

TABLE OF CONTENTS

	PAGE
Table of Contents	<i>i</i>
Table of Authorities	<i>ii</i>
Argument	1
Conclusion	6
Certificate of Service	8

## TABLE OF AUTHORITIES

<u>A. MISSISSIPPI CASES</u>	<u>PAGE(S)</u>
<i>Dorr v. Dorr</i> , 797 So. 2d 1008 (Miss. Ct. App. 2001)	2, 6
<i>Floyd v. Floyd</i> , 949 So. 2d 26 (Miss. S. Ct. 2007)	4
<i>Polk v. Polk</i> , 589 So. 2d 123 (Miss. 1991)	3, 4, 5
<i>Rice v. Merkich</i> , 2009-CA-00318-SCT (SCT May 6, 2010)	4
<i>Riley v. Doerner</i> , 677 So. 2d 740 (Miss. 1996)	3
<i>Robinson v. Lanford</i> , 822 So. 2d 1034 (Miss. App. 2002)	3
<i>Robinson v. Lanford</i> , 841 So. 2d 1119 (Miss. S. Ct. 2003)	4
<i>Rogers v. Taylor</i> , 755 So. 2d 33, 37 (Miss. Ct. App. 1999)	4
<i>Wright v. Wright</i> , 737 So. 2d 408 (Miss. Ct. App. 1998)	2

## ARGUMENT

I. The Court erred by failing to give Chad Potts credit for income tax refunds his ex-wife, Felicia Windham, obtained by claiming their child, Cody Potts, as a dependent for federal and state income tax purposes.

In her response to this assignment of error, the only new legal argument raised by Felicia Dawn Windham, the Appellee herein, was her charge that Chad was not entitled to credit for the income tax refunds she received by claiming the child in contravention of the Judgment of Divorce because he came to court with unclean hands. This was in fact raised in her Answer but never sustained by the Chancellor. As reflected in the Judgment and the Amended Judgment, there was a finding that Mrs. Windham also violated the prior Judgment of the Court, and exactly the same argument can be made regarding her conduct. The Chancellor did not make a finding of unclean hands and had good reason not to do so. Chad proved that, between the divorce, in 2001, and early 2007, he had almost no income.

Mrs. Windham continues to assert that there was no agreement between she and Chad regarding the use of the child exemption for tax purposes. She points out, both in the argument under this assignment of error and the Summary of Argument, that Chad and Mrs. Windham both claimed the child as a dependent for tax purposes for the year 2007. She suggests that this proves that there was no agreement. That argument has no merit because Mrs. Windham had already put Chad on notice that she denied such an agreement when she filed her Answer and Counterclaim on July 17, 2008. (R 36-42) Chad's tax return for the year 2007 was not filed until August 14, 2008. (Exhibit 8)

As indicated earlier, whether Mrs. Windham agreed to accept the tax exemption for Cody as an offset against child support, or whether she did so unilaterally, thereby intentionally breaching the Judgment of Divorce, is of no great moment. The argument that Chad is not entitled to a credit because the tax exemptions were of no value to him is likewise inapposite. First, there is no proof in the record that there was no value to Chad. Likewise, there is no citation to any authority that would support that legal conclusion.

All of these arguments by Mrs. Windham are abrogated by this Court's holding in *Dorr v. Dorr*, 797 So. 2d 1008 (Miss. Ct. App. 2001). It is not a matter of enforcing any agreement and that was not an issue before either Court. The important considerations, and the ones that should control, are those that are discussed at great length in *Dorr*. First, did the fact that Mrs. Windham, by claiming Cody as a dependent, and obtaining tax refunds of over \$18,000.00, adversely affect the best interest of the true beneficiary of the child support obligation, Cody Potts? As in *Dorr* and in the case of *Wright v. Wright*, 737 So. 2d 408 (Miss. Ct. App. 1998), which is cited in *Dorr v. Dorr*, it did not. The child in fact gained a direct benefit because money otherwise not available was made available. Second, was Mrs. Windham unjustly enriched by the \$18,000.00 earned through the violation of the Chancery Court's Judgment or, will she be unjustly enriched now, if Chad is compelled to pay that amount again? The *Wilburn* case relied upon by the Chancellor and Mrs. Windham are clearly inapplicable because no attempt is being made to enforce any agreement made outside the sanction of the Court.

**II. The Chancellor erred in finding that there was no material and substantial change in circumstances adverse to the best interest of the child, Cody.**

III. The twelve-year-old child, having stated a custodial preference, including a reasonable basis for that preference, the Court erred in not articulating on the record why the change of custody was not in the child's best interest.

Mrs. Windham argues that there is a simple three-prong test to be applied in modification of custody cases and cites the case of *Robinson v. Lanford*, 822 So. 2d 1034 (Miss. App. 2002). According to the quote, and to the argument, Chad's burden was to first prove a material change of circumstances and then to prove that change was detrimental to the child's welfare, before the Chancellor could even consider whether or not it would be in the child's best interest to change custody. However, from other cases decided before and after the *Robinson* case, we know that is an oversimplification. For example, from the case of *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996), we know that past or present detriment to the child's welfare is not essential. As stated there, the Court is not required to wait until the child is adversely affected; a change likely to cause an adverse affect in the future, can be the basis for a change in custody.

More to the point is the case of *Polk v. Polk*, 589 So. 2d 123 (Miss. 1991), which has already been thoroughly discussed in Chad's first Brief, and several other cases of similar nature. In fact, one of those is the *Robinson* case cited by Mrs. Windham. There, the Court of Appeals did not simply reverse and remand because the record supporting the change of circumstances was inadequate, it called for a new hearing so that all of the evidence could be in the record and so that the Chancellor could make findings on the record. The stated reason for this is that the Chancellor obviously concluded that it was in the best interest of the child to change custody although secret evidence, known only to the Chancellor, was used as the basis for her decision changing custody.

In *Floyd v. Floyd*, 949 So. 2d 26 (Miss. S. Ct. 2007), the Appellate Court reversed with instructions to the Chancellor to make findings on the record as to both the material change of circumstances and its consideration of the Albright factors. This, of course, makes no sense under the argument proposed by Mrs. Windham. The Albright factors are considered by the Court to determine the best interests of the child. *Rogers v. Taylor*, 755 So. 2d 33, 37 (Miss. Ct. App. 1999) In fact, on the second trip to the Court of Appeals by Robinson and Lanford, that Court upheld a Chancellor's change of custody based on secret evidence, known only to the Chancellor, a record insufficient with regard to a material change of circumstances. Additionally, the Appeals Court acknowledged that the Chancellor never considered the Albright factors but held, in that particular case, and under those specific circumstances, it would not reverse. *Robinson v. Lanford*, 841 So. 2d 1119 (Miss. S. Ct. 2003)

Finally, the simple three-prong test advanced by Mrs. Windham ignores the great body of law which holds that the "polestar" consideration in child custody cases is either the welfare of the child, the best interests of the child, or both. *Rice v. Merkich*, 2009-CA-00318-SCT (SCT May 6, 2010). There are 212 other cases revealed by a simple search of Lexis Nexis that give that direction. Most of the cases cited by both parties in this case contain that very language.

Based on the language of Section 93-11-65 of the Mississippi Code of 1972 Annotated, as amended, the *Polk* case, and others that follow it, where the preference of a child with regard to custody is not followed, the best interest of the child must be taken into consideration and some explanation should be required where that preference is not

followed. In fact, an explanation of why the change in custody is not in the best interest of the child is required by the statutory and case law.

## CONCLUSION

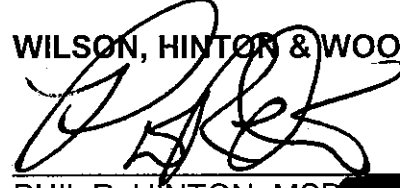
Mrs. Windham received income tax refunds, greater than she would have received had she not claimed Cody Potts as a dependent, in the sum of \$18,139.00. As in the *Dorr* case, those refunds benefited the child who is the ultimate beneficiary of child support orders. If Mrs. Windham is allowed to reap that benefit, in contravention of the Court's Judgment of Divorce, and then have the same amount paid to her by Mr. Potts, who was actually entitled to claim the child as an exemption, then she has been unjustly enriched just as Ms. *Dorr* had been. This case and the *Dorr* case could not be more similar and to treat them differently would be difficult to explain. Mr. Potts should receive credit for all amounts Mrs. Windham received in income tax refunds because of her use of the child tax exemption she was not entitled to use.

Under the specific language of Section 93-11-65 of the Mississippi Code of 1972 Annotated, as amended, Cody Potts was entitled to state his preference as to the custodial parent. He did so and gave very sound reasons, reminiscent of those related in the *Polk* decision, *ante*, and he therefore had a right to either a change of custody or an explanation as to why such change would not have been in his best interest. He received neither. The holding with regard to the change of custody should be reversed and a new trial as to that issue granted. Upon remand, the issue of the child's preference should be addressed and some findings should be made regarding the best interests of this child.



Respectfully submitted,

WILSON, HINTON & WOOD, P.A.

A handwritten signature in black ink, appearing to read 'P. Hinton', is written over the firm name.

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CERTIFICATE OF SERVICE

I, Phil R. Hinton, attorney for the Appellant, certify that I have this day served a copy of this Reply Brief of Appellant, by United States mail, with postage prepaid, on the following persons at the following addresses:

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Chancery Court Judge  
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This the 16<sup>th</sup> day of June, 2010.



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