IN THE SUPREME COURT OF MISSISSIPPI

NO. 2008-~~TS~~-CA-01246 SCT E

VICKI D. WHITE, APPELLANT

v.

JOHN R. WHITE, APPELLEE

BRIEF OF APPELLEE

Appeal from the Chancery Court of Tishomingo County, Mississippi
Cause No. 97-0369

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JOHN R. WHITE, **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 disqualification or recusal.

1. Vicki D. White, Appellant
2. John R. White, Appellee
3. Honorable Kenneth Burns, Chancery Court Judge
4. Helen Bagwell Kelly, Esquire, Trial and Appellate Attorney for Appellant
5. Adam A. Pittman, Esquire, Appellate Attorney for Appellant
6. Gregory D. Keenum, Esquire, Trial and Appellate Attorney for Appellee
7. Lisa A. Koon, Esquire, Guardian *Ad Litem* for Minor Child.

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Attorney for Appellee

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STATEMENT OF ISSUES

1. Did the trial court correctly determined that it had jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) to hear the custody matter?

2. Was the trial court's decision to award custody of the minor child, Alexander, to Appellee an appropriate exercise of the court's discretion that should be affirmed?

STATEMENT OF THE CASE AND OF FACTS

Appellee John R. White adopts the statement of procedural history and facts as set forth by the trial court in the opinion dated May 16, 2008.

Any additional facts required to support arguments in this brief will be included within the appropriate sections of the argument.

SUMMARY OF THE ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT IT HAD JURISDICTION UNDER THE UCCJEA TO HEAR THE CUSTODY MATTER.

The trial court correctly determined that it had exclusive continuing jurisdiction over the custody proceedings. The Mississippi court had home state jurisdiction at the time of the original custody proceedings, and the court had exclusive continuing jurisdiction under the UCCJEA because the minor child ("Alexander") and the Appellee John R. White ("Rusty") had maintained a significant connection with Mississippi. Rusty had lived continuously in

Mississippi following the divorce, and Alexander had regularly visited Rusty in Mississippi for extended periods throughout Alexander's life.

The Mississippi court did not lose jurisdiction as a result of any failure on the part of Rusty to make disclosures provided for in the UCCJEA. The disclosures are not jurisdictional, and under the facts of this case they were unnecessary. The court appropriately determined that it should not decline jurisdiction as an inconvenient forum because there was no other state that was a more convenient forum, and there was no other state in which there had ever been custody proceedings involving these parties.

II. THE TRIAL COURT'S DECISION TO AWARD CUSTODY OF ALEXANDER TO RUSTY WAS AN APPROPRIATE EXERCISE OF THE COURT'S DISCRETION AND SHOULD BE AFFIRMED.

The trial court correctly determined that a material change of circumstances had occurred that adversely affected Alexander. The change of circumstances included interference by Appellant Vicki D. White ("Vicki") in visitation between Alexander and Rusty, including removal of Alexander from Rusty's care without notice to Rusty or to the court. Additional circumstances included Vicki's failure to make sure that Alexander attended school when he was in her care, and serious deterioration in Alexander's grades when he was in Vicki's care as compared to his grades when he was in Rusty's care. Related to this was Vicki's acknowledged inability to discipline Alexander, and her lack of insight into improving that deficit.

The trial court then appropriately applied the relevant custody factors set forth in *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983), and correctly determined that award of custody to Rusty was in Alexander's best interest.

ARGUMENT

I. THE TRIAL COURT CORRECTLY DETERMINED THAT IT HAD JURISDICTION UNDER THE UCCJEA TO HEAR THE CUSTODY MATTER.

On December 15, 2006, the trial court held that the court had not had jurisdiction over Vicki at the time it issued the order dated July 20, 2006, awarding emergency custody of the three children to Rusty, and it set that order aside. (Appellant's Record Excerpts ("R.") p. 44.) At that point Alexander, who had just turned twelve, returned to Texas with Vicki.

Rusty then filed a motion under Rule 65, again seeking custody of Alexander. (R. p. 48.) Vicki opposed the motion, and also filed a motion to dismiss on the ground that the court lacked jurisdiction under the UCCJEA. (R. p. 52.) These matters were heard on January 23, 2007, and April 4, 2008. On January 22, 2007, Vicki had filed a custody action in Texas. (R. p. 64.)

Regarding the standard of review applicable to the jurisdiction issue, this court has recently stated: "'Whether the chancery court had jurisdiction to hear a particular matter is a question of law, to which this Court must apply a de novo standard of review.' *In re Guardianship of Z.J.*, 804 So. 2d 1009, 1011 (¶ 9) (Miss. 2002)." *Shadden v. Shadden*, ___

So. 3d ___, 2009 WL 1383480, at *1 (¶ 7) (Miss. Ct. App. 2009) (not yet released for publication).

A. The Disclosures Required Under The UCCJEA Are Not Jurisdictional And Were Not Required In The Present Case Because The Information To Be Included In The Disclosures Was Already Available To The Court.

In her appeal, Vicki first argues that Rusty failed to comply with the provisions of Miss. Code Ann. § 93-27-209. That section directs that each party, "in its first pleading or in an attached affidavit," shall give information under oath regarding the child's present address, where the child has lived during the last five years, the names and addresses of the persons with whom the child has lived during that period, and information regarding any other custody proceedings or other persons who might claim a right to custody or visitation with the child.

In the present case, the trial court had already presided over the proceedings in which the emergency custody order of July 20, 2006, was set aside. This was not the first time the court had considered this issue and these parties, and all the information required in the disclosure either was before the court or was not relevant.

In making her argument that the trial court erred by exercising jurisdiction over the custody proceeding, Vicki relied on a Mississippi decision that had been decided under the prior law, the Uniform Child Custody Jurisdiction Act (UCCJA). (Appellant's Br. pp. 13-

14.) Under the prior law there was a split of authority on the question of whether the failure of a party to provide the disclosures deprived the trial court of jurisdiction.

Vicki failed to inform the court, however, that this ambiguity had been eliminated in the revisions contained in the UCCJEA, which was enacted in 2004 and governs these proceedings. Under the revised law, the failure to submit the declarations does not deprive the court of jurisdiction to hear the case.

Paragraph (2) of § 93-27-209 now sets forth the remedy that is available if a party fails to submit the declarations:

> (2) If the information required by subsection (1) is not furnished, the court, upon motion of a party or its own motion, *may stay the proceeding* until the information is furnished.

(Emphasis added.)

In case that language is not clear enough, the Commentary to the Uniform Law from which this section was adopted states the following:

> Subsection (b) has been added. It authorizes the court to stay the proceeding until the information required in subsection (a) has been disclosed, *although failure to provide the information does not deprive the court of jurisdiction to hear the case.* This follows the majority of jurisdictions which held that failure to comply with the pleading requirements of the UCCJA did not deprive the court of jurisdiction to make a custody determination.

Unif. Child Custody Jurisdiction & Enforcement Act § 209, ULA Commentary (emphasis added).

Even in the absence of case law interpreting this section, the language and intent of the revised statute are clear and should have been brought to the attention of this Court by the appellant.

B. Mississippi Had Exclusive Continuing Jurisdiction Over Alexander's Custody Determination.

At the hearing on January 23, 2007, the trial court began by considering Vicki's motion to dismiss for lack of jurisdiction. (Tr. 1/23/07 p. 3.) Counsel for Vicki first acknowledged the undisputed fact that the Mississippi court had home state jurisdiction at the time of the initial custody order in 1998. (Tr. 1/23/07 p. 4.) She then acknowledged that under Miss. Code Ann. § 93-27-202, titled "Exclusive continuing jurisdiction," the court that had made the initial custody determination had "the exclusive, continuing jurisdiction over the determination" of custody until the occurrence of certain events. (Tr. 1/23/07 p. 4.)

The statute states, rather confusingly:

> (1) Except as otherwise provided in Section 93-27-204 [concerning emergency jurisdiction], a court of this state which has made a child custody determination consistent with Section 93-27-201 or 93-27-203 has exclusive, continuing jurisdiction over the determination until:
>
> > (a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

> (b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in this state.

Miss. Code Ann. § 93-27-202.

Paragraph (b) is inapplicable to the case because Rusty does continue to reside in this state.

In order to find that it has lost jurisdiction under paragraph (a), the court must find, first, that the child, or the child and one of the parents, have no "significant connection" with this state; and, second, that "substantial evidence" is no longer available in this state regarding the child's "care, protection, training, and personal relationships."

Again, the Commentary to the Uniform Law is helpful:

> If the relationship between the child and the person remaining in the State with exclusive, continuing jurisdiction becomes so attenuated that the court could no longer find significant connections and substantial evidence, jurisdiction would no longer exist. . . . The use of the phrase "a court of this State" under subsection (a)(1) makes it clear that the original decree State is the sole determinant of whether jurisdiction continues.

Unif. Child Custody Jurisdiction & Enforcement Act § 202, ULA Commentary.

As clarified by the Commentary, the "significant connection" to be examined is the relationship between the child and the person who has remained in the state that had initially exercised jurisdiction. The decision that was before the court was whether the relationship between Alexander and Rusty was "so attenuated that the court could no longer find significant connections," and whether the court could no longer find substantial evidence in the state related to the child's life and welfare.

Since this decision is left solely to the court that previously heard the matter, it is an exercise of discretion by that court, and will be reversed only if "the chancellor was manifestly wrong or clearly erroneous" or "if he applied an erroneous legal standard." *Smith v. Smith*, ___ So. 3d ___, 2009 WL 1451340, at *2 (¶ 6) (Miss. Ct. App. 2009) (not yet released for publication).

Vicki has not demonstrated that the trial court erred in concluding that the court had continuing jurisdiction. Although there are no recent Mississippi cases on the issue, the trial court's decision was consistent with Mississippi court decisions prior to the enactment of the UCCJEA. In *Robinson v. Jackson*, 794 So. 2d 290 (Miss. Ct. App. 2001), for example, the court held: "Given that Mississippi was the child's birthplace and place of residence for a substantial part of her early life and was the father's place of residence, we are satisfied that a 'significant connection' within the contemplation of the statute was shown." *Id.* at 292 (¶ 4).

Courts from other jurisdictions that have adopted the UCCJEA have uniformly upheld the exercise of jurisdiction on comparable facts. Examples include *White v. Harrison-White*, 280 Mich. App. 383, 394, 760 N.W.2d 691, 698 (2008) ("[T]he significant connection that permits exercise of exclusive, continuing jurisdiction under [UCCJEA] exists where one parent resides in the state, maintains a meaningful relationship with the child, and, in maintaining the relationship, exercises parenting time in the state."); *Wallace v. Wallace*, 224 S.W.3d 587, 590-91 (Ky. Ct. App. 2007) (reversing a trial court determination that the court lacked continuing jurisdiction, and stating that "clearly under the UCCJEA and even applying

that court's deference to the 'home state' analysis, Kentucky has exclusive, continuing jurisdiction over custody matters pertaining to Cody"); *West v. West*, 364 Ark. 73, 216 S.W.3d 557 (2005) (although ex-wife and children resided in another state, children had a sufficient connection to forum state, and thus, forum court had exclusive, continuing subject-matter jurisdiction under UCCJEA); *Bjornson v. Bjornson*, 20 A.D.3d 497, 499, 799 N.Y.S.2d 250, 252 (2005) ("[C]ontrary to the mother's contention, the record did not support a conclusion that neither she nor the child lacked [*sic*] a significant connection to New York and that substantial evidence was no longer available in this state concerning the child's care, protection, training, and personal relationships. Thus, the Supreme Court has jurisdiction over the matter under the UCCJEA."); and *Fish v. Fish*, 266 Ga. App. 224, 226, 596 S.E.2d 654, 656 (2004) ("Based on Jeffrey Fish's continuous residency, the significant relationship he maintains with his children, and the extended custodial visitation of his children in this State, it cannot be said that neither the children nor the parents in this case have a substantial connection with Georgia.").

There is another ground for affirming the trial court's exercise of jurisdiction. At the time of the hearing, Counsel for Vicki acknowledged the ongoing jurisdiction in statements to the court. Counsel stated that "under the UCCJEA, Section 93-27-202, the law bestows exclusive continuing jurisdiction on the state of Mississippi." (Tr. 1/23/07 pp. 3-4.) And again, moments later: "I would submit to the Court that under the UCCJEA, even though Mississippi has continuing jurisdiction, this is not the proper forum to hear issues regarding this child's care, custody and control." (Tr. 1/23/07 p. 5.)

In her appeal, Vicki now claims that the trial court "erred for failing to consider whether the Chancery Court of Tishomingo County had lost continuing and exclusive jurisdiction over Alexander's child custody determination pursuant with Mississippi Code § 93-27-202(1)." (Appellant's Br. p. 16.)

The cases cited above demonstrate that the court correctly concluded that it had continuing jurisdiction to hear the case. However, even if it had been error for the court to fail to consider the issue, Vicki waived the error by conceding it at trial. *Consumers Veneer Co. v. Chestnut*, 210 Miss. 430, 433, 49 So. 2d 734, 735 (1951) (where the answer of one defendant admitted, and the answer of the second defendant did not deny, the right of the heirs to be substituted in the action, the defendants could not claim on appeal that the substituted plaintiffs had no right of action).

The court's exercise of jurisdiction was correct and should be affirmed.

C. The Trial Court Did Not Err In Determining That Mississippi Was The Most Convenient Forum.

Vicki next cites Miss. Code Ann. § 93-27-207, which states that a court "which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum." As restated in the Commentary to the Uniform Act, this section "authorizes courts to decide that another

State is in a better position to make the custody determination." Unif. Child Custody Jurisdiction & Enforcement Act § 207, ULA Commentary.

Although there are no Mississippi decisions addressing this issue, it is worth noting that at least one court has held that because "the word 'may' is inherently permissive in nature and connotes discretion," once the court in that case had determined that West Virginia was the child's home state, "the family court was under no obligation to even consider whether Ohio was a more appropriate forum." *Rosen v. Rosen*, 222 W. Va. 402, 409, 664 S.E.2d 743, 750 (2008).

In deciding whether to decline to exercise jurisdiction on this ground, the court is directed by the statute to consider eight factors. Vicki has identified the factors relevant to the present facts.

The first two factors raised by Vicki are "(b) The length of time the child has resided outside this state"; and "(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child." Vicki argues that because Alexander has lived in Texas for eight years, that is where the relevant information is, and the court abused its discretion by not declining to exercise its jurisdiction.

The third significant factor is "(h) The familiarity of the court of each state with the facts and issues in the pending litigation." As Vicki acknowledged in her brief, the only prior proceedings in any state were the divorce proceedings that resulted in the 1998 order of divorce. (Appellant's Br. p. 19.) Under this factor, Mississippi is the only state that has any familiarity at all with the facts and issues in the pending litigation.

With regard to the other two factors, in the months before the hearing in January 2007 at which this issue was raised, Alexander had lived and gone to school in Mississippi from June to October 2006. Vicki had then returned Alexander to Texas, where he remained at the time of the hearing on January 23, 2007.

As will be discussed below in the context of the court's decision to modify custody, the issue of whether to modify custody required a comparison and evaluation of Alexander's circumstances in Mississippi and Texas. Under the facts of this case, the circumstances existing in Mississippi are as important as the circumstances in Texas. It is significant in this regard that when Alexander moved to Mississippi in June 2006, both his siblings were living in Mississippi, and his move to Mississippi was the result of his own choice and made with Vicki's consent. (Tr. 1/23/07 pp. 37, 165.)

Vicki has failed to demonstrate that the trial court abuse its discretion either by failing to conduct an analysis under this section, or by refusing to decline the exercise of jurisdiction.

D. The Trial Court Did Not Err By Refusing To Decline To Exercise Jurisdiction Because Rusty Had "Engaged In Unjustifiable Conduct."

On the final jurisdictional issue, Vicki argues that the court was required by Miss. Code Ann. § 93-27-208 to decline to exercise jurisdiction, and it erred by failing to do so.

That section states, in relevant part, that except under specified circumstances, "if a court of this state has jurisdiction under this chapter *because a person seeking to invoke its*

jurisdiction has engaged in unjustifiable conduct, the court shall decline to exercise its jurisdiction." (Emphasis added.) Vicki argues that when Rusty obtained the July 20, 2006, order transferring custody of Alexander to Rusty, the order that was subsequently set aside, Rusty was engaging in "unjustifiable conduct" that obligated the trial court hearing this motion to decline jurisdiction.

As has been discussed above, the Mississippi court had exclusive continuing jurisdiction over the custody issue as a result of the prior custody determination in this state and the ongoing relationship of the minor child with his father in this state. The court's decision to exercise jurisdiction had nothing to do with the fact that Alexander had lived for several months in Mississippi under the order that was set aside.

The predicate for application of this section is simply not present, and this contention by Vicki is frivolous.

II. THE TRIAL COURT'S DECISION TO AWARD CUSTODY OF ALEXANDER TO RUSTY WAS AN APPROPRIATE EXERCISE OF THE COURT'S DISCRETION AND SHOULD BE AFFIRMED.

The requirements for modification of child custody are well established. All agree that "[t]he test for a modification of child custody is: (1) whether there has been a *material change in circumstances* which *adversely affects the welfare of the child and* (2) whether the *best interest of the child requires a change of custody.*" *Giannaris v. Giannaris*, 960 So. 2d 462, 467-68 (¶ 10) (Miss. 2007) (emphasis in original) (footnotes omitted); *accord Lambert*

v. Lambert, 872 So. 2d 679, 683-84 (¶ 18) (Miss. Ct. App. 2003); *Powell v. Powell*, 976 So. 2d 358, 361 (¶ 11) (Miss. Ct. App. 2008).

In making this determination, the totality of circumstances must be considered. *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993).

A. The Trial Court Correctly Determined That A Material Change Of Circumstances Had Occurred That Adversely Affected The Minor Child.

In her appeal, Vicki argues that the findings by the trial court were insufficient to establish a material change of circumstances since the prior custody order, and she argues further that the court made insufficient findings to demonstrate that adverse effects were suffered by Alexander as a result of the changed circumstances.

The trial court's first finding on this issue was that Vicki had violated the July 20, 2006 order. In October 2006, Vicki had taken Alexander back to Texas in the middle of the night without telling Rusty, without Rusty's consent, and in violation of the then-existing order awarding custody to Rusty. After returning to Texas, Vicki had hidden Alexander by moving to different hotels, Vicki had refused to answer her cell phone, and she had refused to take calls from the guardian *ad litem*. (Op. & J. 5/16/08 p. 5; Tr. 1/23/07 p. 137.)

Vicki does not challenge the accuracy of the facts set forth by the trial court, but she contends that these facts were "not appropriate to be considered a material change in circumstances." She argues that because the order was ultimately set aside, the court should not hold Vicki's violation of an improper order against her. (Appellant's Br. pp. 21, 22.)

However, Vicki was required to comply with the custody order that existed in October 2006, as it had not yet been set aside. "The fact that such order is erroneous or irregular or improvidently rendered does not justify a person in failing to abide by its terms." *Ellis v. Ellis*, 840 So. 2d 806, 811 (¶ 19) (Miss. Ct. App. 2003).

The trial court was clearly of the view that Vicki's secret removal of the child in violation of the existing custody order was a material change in circumstances, and the court's view is supported by case law holding that interference with exercise of custody can amount to a change in circumstances. *Ellis v. Ellis*, 952 So. 2d 982, 989-90 (¶ 17) (Miss. Ct. App. 2006) ("Chancellor Littlejohn opined that since the most recent order at the time of his ruling, the material change in circumstances that occurred was Nancy's *continued violation* of court orders pertaining to visitation and continued hindering of the visitation time John did enjoy as well as the father/daughter relationship."); *Davis v. Davis*, ___ So. 2d ___, 2009 WL 447242, at *2 (¶ 9) (Miss. Ct. App. 2009) (not yet released for publication) ("In finding that a material change in circumstances had occurred, the chancellor stated: 'These things in their entirety that I have mentioned, I'm talking about the continued, repetitive failure to allow visitation and the interference referenced and the lack of good judgment, evidencing instability, all of these things together equate with a material change in circumstances[.]'").

Related to these decisions are the cases which hold that the decision of a parent to move to another jurisdiction may constitute a material change of circumstances in that "the moving of one party is sufficient grounds for modification because it makes joint custody impractical or impossible." *Elliott v. Elliott*, 877 So. 2d 450, 455 (¶ 18) (Miss. Ct. App.

2003). In *Elliott*, the chancellor concluded that the wife's move to another state "was a material change in circumstances which warranted a modification of the prior court order." *Id.* at 455 (¶ 21). Cases in addition to *Elliott* that have found a significant change of circumstances based on a party's decision to move to another jurisdiction include *Rinehart v. Barnes*, 819 So. 2d 564, 566 (¶ 7) (Miss. Ct. App. 2002), and *Massey v. Huggins*, 799 So. 2d 902, 906 (¶ 14) (Miss. Ct. App. 2001).

Although "relocation of the custodial parent does not alone constitute a material change in circumstances. . . . , a material change in circumstances may be established where a custodial parent's relocation is one of several supporting factors." *Powell*, 976 So. 2d at 362 (¶ 16).

It is clear that "[a]ll events that have occurred since the issuance of the *decree sought to be modified* may be considered by the chancellor." *Savell v. Morrison*, 929 So. 2d 414, 417 (¶ 9) (Miss. Ct. App. 2006) (emphasis in original). In the present case, that includes the decision of Vicki to move to Texas.

The facts of the present case would support a finding of material change in circumstances based on Vicki's removal of Alexander from Mississippi, in secret and in violation of the existing custody order, and her concealment of Alexander for several days after the removal. In addition, the record contains other examples of Vicki's interference with Rusty's contact and visitation with the children, including her failure to make Alexander available to Rusty by telephone when Alexander was in Texas, and her inhibiting presence in the room with Alexander when he was talking to his father from Texas. (Tr. 4/4/08, pp.

213, 223.) And while Vicki's decision to move to Texas would not, without more, constitute a change of circumstances, combined with Vicki's interference with Rusty's contact with the children, the distance between the parties has resulted in Rusty not being made aware of serious problems that were developing regarding his children. Those problems did not exist at the time of the divorce and they undeniably have an adverse impact on Alexander.

Vicki next challenges the sufficiency of the court's finding that "Vicki does not see that Alex goes to school as he should." (Op. & J. 5/16/08 p. 5.) It was undisputed that Alexander had missed 27 days of school during the prior school year in Texas. The court concluded that the minor child "does not reach his potential in school when he is with Vicki."

At the time of the divorce and the initial custody determination Alexander was barely three years old, and school performance could not have been a consideration. It is unrealistic, however, to ignore circumstances that are directly affecting the minor child and to pretend they have not changed since he was three. This court has stated that "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change." *Morrow v. Morrow*, 591 So. 2d 829, 833 (Miss. 1991). School performance is one of the primary measures of a child's mental and emotional health. At least one court has held that a trial court could properly consider the number of school days a child missed while in her mother's care in determining whether a change of circumstances existed to warrant change of custody. *In re Firth*, 2002-Ohio-5219, ¶ 16, 2002 WL 31168826, at *3 (Ct. App. 2002).

Another change that was apparent from the testimony at trial was that Alexander's performance in school had deteriorated substantially compared to his early years of school, and compared to his performance while he was in Mississippi living with Rusty. Rusty testified that Alexander got all As when he was living with Rusty in Mississippi. (Tr. 4/4/08 p. 220.) This testimony is supported by Alexander's grade report from the fall of 2006 which indicates no grade lower than 93. (Trial Ex. p. 280.) Rusty's testimony regarding Alexander's performance during the 2007-2008 school year, immediately preceding the hearing, was that Alexander's grades were "atrocious." (Tr. 4/4/08 p. 220.) Vicki acknowledged that Alexander had received grades of 40, 50s, 65, and a grade of 54 in science. (Tr. 4/4/08 p. 329.) This was supported by the document from Alexander's school in Texas, titled "Progress Cycle Four." (Trial Ex. p. 341.)

The fact that Alexander, who is acknowledged to be exceptionally intelligent, is not attending school on a regular basis and is not performing up to his capability must certainly be viewed as a threat to his mental and emotional health that is a strong indication of a change of circumstances affecting the question of his custody. In a factually similar case, the court in *Connelly v. Lammey*, 982 So. 2d 997 (Miss. Ct. App. 2008), affirmed the trial court's finding of a material change of circumstances based, in part, on the children's altered school performance. *Id.* at 999-1000 (¶¶ 4-6).

The court next found that Vicki had not cooperated with the guardian *ad litem*, particularly in carrying out the court's directive that each party have a home study made. In her appellate brief, Vicki shrugs off her responsibility to carry out the court's order regarding

the home study, stating that "it was never her responsibility to see that it be done." (Appellant's Br. p. 23.) Vicki also showed little concern about the fact that Alexander had not called the guardian *ad litem* on a regular basis, despite the fact that he had been told by the guardian *ad litem* that it was very important. Vicki testified that she had asked Alexander about that, and the reason he had not called was that he did not want to talk to the guardian *ad litem*. When asked why, Vicki responded: "I don't think he wants to face any of this to be honest with you." (Tr. 4/4/08 p. 358.)

Failure to cooperate and failure to comply with a court order, as has been discussed above, has been held to constitute a change of circumstances warranting review of custody. At a more practical level, the lack of a home study of Vicki's home, and the lack of contact with the guardian *ad litem*, reduced the information available to the court on which it could base its decision.

The court next found that "Vicki does not know how to discipline Alex." Vicki does not appear to disagree. Her only response is to acknowledge that she has never known how to discipline Alexander, so there has been no change of circumstances. (Appellant's Br. p. 23.) The court found that Vicki's discipline consisted of prohibiting Alexander from guitar lessons, and that she had acknowledged that her discipline did not work. "She could not give alternative discipline in response to questions made by the guardian ad litem." (Op. & J. p. 5.)

The testimony was particularly striking with regard to Vicki's efforts to get Alexander to work harder at school and to improve his grades. Rusty testified that when she was

confronted with Alexander's bad grades, Vicki said Alexander was lazy. (Tr. 4/4/08 p. 221.) When she was confronted with the grades at trial, by counsel for Rusty, Vicki first minimized the problem, saying:

> [H]e's, pretty much, brought [his grades] up. . . . He has a sense of humor that is beyond most children of 13, and he cuts up a lot. I think a lot of that is because he thinks he's smarter than the teachers, like Kimberley used to do, and he gets in trouble. He has not been suspended for anything. He's not . . . gotten written up. . . . He just cuts up a lot, like the class clown, and he gets behind. And we get back together. He gets privileges taken away until he gets the grades brought up.

(Tr. 4/4/08 p. 332.)

When she was pressed by counsel for Rusty on the issue of Alexander's homework assignments, there was the following exchange:

> Q And every day, he tells you what assignments he has and what projects are to be done and you make sure he does those?
>
> A Pretty much every day, yes, sir.
>
> Q And he still gets 40s on some of his work?
>
> A Well, Alex has a tendency to fabricate things and lie. I don't sit down with him and do homework every day. I can start doing that.
>
> Q You don't check it?
>
> A No, sir.

(Tr. 4/4/08 p. 334.)

What is striking about this exchange is Vicki's unwillingness to accept any responsibility for her son's poor performance. Having first blamed Alexander's poor

performance on his laziness, she goes on to blame her inability to improve the performance on his mendacity.

When Vicki was asked directly by the guardian *ad litem* whether she could say why Alexander was not completing assignments, Vicki responded:

> To be honest with you, no, because I ask him and I get on to him. He cries. He gets all upset, tells me he's sorry, he's going to do better, and then we get another progress report and he's sorry. . . . [I ask him] what do we need to do to rectify it? And he'll say, I just need to do better. I'm like, How better, you know? But I agree that we need a game plan. I mean, he needs to understand that this is not acceptable. But I'm soft-hearted. When he starts crying, I cry, you know.

(Tr. 4/4/08 pp. 350-51.)

When the guardian *ad litem* then asked: "Do you feel like being soft-hearted hinders you in taking responsibility of disciplining him the way he needs to be disciplined?" Vicki responded: "When you've got a 13-year-old child that is asked to do what he's had to do in the last year and a half, it's hard to get on to him constantly when he doesn't perform. He's distracted. His teachers will tell you he's distracted." (Tr. 4/4/08 p. 351.) At this point Vicki is blaming the custody dispute for Alexander's problems. At no time does Vicki appear to consider that she might not be helping Alexander by making excuses for his poor performance, such as blaming his lack of organization on his personality, which is a lot like hers. (Tr. 4/4/08 p. 363.)

Vicki's lack of insight into her role as a parent would be very strong evidence for the court to consider in deciding whether the changed circumstances were adversely affecting Alexander. Recent decisions have recognized that "a chancellor may satisfy the 'adverse

effects' finding required in custody modification by finding reasonably foreseeable adverse effects if the child continues in the adverse environment." *Gilliland v. Gilliland*, 984 So. 2d 364, 368 (¶ 13) (Miss. Ct. App. 2008) (citing *Johnson v. Gray*, 859 So. 2d 1006, 1014 (¶ 39) (Miss. 2003)). There is every indication in the present case that the adverse effects resulting from the lack of structure and discipline he receives in Vicki's care will continue and will become more severe and more costly as Alexander gets older.

It is unrealistic to look at a 14-year-old boy who lacks discipline and is doing badly in school as though he were the same 3-year-old who was initially placed with his loving and indulgent mother. The circumstances have changed because Alexander's needs have changed and, unlike when he was younger, Vicki cannot now give him the guidance and discipline he needs. There is ample evidence that supports the trial court's finding of a material change of circumstances that are adversely affecting the minor child.

As to the final factor cited by the court, the fact that "Vicki allowed Kim and her boyfriend to share a bedroom while she had Alex's custody," Vicki argues that there was no showing of any effect this may have had on Alexander. She argues that while this fact might be relevant to Vicki's parenting skills, it does not show a material change as to Alexander.

It is for this Court to determine whether the trial court erred in finding that this was a material change of circumstances that had an adverse effect on Alexander. Kim was 17 years old at the time she moved to Vicki's house with her boyfriend. Alexander was 12. While this might not be sufficient, on its own, to support a finding of changed circumstances,

it is further cumulative evidence of Vicki's questionable judgment surrounding her role as a parent.

B. The Trial Court's Decision To Modify Custody Was Supported By Substantial Evidence And Should Be Affirmed.

As has been stated repeatedly, "[t]he standard of review in child custody cases is quite limited, and in order to reverse a chancellor he must be manifestly wrong, clearly erroneous or have applied an erroneous legal standard." *C.A.M.F. v. J.B.M.*, 972 So. 2d 656, 660 (¶ 15) (Miss. Ct. App. 2007); *Connelly*, 982 So. 2d at 999 (¶ 2); *Hensarling v. Hensarling,* 824 So. 2d 583, 586 (¶ 7) (Miss. 2002).

Once the court has determined that there is a sufficient change of circumstances that adversely affects the minor child to warrant a reopening of the custody issue, the court then must determine whether the child's best interest would be served by changing custody. In order to make that determination the court must apply the factors set forth in *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). As summarized in a recent decision, these factors comprise the following:

> Chancellors must consider a number of factors in determining child custody: (1) age, health, and sex of the child; (2) which parent had continuity of care prior to the separation; (3) which parent has better parenting skills and the willingness and capacity to provide primary child care; (4) the employment responsibilities of the parents; (5) the physical and mental health and age of the parents; (6) the moral fitness of the parents; (7) the emotional ties of the parents and children; (8) the home, school, and community records of the children; (9) the preference of a child at the age sufficient to express a

> preference by law; (10) the stability of the home environment and employment of each parent; and (11) the other relevant factors in the parent-child relationship. *Albright v. Albright,* 437 So. 2d 1003, 1005 (Miss. 1983).

Weeks v. Weeks, 989 So. 2d 408, 411 (¶ 10) (Miss. Ct. App. 2008).

Only three of the court's stated reasons have been disputed by Vicki on appeal. The first of these is the third factor, related to which parent has better parenting skills. Vicki argues that there is insufficient evidence of how Alexander would perform in school if he lived in Mississippi because of the limited time Alexander spent in the Mississippi school. She also argues that it is "inappropriate" to compare four months of schooling with several years of schooling, especially when Alexander was in Rusty's care on the basis of an "improper" order.

The reason for Alexander having been in school in Mississippi may be a factor to be considered in some fashion by this Court. However, it should not preclude consideration of Alexander's school records while he was in the state for purposes of evaluating his best interest. Those records indicate that during the months he was at school in Mississippi, Alexander never received a grade lower than 93%, and most were 98% or 99%. (R. p. 280.) As has been discussed extensively below, in the context of changed circumstances adversely affecting the minor child, the implications of these high grades, and the lower grades received by Alexander in Texas, demonstrate clearly that the trial court correctly concluded that Rusty had better parenting skills.

The second of the court's reasons challenged by Vicki is the court's decision not to honor Alexander's stated preference to live with his mother. As it is required by statute to

do, the court gave its reasons for declining to honor Alexander's request. As stated by the court, it was "because the Court believes that his desire is motivated by his mother not properly disciplining him." (Op. & J. p. 7.) The court concluded that "Alex does better in the custody of his father, academically and socially."

Vicki has challenged this conclusion by asserting that there is no evidence that Vicki's failure to "properly discipline" has resulted in any adverse behavior or acts on Alexander's behalf. (Appellant's Br. p. 26.) Much of the testimony, however, was directed toward the question of why Alexander's grades were so low when he was in Texas, and what could be done to bring them up. Vicki's inability to provide effective discipline emerged as a recurring factor. Perhaps Vicki is defining "adverse behavior or acts" to mean that Alexander has not been suspended from school or picked up by the police. Applying a broader definition, however, which includes failing to reach his potential in school, and appearing to be very unhappy about it, there is ample evidence to support a finding that Vicki's failure to discipline has in fact resulted in adverse behavior or acts. Accordingly, there is ample evidence to support the trial court's decision on this issue.

Finally, Vicki challenges the court's reliance on the report of the guardian *ad litem*, complaining that the distance of the guardian *ad litem* from the important factors of Alexander's life in Texas meant that the trial court should have discounted the report, and that the court's reliance upon it in determining Alexander's best interest was error.

In making this argument, Vicki skillfully turns her failure to cooperate with the guardian *ad litem* into a reason the report of the guardian *ad litem* should be discounted. The

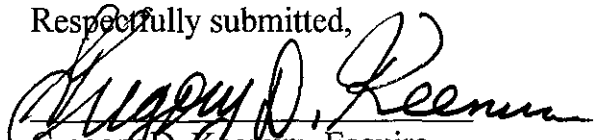
failure on the part of the guardian *ad litem* to have access to information from Texas, particularly a home study of Vicki's house and frequent contact with Alexander, were both identified by the court as being the result of Vicki's lack of cooperation. If the report was lacking in certain information, that was Vicki's fault and she cannot now get the benefit of her lack of cooperation. This is "akin to invited error" and should be rejected as a basis for objecting to the court's decision on this issue. *See Ill. Cent. R. Co. v. Hawkins*, 830 So. 2d 1162, 1178 (¶ 41) (Miss. 2002).

CONCLUSION

The trial court correctly exercised its exclusive continuing jurisdiction over the custody determination. The court then correctly determined that there had been a material change of circumstances that adversely affected Alexander, and the court correctly applied the *Albright* factors to determine that an award of custody to Rusty would be in Alexander's best interest.

For the reasons stated, this court should affirm the award of custody to Rusty.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Gregory D. Keenum, Esquire, do hereby certify that a copy of the above and foregoing BRIEF OF APPELLEE has been mailed, postage prepaid, to:

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