

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MICHAEL PHILLIPS

APPELLANT

VERSUS

NO. 2008-CA-02019-COA

SARAH PHILLIPS

APPELLEE

APPEAL FROM THE CHANCERY COURT OF  
JONES COUNTY, MISSISSIPPI  
SECOND JUDICIAL DISTRICT  
CAUSE NO. 2007-0017

THE HONORABLE FRANKLIN C. MCKENZIE, JR., CHANCELLOR, PRESIDING

**REPLY BRIEF OF APPELLANT**

ORAL ARGUMENT NOT REQUESTED

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## LEGAL ARGUMENT

1. **The Chancellor erred in awarding joint physical custody of the parties' minor children.**
  - A. **The Chancellor failed to make on-the-record findings as to why Shayla Phillips' preference to live with her father should not be honored.**

Prior to a Temporary Order being entered in this case, Shayla and Samantha Phillips lived with their father during the week (Monday through Friday) and lived with their mother on the weekends. At the temporary hearing, Shayla testified that she wanted to live with her father and the Court honored that preference and kept the custodial arrangement the same as it had been prior to the temporary hearing. (CP. 26) That custodial arrangement provided that the children were with the father during the week and with their mother on the weekends.

The Court entered his Temporary Order on March 13, 2007 awarding Michael the physical custody of these two girls. (CP. 26) The custodial arrangement with Michael having physical custody of the children during the week and with Sarah having visitation on the weekend lasted until the Court entered an Order on September 30, 2008. For a period of almost two years, these two girls had a consistent reliable routine. The September 30, 2008 Order rejected Shayla's preference; disregarded Samantha's testimony that she was comfortable with the existing arrangement and disregarded the parents' inability to cooperate or work together in a joint physical custody situation. (CP. 124) (T. 335-337)

Mississippi law mandates that when a child testifies that she wants to live with one parent, a rejection of her preference must be explained in detail by the trial Court. In this case, Shayla testified on two occasions. She testified at the trial on March 5, 2008 and at the hearing on Michael's Motion for Reconsideration of Custody. (T. 317, 328) Sarah misstates to this

Court that when the Chancellor acknowledged Sarah's preference, that somehow equates with explaining in detail why Shayla's wishes were not honored.

This Court has been crystal clear in its cases as late as 2007. *Anderson v. Anderson*, 961 So.2d 55 (Miss. Ct. App. 2007) Chancellors must make an on-the-record finding as to why the best interest of the child would not be served by honoring the child's preference. This principle of law as mandated by the Legislature and wisely followed by this Court, is even more important in cases such as this where the Chancellor honored the child's preference at the temporary hearing but did not honor her preference at the trial of the case. There was no evidence presented by Sarah to show that anything had changed from the date of the Temporary Order, March 13, 2007, through the divorce trial, April 2, 2008, or at the Motion for Reconsideration that would justify the Court in rejecting Shayla's preference to live with her father. Sarah attempts to reframe the facts by stating that because the Court acknowledged that Shayla had a preference that this honors the child's preference.

The law does not state that if the Court weighs the child's preference as a factor in favor of a parent that the Chancellor has fulfilled his obligation to "explain in detail why the wishes of any child were or were not honored." Miss. Code Ann. § 93-11-65 (1)(a). To further support the importance of the Chancellor in this case explaining in detail his reasons for not honoring Shayla's testimony, is the fact that neither party requested joint custody in their pleadings. It was almost as if this was an afterthought by Sarah in her belief that she would not win physical custody because Shayla and Samantha did not want to live with her. Sarah also confuses the issue by saying that a newer version of the law clarified that the child's preference was only one factor in determining custody. While Michael acknowledges that the child's preference is a factor in the custody determination, why in the world would the child's preference be honored at the temporary hearing but not honored at the trial when there were no facts in between that

would indicate that her preference should not be honored in the final divorce custody determination. The law requiring Chancellors to explain in detail why the wishes of any child were or were not honored was the law prior to 2006. The fact that the Chancellor took into consideration the child's preference in assigning that factor to a parent does not in any way whatsoever satisfy the Chancellor's obligation to explain in detail why the child's preference was not honored in this case.

**B. The Chancellor erred in awarding custody on an alternating weekly basis.**

Sarah states that Michael erroneously stated that Shayla had been physically abused by her mother. Sarah makes light of two altercations where Sarah physically injured Shayla. Sarah pushed Shayla into a counter bruising her hip and Sonny Coates grabbed her wrist causing a bruise on her wrist. (T. 10-11) On another occasion, Sarah grabbed her arms, pushed her back and whirled her around causing Shayla to fall. As they were falling down, Shayla hit her knee on and end table. She sustained a big bruise on her knee that was supported by photographs. (T. 329-330, Ex. 2A, 2B) In almost a flippant manner, Sarah states this is a "normal interaction" between a mother and child.

Sarah gives the same careless explanation as to why a grandfather would "moon" his granddaughter with his buttock. Sarah explains this as Shayla and her grandfather "picking back and forth."

There is nothing normal about a grandfather showing his buttocks to his granddaughter. A review of the record does not indicate there was any joking or picking back and forth going on when this occurred. (T. 332) One can only question how joint custody would be appropriate when a mother would tell a Court that this kind of conduct is a normal interaction between a mother and child and a grandfather and child. Again, without either party requesting joint custody in their pleadings and with Michael having physical custody of these children for

approximately two years, why would one week and one week joint custody be in the best interest of these children? In addition, one thing that is certainly clear from a review of this record is that Michael and Sarah do not get along and do not cooperate so that joint custody would not be appropriate under these circumstances. This case is a good example of why the legislature and this Court expect Chancellors to explain in detail why a child's preference should or should not be honored.

**2. The Chancellor erred in his equitable distribution of assets and debts of the parties.**

A Chancellor's findings of fact must be supported by substantial, credible evidence.

*Ligon v. Ligon*, 743 So.2d 404 (Miss. Ct. App. 1999) In disregarding the parties' pre-separation agreement and Michael's assumption of the entire debt to the Bank of Jones County, the Court stated:

"what the Court believes the intent of this was, is that Michael anticipated that a divorce was about to occur between he and Sarah. He felt like that by her signing this Deed, it would put him at an advantage when it came time to come to Court and have a division of marital assets."

There is nothing in the record or any facts that were developed that come close to supporting the Chancellor's finding that Michael attempted to obtain an advantage in divorce court by reaching an agreement with Sarah as to the division of property.

The parties agreed to divide the property and for Michael to assume the debt because Michael did not want Sarah's irresponsibility in paying bills to end in a judgment against their property. (T. 333-335, 259-261) Although Sarah admitted that she freely, voluntarily, and upon advice of counsel, signed the deed, she now states that Michael somehow overreached in this transaction. Sarah goes so far as to say that Wayne Thompson, her attorney, "might not" have been given all the details. There is no evidence in the record to support the fact that Wayne Thompson might not have been given all the details to Sarah before she signed the deed.

This Court has been clear on many occasions that a party is bound by the documents they sign. A party is bound by a document even if that party does not read the document. *Swindle v. Harvey* (2009 WL 1758840); *Terminix v. Rice*, 904 So.2d 1051 (Miss. 2004)

Sarah also fails to point out that Michael was not even present when she met with Wayne Thompson to discuss signing the deed.

This is not a case where there is a conflict in testimony about the circumstances surrounding the pre-separation disposition of real property. In this case, the facts were undisputed that Sarah freely and voluntarily agreed to the exchange of property and there were no facts in the record to support any conclusion that Michael agreed to this transaction to deceive Sarah or gain any advantage in the event of a divorce. Furthermore, the Chancellor in this case did not find that the pre-separation agreement and the exchange of real property was unfair, one sided or resulted from inequality of bargaining power. The cases cited by Sarah in support of overreaching was not even considered by the Chancellor in this case.

### **CONCLUSION**

Before changing an almost two year custody arrangement which was consistent with Shayla Phillips' preference to live with her father, the Chancellor should have explained in detail why Shayla Phillips' preference should not continue to have been honored and award physical custody of the parties' children to Michael during the week with visitation by Sarah on the weekends.

For other reasons outlined in Michael's brief, the Court should not have awarded custody on an alternating one week one week basis since that arrangement was not requested by the parties in their pleadings nor was it in the best interest of the children in light of Shayla's preference and the other evidence presented at trial.

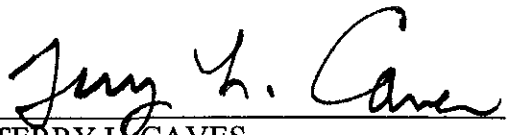
In addition to the Court failing to classify and equitably divide joint marital debt in the sum of \$20,000.00 and loans from Michael's parents, the Court should have enforced a pre-separation disposition of real property.


Therefore, this Court should reverse the decision of the Chancellor and remand for him to reconsider equitable distribution and custody of the parties' minor children.

Respectfully Submitted,

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### CERTIFICATE

I, Terry L. Caves, Attorney for Michael Phillips, do hereby certify that I have this date mailed a true and correct copy of the above and foregoing document to Honorable Sherry Lowe, Attorney at Law, Post Office Box 550, Sandersville, Mississippi, 39477; and Honorable Franklin C. McKenzie, Jr., Chancellor, Post Office Box 1961, Laurel, Mississippi 39441, their usual post office address.

This the 17<sup>th</sup> day of July, 2009.

  
TERRY L. CAVES