

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CIVIL CAUSE NO.: NO. 2009-CA-01342

**BRIAN KEITH MASTERS
APPELLANT**

VS.

**HEATHER BROOK LAIRD MASTERS
APPELLEE**

APPELLEE'S BRIEF

**APPEAL FROM THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI**

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CERTIFICATE OF INTERESTED PARTIES

CIVIL CAUSE NO.: 2009-CA-01342

**BRYAN KEITH MASTERS
APPELLANTS**

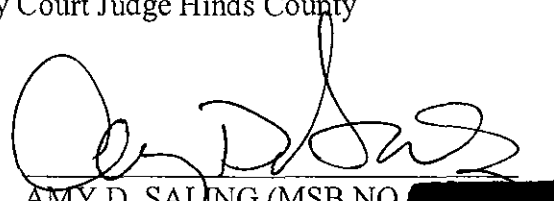
VS.

**HEATHER BROOK LAIRD MASTERS
APPELLEE**

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. Heather Brook Laird Masters, Appellee
2. Bryan Keith Masters, Appellant
3. Robert O. Waller, Attorney for Appellee
4. Amy D. Saling, Attorney for Appellee
5. E. Michael Marks and Julie Ann Epps, Counsel for Appellant on Appeal
6. E. Michael Marks, Counsel for Appellant at trial
7. Honorable Denise Owens, Chancery Court Judge Hinds County

This the ____ day of March, 2010.


AMY D. SALING (MSB NO. [REDACTED])
BOB WALLER (MSB NO. [REDACTED])

Attorney of Record for Appellee,
Heather Brook Laird Masters

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I. STATEMENT OF ISSUES

1. The Chancery Court did not Err in it's Judgment to Deny Bryan Keith Masters' Motion for Modification to Award Him Primary Physical Custody of the Minor Child

STATEMENT OF THE CASE

I. PROCEDURAL HISTORY

Bryan Keith Masters and Heather Brook Laird Masters were married on September 5, 1998. One child was born to the marriage, namely Sommer Grace Masters, born June 7, 1998. The parties were granted a Irreconcilable Differences Divorce on July 18, 2000. As part of the Child Custody, Child Support and Separation and Property Settlement Agreement, Heather and Bryan were awarded joint legal custody of the minor child and Heather was awarded primary physical custody of the minor child, Sommer Grace Masters. Bryan was to pay \$200.00 per month in child support and was awarded reasonable visitation rights.

On March 23, 2009 Bryan filed a Motion for Modification of Former Judgement of Divorce asking that the Court award him physical custody of the minor child, require Heather to pay child support and award him attorney's fees and all costs of Court.

On April 15, 2009 Heather filed an Answer to Movant's Motion for Modification of Former Judgment of Divorce and Counter-Petition to Modify Former Judgment and Complaint for Contempt asking that the Court modify the Judgment to reflect an accurate monetary figure for the amount of child support on behalf of the minor child and to restrict visitation between the minor child and her paternal grandparents to times when the Father is present. Also, Heather asked the Court to hold Bryan in Contempt for talking negatively about her and her family around the minor child and requested attorney's fees as well.

On July 30, 2009, Chancellor Denise Owens conducted a hearing on the above referenced matters and by Judgment dated August 12, 2009 the Chancellor found that Bryan failed to show a material change in circumstances and denied his request to grant him physical custody of Sommer

Grace Masters. She further found that Bryan should be required to pay \$500.00 per month in child support per Heather's request in her Motion for Modification. She denied Heather's request to cite Bryan for contempt and left all other provisions of the divorce decree intact.

On August 17, 2009 Bryan filed his Notice of Appeal of the Judgment dated August 12, 2009.

II. STATEMENT OF THE FACTS

The Appellee, Heather Brook Laird Masters, respectfully disagrees with the Appellant's Statement of Facts presented in his brief. Heather has had primary physical custody of the minor child since the date of the divorce, July 18, 2000. Bryan filed a Motion for Modification on March 23, 2009. The Court found that all of the allegations presented by Bryan in his Motion for Modification and through testimony at the hearing were unsubstantiated and that there was no evidence presented to support the allegations that there had been a material change in circumstances in the custodial home adversely affecting the minor child to warrant a change in physical custody of the minor child. Heather testified at trial that she provides Sommer with a home environment in which all her needs are met. Sommer has passed all grades in school, works with a tutor for certain subject areas, has her own bedroom in the home, goes to the dentist regularly and is loved and cared for by her family and friends. Heather also testified that Sommer's allergies and learning disability are treated and under control. Further, the Chancellor heard all facts and found that a change in custody was not warranted.

III. SUMMARY OF THE ARGUMENT

The standard of review for this case is substantial evidence. We submit the long-standing principle of appellate law dealing with the decision on the facts by the Chancellor which rule is set out in the 2009 case of *Webb, et al. v. Drewrey, et al.*, 4 So. 3d 1078 (2007-CA-01935 SCT) (Miss. App. 2009) [*affirmed 02-24-09*], which states: "In a bench trial, the chancellor is the finder of fact and, thus, solely determines the credibility of the witnesses and the weight to be given to the evidence. This court gives great deference to a chancellor's finding of facts. Therefore, we will not disturb the finding of the chancellor when supported by substantial evidence unless the chancellor abused her discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied."

There is absolutely no evidence presented in the record to support a finding that the Chancellor in this case abused her discretion in any way, was manifestly wrong or clearly erroneous. Furthermore there was not an erroneous legal standard applied. In her bench ruling the chancellor states:

"With regard to the evidence that was presented and the standard, the standard in terms of modifying a child custody award is that the party seeking to modify the grant of custody to one parent, in this case, the other parent, is that there must be a showing of material change in circumstances that adversely affects the child, and, as indicated, those reasons proposed by Mr. Masters that adversely affect the child are set out in the petition, and there was testimony regarding those. With regard to the dental care, there was evidence insufficient to establish that the child is suffering from the lack of dental care. There is evidence of her problems with school, and she has had problems with school and needs attention more so than the other children regarding those, and the evidence seems to indicate that she is getting that help. And just to go to the meat of this situation, I think one of the major things is the smoking, and I will give Ms. Masters the benefit that they are no longer smoking the home because it's detrimental to all the children, the smoke.

Probably one thing is the fact that she's living in a relationship, in a home with a man to whom she is not married, and Mr. Marks pointed that out quite a bit, that she is not married to him and they, in fact, have another child who's born out of wedlock, which indicates there is some instability, given the fact that Ms. Masters had been divorced,

then married, and then divorced, and now it looks like at least she's had a child by another man. And the question is in my mind whether or not that's a material change that would adversely affect the minor child, because that seems to be the main issue here, given the fact that these other matters seem to have resolved. Just like the young 18-year-old and so forth, there seems to be a shift in the social fabric of our country where living with someone without the benefit of marriage becomes more of the norm than otherwise. Of course, although I don't agree with it, our courts have said that that is not a basis from which the Court should find that there is a material change in circumstances that adversely affects the child, so it looks like our courts are making a shift, that there has to be some independent finding of adversity before the Court can make such a finding, I personally don't agree with that, but that is what our courts have provided, and based upon that, I will have to deny the request to modify the primary custody of the minor child.

In her ruling, the Chancellor outlined the standard of proof for the case at hand, a material change in circumstances in the custodial home adversely affecting the child, and she went through each and every allegation brought by Bryan in his Motion for Modification to prove his case for a modification in custody. Each and every allegation was either resolved or found to be unsubstantiated by the Judge. The last factor and seemingly most important issue from the Judge's standpoint was also discussed at length in her ruling and she found that the fact that Heather is living with her fiancé is not enough to constitute a material change in circumstances adverse to the child. There was no error by the Judge in failing to award primary physical custody of the minor child to Bryan.

IV. ARGUMENT

A. Standard of Review:

The standard of review for this case is substantial evidence. We submit the long-standing principle of appellate law dealing with the decision on the facts by the Chancellor which rule is set out in the 2009 case of *Webb, et al. v. Drewrey, et al.*, 4 So. 3d 1078 (2007-CA-01935 SCT) (Miss. App. 2009) [*affirmed 02-24-09*], which states: "In a bench trial, the chancellor is the finder of fact and, thus, solely determines the credibility of the witnesses and the weight to be given to the evidence. This court gives great deference to a chancellor's finding of facts. Therefore, we will not disturb the finding of the chancellor when supported by substantial evidence unless the chancellor abused her discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied."

B. Merits:

Heather currently resides at 615 Foster Road, Florence, Mississippi in a 2006 modular home on four (4) acres of land. She has lived in this home for over a year and a half with her fiancé and three (3) children. (R.E. 9) Heather has primary physical custody of all (3) three of her children. In Heather's home, each of the two (2) older children have their own room and the baby sleeps in a basinet beside Heather's bed. Ashton Robinson, a family friend, testified at the hearing that Heather keeps a very clean house. She also testified that Heather and Jerry cook dinner together for the children every night and the children are well fed. (R.E. 27) Heather also testified that Sommer has several girlfriends that live down the road from their home that Sommer plays with on a regular basis. Sommer and her friends take part in activities such as riding four-wheelers and swimming. (R.E. 26) Heather has Sommer involved in church activities at Mt. Zion as well as bible school. (R.E. 26) As evidenced by the testimony presented by Heather and several witnesses, Sommer's

home environment is loving and nurturing and all her physical and emotional needs are met. The Appellant's brief goes to great length to outline Heather's relationships and living arrangements from the time of Heather and Bryan's divorce in July 2000 to present; however, it has taken approximately nine (9) years from the time of their divorce for him to be concerned enough to file a Motion for Modification of Child Custody concerning Sommer. (Appellant's Brief page 4).

The Appellant's brief goes on to discuss the following issues: a. the diagnosis of Sommer's learning disability and the treatment of said disability, b. Heather's weekend work schedule, c. Heather's living situation, d. the presence of cigarette smoke in Heather's home, e. Sommer's dental care, f. Heather's fiancé, Jerry, and g. Sommer's self confidence. In her ruling, the Chancellor outlined the standard of proof for the case at hand, a material change in circumstances in the custodial home adversely affecting the child, and she went through each and every one of these same issues brought by Bryan in his Motion for Modification to prove his case for a modification in custody. Each and every allegation was either resolved or found to be unsubstantiated by the Judge. The last factor and seemingly most important issue from the Judge's standpoint was also discussed at length in her ruling and she found that the fact that Heather is living with her fiancé is not enough to constitute a material change in circumstances which would adversely affect the child.

a. Sommer's Learning Disability:

Sommer attends Steen's Creek Elementary School in Florence, Mississippi. Sommer was in the fourth grade at the time that this matter began and is currently in the fifth grade. Testimony was presented during the hearing by both parties that Sommer does have a learning disability more specifically in mathematics. Heather testified that she had Sommer tested for the disability and has attended all meetings and counseling sessions with Sommer's teachers concerning the disability. Heather also testified that she helps Sommer with her homework every evening and has retained a

tutor to help Sommer with her math, specifically. (R.E. 25) Sommer has not failed any grade level in school. (R.E. 25) Jerry also testified that he helps Sommer every day that rolls around during the school year and that he has helped Sommer pick up her grades since he has been helping her. (R.E. 12) Ashton Robinson, a family friend, also testified that she helps Sommer with her schoolwork, especially her math. Bryan testified that he had not seen any of Sommer's report cards since 2006. (R.E. 23) After viewing Sommer's current report card at the hearing, Bryan testified that there were no failing grades on the report card and that the special education teachers that Sommer currently have would be similar to those available for her in Georgia. (R.E. 24) Bryan testified that he and his wife have access to Sommer's teachers and in fact have spoken to them and emailed on several occasions. (R.E. 24) While Bryan has alleged that Heather does not provide him with Sommer's report cards, Bryan; admittedly, has had equal opportunity to consult with Sommer's teachers and review Sommer's grades and it can be inferred by the testimony that he presented that he has not received any report cards and he failed to request them from the school. There was testimony after testimony from the above witnesses concerning Sommer's learning disability and the management of said disability by Heather. In the final Judgment the Chancellor stated that "There is evidence of her problems with school, and she has had problems with school and needs attention more so than the other children regarding those, and the evidence seems to indicate that she is getting that help."

b. Heather's Weekend Work Schedule:

Heather is currently employed by Roger Penn, owner of Penn's Restaurant. Heather works Monday through Sunday at the Lakeland Drive location from 10:00 a.m. until approximately 4:35p.m. (R.E. 6). Due to her work schedule, either Jerry or Bryan's parents keep Sommer on the weekends while Heather is working. Jerry also testified at the hearing in this matter that Sommer's paternal grandparents often keep Sommer on the weekends because of Heather's work schedule;

however, Jerry is also available at this time to keep the children. He keeps the other children on the weekends when Heather is working.(R.E. 11,12) There was absolutely no testimony to substantiate Bryan's allegations that Heather was taking Sommer to her paternal grandparents on the weekend to pursue her social calendar. Heather is a very hard worker and her testimony regarding her employment and weekend hours goes to show that she is working to support her family and not spending her weekends to pursue her social calendar.

c. Heather's Living Situation:

As previously stated, Heather currently resides at 615 Foster Road, Florence, Mississippi in a 2006 modular home on four (4) acres of land, where she has lived for over a year and a half with her fiancé and three (3) children. (R.E. 9) Heather has primary physical custody of all three (3) of her children. In Heather's home, the two (2) older children each have their own room and the baby sleeps in a basinet beside Heather's bed. Ashton Robinson, a family friend, testified at the hearing that Heather keeps a very clean house. She also testified that Heather and Jerry cook dinner together for the children every night and the children are well fed. (R.E. 27) Heather also testified that Sommer has several girlfriends that live down the road from their home that Sommer plays with on a regular basis. Sommer and her friends take part in activities such as riding four-wheelers and swimming. (R.E. 26) As evidenced by the testimony presented by Heather and several witnesses, Sommer's home environment is loving and nurturing and all her physical and emotional needs are met.

d. The Presence of Cigarette Smoke in Heather's Home:

Bryan made the allegation in his Motion for Modification that Sommer's clothes smelled of cigarette smoke when she came to visit them and that this was a result of Heather and Jerry smoking

around Sommer. Heather testified at the hearing that she and Jerry do in fact smoke; however, they do so outside of the home. (R.E. 7) Heather also testified that she began smoking outside of the home when Sommer developed allergies. (R.E. 7) While Sommer has not been diagnosed with an allergy to tobacco smoke, Heather and Jerry refrain from smoking in the house. (R.E. 7) Bryan testified at the hearing that Sommer is supposed to take medication daily, and also use nasal spray for her allergies. He also stated that when he gets her back from Heather; however, he has to get the prescriptions refilled himself. (R.E. 20) There were no allegations in Bryan's Motion concerning Sommer not receiving medication for her allergies; however, the fact that he is refilling prescriptions goes to show that the medication is being taken by the child. There was absolutely no testimony at the hearing to indicate that the child was not receiving proper medication to treat her allergies. In the final Judgment the Chancellor stated that "...And just to go to the meat of this situation, I think one of the major things is the smoking, and I will give Ms. Masters the benefit that they are no longer smoking the home because it's detrimental to all the children, the smoke." The Judge found the testimony presented at the hearing sufficient to conclude that Summer's allergies were being taken care of by Heather and that she and Jerry have not been smoking in the home. (R.E. 29)

e. Sommer's Dental Care:

Bryan made the allegation in his Motion for Modification that Sommer's dental needs were not being met. Heather testified that she has always taken Sommer to the dentist and that her last dental appointment was about three (3) months before the hearing in this matter. (R.E. 7) She also testified Bryan was in town when Sommer had her last dental visit and took Sommer to that visit. (R.E. 8) When asked by counsel if Sommer sees the dentist on a regular basis, Bryan could neither admit or deny this fact. When asked by counsel "You didn't ask the dentist when you took her to the dentist if she was seeing a dentist on a regular basis?", Bryan answered "I had made arrangements at Polk, and she pulled

her out of Polk's and put her in this current one that she's currently going to, that I've taken her to in this last appointment, her last appointment I took her to." By his own admission Bryan stated that Heather put Sommer in a new dentist. Bryan gave no testimony and presented no evidence to substantiate his allegations that Sommer's teeth were not being taken care of and that she was not seeing a dentist on a regular basis. The Judge found "With regard to the dental care, there was evidence insufficient to establish that the child is suffering from the lack of dental care." (R.E. 28)

f. The presence of Jerry, Heather's Fiancé, in the Home:

As previously stated, Heather currently resides at 615 Foster Road, Florence, Mississippi in a 2006 modular home on (4) four acres of land. She shares this home with her fiancé, Jerry and her three (3) children. Heather and Jerry both testified that they are engaged and planning a wedding; however, with the financial constraints put on them by the defense of Bryan's Complaint and stress that goes along with it, they have had to postpone ceremony plans. (R.E. 14) Jerry testified that he and Heather love one another and they love their kids and they are getting married. (R.E. 15) Jerry is currently disabled and unable to work outside the home; however, he is available to watch the children when Heather is working and not at home. (R.E. 10) Having Jerry at the home cuts the cost of daycare and babysitters for any of the children. Jerry testified that he helps Sommer with her school work and has helped her pull her grades up. (R.E. 12)

Heather and Jerry both testified that they bought a used dryer from their neighbors because their dryer was not working. (R.E. 13) They had no knowledge nor did they find out and that the dryer was stolen property until the police came to their house and asked if they had the dryer. (R.E. 13) Jerry testified that he was never arrested for this matter. Though Jerry was arrested for a False Pretense charge and is out on bond, he has never been convicted and he went to court concerning this matter and everything seemed to be cleared up as he had previously reported three (3) checks being

stolen from his account and the False Pretense charge stemmed from the cashing of one (1) of those checks. Bryan testified that he had never met Jerry until the day of the hearing. (R.E. 21) Bryan did not present any documentation of any arrest or conviction of Jerry at the hearing and in fact he could not testify to any personal knowledge regarding the alleged arrest or convictions of Jerry. (R.E. 22)

g. Sommer's Self Confidence:

Bryan made the allegation in his Motion for Modification that Sommer lacked self confidence. Heather testified that Sommer has shown no indication of a lack in self confidence or self esteem. (18) Heather also testified that she recently spoke with Sommer's teacher at school and the teacher stated that Sommer is always smiling and is very happy. (R.E. 8) The only testimony that was given by Bryan to substantiate his allegation was testimony by his wife, Darla. Darla stated that "...She is a very outgoing little girl, but she holds back a lot of things. As far as, you know, in dance, she'll shy away from kind of dancing. She's not self-confident in anything she does usually. I mean, I'm trying to figure out another time." Darla Masters is neither a child psychologist or a qualified expert in the field and the only instance in which she could use to illustrate Sommer's alleged lack of self confidence is the fact that she stands in the back in her dance recitals. (R.E. 16) One could only speculate as to why Sommer is in the back during these recitals. It could be because of her height and it was not clarified at the hearing whether or not Sommer's placement on the back row was Sommer's choice or merely a decision of the dance teacher or choreographer. As this was the only testimony presented to substantiate the alleged lack of self confidence, it is insufficient to establish that the child is suffering from the lack of self confidence or self esteem.

C. The Chancery Court did not Err in it's Judgment to Deny Bryan Keith Masters'

Motion for Modification to Award Him Primary Physical Custody of the Minor Child

In her bench ruling, the Chancellor outlined the standard in terms of modifying a child custody award as a showing of a material change in circumstances that adversely affect the child. (R.E. 19) The Chancellor heard and considered all the above facts and testimony presented by both Bryan and Heather, as well as multiple other witnesses, and in her bench ruling found that the testimony concerning treatment/non-treatment of Sommer's learning disability, dental care, and problems associated with allergies to be insufficient to substantiate the allegations. She went through each allegation insofar as to state her decision as to the merits of each. (R.E. 29)

The allegation that the Chancellor spent the most time considering and discussing in her bench ruling is the fact that Heather is currently living with a man to whom she is not married and she has been married and divorced another time. (R.E. 29) While the Chancellor stated that this factor is one that should be considered, she must decide whether this one factor and this factor alone is enough to constitute a material change that would adversely affect the minor child. (R.E. 29) She goes on to state that this is the main issue of the case given that all the other matters seem to have been resolved. (R.E. 29) The Chancellor clearly and succinctly stated the fact that Heather had a relationship outside of marriage, and that fact alone, is not a *per se* ground for changing child custody. (R.E. 29) The Chancellor went on to say that there has to be some independent finding of adversity before the Court can make such a holding. In *Phillips v. Phillips* the Court stated that "There are two prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, after the entry of the judgment sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child.

Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody. *Phillips v. Phillips*, 555 So.2d 698 (Miss. 1989). Furthermore, in *Kavanaugh v. Carraway*, the Court stated that the Chancellor cannot use indiscretions of the custodial parent as the sole ground to change child custody but must look at the overall facts; the “totality of the circumstances” must be considered.” *Kavanaugh v. Carraway*, 435 So.2d 697 (Miss. 1983). Being that all other allegations set out in Bryan’s Motion were heard and considered in their totality and dismissed as unsubstantiated, Heather’s alleged indiscretions were the only remaining piece that the Chancellor had to consider when determining if there had been a material change in circumstances adverse to the child. In line with case precedence, the Chancellor held that this fact alone was not sufficient grounds for modification of child custody. In his brief, the Appellant properly points out that “the Court in *Sullivan v. Stringer* found that ‘the existence of the relationship is insufficient, but if the relationship coupled with other conduct... indicates the custodial parent’s behavior is harmful in additional ways, custody may be changed’; however, in the case at hand there was no other conduct to couple with. In her bench ruling, the Chancellor acknowledges that all of Bryan’s other allegations were unsubstantiated. (R.E. 29) *Sullivan v. Stringer*, 736 So.2d 514,517 (Miss. App. 1999).

D. Albright Factors:

The Appellant’s brief goes on to analyze the factors set forth in *Albright v. Albright*; however, these factors were not discussed at the initial hearing as Bryan never overcame the hurdle of proving by a preponderance of the evidence that there had been a material change in circumstances adverse to the child. *Albright v. Albright*, 437 So.2d 1003 (Miss.1983). However, had said *Albright* factors been considered, Heather is clearly favored in that regard.

1. **Age, Health and Sex of the Child:** Sommer is a healthy 11 year old female. While the child may not be of tender years, this factor does not automatically swing to the father's favor. The Appellant contends that he should be awarded this factor on the basis that he is more conscientious of Sommer's health issues. He basis this statement on the lone fact that he had Sommer tested for allergies. Heather has had continuous care and custody of Sommer since birth and therefore have a strong mother-daughter bond. It is Heather who has taken care of Sommer's medical needs on a regular basis as her primary custodian and to simply award this factor to Bryan on the basis of one doctors visit is ludicrous. This factor should weigh in favor of Heather.

2. **Continuity of Care:** Heather was awarded custody of Sommer when she divorced Bryan and has had continuous care and custody of Sommer since that date. Due to the nature of Bryan's work and his service in the military overseas, it has not been possible for him to exercise consistent standard visitation with Sommer. This factor should weigh in favor of Heather.

3. **Parenting Skills:** The Appellant contends that he should be awarded this factor on the basis that he is more conscientious of Sommer's learning disability and health problems. Again he basis this statement on the lone fact that he had Sommer tested for allergies and had her tested for her learning disability. Heather testified that she had Sommer tested for the disability also and has attended all meetings and counseling sessions with Sommer's teachers concerning the disability. Heather also testified that she helps Summer with her homework every evening and has retained a tutor to help Sommer with her math specifically. (R.E. 25) Summer has not failed any grade level in school. (R.E. 25) Heather has taken care of all of Sommer's medical, emotional and physical needs since birth on a daily basis. This factor should weigh in favor of Heather.

4. **Willingness and Capacity to Provide Primary Care:** Both parents are willing to provide primary care to the child. Heather has been providing for Sommer for 11 years and the child has always been clothed, fed and taken care of. She lives in a modular home on four (4) acres of land. (R.E. 9) Bryan's home is an apartment/condo. Heather works very hard to support her family and while she works, she has a strong support team to watch over her children until she gets home. Bryan also works hard to provide for his family and he also has a support team, namely his wife, to watch over his children until he gets home. Both parties have the willingness and capacity to provide primary care to Sommer. However, because Heather has been the primary care giver, she should continue to in this role.

5. **Employment Responsibilities and Stability of Employment:** Both Bryan and Heather work steady jobs. Heather has worked with Penn's for six (6) years. Bryan has been with the military for thirteen (13) years. The Appellant alludes to the fact that Heather has had sporadic work and therefore this factor should weigh in his favor. However, Heather has in fact held a steady job. Both parties have responsibilities and stability of employment.

6. **Age and Mental Health of Parents:** This factor favors neither parent.

7. **Emotional Ties of Parent and Child:** This factor weighs in Heather's favor. Heather and Sommer have a strong emotional bond. As stated before, Heather has had physical custody of Sommer since the divorce. Due to Bryan's employment, he has lived either out of state or been overseas for a majority of that time and Heather has been the one to care for Sommer when he is not present. While there is no denying that Sommer loves and cares for both of her parents, it would be negligent to deny the fact that mother and daughter have a strong emotional bond.

8. **Moral Fitness of the Parent:** Heather testified that Sommer has attended church

activities when she is in her care and while those activities were disrupted temporarily, Sommer is again returning to those activities at the church. (R.E. 7) Bryan testified at the hearing that they have found a church to attend; however, because of court appearances in this case they had not yet attended. (R.E. 18) At the present time neither Bryan nor his wife are a member of a church. (R.E. 17) While Heather is not married at the present time to her fiancé, Jerry, they plan to be married soon and in fact would have been married already had it not been for the disruption of this lawsuit and fees incurred therein. This factor favors neither parent.

9. **Home, School and Community Record of the Child:** Sommer has been residing with her mother in Mississippi since the date of the divorce. Sommer is involved in school activities, church activities, and dance classes. She has friends in her neighborhood that she plays, swims and rides 4-wheelers with. (R.E. 26) Sommer has multiple sets of grandparents in the community and to take her away from her family, friends, school and church would be an error. In his brief, the Appellant compares the fact that Sommer spends some weekends with her grandparents to a surrender of parental responsibility to a third party. Heather is generous in letting all of Summer's grandparents see Sommer whenever they want and many times on the weekend. To share the joy of grandchild with her grandparents can hardly be compared to a surrender of parental responsibility. As the testimony at the hearing showed, Sommer does have a learning disability and it is being treated by Heather through special education teachers and tutors. (R.E. 25) The help that Sommer is receiving for her learning disability in Heather's care is comparable to any help that she could receive in Bryan's care. (R.E. 24) This factor weighs in the favor of Heather.

10. **Preference of Child:** There is no testimony as to Sommer's preference but the testimony of both Heather and Bryan clearly show that she loves both parents.

11. **Stability of Home Environment:** Testimony was presented at the hearing and previously mentioned in this brief that Heather currently resides at 615 Foster Road, Florence, Mississippi in a 2006 modular home on four (4) acres of land. She has lived in this home for over a year and a half with her fiancé and three (3) children. While the Appellant points out in his brief that Heather has lived in several places since the divorce, the same can be said for Bryan. Bryan has lived in two different states and has been overseas for a two (2) tours of duty in Iraq. Through no fault of his own, Bryan's home environment has not been stable. This factor favors neither parent.


As Bryan never overcame the hurdle of proving by a preponderance of the evidence that there had been a material change in circumstances adverse to the child, the *Albright* factors were not specifically considered at the hearing. *Albright v. Albright*, 437 So.2d 1003 (Miss.1983). However, had said *Albright* factors been considered, Heather is clearly favored in that regard.

V. CONCLUSION

The Chancellor heard and considered all the above facts and testimony presented by both Bryan and Heather, as well as multiple other witnesses, and in her bench ruling found that the testimony concerning treatment/non-treatment of Sommer's learning disability, dental care, and problems associated with allergies to be insufficient to substantiate the allegations. She went through each allegation insofar as to state her decision as to the merits of each. (R.E.29) Being that all such allegations set out in Bryan's Motion were heard and considered in their totality and dismissed as unsubstantiated, Heather's alleged indiscretions were the only remaining piece that the Chancellor had to consider when determining if there had been a material change in circumstances adverse to the child. The Chancellor clearly and succinctly stated that the fact that Heather had a relationship outside of marriage, and that fact alone, is not a *per se* ground for changing child custody. Therefore the Chancery Court did not err in its Judgment to Deny Bryan Keith Masters' Motion for Modification to award him primary physical custody of the minor child.

RESPECTFULLY SUBMITTED, this the 23rd day of March, 2010.

HEATHER BROOK LAIRD MASTERS, APPELLEE

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CERTIFICATE OF SERVICE


I, Amy D. Saling, the undersigned counsel of record for the Appellee, do hereby certify that I have this date mailed, postage prepaid, by United States mail a true and correct copy of the foregoing Brief of Appellee upon the following:

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First Judicial District of Hinds County Judge
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SO CERTIFIED, this the 23rd day of March, 2010



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