

IN THE SUPREME COURT OF MISSISSIPPI  
NO. 2009-CA-00106

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BRIAN E. WIKEL

APPELLANT

VS.

BETHANY J. WIKEL MILLER

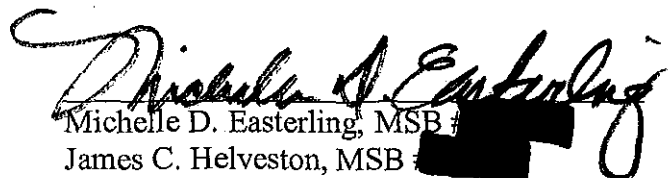
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of 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 disqualifications or recusal.

1. Brian E. Wikel, Appellant
2. Bethany J. Wikel Miller, Appellee
3. Rebecca A. Younger, Esq., Attorney for Appellee
4. Michael R. Farrow, Esq., Attorney for Appellee
5. Carrie A. Jourdan, Esq., Attorney for Appellee
4. Michelle D. Easterling, Esq., Attorney for Appellant
5. James C. Helveston, Esq., Attorney for Appellant
6. Honorable Kenneth M. Burns, Chancellor

SO CERTIFIED, on this the 19<sup>th</sup> day of June, 2009.

  
Michelle D. Easterling, MSB # [REDACTED]  
James C. Helveston, MSB # [REDACTED]

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## **STATEMENT OF THE ISSUE**

- I. WHETHER THE CHANCELLOR'S DECISION TO DENY THE APPELLANT'S COMPLAINT FOR MODIFICATION OF CHILD CUSTODY WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AS REFLECTED IN THE RECORD.

## STATEMENT OF THE CASE

### **A. Nature of the Case, Course of Proceedings and Disposition of the Case Below**

On August 24, 2006, the Appellant, Brian Wikel, (hereinafter “Brian”) filed his Complaint for Modification of the Final Judgment of Divorce entered in this cause on January 7, 2005, asking the Chancery Court of Oktibbeha County, Mississippi, to modify physical custody of the parties’ two minor children, Zachary (then age 7) and Garrett (then age 5) from Bethany Wikel (“Bethany”) to Brian. R.1:30<sup>1</sup>. Brian’s Complaint alleged that Bethany’s misconduct with her paramour and other inappropriate and immoral influences and Bethany’s refusal to communicate with him concerning the children’s school and extracurricular activities were having an adverse effect on the minor children who were then engaged in therapy. R.1:31. Further, Brian alleged that Bethany’s refusal to allow him to participate in the boys’ activities and special events was adversely affecting their father-son bond. R.1:31. Alternatively, Brian asked the Court to modify the existing visitation schedule and provide more specified and extended visitation periods in light of his recent relocation to Florence, Alabama following the closing of his employer’s plant in West Point, Mississippi. R.1:30.

On October 26, 2006, the Appellee, Bethany Wikel (now Miller), filed her Answer and Counter-Claim for Modification, denying Brian’s allegations and seeking an increase in child support, the right to claim the income tax deductions on both children and a modification of the existing visitation schedule. R.1:49. Bethany also sought a modification of custody of the children from joint legal custody to sole legal and physical custody in Bethany and other matters related to property settlement. R.1:49. Brian filed his answer to Bethany’s Counter-Claim for Modification denying Bethany’s requested relief on November 13, 2006. R.57.

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<sup>1</sup> References in this brief to the Record will be “R. \_\_\_”, to the Record Excerpts will be “R.E. \_\_\_”, and to the trial transcript will be “Tr. \_\_\_.” Volumes shall be denoted by the volume number followed by a colon, and the appropriate page number.

The trial of this cause was held on September 8, 2008 and October 29, 2008.

At the trial of this cause, the parties stipulated that Brian Wikel is a good father with excellent parenting skills who has a great relationship with his children. Tr. 2:193-94.

By virtue of its Opinion and Judgment entered by the Court in this cause on December 3, 2008, Brian's Complaint for Modification was denied. R.E.7; R.2:158. The Court found that due to the relocation of both Brian and Bethany, the existing visitation schedule was not working and that modification of the schedule was in the best interest of the children. R.E.8; R.2:159. The Court set forth a detailed visitation schedule and ordered Bethany to cooperate with Brian by keeping him informed with regard to the children's school, social and extracurricular activities and medical conditions. R.E.8-15; R.2:159-166. The Court denied Bethany's Complaint for an increase in child support. R.E.12; R.2:163.

On December 10, 2008, Brian filed a Motion to Reconsider the Court's Opinion and Judgment entered on December 3, 2008. R.2:167-178. Bethany also filed her Motion to Reconsider on December 12, 2008 R.2:179-182. The Chancellor issued his Order on December 22, 2008, in which he overruled Brian's Motion for Reconsideration as to modification of child custody and overruled Bethany's Motion for Reconsideration as to modification of child support. R.E.16; R.2:197. The Court did, however, sustain Brian's Motion with regard to the requested amendment to Brian's visitation schedule. R.E.16; R.2:197-203.

Brian filed his Notice of Appeal with the Court on January 15, 2009. R.2:204. Bethany filed her Notice of Cross-Appeal on January 29, 2009. R.2:208-209.

**B. Statement of the Facts**

The parties were divorced on January 5, 2005. R.1:15-25. They shared joint legal custody of their two minor children, Zachary, born on September 1, 1998 (now age 10) and Garrett, born on February 26, 2001 (now age 8), with primary physical custody vested in

Bethany, subject to Brian's specified visitation rights. The Property Settlement Agreement provided that Brian would have alternating weekend visitation with the minor children, and one night of midweek overnight visitation. It made no provision for summer visitation. R.1:15-25.

Brian testified that at the time of the divorce, he was living in Starkville in the former marital home, and working at the Sara Lee facility in West Point. Tr.1:10. He moved to Florence, Alabama in May, 2007<sup>2</sup> when the West Point facility closed down Tr.1:10-11. Prior to the move, he attempted to find employment in the area to stay close to the children, who also resided in West Point, but he could not find a job that would pay him even close to what he was earning in salary and benefits with Sara Lee<sup>3</sup>. Tr.1:11.

Unknown to Brian until the pendency of this cause, Bethany, while she was still married to Brian, engaged in sexual intercourse with a minor student who attended the high school where she taught. Tr.1:83-85. Bethany's sexual misconduct continued after her divorce from Brian as she admittedly permitted men, including Cain Cannon, her boyfriend of a few weeks, and Will Miller to spend the night in the home she shared with the parties' two minor children, Zachary and Garrett. Tr.1:90-93.

Brian testified that at the time of the divorce in January, 2005, the children were well adjusted, and he observed no issues with their behavior or school performance. Tr.1:12. Bethany testified that after the divorce, the children began experiencing emotional and behavioral problems. Tr. 1:93-94. Though Brian did not observe this behavior at the time, as time went on, Brian did observe that Zachary was becoming withdrawn, and unwilling to discuss his feelings or even his daily activities. Brian related that Zachary became upset when he had to return to his mother's after visitation, or when he had to leave his mother to visit with his dad. Tr.1:13.

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<sup>2</sup> The record citation reflects 2006, but Brian actually moved in April 2007 as reflected in further testimony. See Tr.1:32.

<sup>3</sup> Brian is employed as the Operations Manager for Sara Lee at their Florence, Alabama facility. Tr.1:8-9.



Bethany decided to take the boys to a counselor that she picked out, Melanie Benson, without any input from Brian. Tr.1:13-14; 1:95. Brian participated in some of these counseling sessions<sup>4</sup>. Tr.1:14.

Melanie Benson treated the Wikel children from March, 2005 until July, 2007, during which time she met with them on 22 or 23 occasions. Tr. 1:128. Bethany presented to Ms. Benson with complaints that Zachary was angry, that he experienced temper tantrums and anger outbursts, became physically aggressive with his brother, Garrett, was very repressed and did not verbalize his emotions. Tr. 1:131-133. Ms. Benson testified that following the initial assessment of Zachary, she diagnosed him with adjustment disorder, with mixed anxiety and depressed mood and identified his stressors as the parental divorce, difficulty in visitation schedules and tension between parents. Tr. 1:131-132. While initially Ms. Benson's client was Zachary, during the second visit, when Zachary exhibited aggression towards Garrett, it was decided that Garrett would participate in the sessions so the brothers could work on their relationship and abilities to express themselves. Tr. 1:133. Ms. Benson testified that her initial diagnostic impression of Garrett was adjustment disorder, unspecified. Tr. 1:133-134.

Melanie Benson testified that during the course of her treatment of Zachary and Garrett, the children mentioned their mother's male friend and the activities they did with him. Tr. 1:138-139. See also May 5, 2005 and May 26, 2005 office notes of Melanie Benson, R.E.42-43; Tr.Ex.3,pp.32-33. During a couple of sessions in the summer of 2006, Brian related his concern that Bethany's act of bringing men in and out of the children's lives was affecting the children and causing them confusion about father figures. Tr.1:14-16. Bethany told Brian in the presence of Melanie Benson that what she did in her house was her business and not Brian's. Tr.1:16. Ms.

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<sup>4</sup>Melanie Benson met with Bethany approximately 10 or 11 times, and with Brian 8 or 9 times. Tr. 1:128-129.

Benson counseled with Bethany regarding to the importance of limiting a child's involvement with members of the opposite sex, particularly romantic partners, because children form attachments to adult figures, and if the romantic relationship did not work out and the children had formed a bond with this person, the child would feel abandoned and it could also affect the attachment between the child and the other parent. Tr. 1:139-140. Ms. Benson testified that she counseled Bethany to limit the children's contact with her male friends. Tr. 1:141. In at least two subsequent sessions, Brian and Bethany discussed Bethany's boyfriend, Will Miller<sup>5</sup>, spending the night in the home while the children were present, and how that might confuse the children about cohabitation. Tr.1:17-18.

When asked whether she had concerns about Bethany's activities with over night male company in her home, prior to her marriage to Will Miller, Ms. Benson testified that she did have concerns because this issue had been brought up and Bethany had not followed her recommendations. Tr. 2:158-159. Ms. Benson opined that Bethany's activities with overnight male company in her home **contributed** to the children's psychological problem. Tr. 2:159.

After the June 30, 2005 session, the children did not return to counseling with Ms. Benson until February, 2006. Tr. 1:141-142. At that time, Zachary was again experiencing anger issues, and was also sad because he wasn't seeing his dad often. Tr. 1:142. Zachary wanted to see Brian more often, but was afraid of hurting his mother's feelings, and accordingly, internalized and repressed his feelings. Tr. 1:142. According to Ms. Benson, Zachary expressed uncertainty as to whether he would be able to spend time with his father. Tr. 1:142-143; Ex. 35. At the March 23, 2006 visit, Ms. Benson noted that "his (Zachary's) temper had increased and that he would lose his temper...approximately one or two episodes a day. I did not chart the level of intensity of those, but that he was still taking anger out on his brother and kicking, hitting."

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<sup>5</sup> Bethany was single at the time Brian filed his Complaint for Modification of Custody on August 24, 2006, but married Will Miller seven (7) days after she was served in this case. Tr.1:19-20.

Tr. 1:143. Until he called Ms. Benson in April, 2006, Brian was unaware that the children had returned to counseling and was “understandably a little upset that they were coming and he was not involved, but made it – made it clear that he would come and participate if he were able to attend sessions and [knew] when they were.” Tr. 1:144. Once he became involved again, Ms. Benson testified that Brian was compliant: “Anything that I did ask of him to do, he seemed willing to do it and did follow through with recommendations.” Tr. 1:144.

Ms. Benson testified that in July, 2007, Brian was concerned about the boys and the transition associated with his new job, and he contacted her to arrange a session with the children to address changes in the visitation schedule. Tr. 1:145-146. Ms. Benson had to set the appointment at 6:00 at night so Brian and the boys could attend because Bethany would not agree to take them unless it was Brian’s visitation time. Tr. 1:146.

Brian testified that Bethany terminated counseling sessions with Melanie Benson over his objection and without regard to the progress his elder child made in the course of the sessions. Tr.1:22-23.

Brian testified that Bethany has arbitrarily denied him summer visitation with his children for two years in a row (Tr.1: 23-24) and she has repeatedly refused to accommodate his requests for visitation or to make minor changes to pickup and return times in order to allow the children to spend a few more days with their grandparents over Christmas break (Tr.1:30), or to travel with their grandparents to Disney World (Tr.1:29), or to attend Brian’s grandfather’s funeral. Tr.1:28. Brian testified that until he involved his attorneys, Bethany refused to cooperate with him in securing necessary documents to permit the children to travel to the Virgin Islands with him to attend Brian’s brother’s wedding in the summer of 2008. Tr.1:25-26.

Brian testified that Bethany denied him visitation with the children when it was his night for mid-week visitation, and forced him to choose between having the children attend a counseling session with Melanie Benson or taking them to dinner. Tr.1:32-33.

Brian testified that after he moved to Alabama, Bethany refused to meet him half way and refused to adjust the pick up/drop off time for the boys' visitation periods, as well. Tr.1:38-39. To exercise his weekend visitation, Brian traveled 2 ½ to 3 hours to pick up his children in West Point, and then 2 ½ to 3 hours back to his home in Alabama on Friday nights only to do the same thing on Sunday afternoons. Tr.1:39-40.

Brian testified that Bethany has denied him telephone contact with his children (Tr.1:24-25; 43-45), refused to notify him about the children's school performance and activities and programs (Tr.1:46) and refused to relate information concerning the children's medical conditions and treatment Tr.1:46-47.

Ms. Benson testified that it was always her recommendation to the parties that they "maintain contact...focus on the children's needs and to try to work together, coordinate things together in order to make visitation as easy as possible, considering the circumstance." Tr.1:147. While Brian was generally compliant with her recommendations, Bethany resisted at times, and Ms. Benson believed that the target of her resistance was Brian. Tr. 1:148:

There was a lot of tension and animosity between the two of them throughout the whole time that I saw the boys. However, there were instances when there would be a recommendation made that I perceived that Mrs. Miller may not want to cooperate specifically with Mr. Wikel on that matter, not that she wanted to intentionally cause harm to the children, that there was a lack of cooperation sometimes with visitation and everything was so rigid, that it made it hard to alleviate some of the pressure from the boys regarding visitation." Tr. 1:148-149.

Melanie Benson testified that Brian and his children had a loving and affectionate relationship, and that they were sufficiently bonded, but that any type of disruption in visitation affects that bond. Tr. 2:151. She cited the examples of the visitation dispute at

their last visit, when Bethany refused to allow the children to attend the counseling session, requiring Brian to subordinate his visitation time in favor of a counseling session for his children and then refusing to permit Brian to take the children to eat dinner after the counseling session, even though it was his night to have the boys. Ms. Benson testified that Bethany was being unreasonable, "that if he (Brian) had driven to see his children and spent a considerable amount of visitation time in a therapy session, that to be able to take them to eat supper was not an unreasonable request, and with that being his night, his visitation night at the time." Tr. 1:151-152<sup>6</sup>.

Ms. Benson had no concerns about Brian serving as custodial parent of the minor children, but her concern with Bethany remaining as custodial parent was that "there would not be the relationship with their father promoted as it needs to be to secure an adequate bond in the relationship between the boys and their father." Tr. 2:162-163.

In her December 12, 2006 office note, Ms. Benson expressly noted her impression that "the client appears to feel pressure by mom to reject dad." R.E.55: Tr.Ex.p.45; Tr.2:165. Ms. Benson opined "that there have been opportunities when the relationship could have been encouraged [by Bethany] and I do not see that it was." Tr. 2:158. Ms. Benson testified that Bethany's actions and inactions in refusing to support, promote and encourage the relationship between Brian and the boys **contributed** to their psychological conditions, as her actions added to the stressors that the boys were facing. Tr. 2:159-160.

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<sup>6</sup> Brian testified similarly about his recent trip to see the boys only a week or so prior to the trial in this cause: Brian requested Bethany allow him to visit with the children briefly on the Labor Day weekend, since it would be three weeks before he saw them next. Despite his numerous attempts to secure overnight visitation with his children, Brian was allowed the opportunity to see them for three (3) hours in West Point, Mississippi, between 2:00 and 5:00 p.m., because Bethany had "plans" for the weekend. Though it meant nearly six (6) hours round trip travel for a three (3) hour visit with his sons, without hesitation, Brian made the effort to see his sons. Tr. 1:34-35.

### SUMMARY OF THE ARGUMENT

The Chancellor's decision to deny Appellant's Complaint for Modification of Custody was manifestly wrong, clearly erroneous and not supported by substantial evidence.

A review of the undisputed testimony in this record reveals that since the entry of the Final Judgment of Divorce on January 7, 2005, there have been multiple, significant material changes in circumstances which have adversely affected the minor children's welfare. In the best of interest of the children, custody should be modified from Bethany to Brian.

There is no dispute that Bethany's inappropriate conduct with overnight male visitors in her home, – which began prior to the divorce with her sexual relationship with an underage high school student in the school where she was teaching and continued with other men after the divorce – her steadfast refusal to promote and encourage and facilitate the children's relationship with their father and her denials of interference with visitation periods constituted material changes in circumstances. Most concerning is that the Wikel children have both been diagnosed with and treated for emotional problems by Melanie Benson of Meek Counseling Services since March, 2005, until Bethany unilaterally terminated her services and placed the children under the care of another counselor.

Melanie Benson, the only expert who testified at the trial of this cause, causally related the children's emotional problems to (1) Bethany Wikel Miller's actions with overnight male company in the home when the children were present, prior to her marriage to Will Miller, and (2) Bethany's actions and inactions in refusing to support, promote or encourage Brian's relationship with the children.

Considering the proof of significant material changes in circumstances adversely affecting the Wikel children, and considering the Chancellor's candid acknowledgement that, "[t]his case is close. If the Court were making an initial custody determination, Brian would

probably prevail,” the Chancellor erred in his denial of Brian’s Complaint for Modification of Custody. R.2:154-166.

The proof presented overwhelmingly established that it is not in the best interests of the Wikel children to remain in Bethany’s care and custody – who committed a felony by having sexual intercourse with a minor enrolled at the high school where she taught, who engaged in sexual intercourse with her then-boyfriend in her home while her children were sleeping in the next room, who has promoted rejection of their father by the children, who has time and again placed her own interests over those of her children by denying them opportunities to see their father or to enjoy a close relationship with him despite his involuntary relocation to another state, and who has steadfastly refused to communicate with Brian about the children’s medical conditions, well-being and school performance.

Rather, it would be in the best interest of these children to be in the care and custody of the parent who puts the children’s interest above his own, and who has exhibited time and again, that he is dedicated to their physical and emotional well-being, who respects the bond between a parent and child, and who is vested with good morals and judgment, qualities which are of vital importance to all children, but especially, two young boys. Brian Wikel is that parent.

## ARGUMENT

### **I. Law**

#### **A. Standard of Review on Appeal**

On appeal, this Court utilizes a limited standard of review of a Chancellor's determination on modification of custody: This Court will not disturb a Chancellor's findings where they are supported by substantial credible evidence in the record, unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. *Story v. Allen*, 7 So.3d 295, 297 ¶ 10 (Ct. App. 2008) (citing *Samples v. Davis*, 904 So.2d 1061, 1064 ¶ 9 (Miss. 2004)).

#### **B. Applicable Law**

Modification of custody is appropriate when the Court finds that (1) there has been a material change in circumstances since the entry of the prior decree, that (2) the change is adverse to the child and (3) and that a change in the custody of the child is in the child's best interest. *Eason v. Kosier*, 850 So.2d 188, 190 ¶7 (Miss.Ct.App.2003) (citing *Robison v. Langford*, 822 So.2d 1034, 1037 (Miss.Ct.App.2002)). The totality of the circumstances should be considered when considering whether a material change in circumstances has occurred. *Duke v. Elmore*, 956 So.2d 244, 247 ¶7 (Miss.Ct.App.2006) (citing *In Re: E.C.P.* 918 So.2d 809, 823 ¶58 (Miss.Ct.App.2005) and *Spain v. Holland*, 483 So.2d 318, 320 (Miss.1986)). The Mississippi Supreme Court has stated that the best interest of the child is the polestar consideration in all cases of modification of child custody cases: "[A] chancellor is never obliged to ignore a child's best interest in weighing a custody change; in fact, a chancellor is bound to consider the child's best interest above all else." *Riley v. Doerner*, 677 So.2d 740, 745 (Miss.1996) (citing *Sellers v. Sellers*, 638 So.2d 481, 485 (Miss. 1994)). The Supreme Court further stated:



The test we have devised for custody modification need not be applied so rigidly, nor in such a formalistic manner so as to preclude the chancellor from rendering a decision appropriate to the facts of an individual case. In particular, it should not thwart the chancellor from transferring custody of a child from one parent to another when, in the chancellor's judgment, the child's welfare would be best served by such transfer.

*Riley*, 577 So.2d at 745.

**II. The Chancellor's Decision To Deny The Appellant's Complaint For Modification Of Child Custody Was Not Supported by Substantial Evidence in the Record and Was, Therefore, Manifestly Wrong, and/or Clearly Erroneous.**

**A. Significant and Material Changes in Circumstances**

Bethany admitted to the following facts at trial:

1. That since the final judgment of divorce entered in this cause in January, 2005, Bethany has admitted to having sexual intercourse with a minor student 11 years her junior who was enrolled at the school where she was employed as a high school teacher, a fact which the Appellant, Brian, did not know of at the time of the divorce Tr. 1:83, 85.
2. That Bethany's sexual misconduct continued after the divorce, as she admitted that she permitted men, including Cain Cannon, her boyfriend of a "few weeks," and Will Miller, to spend the night in the home that she shared with the parties' two minor children, Zachary and Garrett Tr. 1:90, 93.
3. That since the divorce and prior to her remarriage, she allowed her (then) boyfriend Will Miller to spend the night while her children were present and in the home on at least two occasions, and that she had pre-marital sexual intercourse with Will Miller while the children were in the home. Tr. 1:90-91.
4. That since the final judgment of divorce, the parties' eldest child, Zachary, experienced emotional and behavioral problems, became withdrawn, and was treated for adjustment disorder

with mixed anxiety and depressed mood by Melanie Benson, a counselor chosen by Bethany. Tr. 1: 93-94.

5. That since the final judgment of divorce, the parties' youngest child, Garrett, also experienced emotional and behavioral problems and was treated for those problems by Melanie Benson, a counselor chosen by Bethany Wikel Miller. Tr. 1: 93-94.

6. That since the final judgment of divorce, Bethany has willfully and arbitrarily refused to cooperate with Brian to permit him reasonable visitation with the minor children, including refusing to permit him to pick up the children on the day school let out before a holiday, denying him summer visitations two years in a row (Tr.1:20, 27) and insisting that he choose between allowing the children to attend counseling or having mid-week visitation with him. Tr.1:29;

7. That since the final judgment of divorce, despite the fact of their joint legal custodial status, Bethany made decisions concerning the children's health and wellbeing without consideration of Brian, including but not limited to: termination of counseling with Melanie Benson (Tr. 1:101), retention of a new counselor for the children Tr.1:101-102.

8. That since the entry of the final judgment of divorce, Bethany has refused to communicate with Brian about the welfare of his children or details regarding visitation (Tr. 1:108), including the children's school progress and special performances, extracurricular activities (Tr. 1:103), special events in their lives, and even accidents requiring emergency medical attention. Tr.1:109. She has also refused to take his calls or simply hung up on him in the presence of the children. Tr. 1:108

9. That since the final judgment of divorce in this cause, Bethany has permitted the younger child of the parties, Garrett at the age of five (5) years, to hunt with a real gun and live ammunition, under the supervision of a 17 year old boy. Tr. 1:109-110.

10. That since the entry of the final judgment of divorce in January, 2005, Bethany and the parties' minor children have moved 3 times. Tr. 1:111.

In its Opinion and Judgment entered on December 3, 2009, the Chancellor correctly identified significant and material changes in circumstances that have occurred since the entry of the Final Judgment of Divorce in January, 2005:

1. That prior to their divorce but unknown to Brian until the pendency of this cause, Bethany had sex with a minor student eleven years her junior, while she was employed as a teacher in the public school that the student attended.

2. That Bethany has had other young men spend the night with her at her home while her children were present.

3. That Bethany admitted to having pre-marital sexual intercourse with Will Miller while the children were present in the home.

4. That Zachary Wikel experienced emotional and behavioral problems, became withdrawn and was treated for adjustment disorder with mixed anxiety and depressed mood by Melanie Benson, a counselor.

5. That Garrett Wikel also experienced emotional and behavioral problems and was also treated by Melanie Benson.

6. That Bethany has made Brian's visitation with his sons difficult, denying him summer visitation for two (2) years in a row, refusing to share the children's school records, not advising him of the children's extra curricular activities, and refusing to take Brian's call when he calls about the children. R.E.4-5; R.2:155-156.

**B. Adverse Effects**

The Wikel children experienced and were treated for emotional problems beginning in March, 2005, by Melanie Benson at the request of Bethany Wikel. Throughout the treating

relationship – over 23 visits – Ms. Benson closely observed the children and their parents, Bethany and Brian, and studied their interactions in order to determine the cause of the problems and how the problems could best be resolved. After she unilaterally terminated the services of Ms. Benson in July, 2007, Bethany testified that the boys were treated by another counselor, Lois Boggess in Columbus. Tr.1:101-102. Clearly, the fact that the Wikel children experienced emotional and behavioral problems sufficient to require counseling by Ms. Benson and subsequently, Lois Boggess, establishes that there indeed were material changes in circumstances in the home that were having an adverse effect upon the children.

At the trial of this cause, Melanie Benson, the only expert who testified, **causally related** the children's emotional problems to Bethany Wikel Miller's actions with overnight male company prior to her marriage to Will Miller, and to her refusal to cooperate and communicate with Brian regarding the children's visitation, as well as her efforts to exclude him from participating in their school and extracurricular events. Tr.2:159-160.

Melanie Benson's complete counseling record for the Wikel children was admitted into evidence at the trial of this cause as Exhibit 3 (R.E.23-59; Tr.Ex.pp 13-49) and indicates that the Wikel children's problems stemmed from much more than simple "transitioning issues": Their emotional and behavioral problems extended far beyond the date of the divorce in this case. Consider the fact that Zachary was back in counseling with Melanie Benson in February and March 2006, nearly fifteen (15) months after the entry of the Final Judgment of Divorce in this cause. Tr. 1:142-143. Obviously, as the parties had been physically separated long before the date the divorce decree was signed, to attribute the children's emotional problems solely to "transitioning" is factually inaccurate, and ignores the conclusions and opinions of the treating counselor and only expert who testified at the trial of the case.

In its Opinion and Judgment, the Court acknowledged the primary importance of fostering the parent-child relationship: “The Court is of the opinion that the preservation of the parent-child relationship is **paramount** to the child’s best interest and welfare.” R.E.13; R.2:164.

Brian Wikel testified in detail about the problems he experienced since the entry of the Final Judgment in getting information from Bethany about the boys’ health, education and welfare, as well as numerous instances where Bethany denied him visitation in accordance with the divorce decree,<sup>7</sup> and refused to be flexible with him with regard to the travel arrangements for visitation once he relocated to Florence, Alabama, after the West Point plant closed. Tr.1:38-40. Bethany’s actions in limiting contact between Brian and the children – by refusing to facilitate visitation with the children, refusing to communicate with Brian about their school performance, extra-curricular activities and medical treatment, refusing to meet him half-way after his move to reduce the children’s time in the vehicle in favor of quality visitation periods – all served to adversely effect the Wikel children and their bond with Brian.

Melanie Benson was equally concerned with Bethany’s disregard of the parent-child relationship between Brian and his sons as reflected in her treatment notes and in her trial testimony. Ms. Benson related the circumstances of the children’s return to therapy in February, 2006 to deal with Zachary’s anger issues: “It was claimed during the therapy session [February 2006] that he was sad because he was seeing his daddy less and wanting to see him more often, kind of feeling torn, not wanting to hurt his mother’s feelings, so internalizing and repressing feelings.” Tr. 1:142. Ms. Benson also testified about Zachary’s fear expressed to her at the March 7, 2006 visit: “He stated he was uncertain that time with his father would be spent, is what he – you know, he kind of stated that he didn’t know when he would get to see him....” Tr.

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<sup>7</sup> Examples include refusal to allow him to have mid-week visitation with the children on an occasion in the summer of 2006, after the counseling session in July, 2007 and on two occasions prior to hearing in this cause in the fall of 2008. Tr.1:33-34; 1:35-36; 3: 257-259.

1:142-143. Ms. Benson described Zachary's emotionally explosive session of December 12, 2006 in which he became visibly angry following Bethany's suggestion that Zachary was "afraid of having to go live with his father":

. . . Zachary adamantly denied that, and it was kind of scapegoated on a math issue that seemed not to have as much to do with the actual issue. And then Zachary, again, said to me when we spoke privately that he didn't say that about his dad, that he didn't – that he didn't say that he was afraid of being with his dad. **And that point, what I observed is there may have been some pressure, whether intentional or not intentional, by Mrs. Miller to promote maybe some rejection by the client to the father.**

Tr.2:164.

Ms. Benson opined that Bethany's actions and inactions in refusing to support, promote, and encourage the relationship between the boys and their dad **contributed** to the children's diagnoses of adjustment disorder with mixed anxiety and depressed mood. Tr. 2:159-160. No other expert testified at the trial of this cause.

**C. The Best Interests of the Children Mandate a Change in Custody**

In accordance with the standard test for modification of custody, upon a showing of material change in circumstances which adversely affect the minor children, the Court should then proceed to a "best interests" analysis utilizing the factors set forth in *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983); *Ellis v. Ellis*, 952 So.2d 982, 989-994 ¶¶17, 18. (citing *Lambert v. Lambert*, 872 So.2d 679, ¶18 (Miss.Ct.App.2003)).

Alluding to the third prong of the standard for modification, the "Albright analysis," the Court candidly noted that had this been an initial determination of custody, "Brian would probably prevail." R.2:153-166. Bethany stipulated that Brian has excellent parenting skills and a good relationship with his children Tr.2:193-195. An examination of the *Albright* factors

indicates that it would be in the children's best interest that custody be changed from Bethany to Brian:

1. **Age and sex of the children.** Zachary is age 10 and Garrett, age 7. Both are male and enjoy fishing and sports. Brian testified that he lives close to the water and the boys enjoy boating and fishing with him. He also testified that Zachary has gotten interested in football, and Brian is in the process of teaching him how to throw a ball and the rules of the game. Tr.1:51-52. This factor favors the father.

2. **Health of the children.** Physically, the children are healthy. Emotionally, however, the children are not. Melanie Benson has diagnosed Zachary as suffering from adjustment disorder, with mixed anxiety and depressed mood, and Garrett with adjustment disorder, unspecified. Tr.1:131-132, 133-134. Melanie Benson opined that Bethany's pre-marital activities with overnight male company has caused or contributed to the children's diagnoses as such. Tr.2:158-159. She has also opined that Bethany's refusal to facilitate, cooperate or encourage the children's relationship with Brian has caused or contributed to their diagnoses. Tr.2:159-160. This factor favors Brian.

3. **Home, school and social record of the children.** The children have not had any difficulty in school. This factor favors neither parent.

4. **Stability of the home environment.** Following the entry of the Final Judgment of Divorce in this cause, Bethany was involved with at least two men—Cain Cannon and Will Miller—both of whom she permitted to stay overnight in her home. Tr.1:90-93. Will Miller spent the night in the home while Bethany's children were present – though the frequency of these activities were disputed. Prior to their marriage, Bethany admitted to having sexual intercourse with Will Miller in the home while the minor children were present. Tr.1:90-91. Will Miller testified that this occurred three times. Tr.3:233. Bethany also admitted that prior to

her marriage, she and Will Miller and the children often watched television together in Bethany's bed in the afternoons. Tr.1:92. Bethany and Will Miller married a week after she was served with the Summons and Complaint for Modification of Custody filed by Brian in this cause. Tr.1:19-20. Additionally, Bethany has moved the children three (3) times since the entry of the Final Judgment of Divorce. Tr.1:111. Brian has moved only once. Tr.1:10-11. This factor favors Brian.

**5. Physical and mental health and age of the parents.** Brian is 39 and Bethany is 33. Both parties are in good health. This factor favors neither party.

**6. Parenting skills.** Prior to the separation, Brian and Bethany split duties with the children. Brian helped bathe the children, and change diapers, and he kept the children at night while Bethany was in school working on her master's degree. Tr.1:50-51. He dropped the school age child off at school some mornings, and met with his teacher when needed. Tr.1:51. Bethany, however, has allowed then 5 year old Garrett to hunt with live ammunition in the presence of a 17 year old boy and testified that she would permit this again. Tr.1:109-110. In addition, Bethany has demonstrated an unwillingness to follow the recommendation of a counselor that she chose herself. Tr.2:158-159. That Brian has sacrificed his visitation time with his sons in order to permit them to attend counseling with Melanie Benson is a clear indication that he puts the emotional needs of his children before his own. Tr.1:33-34. Bethany's actions have indicated an unwillingness to foster the parent-child relationship between Brian and the children.

Ms. Benson testified that the relationship between the children and both of their parents was "crucial to the boys' development and family development and individual development," and hence, she was most concerned with whether "the relationship between both parents [would] be fostered and encouraged." Tr.2:163. Ms. Benson opined that by his actions throughout the



counseling history, Brian would foster the relationship between the boys and their mother if he were the custodial parent, but that as evidenced by her actions throughout the counseling history, Bethany would not and had not done the same. Tr.2:167-168. Ms. Benson testified that her utmost concern with Bethany having custody of the boys was that Bethany would continue to promote estrangement between the boys and their father, which would affect the bond between the boys and their father. Tr.1:158; 2:163. That one parent has evidenced an inability or refusal to foster and promote a child's relationship with the noncustodial parent should be considered evidence of poor parenting skills. See *Price v. McBeath*, 989 So.2d 444, 455 ¶44 (Miss.Ct.App.2008) (Chancellor could reasonably conclude that parent who would impede child's relationship with other parent had poor parenting skills as opposed to parent who fostered child's relationship with other parent).

At trial, Bethany stipulated that Brian is a good father who has excellent parenting skills and a great relationship with his sons. This factor favors Brian.

**7. Stability of employment.** Bethany quit her job as a teacher with the West Point School District in 2008. Tr.1:82-83. She had been employed with a correctional facility teaching inmates for less than a week at the time of the initial hearing of this cause. Tr.3:247. At the time of the trial, Brian had been employed with the same company for sixteen years. After the Sara Lee plant shut down in West Point, Brian was transferred to their Florence, Alabama plant where he has been employed as an Operations Manager since April, 2006 (Tr.1:8), and where he continues to earn the same salary he did at the West Point plant and receive the same quality benefits such as health insurance and 401(k). Tr.1:10-11. This factor favors Brian.

**8. Employment responsibilities and willingness and capacity to provide child care.** Brian works from 5:30 a.m. to 2:30 or 3:00 p.m. at the latest. He can be off in time to pick up the children from the school that is nearby and that he has already investigated, and he has a

child-care provider who is available to help him get the children to school in the mornings.

Tr.1:53-54. Bethany, on the other hand, works in a prison facility. Her hours are 7:30 a.m. to 4:15 p.m. Tr.3:237-238. This factor favors Brian.

9. **Continuity of care.** The boys have been with Bethany since the entry of the Final Judgment of Divorce in January, 2005. This factor favors Bethany.

10. **Moral fitness** – Bethany has exercised poor judgment on several occasions which are *not* isolated incidents and which reflect a lack of moral character, such as:

a) having sex with a minor student when she was a teacher in the high school he attended and in a fiduciary capacity. Tr.1:83-85;

b) allowing a high school student to drink alcohol at her home. Tr.1:89;

c) having sex with Will Miller in the home when the children were present.

d) watching television in her bed with Will Miller and the boys, prior to her marriage to Will Miller. Tr.1:90-91. This factor favors Brian.

11. **Other: Parental interference.** Bethany admitted that it is in the best interest of the children to have as much contact with their father as possible. Tr.1:104. However, Bethany has interfered with Brian's relationship with the minor children by refusing to permit him summer visitation, by refusing to cooperate with him with regard to the visitation schedule with the children before and after his move to Florence, Alabama, and by refusing to communicate with him about the children's school performance (Tr.1:45-46), or medical conditions (Tr.1:46-47), by refusing to take Brian's calls to her or to the children, or simply hanging up on him when the children handed her the phone. Tr.1:43-45. This factor favors Brian.

12. **Polestar consideration: Best Interest of the Child.** Considering all of the above facts, it would be in the best interest of these children to be in the care and custody of a parent who puts their interest above his own, and who has exhibited time and again, that he is dedicated

to their physical and emotional well-being, who respects the bond between a parent and child, and who is vested with good morals and judgment, qualities which are of vital importance to all children, but especially, two boys, as they grow into young men. Brian Wikel is that parent.

## CONCLUSION

The record before this Court reveals significant and material changes in circumstances that have occurred since the entry of the Final Judgment of Divorce, and which have had a significant adverse effect upon Zachary and Garrett Wikel – to the point that they have suffered and been treated for emotional and behavioral problems by not one, but two counselors, causally related to Bethany's poor choices and refusal to foster the parent-child relationship. A change of custody from Bethany to Brian is in the children's best interest.

The best interest of Zachary and Garrett requires that they be placed in the custody of their father, Brian, and not with Bethany, whose moral compass is seriously askew, who committed a felony by having sexual intercourse with a minor enrolled at the high school where she taught, who engaged in sexual intercourse with her then-boyfriend in her home while her children were sleeping in the next room, who has promoted rejection of their father by the children, who has time and again placed her own interests over those of her children by denying them opportunities to see their father or to enjoy a close relationship with him despite his involuntary relocation to another state, and who has steadfastly refused to communicate with Brian about the children's medical conditions, well-being and school performance.

It would be in the best interest of these children to be in the care and custody of Brian, who puts the children's interests above his own, who has exhibited time and again that he is dedicated to their physical and emotional well-being, who respects the bond between a parent and child, and who is vested with good morals and judgment, qualities which are of vital importance to all children, but especially two young boys in their formative years.

Accordingly, the Appellant, Brian Wikel, respectfully requests this Court to reverse the decision of the trial Court and render a decision awarding Brian primary physical custody of his

sons Zachary and Garrett Wikel, subject to the rights of reasonable visitation in favor of Bethany.

**CERTIFICATE OF SERVICE**

I, Michelle D. Easterling, Attorney for Appellant, Brian E. Wikel, hereby certify that I have this day caused to be served by first class mail, postage prepaid, a true and correct copy of the above Brief of Appellant on the following persons:

Carrie A. Jourdan, Esq.  
P. O. Box 1108  
Columbus, MS 39703

Honorable Kenneth M. Burns  
P. O. Drawer 110  
Okolona, MS 38860

SO CERTIFIED, this the 19<sup>th</sup> day of June, 2009.

  
Michelle D. Easterling