IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-CA-01062

LISA M. McCARTY KOLE

APPELLANT

V.

JEREMY McCARTY

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

LISA M. McCARTY KOLE	**APPELLANT**
JEREMY McCARTY	**APPELLEE**
MARK V. KNIGHTEN, ESQ.	**ATTORNEY FOR APPELLEE**
JIMMY D. MCGUIRE, ESQ.	**ATTORNEY FOR APPELLANT**
SUZETTE BRELAND, ESQ.	**GUARDIAN AD LITEM FOR MINOR CHILDREN**

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STATEMENT OF THE ISSUES

I. WHETHER THE CHANCERY COURT ERRED BY AWARDING PERMANENT PHYSICAL CUSTODY OF THE MINOR CHILDREN TO JEREMY McCARTY?

(a) Did the Chancellor accord undue weight to the findings and recommendations of the Guardian Ad Litem?
(b) Did the Chancellor properly apply the *Albright* factors?
(c) Did the Chancellor improperly exclude evidence of the father's prior drug use, DUIs and former parenting ability?

II. WHETHER THE GUARDIAN AD LITEM FAILED TO FULLY REPRESENT THE INTEREST OF THE MINOR CHILD AT ISSUE?
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STATEMENT OF THE CASE

A. Course of Proceedings and Disposition in Court Below:

This is an appeal from a June 2, 2009 Judgment in Jackson County Chancery Court transferring custody of minor children to their father. Record Excerpt (R.E.) No. 2.

Appellant Lisa M. McCarty Kole (hereinafter "Lisa") is the mother of two minor children. She asserts that the chancery court erred when it transferred custody of those children from joint custody with her and their father, Jeremy McCarty (hereinafter "Jeremy"), to sole custody by Jeremy.

On December 22, 2004, Lisa and Jeremy were divorced and entered into a Property Settlement Agreement wherein both parties agreed to joint legal and physical custody of the minor children, Julianna McCarty, a female child born June 5, 2000, and Jacob McCarty, a male child born September 23, 2003.

On May 13, 2005, Lisa filed a Petition for Modification of Final Judgment, seeking to modify the visitation/custodian arrangements between her and McCarty because the eldest child Julianna was going to be starting kindergarten. Though the parties had joint legal and physical custody of the children at that time, the children spent more time in the care of their mother, Lisa Kole, their primary caretaker and the parent primarily responsible for getting Julianna back and forth from school.

Jeremy filed his Answer to Petition for Modification of Final Judgment and Counterclaim on June 7, 2005, wherein he alleged that Lisa should be held in contempt for her behavior around the children and for allowing her current husband Ron Kole (hereinafter "Ron") to transport the children to and from visitation. On

June 20, 2005, Jeremy filed an Emergency Petition for Custody and Contempt, alleging that Lisa had come to his church on Father's Day and forcibly removed Jacob from him in front of the congregation. He then filed his Motion for Temporary Custody on July 15, 2005, alleging that Lisa's conduct was detrimental to the children.

The issue was referenced to a Family Master. The Family Master entered a Judgment on August 12, 2005, holding Lisa in contempt of court for interference with Jeremy's visitation rights, and sentencing her to ten days, suspended, and a $500 fine. On August 12, 2005, the Family Master entered a Temporary Judgment denying Jeremy's Motion for Temporary Custody of the children and retaining jurisdiction of the matter.

Jeremy filed his Objection to Ruling of Family Master on August 19, 2005. No action was taken in this matter, and the case was removed from the active trial docket by Order dated August 22, 2006. An Agreed Order of Reinstatement was entered December 12, 2006.

Discovery was exchanged. On April 17, 2007, Lisa filed her Motion to Find Jeremy McCarty in Contempt of Court and Other Relief, on the grounds that Jeremy had (a) physically and violently assaulted her present husband Ron, (b) improperly discussed the custody matter with the children, and (c) lived with a female to whom he was not then married (hereinafter "Karen").

The parties agreed that the court should appoint a Guardian Ad Litem, and an Agreed Order for Appointment of Guardian Ad Litem (hereinafter "GAL") was entered on July 16, 2007, appointing Suzette Breland, Esq. to that role.

The GAL filed her Preliminary GAL Report on August 28, 2007. After only one interview with each of the parties, the GAL recommended that Jeremy be awarded immediate custody of the children and that the court order Lisa to undergo a psychological evaluation. Based upon a motion by the GAL, a hearing was held on August 30, 2007 to determine temporary custody. Though the children at that time were still living primarily with their mother, the court on that date entered an Order awarding Jeremy immediate temporary custody of the two minor children, enjoining the parties from harassing each other, granting visitation to Lisa, directing the GAL to find a suitable psychiatrist to evaluate the parties, and directing the parties to set the matter for final hearing within six months, during the February 2008 term.

An Order for Psychological Examination was entered November 19, 2007, directing the parties to be evaluated by Dr. Donald J. Matherne. On May 20, 2008, the GAL filed a Motion to Enjoin Parties' Conduct, requesting that the court enjoin each of the parties from discussing the custody matter with the two minor children. An Agreed Order Enjoining the Parties' Conduct was entered on June 2, 2008. Without having conducted any further interviews or evaluations of the parties since the time of her August 2007 Preliminary Report, the GAL filed her Final Report on January 30, 2009. In that report, the GAL recommended the court award permanent physical custody of the two minor children to Jeremy and require the parents and step-parents of the minor children to attend parenting classes.

A trial was held in this cause May 12, 2009, more than ***twenty-one months*** after McCarty had received temporary physical custody of the children. On May 13, 2009, the trial court entered a Temporary Order ordering that Jeremy would continue to have temporary custody of the minor children, granting visitation to Lisa,

enjoining the parties from intimidating or harassing each other, and prohibiting the parties from contacting the other except to accomplish visitation. On June 2, 2009, the court entered its Findings of Facts and Conclusions of Law and Judgment of the Court (R.E. No. 2), finding, after consideration of the relevant *Albright* factors, that Jeremy should have permanent physical custody of the minor children, with the parties sharing joint legal custody, and awarding visitation to Lisa. Lisa now appeals that Judgment.

B. **Statement Of The Relevant Facts:**

Lisa and Jeremy are the parents of minors Juliana McCarty (now 8 years old), and Jacob McCarty (now 4 years old). In a Child Custody Agreement dated November 3, 2004, both Jeremy and Lisa stipulated that both parents were "fit and proper persons to retain joint legal and physical custody of the minor children, with the primary residence of the children being considered with the Wife." R.E. No. 5. In that agreement, Jeremy stipulated that Lisa was a fit and proper parent, and suitable to be the children's primary caretaker. *See also* Matherne Report of Kole, R.E. No. 9, at 3 (emphasizing the agreement that both parties were fit for custody).

After their divorce in December 2004, both parties have re-married. Lisa married Ron Kole in January 2005, and Jeremy married Karen in April 2007. R.E. No. 2, at 160. The children resided most of the time with their mother Lisa, until after the August 2007 temporary custody hearing, at which time they moved in full-time with their father Jeremy and his new wife Karen. *See* R.E. No. 9, at 6.

Lisa is currently almost 40 years old, and is a high school graduate with three and a half years of college education. R.E. No. 9, at 4. She and Ron have two children of their marriage, 4 year old Megan, and 3-year old Holly. R.E. No. 2, at

160. Lisa currently lives in a 3-bedroom, 2-bath home on Lisa's family land while renovating a family home. *Id.* Lisa is a stay-at-home mother and Ron is a poker dealer at Imperial Palace. *Id.* Lisa and Ron have attended parenting classes as ordered by the court.

While Lisa has some history of depression, anxiety and alcoholism, she has attended two rehabilitation programs and she has been sober for about four years. R.E. No. 2, at 160; R.E. No. 9, at 4, 7-8. She has used marijuana, but not since her twenties. R.E. No. 9, at 5. She does not smoke cigarettes. *Id.* Dr. Matherne found in his report that Lisa's depression had improved during the course of ongoing outpatient therapy, and that it was "apparent that some of the depression that was being experienced [by Lisa] was related to issues involving her separation and divorce." R.E. No. 9, at 3. He also found that her use and at times abuse of alcohol was likely related to stressors associated with her marriage to Jeremy. *Id.* At 8. Psychological testing of Lisa indicated "no evidence of impaired reality testing, underlying thought disorder, or psychosis, *id.* at 7, and "no significant or serious psychopathology that would contraindicate her in terms of her parental relationship with the children." *Id.*, at 9.

Dr. Matherne concludes that Lisa is maintaining her sobriety, and is actively treating her depression by being seen in ongoing counseling and taking an antidepressant medication, and that "her issues with depression should not be used as a reason to justify the custodial placement of the children." R.E. No. 9, at 9. "It does not appear that [Lisa's] issues with depression are severe, and to some degree, her issues with depression are related to the intimidation of her by Jeremy McCarty and his wife Karen." *Id.* Dr. Matherne also concludes that Lisa "has very loving

feelings for her children and should continue to have a very close and ongoing relationship with them." *Id.* at 9.

Jeremy and Karen, who married in April 2007, live in Ocean Springs. R.E. No. 2, at 161. Karen is a homemaker and casino worker, and Jeremy owns a business installing garage doors. *Id.* Jeremy has been married four times, and began his relationship with his current wife Karen while he was married to Lisa. Jeremy has three children besides the two with Lisa who are at issue here. He has a son by his first wife, and two sons by a relationship with another female whom he did not marry. His relationship with these older children is distant. Both Jeremy and Karen failed to attend parenting classes that were required by a court order.

According to his testimony, Jeremy has experimented with alcohol, marijuana, cocaine and steroids, though he claims none are now involved in his life. Jeremy has ***three convictions for DUI*** within a five-year time period. Jeremy has been involved in violent altercations with Lisa's husband Ron.

At the trial, Lisa alleged that Jeremy has a drug (cocaine and steroids) and alcohol abuse problem, as well as some violent and abusive tendencies, and a problem with infidelity. R.E. No. 4, at 100:4-103:13. However, the trial court refused to admit or consider any of the evidence submitted by Lisa's counsel that Jeremy does in fact abuse alcohol and drugs.

Another concern that should have been apparent to the GAL and to the court is the appropriateness of placing the children in the custodial care of Jeremy's wife Karen. There is overwhelming evidence that Jeremy's wife Karen is a wholly unsuitable and inappropriate person to be a custodian of Lisa's and Jeremy's

children, or to even be permitted extensive contacts with them.[1] In an alarming 19-page letter written by Karen McCarty to Lisa Kole on or about March 28, 2005, Karen displayed a terrifying glimpse of her spitefulness and vindictiveness, her derangement and delusional self-image, her bitterness and hatred toward Lisa, her intent to intimidate Lisa by threatening to kill or her or have her sent to prison, and her intent to poison Lisa's children, especially Julianna, against Lisa. R.E. No. 8. In his report, Dr. Matherne stated that "without question, [Lisa] has been intimidated by both her former husband and his present wife Karen." R.E. No. 9, at 9.

In July 2007, the court appointed Suzette Breland, Esq. as the Guardian Ad Litem for both of the children, Julianna, then 7, and Jacob, then 3. The GAL interviewed Julianna several times, but she only interviewed Jeremy/Karen and Lisa/Ron ***one time each over the course of the two years that she was GAL***, for no more than about two hours per interview. R.E. No. 4, at 241:5-243:28; R.E. No. 7, at 1, 4-5. (The GAL did not interview Jacob at all, because she thought that he was too young).

The GAL testified that in preparing her preliminary and final Guardian Ad Litem reports, she relied upon the interviews with Julianna, the single interviews with Jeremy and with Lisa, that were no longer than two hours each, and upon the psychological reports of Dr. Stephen Matherne. The GAL did not perform any follow-up interviews of any of the parents, nor did she visit their homes, perform any home studies, or watch any of the parents interacting with any of their children. R.E.

[1] Notably, Karen was not called as a witness by Jeremy's counsel on behalf of his custody petition.

No. 4, at 19-20, 31:14-32:19; 241:5-243:28. The GAL has never observed Julianna in the company of her mother or her father. *Id.*

The GAL's August 28, 2007 Preliminary Report focuses completely upon her interviews with Julianna, and her concern over statements that Julianna made to her regarding Lisa, such as Julianna's fear that Lisa would be very sad if Julianna did not come to live with Lisa because Lisa had said Julianna was her favorite. R.E. No. 6, at 2. Julianna's nervousness about being asked to state a parental preference seems to have been a huge concern to the GAL.

After the Chancellor in February 2009 ordered sole custody be transferred to Jeremy McCarty, the GAL interviewed Julianna a third time. The GAL did not interview either of the parents again. She did not conduct a follow-up interview of Lisa, though Lisa had, on more than one occasion, requested another meeting with the GAL. R.E. No. 4, at 20; 106:24-108:2.

The GAL submitted her final Guardian Ad Litem report on or about January 30, 2009. R.E. No. 7. In addition to reiterating the same concerns about Julianna's nervousness when talking about her mother during GAL's initial interview, the GAL also places an unusual amount of emphasis upon Lisa's ambivalent feelings about Jeremy, and her preoccupation with his relationship with his wife Karen that began while he was married to Lisa. R.E. No. 7, at 6-7. Though the GAL was given a copy of a 19-page threatening letter written by Karen McCarty to Lisa Kole in 2005 to consider for her report, the GAL seems to have given no weight or consideration whatsoever to the letter, which demonstrated Karen's violent tendencies, psychoses, delusions of grandeur, and unadulterated hatred toward the children's own mother Lisa. R.E. No. 7, at 2.

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SUMMARY OF THE ARGUMENT

Appellant contends that the Chancellor's findings of fact were manifestly wrong and clearly erroneous, and that he did not properly apply the legal standards.

First, the Chancellor refused to consider as relevant certain character evidence that bore on the suitability of McCarty as the primary custodian, namely McCarty's former history of drug, alcohol and steroid use, his three DUIs within a five year period, and his poor parenting history with his older children from prior marriages. Such prior conduct is at issue in custody proceedings, regardless of whether it occurred before or after the parties' divorce proceedings.

Also, the Chancellor did not properly apply the *Albright* factors, in part because he did not consider the character evidence regarding McCarty, and in part because he assigned undue weight to the flawed and biased findings of the Guardian Ad Litem ("GAL"). Other aspects of his analysis were flawed (see Section II B).

The GAL did not perform an adequate investigation of the potential custodians Lisa and Jeremy, and their current spouses. The GAL based her conclusions and recommendations primarily on a couple of interviews with the minor child Julianna, and without conducting thorough interviews of any of the parents, or fully considering all of the evidence that was submitted to her by Appellant. Indeed, the GAL was biased against the Appellant Lisa and her husband Ron because of a miscommunication that had resulted in the GAL erroneously feeling that Ron was threatening her and her four children.

Finally, none of the grounds stated in the trial court's judgment or the GAL's report could be considered a substantial enough change of circumstances to warrant the drastic remedy of custody modification.

ARGUMENT

I. INTRODUCTION

Parents have a fundamental constitutionally protected liberty interest in the custody of their children that states cannot lightly take away.

> [A] parent's desire for and right to 'the companionship, care, custody, and management of his or her children' is an important interest that 'undeniably warrants deference and, absent a powerful countervailing interest, protection. Here the State has sought not simply to infringe upon that interest, but to end it. If the State prevails, it will have worked a unique kind of deprivation. A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is, therefore, a commanding one.

Lassiter v. Dep't Soc. Servs., 452 U.S. 18, 27 (1981) (citations omitted); *Troxel v. Granville*, 530 U.S. 57 (2000) ("it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children").

> [C]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society,' rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect.

M.L.B. v. S.L.J., 519 U.S. 102, 116 (1996) (citations omitted).

The chancellor's findings of fact are viewed under the manifest error/substantial credible evidence test." *Vance v. Lincoln County Dep't. of Pub. Welfare*, 582 So. 2d 414, 417 (Miss. 1991) (*citing Bryant v. Cameron*, 473 So. 2d 174, 179 (Miss. 1985); *Veselits v. Cruthirds*, 548 So. 2d 1312, 1316 (Miss. 1989)). A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous, if he [or she] abused his [or her] discretion, or an erroneous legal standard was applied." *See, e.g., Sanderson v. Sanderson,* 824 So. 2d 623, 625-26

(P8) (Miss. 2002) (citations omitted); *Vance,* 582 So. 2d, at 417 (Miss. 1991); *Williams v. Williams*, 656 So. 2d 325, 329 (Miss. 1995).

While wide latitude and discretion is accorded to chancellors and their courts because of the benefits present from having heard the testimony and evidence while observing the witnesses and their demeanor (*Ainsworth v. Natural Father*, 414 So. 2d 417, 420 (Miss. 1982), of equal importance in application of this standard is the duty to abide by the following, that being "where on review it is apparent the court below has misapprehended the controlling rules of law or has acted pursuant to a substantially erroneous view of the law, we will proceed de novo and promptly reverse." *P. K. C. G. v. M. K. G.*, 793 So. 2d 669, 672-673 (Miss. Ct. App. 2001); *Ethredge v. Yawn*, 605 So. 2d 761, 764 (Miss. 1992).

"However, where the chancellor improperly considers and applies the *Albright* factors, an ***appellate court is obliged to find the chancellor in error.***" *Hollon v. Hollon,* 784 So. 2d 943, 946 (P11) (Miss. 2001) (emphasis added).

II. THE CHANCELLOR'S FINDINGS OF FACT WERE MANIFESTLY WRONG AND CLEARLY ERRONEOUS AND HE DID NOT PROPERLY APPLY THE LEGAL STANDARDS

A. The Chancellor Refused To Consider As Relevant Certain Character Evidence That Bore On The Suitability of Jeremy McCarty As a Primary Custodian.

In *Murphy v. Murphy*, 631 So. 2d 812, 816 (Miss. 1994), a child custody case, the Mississippi Supreme Court stated that "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."

Character is "in issue" in child custody litigation. Mississippi Rule of Evidence 404 does not preclude the introduction of evidence of a person's character,

or trait of character, to prove something other than conduct in conformity therewith. In a custody case, a party must prove the trait of good or poor parenting because it is an element of the party's claim or defense. In child custody actions, the character of the potential custodian is highly important, and many times, specific acts of misconduct may be the only available evidence of the character of a potential parental custodian.

Here, the Chancellor failed to consider all relevant evidence that was available to assist him in reaching his ultimate custody decision. At the trial, Lisa alleged that Jeremy has a drug (marijuana, cocaine and steroids) and alcohol abuse problem. R.E. No. 4, at 25:12-27:7; 100:4-103:13; 186:25-188:5. However, the trial court refused to admit or consider any of the evidence submitted by Lisa's counsel that Jeremy does in fact abuse alcohol and drugs, ruling that it was not relevant because it was conduct that occurred prior to the divorce decree and the motion for modification. *Id.*

The Chancellor also disregarded McCarty's three DUIs within a 5-year time period, which is a felony in this state, as irrelevant, even though McCarty had incurred those DUIs between 1998 and 2002, during a period in which Julianna was an infant and toddler, and in which McCarty was certainly driving the infant around in his car. R.E. No. 4, at 42:1-15.

The judge's evidentiary rulings were wrong. Here, the character evidence of Jeremy's prior use of drugs, alcohol and steroids, and his poor parenting skills and abilities in the past, as demonstrated toward his older children, were not being proffered by Appellant to *prove* any charges of past conduct against Jeremy, but rather, they were being proffered to help the court determine Jeremy's predisposition

toward future drug use, or future parental neglect and lack of involvement, that may affect the future best interests of Julianna and Jacob should they be placed with Jeremy. This type of character evidence is essential, when available, to aid the court in custody actions, which are concerned with the future well-being of a minor.

"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, e.g., In re Dorothy L.*, 162 Cal. App. 3d 1154, 1159, 209 Cal. Rptr. 5, 8 (1984) ("Established law has recognized that the character of a parent is at issue in child custody cases); *Hicks v. Hicks*, 249 Cal. App. 2d 964, 967, 58 Cal. Rptr. 63, 65 (1967) (child custody incident to divorce; "Where the character of a witness is in issue (e.g. custody proceedings, specific acts of misconduct are admissible); *Feist v. Feist*, 236 Cal. App. 2d 433, 435, 46 Cal. Rptr. 93, 95 (1965) ("Defendant's moral character had a substantial bearing on whether it would be in the best interests of the children to award exclusive custody to her); *McCabe v. McCabe*, 218 Md. 376, 146 A.2d 768 (1959); *Commonwealth ex rel. Grimes v. Grimes*, 281 Pa. Super 484, 422 A.2d 572 (1980) (parental fitness in a custody case).

B. The Chancellor Did Not Properly Apply The Albright Factors.

The chancellor did not employ the proper legal standards in arriving at his decision, and there is no substantial evidence to support his decision.

The pre-eminent concern in cases involving custody of a child is the child's best interest. *Ainsworth v. Natural Father*, 414 So. 2d 417, 420 (Miss. 1982); *J.C. v. Natural Parents*, 417 So. 2d 529 (Miss. 1982); *Albright v. Albright*, 437 So. 2d 1003, 1004 (Miss. 1983). Factors to be considered in determining the child's best interest are stability of environment, ties between prospective adopting parents and children, moral fitness of parents, home, school and community record of the child. *J.C. v. Natural Parents*, and *Albright v. Albright, supra.*

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). The *Albright* factors used to determine what is, in fact, in the "best interests" of a child in regard to custody are as follows: 1) age, health and sex of the child; 2) determination of the parent that had the continuity of care prior to the separation; 3) which has the best parenting skills and which has the willingness and capacity to provide primary child care; 4) the employment of the parent and responsibilities of that employment; 5) physical and mental health and age of the parents; 6) emotional ties of parent and child; 7) moral fitness of parents; 8) the home, school and community record of the child; 9) the preference of the child at the age sufficient to express a preference by law; 10) stability of home environment and employment of each parent; and 11) other factors relevant to the parent-child relationship. *Albright,* 437 So. 2d at 1005.

In order to determine whether or not the chancellor was manifestly wrong, clearly erroneous or abused his discretion in applying the *Albright* factors, we review the evidence and testimony presented at trial under each factor to ensure his ruling was supported by record.

1) The age, health and sex of the child

There is a presumption in Mississippi that a mother is generally better suited to raise children "of tender years" than the father, though both parents are eligible to have custody no matter the age of the child. *See Sobieske v. Preslar,* 755 So. 2d 410, 413 (Miss. 2000); *Hollon v. Hollon,* 784 So. 2d 943, 947 (Miss. 2001). Here, the court began its analysis of the case with the statement that the Julianna would turn 9 years of age on June 5, 2009, that Jacob is 5, and that both children are in good health. The Chancellor erroneously concluded that this factor favored neither parent. However, even though the tender years doctrine has been weakened, this factor should favor Lisa Kole, especially as Jacob is only 5. The legal presumption, although weakened, still favors the mother to raise a very small child. *See* Shelton Hand, Jr., *Mississippi Divorce, Alimony and Child Custody*, 6th Ed., West 2003, § 19:2, at 724 ("The general rule that children of tender years should be granted to the custody of the mother may, on appropriate occasion, be subjected to an exception . . . ").

(2) *The determination of which parent had continuous care of the child prior to the separation*

The Chancellor also erred in his application of this factor, concluding that the factor does not weigh in favor of either party. The Chancellor failed to note that Lisa Kole had the primary care of the children for the majority of their lives, both while she was married to Jeremy, and for the first few years after they divorced. Though they shared joint legal and physical custody of the children after the divorce, the children lived with Lisa most of the time, while Jeremy had

specified visitation period, sometimes every week and sometimes every other week.

(3) The determination of which parent has the best parenting skills as well as the willingness and capacity to provide primary child care

The chancellor found that this factor weighed in favor of neither parent, as each of them possessed the willingness and capacity to provide primary child care. Appellant disagrees. The chancellor failed to consider relevant evidence that bears upon Jeremy's parenting skills, such as his drug and steroid use, and his history of negligent parenting of his three older children with other women. This factor should have weighed in favor of Lisa.

(4) The employment of the parent and responsibilities of that employment

The court found that this factor weighed in favor of neither parent. Appellant agrees with that assessment.

5) The physical and mental health and age of the parents

The chancellor found that this factor weighed in favor of Jeremy because o Lisa's prior history of depression and alcoholism. This finding is clearly erroneous, given that Jeremy has also admitted to alcohol abuse, which the chancellor did not consider, and the chancellor refused to hear testimony about Jeremy's drug use.

6) *The emotional ties of parent and child*

Commenting on the emotional ties of Lisa and Jeremy to their children, the trial court noted that both parents had strong emotional ties to their children, but that Lisa may have damaged the bond due to her "manipulation of the children during this litigation." No substantial evidence was ever presented of

any such manipulation, other than ambiguous scribbles on Juliana's journal by Lisa. Indeed, Dr. Matherne's psychological report of Lisa notes that she has no psychosis that would impair her fitness as a parent.

Moreover, Jeremy's wife Karen has threatened Lisa in an extreme 19-page letter that does indicate psychotic tendencies and hatred of Lisa, and Jeremy's lackadaisical attitude toward these threats should be of concern. The chancelor's application of this factor is erroneous. Although both parties and their spouses have exhibited childish, inappropriate behavior that was observable by the children and that could be harmful to the children's welfare, only Karen McCarty has exhibited behavior and tendencies that could be truly dangerous to the children and to the maintenance of the children's relationship with their other parent, which is in their best interests. Karen's letter reveals a malicious scheme to poison the children, especially Julianna, against Lisa, if she and Jeremy are given custody. Accordingly, this factor should have weighed in favor Lisa.

7) *The moral fitness of the parent*

The court erroneously found that this factor weighed in favor of Jeremy, noting that Lisa admitted to having a DUI and attending rehab. The court failed to consider, however, that Jeremy had had **three** DUIs in a five-year period, during a time that his daughter was an infant riding in his car. The court also failed to consider Jeremy's drug and steroid use prior to the divorce. The court also neglected to note the GAL's finding that both Jeremy and Lisa had had alcohol abuse problems in the past, though they both were sober presently. Moreover, the court noted that Lisa was involved with her present husband Ron, while ignoring the fact that Jeremy had had an affair with his wife Karen while

married to Lisa. Since both parties have admitted to serious moral lapses, this factor should weigh in favor of neither party.

8) *The home, school and community record of the child*

The court found that this factor favored Jeremy, based primarily on the fact that Julianna made better grades and had a better attendance record after Jeremy received custody than when Lisa had custody. This analysis ignores Lisa's significant contribution, before custody was transferred to Jeremy, of sending Julianna to an additional school to improve her reading ability. This seems likely to have been the catalyst for the change in Julianna's performance at school. This factor should weigh in favor of neither party.

9) *The preference of the child at an age sufficient to express a preference by law*

Julianna, now eight (8) years old, was only seven (7) years old when she was interviewed by the GAL, who gave improper weight to Julianna's wishes about with whom she wished to live. The age where a child is permitted to express his or her preference regarding with which parent to live is twelve (12). Miss. Code Ann. § 93-11-65; *Ferguson v. Ferguson*, 639 So.2d 921, 932 ("If the Court shall find that both parties are fit and proper persons to have custody of the children . . . and that it would be in the best interest and welfare of the children, then any such child who shall have reached his twelfth birthday shall have the privilege of choosing the parent with whom he shall live").

The court properly noted that neither of the children was of the age to express a parental preference, so that this factor weighs in favor of neither parent. Significantly, however, the court also relied in large part upon the recommendations of the GAL, whose report was almost entirely based upon the

"preferences" that the GAL inferred during her five interviews of Julianna, and her feeling that Julianna was more comfortable with her father than her mother (though she had never witnessed Julianna in the company of either her mother or her father).

10) *The stability of home environment and employment of each parent*

The chancellor found that this factor weighed in favor of Jeremy, because Lisa's "continued interference with the children's relationship with Jeremy and her manipulation of the children is detrimental to the stability of the children's well-being and would not make a stable home environment for the children." The court agreed with the GAL's conclusions because it "could find no facts that would make the GAL's Report erroneous." But the court gave undue weight to the GAL's report, which was flawed, because it failed to give any consideration whatsoever to factors such as Jeremy's drug and steroid use, Karen's psychotic and threatening letter to Lisa (with Jeremy's nonchalent acquiescence), and Jeremy's history of negligent and uninterested parenting of his three oldest children.

Because ***both*** parties have exhibited childish, inappropriate behavior that was observable by the children and could be harmful to the children's welfare, and there have been serious moral lapses by ***both*** parties, this factor should have been weighed to favor neither party. A review of the chancellor's analysis of all of the factors reveals that, time after time, he points to Lisa's shortcomings and deficiencies, while ignoring comparable and equal shortcomings and deficiencies on the part of Jeremy.

In considering all of the relevant *Albright* factors, as well as the totality of the circumstances and based upon the best interest of the children, it is evident that the court misapplied the *Albright* factors, and was manifestly wrong in finding that Jeremy should have permanent physical custody of the minor children. Lisa should have been awarded permanent physical custody of the children, with the parties sharing joint legal custody.

III. THE CHANCELLOR ASSIGNED UNDUE WEIGHT TO FLAWED FINDINGS OF THE GUARDIAN AD LITEM

A. The Guardian Ad Litem Has An Affirmative Duty To Zealously Represent A Child's Best Interest In A Competent, Thorough and Unbiased Manner

A guardian ad litem, Suzette Breland, was appointed in this case at the request of the parties. This guardian was not a mere formality. The Mississippi Supreme Court in a recent case "expressed its concerns about the importance of the role of the guardian ad litem . . . ." *In Interest of R.D.*, 658 So. 2d 1378, 1383 (Miss. 1995). The guardian has "an affirmative duty to zealously represent the child's best interest." *In the Interest of D.K.L. v. Hall*, 652 So. 2d 184, 188 (Miss. 1995).

In *Loggans v. Hall*, 652 So. 2d 184 (Miss. 1995), the lower court had properly appointed a guardian ad litem to represent a minor child adjudicated as sexually abused. The Court, concerned about the representation, or lack thereof, by the guardian ad litem stated that the guardian ad litem had merely deferred to the therapist's recommendations . The court ordered the guardian to interview the child and prepare a report for the court to consider. "Carter as the guardian for D.K.L., did not have an option to perform or not perform, rather he had an affirmative duty to zealously represent the child's best interest. *Loggans*, at 190-91. (emphasis added).

The *Loggans* Court ultimately considered the inadequate role of the guardian ad litem to be so egregious that reversal and remand was required. "The guardian ad litem did not perform as required in such an important role. This failure on the part of the guardian ad litem to fully represent this child's interest necessitates remanding so that someone with only D.K.L.'s best interest in mind can evaluate the family situation." *Loggans*, at 191. "This failure on the part of the guardian ad litem to fully represent this child's interest necessitates remanding so that someone with only D.K.L.'s best interest in mind can evaluate the family situation. Therefore, we strongly recommend to the Youth Court that a new and independent expert be appointed to evaluate the present familial relationships. An expert, not connected with or employed by either party, an expert for the court, the child and the record will be in a position to fully assess the relationships as they pertain to the health, safety and well-being of D.K.L." *Loggans*, at 191.

A review of cases from other jurisdictions regarding the importance, purpose and role of the guardian ad litem is noteworthy. In *Short v. Short*, 730 F. Supp. 1037, 1038 (D. Colo. 1990), the court stated that the guardian ad litem "investigates, makes recommendations to a court, or enters reports," and "hold[s] paramount the child's best interest."

> When a statute gives a court the power to appoint an attorney for children in custody disputes, that advocate must represent the children's interests alone. In so doing, the attorney is not to take a passive role but should present all evidence available concerning the child's best interests. ***The attorney is not simply to parrot the child's expressed wishes*** [emphasis added]. Thus, this obligation imposes a higher degree of objectivity on a child's attorney than that for an attorney representing an adult. It is this intensified requisite of objectivity that separates a guardian ad litem from an appointed attorney. When a guardian ad litem investigates, makes recommendations to a court, or enters reports, he or she, like the

> court, must hold paramount the child's best interests. Thus, the guardian ad litem serves as an adjunct of the court. . . . Indeed, the need for an independent guardian ad litem is particularly compelling in custody disputes. Often, parents are pitted against one another in an intensely personal and militant clash. Innocent children may be pawns in the conflict. To safeguard the best interests of the children, however, the guardian's judgment must remain impartial, unaltered by the intimidating wrath and litigious penchant of disgruntled parents. Fear of liability to one of the parents can warp judgment that is crucial to vigilant loyalty for what is best for the child; ***the guardian's focus must not be diverted to appeasement of antagonistic parents. The guardian ad litem has a duty to protect the interests of the children, even if contrary to the children's wishes.***

Short v. Short, 730 F. Supp. 1037, 1038-1039 (D. Colo. 1990) (holding that a court appointed guardian ad litem is entitled to absolute quasi-judicial immunity).

In *In the Interest of R.D.)*, 658 So. 2d 1378, 1383 (Miss. 1995), the Mississipppi Supreme Court, having already expressed its concerns about the importance of the role of the guardian ad litem in *Luttrell* and *Loggans*, expressly adopted the three requirements that had been set forth by the South Carolina Appeals Court in *Shainwald v. Shainwald*, 395 S.E.2d 441, 444 (S.C. Ct. App. 1990), ***as minimum requirements that a judge must adhere to in the appointment of guardians ad litem representing minors before the courts of Mississippi.***

> A guardian ad litem is a representative of the court appointed to assist it inproperly protecting the interests of an incompetent person. . . .children are best served by the presence of a vigorous advocate free to investigate, consult with them at length, marshal evidence, and to subpoena and cross-examine witnesses.. . . Judges should also be mindful of the fact that a guardian ad litem is not in the true sense an adversary party and the court has a duty to insure that guardians ad litem perform their duties properly and in the best interest of their wards. The trial judge's duty to assure the child's best interests are protected requires as a minimum that (1) he select a competent person to serve as guardian ad litem; (2) he select a person with no adverse interest to the minor; and (3) the person so selected is adequately instructed on the proper performance of his duties.

Shainwald v. Shainwald, 395 S.E.2d at 447 (adopted by Mississippi Supreme Court in *In Interest of RD*, at 1383). *See also* Mississippi Code Annotated section 43-21-121 which provides in relevant part that "the guardian ad litem shall investigate, make recommendations to the court or enter reports as necessary to hold paramount the child's best interest.)

B. The GAL Did Not Adequately Perform Her Court-Ordered Duties, And 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 in McCarty's favor. The GAL's bias was evidenced through her excessively heavy reliance on the information provided by the McCartys and Julianna McCarty, and her disregard of the information provided by the Koles.

One plausible explanation for the GAL's bias against the Koles (and for refusing to speak to them again or interview them again) is that the GAL seemed to have taken a very strong dislike to Ron Kole because of a misunderstanding, and even, irrationally, felt that Kole had threatened her. R.E. No. 4, at 167:24-169:28; 238:9-241:4. Apparently, during the course of these proceedings, an occasion arose where Lisa's husband Ron was asking for Anita Strickland's home address (the ex-wife of Lisa's then-attorney Mark Strickland) in an attempt to locate Mr. Strickland, who apparently had lost contact with them and was not answering his phone calls. *Id.* The GAL misunderstood a phone call that she had overheard, and believed that Ron Kole was trying to find ***the GAL's*** home address, not Ms. Strickland's. Somehow, the GAL developed the fear that Kole was seeking to harm her or her children, ***and she actually sought a restraining order against Kole***. " . . . Mr. Kole went looking for me, but went to the wrong house, and I was concerned as Guardian ad Litem, because I have four children, that your husband would come looking for

me." R.E. No. 4, at 168:13-17. "What does make me feel threatened is Mr. Kole coming to look for me and I have four kids. That makes me feel threatened. . . . Of course it [upsets me]. He's looking for my residence where I live with my husband and four children. For what reason? Of course that threatens me. I would be scared for my kids." R.E. No. 4, at 240:23-241:4.

Incredibly, after this occurrence, rather than ask to recuse herself from her GAL duties because of her personal fear and bias, the GAL refused to talk further with Lisa and Ron, and proceeded to submit a report that recommended that custody be taken away from Lisa and Ron Kole. R.E. No. 4, at 167:24-169:28; 238:9-241:4.

The GAL testified that in preparing her preliminary and final Guardian Ad Litem reports, she relied upon (1) the three interviews with Julianna, (2) the single interview with the Koles that lasted no more than two hours (3) the single interview with the McCartys, and (4) the psychological reports of Dr. Stephen Matherne. She did not perform any follow-up interviews of any of the parents, nor did she visit their homes, perform any home studies, or watch any of the parents interacting with any of their children. R.E. No. 4, at 19-20, 31:14-32:19. She did not conduct a follow-up interview of Lisa Kole, though Kole had, on more than one occasion, requested another meeting with Breland. *Id.* at 20; 106:24-108:2. Breland has never observed Julianna in the company of her mother or her father.

The GAL's findings relied almost exclusively on the impressions she had received from a conversation she had with Julianna in 2007, in which the seven-year-old girl relayed a conversation that she had earlier had with her mother. R.E. No. 6; R.E. No. 7, at 4-5; R.E. No. 4, at 46:20-47:8. The child very understandably seemed nervous about hurting her mother's feelings if she should be asked to state a

preference about where she would live. The GAL was concerned because "Julianna said that her mother told her she would be very sad if she didn't live with her because she was the first born . . ." See R.E. No. 4, at 28-29; 34:27-37:3; 46:25-47:8. While the conflicted feelings of parents and children who are involved in custody disputes are sad, they are not grounds for removing a child from her mother's custody. These little conversations between parents and children, or some small resentful allusions to the other parent, do not constitute a change of circumstance that warrants custody modification.

Moreover, the court is not bound by the thoughts and preferences of a child. It is generally beyond the normal developmental level of a child to make sound, wise or even logical decisions about his or her best interest in the larger context of supervision, care, maintenance, guidance and general development. Furthermore, such conflicted conduct and feelings about their parents on the part of children undergoing custody disputes, such as the comments expressed by Julianna to the GAL, are exceedingly commonplace. The GAL assigned a vastly over-inflated importance to this second-hand report of a conversation between Julianna and her mother Lisa. "[T]he child, caught up in the parents' divorce case, comes to the bench of the chancery court without the wisdom of age and experience, even when it comes to his or her own best interest. While, on occasion, the child may be allowed to express a preference, his or her choices are not to be taken as controlling on the court." Shelton Hand, Jr., *Mississippi Divorce, Alimony and Child Custody*, 6th Ed., West 2003, § 18:1, at 675.

Importantly, the GAL admitted that there have been no "inappropriate contacts" (as she defined this ordinary interaction between parents and children) between Kole and Julianna since 2007. R.E. No. 4, at 29:11-23; 30:14-31:8.

Moreover, the GAL ignored important parts of Dr. Matherne's psychological evaluations. For example, Julianna had stated to Dr. Matherne a preference to live with her mother, but the GAL decided that she "did not agree with him." R.E. No. 4, at 33:27-34:7; R.E. No. 10, at 6-7 (Julianna states to Dr. Matherne that she prefers to live with her mother, but wants to spend time with both of her parents).

The GAL also disregarded the "tender years doctrine," though the children were aged 7 and 4 at the time of her report. R.E. No. 4, at 43:17-24.

Furthermore, the GAL disregarded certain facts about Jeremy McCarty, including his history of drug use, evidence of his five DUIs in a five-year period, and evidence of his poor parenting history with respect to his other children. R.E. No. 4, at 24-25, 41:20-42:12. Incredibly, she disregarded the three DUIs as irrelevant to her determination, simply because McCarty "currently had a driver's license," even though he had incurred those DUIs between 1998 and 2002, during a period in which Julianna was an infant and toddler, and in which McCarty was certainly driving the infant around in his car. ***Indeed, the GAL chose to omit Jeremy's three DUIs completely from her report***, depriving necessary information from the Chancellor in making his decision, and thereby prejudicing Lisa. R.E. No. 4, at 41:20-42:15.

The GAL also refused to consider character evidence pertaining to McCartey's parenting history, regarding his other three children. Evidence pertaining to those three children, born of short-lived relationships with two women prior to Lisa McCartney, likely would have shed light on McCartey's parenting

potential regarding Julianna and Jacob. Evidence would have been presented that McCartey had nearly non-existent relationships with his older children. *See* R.E. No. 4, at 38:2-41:19; 173:12-174:6; 175:5-176:10 (almost no contact with his other children at all, and he is not even certain where they live). In disregarding this important evidence about Jeremy's character as a parent, the GAL simply stated, "I did not use that history, because that was a long time ago, to determine whether he's a good father now." *Id.* at 38:27-29.

Finally, the GAL completely disregarded the alarming revelations in the 19-page letter that Karen wrote to Lisa on or about March 28, 2005. In his report, Dr. Matherne concluded that "it is apparent that the content [of Karen's letter] could be interpreted as being extremely threatening to Lisa Kole, and also portrays a person who is extremely grandiose in her depiction of herself and her lifestyle." R.E. No. 9, at 3. In this lengthy and rambling epistle, Karen displayed a terrifying glimpse of her spitefulness and vindictiveness, her derangement and delusional self-image, her bitterness and hatred toward Lisa, her intent to intimidate Lisa by threatening to kill or her or have her sent to prison, and her intent to poison Lisa's children, especially Julianna, against Lisa. R.E. No. 8. In his report, Dr. Matherne stated that "without question, [Lisa] has been intimidated by both her former husband and his present wife Karen." R.E. No. 9, at 9.

But the GAL shrugged off such intimidation and threats. "It just seemed to me to be two women, kind of fighting over one man. I didn't put a lot of weight on it. I didn't think it was threatening." R.E. No. 4, at 21:8-22:10. "I wasn't in her mind when she was writing the letter. If she was writing it to me . . . I wouldn't feel

threatened either. Because it's just a woman, to me, venting." R.E. No. 4, at 240:18-22.

Karen's letter displays her delusions of grandeur,[2] and her petty, spiteful attempts to humiliate Lisa.[3] But, more alarmingly, Karen repeatedly threatens to

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[2] . . . To have a pathetic alcoholic of your sort disturb my life out of pure jealousy and hatred is unacceptable. . . . You need to deal with the fact that I am a wonderful person. I have a fabulous job, great pay and luxuries. I fly in private planes to play golf, go to dinner and watch horse races. I get to go anytime I want to NASCAR rases, concerts, operas. I have dated country music stars, professional wrestlers, millionaires, poor people and lots of fabulous people. . . .I have had a chance to be with whomever I wanted. Jeremy knows that, even picks on me about it. He sees the millionaires, the stars and cute guys that come in and talk about me while playing on his table. He just smiles because he got the girl the whole Coast wanted. . . . I am very special, and you need to get that through your head. I am no ordinary woman. I have lived a great life as an adult. . . . I shop only in elite cities for clothes, I stay in luxury condos on the beach in Destin for free. I get thousands in tips every week. All this from people that like me because I am real; something you are not. Even Jeremy's parents said how much of a fake you were. They only endured you for his sake. . . . I am extremely sought after along the Coast in my position. I have friends that are true to me. I have a great family and never meet a stranger that doesn't fall in love with me as a friend. You are so jealous that your life is so pitiful, you cannot handle the fact that Jeremy fell in love with someone WHO ON MY WORST DAY CAN PUT YOU TO SHAME. . . . . What Jeremy fails to tell you is the fact that when you were two were divorced the first time, he wanted so badly to ask me out. . . . Saw me laugh, talk, smile so big and get flirted with all day. He dreamed of what it would be like if he worked up the nerve to ask me out. . . . He felt that maybe he wasn't good enough for me. But he was wrong in thinking that way. I am just a person, real just like him. But, no other woman on the Coast wears $2,500 & up Armani, Gucci and Chanel suits to work like I do. $500 shoes. . . . I am an awesome housekeeper, unlike yourself (seen the pictures of how you don't clean), I am a fabulous cook (I'm sure you can't). . . . A great fashion designer, and interior designer, I can cut hair, I am an excellent carpenter. I can operate bulldozers and backhoes . . . and I guess that could be very intimidating to any man. You have no clue I am everyone and everything. I made myself into that, and very proud of it. . .

[3] Jeremy knows I adored being single. Jet setting across the world. So, he came after me a long time ago, flirted, and I flirtêd. Funny thing, he never let anyone know he was married. Guess he was too ashamed of you, and now I see why. He chose to have someone much better than you could ever dream of being. . . . Don't for a second believe Ron [Lisa's husband] is going to be with you long. You forget that I KNOW EVERYONE. . . . . Maybe you should lay off the booze and drugs. Maybe Ron only married you out of pity or guilt like Jeremy did the second time. Maybe he couldn't stand to see a friend pitiful and alone, with no skills and no brains. Don't ever underestimate my contacts. If he is smart he would run away from you as quickly as he can . . . [Jeremy] is able to buy me beautiful things all the time, like diamond earrings and watch, new sewing machine for Christmas, and all the other gifts, including my gorgeous diamond ring I got for Valentines Day. We go everywhere any chance we get. . . . We go to Mardi Gras balls and trips to great places. . . . Anyone can get pregnant and have a kid, look around you, they are everywhere. Now, you

have Lisa sent to prison out of revenge, and discusses Karen's recent acquisition of concealed weapons permit and her purported sniper training, which actually seems to be an implied threat to ***kill*** or assault Lisa or her family.

> . . . Surveillance is a beautiful thing. It is good to have friends in high places. . . All is in evidence envelopes in the hands of the right people with Ocean Springs and Biloxi Police. I am a Banner Girl for the Ole Biloxi Marching Club, along with every important official on the Coast. So all is discussed weekly when I'm having dinner and hanging out with the Mayor, and every top attorney on the Coast. From CIA to FBI, and in between. Everyone is helping to put you away for as long as we can. . . . Reason being the more people watching everything for me, and watching you and your new husband, the more facts I get, the more protected my things are and the longer I can have you sent away to prison. Stupid you, you should have listened to Jeremy when he warned you that I was not someone you wanted to threaten and mess with.. . . Beauty of being me, I have close friends who are very protective of me. Local judges, federal judges, DA's, lawyers, FBI, highway patrol, Harrison County Sheriffs, Jackson County, Forrest County, Hattiesburg. And private detectives, FBI and not counting many friends who are millionaires, or more. . . . It is up to me how long I wait to sign to put it on the

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are bringing another into your sick twisted world. You don't deserve to even have kids. Of course I am still waiting for your doctor's office to confirm if it is really true [Lisa's pregnancy]. . . . Jeremy wishes so many times that I was the mom of his kids. . . . You are just the person he messed up and he got pregnant twice, so don't fool yourself into believing you were ever anything more. If he bought you anything . . . I promise it was only out of pity and obligation. . , , . . . [Jeremy] was repulsed by you, but had to do the motions to maintain his lies . . . Even when he begged you back, he was wanting me, flirting with me, wishing he could have me . . . You were never a true wife to him. You never could be sexy enough for him, passionate enough, pretty enough, fit enough, sober enough or loving enough. I do all the right things, in all the right ways, then we do them all over again, some nights several times. . . . I am not an alcoholic as you are, never been to rehab as you have, never had parents who wouldn't protect their child from a sibling's sexual abuse as you have. I have a great job, as you couldn't even keep a job as a waitress. . . . A glorified hooker is the word for you. You fail to realize that I know every important person on this Coast and through half of the state. . . . the DUIs you have, every traffic ticket . . . all these things are of public knowledge if you know the right people. Never fear, you can be certain THAT I DO KNOW THE RIGHT PEOPLE. . . . You are a disgust to society. . . . So all of my discoveries can be used now, just to prove how unfit you are and sick in the head. . . . I know the people that run the rehabs you went to, what a sick file you have. No one will know how I got my hands on it but it will all come out in court, for your new husband and old to see, you will never have anything in this world worth anything. You are a sick person and should be dead or locked away from the world. . . .

> docket for a subpoena to be delivered to you. I can do it this summer, or I can wait a whole year. My choice. Get it over with, or make your life a living hell. . . . You are an amateur, you have no friends and no contacts, the courts would laugh you right out of there. . . . Never fear, I am protected. Between my police friends and watchful eyes. ***I have interviewed with MS Dept of Public Safety for a concealed firearm permit. Of course you could never get a permit for a gun . . . Of course I am trained for use of a firearm, mostly sniper training, but close range is OK too. . . .*** I will not be worried about using it for my protection. . . . And now you'll pay the price for your foolishness, by losing your kids, probably your husband . . . I don't issue threats, no need for that. All I say is promises and facts. You don't try to hurt someone and not pay. . . . Enjoy your freedom while you can. . . . People like you don't deserve to have children . . . If you do not leave us be and let everyone live in simplicity, I will push for even more time behind bars, and when Tony Lawrence, our district attorney, asks will I consider probation and counseling, without jail time, I promise you this, I will say no. It is all up to me now. I have the power in my possession to send you away and destroy everything you have . . .

R.E. No. 8, at 3- 19 (emphasis added).

The letter also clearly indicates Karen's vindictive intent and plan to poison Lisa's own children against her and to wholly destroy Lisa's relationship with them. It also reveals that Jeremy and Karen had long been vengefully plotting for Lisa to lose custody of the children and any continued relationship with them.

> **. . . . *You will pay for all your wrong doings toward your child. She will grow to hate you for your lies***, from the ages of 18 months to 6 years old are the premium years for building memories in a child, too bad hers is of you being so mean toward her dad and step mom. (Forget to tell you, I also help with Mississippi Child Services and counseling? Sorry). And you wonder why your children are so happy around their dad and myself. . . . [Julianna] is only a child. Bad news, she loves me, begs me to stay with me all the time, loves my family and wants to call my parents Grandma and Grandpa. You are so mentally disturbed, for you to call yourself a mom is a hard slap in God's face. So far, every lawyer and judge who has heard all that is sickened and can't wait to take them away. You underestimate me. . . . ***You are ruining [Julianna's] life. She loves me and her dad so much. . . . You're so pathetic, jealous and psychotic that your kids aren't even important to you, you will live to regret it one day. . . . It is a painful thing, much more so if they are taken away while you***

> ***rot in jail.*** And you can have your new baby in jail too. Didn't think we knew already? I told you, I know everyone. . . . Have you any idea that if Jeremy and myself marry, we could have custody of the kids almost immediately? . . .. . . ***Don't worry, if Jeremy hasn't taken the kids away from you by then, I have enough pull.*** . . .No judge in his right mind would let you keep those kids. Put you and Ron against Jeremy and myself side by side, you'd be such a laughing stock. You two pail (sic) in comparison to us together. We are such an awesome couple, everyone that sees us together says how great we are. . . . Everyone is jealous to have what we have. . . . You will be paying us child support, have forced counseling and only have limited supervised visits. That is, after you get out of jail. Sorry, prison I mean, because what you did is a felony. . . . ***Revenge is a sweet thing when it is toward bad people like you. Your children will love me and Jeremy and will finally get a chance for a normal life. You are no mother. Your children deserve to have their dad and step mom raise them.*** Pity on this new kid you are bringing into the world. God will not let you by with all this bad stuff. Watch and see. I know it will be good for your child to finally see the real you and to know you used her dad and everyone around you. . . . . Your kids will grow up and dislike you for trying to ruin everything. Your daughter already knows you lie, and say mean things. . . . She knows you did it. We told her. . . . We are not going to lie to her. . . . Love is something your home will never have. ***And [Julianna] will be in court to see it all said and done. . . . I hated to tell [Julianna] such a slut and sinner like you has no clue who God is, but I couldn't, I just told her that maybe you didn't believe in God. . . .***

R.E. No. 8, at 9-18 (emphasis added).

Finally, the failure on the part of the GAL to conduct any further interviews or to conduct any home study of Lisa's or Jeremy's home, and the GAL's failure to personally observe the principals' interactions with and care of the children when the children were with them, have caused extreme prejudice to Lisa. (The GAL talked to the parents only one time in the nearly two years that she was on the case. R.E. No. 4, at 241:5-243:28.) Had the GAL spent more time with the parents and their spouses, she would likely have learned and testified that Lisa and Ron maintained a safe and secure home environment suitable for all four of Lisa's children, and that Lisa and Ron interact lovingly and appropriately with their children.

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). In the present case, it is clear that the GAL was not acting in the best interests of the children, due to biases and misperceptions of her own. Instead, the GAL chose to put on blinders and to recommend placement of Julianna and Jacob with a psychotic and dangerous individual who had sworn to destroy the children's relationship with their mother, a relationship that would be in the children's best interests to have maintained and nourished, rather than poisoned.

C. The Chancellor, In Making His Decision, Failed In His Obligation To Accord The Proper Weight, Or Lack Thereof, To The GAL's Reports

As the Mississippi Supreme Court stated in *S.N.C. v. J.R.D.*, 755 So.2d 1077, 1082 (Miss. 2000), "there is no requirement that the chancellor defer to the findings of the guardian ad litem, as proposed by the petitioners. Such a rule would intrude on the authority of the chancellor to make findings of fact and to apply the law to those facts." Accordingly, ***"[t]he guardian ad litem's presence . . . in no way detracts from the chancellor's duty to hear the evidence and make a decision on all of the evidence, not just on the testimony of the guardian ad litem.***" *Id.* (emphasis added).

After considering all the evidence, the chancellor was free to, and indeed obligated to, come to his own conclusions on the issues.

The chancellor's decision, giving as much weight as it did to the recommendation of the Guardian Ad Litem, was not supported by credible evidence. It was manifestly wrong and clearly erroneous, and applied incorrect legal standards.

THERE HAS BEEN NO SUBSTANTIAL CHANGE OF CIRCUMSTANCE SUFFICIENT TO WARRANT MODIFICATION OF CUSTODY

A change in child custody should not be granted upon mere whim or caprice, but only when there has been a material change in circumstances, which suggests that a change of custody is in the best interest of the child. *Weigand v. Houghton*, 730 So. 2d 581 (P15) (Miss. 1999). Before undertaking a possible change of custody, the court must first identify the specific material changes in circumstances, which make such a consideration appropriate. *Sturgis v. Sturgis*, 792 So. 2d 1020, 1023-25 (Miss. Ct. App. 2001) (where the trial court failed to first identify a specific change in circumstance, and then do an on-the-record analysis of each of the relevant factors to consider in child custody matters, the appeals court reversed the trial court's decision to modify custody).

In this case, both parties were awarded joint physical custody of the children in the divorce and both parties filed Motions for Custody Modification. The court based its judgment modifying child custody upon the GAL's report finding that "Lisa's behavior towards Julianna, her severe preoccupation with Jeremy and his life and her hatred for Karen constitute a material change in circumstance since the original custody decree that has adversely impacted the children – Julianna in particular." R.E. No. 2, at 163.

"When considering a modification of child custody, the proper approach is to first identify the specific change in circumstances, and then analyze and apply the Albright factors in light of that change. Where there is no specific identification of the alleged change in circumstances, [the appeals court] is placed in the position of

attempting to guess what the chancellor determined was a proper basis for a change in custody." *Id.* *See also Thornell v. Thornell*, 860 So. 2d 1241 (Miss. Ct. App. 2003) (holding that the trial court's opinion was incomplete because it did not reflect what the prior conditions were or identify any changed circumstances with which to make a comparison, and reversing and remanding for proceedings consistent with appellate opinion).

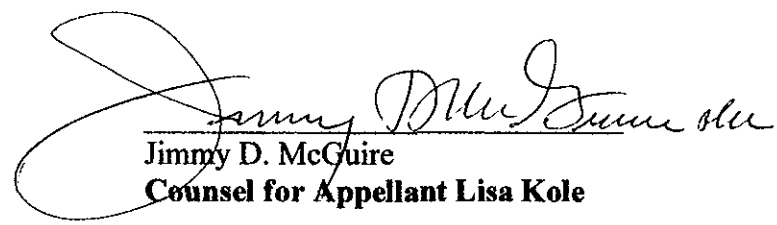
While it is true that the trial court made use of the Albright factors in its Judgment, the opinion did not reflect what the prior conditions had been, such to support the court's conclusions that Lisa's behavior toward Julianna and her "hatred for Karen" constituted a substantial change in circumstances that warrant modifying the existing joint custody arrangement. Indeed, the GAL reports, Dr. Matherne's psychological evaluations, and all of the other evidence submitted in this case indicate that the antipathy between the two women was long-standing, beginning back when Jeremy began his affair with Karen while married to Lisa, and was well-known by all the parties when they entered into their joint custody agreement, so that ***any such feelings or behavior on Lisa's part was not a change in circumstances at all.***

CONCLUSION

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 19th day of January, 2010.



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