

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

VICKI D. WHITE

APPELLANT

VS.

NO. 2008-^{CA}TS-01246 SCTT

JOHN R. WHITE

APPELLEE

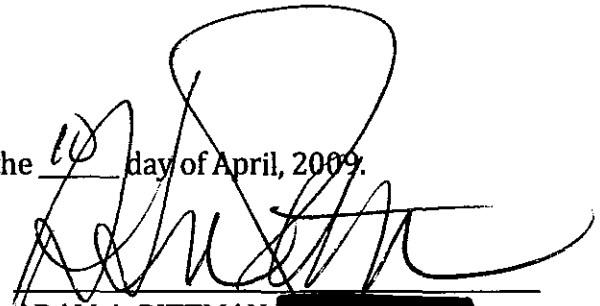
CERTIFICATE OF INTERESTED PERSONS

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.

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RESPECTFULLY SUBMITTED, this the 10 day of April, 2009.

A handwritten signature in black ink, appearing to read 'Adam A. Pittman', written over a horizontal line.

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STATEMENT OF ISSUES

1. The Court erred in determining custody of Alexander in that the Court lacked jurisdiction over his custody determination.
 - a. Rusty failed to make the appropriate disclosures under oath as required by the U.C.C.J.E.A.
 - b. Mississippi had lost the exclusive and continuing jurisdiction over Alexander's custody determination and Mississippi was no longer the *home state* of Alexander.
 - c. The Court should have declined to exercise jurisdiction over Alexander's custody determination because Mississippi is an inconvenient forum under the circumstances and that the Texas is a more appropriate forum.
 - d. Even if the Mississippi Court had continuing jurisdiction over Alexander's custody determination, the Court should have declined to exercise its jurisdiction because Rusty, the person seeking to invoke the Court's jurisdiction, had engaged in unjustifiable conduct.
2. The Court erred in awarding Alexander's custody to Rusty.
 - a. The Court erred in finding a material change in circumstances as to Alexander.
 - b. Even if the Court was correct in finding that there had been a material change in circumstances as to Alexander, the Court failed to make any findings that the change in circumstances had any adverse effect upon Alexander.
 - c. The Court's findings as to those factors enumerated in Albright factors are

not supported by substantial evidence, or in the alternative the Court abused its discretion, was manifestly wrong, or clearly erroneous.

STATEMENT OF CASE

1. NATURE OF CASE

This matter is an appeal for that opinion and judgment entered by the Chancery Court of Tishomingo County, Mississippi, on May 16, 2008.

2. COURSE PROCEEDING

The parties of this matter were divorced by the Chancery Court of Tishomingo County, Mississippi by the entry of a Judgment of Divorce on January 16, 1998. As a result of the entry of the Divorce Decree, the parties shared joint-legal custody over their three (3) minor children with the physical custody of those children being placed with the Appellant (hereinafter referred to as "Vicki"). On May 1, 2003 the Appellee (hereinafter referred to as "Rusty") caused to be filed a Petition to Modify the Custody Provisions of the Divorce Decree, however no summons were ever issued to or served upon Vicki and there is no record of this Petition ever being called up for hearing or otherwise disposed of. On July 20, 2006 an Order Granting Emergency Relief was entered which modifies the custody of the parties three (3) minor children so as to place them in Rusty's custody and furthermore places a restraining order against Vicki restraining her from coming around Rusty's home or trying to remove the children from his care. Although the July 20, 2006 Order indicates that it was granted upon Rusty's "Motion to Modify Original Decree and Request for Emergency Order" there is no record of any such Motion having been filed nor any record of any notice, through summons or otherwise, having been given to Vicki of the proceedings. Furthermore, on July 20, 2006 Lisa Holley was appointed as Guardian Al

Litem to represent the interest of the party's minor children.

On September 5, 2006, all Chancellors of the Chancery District entered an order recusing them from further involvement in the case. Subsequent to September 25, 2006, Rusty again filed a Petition for Modification, however there is no record that any summons were issued or served upon Vicki as it relates to this Petition nor was there any Affidavit or information provided by Rusty pursuant to Mississippi Uniform Child Custody Jurisdiction Act. On October 10, 2006, the Mississippi Supreme Court entered an Order appointing honorable Chancellor Kenneth Burns as special Chancellor for the purpose of hearing all subsequent matters in this case. On October 16, 2006, a petition was filed by Rusty requesting the Chancellor find Vicki in contempt of the Court's July 20, 2006 Order. There does not appear in the record any evidence of a summons ever being issued to or served upon Vicki as to this Petition. On October 16, 2006, an Order was entered by the Court finding Vicki to be in contempt of the Court and ordering her to return one of the three (3) minor children into Rusty's care. On November 22, 2006, a Motion was filed on behalf of Vicki to dissolve the Court's July 20, 2006 Emergency Order. It should be noted that Vicki's Motion includes information required by the Mississippi Uniform Child Custody Jurisdiction and Enforcement Act and proper notice was given by Vicki's counsel to Rusty's attorney. On December 15, 2006, the Court entered an order setting aside the July 20, 2006 Emergency Order and reinstating the terms of the parties' original Divorce Decree and Rusty filed a Motion for Rule 65 Hearing. While it does appear that a summons was finally issued to Vicki at this time, the Summons does not designate what Petition or Complaint the summons was pertaining to. It also should be noted that a separate notice of hearing was provided to Vicki's counsel for the hearing on the Rule 65 Motion.

On January 23, 2007, Vicki filed her response to Rusty's Motion for Rule 65, and in it she provides the information under oath required by the Mississippi Uniform Child Custody Jurisdiction Act and Enforcement Act, and also attaches is a copy of a Petition which had been filed on her behalf in Texas on January 22, 2007, for Modification of Custody as to one of the parties children. A hearing was held on January 23, 2007, which resulted in two (2) orders being entered. The First Order, entered January 30, 2007, directed the Mississippi Department of Human Services to coordinate with the Texas department of Human Services so that a home study could be performed of Vicki's home in Texas. Then on March 6, 2007, the Court entered a Temporary Order in which the Court denied Rusty's Motion for Rule 65 relief and establish certain ground rules for allowing Guardian Al Litem better access to information in regard to the minor child at issue.

On November 27, 2007, Rusty filed his Petition for Citation of Contempt against Vicki, claiming that she failed to pay one half (1/2) of certain Court ordered medical expenses on behalf of the children as well as one half (1/2) of certain college expenses on one (1) of their minor children. On November 28, 2007, Vicki filed her response to Rusty's Petition of Citation of Contempt as well as a Counter-Petition against Rusty for his failure to pay Court ordered child support.

The Court called the matter up for trial on April 4, 2008. Following the conclusion of the trial the Guardian Al Litem filed her report on April 29, 2008, and the Court issued it opinion on May16, 2008.

Vicki filed a Motion for New Trial on May 27, 2008. The Court overruled her Motion on June 9, 2008 and Vicki filed a timely Notice of Appeal on July 9, 2008, bringing this matter before the Appellate Court.

3. STATEMENT OF ALL FACTS

Rusty and Vicki were divorced by a Court Order January 16, 1998 after a long marriage that produced three (3) children. As part of the agreement incorporated into the Irreconcilable Divorce of Decree the parties shared joint-legal custody of their three (3) minor children with Vicki being awarded the primary custody. Vicki and Rusty continued to live in Tishomingo County until approximately January of 1999 when Vicki moved with the three (3) children to Texas (R 28). Andrew, the oldest child, moved back with his father in February of 2001 and other than periods of visitation with his mother has resided with his father in Mississippi since.

Between the time of the Vicki's move to Texas and the trial of this matter Kimberly moved back and forth between the parties, spending years at a time with each (R 29-31). Most recently Kimberly moved back in with her mother in approximately July 2006 and remained there until behavioral problems caused Rusty to come in July of 2006 and pick Kimberly up from Texas and bring her back to Mississippi. Approximately two hours after Kimberly was back in Mississippi Rusty was required to call the police and have Kimberly detained in a juvenile detention facility until a Youth Court proceeding was begun and Kimberly was placed in a behavioral treatment center.

The parties' youngest son, Alexander, had remained with his mother in Texas from the time she had moved in 1999 until a period of extended visitation with his father began in June of 2006. (R 36) It was during this period of extended visitation that Rusty was able to receive the Order granting him granting him emergency custody over all three of the children through the trial court. Following the dissolution of the "Emergency Order"

Alexander was returned to his mother and the parties returned to their previous custody/visitation routine.

SUMMARY OF ARGUMENT

1. The Trial Court committed error by deciding to extend its jurisdiction over the custody determination for Alexander White for the following reasons:

- a. Rusty failed to make the appropriate disclosures under oath as required by the U.C.C.J.E.A., and as such the Court should have denied jurisdiction over the case.
- b. The Trial Court committed error in thinking that the Tishomingo Chancery Court had the exclusive and continuing jurisdiction over Alexander's custody determination, and should have found as a matter of law that because of Alexander's residence for the last eight years Mississippi was no longer the appropriate state to determine Alexander's custody.
- c. The Trial Court committed error by not finding Mississippi to be an inconvenient forum under the circumstances, that the Texas is a more appropriate forum, and that the Trial Court should decline to exercise jurisdiction over Alexander's custody determination.
- d. The Trial Court should have declined to exercise its jurisdiction over Alexander's custody determination because Rusty, the person seeking to invoke the Court's jurisdiction, had engaged in unjustifiable conduct.

2. The Trial Court committed error in awarding Alexander's custody to Rusty for the following reasons.

- d. The Trial Court's finding of material changes in circumstances as to

Alexander where either unsubstantiated by the evidence, not appropriate, immaterial to Alexander or not reflective of an actual change.

- e. The Trial Court failed to make any specific findings that the changes in circumstances had any adverse effect upon Alexander, and as such rendered any such changes to be "immaterial".
- f. The Trial Court's findings as to those factors enumerated in Albright factors are not supported by substantial evidence, or in the alternative the Court abused its discretion, was manifestly wrong, or clearly erroneous.

ARGUMENT

STANDARD OF PROOF

For the sake of brevity it is recognized that throughout this brief the scope of appellate review is limited by the substantial evidence/manifest error rule. Samples v. Davis, 904 So.2d 1061, 1063-65 (¶ 9)(Miss. 2004). The Appellate Court will not disturb the chancellor's opinion when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Holloman v. Holloman, 691 So.2d 897, 898 (Miss 1996).

1. The Court erred in determining custody of Alexander in that the Court lacked jurisdiction over his custody determination.

a. Rusty failed to make the appropriate disclosures under oath as required by the U.C.C.J.E.A.

In 2004 the Mississippi legislature codified the Uniform Child Custody Jurisdiction and Enforcement Act (hereinafter referred to as the U.C.C.J.E.A.) in Chapter 27 of Title 93 of the Mississippi Code in an effort to give direction to Mississippi Courts as to how to determine whether a given Court is the appropriate jurisdiction to make a child custody determination. As a provision of the act (§93-27-209) each party to a child custody proceeding is required to provide certain information under oath. One of the apparent purposes of this requirement is to assist the trial court in determining whether the Mississippi court is the appropriate jurisdiction for the determination of the child custody

case. This information may be provided in either the party's first pleading or in an attached affidavit (§93-27-209(1)).

Upon review of the pleadings filed by Rusty in this matter, beginning with his Petition to Modify filed in May of 2003, it is clear that he fails to ever provide the required information with any of his pleadings. Although there are limited (if truly any) cases dealing with the effect of a party's failure to comply with §93-27-209, we find some guidance from cases decided under the prior version of the law which had been codified in the now repealed §93-23-17.

The former §93-23-17 required that certain disclosures be made by parties to a child custody dispute in their initial pleadings (or by affidavit filed at the same time as the initial pleading). In Marr v. Adair, 841 So.2d 1195 (Miss. Ct. Ap. 2003) the Court of Appeals address the failure of a party to timely file the information as required by the statute. In Marr a father attempts to modify the custody terms of a Louisiana Divorce Decree. The Chancellor, although initially granting the father's requested modification, subsequently (upon the mother's request) sets aside his ruling based upon the finding that Mississippi lacked jurisdiction to modify the Louisiana Decree. One of the issues reviewed by the Court of Appeals was whether the father's failure to timely make the disclosures called for by § 93-23-17 affected the Mississippi Court's jurisdiction over the child custody matter. Although the father failed to initially provide the trial court with the disclosures required by §93-23-17, he did subsequently file an affidavit with the required information after the mother had filed her Motion to set aside the trial court's initial Order.

In addressing the question of the lack of timely filing, the Court of Appeals states

Courts that have addressed the issue in other jurisdictions are divided. Having no precedence to follow in our state, we consider the case law of other states. Two out-of-state cases construing the UCCJA disclosure

requirements provide some guidance, although not the answer to the specific issue before us. The first case, Breaux v. Mays, 746 P.2d 708 (Okla.Ct.App.1987), *overruled on other grounds by* G.S. v. Ewing, 786 P.2d 65 (Okla.1990), held that a petitioning party's failure to initially provide the chancery court with the disclosure information required by the UCCJA, either by pleading or affidavit, was not jurisdictional but rather was merely procedural and that the initial failure to provide the information could be cured by amendment. The second case, Cook v. Court of Common Pleas of Marion County, 28 Ohio App.3d 82, 502 N.E.2d 245 (1986), held that the UCCJA affidavit is a jurisdictional requirement in a child custody proceeding but that the requirement that it be filed with the complaint is considered directory, not mandatory.

¶ 24. It may be concluded from the above cases that timely compliance with the UCCJA disclosure provision upon filing the initial complaint is essential to facilitate a proper determination of the court's jurisdiction but that failure to do so will not necessarily impair the court's exercise of jurisdiction **if appropriately cured by a timely amendment**. Thus, a court may nevertheless validly exercise its jurisdiction if the omitted information is timely supplied by amendment of the pleading or by affidavit annexed to a motion to amend.

Marr v. Adair, 841 So.2d 1195, 1201(Miss. Ct. Ap. 2003) emphasis added

As stated above, Rusty not only failed to comply with the requirements of §93-27-209 in his initial pleading, he also failed to ever provide the information by timely amendment or otherwise. As such, the Trial Court erred exercising its jurisdiction over the child custody modification sought by Rusty.

b. Mississippi had lost the exclusive and continuing jurisdiction over Alexander's custody determination and was no longer the *home state* of Alexander.

When faced with determining whether a Mississippi Court is the appropriate jurisdiction to determine a modification of child custody matter that was initially considered in Mississippi, the Trial Court is directed by Mississippi Code §93-27-202 that states:

(1) Except as otherwise provided in Section 93-27-204, a court of this

state that has made a child custody determination consistent with Sections 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.

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 93-27-201.

The statute creates a two-step process by which the Court is to determine whether or not it has jurisdiction to modify a child custody determination that was initially made by a Court of this state. The first step is to determine whether the initiating Court has lost the exclusive and continuing jurisdiction over the determination. If the Court decides that it has lost continuing jurisdiction, then the Court must decide whether it may still modify the initial custody determination using an analysis under Mississippi Code § 93-27-201.

This issue was one of many raised by Vicki in her Motion to Dismiss filed January 23, 2007. In support of her contention that Mississippi had lost continuing jurisdiction over Alexander's custody determination Vicki points out that Alexander had resided with her in Texas for eight years prior to the beginning of the recent Court hostilities, and that the vast majority of the evidence concerning Alexander's care, protection, training and personal relationships were to be found in Texas. (Record Excerpts, item 8 paragraph 15)

When the Trial Court addressed the issue, the Chancellor stated that he relied

heavily upon Professor Deborah Bell's treatise *Bell on Mississippi Family Law*, and from his reading of Section 18.10 of Professor Bell's book he determined that "the Court issuing an initial decree has continuing subject matter jurisdiction over the action and continuing personal jurisdiction over the parties. So this Court has jurisdiction." (R. 18) Unfortunately the Chancellor's reading of Professor Bell's book was not thorough enough, because while the first sentence § 18.10(1) of *Bell on Mississippi Family Law* does support the Chancellor, the section goes on to reflect the language of the statute by saying "However, even if one party remains in the state, a second state may modify the order if the issuing court finds that neither the child, or the child and one parent, have significant connection with the state and that substantial evidence is no longer available in the state." (Deborah H. Bell, *Bell on Mississippi Family Law* §18.10(1))

The Chancellor 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). Had he performed such an analysis he would have found that neither the child nor one parent (Alexander and Vicki) 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. As was brought out during the trial, because Alexander lived had lived with Vicki in Texas for some eight years the vast majority of evidence about his schooling, medical treatment and friends was in Texas. As such the Chancellor should have determined that the Trial Court no longer had exclusive and continuing jurisdiction over Alexander's custody determination, and should have then, according to the direction of Mississippi Code § 93-27-202(2), looked to Mississippi Code §

93-27-201 to determine if Tishomingo County Chancery Court would now have the jurisdiction over Alexander's custody determination.

Mississippi Code § 93-27-201 states, in pertinent part, that Mississippi would have jurisdiction over Alexander's custody determination only if either (1) Mississippi is Alexander's "home state" or (2) another state is not Alexander's "home state" or, if it is, has declined to exercise jurisdiction. The term "home state" is defined by Mississippi Code § 93-27-102(g) as meaning "the state in which a child lived with a parent or a person acting as a parent for at least six (6) consecutive months immediately before the commencement of a child custody proceeding."

Although never served upon Vicki, it could be argued that the child custody proceedings were commenced by Rusty's filing of a Petition for Modification on September 25, 2006. Although not stated in his Petition, in his Motion for Rule 65 Hearing filed December 15, 2006 Rusty states that Alexander did not come to reside with him in Iuka, Mississippi until June 24, 2006. (Record Excerpts, item 7 paragraph II) As such Mississippi cannot be said to be Alexander's "home state" because he did not reside in Mississippi for at least the six (6) consecutive months immediately before Rusty commenced the custody proceedings.

It can be said, however, that because Alexander had resided with his mother for the eight years prior to the commencement of the proceedings that Texas should be considered Alexander's "home state". And nothing was ever shown that any Court in Texas had declined to exercise jurisdiction over Alexander's custody determination.

As such, had the Trial Court conducted a proper analysis of whether it had

jurisdiction to conduct a custody determination about Alexander, the Court should have found that Mississippi no longer had jurisdiction to make such a determination and should have dismissed Rusty's action to Modify the prior Decree as to Alexander. The failure of the Court to conduct such an analysis was an abuse of discretion.

- c. The Court should have declined to exercise jurisdiction over Alexander's custody determination because Mississippi is an inconvenient forum under the circumstances and that the Texas is a more appropriate forum.**

In her January 23, 2007 Motion to Dismiss Vicki argues, among other things, that the Trial Court should decline to exercise its jurisdiction over Alexander's custody determination because, under the circumstances, Mississippi is an inconvenient forum and that Texas is a more appropriate forum. Her argument is based upon Mississippi Code § 93-27-207 which provides factors for a court to use in determining whether it is an inconvenient forum as compared with a court of another state. Although evidence was presented in support of her Motion during the hearing on January 23, 2007, and the Trial Court provided Rusty's counsel an additional fourteen (14) days to develop the issue (Record Excerpts, item 10 paragraph 2) the Trial Court never finally addressed the issue either on the record nor in a written Order and so it must be assumed that the Court denied Vicki's request. The Court's denial that Mississippi is an inconvenient forum is not supported by substantial evidence and is therefore an abuse of the Chancellor's discretion.

As stated above, when considering whether it is an inconvenient forum the Trial Court is directed to factors outlined by the Mississippi Legislature in Mississippi Code § 93-27-207(2). Of the eight factors for the court to consider, only four are necessarily

applicable to the facts presented in this case. The most obvious factors are found in § 93-27-207(2)(b) & (f), which looks to the length of time the child has resided outside of Mississippi and the nature and location of the evidence required to resolve the litigation. As stated throughout this brief at the time of the January 23, 2007 hearing on Vicki's Motion Alexander had lived in Texas for more than eight years. And as a result of his residency the vast majority of evidence concerning his living arrangements, schooling, medical care and personal relations (evidence necessary to resolve the litigation) was in Texas. And while the remaining applicable factors don't favor Vicki as much, they certainly don't weigh against her. First § 93-27-207(2)(c) looks at the distance between the court of this state (in Tishomingo County) and the court in the state that will assume jurisdiction (Tarrant County, Texas). Although there is no direct evidence of the exact distance between the two, the record is filled with examples when the parties discuss transportation for the purpose of facilitating visitation of how great the distance. Next § 93-27-207(2)(h) looks at the familiarity of the court of each state with the facts and issues in the pending litigation. It cannot be said this factor favors either court because, other than the original Divorce proceedings from 1997/1998 (which were uncontested) there have been other proceedings involving the custody of Alexander in either Court.

In the final analysis it is clear that the Trial Court committed error by not conducting an analysis pursuant with Mississippi Code §93-27-207, or alternatively by not declining to exercise its jurisdiction because Mississippi in an inconvenient forum under the circumstances.

- d. The Court should have declined to exercise its jurisdiction because Rusty, the person seeking to invoke the Court's jurisdiction, had**

engaged in unjustifiable conduct.

Another issue raised by Vicki in her January 23, 2007 Motion to Dismiss was that the Trial Court should deny jurisdiction over Alexander's custody determination because of "unjustifiable conduct" on the part of Rusty. The statutory basis for Vicki's request is found in Mississippi Code § 93-27-208 which states, in pertinent part, that except in matters of temporary emergency jurisdiction, "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)

The Court will recall that July 20, 2006 Rusty was awarded an Order Granting Emergency Custody through which he was awarded temporary emergency legal and physical custody of all three of his children. (Record Excerpts item 2) Although the Order makes reference to the fact that it was granted upon Rusty's Motion to Modify Original Decree and Request for Emergency Order, no such Motion can be found in the record. Furthermore there is no record of any notice of either the mysterious Motion or the Order having ever been given to Vicki. And although in October of 2006 Vicki was found to be in Contempt of the Emergency Order (Record Excerpt item 4), both the Emergency Order and the Order finding her to be in Contempt were set aside by the Trial Court in December of 2006 (Record Excerpt item 6). Unfortunately as a result of Rusty's actions he was able to circumvent the terms of the Decree of Divorce and retain Alexander for some four months contrary to the terms of the original custody decree.

Rusty's actions were unjustifiable to say the least, and he should not have been rewarded by having Alexander's custody determination considered in a location so obviously advantageous to him and, as illustrated above, so inconvenient to Vicki. The

Chancellor was required by § 93-27-208 to decline to exercise his jurisdiction over Alexander's custody determination, and his failure to do so was error.

3. The Court erred in awarding Alexander's custody to Rusty.

As this Court is well aware, to justify the modification of a child custody decree the court must find (1) that a material change in circumstances had occurred since the issuance of the decree sought to be modified, (2) that the material change adversely affected the minor child, and (3) that it would be in the child's best interest for custody to change.

Lambert v. Lambert, 872 So.2d 679, 683-84 (Miss. Co. App. 2003)

A. The Court erred in finding a material change in circumstances as to Alexander.

In the Opinion and Judgment issued by the Trial Court on May 15, 2008 the Chancellor outlined six things upon which he based his decision that there had been a material change in circumstances adversely affecting Alexander. (Record Excerpt item 12, paragraph 21 1-6) The items referenced by the Court as reflecting a material change in circumstances are either inappropriate to consider, not material to Alexander or not something that has been shown to have changed since the entry of the parties' Divorce Decree.

The first two items (Vicki's violation of the July 2006 Order and her removal of Alexander from Rusty in October of 2006) were not appropriate to be considered a material change in circumstances.

As the Court will recall, Rusty was awarded an Order Granting Emergency Custody on July 20, 2006 through which he was awarded temporary emergency legal and physical custody of all three of his children. (Record Excerpts item 2) Although the Order makes

reference to the fact that it was granted upon Rusty's Motion to Modify Original Decree and Request for Emergency Order, no such Motion can be found in the record. Furthermore there is no record of any notice of either the Motion or the Order having ever been given to Vicki. In October 2006 Vicki, in contravention of the July Order, removed Alexander from Rusty's custody and returned with him back to Texas. Although Vicki was initially held to be in contempt of the July Order (Record Excerpt item 4), both the July Order as well as the subsequent Order finding her in contempt was set aside because the Trial Court believed it did not have jurisdiction over Vicki to issue the July Order. (Record Excerpt item 12, paragraph 10.)

First it should be pointed out that the Vicki's only "violation" of the July Order was the episode which occurred in October that the Court refers to in number 2. In other words items one and two appear to refer to the same thing.

Next, It stands to reason that if the Trial Court recognizes the inherent impropriety of the July Order so much as to set aside both the Order as well as the subsequent finding of Vicki's contempt for violating the Order, then the Court should not hold Vicki's violation of an improper Order against her. Furthermore, even if the Court did feel that Vicki's non-compliance with the July Order was contemptuous, it has long been understood that changing child custody is not appropriate punishment for contempt. See Mixon v. Sharp, 583 So.2d 834, 838 (Miss. Ct. App. 2003)

The next item the Court mentions is that Vicki does not see that Alexander goes to school as he should, citing specifically that he had missed 27 days of school during the prior year when he had been with Vicki and that Alexander does not reach his potential in school when with Vicki. Although Alexander did miss 27 days of school, the Trial Court failed

recall that Alexander had missed many of those days as a result of health issues, and Vicki took steps to ensure that, although Alexander was out of school, she made sure that he had his homework assignments. (R. 133-134)

The next item the Court mentions is that Vicki did not cooperate with the guardian ad litem, and cites that she (presumably Vicki) did not have a home study made as directed by the Court. This item penalizes Vicki for something that she was not responsible for. On January 30, 2007 the Trial Court issued an Order directing that a home study be performed on Vicki's home through the Tishomingo County Department of Human Services and the State of Texas ICPC. (Record Excerpts item 9) On March 6, 2007 the Trial Court issued a Temporary Order in which the Court directs the Guardian ad Litem to make arrangements for the home study. (Record Excerpts item 10, paragraph 7) There is nothing in the record that reflects Vicki obstructed or otherwise defeated any effort by the Guardian ad Litem to arrange a home study or the State of Texas to complete one. It seems wholly inappropriate to hold against Vicki the failure to have a homestudy when it was never her responsibility to see that it be done.

Next, the Trial Court states that Vicki does not know how to discipline Alexander, she admits her discipline does not work and could give no alternative disciplines. Without commenting on the Trial Court's recollection of her testimony, it should be pointed out that there was no evidence presented that Vicki's ignorance of forms of discipline is something that has changed since the parties were divorced from each other in 1998. In other words for this to be a "material change" the Court would have to find that at some point Vicki did administer proper discipline, but since the entry of the Decree of Divorce she has lost that ability. Although this may be a proper factor for the Court to consider when looking at the

best interest of the child, this factor is not appropriate to consider as a material change lacking any evidence that Vicki's ability to discipline has changed.

Finally the Trial Court considered as a material change that Vicki allowed Kim (Alexander's older sister) and her boyfriend to share a bedroom while she had Alexander's custody. While this factor will be discussed in the next section, because there was no showing of any effect this may have had on Alexander (adverse or otherwise) this fact, while relevant to Vicki's parenting skills, is not material to show a material change as to Alexander.

After reviewing the six factors, it becomes clear that several were either inappropriate, not material to Alexander or not actually reflecting a change since the entry of the Decree of Divorce. As such it cannot be said that they constitute a material change in circumstances, and the Trial Court was in error in so finding.

B. Even if the Court was correct in finding that there had been a material change in circumstances as to Alexander, the Court failed to make any specific findings that the change in circumstances outlined by the Court had any adverse effect upon Alexander.

As stated above, the next step for the Chancellor in his analysis was to describe how those changes in circumstances had adversely affected Alexander. It is well settled that trial courts are required to make specific findings with regard to the adverse material change analysis. Sturgis v. Sturgis, 792 So.2d 1020, 1025 (Miss. Ct. App. 2001), Ortega v. Lovell, 725 So.2d 199, 203-204 (Miss. 1998) And yet the Trial Court only makes findings that one of his six "material changes" have had an adverse effect upon Alexander, namely in number 3 where the Trial Court states that, as a result of Vicki not seeing that Alexander go

to school as he should, he “does not reach his potential”. No other findings are given to reflect what, if any, adverse effect the Trial Court believes Alexander has or will suffer from the material changes.

The Mississippi Supreme Court has stated that “a change of circumstances which does not adversely affect the welfare of the child would, as a matter of law, be an immaterial change.” Marascalco v. Marascalco, 445 So.2d 1380, 1382 (Miss.1984) (citing Albright v. Albright, 437 So.2d 1003, 1005 (Miss.1983)). As such, without specific findings as to their adverse effect, the “material changes” found by the Chancellor are immaterial.

The best example of this is the sixth change listed by the Chancellor, that Vicki allowed Kim (Alexander’s older sister) and her boyfriend to share a bedroom while she had Alexander’s custody. Although this act was obviously unacceptable by the Chancellor, he fails to indicate that the act had any affect whatsoever on Alexander.

For these reasons the Chancellor erred by considering whether Alexander’s best interest required a change in custody without first finding **material** changes in circumstances that adversely affect Alexander.

C. The Court’s findings as to those factors enumerated in Albright factors are not supported by substantial evidence, or in the alternative the Court abused its discretion, was manifestly wrong, clearly erroneous.

The final prong required of the Chancellor in his decision whether to modify Alexander’s custody was to review what is in the child’s best interest according to those factors delineated by the Mississippi Supreme Court in Albright v. Albright, 437 So.2d 1003 (Miss. 1983) Although the Trial Court accurately identified the factors necessary for his consideration, some of his conclusions as to specific factors were not supported by

substantial evidence.

First, when considering "parenting skills" the Chancellor notes that "Alex was an honor student which with his father and missed little school. When with Vicki, Alex was frequently absent from school and did not do as well as he could academically. Rusty has better parenting skills. This factor favors Rusty." (Record Excerpts item 12, paragraph 22(3)) However the only evidence of how Alexander would perform in school while with his father would be the several months that he was in Rusty's care because of the improper July 2006 Order. It seems inappropriate to compare some four months of schooling while with Rusty against several years of schooling while in the custody of Vicki, especially when Alexander was in Rusty's care based upon an improper Order. Furthermore it does not seem substantial evidence to support either parties parenting skills based solely on Alexander's limited school performance.

Next, in declining to honor Alexander's stated preference to live with Vicki, the Trial Court states his belief that that Alexander's desire is "motivated by his mother not properly disciplining him." (Record Excerpts item 12, paragraph 22(10)) This finding fails to recognize, as stated above, how Vicki's failure to "properly discipline" has resulted in any adverse behavior or acts on Alexander's behalf. To the contrary, there was no evidence presented that Alexander was anything other than a well adjusted, smart, well behaved young man who was starting to have issues with school. As such, the Trial Court's finding as to this factor is not supported by substantial evidence.

Finally, in discussing "other factors" the Trial Court notes that the guardian ad litem, in her written report, recommends that custody be modified so that Rusty would have Alexander's custody. (Record Excerpts item 12, paragraph 22(12)) However a close

reading of her report shows that suffered substantially because much of the information necessary for her to perform her own independent investigation was in Texas. This is no where more evident than when she states "I have had a difficult time working on this case. The fact that Alex has been in Texas for most of my involvement has made it difficult to stay in close contact with him" (Record Excerpt item 11, page 144) As stated above, the Guardian ad litem was unable to procure a home study for Vicki's home. Because her investigation was so hampered as to Alexander's primary home the Trial Court should have discounted the report of the Guardian ad litem, and the Chancellor's reliance upon it in determining Alexander's best interest was ultimately error.

CONCLUSION

Based upon the arguments contained herein, Vicki would respectfully request this Court reverse the May 16, 2008 Opinion and Judgment of the Trial Court and either render a decision finding that it is not appropriate for the reasons stated above for Mississippi to extend jurisdiction over Alexander's custody determination and dismiss Rusty's request for modification, or in the alternative render a decision finding that there were insufficient material changes in circumstances which adversely affect Alexander and deny Rusty's request for a custody modification, or in the alternative remand this matter back to the Trial Court for either additional findings as to the issues raised regarding jurisdiction, additional findings as to the material changes in circumstances and what adverse affect they have on Alexander, or for new trial.

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

VICKI D. WHITE

APPELLANT

VS.

NO. 2008-TS-01246

JOHN R. WHITE

APPELLEE

CERTIFICATE OF SERVICE

This is to certify that I have this day mailed by United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief Record Excerpts to the following interested parties:

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RESPECTFULLY SUBMITTED, this the 12 day of April, 2009.


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