IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-CA-00880

CANDACE D. PRICE — APPELLANT

VERSUS

JASON LAGARRETT McBEATH — APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for Appellee, Jason Lagarret McBeath, certifies that the following persons have an interest in the determination of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

1. Candace D. Price, Appellant
2. Darnell L. Nicovich, Attorney for Appellant
3. La Quetta M. Golden, Former Attorney for Appellant
4. Jason Lagarret McBeath, Appellee
5. L. Arthur Hewitt, Attorney for Appellee
6. Jay Foster, Former Attorney for Appellee
7. Michael J. Vallette, Former Attorney for Appellee
8. The Honorable Margaret Alfonso, Chancellor

Respectfully submitted,

L. Arthur Hewitt

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STATEMENT OF THE CASE

Plaintiff, Jason Lagarrett McBeath ("Jason"), and Defendant, Candace D. Price ("Candace"), are the natural parents of a five (5) year old son, Jason Latrell McBeath, born February 25, 2002. The parties were never married. Jason resides in Moss Point, Mississippi and is employed as a fireman; and, Candace, formerly a Gulf Coast resident, is presently on active duty with the United States Army in South Carolina. Both parties are presently married.

The parties child, Jay, resided with his mother until the onset of litigation. As is

unfortunately too often the case, Jason and Candace experienced difficulties with visitation with their son which were exacerbated by Candace's enlistment in the military and other factors. Without the benefit of a custody and visitation order of the Court, clear guidance as to such matters was nonexistent. Exemplary of the situation existing at the time is Candace's attempt to appoint her mother as Guardian of the parties' child without notice to Jason, and the passage of approximately eighteen (18) months without visitation by Jason.

The procedural history of the case, detailed below, culminated in the entry of a Final Judgment entered April 18, 2007, by the terms of which, *inter alia*, Jason was awarded the paramount physical care, custody and control of Jay, with the parties being granted joint legal custody of the child. Candace has perfected her appeal to this Court aggrieved primarily of what she considers a lack of personal jurisdiction over her and the ruling of the trial Court generally.

PROCEDURAL HISTORY

The procedural developments of this case before the trial Court, in chronological order, are these:

Date	Event
January 7, 2004	Entry of Judgment of Judgment for Support and Other Relief in Cause No. C2402-03-00816(3) in the Chancery Court of Harrison County, Mississippi, declaring Jason to be the father of

	Jay and establishing child support to be paid.
October 24, 2004	Jason filed his Petition for Custody of Minor Child seeking custody of Jay and termination of his child support obligation, or alternatively, liberal visitation rights.
January 24, 2005	Entry of a Judgment on Jason's Petition for Custody of Minor Child by which Jason was awarded the primary care, custody and control of Jay and his child support obligation termination, with the issues of visitation and child support reserved for further ruling.[1]
February 23, 2005	Candace filed her Motion to Reconsider, or in the Alternative, Motion to Set Aside Judgment, and Request for Sanctions, with hearing set for May 6, 2005.
March 16, 2005	Jason filed his Motion for Citation of Contempt and Other Relief, with hearing also set for May 6, 2005.
June 2, 2005	Entry of a Temporary Judgment reserving a ruling on Candace's Motion to Set Aside Judgment, awarding temporary physical custody of Jay to Candace, establishing a temporary visitation schedule, and reinstating Jason's child support obligation.
March 19, 2007	Candace's counsel of record, La Quetta Golden, filed her Motion to Withdraw as Candace's attorney.
March 26, 2007	Final hearing on custody of Jay and related

[1] The hearing of Jason's Petition for Custody of Minor Child was heard by the Court on January 20, 2005 which was not attended by Candace.

matters.

April 18, 2007	Entry of the Final Judgment by which Jason was awarded the paramount physical care, custody and control of Jay, with the parties sharing legal custody, establishing child support to be paid by Candace and resolving related issues.

This appeal by Candace has followed.

SUMMARY OF THE ARGUMENT

Candace's primary basis for this appeal is her assertion that the Chancery Court of Harrison County, Mississippi lacked jurisdiction over her personally and over the subject matter of this controversy. While Candace maintains that she was never served with process of any kind, she also asserts that neither the Miss. R. Civ. P. Rule 4 and Rule 81 summonses provided the required time from the date of service to the date of hearing to be valid, rendering void the Judgment entered by the trial Court on April 18, 2007.

Candace, in the alternative, argues that the Chancellor did not properly assess and weigh the applicable factors to determine which litigant should have custody of the parties' minor child, Jay. Candace sees the decision of the Chancellor as one in which Jason was unduly credited with the benefit of certain of the custody factors while she was not. Such a result, in Candace's view, could have resulted through reversible error by the trial Court.

Jason urges that while Candace may have posed a challenge to the jurisdiction of the Chancery Court, she waived that objection by not obtaining a ruling on the issue prior to going forward in a temporary hearing and the final custody hearing. It is Jason's position that the waiver of the jurisdictional challenge did not preserve the issue for appeal and should not be considered.

Further, Jason sees the Chancellor's analysis of the factors pertaining to custody to have been conducted in depth, properly weighed according to the evidence, and determined by each such factor being assigned to either Candace or him. Jason asserts that the Chancellor's decision to award him custody of Jay was correct, not the product of error, and should remain undisturbed.

ARGUMENT

Jason agrees with Candace's representations as to the standard of review to be applied by this Court when reviewing the findings and rulings of a Chancellor and the supporting authorities offered by Candace. Contrary to Candace's position, however, Jason does not see the trial Court as having abused its discretion nor having applied the law erroneously so as to constitute manifest error.

I. THE CHANCERY COURT PROPERLY EXERCISED BOTH SUBJECT MATTER AND IN PERSONAM JURISDICTION IN THIS ACTION DUE

TO THE FACT THAT EVEN IF PERSONAL SERVICE OF PROCESS WAS NOT PROPERLY EFFECTED UPON CANDACE PRICE, HER GENERAL APPEARANCE BEFORE THE COURT CONSTITUTED A WAIVER OF ANY OBJECTION THERETO.

Candace's position on appeal, in the main, centers on her allegation that she was not properly served with process for the hearing held on January 20, 2005, resulting in the entry of the Judgment on January 24, 2005 whereby Jason was awarded the physical custody of Jay. Candace argues mightily that absent sufficient process, the Court was without personal jurisdiction over her, rendering the Judgment void. This is so Candace says, notwithstanding her subsequent appearances before the Court for further proceedings in this action. Candace asserts that inasmuch as she challenged the jurisdiction of the Court in due time, her objection cannot thereafter be waived. Jason disagrees.

Candace offers several decisions of the Mississippi Supreme Court in support of her position, the first being *Isom v. Jernigan*, 840 So. 2d 107 (Miss. 2003). Candace quotes from the decision that "[C]omplete absence of service of process offends due process and cannot be waived." With this proposition Jason has no argument; however, the *Isom* decision provides much more guidance than that quoted, much of which is applicable to the instant controversy.

In *Isom*, the custodial father filed a Petition for Citation of Contempt for the failure of the child's mother to return the parties' daughter following scheduled visitation. A

Miss. R. Civ. P. Rule 81 (d), summons was issued December 5, 2000 returnable to the hearing set for December 12, 2000. No attempt was made to serve the mother, but rather, the summons was certified by mail to her attorney and received by him on December 6, 2000. The mother's attorney appeared at the hearing without his client and presented evidence on her behalf. The trial Court found the mother in contempt and ordered her incarcerated, leading to the appeal to this Court.

Two (2) findings by the Mississippi Supreme Court in the *Isom* case warrant attention. The first is that although the *Isom* Court determined that while the mother should have been personally served with process in accordance with Miss. R. Civ. P. Rule 81 (d) (2), this shortcoming was waived by her making a general appearance through her attorney. Noting that not only did the mother's attorney appear, he presented evidence on her behalf without contesting the fact that only six (6) days elapsed between issuance of process and the hearing date rather than seven (7) days as required by the Rule. This Court determined that the time requirement was unchallenged and therefore waived. The second finding in *Isom* having application here is that no reason exists to set aside a court order in the event an appearance is made through counsel of record absent a contest to jurisdiction.

Candace argues that her former attorney did contest jurisdiction by filing on her behalf a Motion to Reconsider, or in the Alternative, to Set Aside Judgment and Request

for Sanctions. By this vehicle, Candace sees herself as having preserved the issue of defective service of process for all time. Such a stance, however, is without merit when considered in light of *Isom*. As admitted by Candace, the Chancellor "apparently heard that Motion, and on May 31, 2005, entered its Temporary Judgment which among other things, reserved its decision on the issues of defective service of process." (Appellant's Brief, p. 14). Among the "other things" the trial Court accomplished at the May 31, 2005 hearing was to award temporary custody of the parties' child to Candace. (RE, PP. 45-47). The hearing was attended by Candace's counsel of record, and the Temporary Judgment entered on June 2, 2005 as a result thereof recites that the Court made its findings "... after having reviewed the evidence..." (RE, p. 45).

The official record of this matter reveals that both a Rule 81 and Rule 4 summons were issued by the Harrison County Chancery Clerk's office on December 28, 2004, with the Rule 81 summons returnable to the hearing set for January 20, 2005. (RE, pp. 11, 13). The returns of these respective summonses indicate service on Candace on December 28, 2004. (RE, pp. 12, 14). Notwithstanding Candace's observation that the return on the Rule 81 summons recites that the person served was Candace Donella Price (RE, p. 14), the Affidavit of the process server, Marie Singleton, states that prior to serving the summonses, the individual answering the door identified herself as Candace D. Price. (RE, p. 16). In either event, Candace did not appear before the Court on January 20, 2005, and Jason was

awarded primary care, custody and control of Jay. (RE, pp. 17-19). For this reason, Candace attacked the last-mentioned Judgment on the jurisdictional grounds. What is not discussed by Candace is that if the Court has been without jurisdiction over her since January 20, 2004, and this defect has been preserved through formal objection, then the Temporary Judgment of June 2, 2005, by which she regained custody of Jay is also of no effect and subject to being set aside. Unsurprisingly, Candace did not complain of any purported jurisdictional defect at this juncture, and removed Jay to her home in South Carolina as set forth in her UCCJA Affidavit dated August 10, 2005. (RE, p. 52). While the said Temporary Judgment does recite that the decision of whether or not to set aside the Judgment of January 24, 2005 was to be reserved until a final hearing, the fact remains that Candace, her attorney, or both attended the May 31, 2005 hearing and presented evidence. Furthermore, if the Court initially lacked both in personam and subject matter jurisdiction, by what authority did the Court, notwithstanding the reservation of the jurisdictional issue, proceed to award Candace custody of the parties' child? Candace seemingly seeks to have her cake and eat it as well. The answer is plain: the Chancery Court did, in fact, have jurisdiction which was properly exercised.

Assuming, *arguendo*, that Candace was not personally served with process to appear at the hearing held January 20, 2005, it is beyond dispute that she made a general appearance before the Court on May 31, 2005, either in proper person or through her

attorney, followed by another general appearance on March 26, 2007. As this Court observed in *Isom*:

> "Mississippi does not recognize "special appearances" except where a party appears solely to object to the court's jurisdiction over her person on grounds that she is not amenable to process. *Maladnich v. Kohn*, 250 Miss. 138, 156, 164 So. 2d 785. 791 (1964). One waives process and service, however, upon making a general appearance. See: *Arrow Food Distributors, Inc.* 361 So. 2d 324, 327 (Miss. 1978); *Sandifer v. Sandifer*, 237 Miss. 464, 115 So. 2d 46 (1959). By sending her attorney to appear, Kelly subjected herself to the jurisdiction of the chancery court and waived all objections to improper or insufficient service of process."

840 So. 2d at p. 107 (¶ 1).

The temptation may arise to view the May 31, 2005 as a motion hearing the purpose of which was merely to determine if the Judgment of January 24, 2005 should be set aside, and not a general appearance by Candace. This notion is easily dispelled, however, when, as pointed out above, it is remembered that as a result of that proceeding, the Court placed temporary custody in Candace and reinstated Jason's child support payments. At the very least, Candace's attorney was present and presented evidence to support the Chancellor's ruling. Again, the Temporary Judgment itself says as much. Had Candace's attorney restricted the scope of the hearing to the sufficiency of process for the prior hearing, perhaps Candace would not have risked waiver of that challenge to jurisdiction; however, as observed in *Isom*:

> "Not only did Kelly's attorney appear, he introduced evidence at the hearing on Kelly's behalf..... This indicates that Kelly meant for her attorney to go forward in defending Jay's motion. Since Kelly's attorney appeared on her behalf and did not

> object to the hearing being six days between the time process was served instead of seven, that requirement of Rule 81 was waived."

Id.

Candace cites *Schustz v. Buccaneer, Inc.*, 850 So. 2d 209 (Miss. Ct. App. 2003) as authority for her proposition that the right to contest a court's jurisdiction based upon a claimed problem with service may be lost after making an appearance in the case if the issues related to jurisdiction are not raised at the first opportunity. This is indeed what *Schustz*, in part, holds; but, this decision goes a good measure further by concluding that a litigant's general appearance through counsel followed by a lengthy delay in contesting in personam jurisdiction can result in a waiver of the defective service of process. *Id.*, at p. 214-215. More to the point, Judge McMillain, writing for the *Schustz* Court, after noting that the concepts of "first opportunity" and "timely" were without clear definition in prior decisions, observed that:

> "In other words, the issue can be framed as whether (a) a voluntary appearance followed by (b) a prolonged failure to affirmatively challenge the validity of the service may, in combination, constitute a waiver of the right to contest in personam jurisdiction in the same way that a subsequent affirmative act to defend on the merits without first challenging the court's jurisdiction is deemed a waiver of the jurisdictional issue."

850 So. 2d at p. 213 (¶ 4).

Jason submits that the facts of the present case could arguably fall within either of the two (2) scenarios described above. Bearing in mind that the issue of whether or not Candace was initially personally served with process was never decided by the Chancellor,

there elapsed a period of time from February 23, 2005 until April 18, 2007 during which the challenge to jurisdiction was not pressed. It is true enough that Candace objected to jurisdiction by means of her Motion to Reconsider, or in the Alternative, Motion to Set Aside Judgment, and Request for Sanctions; however, it appears that upon entry of the Temporary Judgment of June 2, 2005 under the terms of which Candace was awarded temporary custody of Jay, the challenge faded into nonexistence. That is, Candace did voluntarily appear before the Court through counsel and initially challenge jurisdiction over her, but she did not thereafter affirmatively assert the objection in timely fashion. It is Jason's position that Candace's failure to seek a ruling on the issue resulted from the fact that Candace agreed with the Chancellor's ruling as made that day. On the other hand, at the hearing held March 26, 2007, Candace proceeded to defend herself on the merits *pro se* without raising the jurisdictional challenge beforehand.

The record shows that the following exchange occurred among the Chancellor, Candace, and Jason's attorney (R., pp. 14-15):

THE COURT: Okay. Now what we need to do is this: We need to see - - Mr. Lusk, if you have time on this case, you will represent her; is that correct?

MR. LUSK: Yes, ma'am.

THE COURT: Okay. It's just that you can't represent her today?

MR. LUSK: No, ma'am. There is no way because I have not seen - - I did not even

know it was a custody issue or even a visitation issue. I didn't know what it was.

THE COURT: Okay. I'm going to take a brief recess and talk to Mr. Lusk and Mr. Foster. I will be out in about 10 minutes.

(MR. LUSK DID NOT RETURN)

(RECESS WAS TAKEN.)

THE COURT: It's my understanding that Mr. Lusk talked to you - - we are on the record. Ms. Price - - and that you desire to go forward without representation; is that correct?

MS. PRICE: Yes, Your Honor.

THE COURT: Okay. Are you ready to proceed?

MR. FOSTER: Yes, Your Honor.

THE COURT: Okay. So, let's - - let's get the pleadings that are before the court today. And that's the October 26, 2004 petition for custody of minor child; is that correct?

MR. FOSTER: That is correct, Your Honor.

The hearing proceeded during which Candace cross-examined Jason's witnesses (R., pp. 23-27, 54-60, 78-102, 104-105), gave testimony (R., pp. 136 - 145), called a witness to give testimony on her behalf (R., 119-129), and introduced tangible evidence (R., pp. 138-139, 153). Without question Candace appeared and participated in the trial without raising the jurisdictional issue, the only mention of which was the Chancellor's observation that the

issue had been reserved in earlier proceedings for subsequent determination by the Court. (R., p. 147). Candace's failure to pursue the jurisdictional challenge prior to going forward in the hearing cannot be overlooked simply because she opted to represent herself. This Court in *Chasez v. Chasez*, 935 So. 2d 1058, 1062 (¶ 3)(Miss. 2005), a case with similar jurisdictional concerns, stated the familiar rule in these words:

> "A person electing to represent himself in a civil proceeding is bound by the same rules of practice and procedure as an attorney. *Bullard v. Morris*, 547 So. 2d 789, 790 (Miss. 1989). Mr. Chasez, claiming not to have been able to obtain a lawyer, began to defend himself before the court, and even brought his own motion, before ever objecting to the jurisdictional question. We are not required to address issues not objected to at trial and preserved for appeal. *Dennis v. Dennis*, 824 So. 2d 604, 608 (Miss. 2002). Because Mr. Chasez failed to raise the issue of improper notice at the show cause hearing, we find that it is waived."

935 So. 2d at p. 1062.

Mr. Chasez was the defendant in three (3) successive actions for contempt. Although the Court Administrator mailed a hearing notice to Mr. Chasez for the first hearing, he was not served with a Miss. R. Civ. P. Rule 81 summons. Notwithstanding this oversight, Mr. Chasez appeared and stated his election to proceed *pro se*, and was found in contempt and incarcerated. After giving the Court his assurances of future compliance, Mr. Chasez secured his release only to be subsequently jailed a second time, at which point he challenged the jurisdiction of the Court asserting that he was not initially served with process for the initial contempt hearing. *Id.*, at pp. 1060-1061. Mr. Chasez perfected his appeal to this Court following his third incarceration for contempt. *Id.* The passage quoted

above states this Court's ruling as to the jurisdictional issue, with the other matters included in Mr. Chasez's appeal, *res judicata* and attorney's fees, not germane to the case at hand.

Candace, very much like Mr. Chasez, chose to go forward at trial on the merit's, failing to first bring on her jurisdictional challenge; and, in doing so waived any perceived defect in the service of process upon her. She did so at her peril, resulting in the Chancellor deeming the jurisdictional challenge abandoned. (RE., p. 73). Jason respectfully urges upon this Court that such ruling by the Chancellor was correct, supported by the applicable authorities, and should therefore allowed to stand.

II. THE DUE PROCESS RIGHTS OF CANDACE PRICE WERE NOT INFRINGED UPON BY ANY PURPORTED FAILURE TO COMPLY WITH MISS. R. CIV. P. RULE 81.

This second issue presented by Candace is quite similar to the first, and in fact, elicits a response which parallels that given by Jason above. For the reasons discussed below, Jason asserts that this second argument by Candace should also fail.

No doubt exists that the Chancery Court of Harrison County, Mississippi was vested with subject matter jurisdiction to determine the custody of the parties' child. *Miss. Const.*, Art. 6, § 159. This article and section of our state's constitution recites that:

"The chancery court shall have full jurisdiction in the following matters and cases, viz.:

(a) All matters in equity;
(b) Divorce and alimony;

(c) Matters testamentary and of administration;
(d) Minor's business;
(e) Cases of idiocy, lunacy, and persons of unsound mind;
(f) All cases of which the said court had jurisdiction under the laws in force when this Constitution is put in operation."

This Court has long held that the equity powers of the Chancery Courts and its jurisdiction over infants and minor's business includes the authority and obligation to protect their interests and welfare by ajudicating custody matters. *Davis v. Davis*, 194 Miss. 343, 12 So. 2d 435 (Miss.) The Chancery Court's jurisdiction over custody matters is exclusive. *Chrissy F. By Medley v. Mississippi Dept. Of Public Welfare* (S.D. Miss. 1991) 780 F. Supp. 1104, *affirmed in part, reversed in part* 995 F. Fd 595, *rehearing denied*, 3 F. 3d 441, *certiorari denied*, 114 S. Ct. 1336, 510 U.S. 1214, 127 L. Ed. 2d 684. It cannot be said that the Chancery Court of Harrison County lacked subject matter jurisdiction of the custody dispute between Candace and Jason.

Candace's due process argument, with subject matter jurisdiction aside, appears to be based upon the fact that neither the Miss. R. Civ. P. Rule 4 or Rule 81(d) summonses provided sufficient time within which to compel Candace's attendance before the Court. Candace offers *Bryant v. Walters*, 493 So. 2d 933, 938 (Miss. 1986) in support of her position that a judgment is only valid if the Court has jurisdiction of the subject matter, the parties and assures due process of law. Candace has correctly stated a portion of the *Bryant* decision; however, she omits the following observation by that trial court as contained in

footnote 4: "A due process violation so gross so as to make the judgment void is extremely rare." (Citations omitted.) *Id.*, p. 938. Furthermore, the facts of *Bryant* show that the issue presented was whether or not an individual could be made liable for corporate debt on open account. The argument made by Walters, the debtor, was that inasmuch as he was *not* personally liable for his corporation's debt, a default judgment entered against him was void under Miss. R. Civ. P. Rule 60 (b). This strategy did not succeed. Important here is that *Bryant* was not a case which discusses defective service of process or jurisdiction of the trial Court impacting on due process concerns. *Bryant* is not helpful in resolving the issues of the case *sub judice.*

Candace next proposes that a judgment rendered by a Court without jurisdiction is absolutely void and subject to direct or collateral attack without restriction as such judgment constitutes a misuse of power and amounts to an absolute nullity. In support she cites *Roberts v. Roberts,* 866 So. 2d 474 (Miss. Ct. App. 2003), citing *Duvall v. Duvall,* 224 Miss. 546, 80 So. 2d 755 (1955). Again, with Candace's statement of these partial rulings, Jason concurs, but not with the applications of those authorities Candace attempts to make to this case.

Roberts involved a divorce filed by the wife in Tate County, Mississippi, the county of residence of the Robertses, which was answered by the husband with a counter-claim for divorce. The Chancellor denied either party a divorce but granted custody of the

parties' children to Mr. Roberts. Mrs. Roberts relocated to DeSoto County and re-filed for divorce alleging contested grounds. Mr. Roberts filed a waiver of process and entered his appearance. The DeSoto Chancery Court granted Mrs. Roberts a divorce, attaching thereto the decree the Tate County order and a property settlement agreement. Upon Mr. Roberts subsequently citing Mrs. Roberts for contempt for refusing to execute and deliver a quitclaim deed as set out in the property settlement agreement, Mrs. Roberts countered with a motion to set aside the divorce decree asserting that as venue was improper in DeSoto County, the divorce judgment was void. *Id.*, p. 476. The DeSoto Chancery Judge declined to set aside the divorce, leading to Mrs. Roberts' appeal; and, this Court reversed, rendered and remanded the case. En route to its ruling, this Court did indeed recite the language mentioned above and relied upon by Candace that judgments rendered by courts without jurisdiction are void. The contexts from which these prior decisions were emanated, however, were and are completely different from that presented here. As discussed above, *Roberts* concerned the purposeful filing of a divorce action in the wrong county. The issue on appeal in *Duvall* was whether or not a Chancery Court had subject matter jurisdiction to enter a decree entitling the wife to a portion of the husband's personal property when the original suit was for separate maintenance only. *Id.*, at pp. 552-553. This Court recognized in *Duvall* that the Chancery Court certainly was empowered with jurisdiction to hear and determine the separate maintenance issue and could proceed

to determine such other matters, legal or equitable, necessary to resolve the entire controversy. *Id.*, at p. 755. *Duvall* is a potent and enduring discussion of the subject matter jurisdiction of the Chancery Courts, but nothing said in *Duvall* pertains to a denial of due process arising from a purported defective service of process. As discussed above, the Chancery Court of Harrison County, Mississippi undeniably held subject matter jurisdiction of the custody dispute between these litigants. Nothing in *Duvall* holds otherwise.

Candace's position is untenable. In sum, she maintains that due to the defective service of process, an issue never determined by the Chancellor, results in the trial Court not having *in personam* or subject matter jurisdiction amounting to a denial to her of rights to be afforded due process. As stated, the subject matter issue is without merit. The plain fact that Candace did not seek a ruling on the issue of personal jurisdiction prior to proceeding *pro se* on March 26, 2007 constitutes a waiver of that particular jurisdictional challenge.

A recent decision of this Court affording guidance is *Venagas v. Garganus*, 911 So. 2d 562, 568 (¶ 5)(Miss Ct. App. 2005). There, the unmarried parents of a child became embroiled in a paternity action filed by the father. The mother maintained that she and the child were residents of Louisiana, and that she was not properly served due to a return of service nor being of record. Venegas, the mother filed a motion to dismiss for lack of

subject matter and *in personam* jurisdiction. The record did not contain an order reflecting a decision regarding the motion to dismiss. At trial on the paternity action, the jurisdictional challenge was not raised. This Court, citing *Dennis, supra.*, observed that because the party challenging service of process did not raise the issue at trial, the issue could not be considered on appeal. *Id.*, at p. 611, and cited several decisions in which a similar result was reached. Striking directly to the heart of the issue is the following observation made in *Venegas*, citing *Cossitt v. Alfa Insurance Corp.*, 726 So. 2d 132, 135 (Miss. 1998):

> "The affirmative duty rests upon the party filing the motion to follow up his action by bringing it to the attention of the trial court." Cossitt I, 541 So. 2d at 446. A motion that is not ruled upon is presumed abandoned. (Citations omitted).

911 So. 2d at p. 568 (¶ 5).

The *Venegas* Court, in affirming the Chancellor's ruling. concluded that:

"Since it was Venagas' duty to follow up her motion and ensure that the court ruled on the motion, we find that her allegations the court erred by not resolving the matter through order or opinion are without merit." *Id.* (¶ 6).

Notwithstanding Candace's argument that she was not properly served with process for the hearing held January 20, 2005, she willingly and purposefully elected to represent herself at the subsequent hearing on March 26, 2007. At the latter hearing, Candace did not renew her jurisdictional challenge nor follow up her prior motion by securing a ruling from the Chancellor. As a consequence, the objection to jurisdiction

evaporated and with it any notions of due process violations. Candace should not be heard by this Court to complain of a circumstance of her own making.

III. THE CHANCERY COURT DID NOT COMMIT ERROR IN AWARDING CUSTODY OF THE PARTIES' CHILD TO JASON LAGARRETT McBEATH.

Both Candace and Jason agree that the Chancellor's decision must be affirmed unless the same is found to manifestly wrong, clearly erroneous, or if the application of a clearly erroneous standard if found to have occurred. *Yelverton v. Yelverton*, 961 So. 2d 19, 24 (Miss. 2007) (citing *R.K. v. J.K.*, 946 So. 2d 764, 722 (Miss. 2007) and *Mizell v. Mizell*, 705 So. 2d 55, 59 (Miss. 1998)).

Jason asserts that the Chancellor correctly applied the factors enumerated in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) and carried forward by its progeny; See: *Gianaris v. Gianaris*, 960 So. 2d 462, 466 (Miss. 2007), *Copeland v. Copeland*, 904 So. 2d 1066, 1074 (Miss. 2004). Furthermore, the Chancellor observed the manner and demeanor of each witness and "smelled the smoke of battle," all of which are indispensable in reaching a decision and rendering judgment. *R.B.S. v. T.M.S.*, 765 So. 2d 616, 619 (Miss. Ct. App. 2000) (Citing *Culbreath v. Johnson*, 427 So. 2d 705, 708 (Miss. 1983). As required, the *Albright* factors and analysis were set out in the Judgment of April 18, 2007. *Powell v. Ayars*, 792 So. 2d 240 (Miss. 2001). Candace simply proposes that the Chancellor did not examine the elements of *Albright* closely enough or properly assign the benefit of those factors in light

of the testimony given. Again, Jason respectfully urges upon this Court the opposite view.

Candace has addressed each of the *Albright* factors in order as enumerated in the Judgment of April 18, 2007 (hereinafter the "Judgment"), and Jason will follow suit:

1. Age, health, and sex of the child: The parties' child is five (5) years of age at the time of trial, and will reach six (6) years of age February 25, 2008. The Chancellor correctly noted in the Judgment the statutory prohibition against a presumption that the best interests of a child are served by an award of custody, legal or physical, to the mother. Further, the Chancellor cited the authorities which have addressed the "tender years doctrine, " observing that children over the age of four (4), as Jay is, are not subject to the application of the doctrine. (RE, pp. 81-82). The fact that Jay is a male child was found to slightly favor Jason.

2. Continuity of care prior to separation: Although a difficult factor to assess, the Chancellor found that Candace had been the primary care giver for Jay, even though each party had depended upon their mothers for assistance. Jason had paid child support and provided care for Jay during extended visitation periods. Jason sees it as noteworthy that Candace denied him any direct interaction with Jay for a span of eighteen (18) months (R., p. 142, 146); and, caused her mother, Tonya Price, to be appointed as Temporary Guardian of Jay without Jason's knowledge (R., p. 111). Nonetheless, the Chancellor found this factor to weigh slightly in Candace's favor.

3. Parenting skills and willingness and capacity to provide primary child care: The Chancellor found that this factor weighed heavily in Jason's favor. This is so due the difficulties Jason has experienced in having unimpeded interaction with Jay due to Candace's actions, which are mentioned above. Further, the trial Court determined that Candace had not provided the level of medical attention to Jay that was warranted on occasion, including two (2) black eyes (R., pp. 124,151), ringworms (R., p. 75), and a scalded foot (R., 126), but that Jason had met his responsibilities in this regard. (R., pp. 82-83). Finally, the Chancellor was convinced that placement of primary custody of Jay would present Jason with unending barriers to his developing a close relationship with Jay.

Candace takes the position that the trial Court should have weighed this element heavily in favor of Candace for Jason's failure to have maintained a close relationship with Jay and for not paying child support. The trial transcript indicates that Jason did, in fact, pay child support through a separate withholding order (R., pp. 94-95), and that he attempted on numerous occasions to have contact and visits with Jay. (R., pp. 72-74). Jason agrees with the decision of the Chancellor that this factor was properly heavily weighed in his favor.

4. Employment of the parent and responsibilities of that employment: Jason concurs with the Court's assessment that this *Albright* factor, on balance, favors neither party based upon the record.

5. Physical and mental health and age of the parents: Both Candace and Jason agree that the Chancellor's decision as to this element being weighed equally was correct.

6. Emotional ties of the parent and the child: The trial Court gave both parties equal recognition as having a close emotional bond with their child with neither side outweighing the other. Candace agrees with this determination as does Jason.

7. Moral fitness of the parents: Jason disagrees with the position taken by Candace with regard to this factor inasmuch as she describes both parties having been exposed to marijuana. The transcript contains one passage elicited during the testimony of Tonya price, Candace's mother, who testified that she smelled the odor of marijuana on Jay's clothing. (R., p. 121). On the other hand, the testimony of Jason demonstrates that a police officer, called to the child's day care facility, smelled the odor of marijuana emanating from Candace's vehicle and made this observation a part of his report, which was introduced into evidence. (R., pp. 70-72). The Chancellor, after observing that both parties attended church and were other otherwise equally fit parents, found that due to the foregoing, this factor slightly favored Jason. With this analysis Jason concurs.

8: The home, school and community record of the child: The Chancellor found that this particular *Albright* factor to slightly favor Jason (R., p. 84) based upon the fact that Jason's family is local, and that Jay would have the benefit, support and relationships with his extended paternal relatives. Otherwise, the trial Court observed that the parties' child

has formed a bond with both his half-sister, Candace's daughter by her current husband, and with his step-brother, the son of Jason's present wife; and, that Jay will be enrolled in kindergarten this coming fall. Candace asserts that this factor should have favored her inasmuch as Jay was enrolled in Head Start in South Carolina and learning Spanish, and because Jason does not have Jay participating in sports. Certainly the Chancellor considered these matters along with all others and found the fact that in Jason's custody, Jay would be surrounded by his father's family; and, that such an environment was the crucial point. Jason agrees with this decision.

9. The preference of the child, at the age sufficient by law, to express a preference: This factor favored neither party as Jay is not old enough to express a preference.

10. Stability of home and employment of each parent: The Chancellor rightfully considered many matters brought out in testimony in reaching a decision as to this important factor. As observed by the trial Court and by Candace, both parties have three (3) bedroom homes with sufficient room for Jay, but that Jason family members reside nearby, and he has the benefit their assistance if needed. Candace is on active duty with the United States Army, presently stationed in South Carolina, and anticipates transfer to Florida during her re-enlistment term which terminates in 2011. Jason is employed as a fireman with the Moss Point, Mississippi Fire Department, and has been since June of 2006. Candace's husband earns his living as a sous-chef at a nursing home, and Jason's wife is

employed as a x-ray technician at the Veteran's Administration Hospital.

Candace points out that if Jay were in her custody, he would enjoy the extra benefits of travel and the exposure to the varying "cultural elements" concomitant therewith. Jason wonders if Candace's possible duty stations would be so scenic and stimulating. If Candace were have custody and be deployed overseas, her dependents would be left behind, her husband would be, by default, the care-giver for Jay, and she would be the only beneficiary of these diverse cultures. Speculation aside, the Chancellor found that Jason's extended community environment, including his employment, home, and family relationships presented a more stable environment than that offered by Candace. With this analysis Jason has no argument.

11. Other factors relevant to the parent-child relationship: The Chancellor found that Jason may be the father of another child near in age to Jay, however, that paternity matter remains pending in a separate action. The trial Court correctly observed that even though paternity in the other case had yet to be established, Jason was paying support for that child. Candace argues that Jason has not paid Court ordered child support for Jay; and, that this fact should weight against him. Jason disputes this assertion and has discussed the same above. The Chancellor determined that Jason's actions in paying his child support for Jay and the child of whom he may be the putative father does not diminish his ability to care for Jay. Again, Jay sees the Chancellor's analysis as correct.

Candace offers this Court's decision in *Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001) as authority for the proposition that improper consideration or misapplication of the *Albright* factors constitutes reversible error. True enough, but *Hollon* is inapplicable here. The *Hollon* opinion informs all that a Chancellor cannot assign an inordinate amount of weight to one of the *Albright* factors; and, that the analysis of each of the *Albright* factors should result in assignment of the benefit of each element to one of the litigants. *Id.*, at pp. 951-952. In *Hollon*, this Court found that the Chancellor considered each of the *Albright* factors, but did not recite in the Judgment rendered which party received the benefit of certain of those factors; and, that one factor, "moral fitness," appeared to form the primary basis of the custody determination. *Id.* In the instant case, the Chancellor did not commit the error found in *Hollon*, as each *Albright* factor was considered and appropriately analyzed according to the evidence, with the benefit of each factor which was not equally placed or inapplicable being credited to either Candace or Jason. (RE., pp. 80-86). Particularly noteworthy is the fact that the Chancellor specifically stated that "No one factor was isolated or given undue weight. The Court reached its decision by considering the situation as a whole." (RE., p. 86 ¶ 36). The process undertaken by the trail Court followed exactly the dictates of applicable authority, specifically those of *Albright* and *Hollon*, and no error was committed.

Candace also asks this Court to consider the fact that Jay will be deprived of the

relationship of his half-sister if the Chancellors's decision is not reversed, and she offers four (4) decisions in support of this request, *Mixon v. Bullard*, 217 So. 2d 28, 30 (¶ 3) (Miss. 1968), *Sparkman v. Sparkman*, 441 So. 2d 1361 (Miss. 1983), *Sootin v. Sootin*, 737 So. 2d 1022 (Miss. Ct. App. 1998), and *Owens v. Owens*, 950 So. 2d 202 (Miss. Ct. App. 2006). In each of these cases, this Court was faced with the separation of whole-blood siblings. *Mixon, supra.*, at p. 29; *Sparkman, supra.*, at p. 1362., *Sootin., supra.*, at p. 1025, and *Owens, supra.*, at p. 205, clearly distinguishing the facts of each from the facts presented here. Candace cites no authority supporting the proposition that in deciding the award of custody of a child born to unwed parents, the Court should consider that child's separation from a half sister or step brother.

In Jason's view, Candace has omitted an important point in the language quoted from the *Mixon* case which is carried forward in the other cases mentioned above. The full quotation is as follows:

> "It is well recognized that the love and affection of a brother and sister *at the ages of these children* is important in the lives of both of them and to deprive them of the association would ordinarily not be to their best interest." (Emphasis supplied).

217 So. 2d at p. 30 (¶ 3).

The two (2) Mixon children, Marvin Richard Mixon, Jr., and Kim Suzanne Mixon, were thirteen (13) and nine (9) years of age, respectively. *Id.*, at p. 29. Obviously, the *Mixon* Court deemed the childrens' ages significant and worthy of mention. Jay is only five (5) years old, leading Jason to assert that such facts further distinguish the case at hand from

those discussed above. While Jason does not discount the value of the relationship Jay has developed with his half-sister thus far, he does not view the separation of these children caused by his having custody of Jay as diluting the strength of the *Albright* factors or operating against Jay's best interests.

In reaching its decision as set forth in the Judgment of April 18, 2007, the trial Court properly kept the best interest and welfare of the parties' child as its primary concern, considered the totality of circumstances, and utilized a detailed analysis of each of the applicable factors in reaching its decision. The decisions of this Court which set forth these principles were identified by the Court in the Judgment. (RE., p. 81). Of the eleven *Albright* factors, one was found to favor Candace,[2] four (4) were found to favor neither party,[3] and six (6) were found to favor Jason.[4] (RE., pp. 81-86). The Court did not abuse its discretion nor apply the law erroneously so as to constitute manifest error.

CONCLUSION

By virtue of the decisions of the Mississippi Supreme Court on point, it is beyond

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2 The continuity of care prior to separation (RE., p. 82).

3 The employment of the parent and responsibilities of that employment; the physical and mental health and age of the parents; the emotional ties of the parent and the child; and, the preference of the child, at the age sufficient by law, to express a preference. (RE., pp. 83-84).

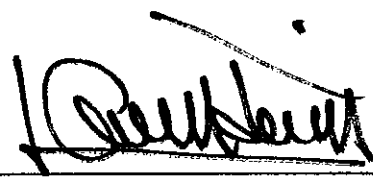
4 The age, health and sex of the child; the parenting skills and willingness and capacity to provide primary child care; the moral fitness of the parents; the home, school and community record of the child; the stability of home and employment of each parent; and the other factors relevant to the parent-child relationship. (RE., pp. 81-86)

dispute that Candace waived any challenge she may have had to jurisdiction by electing to go forward at trial without first obtaining a ruling on the jurisdictional issue. The fact that Candace elected to go forward at trial *pro se,* and perhaps unaware of the ramifications of her decision, avails her nothing, as she is held to the same standards as an individual litigant as an attorney would be. From this result there is no refuge. Candace's position that the trial Court was without subject matter of the custody dispute and without personal jurisdiction over her are without merit. Having not been properly preserved below, Candace's alleged jurisdiction challenges should not be considered an appeal.

Candace's alternative argument, that the Court below improperly awarded custody of the parties' child to Jason must also fail. The record before this Court demonstrates that the Chancellor undertook an extensively detailed and through analysis of the applicable factors in determining that Jason should have the primary physical custody of Jay. Notwithstanding Candace's assertions to the contrary, the trail Court did not abuse its discretion, erroneously apply the law or commit manifest error in reaching the decision rendered, and its Judgment should be affirmed.

Respectfully submitted,

JASON LAGARRETT McBEATH



By:_____

L. Arthur Hewitt, His Attorney

CERTIFICATE OF SERVICE

I, L. Arthur Hewitt, do hereby certify that I have this day served by United States mail, postage fully pre-paid, a true and correct copy of the above and foregoing **Brief of Appellee** on the following:

The Honorable Margaret Alfonso
Chancellor - Eighth Chancery Court District
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Gulfport, MS 39502

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THIS, the 10th day of January, 2008.

L. Arthur Hewitt

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CERTIFICATE OF MAILING

I, L. Arthur Hewitt, do hereby certify that I have this day personally deposited in the United States mail, postage fully pre-paid, addressed to the Clerk of the Supreme Court of Mississippi, the following:

The original and three (3) copies of the Brief of Appellee.

THIS, the 10th day of January, 2008.

L. Arthur Hewitt