2007-CA-02088-COA t

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following 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 disqualifications or recusal.

1. Gregory Lee, Sr., Appellant;

2. Sonia Alicia Lee, Appellee

3. Monique Brooks Montgomery, attorney for Appellant;

4. Stephanie Mallette, attorney for Appellee

Monique Brooks Montgomery

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Did the Chancellor Error by failing to disestablish paternity when the Court found by clear and convincing evidence that Appellant who was previously ordered to make child support payments, is not the biological father of the child for whom support has been ordered.

STATEMENT OF THE CASE

Throughout this brief, references to the Record Excerpts will be indicated as (R.E. p. __).

A. Course of Proceedings and Disposition in Court Below:

Appellant, Greg Lee, Sr.(hereinafter "Greg") and Appellee, Sonia Alicia Lee (hereinafter "Sonia") executed a Child Custody and Settlement Agreement (R.E. p. 11) on April 14, 2005 and were divorced by a Final Decree of Divorce (R.E. p. 22) on June 22, 2005. Greg was ordered to pay the sum of $714.20 per month as child support for two minor children believed to be born to the marriage. Appellant was also awarded certain visitation privileges with the children.

During the marriage, Sonia had an adulterous affair. On April 7, 2004 Greg had a home DNA test performed, where the results revealed that there was a zero (0%) percent chance that he was the father of M.T.L. In spite of these results, Sonia still stated that Greg was M.T.L's father. (See R.E. p. 10). She further expressed that the results may be valid, but questioned the procedures that were used to collect the samples. (See R.E. p. 25).

On April 14, 2005, Greg signed a Child Custody and Settlement Agreement, hoping and believing that Sonia had not had an affair and also hoping that M.T.L. would biologically be his child.

On June 26, 2007 Greg filed a Petition To Modify Former Decree and on October 23, 2007, and the Chancery Court of Lowndes County rendered an Opinion and Judgement in favor of Sonia and against Gregory (See R.E. p 4). Greg filed an Amended Motion For Reconsideration of Opinion and New Trial on November 6, 2007. The Chancery Court of Lowndes County overruled the Appellant's Motion for Reconsideration of Opinion and New Trial in favor of Sonia (See R.E. p. 9).

B. Statement of the Facts

The Facts relevant to the issues presented in this appeal are set forth in the Course of Proceedings.

SUMMARY OF THE ARGUMENT

Did the Chancellor Error by failing to disestablish paternity when the Court found by clear and convincing evidence that Appellant who was previously ordered to make child support payments, is not the biological father of the child for whom support has been ordered.

The Chancellor found that Greg was not MTL's father, but still ordered him to make payments towards her support.

Based on the home DNA test, the Chancellor states that Greg was one hundred percent (100%) certain that he was not the biological father. However, Greg was NOT certain of his biological status as it pertained to MTL. **Sonia was the only one who would know whether she had sexual intercourse and conceived a child with someone other than her husband.**

Since Greg and Sonia were married, a child born during the marriage is the child of the husband. Under these circumstances, the law presumes legitimacy, which carries one of the strongest rebuttable presumptions under the law. Greg overcame this presumption, but it wasn't until after the legal DNA test results revealed that he could not be the biological father of MTL.

Further, the home DNA test results that Greg obtained were not admissible and considered unacceptable by the court in this case. These same home DNA test results were resisted by Sonia but used to support her position in the case at hand. Since these test results were unreliable, Sonia filed a Motion for a DNA test that would be reliable and admissible in court. (R.E. p. 25)

Sonia misrepresented that Greg was MTL's father when she signed the Joint Bill for Divorce (R.E. p. 10) and Child Custody and Settlement Agreement (R.E. p. 11) on April 14, 2005. Greg agreed to pay child support because Sonia stated under oath that he was the father. In the Child Custody and Settlement Agreement, he was fraudulently lead to believe that MTL was his child. This misrepresentation was evidenced, and put in writing when Sonia signed the Child Custody and

Settlement Agreement. Once again, **Sonia would be the only one to know if she had sexual intercourse and conceived a child with another man or not**. She stated that MTL was Greg's child and he detrimentally relied on her statement under oath.

And finally, the Chancellor erred pursuant to Rule 60 (b) of the Mississippi Rule of Civil Procedure when he failed to grant Greg relief due to the material change in circumstances for relief from the Final Decree of Divorce (R.E. p. 22) based on fraud, newly discovered evidence and Sonia's misrepresentation. {Please note that Greg never adopted MTL nor had he contracted to pay child support payments for a child he knowingly and admittedly agreed was not his. The Child Custody and Settlement Agreement was made under the agreement that MTL was his child.}

Pursuant to Rule 30 of the Mississippi Rules of Appellate Procedure, please find the specifically contested pleadings and Orders indexed and bound in the Record Excerpts, which have been provided for the Court's convenience and review.

ARGUMENT

I. Did the Chancellor Error by failing to disestablish paternity when the Court found by clear and convincing evidence that Appellant who was previously ordered to make child support payments, is not the biological father of the child for whom support has been ordered.

Provided below, is a timeline of relevant proceedings for the convenience of the Court:

7/23/1998	Date MTL was born
4/7/2004	Date home DNA test was taken
4/14/2005	Date Sonia signed the Child Custody and Settlement Agreement
4/14/2005	Date Greg signed the Child Custody and Settlement Agreement
6/22/2005	Date Final Decree of Divorce was filed (R.E. p. 22)
6/26/2007	Date Petition to Modify Former Decree was filed

8/15/2007 **Date Sonia filed a MOTION FOR DNA TESTING (R.E. p. 25)**

8/21/2007 Date Greg filed a Motion for DNA Testing

8/23/2007 Date Sonia filed a Motion to Withdraw Respondent Motion for DNA Testing

8/27/2007 Order allowing Sonia's Motion to Withdraw Respondent Motion for DNA Testing

8/30/2007 Order Granting Greg's Motion For DNA Testing

9/25/2007 Date Greg deemed not to be the biological father of MTL (R.E. p. 28)

10/15/2007 Briefs submitted by Greg

10/25/2007 Court's Opinion and Judgment in favor of Sonia (R.E. p. 4)

11/6/2007 Amended Motion for Reconsideration of Opinion and New Trial

11/13/2007 Order overruling Amended Motion for reconsideration of Opinion and New Trial (R.E. p. 9)

Miss Code Ann. §93-11-71 (4) "states that the court shall disestablish paternity and may forgive any child support arrears of the obligor for the child or children determined by the court not to be the biological child or children of the obligor, if the court makes a written finding that, based on the totality of the circumstances, the forgiveness of the arrears is equitable under the circumstances." The Chancellor's ruling to force Greg to continue paying child support, is in violation of the Mississippi statute presented herein and above. Shall as used in statutes, contracts, or the like, this word is generally imperative or mandatory. The word in ordinary usage means "must" and is inconsistent with a concept of discretion. BLACK'S LAW DICTIONARY 1375 (6th ed. 1991). The legislature even goes further and explains that the chancellor may forgive arrears of the obligor that have previously been ordered if he finds that it would be equitable to do so. The legislature is interested in fairness. How can you force someone to be obligated to pay child support for a child who is not theirs, and allow the biological noncustodial parent to go scot free.

In denying Greg's request for relief, the Chancellor stated that "[t]he Court believes that this case is controlled by *Williams v. Williams,* 843 So.2d 720 (Miss. 2003). (R.E. p 125).

If *Williams* is the controlling case, then the Chancellor's ruling clearly should have been in favor of Greg. The Supreme Court held in *Williams* that the presumption of paternity had been effectively rebutted and that it would be unjust and unfair to require Williams to continue paying child support.

The facts and analysis in the *Williams* case, are much like Greg's case. Williams was married to Angela. They divorced eight years later. Both Williams and Angela swore that the child was their son in the divorce decree. Williams was ordered to pay child support three (3) years later. Williams noticed a lack of similarity of physical features between himself and the child. Suspecting that the child might not be his, Williams had a home paternity test conducted. The results showed that the child was not his. Williams filed a motion to modify the divorce decree. The Chancellor ordered that the parties undergo a legal DNA test. The legal DNA test confirmed the earlier test that Williams was not the child's father. The Chancellor dismissed William's petition in favor of Angela, and Williams appealed, arguing that the results of the DNA testing rebutted the presumption of paternity. The Supreme Court in *Williams*, concludes by saying, "we refuse to sanction the manifest injustice of forcing a man to support a child which science has proven not to be his", thereby overturning the Chancellor's ruling.

Just like our case at hand, Greg's clear scientific evidence of nonpaternity rebutted the presumption of paternity and the Supreme Court should find that the Chancellor's ruling was fundamentally unfair to require Greg to continue paying child support for someone who is not his child.

The Chancellor also cited *NPA v. WBA,* 380 S.E.2d 178 (Va. Ct. App.1989) which held:

> even though setting aside a judgment of paternity:
> We do not hold that a man who is not a child's biological father can be absolved of his support obligations in all cases.
> Those who have adopted a child or **voluntarily and knowingly assumed the obligation of support will be required to continue dong so. (Emphasis added)** (citation omitted)
> (R.E. p. 125)

In our case, Greg never adopted MTL, nor had he contracted to support her knowing that she was NOT his child. In the Child Custody and Settlement Agreement, both parties agreed that MTL was their child. (R.E. p. 3). That is what Greg believed at that time. Although Greg had a home DNA test done, Sonia stated that the home DNA test results were not accurate due to the collection of samples. (See R.E., p. 66). Greg relied on Sonia's statement under oath that MTL was his biological child and he agreed to pay child support based on MTL being his child. Greg had no way of knowing if Sonia had sexual intercourse and conceived a child with another man. He simply trusted her and continued to hope that she had not had an affair.

In *NPA v. WBA,* the wife contends that her former husband should be required to support a child that is found not to be his biological child, when he has reared and supported the child for five (5) years since birth under the false belief that he was the child's father. The high court ruled that the trial court properly ruled that the husband was not liable for the support of his former wife's child.

One basic fact in *NPA* that differs from Greg's case is that Greg did have a home DNA test done. Nevertheless, he still accepted his wife's statement that he was the child's father primarily because of her questions regarding the procedures used by the testing company. (See R.E. p. 66). He had hoped that the results were inaccurate, and she easily convinced him that they were inaccurate and unreliable. The remaining facts in WBA are much like Greg's case. WBA proceeded

with the responsibility of rearing the child. The child had WBA's surname. WBA treated the child as his own. The Trial Court ordered a legal DNA test that established that the husband was not the natural father of the child. The Trial Court further found that, "because the husband was not the biological father of the child, and because he had neither adopted the child nor contracted to support the child, he had no legal support obligation."

In Greg's case, he is not the biological father of the child, nor has he adopted or contracted to support the child. WBA had maintained a relationship with the illegitimate child for nearly five years, and Greg had maintain a relationship with this child for two years. The Court further adds that the general rule in Virginia is that a parent owes a duty of support only to his or her natural or legally adopted child. See *T... v. T...*, 216 Va. 867, 869. "Furthermore, a husband is not liable, merely because of his status as husband, for the support of his wife's illegitimate child born before or after marriage."

Another analysis examined by the Chancellor in this case are three of the four theories mentioned by the Virginia Supreme Court in *T... v. T...*, (1) common law adoption; (2) in loco parentis to the child; and an (3) expressed oral contract. In that case, the trial court was affirmed by the Supreme Court where they upheld that the husband was not liable to support the wife's illegitimate son. The reasons discussed, were for the same reasons the Chancellor should have decided in favor of Greg in the case at bar.

First, common law adoption in Mississippi, is solely a creature of statute much like in Virginia Courts. Greg never adopted MTL. Since Mississippi does not recognize common law adoption; the rights and responsibilities incidental hereto, such as support, do not exist.

The second theory, in loco parentis[1] to the child, which is a theory that provides:

"in effect, that a stepparent or one who knowingly and voluntarily assumes the role of parent to a child may obtain certain legally cognizable rights and obligations the same as if between "a parent and child" but only so long as the relationship which gave rise to the rights and duties continues to exist." *Doughty v. Thornton*, 151 Va. 785, 792.

In *Doughty,* the husband did not knowingly and voluntarily accept another man's child into his care... However, in the absence of consanguinity, legal adoption, or a knowing and voluntary assumption of the obligation to provide support, the law will not compel him to stand in the place of a parent to support the child after the relationship has ceased. Essential to the status of in loco parentis is an intent to assume and continue a parental relationship. *A. S. v. B.S.,* 139 N.J. Super. 366, 367-68. The husband did not, with full knowledge of the facts, at any time voluntarily assume the role of a parent to the child. Furthermore, when the relationship which brought about the status of in loco parentis in terminated, "the reciprocal rights, duties, and obligations of parent and child" do not survive independent of the relationship, except by agreement or good will. *Doughty, 151 Va, at 792.* He assumed that he was the child's natural father, and brought the child into his home and under his care.

Greg has no intentions of continuing a parental relationship with MTL. Built on the erroneous assumption that he was her father, he brought her into his home to care for her. Although she may be a victim of her mother's wrongful adulterous acts, the law should not compel Greg to stand in the place of a father or stepfather after the relationship has ceased between Sonia and Greg.

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[1]A person acting in loco parentis is one who has assumed the status and obligations of a parent without a formal adoption. *Logan v. Logan,* 730 So. 2d 1124 (Miss. 1998).

When the relationship of in loco parentis was terminated, Greg's relationship with MTL should not be required to survive unless it be through an agreement or under his own goodwill. At no point in time did Greg voluntarily assume the role of a parent to MTL, with full knowledge of the fact that he was not her father. Greg signed the Child Custody and Settlement Agreement believing that MTL was his child. (R.E. p 3, 6-16)

This brings us to the third and final theory addressed by the Chancellor in his Opinion and Judgment; (R.E. p. 139); the expressed or implied oral contract theory.

In the *T... v. T...* case, an expressed oral contract was entered between the parties. The wife agreed to forego her plans to put the child up for adoption, to forego her plans to move to New York, she also agreed to marry the husband, wherein he would accept the child into the family and rear the child"as if it was his own". The wife detrimentally relied upon her future husband's promise. The agreement was enforceable against the husband clearly acknowledging that the child was not his.

In the case at hand, clearly no expressed contract to support MTL existed between Greg and Sonia. Greg accepted his wife's daughter into their home on the mistaken assumption that the child was his own. The court ruled that "to enforce a duty of support on the husband based upon a theory of expressed or implied oral contract, we must be able to ascertain from the record that the husband knowingly and intentionally entered into an agreement with the wife to support her illegitimate child. *T... v. T...* As previously explained, the record shows that Greg accepted the wife's representation that he was the child's father. (R.E. p. 3, 6-16). There was no evidence presented by Sonia that Greg agreed to support another person's child in an expressed contract or through an implied contract.

For the reasons set out herein, the Chancellor should have held that Greg would not be liable for the support of Sonia's illegitimate child.

Another important point, is that the Court refuse to rely on the home DNA test results pursuant to *Miss. Code Ann. §93-9-21(5).* That same statute should apply to Greg. The Court states that Greg "was one hundred (100%) percent certain that he was not the biological father of MTL, However, Greg never testified to this fact, nor had a legal DNA test been performed before the divorce. Greg has another child by Sonia. He had hoped that MTL would turn out to be his child also. Even though he had a home DNA test done, Sonia continued to tell him that she had not had an affair and that the home DNA test results were wrong. Greg relied on her sworn statement in the Joint Bill for Divorce and in the Child Custody and Settlement Agreement. She continued to try and convince him that MTL was his child, and Greg accepted her representation that MTL was his child. And until the Court ordered the legal DNA test for the parties, Greg did not know whether he was MTL's father until or about September 11, 2007.

Greg properly filed a Petition to Modify Former Decree pursuant to *Mississippi Rules of Civil Procedure 60 (b).* But the Chancellor states that this is not a Rule 60 (b) case. (R.E. p. 125) When Sonia told Greg that he was MTL's father, that was a misrepresentation and of facts and if she knew that he was not the father, then she committed fraud. Based on her sexual misconduct, only Sonia could make the determination regarding whether this matter is based on fraud or a misrepresentation claim. Regardless, there has been newly discovered evidence and a material change in circumstances now that a legal DNA test reveals that Greg is not the biological father of MTL. *Miss Code Ann. §93-5-2(2) (Rev. 1994)* provides that "[an] agreement may be incorporated in the judgment, and *such judgment may be modified as other judgments for divorce.*" emphasis added). Greg and Sonia's Child Custody and Settlement Agreement was incorporated in the Final Decree of Divorce, therefore such judgment may be modified as other judgments for divorce.

Further, *Miss. Dept. of Human Services v. Shelby*, 802 So. 2d 89 (Miss. 2001), states that: "the terms of a child support order are 'inherently modifiable upon a showing of a material change in circumstances." The change of circumstances were apparent when Greg learned that MTL was not his biological child. See also, *In re Bethards,* 526 N.W.2d 871 (Iowa Ct. App. 1994) finding sufficient change in circumstances to warrant modification of divorce decree and cease child support obligation when testing established nonpaternity.

Nevertheless, *Mississippi Rules of Civil Procedure 60 (b)(6)* extends to **any other reason justifying relief from the judgment.** And in the cases presented herein, mainly *Williams v. Williams*, 843 So.2d 720 (Miss.2003), it is "a manifest injustice for someone to continue making child support payments for a child which unquestionably is not his." Such would justify relief and although a material change exist since the divorce, a manifest injustice should allow Greg to prevail and not be forced to pay child support for a child that has been scientifically proven not be his.

The controlling issue in this matter hinges upon fairness. The Mississippi Supreme Court ruled in *M.A.S. v. Mississippi Department of Human Services*, 842 So. 2d 527, that finality should yield to fairness. In that case, M.A.S. had paid child support for someone else's child for over ten years. He would have been obligated to support that child for many more years unless the flawed paternity and child support order was vacated. The Supreme Court stated that "The chancellor's refusal to withdraw the paternity order in the face of unrefuted proof that M.A.S. was not the child's father, was an abuse of discretion." It was concluded that forcing M.A.S. to continue making child support payments when S.M. was shown not to be his child would result in a manifest injustice. The Court further found that M.A.S. had been excluded as the father of the minor child. It would be profoundly unjust to require him to continue making child support payments for a child which is

known not to be his.

M.A.S. is very similar to Greg's case. Greg has paid child support for MTL for two years. The presumption of paternity has been effectively rebutted through a legal DNA test that was performed pursuant to Miss. Code Ann. §93-9-21 (2004) where we now know beyond a reasonable doubt that the Greg is not MTL's father. Just like in the *M.A.S.* case, it would be unjust and unfair to require Greg to continue paying child support.

Based on these circumstances, Greg is requesting that this Court reverse the Chancellors ruling and release him from all child support obligations for MTL.

Lastly, it is unreasonable for MTL to continue being told that Greg is her father, when he is not. This in not in the child's best interest. Based on *Department of Human Service v. Smith*, 627 So. 2d 352, "protection of a child's best interest is a goal which the Court considers to be of utmost import in any domestic-relations case." Hence, MTL clearly has a right and is entitled to know her biological father now or if she chooses to know him in the future. The Court in *Smith* states that "[w]e believe that the best interest of the child, in the factual scenario presented, is to know the identity of the natural father.... *Smith* goes further and holds that "[p]ublic policy dictates that a determination of paternity is in a child's best interest".

It is our belief that the child's biological father is the best father to care for her in all circumstances. Mainly to determine her "True lineage" for future medical needs. MTL has a rare sickle cell anemia trait. It would be in her best interest - from a medical stand point- to know who her biological father and his family. Additionally, in *Logan v. Logan*, 730 So. 2d 1124, the presumption in all cases is that the child's parents will love it most and care for it better than anyone else. Based on the *Logan* case, MTL's biological father would be best suited to care for her and to provide her with the necessary maintenance and support that is expected of a biological father.

CONCLUSION

The Chancellor in this matter incorrectly failed to disestablish paternity after it was determined through a legal DNA test that Greg was not the biological father of MTL. Mississippi law states that the Court shall disestablish paternity when the paying obligor is found not to be the father of a child that he was previously ordered to pay child support for. Thus, based on this alone, the decision of the Chancellor should be overturned in the favor of the appellant, Greg Lee. Greg believed that MTL was is child up and until the legal DNA test.

For the above and foregoing reasons, Greg respectfully requests that this court reverse the Chancellors Opinion and Judgment and disestablish paternity and suspend child support payments for a child where legal DNA test has proven that he is not the biological father.

RESPECTFULLY SUBMITTED, this the 8th day of April, 2008.

THE MONTGOMERY LAW FIRM, L.L.C.

BY: _____

Monique Brooks Montgomery
Miss. Bar No. 10720
Court Square Towers
200 Sixth Street North, Ste. 201
Columbus, MS 39701
Telephone: (662) 327-0030
Fax: (662) 327-4433

COUNSEL FOR APPELLANT,
GREGORY LEE, SR.

CERTIFICATE OF SERVICE

I Monique Brooks Montgomery, attorney for the Appellant in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of the Brief of Appellant to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Stephanie L. Mallette
Attorney at Law
P.O. Box 80170
Starkville, MS 39759

Honorable Kenneth M. Burns
District 14 Chancery Judge
Trial Court Judge
P.O. Box 110
Okolona, MS 38860

Dated this the 8th day of April, 2008.

MONIQUE BROOKS MONTGOMERY

CERTIFICATE OF FILING

I, Monique Brooks Montgomery, attorney for the Appellant in the above-styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellant** by mailing the original of said document and three (3) copies thereof to the following:

Ms. Betty W. Septon
Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205-0249

This the 8th day of April, 2008.

MONIQUE BROOKS MONTGOMERY