IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NUMBER 2009-TS-00310

LORI D. BROWN
Plaintiff – Appellant

VERSUS

CHRISTOPHER CRUM
Defendant – Appellee

APPEAL FROM THE CHANCERY COURT OF
LINCOLN COUNTY, MISSISSIPPI

APPELLEE'S BRIEF ON BEHALF OF CHRISTOPHER CRUM

ORAL ARGUMENT IS NOT REQUESTED

BRADLEY RUSSELL BOERNER, ESQ.
BOERNER LAW FIRM, P.C.
Attorneys at Law
117 S. Railroad Ave.
P.O. Box 205
Brookhaven, Mississippi 39602-0205
Phone: 601-833-1128
Fax: 601-833-0161
[redacted]

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-TS-00310

LORI D. BROWN **PLAINTIFF/APPELLANT**

V.

CHRISTOPHER CRUM **DEFENDANT/APPELLEE**

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 Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. Judge Edward E. Patten, Jr., Chancellor of the Fifteenth Judicial District
2. Lori D. Brown, Plaintiff/Appellant
3. Christopher Crum, Defendant/Appellee
4. Edwin L. Bean, Jr., Esq., P.O. Box 1322 McComb, MS 39649
   Attorney for Plaintiff/Appellant
5. Bradley Russell Boerner, Esq., P.O. Box 205, Brookhaven, MS 39602
   Attorney for Defendant/Appellee

BRADLEY RUSSELL BOERNER
Attorney of Record for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases: **Page(s)**

Other Authorities:

STATEMENT OF THE ISSUES

1. The Chancellor Improperly Treated The Proceeding As An Initial Determination Of Custody and Consequently Used The Wrong Legal Standard When He Failed to Apply The "Material Change" in Circumstances Test.

(A) The facts of this case and the distinction of the previous determination of custody Distinguish the present case from the previous cases, and a different standard should be used. Custody in this case has already been determined.

(B) The Mississippi DHS support order and execution thereof should be considered an initial custody determination.

(C) The parties previously agreed to a determination of custody.

2. Crum waived his entitlement to an *Albright* analysis because of his delay in asserting custody.

STATEMENT OF THE CASE

1. Nature of the Case

This matter involves the initial custody determination of children born out of wedlock.

2. Procedural History

On May 21, 2008, Lori Brown, hereinafter "Brown", filed a Complaint for Custody. On July 7, 2008, Christopher Crum, hereinafter "Crum", filed an Answer to Complaint for Custody and Counter-Complaint for Custody. On July 12, 2008, Brown filed an Answer to Crum's Counter-Complaint for Custody.

On October 8, 2008, a trial took place before the Honorable Judge Ed Patten in the Lincoln County Chancery Court. The court issued a ruling from the bench on that same day in favor of Crum and signed a Final Decree on October 13, 2008, accordingly. The Final Decree awarded physical custody to Crum, subject to visitation rights of Brown.

On October 22, 2008, Brown filed a Motion for Reconsideration, which the court entertained by hearing on January 6, 2009. The court denied Brown's motion from the bench on January 6, 2009.

Thereafter, Brown filed her appeal.

3. Statement of the Facts

Crum and Brown are the parents of two children, Caelan Sylvia Crum, who was five years old at the time of trial and Brendon Jacob Crum, who was four. (R.8). Crum and Brown were never married. (R.44).

Crum was adjudicated the father of Caelan and Brendon as a part of a DHS action. (R.131, 132, 140). The same action established his child support obligation. (R.131-133). At the

time of the trial, there was no custody order with regard to Caelan and Brendon. (R.120, 133, 148).

Crum and Brown made verbal arrangements with regard to visitation and care of the children; however, there was no written agreement, nor did they have an agreement endorsed and adopted as an order of any court with proper jurisdiction. (R. 120, 121, 133). Crum requested that the parties enter a written agreement as a part of a child support agreement, to which Brown declined. (R. 133).

After hearing all of the evidence from both parties, the Honorable Judge Ed Patten applied the Albright analysis and found that the best interests of the children were served in placing them in the physical custody of Crum. (R.140-158).

SUMMARY OF THE ARGUMENT

The lower court applied the correct standard of law, being the initial Albright analysis, as the children at issue were children born out of wedlock and there was no prior custody order. The fact pattern in the matter at hand is eerily similar to several opinions rendered by the Mississippi Supreme Court and Mississippi Court of Appeals wherein those respective Courts found that an initial Albright analysis is the proper standard of law to be considered by the lower courts when faced with a situation involving children born out of wedlock and without the benefit of a prior custody order.

A DHS order addressing paternity and child support does not determine custody. DHS does not have the power (by statute or caselaw) to file suit for custody given the circumstances in this matter and did not file a custody action as a result. Brown was not even a party to the suit that determined paternity and child support. Rather, the DHS action against Crum merely established that he was the father and created a financial obligation for child support.

A verbal agreement, or any agreement for that matter, which is not endorsed and made part of an order from the proper court having jurisdiction does not qualify as a custody determination, as it is not legally binding. Only the court having proper jurisdiction has the power to determine custody and order same. In this matter, no court had determined custody prior to the decree that Brown now appeals.

Crum did not waive his entitlement to an Albright analysis as the result of the time period elapsing prior to his asserting custody. Neither the facts in this matter nor the law support Brown's assertion that Crum somehow waived his right to an Albright analysis. Parents retain the right and entitlement to an Albright analysis until a proper custody order is in place.

Brown did not raise any of the issues now before this Court at any time in the lower court proceedings, despite ample opportunity. Therefore, none of these issues have been preserved for appeal. Accordingly, none of these issues are properly before this Court.

ARGUMENT

Standard of Review

"In child custody matters, review by this Court is 'quite limited in that the Chancellor must be manifestly wrong, clearly erroneous, or apply an erroneous legal standard in order for this Court to reverse." *In re Custody of M.A.G.*, 859 So.2d 1001, 1004 (P8) (Miss. 2003) (quoting *M.C.M.J. v. C.E.J.*, 715 So.2d 774, 776 (P10) (Miss. 1998)). See also *Johnson v. Gray*, 859 So. 2d 1006, 1012 (P31) (Miss. 2003); *Bland v. Bland*, 620 So. 2d 543, 544 (Miss. 1993); *Beasley v. Beasley*, 913 So. 2d 358, 360 (Miss. Ct. App. 2005); *Fletcher v. Shaw*, 800 So. 2d 1212, 1214 (Miss. Ct. App. 2001).

1. ***The Chancellor improperly treated the proceeding as an initial determination of custody and consequently used the wrong legal standard when he failed to apply the "material change" in circumstances test.***

   a. ***The facts of this case and the distinction of the previous determination of custody distinguish the present case from the previous cases, and a different standard should be used. Custody in this case has already been determined.***

The issue is whether the lower court used the proper standard and whether or not custody had already been determined prior to the lower court's hearing. We would submit a three part response to this issue as follows:

(i) The chancellor in the lower court applied the proper legal standard, as the Mississippi Supreme Court and the Mississippi Court of Appeals have established the legal standard applied in numerous reported opinions with almost identical fact scenarios;

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal;

(iii) Brown did not properly cite authority supporting her argument.

We would elaborate on each argument accordingly and in the same order as posed above.

(i) The chancellor in the lower court applied the proper legal standard, as the Mississippi Supreme Court and the Mississippi Court of Appeals have established the legal standard applied in numerous reported opinions with almost identical fact scenarios.

The Mississippi Supreme Court and the Mississippi Court of Appeals have provided clear and unequivocal caselaw which support the lower court's application of the law. The proper standard of law has been established by *Law v. Page*, 618 So.2d 96 (Miss. 1993), and later entrenched by it's progeny, which held "that the appropriate legal standard to apply in custody actions dealing with an illegitimate child, when there has been no prior custody determination, is that found in divorce proceedings, which is the best interest of the child considering the Albright factors." *Law*, 618 So.2d at 101. See also *S.B. v. L.W.*, 793 So.2d 656 (Miss. Ct. App. 2001); *Fletcher*, 800 So. 2d at 1214 (Miss. Ct. App. 2001); *White v. Thompson*, 822 So. 2d 1125, 1128 (Miss. Ct. App. 2002); *C.W.L. v. R.A.*, 919 So.2d 267, 271 (P10) (Miss. Ct. App. 2005); *Romans v. Fulgham*, 939 So. 2d 849, 852 (Miss. Ct. App. 2006); *Williams v. Stockstill*, 990 So. 2d 774, 776 (Miss. Ct. App. 2008). To find otherwise in this matter would not just create a distinction, but would overrule an entire line of cases and well established mandates of law.

It is also important to note that "in custody [matters] involving an illegitimate child, when the father acknowledges the child as his own, the father is deemed on equal footing with the mother as to parental and custodial rights to the child." *Law* at 101. (citing *Smith v. Watson*, 425 So. 2d 1030, 1033 (Miss. 1983)).

In order for the lower court to apply the alternative standard, that of a modification of custody, wherein a material change in circumstances adversely affecting the child must be shown

before the court can modify the custodial order in place, there must be a custodial order in place for the lower court to modify. The Mississippi Supreme Court states this point more eloquently, when it stated that "the 'material changes' standard used in modification proceedings is dependent on there being a prior determination of custody" and further held that "since no prior custody determination was made in this case, the proper standard of law to be applied is that found in divorce proceedings, which is the best interest of the minor child." *Williams*, 990 So.2d at 776 (P7), citing *Law* at 101; see also *C.W.L.*, 919 So.2d at 271 (P10); and *Romans*, 939 So. 2d at 852.

Brown recognizes the above requirement of a custody determination, and, therefore, Brown also asserts that custody had been "determined" prior to the lower court trial. Nevertheless, there was no custody order in place prior to the lower court's decision that Brown now attempts to challenge. Without a custody order, Browns assertion that custody has already been determined fails.

It is important to note that Brown's complaint, which provoked the lower court's decision, was a Complaint for Custody. No part of the complaint makes any mention of a prior custody determination or that a material change in circumstances had occurred. Rather, Brown's Complaint for Custody requested that the lower court make an initial determination of custody. To now claim that the material change in circumstances standard should have applied creates a paradox in Brown's requests for relief, as it is a clear contradiction to her initial Complaint.

We complete our address to Brown's alternate arguments that custody had been determined prior to the lower court trial in our responses below.

Brown also argues that the matter at hand contains a fact pattern that is distinguishable from the previous cases, presenting a clear determination of custody. This flawed attempt brings to mind the lawyer's old maxim "if the law doesn't support your argument, then focus on the

facts." Nevertheless, a review of the fact pattern in this matter yields very similar results of cases considered. We discuss the relevant facts of *Romans v. Fulgham*, *C.W.L. v. R.A.* and *S.B. v. L.W.* as support of our contention that very similar facts have been considered and opined upon by the Mississippi Appellate Courts with identical results which support our position.

In *Romans v. Fulgham*, a child was born out of wedlock in 1996, a suit for paternity and child support ensued in 1997, yet the resulting order made no custodial determination. *Romans* at 851. In late 2004, seven years after the paternity and child support order and just before the child's eight year old birthday, the father filed suit for custody. *Id.* The lower court properly treated the action as an initial custody determination and applied the best interests Albright analysis, granting custody to the father. *Id.*

As in the matter at hand, the father in *Romans* had been adjudicated to be the natural parent, required to pay child support, verbally agreed to visitation arrangements and later filed an action for custody. *Id.*

In *C.W.L. v. R.A.*, the appellant mother, C.W.L., argues that the lower court applied an erroneous legal standard in determining custody, as she contended (much like Brown herein) that an earlier paternity order created a "de facto custody." *C.W.L.* at 270-271. C.W.L. continued to reason that due to the earlier paternity order, the material changes standard should have applied. *Id.* The Mississippi Court of Appeals found that "because custody of [the subject child] had never been judicially determined, the material-change-in-circumstances standard did not apply" and further held that the Albright application was the correct standard as applied by the lower court, as a paternity order is not an initial custody determination. *Id.*

While dates of birth and subsequent dates of pleadings are not made clear in the *C.W.L. v. R.A.* opinion, the opinion indicates that the child was approximately eight years old when the lower court made the initial custody determination by applying the best interests Albright

analysis. It should also be noted that here again in C.W.L., paternity and child support had been adjudicated when the child was "approximately one year old." *Id.* at 269.

In *S.B. v. L.W.*, the parents of an illegitimate child made verbal agreements with regard to visitation and support. *S.B.*, 793 So.2d at 657. It was not until the child was in school that the father filed suit for custody. *Id.* The lower court applied the proper best interests Albright analysis and granted custody to the father, which the Mississippi Court of Appeals affirmed. *Id.*

In these three cases, it has been found that no custody determination was made prior to the order appealed. Brown makes no new allegation for this Court to consider with regard to applicable facts. Therefore, we would respectfully submit that the argument that the facts call for a distinction should fail.

It is important to note that the lower court did find that the "continuity of care" factor (from Albright) favored Brown. While there was no prior custody order, and, thus, no custody determination, the prior living arrangement of the children was recognized by the lower court and Brown was given credit for that arrangement. However, almost all of the remaining factors favored Crum. Brown makes no issue of the lower court's application of the Albright factors. We mention this to highlight the point that the lower court did not turn a blind eye to the prior arrangement of the parties, as Brown suggests in her appellate brief.

In conclusion, the caselaw is clear and abundant, the proper standard to be applied in the determination of custody when there is no prior court order determining custody is that of an initial Albright analysis. The lower court properly applied this standard and carefully considered each of the Albright factors in its analysis. Therefore, we would respectfully submit that this assignment of error has no merit.

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal.

This argument was never raised, never made part of an objection nor mentioned whatsoever in the lower court trial or on the hearing on Brown's motion to reconsider. In fact, as we have stated above, Brown, the appellant, initiated this matter in the lower court by filing a Complaint for Custody. There is no mention of the "material change" standard in her Complaint, throughout the trial or during the hearing on Brown's Motion to Reconsider.

"As a general rule, a litigant cannot raise issues for the first time on appeal because the trial judge had no opportunity to deal with the issue at the trial level." *Jones v. State*, 958 So. 2d 840, 843 (Miss. Ct. App. 2007), citing *Crowder v. State*, 850 So. 2d 199, 200 (P5) (Miss. Ct. App. 2003).

"The law is well settled in Mississippi that appellate courts will not put trial courts in error for issues not first presented to the trial court for resolution, and that issues not presented in the trial court cannot be first argued on appeal." *Robinson v. State*, 758 So. 2d 480, 490-491 (Miss. Ct. App. 2000), citing *Chassaniol v. Bank of Kilmichael*, 626 So. 2d 127, 133-34 (Miss. 1993). See also *Seaney v. Seaney*, 218 So. 2d 5 (Miss. 1969).

In fact, the *Romans* case, which we have discussed throughout our brief due to the similarities in facts and applicable law, addresses this very same issue, and held as follows:

> We decline to find error in the trial court and adopt an argument that was not properly presented below. The contention that the paternity judgment was an initial custody determination was not raised at the chancery court level until after the chancellor had issued his bench opinion. In fact, Lisa's original counsel, during his closing argument, merely urged the chancellor to study the totality of the Albright factors in reaching his decision. In keeping with the holdings of *Law v. Page, C.W.L. v. R.A.*, and *S.B. v. L.W.*, the chancery court denied the motion to reconsider, thereby confirming the chancellor's decision that the issue should be treated as an initial determination, rather than a modification of custody.
> ***

> Finally, in neither Lisa's motion to reconsider the bench opinion, nor either party's brief to this Court, is the argument made that Ryan has waived his entitlement to an Albright analysis by virtue of his delay in bringing the custody proceeding. Thus, we find this case is not an appropriate vehicle to alter the law in this area.

Romans at 853.

Although it was not argued by Brown in her brief (or at any time) that she should enjoy the benefit of raising issues for the first time on appeal, the dicta quoted above from the *Romans* Court confirms that this matter and cases involving initial custody determinations of children out of wedlock are no exception to the rule that a litigant cannot raise issues, arguments or assignments of error for the first time on appeal.

Therefore, we would respectfully submit that this assignment of error lacks merit, as it was not raised at any point in the lower court and is not properly before this Court.

(iii) Brown did not cite authority supporting her argument.

In this assignment of error, Brown fails to cite authority which supports her argument. While Brown does offer cites from Mississippi law, the cases and law cited are either completely irrelevant, do not support her argument, or are portions of dissenting opinions. Therefore, the opinions and statutes cited by Brown are mere ornaments of frill and distraction, which provide no foundation or support to the argument itself.

The Mississippi Court of Appeals recognized that portions of dissenting opinions are not binding precedent and, therefore, not supportive authority for an argument in *Brock v. Brock*, 906 So. 2d 879, 887 (Miss. Ct. App. 2005). Therefore, citations taken from dissenting opinions cannot stand alone as law cited as authority for an argument.

The failure to provide citations to supporting law creates a procedural defect, precluding this Court from considering the assignment of error on appeal. *Turner v. Turner*, 612 So. 2d 1141, 1143 (Miss. 1993); *Grey v. Grey*, 638 So. 2d 488, 491 (Miss. 1994); *Devereaux v. Devereaux*, 493 So. 2d 1310 (Miss. 1986).

The above considered, we would respectfully submit that this assignment of error lacks merit, as no supporting law is properly cited by Brown and, therefore, should not be considered by this Court.

b. *The Mississippi DHS support order and execution thereof should be considered an initial custody determination.*

The issue is whether a DHS support order and execution thereof is recognized by law as an initial custody determination. We would again submit a three part response to this issue as follows:

(i) A DHS order does not determine custody;

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal;

(iii) Brown did not cite authority supporting her argument.

In keeping with our organizational approach, we would elaborate on each argument accordingly and in the same order as posed above.

(i) A DHS order does not determine custody.

The Department of Human Service's "authority is limited to establishing paternity and establishing, modifying and enforcing support orders", while "related issues such as custody and visitation are not within the scope of their representation." *D. Bell, Bell on Mississippi Family Law*, 397 (2008), citing MCA 43-19-35 (3) (2004). Further, "in a proceeding brought by the legal section of [DHS] to adjudicate paternity and responsibility for child support, the mother is not a necessary party" and "[t]he only interest of the [DHS] is in seeing that the taxpayers are relieved of some, or all of the burden in supporting an indigent child." *McCollum v. State Dep't of Public Welfare*, 447 So. 2d 650, 653 (Miss. 1984); see also *Minor v. State Dep't of Public*

Welfare, 486 So. 2d 1253, 1255 (Miss. 1986); *Hull v. State Dep't of Public Welfare*, 515 So. 2d 1205, 1207 (Miss. 1987).

This is not the first time such an issue has been considered on appeal. In the *Romans* matter, the mother of the child at issue made an identical argument. We would quote the *Romans v. Fulgham* opinion exhaustively:

> In our case, claiming that an initial custody determination was made as part of the 1997 judgment finding Ryan to be the natural father of A.F., Lisa argues that this matter should have been treated as a custody modification proceeding rather than an initial determination of custody. While Lisa concedes that the paternity judgment did not explicitly award her primary physical custody of A.F, she argues that, by ordering Ryan to pay her $ 100 per month in child support, the chancery court implicitly awarded her primary physical custody of A.F. We do not find this argument persuasive. As an initial matter, we note that Lisa was not a party to the original paternity action. Rather, the action was initiated by the Mississippi Department of Human Services pursuant to its statutory authority to commence paternity actions. See Miss. Code Ann. § 43-19-31(b) (Rev. 2004). The Department of Human Services' enabling act contains no language even authorizing it to initiate custody proceedings.
> ***
> While the Mississippi Supreme Court has noted that custody issues are routinely decided in paternity actions, it has also recognized that "a paternity action is not the most convenient or appropriate forum for determining the best interests of the child where custody actions are arranged to effectively and exhaustively address the issue." *Griffith v. Pell*, 881 So.2d 184, 187-88 (P12) (Miss. 2004).
> ***
> We maintain the appropriate standard is one of an initial custody proceeding utilizing an Albright analysis in order to determine the best interest of the child.
> *Romans* at 853.

In conclusion, by raising this issue, Brown asks this Court to overrule decades of caselaw and contradict state and federal statutes. A review of the applicable caselaw and statutes make it clear that a DHS order and/or the enforcement thereof are not an initial custody determination. Premises considered, we would respectfully submit that this assignment of error has no merit.

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal.

This argument was never raised, never made part of an objection nor mentioned whatsoever in the lower court trial or on the hearing on Brown's motion to reconsider. We would reassert this response, as it applies to each and every assignment of error. However, in the interests of brevity, we would provide an abbreviated version of this argument here and reassert the same argument as stated above.

"The law is well settled in Mississippi that appellate courts will not put trial courts in error for issues not first presented to the trial court for resolution, and that issues not presented in the trial court cannot be first argued on appeal." *Robinson*, 758 So. 2d at 490-491, citing *Chassaniol*, 626 So. 2d at 133-34.

Therefore, we would respectfully submit that this assignment of error is not properly before this Court, as it was not raised at any point in the lower court.

(iii) Brown did not cite authority supporting her argument.

In this assignment of error, Brown fails to cite authority which supports her argument. Brown cites a portion of the dissenting opinion from *Romans* and other statues which do not in any way support her argument.

The Mississippi Court of Appeals recognized that portions of dissenting opinions are not binding precedent and, therefore, not supportive authority for an argument in *Brock*, 906 So. 2d at 887. Therefore, citations taken from dissenting opinions cannot stand alone as law cited as authority for an argument.

The failure to provide citations to supporting law creates a procedural defect, precluding this Court from considering the assignment of error on appeal. *Turner*, 612 So. 2d at 1143; *Grey*, 638 So. 2d at 491.

The above considered, we would respectfully submit that this assignment of error lacks merit, as no supporting law is properly cited by Brown and, therefore, should not be considered by this Court.

c. *The parties previously agreed to a determination of custody.*

The issue is whether the parties agreed to a determination of custody prior to the lower court's hearing and whether such agreement, if made, has any bearing on a subsequent hearing on custody. We would submit a three part response to this issue as follows:

(i) An agreement between parties regarding custody of their child, having no endorsement or resulting order from the court having proper jurisdiction, is not legally binding and should not be considered when determining custody;

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal;

(iii) Brown did not cite authority supporting her argument.

As we have above, we would elaborate on each argument accordingly and in the same order as posed above.

(i) An agreement between parties regarding custody of their child, having no endorsement or resulting order from the court having proper jurisdiction, is not legally binding and should not be considered when determining custody.

"In *White v. Thompson*, 822 So. 2d 1125, 1128 (P8) (Miss. Ct. App. 2002), this Court determined that a custody agreement entered into between the parties but never endorsed by a court of law did not have binding legal force so as to alter the analysis to be followed by the court in determining custody." *Beasley*, 913 So. 2d at 363. The *White* Court further held that such a situation called for an initial primary custody determination and affirmed the lower court's application of the Albright analysis. *White*, 822 So. 2d at 1128. Conversely, in *Fletcher*

v. Shaw, the parties, in fact, had a court approved contract establishing paternity and custody of the child at issue, and correctly applied the "material change" modification standard. *Fletcher* at 1215.

As addressed above and admitted by Brown, Brown and Crum had no court approved agreement or custody determination of any kind prior to this action. Brown and Crum lacked the authority and/or power to create a legally binding custody determination without the endorsement and subsequent order of the court having proper jurisdiction.

Of course, Brown is fully aware that there was no custody determination prior to this action, as Brown filed a Complaint for Custody to give birth to the litigation that followed. Further she reasserted the Albright application to be the proper standard in her Answer to Crum's Counter-Complaint, as she did not raise the issue. We have fully explored this above, and would reassert said arguments. We would invite this Court to review Brown's Complaint for Custody, Crum's Answer and Counter-Complaint and Brown's Answer to Counter-Complaint, all of which have been made excerpts to this brief.

Brown makes reference to *McCracking v. McCracking* as support of her argument that an out of court agreement between the parties is valid and establishes custody; however, there is no mention whatsoever of any out of court agreement in the *McCracking* matter. *McCracking v. McCracking*, 776 So.2d 691, 694 (Miss. Ct. App. 2000). Rather, McCracking is a case regarding an attempted modification of a Court Order, vastly different than any alleged out of court verbal arrangement. *Id.*

An agreement between parties regarding custody of their child, having no endorsement or resulting order from the court having proper jurisdiction, is not legally binding and should not be considered when determining custody. To hold otherwise would negate the judicial system with regard to custody and create a world of unenforceable and inconsistent custodial agreements

created by persons not trained or experienced in the practice of law. Accordingly, we would respectfully submit that this assignment of error is without merit.

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal.

This argument was never raised, never made part of an objection nor mentioned whatsoever in the lower court trial or on the hearing on Brown's motion to reconsider. In fact, as we have stated above, Brown, the appellant, initiated this matter in the lower court by filing a Complaint for Custody. There is no mention of the "material change" standard in her Complaint, throughout the trial or during the hearing on Brown's Motion to Reconsider.

"The law is well settled in Mississippi that appellate courts will not put trial courts in error for issues not first presented to the trial court for resolution, and that issues not presented in the trial court cannot be first argued on appeal." *Robinson* at 490-491, citing *Chassaniol* at 133-34.

Therefore, we would respectfully submit that this assignment of error lacks merit, as it was not raised at any point in the lower court and is not properly before this Court.

(iii) Brown did not cite authority supporting her argument.

In this assignment of error, Brown fails to cite authority which supports her argument. Brown cites *McCracking*, which was taken out of context and is irrelevant, and a portion of a dissenting opinion from *Williams* as support for this argument.

The Mississippi Court of Appeals recognized that portions of dissenting opinions are not binding precedent and, therefore, not supportive authority for an argument in *Brock* at 887. Therefore, citations taken from dissenting opinions cannot stand alone as law cited as authority for an argument.

The failure to provide citations to supporting law creates a procedural defect, precluding this Court from considering the assignment of error on appeal. *Turner* at 1143; *Grey* at 491.

The above considered, we would respectfully submit that this assignment of error lacks merit, as no supporting law is properly cited by Brown and, therefore, should not be considered by this Court.

2. ***Crum waived his entitlement to an Albright analysis because of his delay in asserting custody.***

The issue is whether Crum waived his entitlement to an Albright analysis due to delay in asserting custody and whether any such waiver exists within Mississippi law. We would submit a two part response to this issue as follows:

(i) Crum did not waive his entitlement to an Albright analysis as the result of time period elapsing prior to his asserting custody; and

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal.

Again, we would elaborate on each argument accordingly and in the same order as posed above.

(i) Crum did not waive his entitlement to an Albright analysis as the result of time period elapsing prior to his asserting custody.

In *Williams v. Stockstill*, the Court held that "there is no law to support a different burden of proof for fathers of children born out of wedlock ***who delay in seeking custody***," rather, "the law is that unless a prior custody determination has been made, custody is determined by the Albright factors." *Williams* at 776 citing Law at 101. See also *Romans* at 852 (P4); *C.W.L.* at 271 (P10); *S.B.* at 658 (P7). We would quote the *Williams* opinion exhaustively, as it is precisely on point:

> Amy argues that the chancellor should have first determined whether there had been a material change in circumstances which adversely affected the child's best interest before reaching an Albright analysis. Amy asserts that Shane "waived his right to an Albright analysis because of his two year delay in bringing the custody proceeding."
> ***
> We find Amy's argument that the chancellor should have first determined if there was a material adverse change in circumstances to be without merit. The "material changes" standard used in modification proceedings is dependent on there being a prior determination of custody. Law v. Page, 618 So. 2d 96, 101 (Miss. 1993). Since no prior custody determination was made in this case, the proper standard of law to be applied is that found in divorce proceedings, which is the best interest of the minor child. Id.; Albright v. Albright, 437 So. 2d 1003, 1004 (Miss. 1983).
> *Williams* at 776.

In *Romans v. Fulgham*, the Mississippi Court of Appeals held that there is no law that makes a distinction between a parent who files a custody action upon learning of paternity or sometime thereafter, and, further, that "there is no indication that the timing of the custody proceeding was a dispositive factor" in the line of cases considering this issue, beginning with *Law v. Page* to the present. *Romans* at 853.

Brown claims that Crum waived his entitlement to an Albright analysis due to a five year delay. We would again point out that the Mississippi Appellate Courts have affirmed the application of an initial custody best interests Albright analysis in cases where the child was eight years old and the paternity and child support order had been in place for seven years (*Romans* at 851); where the child was approximately eight years old and the paternity and child support order had been in place for seven years (*C.W.L.* at 269); and where the child was already in grammar school (*S.B.* at 657). The case at hand involves no different time span than those cases which have already been considered.

There is no time limit on a parent's right to seek custody of his or her child. To place a statute of limitations or some other form of time limit on the right to seek custody of a parent's

child would deprive that parent to the fundamental right inherent in parenthood and established by law. We would respectfully submit that this assignment of error has no merit.

(ii) Brown did not raise this issue in the lower court, and, therefore, did not preserve this issue for appeal.

This argument was never raised, never made part of an objection nor mentioned whatsoever in the lower court trial or on the hearing on Brown's motion to reconsider. We have made this argument in detail above, and would re-assert same.

"The law is well settled in Mississippi that appellate courts will not put trial courts in error for issues not first presented to the trial court for resolution, and that issues not presented in the trial court cannot be first argued on appeal." *Robinson* at 490-491, citing *Chassaniol* at 133-34.

Therefore, we would respectfully submit that this assignment of error lacks merit, as it was not raised at any point in the lower court and is not properly before this Court.

CONCLUSION

The lower court properly applied the best interests Albright analysis to the case at hand, as no prior custody order had been made. Brown makes no issue of the application of the Albright analysis, by which the lower court meticulously examined the evidence provided and ruled accordingly.

The only legally binding initial custody determination comes in the form of a custody order after applying the best interests Albright analysis. Therefore, any argument that (a) a DHS paternity and child support order determined custody by inference or (b) the parties verbal agreement created a custody determination fail.

Brown did not bring any of her issues before the lower court to consider, as these issues were first asserted and first mentioned on appeal. As a result, these arguments are not properly before this Court.

While there is an abundance of caselaw supporting Crum's position, Brown cites no supporting authority for her arguments.

Premises considered, we would respectfully request this honorable Court Affirm the lower court's proper application of law and lawful decision.

CERTIFICATE OF SERVICE

I, Bradley Russell Boerner, Esq., do hereby certify that I have this day hand delivered and/or mailed postage prepaid by U. S. Mail, a true and correct copy of the above and foregoing documents to the following:

Hon. Betty W. Sephton
Supreme Court Clerk
P.O. Box 249
Jackson, MS 39205

Edwin L. Bean, Jr., Esq.
P.O. Box 1322
McComb, MS 39648

Hon. Edward E. Patten, Jr.
Chancellor of the Fifteenth Judicial District
P.O. Drawer 707
Hazlehurst, MS 39083

This the 22nd day of July, 2009.

BRADLEY RUSSELL BOERNER