

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI**

**DOUGLAS MERCIER**

**APPELLEE**

**V.**

**DOCKET NO.: 2008-TS-00596**

**MARLA MERCIER**

**APPELLANT**

**APPELLEE'S BRIEF**

**APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI**

**ORAL ARGUMENT IS NOT REQUESTED**

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**CERTIFICATE OF INTERESTED PERSONS**

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

The Appellant:

Marla Mercier

The Appellee:

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The Trial Judge:

Chancellor Mitchell Lundy, Jr.

Chancery Court Chancellor

P.O. Box 471

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Chancery Court Chancellor



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H.R. Garner, [REDACTED]

Attorney of Record for Appellee,

Douglas Mercier

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## STATEMENT OF THE ISSUES

The issues presented by the Appellant in this appeal are:

ISSUE I: THERE HAS BEEN NO MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES SINCE THE RENDITION OF THE JUDGMENT OF DIVORCE THAT HAVE TRANSPIRED ADVERSELY AFFECTING THE BEST INTEREST AND WELFARE OF THE PARTIES CHILDREN, AND THE JUDGMENT OF THE CHANCELLOR SHOULD BE AFFIRMED.

ISSUE II: THAT THE APPELLANT SHOULD BE RESPONSIBLE FOR THE AMOUNT DUE ON THE PARTIES MERCEDES LEASE , THAT HER VIOLATION OF THE AGREEMENT CONTAINED IN THE JUDGMENT OF DIVORCE BROUGHT ABOUT.

ISSUE III: THAT THE CHANCELLOR WAS CORRECT IN THE MODIFICATION OF THE VISITATION SCHEDULE OF THE APPELLANT WITH THE PARTIES CHILDREN, IN THAT THE CHANCELLOR FOUND FROM THE EVIDENCE THAT THE VISITATION WAS NOT WORKING AND IT WAS IN THE BEST INTERESTS OF THE CHILDREN TO MODIFY THE ORDER, *CHRISTIAN V WHEAT*, 876 So2d. 341, 345 (Miss, 2004)

ISSUE IV: THAT THE CHANCELLOR WAS CORRECT IN REQUIRING THE APPELLANT TO PAY FUTURE CHILD SUPPORT.

## STATEMENT OF THE CASE

### A. Nature Of The Case, Course Of The Proceedings And Disposition In The Court Below \*

A Petition to Cite for Contempt and Modification and Other Relief that was filed on May 4, 2007 the Chancery Court of Tate County, Mississippi by Douglas Christopher Mercier, Petitioner/Counter-Respondent, against the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier (CP Vol I 103); personal service of process being served upon the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, pursuant to Rule 81(d) (2) of the Mississippi Rules of Civil Procedure on the 11th day of May, 2007; an Answer and Counter-Claim being filed by the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, on the 21st day of May, 2007 (CP Vol I 143); Petitioner/Counter-Respondent, Douglas Christopher Mercier, on May 29, 2007 filed an Answer and Defenses to Counter-Claim (CP Vol II 152); this cause being originally set for trial previously, but was continued by Order of this Court for hearing on Monday, November 26, 2007 for the Tate County, Mississippi Chancery Court in Grenada. (CP Vol II 174) This Cause being continued for conclusion on Friday, November 30, 2007 for the Chancery Court of Tate County, Mississippi in Grenada.

At the conclusion of the evidence, the Court instructed both parties by and through their attorneys to present pursuant to Rule 52(a) of the Mississippi Rules of Civil Procedure, Proposed Findings of Facts and Conclusion of Law, after which the Court would render its decision.

The parties stipulated and agreed upon the following:

1. That the Petitioner/Counter-Respondent, Douglas Christopher Mercier, would be responsible for the payment of the medical bill for the birth of the parties' youngest child, Lily Katherine Mercier, a female child, born November 30, 2000, presently 7 years of age. That he shall indemnify and hold Respondent/Counter-Petitioner, Marla Veronica Davis Mercier,



blameless and harmless for the payment of same. That the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier and her attorney Lisa Scruggs, shall provide Petitioner/Counter-Respondent, Douglas Christopher Mercier and his attorney, H.R. Garner, a copy of the bill that was mailed to Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, in order for the Petitioner/Counter-Respondent, Douglas Christopher Mercier, to be provided full details regarding same. (CP 193, MRE 37, 42)

That the Court was requested to make a determination on the following issues:

1. That the Petitioner/Counter-Respondent, Douglas Christopher Mercier, prayed for the following relief in his Petition:

(a) That the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, be cited for contempt of Court and held in the custody of the Sheriff of Tate County, Mississippi until she had complied with the Court's Order. (CP 110)

(b) That the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, be required to pay the deficiency owed on the Mercedes Benz lease in full and one-half ( $\frac{1}{2}$ ) of the penalties and to indemnify and hold Petitioner/Counter-Respondent, Douglas Christopher Mercier, harmless and blameless for the payment of same. (CP 110)

(c) That the Court modify or terminate the joint legal custody of the parties' minor children with the parties and to award the full custody of the parties' minor child to the Petitioner/Counter-Respondent, Douglas Christopher Mercier. (CP 110)

(d) That the Court enter an Order enjoining the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, and her Highway Patrol boyfriend, Matt Stewart, from threatening, bothering, or molesting the Petitioner/Counter-Respondent, Douglas Christopher Mercier. (CP 110)

(e) That the Court enter an Order enjoining the Highway Patrol boyfriend, Matt Stewart, from being around the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, when the children are visiting. (CP 111)

(f) That the Court Order the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, to pay reasonable attorney's fees and costs to the Petitioner/Counter-Respondent, Douglas Christopher Mercier. (CP 111)

(g) That the Court modify child visitation pursuant to *Cox v. Moulds*, 490 So.2d 866, 869 (Miss. 1986); and *Bratcher v. Surrette*, 848 So.2d 893, 897 (21) (Miss. Ct. App. 2003). (CP 111)

(h) That the Court adopt the modified visitation with the parties' minor children as follows: (CP 111-113)

**"A. WEEKENDS**

**Respondent (Mother) shall have visitation with the parties' minor children on the first and third weekend of each month from 3:00 P.M. on Friday and concluding on Sunday at 6:00 P.M.**

**B. HOLIDAYS**

**Respondent (Mother) shall have periods of visitation with the minor children on holidays on alternating years as follows:**

<u>HOLIDAY</u>	<u>ODD YEAR</u>	<u>EVEN YEAR</u>
NEW YEAR'S DAY	Mother	Father
EASTER	Mother	Father
MEMORIAL DAY	Father	Mother
JULY 4TH	Mother	Father
LABOR DAY	Father	Mother
THANKSGIVING	Mother	Father
CHRISTMAS	Mother	Father
SPRING HOLIDAYS	Mother	Father
FALL HOLIDAYS	Father	Mother

Custody shall commence at 7:00 A.M. and end at 7:00 O'clock P.M., with the exception of the Christmas Holidays.

On the "even years" when the Petitioner (Father) shall have custody 6:00 o'clock p.m., on the day the children get out of school for Christmas Holidays until December 25 at 6:00 o'clock p.m. The Respondent (Mother) shall have custody from 6:00 o'clock p.m. on December 25 until 6:00 o'clock p.m. on January 1st.

On the "odd years", the Respondent (Mother) shall have custody from 6:00 o'clock p.m., on the day the children get out of school for Christmas Holidays until December 25 at 6:00 o'clock p.m. The Petitioner (Father) shall have custody from 6:00 o'clock p.m. on December 25 until 6:00 o'clock p.m. on January 1st.

**C. SPECIAL DAYS**

**(1) FATHER'S DAY**

Petitioner (Father) has custody of his children on each Father's Day, regardless of whose weekend it may fall on commencing at 7:00 o'clock a.m., and ending at 7:00 o'clock p.m.

**(2) MOTHER'S DAY**

Respondent (Mother) has custody of her children on each Mother's Day regardless of whose weekend it may fall on commencing at 7:00 o'clock a.m., and ending at 7:00 o'clock p.m.

**(3) PARENT'S BIRTHDAYS AND CHILD'S BIRTHDAYS**

Each parent shall have visitation with the minor children for at least three (3) hours on each of their respective birthdays, if such birthday is not on their respective weekend of physical custody.

**D. SUMMER**

Respondent (Mother) shall have visitation with the minor children for four (4) weeks during each and every summer to be taken in two week intervals with Father having the children for one week in between said visitation periods. Respondent's (Mother's) first two (2) weeks of summer visitation shall commence the Sunday evening at 6:00 o'clock p.m. after dismissal of school for that academic year and she shall return the children to Petitioner (Father) at 6:00 o'clock p.m. on the Sunday following the end of the two weeks visitation. The parties shall

**exchange the children at 6:00 o'clock p.m. on Sunday until Mother's summer visitation has been completed. This summer shall preempt Respondent's (Mother's) weekend visitation; once Respondent's (Mother's) summer visitation has been completed, she will resume her regular weekend visitation as set forth above.**

**E. OTHER**

**The Respondent (Mother) shall have such other periods of custody as may be mutually agreed upon between the parties.**

**F. TRANSPORTATION:**

**The Respondent (Mother) shall be responsible for picking up or returning the children to the Petitioner (Father).**

**Each parent shall be responsible for the exercising of birthday privileges and any transportation connected therewith."**

(i) That the Court modify the visitation, in the alternative, as suited by the Court for the best interest and welfare of the parties' minor children. (CP 113)

(j) That the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, be ordered to pay child support unto the Petitioner/Counter-Respondent, Douglas Christopher Mercier, for the support and maintenance of the parties' minor children pursuant to Mississippi Code Annotated Section 43-19-101 and 43-19-103 (1972 as amended ).

2. That the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, prayed for the following relief in her Counter-Petition:

(a) That the Petitioner/Counter-Respondent, Douglas Christopher Mercier, be ordered to provide medical insurance on the minor children and furnish proof of insurance to the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier. (CP 145)

(b) That the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, be awarded custody of the parties' three minor children. (Olivia Davis Mercier, a female child, born November 22, 1991, presently 16 years of age; Jackson Douglas Mercier, a male child, born July

29, 1998, presently 9 years of age; and Lily Katherine Mercier, a female child, born November 30, 2000, presently 7 years of age). (CP 145)

(c) That the Petitioner/Counter-Respondent, Douglas Christopher Mercier, be required or ordered to pay child support to Respondent/Counter-Petitioner, Marla Veronica Davis Mercier. (CP 145)

(d) That the Court find the Petitioner/Counter-Respondent, Douglas Christopher Mercier, in contempt of Court. (CP 145)

(e) That the Petitioner/Counter-Respondent, Douglas Christopher Mercier, be ordered to pay a reasonable sum for attorney's fees and Court costs to Respondent/Counter-Petitioner, Marla Veronica Davis Mercier. (CP 145)

The Court made a written finding into the record and entered an Order of Modification, Etc. on the 29<sup>th</sup> day of January entered Nunc Pro Tunc on the 28<sup>th</sup> day of February, 2008. (CP 193, MRE 36)

Finding and ordering as follows:

1. That the Petitioner/Counter Respondent, Douglas Christopher Mercier, be required to pay all bills incurred for the birth of the parties' youngest child, Lily Katherine Mercier, age 7. (CP 193, MRE 37)

2. Finding the Respondent/Counter Petitioner, Marla Veronica Davis Mercier, in contempt Court for her failure to pay one-half of the payment on the leased Mercedes, and finding her to be in wilful contempt of the Court ordered her to pay the entire amount due on the leased vehicle. (CP 193, MRE 37)

3. Finding the Petitioner/Counter Respondent, Douglas Christopher Mercier, in contempt of Court for failing to timely pay alimony payments due the Respondent/Counter Petitioner,

Marla Veronica Davis Mercier, but did not find him to be in wilful contempt of the Court's prior orders. (CP 193, MRE 37-38)

4. Awarding neither party attorneys fees. (CP 193, MRE 38)

5. Finding that the Respondent/Counter Petitioner, Marla Veronica Davis Mercier, had failed to prove by the preponderance of the evidence that there had been a substantial change in circumstances have transpired since the original custody decree; and that the change adversely affected the best interest and welfare of the parties' children, and denied a modification of the custody of the parties' children. (CP 193, MRE 38)

6. The Court found that there had been a substantial change in circumstances in regard to the visitation schedule and it was not working and modified the visitation schedule. (CP 193, MRE 38)

7. The Court found that the Respondent/Counter Petitioner, Marla Veronica Davis Mercier, be ordered to pay twenty-two percent ( 22%) child support of her adjusted gross income once she becomes employed and retained jurisdiction. (CP 193, MRE 39)

8. The Court ordered Douglas Christopher Mercier, Petitioner/Counter-Respondent to provide medical insurance on the children and to split equally all sums not covered by medical insurance. (CP 193, MRE 39)

9. The Court ordered the parties to refrain from confrontation, and found that there was no need to meet to exchange the children at any law enforcement office. (CP 193, MRE 39)

The Respondent/Counter- Petitioner, Marla Veronica Davis Mercier, being aggrieved of the Court's decision appealed this cause to this Court.

**\* The following abbreviations shall apply as used herein for reference: CP means Clerk's Papers. TR means transcript. MRE means mandatory record excerpts.**

**B. STATEMENT OF THE FACTS AND CIRCUMSTANCES OF THE CASE**

Trial commenced on Monday, November 26, 2007 at approximately 10:30 o'clock A.M. in the Chancery Court of Tate County, Mississippi setting in Grenada, Mississippi before Chancellor Mitchell Lundy, Jr.

The Petitioner/Counter-Respondent, Douglas Christopher Mercier, presented the following witnesses:

**Marla Veronica Davis Mercier**, Respondent/Counter-Petitioner, was called as an adverse witness by the Petitioner/Counter-Respondent, Douglas Christopher Mercier. (TR Vol I 10-93)

Her testimony is summarized as follows:

On direct examination as an adverse witness, she testified that the visitation as it presently stands is not working and she would like the Court to designate times. That she was aware of the cell phone calls between her fiancée, Matt Stewart, and Douglas Christopher Mercier, since the marriage. She admitted that she knew there was bad blood between the two men. She testified that she is engaged to be married to Matt Stewart.

She testified that since the divorce, she is going to school full time but expects to be out on February 15, 2008. Her only income was alimony. At the time of the divorce, she was a full time mother but not at the present time.

She testified that she had not paid the lease on the automobile as required by the Judgment of Divorce.

She testified that if she got custody of the children, that she would get child support. That Douglas Christopher Mercier had changed since he had remarried and that he and his present wife drink around the children act ugly and mean around the children,

which when pressed stated she had no personal knowledge of this, except for one occasion on the occurrence at the video store in New Albany, when there was an altercation between Matt Stewart, Linda Mercier, Douglas Christopher Mercier, and herself. She testified that no one was arrested nor any charges filed. This was verified by the testimony of Matt Stewart.

She testified that the children had been tardy at school, however, the testimony of the school officials were that they could not tell if the tardies for the school year 2006-2007 were before or after the divorce in December, 2006.

She testified at the time of the divorce she had a bad relationship with her daughter, Olivia Davis Mercier, and had actually slapped her on one occasion. But since the divorce the relationship had improved, and she was not asking the Court to award her custody of her daughter, Olivia Davis Mercier, but that she should stay in the custody of her father, Douglas Christopher Mercier. She was only asking for custody of the two younger children.

She testified that she had sold her jewelry to pay her attorney. That she received some financial support from her fiancée, Matt Stewart, who paid her car note, automobile insurance, and other expenses.

She did not testify as to any material and substantial change in circumstances of the parties since the divorce which adversely affected the best interests and welfare of the two minor children. Her sole basis for wanting the children now was that she loved them and could better care for them.

**Summer Davis**, the sister-in-law of Marla Veronica Davis Mercier, being married to her brother, was called out of order by agreement of the parties and their attorneys, by



the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier. (TR Vol I 94-96)

Her testimony is summarized as follows:

1. That she is the sister-in-law of Marla Veronica Davis Mercier who is married to Marla's brother. She testified that Marla is a good mother.
2. On cross-examination, she admitted that she did not know whether Douglas Christopher Mercier was a good father or not since the divorce.

**Douglas Christopher Mercier**, the Petitioner/Counter-Respondent, was the next witness. (TR Vol I & II 97-139, 144-172)

His testimony is summarized as follows:

1. He testified that he lived in Senatobia where he has lived for approximately four years. That he was the father of three children, namely: Olivia Davis Mercier, a female child, 16 years of age; Jack Mercier, a male child, 9 years of age; and Lily Mercier, a female child, 7 years of age.
2. That he had received the physical custody of all three children at the time of the divorce, from Marla Veronica Davis Mercier, and that the parties had joint legal custody of the children. That Marla Veronica Davis Mercier was not required to pay any child support. That under the terms of the Judgment of Divorce, regarding joint legal custody he was to confer with her about health, education and welfare of the children, but he as the custodial parent was to have the ultimate decision making rights regarding the children.
3. That he married his present wife, Linda Beale Mercier, in June, 2007. That he had been a chiropractor for 10.5 years in Mississippi and owned his own practice in Senatobia. That he had a secretary, a lady that does dictation on a part time basis, and

independent contractor, one independent contractor who is a licensed practicing therapist. That he currently has medical insurance through his current wife on the children.

4. He was asked the difference between December 2006 when the parties were divorced and the date of the trial.

He testified that the children still attend school in Senatobia. That his daughter, Olivia Davis Mercier, is in the 10<sup>th</sup> grade in school with above average grades. That he has provided her with a Jeep Cherokee automobile to drive. That she is active on the cheerleading squad and with her church activities. That his son, Jack Mercier, is in the third grade. That his daughter, Lily, is in the 1<sup>st</sup> grade. That after the divorce, he took Olivia Davis Mercier to 5-6 weeks of counseling because she did not have a good relationship with her mother, Marla Veronica Davis Mercier.

5. In September, 2007 he testified that he and his wife went to a ball game in Senatobia where his daughter was cheerleading. That Matt Stewart accosted him at the ball game and he was thrown out of the game and charges are pending out of that episode.

6. He testified that 9 days after the divorce, that his secretary was present when he received a call from Matt Stewart at his office. That Matt Stewart was cursing and yelling and making threats over the telephone to him. He testified that he had called Marla Veronica Davis Mercier about a week or two later. He testified that she was there when Matt Stewart called Douglas Christopher Mercier. That he used her cell phone.

7. That Matt Stewart is a Highway Patrolman and in the Mississippi National Guard. That Douglas Christopher Mercier called the Highway Patrol and complained about the threats and telephone calls that he was receiving from Matt Stewart in January, 2007. He was advised that Matt Stewart had been reprimanded and informed by his

superiors to leave Douglas Christopher Mercier alone. That he never complied with same. He testified that he was arrested 4 times in February, 2007 because Marla Veronica Davis Mercier would call him at night, and he would call her back on the phone number she had called from which was registered in the name of Matt Stewart, and then he was charged with phone harassment.

8. He testified about the incident that took place in August, 2007 at the video store in New Albany, Mississippi. Douglas Christopher Mercier was to meet Marla at the video store to exchange the children, when he was passing the Highway Patrol office, Matt Stewart was there in the driveway in his dad's red pickup truck. He pulled out right behind Dr. Mercier & stayed right on his tail. He made Dr. Mercier almost miss his turn. Dr. Mercier pulled over, Matt Stewart turned around and spun out of some gravel. Later, at 6:00 when they met at the video store to exchange the children, Matt Stewart was in the driver's seat of Marla's car. Jack and Lily and Marla were the other passengers. That is when there was a lot of bickering going on back and forth. Cursing and name calling, etc.

9. He testified from January through March, 2007, that each time he attempted to call Marla Veronica Davis Mercier regarding the children, that Matt Stewart was always there and always had Marla Veronica Davis Mercier insist on exchanging the children at the police station in New Albany, Mississippi.

10. He testified on visitation by Marla Veronica Davis Mercier during the week he does not like the disruption in the children's lives every scheduled weekend when he has to drive the children 1.5 hours to New Albany. He testified that he feels that since Marla Veronica Davis Mercier was the one that moved away, that she should be responsible for picking up and returning the children to him in Senatobia. He testified that

he feels that the visitation during the week with the children by Marla Veronica Davis Mercier on Tuesdays from 3:00 p.m. - 6:00 p.m. is disruptive of their schedule, because the children have to cram 3 hours' of homework into about an hour when they get home.

11. He testified that he wanted full custody of the children as the joint legal custody is not working.

12. He testified that his present wife, Linda Beale Mercier, helps him with the children. With her, he has more one on one time with each child. He now has medical insurance and his finances are much better.

13. He denies wild drinking, but admits that he does take an occasional drink.

14. He testified that his daughter, Olivia Davis Mercier, rarely keeps the younger children. That she is mostly involved with her cheerleading practice schedule, etc. That Kerri Hathaway, a friend, married, student, 35, keeps them on Monday, Wednesday, and Friday after school until he gets home from work. On Tuesday each week, Aunt Jane keeps the children. She stays overnight and actually cleans the house each week. That Douglas Christopher Mercier keeps them on Thursday. That both he and his wife help the children with their homework and fix them supper.

15. That Olivia Davis Mercier is in cheerleading, Lily plays soccer, baseball, gymnastics and dance. Jack plays soccer, baseball and basketball. That he attends all the games and almost all the practices and pep rallies, and he misses very few.

16. When asked how Marla Veronica Davis Mercier has changed and if she is a good mother, Douglas Christopher Mercier testified that she signed the custody of the children over to him at the time of the divorce, has money issues, and is basically unstable. That it would not be in the children's best interests to award her custody.

17. He testified about Marla Veronica Davis Mercier failure to pay her portion of the lease on her Mercedes vehicle.

18. He testified that Marla Veronica Davis Mercier had agreed to pay the October and November payments on the vehicle and return the vehicle on December 1, 2006 to the dealer. That she had the bills coming to the house in her name, and that she waited until the middle of January, 2007 to turn it in.

19. He testified he had no mental or physical problems. That he was involved in the community, goes to church on a regular basis. That the two younger children participate in the youth program at church. That the daughter, Olivia Davis Mercier, still attends the Methodist Church where she was going at the time of the divorce and she is very involved in the church program.

20. Douglas Christopher Mercier testified that he works Monday, Tuesday, Wednesday, and Friday from 8:00 a.m. - 12:00 p.m. and 2:00 p.m. - 6:00 p.m. Other than that, he spends all his spare time with his children.

21. He testified that he believes the children need structure and stability in their life. That his present wife, Linda Beale Mercier, has never had children but she is really a good stepmother. The children call her Mama Lin. She spends time with them, she does sports with them. That she spends a lot of time with them outside and she stays up with Lily when she has an asthma attack.

22. A break was had to take the testimony of Melody Crutcher out of order by the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier.

23. The testimony of Douglas Christopher Mercier then began on cross examination by the attorney for Respondent/Counter-Petitioner, Marla Veronica Davis Mercier.

24. He denied that his current wife ever spent overnight visitation with the children present before their marriage.

25. He denied that he drank and drove with the children.

26. He denied getting drunk around the children, admits he smokes occasionally, but it is on the outside. He said that Lily loves animals, but that she knows that after petting the dogs, she must go in and wash her hands.

27. He denied that Jack had 27 tardies since December, 2006 at the time of the divorce but admitted being a little late on occasion which he has now got corrected.

28. He testified about the matter that occurred at Thanksgiving regarding picking up the children in New Albany.

29 . He testified that the problem with Marla Veronica Davis Mercier having the children on Tuesdays from 3:00 p.m. - 6:00 p.m. is that when the children they have to cram a lot of homework into a small amount of time. A lot of time is taken up with homework, getting them ready for bed, etc. That the visitation schedule has caused disruption with the children.

**Ms. Melody Crutcher**, who is an employee of Douglas Christopher Mercier, a witness for the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, was called out of order by agreement of the parties and their attorneys. (TR Vol I 140-144)

Her testimony is summarized as follows:

1. She was called as an adverse or hostile witness by Marla Veronica Davis Mercier and her attorney. She testified that she is the office manager for Douglas Christopher Mercier.

2. She was asked had she ever told anyone that Linda Beale Mercier should not be with the children. She denied ever making that statement.

3. She stated she had nothing negative to say about Douglas Christopher Mercier or his current wife, Linda Beale Mercier, and their relationship with the Mercier children.

**Olivia Davis Mercier**, the parties' 16-year-old daughter, was called out of order by agreement of the parties and their attorneys, by the Petitioner/Counter-Respondent, Douglas Christopher Mercier. That by agreement of the parties and approval of the Court, the parties were not present when the witness testified. That the only parties present were the Court, Court Reporter, and attorneys for both parties. (TR Vol II 172-203)

Her testimony is summarized as follows:

1. Olivia Davis Mercier testified in Chambers. She is the 16 year old daughter of Marla Veronica Davis Mercier and Douglas Christopher Mercier. That she was in the custody of her father. She had never been to her mother's in New Albany overnight. That she wanted to stay with her father, because all her friends in school were there. She testified she worked with the Methodist Church Youth Group. That her father, stepmother, and siblings attended another church. That her father was strict upon her drinking and things like that. That he was a good father and she loved him as well as her mother. That she enjoyed cheerleading. That she did well in school. That she was permitted to drive by her father and had received no speeding tickets.

2. She testified that she babysat some with her siblings, but her father had a babysitter. That the babysitter did a lot of things with her siblings when she was there.

3. She testified that sometimes she would have disagreements with her father and stepmother and she would tell her mother, Marla Veronica Davis Mercier, about this. She does not remember what the problems were even about.

4. She testified that their father loves both her and her siblings. That he takes up a lot of time with them. She testified that she did not babysit much. That at times her father was kind of strict. She testified that her mother had hinted that she wanted custody of her siblings, but has not really said it to her.

5. That she had heard her parents in the past talk about each other. She testified that Douglas Christopher Mercier and her stepmother would occasionally drink at night after the younger children went to bed. She testified that neither her father or her stepmother smoked. That they would go out occasionally on weekends. That she had seen them intoxicated on one occasion but the younger children were not there. She testified about an incident at a wedding in Nashville in the summer of 2007, when Linda Beale Mercier had fallen. She testified that Linda Beale Mercier sometimes keeps the children. She identified some text messages from her phone to her mother. One was on June 13, 2007. She stated she was upset when she sent it. Another was on May 21, 2007. She testified her sister had asthma. She testified in detail about the Nashville trip. She testified about getting in trouble one night when her father and stepmother came home and found a bunch of her friends over there that were drinking in the garage. She testified that she had seen her mother intoxicated on occasion.



6. She testified that she knew Matt Stewart who used to be a family friend and that her mother was intending on marrying him. She said the reason her mother told her that she did not want her custody was because she didn't want to make the other children and herself start over at the time of the divorce. That the only change in her mother that she has seen is that she now wants custody of her two siblings.

**Gail Mercier Rutledge**, the paternal grandmother of the Mercier children, was called as a witness for the Petitioner/Counter-Respondent, Douglas Christopher Mercier. (TR Vol II 204-208)

Her testimony is summarized as follows:

1. That she is the mother of Douglas Christopher Mercier and the paternal grandmother of the children. That she is married to an attorney in New Albany, Mississippi and that she and her husband have all sons. That she has been married to her husband for twenty-five years.

2. She testified that on one occasion in New Albany, at the video store she had driven Douglas Christopher Mercier's automobile to pick up the Mercier children at a video store. That a vehicle pulled up real quick, and a man came up abruptly to her. That she later identified the man as Matt Stewart. That she felt he was acting threatening because he thought it was her son, Douglas Christopher Mercier.

3. She testified that Douglas Christopher Mercier is a good father and a good son. That he takes up a lot of time with his children.

4. That he is not a drunkard. That the family all celebrates holidays together and that Douglas Christopher Mercier and his stepfather are very close. In fact, his stepfather considers him like one of his own.

The Court then recessed and entered an Order setting this trial for additional hearing on Friday, November 30, 2007 at 9:30 o'clock A.M. in the Chancery Court of Tate County, Mississippi in Grenada, Mississippi. (TR 204-208)

The following witnesses were called by the Petitioner/Counter-Respondent, Douglas Christopher Mercier:

**Linda Beale Mercier**, the current wife of Douglas Christopher Mercier, and stepmother of the Mercier children. (TR Vol II 210-256)

Her testimony is summarized as follows:

1. That she is a pharmacist who has been with Fred's Pharmacy since 1995 and the current wife of Douglas Christopher Mercier. That they were married in June 2007 and she was aware that he had three children from his prior marriage.
2. She said it was a challenge at first, since she had no other children. Getting used to the stepchildren. That the children are good children and Douglas Christopher Mercier is a good father. That occasionally they go out on Tuesday nights but they have an overnight babysitter with the children. That they come in after they go out to eat, etc.
3. She testified that about the wedding reception in Nashville, Tennessee.
4. She testified that Olivia Davis Mercier, her stepdaughter, is a good driver and she has permitted her to even drive her own vehicle. That she does things with her stepdaughter and other stepchildren.
5. She testified that Douglas Christopher Mercier handles the discipline of the children, but they do not need much as they are really good children. That she has a good relationship with her stepchildren, Jack and Lily. That she is familiar with Lily's allergies.

That she has medical insurance that covers Douglas Christopher Mercier and the children through her employer.

6. She testified about the incident at the video shop in New Albany, Mississippi. She testified that she was going to her mother-in-law's house with her husband when a vehicle started following them and she later learned it was Matt Stewart, the fiancé' of Marla Veronica Davis Mercier. She testified as to the following close, etc.

She testified about the altercation that occurred at the video shop when they were picking up the children in New Albany, and the threatening manner that Matt Stewart made towards Douglas Christopher Mercier, and her behavior as well as the behavior of Marla Veronica Davis Mercier.

7. She testified about the confrontation at the ball game in September, 2007 wherein Matt Stewart, whom she advised was very aggressive, came up to them and accused Douglas Christopher Mercier of damaging his vehicle. She testified that she was present when Douglas Christopher Mercier asked the City policeman to intervene at the ball game.

8. She testified that the current visitation between the younger two children and Marla Veronica Davis Mercier is presently not working. That it usually takes the children a while for them to warm up when they get up early to go to school. That visitation during the week disrupts the children and they are unable to finish their homework in order to meet their bedtime.

9. That she and her husband and the children attend Long Point Baptist Church on a regular basis. That she was not living with Douglas Christopher Mercier prior to the parties' marriage. That she had gotten a letter from Olivia Davis Mercier, her

stepdaughter, which was introduced into evidence. The letter apologized for how she had been behaving.

10. On cross examination she was asked whether she drank. She said she did two or three times a week. She denied being a drunkard. She has never heard Douglas Christopher Mercier curse in front of the children. That the day of the video shop incidence, she admitted calling Marla Veronica Davis Mercier a racial slur name. She admitted that she knew the teachers.

The Petitioner/Counter-Respondent, Douglas Christopher Mercier, then rested his case in chief subject only to rebuttal testimony

The following witnesses were called by the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, on her case and chief and Counter-Petition for Modification of Child Custody, Etc :

**Teresa Williams**: the Superintendent of North Mississippi Compulsory School Attendance for the Mississippi Department of Education, which covered the Senatobia School System. (TR Vol II 256-262)

Direct Examination: Ms. Williams testified that she had no personal knowledge of the attendance of the Mercier children at the Senatobia School system for the School Year 2006 - 2007. She testified from the record attached as Exhibit 6 that there were 25 Tardies in the School Year 2006 - 2007.

Cross Examination: Ms. Williams testified that the records did not reveal how many tardies were prior to December 2006 when the divorce took place, and how many after the divorce in January 2007 to April or May 2007, when the children were in the custody of Petitioner/Counter-Respondent, Douglas Christopher Mercier .

**Jane Smith** : The maternal aunt of Marla Veronica Davis Mercier, great aunt of the Mercier children, housekeeper and babysitter for Petitioner/Counter-Respondent, Douglas Christopher Mercier, one day per week. (TR Vol II 262-267)

Direct Examination: Ms. Smith said her niece, Marla Veronica Davis Mercier, was a wonderful person and good mother, a good housekeeper. She testified that Linda Mercier, the stepmother had good mothering skills with the children. She testified that she lived in New Albany and attended the same church as her niece, Marla Veronica Davis Mercier, the Respondent/Counter-Petitioner. That she was active in the church when the children were with the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, on visitation. She never heard either Douglas Christopher Mercier, Marla Veronica Davis Mercier, or Linda Mercier say any profanity in the presence of the children. That Petitioner/Counter-Respondent, Douglas Christopher Mercier, and his wife, Linda Mercier, went out to eat on Tuesday night when she would keep the children and stay overnight. That she could not testify that either of them were intoxicated after the they returned. She could not testify that Linda Mercier ever stayed over night prior to the marriage to Petitioner/Counter-Respondent, Douglas Christopher Mercier, but she did see some of Linda's clothes there on one or two occasions.

Cross Examination: She testified that Petitioner/Counter-Respondent, Douglas Christopher Mercier, paid her very well to come over from New Albany each Tuesday and clean the parties' home and babysit the Mercier children. She would take would pick up the children after school on these particular days, but that Petitioner/Counter-Respondent, Douglas Christopher Mercier, would take them to school that day and the next morning.

She testified that Marla Veronica Davis Mercier, Respondent/ Counter-Petitioner, was a good mother for the children prior to the divorce. Did not know why her niece, Marla Veronica Davis Mercier, gave up the custody of her children at the time of the divorce in December, 2006. She testified that Petitioner/Counter-Respondent, Douglas Christopher Mercier, was a good father to his children.

She testified that she had visited in the home of her niece, Marla Veronica Davis Mercier, since the divorce in New Albany. That she had seen one Matt Stewart at Marla Veronica Davis Mercier's home on occasion, but she had no knowledge of whether he every stayed over night with Marla Veronica Davis Mercier, or overnight with Marla Veronica Davis Mercier, when the Mercier children were visiting.

**Ronnie Davis** : The father of Respondent/ Counter- Petitioner, Marla Veronica Davis Mercier, and the maternal grandfather of the Mercier children. (TR Vol II 270-283)

Direct Examination: He testified that he was the maternal grandfather of the Mercier children and the father of Marla Veronica Davis Mercier. That he and her mother helped Marla out from time to time with the children. That she was a good mother. That he was familiar with Matt Stewart being around the two younger children, and seemed to get along well with them.

Cross Examination : He testified that both his daughter, Marla Veronica Davis Mercier , and his former son in law, Douglas Christopher Mercier , were both good parents. Testified that he had no personal knowledge that Douglas Christopher Mercier was not a good father after the divorce.

He was asked if he saw anything different since the divorce. He was also asked if he had any knowledge as to the reason that Marla Veronica Davis Mercier gave up the custody of her children during the divorce.

He did not know how long his daughter, Marla Veronica Davis Mercier had been seeing Matt Stewart. He understood that they were engaged to get married but he did not know the date. He testified that he had not helped Marla Veronica Davis Mercier financially since the divorce, although she spent more than she made each month, "She never asked him for anything".

**Jeanie Davis a/k/a Judy Davis** : The mother of Respondent/ Counter-Petitioner, Marla Veronica Davis Mercier, and the maternal grandmother of the Mercier children: (TR Vol II 284-298)

Direct Examination: She testified that Marla Veronica Davis Mercier was a compassionate, loving and caring mother. She testified that the reason her daughter, Marla Veronica Davis Mercier, gave up the custody of her children at the time of the divorce, was because she thought it was in their best interest at the time in December 2006.

That she works at the New Albany School and "thinks" if the children are awarded to Marla Veronica Davis Mercier's custody that she would be able to pick them up after school, if they are in the same school she is employed.

She testified that she knew Matt Stewart, who was the fiancée of her daughter, Marla Veronica Davis Mercier, and in her opinion he was good around her grandchildren.

That she gets to see her grandchildren, when they visit her daughter, Marla Veronica Davis Mercier.

She wants the Mercier children with their mother, Marla Veronica Davis Mercier. She testified that she had no knowledge that Marla Veronica Davis Mercier was struggling financially. That Marla Veronica Davis Mercier had never asked her for anything.

She testified that Douglas Christopher Mercier was an angry young man, but gave no basis or reason for her opinion.

Cross Examination: She testified on cross examination that Petitioner/Counter-Respondent, Douglas Christopher Mercier, was not a good father, but had no personal knowledge of what kind of father he was since the divorce. She knew that Marla Veronica Davis Mercier and Matt Stewart were engaged but did not know the date or planned date of the marriage.

She denied knowing that Matt Stewart was a violent person sometimes as part of his duties as a highway patrolman. She had seen him in uniform with a pistol on at her daughter's house. She once again stated that the reason that her daughter, Marla Veronica Davis Mercier, gave her for giving up the custody of her children in December because it was in the best interest of the children at that time. She based this solely on what her daughter told her and could not give any other reason to her personal knowledge for Marla Veronica Davis Mercier to give up the custody of her children.

She was unable to testify that she had any personal knowledge of whether her daughter, Marla Veronica Davis Mercier, and Matt Stewart were living together. Nor could she give any reason as to why she thought that Douglas Christopher Mercier was an unfit father, since she had not been around him since the divorce. She testified that she had no knowledge of whether Matt Stewart had spent the last three days and nights at her daughter's home in New Albany.



Redirect Examination: She was asked if she thought it was better for the children to spend time with Aunt Jane (Jane Smith) or her daughter, Marla Veronica Davis Mercier, to which she answered Marla Veronica Davis Mercier.

She was also asked to what was different after the divorce with Douglas Christopher Mercier with the children. To which she responded that he had married and had a new wife, Linda Mercier.

The Court recessed for lunch and reconvened as 1:00 P.M. when the Respondent/Counter- Petitioner, Marla Veronica Davis Mercier, proceeded with her portion of the case.

**Matt Stewart** : Highway Patrolman, National Guard Soldier, and lover and fiancée' of Respondent/Counter-Petitioner, Marla Veronica Davis Mercier. (TR Vol II and III 299-361)

Direct Examination : (TR Vol II and III 299-334) by Lisa Scruggs

Matt Stewart testified that he was a full time Highway Patrolman for the past seven years and a member of the Mississippi National Guard.

That prior to his becoming involved with Marla Veronica Davis Mercier, there had never been any complaints or disciplinary reports in his record.

He testified that he and Marla Veronica Davis Mercier were engaged to be married around the middle of December of 2007, and that the two younger children had accepted him and he thought very highly of them.

He testified that he intended to support Marla Veronica Davis Mercier and the children, and testified about the funds he has in the bank.

He testified that he had phone harassment charges from January, 2007 and that he was currently on administrative leave.

He testified about the incidence at the video store in New Albany between Douglas Christopher Mercier, Marla Veronica Davis Mercier, Linda Mercier, and himself.

He testified about the incidence at the football game and the altercation between Douglas Christopher Mercier and himself.

He testified about his relationship with Marla Veronica Davis Mercier and her relationship with her children. He testified he never stayed overnight with Marla while the children were visiting. He testified he stayed at Marla's house during the week sometimes.

He identified pictures of him and the children and outings. He testified about being knowledgeable of Lily's asthma and how to administer breathing treatments.

He testified that he did not know whether or not Douglas Christopher Mercier was a good father.

He testified that he had a good relationship with Marla Veronica Davis Mercier's family and that neither he nor Marla drank or smoked around the children. He testified that he and her parents have kept the children on occasion.

He testified that he received a phone message from Douglas Christopher Mercier on December 29, 2007.

Cross Examination (TR Vol III 335-360) by H.R. Garner

He admitted on cross examination that he was suspended from the Highway Patrol and charged with a crime and was awaiting a trial date in Justice Court on January 3, 2008.

He testified that on January 12, 2007, that he was talked to by his superior, Captain Jeff McNeice about harassing or calling Douglas Christopher Mercier.

He testified that at the time of the divorce in December, 2006 that he was seeing Marla Veronica Davis Mercier. In fact, he testified that he had stayed with her the preceding Monday night, the week of the trial. He admitted discussing the case with her, but denied discussing with her what he was going to testify to.

He admitted that he and Douglas Christopher Mercier were once friends. That there was now bad blood between them since his involvement with Doug's former wife, Marla Veronica Davis Mercier.

He admitted that on December 29, 2006 that he contacted Douglas Christopher Mercier by telephone and they had a disagreement about his involvement with Doug's children.

He testified that he instigated the incident at the ball game in Senatobia in September, 2007 with Douglas Christopher Mercier.

He was asked why he failed to arrest Douglas Christopher Mercier or call for help at the video shop in New Albany, Mississippi when the altercation occurred. He admitted following Douglas Christopher Mercier and his wife earlier that day in New Albany.

He admitted that he drank on occasion. He admitted that Marla Veronica Davis Mercier drinks wine.

He admitted under cross examination that Douglas Christopher Mercier had no record of any DUI arrests or any other type of arrests, especially involving alcohol.

He admitted helping Marla Veronica Davis Mercier financially and that he pays her car note, Energy bill, groceries, cable, phone, and other things that she needs.

He admitted that it was his idea that Marla Veronica Davis Mercier and Douglas Christopher Mercier exchange the children at the police station in New Albany.

He admitted that he had written a letter to Douglas Christopher Mercier not to contact him anymore for any reason.

He admitted that Olivia Davis Mercier had visited her mother two or three times since the divorce when he was present. He testified that he was familiar with the relationship between Marla Veronica Davis Mercier and Olivia Davis Mercier at the time of the divorce and that the relationship was bad. He stated that now Olivia Davis Mercier is nice and well behaved. Further, he admitted that Olivia Davis Mercier had been with her father, Douglas Christopher Mercier, since the divorce in December, 2006.

Re-Direct Examination (TR Vol III 360-361) by Lisa Scruggs

On redirect examination he testified that the arresting of a person who committed a misdemeanor in his presence was discretionary on the part of the officer.

The Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, then rested her case in chief.

The Petitioner/Counter-Respondent, Douglas Christopher Mercier, then put on his rebuttal testimony:

**Douglas Christopher Mercier:** The Petitioner/Counter-Respondent testified as a rebuttal witness:

Direct Examination: (TR Vol III 361-363) by H.R. Garner

Denied the allegations of Matt Stewart.

Cross Examination: The Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, attorney waived further cross examination of the Petitioner/Counter-Respondent, Douglas Christopher Mercier.

The Petitioner/Counter-Respondent, Douglas Christopher Mercier, then rested his case. The Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, rested her case on surrebuttal.

At the conclusion of the testimony and evidence presented and both parties having rested their respective cases.

The Petitioner/Counter-Respondent, Douglas Christopher Mercier, by his attorney who made the Motion Ore Tenus for a Rule 42 of the Mississippi Rules of Civil Procedure Motion.

**Rule 42 of the Mississippi Rules of Civil Procedure provides as follows:**

**“DISMISSAL OF ACTIONS**

...

**(b) Involuntary Dismissal: Effect Thereof.** For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff, in an action tried by the court without a jury, has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. The court may then render judgment against the plaintiff or may decline to render any judgment until the close of all the evidence. If the court renders judgment on the merits against the plaintiff, the court may make findings as provided in Rule 52(a). Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any other dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

...”

The basis of the Petitioner/Counter-Respondent, Douglas Christopher Mercier, Motion by his attorney was as follows:

1. That the Respondent/Counter- Petitioner, Marla Veronica Davis Mercier, had failed to meet the Burden of Proof and had failed to prove that there had been a material and substantial change in circumstances adversely affecting the best interest and welfare of the children since the rendition of the judgment of divorce.

2. That the Court enter an order granting a modification of child visitation.

That the child visitation from the proof of every witness was that the child visitation as it presently stands is not working, and that the Court adopt the Farese Schedule of Visitation.

3. That the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, failed to pay one-half of the lease as ordered in the Judgment. (CP 73, MRE 11)

4. That there is no proof that Douglas Christopher Mercier, the Petitioner/Counter Respondent, was late on the payment of the alimony. (TR 352-353)

The Court then took the matter under advisement, and upon agreement of both parties a transcript of the proceeding was to be made a part of the proceeding by the Court Reporter, Ms. Kimberly Land, with each to pre-pay for same one-half each. That two weeks after the transcript was prepared and delivered to both parties' attorneys, each party pursuant to Rule 52 (a) of the Mississippi Rules of Civil Procedure, shall each present in writing to the Court a Proposed Finding of Facts and Conclusions of Law to support their respective cases.

After which same had been submitted to the Court, that the Court shall render its Opinion at a time and place to be set by the Court.

## **SUMMARY OF THE ARGUMENT**

The argument of the Appellee, Douglas Christopher Mercier, is summarized as follows:

ISSUE I: THERE HAS BEEN NO MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES SINCE THE RENDITION OF THE JUDGMENT OF DIVORCE THAT HAVE TRANSPIRED ADVERSELY AFFECTING THE BEST INTEREST AND WELFARE OF THE PARTIES' CHILDREN, AND THE JUDGMENT OF THE CHANCELLOR SHOULD BE AFFIRMED

The evidence clearly revealed to the Court that there had been no material and substantial change in circumstances of the parties which adversely affected the best interest and welfare of the parties children. In fact the Appellant, Marla Veronica Davis Mercier, admitted that there had been no change in Douglas Christopher Mercier, Appellee, since the rendition of the Judgment of Divorce.

ISSUE II: THAT THE APPELLANT SHOULD BE RESPONSIBLE FOR THE AMOUNT DUE ON THE PARTIES' MERCEDES LEASE , THAT HER VIOLATION OF THE AGREEMENT CONTAINED IN THE JUDGMENT OF DIVORCE BROUGHT ABOUT.

The evidence and agreement of the parties clearly revealed that the Appellant, Marla Veronica Davis Mercier, had refused to pay the Court Ordered lease on the Mercedes automobile and that she was found in contempt by the Court and ordered to pay remaining amounts.

ISSUE III: THAT THE CHANCELLOR WAS CORRECT IN THE MODIFICATION OF THE VISITATION SCHEDULE OF THE APPELLANT WITH



THE PARTIES' CHILDREN, IN THAT THE CHANCELLOR FOUND FROM THE EVIDENCE THAT THE VISITATION WAS NOT WORKING AND IT WAS IN THE BEST INTERESTS OF THE CHILDREN TO MODIFY THE ORDER, *CHRISTIAN V WHEAT*, 876 So2d. 341, 345 (Miss, 2004)

The evidence clearly revealed that the child visitation was not working and that the best interest and welfare of the children was to modify same, which the Chancellor did.

ISSUE IV: THAT THE CHANCELLOR WAS CORRECT IN REQUIRING THE APPELLANT TO PAY FUTURE CHILD SUPPORT.

The Chancellor was correct in retaining jurisdiction so as to consider the amount that the Appellant, Marla Veronica Davis Mercier, was to pay in child support when she became employed pursuant to Miss. Code Ann. § 43-19-101(1972).

## ARGUMENT

### A. STANDARD OF REVIEW

The standard of review in domestic relations cases is well settled and is limited:

“... this Court will not disturb the findings of a Chancellor unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied”

*Crow v Crow*, 622 So2d 1226 (Miss. 1993); *Dell v. Parker*, 563 So2d 594 (Miss. 1990).

In other words, the Court has stated:

“ ... on appeal, we are required to respect the findings of fact made by a Chancellor, supported by credible evidence and not manifestly wrong.”

**B. ISSUE I: THERE HAS BEEN NO MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES SINCE THE RENDITION OF THE JUDGMENT OF DIVORCE THAT HAVE TRANSPIRED ADVERSELY AFFECTING THE BEST INTEREST AND WELFARE OF THE PARTIES' CHILDREN, AND THE JUDGMENT OF THE CHANCELLOR SHOULD BE AFFIRMED**

In a modification proceedings, the burden is on the non-custodial parent to prove by a preponderance of the evidence: "(1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody." *Id.* (citing *Bubac v. Boston*, 600 So.2d 95 1,955 (Miss. 1992).

The party who petitions for a modification of a child custody order bears the burden of proof by a preponderance of the evidence. *Jones v. Jones*, 878 So.2d 1061,1065 (Miss. Ct of App. 2004)

In order to satisfy this burden of proof, the proponent must offer evidence which is more convincing than the evidence offered against it. Black's Law Dictionary 1 182 (6<sup>th</sup> Ed. 1990) *Marter v. Marter* 914 So.2d 743, (Miss. App. 2005)

"The chancellor should find that the overall circumstances in which a child lives have materially changed and are likely to remain materially changed for the foreseeable future." *McSwain v McSwain*, 944 So.2d at 52,2005 WL 2979678 at (quoting *Tucker v. Tucker*,453 So.2d 1294, 1297 (Miss.1984)

In order to modify a previous child custody order, three distinct prerequisites must be satisfied: (1) the party seeking the change bears the initial burden of proving there has been a material change in circumstances; (2) the change must be adverse to the child's welfare; and (3)the chancellor must find a change in custody is in the best interest of the child. *Thompson v. Thompson*, 799 So. 2d 919,922 (Miss. Ct. App. 2001) (citing *Bredemeier v. Jackson*, 689So. 2d 770, 775 (Miss. 1997). The totality of the circumstances must be examined in order to determine if a material change in circumstances has occurred. *Id.* If a material change has occurred, then the chancellor will make a separate assessment to determine if the change is adverse to the child. *Id.* Then, if there is a finding of adverse material change in circumstances, the chancellor may determine whether the best interest of the child requires a change in custody. *Id.* (citing *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984). If the chancellor reaches the best interest of the child analysis under the above prerequisites, he is then required to make on the- record findings for each of the Albright factors. *Sturgis v. Sturgis*, 792

So. 2d 1020, 1025 (1121) (Miss. Ct. App. 2001) (citing *Powell v. Avers*, 792 So. 2d 240,249 (133) (Miss. 2001)

Marla Veronica Davis Mercier, testified that there had been no material change in Douglas Christopher Mercier since the Judgment of Divorce awarding him physical custody of the parties' children.( TR Vol I 71-72) That she wanted the custody of the parties' two youngest children, since she loved them and could now take care of them. She had a house, was attending school, and was engaged to be married to her fiancée, Matt Stewart. That Douglas Christopher Mercier she claimed drank, but had done so prior to the divorce. (TR Vol I 27) She testified as to events involving run-ins with Matt Stewart, her fiancée, and Douglas Christopher Mercier, since the divorce on two or three occasions, but she had not personally had any direct run-ins with Douglas Christopher Mercier or his wife. (TR Vol I 19-21)All of her other witnesses' testimony was that they could not testify as to Douglas Christopher Mercier's fitness as a father since the divorce. The witness who testified as to the school tardies on the part of the children, could not testify as to what was before and after the divorce in December, 2006. The only witness to testify as to any problems with Douglas Christopher Mercier was Matt Stewart, the man who was going with Marla Veronica Davis Mercier at the time of the divorce, and who had several run-ins with Douglas Christopher Mercier about the children. All of her witnesses testified that she was a good mother, but no other information was given by them regarding Douglas Christopher Mercier.

Douglas Christopher Mercier testified that he drank on occasions, but had never been arrested or convicted of driving under the influence or public drunkenness. (TR

Vol I 120) He testified how he and his present wife cared for the children. The only difference since the divorce was that he and his younger children were going to a different church, and that he had remarried. (TR Vol I 120-121) That on the rare occasions that he and his wife went out, he always saw that the children were cared for by a babysitter.

Simply put there was no evidence, let alone a preponderance of evidence presented by the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, and her witnesses to anywhere near meet the burden of proof that there had been " a material and substantial change in circumstances of Douglas Christopher Mercier, which adversely affect the best interest and welfare of the parties' minor children which would warrant modification of child custody. *Thompson v. Thompson*, 799 So. 2d 919,922 (Miss. Ct. Appellant . 2001) *Marter v. Marter*, (Miss. App. 2005)

The Chancellor correctly held based upon the evidence presented by Marla Veronica Davis Mercier, she had failed to meet the burden of proof required to modify child custody.

**C. ISSUE II: THAT THE APPELLANT SHOULD BE RESPONSIBLE FOR THE AMOUNT DUE ON THE PARTIES' MERCEDES LEASE , THAT HER VIOLATION OF THE AGREEMENT CONTAINED IN THE JUDGMENT OF DIVORCE BROUGHT ABOUT**

The evidence clearly revealed and from her own testimony that Marla Veronica Davis Mercier, had failed to carry out the terms of the Judgment of Divorce. She admitted that she had failed to pay her portion of the lease on the automobile as ordered by the Court. She gave no reason , nor did she at any time state that she had the inability to pay her portion of the lease . *Hine v. Anchor Lake Prop. Owners Assn.*, 91 1 So.2d 1001,

1005(1 14) (Miss. Ct. App.2005). "Rather, the test is whether there is a clear record of delay or contumacious conduct by the plaintiff." Id. (emphasis added). Contumacious conduct has been defined as "willfully stubborn and disobedient conduct, commonly punishable as contempt of court." BLACK'S LAW DICTIONARY 330 (6th ed. 1990). " Where a clear record of delay has been shown ... there is no need for a showing of contumacious conduct." Id.

Whether a party is in contempt of court is left to the chancellor's substantial discretion *Shelton v. Shelton*, 653 So.2d 283,286-287 (Miss. 1995). "When a party is unable to pay court ordered support, the proper action for him to take is to promptly file for a modification of support." Id. (citing *Cumberland v. Cumberland*, 564 So.2d 839, 845 (Miss.1990)). "When this course of action is followed, a finding of contempt is not proper." Id. (citing *Cumberland*, 564 So.2d at 847; *Thurman v. Thurman*, 559 So.2d 101 4, 101 6- 17 (Miss. 1990).

Matters of contempt involving the violation of a court's orders are committed to the trial court's sound discretion because, "by institutional circumstance and both temporal and visual proximity," the trial court "is infinitely more competent to decide the matter than are we." *Cumberland v. Cumberland*, 564 So.2d 839,845 (Miss. 1990). While civil contempt is ordered to induce a party's compliance a court order, criminal contempt punishes past conduct. *Varvaris v. State*, 5 12 So.2d 886,887 (Miss. 1987)

Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, was cited for contempt of this court's prior orders. She gave no explanation or other defense for her failure to carry out what was ordered by this Court to do.

The Chancellor was absolutely correct in ordering her to pay the balance on the lease of the Mercedes automobile, which if she had complied with the Court's Order and her agreement, nothing would have been owed. (CP 245, MRE 56)

**D. ISSUE III: THAT THE CHANCELLOR WAS CORRECT IN THE MODIFICATION OF THE VISITATION SCHEDULE OF THE APPELLANT WITH THE PARTIES' CHILDREN, IN THAT THE CHANCELLOR FOUND FROM THE EVIDENCE THAT THE VISITATION WAS NOT WORKING AND IT WAS IN THE BEST INTERESTS OF THE CHILDREN TO MODIFY THE ORDER, *CHRISTIAN V WHEAT*, 876 So2d. 341, 345 (Miss, 2004)**

To modify a visitation order, the Petitioner must prove that the visitation order is not working and that it is in the children's best interest to modify the order, *Christian v Wheat*, 876So2d 341,345 (Miss. 2004).

The mid week visitation on the part of the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, in that the visitation is disruptive to the children's education and stability. *Sistrunk v McKenzie*, 455 So2d 341 (Miss. 2004).

The evidence presented at trial clearly supported the Chancellor's finding that the visitation schedule was not working and required modification for the best interests of the parties' children.

**E. ISSUE IV: THAT THE CHANCELLOR WAS CORRECT IN REQUIRING THE APPELLANT TO PAY FUTURE CHILD SUPPORT**

A non-custodial parent should pay unto the custodial parent support and maintenance for the parties' minor children to the custodial parent.

In this case, Marla Veronica Davis Mercier and Douglas Christopher Mercier are the parents of three minor children. That Douglas Christopher Mercier has custody

of all three children. That Marla Veronica Davis Mercier has assets and earning capacity, and is able to pay a reasonable amount of child support.

That Mississippi Code Annotated Section 43-19-101( 1972 as amended) provides under the guidelines that she should pay twenty-two percent (22% )of her adjusted gross income. However, the Court may take into consideration the factors or variance as provided under Mississippi Code Annotated Section 43-19-103 (1972 as amended).

The Chancellor in his opinion retained jurisdiction of the parties and subject matter in order to assess child support to the Respondent/Count- Petitioner, Marla Veronica Davis Mercier, upon her becoming employed. Clearly the Chancellor took into consideration the circumstances of Marla Veronica Davis Mercier as he was authorized to do in his discretion pursuant to Miss. Code Ann. § 43-19-103 (1972 as amended ).

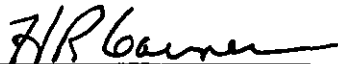


## CONCLUSION

The Chancellor was correct based upon the evidence adduced at trial by Marla Veronica Davis Mercier, Appellant, that she had failed to meet the burden of proof to modify child custody of the parties' minor children. That Douglas Christopher Mercier, Appellee, had met the burden of proof that Marla Veronica Davis Mercier was in contempt for failure to comply with the Court's prior Judgment of Divorce. That the evidence presented by Douglas Christopher Mercier to the Court clearly met the burden of proof that the child visitation was not working, and that it was to the best interest of the parties' children that visitation be modified. Finally the Court was correct in retaining jurisdiction of the issue of child support to make a determination as to the amount that Marla Veronica Davis Mercier was to pay "when she got a job or became employed."

The Chancellor's ruling was correct on all issues raised by the Appellant, Marla Veronica Davis Mercier, and the Chancellor's Order should be affirmed by this Court.

Respectfully submitted,

  
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Attorney for Appellee

CERTIFICATE OF SERVICE


I, H.R. Garner, do hereby certify that I have this date mailed by United States Mail,  
postage prepaid, a true and correct copy of the foregoing APPELLEE'S BRIEF to:

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Dated this the 18<sup>th</sup> day of October, 2008.

  
\_\_\_\_\_  
H.R. Garner,  
Certifying Attorney