 943 ¶ 11 (Miss. Ct. App. 2000) (emphasis added) (citing Kavanaugh v. Carraway, 435 So. 2d 697, 700 (Miss. 1983)). In such cases, an adverse effect upon the child must be shown, beyond the mere indiscretions. *Id.* At trial, it was shown well beyond a preponderance of the evidence that Melissa’s indiscretions had additional adverse effects on Hannah.⁶

The first is Melissa’s relationship with her stepbrother, Rod. This, in and of itself, is perhaps no great additional harm to Hannah, but Mississippi law requires adverse effects upon the child to be considered in the totality of the circumstances. Forsythe, 768 So. 2d at ¶ 11. The fact that Melissa engaged in an incestuous sexual relationship certainly speaks to a want of moral fitness, a factor that our courts must consider in the totality of the circumstances. *Id.* Now, it may be argued that Melissa’s sexual relationship with her stepbrother is a lesser form of incest because the two are not related by blood, and a marriage between them would not be subject to criminal punishment by the law of this state. *See* Miss. Code Ann. § 93-1-1 (2007). However, neither argument stands up to scrutiny. First, incest is distinct from inbreeding; Mississippi law in fact prohibits numerous incestuous marriages where no blood relation exists— for example, marriages between a father and his son’s widow, or his wife’s daughter, are void and subject to criminal punishment. *Id.* Furthermore, incest is a social construct, as well as a legal one; and all things that are as immoral are not necessarily illegal. Sexual relationships between step-siblings have often been regarded as immoral in our society and in our traditions. Furthermore, Melissa’s willingness to enter a sexual relationship with her stepbrother sets a poor example for her

⁶ Certainly, these are not the only adverse effects Hannah suffered as a result of her mother’s unstable home; others not related, or peripherally related, to Melissa’s indiscretions will be discussed as well, below.

daughter, especially since some of Melissa's male companions, such as T-Bone, who she was seeing at the time of trial, have had children of their own.

Much more apparent is the harm Hannah suffered as a result of Melissa's relationship with Ray Beaudoin. During the eight or nine months Melissa and Hannah lived in his home, by Melissa's own admission, Hannah witnessed her mother being subjected to both physical⁷ and emotional abuse on some of these occasions. (R. at 403 (RE 7); *see also* Tr. IV, 572-73). This is an undeniably adverse effect upon the child, of the sort required by Forsythe. While no one would blame Melissa for the abuse she suffered at Ray's hand, it cannot be denied that this abuse, and its adverse effect upon Hannah, were a product of her indiscretions with Ray Beaudoin. Had Melissa not taken Hannah to live in Ray's home, Hannah would not have had to see her mother subjected to physical and emotional abuse. And, as this brief will develop, Hannah suffered other adverse effects that are directly or peripherally related to her mother's cohabitation with, and subsequent flight from, Ray Beaudoin.

One of these is the \$30,000 that Melissa took from Ray Beaudoin. Melissa never told Ray she was leaving him; nor did she give notice to her employer. (Tr. IV, 587-88). She decided to move a considerable distance from Meridian to Oxford, even though she had no job in Oxford (Tr. IV, 588), and she spent most of the money immediately after arriving there (R. at 404.) (RE 8), but still waited six months before getting a job, and after that worked for only one night a week as a waitress (Tr. V, 707).

⁷ Brad testified that Melissa told him Ray had hit her, when she needed him to watch Hannah while she "cleaned out" the bank account and moved to Oxford. (Tr. II, 275). At trial, however, while Melissa admitted that Ray was "very emotionally abusive," (Tr. IV, 572) in characteristic fashion, she downplayed the physical abuse she suffered. Melissa testified that Ray "never hit [her]," but that he "grabbed [her] face," "penned [sic] [her] up against the counter," and volunteered that on one occasion Ray "nudged" her head with his foot as she slept on the floor. (Tr. IV, 572).

Melissa justified taking Ray's money by arguing that she had a right to it because "[her] name was also joint on that account." (Tr. IV, 588). While she was living with Ray, Melissa worked for the Lauderdale County Sheriff's Department (Tr. V, 704), and was receiving child support from Brad. This income was deposited into the joint checking account (Tr. V, 647); but she nonetheless qualified for public assistance.⁸ Melissa never claimed that she had earned all of the money she took from the joint account, and well after the money was spent, she settled a civil suit for six thousand dollars, to be repaid starting in 2007. (R. at 404) (RE 8).

Melissa took a considerable sum of money that did not belong to her, spent it quickly so it could not be recovered, and used those ill-gotten gains to avoid having to work to support herself and her family. This set a poor example for her daughter and negatively reflected on Melissa's moral fitness as a parent. The trial court erred when it failed to acknowledge this as an adverse effect on the child.

- ii. **Hannah was adversely affected when Melissa allowed her teeth to decay to the point where her front four teeth were "like fangs" and black "like charcoal"**

The evidence presented at trial clearly established, well beyond a preponderance of the evidence, that as a result of her mother's unstable home, Hannah's teeth decayed heavily and went untreated for more than a year. The trial court erred in not recognizing this as an adverse effect upon Hannah's welfare.

When Hannah was only a year or a year and a half old, Melissa noticed that there was something wrong with the child's teeth. (Tr. V, 638). Melissa described the teeth at this early juncture as white, but with "little chunks missing." (Tr. V, 639). At some later date, Melissa

⁸ Though Melissa did not always take advantage of non-cash assistance, as where she allowed Hannah's Medicaid coverage to lapse even as the child was suffering from advanced tooth decay. (Tr. V, 706).

took Hannah to the health department for an unrelated ailment, but mentioned Hannah's teeth as well. (Tr. V, 639) As a result of this, Melissa put Hannah on a "sippy cup," but the child's teeth continued to deteriorate. (Tr. V, 639).

Brad and his wife, Kathleen, noticed Hannah's teeth as well. Exactly what happened when they brought their concerns about the continuing deterioration to Melissa's attention is somewhat unclear. Brad (Tr. II, 261) and Kathleen (Tr. I, 36) testified that Melissa agreed to take Hannah for treatment, and that she later told them that no dentist in Meridian would accept Medicaid⁹ (Tr. II, 261). Melissa apparently recalled this as a single event, where Brad and Kathleen asked her to take care of Hannah's teeth, and she told them that there was "not a doctor in Meridian would take Medicaid," that she felt she was missing too much work at the Sheriff's Department because of her children's other medical needs, and that Brad should take care of it. (Tr. V, 640). At any rate, the Monday following Melissa's representations that no dentist in Meridian would accept Medicaid,¹⁰ Kathleen made an appointment for Hannah with a dentist in Jackson, who Kathleen knew accepted Medicaid. (Tr. I, 36). This dentist in Jackson had a significant backlog, but Kathleen got the first available appointment. (Tr. I, 38). The appointment was made in late November or early December, 2002, and was set for April, 2003.

⁹ Although the divorce agreement did specify that Brad would pay for Hannah's medical insurance, there does not seem to have been any disagreement between the parties that Hannah *should* have been on Medicaid. Medicaid has much lower out-of-pocket costs (which were shared between Brad and Melissa, *see* R. at 396) (RE 4) than most private insurance plans. Furthermore, according to the agreement, Melissa could have made such a decision regarding Hannah's insurance because Melissa had "the final decision making power regarding matters that touch upon [Hannah's] health." (R. at 395) (RE 3).

¹⁰ Melissa testified that she enquired of "several" dentists in Meridian whether they accepted Medicaid before reaching this conclusion. (Tr. 582-83.) A cursory search online, through the Mississippi State Department of Health, reveals that as of August 12, 2007, at least twelve dentists in Meridian have open Medicaid provider numbers. *See* <https://msmedicaid.acs-inc.com/msenvision/ProviderLocatorInquirySubmit.do> (choose Provider Type "Dentist," enter "Meridian" as the city, and click "submit.")

(Tr. I, 37). Kathleen and Brad notified Melissa of the appointment several days after it was made. (Tr. I, 38; Tr. II, 262.)¹¹

At some point after the initial appointment was scheduled, Melissa allowed Hannah's Medicaid coverage to lapse. At trial, Melissa stated that her child's health insurance was "very important" to her (Tr. IV, 582), but she also testified that she did not "recall 2002 in paperwork," (Tr. IV, 582), that she did not know why she let the coverage lapse (Tr. IV, 582), and that she did not recall being told on numerous occasions that she needed to sign Hannah back up (Tr. IV, 583-84). She simply maintained that "if [she] knew [Hannah's] Medicaid was out, [she] would go fill out the paperwork to get her back on Medicaid." (Tr. IV, 584). Kathleen and Brad testified that they reminded Melissa "many times" prior to the April appointment to remedy the situation (Tr. I, 39-40; Tr. II, 263); Melissa testified that she did not remember being reminded, and that if she had been, she would have acted (Tr. IV, 583-84). Brad and Kathleen were forced to cancel the April appointment when it became apparent that Hannah would not have Medicaid coverage to pay for the surgery. (Tr. II, 263). This was about two months after Melissa had moved to Oxford, and it's not clear how much of the \$30,000 she had left at this point.

Brad and Kathleen rescheduled the appointment for "a few months later." (Tr. II, 263). Though Melissa testified, first, that she would have reinstated the Medicaid if she knew it had lapsed (Tr. IV, 584), and second, that she was aware that Hannah had missed the first appointment because the Medicaid had lapsed (Tr. IV, 584-85), Hannah did not have Medicaid coverage in time for the second appointment (Tr. II, 264).¹² Because Melissa was unemployed

¹¹ Melissa said she was "not sure" whether Brad told her about the appointment, but that he "may have." (Tr. IV, 583.)

¹² Melissa testified that Brad had brought her paperwork and that she had finally filled it out prior to the second appointment (Tr. IV, 585), but the coverage apparently was not in effect in time to cover the cost of the appointment (Tr. II, 254). Brad testified that Hannah did not have Medicaid at the time he made the third appointment. (Tr. II, 264).

and had apparently exhausted Ray Beaudoin's money by this point, Brad and Kathleen covered the cost of the second appointment themselves. (Tr. I, 41; Tr. II, 263-64).

The reason for this was that by June, 2003, the decay of Hannah's teeth had advanced to the point where four of her front teeth were "[b]lack, broke off, disgusting," "horrible" (Tr. I, 35 (Kathleen's recollection)), "rotted out," "just black," "like fangs" (Tr. II, 264 (Brad's recollection)), and "[had] rot on them" (Tr. IV, 581 (Melissa's recollection)). In addition to this, Hannah had six cavities in the back of her mouth that were "black . . . but not as bad as the front" (Tr. I, 37 (Kathleen's recollection)), and "black . . . with cavities" (Tr. II, 269 (Brad's recollection)).¹³

In the next visit, Hannah was put under general anesthesia, her front teeth were crowned with white cap, and her cavities in the back were filled with silver amalgam. (Tr. II, 268-270). Since natural-looking white caps were not covered by Medicaid, Brad paid the difference out of pocket, and Melissa agreed to allow Brad to deduct half of the out-of-pocket cost from her child support payments. (Tr. II, 270-71). Melissa knew of the second appointment, the surgery appointment, and subsequent visits, but chose not to go to any of them, despite the fact that at this time she was either not working all, or was working only one day a week.¹⁴ (Tr. II, 271; *see also* Tr. V 707). As a result of Brad and Kathleen's efforts, Hannah's "beautiful smile" was restored (Tr. II, 268) and her teeth did not hurt her anymore (Tr. II 270).

The lower court was clearly in error when it failed to recognize Hannah's suffering as an adverse effect upon her. Hannah was born on October 2, 1999 (R. at 395) (RE 3) and so according to Melissa's own admissions, Melissa recognized the problem with Hannah's teeth

¹³ Melissa testified that she did not recall seeing Hannah's back teeth black and rotted, and that she did not know about the back cavities until after Hannah eventually saw a dentist. (Tr. IV, 581).

¹⁴ The trial court noted that Melissa testified that she "had to work," (R. at 409) (RE 10) but at this time Melissa was only working Wednesday nights, or not at all (*see* Tr. IV, 592).

between October, 2000, and March, 2001 (*see* Tr. V, 638). Rather than taking the child to the dentist, Melissa merely mentioned it to someone at the Health Department; the only action she took was to change Hannah from a bottle to a “sippy cup.” Hannah’s teeth continued to decay, and when Brad and Kathleen confronted Melissa about it, she told them that no dentist in Meridian would take Medicaid, and that even though she was the custodial parent with “the final decision making power regarding matters that touch upon [Hannah’s] health” (R. at 395) (RE 3), Brad and Kathleen should take care of it. Brad and Kathleen promptly secured a hard-to-get appointment, which Hannah was unable to attend, because Melissa had allowed the Medicaid to lapse in the meantime. To get his daughter’s teeth fixed, Brad ended up paying for the next appointment out of pocket, and had to literally hand-deliver the Medicaid paperwork to Melissa, despite the fact that she was unemployed at the time.

This sequence of facts, clearly developed and uncontradicted at trial, demonstrates that Hannah suffered as a result of her mother’s poor parenting skills and unstable home. In fact, nothing in the record suggests that Melissa *ever* took Hannah to a dentist in these early years of her life. As a result, Hannah’s physical health was adversely affected and her appearance was disfigured for an extended period of time. As per the rule stated in Forsythe v. Ackers, 768 So. 2d 943 ¶ 11 (Miss. Ct. App. 2000), the trial court was required to consider this harm, and to recognize it as an adverse effect upon the child. The lower court was clearly in error in failing to do so.

- iii. **Hannah’s mental and physical health suffered as a result of Melissa’s unstable home, where Hannah’s acting out caused her to be given a potent anti-psychotic drug**

In November, 2003, a few months after Hannah's teeth were repaired, and about ten months after Melissa's sudden move to Oxford, roughly four month's after Melissa's move from her first apartment there, and around the time of Melissa's second round of trips to visit her stepbrother Rod, in Florida, a series of events transpired that led to Hannah coming to live with Brad, back in Meridian, in December of the same year.¹⁵ Hannah would live in Brad and Kathleen's home for the next twenty months.

Exactly how this came about was disputed at trial. Brad testified that Melissa described to him an incident at a J.C. Penny's where Hannah was "out of control," had been "biting, pushing, and kicking" Melissa, and that Melissa "just couldn't handle [Hannah]." (Tr. III, 308). As a result of this, Melissa took Hannah to a doctor who put her on Risperdal, a potent anti-psychotic. (Tr. III, 307). Hannah had just turned four years old (Tr. III, 310), and Brad was concerned about the Risperdal, so much that he drove from Meridian to Oxford to discuss it with Melissa (Tr. III, 308-309). Brad had researched Risperdal online, and after bringing his concerns over it to Melissa in person, both agreed that Hannah should not continue taking the medicine. (Tr. III, 309). Brad then suggested to Melissa that Hannah could come live with him and Kathleen, and two days later, on November 19, 2003, Melissa called him to accept the offer.

Melissa's story was different. Her description of the "J.C. Penny incident" is worth quoting verbatim:

Q. And what happened in your opinion?

A. Well, I was there. But Hannah used to bite very bad when she was a baby. And we were walking through the store holding my hand. She was holding my hand, and she went to bite my hand. So I picked her up by this hand and

¹⁵ Melissa denied accusations that her apartment around this time was littered with cigarette butts and beer cans, or that she had Hannah wearing shoes and clothes that were too small for her. (Tr. V, 651, 679.) Melissa also denied that Hannah was smelly, dirty, and shoeless when Brad got her on September 4, 2003, and that at that time Melissa was wearing expensive new clothes and appeared to have recently had her hair and nails done on that date. (Tr. V, 603-605).

I went to swat her butt. And that that point, she jumped. And the floor is very slick. She slid across the floor. I recall laughing when I was telling them about the incident and saying, "Oh Lord, they're going to call child services on me. It looks like I just slung her across the floor."

(Tr. V, 610.) (RE 42). Melissa also explained how Hannah ended up on Risperdal:

Q. What was the reason why you consulted with a physician or whoever you consulted with to get that prescription?

A. Hannah went through I'm considering it to be age process, but she would fight sleep extremely. She would stay up until sometimes two o'clock in the morning fighting sleep really hard so my oldest daughter had already seen a pediatrician so I took her to her and asked her opinion on that. That's when she prescribed Hannah this medication. It would do nothing more than to relax her enough to help her sleep.

(Tr. V, 679-80.) (RE 43-44). Melissa claimed her reason for sending Hannah to live with Brad and Kathleen was that Melissa wanted to go back to school (R. at 410) (RE 11).

If one knows what Risperdal really is and how it's been used by physicians it becomes apparent that Melissa's version of the events is very implausible. Risperdal is a potent anti-psychotic that, at the time, was FDA-approved only to treat schizophrenia and bipolar mania in adults. Though it was not approved for any use with children at the time Hannah took it, Risperdal has recently been approved by the FDA¹⁶ for the treatment of "irritability associated with autistic disorder," "including symptoms of aggression toward others, deliberate self-injuriousness, temper tantrums, and quickly changing moods" for children aged five and older¹⁷ (Hannah had just turned four years old when her mother gave her Risperdal). National

¹⁶ See <http://www.fda.gov/bbs/topics/NEWS/2006/NEW01485.html>. (RE 45) Risperdal was also very recently approved for treatment of schizophrenia in children and adolescents aged ten to seventeen years, and for treatment of bipolar I disorder in children and adolescents of the same age range. See <http://www.fda.gov/bbs/topics/NEWS/2007/NEW01686.html>. (RE 46-47)

¹⁷ This information is available through the manufacturer's website. See <http://www.risperdalaautism.com/risperdalaautism/>. (RE 48-49)

newspapers such as Salon¹⁸ and the New York Times¹⁹ have reported that Risperdal is often used “off label” to control acting out in children, despite the fact that it is not FDA approved for this use. Furthermore, the manufacturer of Risperdal cites *insomnia* as a frequent side effect of the drug; in 8-week trials it occurred in 26% of patients taking a small dose and 23% taking a larger dose of the drug. (See <http://www.risperdal.com/risperdal/assets/risperdal.pdf>.) (RE 50-56)

Although it was not developed at trial, this Court is well within its powers to take judicial notice of the facts that Risperdal is an anti-psychotic, that Risperdal’s only FDA-approved use in young children is for the treatment of “irritability associated with autistic disorder,” and that Risperdal is acknowledged to *cause* insomnia as a side effect, rather than to treat it. Each of these facts are not subject to reasonable dispute in that they are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned— the manufacturer of the drug, publishing in compliance with numerous government regulations; and the FDA itself. Miss. R. Evid. 201(b)(2). Furthermore, this Court should take judicial knowledge of the generally-known facts that Risperdal is often used to treat “acting out” in children, as reported in nationally-published newspapers, and that common sense dictates that a physician would not, under circumstances as described, prescribe a potentially-dangerous anti-psychotic, that to this day has not been FDA approved for children as young as Hannah was— that’s even known to cause insomnia— to treat such a simple condition as insomnia, when any

¹⁸ “[A] new class of anti-psychotic medications -- the most popular these days is Risperdal -- is heralded as the ultimately effective treatment for a number of diagnoses whose common features are not hallucinations or psychosis, but severe acting-out behaviors.” Dr. Lawrence H. Diller, *Kids on Drugs*, SALON.COM, Mar. 9, 2000, *available at* http://archive.salon.com/health/feature/2000/03/09/kid_drugs/index.html. (RE 57-66).

¹⁹ “These best-selling drugs, including Risperdal . . . are now being prescribed to more than half a million children in the United States to help parents deal with behavior problems despite profound risks and almost no approved uses for minors.” *Psychiatrists, Children and Drug Industry’s Role*, N.Y. TIMES, May 10, 2007, *available at* <http://www.nytimes.com/2007/05/10/health/10psyche.html?ex=1188705600&en=122883670563edae&ei=5070>. (RE 67-72).

number of safer and proven alternatives are available, even over the counter. Miss. R. Evid. 201(b)(1). In light of these facts, it is incumbent upon this Court to recognize adverse effects on Hannah in both the acting out that led her to be prescribed this anti-psychotic, and in her being administered the drug, even if it was only given once as Melissa claimed. (Tr. V, 680-81.)

iv. Hannah was adversely affected by her mother's inability to care for her for twenty months, and by Melissa's subsequent denials of Brad's rightful visitation

Mississippi case law regarding temporary custody modifications is unfortunately somewhat muddled.²⁰ In Arnold v. Conwill, our Supreme Court held that a temporary custody modification, agreed to by a mother "because of conditions over which she had no control," did not adversely affect her child "to the extent that his custody should be changed" 562 So. 2d 97, 100 (Miss. 1990).

The instant case can easily be distinguished from *Conwill*. Even if the Court were to accept Melissa's explanation that she sent Hannah to live with Brad and Kathleen for twenty months only so Melissa could go back to school (R. at 410) (RE 11), her choice to go back to school was clearly not a "condition over which she had no control," as Arnold requires. Furthermore, Hannah, as a child of tender years, was adversely affected, not by the temporary modification, but by Melissa's subsequent actions that disregarded Hannah's relationship with her father and Kathleen.

The evidence establishes that Brad had visitation with Hannah in her early life that was "usually every weekend from Thursday night to Sunday," as well as the other days he had off,

²⁰ In Forsythe v. Akers, 768 So. 2d 943, 948 (Miss. Ct. App 2000), the Court of Appeals added that "[t]he agreement of the parties to enter a temporary custody modification cannot be used as evidence there was a material change of circumstances." As will be developed, the harm suffered by Hannah in the instant case was not the agreement itself, but Melissa's subsequent behavior.

and holidays. (R. at 413) (RE 14). This pattern of visitation continued even after Melissa's sudden move to Oxford in February, 2002. (R. at 413) (RE 14). From December, 2003, through July, 2005, Hannah lived with her father and Kathleen. Unlike her early life with Melissa, in Brad's home, Hannah flourished, and she was by all accounts a happy, healthy, and well-adjusted child. (*see* R. at 411-13) (RE 12-14). During these twenty months, Melissa had regular visitation with Hannah, with the single longest visit lasting a week. (R. at 412) (RE 13). Brad and Kathleen never asked Melissa for child support, even for the summer of 2005 when Brad and Kathleen had both Hannah and Destiny (whose father could not take her for the summer). (R. at 411) (RE 12).

However, after Brad returned Hannah to Melissa following the Habeas Corpus proceedings on August 11, 2005, the situation changed dramatically for the worse. While both Brad and Melissa perhaps had reason to be upset with the other (*see* R. at 413-14) (RE 14-15), Melissa's subsequent actions were unjustifiable, unfair to Brad, and harmful to Hannah.

Immediately after Hannah was returned, Melissa refused Brad any visitation at all. Brad didn't see his daughter, who had lived with him for the last 20 months, until September 9, 2005, almost a month later, because she insisted on a modified visitation schedule. (R. at 415) (RE 16). Melissa then formed a habit of summarily rejecting nearly all Brad's requests for non-mandatory visitation, even to attend Church functions, or when Brad was in Oxford to confer with Hannah's teachers. (*see* R. at 416 (RE 17), 412 (RE 13); Tr. III, 399, Tr. V 661). Melissa refused to allow Brad's scheduled weekend visitations on November 11, 2005, February 17, 2006, and March 3, 2006 (R. at 416) (RE 17). Melissa refused to allow Kathleen to telephone Hannah directly,²¹ and stopped answering the phone when Brad called, except on those times she

²¹ Kathleen did get to talk with Hannah on the phone, but only during times the visitation schedule required Melissa to allow Brad to call. (R. at 421) (RE 22).

was required to by the visitation order. (Tr. V, 660-61). On numerous occasions, Melissa denied Brad phone visitation, including one where she claimed his call was a minute late. (R. at 422) (RE 23). Eventually, Melissa became suspicious that Brad and Kathleen were “interrogating” Hannah, and began taping the telephone visitations.

Melissa’s efforts to isolate Hannah from her father produced the anticipated effect upon Hannah. In January, 2006, Hannah began acting up during exchanges when Brad and Kathleen would return her to Melissa. The lower court summarized the difficulties as follows:

[Brad] and Kathleen saw Hannah at a teacher’s conference in January, 2006, and Hannah started crying and wanted to go with them. Hannah did not want to release Kathleen and the teacher’s assistant eventually took control of Hannah. On January 22, 2006, Hannah was crying and “acting out” before her return to her mother. Melissa did not observe any unusual conduct at the exchange on January 22, 2006. Hannah became upset and excited before a visitation exchange in February, 2006. She threw herself on the bed. Kathleen testified that Hannah was crying when they arrived in Oxford to receive her for the commencement of 2006 spring break visitation. The exchanges of Hannah in April, 2006, were difficult. Hannah was crying, hysterical and “acting out” at the exchange on April 2, 2006. She did not want to return to [Melissa]. [Brad] and Kathleen needed 20 minutes to take Hannah to [Melissa’s] vehicle. [Melissa] did not assist with the effort. The worst exchange was on April 12, 2006. [Melissa] allowed [Brad] and Kathleen one hour visitation with Hannah and the place of return was the Wal-Mart parking lot. Hannah again became hysterical and was crying and kicking. Bradley, Kathleen, and Melissa were trying to seat Hannah in Melissa’s vehicle and their effort lasted 20 to 30 minutes. They finally succeeded and Bradley and Kathleen left. Hannah stopped her antics after they left. Melissa allowed Hannah to talk with Kathleen on the telephone several minutes after they left. Melissa denied the testimony of Bradley and Kathleen that Hannah tried to slap her during the struggle to place Hannah in her vehicle. [Brad] had some return exchange difficulty with the next visitation, but it was not as difficult. The evidence does not develop any difficulty with exchanges after April, 2006.

(R. at 422-23) (RE 23-24). Melissa took Hannah to a counselor because she “needed someone to talk to,” but the counselor’s treatment or diagnosis, if any, was not developed at trial. (R. at 420-21) (RE 21-22).

The record clearly shows that Melissa’s actions were adverse to Hannah’s best interest, and harmful to the child. After she resumed custody of the child, Melissa isolated Hannah from

her father for almost a month, until she secured a new visitation schedule, with less liberal visitation terms. The trial court concluded that “[t]he evidence does not develop the reason for Hannah’s inappropriate conduct from January, 2006, through April, 2006,” but this was clearly erroneous. From the very first event, where Hannah clung to Kathleen and “started crying and wanted to go with them,” the reason for her outbursts was clear-- she missed her father and Kathleen. And Melissa, after wrongfully denying Hannah numerous visitations before this, responded by... wrongfully denying Hannah her scheduled visitations on February 17, 2006, and March 3, 2006— two scheduled visitation weekends in a row.

Hannah’s previous visitation would have been on February 3, 2006, and the next would have been March 17, 2006-- a heartbreaking six weeks. Together with the other missed weekend and the initial month Hannah didn’t see her father after returning to Melissa, that is one six week period and two periods of almost a month without seeing her father-- over the course of only about eight months from August, 2005, to March, 2006. Melissa caused Hannah to suffer this after the child spent twenty straight months without being away from Brad and Kathleen for more than a week at a time. In fact, the record doesn’t show that Hannah had *ever* been away from her father for even the shortest of those durations Melissa wrongfully imposed on her.

The reason that Hannah acted hysterical when being returned to her mother, as was the case in every outburst, was because she wanted to go home with her father and Kathleen.²² Hannah was undoubtedly suffering from a very reasonable fear that Melissa would keep her from seeing them again for another long period of time. As one would expect, after Melissa stopped denying Hannah regular visitation with her father, the outbursts ceased.

²² Melissa testified that, at one point, she didn’t think Hannah even knew who her biological mother was. (Tr. 662.) Melissa attributed this to Brad and Kathleen’s allowing Hannah to call Kathleen “Mommy” for a time before switching to “Mommy Kat.”

E. Conclusion

The chancellor's finding of a material change of circumstances, but with no adverse effect on the child, was manifestly wrong and clearly erroneous. The evidence clearly established beyond a preponderance of the evidence that Hannah was adversely affected by her mother's unstable home—Hannah was subjected to her mother's immoral relationships and financial indiscretions; Hannah was forced to witness the physical and emotional abuse her mother received during the nine months they lived in Ray Beaudoin's home; Hannah's teeth were allowed to decay greatly and were made to go untreated by her mother's inaction; after a physical altercation with her mother in a J.C. Penny's store, Hannah was given a powerful anti-psychotic drug; and after living with her father for twenty months, Hannah was then denied visitation with her father for long periods of time, up to six weeks-- the result of which was that she was put under great stress, threw fits, and saw a counselor for several months. The trial court committed clear error in failing in its duty to recognize these harms. The judgment of the trial court on this issue should be reversed; the judgment of the trial court on the other issues, dependent on this erroneous finding, should be vacated; and the case remanded for further proceedings consistent with that judgment.

POINT OF ERROR TWO:

THE CHANCELLOR ABUSED HIS DISCRETION IN DENYING BRAD SUDDUTH'S MOTION FOR NEW TRIAL BASED ON NEWLY-DISCOVERED EVIDENCE WHERE HANNAH'S REPORT CARD, ISSUED AFTER TRIAL BUT BEFORE JUDGMENT, SHOWED THAT HANNAH WAS FAILING THE FIRST GRADE.

A. General law and standard of review

A motion based on newly-discovered evidence should be granted if it can be shown that:
(1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to

discover the new evidence is shown or may be inferred; (3) the evidence is material and not cumulative or impeaching; (4) the evidence is such that a new trial would probably produce a new result. Goode v. Synergy Corp., 852 So. 2d 661 ¶ 8 (Miss. Ct. App. 2003) (citing Moore v. Jacobs, 752 So. 2d 1013, 1017 (Miss. 1999)). Such decisions are reviewed for abuse of discretion. Id. at ¶ 7.

B. The evidence presented and the lower court's findings

The trial court had before it considerable evidence of an adverse impact upon Hannah, as detailed in Appellant's Point of Error One, above, but nonetheless acknowledged no adverse impact upon the child.

Brad filed a Motion for Relief Pursuant to Rule 60 and Rule 59 of the Mississippi Rules of Civil Procedure within ten days of the rendering of the judgment. (R at 469-478) (RE 29-38). In support of this motion, Brad offered Hannah's report card from the fall half of her first grade in elementary school. (R. at 476) (RE 36). The report card detailed Hannah's progress over the course of the semester the trial had been conducted, and contained the conclusions of Hannah's teachers formulated at the end of that semester. The report card's conclusions were stark, among them, a 42% grade average in Reading. To advance to the second grade, Hannah would need a yearly average of 70% in reading-- thus, by this indication, to pass the first grade Hannah would have mustered a near-perfect 98% average for the second semester.

The report card also reflected a marked decline in Hannah's performance from the first half of the semester to the second half: her grade in Reading slipped from 47% to 37%, her grade in Spelling was nearly cut in half from 73% to 46%, even her handwriting slipped from "satisfactory" to "needs improvement." The school's appraisal of Hannah's work habits also

suffered: “Organizes work and materials” slipped from Satisfactory to Needs Improvement; “Completes work on time” slipped from Needs Improvement to Unsatisfactory”; and “Returns work on time” fell from Satisfactory to Unsatisfactory. Hannah was marked as Needing Improvement in her listening, following directions, and in doing her best work throughout the semester. The report concluded with this admonition to her mother, Melissa:

“Please make sure that [Hannah] is doing what is expected of her to do at home.”

(R. at 476 (emphasis added)) (RE 36).

The trial court acknowledged that the motion was timely filed under Rule 59, but denied it without factual elaboration. (R. at 479-81) (RE 39-41).

C. The trial court abused its discretion in not granting relief pursuant to M.R.C.P. 59, because the evidence of Hannah’s poor school performance would have required the trial court to find an adverse effect upon Hannah

The newly-discovered evidence offered with Brad’s motion clearly satisfied the requirements of Rule 59. The trial court abused its discretion by denying it.

i. The evidence was discovered following the trial, and, because it did not exist prior to the last day of trial, Brad’s due diligence in obtaining it may be inferred.

The report card respected a grading period and a teacher’s conclusions that ended on December 15, 2006. The pretrial conference and agreements were concluded by August 18, 2006, and the trial was conducted on September 13, 14, 15, and December 11 of that same year.²³ Thus, the report card could not have been discovered to be used at trial by Brad. In fact,

²³ At trial, Melissa maintained that the relevant period at trial for school-related evidence was prior to June 17, 2006, and the trial court appeared to agree when it sustained the objection. (Tr. 709-10.)

the trial court found that the report card was not available on any of those dates. (R. at 480) (RE 40). No amount of diligence could have found a document that did not exist.

- ii. **The report card was material and not cumulative or impeaching, and was such that a new trial would probably produce a new result.**

At trial, Brad attempted to establish that Hannah was not doing well in school. His testimony and that of his wife Kathleen²⁴ about Hannah's poor performance in school was not given much weight by the trial court, primarily because of Hannah's kindergarten report cards, representing the first three semesters of Hannah's kindergarten year:

Kathleen reviewed Hannah's school work and conferred with Hannah's teacher and Kathleen opined that Hannah was "not doing well in school." [Brad] opined on April 13 2006, that Hannah had not improved her work.

The lower court then weighed that testimony negatively against the kindergarten report card:

Exhibit 13 is a copy of Hannah's Bramlett Elementary School achievement record for the first three grading periods for kindergarten. The grading categories are satisfactory, needs improvement, and unsatisfactory. Hannah had a satisfactory for most categories and she needed improvement in several categories. She did not have an unsatisfactory in any category. Kathleen did not consider the [kindergarten report card] in developing her opinion that Hannah "was not doing well in school."

(R. at 419) (RE 20). Furthermore, Brad testified that he had on one occasion personally witnessed Melissa keeping the child out late on a school night in January, 2006, and Melissa testified that during the fall of 2006, she started leaving Hannah with Melissa's sister, at 6:20 A.M. in the morning. (R. at 419) (RE 20).

The trial court is required to consider school records among other things:

[T]here are many things looked at in deciding whether or not a material change has occurred, such as health, willingness of the parent, employment, parenting skills, moral fitness, physical and mental health of the child, **school record of the child**, and . . . those factors are to be looked at in a totality of circumstances.

²⁴ Kathleen is presently a student at the Mississippi State University, majoring in elementary education. (R. at 401) (RE 6).

Forsythe v. Akers, 768 So. 2d 943 ¶ 11 (Miss. Ct. App. 2000) (emphasis added). The report card was clearly material to the outcome of the case.

The admission of the report card and the subsequent elaboration upon Hannah's very poor school performance while in Melissa's charge would have changed the result of the trial. As elaborated upon in Point of Error One of this brief, Brad presented significant evidence at trial, often uncontested, that supported a finding of an adverse impact on Hannah. Melissa sent Hannah to live with her father for twenty months; Melissa was unemployed, or under-employed, for a period of almost a year; Melissa allowed her child's teeth to decay and didn't follow through with her part in helping Brad get them fixed; Melissa engaged in numerous affairs with men with whom she was not married, including her stepbrother, and she cohabitated with Ray Beaudoin, who abused her in front of Hannah for nine months; Hannah was given a potent anti-psychotic, Risperdal; Hannah was ripped away from her father for months at a time, in violation of court orders; and as a result, the stress she manifested on being returned to Melissa led Melissa to take her to counseling.

If this was not enough to prove an adverse effect upon the child, the loss of the only factor the Court of Appeals saw fit to enumerate in Forsythe that appeared to go in Melissa's favor-- Hannah's school records-- would surely have pushed the balance of the evidence beyond the preponderance that would have required the trial court to find an adverse effect upon the child.

D. Conclusion Issue Two

The Fall, 2006 report card meets all four of the requirements enumerated in Goode v. Synergy Corp., 852 So. 2d 661 ¶ 8 (Miss. Ct. App. 2003): it could not have been discovered in time to be admitted to trial, but was discovered in time for a Rule 59 motion; it was material; and

its contribution to the case would have been such that a new trial would probably have produced a new result. The trial court abused its discretion when it denied the motion. This Court should reverse the trial court's denial of Brad's Rule 59 motion, and remand for a new trial.

CONCLUSION

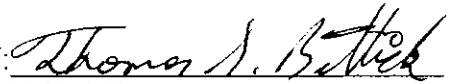

It is submitted that the lower court made the following errors:

1. The lower court's finding that Hannah was not adversely affected by her mother's unstable home was manifestly wrong and clearly erroneous.
2. The lower court abused its discretion when it denied Brad Sudduth's motion for relief pursuant to Rule 59, where new evidence was discovered that during the trial, Hannah's performance in school had taken a dramatic turn for the worse.

Appellant, therefore, submits that the lower court's order of judgment was predicated on error, and Appellant asks this Court to reverse and remand for appropriate proceedings to determine the best interests of the child, Hannah Sudduth. Appellant also asks that the costs for this appeal be taxed against the Appellee.

Respectfully Submitted,

BRAD SUDDUTH

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CERTIFICATE OF SERVICE


Pursuant to M.R.A.P. 25(a), I, Thomas G. Bittick, Attorney for Bradley Sudduth, do hereby certify that I have this day delivered via hand delivery and/or United States Mail, postage prepaid, the original and three copies of the foregoing Brief of Appellant to:

Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
P.O. Box 249
Jackson, MS 39205-0249

I further certify that I have this day delivered, via United States Mail, postage prepaid, one copy of the foregoing Brief of Appellant to the following:

James C. Mayo
Attorney for Appellee
P.O. Box 509
Louisville, MS 39339

This the 24th day of October, 2007.



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