IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2007-CP-00401-COA

THOMAS G. BITTICK **APPELLANT**

vs.

STACY ELIZABETH (BITTICK) HOUSE **APPELLEE**

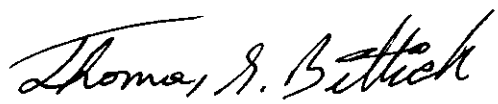
APPEAL

FROM THE LAUDERDALE COUNTY CHANCERY COURT

BRIEF OF APPELLANT

(ORAL ARGUMENT REQUESTED)

Prepared by:



Thomas G. Bittick, MSB #[redacted]
Cutturini & Bittick, P.L.L.C.
115 E. Van Dorn Ave.
Holly Springs, MS 38635
662-551-1141
662-551-1142 (Facsimile)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal:

Thomas G. Bittick, Esq., Appellant; Pro Se

Leigh Ann Key, Esq., trial attorney for Appellant;

Stacy Elizabeth (Bittick) House; Appellee

John Morse, Esq., trial attorney for Appellee;

Joseph A Kieronski, Jr. Esq., Appellate attorney for Appellee

Honorable Sarah Springer, presiding Chancery Court Judge; and

Respectfully submitted,

Thomas G. Bittick

Thomas G. Bittick, MSB #[redacted]
Cutturini & Bittick, P.L.L.C.
115 E. Van Dorn Ave.
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STATEMENT OF ISSUES

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN RULING THAT NO MATERIAL CHANGE OF CIRCUMSTANCE HAD OCCURRED WHEN THE APPELLEE (STACY) INTERFERED WITH THE PARENT CHILD RELATIONSHIP BY ONLY ALLOWING APPROXIMATELY 23% OF WEEKEND VISITATIONS DURING A TWO YEAR PERIOD INCLUDING A PERIOD OF NINE STRAIGHT MONTHS WITHOUT A "WEEKEND VISITATION," AND BY DENYING ALMOST TWO HUNDRED PHONE CALLS DURING THE SAME PERIOD

ISSUE TWO:

WHETHER IT WAS A MISTAKE OF LAW FOR THE TRIAL COURT TO REFUSE TO ENFORCE THE PROPERTY SETTLEMENT AND CUSTODY AGREEMENT CONTRACT

ISSUE THREE:

WHETHER THE TRIAL COURT ERRED IN CHANGING THE VISITATION SCHEDULE WHEN THE PARTY SEEKING THE CHANGES CREATED THE NECESSITY FOR THE CHANGES AND HAD UNCLEAN HANDS

ISSUE FOUR:

WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THE APPELLEE (STACY) IN CONTEMPT OF COURT

STATEMENT OF JURISDICTION

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

STATEMENT IN SUPPORT OF ORAL ARGUMENT

This case is very fact-intensive and Thomas would respectfully request this Court to grant oral argument to present conflicts in the rulings of the trial Court based on the evidence and testimony presented at trial that are alleged by the Appellant to be erroneous.

STATEMENT OF THE CASE

"I have no control."
Stacy Elizabeth (Bittick) House (T.I. 53)

These were the words of the Appellee, Stacy Bittick, on August 16, 2006 as she tried to explain away another denied weekend visitation during a two year period in which she only allowed the Appellant, Thomas Bittick, less than twenty-three percent (23%) of his Court ordered weekend visitations. For Stacy, the ultimate form or control was denial...denial of visitation, denial of phone calls, denial of transportation, and denial (refusal) to pay her portion of the mortgage.

a. procedural history

A divorce was granted for Thomas and Stacy by the Lauderdale Chancery Court on August 20, 2004, which included a Property Settlement and Custody Agreement that was incorporated in the Judgment of Divorce. (C.P. 11-23) (RE 5-17) Stacy filed a complaint for contempt and to modify the Decree of Divorce just a few months later on November 3, 2004. (C.P. 28-32) (RE 18-22) Thomas filed his Answer to Complaint to Modify Prior Decree of Divorce, Affirmative Defense, and Counterclaim for Contempt and Child Custody on December 10, 2004. (C.P. 37-47) (RE 23-33) Stacy filed an Answer to Counterclaim for Contempt and Child Custody on January 6, 2005. Asserting that he still was not getting visitation, phone calls, or the mortgage payments, Thomas filed Complaints for Contempt against Defendant on August 8, 2005, (C.P. 56-61) (RE 34-39) April 5, 2006, (C.P. 69-73) (RE 40-45) and August 4, 2006.

(C.P. 75-78) (RE 46-49) Stacy filed one other Complaint for Contempt on September 2, 2005 (C.P. 63-66) (RE 50-53) in Response to Thomas's August 8, 2005 Complaint for Contempt. The Lauderdale County Chancery Court, Honorable Chancellor Sarah Springer presiding, entered a Memorandum Opinion and Judgment encompassing all matters before the Court since Stacy's November 3, 2004 filing on December 21, 2006. (C.P. 81-104) (RE 54-77) The Court added an Amended Bittick Visitation Schedule on December 22, 2006 (C.P. 109-112) (RE 78-81) to replace the erroneous one from December 21, 2006.

Thomas then filed a Motion Pursuant to Rules 59 and 60 of the M.R.C.P. on January 2, 2007, and Stacy responded with an Objection to the Motion. Both parties then entered an Agreed Stipulation which waived objection to the sitting Chancellor (Chancellor Primeaux who was recently elected to replace Chancellor Springer) considering the Motion and Responses. On the 12th of February, 2007, The Lauderdale County Chancery Court overruled the Motions under Rules 59 and 60 of the M.R.C.P., noting that rules 59 and 60 allow a Chancellor to correct their errors, not those of the previous Chancellor. Thomas filed a timely Notice of Appeal, Designation of Record, and Certificate of Compliance with Rule 11(b) which was accepted by the Supreme Court of Mississippi on March 19, 2007.

In the interim period Thomas filed a Motion for Stay Pursuant to Rule 62 of the M.R.C.P. and an accompanying brief on May 4, 2007. Stacy filed a response on June 15, 2007. The Court ruled on June 18, 2007 that part of the Stay was granted and part was denied.

b. foreword

Once the personal property had been divided, a property settlement and custody agreement was entered into and a divorce granted, the Appellee, Stacy Bittick only had a few remaining tools in her bag to be able to exert control or inflict hurt over her former husband, the Appellant Thomas Bittick. Those tools, specifically, were their minor son together, M.A.B.,

Thomas's other minor sons, S.G.B. and J.C.B., and the former marital home which was on the market to be sold. When all other forms of control failed, Stacy would usually just default to denial – her ultimate form of control. If she could not force Thomas by other means, she would just deny or refuse: the visit, the phone call, to make the mortgage payment, etc. It was through these bad acts that she sought to control Thomas.

The pattern of behavior and multiple acts of contempt of Court exhibited by Stacy can best be summed up by an inclusion of some of the bad acts grouped in larger categories. To include a narrative of the more than two hundred forty acts of contempt of Court would exhaust the page limits of this brief as allowed by Rule 28 of the M.R.A.P.

This, unfortunately long, Statement of the Case will, therefore, include just some of those "bad acts" grouped into the categories of "passive interference," "active interference," "overt acts to harm," "reputation for dishonesty, pattern of interfering at work," and "lies, falsehoods, and misstatements."

c. passive interference

From the separation to the divorce, Thomas was able to enjoy most of the fruits of his contract Property Settlement and Custody Agreement) with Stacy. (C.P. 14-23) (RE 8-17) This property settlement and custody agreement was a contract that Thomas only entered into because of the structured visitation. (T.III. 286, lines 2-6) This was especially true for the bargained for visitation, but also true for the nightly telephonic visitations, non-interference by Stacy in the parent child relationship, and in consideration of Stacy making her promised half of the mortgage payments. (T.III. 393, lines 8-14) Shortly after the couple divorced, however, Stacy began to breach their contract across the board and then with the same unclean hands, filed a Complaint for Contempt and To Modify Decree of Divorce on November 3, 2004. (C.P. 28-32) (RE 18-22) In her complaint, Stacy alleged that "...difficulties have arisen between the parties

regarding the reasonable visitation schedule..." (C.P. 29) (RE 19), which is apparently some sort of euphemism for "I refuse to follow the existing agreement that I freely entered into and now I want the Court to rewrite my contract to suit me."

With the divorce having been final on August 20, 2004 (C.P. 11-23) (RE 5-17), and Stacy filing for modification on November 3, 2004 (C.P. 28-32) (RE 18-22), one must wonder what difficulties could have arisen which were not contemplated or agreed to by the parties just two months before. In reality it appears that Stacy just never intended to comply with the agreement she entered into. She admitted on the stand that, "...every month I got a certified letter...demanding visitation for two weekends." (T.I. 72, lines 14-16) However, while she could not always give a reason for why she denied so many of the weekend visitations, at Court, Stacy asserted that for "...every time that I have told him [Thomas] no there has been a reason."

Some of the reasons she offered while on the stand show that Stacy did not really respect the Court order or the contract to which she had entered and that she was instead interested in controlling Thomas. Initially, when Thomas and Pam started dating, Stacy exerted control by requiring that Pam not be spending the night for M.A.B. to get to have a visitation with his father and brothers. (T.I. 53, lines 11-14) When Thomas complied with this Stacy-imposed-restriction-to-visitation, Stacy asserted new forms of control and conditions precedent. For example, Stacy testified to the fact that on November 18, 2004, she would not allow Thomas his visitation unless Pam was <u>not going to be in Oxford</u> – the town where Thomas lives. (T.I. 53 lines 25-27) (T.III. 305. lines 28-29, and T.III. 306 lines 1-22) (T.III. 324, lines 22-29 and 325, line 1) Stacy also admitted that she denied visits in May 2005 unless Thomas promised not to have M.A.B. around his "whore" anymore. (T. I. 56, lines 6-10) The string of conditions precedent, therefore, went from "not in his presence overnight" to "not anywhere in the same <u>town</u>" to "never in his presence in <u>any</u> town."

While Stacy's attorney tried to characterize Thomas and Pam living together as a violation of the "morality clause" of the Property Settlement and Custody Agreement (T.IV. 519, lines 7-9), both Thomas and Stacy asserted that the "morality clause" was placed into their agreement because of Stacy's previous drug use. (Stacy T.I. 20, lines 2-5, and Stacy T.I. 45. lines 12-15) (Thomas T.III 290, lines 1-3, T.IV. 430, lines 25-29 and 431, line 1, T.I.V. 521, lines 11-15) Stacy even admitted that as well as her previous drug use, that she had cohabitated with Thomas and the children (T.I. 44 lines 17-20) before their marriage.

On another occasion Stacy denied a visitation between M.A.B. and his brothers which was to be spent with Pam alone. That even though Pam and Thomas would not be cohabitating that weekend due to Thomas' Air National Guard requirements, Stacy denied the visitation. (T.V. 566 lines23-27, and T.V. 567 lines 7-22) Stacy denied it even though this was an Ole Miss football weekend, M.A.B. had a season ticket that she had not let him use yet, and this was a chance to go to a game with his brothers. (T.V. 567, lines4-22) This last example of denied visitation makes it clear that cohabitation is not the reason for denied visitation; Pam was this reason and controlling Thomas is the overall goal.

Stacy also admitted to interfering with the parent child relationship by denying visitation for various other reasons. There was the weekend that was denied because Stacy was moving and "...couldn't do the driving." (T.I 54, lines 27-29, and 55, line 1) She admitted denying another weekend because M.A.B. was going to be singing in church. (T.I. 71, lines12-19) Another weekend was denied and Stacy testified that , "...no he couldn't have a visit because I was going to be out of town and there was nobody to do the transportation." (T.I. 58, lines4-6) The following requested weekend was denied for similar reasons (T.I. 58, lines 9-17). Then, the following month, in November of 2005, Stacy denied the first requested weekend of November because she was going to be "gone to New York City for a two-week time period..." (T.I. 58,

lines 21-25). With that single excuse of a two-week trip to New York, Stacy tried to excuse these three different denied visitation weekends. M.A.B. also provided testimony to explain a denied visitation. There were several examples, but the most egregious must be that he missed some visits because of football season, "[b]ecause momma had to pay $50.00 for me to be able to play and it would be a waste." (T.II. 172, lines18-25)

Also in November of 2005 Stacy denied a visitation because Thomas would have her arrested if she broke the law. She stated that Thomas said he would have her arrested for "[t]respass if I come on his property." (T.I. 9, lines 15-18) She left out that she had threatened Thomas and Pam the month before. (T.III. 295 lines 27-29 and T.III. 296, line 1, T.III. 347, lines 23-26,) Stacy had also left out that before Thomas asserted that he would have her arrested for breaking the law, she had announced that she was coming to his property against his wishes instead of the "neutral location" and had asked him what he would do if she showed up at his property. (T.II. 139, lines9-19)(T.III. 347, lines 5-26 and T.III. 348, lines 4-10) Stacy eventually took the position that if "...she wasn't welcome there [Thomas' house], then he [M.A.B.] couldn't come." (T.III. 348 lines 4-5)

This denial of visitation came after Stacy exerted a new form of control and condition precedent. If Thomas wanted visitation, the pair would no longer meet in the middle as had been their practice for over two years, but rather they would follow the Court order and each parent drive one way with Thomas driving on Fridays. (T.I. 55, lines 12-17) (T.III 304, lines 6-10) (T.I. 7, lines 9-11) The problem with this condition, for Stacy, was that Thomas was willing to follow the Court order and drive on Fridays in order to get visitation. (Exhibit 9 letters dated (November 8, 2005) (December 19, 2005) (January 12, 2006) (February 10, 2006) (March 13, 2006) (April 15, 2006) (May 12, 2006) (RE 82-91) Of course, after Thomas displayed a willingness to follow the property settlement agreement and drive one way on Fridays, Stacy

interposed a new condition precedent in an attempt to control...if **she** did not get to drive, or drop off, on Fridays, then Thomas and his other sons would not get a visitation with M.A.B. (T.I. 7, lines 6-11)(T.I. 50, lines21-26)(T.III 347, lines 5-8) This was the position she remained with even though she admitted "[a]nd the way it reads, it says: Father will pick up child at 6:00 p.m. on Friday." (T.III. 49, lines 20-22) In short, every time Thomas agreed to meet the condition precedent, Stacy would change the condition precedent to getting visitation, and once again interfere with the parent-child relationship.

At trial, Stacy stated that she had to drive on Fridays so that she could meet her obligations at church on Sundays. (T.I. 8, lines 4-6) Thomas countered by noting that the first time he had ever heard that reason offered was there at trial (T.IV. 444, lines 15-29)(T.IV. 447, lines 2-4) and that previously, via a letter through her attorney, Stacy had asserted that she had work-related reasons for needing to drive on Fridays (T.IV. 445, lines 7-9). Further, in the letter her attorney had asserted, "Ms. Bittick has informed your client as I have that this [driving on Sunday] is not possible for her due to her work schedule." (T.IV. 446, lines 28-29 and T.IV. 447, line 1) After the multiple transportation condition precedent changes, Stacy added a new one in an effort to control – visits arranged by attorneys or no visitation.

Stacy began to require that the attorneys arrange the visitation, or no visitation would occur, and as a result, M.A.B. did not get to see his father **from December 29, 2005 until June 1, 2006**. (T.III. 354, lines 13-14) Further, Stacy acknowledged that any missed visit with his father was a missed visit with M.A.B.'s brothers (T.I. 78, lines 15-18), and she admitted that the missed visitations have an affect on their relationship. (T.I. 109, lines 26-29) Even though she admitted that the property settlement does not require that visitations be arranged by or through party's attorneys (T.I. 57, lines 23-28), she often refused to allow the visits unless it had been arranged this way. (T.I. 68, lines 23-26)(T.III. 355 lines 13-14) Examples may be found in the

passage: "...then I just flat out told him [Thomas] I was not going to make a visit unless it was arranged between our two attorneys and he would not do that." (T.I. 57, lines 1-3), and her handwritten note on the bottom of Exhibit 4 also demands visitation arranged by attorneys. This way, if the attorney's did not come to an agreement, Stacy must have thought that she would be less culpable for the missed visits.

There was the weekend that she denied visitation because she thought the requested weekend was mother's day weekend, and she cursed at Thomas for asking. Then upon finding out that she had made a mistake about when mother's day was, she denied the visitation without any reason at all. (T.III. 329, lines 16-20) And just like the weekend when she was asked to not bring M.A.B. directly to Thomas' house (but rather to a neutral location), Stacy refused to bring M.A.B. to Thomas' graduation from law school because, "...either both of them [Stacy and M.A.B.] got to come or he [M.A.B.] didn't get to come." (T.III. 356, lines 26-27)(T.I. 119, lines 28-29, T.I. 120, lines 1-14) There was a weekend that Stacy denied visitation because M.A.B. was going to be baptized even though Stacy knew that Thomas had planned to have M.A.B. that weekend. (T.IV. 405, lines 28-29) There was an entire month in which Stacy denied visitation because Stacy said she was "busy with church for the whole month." (T.III. 330, lines 4-15) There were occasions when she denied weekend visitation because there was a Court date pending. Similar to that was the denial of any visitation until the parties got back to Court. On the bottom of Exhibit 4 (RE 92) one can read her handwritten note "Thom, I will not grant nor discuss Any [her underscore] visitation weekends with you between today (12/29/05) and the date that we finally go to Court on our pending issues! This is my 2nd notice of such ...[her ellipses]" (Exhibit 4) (RE 92) (see also T.I. 92, lines 9-16) Following that note, no visitations of any kind were granted from December 29, 2005 until June 1, 2006 (T.III. 354, lines 13-14), and the next "weekend visitation" was not granted again until July 28, 2006. (see T.III. 312, lines 2-

22 which lays foundation for Exhibit 8 – where one can see that no weekend visitation periods occurred from October 16, 2005 until July 28, 2006) (Exhibit 8) (RE 93-117)

This pattern of interference through denial of weekend visitations is unmistakable, but the scope is overwhelming. One passage at trial, by Thomas, sums up the interference issue as it relates to missed visitations, "And then after that Ms. Bittick started changing up the rules and every time I would adjust to the new rules she set up I would get denied visitation again. And that is how I only got 11 weekends out of 104." (T.V. 588, lines 8-12) While "104" represents two years, fifty-two (52) of those weekends should have been visitation weekends. Even if one takes away four (4) of those weekends to account for two different periods of "summer visitation", Thomas was entitled to forty-eight (48) weekends as "weekend visitation" over that two year period ($11 \div 48 = 22.91\%$). This means that Thomas received just under twenty-three percent (23%) of his weekend visitation. And while Stacy's attorney tried to assert that Thomas would have gotten the visitations had it not been for bad communication, or inability to communicate between the parties (T.V. 588, lines 19-21), Thomas accurately summed up the situation when he retorted, "No sir, I would have gotten it [visitation] if your client had complied with the Court order." (T.V. 588, lines 22-23) Further, Stacy even admitted to getting certified mail every month, "...demanding visitation for two weekends." (T.I. 72, lines14-16) That appears to clear up the "communication" issue. He wrote it, she received it, and apparently understood it...that is communication.

Stacy's interference was not limited to denial of weekend visitations. She also actively denied the agreed to nightly calls. As early as October 2004 – just short of two months after the divorce – Stacy told Thomas that she was not going to keep giving him these "nightly calls." (T.IV. 526, lines 8-18). Then there was the time when Stacy told Thomas that if he does not tell her then and there whether he is a Christian or not, she will not let him speak with M.A.B. on the

phone again. (T.III. 302, lines 9-11). In a further attempt to control, Stacy sent Thomas an email on February 15, 2005, outlining a complex schedule with narrow windows for the nightly calls. (Exhibit 11) (RE 118) While Thomas followed the complex schedule, it was to no avail. He still was not getting the nightly phone calls regularly. (T.IV. 525, lines11-26). Though Thomas diligently recorded attempts to call M.A.B., he admitted that he did not always go back and record that he did **not** get a call. Therefore those listed as missed on Exhibit 8 are those nights that he is 100% sure he did not get a nightly call. (T.III. 313, lines24-29 to T.III. 314, lines 1-2) All total, between August 2004 and August 2006, Thomas recorded that he did not get 192 nightly calls. (Exhibit 8) (RE 93-117)

The former marital home also served as a mechanism for Stacy to control or injure Thomas. Stacy told the Court that she was a "...single parent making $22,000.00 a year with a child" (T.I. 15, lines 16-17) and because of different reasons found herself unable to pay her half of the mortgage on the former marital home. This statement was made even though by contract (property settlement agreement) she had agreed to pay it. Stacy admitted that she voluntarily agreed to pay half of the mortgage. (T.I. 11, lines 23-26) Further, still she received great consideration in this contract. She even admitted that she was no longer living in the home at the time she agreed to the obligation. (T.I. 12, lines 12-15, but she refers to property settlement agreement as the "separate maintenance") This means she could not have been in duress – at least with regard to being needful of a place to live. Further, she presented no evidence that she was under any other form of duress, or that there was any coercion or fraud employed in getting her to agree to make these payments.

As well as not proving fraud, coercion, or duress, Stacy did not tell the Court that Thomas was also single parent with two children at home with only his Air Guard income during that same time period. Further, Stacy did not tell the Court that Thomas was making his half and

her half of the mortgage payments. Stacy just casually noted that she did not "believe that [she] ever made one payment to him really." (T.I. 15, lines 13-14) Later she corrected herself and noted that she had made some payments by deducting child support in lieu of partial house payments. (T.I. 15, lines 21-23) Of course, she initially presented it to the Court as if Thomas had taken the money against her wishes, but she later admitted that he always asked before deducting child support from her balance due. (T.I. 15, line 29, T.I. 16, 1-3). Stacy later came clean and went so far as to state, "...I did allow him to use the child support that he should have paid in the first – I don't know how long – of the divorce towards that mortgage. So he did get $200.00 a month for several months." (T.I. 72, line 29, T.I. 73, lines 1-4)

In fact, Thomas noted that she had made several payments before the divorce for which he had given her credit (T.III. 367, lines 22-25) from her total and final arrearage of $5531. (T.III. 366, lines 19-22) Stacy, however, eventually decided that she did not want to deduct the child support in lieu of a portion of the mortgage payments she was to pay. She asked for direct payments of support and stopped paying her portion of the mortgage altogether <u>just one month after the divorce</u>. (T.III. 365, lines 11-29, T.III. 366, lines 1-19) Therefore, it is obvious that she never intended to honor the obligation she entered into in the property settlement agreement. Further still, to others it may look as if it were done intentionally to hurt Thomas.

It especially looks malicious when one considers that she did not make a single payment after the divorce was granted – not even $1 between August 2004 and the time of this filing. Further still it looks suspect when one realizes that while Stacy moved the Court (two months after her divorce) to give clarification about how proceeds or deficits from the sale of the home would be divided, she never asked the Court to grant her relief from having to pay the debt. (C.P. 29, ¶ 6) (RE 19) She also vexed Thomas by refusing to allow Thomas the proceeds of the sale of the former marital home because she and Thomas could not agree on what to do with the

money (i.e. how to divide it). (T.I. 14, lines 21-22)(T.III. 349, lines 19-27). Delaying the sale, therefore, was obviously to harass or annoy since part of the proceeds of the sale had to go to the Court even though she later admitted she never wanted any of the proceeds of the house. (T.I. 14, 22-24) What other reason could there have been to put the money in the register of the Court if a person did not want any of the proceeds? Other than to harass or vex that is.

d. active interference

The denials, visitation and phone calls, are more of a passive nature of interference – at least compared to some of Stacy's other acts of interference. There was a time when Thomas and M.A.B. were on the phone. Thinking Thomas was on hold, Stacy could be heard saying to M.A.B., "Ask him why doesn't he make Pam and Drew stay away for the weekend so you can come visit." (T.IV. 441, lines 9-23) There was another time, when Stacy could be heard saying, "Tell him you don't want to talk to him" as she was handing M.A.B. the phone. (T.IV. 442, lines 8-11). Stacy even admitted on the stand that she had previously told M.A.B. that, "...if you don't want to talk to your dad, you don't have to." (T.I. 97, lines 13-15) The previously mentioned occurrence of Stacy setting M.A.B.'s baptism on a requested visitation weekend was another active step toward interference. (T.IV. 405, lines 28-29) Certainly there were other weekends that he could have been baptized.

There was an episode where Stacy was screaming and cursing at Thomas and Pam in front of all the children. At trial, Thomas related a portion of the incident in the passage

> She started screaming and cursing. Come [sic] running out of the car. Called me an F***ing B word and then said, How dare you bring your whore here. And I reminded her that the children were present....Then she calls me on her cell and you know, how dare you bring her – same thing. Calls me an S-O-B, but she doesn't say S-O-B...And I said, Hold on. Are you saying all this in front of [M.A.B.]?...of course, he already knows you are an S-O-B." (T.III. 295, lines 13-24)

This episode shows that Stacy does not just limit her interference to M.A.B. She has a history of interference with S.G.B. and J.C.B. as well.

Stacy apologized to Kellie, the mother of S.G.B. and J.C.B., for some of those past intentional acts of interference. Kellie testified to this apology in the passage, "...you know, she [Stacy] said, I am sorry that I tried to keep the boys away from you." (T.III. 247, lines 25-26) (see also T.III. 276, lines 19-21) Thomas also testified that Stacy had tried to prevent S.G.B. and J.C.B. from speaking with their mother via the telephone during the course of Stacy and Thomas' marriage. (T.IV. 492, lines 12-21) Kellie also testified that she heard Stacy tell both of the boys that their father "...will do nothing but lie to them." (T.III. 270 line26) and that Stacy encouraged the boys to contact her furtively. (T.III. 243, lines1-4) Stacy has also previously told Thomas that she will continue to try and contact the boys with or without Thomas' permission. (T.IV. 529, lines 14-17) And for our purposes here, one final example of Stacy's interference was the birthday party for J.C.B. that she cancelled. After canceling J.C.B.'s birthday party and threatening to harm J.C.B. if Thomas brought J.C.B. around her, Stacy told J.C.B. that "...your father just cost you a birthday party." (T.III. 293, line 29, 294, line 1) Under cross examination Stacy admitted to having made this horrible statement to J.C.B. (T.I. 104, lines 25-26) She even admitted to having referred to Pam as a "gold-digger" and a "whore" to M.A.B. (T.I. 105, lines 14-18), who in turn referred to Pam as "gold-digger" in front of Pam's son.

e. overt acts to harm

It also came out at trial that Stacy tried to harm Thomas in other ways besides interfering in his relationship with his children. For instance, Stacy admitted to telling Thomas that he would **not be taking the bar**, "if she had anything to do with it." (T.I. 42, lines 23-24)(T.I. 43, lines 11-14). Further, that she went so far as to write a letter to the bar after she and Thomas had

argued about summer visitation. (T.II. 128, lines 13-29, T.II. 129, line 1) Thomas testified that shortly after her threat, he had to meet with an "informal inquiry" to be allowed to sit for the bar. (T.IV. 448, lines 2-8)(T.IV. 545, lines 20-29, T.IV. 546, lines 1-25) Evidence was also introduced that Stacy called Thomas' Commander at the Air National Guard base and told the Commander, falsely, that Thomas was not paying his child support. (T.IV. 448, lines 27-28)

Thomas also must live in fear of Stacy attempting to contact his other children. Stacy has stated to Thomas that she will attempt to contact his children with or without his permission. (T.IV. 529 lines 14-17) Further, she has carried out her threat twice that he is aware. She did it one time when the boys were visiting their mother (T.IV. 529, lines 17-18), and this prompted their mother, Kellie, to send Stacy an email requesting that she not contact them again without her permission. (Exhibit 6) (RE 119) The other time happened after the Court proceedings leading to this appeal when Stacy attempted to contact S.G.B. at his school. And while this last occurrence happened "outside" the record, it does go to show that Stacy will carry out this threat.

Also, while it does not directly affect Thomas, Stacy employed an indirect but active form of harassment when Thomas and Pam first started dating. Stacy hired a process server and requested that he serve Pam in front of her students at the school where she was working as a teacher. (T.III. 280, 24-25). This request was sent via her attorney at the time, the now suspended from the practice of law, John Morse. (T.III. 281, line 1). This evidence was never refuted by Stacy or any other. The process server refused to perform this act because, "I stated that I wasn't in this business to embarrass people." (T.III. 282, lines 16-17)

The last item offered (but not the last example possible) of overt acts to harm is Stacy's Complaint for Contempt and To Modify Decree of Divorce. (C.P. 28-32) (RE 18-22) In the complaint Stacy asserted that Thomas was consuming alcohol in front of M.A.B. in violation of their agreement (C.P. 29 ¶ 9) (RE 19) and asking that he be sanctioned and enjoined for the

behavior. (C.P. 30 ¶ 6 and 7) (RE 20) However, when asked by her counsel, "Do you know if there is any alcohol consumed in front of [M.A.B.] by Mr. Bittick?" Stacy answered, "No." (T.I. 23, lines 9-10) Seconds later, when she was asked if she had been drinking in front of M.A.B. Stacy answered, "Yes. I've had a martini from time to time in front of [M.A.B.] at home." (T.I. 23, lines 15-16) Of course, there was no mention by the Court of a reprimand or sanctions for her frivolous pleading. Aside from being the most classic example of **unclean hands**, this was an example of blatant lie – false assertion in her pleading. But then, it was also testified to that Stacy has a reputation for dishonesty.

f. reputation for dishonesty, pattern of interfering at work

All these passive acts of interference (missed visitation and phone calls), active interference, and overt harmful acts were performed by a person with a reputation for dishonesty (T.II. 209, line 9) and a past history of making false claims at his work in order to hurt Thomas. (T.II. 213, lines 18-20). Detective Darrell Theall testified to investigating a report of rape made by Stacy Bittick in January 2001. (T.II. 209, lines 20-21)(T.II. 211, lines 10-29) Darrell also testified that Stacy later admitted that the claim – that Stacy had been raped by a stranger – that she had made to 911, the police, and hospital personnel was a lie intended to "get even" with Thomas. (T.II. 213, lines 11-20) Further, that this investigation lasted from a Friday until the next Wednesday and Stacy only admitted the truth after Darrell threatened Stacy with a polygraph. (T.II. 211, 21-29)(T.II. 212, lines 1-3 and T.II. 213, lines 13-20) At the time, Darrell was a co-worker of Thomas who was working as a police detective with the City of Meridian. (T.II. 207, lines 13-15). This Stacy, who tried to hurt Thomas with a false report of rape, by withholding visitations and phone calls, by contacting employers and professional organizations with false allegations, and that also tried embarrass his girlfriend in front of her students, is also the Stacy who testified falsely in these proceedings.

g. lies, falsehoods, and misstatements

Stacy cavalierly testified that Thomas only gave two days notice (T.I. 6, line 29, T.I. 7, lines 1-3) that he wanted a certain visitation, but then had to retract that statement on cross examination when it was proven that he had asked weeks before that specific visitation. (T.I. 52, lines 25-28) (T.I. 53, line 2) She also plead to the Court on September 2, 2005 that Thomas failed to pay support for August and September 2005. (C.P. 63 ¶ 4) (RE 50) Further, she testified during these proceedings that Thomas never paid support for August and September of 2005; she even repeated the claim when the Court asked her specifically about those dates in the passage, "THE COURT: So you're saying he didn't pay child support August and September 2005...THE WITNESS: yes, ma'am." (T.I. 24, lines 17-29, T.I. 25, lines 1-15) (RE 120-121) In her first series of questions, Thomas' counsel exposed these lies by showing Stacy the cancelled checks for those periods. These checks were the cancelled checks which Stacy had signed and they had memos designating them as the support from August 2005 and September 2005. (T.I. 32, lines 19-29, T.I. 33, lines 1-29, T.I. 34, lines 1-25). Again, there was no reprimand or sanction in the Memorandum Opinion for this obvious lie...it was not even mentioned

Then there was her assertion, on redirect, that she had never threatened harm to Thomas. (T.II. 139, lines 5-8) This was followed with an assertion that she had previously threatened Thomas. (T.III.142, lines 26-27) Now while these occurrences only happen three pages apart in the transcript, two things need to be pointed out: 1) she was not correcting her previous statement, she appears only to be answering another question extemporaneously on redirect; and 2) the second answer was given during the next day of open Court and it is possible that she had already forgotten her previous testimony. She also testified that the Court order did not say which way she was responsible for transportation. (T.I. 63, lines 5-7) This was, again, just

minutes after she had stated that the Court order said Thomas was to drive on Fridays. (T.I. 49, lines 20-22).

Stacy asserted on cross examination that M.A.B. got "in-school suspension" for a "second or third tardy...even though he was not late of his own fault or my [Stacy's] own." (T.I. 90, lines 22-26) But later, when describing the same event on redirect examination Stacy noted, "That was the time I made it up to him because I cost him to have that third tardy and **I got him in-school** [suspension]." (T.I. 116, lines 18-20) (emphasis added) Also, we should not forget that she promised to prove that Thomas was drinking alcohol in front of M.A.B., asked for sanctions, and then never offered any proof except that she drinks alcohol in front of the child...all without reprimand or sanction – for the lie or the harassment.

The previous three paragraphs encompass some, but not all, of the examples where Stacy contradicted herself in an obvious way. She also willingly offered that Thomas will never reschedule even though she has offered. (T.I. 55, lines 5-6) (Exhibit 9) (ltr dated July 6, 2006) (RE 91) which she received four to six weeks before making this statement, in Court, shows that Thomas is willing to reschedule requested visitation periods. Maybe this was a misstatement by Stacy, though, and not just a lie designed to prejudice the Court. Of course, with so many denied visitation periods, one might understand how she might mix them up.

Stacy thumbed her nose at the Court and only allowed Thomas, less than twenty-three percent (23%) of his Court ordered visitation. For Stacy, the ultimate form or control was denial: denial of visitation, denial of phone calls, denial of transportation, and denial (refusal) to pay her portion of the mortgage, which she had agreed, through the Property Settlement and Custody Agreement, to paying. In the end, the Court, through many misstatements of the facts and through mistakes of law waived away over two hundred sixty separate acts of contempt and gave the lady with the unclean hands, almost everything that she asked for.

SUMMARY OF THE ARGUMENT

With regard to issue one, the summarized argument is that the trial Court misapplied the law or manifestly erred in failing to rule that a material change had occurred when Stacy obviously and willfully interfered with the parent/child relationship through a denial of visitations and phone calls. The trial Court erred in failing to realize or recognize that the level of the interference rose to the level that it is both a material change in circumstances and proof of harm to the minor child thereby satisfying the first two prongs in Lambert. Also included is an Albright analysis from facts offered at trial. This analysis proves that the decision to not change custody to Thomas should reversed and rendered.

In the second issue, Thomas points out that the trial Court failed to follow contract law and enforce the contract between the parties, namely the property settlement and custody agreement. Further, though it was a property settlement and custody agreement, the trial Court was bound to enforce the contract absent some showing of fraud, mistake, or overreaching as is required in Lowrey. That the decision to, essentially, re-write the property settlement and custody agreement should be reversed and rendered.

In issue three Thomas points out that Stacy came to the Court with unclean hands, created the necessity for a modification, and then was still granted the modification. Thomas asserts that this was an abuse of discretion and a misapplication of the law by the trial Court by ruling on Stacy's modification once it was apparent that Stacy was in willful and contumacious contempt of Court or so the holding in Riddick would have us believe. The decision to grant Stacy relief should be reversed and rendered.

The fourth issue can easily be summarized by pointing out that though Stacy was guilty of over two-hundred sixty acts of contempt of Court, she was not held accountable for even one of them. The trial Court obviously erred in failing to find Stacy guilty of some of the more

egregious examples where she admitted guilt on the stand. That decision to not her find her in contempt should be reversed and rendered or reversed and remanded for further proceedings.

ARGUMENT

ISSUE ONE:

WHETHER THE TRIAL COURT ERRED IN RULING THAT NO MATERIAL CHANGE OF CIRCUMSTANCE HAD OCCURRED WHEN THE APPELLEE (STACY) INTERFERED WITH THE PARENT CHILD RELATIONSHIP BY ONLY ALLOWING APPROXIMATELY 23% OF WEEKEND VISITATIONS DURING A TWO YEAR PERIOD INCLUDING A PERIOD OF NINE STRAIGHT MONTHS WITHOUT A "WEEKEND VISITATION," AND BY DENYING ALMOST TWO HUNDRED PHONE CALLS DURING THE SAME PERIOD

Standard of Review

In the case of Ellis, the Court held that,

> "[i]n child custody modification cases, unless the chancellor was manifestly wrong, clearly erroneous, abused his discretion, or applied an erroneous legal standard, we must uphold his decision. Barnett v. Oathout, 883 So.2d 563 ¶6 (Miss. 2004). The chancellor has the responsibility to evaluate the credibility of witnesses and evidence and we, as the reviewing Court, "will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interests of the child." Id. Additionally, findings of fact made by the chancellor may only be disturbed if they are not supported by substantial, credible evidence." Ellis v. Ellis, 952 So. 2d 982, 989 ¶15 (Miss. Ct. App. 2006).

This case is quite similar to Ellis in that there was severe interference with the parent child relationship and a systematic attempt by the custodial parent to alienate the child from the non-custodial parent. Stacy admitted that, "...every month I got a certified letter...demanding visitation for two weekends." (T.I., lines 14-16) Through a reading of the Statement of the Case it must be pretty clear that Stacy went out of her way to passively and actively interfere with the parent child relationship. One can see where she was heard coaching M.A.B. to say things to put a divide between father and son. It was shown through testimony and the visual aids that Stacy's passive and active interference resulted in Thomas and M.A.B. only getting between twenty-two

and twenty-three percent of the ordered weekend visitation between August 2004 and August 2006. It was also entered into evidence – and un-refuted – that Thomas was denied at least one-hundred ninety-two (192) phone calls over the same period. (Exhibit 8) (RE 93-117)

In Ellis the Court held that severe interference can rise to the level of being a material change in circumstance. In Ellis the Court noted

> While visitation issues should not normally be considered by the lower court when hearing a plea for custody modification, the supreme court has identified that interference with visitation may constitute a material change in circumstances given sufficient severity. Indeed, "a non-custodial parent's right to visitation has been described as 'a right more precious than any property right.'" Ellis v. Ellis, 952 So. 2d 982, 994 ¶27 (Miss. Ct. App. 2006) (quoting Mord v. Peters, 571 So.2d 981, 983 (Miss. 1990).

How much more severe does one have to get than over seventy percent of denied weekend visitations over a two year period, including one period where no visitation occurred from from December 29, 2005 until June 1, 2006. (T.III. 354, lines 13-14) Further, if one looks at it, there was not a regular "weekend visitation" from October 16, 2005 until July 28, 2006! (Exhibit 8) (RE 93-117) That is over nine (9) months of weekend visitations missed consecutively.

When analyzing this as a custody modification case, it is clear that the chancellor either was manifestly wrong, clearly erroneous, or abused her discretion. Further, it is clear that the chancellor applied the wrong legal standard to the issue of the material change. In light of the fact that the chancellor was manifestly in error, abused her discretion, or simply misapplied the law, the decision that this obvious interference was not a material change of circumstance should be reversed. As this is a matter that the Appellate Court can review de novo, and having proven a material change of circumstance we next look to whether, "...(2) the change adversely affects

the welfare [**16] of the child, and (3) the proposed change in custody would be in the best interests of the child." Lambert v. Lambert, 872 So.2d 679 ¶18 (Miss. Ct. App. 2003).

In the case of Richardson, the trial Court ruled that the parental interference in the form of denied visitation and phone calls were sufficient to satisfy the first two prongs of the test. Further, the Court of Appeals upheld this holding. Richardson v. Richardson, 790 So. 2d 239, 243 ¶11 (Miss. Ct. App. 2001) (see also Saunders v. Saunders, 724 So. 2d 1132, 1135 ¶10 (Miss. Ct. App. 1998) holding that a mother's contumacious interference with visitation was a material change in circumstances).

M.A.B. testified to the change adversely affecting him. When asked how it made him feel about not getting to see his dad, M.A.B. testified that it made him feel, "[v]ery depressed." (T.II. 166, line 8)

Thomas testified at trial that he believed that along with the disparaging difference in M.A.B.'s academic accomplishments compared with Thomas' other children, Thomas believed the "...absence itself from the rest of the family" to be M.A.B.'s change in circumstance, as well as M.A.B.'s decline in attendance at school. (T.III. 395, lines 4-26) Thomas testified that when they actually do get visits, "...he seems guarded. He seems changed. Whenever we visit, we spend the first day getting to know each other all over again. And then by the time he leaves, he is guarded all over again as if he is stealing [sic] himself for the return." (T.III. 395, lines 9-13) Further, he went on to explain the how the change adversely affected M.A.B. in the passage, "...I believe he has been harmed. I believe that he is missing the valuable time with his brothers and I. I would never do that to him. And so, I believe the adverse impact on him has resulted in his poor schooling and also the absence itself from the rest of the family." (T.III. 395, lines 21-26).

This passage also satisfied the third prong from Lambert since Thomas testified that, "I would never do that to him." Lambert at 989 ¶17. In fact, Kellie, the mother of Thomas' other children, testified that Thomas had not ever done anything to try and keep Kellie from seeing their children together and that his entire existence has been for the children. (T.II. 250, lines 7-26).

There were enough Albright factors present for this Court to hold that it would be in the best interest for M.A.B. to be in the custody of his father. Albright v. Albright, 437 So.2d 1003, 1005 (Miss. 1983). That the following analysis is included in support of the contention that it would be in the best interest of M.A.B. to be in the custody of his father.

(1) Age, health and sex of the child. In the case of Messer it was held that a 10 year old boy's age and gender favored his father, due to the importance of male guidance at that age. Messer v. Messer, 850 So. 2d 161, 167 ¶19 (Miss. Ct. App. 2003); (see also Hassett v. Hassett, 690 So 2d 1140, 1149 (Miss. 1997). M.A.B. is now 11 (C.P.15) (RE 9) and would certainly benefit from being with his father at this age. Thomas testified to this fact. (T. IV. 452, lines 21-23)

(2) Determination of the parent that had the continuity of care prior to the previous modification. This factor favors Stacy, though it can be said that her efforts to keep M.A.B. away from his father and brothers increased the amount of care.

(3) Which parent has the best parenting skills and which has the willingness and capacity to provide primary child care. In Brawley the Court held that a parent may be favored because the parent is attentive to a child's personal hygiene and medical needs and that this factor alone may be enough to change custody. Brawley v. Brawley, 734 So. 2d 237, 241-42 ¶13 (Miss. Ct. App. 1999). Thomas testified to getting rid of warts on M.A.B. that Stacy had not taken care of,

though she knew of them. (T.IV. 440, lines 7-12) Thomas also testified to taking care of warts immediately when they were discovered on his son S.G.B. (T.IV. 439, lines 8-10) M.A.B. continued to get poison ivy and Thomas even sent pictures to Stacy, for M.A.B., of poison ivy so they could search her land for it, and Stacy just remarked to Thomas that "...boys will be boys and that he is going to get poison ivy." (T.IV. 439, lines 1-8) Thomas testified to M.A.B. having "fecal matter stains" in his underwear at visits and that he did not wipe his bottom properly or fully. (T.IV. 447, lines 14-22) Thomas also testified to having remedied the problem that Stacy had not. (Id.) Thomas testified to M.A.B.'s speech impediment (T.IV 448, lines 7-23) and his actions to correct it, but that Stacy's only actions that he is aware of are through the school and that he does not know if Stacy is reinforcing it at home as he is.

Stacy also testified to having taken M.A.B. to an arcade after he got in-school-suspension to make it up to him, because she made him late for school. (T.I. 116, lines15-21) Finally, Thomas testified to having willingness and capacity to parent. He stated that he thought both parents were necessary and that he would not interfere the way Stacy had. (T.IV. 450, lines 11-26)

Also, Al Cutturini testified that Thomas' house is clean and well organized, and that he has a close relationship with his children. (T.II. 225, lines 15-21) Thomas testified to Stacy having a tremendous temper, and when she is angry she screams and lashes out. (T.IV. 448, lines 3-5) Thomas also testified that now M.A.B. displays this same behavior and that he will yell, "...at the drop of a hat. I mean, he gets upset and he just screams." (T.IV. 407, lines 16-18) Thomas testified to giving M.A.B. an allowance and a bank savings account. (T.V. 597, lines 21-25) Thomas also testified that Stacy's parenting skills were lacking especially as it pertained to handing out punishment which Thomas classified as often being "draconian." (T.V.569, 25-

29, 570, line 1) Darrel Theall testified to the fact that all three children were home at the time that Stacy staged the hoax rape. (T.II. 222, lines 18-22)

In Gutierrez, the Court held that exposing the children to disputes between the parents can be considered bad parenting. Further, the Court held the father, in that case, to have better parenting skills because the mother refused to follow the visitation order and because of the mother's harassment of the father during separation. Gutierrez v. Bucci, 827 So. 2d 27, 35-36 ¶50 (Miss. Ct. App. 2002). Obviously in this case Stacy has obstinately and contumaciously refused to follow the Court order, and she has harassed Thomas through the interference with visitations, contacting his Commander with the National Guard, contacting the MS Board of Bar examiners, and by telling his other children that he is lying to them, filing fallacious petitions, etc. Further, if this is not enough, Stacy was screaming and cursing at Thomas in public at a "hand off" of M.A.B. in October of 2006. (T.III. 295, lines 4-24)

(4) The employment of the parent and responsibilities of that employment. The Court noted that Thomas was an attorney and going into private practice. (C.P. 94 lines 20-23) (RE 67) Stacy testified to the fact that she travels a great deal for her work including being out of town overnight. (T.II. 138, lines 20-22) In Lee, a father was favored for this factor since his employment was closer to home while the mother's work was further away. Lee v. Lee, 798 So. 2d 1284, 1288 ¶9 (Miss. 2001).

In Moak, the Court held that the fact that a parent's work schedule allows more time with a child can weigh in that parent's favor. Moak v. Moak, 631 So. 2d 196, 198 (Miss. 1994). In this case, Stacy testified to being out of town one night a week every three weeks. (T.II. 138, lines 20-22)

(5) Physical and mental health and age of the parents. Thomas testified to being in good health. (T.IV. 451, lines 10-12) Thomas also testified to a conversation with Stacy in which she

claimed that if it, "...weren't for Wellbutrin she couldn't get out of bed." In Divers the Court held that in a case of a parent who is suicidal with borderline personality syndrome, the mental health factor weighed so heavily for the father that custody should be awarded on that factor alone. Divers v. Divers, 856 So. 2d 370, 375 ¶19 (Miss. Ct. App. 2003). We do not know what Stacy's diagnosis is, but this should be considered in favor of Thomas, especially considering Stacy's admitted drug use.

Regarding her drug abuse, the Court in Gutierrez, held that parents have been rated poorly on the mental health factor based on alcohol abuse, illegal drug usage, and abuse of prescription drugs. Gutierrez v. Bucci, 827 So. 2d 27, 34-35 (Miss. Ct. App. 2002). Further, we should not forget that Stacy is a person who staged her own rape and that act does not exactly exude mental stability. (T.II. 213, lines 11-20)

(6) Emotional ties of the parent and child. It does not appear there is evidence one way or the other proving a greater bond between M.A.B. and either parent. Though M.A.B. himself admitted that his relationship with his father has gotten worse because of not being able to see him often enough. (T.II. 166, lines 4-6) Stacy admitted that only allowing eleven (11) weekends of visitation out of one-hundred four (104) weekends does not foster a good relationship between parent and child. (T.I. 79, lines 5-11)

(7) Moral fitness of the parents. While Stacy would argue that Thomas living with Pam weighs this column in her favor, we should not forget that Stacy and Thomas both testified to their having lived together prior to marriage (Thomas T.IV. 506, lines 4-10) (Stacy T.I. 44, lines 17-20) while all three children were with them. What you will not find in the record is the fact that Stacy moved in with a man shortly after this trial, and while they have since married, it shows that cohabitating is not really something that bothers Stacy.

The Court in Beasley held that a mother's foul language weighed against her in the Albright analysis. Beasley v. Scott, 900 So. 2d 1217, 1221 ¶17 (Miss. Ct. App. 2005). At trial Thomas testified to the fact that Stacy would scream and curse at him, even in front of the children. (T.III. 329, lines 16-20) (T.III. 295, lines 13-24). There was also the time that she cursed Thomas out because she heard that he and Pam were getting married. (T.III. 324, lines 22-28)

(8) The home, school and community record of the child. In Myers the trial Court properly awarded custody of the children to the father upon evidence that they attended school more regularly and were better behaved when in his custody. Myers v. Myers, 814 So. 2d 833, 835 (Miss. Ct. App. 2002). Stacy's counsel did a good job of recapping M.A.B.'s attendance when he showed that M.A.B. missed five (5) days in kindergarten, six (6) in first grade [pre-divorce], eight (8) in second [during separation], fifteen (15) in the third and fourteen (14) in the fourth grade [these two were post divorce]. (T.IV. 537, lines 28-29, 538 line1) (see also Exhibit 13 pg 2 absences) (RE 123) As well as Thomas testifying to the fact that his other children attended school more regularly (T.III. 398, lines 13-16), Al Cutturini testified to Thomas' children being well behaved. (T.II. 225, lines 15-21)

Further, the Court in Massey rated a mother poorly on this factor because her child had excessive unexcused absences while the mother was caring for her. Massey v. Huggins, 799 So. 2d 902, 907 (Miss. Ct. App. 2001). Thomas testified to S.G.B. and J.C.B. missing one (1) day and four (4) days respectively the previous year. (T.III. 398, lines 13-16) Also, Thomas testified to M.A.B. being an "exceptional child" (T.III. 398, line 25) even though Stacy had testified that he was only a "mediocre" student (T.I. 88, lines 24-25, T.I. 117, lines 15-17). Stacy, however, compared M.A.B. to Thomas' other children, who Stacy called "exceptional." (T.I. 117, line 19-22)

(9) The preference of the child at the age sufficient to express a preference by law. M.A.B. was not of sufficient age to express a preference at the time of this proceeding.

(10) Stability of home environment and employment of each parent. In the case of Pacheco the Court considered whether or not a parent provided balanced meals and made sure proper hygiene was ensured. Pacheco v. Pacheco, 770 So. 2d 1007, 1010 (Miss. Ct. App. 2000). There was testimony that Thomas cooked nightly, and that Thomas had to address M.A.B.'s hygiene deficiencies.

In Blevins the Court held that smoking can negatively affect this factor for the parent in the home where the smoking occurs. Blevins v. Bardwell, 784 So. 2d 166, 173 ¶ 27, 176 ¶36 (Miss. 2001). Thomas testified to the fact that he does not smoke and that Stacy does. (T.IV. 438, lines 3-7) Thomas had also testified to Stacy's terrible temper, and when she is angry she screams and lashes out. (T.IV. 448, lines 3-5) And in Gable the Court held that a parent's personality traits such as a temper may also affect this factor. Gable v. Gable, 846 So. 2d 296, 299 ¶11 (Miss. Ct. App. 2003).

(11) Other factors relevant to the parent-child relationship. While Stacy would point to the fact that the Court ruled that "[M.A.B.] has strong faith and enjoys his church, and this religious upbringing is absent in his father's home." (C.P. 100, lines 8-10) (RE 73) Thomas would argue that it was a manifest error for the Court to hold that a religious upbringing was "absent" in his father's home as Thomas testified to discussing matters of religion with M.A.B. and to having studied religion in college and imparting this knowledge to all of his children. (T.IV. 513, line 20-29, 514, lines 1-3). Further, Thomas testified to attending church and having religious beliefs (T.IV. 515, lines 1-2) and went on to object to the questioning about religion as being an attempt to prejudice the judge against Thomas. (T.IV. 514, lines 8-10) As the Judge

ruled that "religious upbringing" was absent in Thomas' house (C.P. 100, lines 8-10) (RE 73), that fear was apparently well founded.

In several cases, custody has been denied to a parent based on interference with the other parent's relationship with a child. One such case is Mabus, and in that case the mother's interference with the children's relationship with their father was one reason supporting award of legal custody to father. Mabus v. Mabus, 890 So. 2d 806, 818 ¶50 (Miss. 2003). Similarly a mother's interference with the contact between the children and their father in Richardson was one of several reasons supporting a modification of custody to the father. Richardson v. Richardson, 790 So. 2d 239, 242-43 ¶11 (Miss. Ct. App. 2001).

For all the stated reasons, Thomas would move the Court to hold that a material change did occur, that it was adverse to M.A.B.'s best interest, and that a change of custody to his father would be in the best interest of M.A.B. and that the trial Court abused its discretion or mistakenly applied the law, and the trial Court's holding should be reversed and rendered.

a. mistake of fact, bias, misunderstanding or misrepresentation of the facts

While one hates to waste precious space in the appellant's brief with so many of these cumulative instances, it is important to point out that this pattern of interference and denial of visits continued even after August 2006 when the parties first met in Court. Even after a "standard" visitation schedule (T.V. 587, lines 15-17) was temporarily put in place – while the parties were still before the Court – Stacy denied even more visitation. (T.V. 640, lines 2-4) This was, again, without any reprimand or sanction by the Court.

The testimony, proving her continued denial of visitation, was after Stacy's counsel argued facts not in evidence and asserted that Thomas had cursed Stacy out on the phone and called her vile names. Stacy's counsel had asserted that this cursing had led to the denial of

visitation. (T.V. 586, lines 1-6) In response, Thomas played a recording of the conversation in which Stacy's counsel had asserted that Thomas cursed during. (T.V. 637, line 2 through 640, line 4) Clearly there was no cursing in the recording. There was only Stacy refusing to discuss a visitation...again.

Had it not been for the recording, one might be left wondering if Thomas had actually cursed at Stacy. This and dozens of other examples show conclusively that Stacy and her counsel set out to lie and try and cheat their way to a favorable ruling. In the Statement of the Case there are other examples of her lies and getting caught in falsehoods. The record is rife with them and to point them all out would only accomplish an exhaustion of the page limit. Apparently this tactic worked for Stacy, because even though over two hundred forty counts of contempt (for visitations and phone calls) went unanswered by Stacy, she maintained custody. She denied visits. She denied phone calls. She placed events on scheduled visitation periods to interfere with and deny visitation. She screamed and cursed at Thomas in front M.A.B., and still she maintained custody.

The Court held that, "[n]one of the complaints that Thomas has about Stacy rise to the level of a material and substantial change in circumstances such as to justify a change in custody." (C.P. 99, lines 20-22) (RE 72) The Court also went on to hold that, "[t]he set visitation schedule will go a long way toward resolving these problems." (Id. at 23-24) (RE 72) The Court made that holding even though Stacy had already begun to deny the Court's "set visitation schedule." (T.V. 640, lines 2-4) What the record does not show is that the Chancellor's jaw dropped when she heard that Stacy had denied yet another visit – but the Court still left custody with Stacy. The record also does not reflect that the Chancellor's ex-husband's name is Thomas. The record does reflect that the Court signed the Memorandum Opinion on December 21, 2007 – another error since it was signed in 2006. (C.P. 104) (RE 77)

The record also does not reflect that when M.A.B. appeared in Court he was wearing a brand new cross on display outside his turtleneck shirt – a cross that he has not worn since. This could be what led the Court to hold "[M.A.B.] has strong faith and enjoys his church, and this religious upbringing is absent in his father's home." (C.P. 100, lines 8-10) (RE 73) It could be any number of the "dirty tricks" like that one that led the Court to rule that no material change had occurred, even though it was clearly a case of extraordinary interference. There were certainly other errors by the Court as well. The Court, in the Memorandum Opinion and Judgment, pointed out twice that Thomas describes his relationship with Pam as "golden," (C.P. 86, line 13) (RE 50) (C.P. 100, line 19) (RE 73) but it was his pre-divorce relationship with M.A.B. that Thomas had described as "golden." (T.IV. 428, line2)

At trial, the Court also blurted out "All right. Well, I will give you an example of an immoral environment if that will help move this along. The environment in Mr. Bittick's house is an immoral environment" (T.IV. 523, lines 11-14) (RE 124) even though Courts should not act in an adversarial role. In the case of Powel the Court held that, "...it is grounds for reversal if the trial judge abuses the authority to call or question a witness by abandoning his impartial position as a judge and assuming an adversarial role. Powell v. Ayars, 792 So. 2d 240, 248 ¶29 (Miss. 2001). This is not exactly questioning by the Court, but one can hardly doubt that it is adversarial. At one point in his testimony Thomas had made a comment that he decided to follow "previous teachings" and avoid "wrestling with a pig" because one accomplishes nothing but getting dirty. (T.V. 577, lines 23-25) (RE 125) The Court later quotes Thomas as having called his former wife a dirty pig. (T.V. 580, lines 11-16) (RE 126)

The Court also held that, "...Thomas **took** $2,000 of the proceeds of the sale to finance a vacation for himself and the boys to Las Vegas..." (C.P. 92, lines 12-14) (RE 65) (emphasis added) This characterization of Thomas having **taken** the money seems very biased and very

inaccurate in light of the fact that Stacy testified to the fact that she **let** Thomas take some of the proceeds from sale of home (T.I. 124, lines 13-14) and that she had no objection to him receiving them. (T.I. 124, lines 19-21) The Court did not state that it was the first Christmas Thomas' children had ever spent with Thomas' mother, who had just survived cancer for the second time.

The Court also held that, "Both Stacy and Thomas need to comport themselves in an appropriate manner at visitation exchanges." (C.P. 91, lines 20-21) (RE 64) This statement shows either that the Court did not understand the evidence presented or that the Court was too biased to notice that all of the evidence pointed toward Stacy being troublesome at visitation exchanges, not Thomas. In fact, there was no evidence offered that Thomas was anything but comported at <u>any</u> visitation exchange. There was evidence, which has been discussed at length that Stacy was confrontational, tempestuous, and made a spectacle of herself in front of the children.

The Court also noted that, "Thomas discontinued contact between Stacy and his sons after she enjoyed only about two or three visits after the divorce." (C.P. 87, lines 8-10) (RE 60) This too paints Thomas in a bad light. It appears as if it were stated this way to prejudice any future reader (i.e. appellate review perhaps). This is especially true considering the fact that the Court left out that the reasons for the discontinuation. The Court did not relay Stacy's direct threat to harm Thomas' son J.C.B. (T.III. 293, lines 10-11), or that Stacy had set out to harm the boys opinion of their father (T.III. 245, lines 6-12, 270, line 26), and most importantly that Thomas and Kellie (their mother), in light of those other matters, had decided that she should not see them unsupervised. (T.III. 17-19)

The Court also seems to be faulting Thomas in the passage, "Thomas has kept records and conducted his entire communication with his former wife as if his whole life were a lawsuit..." (C.P. 100, lines 28-29) (RE 73) while simultaneously faulting Thomas for not

keeping records about a few short duration visitations during non visitation periods. (C.P. 88, lines 26-29) (RE 61) It appears that Thomas was literally "darned if he did and darned if he didn't." While the Memorandum Opinion and Judgment is relatively replete with other such examples, for our purposes it is safe to say that these few examples alone show a propensity toward bias against Thomas, or at least a cavalier manner with facts which could easily lead to manifest error or clearly erroneous findings of fact. More importantly, who could be for sure as to which cavalier or erroneous comment would do Thomas harm under appellate review.

The weight of a single grapefruit-sized stone is not that great, at least until you find yourself prostrate with thirty or so stones piled upon you. The English practice of crushing, "pressing," or *Peine forte et dure* was abolished in England around 1772, and the victims were usually face up. Regardless of how the victim is facing, it eventually takes just that one last stone to do him in. In the case of Giles Corey, the only known American victim of *Peine forte et dure,* the final stone was immediately preceded by his last words, "[m]ore weight."[1]

One cannot be sure which comment or erroneous recitation of the facts could have been the final stone for Thomas. However, one can look at the body of this transcript and see that Thomas overwhelmingly proved interference by Stacy in Thomas' relationship with M.A.B.

ISSUE TWO:

WHETHER IT WAS A MISTAKE OF LAW FOR THE TRIAL COURT TO REFUSE TO ENFORCE THE PROPERTY SETTLEMENT AND CUSTODY AGREEMENT CONTRACT

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[1]Summerson, Henry (1983). "The Early Development of Peine Forte et Dure." *Law, Litigants, and the Legal Profession: Papers Presented to the Fourth British Legal History Conference at the University of Birmingham 10-13 July 1979* ed E. W. Ives & A. H. Manchester, 116-125. Royal Historical Society Studies in History Series 36. London: Humanities Press.

Standard of Review

> In the case of Singley the Court held that "[t]his Court will not interfere with a chancellor's findings of fact unless they are manifestly wrong, clearly erroneous or an erroneous legal standard was applied. However, we review the chancellor's interpretation and application of the law de novo." Singley v. Singley, 846 So. 2d 1004, 1006 ¶5 (Miss. 2002).

The issues in question in this section revolve around the Court's decision to alter a previously "agreed-to" order. (C.P. 14-23) (RE 8-17) In that original agreement, the parties voluntarily created a binding contract which allowed Thomas to visit nightly with his son via telephone, allowed Thomas to choose the summer month for visitation with his minor son, allowed Thomas to pick up his son at 6:00 PM on Fridays on visitation weekends, required Stacy to pay half of the mortgage on the former marital home and also gave Thomas a two month grace period from paying support to Stacy immediately after Thomas graduated law school if he felt it was needed. Id.

In changing the original Property Settlement and Custody Agreement the Court either paternalistically interfered with the parties' freedom to contract, or the Court simply abused its discretion and wrongfully modified a contract absent a showing of fraud, mistake, or overreaching. In either case, it is an abuse of discretion and reversible error.

The Court is required to give the same deference to a property settlement and custody agreement that is given to any other contract between parties. In Beezley, the Court stated that, "[a] property settlement agreement is no different from any other contract, 'and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character.'" Beezley v. Beezley, 917 So. 2d 803, 807 ¶13 (Miss. Ct. App. 2005) (quoting in part from East v. East, 493 So. 2d 927, 931-32 (Miss. 1986)). The Beezley decision went on to explain that Courts are bound by the terms of the contracts. This is made most clear in the passage, "Courts are bound by what the parties have said, 'provided only that we read the entire settlement agreement/divorce judgment and in the best light possible, attributing to its

provisions the most coherent and reasonable scheme they may yield.'" Id. at 807 ¶13 (quoting in part from Webster v. Webster, 566 So. 2d 214, 215 (Miss. 1990).

Of course, as with any other agreement, if there were fraud in the formation or inducement, mistake or overreaching, the Court may not enforce the contract. The Court in Lowrey reiterates the rule which was stated in McManus, that, "...the law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the Agreement which the parties have made, absent any fraud, mistake, or overreaching." Lowrey v. Lowrey, 919 So. 2d 1112, 1120 ¶30 (Miss. Ct. App. 2005). Lowrey also went on to explain that, "[t]his is *as true of agreements made in the process of the termination of the marriage by divorce as of any other kind of negotiated settlement.*" Id. (emphasis added). There was no mention of fraud, mistake or overreaching in either the Memorandum Opinion and Judgment on December 21, 2006, (C.P. 81-104) (RE 54-77) or in the Amended Bittick Visitation Schedule on December 22, 2006. (C.P. 109-112) (RE 78-81) As such, it was abuse of discretion to make any changes to the original Property Settlement and Custody Agreement absent some showing that the changes had to do with a modification of custody or visitation for good cause shown.

Of course, Stacy would argue that some of these changes were no modification of custody, but rather a modification of visitation and in the case of H.L.S. v. R.S.R. the Court noted that "[w]hen modification of visitation is at issue, the material change in circumstances test is not applicable because the Court is not being asked to modify the permanent custody of the child." H.L.S. v. R.S.R., 949 So. 2d 794,798 ¶9 (Miss. Ct. App. 2006). Further, that "[t]o modify a visitation order, 'it must be shown that the prior decree for reasonable visitation is not working and that a modification is in the best interest of the child.'" Id. While Thomas would contend that these changes were an abuse of discretion, we must also look at an analysis of some of these issues as a modification of visitation as well.

a. phone calls

With regard to the phone calls the trial Court held,

> The property settlement agreement allows Thomas daily telephone contact with [M.A.B.], but this contact was bothersome to Stacy. Sometimes Thomas would call and they would be having supper, and [M.A.B.] would forget to call his father back. The Court is of the opinion that daily phone calls may indeed be disruptive to the household where the child resides.(C.P. 89, lines 15-21)(RE 62)(emphasis added)

There were no facts entered that the child was adversely affected by Thomas exercising the rights that Thomas contracted for. The Court held that it was "bothersome to Stacy." There was also a finding of fact that "...daily phone calls ***may*** indeed be disruptive to the ***household*** where the child resides." Id. (RE 62) (emphasis added)

At best this is a finding that at some point in the future a phone call may disrupt the household, not the child. This could also be a personal bias or personal observation that in other cases phone calls may be disruptive. Whether this disruption is one that would adversely affect M.A.B. is not a matter that this Court determined. There was not proof that it was "not working." Finally, the law "favors the settlement of disputes by agreement" and the Court never made a finding of "any fraud, mistake, or overreaching" as is required by Lowrey. Lowrey v. Lowrey, 919 So. 2d 1112, 1120 ¶30 (Miss. Ct. App. 2005). For all the stated reasons, this change was a mistake of law, or an abuse of discretion and should be reversed and rendered.

b. summer month

Originally Thomas and Stacy agreed that Thomas was to "...have the child one month each summer and Husband [Thomas] will **have his choice** of which summer month." (Original Property Settlement and Custody Agreement) (emphasis added) (C.P. 16, ¶3) (RE 10) In the Amended Bittick Visitation Schedule entered December 22, 2006 (C.P. 110 ¶6) (RE 79), Thomas's summer visitation was changed to,

> Thomas shall have the children with him for four consecutive weeks during the summer months. Unless the parents can agree otherwise, said four weeks shall be

> in the month of July, beginning at the commencement of the July 4th holiday period in even-numbered years, and after the July 4th holiday in even-numbered years.

The change essentially takes the choice from Thomas and gives it to Stacy. If Stacy wants July, and Thomas, because of Air Guard obligations or for other reasons wants June, Stacy only needs to refuse the June visitation period, and Thomas has no recourse.

To begin with, Thomas went from a "month" to "four consecutive weeks." Since summer visitation will never occur in February, Thomas automatically loses at least two days visitation in this ruling. If Thomas were to choose June or July under the previous agreed to visitation schedule, he would get either thirty (30) or thirty-one (31) days respectively. As Stacy flippantly pointed out when discussing summer visitation, "[b]ut Tom [sic] wants his whole 30 days." (T.I. 43, line 4). With the change in summer visitation, Thomas loses at least two days.

There was no showing that the "summer visitation" was "not working." In H.L.S. v. R.S.R. it was held that it must be shown "that the prior decree for reasonable visitation is not working and that a modification is in the best interest of the child." H.L.S. v. R.S.R., 949 So. 2d 794,798 ¶9 (Miss. Ct. App. 2006). When analyzed as a modification of visitation, the Court improperly changed the summer month visitation from being Thomas' choice to being Stacy's choice without there ever having shown that the summer visitation was "not working." Finally, as a contract matter the Court never held that there was any fraud, mistake, or overreaching, as is required by Lowrey. Lowrey v. Lowrey, 919 So. 2d 1112, 1120 ¶30 (Miss. Ct. App. 2005). For all the stated reasons, this change was a mistake of law and should be reversed and rendered.

c. pick-up at 6:00p.m on Fridays

The Court discusses the transportation issue in the Memorandum Opinion and Judgment dated December 21, 2006. There, the trial Court states,

> Stacy complained that Thomas was controlling and manipulative about the times of visitation, and that transportation to facilitate the visitation was a huge

> problem. They had agreed to meet half-way between Oxford and Meridian in West Point, but Stacy found that her obligation to provide half of the transportation interfered with her church activities on Sundays. The property settlement agreement provides that transportation be shared "one way each" but Stacy stated that Thomas would not cooperate. The transfer time is at 6:00 p.m. and with the half-way point meeting on Sunday, the child was not getting home till [sic] 10:00 p.m. and if the transportation was split with her driving on Friday and Thomas driving on Sunday, the child could be home in bed at a decent hour for school the following Monday. (C.P. 85, lines 9-24) (RE 58)

As to Stacy's claims that Thomas was controlling or manipulative about the times for visitation, the Court left out that it was always Thomas' position, that in absence of an agreed deviation from the agreement, that the parties simply follow the written agreement. (Exhibit 9) (RE 82-92) In fact, the Court may have mistaken Stacy for Thomas in the Court's notes because it was Stacy that was controlling and manipulative. Stacy is the one that testified to having said, "I told Tom [sic], I said, okay, I'm going to drive Michael on Fridays to Oxford and you bring him home on Sunday, you know, I am the only single parent here." (T.I. 8, lines 7-10) (emphasis added) This statement ignores the fact that Thomas was a single parent of two children during the same time period.

Aside from that it was also Stacy who later admitted that she was insisting on driving on Fridays now even though she had previously "...told him that we would go by the divorce decree. And the way it reads it says: Father will pick up child at 6:00 p,m, on Friday." (T.I. 49, lines 20-22) (emphasis added) Stacy had said she and Thomas would go by the divorce decree because to meet in the middle would be something that would help Thomas, and if it was going to help Thomas, she said she would not do it. (T.I. 55, lines 12-17) Of course, with a 6:00 p.m. hand off at West point, M.A.B. could be home at 7:30 p.m. In other words it would also help M.A.B.

It was also this same Stacy who later told Thomas that if he would not drive on Sundays he would not get a visit (T.I. 50, lines 24-26). The same Stacy had also, at one point, said, "[h]e

was unwilling to drive both ways so he didn't get a visit." (T.I. 54-55, lines 29-1) The Court must have mistaken Thomas for Stacy because all the testimony was about Stacy changing the transportation arrangements and thereby controlling and manipulating. It was Stacy that insisted on changing from meeting in the middle, who then insisted Thomas drive on Fridays, who then insisted that Thomas drive on Sundays, who even insisted that Thomas drive both ways all to get visitation that was already Court ordered.

That aside, the Court obviously misunderstood the issue and the distances discussed. The Court improperly noted that "The transfer time is at 6:00 p.m. and with the half-way point meeting on Sunday, the child was not getting home till [sic] 10:00 p.m..." (C.P. 85, lines 18-21) (RE 58) It was correct that the meeting was at 6:00 p.m., but no one testified that if Thomas and Stacy met half-way in West Point on Sunday, the child would not get home until 10:00 p.m. West Point is about an hour and a half from Meridian, not four hours. This is a clear mistake of fact and an error by the Court.

There was evidence that Stacy continued to change her mind as to who was supposed to drive and at what time, in order for Thomas to get a visitation. However, the Court did not make a finding that Stacy ever followed the order, and that it did not work. There was evidence introduced that Stacy had obligated herself at her church during times that she knew she had to do this driving for her son even though, "[i]t wasn't like that when we got divorced. It is now." (T.I. 60, lines 20-21) Stacy, therefore, came to the Court with unclean hands – she had denied visitations because it would interfere with the plans she made after the property settlement agreement – and is asking the Court to change the agreement.

In this case there was no determination that the visitation schedule is not working with regard to the transportation. In fact Stacy never followed the agreement in order to determine if it would work. When analyzed as a modification of visitation schedule, the Court improperly

changed the "pick up" arrangement from Thomas driving on Friday and Stacy driving on Sunday to Stacy driving on Friday and Thomas driving on Sundays. (Amended Bittick Visitation Schedule) (C.P. 111, ¶10) (RE 80) Finally, as a contract matter, "...the law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the Agreement which the parties have made, absent any fraud, mistake, or overreaching." Lowrey v. Lowrey, 919 So. 2d 1112, 1120 ¶30 (Miss. Ct. App. 2005). For all the following reasons, this change was a mistake of law and should be reversed and rendered.

d. two month grace period

In the Memorandum Opinion and Judgment the Court commented that

> "[e]ven though Thomas was preparing for the bar exam, he was not 'unemployed' due to the fact that he is a Captain in the Air National Guard, and grosses $725.00 per month. He [Thomas] also took out a $10,000 loan to tide him over while he took the Bar exam, and it certainly cannot be said under these circumstances that a grace period was "needed." (Memorandum Opinion and Judgment) (C.P. 93, lines 21-27) (RE 66)

Aside from the fact that the parties contracted for this eventuality, the Court was improperly looking at this in retrospect. Also, the State of Mississippi does not consider service in the National Guard or Air National Guard to be "employment." There was no pleading about the issue. Finally, whether or not Thomas felt the need was subjective, not objective.

To begin with the Court improperly noted that Thomas was "not 'unemployed' due to the fact that he is a Captain in the Air National Guard." (C.P. 3, lines 22-24) (RE 66) This was an obvious manifest error in light of the fact that Miss. Code Ann. § 71-5-11 (J)(5)(c)(iii) (2007) (RE 137) (the statute that lists the Mississippi definitions for unemployment compensation) states that the term "employment" does not apply to service with the State National Guard or Air National Guard. Further, at trial Thomas had asserted that he never considered his service to the Air National Guard to be "employment." (T.IV. 477, lines 19-22) By the State's own definitions, Thomas was unemployed. The contract contemplated "employment" not private

loans. As such, Thomas was certainly unemployed and should have been able to exercise the contract for which he had bargained – a bargain that included visitation instead of custody.

Also, the Court was looking backward, in retrospect, from December 2006 at June and July 2006 and deciding whether or not the grace period was "needed." To begin Thomas testified that he "needed it." (T.IV. 485, lines 2-8). There was never any evidence or testimony to the contrary. Further, let us not forget that the two months, or $400 was never plead as an issue by Stacy. There was an objection about this and the Court never ruled on the issue. (T.IV. 472, line 21 through 474, line 19) (RE 127-129) The Court, therefore abused its discretion and made a manifest error to rule otherwise.

Further, during June of the disputed period the child was with Thomas – the first visit Thomas and the child had together in over six (6) months. (Exhibit #8) (RE 93-117) That aside, however, during June and July 2006 while the Thomas was studying for the bar, he took out the $10,000 loan, and he did not know how long he and his two other sons were going to have to live off of that money. Also, $1,800 of that money went to a bar preparation course. (T.IV. 479, lines 10-13) Therefore, the $10,000 was really $8,200. Further, Thomas testified that he was using that money to open a law firm with a classmate. (T.IV. 482, lines14-20)

At the time that Thomas took out the loan he did not know if he would even pass the bar or whether or not he would be able to find work as an attorney. Also, the $725 that the Court mentioned was a raise that occurred in July when Thomas was promoted to Captain in the Air National Guard. Prior to that, Thomas made less than $700 per month and that constituted almost his entire income during his tenure in law school. Though he made so little, he voluntarily agreed to pay $200 a month in support – an amount that, by far, exceeded the fourteen percent of adjusted gross Thomas would have had to pay. (T.V. 614, lines12-13)

At the time Thomas exercised this "grace" period he did not know if he would pass the bar, if he would get a job in law after passing the bar, or when he and his two minor sons at home would have another income...he felt it was needed. As it turned out, the $8,200 (along with Guard pay) only had to last from June until December. Thomas found out that he passed the bar in September and he opened a firm with a classmate in October. Of course, his firm did not turn a profit until December 2006. In retrospect, some outsiders may look back and determine that $10,000 (really $8,200) for six months is more than adequate and that the grace period was not "needed." Thomas, whose perspective was controlling in the contract, had felt in June and July that the grace period was appropriate considering all the factors discussed here.

Finally, as a contract matter, "...the law favors the settlement of disputes by agreement of the parties and, ordinarily, will enforce the Agreement which the parties have made, absent any fraud, mistake, or overreaching." Lowrey v. Lowrey, 919 So. 2d 1112, 1120 ¶30 (Miss. Ct. App. 2005). There was no evidence of fraud, mistake or overreaching in this matter. For all the stated reasons, this ruling was a mistake of law and should be reversed and rendered and the $500 (or 125% of $400) now held in trust by the Lauderdale County Chancery Court should be returned to Thomas.

e. $5531 in mortgage arrearage

The Court made no ruling on Stacy's $5531 mortgage arrearage. There was no ruling that it was to be paid to Thomas. There was no holding that Stacy's debt was forgiven. There is not even any mention of the $5531. The Court did hold that, "[t]he Court denies Thomas' request that Stacy pay to him any additional monies over and above the sales proceeds." (C.P. 102 lines 14-15) (RE 75) This excerpt was ten pages after Court's mention of the former marital home.

Thomas testified that as of December 29 [2005], Stacy owed him $5531 for mortgage arrearage. (T.III. 366, lines 14-19) Further, to clear up any other confusion, Thomas testified that this was above and beyond the amount still in the register of the Court. (T.III. 372, lines 26-29, 373, lines 1-21) For Stacy and Thomas to each realize an equal share of the sale of the house, and for Thomas to be made whole for paying all of the mortgage for nearly two years, Thomas should get $288 from Stacy, the money in the register of the Court, and the $5531 that she still owed him in arrearages. (Id.)

In the Memorandum Opinion and Judgment the Court held that

> She [Stacy] never paid any part of the mortgage payment because she was a single parent, unemployed, and simply was unable to stay there. When Stacy failed to pay the mortgage payment, Thomas withheld the child support from her and paid it on the mortgage. The child support was about one-half of Stacy's share of the mortgage payment. (C.P. 92, lines 16-22) (RE 65)

This ruling is unsupported by the evidence. This is a manifest error. Firstly as a contract matter it should be pointed out that Stacy entered into this agreement voluntarily. (T.I. 11, lines 21-29) Secondly, the Court makes it sound as if she fled in poverty from this oppressive half mortgage payment. This is error as well since Stacy entered this agreement after she had already moved out of the former marital home. This is more than evident in the passage, "[a]t the time the divorce decree was drawn up I was no longer living there. I wasn't living there when the separate maintenance [property settlement and custody agreement] was drawn up. I had already moved out by then, I believe." (T.I. 12, lines 12-15)

Stacy, therefore, after having moved out of the former marital home, agreed to pay half the mortgage on that house in the original Property Settlement and Custody Agreement. Though she made this decision freely, Stacy was excused from paying $5531.00 in mortgage arrears because, "[s]he [Stacy] never paid any part of the mortgage payment because she was a single parent, unemployed, and simply unable to stay there." (C.P. 92, lines 16-18) (RE 65)

The Court did not recognize that Thomas was a single unemployed parent of two children, and he had to pay his half of the mortgage and Stacy's half as well. Also, the Court incorrectly noted that Stacy was "unable to stay there." (C.P. 92, lines 16-22) (RE 65) Stacy had moved out of the former marital residence approximately five months before entering into the agreement to pay half the mortgage.

Another manifest error was the Court holding that, "When Stacy failed to pay the mortgage payment, Thomas withheld the child support from her and paid it on the mortgage. The child support was about one-half of Stacy's share of the mortgage payment. (C.P. 92, lines 16-22) (RE 65) Though Stacy initially presented it as Thomas taking the money against her wishes, a few lines later she stated, "[h]e would send me an email an say, hey, I want to just take your child support for this month and apply it to what you owe me and I would e-mail back okay. Then when I lost my job I said, no, I need the money." (T.I. 15, line 29, 16, lines 1-3). Further, this is consistent with what Thomas testified to (T.III. 365, lines 11-29, 366, lines 1-19) and a separate signed agreement between the parties dated April 9, 2004, which was an attachment to Thomas' Answer to Complaint to Modify Prior Decree of Divorce filed December 10, 2004. (C.P. 47) (RE 33)

If the Court had forgiven Stacy this debt, it would not make the debt go away. The forgiveness would just transfer the debt from the person who refused to follow the Court order, to the one that actually followed the Court order. All this was done without a single note by the Court of a reason to forgive a contract breach. Again, there was no mention of the $5531 in the Memorandum Opinion and Judgment. There was also no mention of the fact that Thomas had to pay off a lien against Stacy for $4,626 before the house could sell. (T.III. 372, lines 5-23) If not for this lien there would have been another $4,626 realized from the sale of the house. The lien was money owed to a check cashing business (Cash Depot) where Stacy had cashed a check as a

part of a "Nigerian" check cashing scheme. (T.III. 371, lines 21-27) (see also Exhibit 7 pg 2) (RE 131) In short, she refused to pay on the mortgage ($5,531), this was forgiven (by omission), and Stacy realized a $4,626 gain by Thomas paying off her lien. All total she realized a $10,157 gain from the Court's ruling; where Thomas gained $4,049 from the sale of the house after paying off Stacy's $4,626, but considering he also paid Stacy's $5,531 portion of the mortgage, he really lost $1,482 ($4,049-$5,531= -$1,482). This is inexcusable considering that it was Thomas who was following the Court order – the Court order which was also an "agreed to" contract with mutual exchange of promises.

Finally, as a contract matter, Lowrey the court held "...the law favors the settlement of disputes by agreement..." and "...will enforce the Agreement... absent any fraud, mistake, or overreaching." Lowrey v. Lowrey, 919 So. 2d 1112, 1120 ¶30 (Miss. Ct. App. 2005). There was no evidence of fraud, mistake or overreaching in this matter. For all the stated reasons, this ruling was an obvious manifest error and a mistake of law and should be reversed and rendered. Stacy should be ordered to pay the $5531 along with interest to Thomas.

ISSUE THREE:
WHETHER THE TRIAL COURT ERRED IN CHANGING THE VISITATION SCHEDULE WHEN THE PARTY SEEKING THE CHANGES CREATED THE NECESSITY FOR THE CHANGES AND HAD UNCLEAN HANDS

Standard of Review

> Findings will not be disturbed on review unless the chancellor abused his discretion, was manifestly wrong, or made a finding which was clearly erroneous. This Court reviews questions of law, however, under a de novo standard. Broome v. Broome, 832 So. 2d 1247, 1251 ¶7 (Miss. Ct. App. 2002) (citations omitted).

"[H]e who seeks equity must do equity." Balius v. Gaines, 908 So. 2d 791, 802 ¶30 (Miss. Ct. App. 2005). In the case of Brennan, the Court recited the old maxim "...he who comes into equity must come with clean hands." Brennan v. Brennan, 605 So. 2d 749, 752 (Miss. 1992). In Riddick the Supreme Court has held the meaning of the maxim "...to be that no person as a complaining party can have the aid of a Court of equity when his conduct with

respect to the transaction in question has been characterized by wilful [sic] inequity." Riddick v. Riddick, 906 So. 2d 813, 825 ¶38 (Miss. Ct. App. 2004).

Stacy had the greatest case of unclean hands imaginable. As of the time of Thomas' last pleading, she had denied Thomas sixty-six (66) visitations and one-hundred seventy-nine (179) phone calls – a total of 245 counts of contempt. Further, if you add in the seventeen (17) mortgage payments she missed and the countless examples of intentionally attempting to injure Thomas' children's opinion of him, who knows what her total should have been.

Stacy will argue that Thomas was in contempt for the two missed support payments of June and July 2006 which are still a subject in this appeal as the contracted "grace period." Thomas believes his argument stands for itself and will abide by the ruling of this Court with respect to that issue. Further, Stacy may argue that Thomas was in contempt for not paying support by the beginning of each month. The property settlement agreement did not address this issue. However, after the Court addressed the issue in open court and stated, that in the absence of guidance in the agreement, support should be paid by the first of any month (T.I. 36, lines 27-29, T.I. 37, lines 1-6) (RE 132-133), Thomas adjusted his payment schedule in compliance immediately. (T.V. 617, lines 4-11)

The Court in Riddick, also held that "[t]he purpose of holding a party in civil contempt is to coerce action or non-action by a party." Riddick v. Riddick, 906 So. 2d 813, 824 ¶37 (Miss. Ct. App. 2004). Thomas complied immediately with the Court's ruling. Stacy, however continued to deny visitations and phone calls even after a more "standard" schedule was put in place.

The Court should have refused to hear Stacy's complaints until she proved that she had ever complied with the original order/agreement. She instead offered excuses such as M.A.B. being busy with church for an entire month (T.III. 330, lines 4-15) as an excuse for non-

compliance. Let's say for the sake of argument that Thomas was unreasonable in his demands for the weekends he wanted for visitation each month, he was still entitled to two weekends per month. (C.P. 15, ¶1) (RE 9) Stacy never even tried to comply with the order. If she did not like the two weekends Thomas chose – as the contract she voluntarily entered into allows – then she should have just picked the two she wanted and attempted delivery. After the first two weekends of any month pass by, to keep herself out of contempt, Stacy should have planned on Thomas, and more importantly M.A.B., getting the last two weekends of any month as a visitation period.

Instead of ensuring her own compliance, Stacy shows up for Court with excuses about why she (willfully) chose to violate the Court order. Further, she presented the issue as being one of bad communication on the part of the former husband and wife. However, how much more clear can communication be than a certified letter "every month... "...demanding visitations for two weekends," as Stacy had put it? (T.I. 72, lines 14-16) This was not bad communication. This was willful, contumacious, and obstinate contempt and unclean hands.

Also, it should be noted again, that Stacy complained that Thomas was drinking alcoholic beverages in front of M.A.B. in her first complaint. (C.P. 29 ¶ 9) (RE 19) and asking that he be sanctioned and enjoined for the behavior. (C.P. 30 ¶ 6 and 7) (RE 20) Yet at trial she admits that she doesn't know if he has been drinking or not, but that she has an occasional Martini in front of [M.A.B.]. (T.I. 23, lines 9-16) One does not get much dirtier hands than to claim that the other party is doing the very thing that the complainer is guilty of doing and for the guilty party to frivolously ask for sanctions against the innocent party!

Stacy also complained that Thomas had not paid child support for September and August of 2005. The Court even questioned Stacy about this directly in open court and Stacy repeated the claim in the passage, "THE COURT: So you're saying he didn't pay child support August and September 2005...THE WITNESS: yes, ma'am." (T.I. 25, lines 1-15) (RE 121) However,

on cross examination it was shown that Stacy had in fact received, signed, and cashed those checks with the memo lines purporting to be support for August 2005 and September 2005. (T.I. 32, lines 19-29, T.I. 33, lines 1-29, T.I. 34, lines 1-25).

Thomas even pointed out at trial that, "[b]ut I didn't feel as if she could create the problem and then request some kind of alteration because of the problem she created." (T.IV. 497, lines 6-8) Stacy set up all the barriers to complying with the Court ordered visitation and then requested relief from the barriers which she had erected. The Court in this matter committed manifest error in entertaining Stacy's complaint, much less in granting her capricious wishes in the form of relief. The Court's order granting relief to Stacy should, therefore, be reversed and rendered.

ISSUE FOUR:
WHETHER THE TRIAL COURT ERRED IN FAILING TO FIND THE APPELLEE (STACY) IN CONTEMPT OF COURT

Standard of review

"Contempt matters are committed to the sound discretion of the trial Court, and this Court will not reverse where the chancellor's findings are supported by substantial credible evidence." Weston v. Mounts, 789 So. 2d 822, 826 ¶17 (Miss. Ct. App. 2001).

The Court in Milam stated that "[c]ontempt is to be determined upon the facts of an individual case and is a matter for the trier of fact." Milam v. Milam, 509 So. 2d 864, 866 (Miss. 1987). Further, the Court in Cooper held that, "[a] contempt citation is proper only when the contemner has wilfully [sic] and deliberately ignored the order of the Court." Cooper v. Keyes, 510 So. 2d 518, 519 (Miss. 1987).

For all the previous examples of willful contempt on the part of Stacy, she should have been held in contempt of court. The facts in this case clearly delineate that Stacy's actions were willful and contumacious. This is especially true for the missed visitations, phone calls, and

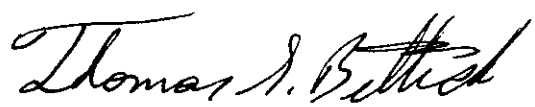
missed mortgage payments on which Stacy admitted to non-compliance to while on the stand. The trial Court abused its discretion in refusing to find Stacy in at least civil, if not criminal contempt for these matters. Further, the trial Court failed to apply the proper legal standard to the issues of contempt since it was obvious that Stacy's actions were a "willful and deliberate" refusal to comply with the existing and modified orders. This is especially true in light of the fact that she continued to violate the order even at that time of these proceedings (T.V. 640, lines 2-4), and continues to this day.

If this Court is unable to determine which of the two-hundred sixty plus acts of contempt were willful and deliberate from this record and reverse and render the trial Court's ruling, the Court should at least reverse and remand for the trial Court's determination as to which of those counts were willful acts of contempt and order that appropriate sanctions be enforced.

CONCLUSION

The Appellant herein submits that based on the propositions cited and briefed hereinabove, together with any plain error noticed by the Court which has not been specifically raised, the judgment of the trial Court should be reversed and rendered, and the matter remanded to the lower Court for further proceeds consistent with this Court's ruling. The Appellant further states to the Court that the individual and cumulative errors as cited hereinabove are fundamental in nature, and, therefore, cannot be harmless. The Appellant would further move this Court to assess the costs of the appeal to the Appellee.

Respectfully submitted,



Thomas G. Bittick, Esq., Appellant

CERTIFICATE OF SERVICE

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

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

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

Hon. Joseph A Kieronski, Jr.
P.O. Box 949
Meridian, MS 39302-0949

This the 11 day of September, 2007.

Thomas G. Bittick, MSB # 102288
Pro Se Appellant
Cutturini & Bittick, P.L.L.C.
115 E. Van Dorn Ave.
Holly Springs, MS 38635
662-551-1141
662-551-1142 (Facsimile)

AMENDED CERTIFICATE OF SERVICE

Pursuant to M.R.A.P. 25(a), I, Thomas G. Bittick, Pro Se Appellant, do hereby certify that on or about September 11, 2007, I did hand deliver the original and three copies of the Brief of Appellant to:

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

I further certify that I did hand deliver a copy of the Brief of Appellant on or about September 11, 2007, to the office of:

Hon. Joseph A Kieronski, Jr.
509 Constitution Ave
Meridian, MS 39302

This the 13th day of September, 2007.

Thomas G. Bittick

Thomas G. Bittick, MSB #[redacted]
Pro Se Appellant
Cutturini & Bittick, P.L.L.C.
115 E. Van Dorn Ave.
Holly Springs, MS 38635
662-551-1141
662-551-1142 (Facsimile