

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL WARREN ROBBINS

APPELLANT

VERSUS

NO: 2008-TS-02141

KATHERINE ANTOINETTE ROBBINS

APPELLEE

On appeal from the Chancery Court of Forrest County, Mississippi
Case No. 2005-0346-GN-W

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

The undersigned attorney of record for Katherine Antoinette McChesney (Robbins) certifies that the following listed persons have an interest in the outcome of this case. These representations are made for the purpose that the Justices of this Court may evaluate possible disqualification or recusal:

1. Plaintiff/Appellant, Michael Warren Robbins
2. Defendant/Appellee, Katherine Antoinette McChesney (formerly Robbins)
3. David A. Pumford, Attorney for Katherine Antoinette McChesney
4. Erik M. Lowrey, P.A. Attorneys for Katherine Antoinette McChesney
5. Jay L. Jernigan, Attorney for Michael Warren Robbins
6. Hon. Johnny L. Williams, Chancellor

This the 27th day of October, 2009.


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WAIVER OF ORAL ARGUMENT

The Appellee submits that oral argument would **not** be necessary or beneficial to the resolution of this case, and submits that the record, exhibits, and brief should be sufficient for the Appellate Court to determine that the Chancellor should be affirmed.

TABLE OF AUTHORITIES

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STATEMENT OF THE ISSUES

1. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN FINDING THAT AS A MATTER OF FACT AND LAW THAT MICHAEL DID NOT PROVE THE ELEMENTS NECESSARY FOR A CHANGE OF CUSTODY UNDER MISSISSIPPI LAW.**

2. **WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN RELATION TO EXAMINATION OF THE *ALBRIGHT* FACTORS BEFORE RENDERING ITS DECISION.**

STATEMENT OF THE CASE
AND RELEVANT PROCEDURAL HISTORY

This case involves a modification of child custody petition and resulting judgment. The parties to this action and original divorce and custody agreement are the Appellant, Michael Robbins (Michael) and the Appellee, Kathy McChesney (Robbins) (Kathy). The parties have one minor child, Madelyn (Maddie). The parties were divorced on August 18, 2005. At that time, by agreement of the parties, as set forth in their Property Settlement Agreement, Kathy was awarded custody of the minor child. Thus an initial custody determination has already been made in this case.

After a trial on the merits of the modification petition the Chancery Court stated: “That is probably the crux of the matter for the Court is to decide if there is a substantial and material change in circumstances since the divorce which is adverse to the welfare of the child in the custodial parent’s home. That’s the standard that we’re looking at and that is what the Court will be looking at very closely.” (TR 242) The Chancery Court found, as a matter of fact and as a matter of law, that Michael did not prove the elements necessary for a change of custody under Mississippi law. No witness in this case produced any testimony or evidence of a substantial and material change in circumstances in the custodial home, adverse to the best interests of the minor child, since the time of this initial custody determination. *Pierce v. Chandler*, 855 So.2d 455 (2003); *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996).

Michael made numerous baseless allegations in his pleadings which proved to be

unfounded, inaccurate, incomplete, or factual misrepresentations, when tested at trial. Both expert witnesses in this case testified that Michael furnished this very same information to them and that they relied in part on this information from Michael in their analysis of the issues before the Court.

Findings of Fact, Conclusions of Law, and Final Judgment were entered by the Chancery Court on September 26, 2008. Michael filed a post-trial *Motion to Reconsider or for a New Trial* but did not allege or specify whether or how the Chancery Court made any errors of law or fact that would warrant changing its findings. An *Order* overruling this Motion was entered on December 9, 2008.

Included in the Record Excerpts of the Appellee are the original *Final Decree of Divorce*, entered August 18, 2005; the *Petition to Modify Custody* filed by Michael on January 22, 2007; and the *Findings of Fact, Conclusions of Law and Final Judgment* entered on September 26, 2008. (CP 159) (RE 15). Throughout this Brief the transcript of Court proceedings shall be referenced "TR" by page number, the Clerks Papers are referenced "CP" and the Record Excerpts referenced "RE". Trial Exhibits are referred to as "EX".

STATEMENT OF THE FACTS

The Chancellor's Findings of Fact

The Chancellor heard this matter over a one day trial, at which 18 exhibits were admitted into evidence. The Chancellor heard the testimony of Kathy and Michael and seven other witnesses.

The Chancery Court found that the parties were granted a divorce on the ground of irreconcilable differences on August 18, 2005, and that pursuant to the agreement entered into between the parties, Kathy was awarded full paramount physical custody of Madelyn Sunshine Robbins (Maddie). (CP 159) (RE 15) The Chancellor noted that throughout the marriage Kathy had suffered from many health problems and had undergone a kidney transplant during the marriage in April, 2004. As a result Kathy was prescribed medications during the marriage which she continued to take after the divorce. (CP 159-60) (RE 15-16) Kathy's fluctuation in weight after her divorce arose from her medications, not from an eating disorder. Since the divorce Kathy has visited the emergency room numerous times with the same health problems that she suffered prior to the divorce, but this has not stopped her from working and holding a full time job since 2007. (CP 160) (RE 16)

The Chancellor's Ruling

The Chancellor made detailed findings of fact and conclusions of law and properly considered the applicable law in Mississippi in order to determine whether or not there had been a substantial and material change in circumstances, adverse to the best interests of the minor child, since the parties' Final Judgment of Divorce. The Chancellor noted at the outset that it is well-settled law in Mississippi that in order to transfer or modify custody of a child, the non-custodial parent has the burden of proving that since the entry of the decree or order sought to be modified, a material change in circumstances must have occurred that adversely affects the child's welfare. The applicable law cited by the Chancellor for this standard was

Polk v. Polk, 589 So.2d 123 (Miss. 1991); *Tucker v. Tucker*, 453 So.2d 1294 (Miss. 1984); *Philips v. Philips*, 555 So.2d 698 (2003); *Pierce v. Chandler*, 855 So.2d 455 (2003); and *Brawley v. Brawley*, 734 So.2d 237, 241 (1999). (CP 160) (RE 16)

The Chancellor recognized that while Kathy had suffered some serious health issues since the divorce, all of these health issues were pre-existing conditions that she dealt with both prior to and at the time of the divorce. The Chancellor further noted that since the divorce Kathy has been released to work and has held down a full time job since 2007. (CP 161) (RE 17)

The Chancellor noted that two psychologists, Dr. William P. Osborn, Ph.D and Dr. Pat Galloway, Ph.D. had expressed concern over Kathy's on-going health problems and their bearing on her ability to take care of Maddie. The Chancery Court noted that "While this Court certainly respects the opinions of these two doctors, it again must recognize that Kathy's health issues were in existence prior to the parties' divorce, and therefore do not constitute a material change in circumstances." (CP 161) (RE 17)

The Chancellor next examined the question of whether there has been any adverse impact on Maddie, noting the case *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996). The Chancellor found that despite Kathy's health issues and hospital stays "there has been absolutely no evidence presented by Michael indicating that Maddie is living in any sort of adversity." (CP 162) (RE 18) The Chancellor found that Maddie had her own room, had a best friend nearby named Jordan, had her own dog, that she was currently being tested for

her school's gifted program, and that she has been very involved in cheerleading. The Chancellor noted that Maddie has always been well taken care of by her maternal grandparents, both of whom she is very close to, any time that Kathy was in the hospital. The Chancellor noted that Maddie's second grade teacher stated that she was a "model student", who for the most part gets straight "A"s, that Maddie always makes up work that she misses and never has excessive absences. The Chancellor further noted that Maddie is described as well-behaved, well-groomed, and that she takes instruction well.

The Chancellor also cited *Albright v. Albright*, 436 So.2d 1003 (Miss. 1993) and made findings concerning ten of the "*Albright* factors", finding seven neutral, one favoring Michael and two favoring Kathy. (CP 163-165) (RE 19-21) The Chancellor also cited the case *Smith v. Todd*, 464 So.2d 1155 (Miss. 1995) which states that it is important that child has as much stability as possible when her parents are divorced, and that once the Court has determined which parent has custody, the child should be allowed the stabilizing influence of knowing where her home is. (CP 165) (RE 21)

The Chancellor found as a matter of fact and law that Kathy has had continuous paramount physical custody of Maddie since her divorce from Michael in 2005. The Chancellor found that since that time Maddie has become enrolled in school, has become involved in extra-curricular activities, and has made friends. The Chancellor noted that Maddie is for the most part a straight "A" student and extremely well behaved. (CP 165) (RE 21)

The Chancellor stated that although Kathy has experienced health problems, these are the same problems she suffered both prior to, and at the time of her divorce from Michael, when Michael agreed to allow Kathy to have paramount physical custody of Maddie. The Court found that there had been no material change in circumstances since the entry of the divorce. Further, the Chancellor found that Maddie seems to be doing extremely well in her current living situation and that in no way does Maddie appear to be living in adverse circumstances. The Chancery Court accordingly found and ordered that Kathy shall retain paramount physical custody of Maddie, subject to Michael's continued visitation. The Chancery Court also granted Kathy's request for an increase in child support commensurate with the Mississippi child support guidelines, Miss. Code Ann. § 43-19-101 (2004), which has not been challenged by Michael on appeal. (CP 165-166) (RE 21-22)

SUMMARY OF THE ARGUMENT

The Chancery Court correctly found, as a matter of fact and as a matter of law, that Michael did not meet his burden to prove the elements necessary for a change of custody under Mississippi law. *Marter v. Marter*, 914 So.2d 743 (Miss. Ct. App. 2005) No witness in this case produced any testimony or evidence of a substantial and material change in circumstances in the custodial home, adverse to the best interests of the minor child, since the time of this initial custody determination. *Pierce v. Chandler*, 855 So.2d 455 (2003); *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996). Michael's *Motion to Reconsider or for a New Trial* did not allege or specify whether or how the Chancery Court made any errors of law

or fact and his post-trial motion, as well as his subsequent appeal, would be correctly denied on that basis. The *Findings of Fact, Conclusions of Law, and Final Judgment* entered by the Chancery Court are supported by the record in this cause and the Chancellor correctly followed Mississippi precedent governing the attempted modification of child custody. The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in finding that there had been no substantial and material change in circumstances, adverse to the best interests of the minor child, since the parties' *Final Judgment of Divorce*.

STANDARD OF REVIEW

The scope of review in domestic relations matters is strictly limited. *Brawdy v. Howell*, 841 So.2d 1175, 1178 (Miss. Ct. App.2003); *Montgomery v. Montgomery*, 759 So.2d 1238, 1240 (Miss. 2000). The findings of a Chancellor will not be disturbed by the reviewing Court unless the Chancellor was "manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.* "Our familiar standard holds that, absent an abuse of discretion, we will uphold the decision of the Chancellor. To disturb the factual findings of the Chancellor, this Court must determine that the factual findings are manifestly wrong, clearly erroneous or the Chancellor abused his discretion." *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001). The trial court is presumed to be correct unless the record shows otherwise. *Myers v. Miss. Farm Bureau Mut. Ins. Co.*, 749 So.2d 1172 (Miss. App. 1999).

The standard of review for child custody cases is very limited. *Johnson v. Gray*, 859 So. 2d 1006, 1012 (Miss. 2003). In order for the appellate court to reverse, the chancellor must be “manifestly wrong, clearly erroneous, or apply an erroneous legal standard.” *Id.* (citing *Mabus v. Mabus*, 847 So. 2d 815, 818 (Miss. 2003)). The chancellor’s findings of fact may not be set aside or disturbed on appeal if they are supported by substantial, credible evidence. *Id.* (citing *Marascalco v. Marascalco*, 445 So. 2d 1380, 1382 (Miss. 1984)). It is the petitioner who has the burden of proof in a child custody modification proceeding. *Marter v. Marter*, 914 So.2d 743 (Miss. Ct. App. 2005).

ARGUMENT

1. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN FINDING THAT AS A MATTER OF FACT AND LAW THAT MICHAEL DID NOT PROVE THE ELEMENTS NECESSARY FOR A CHANGE OF CUSTODY UNDER MISSISSIPPI LAW

The law on custody modification is well established. “[A] non-custodial party must prove [that]: (1) there has been a substantial change in circumstances affecting the child; (2) the change adversely affects the [child’s] welfare; and (3) a change in custody is in the best interest of the child.” *Johnson, v. Gray*, 859 So. 2d 1006 at 1013 (Miss. 2003) (citing *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997)). The totality of the circumstances must be considered in determining whether there was a material change in circumstances. *Mabus v. Mabus*, 847 So. 2d 815, 818 (Miss. 2003) (citing *Bredemeier*, 689 So. 2d at 775).

Furthermore, it is well settled that the polestar consideration in any child custody matter is the best interest and welfare of the child.” *Id.* (citing *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)). See also *Pierce v. Chandler*, 855 So.2d 455 (2003); *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996).

Michael did not prove the elements necessary for a change of custody under Mississippi law. No witness in this case produced any testimony or evidence of a substantial and material change in circumstances in the custodial home, adverse to the best interests of the minor child, since the time of this initial custody determination. The Chancery Court correctly found, as a matter of fact and as a matter of law, that Michael did not prove the elements necessary for a change of custody under Mississippi law. On direct examination, when questioned by his attorney whether there had been a substantial change in circumstances, adverse to the best interests of the child, since the divorce, Michael himself testified that “Well, it actually, you know, happened prior to that also.” (TR 111)

Further, as a matter of procedure, Michael’s *Motion to Reconsider or for a New Trial* did not allege or specify whether or how the Chancery Court made any errors of law or fact in this case. (CP 168) Failure to properly seek relief first in the Chancery Court or through a post-trial motion means that the issue is procedurally barred on appeal. *Chapel v. Chapel*, 700 So.2d 593, 600 (Miss. 1997); *Concannon v. Reynolds*, 878 So.2d 107, 109 (Miss. Ct. App. 2003); MRCP 59; MRCP 52(b).

Michael made a number of allegations in his pleadings which he did not support with

any credible evidence at trial. Likewise, Michael made the same assertions to both Court-appointed experts in this cause, who relied on information, or mis-information, provided by Michael in forming their opinions. Multiple misrepresentations were made by Michael to the Court, to Dr. Galloway, and to Dr. Osborn, both his Petition and Motions filed in this cause as well as in his interviews with Dr. Osborn and Dr. Galloway.

Michael alleged that Kathy is using cocaine or other drugs. Kathy used no illegal drugs, or drugs which were not prescribed to her, since August 18, 2005. (TR 154) Kathy testified that she occasionally will smoke a cigarette, that she did so at the time of the divorce, that Michael was aware of this, and that she did not smoke around her daughter. Kathy is not using drugs, has a full-time job and had negative drug-testing results admitted into evidence at trial. (EX 1) (RE 24) The only medicines taken by Kathy are under the supervision of her physician in a manner prescribed by her physician. (TR 27-28). Dr. Galloway was told by Michael that Kathy was using cocaine. (TR 126) When asked at trial whether Kathy had a cocaine problem, and whether that was the basis for his request for a change in custody, Michael responded "No" it is not. (TR 127) (RE 84)

Michael alleged that Kathy "continues to suffer from an eating disorder." Absolutely no evidence was produced to show this. Since the date of the divorce, August 18, 2005, Kathy had not been diagnosed with any form of eating disorder. (TR 155) There was no evidence of an eating disorder and Kathy is of average or above-average weight. (TR 28) Michael also claimed that the minor child, Maddie, also has an eating disorder, or is showing

symptoms of an eating disorder. Again, there is no factual basis for this assertion and no medical evidence or testimony provided by Michael to support this claim. Kathy takes anti-rejection medication, blood pressure medicine and Prednisone, a steroid linked to her kidney transplant. (TR 169)

Michael alleged that there was a post-divorce attempt at reconciliation between Kathy and Michael. This was simply not the case and there was no testimony or evidence produced to support this allegation. At trial Michael testified that, contrary to that which he had told Dr. Galloway, there was in fact no attempt at a post-divorce reconciliation and that there was no change in circumstances in that regard. (TR 128-129) (RE 85-86)

Michael alleged that Kathy has been diagnosed as “bipolar”. Likewise, there is no factual basis for this assertion and no medical evidence or testimony was provided by Michael to support such a claim. The evidence at trial was that there had never been any diagnosis that Kathy has bipolar disorder. (TR 28) Michael also alleged that Kathy is, or was, receiving disability benefits since the divorce and that she was disabled mentally and physically. Kathy did receive disability benefits for a period of time, but not at the time that Michael filed his Complaint. The evidence reflected that Kathy was and is in fact a full-time employee and that Michael was aware of this. (TR 8) (TR 28) (EX 2) When asked by his own attorney whether he had any evidence to back up these allegations Michael replied “No, sir”. (TR 115)

The following misrepresentations were made by Michael to Dr. Osborn:

"I filed for custody in Dec. of 2007 after Kathy had fallen back into her old ways. She stayed in the hospital for 8 months out of that year, leaving Maddie with neighbors, grandmother and various other people I do not know." Again, the evidence at trial was to the contrary. Kathy was not in the hospital for 8 months in 2007. (TR 155) This fact is also reflected by Kathy's pay-stubs for February, 2007, through October, 2007 (EX 2). (TR 29) Kathy was treated at the emergency room on occasion. The reason that she is treated at the emergency room more often than might normally be the case is that her doctor tells her she must go to the emergency room as a precaution because she is a post-transplant patient. (TR 27) When asked at trial whether he knew how many days or weeks Kathy was in the hospital in 2007, Michael responded "No, Sir." (TR 121) (RE 78)

Michael represented to Dr. Osborn, and to Dr. Galloway, without any basis other than his own conjecture and speculation, that Kathy has an "eating disorder". She does not. She in fact has an enlarged colon, which has nothing to do with any eating disorders, but can become stopped up and require laxatives and occasionally medical attention. (TR 25) Kathy testified concerning her health as of the date of the divorce, being August 18, 2005. At that time Kathy had an enlarged colon, she had recently had a kidney transplant, and took prescribed medications related to the transplant and anti-rejection measures. (TR 170) The evidence at trial was that both parties knew about these medicines and courses of treatment at the time they entered into their divorce, child custody and property settlement agreement. The evidence at trial was that both parties knew that Kathy had an enlarged colon and the

attendant medical effects. (TR 25-27) (TR 222) The evidence and testimony at trial was that the medicines that Kathy takes do not impact her ability to raise and care for Maddie. (TR 28-29) When asked at trial whether he had any medical evidence that Kathy had an eating disorder, Michael responded “No.” (TR 124) (RE 81)

The testimony and evidence at trial support the Chancellor’s finding that there was no adverse impact on Maddie since the entry of the divorce. Michael alleged that Kathy has prevented Maddie from having medical exams. Kathy accounted for two appointments that were missed or re-scheduled. (TR 20-23; 29; 31) Kathy’s health has not caused Maddie to have excessive absences and has not impacted her schooling. Maddie is always taken care of with the help of family members if necessary. (TR 155-166) The testimony and evidence at trial was that Maddie is a happy and well-adjusted child whose needs are cared for by her mother, family and extended support network. Maddie’s student report card (EX 8) (RE 29-36) reflects that she achieves satisfactory (the highest category) scores for all of her work and study habits, that she makes “A’s” in all subjects, and is an Honor Roll student. Her STAR rating for reading is above average and that Maddie is, in the words of her teacher, “a joy to teach” and a “model student”. (TR 152) (RE 95) Maddie’s school teacher, Nancy Ratcliff testified at trial. She stated that Maddie made all “A’s” and “B’s” and was a gifted student who was every teacher’s “dream student”. (TR 148) (RE 91) She taught Maddie for three nine week periods, therefore she was very familiar with Maddie and she saw Maddie on a daily basis. Maddie’s teacher also testified that Maddie had no behavioral problems and no

personal hygiene problems. (TR 149) (RE 92) Maddie continues to make “A’s” and “B’s” and has no disciplinary or attendance problems at school. (TR 31) (EX 9) (RE 37).

Michael suggests that the Court was in error for failing to follow the recommendations of the Court-appointed experts in this case. Both of these experts were provided incorrect factual information concerning Kathy’s post-divorce circumstances by Michael. Michael elected to call both experts as early witnesses and to release them prior to their having the opportunity to hear the cross-examination of Michael, or any of the other witnesses who testified at trial. (TR 93) It was Michael’s burden to prove a substantial and material change in circumstances in the custodial home, adverse to the best interests of the minor child, since the initial custody determination as of the date of the divorce. A Chancellor is vested with broad discretion regarding the extent to which to rely on any findings and recommendations of the experts that it appoints and is under no obligation to adopt their findings and recommendations. *Balius v. Gaines*, 914 So.2d 300, 305-6 (Miss. Ct. App. 2005).

Contrary to the information and “facts” furnished to Dr. Osborn and to Dr. Galloway prior to trial, the uncontradicted evidence and testimony at trial was that Kathy’s anti-rejection medicine and blood pressure medicine had no side-effects and did not impact her ability to raise Maddie; that Kathy has not actively prevented Maddie from going to medical exams; that Kathy did not stay in the hospital for eight months in 2007, in fact she worked full time that year; that Kathy does not have bipolar disorder; that Kathy does not have an eating disorder; that Kathy does not use illegal drugs; that Kathy has never attempted

reconciliation with Michael since the divorce; that on those occasions that Kathy has had to go to the hospital there were no adverse effects on Maddie; that Maddie makes all “A’s” and “B’s” at school; that Maddie receives medical treatment as and when she needs it; and that the longest consecutive period of time that Kathy ever spent in hospital since the divorce was three weeks. (TR 28-31) Michael alleged that Kathy is unable to take care of Maddie due to her health. The evidence at trial was that Kathy underwent a successful kidney transplant, is not on dialysis, is able to walk, and takes only anti-rejection medicine and blood pressure medicine, none of which have any impact on her ability to raise her daughter. (TR 25-27)

Michael alleged that he was denied visitation with Maddie. The record does not support this assertion. Michael denied having summer visitation in 2007 at an earlier hearing, but again changed his testimony at trial. The testimony of the parties and witnesses at trial showed that Michael received more than his allotted summer visitation in the summer of 2007. (TR 129-130) (TR 189).

Regardless of the mis-information provided by Michael, which was refuted at trial, after Dr. Galloway and Dr. Osborn had been called and released as witnesses by Michael, both Dr. Galloway and Dr. Osborn testified that they did not find a substantial and material change in circumstances in the custodial home, adverse to the best interests of the minor child, an observation that is wholly consistent with the decision of the Chancellor to leave Kathy vested with primary physical custody of Maddie.

Dr. Osborn testified that he had seen no actual evidence of alcohol or drug abuse on

Kathy's part. (TR 65) (RE 43) Dr. Osborn testified that Michael had represented to him that Kathy had an eating disorder, that Michael alleged that Kathy was on drugs and that Michael was the only source of information for any references to the same in his report. (TR 71-72) (RE 49-50) Dr. Osborn also testified that Michael told him that Kathy was hospitalized for eight months in 2007. (Tr 72) (RE 50) When questioned as to whether these facts were true or not Dr. Osborn testified that "It was Michael's perception that that was true." (TR 73) (RE 51)

Though Dr. Osborn cited the familiar *Albright* factors in his testimony, he candidly testified on cross-examination that he was not familiar with the legal import of those factors, or the standard to which they should be applied in child custody modification cases, as opposed to an initial custody determination. (TR 83-90 (RE 61-68) Dr. Osborn testified that he did not know the legal standard for a modification of child custody in Mississippi. When asked whether he had any data that shows a change in circumstances between August 18, 2005, and the filing of the lawsuit by Michael, Dr. Osborn responded "No". (TR 88) (RE 66)

Dr. Galloway testified that he had met both parties in 2001, prior to their divorce, and has also interviewed both parties and the minor child on two occasions subsequent to the divorce. (TR 96) Dr. Galloway testified that Kathy "still suffers" from an eating disorder and/or psychological problems (TR 97) and that "Her behavior is pretty much the same as it was when I saw her back in – and I remember back in 2002 this being the case." (TR 100) On direct examination, when asked whether a change in custody might be considered, Dr.

Galloway carefully qualified his answer by stating that a change in custody might be considered “if all medical evidence presented indicates that Ms. Robbins is continuing to have problems,” stating that “I didn’t have all the necessary physician-related documents and I didn’t have a physician I was talking to that was treating her.” (TR 100) On cross examination Dr. Galloway testified that he had not spoken to any of Kathy’s medical doctors in this case and had not seen any diagnosis that Kathy has an eating disorder. (TR 104) Likewise Dr. Galloway testified that he had not spoken to any of Maddie’s medical doctors in this case and had not seen any diagnosis that Maddie has an eating disorder. (TR 105-106) (RE 71-72) When questioned specifically whether he could testify to any substantial change in circumstances between August 18, 2005, and that date of trial, with regard to any of the parties or the child, Dr. Galloway stated that he was not aware of any. (TR 106-108) (RE 72-74).

As in all child custody modification cases, this case is obviously a highly fact-specific matter, which is why a Chancellor’s decision is subject to such a highly deferential standard of review. The Chancellor was in the best position to judge the demeanor and the veracity of the witnesses at trial. *Culbreath v. Johnson*, 427 So.2d 705, 708 (Miss. 1983). Absent an abuse of discretion, the Appellate Court will uphold the decision of the Chancellor. To disturb the factual findings of the Chancellor, the appellate Court must determine that the factual findings are manifestly wrong, clearly erroneous or that the Chancellor abused his discretion. *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss. 2001). The appellate court’s scope

of review in domestic relations matters is limited by the familiar substantial evidence/manifest error rule. The *Findings of Fact, Conclusions of Law, and Final Judgment* entered by the Chancery Court are supported by the record in this cause and correctly follow Mississippi precedent governing modification of child custody. The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in finding that there had been no substantial and material change in circumstances, adverse to the best interests of the minor child, since the parties' Final Judgment of Divorce.

2. WHETHER THE CHANCERY COURT ABUSED ITS DISCRETION, WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, OR APPLIED AN ERRONEOUS LEGAL STANDARD IN RELATION TO EXAMINATION OF THE ALBRIGHT FACTORS BEFORE RENDERING ITS DECISION.

Modifications of child custody are a potentially jolting and traumatic experience for the child, which should not be ordered without serious cause. *Lambert v. Lambert*, 872 So.2d 679, 684 (Miss. Ct. App. 2003). Accordingly modifications of child custody should only take place where there is behavior on the part of the custodial parent that clearly poses or causes danger to the physical, mental or emotional well being of a child. *McCracking v. McCracking*, 776 So.2d 691, 693 (Miss. Ct. App. 2000). The Chancellor is required to make specific findings of fact as to (1) whether a material change has occurred; (2) if so, whether there has been an adverse affect on the child; and (3) if so, whether modification is in the child's best interest. If, and only if, these first two criteria are met, that there is an adverse

material change, should the Chancery Court make any analysis or findings with respect to the *Albright* factors. *Marter v. Marter*, 914 So.2d 743, 746 (Miss. Ct. App. 2005) (Chancellor must first identify specific changes in circumstances before making an analysis of the *Albright* factors); *Gray v. Gray*, 969 So.2d 906 (Miss. Ct. App. 2007); *Balius v. Gaines*, 914 So.2d 300, 310 (Miss. Ct. App. 2005) (Chancellor properly refused to apply *Albright* where petitioner father did not prove a material change); *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996). See also *Moore v. Cole*, 961 So.2d 737 (Miss. Ct. App. 2007); *Anderson v. Anderson*, 961 So.2d 55 (Miss. Ct. App. 2005); *Parker v. South*, 913 So.2d 339, 347 (Miss. Ct. App. 2005)

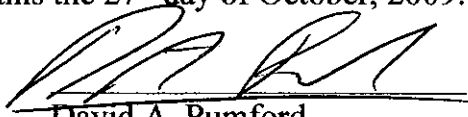
Though it was not necessary for the Chancellor to reach the *Albright* factors, because this case was not an initial custody determination, but a modification case, requiring that Michael show an adverse material change, the Chancellor also made additional findings pursuant to the factors cited *Albright v. Albright*, 436 So.2d 1003 (Miss. 1993), finding seven neutral, one that would favor Michael (*Physical Health*) and two that would favor Kathy (*Age, Health and Sex of Child; Continuity of Care*). (CP 163-165) (RE 19-21) The Chancellor also cited the case *Smith v. Todd*, 464 So.2d 1155 (Miss. 1995) which states that it is important that children have as much stability as possible when their parents are divorced, and that once the Court has determined which parent has custody, the children should be allowed the stabilizing influence of knowing where their home is. (CP 165) (RE 21) Though it was not necessary or required for the Chancellor to conduct an *Albright*

analysis, the Chancery Court followed the law, and acted well within its discretion. There is substantial evidence in the record to support the Chancellor's findings that it would be in the best interests of Maddie to remain in the primary physical custody of Kathy.

CONCLUSION

The Chancery Court did not abuse its discretion, was not manifestly wrong, clearly erroneous and did not apply an erroneous legal standard in its ruling that it would be in the best interests of Maddie to remain in the primary physical custody of Kathy. There is substantial evidence in the record to support the findings and fact and conclusions of law made by the Chancellor that there had been no material change in circumstances since the entry of the divorce, and also the Chancellor's finding that in no way does Maddie appear to be living in adverse circumstances, and that Michael had failed to meet his burden of proof in proving the same. The Chancellor's *Findings of Fact, Conclusions of Law and Final Judgment* were well within the bounds of discretion that has been vested in Chancellors in this State and were anchored in well established Mississippi jurisprudence concerning the modification of child custody. For the foregoing reasons, Kathy McChesney (Robbins), Appellee, respectfully requests that the Judgment of the Chancery Court of Forrest County, Mississippi, be affirmed.

Respectfully submitted this the 27th day of October, 2009.


David A. Pumford,
Counsel for Appellee

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MICHAEL WARREN ROBBINS

APPELLANT

VERSUS

NO: 2008-TS-02141

KATHERINE ANTOINETTE ROBBINS

APPELLEE

CERTIFICATE OF SERVICE AND FILING

I, David A. Pumford, do hereby certify that I have this date mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief of the Appellee to the following counsel at their usual mailing addresses:

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I, David A. Pumford, Attorney for the Appellee hereby certify, that I have actually mailed this date the Original and three copies of the Brief of the Appellee to the Mississippi Supreme Court.

THIS, the 27th day of October, 2009.


David A. Pumford

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