2008-CA-00037 C

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2008-TS-00037

JAMIE RENEE BUCHANAN (now McGRAW) **APPELLANT**

VERSUS

ERIC BUCHANAN **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible conflicts, disqualifications or recusal:

1.	Jamie Renee Buchanan (Now McCraw)	Appellant
2.	Eric Buchanan Elizabeth "Liz" Thornhill	Appellees
3.	Renee McBride Porter Porter Law Firm, P.A. P.O. Box 982 915 Main Street Columbia, Mississippi 39429	Attorney for Appellees
4.	Joseph L. Turney 716 Main Street Columbia, Mississippi 39429	Attorney for Appellant
5.	Honorable Judge Sebe Dale, Jr. Chancellor, 10th Chancery District P.O. Box 1248 Columbia, Mississippi 39429	Chancellor

Respectfully submitted, on this the 30th day of July, 2008.

Renee McBride Porter, MSB: [redacted]

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STATEMENT OF THE CASE

Eric and Jamie were lawfully married on or about 30 June 1997 in Marion County Mississippi. The parties lived together as husband and wife until the date of their final separation on or about 15 June 1999. Of the marriage union, one child was born, namely, Ashton Renee Buchanan born 21 October 1997. On 8 July 1999, Eric and Jamie filed a Joint Complaint for Divorce on the grounds of irreconcilable differences. Also on 8 July 1999, the parties filed a Child Custody, Child Support, and Property Settlement Agreement.

Nonetheless, on 9 November 1999, Jamie filed a Complaint for Divorce on the grounds of habitual cruel and inhuman treatment and seeking physical custody of the minor child. Eric filed his Affirmative Defenses and Answer to Complaint on 13 December 1999. Prior to Eric filing his affirmative defenses and answer to Jamie's complaint, Jamie filed a Motion for Temporary Features on 9 November 1999. An Order Granting Temporary Features was entered 21 September 2000, giving temporary custody of the minor child to Jamie and reasonable visitation rights to Eric. The Order further provided Eric was to pay unto Jamie the amount of $160.00 per month in child support and $40.00 per month for transportation costs.

On 5 December 2000, Eric and Jamie filed a Joint Motion for Dismissal of Contested grounds stating they had agreed to a divorce on irreconcilable differences. An Order Dismissing Contested Grounds was entered on 5 December 2000. The parties next filed a Child Custody, Visitation, Support, and Property Settlement Agreement on 8 December 2000, in which the parties agreed to share joint legal custody with primary physical custody being vested in Jamie. The agreement further granted unto Eric visitation rights in alternate two week periods, as well as, other specified time periods.

The agreement also provided that Eric would pay unto Jamie the amount of $175.00 per month in child support. A Final Judgment of Divorce was entered on 13 December 2000, granting Eric and Jamie a divorce on the grounds of irreconcilable differences. The Final Judgment further approved and adopted the Child Custody, Visitation, Support, and Property Settlement Agreement filed 8 December 2000.

Eric filed a Motion for Emergency Custody on 21 May 2001 alleging a material change in circumstances in that Jamie had abandoned the minor child. An Order Granting Emergency Custody was entered 21 May 2001, granting unto Eric temporary physical custody of the minor child. In response, Jamie filed a Motion for Relief from Judgment or Order on 12 June 2001, asking the Court to strike Eric's Motion for Emergency Custody and set-aside the Order Granting Emergency Custody. On 5 November 2001, Jamie filed a Petition for Child Custody, Relief from Emergency Order, and Contempt of Court, alleging Eric was in arrears in his child support and asserting custody of the minor child should be returned to her. Jamie filed a Motion for Fiat Order for Trial Date Setting on 24 January 2002.

Eric next filed a Complaint for Modification of Final Judgment of Divorce on 1 March 2002, asserting there had been a material change in custody adverse to the interests of the child and that it was in the best interests of the child for custody to be modified, vesting primary legal and physical custody in Eric. On 5 March 2002, Eric filed his Answer to Petition for Child Custody, Relief from Emergency Order, and Contempt of Court. An Agreed Order was entered on 6 March 2002, in which the Emergency Order was vacated, set aside, and held for naught, and further stated the parties were to return to the previously ordered Judgment of Divorce, as well as, their approved and ratified Property Settlement Agreement.

On 10 April 2002, Eric filed his Complaint for Citation of Contempt of Court and for Modification of Final Judgment of Divorce and for Review, in which he asked the Court to find Jamie in contempt of court for violating the Agreed Order, and for primary physical custody of the minor child, among other things. Jamie next filed her Answer and Counter-Claim for Contempt of Court, asserting Eric should be held in contempt for willfully refusing to return their daughter. An Order of Modification was enter on 10 July 2002, vesting custody of the minor child in Eric and granting unto Jamie reasonable visitation rights. Jamie filed a Petition to Cite Eric in Contempt and for Other Relief on 30 January 2003, asking the Court to hold Eric in contempt and to return physical custody of the minor child to her. On 30 January 2003, Eric filed a Writ of Habeas Corpus alleging the minor child was being held by the Jamie and asking the Court to direct the Sheriff to take custody and possession of the minor child and return her to Eric. The Writ of Habeas Corpus was granted by the Court on 30 January 2003. An Order of Modification was entered on 26 June 2003, ordering that physical custody of the minor child should remain in Eric and furthered provided for visitation. On 26 June 2003, Jamie filed a Motion to Alter or Amend Judgment, asking the Court to amend the visitation schedule set forth in the previous Order of Modification.

Eric and his mother, Mary Elisabeth Thornhill, filed a Petition for custody and Other Relief on 6 July 2004, asking the Court to award unto Mary and Eric joint legal custody of the minor child and vest primary physical custody in Mary. Jamie then filed a Response to Petition for Custody and Counter-Petition on 19 August 2004, asking the Court to award joint legal custody of the minor child unto Jamie and Mary and to vest primary physical custody in Jamie. On 2 September 2004, Eric filed his Answer to Counter-Petition. An Order for Continuance was entered on 12 January 2005, directing Eric to

exercise his custody in the home and presence of Mary and further directing Jamie, on a temporary basis, only be allowed daytime visitation with the minor child. From that time period, specifically January 12, 2005, until June 9, 2006, Ashton was in the custody of Mary Elizabeth Thornhill. Mary Elizabeth Thornhill had custody of Ashton until June of 2006.

At the trial on the merits and partly because of a home study that was approved, custody was modified and vested in Jamie in 2006. The social security checks paid to the minor child on behalf of Eric were ordered to be deposited into a guardianship banking account. Since the time custody was returned to Jamie the following has occurred: (1.) The minor child was physically abused by her mother and step father. (2.) The minor child's mother, after guns were ordered to be removed from the home, shot Ashton's dog. (3.) The minor child's grades went from A's and B's to C's and D's. (4.) When Ms. Thornhill picked up Ashton from school for visitation, she is not properly dressed, not even wearing panties. (5.) Ashton had vaginal warts. (6.) Ashton's mother would will not take her to get proper dental care or medical care. (7) Jamie did not follow the court order and deposit the social security checks into an account and in fact cashed the same. Dr. John Pat Galloway was appointed to evaluate this matter and James D. Johnson was appointed guardian ad litem. After a trial the Court found that custody should be vested once again in Appellant, Liz Thornhill.

The case was then appealed.

SUMMARY OF THE ARGUMENT

Before this Court can overrule a Chancellor it must be found that the chancellor has abused his discretion, was manifestly wrong or has made a finding which was clearly erroneous, none of which are present in the case at hand. It is clear from the ruling that the Chancellor looked at all the evidence presented in this matter and made his determination based on the best interest of the child. This ruling is supported by the evidence and testimony submitted at trial. This is a custody case where it is clear that the Court must look at the best interest of the child. In this case the Court after looking at the best interest of the child found that custody should be vested in Mary Elizabeth Thornhill. Awarding custody to third parties has been approved and is proper when it is in the best interest of a child. In this case the appointment of a guardian ad litem was not mandatory, and therefore the Court was not obligated to follow the dictates of the guardian ad litem. However, if this Court deems the appointment necessary then the Chancellor complied with the dictates of this Court in that the Chancellor did include a summary review of the recommendations of the guardian ad litem in his findings. Jamie did not present her financial situation to the Court nor did she put a financial declaration into the record. Therefore any complaint now based upon the financial inability of Jamie is not well taken as she did not present evidence to the Court as to her financial ability. This Court after review at trial, found that it was in the best interest of Ashton for her custody to be vested in Appellee, Mary Elizabeth Thornhill, and the court ordered both parties to pay the costs. This Order is supported by the evidence and must be affirmed.

ARGUMENT

I. The Chancellor will not be overturned unless he made a decision that was in manifest error.

The law is clear that a Chancellor is vested with great authority to rule as he deems necessary in a domestic relations case, and that further his decision will not be overturned unless he is in manifest error. The court in Pearson v. Pearson, 761 So. 2d 157 (Miss. 2000) stated "Our scope of review in domestic relations matters is limited by our familiar substantial evidence/manifest error rule." Magee v. Magee, 661 So. 2d 1117, 1122 (Miss. 1995). " This Court will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard" See Johnson v. Johnson, 650 So. 2d 357 (Miss. 1994). See also McEwen v. McEwem, 631 So. 2d 821, 823 (Miss. 1994).The only way an appellate court can reverse a chancellor's ruling of fact is when there is not "substantial, credible evidence" to justify his findings. The Court referenced Parsons v. Parsons, 678 So. 2d 701,703 (Miss. 1996), saying the award on appeal will not be disturbed unless it is found to be against the overwhelming weight of the evidence or manifestly in error. The court in Carr v. Carr, 480 So. 2d 1120 (Miss. 1985) stated that " Findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong; this is not whether the finding relates to evidentiary fact questions, or to ultimate fact questions" Tucker v. Tucker, 453 So. 2d 1294 (Miss. 1984). The Court went on to conclude that if there is evidence in the record that support the chancellor's finding of fact, then the finding should not be disturbed. "The Court is bound by the findings unless it can be said with a reasonable certainty that those findings were manifestly wrong and against the overwhelming weight of the evidence." Torrence v. Moore, 455 So. 2d 778 (Miss. 1984).

"An appellate court is not at liberty to overturn decisions of the chancellor unless they are

manifestly in error." Devereaux v. Devereaux, 493 So. 2d. 1310 (Miss. 1986). The Devereaux court stated again that they would not reverse the chancellor's finding of facts on contradictory testimony unless it is manifestly wrong. Again the law is that "[t]his Court will not disturb the factual findings of a chancellor when supported by substantial evidence unless it can say with reasonable certainty that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard." Morgan v. West, 812 so.2d 987, 990 (Miss. 2002); Cummings v. Benderman, 681 So.2d 97, 100 (Miss. 1996). Further, in order to disturb the findings of a chancellor this court must find that the chancellor has abused his discretion, was manifestly wrong or has made a finding which was clearly erroneous. See Bank of Miss. V. Hollingsworth, 609 So.2d 422 (Miss. 1992). The chancellor's determination regarding the weight and credibility of witnesses is given deference when there is conflicting testimony. See. Scott Addison Constr., Inc. v. Lauderdale County Sch. Sys., 789 So.2d 771 (Miss. 2001); Murphy v. Murphy, 631 so.2d 812 (Miss. 1994); Culbreath v. Johnson, 427 so.2d. 705 (Miss. 1983).

In this case this matter was tried for three days and the record is full of evidence to support the Court's findings. The Court found that "Jamie's life from the time she and Eric were together, both before and after their marriage, has been marked with a rather tumultuous environment lacking in stability, demonstration of determination and in strength of character. The result has been exposure of Ashton to activities and circumstances not conducive to her best interest and welfare. Instances of inappropriate sexual behavior by Jamie in the presence of the child, engaging in drug use even with Eric before their separation, cohabitation with one or more persons to whom she was not married, and all that at times when Ashton was in her care and was present, demonstrate a lack of thoughtful maturity

and responsibility requisite to the proper care, training and upbringing of a child, and particularly up to the present age of Ashton." Memorandum Opinion, pate 6). "The instance of Jamie shooting and killing Ashton's pet dog without explanation whatsoever to Ashton was an extremely traumatic event for Ashton, and demonstrates Jamie's lack of mature concern for Ashton's emotional well being. Repeated reports by others of instances of Ashton's appearing at school, arriving at Liz's home, and other locations, all in unkempt condition as to clothing, and with body odor all lend credence to the Court's finding and opinion that Dr. Galloways' stated opinion that Jamie has a difficult time being a parent is certainly correct." (Memorandum Opinion, page 7.

Before this court can disturb the findings of the Chancery Court it must find that the chancellor has abused his discretion, was manifestly wrong or has made a finding which was clearly erroneous, none of which are present in the case at hand. It is clear from the ruling that the Chancellor looked at all the evidence presented in this matter and made his determination based on the best interest of the child.

II. The Ruling is supported by the evidence submitted at trial.

The record is complete with information from witnesses who testified and supported the ruling of Court.

A. Dr. John Pat Galloway testified:

1. That in Mrs. McCraw's home the child experiences problems regarding her sexuality and specifically Dr. Galloway stated that in the home of the Appellant (Jamie) the minor child is viewed and treated as a sexual perpetrator. "She's viewed as a perpetrator." ((Record, page 9, line 16 and 17).

2. That in the care of her mother the minor child has "an inordinate amount of fear" (Record page 10, line 20) whereas in contrast to living with her grandmother the child is at ease.

3. Dr. Galloway testified that Ashton was careful around her mother to not say things that would bring punishment from the step-father, and that her fear was not normal fear. (Record page 13, line 6).

B. Jamie McCraw:

1. Jamie McCraw admitted that she knew that there was a court order providing that she was to deposit funds received by Ashton into a bank account but that despite the court order she called social security and had the checks sent to her. (Record page 61, lines 11 through 13).

2. Jamie admitted that her daughter when living with Liz Thornhill had perfect attendance and A's and B's but that now after moving in with her mother and on April 19, 2007, Ashton did not have A's and B's and actually had a D in Spelling (Record page 70, line 21).

3. Jamie admitted that Ashton went to school with no panties on. (Record page 80, line 10).

4. Jamie admitted that while Ashton had been in her care she had vaginal warts now, and that Ms. Thornhill the Appellee herein, had taken Jamie to the doctor to have the warts taken care of. (Record pages 83 and 84). Jamie admitted that this vaginal wart situation had not occurred with Jamie was with her grandmother, Liz Thornhill.

5. Jamie admitted that she was hospitalized for chemical poison while Ashton was in her care and placed in intensive care. (Record page 85, line 25).

6. Jamie admitted that she had shot Ashton's pet dog (Record 88, line 16).

C. Liz Thornhill:

1. Liz Thornhill testified that when Jamie came to her home she would have dirty underwear and be unkempt. (Record page 134).

2. Liz Thornhill testified that Ashton's Uncle, A.J., has abused Ashton (which was confirmed by Dr. Galloway) , and that Jamie allows Ashton to continue to stay alone in the home with A.J. (Record page 152, line 16.)

3. Liz Thornihill testified that she only kept Ashton out of school for two days, and during those missed days Liz made sure Ashton completed her assignments; she also checked Ashton out early one day for a dentist appointment. (Record page 173.)

D. Robert R. Thornhill

1. Robert Thornhill testified that Ashton has had bruises when she arrived at their house. Ashton told him one time it was from her step daddy when he beat her and drug her down the hall, and the other was from her mama. (Record page 193)

2. Robert Thornhill testified that he picks Ashton and takes her home now because his wife and sister-in-law were threatened by Jamie, in contrast to Ashton missing thirty-five (35) days while in Jamie's care (see Exhibit 7). (Record 196)

3. Robert Thornhill testified that every time he picks Ashton up on Sunday and most of the time when he picks her up on Wednesday, she has a very strong stink and smell. On one occasion Ashton had dog waste on her feet and shoes. Jamie made Ashton wear soaking wet shoes on a cold day as well. (Record page 197)

E. Kathey Perry

1. Kathey Perry testified that when she would go with her sister, Liz Thornhill, to pick Ashton up her condition was always "very deplorable, very dirty nasty, reeked of pungent odor, hair unbrushed, teeth unbrushed." Ashton would have sores all over her from flea and ant bits. (Record page 200)

2. Kathey Perry testified that Ashton had told her the bruises on her body were from her stepdaddy and her mother hit her. Her stepfather hit her on and on. (Record page 201)..

The record establishes that in the short time Ashton was returned to Jamie's care her grades fell, she was absent 35 days from school, she had vaginal warts, her pet dog was killed by her mother, she was abused by her mother and step-father, she was in an unkempt situation, she was allowed to go to school without underware on. That the above evidences the fact that a material and substantial change had occurred and supports this Court's decision.

F. Trial Exhibits. There are some 25 trial exhibits including the Pine Belt Records of Ashton and her school records. These exhibits confirm Ashton's fear at her mother's home, confirm Ashton's significant reduction in her grades, and confirm that Ashton when from perfect attendance with her grandmother to missing 35 days when she lived with her mother.

III. The Court must look at the best interest of a child before making any child custody decision.

As this Court stated in Riley v. Doerner, 677 So.2d 740 (Miss. 1996) "...we take this opportunity to clarify that a chancellor is *never* obliged to ignore a child's best interest in weighing a custody change; in fact, a chancellor is bound to consider the child's best interest above all else." Id. at

744. (Emphasis original.) The Riley court went on to state "'[a]bove all, in modification cases, as in original awards of custody, we never depart from our polestar consideration: the best interest and welfare of the child.'" Id. quoting Ash v. Ash, 622 So.2d 1264, 1266 (Miss. 1993)(citing Marascalco v. Marascalco, 445 So.2d 1380, 1382 (Miss. 1984)). See also, Albright, 437 So.2d at 1005.

The Chancellor in this matter made a very long and detailed finding regarding the welfare and best interest of the minor child in this case. The Chancellor found that it was in the best interest of the minor child to vest custody in Liz Thornhill.

IV. The Court can award custody to a third party in certain situations.

As this court noted in Barnett v. Oathout, 2001-CA-01309-SCT (Miss. 10/30/03), in addressing the natural parent presumption, this Court noted that "it is presumed that the best interests of the child will be preserved by it remaining with its parents or parent. In order to overcome this presumption there must be a clear showing that the parent has (1) abandoned the child, or (2) the conduct of the parent is so immoral (as) to be detrimental to the child, or (3) the parent is unfit mentally or otherwise to have the custody of his or her child." Grant v. Martin, 757 so.2d 264, 265 (Miss. 2000)(quoting McKee v. Flynt, 630 So.2d 44, 47 (Miss. 1993).

In this case Jamie agreed for Liz to have custody of her minor child by entry of the Order on June 26, 2003. Jamie has now forfeited her right to rely upon the natural parent presumption. Grant v. Martin , 757 So.2d 264 (Miss. 2000) held that " that a natural parent who voluntarily relinquishes custody of a minor child, through a court of competent jurisdiction, has forfeited the right to rely on the existing natural parent presumption." The Court went on to discuss "This new rule not only reaffirms that the polestar consideration in all child custody cases is the best interest of the child,

but also gives the chancellor the authority to make a "best interest" decision in voluntary relinquishment cases without being fettered by the presumption in favor of natural parents. Grant v. Martin, 757 So. 2d 264 (Miss. 2000).

V. Whether the lower Court erred in failing to follow the Mississippi of the Guardian Ad Litem by granting paramount physical custody of the minor child with a third party rather than the natural parent when no determination of current unfitness of the natural parent has been made and where the natural parent has not voluntarily relinquised her custody to a third party?

In this case the appointment of a guardian ad litem was not mandatory and was made by the Court by it's Order dated January 10, 2007. (Record Excerpt page 35). That thereafter and after a Motion for Emergency Custody was filed by the Appellee alleging that it was urgent that custody be modified and vested in Appellee, Liz Thornhill, the Court set this matter for trial on an early date and ordered that Dr. John Pat Galloway evaluate this matter. (Record Excerpt, page 46).

Dr. John Pat Galloway testified that Ashton should be with her grandmother.

This Court in the case of Tanner v. Tanner,No. 2006-CA-00423-COA. Court of Appeals of Mississippi, is analogous as the appointment of a guardian ad litem was not necessary in that case. The Court in Tanner found that the appointment of a guardian ad litem was not mandatory but was merely to assist the Chancellor so the Chancellor was not obligated to follow the guardian ad litem's report. In this case the appointment of a guardian ad litem was not necessary but merely to assist the Chancellor so the Court was not obligated to follow the dictates of the guardian ad litem.

This Court has made it clear that only when the appointment of the guardian is mandatory and the chancellor disagrees with the guardian's report we will require the chancellor to summarize the guardian's recommendation and why the chancellor chose to disregard it. See Ponder v. Ponder, 943 So.2d 716, 720(¶ 16) (Miss.Ct.App. 2006); Balius v. Gaines, 914 So.2d 300, 305-06(¶ 13) (Miss.Ct.App. 2005); Passmore v. Passmore, 820 So.2d 747, 751(¶ 13) (Miss.Ct.App. 2002).

If the appointment of a guardian ad litem is deemed by this Court to be necessary then the Chancellor complied with the dictates of this Court in that the Chancellor did include a summary review of the recommendations of the guardian ad litem in his findings. S.N.C. v. J.R.D., Jr., [755 So.2d 1077, 1082 (Miss. 2000)]. The Court's findings did include the reasons for rejecting the guardian ad litem's findings and that he followed the findings of Dr. John Pat Galloway. The Court is not bound to follow findings of a guardian ad litem. The court has found "While a chancellor is in no way bound by a guardian's recommendation, a summary of these recommendations in addition to his reasons for not adopting the recommendations is required in the chancellor's findings of fact and conclusions of law." Hensarling v. Hensarling, 824 So.2d 583, 587 (Miss. 2002).

This Court in it's findings finds that "The Court has given careful attention to the evidence before it. The reports and opinions of Dr. Galloway and of the Guardian Ad Litem, James D. Johnson, Esquire, have been scrutinized and considered throughly, and the Court notes that there are differences of assessment and emphasis between the two, as well as ultimate recommendation by each, that of Dr. Galloway favoring Liz and that of Mr. Johnson favoring Jamie insofar as dominate physical custody is concerned. The Court, upon its most serious consideration and evaluation declines to follow

the ultimate recommendation as to custody offered by the Guardian Ad Litem." (Record Excerpt page 64).

The Court therefore heard and considered the report of the guardian ad litem but did not follow the same. The Court was correct and should be affirmed as the Court followed the procedure set forth by this Honorable Court regarding guardian ad litems.

VI. Whether the lower Court erred in failing to award attorney's fees and cost from grandparent, allow the Guardian Ad Litem to be paid from the funds held for the benefit of the minor child, and then assessing the Guardian Ad Litem's fees equally against the parties without regard to the financial ability of the parties?

Jamie did not present her financial situation to the Court nor did she put a financial declaration into the record. For her to now complain that the Court did not consider her financial ability should not be well taken as the Court was not presented evidence as to her financial ability. The case of McIntosh v. McIntosh, 977 So. 2d 1257 (Miss., App. 2008) is a recent case which affirms the long standing rule that you must raise issues at the trial level to perfect a right to appeal. The Mcintosh case provided "Therefore, we find that this issue is procedurally barred because it was not first raised at the trial level. Brown v. Thompson, 927 So.2d 733, 738 (¶ 16) (Miss. 2006) (citing Scott v. State, 878 So.2d 933, 963 (¶ 81) (Miss. 2004)). A chancellor should only grant attorney's fees in situations where the requesting party can establish an inability to pay. Id. (citing Dunn v. Dunn, 609 So.2d 1277, 1287 (Miss. 1992)). Jamie did not establish this inability and this issue is not properly before this Court.

Mississippi Rule of Civil Procedure No. 17 provides: "(d) Guardian ad litem; how