2007-CA-01991 t

STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested in this cause, in that such may aid or assist in the resolution of this matter.

CERTIFICATE OF INTERESTED PERSONS

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

A. Parties

Appellant	Joy Lynn Pearson
Appellee	Steven Allen Pearson

B. Attorneys

For Appellant	Eduardo A. Flechas Flechas & Associates, P.A. 318 South State Street Jackson, MS 39216
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EDUARDO A. FLECHAS

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STATEMENT OF THE ISSUES

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Issue 2: Whether the trial court erred in its analysis of the *Albright* factors, specifically in its omission of a finding regarding the age of the child, and the undue weight given to the mental health of the mother.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in the Court Below

On August 9, 2006, in the Chancery Court of Pike County, Mississippi, a final decree of divorce was issued to Joy Lynn Pearson and Steven Allen Pearson. According to the terms of the Decree of Divorce, the parties agreed to joint legal and physical custody of their minor child, McKenna Claire Pearson. Subsequently, on October 9, 2006, a Petition for Modification was filed on behalf of Mr. Pearson seeking a modification of the couple's joint custody agreement, and requesting that sole physical custody of the minor child be vested in him. Following the filing of the Petition, Notice was issued to Joy Pearson, informing her to appear and defend the action on October 31, 2006 at the Amite County Courthouse in Liberty, Mississippi.

The record is devoid of any evidence regarding the hearing scheduled for October 31st, including whether any attorneys entered an appearance on behalf of either party or whether a continuance was granted. The next documents in the court record are the Notices of Deposition issued for Steven Pearson and Joy Pearson, dated November 3, 2006 and November 7, 2006, respectively. Both of these depositions were scheduled to be taken at the office of Edwin L. Bean (initial counsel for Joy Pearson) on December 18, 2006. The record contains a re-notice of deposition for Steven Pearson and Joy Pearson scheduled to be held on February 16, 2007. A Pre-Trial Conference was scheduled for April 9, 2007, and an Agreed Order Setting Trial for

April 12, 2007 was entered. Prior to the April 12 trial, defendant-appellant, Joy Pearson filed an Answer and Counterclaim in this matter.

On April 12, 2007, a trial was held and testimony taken on the Petition for Modification. As the testimony was unable to be completed in one day, the matter was continued by an Agreed Order of Continuance to May 15, 2007. The Order of Continuance was signed by Honorable Debbra K. Halford on April 30, 2007, and filed on May 4, 2007. Testimony was completed in this case on May 15, 2007, and an Order was entered on May 29, 2007, granting sole physical custody of McKenna Claire to her father, Steven Pearson.

Following the court's order, a Motion for Reconsideration was filed on behalf of Joy Pearson on June 8, 2007. The subject motion to reconsider was set for hearing on August 27, 2007. Also, on August 27, Edwin Bean withdrew as counsel of record for Joy Pearson, and Eduardo A. Flechas entered his appearance. On October 29, 2007, the court issued an order denying the Motion for Reconsideration, or Alternatively, for New Trial. A Notice of Appeal was filed with this honorable Court on October 30, 2007.

B. Statement of Facts

The parties were married on June 6, 1998, and lived together as husband and wife in Pike County until on or about January 4, 2006, at which time they separated. [R. 10] In May 2006, in a written document styled "Child Custody and Property Settlement Agreement," the parties agreed to share joint legal and physical custody of their daughter, McKenna Claire (three years old at the time). At the time of separation, the parties both resided in separate residences in McComb, Mississippi. The Final Decree of Divorce was entered on August 9, 2006, and incorporated into the "Child Custody and Property Settlement," granting joint physical and legal custody to both parents. [R. 10]

At the time of the divorce, the parties were still residing in Pike County, a short distance from one another. Both parents were employed as pharmacists at Southwest Mississippi Regional Medical Center, and the child was enrolled in a daycare program at First Baptist Wee Center. [T. 8] When neither parent was able to care for the child, and the child was not in daycare, her maternal grandmother, Charlotte Wallace would assume care for McKenna Claire. [T. 8]

Approximately four weeks following the final decree of divorce, Joy Pearson informed Steven that she was considering a relocation to Jackson, Mississippi, in pursuit of better employment. [T. 9] Sometime during her residence in Pike County, it was acknowledged that Joy suffered from depression, which was being successfully managed by medication during and after her marriage ended. [T. 35-36; T. 120-21] In addition, family tension between Joy and her family members who resided in McComb (both preceding and subsequent to the divorce) was growing, as the religious beliefs of her family precluded them from supporting her in her decision to end her marriage to Steven. [T. 88-89] As a result of all these factors, Joy made the difficult decision to move and take a position at St. Dominic's Hospital in Jackson, Mississippi, some 80 miles away. She believed relocating would alleviate the stresses placed on her by her family and ex-husband and allow her to provide a more stable, secure, and healthy environment in which to raise her daughter.

Following the initial decree of divorce, wherein the parties stipulated to joint physical and legal custody of their child, the rotating schedule of three days with one parent, and four days with the other was commenced. This arrangement continued and worked between the parties, though a great deal of tension still existed between Joy and her family and Steven. Much of this tension was created solely through Steven's continued presence at Sunday family lunches

which were held at the home of Joy's mother and father. There was no indication of any problems with this initial custody rotation, until Steven had notice of Joy's intent to relocate to Jackson, Mississippi.

Steven Pearson consequently had Joy served with process seeking a modification of the custody agreement on October 13, 2006, with a hearing scheduled for October 31. The court record is completely devoid of the events which may have transpired at this initial hearing. However, in Exhibit "A" attached to the Order Denying the Motion for Reconsideration (October 29, 2007), Judge Halford states that "Mrs. Pearson, who is the movant herein filed a motion or asked for a continuance at that time", and yet, there is no documentation substantiating this assertion. Unfazed, and still with the belief that the joint custody arrangement could be maintained, Joy followed through with her move to Brandon, where she had already secured the purchase of a home, as well as a full-time pharmacist position at St. Dominic's Hospital. The parties from October through mid-December continued to follow their established three/four day custody rotation.

In mid-December, Joy requested from Steven that the custody arrangement be altered, so as to allow for a full week rotation (seven days for each parent, alternating weekly). Steven claims that he only gave in to ex-wife, but that he didn't feel that this new arrangement was what was best for his child. However, Joy maintains that she believed that this schedule would be best for her child, as it would reduce the number of times that the child would have to be switched between them. This new schedule was continued between the parties until the time of the ruling on the petition for modification, on May of 2007.

When the child was in her father's care, she was in daycare for the majority of the day while her father worked, but also did spend some time with members of Joy's family members

who resided in the McComb area. When the child was in the Jackson area, she was in daycare on the premises of her mother's employment, and here, too, she had interaction with Joy's family, as well as Steven's mother.

After applying the factors delineated in *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983), the chancellor determined that the child's best interests would be served in her father's custody. The record of the chancellor's findings on each of these factors in favor of either parent is very scant at best. However, the chancellor held the two parties equal on the following factors: health and sex of the child, continuity of care prior to separation, parenting skills, emotional ties of the parent and child, parent's age and health, and moral fitness.

The chancellor ruled that the following factors were in favor of the father: employment of the parent & childcare capability, parent's mental health, home, school, and community record of the child. The chancellor also held that the parties were relatively equal with regard to the factor of stability of the home environment. She stated though that this factor weighed "slightly" in the father's favor, since he remained in the Pike County area following the divorce. The chancellor continued, stating that Mrs. Pearson's change of jobs is not an issue, as she remained within her same career field.

Next, the chancellor stated that based on the consideration of other factors relevant to the parent-child relationship, she "is going to have to score Mr. Pearson slightly equal based on the fact that he – I do not feel that he misrepresented to the court that a joint custody arrangement was working at a time when it wasn't." [R. 53] However, what the chancellor fails to mention here is that while Mr. Pearson may not have done that, he certainly did mislead the court, by indicating that the custody arrangement wasn't working at a time when it was.

The chancellor made substantial comment regarding Joy Pearson's "degree of impairment, a condition," especially during the course of the court's examination of witnesses during the hearing of this matter. [T. 51] The chancellor appeared to conclude that the mere fact that Joy suffered from depression weighed heavily in favor of Mr. Pearson, while at the same time, she conceded that the condition was regulated with medication. There was no testimony from witnesses in the hearing which indicated that Mrs. Pearson's depression prevented her from performing her duties as a mother, nor was there any testimony from an expert demonstrating that the depression impaired Mrs. Pearson's ability to care for her child.

Furthermore, there was no specific finding on the record regarding the child's age, and whom that factor favored.

SUMMARY OF THE ARGUMENT

An appellate court limits its review of in custody cases, and will not reverse a trial court decision unless the decision was "manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *K.D.F. v. L.D.H.*, 933 So.2d 971, 980 (Miss. 2006) (quoting *Hensarling v. Hensarling*, 824 So.2d 583, 586 (Miss. 2002).

The first issue in this appeal is the error made by the trial court was in its failure to make a finding of a material change in circumstances. Case law shows that this finding must be made prior to an *Albright* analysis in the case of custody modification. While there are cases stating that relocation of one parent is a material change, those cases are not analogous to the case at bar. Furthermore, the court has been careful in its holdings that a relocation only may constitute a material change, not that it definitively is a material change.

Should it be determined that a material change existed, the trial court still made an error in its application of the *Albright* analysis. The court wholly failed to make any finding of fact

regarding the age of the child, and if that factor favored either parent. This error is evidenced by the trial court's attempt to correct it in the Order Denying the Motion to Reconsider. Furthermore, the court gave improper weight to the factor of Mrs. Pearson's mental health, as well as the evidence it used in weighing that factor. The court incorrectly maintained that because Mrs. Pearson suffered from depression, this factor should weigh in Mr. Pearson's favor, but failed to consider whether the depression impaired her ability to care for her child. In addition, the court considered evidence of Mrs. Pearson's depression which existed prior to and at the time of divorce. There was no evidence offered showing that the condition had worsened, and as such no weight should have been given as to the mental health factor against Mrs. Pearson.

ARGUMENT AND AUTHORITIES

Point of Error One:

The trial court erred in its finding of a material change of circumstances in its initial order.

In general, when determining whether a modification for custody is warranted, a court must look at several factors. A party seeking modification 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." *Mabus v. Mabus*, 847 So. 2d 815 (Miss. 2003) (citing *Bubac v. Boston*, 600 So. 2d 951 (Miss. 1992)). "Adverse" has been defined by the courts to mean a change which has occurred since the time of the divorce decree and initial order of custody. *Tucker v. Tucker*, 453 So. 2d 1294 (Miss. 1984); *Spain v. Holland*, 483 So. 2d 318 (Miss. 1986). The finding of a material change in circumstances is a condition precedent to a court's proceeding to an *Albright* analysis. *McRee v. McRee*, 723 So. 2d 1217 (Miss. Ct. App. 1998).

Relocation of one parent in the case of joint custody will almost always be a material change in circumstances which justifies a change to sole custody in one parent. *Lackey v. Fuller*, 744 So. 2d 1083 (Miss. 2000); *McRee*, 723 So. 2d at 1219; *Sobieske v. Preslar*, 755 So. 2d 410 (Miss. 2000). More recently, the court has held that the moving of one party is ample grounds for a modification of custody, when it makes the joint custody impractical or impossible. *Elliott v. Elliott*, 877 So. 2d 450 (Miss. Ct. App. 2003). However, in 2006, this Court held that "*moving of one party some distance away* ***can*** constitute a material change in circumstances sufficient to warrant the modification of a custody agreement" in the case of joint custody. *Franklin v. Winter*, 936 So. 2d 429 (Miss. Ct. App. 2006) (emphasis added).

In the instant case, Mrs. Pearson moved in October of 2006, at which time her husband sought to have the couple's joint custody agreement modified. The chancellor appeared to agree that Mrs. Pearson's relocation constituted a material change in circumstances, though her findings in the record do not reflect that this was the sole basis for her determination of this matter. The Order dated June 2007 states that "the Court finds the move and other factors renders the prior joint custody agreement unworkable." [R. 41] Other than this vague reference to "other factors", there is no indication of what else the court considered in its determination that there had in fact been a material change in circumstances. The court, realizing its defect in its original Order, attempted to make a remedial measure in the Order Denying the Motion for Reconsideration. In that Order, the Court sought to clarify that the **only** other factor considered in its initial determination was the fact that the child was reaching school age.

Applying the case law to the facts of this case, Mrs. Pearson's relocation does not rise to the level of a material change in circumstances. In *McRee*, the mother was relocating to Texas, a distance which clearly made the current joint custody arrangement impossible. *McRee*, 723 So.

2d at 1219. Similarly in *Lackey*, the mother was moving to New York, and the exchange of two young children every two weeks would have been incomprehensible. *Lackey*, 744 So. 2d at 1083. Finally, in the case of *Sobieske*, the mother was likewise moving out-of-state (to Atlanta, Georgia). *Sobieske*, 755 So. 2d at 410. Contrastingly, here, Mrs. Pearson was moving to Brandon, a location of approximately eighty miles distance from her previous residence, with a travel time of some one hour. While the distance does make the pre-existing custody arrangement more difficult, it certainly does not make it impossible. In all of the above cases, one of the custodial parents was moving a distance of at least *five hundred* miles away, which is hardly comparable to the case here.

Furthermore, this court has previously affirmed a joint custody arrangement in a case where the parents lived four hours apart. *Delozier v. Delozier*, 724 So.2d 984, 986 (Miss. Ct. App. 1998). In that case, the court provided for joint custody with the father having custody during the school week and the mother having custody of the child every weekend and during the summer. Also, in *Franklin*, the court's wording of its holding only stated that a move of one of the parties could amount to a material change, not that it was conclusively a material change. The court's wording there as well used language of "some distance away," and there is no clarification of exactly how much distance would be enough to justify a modification of custody.

The Supreme Court has specifically cautioned chancellors in custody cases to be cautious and thorough in their decisions, as they have immense ramifications on children. *Lambert v. Lambert*, 872 So. 2d 679(Miss. Ct. App. 2003). "This is not to say that a chancellor cannot change custody, if the circumstances warrant, but to do so, within a short time and without sufficient justification is perhaps one of the most egregious errors that a chancellor can commit."

Lambert, 872 So. 2d at 684. "In seeking to placate one parent, the chancellor exacerbates the trauma to the one person least deserving to be subjected to the caprice and whim of the chancery court--the child." *Id.*

Point of Error Two:

The trial court erred in its analysis of the *Albright* factors.

In the case of joint custody, after a finding of a material change in circumstances, the court is then to proceed to an *Albright* analysis to determine what is in the best interests of the child. *McRee*, 723 So. 2d at 1219. Under this analysis, the court is to specifically review the following factors in its assessment of the best interests of the child : (1) age, health and sex of the child; (2) a determination of the parent that has had the continuity of care prior to the separation; (3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; (4) the employment of the parent and responsibilities of that employment; (5) physical and mental health and age of the parents; (6) emotional ties of parent and child; (7) moral fitness of the parents; (8) the home, school and community record of the child; (9) the preference of the child at the age sufficient to express a preference by law; (10) stability of home environment and employment of each parent and other factors relevant to the parent-child relationship; and (11) any other relevant factors. *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). It is not necessary for a court to state which party prevails under each factor, as long as specific findings of fact are made under each. *Weeks v. Weeks*, No. 2006-CA-01265-COA, 2008 WL 1869283 (Miss. Ct. App. Apr. 29, 2008). Courts have reversed trial courts on appeal in cases where the chancellor addressed some but not all of the *Albright* factors. *See Fulk*

v. Fulk, 827 So. 2d 736 (Miss. Ct. App. 2002); *Hamilton v. Hamilton*, 755 So. 2d 258 (Miss. Ct. App. 1999).

In the instant case, the first issue with regards to the chancery court's *Albright* analysis lies in its failure to make a specific finding of fact under the factor of age. While throughout its initial ruling on May 15, 2007, the court does make reference to the child's young age, no specific finding of fact is made on the record. Furthermore, in the court's *Albright* analysis, the court specifically addresses the child's health and sex, but fails to make mention of the child's age, or whether the child's age favors custody in the mother or the father. [R. 50]

In the hearing on the Motion for Reconsideration, counsel for Mrs. Pearson specifically addresses the fact that the Court overlooked this issue in the previous Order. It is only in the record of the Reconsideration hearing that the court first addresses the issue of the child's age, and the "Tender Years" doctrine. [R. 74] However, § 93-5-24(7) of the Mississippi Code specifically states that, "there shall be no presumption that it is in the best interest of a child that a mother be awarded either legal or physical custody." Miss. Code Ann. § 93-5-24(7) (2001). Although there is no longer a presumption under this code section, Courts have continued to hold that "there is still a presumption that a mother is generally better suited to raise a young child." *Passmore v. Passmore*, 820 So. 2d 747 (Miss. Ct. App. 2002) (quoting *Hollon v. Hollon*, 784 So. 2d 943 (Miss. 2001)). The transcript of the hearing demonstrates that initially, Mrs. Pearson performed most all of the basic tasks of feeding, bathing and caring for the child, and that as the child has aged, each parent has assumed a more equivalent role in providing basic care. Regardless, the court wholly failed to address the reason(s) as to why Mrs. Pearson would not be better suited to raise this young child, as the general presumption implies.

The second error in conjunction with the chancellor's *Albright* analysis lies in the court's weighing of the factor concerning the physical and mental health and age of the parents. In its discussion, the court found that this factor favored both parents equally with respect to the physical health and the age of the parents. However, the court determined that the mental health of Mrs. Pearson decidedly made this factor weigh heavily in favor of Mr. Pearson. The chancellor concluded that the depression suffered by Mrs. Pearson affected her decision-making abilities, as well as her parenting abilities, without a scintilla of expert evidence demonstrating this. [R. 73-74] As validation for her decision, the chancellor asserts that Mrs. Pearson falsely entered into the original custody agreement at the time of the divorce, as she was considering the possibility of a move. In addition, the judge cites that Mrs. Pearson turned away from her family at this time. She also states that Mrs. Pearson sought to remove the child to a new geographic area, where she would be working a shift which was not cohesive with the school day.

First, the evidence relied on by the judge is simply not supported by the transcript from the hearing. The daycare center in which Mrs. Pearson enrolled her child in Jackson was open from the hours of 6:00 a.m. to 7:30 p.m. [T. 232] As indicated by the work schedule of Mrs. Pearson and the then-existing custody arrangement, Mrs. Pearson was not working any shifts which would prevent her from being able to care for the child once she reached school age. [T. 231-32] There is also no evidence indicating that Mrs. Pearson deliberately entered into the original custody agreement with full knowledge that a relocation only an hour away would destroy the joint custody and require modification of the child's custody. Testimony given by multiple individuals also showed that Joy's strained family relationship and separation existed from the time that she informed her family of her intent to divorce Steven. It is difficult to

ascertain how the chancellor was able to conclude that the existence of these factors served as determinative proof of Mrs. Pearson's poor mental health.

Of most important consequence here, however, is the evidence that the court used to make its decision that Mrs. Pearson's mental health was a negative factor for her under the analysis of *Albright*. In the case of modification, the court is only to look at the circumstances which have changed since the issuance of the original custody order which is sought to be modified. *Tucker*, 453 So. 2d at 1294. Throughout the transcript, several individuals testified that Joy Pearson's depression pre-existed the time of the divorce, and continues to exist at present. There was no evidence which indicated that her depression had worsened, and in fact there was evidence shown that her condition had improved through her use of medication.

The mere fact that a parent has experienced an emotional problem such as depression is not a bar to custody unless it is shown that the individual's present ability to care for the child is affected. *Passmore*, 820 So. 2d at 751. This is particularly evidenced in *Passmore*, where the court, after conducting an *Albright* analysis awarded custody to the mother, though she had previously suffered from serious depression and a suicide attempt. *Id.* Expert testimony was proffered in that case which showed that the mother was receiving counseling and medication, and that she was presently fully capable of having primary care of her children. In the instant case, Mrs. Pearson suffers from depression which can hardly be characterized as severe. As the transcript shows, Mrs. Pearson has been able to continue to care for her child properly when she is in Jackson, as well as successfully perform a job in a busy hospital. Her job evaluations indicate that her performance and attendance have been impeccable, which is indicative of the fact that her depression is not an impairment on her life or her daily activities.

CONCLUSION

For the foregoing reasons, the Appellant, Joy Lynn Pearson, contends that there were substantial errors made in the custody modification which require reversal. Therefore, the Appellant respectfully requests that this court reverse the judgment of the Pike County Chancery Court, and remand this case for re-trial.

Respectfully submitted,

Joy Lynn Pearson, Appellant

BY: _____
EDUARDO A. FLECHAS

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing Appellant's Original Brief was this date posted via first class mail, postage prepaid, or by hand delivery, to the following:

HONORABLE WAYNE SMITH
Post Office Box 525
Liberty, Mississippi 39645

SO CERTIFIED, this, the 6th day of June, 2008

_____
EDUARDO A. FLECHAS