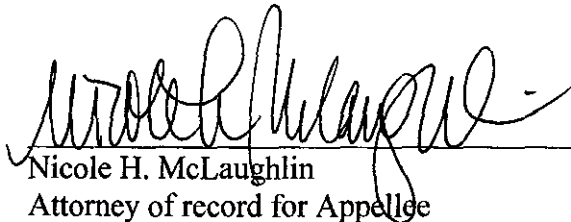


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**CERTIFICATE OF INTERESTED PERSONS**

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

1. Stephanie Ann Bolton, Appellant
2. Randy Wayne Bolton, Appellee
3. John D. Weddle, attorney for Appellant
4. D. Kirk Tharp, attorney for Appellee
5. R. Shane McLaughlin, attorney for Appellee
6. Nicole H. McLaughlin, attorney for Appellee

  
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Nicole H. McLaughlin  
Attorney of record for Appellee

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### **STATEMENT REGARDING ORAL ARGUMENT**

While Appellee's counsel would welcome the opportunity to present this case orally, Appellee does not believe oral argument would be helpful to the Court in light of the straightforward nature of the issues on appeal. All of the issues raised by Appellant were within the discretion of the Chancellor and are manifestly supported by substantial evidence in the Record.

### **STATEMENT OF THE ISSUES**

1. Whether the Chancellor erred in granting Randy Bolton extended visitation on an interim basis during the pendency of the trial.
2. Whether the Chancellor erred in finding that a substantial and material change in circumstances adverse to the interests of Tyler had occurred since the entry of the divorce decree.
3. Whether the Chancellor erred in finding that under the *Albright* analysis, it was in the best interest of Tyler to modify custody.
4. Whether the Chancellor erred in providing child support credits to Randy Bolton for amounts paid by him.

## STATEMENT OF THE CASE

Stephanie and Randy Bolton were granted an Irreconcilable Differences divorce by Decree of the Itawamba County Chancery Court on March 7, 2003. (C.P. p. 19).<sup>1</sup> Randy Bolton filed his Complaint for Modification of Divorce Judgment in this matter seeking a modification of physical custody of one of the Parties' children, Tyler Michael Wayne Ward, and other relief from his ex-wife Stephanie Bolton on July 23, 2007. (C.P. p. 31). After Randy filed his Complaint for Modification, Stephanie filed her Answer and Counter-Complaint for Contempt of Court and for Modification and Emergency Relief. (C.P. p. 55). Among other things, Stephanie asked the Court to find Randy in contempt for failing to pay child support. (*Id.*).

The Parties entered into an Agreed Order regarding visitation and child support of the minor children on August 15, 2007, and agreed to have the modification issues heard during the summer of 2008. (C.P. p. 65-67). Testimony began on the modification issue on July 9, 2008, and resumed over the course of several days: July 25 and December 15-16, 2008. (C.P. p. 68, 70-71). After hearing the testimony and evidence presented on July 9 and 25, 2008, the Chancellor issued an Interim Order granting Randy extended visitation with Tyler, and providing Stephanie with Thanksgiving visitation of Tyler until the trial could be concluded. (C.P. 72-74). Following the conclusion of the testimony and the evidence, the Chancellor found that there had been a substantial and material change in circumstances adverse to the interests of Tyler and applied each of the factors enumerated in *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983), and awarded custody of the minor child to Randy. (T. p. 713; C.P. p. 131-52). The Chancellor provided visitation for Stephanie and ceased all child support obligations. (C.P. p. 102-105). Randy was found to be in contempt of court for failing to pay some child support amounts and

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<sup>1</sup> Clerk's Papers are cited as "C.P." and the trial transcript is cited as "T."

medical expenses. (*Id.*). After crediting Randy for amounts paid, the Court awarded a total judgment to Stephanie in the amount of \$5,467.29. (*Id.*).

The Court issued its Supplemental Opinion, Order Partially Granting Motion to Alter or Amend, and Order Granting Petition for Contempt on July 9, 2009. (C.P. p. 131-152). Stephanie Bolton appealed the Chancellor's decision to this Court. (C.P. p. 154).



## **STATEMENT OF FACTS**

Stephanie and Randy Bolton were divorced by Decree of the Itawamba County Chancery Court on March 7, 2003. (C.P. p. 19). Initially married on July 4, 1997, Randy and Stephanie had two children together, Tyler Michael Wayne Ward born July 28, 1994, and Jennifer Anne Bolton born March 18, 2002 (hereinafter “Tyler” and “Jenny” respectively). (C.P. p. 4). Tyler was almost thirteen (13) years old at the time Randy filed his Complaint for Modification. (C.P. p. 4, 31). Stephanie has an older child, Libby, who was fifteen (15) years old at the time of the proceedings. (T. p. 4). Randy treats Libby as his own biological child and provides for her and visits with her as he does his biological children. (T. p. 303). In 2003, the Parties agreed to an Irreconcilable Differences divorce where Stephanie would have primary physical custody of Tyler and Jenny and Randy had liberal visitation rights. (C.P. p. 15-19).

Stephanie and Randy resumed their relationship in June 2003, only three (3) months after the divorce was final. (T. p. 305). At the time, they lived together with the three children and Randy stopped paying Stephanie child support since he was otherwise supporting her and the kids. (T. p. 307). In 2005, the whole family moved to Las Vegas. (T. p. 301). Randy stayed with the family in Las Vegas for four (4) months and then moved back to Mississippi to find a better paying job. (T. p. 301-2). Stephanie stayed in Las Vegas until December 2005, when she moved to Paradise, California with the children and her parents. (T. p. 316).

After returning to Mississippi, Randy resumed his previous job as a contractor working with his parents. (T. p. 369). Randy lives with his parents in a three-bedroom home owned by him. (T. p. 369, 411). He normally works daily until 3 or 4 p.m. (T. p. 361).

Between 2005 and July 2007, Randy made sporadic child support payments and sent money to Stephanie using Western Union when she asked for it. (T. p. 312, 387). From July

2007 until December 2008, Randy consistently paid Stephanie \$285.00 per month for child support as was ordered by the Chancellor. (T. p. 312). Randy also paid for the children's plane tickets when the parties were ordered to each bear one-half the cost. (T. p. 86). For Thanksgiving 2007, Randy bought airline tickets for the children to visit him in Mississippi. (*Id.*). Stephanie was ordered to reimburse him for one-half the cost of the tickets, but she never did. (T. 86-87, 327).

After Randy moved back to Mississippi in 2005, he maintained a good relationship with the children by calling them at least twice a week and visiting when possible. (T. p. 315). He and his parents drove to see them and brought them back to Mississippi on one occasion. (*Id.*). Randy began purchasing plane tickets for the children to visit, but received no financial help or scheduling cooperation from Stephanie. (T. p. 320). Stephanie maintained control over the children and would only let Randy visit with them if she approved. (T. p. 318). Randy was unable to visit with the children on any regular basis. (T. p. 325). In addition to controlling visitation, Stephanie has also interfered with Randy's relationship with the children. (T. p. 34, 51). She has told the kids that Randy is unfit and has not allowed telephone contact between him and the kids. (*Id.*). Stephanie has even told the children that they would never see their father again. (T. p. 29). Libby stated that her mom says "that I can never see my dad again and stuff like that. . . I'm going to fix your dad, you're never going to have to come back down there again and deal with them." (T. p. 29).

After Stephanie and the children moved to California in 2005, Randy began to have concerns about Tyler. (T. p. 324). Randy was concerned because Tyler was being left alone, his grades were bad, Stephanie's then-boyfriend had a drinking problem and would come to her house intoxicated while the children were there and Tyler might run away or he did not know

what Tyler would do. (T. p. 324). Randy filed a motion to modify custody of Tyler on July 23, 2007. (C.P. p. 31).

Libby testified that all three children were mostly left alone in California. (T. p. 8). She stated that Tyler was not happy in California and that he fights with their mother frequently. (T. p. 10). Sometimes Stephanie raises her hand to strike Tyler, but she has not yet hit him. (T. p. 10). She has, however, thrown a remote control at him, narrowly missing him. (T. p. 173-4). Libby stated that she wanted whatever was best for Tyler, even if that meant he lived in Mississippi and she and Jenny lived in California. (T. p. 10). Libby described her mother as arguing a lot with Tyler and "screaming at him, and he'll just – he'll start crying and stuff." (T. p. 12). She also yells at him if he asks her to take him to a friend's home or to band practice. (T. p. 14). Libby noticed that Tyler and Stephanie's relationship has changed and that they recently began to argue more frequently. (T. p. 38).

One of Randy's concerns about Tyler in California was the effect that Stephanie's boyfriend had on Tyler. (T. p. 324). Stephanie had been dating Richard Rutledge in California, but ended the relationship sometime during the course of the modification proceedings. (T. p. 90). Richard had spent the night several times at Stephanie's house while the children were present. (T. p. 49, 90-91). Richard drinks alcohol and had recently received a citation for driving under the influence. (T. p. 91). However, Stephanie denied that he had a drinking problem. (*Id.*) Tyler testified that he had observed Richard intoxicated at his house. (T. p. 149-150).

In California, Stephanie manages a grocery store owned by her father. (T. p. 105). She normally works from 8 a.m. until 5 p.m. (T. p. 93-94). Stephanie and the children live close to her parents in California. (T. p. 16). Stephanie's father, Michael Ward, drinks alcohol and has used profanity in front of the children. (T. p. 108, 110, 587). Stephanie also uses profanity in

front of the children. (T. p. 163). Tyler stated that his mom yells and cusses daily. (T. p. 169, 173). He stated that she yells and cusses to such an extent that he fears her. (T. p. 139-40, 155). Stephanie admitted that she had used foul language, the "F" word and "GD", in front of the children and that this language would have an effect on them. (T. p. 118).

Another of Randy's concerns was the lack of supervision of the children in California. One of Libby's male friends was allowed to spend the night at Stephanie's home in California. (T. p. 122). Stephanie characterized this as an overnight guest of Tyler; however, Tyler testified that the guest spent the night with Libby, not him, and that he and Libby were in bed together. (*Id.*, p. 147).

Tyler wanted to live with his father. (T. p. 133). Tyler testified that he is much closer to his father than his mother and he looks up to his father as a role model. (T. p. 152, 157). Tyler testified that while in Mississippi, his father cares and provides for him. (T. p. 133). Tyler repeatedly testified about his desire to live with his father. (T. p. 133, 154, 288). Tyler testified that he fears his mother due to her yelling at him and threats toward him. (T. p. 195). Stephanie has told him that "she'll knock me out or she'll hit me." (*Id.*). After the Chancellor issued the Interim Order extending Randy's visitation of Tyler, Tyler testified that he wanted to stay with his father and that the separation of the siblings has not affected him. (T. p. 288, 290). Further, Tyler began performing better in school and had no excessive absences while in Mississippi. (T. p. 288, 335). In California, Stephanie had received a truancy notice due to Tyler's absences and his grades were D's and F's. (T. p. 336, 352-3, 611). Tyler testified that his mother was not involved in his school work in California, but his father was very involved in his school in Mississippi. (T. p. 137, 338-9). Randy met with Tyler's teachers and had become very active in his education. (T. p. 338-9). Tyler's principal in Mississippi, Derrick Shumpert, testified that

Tyler has improved in Mississippi compared to his transcript from California and that he observed that Randy is very active in Tyler's education. (T. p. 467).

Randy's mother, Pauline Bolton testified that Tyler is doing well in Mississippi and that the separation of him and his sisters has not had a big effect on Tyler. (T. p. 549, 554). She stated that Randy cooks for Tyler and cares for him. (T. p. 551). While in Mississippi, Tyler has attended Church with Randy and been baptized; Tyler did not attend Church in California and Stephanie did not attend Church. (T. p. 697). Also, Tyler and his band began playing at a local coffee house which was arranged by Randy; whereas, Tyler played at a bar in California. (T. p. 333).

Following the four-day trial, which consisted of the testimony of seven (7) witnesses, the trial court rendered its decision. (T. p. 713; C.P. p. 131-52). The trial court found that a material change in circumstances adverse to Tyler had occurred and discussed each *Albright* factor in detail. (C.P. p. 131-52). The trial court found, considering all of the factors, that it was in the best interests of Tyler for his father, Randy Bolton, to have physical custody of the child. (*Id.*). The Court awarded Stephanie reasonable visitation and ordered that child support obligations cease. (*Id.*). The Court also found that Randy was in contempt for failure to pay child support and medical expenses in the amount of \$5,467.29. (C.P. p. 102-105).

Stephanie has appealed the Chancellor's ruling to this Court. As discussed below, the Chancellor's rulings and analysis of the modification and of the *Albright* factors was manifestly correct, and was certainly no abuse of discretion. Accordingly, all of Stephanie's arguments are wholly meritless and the Chancellor's decision should be affirmed.

## STANDARD OF REVIEW

The standard of review of a chancellor's decision on a request for modification of custody is limited. *Thornell v. Thornell*, 860 So. 2d 1241, 1243 (Miss. Ct. App. 2003). A chancellor's decision will only be reversed if it is "either manifestly wrong or clearly erroneous, or if the chancellor has applied an erroneous legal standard." *Thornell*, 860 So. 2d at 1243. The Mississippi Supreme Court has held that the standard of review in custody cases is "well settled and is limited: this Court will not reverse a Chancery Court's factual findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence in the record supporting these findings of fact." *Brocato v. Brocato*, 731 So. 2d 1138, 1140 (Miss. 1999). "There must be sufficient evidence in the record supporting the chancellor's opinion for this Court to say that the chancellor has not abused his discretion." *Brocato*, 731 So. 2d at 1140.

The Mississippi Court of Appeals has held:

The resolution of disputed questions of fact is a matter entrusted to the sound discretion of the chancellor. On appeal, we are limited to searching for an abuse of that discretion; otherwise, our duty is to affirm the chancellor. Our job is not to reweigh the evidence to see if, confronted with the same conflicting evidence, we might decide the case differently. Rather, if we determine that there is substantial evidence in the record to support the findings of the chancellor, we ought properly to affirm.

The chancellor, by his presence in the courtroom, is best equipped to listen to the witnesses, observe their demeanor, and determine the credibility of the witnesses and what weight ought to be ascribed to the evidence given by those witnesses. It is necessarily the case that, when conflicting testimony on the same issue is presented, the chancellor sitting as trier of fact must determine which version he finds more credible.

*Carter v. Carter*, 735 So. 2d 1109, 1114 (Miss. Ct. App. 1999). That is, the Appellate Court "does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder." *Bower v. Bower*, 758 So. 2d 405, 412 (Miss. 2000). Rather, the Court has stated "[i]f there is substantial evidence in the record to support the chancellor's findings of fact,

no matter what contrary evidence there may also be, we will uphold the chancellor. *Bower*, 758 So. 2d at 412.

In this case, the Chancellor was not manifestly wrong or clearly erroneous, and did not apply an erroneous legal standard in modifying custody. Further, the Chancellor applied the proper legal analysis in determining the best interest of the child, her decision as to each *Albright* factor was supported by credible and substantial evidence and she did not abuse her discretion. The Chancellor was correct in her finding of the amount of child support owed by Randy Bolton. Consequently, the Court should affirm the Chancellor's decision.

### **SUMMARY OF THE ARGUMENTS**

The Chancellor in this case determined during the middle of the proceedings that visitation was not working and that it was in the child's best interest for his father to have extended visitation during the pendency of the trial. After the conclusion of all of the evidence, the Chancellor determined that a material change in circumstances adverse to the child had occurred. The totality of the facts, including the mother's instable behavior, her yelling and scolding of the child, the deterioration in the parent/child relationship, the child's deep desire to live with his father and the child's emotional and mental state, required a finding that a material change had occurred which was adverse to Tyler.

The Court proceeded to complete an in-depth *Albright* analysis to determine which parent should have custody. The Chancellor correctly determined that the continuity of care prior to the separation and home, school and community record of the child factors weighed in favor of Randy Bolton having custody. None of the *Albright* factors favored the mother. Therefore, even if these two factors favored her, the other factors favored Randy. The Chancellor also carefully examined the separation of the siblings and concluded that any effect it might have on the

children was greatly outweighed by the child's best interest for custody to be with his father. The Chancellor properly determined that it was in Tyler's best interest for custody to be modified to his father.

Finally, the Chancellor properly credited Randy for amounts he paid toward child support and for times that he actually supported Stephanie and the children. There was substantial evidence of the amounts Randy paid by Western Union, the times that he and Stephanie lived together after their divorce and he supported the children, his purchase of plane tickets that Stephanie failed to reimburse him for and for amounts he paid while Tyler lived with him in Mississippi. The Chancellor was correct in providing Randy with these credits against the amount he owed.

The Chancellor's findings are supported by substantial, indeed overwhelming, evidence in the record and are no abuse of discretion. Accordingly, the Chancellor's decision should be affirmed.



## **ARGUMENT I.**

### **THE CHANCELLOR ACTED WITHIN HER DISCRETION WHEN SHE PROPERLY EXTENDED RANDY'S VISITATION OF TYLER ON AN INTERIM BASIS.**

The Chancellor's decision that visitation was not working and that it was in Tyler's best interests to have extended visitation with Randy was made after substantial credible evidence was presented and was within her discretion. Child visitation and restrictions placed upon it are within the discretion of the Chancery Court. *Christian v. Wheat*, 876 So. 2d 341, 345 (Miss. 2004). The Chancellor is charged with the responsibility to protect the children and determine what visitation is in their best interest and great deference is given to the Chancellor's decision on these matters. *Newsom v. Newsom*, 557 So. 2d 511, 517 (Miss. 1990). On visitation issues, as with other issues concerning children, the Chancery Court enjoys a large amount of discretion in making its determination of what is in the best interest of the child. *Haddon v. Haddon*, 806 So. 2d 1017, 1020 (Miss. 2000). Where a Chancellor has made factual findings on the matter of visitation, an Appellate Court should not disturb those findings unless (1) his findings are not supported by substantial credible evidence, (2) he has either committed manifest error, or (3) he applied an erroneous legal standard. *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997).

Before modifying a current visitation arrangement, the Chancellor must find that the prior decree providing for visitation "isn't working and that it is in the best interest of the children that the current decree be altered." *Shepherd v. Shepherd*, 769 So. 2d 242, 245 (Miss. Ct. App. 2000). The Mississippi Supreme Court announced in *Sistrunk* that a party does not have to show a material change in circumstances to modify visitation. *Sistrunk v. McKenzie*, 455 So. 2d 768, 770 (Miss. 1984). A Chancellor may modify visitation upon a showing that the visitation rights

in place are not working and are not in the best interest of the child. *Olson v. Olson*, 799 So. 2d 927, 929 (Miss. Ct. App. 2001); *Haddon v. Haddon*, 806 So. 2d 1017, 1019-20 (Miss. 2000).

In *Newsom*, a mother's instability and previous abduction of the children in defiance of the court order was ample justification for restricted visitation by a Chancellor. *Newsom*, 557 So. 2d at 517. In *Johnson*, the Chancellor found after the conclusion of the trial that there had been no material change in circumstances warranting a modification of custody. *Johnson v. Johnson*, 913 So. 2d 368, 370 (Miss. Ct. App. 2005). The Chancellor's order modified visitation instead of custody. *Johnson*, 913 So. 2d at 370. However, the Court of Appeals held that the Chancellor in essence modified custody without a finding of a material change. *Id.* at 371.

On July 25, 2008, Chancellor Mask extended Randy's visitation of Tyler on an interim basis until the conclusion of the trial. (C.P. p. 72-74). Chancellor Mask extended Randy's visitation after hearing testimony from Elizabeth "Libby" Ward two times, Stephanie Bolton and Tyler Ward. (T. p. 250-1). Randy's visitation was extended until the Court could finalize the case due to the physical distance between the parties, Mississippi and California. (T. p. 251). Chancellor Mask specifically stated that she was not making a custody determination because she had not fully heard the case, but that she had "to make a decision concerning" visitation. (T. p. 250). At this point in the proceedings, there was sufficient testimony for the Chancellor to determine that visitation was not working and it was in the best interest of Tyler to have extended visitation with his father and remain in Mississippi.

At the time that the Chancellor modified visitation, there had already been ample evidence of Stephanie's instability and violent temper and that visitation was simply not working. Stephanie repeatedly told the children they would never see their father again and

threatened his visitation rights. Further, the children were only allowed to visit their father when their mother approved it.

There was also substantial testimony from Libby and Tyler explaining Stephanie's instability and violent temper toward Tyler. Stephanie would cuss and yell at Tyler daily, make him cry and threaten to hit him. At this point in the proceedings, Chancellor Mask had sufficient evidence before her to find that visitation was not working and that it was in Tyler's best interest to modify visitation on a temporary basis until the conclusion of the proceedings.

Appellant in her brief relies heavily on *Johnson*, comparing what the Chancellor did there to this case. However, *Johnson* is significantly different. In *Johnson*, the court decided to modify visitation at the conclusion of the proceedings after finding that there was no substantial material change to modify custody. Here, the court properly modified visitation only on an interim basis while waiting on the conclusion of the proceedings and after hearing a significant portion of the evidence. The court here stated specifically in her ruling that she was not, at the time, making a decision concerning custody because she had not fully heard the case.

Appellant further argues that by extending Randy's visitation, the Chancellor essentially gave him an advantage in the *Albright* analysis for determining custody. Appellant argues that she would have been favored for the *Continuity of Care* and *School Record* factors in the analysis but for Randy's extended visitation. (See Appellant's Brief at p. 13-14). However, none of the other factors favored her. As discussed further below, the *Albright* analysis would have resulted in modifying custody to Randy regardless of these two factors.

Chancellor Mask used her discretion after listening to the substantial credible evidence to determine that the prior visitation decree was not working and that it was in Tyler's best interest that he remain on extended visitation with his father during the pendency of the proceedings.

The Chancellor's decision should be affirmed since it was based on substantial credible evidence, the correct legal standard was applied and there was no manifest error.

## ARGUMENT II.

### **THE CHANCELLOR PROPERLY FOUND THAT A SUBSTANTIAL AND MATERIAL CHANGE IN CIRCUMSTANCES ADVERSE TO TYLER HAD OCCURRED.**

After hearing the substantial credible evidence, the Chancellor properly found that there had been a material change in circumstances adverse to Tyler's best interests. In regards to modification of custody, the Mississippi Supreme Court has stated: "the prerequisites to a child custody modification are: (1) proving a material change in circumstances which adversely affects the welfare of the child and (2) finding that the best interest of the child requires the change of custody." *Smith v. Jones*, 654 So. 2d 480, 486 (Miss. 1995). The 'totality of the circumstances' must be considered. *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993); *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984); *Brocato v. Brocato*, 731 So. 2d 1138, 1141 (Miss. 1999). The Mississippi Court of Appeals provided the following guidance for chancellors: "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." *Sturgis v. Sturgis*, 792 So. 2d 1020, 1025 (Miss. Ct. App. 2001). In order to clarify the type or magnitude of material change that warrants a modification of custody,

our supreme court explained that when the totality of the circumstances display a material change in the overall living conditions in which the child is found which are likely to remain changed in the foreseeable future and such change adversely affects the child, a modification of custody is legally proper.

*Fletcher v. Shaw*, 800 So. 2d 1212, 1215-1216 (Miss. Ct. App. 2001)(citing *Kavanaugh v. Carraway*, 435 So. 2d 697, 700 (Miss. 1983)).

The Mississippi Supreme Court has held that behavior of a parent which clearly causes danger to the mental or emotional well-being of a child is sufficient for modifying custody. *Ballard v. Ballard*, 434 So. 2d 1357, 1360 (Miss. 1983). The Court of Appeals stated in *Hinton* that a situation could exist “where a child, of some age over twelve years, could articulate compelling reasons as to why a change of custody would be in that child's best interest to the extent that the child's preference, supported by those articulated reasons, would warrant some modification.” *Best v. Hinton*, 838 So. 2d 306, 309 (Miss. Ct. App. 2002). In *Jones*, the Court found a material change in circumstances where the daughter expressed her strong desire to live with her mother, the daughter was so unhappy in the father's home that it was psychologically unhealthy for her and the mother's home became a better option for the child. *Jones v. Jones*, 878 So. 2d 1061, 1065 (Miss. Ct. App. 2004).

After considering all of the evidence presented at the four (4) day trial, the Court found that a material change in circumstances which adversely affected the welfare of Tyler existed. (C.P. 145). The Court based the material change on the following facts that were prevalent throughout the trial:

the child's frequently being left home alone by the mother, the mother's frequent yelling and scolding of the child, the older sibling's testimony concerning the deteriorated relationship between the mother and the child and the need for the child to have another place to live, the child's being increasingly unhappy, miserable and isolated because of the breakdown in the relationship between mother and child, and the child's testimony on multiple occasions through the two-year span of this litigation regarding his desire to no longer reside with his mother and his preference to reside primarily with his father.

(C.P. p. 145-6). There was extensive testimony from Libby and Tyler about his unhappiness and emotional state, the deterioration in his relationship with his mother and his fear of his mother. Further, Tyler, on numerous occasions, told the Court that he desired to live with his father and why a change in custody to his father would be in his best interests. The Chancellor reviewed

the totality of the circumstances before finding a material change adverse to Tyler occurred. Following *Hinton*, the Court listened to Tyler's testimony where he expressed a desire to live with his father and also provided compelling reasons for a change in custody. The Chancellor weighed Tyler's testimony along with the other evidence prior to determining a material change occurred. The Chancellor heard about Stephanie's unstable behavior, her cussing and yelling at Tyler daily, his crying and fear of her, her work schedule and time spent with her boyfriend instead of her kids, her boyfriend's alcohol problems and Tyler's preference to live with his father. Libby testified specifically that Tyler and Stephanie's relationship significantly deteriorated recently. She stated that Tyler was simply not happy in California. The Chancellor determined that these problems were likely to remain in the foreseeable future. Any one of these facts may not be enough to rise to the level of a material change, however, considering them in total along with the effect these issues were having on Tyler's mental/emotional state were more than sufficient for the Chancellor to use her discretion in finding a material change adverse to Tyler.

### **ARGUMENT III.**

#### **THE CHANCELLOR DID NOT ABUSE HER DISCRETION IN MODIFYING CUSTODY AFTER CONDUCTING A THOROUGH *ALBRIGHT* ANALYSIS.**

The Chancellor analyzed all of the facts and conducted a thorough *Albright* analysis to correctly find physical custody should be modified to Randy. Of course, the polestar consideration in making a custody determination must be the best interest of the child. *Albright*, 437 So. 2d at 1005. The Court in *Albright* set out several factors which should be considered in determining the child's best interest. *Albright*, 437 So. 2d at 1005. However, as one commentator has noted "the difficult question of custody between two fit parents can never be reduced to a formula. Each case is different – judges are given great discretion to determine the

arrangement that best serves the needs of a particular child.” DEBORAH H. BELL, BELL ON MISSISSIPPI FAMILY LAW § 5.02 (1st ed. 2005).

After finding a material change in circumstances adverse to the interests of the child, the Chancellor properly conducted an *Albright* analysis to determine whether a change in custody was warranted. A summary of the Chancellor’s *Albright* analysis is as follows:

1. *Age, health and sex of child*: The Chancellor found that this factor slightly favored the father with regard to the child’s gender.
2. *Continuity of care prior to the separation*: The Chancellor found that this factor previously favored the mother when Tyler lived in California, but at the time of the analysis, this factor favored the father.
3. *Best parenting skills*: The Chancellor found that this factor favored the father due to the mother’s poor judgment in communicating with Tyler and delegating responsibility to the fifteen year old daughter during the many times when the mother was absent from the home.
4. *Willingness and capacity to provide care for child*: This factor favored neither party.
5. *Employment of the parents and responsibilities of employment*: This factor favored neither party.
6. *Physical and mental health and age of the parents*: This factor favored Randy due to Stephanie’s instability.
7. *Emotional ties of the parent/child*: This factor slightly favored Randy because the relationship between Tyler and Stephanie had weakened considerably.
8. *Moral fitness factor*: This factor favored neither party.
9. *Home, school and community record of the child*: This factor favored Randy because Tyler’s grades improved while he was in Mississippi, he attends Church in Mississippi and has a more extensive connection with Mississippi.
10. *Preference of the child*: This factor strongly favors Randy as Tyler testified on multiple times about his desire to live with his father.
11. *Stability of home environment*: This factor favored neither party.
12. *Other relevant factors*: The Chancellor considered the separation of the siblings and the effect it had on the family.

Stephanie mainly objects to the Chancellor’s favoring Randy for the continuity of care prior to the separation and the home, school and community record factors. As stated above, Stephanie believes that she should be favored in these analyses as Randy was only favored because of the Interim Order providing him with extended visitation. However, Stephanie ignores the wealth of evidence that shows otherwise. Both care before and after separation

should be considered in the continuity of care prior to the separation factor. *See Caswell v. Caswell*, 763 So. 2d 890, 893 (Miss. Ct. App. 2000). To determine who has been a child's primary caretaker Courts consider facts such as who bathed the child, put the child to bed, prepared meals, arranged social activities, handled medical care and clothing purchases, played with the child, *et cetera*. *See, e.g., Watts v. Watts*, 854 So. 2d 11, 13 (Miss. Ct. App. 2003). *See also* BELL, *supra*, § 5.03(3) (collecting authorities).

There was evidence presented that while in Las Vegas, Randy provided most of the children's care by picking them up from school and taking care of them in the afternoons. Randy continued to be Tyler's primary caregiver in Mississippi by helping him with schoolwork and becoming very involved in his education, getting a suitable place for his band to play, rather than the bar they played at in California, preparing his meals, shopping for him and completing all of the parenting needs for Tyler. Stephanie chose to spend time with her boyfriend rather than with the children, often leaving Libby in charge of the other two.

The Chancellor considered the time the parties resided together after the divorce and the fact that Randy currently had extended visitation of Tyler and that Tyler was doing well to favor Randy in the continuity of care prior to the separation factor.

Stephanie also argues that the home, school and community record factor should have favored her if not for the Court's Interim Order granting extended visitation to Randy. In analyzing this factor, the Court looks to the child's school record, involvement in community activities and where the child has lived for the longest period of time, if applicable. *Bower v. Bower*, 758 So. 2d 405 (Miss. 2000); *Sobieske v. Preslar*, 755 So. 2d 410 (Miss. 2000). Tyler was involved in many extracurricular activities in California as well as Mississippi and had extended family nearby in both locations. In Mississippi, Tyler's grades drastically improved



and he began attending Church with his father. Tyler began playing with his band in a local coffee shop and adjusted very well in Mississippi after remaining on extended visitation with his father. There was evidence that while Tyler lived in California, his grades were failing, Stephanie received a truancy notice for his school attendance, she did not help him with homework, she allowed his band to play in a bar and she did not attend church. This factor undoubtedly favored Randy.

After completing the *Albright* analysis, it was clearly in Tyler's best interest to modify custody to Randy. Even if Stephanie had been favored as to the continuity of care prior to the separation and home, school and community record factors, it nevertheless would have been in Tyler's best interest to modify custody as Randy was favored as to six of the remaining factors. However, there simply was not sufficient evidence to favor Stephanie over Randy as to these factors.

Stephanie also argues that the Chancellor should not have separated the siblings. The Chancellor considered the separation of the siblings and the evidence presented regarding this factor. The Mississippi Supreme Court has held that "[t]here is no 'hard and fast' rule that the best interest[s] of siblings will be served by keeping them together." *Copeland v. Copeland*, 904 So. 2d 1066, 1076-77 (Miss. 2004) (citing *Sellers v. Sellers*, 638 So. 2d 481, 484 (Miss. 1994)). In *Copeland*, the Supreme Court affirmed a chancellor's decision to award custody to a father, even though it required separation of a child from his half-sibling. *Id.* In this case, the Chancellor considered the effect it might have on the siblings. Both Libby and Tyler testified that it would have a small effect. Libby even testified that she just wanted her brother to be happy and she knew he would not be happy in California. Further, there did not appear to be a negative effect on the siblings because of the separation during the six months of Tyler's

extended visitation with his father. The evidence clearly showed that Tyler was doing very well in Mississippi and was flourishing. The Chancellor determined that any negative effect the separation might have did not outweigh the other factors favoring Randy for custody.

Since the Chancellor's meticulous analysis as to each *Albright* factor is supported by substantial evidence and was not an abuse of her discretion, the Court should affirm the Chancellor's decision.

#### **ARGUMENT IV.**

##### **THE CHANCELLOR PROPERLY CREDITED RANDY FOR AMOUNTS PAID AS SUPPORT.**

After hearing the evidence presented regarding child support amounts due, the Chancellor properly credited Randy for amounts paid and determined what he currently owed. The factual findings of the chancellor in civil contempt cases are affirmed unless manifest error is present. *Strain v. Strain*, 847 So. 2d 276, 278 (Miss. Ct. App. 2003). Contempt matters are committed to the sound discretion of the trial court, and should not be reversed where the Chancellor's findings are supported by substantial credible evidence. *Strain*, 847 So. 2d at 278. Child support obligations vest in the child as they accrue, and courts cannot modify or forgive them if they are not paid. *Varner v. Varner*, 588 So. 2d 428, 432 (Miss. 1991). The only defense to an action for contempt for failure to pay child support is payment of the amounts due. *Varner*, 588 So. 2d at 433. Once child support payments are past due they become vested and cannot be modified. *Premeaux v. Smith*, 569 So. 2d 681, 685 (Miss. 1990). Civil contempt for failure to timely make child support payments is not a proper recourse when there are no overdue payments at the time of trial. *Strain*, 847 So. 2d at 279.

Further, a parent may properly receive credit for child support where the parent directly supported the child and to hold otherwise would unjustly enrich the other parent. *Varner v.*

*Varner*, 588 So. 2d 428, 435 (Miss. 1991). That is, a parent is entitled to a credit for child support for time during which the child resided with and was supported by the parent. *Alexander v. Alexander*, 494 So. 2d 365, 368 (Miss. 1986). See also *Smith v. Smith*, 20 So. 3d 670, 677 (Miss. 2009).

Appellant is correct in her statement of the law that past due child support amounts cannot be modified by the Court. However, the Chancellor here did not modify the past due amount, instead she listened to the evidence presented and determined that Randy should be given specific credits for amounts *already paid* by him. Of course, payment of child support is a defense to a contempt action and the Chancellor's role is to determine whether any amounts have been paid and what is currently owed. Initially, the Court found that Randy owed \$14,537.00 in child support. The Chancellor credited Randy for the following amounts due to the evidence which was produced over the course of the trial:

- (A) \$2,939.00, which was paid by Randy via Western Union funds;
- (B) \$1,019.85, which represents one-half (1/2) the airline ticket expense paid by Randy for visitation during Thanksgiving 2007;
- (C) \$1,995.00, as an adjustment for the time Randy and Stephanie resided together with the children from Sept. 2004 through March 2005, and during which time he directly provided support for the children, which was calculated as seven (7) months of support at the rate of \$285 monthly for which an adjustment was made for the full amount thereof;
- (D) \$2,137.50, as an equitable adjustment to child support due from May 2003 through August 2004, payment of which was disputed by the parties. The Court finds the credible proof supports an adjustment in this sum to Randy's support obligation for the stated time period, which was calculated as fifteen (15) months of support at the rate of \$285 monthly, for a total of \$4,275, for which an adjustment was made for one-half (1/2) the amount thereof. Stephanie asserted Randy provided little support, while Randy asserted he provided full support for the expenses of the family, and the Court's finding is based on its assessment of the credible proof presented at trial.
- (E) \$1,710.00, for child support paid from July 2008 through December 2008, during which time the subject child resided with Randy, which the Court calculated as six months of support at the rate of \$285 monthly for which an adjustment was made for the full amount thereof.

(C.P. p. 150). After credits and adjustments, the Chancellor found that Randy currently owed \$4,735.65. (*Id.*).

The Trial Court did not modify Randy's child support obligation; rather, the Court credited Randy for amounts he paid or for times he actually supported the children. There was credible evidence that Randy sent money to Stephanie using Western Union. Stephanie agreed that Randy purchased the airline ticket for Thanksgiving 2007 and that she never reimbursed him for her half. There was conflicting testimony from both parties about the time they lived together and Randy's amount of support. Finally, Randy paid Stephanie \$285 per month from July 2008 through December 2008 when Tyler was at his home for extended visitation. Randy was able to present evidence that he paid the amounts that he was credited for. Providing Randy with the foregoing credits was within the sound discretion of the Trial Court and is supported by substantial credible evidence presented at trial.

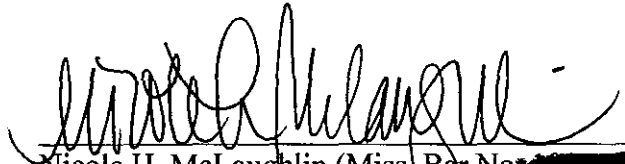
### **CONCLUSION**

The Chancellor properly granted Randy Bolton extended visitation of Tyler on an interim basis during the pendency of the trial as it was in Tyler's best interest. The Chancellor in this case properly found that a material change in circumstances adverse to the minor child had occurred and carefully evaluated all of the *Albright* factors. The Chancellor considered the separation of the siblings in the *Albright* analysis. The Chancellor determined that it was in Tyler's best interest to award physical custody to Randy Bolton. Further, the Chancellor properly credited Randy with amounts he paid toward child support. The Chancellor's decisions are supported by substantial evidence, indeed overwhelming evidence, in the record. Accordingly, Appellee requests the Court to affirm the Chancellor's decision in all respects.

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

**MCLAUGHLIN LAW FIRM**

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**CERTIFICATE OF SERVICE**

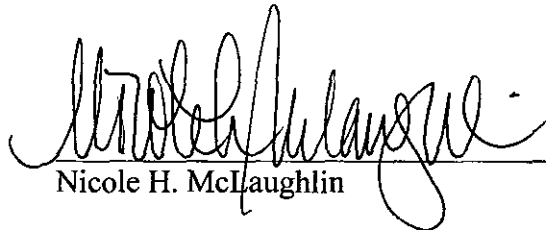
I, Nicole H. McLaughlin, attorney for the Appellee in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of **Brief of Appellee** to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

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**Hon. Jacqueline Estes Mask  
Chancellor  
Post Office Box 7395  
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This the 10<sup>th</sup> day of August, 2010.

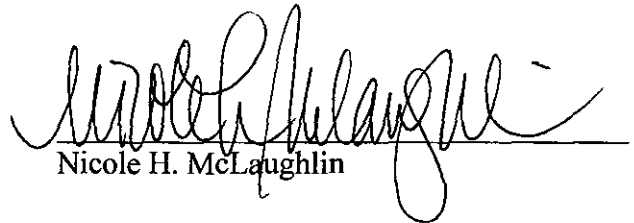
  
\_\_\_\_\_  
Nicole H. McLaughlin

**CERTIFICATE OF FILING**

I, Nicole H. McLaughlin, attorney for the Appellee in the above styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the **Brief of Appellee** by mailing the original of said document and three (3) copies thereof via First Class Mail, postage pre-paid, to the following:

**Ms. Betty W. Sephton  
Supreme Court Clerk  
P.O. Box 249  
Jackson, MS 38295-0248**

This, the 10<sup>th</sup> day of August, 2010.

  
Nicole H. McLaughlin