IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-CA-01333

TABATHA RENEE QUICK

Appellant

vs.

JEFFREY DALE QUICK

Appellee

On Appeal from the Chancery Court of Simpson County, Mississippi

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BRIEF OF APPELLANT TABATHA RENEE QUICK

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TABATHA RENEE QUICK **APPELLANT**

vs.

JEFFREY DALE QUICK **APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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

1. Tabatha Renee Quick (Saint), Appellant.[1]

2. Jeffrey Dale Quick, Appellee.

3. Philip A. Gunn and Wells Marble & Hurst, PLLC, Wells Marble & Hurst, PLLC, P. O. Box 131, Jackson, Mississippi 39205-0131, counsel for Appellant.[2]

4. W. Terrell Stubbs, P. O. Box 157, Mendenhall, MS 39114-0157, counsel for Appellee.

5. April D. Taylor, P. O. Box 1526, Prentiss, MS 39474, Guardian Ad Litem.

6. Honorable Joe Dale Walker, Chancellor, P. O. Box 909, Monticello, Mississippi.[3]

7. Honorable Larry Buffington, Chancellor, P. O. Box 924, Collins, Mississippi.

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[1] After the parties divorced, Tabatha Renee Quick remarried. Her new married name is Tabatha Saint. However, she will be referred to as "Tabatha Quick" herein to reduce confusion.

[2] Philip A. Gunn was not the attorney for Tabatha Quick in the court below. He was hired after this matter had already been appealed to this court to continue with the appeal.

[3] Honorable Joe Dale Walker was the trial judge in the court below. Judge Walker recused himself from this case after it was appealed to this court, and the case was re-assigned to Honorable Larry Buffington.

Respectfully Submitted,

Philip A. Bunn
Attorney of Record for
Tabatha ReneeQuick

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STATEMENT OF THE CASE

On March 14, 2007, the Chancery Court of Simpson County, Mississippi, entered a *Final Judgment of Divorce* granting a divorce on the ground of irreconcilable differences to Tabatha Renee Quick (Tabatha) and Jeffrey Dale Quick (Jeff), the parties herein. (R 7). In conjunction with their divorce, the parties entered into a *Child Custody, Support and Property Settlement Agreement* in which the parties agreed that they would share joint legal and physical custody of their three minor children with the wife having primary physical custody. (R 17, ¶ IIIa)

Thereafter, on June 27, 2007, Jeff filed a *Petition for Citation of Contempt and for Modification* in which he alleged that he was an adult resident citizen in the State of Louisiana and that Tabatha was an adult resident citizen of the State of Alabama (R 38-39). Recognizing that Jeff was no longer a resident of Mississippi but was now a resident of Louisiana, Tabatha realized that neither the parties nor their children had any significant connection with the State of Mississippi anymore. Consequently, on August 3, 2007, Tabatha filed a *Motion to Transfer Jurisdiction* pursuant to the *Uniform Child Custody Jurisdiction and Enforcement Act* ("UCCJEA") which has been codified at Miss. Code Ann. § 93-27-101, *et seq.* (R 50). As part of her motion, Tabatha attached as an exhibit a protection order that was entered by the Circuit Court of Marshall County, Alabama, on May 1, 2007, against Jeff. (R 56). Tabatha also attached to her motion a copy of a *Petition for Modification* that was filed in the Circuit Court of Marshall County, Alabama on May 22, 2007. (R 59). The basis of Tabatha's motion was that the parties were no longer Mississippi residents and no longer had any significant connection with Mississippi. The children were living with Tabatha in Alabama, so the nature and location of any evidence pertaining to the best interests of the children was now located in Alabama. Therefore, the strongest jurisdictional ties now existed in Alabama. Further, Tabatha alleged that

she had been a victim of domestic violence from Jeff in the past and felt that the local court in Alabama would be better able to provide her with the protection she needed rather than a court in Mississippi. Therefore, the more convenient forum to assume jurisdiction of the case was the Circuit Court of Marshall County, Alabama. (R 50-54).

On September 18, 2007, the Chancery Court of Simpson County entered an order denying Tabatha's *Motion to Transfer Jurisdiction.* (R 92). On the same day, the Court entered an *Order of Contempt and Modification* against Tabatha. (R 94).

On November 13, 2007, Jeff filed another *Petition for Citation of Contempt and for Modification* and once again admitted that he was a resident of Louisiana. (R 99). Jeff attempted to serve process on Tabatha through a process server named Ed Teal. Mr. Teal later testified under oath about his efforts to serve process on Tabatha. Mr. Teal stated that he went to Tabatha's house but admitted that he did not personally hand any process to Tabatha. (T 83). In fact, Mr. Teal testified that the closest he ever got to Tabatha was "10-15 feet away" when she walked out of her house at the time that he was trying to give the papers to her husband who refused to accept them. (T 83-84). Mr. Teal simply laid the papers on the ground and yelled to Tabatha "here's your papers." (T 83). Further, upon questioning by the Court, Mr. Teal admitted that he never attempted to hand the papers to Tabatha. (T 84). When asked by the Court why he did not hand the papers to Tabatha, he responded "they were refusing to accept them." (T 84).

Despite his failed attempt to personally serve Tabatha, Mr. Teal, nevertheless, completed a proof of service in which he claims to have personally served Tabatha on December 31, 2007, in Marshall County, Alabama. He filed this proof of service in the Chancery Court of Simpson County, Mississippi, on January 3, 2008. (R 108).

Thereafter, on January 7, 2008, the Chancery Court of Simpson County proceeded with a

hearing on Jeff's *Petition for Citation for Contempt and for Modification* which he had filed on November 13, 2007. Because Tabatha had not been legally served with process for this hearing, she did not appear. (T 10 and 13). Despite Tabatha's absence, the Court proceeded with the hearing. Presumably, Jeff was allowed to present evidence in support of his motion for modification, which would have included a discussion and consideration of the *Albright* factors. In fact, the order signed by the court specifically states that the *Albright* factors were considered in making its ruling. (R 111). As a result of this hearing, the Court entered an Order dated January 10, 2008, *nunc pro tunc* to January 7, 2008, transferring custody of the minor children to Jeff and suspending the visitation rights of Tabatha until she made an appearance before the court. (R 110-112).

In response to this ruling, Tabatha filed a *Rule 60(b) Motion for Relief from the Court's Order* on February 22, 2008, on the basis that the Court did not have personal jurisdiction over her at the time of the January 7, 2008, hearing and that the service of process attempted by Ed Teal was insufficient. (R 113). At the same time, Tabatha requested the Court to transfer jurisdiction of the case to her home state of Alabama.

Further, on April 16, 2008, Tabatha filed a *Motion to Dismiss* in the Chancery Court of Simpson County asserting that the Order entered by the Court on January 10, 2008, was void, because Tabatha was never served with personal process, and therefore, the Chancery Court of Simpson County lacked jurisdiction to enter said Order and to make the findings and rulings that it did. (R 128). Tabatha again requested that jurisdiction of the case be transferred to Alabama under the UCCJEA inasmuch as the parties were no longer residents of Mississippi. (R 128-129).

A hearing was held on both of Tabatha's motions on May 21, 2008. At the conclusion of the hearing, the Court denied Tabatha's motion to dismiss and declared that Tabatha had been

properly served with process and entered an *Order of Contempt*. (R 136). In its *Order of Contempt*, the Court ordered the Sheriff of Covington County to hold Tabatha in jail until such time as she turned the children over to Jeff. The Court further ordered that Tabatha should have no visitation with the minor children until further order of the Court and ordered Tabatha to post a security bond in the amount of $7,500.00 before the Court would consider any visitation rights whatsoever. (R 136-37).

SUMMARY OF ARGUMENT

The trial court did not have personal jurisdiction over Tabatha Quick on January 7, 2008, when it proceeded with a hearing to change custody, because Tabatha had not been served with process. A trial court can only acquire jurisdiction over an individual through service of process. The rules regarding service of process are clear and are to be strictly construed. Failure to comply with the rules for service of process equates to insufficient service of process, and the trial court has no jurisdiction over the person. If the trial court lacks personal jurisdiction over a person, then any judgment rendered against that person is void and invalid.

In this case, the summons issued for Tabatha was not personally served on her. Rather, the process server attempted to serve process on Tabatha's husband who refused to accept process. Apparently, the process server simply left the summons lying in the yard somewhere. Additionally, the process server never mailed a copy of the summons to Tabatha at the address where he left the summons. Miss. R. Civ. P. 4(d)(1)(B) provides that when such "residence service" is made, it must be followed by the mailing of a copy of the documents to the defendant at the residence where process was delivered.

Finally, even if the process server had complied with the requirements of Miss. R. Civ. P. 4(d)(1)(B), such "residence service" is not deemed complete until the tenth day after such

mailing. Therefore, the earliest possible date the service would have been deemed complete was 3 days after the hearing had already been held.

Clearly, the attempted service of process in this case was insufficient, so the Chancery Court of Simpson County did not have personal jurisdiction over Tabatha on January 7, 2008, when it ordered a change in custody. Consequently, the findings and rulings of the Chancery Court of Simpson County arising out of the January 7, 2008, hearing were in error and should be set aside.

As stated above, the Court proceeded with a hearing to change custody on January 7, 2008, and considered the *Albright* factors even though Tabatha Quick had not been properly served with process and was not present. It is error for a court to consider the *Albright* factors when both parents are not present for the hearing.

The "paramount consideration" in any child custody determination is *the best interest of the child.* Before a court can modify an existing child custody order, the court must determine that a change in custody is in the best interest of the child. Such a determination must include a consideration of the *Albright* factors before deciding to alter custody.

There is no evidence in the Record evidencing the basis of the Court's decision, no on-the-record findings of fact as to each of the *Albright* factors, or any finding as to why a change of custody was in the best interest of the children. Any court is better able to make a decision regarding what is in the best interest of the child after hearing from *both* parents, rather than only one. Without hearing from both parents, the Court was less informed, less knowledgeable, and, therefore, less able to fully consider what was in the best interests of the children and rule accordingly.

For the Court to proceed in this fashion was error. Consequently, any findings of the

Court arising out of the January 7, 2008, hearing should be set aside and custody of the children should be returned to Tabatha Quick until such time as another hearing can be conducted with both parents present.

As previously stated herein, after the parties divorced, they each moved from Mississippi—Tabatha moving to Alabama with the three minor children and Jeff moving to Louisiana. Therefore, neither the parties nor their children had any further significant connection with the State of Mississippi.

Consequently, Tabatha filed a *Motion to Transfer Jurisdiction* on August 3, 2007, pursuant to the *Uniform Child Custody Jurisdiction and Enforcement Act* (UCCJEA), which is codified at Miss. Code Ann. § 93-27-101, *et seq*.

The Chancery Court of Simpson County erred when it failed to transfer jurisdiction of this case to the Circuit Court of Marshall County, Alabama. The evidence in this case clearly establishes that neither the parties nor the children had any significant connection with the State of Mississippi anymore. The more convenient forum for this action was the State of Alabama inasmuch as Tabatha lived there with the children and had been doing so for two years, the children were enrolled in school there and doing well, their entire lives were connected to Alabama, and Jeff no longer lived in Mississippi. Furthermore, Tabatha's whole family lived in Alabama which provided her with a substantial support system for the children. Clearly, the parties no longer had any significant connection with the State of Mississippi, and Alabama was a more convenient forum to handle this matter. Therefore, jurisdiction of this matter should be transferred to the Circuit Court of Marshall County, Alabama.

The rulings of the Chancery Court of Simpson County worked to create great hardship on Tabatha, but more importantly, did not take into consideration what was in the best interests of

the children.

The January 10 Order suspended all visitation rights of Tabatha until such time as she came before the Court; there is nothing in the Order stating why it would be in the best interest of the children for their visitation rights with their mother to be suspended. This Order also required Tabatha to pay $420.00 a month in child support without setting forth the basis for such a determination or even whether this complies with the statutory guidelines for child support.

The Court's Order of Contempt entered on July 14, 2008, also ordered Tabatha to be jailed until such time as the children were delivered to Jeff. The Court further ordered that Tabatha would have no visitation with the parties' minor children until further order of the Court. Again, the Court failed to provide any justification, explanation, or finding as to why it would be in the best interest of these young children for them to not see their mother in the course of regular visitation privileges.

These orders and rulings served to create great hardship on Tabatha, were inequitable, unjust, and, most importantly, hurt the children and were not in their best interest. Therefore, the January 10, 2008, order and the July 14, 2008, order of the Court were in error and should be set aside. Custody of the parties' minor children should be returned to Tabatha and this matter transferred to the Circuit Court of Marshall County, Alabama, for any further proceedings.

ARGUMENT

I. The attempted service of process on Tabatha Quick was insufficient and therefore, the Chancery Court of Simpson County, Mississippi, lacked personal jurisdiction over her at the time of the January 7, 2008, hearing and committed error by proceeding with the hearing in her absence.

Whether a trial court has jurisdiction is a question of law, so the appellate court conducts a *de novo* review of jurisdictional questions on appeal. *Trustmark National Bank v. Johnson*,

865 So.2d 1148, 1150 (Miss. 2004).

"The existence of personal jurisdiction depends upon reasonable notice to the defendant." *Mansour v. Charmax Industries*, 680 So.2d 852, 854 (Miss. 1996), citing *Noble v. Noble*, 502 So.2d 317, 320 (Miss. 1987). A trial court can only acquire jurisdiction over an individual through service of process or by the individual's personal appearance. *Mansour,* at 854, citing *Aldridge v. First Nat'l Bank*, 165 Miss. 1, 14, 144 So. 469, 70 (1932) and citing *State ex rel. Moak v. Moore*, 373 So.2d 1011, 1012 (Miss. 1979).

The rules regarding service of process are clear and are to be strictly construed. *Tucker v. Williams*, 2007-CA-02223-COA, ¶12 (Miss. Ct. App. Mar. 31, 2009); *Lexington Ins. Co. v. Buckley*, 925 So.2d 859, 869 (Miss. Ct. App. 2005); *Young v. Sherrod*, 919 So.2d 145, 148 (Miss. Ct. App. 2005); *Kolikas v. Kolikas*, 821 So.2d 874, 878 (Miss. Ct. App. 2002); *Birindelli v. Egelston*, 404 So.2d 322, 323-24 (Miss. 1981).

The concept of personal jurisdiction requires strict compliance with the rules for service of process. *Tucker,* at ¶9; *Lexington,* at 865. Defects in the service of process are not permissible. *Mansour*, at 855, citing *Powell v. Powell*, 644 So.2d 269, 273-74 (Miss. 1994). Failure to comply with the rules for service of process equates to insufficient service of process, and the trial court has no jurisdiction over the person. *Tucker*, at ¶9 and ¶12; *Lexington*, at 869; *Young*, at 149; *Mansour,* at 855. If a party fails to comply with the standards governing adequate service of process, then the chancery court cannot obtain personal jurisdiction over an opponent. *Lexington,* at 864. Accordingly, the Mississippi Court of Appeals has held that it will reverse cases featuring defective service of process. *Id.*

If a chancery court lacks personal jurisdiction over a party, then any judgment rendered against that party is void and invalid because "no judgment or order or decree is valid or binding

upon a party who has had no notice of the proceeding against him." *Tucker*, at ¶9 and ¶20; *Lexington*, at 864, citing *James v. McMullen*, 733 So.2d 358 (Miss. Ct. App. 1999).

In this case, the summons issued for Tabatha was issued pursuant to Miss. R. Civ. P. 81(d)(2) which states that certain actions are triable seven days *after completion of service of process*. Obviously, the successful completion of service of process is required before any matter listed under Miss. R. Civ. P. 81(d)(2) can be tried.

The attempted service of process by Ed Teal on December 31, 2007, failed to comply with the requirements for service of process under Miss. R. Civ. P. 4(d)(1)(A). Under Miss. R. Civ. P. 4(d)(1)(A), service of a summons on an individual must be delivered to the individual *personally*. By Mr. Teal's own testimony, he did not serve Tabatha *personally*. As shown above, Mr. Teal stated that he went to Tabatha's house but did not personally hand any process to Tabatha. (T 83). He testified that the closest he ever got to Tabatha was "10-15 feet away" when she walked out of her house while he was trying to give the papers to her husband who refused to accept them. (T 83-84). He merely laid the papers on the ground and yelled to Tabatha "here's your papers." (T 83). He admitted that he never attempted to hand the papers to Tabatha. (T 84). Consequently, Mr. Teal's attempted service failed to comply with the requirements of Miss. R. Civ. P. 4(d)(1)(A) for service upon an individual.

Alternatively, under Miss. R. Civ. P. 4(d)(1)(B), a copy of a summons can be left at the individual's usual place of abode with the individual's spouse *who is willing to receive service* and *by thereafter mailing a copy of the summons to the person to be served at the place where a copy of the summons was left*. Clearly, by Mr. Teal's own testimony, he admitted that Tabatha's husband refused to accept service, *i.e.*, *was not willing to receive service.* (T 83-84). Furthermore, there is no evidence that Mr. Teal ever thereafter mailed a copy of the summons to

Tabatha at the place where he left the summons. The Mississippi Supreme Court has held that "residence service" by the mere delivery of a summons and without the requisite mailing thereafter does not complete service. *Williams v. Kilgore*, 618 So.2d 51, 55 (Miss. 1992). The court explained that Miss. R. Civ. P. 4(d)(1)(B) provides that when such "residence service" is made, it must be followed by the mailing of a copy of the documents by first class mail to the defendant at the residence where process was delivered. *Id.* So again, Mr. Teal's attempted service failed to comply with the requirements of Miss. R. Civ. P. 4(d)(1)(B) for "residence service."

Finally, even if Tabatha's husband had been willing to accept service on her behalf and even if Mr. Teal had mailed a copy of the summons to Tabatha as required by Miss. R. Civ. P. 4(d)(1)(B), such "residence service" is not deemed complete until the tenth day after such mailing. Miss. R. Civ. P. 4(d)(1)(B); *Collom v. Senholtz*, 767 So.2d 215, 216 (Miss. Ct. App. 2000); *Williams v. Kilgore*, at 55. Therefore, assuming *arguendo* that Mr. Teal had complied with the requirements of Miss. R. Civ. P. 4(d)(1)(B), (which is denied), the earliest possible date he could have mailed the summons to her would have been that same day – December 31, 2007. Ten days from December 31, 2007, was January 10, 2008, and that would have been the earliest date which service of the summons would have been deemed complete under Miss R. Civ. P. 4(d)(1)(B). Therefore, even if Mr. Teal had properly made a "residence service," service would not have been deemed complete until January 10, 2008; yet the hearing in this matter was 3 days earlier on January 7, 2008.

Service of process is not proper where a plaintiff chooses which obligations for service of process he wants to meet. *Lexington,* at 868. Nor is service of process proper where the plaintiff meets some or most of the obligations for service of process. *Id.* Rather, a party must fulfill

every obligation required for successful service of process before service of process is deemed complete. *Id.*

Clearly, the attempted service of process in this case was insufficient, so the Chancery Court of Simpson County, Mississippi, did not have personal jurisdiction over Tabatha on January 7, 2008, when the Court attempted to go forward with a hearing on Jeff's petition. For the Court to proceed with the January 7, 2008, hearing in the absence of an appearance by Tabatha was error. Consequently, the findings and rulings of the Chancery Court of Simpson County arising out of the January 7, 2008, hearing were in error and should be set aside.

II. The Chancery Court of Simpson County, Mississippi, erred when it considered the *Albright* factors without both parents being present.

As stated above, the Court proceeded with a hearing on Jeff Quick's petition to change custody on January 7, 2008, and considered the *Albright* factors even though Tabatha Quick had not been properly served with process and was not present. (R 111). The case of *Wade v. Wade*, 967 So.2d 682 (Miss. Ct. App. 2007) clearly shows that this was error by the Court.

In *Wade*, the husband sought a divorce from the wife and *personally served her with a summons and complaint* (which is not even the case here). However, the wife never appeared nor made any response to the complaint. The husband ultimately obtained a final judgment of divorce on the ground of cruel and inhuman treatment, and the court awarded custody of the parties' minor child to the husband.[4] Thereafter, the wife received a copy of the judgment of divorce and immediately filed a motion to set aside the judgment and requested a new trial. The chancery court granted the wife's request to revisit the issue of custody based on the *Albright*

[4] The wife in the *Wade* case not only lost custody but was ordered to pay child support, provide health insurance, maintain a life insurance policy, and ordered to pay for the college education of the minor child.

factors finding that it was error to conduct a hearing on custody and consider the *Albright* factors when both parents were not present.

The Mississippi Court of Appeals affirmed the decision of the chancery court to not make a decision on child custody without both parents being present:

> It passes without citation that, in child custody cases, the paramount consideration is the best interest of the child. The chancellor's rationale for granting [the wife's] motion is clear from the order wherein he stated that the motion was "granted in part because of equitable considerations" and that the court would revisit the issue of custody for a determination based on the *Albright* factors, an exercise not undertaken in the original grant of custody. *Certainly, a more prudent determination of custody may be made when based upon evidence presented from both parents rather than evidence presented by only one. Where a chancellor has the opportunity to consider the argument of both parents, the facts and circumstances affecting his determination are presumably more fully developed. It follows that a chancellor is able to make a more informed decision, thereby insuring to a higher degree of certainty that the best interest of the child is met.*
>
> Moreover, in the original judgment of divorce, the chancellor made no findings of fact or conclusions of law under the *Albright* factors, nor did he allude to them in any way. Our Supreme Court holds that the failure of a chancellor to make findings of fact as to the applicable *Albright* factors is reversible error. *J.P.M. v. T.D.M.,* 932 So.2d 760, 770 (Miss. 2006), citing *Powell v. Ayars,* 792 So.2d 240, 244 (Miss. 2001). It is clear from the record that the chancellor realized his mistake and sought to cure it in granting [the wife's] motion. In the second hearing on child custody, the chancellor heard additional testimony and made "new" findings of fact as to each applicable *Albright* factor. In doing so, he satisfied the requirement that on-the-record findings of fact are to be made as to each applicable *Albright* factor.

Wade, at 684-85 (emphasis added).

The *Wade* case clearly establishes that it is error for a court to entertain a petition for change of custody and to consider the *Albright* factors when both parents are not present for the hearing. As clearly stated in the *Wade* case, the "paramount consideration" in any child custody determination is *the best interest of the child*, not which parent has the better claim or which parent may have offended the court. *Id.* at 684. It appears from the Record in this case that the

Chancery Court of Simpson County proceeded to change custody - not based on what was in the best interest of the children - but to punish Tabatha her for her perceived contempt. Clearly, there is no evidence in the Record evidencing the basis of the Court's decision, no on-the-record findings of fact as to each of the *Albright* factors, or any finding as to why a change of custody was in the best interest of the children.

Before a court can modify an existing child custody order, the court must make three determinations: 1) determine that there has been a material change in circumstances affecting the child; 2) determine that this change is detrimental to the child's welfare; and 3) determine that a change in custody is in the best interest of the child. *Bredemeier v. Jackson*, 689 So.2d 770, 775 (Miss. 1997). In deciding whether there has been a material change, the totality of circumstances should be considered. *Id.* Even if the Court finds a material change in circumstances, there is another step; a change in custody is not automatic. Such a finding is merely the first step, the one which then authorizes and indeed challenges the chancellor to then go forward and determine whether the best interest of the child justifies a change of custody. *Tucker v. Tucker*, 453 So.2d 1294, 1297 (Miss. 1984); *Bredemeier,* at 775. Such an assessment must include a consideration of the *Albright* factors before deciding to alter custody. *Sturgis v. Sturgis*, 792 So.2d 1020 (Miss. Ct. App. 2001). In *Sturgis*, the chancellor found a material change in circumstances adverse to the interest of the children, but did not mention the *Albright* factors before deciding to alter custody. A majority of the appellate court found such an action to be reversible error. *Id.* at 1024.

As clearly stated in the *Wade* case, any court is better able to make a decision regarding what is in the best interest of the child after hearing from *both* parents, rather than only one. Therefore, for the Chancery Court of Simpson County to proceed with a hearing on January 7,

2008, to consider a change in custody and to consider the *Albright* factors without both parents being present was error.

Indeed, if the objective is to do what is in the best interest of the children, then it logically follows that, the more information the court has about the children, the better decision the court will make about what is in their best interest. Without hearing from both parents, the Court is less informed, less knowledgeable, and, therefore, less able to fully consider what is in the best interest of the children and rule accordingly. Therefore, it seems that great effort should be made to allow both parents to be heard before making any decision regarding a change in custody. In fact, only in rare or extreme circumstances – such as when a parent has completely abandoned a child or has expressed no interest in the custody of his child - should a chancery court proceed with a decision on custody without hearing from both parents.

Such is certainly not the case here. Tabatha has great interest in the welfare of her children and in their custody, and there is no evidence in this case to suggest otherwise. Tabatha simply failed to appear for a hearing about which she had no notice. Such an occasion certainly does not rise to the level of a rare or extreme circumstance as argued above. Considering the magnitude of the decision the court was about to make, it certainly seems reasonable for the court to make every effort to allow both parents to heard before making a decision on custody. For the Court to order a change in custody under these circumstances certainly does not reflect a desire to do what is in the best interest of the children.

Furthermore, the Order issued by the Court arising out of the January 7, 2008 hearing (dated January 10, 2008) does not contain any evidence whatsoever of the Court's on-the-record findings of fact as to each of the *Albright* factors. (R 110). Clearly, under *Sturgis*, this is reversible error. Consequently, any findings of the Court arising out of the January 7, 2008,

hearing should be set aside and custody of the children should be returned to Tabatha Quick until such time as another hearing can be conducted with both parents present.

III. The Chancery Court of Simpson County, Mississippi, lacked jurisdiction to rule in this case.

As previously stated herein, after the parties divorced, they each moved from Mississippi—Tabatha moving to Alabama with the three minor children and Jeff moving to Louisiana. As noted above, Jeff filed two petitions on June 27, 2007, and November 13, 2007, wherein he admitted that he was now a resident citizen of Louisiana and that Tabatha was a resident citizen of Alabama. (R 38-39 and 99-100). Therefore, neither the parties nor their children had any further significant connection with the State of Mississippi.

Consequently, Tabatha filed a *Motion to Transfer Jurisdiction* on August 3, 2007, pursuant to the *Uniform Child Custody Jurisdiction and Enforcement Act* (UCCJEA), which is codified at Miss. Code Ann. § 93-27-101, *et seq*. The purpose of the UCCJEA is to provide a mechanism whereby parties who no longer have any significant connection with the State of Mississippi can transfer jurisdiction of a child custody matter to the "new home state" of the children so as to be more convenient for the children and the parties. Miss. Code Ann. § 93-27-101 (1972). Once it is shown that neither the parties nor their children have any further significant connection with the State of Mississippi, a court of this state which has jurisdiction to make a child custody determination may decline to exercise its jurisdiction if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. *Id.* Relevant factors which the court should consider in making this decision include: (a) whether domestic violence has occurred and which state could best protect the parties and the child; (b) the length of time the child has resided outside the state; (c) the distance

between the court in this state and the court in the state that would assume jurisdiction; (d) the relative financial circumstances of the parties; (e) any agreement of the parties as to which state should assume jurisdiction; (f) the nature and location of evidence pertaining to the children; (g) the ability of the court of each state to decide issues expeditiously; and (h) familiarity of the court of each state with the facts and issues. *Id.*

A court of this state which made an initial child custody determination has continuing jurisdiction over the determination until (a) neither the child nor the child and one parent have any significant connection with this state, and substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or (b) the child and his parents no longer reside in the state. Miss. Code Ann. § 93-27-202 (1972). The "home state" of a child is considered to be the state where the child has lived with a parent for at least six consecutive months immediately before the commencement of a child custody proceeding. Miss. Code Ann. § 93-27-102(g) (1972).

Based on the foregoing statutes, Tabatha filed a *Motion to Transfer Jurisdiction* on August 3, 2007. (R 50-91). In her motion, Tabatha clearly set forth the basis upon which jurisdiction of this matter should be transferred to Alabama: (1) two protection orders had been issued by the court in Alabama protecting Tabatha against the treats made to her by Jeff (see Trial Exhibits pp. 7-11, 12-14, 15-19, and 20-22); (2) a petition for modification had been filed in the Circuit Court of Marshall County, Alabama (R 59-61); (3) Jeff had threatened to kill Tabatha and had kidnapped one of the minor children during one of his scheduled visits, thereby resulting in the entry of the protection order (R 59); (4) Tabatha had lived in the State of Alabama with the children for almost two years (R 87-88); (5) Jeff was a resident of the State of Louisiana (R 38, 88, 99); (6) Jeff had threatened to do bodily harm to Tabatha after her last

attempt at visitation and threatened to keep the children away from her (R 88). Tabatha filed her *Motion to Transfer Jurisdiction* pursuant to Miss. Code Ann.§ 93-27-206(1) which provides in part that a court of this state may not exercise jurisdiction if, at the time of the commencement of the proceeding, a proceeding concerning has been commenced in a court of another state having jurisdiction substantially in conformity with this chapter.

The Chancery Court of Simpson County erred when it failed to transfer jurisdiction of this case to the Circuit Court of Marshall County, Alabama. The evidence in this case clearly establishes that neither the parties nor the children had any significant connection with the State of Mississippi anymore. The more convenient forum for this action was the State of Alabama inasmuch as Tabatha lived there with the children and had been doing so for two years, the children were enrolled in school there and doing well, their entire lives were connected to Alabama, and Jeff no longer lived in Mississippi. (T 18 and Trial Exhibit No. 7, p. 118-119 of trial exhibits). Furthermore, Tabatha's whole family lived in Alabama which provided her with a substantial support system for the children. (T 18-29). Clearly, Tabatha's *Motion to Transfer Jurisdiction* set forth sufficient evidence establishing that neither the parties nor the children had any significant connection with the State of Mississippi any longer, and Alabama was clearly now a more convenient forum to handle this matter. Therefore, jurisdiction of this matter should be transferred to the Circuit Court of Marshall County, Alabama.

Alternatively, the Chancery Court of Simpson County, Mississippi, erred in communicating with the Circuit Court of Marshall County, Alabama, regarding this matter. Miss. Code Ann. § 93-27-110 (1972), clearly provides that, when there is a competing jurisdiction between states, the court of this state may communicate with a court in another state concerning jurisdiction. The court may allow the parties to participate in said communication,

but if the parties are not able to participate in the communication, they must be given an opportunity to present facts and legal arguments before a decision on jurisdiction is made. Furthermore, a record must be made of the communication between the courts and the parties must be promptly informed of the communication and granted access to the record. *Id.* For purposes of this section, "record" means information that is inscribed on a tangible medium, or that is stored in an electronic or other medium and is retrievable in perceivable form. *Id.*

The Chancery Court of Simpson County failed to comply with Miss. Code Ann. § 93-27-110 when it communicated with the Circuit Court of Marshall County, Alabama. The Court stated on the record that it merely talked with the Judge in Alabama. (T 23-25). There is no evidence in the Record that the parties were able to participate in this communication or that a record was made of this communication between the Chancery Court of Simpson County, Mississippi, and the Circuit Court of Marshall County, Alabama. Furthermore, there is no evidence that the parties were promptly informed of the communication or granted access to the record. Therefore, the Chancery Court of Simpson County erred and failed to comply with the provisions of Miss. Code Ann. §93-27-110 (1972): 1) when it failed to include the parties in its communication with the Circuit Court of Marshall County, Alabama; 2) when it failed to make a record of its communication with the Circuit Court of Marshall County, Alabama; 3) and when it failed to promptly inform the parties of the communication and grant them access to the record. For these reasons, the Order entered by the Court retaining jurisdiction should be set aside and this matter transferred to the Circuit Court of Marshall County, Alabama.

IV. The Order entered by the Chancery Court of Simpson County, Mississippi, on January 10, 2008, was inequitable, unfair, not based on the evidence, and created an undue hardship on Tabatha Quick.

As set forth above, the Chancery Court of Simpson County committed numerous errors in

this case: (1) Tabatha was not properly served with process in this case, and therefore the Court had no personal jurisdiction over her when it made its rulings and entered its judgment on January 10, 2008, *nunc pro tunc* to January 7, 2008; (2) the Court transferred custody of the children to Jeff without Tabatha being served with process, without Tabatha being present in Court, without the Court hearing from Tabatha as to what the best interest of the children should be, without stating any basis as to why a change in custody was in the best interests of the children, and without properly making on-the-record findings of the *Albright* factors; (3) the Court did not transfer jurisdiction of this matter to the Circuit Court of Marshall County, Alabama, which is a more convenient forum for this matter; (4) the Court denied Tabatha's Rule 60(b) Motion for Relief from Orders (R 113) and her Motion to Dismiss (R 128).

The January 10 Order also suspended all visitation rights of Tabatha until such time as she came before the Court; there is nothing in the Order stating why it would be in the best interest of the children for their visitation rights with their mother to be suspended. (R 110). This Order also required Tabatha to pay $420.00 a month in child support without setting forth the basis for such a determination or even whether this complies with the statutory guidelines for child support. (R 110). This Order also commanded Tabatha to pay Jeff's attorney's fees. (R 110). Clearly, such an order is harsh when the Court had no personal jurisdiction over Tabatha and when the Court obviously did not have sufficient evidence to make such a ruling, because all the parties were not before the Court.

The Court's Order of Contempt entered on July 14, 2008, arising out of the hearing on May 21, 2008, also implemented an inequitable and unfair result and created great hardship on Tabatha. In this Order, the Court ordered Tabatha to be jailed until such time as the children were delivered to Jeff. (R 136-37). At the hearing of this matter, Tabatha informed the Court

that she was a nursing mother and needed to return home to nurse her infant child. (T 147-149). At the same time, however, the Chancellor ordered Tabatha to be both jailed and to produce the children who were still at home in Alabama. Obviously, Tabatha could not be both. Therefore, Tabatha had to rely upon the generosity of family and friends to deliver the children to Mississippi before she could be freed from jail. This created a great hardship on Tabatha and was an excessive and unnecessary punishment on Tabatha considering the nature of her "alleged offense." In other words, this punishment did not fit the perceived offense.

The Court further ordered that Tabatha would have no visitation with the parties' minor children until further order of the Court. (R 137). Again, the Court failed to state why or how this would be in the best interest of the children. Clearly, considering the young ages of the children (8, 5 and 3), it was in their best interest to be able to see their mother. The Court provided no justification, explanation, or finding as to why it would be in the best interest of these young children for them to not see their mother in the course of regular visitation privileges.

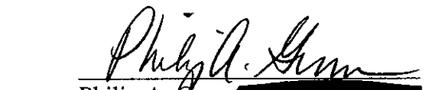
Finally, the Court ordered Tabatha to post a $7,500.00 security bond before the Court would even consider any visitation whatsoever. (R 137).

Clearly, the ruling of the Court was designed to punish Tabatha for what it perceived to be contempt of court. These orders and rulings served to create great hardship on Tabatha, were inequitable, unjust, and, most importantly, hurt the children and were not in their best interest. Therefore, the January 10, 2008, Order and the July 14, 2008, Order of the Court were in error and should be set aside. Custody of the parties' minor children should be returned to Tabatha and this matter transferred to the Circuit Court of Marshall County, Alabama, for any further proceedings.

CONCLUSION

Based on the foregoing errors, the January 10, 2008, and the July 14, 2008, orders of the Chancery Court of Simpson County should be voided and set aside, the custody of the children should be returned to Tabatha Quick, and this matter should be transferred to the Circuit Court of Marshall County, Alabama.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Philip A. Gunn, attorney for the Appellant, do hereby certify that I have this day served a copy of the foregoing document via U. S. Mail, postage prepaid, on:

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GUARDIAN AD LITEM

This the 6th day of April, 2009.

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