

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

CHAD GREGORY POTTS,

Appellant

VS.

FELICIA DAWN WINDHAM,

Appellee

CASE NO. 2009-CA-01435

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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 may evaluate possible disqualification or recusal.

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2. John A. Ferrell, Attorney for Appellee;
3. Chad Gregory Potts, Appellant; and
4. Felicia Dawn Windham, Appellee.

Respectfully submitted,

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### APPELLANT'S STATEMENT OF ISSUES

1. 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.
2. The Chancellor erred in finding that there was no material and substantial change in circumstances adverse to the best interest of the child, Cody.
3. 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.

## STATEMENT OF THE CASE

This case arises from a Complaint to modify child custody and a Counterclaim seeking a judgment for child support in arrears.

Chad Gregory Potts, Appellant here, and Felicia Dawn Potts were divorced on the ground of irreconcilable differences by a Decree of Divorce, Etc. entered on October 25, 2000. Felicia was granted custody of the parties' child, Cody Wyatt Potts, who was born on December 21, 1995, and Chad was granted specific visitation rights. Chad was ordered to pay Felicia \$300.00 per month as support for Cody, and he was granted the right to claim the child as a dependent on his federal and state income tax returns. (R 18-31) Soon after the divorce, Felicia remarried and is now known as Felicia Dawn Windham. (T 157)

On June 26, 2008, Chad filed a Complaint against Felicia seeking, among other relief, custody of his son, Cody, who had just turned twelve. (R 33-35) Felicia filed her Answer and a Counterclaim seeking, among other relief, a determination that Chad was in contempt of Court for failure to pay child support and a judgment against him for arrearages in support and his portion of medical expenses incurred for the benefit of the child. (R 36-42)

Evidence, consisting of testimony by eight witnesses, was taken on November 3, 2008 and on May 11 and 12, 2009. Twenty exhibits were offered and received into evidence during the trial of the cause and five additional exhibits were received into evidence subsequent to trial, pursuant to Chad's Amended Motion to Supplement Record by Order entered on December 9, 2009. (R 88-161)

Chad Potts did not dispute that he was in arrears in child support but did take issue with the amount due. His contention was that he allowed Felicia to claim Cody as a

dependent on her federal and state income tax returns as a substitute for support which he was at that time unable to pay. (R 43-48) Felicia disputed such an agreement but did admit claiming the child as a dependent when she filed her state and federal income tax returns for the years 2001 through 2007. (T 222-223) On the record, in anticipation of Chad submitting calculations of the monetary benefit to Felicia as a result of claiming the child as a dependent, the parties stipulated that Felicia would have seven days after trial in which to submit to the Court and Chad objections to the calculations being tendered. Additionally, the parties stipulated that Chad would be given an additional thirty days after the trial in which to submit additional child support checks which were inadequately established by documents then available for introduction into evidence. (R 43 and 44, T 64-66) Additional checks were timely submitted by Chad, and Felicia, through her attorney, submitted alternate calculations of the benefits she should have received by claiming Cody as a dependent for tax purposes had she properly filed. (R 91-95)

After trial on the merits, the Chancellor assigned to the case, Judge Jacqueline Mask, rendered her Opinion by letter (R 50-51) and, pursuant to her direction, a Judgment was prepared and entered on August 3, 2009 (R 52-56). In the Opinion and Judgment entered, Judge Mask held Chad in contempt for failure to pay child support and awarded Felicia a judgment against him for \$21,469.00, together with a judgment for medical expenses in the sum of \$874.08. The Chancellor also declined to modify custody, but she did expand Chad's visitation rights with Cody. Feeling aggrieved by the failure to change custody and the amount of the judgment awarded, Chad appealed.

## STATEMENT OF FACTS

Cody, the twelve-year-old boy at the center of this custody dispute, testified that he wanted to live with his father. Cody stated that he was twelve and three-fourths years old at the time of trial, that he was in the seventh grade and that he was attending school in Thrasher, Mississippi, where he had been since the first grade. Since the divorce of his parents, he had been living with his mother, Felicia, and her new husband, Durand Windham, and he now had two half-sisters, Albany and Allie Windham, who are ages six and seven. Cody reported that he told his mother starting when he was ten or possibly eleven that he wanted to live with his father. He said that he enjoyed spending time with his father, which included riding horses, going to ballgames, watching television and working. His father maintains five horses at his home, which Cody rides. Cody said that he was unhappy living with his mother because of arguments with his mother, Durand and Durand's mother, Debbie. Cody testified that his test grades in school were good but that his homework grades were poor because he was not doing the homework assigned. Cody admitted that he refused to do homework for his mother, and could get away with it, but that his father, Chad, had convinced him to start doing it. Chad had been to the school to talk with the principal and several teachers and told Cody that he would get his "butt torn up" if he did not start doing his homework. (T 2-10)

Although Cody characterized his differences with his stepfather, Durand, as arguments, he actually described what Cody considered as criticism. Durand told him that he should have fought another boy at a ballgame who was picking on him and he cursed Cody for misplacing his softball glove. He said that Durand called him a s.o.b. or an ass. Cody said that Durand only cursed him a few times but mainly calls him a "wussy," which

Cody considered picking on him and making fun of him. Cody said that Durand gets enjoyment out of calling him names and picking on him. Cody said that Durand had taken him hunting and fishing on very few occasions but that he coached most of his little league teams. He said he enjoyed that time with Durand except when he would "holler" at him, which usually started arguments. Cody also complained that his mother, Felicia, curses, not necessarily at him, but just in general, including the f-word, shit and damn. He characterizes her language as loud, angry and scornful, and he said that it happened daily. Cody was also concerned because he had observed two incidents of violence between his mother and Durand. He said that Durand accused her of cheating on him and took her cell phone away, which resulted in her cursing him and them fighting outside the house when she tried to get her phone back. Durand backhanded her twice. Cody thought that Felicia had pushed Durand and ripped his shirt, and he recalled that she went to the ground when Durand hit her. (T 11-18) That incident was five months or less, prior to the first hearing. The other incident occurred while the family was traveling to the mountains in a car and Durand and Felicia were arguing. On that occasion, Durand pulled Felicia's hair. He has also observed them arguing, cursing and yelling at each other. (T 19-20)

Cody said that he seldom hears his father curse and that the only violence in his father's home is when he gets a whipping. His father never picks on him, except in a fun way. Cody does not really enjoy mowing the yard at his fathers, but he does enjoy other work they do together including weedeating, trimming trees, bailing hay, working with the horses, or hauling things. (T 11-20)

The child testified that his father lived in Florida for three or four years after the divorce from Felicia but that he still returned for his weekend visitation with Cody. Chad



also came to Cody's ballgames, when he was there on weekends, and Cody testified to playing numerous sports. (T 21-25)

On cross-examination, Cody admitted that his mother kept a clean house, that she fed him and that she did his laundry most of the time. He agreed that he was a good student, except for his homework, and that he made A's and B's on all of his report cards. (T 20-37)

Chad Potts testified that he now lived in Glen, Mississippi at the address where he and Felicia lived during their marriage. He married his wife, Cathy, in 2008, and they share their home and forty acres with her daughter by a prior marriage, Jordan, a thirteen-year-old girl. Cody has his own room when he visits there. Chad also testified that, at the time of the divorce, he was in the construction business doing dirt work, backhoe work, installing septic tanks and doing similar construction work. (T 68-89) Chad identified his tax returns for the years 2002 through 2007, except that he relied on an abstract from the Internal Revenue Service in lieu of his 2004 tax return. (Exhibits 1-8) Chad testified that his company, known as Triple P Farms, had no income in 2002, lost \$4,621.00 in 2003, earned \$2,477.00 in 2004 and lost \$2,807.00 in 2005. (T 68-90) At the time of trial, Chad was doing very little construction work and was then primarily in the recycling business. (T 90)

Chad also identified his financial statement, prepared in accordance with Rule 8.05 of the Mississippi Rules of Chancery Practice and testified that his recently improved income picture was due to his change in business and a five-year contract for recycling that he entered into with another company. Chad testified that, since his divorce from Felicia, he traveled out of Mississippi for approximately four years and that he had worked in several states, including Florida. Even during those times, he made the vast majority of his

visitation with his son which included the first and third weekend of each month, four weeks in the summer and alternating holidays. (T 91-93)

According to Chad, in 2002, he talked to his ex-wife, Felicia, told her about his poor financial situation and that he could not afford to pay his child support. He said that he offered her the tax exemption for the child which would allow her to get money she would not otherwise be entitled to. According to Chad, she agreed and did in fact claim Cody as a dependent for the years 2001 through 2007. Chad testified that he did not claim Cody as a dependent for those years and that was borne out by the tax returns which were introduced into evidence. (Exhibits 3, 4, 5, 6, 7 and 8) Chad said that he did not discuss it with her every year, but he did on the "biggest percentage." (T 94-96) Chad also agreed that he owed medical expenses but testified that he had not received copies of the unpaid bills from Felicia. He also testified to having paid other medical expenses for Cody in the past. (T 96 and 97)

Turning to the custody issue, Chad testified that his son, Cody, is not a happy child living in Felicia's home. There is a difference in the homes, and Cody feels more comfortable and feels that he is respected in Chad's home. Additionally, Cody does not have the same attitude in Chad's home as he does in Felicia's home. Chad observed that Cody and his mother bicker with each other on a continuous basis. Chad also does not berate Cody or call him names as Durand does nor does he talk down to him and curse him. According to Chad, the child is happy when he is in Chad's home, they ride horses, play basketball and do work around the home and barn. Cody helps take care of the horses. (T 98-102)

Chad testified that Felicia called him about Cody's failure to do his homework and told him that he needed to do something; that she could not handle him anymore and did not know how to get him to do his homework. Chad talked with people at the school, including Cody's teachers, and followed up by talking to Felicia several other times. She again said that she could not handle Cody and needed his help and implored him to do something. Cody apparently improved his homework performance, then slipped again, before Chad could get him back on track. Chad must stay on Cody to get him to do his homework and gains his compliance by threatening to not let him attend horse shows with him. Other than difficulties with homework, Chad has absolutely no discipline problems with Cody. (T 103-107)

Chad was aware of the violence between Durand and Felicia when they argued over her cell phone but did not know the specifics. Felicia confided in Chad that Durand caught her sending emails or text messages to another man, that he accused her of doing things that she should not and that Durand had been upset. (T 105-106)

Catherine "Cathy" Potts, Chad's new wife, testified that she had done, and continued to do, the bookkeeping for Chad's businesses. She also completed a course taught by H & R Block to prepare tax returns. Although a CPA had calculated the benefits Felicia gained by claiming Cody as a dependent for federal and state income tax purposes, Cathy testified that she too had done the calculations and that they agreed. She identified Exhibits 13 and 14 and they were allowed into evidence. (RE 99-103, 104-108) They showed that, by claiming Cody as a dependent for federal and state income tax purposes, Felicia received income tax refunds, between the years 2001 and 2007, totaling \$18,139.00. That amount

was over and above any refund she would have received had she not claimed Cody as her dependent. (T 144-182)

Felicia Windham, formerly Felicia Potts, testified that she prepared her own tax returns for the years 2001 through 2007. She admitted that she did not file jointly with her husband, Durand, although married to him all of those years. She filed as head of household, as opposed to married filing jointly, or married filing separately. Felicia used the name "Felicia Potts" on her tax returns instead of her correct name "Felicia Windham." She also used a post office address, which was not her residence address, and it was in a county where she did not reside. She also testified that she and Durand had two children, Albany and Allie, during their marriage. (T 157-160, T 271-287)

Felicia denied cursing in the presence of her son except for the "F-word" and the "A-word" and denied that the fight over her cell phone with Durand was anything other than a game. (T 278-280)

There was other testimony by Chad, Felicia, Cathy and other witnesses that has not been covered here. However, that testimony is not relevant to the issues presented for appeal and dealt primarily with the *Albright* factors, which were never addressed by the Chancellor. Chancellor Mask ruled that there was no material change of circumstances adversely affecting the child, so there was no need to address *Albright* here. She did award Felicia a judgment against Chad for past due child support but declined to give him any credit for tax refunds Felicia received by claiming Cody as a dependent.

### SUMMARY OF THE ARGUMENT

Felicia Windham, formerly Felicia Potts, claimed the parties' child, Cody Wyatt Potts, as a dependent for income tax purposes, for the years 2001 through 2007. That was contrary to the Decree of Divorce, which granted to Chad Potts that dependent exemption. As a result of claiming the child as a dependent, Mrs. Windham received income tax refunds, federal and state, in the sum of \$18,139.00 more than she would have received in refunds had she filed declaring her correct marital status and not claiming Cody as a dependent. The net result is that she was unjustly enriched in that amount because the Chancellor below awarded her a judgment against Chad Potts for past due child support, without allowing a credit for income tax refunds she was not entitled to receive.

Chad Potts sought modification as to custody of his twelve-year-old son, Cody, and the child testified that he wished to live with his father. The child also stated several reasons for his preference. The Chancellor denied the modification request saying only:

"With regard to child custody, the Court finds a material and substantial change in circumstances adverse to the best interest of the child has not been demonstrated." (R 51), (RE 16)

The Chancellor made no findings on the record and stated no reasons for declining to follow the wishes of the child. Therefore, this Court cannot adequately review the custody decision. If believed credible, the evidence in support of the modification change was adequate under the standards announced by this Court. Under Section 93-11-65 of the Mississippi Code of 1972 Annotated, as amended, and the case law interpreting it, Chad and Cody were entitled to know why the modification was denied and why it was not in the best interest of the child for the modification to be granted.

## 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.**

Felicia Windham testified that she did claim Cody Potts as a dependent for tax purposes even though she knew that Chad Potts was entitled to the exemption for that child pursuant to the Decree of Divorce, Etc. Felicia disputed the testimony of Chad that her use of that dependent exemption was by agreement and said that she simply did so in violation of the Judgment because Chad was not current on support. (T 157-160, T 222-223) The pertinent provision of the Decree of Divorce, Etc. is found in paragraph 21 and reads as follows:

"Chad Gregory Potts shall have the right to claim Cody Wyatt Potts as a dependent on his federal and state income tax returns and Wife agrees to execute upon the request of Husband any document required by either the federal or state governments in order to permit Husband to claim the said child as a dependent on his income tax returns." (R 28), (RE 14)

Nothing in the balance of the Judgment required that Chad be current on all support in order to claim the benefit of Cody as an exemption for tax purposes. (R 18-31), (RE 4-17)

In her letter Opinion, Chancellor Mask addressed Mrs. Windham's use of the dependent exemption for Cody and the arrearage calculations as follows:

"With regard to Mr. Potts' request for credits against his child support arrearage for Mrs. Windham's utilization of the tax deduction for the child, the Court finds Mrs. Windham utilized the deduction contrary to the parties' no fault divorce agreement, and therefore violated the Court Order, but no adjustment should be allowed to Mr. Potts' arrearage for those sums." (R 50), (RE 15)

The Chancellor based her decision on what she called an "alleged agreement," which "was not submitted for Court approval." The learned Chancellor cited *Wilburn v. Wilburn*, 991 So. 2d 1185 (Miss. 2008).

The Chancellor's reliance on the *Wilburn* case is misplaced. There, Chasity Wilburn and William Wilburn had been divorced on the ground of irreconcilable differences. Their agreement, which had been ratified and approved by the trial court, granted William physical custody of the parties' children and awarded Chasity specific visitation rights. Nearly six months later, Chasity sought to hold William Wilburn in contempt and requested a modification as to visitation, which amounted to a joint custody arrangement. In her pleading, she alleged that prior to the entry of the Judgment of Divorce, the parties had shared custody on an alternating week basis. She also alleged that William had promised that arrangement would continue, otherwise she would not have signed the agreement which clearly provided her with much less time with her children. In other words, the agreement related to custody and visitation presented to the Court, and approved by the Court, was substantially different than the agreement Ms. Wilburn claimed that she had with Mr. Wilburn prior to and at the time of the divorce. In the *Wilburn* Opinion, the Supreme Court reiterated its long-standing rule against such duplicity:

"This Court has stated that "[i]t would be tantamount to defrauding the court for parties to present to the court a property settlement agreement, which is subsequently incorporated into the final decree, while actually intending to abide by a contradictory private contract. This is clearly against public policy." 991 So. 2d at 1193. See also *Sullivan v. Pouncey*, 469 So. 2d 1233, 1234 (Miss. 1985); *Traub v. Johnson*, 536 So. 2d 25, 26 (Miss. 1988).

The agreement between Chad Potts and his ex-wife, Felicia, was not an agreement reached prior to the parties' divorce but was instead an attempt on their part to modify what had already been ordered, albeit without Court approval.

There is, however, a Mississippi case which is almost factually identical to the present case. In *Dorr v. Dorr*, 797 So. 2d 1008 (Miss. Ct. App. 2001) the parties were divorced in 1983 with Susanne Door receiving custody of the parties' minor child and Mr. Dorr was ordered to pay periodic child support. Also, pursuant to the Judgment of Divorce, Mr. Dorr was entitled to claim the child as a dependent for income tax purposes. Mr. Dorr got behind in his child support obligation and voluntarily transferred the right to claim the child as a dependent for tax purposes to Susanne. She did in fact claim the child as an exemption thereafter and, according to Mr. Dorr, Susanne agreed that that would be in lieu of his child support obligation. Ms. Dorr denied that agreement claiming that Mr. Dorr unilaterally conceded the dependent tax exemption to her without any concession on her part.

The only slight difference between the *Dorr* case and the case sub judice is that Felicia Windham claims that not only was there no agreement, but that Chad did not unilaterally transfer his rights to her. Instead, she decided to claim Cody as a dependent for tax purposes, in contravention of the Judgment of Divorce, because Mr. Potts was not current in his support obligation. According to the reasoning in *Dorr*, this is a difference without a distinction. In the *Dorr* case, it was undisputed that Ms. Dorr gained tax refunds of approximately \$4,300.00 by virtue of claiming the parties' child as a dependent. The Chancellor awarded Susanne a judgment against Mr. Dorr for all past due child support and refused to give him any credit for the tax refunds his ex-wife had received.

On appeal and cross-appeal, several issues, including Mr. Dorr's entitlement to credit against his child support arrearage, were heard. The Chancellor had penalized Ms. Dorr by refusing to award her attorney's fees and not awarding interest on some of the



arrearage. He also ordered her to file amended tax returns not reflecting the child as a dependent. On the other hand, Mr. Dorr had been refused any credit for the direct cash benefit Ms. Dorr received by claiming the child as an exemption. In deciding that a credit should have been given, Justice McMillin, writing for the Court, held as follows:

"The second reason offered by the chancellor to find the agreement void cannot be so easily disposed of. It is a general rule that court-ordered obligations for the support of the minor children of divorcing parents may not be modified by the obligor and obligee extrajudicially, but that, rather, any such proposed modification must be submitted to and approved by the court. *Calton v. Calton*, 485 So. 2d 309, 310-11 (Miss. 1986). The rule is not absolute, however, and, in certain circumstances, such agreements have been given effect when to do so does not adversely affect the true beneficiary of the obligation, *i.e.*, the child, and to do otherwise might produce an inequitable result as between the litigants themselves. By way of example, this Court, in *Wright v. Wright*, gave effect to an extrajudicial agreement to lower child support due to changed circumstances that, through apparent oversight, had never been presented to the court for approval but had been honored by the parties until the fact of the failure to obtain court approval was discovered. *Wright v. Wright*, 737 So. 2d 408 (P6) (Miss. Ct. App. 1998). This Court reasoned that to retroactively enforce the higher support amount that, under strict legal principles, remained in effect would be inequitable as permitting the support obligee to be unjustly enriched. *Id.*

The issue then becomes whether there are equitable principles at work in this case similar to those discovered in *Wright* that might suggest the propriety of enforcing the agreement. We begin consideration of that issue with the notion that, to the extent any such agreement might adversely affect the best interest of the true beneficiary - which is, of course, the affected minor child - then it would appear doubtful that any competing equities between the adult parties themselves could override the legal obligation of support owed to that child." 797 So. 2d at 1013.

As previously mentioned, the Chancellor had penalized Ms. Dorr by ordering that she file amended tax returns for the years that she had claimed the child as a dependent. The Court of Appeals decided this was an inappropriate exercise of the equitable powers of the Court and noted several difficulties that might arise from that direction. That portion of the Chancellor's judgment was reversed and the Court of Appeals took the appropriate step of

granting Mr. Dorr a credit for the money Ms. Dorr received in tax refunds and explained its reasoning as follows:

"Nevertheless, we are sympathetic to the underlying principle apparently supporting the chancellor's ruling on this aspect, which we discern to be the notion that it is inequitable to permit Mrs. Dorr to gain the full advantage of the purported agreement, even though we find the agreement, if there was one, unenforceable. By her own testimony, Mrs. Dorr received a very real financial benefit by virtue of Mr. Dorr's willingness, no matter what the incentive, to forego his right to claim the child as a dependent for tax purposes and to relinquish that right to her. Mrs. Dorr testified that the benefit of that right to her had been calculated to be \$ 4,300 and that figure was not contested or rebutted by Mr. Dorr. Certainly, Mrs. Dorr understood that this financial benefit to her was derived as the direct result of an action taken by Mr. Dorr for the purpose of providing some financial advantage to the minor child even though he was apparently unwilling to voluntarily meet his support obligation in full. In our view, this financial benefit to Mrs. Dorr for the child's benefit, though not directly derived from Mr. Dorr's own income, in equity ought to be considered as a credit towards Mr. Dorr's recurring child support obligations accruing during the same period, much in the same manner that such indirect payments as social security payments to dependent children derived through the efforts of the obligee have been allowed as credit toward child support.

Therefore, while we decline to enforce the alleged extrajudicial agreement between the parties on the terms urged by Mr. Dorr, we nevertheless find it equitable, and so order, that Mr. Dorr receive a credit in the amount of \$4,300 against those support obligations that accrued during the period of January 1988 through July 1994.

We note that, even if it were found as a matter of fact that Mr. Dorr's relinquishment of the tax dependency claim was a purely gratuitous and unilateral act, notions of unjust enrichment would compel the same result."  
Id. at 1014 and 1015. (Emphasis added)

Under the reasoning set forth in *Dorr*, it is clear that whether Chad and Felicia had an agreement respecting the transfer of his right to claim Cody as a dependent or whether Felicia took it upon herself to unilaterally disregard the Judgment of the Court by claiming the child, is irrelevant. According to Cathy Potts' calculations, the financial benefit to Felicia was a total of \$18,139.00, which represents the difference between the refund she was

entitled to as married filing separately, without Cody as a dependent, and filing as head of household, with Cody as a dependent. (Exhibits 13 and 14, T 180-181), (RE 99-103, 104-108)

Although Felicia objected vigorously during the trial of the cause, that no credit was proper, and her attorney frequently argued on the record that she had done nothing inappropriate when she filed her tax returns as head of household, she later submitted her own calculations of the over payments she received. In his letter to the Chancellor, Felicia's attorney, when submitting those calculations, stated the following:

"While I do not agree that he (Chad) is entitled to any credit whatsoever for the reasons hereinafter set forth, if a credit is going to be given it should be based upon how much savings Mrs. Windham would have properly received had she filed married filing separately and not based upon what she actually received as a refund in her filings for the various years. The issue of whether or not she did file incorrectly for those years and got a benefit that she should not have received is between her and the federal government and has nothing to do with Mr. Potts. Therefore, the computation attached hereto correctly analyzes her tax savings with and without the child as a dependent."  
(R 91)

As indicated in his letter, the calculations submitted (R 94 and 95) were based upon what would have occurred had Mrs. Windham not set out to defraud the government.

Federal income tax is imposed upon persons earning income in the United States. If you are married, you may elect to file jointly with your spouse or separately under the "married filing separately," category. If you are single without other dependents in your household, you must file as an individual. In some circumstances, a person may also file as "head of household" if there are dependents in their home. Each of the four categories have different tax brackets. 26 U.S.C. Sections 1, 2 and 7703, (RE 115-121, 122-123 and 132) According to Mrs. Windham's testimony, and that of her husband, she obviously did not qualify as a head of household. (T 57-60, T 271-287, T 304-307)

26 U.S.C. Sections 151 and 152 make provision for various dependent exemptions for income tax purposes, including children, and subsection 152(e)(2) defines the taxpayer who is entitled to claim a child exemption and generally states that it will be by a written declaration which is attached to the tax return. That subsection grants to the Secretary of the Treasury the power to determine exactly what qualifies as a "written declaration" transferring the child exemption under the statute. (RE 126-127, 128-131) According to the regulations promulgated by the Secretary of the Treasury, the agreement of the parties at the time of their divorce, which was incorporated in the Judgment of the Court, fully satisfied the legal requirements for Chad to claim Cody as a dependent, without further action on the part of Felicia. 26 C.F.R. 1.52-4, subsection (b)(3)(i). Also see example 6 which is a part of that C.F.R. and which is identical to the situation in the case sub judice. (RE 109-114) The value of the dependent exemption changes annually and has grown over the last decade. Additionally, for the years in which Mrs. Windham claimed Cody as an exemption, she also used him to gain an additional child tax credit worth \$1,000.00 every year. According to 26 U.S.C. Section 24, which make provision for that child tax credit, she is only entitled to the child tax credit if she was originally entitled to the tax exemption. (RE 124-125)

Felicia Windham clearly knew what she was doing when she claimed Cody as a dependent. She used her former name of Potts, so that she would not be associated with Mr. Windham. She used a different address, which was set up in a county where she did not reside, and she claimed to be the "head of a household" which she did not qualify for under federal tax law. She actually received a benefit of \$18,139.00 and it is impossible to

say that she has not been unjustly enriched in that amount since Mr. Potts now must pay her that same amount all over again.

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.

Cody Potts told the Chancellor that he would prefer to live with his father and that he had been telling his mother that since he was ten or possibly eleven years old. Cody testified that he was unhappy at his mother's home and was happy at his father's home. He did not like the arguing, fighting and cursing in the home of his mother, and he disliked being called names by his mother's present husband, Durand Windham, which Cody believed Mr. Windham did for enjoyment. Cody was also disturbed by two incidents of physical violence between his mother and stepfather, one of which ended in Mrs. Windham being back handed twice and knocked to the ground. Cody also admitted that he did not do his homework for school and that his father could force him to do so while his mother could not.

The serious physical violence, in which Mr. Windham struck Felicia, resulted from her sending text messages to another man which Mr. Windham felt was inappropriate. She confided in her ex-husband, Chad, about Mr. Windham's anger and the basis but not about the physical violence that had followed. Chad also said that Mrs. Windham had told him on several occasions that she could not handle Cody, referring to his failure to do homework, and that Chad needed to do something to help her discipline the child.

In the Chancellor's two-page letter Opinion, only one sentence addressed the change of custody sought by Chad and Cody. The paragraph in which that sentence is found is as follows:

"With regard to child custody, the Court finds a material and substantial change in circumstances adverse to the best interest of the child has not been demonstrated. However, the Court finds the best interest of the child shall be served by additional visitation being provided to Mr. Potts." (R 51), (RE 16)

Though Chad and Cody are pleased with the additional time that the Chancellor gave them together by expanding visitation, they are disappointed because they do not understand the Chancellor's perfunctory dismissal of Cody's wishes and the serious issues he raised in his testimony.

In their second visit to our Mississippi Supreme Court, Erma and LaPlause Polk raised a similar issue. In their divorce, LaPlause was granted custody of two of the parties' minor children, Marcus and Darien Polk. Kawanis Polk was placed in the custody of Erma. Many issues were raised during the trial but the one of interest here is Erma's complaint that the Chancellor had not modified the original divorce judgment to grant Erma custody of Marcus. At the time of trial, Marcus was twelve and he testified that he preferred to live with his mother.

In that case, *Polk v. Polk*, 589 So. 2d 123 (Miss. 1991), the Court first stated the general rules applicable to modifications of child custody as follows:

"The law in child custody cases is well-settled. For the custody decree or order to be modified so as to transfer custody to the non-custodial parent, the non-custodial parent must prove that since the entry of the decree or order sought to be modified, a material change of circumstances has occurred within the custodial home which adversely affects the child's welfare. *Tucker v. Tucker*, 453 So. 2d 1294 (Miss. 1984); *Phillips v. Phillips*, 555 So. 2d 698 (Miss. 1989). In considering this alleged change, the court should view the evidence within the totality of the circumstances, and not base a finding on

an isolated incident. Once the material change has been found, a change in custody is in order only if it would be in the best interest of the child involved. *Spain v. Holland*, 483 So. 2d 318 (Miss. 1986)." *Id.* at 129.

Justice Pittman recapped the testimony of Marcus supporting his desire to live with his mother as follows:

"'Marcus' objections to his father centered primarily around his alleged drinking. He stated that his father drank 'mostly every day when he would come in from work.' Marcus alleged that his father would stagger and fall on the floor and call him ugly names. At one point, Marcus stated that his father bought him everything he needed. Then Marcus stated that he didn't have enough pants. Kawanis stated that her father drank almost every day and that when he did, he had more of a direct tone to his behavior. LaPlause was barely questioned on this matter." *Id.* at 129 and 130.

The Supreme Court reversed the Chancellor's decision denying modification of the custody of Marcus and returned that issue to the lower court for further proceedings consistent with the Supreme Court's Opinion. In pertinent part, the ruling is as follows:

"Marcus appears not to have much of a relationship left with his father, and his testimony, however confusing, was clear on one matter -- he wanted to remain with his mother. As Marcus had reached the age of twelve, he had the privilege, under § 93-11-65, to choose the parent with which he would live, as long as the chancellor found that the choice was in Marcus' best interest and the other requirements of the statute were met. In denying Marcus this privilege, the chancellor found only that the best interest of Marcus did not require that his custody be changed. We find that when the chancellor denies a child his choice of custodial parent under § 93-11-65, then the chancellor must make on-the-record findings as to why the best interest of the child is not served. This cause is reversed and remanded for further consideration on this matter. As to whether there has been a substantial and material change in circumstances, we find that the lower court should consider the fact that Marcus has chosen to live with his mother, as well as the fact that Marcus has passed twelve years of age and may qualify under § 93-11-65, as factors to be considered on remand along with any other evidence the parties may wish to produce." *Id.* at 130.

The *Polk* decision, ante., was cited with favor in the case of *Floyd v. Floyd*, 949 So. 2d 26 (Miss. S. Ct. 2007), where, once again, a chancellor failed to modify custody of a twelve-year-old child. This decision is important because it, as well as the decision in *Polk*,

rely in substantial part on the language in Section 93-11-65 of the Mississippi Code of 1972 Annotated, as amended. The language of that statute was amended after the *Polk* decision but before the *Floyd* decision. In *Floyd*, the Supreme Court announced the following in reversing the chancellor's ruling:

"In ***Polk v. Polk***, the Court reversed and remanded a custody modification case to further consider this issue, holding that "when the chancellor denies a child his choice of custodial parent under § 93-11-65, then the chancellor must make on-the-record findings as to why the best interest of the child is not served." ***Polk v. Polk***, 589 So. 2d 123, 130 (Miss. 1991). In the present case, the court's order simply acknowledges the child's election and concludes that "the appellate [sic] Courts have ruled that this could not be the sole basis for a change in custody and that based on the evidence presented that the motion for modification should be denied." This vague finding does not adequately explain the reasons for rejecting the child's election to live with his mother as required by this Court's directive in ***Polk***. Therefore, we remand to the chancery court with specific instructions to address this issue with the specificity required by § 93-11-65 and to make findings on the record in support of its decision." *Id.* at 30.

In another case citing *Polk* with favor, *Thompson v. Thompson*, 799 So. 2d 919 (Miss. Ct. App. 2001), the Court of Appeals interpreted the Supreme Court's earlier decision as follows:

"The Supreme Court has said that this statute permits a child of the right age to choose the custodial parent if "the choice was in [the child's] best interest and the other requirements of the statute were met"; if "the chancellor denies a child his choice of custodial parent under § 93-11-65, then the chancellor must make on-the-record findings as to why the best interest of the child is not served." *Polk v. Polk*, 589 So. 2d 123, 130 (Miss. 1991). This ruling suggests that the first two factors of a change in custody can be satisfied by the child's own preference, and the chancellor must then explain on the record if the choice is not honored. It also was the ruling of this chancellor, that it would be the obligation of the father to indicate why a change in conformity with this statement of preference was not in the child's best interest." *Id.* at 925.



In another Court of Appeals case, which does not rely specifically on *Polk*, *Floyd* or *Thompson*, the Court affirmed a change of custody and the following provides alternate, but very similar, reasoning:

"From all indications in the record, both parents were suitable and both had appropriate living environments in which to raise their children. In fact, James made it very clear that he loved both of his parents and that his mom had provided him a good home and had always taken care of his needs. Standing alone, James's reasons for wanting to live with his father may not meet the standard for modifying custody; however, we look to the totality of the circumstances in modification issues. *Lackey v. Fuller*, 755 So. 2d 1083 (Miss. 2000). Having previously found no abuse in the chancellor's decision to modify custody of Tyler Ingram, the younger son, we look to the rule that if possible, it is in the best interest of siblings that they remain together. *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997). As stated, the child's preference alone is not sufficient to warrant modification, but in this case, looking to James's preference to live with his father, finding that both parents are fit and caring, and recognizing that the best of interests of the boys require they be kept together, we find that the chancellor did not abuse his discretion in modifying custody of James to his father." Emphasis added. *Cooper v. Ingram*, 814 So. 2d 166, 169 (Miss. Ct. App. 2002).

Another case which helps develop the obligations of the chancellor is that of *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996) where the Supreme Court described at least one exception to the prerequisite of finding a material change of circumstances adverse to the interests of the child:

"However, we take this opportunity to clarify that a chancellor is *never* obliged to ignore a child's best interest in weighing a custody change; in fact, a chancellor is bound to consider the child's best interest above all else. . . . The test we have devised for custody modification need not be applied so rigidly, nor in such a formalistic manner so as to preclude the chancellor from rendering a decision appropriate to the facts of the individual case. In particular, it should not thwart the chancellor from transferring custody of a child from one parent to another when, in the chancellor's judgment, the child's welfare would be best served by such transfer." *Id.* at 744 and 745.

We do not know from the Chancellor's decision here what evidence she relied upon in finding no material change of circumstances adverse to the child nor do we have any

insight into what she found to be the credibility of any of the witnesses. If the totality of the circumstances is genuinely considered, some deference is given to the wishes of the child, and if the best interests of the child are truly the polestar consideration of the Court, then custody should have been modified in this particular case or, if not, then some reasonable explanation should have been made for declining to do so.

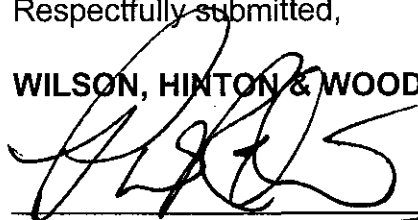
## CONCLUSION

The undisputed proof is that Felicia Windham claimed the parties' child, Cody Wyatt Potts, as a dependent for income tax purposes. Whether she did so by agreement of the parties, which she now denies, or simply because she decided unilaterally to defy the Order of the Court, she has been unjustly enriched in the sum of \$18,139.00, which is made up of income tax refunds which she would not otherwise have been entitled to. She was awarded a judgment against Chad Potts for over \$21,000.00 and, if he pays that amount, she will have been paid twice. By her own admission, those refunds are over and above what was actually due had she properly filed but, regardless, she has received the benefit of that money. A credit against the arrearage due from Chad Potts should be granted. To do otherwise rewards Felicia for her own wrongdoing.

The testimony of the parties' twelve-year-old, Cody Wyatt Potts, and that of his father, Chad, was undisputed in many regards and not seriously disputed in others. That testimony and the admissions of Felicia Windham, if believed credible by the Chancellor, warranted modification as to custody of the child. The one-line ruling of the Chancellor denying the modification is inadequate under the plain language of Section 93-11-65 of the Mississippi Code of 1972 Annotated, as amended, and the case law. This issue should be remanded to the Chancery Court of Alcorn County, Mississippi to develop the situation as it presently exists and the Chancellor should be required to state for the record the basis for the decision she eventually makes regarding custody.

Respectfully submitted,

**WILSON, HINTON & WOOD, P.A.**



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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 Brief of Appellant, by United States mail, with postage prepaid, on the following persons at the following addresses:

Honorable John A Ferrell  
Post Office Box 146  
Booneville, MS 38829

Honorable Jacqueline Estes Mask  
Chancery Court Judge  
Post Office Box 7395  
Tupelo, MS 38802

This the 24<sup>th</sup> day of February, 2010.



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