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ARGUMENT

I. The Character Evidence Pertaining To McCarty's DUI Convictions and Drug Use Was Improperly Excluded By The Chancellor.

Appellee's reliance on *Gainey v. Edington*, No. 2008-CA-00237-COA (Miss. App. Nov. 2009) is misplaced. If it was "well-settled under Mississippi law" that the court could only consider circumstances that occurred, or traits that were exhibited, since the most recent custody decree, then the Mississippi legislature would have stated as such in the relevant child custody statute. Mississippi Code Ann. Section 93-5-24(6) reads in relevant part, "Any order for joint custody may be modified or terminated upon the petition of both parents or upon the petition of one (1) parent showing that a material change in circumstances has occurred." The statute does not state that any change in circumstance must have occurred "since the most recent custody decree," nor is there any comment or annotation to the statute that refers to or reflects upon the admissibility of evidence from any particular time period.

Rather, contrary to Appellee's contention, it is the duty of the trial court in a child custody proceeding to hear and consider ***all*** evidence that bears upon the fitness for custody of the respective parents or that bears upon the best interest of the child. In *Murphy v. Murphy*, 631 So. 2d 812, 816 (Miss. 1994), the Mississippi Supreme Court reversed and remanded the case, holding that the lower court had erred in its refusal to hear and consider additional evidence and testimony at the hearing on appellant's motion for a new trial, on the basis that the previous orders had rendered the issue of fitness *res judicata*.

> In child custody cases, the chancellor's duty is to determine what is in the best interest of the child. As such, chancellors should consider any and all evidence which aids them in reaching the ultimate custody decision. . . . When the best interest of a minor child is at issue, the ability to hear and consider additional evidence is at all times within a chancellor's authority. . . . We realize that the chancellor attempted to accomplish the best for the child in this case, however, he should have heard and considered *all* the relevant testimony and evidence which

> contribute to determining which party (if any) is best suited to assert permanent care, custody and control over the minor child. In matters concerning child custody, it is never too late for additional evidence and testimony to be considered. The polestar consideration is what is in the best interest of that child."

Murphy, 631 So. 2d at 816 (citations omitted).

The excluded evidence at issue here – evidence of McCarty's drug use, and of his three DUIs within a five-year period – was proffered to show McCarty's character and his suitability in general for the important role of primary caretaker of young children. "The right of a parent to retain custody of his child may depend on a finding of the fitness of that person as a parent. In these cases, character evidence is of course admissible since what is at issue in the case is a character trait, and if the issue is to be resolved on the basis of evidence, evidence of character must be admitted." 1A John Wigmore, *Evidence at Trials in Common Law*, § 69.1 at 1457 (Chadbourn rev. ed. 1979) (Boston: Little Brown & Co.); *see also* Miss. Rule of Evidence 404, *In re Dorothy L.*, 162 Cal. App. 3d 1154, 209 Cal. Rptr. 5, 8 (1984) ("Established law has recognized that the character of a parent is at issue in child custody cases).

Even if Appellant's contention were correct that only those incidents after the most recent custody decree are relevant in demonstrating a material change of circumstances in the custodial home, the evidence excluded by the trial court was not proffered by Appellant for that purpose. Appellant does not contend that McCarty has recently picked up a drinking or drug problem. The evidence was not proffered to prove the fact and circumstances of McCarty's three DUI arrests. Rather, the trier of fact may infer from McCarty's behavior, and from the fact that these DUIS were incurred while Julianna was a small child and while he was responsible for her safe transportation, McCarty's character traits of recklessness, parental negligence and general imprudence. *See* R.E. No. 4, at 42:1-15 (DUIs were incurred between 1998 and 2002, while Julianna was an infant and toddler).

Likewise, McCarty's parenting skills and parental relationship with his three older children, while not a material change in circumstances occurring since the most recent custody decree, do still bear upon his character and his suitability for the role of primary custodian of his younger children. The court could reasonably have inferred, had it listened to testimony regarding this matter, that McCarty might behave in a manner as uninterested and apathetic toward his younger children as he had toward his older ones.

In sum, McCarty was an unsuitable parental custodian at the time of divorce, and at the time of the Temporary Order granting custody to McCarty, from which the trier of fact could reasonably infer that McCarty still is an unsuitable parental custodian today.

II. The GAL's Reports Were Seriously Flawed and Unreliable.

Suzette Breland's findings in her Guardian Ad Litem report were flawed, and her recommendations should not have been followed because she was biased against the Koles and in McCarty's favor

A guardian ad litem must exercise his or her affirmative duty to independently and zealously represent the child before the court, actively pursuing the best interests of the child and the child only. *In Interest of R.D.*, 658 So.2d 1378 (Miss. 1995); *In Interest of D.K.L.*, 652 So.2d 184 (Miss. 1995). One cannot say that this GAL did a thorough and competent job of investigating each of the parents and reporting her findings. The GAL did not perform any follow-up interviews of any of the parents, not even of Lisa Kole when Kole had, on more than one occasion, requested another interview. That alone veers on gross negligence on the GAL's part and dereliction of her duties. Nor did the GAL visit the parents' homes, perform any home studies, or watch any of the parents interacting with any of their children. Breland has never even observed Julianna in the company of her mother or her father. The children deserved a

more active and disinterested guardian to represent their best interests, and this case should be reversed and remanded so that one may be appointed. *See Loggans v. Hall*, 652 So. 2d 184, 191 (Miss. 1995) (lower court reversed and remanded because *guardian ad litem* had not performed adequately in her role); *Copiah County Dep't of Human Servs. v. Linda D. (In the Interest of R.D.)*, 658 So. 2d 1378, 1383 (Miss. 1995); Mississippi Code Annotated section 43-21-121.

The GAL also completely disregarded the psychotic 19-page letter that Karen wrote to Lisa, with McCarty's lackadaisical acquiescence – a letter that Dr. Matherne called "intimidating" and "extremely threatening to Lisa Kole." R.E. No. 7, at 3, 9. In that letter, Karen threatens to have Lisa sent to prison out of revenge, and Karen even impliedly threatens to kill or assault Lisa or her family. Tellingly, the GAL "seen it for what it was [sic] and found it simply an argument between two women." Appellee Brief at 15.

The answer to why the GAL chose to emphasize certain evidence and ignore other evidence lies in her irrational fear of Ron Kole because of a harmless incident in which the Koles were trying to contact her by trying to locate McCarty's attorney. The GAL clearly was not acting in the best interests of the children, due to biases and misperceptions of her own. Contrary to Appellee's assertion that, "if there was any concern about the neutrality of the GAL," then Appellant should have taken it upon herself to file a motion to disqualify the GAL, the GAL herself should have recognized the danger of her own fear and prejudice, brought it to the court's attention, and voluntarily moved to recuse herself from the case. (When Kole agreed to appointment of a GAL, she had no way of knowing that the GAL would fall short in her duties or fall prey to her own fears and prejudices.)

III. The Chancellor's Findings of Fact Were Not Supported By Substantial Evidence That Primary Custody by McCarty Was In The Child's Best Interest.

The chancellor gave improper weight to the GAL's report and recommendations, ignoring other pertinent evidence, including the expert psychologist's reports. Within his analysis of the

Albright factors, the chancellor abused his discretion by placing too much weight upon the GAL report and the interview in which Julianna expressed some nervousness about hurting her mother's feelings, while ignoring the voluminous evidence presented under the remaining factors supporting Kole as the preferred custodial parent. *See Watts v. Watts*, 854 So.2d 11 (Miss. Ct. App. 2003) (reversing because chancellor gave improper weight to one factor, in that case, the moral fitness of the mother).

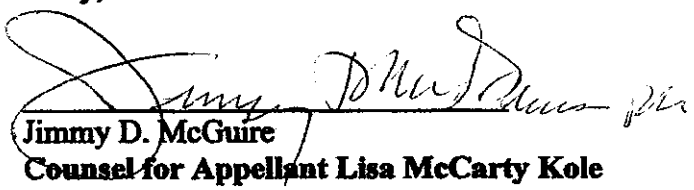
While the GAL's report should have been given due consideration like all other pieces of evidence (while taking into account the GAL's bias), it appears that the allegations offered in her report were far and away the most scrutinized among the evidence reviewed at trial. *See Hollon v Hollon*, 784 So. 2d 943 (Miss. 2001) (reversing on the grounds that the majority of the *Albright* factors weighed in appellant's favor, and that the trial court had placed too much weight on the "moral fitness" factor). In the present case, like in *Hollon*, the chancellor's findings emphasized the perceived shortcomings of the mother, but failed to mention that the father (who admitted to only moderate drinking in the present and recent past) had ***in the past*** drank to the point of being under the influence, and had ***in the past*** spent much of his time gambling. While a parent's history of either poor or exemplary parenting may not be ***determinative*** of how he or she will parent in the future, it is always ***relevant*** and should always be considered.

It all goes back to the touchstone of child custody law – that "the polestar consideration in child custody cases is the best interest and welfare of the child." *Albright v. Albright,* 437 So. 2d 1003, 1005 (Miss. 1983).

Appellant Lisa McCarty Kole respectfully requests that this Court reverse the decision of the Jackson County Chancery Court and award physical custody of Julianna and Jacob McCarty to her, with joint legal custody shared with Jeremy. In the alternative, she asks that the Court

remand the case for a new trial, to be held after a new Guardian Ad Litem has made a full report and submitted findings and recommendations.

RESPECTFULLY SUBMITTED this the 10th day of May, 2010.



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IN THE COURT OF APPEALS OF MISSISSIPPI

NO. 2008-CA002130

CERTIFICATE OF SERVICE

I, Jimmy D. McGuire, do hereby certify that I have this day caused to be mailed via United States mail, first class postage prepaid, a true and correct copy of the foregoing Brief of the Appellants to the interested parties to the foregoing action at the following addresses:

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