2009-CA-01910-T

I. CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant certifies that the following persons have an interest in the outcome of this case. This representation is made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal:

1. Tara S. Wilson, Walls, Ms.
2. David L. Walker, Southaven, Ms.
3. Kelly Don Wilson, Horn Lake, Ms.
4. Paige Williams, Hernando, Ms.

Respectfully submitted,

This the 11 day of MAY 2010.

David L. Walker MBN [redacted]
Counsel for Appellant

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2. Whether the chancellor was manifestly wrong and/ or clearly erroneous or applied an erroneous legal standard in finding that the parties entered into a property settlement agreement that was a binding contract and should be enforced as to property division.

3. Whether the trial court erred in overruling the Appellant's objection To the introduction into evidence of the property settlement agreement.

V. STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

The Appellee, Kelly Don Wilson, filed a complaint for divorce against the Appellant, Tara Wilson, against in the chancery court of Desoto County, Ms. on September 18th, 2007 alleging that the Appellant had committed uncondone adultery and in the alternative that irreconcilable differences had arisen between the parties. R. at 8-10. The complaint indicated that Tyler J. Wilson was born unto the parties on February 10th, 2003. R. at 8. The Appellee asked for permanent custody of the minor child. R. at 10. The parties had acquired possession of a home located at 7118 Durango Dr. Horn Lake, Ms. and the Appellee also asked for permanent use, title and possession of the aforesaid property. Id.

The parties entered into a voluntary consent to divorce based upon irreconcilable differences with the court to determine certain issues prior to the trial of this case. R. at 15. The parties agreed to submit to the chancellor the following issues for disposition:

1. Which parent shall have primary care, custody and control of the minor child of the parties, amount of child support due from the non-custodial parent and degree of visition for the non-custodial parent;

2. disposition of the alleged marital home in Horn Lake, Ms. and payment of the outstanding debt on said home;

3. payment of any outstanding guardian ad litem fees;

4. an equitable division of the marital property.

The trial court conducted a trial on these issues on April 16th, 2009 and rendered the following disposition of these issues:

1. paramount physical and legal custody of the minor child was awarded to the Appellee;

2. sole and exclusive ownership of the alleged marital home in Horn Lake, Ms. to the Appellee with no equity there from for the Appellee;

3. payment of the guardian ad litem fees shall be paid by Appellee

3. Appellant was ordered to return to the Appellee a refrigerator, washer and dryer, vents from the ceiling and couch and dinette set.

R. at 16-21. The Appellant filed a motion to reconsider decision of the chancellor on the issues of visitation with the minor child, the award of no child support for the Appellee, the payment of guardian ad litem fees by the Appellee on August 24th, 2009. The chancellor entered an order on December 18th, 2009 denying the motion to reconsider the issues of child support and payment of guardian ad litem fees by the appellant, but granting motion with respect to child visitation. R. at 30-31. The Appellant filed a notice of appeal on November 23, 2009.

B. APPELLANT'S TRIAL WITNESSES

ASHLEY SCHACHTERLE

At the time of the trial Ashley Schachterle testified that she was the owner of New Beginnings and had a masters degree from the University of Mississippi in psychology. R. at 5. She was also a lincensed clinical social worker. Id. She was accepted by the chancellor as an expert witness in the field of psychology and licensed social work. Id.

Ms. Schachterle had been seeing Tyler Wilson, the minor child of the parties since August of 2008. R. at 5 and Clerk's papers at 8. She had never met the parties. R. at 6. Her job was to work with Tyler. Id. He did not want to live with his mother. Id. She recommended supervised visitation for both parents at one time. He did not like the discipline imposed by his father. R. at 8.

Tyler was hit in the face by Mike Trayhan, the Appellant's boyfriend. Id. The blow was with a hand. Id. He felt that his mother did not protect him nor do anything about the slap to the face. Id. He did not want to be around Mr. Trayhan. He was afraid that he would be hit again. Id. He was out of control when he first came to see Ms. Schachterle. R. at 9. But at the time of the trial he was tremendously better and a totally different kid. Id. During this time, temporary custody had been placed with the a grandmother. Id. She would not classify either party as unfit. Id.

Tyler would be better off where he was or with somebody that can give him consistent structure and routine. He did not want to go to mom's house. R. at 10. He was concerned about who would have custody of him and frequents this issue with Ms. Schachterle. Id. He wanted to visit with his mom. R. at 11.

On cross examination Ms. Schachterle testified that she never performed a home study nor interviewed the parties. Id. She did not know that the Appellee had a live-in girlfried. R. at 12. She did not contact the Appellant to determine if she still had a relationship with Mr. Trayhan. Id. The child never claimed that his mother ever abused him. R. at 13. His only accusation against his mother is that he was scared of her because her anger and yelling. Id. Psychological testing indicated that he had ADHD, anxiety and adjustment disorder. R. at 14. He was not on any medication and had been raised by his grandmother, Debbie, since August 2008. Id. She did not have any facts on which parent raised

him prior to August 2008. R. at 15. He was referred to her by the grandmother. R. at 16. She considered her job to be that of preventing him from being kicked out of school. R. at 17.

TARA WILSON

Tara Wilson resided in an apartment with Joseph, her baby, at the time of the trial. R. at 18-19. She denied that she was still involved with Mr. Trayhan and denied that he was her boyfriend. R. at 19-20. The Appellee is not the father of Joseph. R. at 21. Mr. Trayhan is in fact the father of this child. R. at 22. She was not working and was attending college and had a 4.0 grade point average. R. at 23. At one time she was a stay-at-home mother. R. at 25. When she had temporary possession of the marital home she sold one of the two refrigerators that were in the house. R. at 26. When she departed this house, she took the washer and dryer, couch, bed and baby's things because they were hers. R. at 27. She also took a sofa. R. at 28. The Appellee took everything of value. Id. In 2005 she paid $2900 to keep the

marital house out of foreclosure. R. at 31.

The Appellant executed a property settlement agreement while represented by Kim Jones, Esq. which included a provision that required her to quitclaim her interest in the marital home to the Appellee. R. at 33. She understood that she would receive the stuff in the first part in exchange for doing things in the second part. Id. The Appellant did not uphold his end of the agreement. Id. She was extremely emotional when she signed this document because she had not seen the minor child of the parties in almost three months, and did not know where he was suppose to be. R. at 34. She was told that if she signed this document that the Appellee would tell her the location of the child. Id. Her new attorney, Leigh Ann Rutherford, told her that this document had been cancelled out. R. at 35. She had been separated from her son for twenty days and had never been separated from him in her life. Id. The trial court admitted this

document into evidence and overruled the Appellant's objection thereto. R. at 36-38.

According to the Appellant the DHS closed its case concerning Mr. Trayhan slapping the minor child of the parties as an unfounded case. R. at 40. Mr. Trayhan denied that he slapped the child. Id. When the parties were together as a couple, the Appellee was gone off and on a lot. R. at 49. Tyler did not like the Appellee's beer drinking. Id. The Appellee is an excellent dad when he is not drinking beer, going to a dart tournament and chasing bar girls. Id. The Appellant was not able to pay on the guardian ad litem's fees. R. at 52. She intends to live in Horn Lake and Southaven, Ms. area. R. at 53.

DEBORAH SPYCHALLA

Deborah Spychalla is the mother of the Appellee. R. at 55. She had temporary custody of the minor child since August. Id. In her opinion the Appellee was a good parent to the child. R. at 58.

The custody battle over the child by his parents had an adverse effect on his performance at school R. at 59-60. She had not permitted the child to stay overnight with the Appellee. R. at 60. She did not want to raise the child. Id. The nine months before the trial had been hard. Id. She was of the opinion that the child needed to be with her son, that is, the Appellee. Id.

On cross examination she admitted that she did not take the child to church. R. at 61. Her son has a girlfriend, Tracy Lisle. R. at 61. While the child was having problems in school he was in her custody. R. at 61. The child had been raised by both of his parents. Id. She admitted that she could not get along with the Appellant most of the time. R. at 62. She had never been to the Appellant's home in Walls. R. at 63. The child is pretty much a normal six year old. Id.

DALE SPYCHALLA

Dale Spychalla is married to the Appellee's mother and is

the father of the Appellant. Id. He described the child as rambunctious. R. at 64. The child acted okay around both of the parties. Id. He could not say whether the Appellant was a good mother, but he could say that the Appellee was a good parent. Id. His opinion was that the child would be better off residing with himself and his wife until he was eighteen years old. R. at 65. However, he this was not an option and suggested that primary custody of the child should be with the Appellee. Id.

On cross examination Mr. Spychalla admitted that his wife ran his house, but denied that he was afraid of her. R. at 66. He felt that the Appellee was the better parent because the Appellant flew off the handle pretty often. R. at 66. He admitted that he does not go to the Appellee's home and did not know with he lived. He does not hang around with the Appellee. R. at 67.

KELLY WILSON

Kelly Wilson resided in the marital home at the time of the trial. R. at 69. This home was purchased during the marriage of the parties. R. at 70. Tyler was a wild child. Id. The Appellant took care of him for the first two and one half years of the marriage. R. at 72. Both parents were taking care of him when the parties split when he was about three years old. Id. He felt that he was the better parent because he had more patience than the Appellant. Id.

Mr. Wilson was employed by Al Williams Bail Bondsman Company. R. at 73. At the time of the trial he was involved in a relationship with Ms. Lisle. This relationship started six to eight months after the parties separated. R. at 74. She stays at "his" house sometimes. Id. She will not be allowed to stay there when his son is there. Id. He has discussed marriage with her, but

no decision has been made on this issue. Id. He denied that he was a drunk, but did admit to drinking beer. R. at 75.

Mr. Wilson could not place a value on the marital home. The debt on it was in excess of $79,000. R. at 76. The house was purchased six years before the trial. The financing secured for it was $85,500. R. at 77. This was his home and Tyler's home, but apparently not the Appellant's home. Id. He paid $3100 to get the house out of foreclosure when he moved back into it. R. at 82. These funds came from an aunt. Id. He is not best friends with the Appellant's father. R. at 84.

On cross examination the Appellee admitted that he drank three, maybe four beers, a couple of nights per week. Id. He has attended AA. Id. He admitted that the marital house was purchased together with his wife. He admitted that she made three house payments when he was on medical leave from a job. R. at 85. He did not know how to answer the question of permitting Tracy to stay overnight at the

marital home and how this would show good moral character and a good moral example for his son. R. at 86. He does not attend church. R. at 86. He works on Wednesday and Sunday. Id. His shift at work varies. R. at 87. On Monday and Tuesday he goes to work at midnight and works until eight a.m. On Wednesday and Saturday he works four p.m. until midnight. Id. On Sunday he works eight a.m. to four p .m. R. at 89. If the Appellee were awarded primary custody of his son, someone would have to take care of him two nights per week. Id.

The Appellee admitted that he watched Ms. Lisle take a shower and that he filmed her doing so. Id. This occurred during his marriage to the Appellant. R. at 89. He did not think that the property rights, child custody and support agreement entered into evidence by the trial court should be enforced because circumstances had changed. R. at 91. Everything in the agreement should be enforced except for the custody agreement. Id. He was trying to get his mind off of this case when he was filming his girlfriend. R. at 96.

The Appellee's mother or aunt would keep the child while he was at work. R. at 97.

APPELLANT'S TRIAL WITNESSES

JENNIFER ROSE WOOD

Jennifer Rose Wood testified that she was a crisis counselor at The House of Grace. R. at 99. She has known the Appellant for more than a year. Id. She came there for counseling for herself and Tyler. Id. His father allegedly committed physical abuse upon him. R. at 100. He needed consistency. Id. He did not need to be shifted from location to location. Id.

On cross examination she testified that she had never met the Appellee. R. at 102. She was never told of Mr. Trayhan striking the child. Id. She was concerned for the child safety. She was of the opinion that the Appellee was going to hurt the child. R. at 103.

TARA WILSON

Tara Wilson was enrolled in college at the time of the

trial. R. at 106. She hoped to secure employment in the medical field. She lived in Walls, Ms. in a large apartment. R. at 106-107. She lives there with her son, Joseph. R. at 107. She had terminated her relationship with Mr. Trayhan in October 2007. She did not sneak around to see him. Id. She does not spend the night with him. R. at 107. The Appellee had purchased her a Ford SUV during the marriage. R. at 108.

$5000 in Mississippi bond money was used for the down payment on the marital house. R. at 110. She paid the payments on the mortgage on the marital home when the Appellee moved out of it a couple of times. R. at 111. She made at least six payments on the marital home. R. at 111.

In lieu of making other mortgage payments she provided the Appellee with sexual servies, hosekeeping services, cook services and things of that nature. R. at 112.

The minor child of the parties, Tyler, was born on February 10th 2003. She was the primary caregiver for the child during the first two -three years of his life. Id. At about age three she discovered that he had some behavior issues. He had a hard time being with kids. Id. She would drop him off and pick him up from pre-K. R. at 113. She quit college to be home to be a mom. R. at 116. Her mother is in complete control of the marriage with the Appellee's father. R. at 120. She did not want to separate her two children. R. at 123.

On cross examination the Appellant testified that the Appellee told her that Mr. Trayhan could have her. R. at 130. He had Kim. Id. She admitted to smoking marijuana, but not since Tyler was born. R. at 132.

SANDRA VALENTO

Sandra Valento testified that she is the step-mother of the Appellant. R. at 138. She raised the Appellant since she was four or five years old. R. at 139. She had lived in Southaven, Ms. for four or five years. Id. She described the Appellant as very devoted to Tyler. Id. She had never

seen the Appellant be violent toward Tyler. R. at 140. The Appellant has never expressed a desire to return to Minnesota. Id.

DEBORAH PACE BRANAN

Deborah Pace Branan was appointed the guardian ad litem in this case. She is a licensed attorney in Mississippi and Tennessee. She is certified in both states. R. at 142. She had met with both parties. Id. According to her investigation Mr. Trayhan struck Tyler and the Appellant knew that it occurred. She told him not to do it again. R. at 143. Mr. Trayhan has a girlfriend. R. at 145. She had a concern about the Appellant's credibility. R. at 146. Both parties were interested in Tyler. R. at 149. The child is a handful to control. Id.

The issue of which parent should be awarded custody was a bit hard because both parties have issues. Id. She felt that the Appellee's issues could be corrected and thus she favored him. R. at 150. Both parents were doing wrong by not being faithful to each other. Id. She

was of the opinion that the child needed a man in her life because he is all boy. He also needs his mother. Id. In her opinion custody of the minor child should be granted to the Appellee. R. at 151. The Appellant's projected work hours would be more preferable than the Appellee's from a child care standpoint. R. at 155. She felt that the Appellee was not extremely truthful about his relationship with Tracy. Id. She did not know how to comment on the Appellee filming his girlfriend naked in the shower. R. at 156. The Appellant did not condone Mr. Trayhan slapping the child. R. at 157. He was slapped because he either talked back to Mr. Trayhan or would not do what he was suppose to do. R. at 158. This was a one time event. Id.

VI. SUMMARY OF ARGUMENT

The trial court erred in its application of the **Albright v. Albright** factors in awarding paramount physical and legal custody of the minor child of the parties to the Appellee.

The trial court erred in finding that the parties entered into a property settlement agreement that was a binding contract and should be enforced as to property division. The Appellant withdrew her consent to the aforesaid property settlement agreement when the parties executed the voluntary consent to divorce based upon irreconcilable differences with the court to determine certain issues noted herein. In the alternative, the Appellant executed the aforesaid agreement under the duress of not able to see the minor child of the parties per the actions of the Appellee.

The trial court erred in overruling the Appellant's objection to the introduction into evidence of the property settlement agreement.

VII. ARGUMENT

ISSUE NO. 1: Trial court erred in applying the Albright factors.

The trial court indicated in its judgment of divorce that it considered the child custody factors set forth in **Albright v. Albright**, 437 So. 2d 1003 (Miss. 1983) in determining the appropriate parent to have paramount physical and legal custody of the minor child. Clerk's papers at 16. It found that the following factors favored the Appellee:

1. parenting skills and capacity to provide care;
2. physical and mental health of the parents;
3. moral fitness;
4. stability of the home environment;
5. stability of employment of the parents;
6. other relevant factors: Guardian Ad Litem Report;

It found that the following factors are neutral:

1. Age/health/sex of the child;
2. continuity of care prior to the separation;
3. emotional ties of the parent and child;

4. home/school and community record of the child;

5. age sufficient to state a preference. Id.

The trial court weighed none of the aforesaid factors in favor of the Appellant.

In order for a reviewing court to reverse the decision of the chancellor in an initial permanent child custody decision the lower court must have been manifestly wrong, clearly erroneous or applied an erroneous legal standard. **Weigand v. Houghton**, 730 So. 2d 581 (Miss. 1999).

The chancellor was manifestly wrong and clearly erroneous in his analysis of the aforesaid factors as follows:

1. That the Appellee had better parenting skills and capacity to provide care for the minor child of the parties. The record indicates that the Appellant had been a stay-home mom for periods of time during the marriage when not working. R. at 25. Dale Spychalla did not go to the Appellee's home and did not hang around him. R. at 67. The Appellee felt he was the better parent because he had more patience than the mother.

R. at 72. The Appellee's capacity to provide care for the minor child was adversely affected by his employment as a bail bondsman. R. at 73. He worked on from 4 p.m. to midnight on Wednesdays and Saturdays. On Mondays and Tuesday he worked from midnight to eight a.m. On Sundays he worked 8 a.m. to 4 p.m. R. at 89. These working hours would require someone else to take care of the minor child two nights per week. Id.

The Appellee's parents skills were adversely affected his consumption of maybe four beers a couple of nights per week. R. at at 84. Moreover, his son would have to compete with the Appellee's girlfriend for his time.

The Appellant testified that she was the better parent to have permanent custody of the minor child because she did not drink and go out and party. R. at 115. She did not put a boyfriend over the child. R. at 116. She took the child to church, whereas the Appellee did not attend

church. R. at 86 and 117. She expected to work from 8 a.m. to 2. p.m. Id.

2. That the Appellee's physical and mental health favored him over the Appellant.

The Appellant testified that she was very healthy. R. at 120. With respect to her mental health, she did seek a little bit of counseling. R. at 121. She was not crazy. Id. The Appellee denied that he had any mental issues. R. 75. This factor seems to be neutral, as opposed to favorable to the Appellee. The Appellee presented no proof in the record that the Appellant was mentally unstable.

3. That the moral fitness of the Appellee was more favorable than the Appellant's.

The chancellor's weighing of this factor in favor of the Appellee is difficult to analyze because both parties admitted to extra-marital affairs (the Appellee with Tracy Lisle and the Appellant with; Mike Trayhan). The Appellant attended church with the minor child, the Appellee did not. The Appellee filmed his girlfriend taking a shower. Moreover, the credibility

of the Appellee was questionable in the opinion of the guardian ad litem. According to her opinion, he was not extremely truthful about his relationship with Ms. Lisle. R. at 155. This factor should be construed as either neutral or favorable to the Appellant. She attended church and did not make porno movies of Mr. Trayhan.

4. Stability of the home environment favored the Appellee.

At the time of the trial the Appellant resided in an apartment in Walls, Ms. with her son, Joseph. R. at 18. She spends every night at the apartment. R. at 19. The Appellant did not have any control nor discipline problems w ith the child on a regular basis in the home environment. R. at 122. The Appellee resided at home in Horn Lake, Ms. purchased by the parties. during the course of the marriage. R. at 69-70. The Appellee's work schedule as noted herein would adversely affect the stability of the home environment. His girlfriend sometimes stays at this house, but she could not stay there when his son was there. R. at 74. This factor thus weighed in favor of the Appellant.

5.Stability of the employment of the parents.

At the time of the trial the Appellant testified that she would be seeking employment in the medical community. R. at 118. The Appellee was employed as a bail bond agent. R. at 73. Before filing for divorce he worked for Gold Strike Casino and went on medical leave for a work injury. R at 85. Since this divorce action was filed he had worked for Resorts Casino. He was fired from this job. R. at 92. Shortly after the parties married, the Appellant worked for the Appellee's mother in a food service business. R. at 111. She came to Mississippi to work for the Grand Casino in 1998. R. at 125. She had worked for the Grand Corporation for approximately eight years. Id. Her positions were as a head main cage cashier and surveillance worker. Id. She managed a Subway. She met the Appellee, became pregnant and quit school and stayed home. Id. She worked for a brokerage firm from April 2007 until February. She then worked for the House of Grace at the thrift store. R. at 126.

Both of the parties thus at one time worked in the casino industry.

Apparently, the chancellor considered the Appellee working a as bail bond agent was more worthy of credit on this factor than working in the House of Grace, managing a Subway and working for brokerage. There was no proof that the Appellant was ever terminated from a job as was the Appellee. This factor obviously weighs in the Appellant's favor.

6. Other relevant factors in favor of the Appellee: Guardian Ad Litem report.

The report of the guardian ad litem, that being her testimony at the trial of this case, was defective in several ways. First, she did not have an opinion about the Appellee having an affair during the marriage. She really did not investigate this at all. R. at 156-157. She felt this was not pertinent to her involvement in the case. R. at 157. Secondly, she faulted the Appellant for trying to "shut down" her mother-in-law's food service business and classified the Appellant as "mean" for doing so. R. at 152. This does not reflect on the Appellant's parenting skills. She faulted the Appellant for

reporting improper activity to t he authorities. R. at 153. She was of the opinion that the child needed "a man in his life. He needs some things to do because he is all boy, but he needs his mom too." R. at 150. However, she did not state the reasons for forming the opinion that the Appellee would be the better parent to have permanent custody of the child other than the generalization that he needed a "man in his life."

The trial court considered the age/health/sex of the child to be neutral. The child was of tender years. This factor and the continuity of care from the child's birth until the separation of the parties should have favored the mother. The court noted in **Albright,** supra, that abandoning the doctrine of tender years would discard a factor worthy of weight in determining the best interest of a child in a a particular case. Id. at 1005.

The trial court also considered the continuity of care prior to the separation of the parties to be neutral. The Appellee admitted that

that the Appellant was the primary care giver of the child during the first two and two a half years of the marriage. R. at 72. The minor child was born on February 10th, 2003 and the complaint for divorce alleged that the parties separated on or about August 4th, 2007. Clerk's record at 8. The Appellant testified that she had the continuing care of the minor child prior to the separation of the parties. R. at 115.

The matter of child custody is a matter within the sound discretion of the chancellor. **Sturgis v. Sturgis**, 792 So. 2d 1020, 1023 (Miss. Ct. App. 2001). The trial court clearly abused its discretion in awarding permanent custody of the minor child to the Appellee as noted in the foregoing analysis of the **Albright** factors.

The primary consideration in all child custody matters is "the best interest and welfare of the child." **Albright** at 1005. Clearly, the best interest of the minor child was to have the Appellant given permanent custody, care and control of him. She had raised him from birth until the separation of the parties, took him to church, cared for his health problem

(asthma R. at 115) and worked several different jobs to help support him. The chancellor's decision on child custody must be supported by substantial evidence in the record. **Norman v. Norman**, 962 So. 2d 718 (Miss. Ct. App. 2007). The chancellor's weighing of none of the **Albright** factors in t he Appellant's favor and the remaining factors neutral and the analysis of those factors herein indicate that his decision is not based upon substantial evidence in the record. The Appellee's mother had temporary custody of the minor child for a large period of the separation of the parties. Thus, he did not demonstrate that the best interests of the minor child would be served by awarding him permanent custody of the minor child.

I. WHETHER THE CHANCELLOR ERRED IN FINDING THAT THE PARTIES ENTERED INTO A PROPERTY SETTLEMENT GREEMENT THAT WAS A BINDING CONTRACT AND SHOULD BE ENFORCED AS TO DIVISION OF PROPERTY.

The chancellor found that the parties entered a property settlement agreement that is a binding contract and shall be enforced as to property division. Clerk's record at 17. Specifically, the Appellee shall be the sole and exclusive owner of the property at 7118 Durango Dr. Horn Lake, Ms. and that the Appellant shall have no ownership interest in the said property and entitled to no equity there from. Id. The Appellee could not place a value on this property because of the state of the real estate market at the time of the trial. However, the debt on the property was more than $79,000. R. at 76. The property was purchased approximately six years before the trial. It was financed for $85,500. R. at 77.

The property settlement agreement was signed in the presence of both of the attorneys for the parties. Id. It was signed on a day when

a judge was present for a hearing if necessary. Id. This house was purchased by the parties together. R. at 85. He admitted that the Appellant made probably three payments on the property. Id. The Appellee admitted that during the 14 to 20 days before the property settlement was signed that the minor child of the parties was in his care being babysat by Aunt Carol while he was at work. R. at 90. The Appellant was not permitted to take the child anywhere during this period because of his fear that she would take the child up north. Id.

The Appellee did not believe that the custody arrangement of the property rights, child custody and support agreement should be enforced because circumstances had changed. R. at 91. However, everything else should be enforced. Id.

The Appellant testified that the parties received $5000 in Mississippi bond money to use as a down payment on the property.

This money would have to be repaid if the house was sold. R. at 110-111. She also had to come up with two thousand nine hundred dollars to save the mortgage on the home when the Appellee had moved out. R. at 31.

The Appellant identified the agreement for settlement of child custody and property dated August 11, 2007. R. at 31-32. She identified her signature on this document. R. at 32. This agreement required the Appellant to quitclaim any interest that she had in the marital property to the Appellee. R. at 33. She understood that the parties were going to receive certain things by signing the agreement. R. at 33. The parties then retained new attorneys after the agreement was executed. Id. She signed the agreement because she had not seen her son in almost three months. R. at 34. The Appellee was the only one who knew where her son was. Id. She was very emotional. The parties had started out in front of the court for a temporary hearing and then moved on to

discussing the agreement. Id. She was told that if she signed this document that she would be told where her son was. Id. Her son had been missing for twenty days. R. at 35. She was of the opinion that this agreement had been cancelled out by one of her prior attorneys. Id.

The trial court ruled that this agreement was a contract and enforceable outside of whether or not the parties were granted a divorce. R. at 36. It focused on the standing alone language in the agreement. Id. The Appellant then asked the trial court to enforce the agreement as written including the provision concerning child custody. R. at 37. That is the trial court should not be able to pick a paragraph out and enforce that and not enforce the rest of it. Thus, the entire agreement should be enforced or none of it enforced. Id. The court responded that the Appellee had only asked that the agreement be introduced into evidence as an exhibit, not

that it be enforced.

A true and genuine property settlement agreement is no different from any other contract, and the mere fact that it is between a divorcing husband and wife, and incorporated in a divorce decree, does not change its character. **East v. East**, 493 So. 2d 927 (Miss. 1986). Property settlement agreements are fixed and final and may not be modified absent fraud or contractual provision allowing modification. **Weathersby V. Weathersby** 693 So. 2d 1348, 1352 (Miss. 1997).

A separation agreement executed in conjunction with a joint bill for divorce based upon irreconcilable differences could not be held valid when the joint bill had been voided by one of the parties, that is, one of the parties withdrew from the proceedings to pursue a divorce based on another ground. **Grier v. Grier** 616 So. 2d 337 (Miss. 1997). The facts of this case are analogous to **Grier** in that the parties executed the voluntary consent to

divorce based upon irreconcilable differences with the court to determine certain issues noted herein., one being the disposition of the alleged marital home in Horn Lake, Ms. and payment of the outstanding debt on said home and two being an equitable division of the marital property. If the parties were of the opinion that the property settlement agreement was enforceable, then they would not have executed the voluntary consent to divorce. Moreover, the filing of the voluntary consent to divorce obviously placed the issue of the disposition of the marital home and an equitable division of the marital property in issue.

Moreover, the Appellant obviously executed the property settlement agreement under duress and upon misrepresentation by the Appellee. He kept the minor child of the parties from the Appellant until she executed the property settlement agreement and then misrepresented his position by refusing to honor the

child custody provisions of the agreement. He wanted to enforce the provisions favorable to him and not those that concerned the prior custody agreement concerning the minor child which he no longer agreed with. The rules applicable to the construction of written contracts in general are to be applied in construing a postnuptial agreement. Such a contract must be considered as a whole, and from such examination the intent of the parties must be gathered. **Roberts v. Roberts**, 381 So. 2d 1333(Miss. 1980). The obvious intent of the Appellant that all of the provisions of the agreement be enforced and honored, not just the provision concerning the disposition of the marital home.

Additionally, this provisions of the agreement were never approved by the trial court as being "adequate and sufficient" as required by Miss. Code Ann. Section 93-5-2 (2)(1994). This language is **not** included in the judgment of divorce entered herein, thus making the judgment itself void.

ISSUE THREE: WHETHER THE TRIAL COURT ERRED IN OVERRULING THE APPELLANT'S OBJECTION TO INTRODUCTION INTO EVIDENCE OF THE PROPERTY SETTLEMENT AGREEMENT

When the Appellee asked the trial court to make the property settlement agreement an exhibit the Appellant objected on the basis that this document was part of the settlement discussions and that the general rule of law in Mississippi is that settlement discussions, which are unsuccessful are inadmissible. R. at 32 and 36. The Appellee responded that this document was a signed, filed property settlement agreement. Mississippi law recognizes this as a contract between the parties and it is enforceable as to property rights. R. at 32. The Appellant noted that this agreement had never been approved by the chancellor. Id. The trial court overruled the objection. R. at 33.

Mississippi Rule of Evidence 408 states evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to com-

prise a claim which was disputed as either validity or amount, is not admissible to prove liability or invalidity of the claim or its amount. evidence of conduct or statements made in compromise negotiations is likewise not admissible.

The parties obviously executed the property settlement agreement with the intent to settle or a reach compromise on the issues contained therein. The trial court was manifestly wrong and clearly erroneous in his decision on this issue and failed to apply the correct legal standard. Reversal is therefor appropriate.

VIII. CONCLUSION

Based upon the foregoing authorities and argument the Appellant respectfully requests the Court to reverse the lower court on the issues cited herein and to remand the case to the trial court for further proceedings.

Respectfully submitted,

This the 11th day of May 2010.

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Certificate of Service

I, David L. Walker, counsel for the Appellant, hereby certify that I have This day hand-delivered a copy of the foregoing Appellant's brief to Hon. Mitchell P. Lundy, Jr. chancellor, and Hon. Paige Williams, trial counsel for the Appellee, at their usual business addresses.

This the 11th day of May 2010.

David L. Walker