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MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2009-CA-00802

WILLIAM M. COVINGTON

APPELLANT

VERSUS

CAROL MONTGOMERY (COVINGTON)

APPELLEE

APPELLANT'S BRIEF

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PARTIES

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 the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. William M. Covington, III, Esq., Appellant, Pro Se;
2. Carol Montgomery (Covington), Appellee;
3. Dean Holleman, Esq., Attorney for Appellee.

This the 20th day of November, 2009.

WILLIAM M. COVINGTON, III

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STATEMENT OF THE CASE

This case arises out of an agreed divorce granted on grounds of irreconcilable differences in 2005. As part of the divorce, the parties entered into a Child Custody, Child Support, and Property Settlement Agreement. At the time, the parties agreed that Mother would have primary custody of the minor child and Father would have visitation and would obligated to pay the monthly sums of $800.00 in child support and $400.00 in periodic alimony. Additionally, Father agreed to pay four (4) annual lump-sum alimony payments for the purpose of property division.

Thereafter, in November, 2007, Father sought emergency relief from the Chancery Court to address allegations made by the minor child that he had been subjected to multiple incidents of abuse and neglect by Mother immediately prior thereto. Concurrently, Father also sought permanent relief in the form of a custody modification, based upon the new allegations as well as other less-immediate circumstances.

A *guardian ad litem* was appointed, at Father's request, and a lengthy period of discovery and investigation ensued, during which time a Chancellor was appointed by the Mississippi Supreme Court to hear the case, following recusal of all elected Chancellors in the original jurisdiction. On October 30th and 31st, a trial

was held before the Hon. Franklin McKenzie at the Harrison County Chancery Court in Gulfport, Mississippi.

The trial court made its ruling on the custody issue within minutes of the conclusion of evidence at trial. However, for unknown reasons, the rulings on all remaining issues were delayed until issuance of the Final Judgment on March 9, 2009, over four (4) months later. Notice of Appeal was timely filed by Father, whereafter the record was compiled and submitted, bringing the matter before this Court.

STATEMENT OF THE FACTS AT TRIAL

Appellant called multiple witnesses to substantiate certain allegations raised by Appellant in his Petition for Modification, in an effort to demonstrate a material change in circumstances adverse to the best interests of the minor child. Specifically, Appellant alleged that Appellee: had committed, and allowed others to commit, acts of neglect and/or abuse upon the minor child; had frequently and consistently cohabitated with her male companion in the presence of the minor child; had committed and been convicted of reckless driving with the child in the vehicle; had committed and been convicted of other misdemeanors, not in the presence of the child; had intentionally disrupted or inhibited contact between the minor child and Appellant; had moved some six times in the preceding five years, and had current plans to move yet again; had purposefully and maliciously attempted to poison the father-son relationship between the child and Appellant; and was currently romantically involved with a married male companion whom she had met via an internet sex/dating service.

Trial witnesses included a former boyfriend with whom Appellee had cohabitated, the victim of a physical assault committed by Appellee, the minor child, Appellant, Appellee, and the *Guardian ad Litem.* By way of testimony before the Court, particularly through admissions of Appellee, the truth of most of the

allegations was ultimately undisputed, although the significance, extent, and causation for many of the underlying circumstances was.

Specifically, Appellee admitted to: cohabitation in the presence of the minor child; multiple changes of residence; interfering with communication between Appellant and the minor child; reckless driving with the minor child in the vehicle; other misdemeanor convictions; and being currently romantically involved with a married male companion, including the facts of how they became acquainted. Appellee denied committing or allowing instances of abuse or neglect upon the minor child. Appellee also denied the then-present intent to move her residence again, even though she did have her home listed for sale at the time of trial, and even though she did relocate to Destin, Florida, within thirty (30) days of the issuance of the Final Judgment.

The minor child testified that he had been instructed by Appellee to fabricate portions of his testimony before the court, that he had been subjected to certain acts of abuse and/or neglect at the hands of Appellee, and that Appellee intended to relocate to Florida in order to separate him from Appellant. The minor child further relayed to the *Guardian ad Litem* that he had been subjected to other acts of physical and verbal abuse by Appellee and others in her presence.

The *Guardian ad Litem* testified and submitted her report, the individual

findings of which largely mirrored the testimony of the minor child. However, the report cited and applied verbatim language from Mississippi case law, and detailed how the *Guardian ad Litem* had analyzed the findings of her investigation in the context of the legal standards in that case law. The recommendation to the trial court was expressly based upon the *GAL*'s application of legal standards, and not upon her reasonable opinion of the situation as it related to the best interests of the minor child. The recommendation at trial was to deny a change of custody, despite the fact that her recommendation only days before, expressed to counsel for both parties, had been to grant the change of custody.

Other testimony and documentary evidence included that from Appellant which detailed and substantiated a severe and unavoidable loss of income that was anticipated to continue indefinitely, this pertaining to the request by Appellant for a reduction in child support and/or alimony. This evidence was not disputed by Appellee, and documentation was provided by Appellant in support. Also regarding the issue of Appellant's requested termination of alimony, no testimony or other evidence whatsoever was presented by Appellee to demonstrate that there was no financial co-dependence between Appellee and her boyfriend for the period of months they cohabitated.

At the conclusion of the evidence, the trial court immediately rendered a

decision denying the modification of custody sought by Appellant, citing that there had not occurred a material change in circumstances, and that the trial court could not go against the recommendation of the *Guardian ad Litem* under the facts and circumstances in evidence at trial.

SUMMARY OF THE ARGUMENTS

The evidence at trial, particularly the admissions and inconsistencies in Appellee's testimony, was overwhelmingly sufficient to mandate a change in custody. Many of the specific allegations, particularly ones admitted to by Appellee, were identical to some that have been specifically and repeatedly found by the appellate courts to be of major significance in considering a change of custody. The trial court plainly failed to consider the totality of the circumstances of all facts in evidence, instead considering and analyzing each one in a bubble, apart from the others. This method of analysis is very clearly contrary to the lawful prescribed standard in custody modification cases. Further, the trial court incorrectly stated the weight that the court was required to give the recommendation of the *Guardian ad Litem.* These errors constituted an abuse of discretion, or at the very least resulted in a decision that was manifestly wrong and clearly erroneous, and against the great weight of the evidence at trial.

Further, the trial court accepted and arbitrarily ratified a report by the

Guardian ad Litem, where the author had applied the recognized legal standard for custody modification and reached her own *legal* conclusion under that standard. Thus, the scope, purpose, and duty of the *Guardian ad Litem* was greatly over-reached, in that she took it upon herself to conduct a legal analysis to reach a conclusion on a question of law, rather than simply consider the findings of her investigation and report those to the court along with her recommendation based solely thereupon. It is the purpose and duty of the courts, not witnesses, to apply law to facts and decide questions of law. Accordingly, the trial court's acceptance and ratification of the legal analysis conducted by a witness was improper, and constituted an abuse of discretion, or at the very least resulted or assisted in a decision that was clearly erroneous.

Next, the trial court committed clearly reversible error by not granting a termination of periodic alimony, where it was admitted and undisputed that cohabitation had occurred for a period of months, and where no evidence whatsoever was presented by Appellee to meet the shifted burden of proof to rebut the presumption of financial co-dependence. Not only did the trial court not grant the requested relief, there were no findings made by the court to indicate that the request for relief had even been considered thoroughly.

ARGUMENT I.

THE TRIAL COURT ERRED BY APPLYING THE WRONG LEGAL STANDARD, IN FAILING TO CONSIDER THE TOTALITY OF THE CIRCUMSTANCES WHEN REVIEWING EVIDENCE OF INSTANCES OF NEGLECT AND OTHER CONDUCT DETRIMENTAL TO THE BEST INTERESTS OF THE MINOR CHILD.

Consistent with the long-recognized standard for evaluation of custody modifications, significant and credible evidence was presented to demonstrate that there had occurred a material change in circumstances, adverse to the best interests of the child, and that modification was in the best interests of the child. *Gianarris v. Gianarris*, 960 So.2d 462 (Miss. 2007), *Robison v. Lanford*, 841 So.2d 1119 (Miss. 2003), *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996).

This long-standing three-part test requires the trial court to find, by a preponderance of the evidence, first, that a material change in circumstances has occurred, and second, that such change is adverse to the best interest of the minor child. As for the evidence presented to demonstrate a material change in circumstances, it is *undisputed* and *admitted* in the record that Appellee engaged in multiple frequent relocations during a short period of time (TT. at 116); that Appellee engaged in a cohabitive romantic relationship with a man to whom she was not married in the presence of the child (TT. at 122); that she had been convicted at trial of multiple offenses (TT. at 126), including reckless driving during which the

child was in the vehicle (TT. at 124); that she had intentionally interfered with communication between the child and Appellant (TT. at 144); and that Appellee was currently engaged in a romantic relationship with a married man whom she had met via an internet site (TT. at 130). These facts by themselves should constitute sufficient cause for any reasonable court to conclude that a material change in circumstances had occurred.

However, further evidence presented at trial supported other of the numerous and serious allegations that were not specifically admitted by Appellee. The minor child testified that he had been subjected to actions by Appellee that arguably constitute verbal and/or physical mistreatment, such as being locked out of his home for a significant period of time after being yelled at by Appellee for wanting to call Appellant on the phone (TT. at 58, 59). The minor child further testified at trial that he had been instructed by Appellee to "get back at Kenny somehow and just say stuff to where you can come live over there" (TT. at 60), constituting a flagrant attempt to unduly influence the child's testimony. Further testimony from the child to the *guardian ad litem* evidence even more instances of possible abuse and/or neglect, as well as conduct by Appellee intended to poison the father-son relationship between the minor child and Appellant. (GAL Report)

It is arguable that certain of these events could independently form the basis

of a finding of material change in circumstances. However, it is immaterial whether any individual event or condition would meet this burden. The trial court is required to consider whether the change in circumstances is one in the overall living conditions in which the child is found. The totality of the circumstances must be considered. *Hill v. Hill*, 942 So.2d 207 (Miss. 2006), citing *Tucker v. Tucker*, 453 So.2d 1294 (Miss. 1984). The trial court may not consider each element and factor in a bubble, but must weigh them all together and make a determination in consideration of the totality of the circumstances. *Elliot v. Elliot*, 877 So.2d 450 (Miss.Ct.App. 2003)

Hill is exceptionally analogous to the instant case, in that many of the factors found by the Court to be significant in affirming the custody change are present in this case. Specifically, in *Hill,* custody was modified to the father after evidence showed that the mother had undertaken multiple relocations in a short period, cohabitated with a boyfriend, dated a married man, and engaged in domestic conflict resulting in criminal charges. The trial court found that, while these factors individually were likely insufficient by themselves to warrant a modification of custody, the totality of the circumstances did mandate such a change. Each and every significant factor in *Hill* is present in this case, and largely admitted by Appellee. Worse, the reckless driving that resulted from Appellee's domestic

dispute was committed by her with the minor child in the vehicle. Moreover, there are multiple additional factors of Appellee's behavior to be considered herein, in addition to those found by the trial court in *Hill*, and later affirmed by this Court.

A material change in circumstances may be established where a custodial parent's relocation is one of several supporting factors. *Powell v. Powell*, 976 So.2d 358 (Miss.Ct.App. 2008), citing *Jernigan v. Jernigan*, 830 So.2d 651 (Miss.Ct.App. 2002), *Fletcher v. Shaw*, 800 So.2d 1212 (Miss.Ct.App. 2001). *Powell* is also analogous to the instant case, in that the mother was found to have had multiple relocations and also engaged in other conduct detrimental to the best interests of the child. The most significant issue found by the trial court was the relocations, which it did not deem sufficient to warrant modification. However, the appellate court reversed, finding that the trial court failed to consider the totality of the circumstances, including the relocations as one factor of many.

The trial court herein failed to consider the evidence at trial in the proper perspective of the totality of the circumstances. Rather, it is clear from the record that the trial court considered each item separately and not in conjunction with the presence or significance of other factors. For this reason alone, the evidence is clear that the decision was manifestly unjust and must be overturned.

It was argued by Appellee at trial that a modification was not warranted

because there had been no showing of actual harm or threat of immediate harm. However, the jurisprudence of the appellate courts has gradually refined the requirement for showing of adverse effects. Such proof is simply not required where it is reasonable to expect that harm *may* occur as a result of the offending parent's conduct. This Court has stated that a chancellor need not wait for the minor child to actually be injured before finding an adverse effect. Glissen v. Glissen, 910 So.2d 603 (Miss.Ct.App. 2005). The chancellor may satisfy the adverse effects finding...by finding reasonably foreseeable adverse events if the child continues in the adverse environment. Johnson v. Gray, 859 So.2d 1006 (Miss. 2003), *Gilliland v. Gilliland,* 984 So.2 364 (Miss.Ct.App. 2008), citing *Riley.* Where a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment. *Riley v. Doerner*, 677 So2d 740 (Miss. 1996). *Riley* was an earlier statement of the rule that actual harm need not be shown under circumstances where harm is reasonably foreseeable. However, the Court did go further in delineating in even greater detail what may be acceptable to warrant a change of custody. Specifically, when the environment provided by the custodial parent is found to be adverse...and the non-custodial parent...is able to provide an environment more

suitable...the chancellor may modify custody. *Id* at 744. *Duke v. Elmore,* 956 So.2d 244 (Miss.Ct.App. 2006). A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons. *Id* at 744.

Adverse effects exist if it is shown that it is reasonably foreseeable that the child will suffer adverse effects... *Savell v. Morrison*, 929 So.2d 414 (Miss. 2006). In *Savell*, the trial court granted a modification of custody and was affirmed by the appellate court, after finding that the mother had engaged in denial of visitation and subjected the child to verbal abuse and threats. The decision was affirmed, despite the absence of any proof of actual harm having affected the child. Another case affirmed by this Court where no distinct harm was shown, but where material change in circumstances adverse to the child was found, included the specific allegations of cohabitation, frequent moves, and sporadic employment. The case now before this Court contains these issues and many more, some of dramatically more severity and importance. Finally, the appellate court affirmed a decision to grant a modification based largely on the child's having been pushed to be deceptive in his testimony, and where the mother had cohabitated with a married man in the presence of the child. *Pruett v.* Prinz, 2007-CA-00156-COA (Miss.Ct.App. 2008). This is yet another example of cases where modification was warranted, while

including only one or two of the significant issues brought before the trial court herein.

Again, we are brought to the number and severity of factors influencing the analysis in the instant case. It is clear that a large number of events of similar conduct as found in the referenced cases are present in this case. These events and factors were not considered in their totality, but rather individually and separate from the implications of the others. The decision reached was very much contrary to the weight of the evidence presented, again, much of which was undisputed. To allow such an incomplete analysis and application of proper legal standard to stand would result in a manifest injustice and may likely result in substantial and irreparable harm to the minor child.

ARGUMENT II.

THE TRIAL COURT ERRED BY NOT INDEPENDENTLY EVALUATING THE EVIDENCE UNDER THE APPLICABLE LEGAL STANDARD, INSTEAD ALLOWING A FLAWED ANALYSIS TO BE PERFORMED BY A WITNESS, WHICH INCLUDED DETERMINATION OF QUESTIONS OF LAW, AND THEN ARBITRARILY RATIFIED THAT ANALYSIS, THEREBY IMPROPERLY DELEGATING TRIAL COURT DUTIES TO A THIRD PARTY WITNESS.

In rendering her report and recommendation, the *guardian ad litem* conducted a lengthy investigation that included multiple conversations with all parties.

However, the written report submitted to the trial court contained specific language indicating that the report was the result of a legal standard application and analysis, rather than a recitation of the circumstances and reasonable opinions derived therefrom, regarding the best interests of the child. "I do not believe that a material and substantial change of circumstances has occurred which is adverse to the interest of the minor child and which poses a danger which is expected to continue." (GAL Report p8) Not only does this language indicate that the GAL was rendering a legal opinion, as opposed to a fact-based reasonable lay opinion, it arguably misstates the applicable standard for modification of custody. The bulk of related case opinions from the appellate courts of this state make no mention of the requirement of actual generic "danger", let alone danger "that is expected to continue". The language used in the GAL report reflects a misunderstanding of the applicable standard, reciting it drastically more stringent than as opined and held by our appellate courts. Since the recommendation of the GAL was obviously based directly upon application of that flawed standard, then the recommendation must be questioned.

The trial court stated that "in order for this court to not follow a Guardian ad Litem's report and recommendation, it is encumberment (*sp inc.*) upon the court to make specific findings and facts and conclusions on the record as to why the recommendation...should not be followed." The court continued, "Frankly, I am

not in a position to do that in this case." (TT. at 178) Regardless of the need to make specific findings to deviate from the GAL's recommendation, the evidence was certainly sufficient to do so. The trial court's stern reluctance to take any action other than that recommended by the GAL is misplaced. It is the chancellor's decision whether or not to accept the guardian ad litem's recommendation. *Porter v. Porter,* 2006-CA-01592-COA (Miss. Ct. App. 2008).

Moreover, the action by the trial court in allowing a witness (the GAL) to render an opinion on a question of law constitutes reversible error and abuse of discretion, especially where that witness was essentially allowed to determine the central issue of the trial without the trial court conducting its own legal analysis using the evidence provided by the witness. The trial court was aware of the language of the report and had ample time to review it in detail before ruling on the custody modification issue. Whether the trial court failed to review the language in the report indicating the improper analysis by the GAL, or rather did review it and allowed it to go unquestioned, only to summarily ratify it later. Either compromises the integrity of the verdict, and results in a decision that is manifestly unfair and against the weight of the evidence.

ARGUMENT III.

THE TRIAL COURT ERRED IN FAILING TO ELIMINATE APPELLANT'S PERIODIC ALIMONY OBLIGATION WHERE UNDISPUTED EVIDENCE OF COHABITATION WAS PRESENTED, AND WHERE APPELLEE OFFERED NO EVIDENCE TO REBUT THE PRESUMPTION OF FINANCIAL CO-DEPENDENCE DURING SAID COHABITATION.

Proof of cohabitation creates a presumption that a material change in circumstances has occurred. *Scharwath v. Sharwath*, 702 So.2d 1210 (Miss. 1997). Accordingly, upon proof of cohabitation, the burden of proof shifts to the recipient spouse to come forward with evidence suggesting there is no mutual support. *Id.* There is no more clear statement of the law on this issue in Mississippi.

In the instant case before the court, the boyfriend with whom Appellee cohabitated testified that cohabitation between him and Appellee had occurred for approximately six months, sometime following Hurricane Katrina, in 2005. (TT page 68) That testimony was followed by the admission of Appellee, at trial, that the cohabitation previously referenced had taken place. (TT page 122) Statements of the minor child further corroborated the cohabitation. At no point during trial did Appellee present any evidence whatsoever to rebut the presumption of mutual support. However, in the face of undisputed proof, and in the absence of any evidence to rebut the presumption of mutual support, the trial court denied

Appellant's request to terminate the periodic alimony obligation of Appellant.

Appellee did seem to argue at trial that the cohabitation should possibly be excused, as it was the result of exigent circumstances following the hurricane. Appellee further argued that applicable case law did not contemplate the intervention of a catastrophe of that magnitude (TT. at 221). However, the single most analogous case on point to be found anywhere is *Rester v. Rester*, 5 So.3d 1132 (Miss.Ct.App. 2008). In *Rester,* the evidence indicated that cohabitation had occurred between the parties, *largely as a direct result of Hurricane Katrina*, for a period of months. The cohabitation was admitted by the recipient spouse. The recipient spouse did not offer any evidence to rebut the presumption of mutual support. Finally, the appellate court reversed and rendered judgment, terminating the alimony obligation. "Because Beth admitted that she and Cabrera cohabited, and failed to rebut the presumption of mutual support, we must conclude that the chancellor was clearly wrong when he declined to terminate alimony." *Id.*

The failure or refusal of the trial court to terminate the alimony obligation, in the face of undisputed proof and black-letter law, is clearly wrong and constitutes and manifest reversible error. Accordingly, the decision of the trial court as to this issue should be reversed and rendered.

CONCLUSION

The decision of the trial court regarding modification of custody of the minor child should be reversed and remanded for further proceedings in compliance with the directive of this Court and the law of the State of Mississippi. The decision of the trial court regarding alimony termination should be reversed and rendered, terminating the alimony obligation at issue.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William M. Covington, Appellant, pro se, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing to the following:

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Honorable Franklin McKenzie
Jones County Chancery Court
Post Office Box 1961
Laurel, MS 39441

THIS the 20th day of November, 2009.

WILLIAM M. COVINGTON, III

MISSISSIPPI SUPREME COURT
MISSISSIPPI COURT OF APPEALS

NO. 2009-CA-00802

WILLIAM M. COVINGTON

APPELLANT

VERSUS

CAROL MONTGOMERY (COVINGTON)

APPELLEE

CERTIFICATE OF COMPLIANCE

Pursuant to Miss. R. Civ. P. 32, the undersigned certifies this brief complies with the type-volume limitations of Rule 32.

1. Exclusive of the exempted portions in Rule 32(c), the brief contains:

   A. 4,994 words in proportionally spaced typeface.

2. The brief has been prepared:

   A. In proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.

3. If the Court so requires, the undersigned will provide an electronic version of the brief and/or a copy of the word or line printout.

4. The undersigned understands a material misrepresentation in completing this certificate, or circumvention of the limits in Rule

32, may result in the Court's striking the brief and imposing sanctions against the person signing the brief.

This, the 20th day of November, 2009.

WILLIAM M. COVINGTON, III