

SUPREME COURT OF MISSISSIPPI  
CAUSE NO. 2010-TS-00613

THOMAS DALE WATTS

APPELLANT

VS.

KIMBERLY J. WATTS

APPELLEE

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APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY,  
MISSISSIPPI, FIRST JUDICIAL DISTRICT  
CAUSE NO. C2401-08-01827-4 AND 08-01816-4  
HONORABLE CARTER BISE, PRESIDING TRIAL JUDGE

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**BRIEF OF APPELLEE**

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**CERTIFICATE OF INTERESTED PERSONS**

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The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal:

Thomas Dale Watts, Appellant

Kimberly J. Watts, Appellee

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Honorable Carter Bise., Trial Judge

Respectfully submitted, this the 14<sup>th</sup> day of March, 2011.



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DEAN HOLLEMAN  
ATTORNEY FOR APPELLEE

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
I. STATEMENT OF THE ISSUES	1
 <b>Issue 1: The Chancellor's ruling was based on and supported by the substantial credible evidence in the record below relevant to the <u>Albright</u> factors and the Chancellor properly sat as the trier of facts determining the weight and credibility of the evidence and was correct in concluding that Thomas' testimony and assertions were less credible.</b>	
 <b>Issue 2: The Chancellor's award of Joint Legal and Joint Physical Custody of Trevor was based upon the Chancellor's determination of an <u>Albright</u> analysis, the substantial and credible evidence given weight by the Chancellor and in recognition of the best interest of Trevor and was not error.</b>	
 <b>Issue 3: The Chancellor's award to Kim of alimony of \$1,000.00 per month was not error.</b>	
 <b>Issue 4: The Chancellor's finding that Thomas' Affidavit submitted on July 10, 2008, to obtain his Temporary Restraining Order was a manipulation of the Court was not error, was based upon the substantial and credible evidence given weight by the Chancellor and was correctly considered by the Court.</b>	
 <b>Issue 5: The Chancellor's finding that Thomas' Journal was 'not trustworthy' was based upon the substantial credible evidence given weight by the Chancellor and was not error.</b>	
 <b>Issue 6: The Chancellor's rulings on Thomas voluminous post-trial motions were not error and were not an abuse of discretion.</b>	
II. STATEMENT OF THE CASE	1
III. SUMMARY OF THE ARGUMENT	17
IV. LEGAL ARGUMENT	19
CONCLUSION	55
CERTIFICATE OF SERVICE	58

## TABLE OF AUTHORITIES

### CASES:

<u>Albright v. Albright</u> , 437 So.2d 1003, 1005 (Miss.1983)	18,45
<u>Ash v. Ash</u> , 622 So.2d 1264, 1266 (Miss.1993) (citing <u>Marascalco</u> , 445 So.2d at 1382)	18,45
<u>Askew v. Askew</u> , 699 So.2d 515, 520 (Miss. 1997)	53
<u>Belding v. Belding</u> , 736 So.2d 425 (Miss.App.1999)	17,19,20,48,53,56
<u>Chamblee v. Chamblee</u> , 637 So.2d 850, 860 (Miss.1994)	18,46,49
<u>Donaldson v. Convington County</u> , 846 So.2d 219 (Miss.2003)	17,19,20,48,53
<u>Dorrough v. Wilkes</u> , 817 So.2d 567, 577 (Miss.2002)	44
<u>Gray v. Gray</u> , 562 So.2d 79 (Miss. 1990)	54,55
<u>Harmon v. Harmon</u> , 757 So.2d 305 (Miss.App. 1999)	20
<u>In re S.A.M.</u> 826 So.2d 1266, 1277 (Miss.2002)	44
<u>In re V.R.</u> , 725 So.2d 241, 245 (Miss.1998)	44
<u>January v. Barnes</u> , 621 So.2d 915, 920 (Miss. 1993)	54
<u>Lorenz v. Lorenz</u> , 987 So.2d at 430 (citing <u>Chamblee v. Chamblee</u> , 637 So.2d 850, 860 637 So.(Miss.1994))	49
<u>Mabus v. Mabus</u> , 847 So.2d 815, 818 (Miss.2003)	45
<u>Madden v. Rhodes</u> , 626 So.2d 608, 616 (Miss.1993)	56
<u>Magee v. Magee</u> , 661 So. 2d 1117, 1122 (Miss. 1995)	19,48
<u>Marascalo</u> , 445 So.d. at 1382	45
<u>Pub. Employees' Retir. Sys. v. Dishmon</u> , 797 So.2d 888, 897 (Miss.2001)	45
<u>Riley v. Doerner</u> , 677 So.2d 740, 744 (Miss.1996)	18,44,45

<u>Retzer v. Retzer</u> , 578 So.2d 580, 592 (Miss.1990)	47
<u>Smith v. Jones</u> , 654 So.2d 480, 485 (Miss.1995)	56
<u>Stewart v. Stewart</u> , 2 So.3d 770 (Miss.Ct.App. 2009)	19,48
<u>Taylor v. Taylor</u> , 755 So.2d 681 (Miss.2001)	39
<u>Thweatt v. Thweatt</u> , 4 So.2d 1085 (Miss.App.1999)	17,19,20,48,53
<u>Trim v. Trim</u> , 33 So.3 <sup>rd</sup> 471 (Miss.2010)	17,19,20,48,53
<u>University of Mississippi Medical Center v. Johnson</u> , 977 So.2d 1145 (Miss.App.,2007)	20
<u>Vulcan Lands, Inc. v. City of Olive Branch</u> , 912 So.2d 198 (Miss.App.,2005)	20
<u>Walker v. State</u> , 671 So.2d 581, 597 (Miss.1995)	44
<u>Williams v. Rembert</u> , 654 So. 2d 26, 28 (Miss. 1995)	19
 <b><u>OTHER:</u></b>	
Mississippi Rules of Evidence 702	42
Mississippi Rules of Civil Procedure 60(b)(3)	54
Federal Rule of Civil Procedures 60(b)(2)	55

## **I. STATEMENT OF THE ISSUES**

**Issue 1: The Chancellor's ruling was based on and supported by the substantial credible evidence in the record below relevant to the Albright factors and the Chancellor properly sat as the trier of facts determining the weight and credibility of the evidence and was correct in concluding that Thomas' testimony and assertions were less credible.**

**Issue 2: The Chancellor's award of Joint Legal and Joint Physical Custody of Trevor was based upon the Chancellor's determination of an Albright analysis, the substantial and credible evidence given weight by the Chancellor and in recognition of the best interest of Trevor and was not error.**

**Issue 3: The Chancellor's award to Kim of alimony of \$1,000.00 per month was not error.**

**Issue 4: The Chancellor's finding that Thomas' Affidavit submitted on July 10, 2008, to obtain his Temporary Restraining Order was a manipulation of the Court was not error, was based upon the substantial and credible evidence given weight by the Chancellor and was correctly considered by the Court.**

**Issue 5: The Chancellor's finding that Thomas' Journal was 'not trustworthy' was based upon the substantial credible evidence given weight by the Chancellor and was not error.**

**Issue 6: The Chancellor's rulings on Thomas voluminous post-trial motions were not error and were not an abuse of discretion.**

## **II. STATEMENT OF THE CASE**

### **Introduction**

Thomas appeals from the Chancellor's ruling granting Thomas and Kim Watts the joint legal and joint physical custody of the parties' minor son, Trevor Watts, age 12. Additionally, Thomas takes issue with the Chancellor's award of alimony, attorney fees, and the weight of the evidence given by the Chancellor in the totality of his ruling on all issues.

Thomas' brief has the appearance of thoroughness and conviction. It is well written by an able attorney. However, Thomas' attempted rendition of the evidence adduced at the trial of this cause is far from complete and thus inaccurate. This rendition's focus is on the 'weight and credibility of the evidence.' It rests primarily upon the testimony of Thomas, whose credibility was questioned by the Chancellor. As will be so clearly shown below, Thomas' reliance upon claims of the Chancellor's 'recklessness' and the Chancellor's taking "quantum leaps" in making his rulings are without factual basis, wrong, and misplaced.

Thomas' rehash of his testimony, his 'journal' and his Affidavit is nothing more than a continuation of Thomas' presentation of the facts according to Thomas, beginning with the initial filing of his divorce through the trial/post trial and now through this appeal. Thomas ignores all other substantial credible evidence. Thomas' obsession and desire to control the outcome of this case will allow him only to see it 'his way.' The record below consists of much more than the conduct of Kim "according to Thomas."

To appreciate what has transpired in the Watts' household dating back to Fall 2006, one must look to all of the evidence which the learned Chancellor so ably and succinctly considered in his ruling.

#### 1. The Early Years

Kim and Thomas were raised in Harrison County, Mississippi and both have extended family in Harrison County. They were married on May 4, 1996. Kim was a registered nurse, and Thomas was a certified nurse anesthetist. Tr.491-92;497; 18-23.

Two years prior to the marriage, Thomas had stolen and used narcotics from Memorial Hospital at Gulfport where he was employed. After overdosing in the parking

lot of the hospital, he engaged in a rehabilitation program and recovered. During his recovery, he met Kim, who worked with him during that time. They began dating, she became pregnant, and they married. Tr.491-94; 497; 18-23. See Also Reports of Gasparrini and Miller.

There was one child of the marriage, Trevor, born August 21, 1996. The family resided in Thomas' grandmother's home until they moved to Columbus, Mississippi, in or about 1999. Due to Kim's father's bad health, they moved back to the Gulf Coast in about 2000. They purchased a home in Long Beach, Mississippi, and in 2005, constructed a new home in Long Beach, Mississippi, which was the marital home at the time of the separation on July 5, 2008. Tr.501-504. Thomas later worked full-time as an anesthetist at Hancock Medical Center. Kim worked on a part-time basis as a registered nurse. In Trevor's early school years he attended St. John Catholic School in Gulfport, Mississippi. Subsequently, he attended public school, where he was attending at the time of the separation of the parties. At trial, Trevor was described by his teachers as a great kid, a good student, well-mannered and a product of excellent parents. Both Kim and Thomas were described as very involved. Tr.191-202;258-75;460-62;500-09;511-24;5-16;115.

Both Kim and Thomas were dedicated and involved in the raising of Trevor. They shared all responsibilities, with Kim being the disciplinarian. Trevor's extra-curricular activities included camps, golf, shooting the BB gun, Frisbee, violin, soccer, and Church. Tr.35-47;503-24;115;258-75;460-63.

## 2. Changes in the Watts Household: October 2006

In October 2006 things began to unravel around the Watts household. Kim's father was very ill, and she was assisting in his care. During this time, Kim observed



Thomas' behavior to be abnormal, and there were many discussions between the parties. When Kim asked if drugs were an issue, Thomas denied such. They then began discussing the marriage and its problems, as Kim had come to not trust Thomas. Thomas suggested she 'borrow from the trust bank' as he would seldom say, i.e. dig deep and trust him. Tr. 527-48.

During this time of increasing stress in the household, Kim was taking care of most of Trevor's needs. Thomas was withdrawn, distant, and rude. Tension was heightened by Kim's father's illness, and Kim would repeatedly ask Thomas: 'What is wrong? Was there something wrong?' Tr.528. Then the sky fell. Thomas came home and told Kim he had once again relapsed. He had stolen and used the drugs Fentanyl (narcotic for pain) and Verset (sedative) from his employer, Hancock Medical Center Tr.530-31. Thomas claimed that he did this for a sinus problem Tr.530. The discovery of his actions came after Thomas was observed to be 'sleepy' by a coworker. This observation and inquiry led to his admission of stealing the drugs and injecting them into his body over a two week period. Tr.109;528-543;50-53; Gasparrini and Miller Reports, Exhibits 11-14, March 2-5, 2009.

After Thomas' devastating revelation to Kim,, the next few weeks in November and December 2006 were very difficult. The focus of the household surrounded Thomas' outpatient treatment and the planning of his 28-day inpatient treatment that was completed in January 2007. Tr.530-31. During this time, Kim was providing Trevor's continuity of care and his every need, notwithstanding the fact that she was also dealing with her father's illness and pending death, her mother's illness and surgery, her own surgery in December 2006, and the fact that the household income had been reduced drastically due

to Thomas' relapse Tr.531-33. According to Kim, as a result of the relapse, Thomas' life "kind of stopped." Tr.532. Thus, the responsibility for the Watts household fell upon Kim, and yes, this caused Kim to become depressed. Miller Report, Exhibit 13, March 2-5, 2009.

Kim's participation in Thomas' rehabilitation process was one of dedication. She attended his therapy session with his counselor, and she read books on addiction as instructed by the counselor. She attended the family session at the inpatient facility with Thomas. In addition to meeting Trevor's needs, she was required to return to full time work to supplement the household income. Tr.528-43.

Upon Thomas' return to the home in January 2007, there were continuous arguments about trust and divorce Tr.533-43. As to how Kim and Thomas had historically handled their marital discord in Trevor's presence prior to Fall 2007-2008, it is important to note that Kim's uncontroverted testimony was that the couple had always talked or argued outside Trevor's presence. Tr.543-545. With all of the tension and discussion ongoing throughout 2007 there was a lot of difficulty being verbally open in the household due to Trevor's presence. This made it hard on Kim Tr.543-551.

### 3. Fall 2007: Thomas' Secret

Things got worse in October 2007 when Kim's father died. Tr.542-551. Shortly after her father's death, Kim and Thomas discussed divorced but took no action, or so Kim thought Tr.123. In about November 2007, Thomas secretly visited an attorney to discuss divorce, and upon the advice of his attorney, he began to secretly keep an electronic journal of a day's events. Tr.124-125. While Thomas testified he 'did not know what the journal was for,' he made sure that he recorded negative information on alleged

misconduct and quotes by Kim that he claimed occurred in the presence of Trevor.

Tr.125-126. Of course, he recorded nothing negative about himself. Tr.125.

Thomas continued with the creation of his journal from November 2007 through the summer of 2008. Kim did not discover its existence until the discovery phase of this divorce in late 2008. According to Kim, the journal was inaccurate and an unfair depiction of the events contained therein. Tr.548-51;658-60.

#### 4. The Final Separation

The final separation of the parties resulted from a domestic violence incident on July 5, 2008. This incident involved an argument between Thomas and Kim about a computer and printer. Trevor was present at the home. After Thomas threw a golf club in the yard and kicked the dog in the doorway, the argument escalated. Kim claims she took her hand and touched Thomas' left cheek. Thomas claims she pushed him in the face with her hand. Surprisingly, Trevor's version of that day's events as told to the psychiatrist who evaluated the parties was that there was a hole put in the wall by a door. He told Dr. Gasparri he 'heard' his mom slapped his dad. Gasparri Report, Exhibit 11, March 2-5, 2009 Trevor's version did not occur. Where did this exaggeration come from? Thomas.

After the altercation, Kim called the police which resulted in her being arrested for domestic violence. She was later found not guilty. After the incident, Kim did not return to the home but stayed with her family. However, with Thomas' blessing, Trevor visited Kim each day from July 6, through July 10, 2008. Tr.556-563.

#### 5. Thomas Files for Divorce

Unbeknownst to Kim, on July 9, 2008, Thomas filed a Complaint for Divorce, for Temporary Relief and for Emergency Relief without notice. In this filing Thomas sought

a divorce, custody, support and division of property. (Count One); he sought temporary relief requesting Kim be allowed 'supervised visitation' only after evaluation by a psychiatrist. (Count Two). He sought a temporary restraining order and custody without notice. He claimed "immediate and irreparable injury, loss or damage will result before [Kim] or her attorney can be heard in opposition." He also represented to the Chancellor that his Affidavit "demonstrates that the health and safety of the minor child will be threatened with irreparable harm should the Court not issue a temporary restraining order without notice". (page 6). Finally, Thomas asserted once a 'preliminary injunction' was entered it should "be followed by a Permanent Injunction **at the conclusion of the divorce proceedings**". [This pleading was never withdrawn or amended]. C.P. 1-37.

On July 10, 2008 at 8:45 am Thomas secretly appeared before the Chancellor. Based upon Thomas' pleadings and his supporting affidavit there was a Temporary Restraining Order entered without notice. The Temporary Restraining Order was prepared by Thomas' attorney [see notation on order]. It provided "because [Kim] has subjected the child to emotional abuse, threatened to take child away, and most recently, caused the child to lock himself in the bathroom, which resulted in [Kim's] arrest for domestic violence, after she called the police, **a substantial likelihood exists that irreparable harm will result to the minor child**". C.P.13. Further, the order provided "there is **substantial risk** that [Kim] could act on her threat and remove the child from the jurisdiction of the Court or otherwise subject him to emotional abuse". C.P.13. Finally, the order granted Thomas temporary legal and paramount physical care, control and custody of Trevor. C.P.37. In his supporting affidavit used to obtain the order without notice to Kim, Thomas represented, *inter alia*, to the Court that Kim had a **mental illness**

undergo psychological evaluations by Dr. William Gasparrini. The order also provided that the parties would undergo psychiatric evaluations by Dr. Jule Miller. C.P.37-40

6. Guardian Ad Litem:

On August 12, 2008, the Guardian Ad Litem issued his initial letter and recommended that Kim should have unsupervised overnight visitation. He specifically found Kim “did not pose a physical danger” to Trevor. C.P.68. Further, upon the completion of the psychiatric and psychological evaluations of the parties and Trevor, the Guardian Ad Litem agreed with both Dr. Gasparrini and Dr. Miller that Kim would have unrestricted visitation with Trevor. The Guardian Ad Litem ultimately reported to the Chancellor he did not believe “either parent is unfit to have custody”, that neither evaluation found any major mental illness issues with Kim. C.P.68.

7. Psychiatric/Psychological Evaluations

The Court-ordered evaluations were completed by late September 2008. Gasparrini and Miller Reports, Exhibits 11-14, March 2-5, 2009. Thomas’ claims of Kim’s mental illness were left meaningless and without support. Neither Gasparrini nor Miller found Kim to have any mental illness nor any reason to deny Kim visitation with Trevor or to parent Trevor. Proceeding are the highlights of these evaluations:

A. Thomas Dale Watts

1. Jule P. Miller, III, M.D.

Thomas told Dr. Miller “when [Kim] is good ‘she is good as gold’. She is polite, thoughtful, and courteous. She wants to take care of us to such a degree that it weighs on her. She will overdo herself.”

Thomas would rather be the victim than take charge of the situation. He would rather feel justified in his blaming [Kim].

Thomas is very motivated to “prove his case against [Kim]”. “He came bearing over 30 pages of notes that detail her transgressions”.

Thomas has narcissistic traits, and has a tendency to be controlling and can be demeaning as how he controls.

Thomas has “bent over backwards to be the victim at times so as to feel justified in blaming his wife.

Thomas exhibits “passive aggressive tendencies as well as compulsive ones”. [Such a person plays the innocent victim of other’s unfair treatment and rarely holds self as responsible for any wrong deed they have done. He blames others]

Thomas remains at a risk for substance abuse because of the easy access he has to his preference drug. He should remain in treatment.

Thomas was diagnosed: “Opioid Substance Abuse and a history of dependence. Rule Out Personality Not Otherwise Specified with narcissistic, and passive aggressive tendencies. It is possible that his personality issues have been worsened by marital stress.”

## 2. William Gasparrini, Ph.D., ABPP

Thomas did not see his “current situation” as a divorce “but as an intervention” for Kim. He stated he desired to “participate in marriage counseling and have [Kim] attend psychotherapy or have other psychiatric treatment *so that they can stay together*”.<sup>1</sup> As stated by Dr. Gasparinni “Nevertheless” Thomas prepared “several lengthy documents” to show Kim’s conflicts in the family.

Thomas stated he believed Kim “might have Bipolar Disorder, OCD, Depression, and Paranonia. He stated she always had those symptoms”. Thomas stated Kim “had been asked by several doctors about depression and about possible psychiatric treatment, but she would not take psychiatric medications or address her emotional problems”<sup>2</sup>.

Thomas stated that “he’s hoping that the outcome of the trial [for domestic violence arrest on July 5, 2008] will be a court order for her to participate in anger management or other therapy”.

Thomas stated he hoped the psychiatric assessment for himself, Trevor and Kim and the psychological testing “will show *that [Kim] needs psychotherapy*”.

## B. Trevor Lee Watts

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<sup>1</sup> At no time in the record is there any evidence of Thomas’ effort to ‘save the marriage’. Again, Thomas’ focus is on his assertion that Kim has a ‘mental illness’ that needs psychiatric treatment.

<sup>2</sup> This assertion by Thomas about Kim being asked by doctors about depression and psychiatric treatment is not supported **by one fact in the record!** If this were the truth, it is something that would obviously have been explored and asked about in the record. It was not.

1. Jule P. Miller, III, M.D.

“The parents tend to focusing [sic] on criticizing each other, exaggerating faults and minimizing virtues in the process. Divorce tends to make people see the world in black and white and from their perspective they are always the good guy or the victim. Children can see both parents’ flaws and virtues. Unfortunately, children can never be objective when it comes to talking about their parents. Their simpler minds also want to divide the world up into good and bad, right and wrong. Usually the parent they spend the most time with will be the one they will ally with. The parent with primary custody will often fall into this view as well. In more extreme cases, the parental alienation syndrome becomes apparent.” Trevor clearly takes his father’s view of who is right and wrong.

Trevor stated it was his wish his mother would “get medical attention for anger management issues”. Dr. Miller opined this wording suggested to him Thomas’s influence upon Trevor.

Trevor described the July 5, 2008 incident leading to Kim’s arrest as involving her slamming a door and putting a big hole in the wall. However, neither Kim nor Thomas described such an incident on that day.

Trevor described his hearing his mother ‘slap his dad’s face’ on July 5, 2008, however, neither Kim nor Thomas described Kim slapping Thomas.

Trevor stated that he and his father “changed the locks [on the house] when she was arrested. She was really mad”.<sup>3</sup>

Trevor stated that when an argument occurred between his mom and dad, his dad would tell me what happened and why mom is mad. Dr. Miller opined this is an example of Thomas trying to ‘win over’ Trevor to his side.

Dr. Miller opined Trevor “has taken his father’s side in the marital dispute”. Further, he opined that there was “strong” suggestion that Thomas had taken an active part in influencing how he feels about his mother.

Dr. Miller opined that although Trevor had been negatively affected by the marital problems, he did not demonstrate “any pathology himself”.

2. William Gasparrini, Ph.D., ABPP

Trevor was reported by his father as being “fearful of his mother and apprehensive around her”. However, according to Trevor, “he’s glad to visit his mom every Tuesday, but he’s concerned about having to spend every Saturday with her as well because that could mess up his free day to have friends over and be with young people”. He reported not having any fears. He stated he was not afraid to

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<sup>3</sup> Would helping his dad change the locks lead Trevor to believe his mom was a danger and that he and his dad were protecting themselves from her, even to the extent of changing the alarm code?

visit his mom. He stated he was “comfortable visiting his mom and is willing to visit her”.

Trevor reported that he “heard” his mother slapped his father on July 5, 2008. Dr. Gasparrini opined he was told this by Thomas. Other indications of Thomas’ influence over Trevor involved Trevor describing his mother as having a drinking problem when neither Kim nor Thomas had reported this to Dr. Gasparrini, and Trevor did not believe his father had a drug issue. Dr. Gasparrini opined that Trevor accepts his father’s explanations of the marital conflicts between his parents.

Trevor stated he believed his mother needed “some kind of medication” mirroring those statements of Thomas.

Trevor viewed “all of his dad’s decisions and actions in the conflict between his parents as being correct”.

C. Kimberly J. Watts

1. Jule P. Miller, III, M.D.

Kim admitted she had “said things in front of” Trevor and “involving him in conflict in ways that she wishes now she had not”.

Kim described Thomas as being very controlling.

Kim showed no evidence of thought disorder. There were no hallucinations. There were no frank delusions.

Kim’s fears sounded “a bit paranoid”, “but were within normal range of feelings that many people get in marital conflict leading to divorce.”

Kim was “hit very hard by her father’s death”. Dr. Miller recommended counseling.

Kim’s diagnosis was “unresolved grief superimposed on a dysthymia. Marital discord. Rule out Personality Disorder”.

Kim’s conflicts were with Thomas and herself. She had made errors in judgment regarding Trevor. Dr. Miller opined “This is not uncommon in these situations.” There was no evidence that Kim would be abusive or neglectful or pose any immediate risk to Trevor. He saw no reason to limit her visitation.

2. Supplemental Report 2/3/2009:

Since the above evaluation Kim continued treatment with Dr. Miller.

Dr. Miller opined “What most impressed me was how Ms. Watts seemed to improve once she got into her own apartment”. There was no longer any evidence



of low grade depression or dysthymia. There was no evidence of personality disorder. His diagnosis was she had suffered from Adjustment Disorder due to marital stress, and it is now resolved. She was on no medication. He opined she was “fit to take care of her son, including full physical custody, if that is what the Court decides”.

3. William Gasparrini, Ph.D., ABPP:

Kim stated that Thomas’ affidavit made her seem terrible and was consistent with Thomas wanting a divorce, not to saving the marriage.

Dr. Gasparrini opined Kim was experiencing some symptoms of emotional distress, which could be described as Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, including anxiety, depression, and irritable, acting out behavior.

Kim did not appear to have any mental illness such as OCD, Bipolar Disorder, Psychosis or Major Depression and she did not have a full personality disorder.

Dr. Gasparrini opined counseling would help her with visitation with Trevor. Further, Kim “seems capable of raising her son or having unrestricted visits with him”.

As a result of the reports of the Guardian Ad Litem, Dr. Gasparrini, and Dr. Miller there was no factual basis upon which to rely upon or accept Thomas’ claims that Kim was mentally ill and a danger to Trevor.

8. The Rest of the Substantial Credible Evidence:

In appreciating the Chancellor’s reasoning in its ruling, one must be careful to anatomize the record below to understand what evidence was “according to Thomas” and then look at all the other evidence. Thomas states in his brief “The material facts are largely uncontroverted”. Appellant’s brief, Page 4. This would be only true if one were to consider only those ‘facts’ that are “according to Thomas”. When reflecting on Thomas’ carefully crafted journal it reminds one of Mark Twain’s saying: “Get your facts first, then you can distort them as much as you please”.

So where do the material facts really begin in the evidence presented at trial? This inquiry should begin in the fall 2006. Following Thomas’ theft and use of drugs in the fall

of 2006, he was confronted with a big problem: Kim had had enough and suggested a divorce Tr.122-23. Along with this revelation, Thomas was faced with rehabilitation and the substantial loss of income. He was the 'deer in the headlights' within his messed up world. As the Watt's household unraveled over the next many months (i.e. Kim's father was sick and eventually died in October 2007, Kim's mother was sick, Kim was sick, and Thomas was recovering once again from drug usage) Thomas made a strategic choice: go get an attorney and a plan. This plan involved the creation of a secret "journal" wherein Thomas would record events as he saw them over the next many months, obviously for the purpose of establishing a case for divorce and custody of Trevor. [Note: when asked why he did not just make audio recordings of these events Thomas stated it was a "risky choice that Kim would come across it and go ballistic and remove my child from the house and run out of state with him and our—make our lives so miserable that it would not be pleasant" Tr.127. ]

As a side note, it is interesting that Thomas states in his brief "In anticipation of divorce, Kim sought change Trevor's view of his father" (Page 7) and "...once Thomas refused Kim's request for a divorce, Kim embarked on a nine month campaign to influence Trevor against his father, to make Trevor feel shameful of his father" (Page 23). Such statements are so amazing when the facts were Kim knew nothing about a divorce being anticipated by Thomas, did not know he had seen an attorney, did not know he was keeping a journal, and had no idea there was a "campaign" being waged. Tr.551. The obvious was that it was Thomas who was secretly campaigning and preparing a case for a divorce and placing of Kim in bad light to support his case. And do not forget, Thomas knew the journal was being kept and Kim did not! Cox v. Cox, 279 So.2d 612.

9. The Chancellor's Ruling

The Chancellor began his bench ruling with a premise: "In dealing with any case, the main thing that I look at is credibility of witnesses" and "Credibility in this case played a very key role" Tr.707. The Chancellor was critical of both Kim and Thomas for their equivocation during their testimony. However, the Chancellor made one important finding about Kim: "...the key thing with her testimony was she admitted that she was at fault. She admitted she exposed Trevor to things to which he should not have been exposed" Tr.708. On the other hand, Thomas does not admit much, if anything. He attacks the Chancellor for 'reckless' findings. He attacks the Chancellor for knowing Kim's brother as a substitute bailiff. He attacks Dr. Jule Miller for finding no 'mental illness' in Kim. He causes a Guardian Ad Litem to be appointed, only to reject his findings and avoid calling him as a witness. The real truth not according to Thomas is found in the record below, all supporting the Chancellor's ruling.

10. Thomas' Affidavit for Emergency Relief: Truth or "According to Thomas"

Kim was arrested on July 5, 2008, for domestic violence. She was later found not guilty in the Harrison County Justice Court. Tr.136,226. Following the domestic incident at the home on July 5, 2008, Kim stayed with her family while Thomas and Trevor remained in the home Tr.141-145. With Thomas' full knowledge and blessing, Kim visited with Trevor on July 6,7, 8, 9 and 10. Unbeknown to Kim, on July 9, 2008, Thomas filed for a divorce and on July 10, 2008 at 8:40 am he obtained an 'emergency' Temporary Restraining Order, without notice, granting him custody of Trevor. In Thomas' pleadings, including the Affidavit offered by him into evidence (Tr94, Exhibit 5), it was represented to the Chancellor that Thomas had been the "primary caregiver" for Trevor; that Kim was

“suffering from emotional illness for which she refuses treatment”; that she was bipolar, depressive, paranoid; that she was a threat to remove Trevor from the state and from his school; that Trevor was “afraid of his mother” and “apprehensive about being around his mother”; that because of Kim’s “unpredictable, violent and erratic nature” she should be allowed only “supervised visitation” but not “until she has been fully evaluated by professionals and/or treated” and “said visitation should take place only after an evaluation from a Court ordered psychiatrist” [emphasis mine]. C.P.13. Paragraphs 7-8,14. Of special note was Thomas’ representation to the Chancellor at 8:40 am on July 10, 2008 wherein he communicated to the Chancellor in his pleading that “Immediate and irreparable injury, loss or damage will result before the Defendant or her attorney can be heard in opposition, and therefore, no notice to the Defendant is required”, that his Affidavit “demonstrates that the health and safety of the minor child will be threatened with irreparable harm should the Court not issue a Temporary Restraining Order, without notice”, that “The Court should enjoin the Defendant from contacting, calling, bothering, harassing, threatening, assaulting or in any way interfering with or coming within 100 feet of the Plaintiff” and “After the Court holds a hearing on this matter, Plaintiff is entitled to a Preliminary Injunction, to be followed by a Permanent Injunction at the conclusion of the divorce proceedings” C.P.13. Paragraphs 18-19,21. This pleading was never withdrawn or amended.

In his bench ruling the Chancellor addressed Thomas’ Affidavit that was placed into evidence by Thomas (Tr.94, March 2-5, 2009, Exhibit 5): “Probably the key document with which Mr. Watts has been saddled is the affidavit that was filed with his motion for ex parte emergency relief” Tr.708. The Chancellor made note that based upon

the evidence adduced at trial Kim “was not a danger to herself and to others. She was certainly not a danger to Trevor” Tr.709. What Thomas alleged in his request for emergency relief was far different from the evidence adduced at trial upon which the Chancellor based his ruling.

### **III. SUMMARY OF LEGAL ARGUMENT**

A review of all of the evidence considered by the Chancellor below will lead but to one conclusion: the Chancellor’s ruling was supported by substantial evidence in the record. In reaching his conclusions, the Chancellor appropriately determined the credibility of the witnesses and the weight to be given said evidence. Belding v. Belding, 736 So.2d 425 (Miss.App.1999); Thweatt v. Thweatt, 4 So.2d 1085 (Miss.App.1999); Trim v. Trim, 33 So.3<sup>rd</sup> 471 (Miss.2010); Donaldson v. Convington County, 846 So.2d 219 (Miss.2003).

Thomas asserts the Chancellor erred in his rulings due to his making “reckless” findings not supported by a “single fact” or “substantial evidence”. It is Thomas’ claim that the Chancellor’s ruling below is not supported by “*a single fact*” in the record and certainly not any “substantial evidence”. There is no question, however, that the Chancellor’s decision was based upon *the record* which included, but was not limited to: the history of Thomas’ journal, affidavit and seeking of emergency relief; the opinions of a psychiatrist and a psychologist; the testimony of the parties; the testimony of teachers called by both parties; the testimony of family members; the testimony of neighbors; the testimony of co- workers; etc.

“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.

'Above all, in 'modification cases, as in original awards of custody,' we never depart from our polestar consideration: the best interest and welfare of the child.' " Riley v. Doerner, 677 So.2d 740, 744 (Miss.1996) (quoting Ash v. Ash, 622 So.2d 1264, 1266 (Miss.1993)) (citing Marascalco, 445 So.2d at 1382). See also Albright v. Albright, 437 So.2d 1003, 1005 (Miss.1983). "The credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts." Chamblee v. Chamblee, 637 So.2d 850, 860 (Miss.1994). It is obvious, by looking at the record, that the chancellor reasonably looked at all the factors and came to the correct decision based upon Trevor's best interest. The custody award was not error.

The Chancellor awarded Kim periodic alimony of \$1,000.00 per month. This award was made after the Chancellor had made his analysis under Cheatham-Ferguson. The Chancellor found that the property division of the parties' marital assets could not be utilized to eliminate periodic payments or potential sources of friction between the parties. Tr.722. The Chancellor did make note of the economic hardship caused by Thomas drug relapse and its resulting affect on the household income. Tr.721-22. The Chancellor correctly considered the Armstrong factors.

Further, it was the Chancellor's role as the trier of facts to determine the credibility of the witnesses and the weight to be given to the evidence. For these reasons and those set forth supra, the Chancellor's finding that Tho9mas manipulated the Court and that Thomas' Journal was not trustworthy was not in error. Further, based upon the stipulations of the attorneys for the parties and the Court's reasoning, the award of attorney fees to Kim was proper.

#### IV. LEGAL ARGUMENT

**Issue 1: The Chancellor's ruling was based on and supported by the substantial credible evidence in the record below relevant to the Albright factors and the Chancellor properly sat as the trier of facts determining the weight and credibility of the evidence and was correct in concluding that Thomas' testimony and assertions were less credible.**

Upon conclusion of the trial below, the Chancellor below rendered his ruling from the bench summarizing the evidence in support of his conclusions and rulings. Based upon the evidence from witnesses called by both Thomas and Kim and the reports of Dr. Gasparrini and Dr. Miller, the Chancellor was correct in awarding the joint legal and joint physical custody of Trevor to the parties. Thomas asked the Court to *revaluate the evidence* which is not the role of this Court.

A review of all of the evidence considered by the Chancellor below will lead but to one conclusion: the Chancellor's ruling was supported by substantial evidence in the record. In reaching his conclusions, the Chancellor appropriately determined the credibility of the witnesses and the weight to be given said evidence. Belding v. Belding, 736 So.2d 425 (Miss.App.1999); Thweatt v. Thweatt, 4 So.2d 1085 (Miss.App.1999); Trim v. Trim, 33 So.3<sup>rd</sup> 471 (Miss.2010); Donaldson v. Convington County, 846 So.2d 219 (Miss.2003). The Judgment of the Chancellor should not be disturbed unless the findings are manifestly wrong or clearly erroneous. Stewart v. Stewart, 2 So.3d 770 (Miss.Ct.App. 2009); Magee v. Magee, 661 So. 2d 1117, 1122 (Miss. 1995).

This Court may reverse the Judgment below ONLY if there is an absence of "substantial, credible evidence" justifying the Chancellor's finding. Williams v. Rembert, 654 So. 2d 26, 28 (Miss. 1995). This law has been repeated many times over by our Courts: *This Court does not reevaluate evidence, retest credibility of witnesses, or*

*otherwise act as a second fact-finder.* Belding v. Belding, 736 So.2d 425

(Miss.App.1999). The credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the trier of facts. Trim v. Trim, 33 So.2d 3<sup>rd</sup> 471 (Miss. 2010). The sufficiency of the evidence is determined by the chancellor, who sits as finder of fact and makes determinations as to the weight and credibility of the evidence. Thweatt v. Thweatt, 4 So.3d 1085 (Miss.App.,2009). Unless the testimony is “*so incredible as to be absolutely unworthy of belief*”, this Court does not re-weigh the evidence. University of Mississippi Medical Center v. Johnson, 977 So.2d 1145 (Miss.App.,2007). The appellate court may not reweigh the facts nor may it substitute its judgment for that of the lower tribunal. Vulcan Lands, Inc. v. City of Olive Branch, 912 So.2d 198 (Miss.App.,2005). Because it observes witnesses first hand, trial court is in best position to assess persuasiveness of witness and to decide what weight to afford that witness's testimony. Donaldson v. Covington County, 846 So.2d 219 (Miss., 2003). Weight and worth of witnesses' testimony is solely for the chancellor to determine. Harmon v. Harmon, 757 So.2d 305 (Miss.App. 1999).

The Chancellor below was first introduced to this case on July 10, 2008. He was asked by Thomas to enter a Temporary Restraining Order against Kim and without notice to Kim granting Thomas custody of Trevor. This order was granted after Thomas made serious allegations of Kim having mental illness, needing psychiatric treatment, having been guilty of damaging misconduct and her being an immediate risk of danger to Trevor.

The Chancellor had the opportunity not only to witness Thomas' baseless allegations tested under cross examination but he had the opportunity to consider and/or



hear the opinions of the psychiatrist and psychologist who saw the parties and Trevor.

The evidence was not limited to the nine months leading up the Thomas' filing for divorce upon which Thomas is focused, but on the entire 12 years of Trevor's life and the Watts household. The Chancellor had the opportunity to hear and assess the witnesses offered by the parties, all of whom had invaluable insights and observations of the quality parenting by Thomas and Kim and the fine child that was the product of that parenting. The evidence provided the Chancellor with the totality of the facts of the entirety of Trevor's life, not just the facts 'according to Thomas'.

Notwithstanding the horrendous image of Kim that Thomas wants to project, the totality of the evidence was to the contrary and the Chancellor's ruling was correct. There were not 'reckless' findings. There surely is nothing the Chancellor below did which "damaged" the relationship between Thomas and Trevor. The Chancellor did not 'indict' Thomas. The Chancellor did his job and in an honorable fashion as will be shown herein. In short, Thomas' representation that there is "**not a single fact** in the record and certainly not substantial evidence" that supports the Chancellor's ruling is false.

1. The Chancellor's Albright Analysis

A summary of the Chancellor's ruling following using an Albright analysis is as follows:

Age, Sex and Health of Child:

The Chancellor found Trevor to be in good health and that his age of 13 did not favor either parent. Additionally, he noted that the fact Trevor was a young man would lend to his being better off having a stronger influence from his father.

Age and Health of Parents:

Age of the parents was not a factor. The Chancellor noted Kim's physical conditions of spondylitis and reactive arthritis Tr.711,522-24. He also recognized she was diagnosed with some depression related to several stressors, for which she sought successful treatment from Dr. Jule Miller. Tr.711-12.

Due to Thomas' drug history, the Court concluded the "health" factor favored Kim. Thomas takes issue with the Court's statement in its ruling that "once an addict, always an addict". At page 55 of Thomas' brief he states: "This is another instance where the Chancellor cited non-existent evidence. The admission attributed to Thomas *does not exist* in the record. It is another example of the Chancellor citing non-existent evidence to help Kim." [Emphasis mine].

Contrary to Thomas' argument, the "addict" statement does in fact come from the evidence and it is Thomas' evidence. It actually comes from Thomas' own Affidavit at page 11, paragraph 18 wherein Thomas attributes this same statement as something Kim told Thomas' counselor during his inpatient drug rehab. In other words, it was Thomas himself who placed the phrase in evidence. So, does it really matter? Surely Thomas does not suggest that he is not a recovering "addict"? While he may color it as he likes, there really is no question he knows what he is: He testified "I have a dependency disorder" Tr.110. He admitted to Dr. William Gasparrini he had a "substance abuse disorder" and that he was 'in groups to avoid a return to substance abuse' Exhibit 12, March 2-5, 2009. Any issue that the Chancellor's finding was not supported by the evidence adduced at trial is totally absurd and without factual basis and nothing but a 'reckless' attack upon the learned Chancellor.

Going further, how accurate is the Chancellor's conclusions that Thomas was an "addict"? What are the material facts in evidence of Thomas' history of drug usage? In 1994 Thomas stole Fentanyl (pain/narcotic) and Verset (sedative) from his employer (Memorial Hospital at Gulfport) over a period of four months. He was ultimately found overdosed in the hospital parking lot Tr.108-110. Then in November 2006 he claims he had an unresolved sinus condition that lead him to once again steal Fentanyl from his employer (Hancock Medical Center) for a two week period until a co-worker approached him about his 'sleepy' appearance Tr.116-118. Such facts arise to a lot more than Thomas' reference to 'brief' misuse of 'prescription' drugs or 'medications'!

Notice should also be taken of how Thomas downplays his addiction in the record and in his brief: in November 2006 he had a **"brief"** relapse Tr.50,116; "Thomas used **short-acting prescription** narcotics **three** times at work before **self reporting** to a doctor" and "returned to Pine Grove for a **one-day** evaluation which recommended **only out-patient** treatment" and **"On his own**, he decided to go to Lakeview" (inpatient facility) Appellant Brief, P.5; "Thomas' very **brief** episode of **prescription** drug usage in November 2006" Appellant Brief, P.55. Also, see Footnote 6 in Thomas' brief: "...Thomas took the **medications** at work..." which is such a subtle but obvious attempt to down play the theft and use of a narcotic from his employer. Thomas Brief, P. 8. This was a very careful and intentional choice of descriptive words!

Finally, how serious does Thomas view his actions and danger to Trevor: Q- All right. And, of course, there's no question, stealing that drug, that controlled substance from your employer, that would be a felony, wouldn't it? A- I don't know Tr.116. Can anyone believe that a certified register nurse anesthetist would not know that stealing a

controlled substance from a hospital would be a felony? Does such an absurd denial by a very intelligent person reflect on his morals? Does it reflect on the strength of his status of a recovering addict?

The above examples are just more downplaying by Thomas of his terrible choices and conduct all to protect his 'campaign' to control and win. What is more shocking is that while he was ingesting these drugs in November 2006 he testified he was parenting Trevor: Q- Were you participating in parenting during the time that you were taking these illegal drugs from your employer and putting it in your body? A- Yes Tr.117. Q- You think you were—you were a fine parent during the time you were using that drug? A- Yes Tr.162. That is unbelievable testimony! There is no question whatsoever that the record is replete with evidence that Thomas was and is an addict, albeit a recovering addict. The Chancellor's finding that the health of the parents favored Kim was supported by the evidence and was correct.

#### Continuity of Care

The Court found that both parents shared the responsibility of raising Trevor. Tr.712. Continuity of care was shared "except when Mr. Watts was in rehab, at which time continuity of care was solely the responsibility of Mrs. Watts". Tr.713. A review of ALL the testimony ample shows evidentiary support for the Court's finding:

The evidence considered by the Chancellor is much more than just the testimony 'according to Thomas'. The testimony of most if not all of the witnesses who testified support the Chancellor's conclusion. In truth, both parents shared the responsibility of raising Trevor to be a "GREAT KID":

P. Carter-Trevor's 5<sup>th</sup> Grade Teacher: got to know both Thomas and Kim; Both went on week- long field trip; Both seen at school; Kim checked on Trevor; Trevor was a "great kid"; Trevor was a "reflection" of excellent parents. Tr.15-16.

T. Attipoe-1<sup>st</sup> & 2<sup>nd</sup> Grade Teacher: Known Watts family for six years Tr.198; "Great child", "well behaved", "well groomed", and "good student" Tr.198; Both excellent parents and involved in education Tr.198; Both involved in presence in classroom Tr.193; Both involved in attending programs Tr.194; "Good relationship" with Kim Tr.198.

Herman Watts-Thomas' Father: Good student and give both Thomas and Kim credit Tr.219.

Helen Watts-Thomas' Mother: "Super Kid" and "Happy Kid" Tr.250.

Thomas Watts- Kim was the parent who took care of Trevor's needs each morning, getting him off to school, doing what needed to be done Tr.115; While Thomas worked Kim was responsible to caring for the home and being available to Trevor Tr.115; Both involved with Trevor's extracurricular activities Tr.35; Each parent's involvement depended on his/her availability from work Tr.35; Both involved in class room projects Tr.36; Both involved in camps Tr.39; Both involved in Robotics Tr.42; Both involved with doctor visits Tr.42; Both involved with violin Tr.45; and according to Thomas Kim was also involved with computer games, soccer and Frisbee activities with Trevor Tr.46; told Dr. Jules Miller: when Kim is good "she is as good as gold. She is polite, thoughtful, and courteous. She wants to take care of us to such a degree that it weighs on her. She will overdo

herself' See 21 Sept 08 Report, Jule P. Miller, III, M.D., Exhibit 12, March 2-9, 2009.

C. Gentry-Kim's coworker: When Kim and Trevor came to work place Trevor appeared "very happy", "nice young man", "having nice time together", they were "very connected", Trevor showed "no fear", he was "polite, friendly, and smiling" Tr.260; Kim came to the workplace with Trevor helping him with his fundraiser Tr.261; Kim "really loves being a mom" Tr.261.

F. Brown-Kim's coworker: When Kim and Trevor came to work place they were laughing and grinning as they interacted with each other Tr. 267.

George Bass-Kim's Brother in Law: Thomas and Kim are "great parents" Tr.270; Kim very protective of Trevor, i.e. television shows, Tr.271; Kim is the disciplinarian Tr.272; Kim prepared the meals Tr.272; Both did the home chores Tr.272; Kim's extended family is a "very close knit family" Tr.275; Kim was "more" of the primary caregiver for Trevor Tr.275; Both involved with soccer Tr.275; Kim is an "excellent parent" Tr.292.

Janet Welch-Kim's family friend: Kim is very "protective" of Trevor Tr.460; Kim is very attentive to Trevor, a "good mother" Tr.461.

Kim Watts: Kim did more of the laundry, cleaning and grocery shopping, caring for most of Trevor's needs Tr.503,507; involved in selected Trevor's school Tr.505; involved in Scouts Tr.507; assisted with school activities e.g. building classroom loft (sawing, nailing, carpet) Tr.508; in school classrooms on a regular basis Tr.509,514; attended Robotic competitions Tr.511; encouraged violin

Tr.512; assisted Trevor with his art work and publishing photo(s) Tr.512; encouraged interest in Chess Club Tr.513; attended field trips Tr.513; reading Tr.513; met with teachers Tr.514; registered Trevor for camps Tr.516; played Wii, golf, shot BB gun and paintball with Trevor Tr.517; encouraged and participated in soccer Tr.517; stressed 'being near God and walking with God' Tr. 519; involved with Trevor's medical needs Tr.522; provided Trevor's care in Fall of 2006 when Thomas relapsed by stealing and using drugs resulting in his being "withdrawn", "distant", "rude", and his life "kind of stopped" Tr.528.

The record is replete with evidence that BOTH Kim and Trevor were eagerly and heavily involved in caring for Trevor. The 'ringing truth' from the evidence is found in the quality of the 'product': Trevor. He was described as a great kid, very happy, nice young man, super kid, and a reflection of "excellent parents". The real truth of the value of Kim's contribution is found in Thomas' "**Freudian Slip**" to Dr. Miller of which Dr. Miller writes:

**"...when Kim is good "she is as good as gold. She is polite, thoughtful, and courteous. She wants to take care of us to such a degree that it weighs on her. She will overdo herself".**

**Miller Report, Exhibit 13, March 2-5, 2009.**

In other words, they both get the credit but Kim probably gets more credit with this inadvertent **truthful** statement by Thomas. The Chancellor's conclusions on continuity of care favoring neither parent were supported by the evidence.

### Parenting Skill

First, in considering the parties' parenting skills and the quality of those skills we must remind ourselves of the extensive testimony of those witnesses summarized herein above that the parties' were "excellent parents", that Trevor had a good relationship with Kim, he was a super kid, 'great parents', Kim was a 'good mother', etc. Second, in considering parenting skills the Court carefully reviewed the evidence as related to each party's conduct as it weighed upon the quality and health of each party's 'parenting skills'. Tr. 713; C.P.217.

The Court noted Kim's admitted exposure of Trevor to the party's arguments and her taking responsibility for her doing so. Tr.713 and Tr. 548,639. Much to the dislike of Thomas, the Court concluded Thomas' handling of the arguments between he and Kim as the journal was being kept was an effort to "set up" Kim "so that it could go into the journal and be used against her in the future (which is exactly what he did) Tr.713. What was the evidence of this "set up"? One must first put things in to proper perspective in accordance with what was going on and when.

In October 2007, the parties were a mere nine months since Thomas' completion of his drug rehab inpatient treatment. Looking back to the Fall of 2006 what was going on in the Watts household: Everyone was still recovering from Hurricane Katrina Tr.111,528; Thomas revealed to Kim in October that he had stolen Fentanyl (a narcotic) and Verset (a sedative) from his employer Hancock Medical Center and injected them into his body for a "sinus" problem. Tr.109,530 (This is the same 'addict' conduct he exhibited back in 1994, of which Kim was aware of); Kim's father was very ill requiring her assistance in his care Tr.112,532; Kim had surgery for an ovarian cyst in December



2006 Tr.532; Kim's mother became sick and had surgery in December 2006 Tr. 530-532; Kim suffered from the embarrassment of Thomas' relapse with friends, family and Church Tr.114,123-24,533; the Watts' household income dropped from \$150,000.00 per year to Thomas having a \$29.99 per hour job, all due to his drug relapse Tr.533; Kim was required to return to work full time Tr.533. Kim's father died in October 2007. Tr.533; and Thomas and Kim were arguing and divorce was discussed. Tr.533.

During the period Fall 2006 through September 2007 it had been their practice that most of the arguments would take place outside of Trevor's presence and Thomas' drug history was never discussed in Trevor's presence Tr.122,543. This approach soon changed. Tr.165-167.

Soon after her father's death in October 2007, Kim advised Thomas she wanted a divorce. However, it was Thomas who then secretly saw an attorney. Tr.124,551. Upon "advice" of his attorney Thomas chose to begin secretly keeping a journal: "Mike Holleman had asked me to write these things down. What they were to be used for, I did not know" Tr.124-126. Is it believable that Thomas did not know why he was keeping the secret journal? Thomas was well aware that his drug use just ten or so months earlier was a big problem for him if Kim sought a divorce. Thomas was well aware that Kim had in fact been "good as gold" as a wife and mother. It had to be obvious that these two things alone would most probably lead to a divorce and Kim being awarded custody. So, the preparation for a divorce and custody case was begun albeit secretly and in Thomas' writing only, no audio as Thomas testified this was 'too risky'. Tr.127.<sup>4</sup>

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<sup>4</sup>Throughout Thomas' interviews with Dr. Gasparri and Dr. Miller and during his testimony he seems to take a position on one hand that he still loves Kim and he wanted the marriage to stay in place. However, his actions in attempting to destroy Kim were

Kim learned of the secret 'journal' after Thomas filed his divorce on July 10, 2008. Its contents are not uncontroverted as asserted by Thomas. Kim testified the journal is not an accurate and fair depiction of the events described therein.<sup>5</sup> One big point, it does not include Thomas' statements Tr.548-49. In retrospect, she testified the events also involved Thomas 'goading' her as he would say: "go ahead, go ahead" Tr.543, "eat shit and die, I'll just say you sleep around" Tr.548-49, "hit me, go ahead and hit me, why don't you just hit me" Tr.548-49, 'go ahead, I don't care who you tell about my drug use' Tr.549, "bang" (like he was shooting a gun) Tr.549, "go ahead, show you're crazy, you're crazy" Tr.550-51, "just eat shit till turds come out of your nose and then die" Tr.553, "Why don't you just go lay down in the road and get run over" Tr.553, "I should just pick up the planter and hit you in the head" Tr.553. Taking Thomas' argument about facts being uncontroverted, every single one of these comments as testified by Kim was NEVER denied by Thomas and therefore facts upon which the Chancellor could rely! If not true, then why did Thomas not retake the stand in rebuttal and refute the statements? Because they were true and they stand uncontroverted. Not very good parenting, to say the least and as Thomas likes to say "bad parenting"!

An important question to remember is how did Kim and Thomas handle their arguments before the fall 2007? Kim testified (uncontroverted) she and Thomas never argued or discussed sensitive issues (his drug relapse) in the presence of Trevor Tr.658.

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totally inconsistent with reconciliation and there was absolutely not discussion of such between Kim and Thomas.

<sup>5</sup> As already pointed out, Kim testified the journal was neither accurate nor a fair depiction of the events described Tr.548. More specifically, and to the contrary of Thomas' assertions, Kim testified she never told Trevor that he would go to "juvie" as asserted by Thomas Tr.635. She testified she never told Trevor the state would 'regulate' him like they regulated his dad Tr.636.

Trevor would always be placed outside the presence of an argument. Tr.658. That changed as Thomas began keeping his journal in the Fall 2007. Thomas made sure the arguments did take place in Trevor's presence.

From the evidence the Chancellor was warranted in finding that Thomas' secretly seeing an attorney and keeping his journal was indeed an "effort to set up Mrs. Watts that it could go into a journal and be used against her in the future". Tr.713. Further, this conclusion was also based upon Dr. Jule Miller's opinion that "Mr. Watts plays victim in front of Trevor" Tr.714; Dr. Jule Miller Report, Page 3, Exhibit 12, March 2-5, 2009. The Chancellor's conclusion that Thomas did in fact set out to build his case around what he recorded in his journal was amply supported by the evidence.

In regards to the issue of parenting skills, the Chancellor further found that Kim was the disciplinarian Tr.714. This conclusion is also supported by the evidence. George Bass testified Kim was the disciplinarian. She was very sensitive to Trevor's exposure to television at all times and in all places Tr.270-72. Janet Welch testified Kim was very protective of Trevor and he was the center of Kim's world Tr.461.

The Chancellor found that while Kim recognized her involving Trevor in the arguments was damaging, she had taken the necessary steps to learn how to be a better parent Tr.714. Dr. Miller opined that much of Kim's contribution to the marital conflict was due to her unresolved grief over the loss of her father in October 2007. According to Dr. Miller, another contribution to the conflict was Thomas' "focus on proving his wife wrong (see his affidavit)". Dr. Miller, Exhibit 12, March 2-9, 2009. Finally, in his supplemental report of February 3, 2009, Dr. Miller found Kim no longer suffered from low grade depression, there was no paranoia, there was no evidence of a personality

disorder, and the “adjustment disorder due to marital stress” was resolved. Dr. Miller, Exhibit 13, March 2-9, 2009. Again, the Chancellor’s conclusions that Kim was favored under the parenting skills factor are amply supported.

Further note should be made of the Chancellor findings of Thomas’ manipulation of Trevor: “While at the same time, I see Mr. Watts as playing Trevor against Mrs. Watts” Tr.715. Was He? Did Thomas favor Trevor to affect his preference? Did Thomas lead Trevor to believe he was his ‘protector’? Did he manipulate Trevor during the period of the journal? The answer is yes. There are many supporting examples of this type of conduct in the record and here are a few:

1. Thomas played the ‘cool dad’ by allowing Trevor to do things that Kim, the disciplinarian, would not allow: After Kim left the home on July 5, 2008, Thomas and Trevor remained. A couple of days later, in Thomas’ journal he recorded he and Trevor were watching the television show “I Survived a Japanese Game Show” Tr.145-46. Thomas admitted that Kim did not allow Trevor to watch this particular show, but he allowed it anyway. Id.
2. Thomas played up fear of Kim in Trevor: Following Kim’s exiting the home on July 5, 2008, it was reported by Trevor to Dr. Miller that “We [Trevor and his dad] changed the locks when she was arrested. She was really mad”. Dr. Miller, Exhibit 12, March 2-9, 2009. What reason(s) was there to change the locks on the home other than to lead Trevor to believe there was something to fear in his mother.

3. Thomas played the role of the ultimate ‘protector’ of Trevor in many respects: On the presidential election night of November 4, 2008, Trevor text his dad: “I am fine and just a little frustrated. I’ll tell you tomorrow. Obama won”. Thomas responded as follows: “I am sad about it also. The fact that I am your father and that I love you and always will won’t ever change by any election. [sic]” Tr.170. Did Trevor need protection from the newly elected President? Surely not. Good parenting? No.
4. Are Thomas’ attempts to manipulate Trevor and ultimately the Chancellor not shown by the following entries in his Journal on July 10, 2008, which is the same day he secretly appeared to obtain his temporary restraining order: “I assured [Trevor] he was very very safe and loved by both parents and that he had nothing to do with this. He said he know knew why, it was mom. He was happy when he learned I was going to have full custody of him till the 22<sup>nd</sup> of this month and that his mother could not just show up....We ran errands and met Mr. [Mike] Holleman....**We changed out their locks and ours, along with the security codes for the house**”. Exhibit 9, March 2-9, 2009. Was Kim so dangerous that Thomas had to demonstrate this danger by changing the locks and the security code? Note what he writes as Trevor’s response: “You can tell this stressing Trevor...”. Not only was Thomas protecting Trevor’s safety, but he had an attorney for Trevor to meet with, he had access to the Judge to have a ‘secret meeting’ (journalized) and he ‘was going to have full custody’. That

is a pretty powerful message Thomas has sent to Trevor to protect him from his mother.

5. Further, on July 10, 2008, one can see the effects of Thomas efforts to create fear in Trevor of Kim in the following journal entry: "Trevor asked if he could go to a movie with Dame, Jared and Hallie. I said I don't see why not. He said we will have to it [sic] in secret. I asked why. He said **he didn't want his mom stalking him**. He didn't want her showing up where he was". Ex. 9, p. 36. Now where does one think Trevor acquired the fear and belief that his mother will stalk him? Obviously, Thomas. Exhibit 9, March 2-9, 2009.
6. More evidence of the creation of fear in Trevor: The entry in Thomas' journal no July 13, 2008: "Trevor wants me to get a cell phone from Verizon so I can get parent/child chaperone. This allows me to keep up where he is. For safety he wants me to be able to keep up where he is". Is such an action the idea of Trevor or Thomas? Obviously, Thomas. Exhibit 9, March 2-9, 2009.
7. After having secured temporary custody of Trevor and just prior to the trial in March 2009, Thomas and his parents took Trevor on a one week cruise, allowing him to miss a week of school. No such trip had ever been taken during school time. Tr.221. Kim was not told of this trip. Was this an effort to manipulate Trevor's custody preference just prior to the trial? Does one think a week on a cruise ship and a missed week of school is not enticing? This was just another attempt to sway Trevor's favor.

8. Thomas once again portrayed himself to Trevor as the 'cool dad' when he allowed Trevor to bring Cuban cigars from the cruise back in to the States. Tr.223,294 Is smuggling Cuban cigars from a cruise illegal? Yes. Is this good parenting? No. [Trevor even offered his uncle George Bass one of these cigars. Tr.294]
9. Thomas encouraged a secret code with Trevor to 'warn' each to other of Kim: On June 18, 2008, the journal refers to Thomas and Trevor having a "beware face" to beware of Kim. Exhibit 9, March 2-5, 2009. Is it good parenting to have a 'secret' code with a young child to warn of the other parent? Does that make the other parent the 'bad' parent or the 'danger' parent? Yes.
10. Thomas promised to get Trevor a 'secret' meeting with the Court: On June 28, 2008, the journal reads "don't worry about it son, we'll get a secret meeting with the Judge so you can tell him who you want to live with". Exhibit 9, March 2-5, 2009. Does Thomas telling a young child that he has the power to get him a 'secret' meeting with the Chancellor manipulate Trevor? Yes. In other words, 'do not fear mom, I know the Judge'.
11. Trevors adopting of Thomas' views: Has manipulation not taken place when a 12 year old child claims she is the "all powerful control parent"; or that "his mother would get medical attention for anger management issues"; or when he claims a hole was put in a wall and his mother slapped his dad on July 5, 2008, when neither occurred?

There is no question Kim said inappropriate things to Trevor. She admitted and regretted this. Tr.547. However, how can Thomas on one hand truly believe Trevor is being so terribly harmed by Kim's conduct throughout the time period covered by the journal and on the other hand not do something about this 'danger' as a concerned parent? He could have filed a divorce in the Fall 2007. He could have sought to remove Trevor from any such danger early on. He did not and the obvious reason is he was sacrificing Trevor during this time period for his 'campaign' and to allow him and his attorney time to 'build his case'.<sup>6</sup>

And finally, if the test of the proof is what is or what is not 'uncontroverted' then the horrendous statements of Thomas as testified to by Kim are the type of terrible parental misconduct that place Thomas's parenting skills in question Tr.548-553. While Thomas could have taken the stand in rebuttal and refuted these statements, he did not. One would wonder why he did not do so? The Chancellor's conclusions on parenting skills were supported by the substantial evidence.

#### Willingness and Ability to Provide Child Care

The Chancellor found Thomas to have been very active in Trevor's school and activities. He also found Kim to have participated. The support of both Kim and Thomas' involvement with Trevor and with his care has been set forth herein above. This factor favored neither parent.

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<sup>6</sup> It is interesting to note that Thomas Brief at Page 48 reveals that as this journal was made, Thomas emailed the journal to his attorney and his attorney ultimately decided what part of the journal to use. Appellant's Brief, P.48.



### Employment Responsibilities

Because Thomas got off of his work at 3:00 each day, the Court found this factor to favor Thomas. Frankly, with Trevor's activities and his age it should have made no difference as Trevor's afternoons probably did not depend upon the presence of either parent.

### Emotional Ties

Regardless of the belief that Thomas had manipulated his relationship with Trevor to gain his favor, the Court concluded this factor favored Thomas. The substantial credible evidence of this manipulation has been set forth herein above.

### Moral Fitness

The Chancellor reasoned that this factor favored Kim due to Thomas' manipulation of Trevor's relationship with Kim and Thomas. The Chancellor stated he believed that Thomas somewhat poisoned Trevor against his mother. Tr.716. The heretofore referenced evidence of Thomas' conduct and manipulation supports this finding. Going further, it is believed the Chancellor's ultimate finding that this factor favored Kim is correct based not only upon Thomas' conduct towards Kim using Trevor as the pawn, but also upon Thomas' admitted past behavior of stealing drugs from his employer and using them. This behavior was criminal, although not acknowledged by Thomas. Yes, he is recovering but it is what it is. No such type of conduct on Kim's part is even suggested by Thomas.

### Home, School, and Community

The Chancellor noted Trevor was an excellent student. He was active in church and sports. Both Kim and Thomas were involved with Trevor's schooling and activities,

although Thomas' schedule had allowed him a little more involvement. Tr.716. The substantial credible evidence of this involvement is set forth herein above.

#### Stability of Employment

The Chancellor found this factor to favor Thomas due to his employer's willingness to work with him through his relapse. The fact that Thomas has been through two drug relapses with two different employers should not be viewed as a positive, but a negative. Putting it bluntly there is no question Thomas' employment stability only rests upon whether he chooses to partake of drugs again. On the other hand, Kim has been a registered nurse for many years. Her coworkers testified of how wonderful of a coworker she is to them. Tr. 258-267. This factor should have favored Kim.

#### Child's Preference

While the Chancellor noted this factor favored Thomas, he attributed Trevor's preference to Thomas' "staging things". Tr.717. From the sampling of Thomas' efforts to influence Trevor as set forth herein above, there is no question Thomas continuously attempted to influence Trevor's views of his mother unfavorably and his father favorably.

#### Other Factors

Finally, the Chancellor made special note of Thomas' active interference with the relationship between Kim and Trevor. Tr.718. The support of this interference has been set forth herein above.

#### Joint Legal and Joint Physical Custody

The Chancellor, as Trevor's super guardian, found that his best interest would be served by an award of joint legal and joint physical custody. Trevor's best interest is

paramount. The Chancellor reasoned that Trevor “needs to rebuild his relationship with his mother” while at the same time maintaining a strong relationship with his father.

2. Thomas’ Attacks:

A. Claim: The Chancellor was “reckless” and took “quantum leaps”:

Thomas asserts the Chancellor erred in his rulings due to his making “reckless” findings not supported by a “single fact” or “substantial evidence”. Thomas’ primarily relies upon the case of Taylor v. Taylor, 755 So.2d 681 (Miss.2001).

It is Thomas’ claim that the Chancellor’s ruling below is not supported by “*a single fact*” in the record and certainly not any “substantial evidence”. Further, Thomas asserts based upon Taylor the Chancellor below erred because his findings were “reckless” and a “quantum leap”, “having no factual basis in the record and the findings *reveal the Chancellor’s bias resulting in his abuse of his discretion*”. Appellant Brief, Pp.22-23, 42.

Thomas’ problem is he is practically blind to the ‘other evidence’ in the record before the Chancellor. Furthermore, his total reliance upon Taylor is based upon a total misunderstanding of the facts of Taylor. According to Thomas, Taylor involved the following [**emphasis mine**]: “...the Chancellor awarded a change in custody to the father stating that *he is not convinced that [the mother’s new husband] is not the culprit* in the sexual allegations made by the child. Id. **The child had accused the stepfather of sexual abuse, and then recanted.** The Court held that the Chancellor’s finding was “reckless” and “a quantum leap” which had no factual basis in the record, and which we [sic] find *reveals the chancellor’s bias resulting in the abuse of his discretion*” Id.” Thomas Brief, p.42.

The problem is Thomas has the Taylor facts wrong. Taylor involved the modification of custody from the mother to the father. Both parties had remarried since their divorce. During the proceedings the mother accused the father of sexual molestation of the child. Criminal charges were filed against the father and the stepmother. These charges were dismissed. Ken, the mother's husband and the stepfather, was never accused of the sexual allegations. Ken did not testify. The Chancellor's error was that his ultimate finding was based upon not Ken's testimony, but the absence of his testimony:

"The real concern the Court has, though is Ken. The Court is not convinced that he is not the culprit in the sexual allegations made by the child and, again, without his testimony, [the Court] has to draw such conclusions from the evidence it has before it." Id. at 859 So.2d 1006, Paragraph 18.

In other words, the chancellor in Taylor ultimately based the change of custody to the father upon the fact that Ken, the step father, may have been the culprit. There was not "one fact" in the evidence to support such, but the chancellor drew his conclusion based upon the absence of Ken's testimony. The Court of Appeals held there was "no substantial basis in the record *even remotely suggesting that Ken* may have perpetrated the alleged sexual abuse in this case, with the exception of the testimony of Karen that Rodney, Jr., is modest around Ken". Id. Thus, the Court of Appeals found the chancellor's ultimate decision was not based on substantial and credible evidence *in the record*, i.e. the chancellor could not speculate on something that was not in the record.

In the instant case, there is no speculation by the Chancellor that is based upon some witness' nonexistent testimony or some other matter outside the record. The Chancellor's decision was based upon *the record* which included, but was not limited to:

the history of Thomas' journal, affidavit and seeking of emergency relief; the opinions of a psychiatrist and a psychologist; the testimony of the parties; the testimony of teachers called by both parties; the testimony of family members; the testimony of neighbors; the testimony of co-workers; etc. It would seem that Thomas would concede at least some of the evidentiary facts would suffice as a "single fact" to support the Chancellor's findings and that all of this evidence did in fact provide the substantial evidence upon which the Chancellor based his decision. Being the 'control' person he is he cannot make such a concession.

B. Claim: Dr. Jule Miller was Biased in Favor of Kim:

Thomas asserts that the testimony of Dr. Jule Miller is suspect because of the fact that after he had conducted his evaluations of Thomas, Kim and Trevor and completed his reports and recommendations he entered into an inappropriate therapeutic relationship with Kim. In fact he claims Dr. Miller was unethical. The fact is that Dr. Miller recommended Kim continue in therapy after his evaluations and she followed his recommendation and successfully. Miller Report, Exhibits 13-14 March 2-5, 2009.

Dr. Miller was appointed by the Chancellor in the July 31, 2008, Temporary Order as the psychiatrist who would evaluate the parties and Trevor. These evaluations were complete by the end of September 2008. Thereafter, between September 2008 and the trial in March 2009, Dr. Miller saw Kim six times in therapy which she successfully completed. Although, Dr. Miller recommended Trevor also undergo therapy, Thomas chose not to take him to Dr. Miller. There was nothing in Dr. Miller's seeing Kim that affects the findings and conclusions in his reports which predate his seeing Kim for therapy. Had Dr. Miller been Kim's therapist prior to or during his evaluations then it is

guaranteed Thomas would have objected to his being appointed to evaluate the parties.

That was not the case. Miller Report, Exhibits 13-14 March 2-5, 2009.

Thomas cites Miss.R.Evid. 702 for the proposition that an expert's opinion cannot be based upon speculation and must be based upon what is known, i.e. uncontroverted facts. The fact that Thomas provided his affidavit or journal to Dr. Miller at the time of his evaluation listing Thomas' version of events does not establish "facts" which Dr. Miller had to except as truth. In fact Dr. Miller testified he refused to read the journal, as it was the better practice to gather his information from his interaction with the patient and to draw his conclusions there from based upon his training and experience as a psychiatrist. Tr.198, 287-289,301. That is what he did. It is also important to note the consistency between Dr. Miller's opinions about Thomas' influence of Trevor and Dr. Gasparrini's opinions. Both concluded that Trevor had sided with Thomas and as a result being influenced by Thomas. Exhibits 12-14, March 2-5, 2009.

C. Claim: Court's Bailiff: Bias and Abuse of Discretion

It is not clear as to exactly why Thomas has added this attack on the Chancellor. What is involved is that Kim's brother, Joey Holcomb, is a Court Bailiff employed by the Harrison County Sherriff's Department. While he was not the bailiff at any time during the Watts trial, he had substituted as the Chancellor's bailiff on prior occasions. This information was shared with the attorneys off the record as is shown by the record excerpt below. It does not take long to understand what transpired if one looks at the record:

The Court: And let me interrupt. Let the record reflect, and I believe we've addressed this before with counsel, but Joey Holcomb has acted as my bailiff on

occasion. I believe everyone is aware of that, and I believe everyone agreed that there was no conflict. But I would like for that to be stated on the record for once.

Mr. Michael Holleman: **Okay**

Mr. Dean Holleman: **That's correct.**

The Court: All right. I might as well add also that my son worked one summer with Damian Holcomb, Joey's son. I have not spoken with Joey Holcomb about this case except to ask him what he was doing in the courtroom when it came up, I believe, in the end of July '08, I guess on the motion to set aside the temporary restraining order.

Mr. Dean Holleman: **Yes sir.**

Mr. Michael Holleman: Judge, could I have a moment?

The Court: Yes Sir.

Mr. Michael Holleman: Judge, **I don't have any—we don't have any problem, but I will state to be accurate, I didn't know that he was your bailiff until just then. I —but my client has no problem with it.**

The Court: He is not my bailiff. He has acted as a substitute bailiff for me on occasion just as everyone in transport's available.

Mr. Michael Holleman: **I'm not—I have no problem with it.**

At Tr. 492:

So, if Mr. Michael Holleman had no problem with it and Thomas had no problem with it why is this now an issue on appeal? Why did Thomas and his attorney not promote judicial economy and save client's time, lawyer's time, and all the other resources that have gone into this case by objecting to Judge Bise continuing on the case and asking for his recusal? How can Thomas now assert bias and an abuse of discretion after Thomas decides he is now unhappy with Judge Bise's ruling? Is that fair? Is that right? It is neither.

Is there other basis for the Chancellor's finding that Thomas manipulated the Court on July 10, 2008, in securing the temporary restraining order? As covered in detail, there was plenty of evidence Thomas manipulation of his journal and resulting affidavit was solely to use them in his divorce proceeding, which is exactly what he did. This attempt at creating error on the part of the Chancellor is wholly without merit.

Thomas has waived any objection to the Chancellor's having put on the record that Kim's brother had been his substitute bailiff on prior occasions. There is a general requirement that objections must be raised at the trial level. In re S.A.M. 826 So.2d 1266, 1277 (Miss.2002); In re V.R., 725 So.2d 241, 245 (Miss.1998). See Riley v. Doerner. The Supreme Court has stated that "[i]f no contemporaneous objection is made, the error, if any, is waived." Dorrough v. Wilkes, 817 So.2d 567, 577 (Miss.2002) (quoting Walker v. State, 671 So.2d 581, 597 (Miss.1995)). Thomas claims that the Chancellor's failure to recuse himself is a matter of plain error and therefore the issue should not be barred. Only where a fundamental right of a party has been violated can an appellate court address plain error issues on appeal. Pub. Employees' Retir. Sys. v. Dishmon, 797 So.2d 888, 897 (Miss.2001). This is not the case here. The Chancellor has already put a lot of time into



this case. He had already presided over a majority of the hearing, including the issuance of the Temporary Restraining Order and the subsequent temporary orders. There is no 'plan error' to be considered. Mabus v. Mabus, 847 So.2d 815, 818 (Miss.2003).

**Issue 2: The Chancellor's award of Joint Legal and Joint Physical Custody of Trevor was based upon the Chancellor's determination of an Albright analysis and in recognition of the best interest of Trevor and was not error.**

In his bench ruling, the Chancellor addressed each of the Albright factors as applied to the substantial credible evidence viewed by the Chancellor Tr.711-18.

Additionally, the Chancellor considered one "other factor" as allowed under Albright:

The other factor that I looked at, which is really not included in Albright, is parental interference, and I find that Mr. Watts has actively interfered with the relationship between Mrs. Watts and Trevor. Having said all of that, I believe that joint legal custody is in Trevor's best interest. Your attorneys can explain to you what that means. I also believe that joint physical custody I in Trevor's best interest. He needs to rebuild his relationship with his mother, but he needs to maintain a strong relationship with his father. Therefore, I am going to divide custody on the basis of two weeks with dad, two weeks with mom.Tr. 717-18.

The Chancellor's award of joint legal and joint physical custody was centered upon Trevor's best interest as determined by the Chancellor. "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. 'Above all, in 'modification cases, as in original awards of custody,' we never depart from our polestar consideration: the best interest and welfare of the child.' " Riley v. Doerner, 677 So.2d 740, 744 (Miss.1996) (quoting Ash v. Ash, 622 So.2d 1264, 1266 (Miss.1993)) (citing Marascalco, 445 So.2d at 1382). See also Albright v. Albright, 437 So.2d 1003, 1005 (Miss.1983). It must always be remembered that while all the Albright factors are important to consider, the

Chancellor had the ultimate discretion to weigh the evidence the way he sees fit. “The credibility of the witnesses and the weight of their testimony, as well as the interpretation of evidence where it is capable of more than one reasonable interpretation, are primarily for the chancellor as the trier of facts.” Chamblee v. Chamblee, 637 So.2d 850, 860 (Miss.1994). It is obvious, by looking at the record, that the chancellor reasonably looked at all the factors and came to the correct decision based upon Trevor’s best interest. The custody award was not error.

**Issue 3: The Chancellor’s award to Kim of rehabilitative alimony of \$1,000.00 per month was not error.**

The Chancellor awarded Kim periodic alimony of \$1,000.00 per month. This award was made after the Chancellor had made his analysis under Cheatham-Ferguson. The Chancellor found that the property division of the parties’ marital assets could not be utilized to eliminate periodic payments or potential sources of friction between the parties. Tr.722. The Chancellor did make note of the economic hardship caused by Thomas drug relapse and its resulting affect on the household income Tr.721-22.

In making his award of alimony, the Chancellor correctly considered the Armstrong factors. The Chancellor considered the financial security, assets and earning capacity of the parties. Tr.723. It was noted that Thomas had a master’s in anesthesia from Xavier University and was capable of earning \$150,000.00 per year which was his earnings at the time of trial. Tr.721,723. On the other hand, Kim’s earning capacity was at best \$43,000.00 per year. The Chancellor found that based upon this disparity of income and the health of the parties, Kim was entitled to alimony. Tr.723.

In his bench ruling the Chancellor further considered Kim’s shortfall each month was approximately \$500.00 based upon her financial declaration. Tr.723-726. She

testified she would be purchasing a home (living in apartment at the time of trial) with a mortgage note of \$1,200.00 per month for total expenses each month of \$3,250.00.

Tr.724. The Court noted Kim's deficit. On the other hand, Thomas had excess income over his projected expenses each month. According to Thomas' financial declaration, he showed expenses each month of \$5,500.00. Exhibit 16, March 2-5, 2009.

The Chancellor further examined whether there were any special needs in regards to Trevor. There were none. The marital debts were few and allocated to Mr. Watts, who received the corresponding asset. Tr.724. He noted Kim's debt to her mother for attorney fees, but addressed it separately. He noted the marriage was a long term marriage of twelve years. In regards to fault, the Chancellor determined such should be considered in its decision to award alimony: "And I find Mr. Watts was at fault. His fault, his misconduct consisted of, first, the relapse into narcotic abuse, and then, second, his manipulation of Trevor." Tr.725.

The Chancellor acknowledged the dissipation of assets by Thomas as described hereinabove in regards to his relapse and treatment and the parties' modest standard of living. Finally, the Chancellor noted that any alimony would be taxable to Kim and deductible to Thomas. Tr.725. And having completed his Armstrong analysis the Chancellor concluded as follows: "Having gone through all of that, I find that Mrs. Watts is entitled to alimony in the amount of \$1,000.00 per month". Tr.725-26.

The Court in *Cleveland* applied the factors to a wife that was granted a divorce from her husband on ground of habitual cruel and inhuman treatment. This Court had held that "[i]t is a general rule that alimony will not be allowed a wife when the husband is granted a divorce because of her fault." Retzer v. Retzer, 578 So.2d 580, 592 (Miss.1990)

(citations omitted). Thomas and Kim's divorce was based upon their consent to adjudicate the divorce on the grounds of irreconcilable differences. In awarding alimony, the Chancellor followed the appropriate analysis and based upon the record the Chancellor properly awarded alimony to Kim, particularly considering the large disparity of incomes and Kim's reasonable needs. The Chancellor's award was not error.

**Issue 4: The Chancellor's findings that Thomas' Affidavit submitted on July 10, 2008, to obtain his Temporary Restraining Order was a manipulation of the Court was not error and was correctly considered by the Court.**

**Issue 5: The Chancellor's findings that Thomas' Journal was 'not trustworthy' was based upon the substantial credible evidence and was not error.**

Since both of these issues deal with the weight and credibility of the Affidavit offered by Thomas, the issues will be dealt with together.

The Chancellor's ruling was supported by substantial evidence in the record as herein set forth. In reaching his conclusions, the Chancellor appropriately determined the credibility of the witnesses and the weight to be given said evidence. Belding v. Belding, 736 So.2d 425 (Miss.App.1999); Thweatt v. Thweatt, 4 So.2d 1085 (Miss.App.1999); Trim v. Trim, 33 So.3<sup>rd</sup> 471 (Miss.2010); Donaldson v. Convington County, 846 So.2d 219 (Miss.2003). The Judgment of the Chancellor should not be disturbed unless the findings are manifestly wrong or clearly erroneous. Stewart v. Stewart, 2 So.3d 770 (Miss.Ct.App. 2009); Magee v. Magee, 661 So. 2d 1117, 1122 (Miss. 1995).

On July 9, 2008, Thomas' filed his complaint for divorce, for temporary relief and for emergency relief without notice. In this filing Thomas sought a divorce, custody, support and division of property. (Count One); he sought temporary relief requesting Kim be allowed 'supervised visitation' only after evaluation by a psychiatrist. (Count Two). He sought a temporary restraining order and custody, without notice. He claimed

“immediate and irreparable injury, loss or damage will result before [Kim] or her attorney can be heard in opposition”. (page 5). He also represented to the Chancellor that his Affidavit “demonstrates that the health and safety of the minor child will be threatened with irreparable harm should the Court not issue a temporary restraining order, without notice”. (page 6). Finally, Thomas asserted once a ‘preliminary injunction’ was entered it should “be followed by a Permanent Injunction **at the conclusion of the divorce proceedings**”. C.P.13. This pleading was never withdrawn or amended.

Because of Thomas filing and his allegations of mental illness and danger, Kim was required to submit to psychiatric and psychological evaluations and to interviews by the Court’s Guardian Ad Litem (GAL). Even though these evaluations and the GAL did not support Thomas’ allegations of mental illness and danger, Thomas continued his pursuit to prove mental illness on Kim’s part, directly and indirectly, throughout the record below. As a result, Kim had to defend against Thomas’ continuing attack. In the end, the Chancellor found that Thomas has manipulated the Court by asserting Kim suffered from mental illness and was a danger to Trevor. The Court did not enter a ‘permanent injunction’ upon the conclusion of the proceedings as plead by Thomas.

As noted, credibility and weight-of-evidence issues are factual issues for the Chancellor to decide. Lorenz v. Lorenz, 987 So.2d at 430 (citing Chamblee v. Chamblee, 637 So.2d 850, 860 (Miss.1994)). Based upon the substantial credible evidence the Chancellor did not find Thomas’ or his affidavit credible. The Chancellor found that Thomas had manipulated the Court on July 10, 2008 when he represented the facts in his Affidavit as truthful. Based upon the evidence the Court specifically found that Kim was not a danger to Trevor necessitating a temporary restraining order, much less a permanent

injunction. As discussed *supra* the substantial credible proof further showed Thomas' journal to not be reliable and/or trustworthy.

In its Order on Post Trial Motions the Chancellor explained his reasoning for the award of \$15,000.00 in attorney fees to Kim. Kim had incurred some \$30,000.00 in attorney fees of which her mother had paid \$12,000.00. Tr.588;726-728; Exhibit 27, March 2-5, 2009; C.P.217. The Chancellor "awarded Ms. Watts some of her attorney fees on the basis of the temporary restraining order obtained by Tom Watts in "dealing with the consequences of that temporary restraining order". Of note, is that while Thomas portrayed Kim as having a mental illness and needing psychiatric treatment making her a "danger", not one professional agreed with his assertions. Kim's defense to Thomas' assertions and actions using the power of the Court were not easy to defend and were time consuming.

The Court then went on to make its McKee analysis, such was not necessary. The attorneys for Kim and Thomas both stipulated to that both side's fees were "reasonable and necessary" and both were waiving the McKee analysis and its other factors. Tr.592.

It was the Chancellor's role as the trier of facts to determine the credibility of the witnesses and the weight to be given to the evidence. For these reasons and those set forth *supra* the Chancellor's finding that Thomas manipulated the Court and that Thomas' Journal was not trustworthy was not in error. Further, based upon the stipulation of the attorneys for the parties and the Court's reasoning the award of attorney fees to Kim was proper.

**Issue 6: The Chancellor's rulings on Thomas voluminous post-trial motions were not error and was not an abuse of discretion.**

It was Thomas who chose to shoulder the Chancellor with multiple post trial motions leaving to much discussion on the record on how to deal with the different motions. Tr.731-732, 776,778-780,841,850. The hearing on February 1, 2008, began with the attorneys providing oral arguments on Thomas' MRCP59 motion, rehashing the exact factual and legal argument previously covered. Tr.732-778.

Following the oral arguments, Thomas' counsel then proceeded with offering testimony in support of his MRCP 60 motion to reopen the record. Tr.780. The Court heard testimony of Kim, Thomas, Trevor and George Bass. Much of the testimony surrounded continuing accusations of Kim making derogatory statements in Trevor's presence, the exact nature and time of such not easy to ascertain. Tr.781-894. The testimony was uncontroverted that notwithstanding the parties' differences, Trevor was still a great student, a great kid, and doing well. Tr.781-894;852-855. While Trevor at certain points testified he felt 'awkward' when with his mom, that was the extent of any 'effect' upon him of any negative statements by his mom and/or a family member.<sup>7</sup> It is important to note that upon Thomas' completion of his offering of proof under his MRCP 60 motion he suggested to the Court: "Judge, my client would like to go ahead and let the court decide the motions that are before it, and we'll reset the modification depending on the outcome of these motions". Tr.850. Counsel for Kim objected to this approach and move forward with offering his witnesses. Tr.851.

On March 11, 2010, the Chancellor entered his *Order On Post-Trial Motions*. C.P.217. Thomas once again asserted that the Chancellor had 'twisted the facts and

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<sup>7</sup> Note that Thomas quotes of texts on Page 12 of his brief are from documents not evidence, but are from an attachment to Thomas' motions.

evidence'. Kim contends the Chancellor was correct in finding from the substantial and credible evidence adduced at trial that Thomas did in fact 'set up' Kim and use many different methods to manipulate Trevor and his view of his mother. Again, Thomas focuses on the facts *according to Thomas* when he continually asserts that Kim was abusive towards Trevor.

As the Chancellor recognized in its order that neither Gasparrini nor Miller found *in their reports* that Kim was abusive. They did not find such in their reports. Gasparrini Kim did not exhibit any mental illnesses as asserted by Thomas many times over. Further, it was noted that Gasparrini found that Thomas did attempt to influence Trevor to side with Thomas. Trevor did in fact side with his father. The Chancellor's findings also found that Trevor learned of his version of 'Kim's arrest' from Thomas and that Trevor "does appear to accept his dad's explanation of the conflicts". More importantly, Gasparrini concluded "Trevor does not show any emotional or behavioral disturbance". The Chancellor noted that Dr. Miller's findings mirrored these findings.

The Chancellor re-examined its findings as related to certain Albright factors: Health of Parents—"what would have been more precise would be to state that neither found that she had any mental illness that would prevent her from exercising custody or unrestricted visitation", otherwise, the findings remained the same. After reexamining its findings the Chancellor made not changes on the following factors: parenting skills, moral fitness; home, school and community record; preference of child; and the other factor of parental interference. The Court held as follows: this Court determined that in examining the entire relationships between the parties and the child in light of all the applicable Albright factors that joint physical custody would be in Trevor's best interest.



The Chancellor reiterated that its award of attorney fees was based upon two issues: Thomas obtaining the temporary restraining order and Kim's attorney having to deal with the consequences of that temporary restraining order. What were those consequences? Kim was required to submit to a psychiatrist examination, a psychologist examination, and meetings with a Guardian Ad Litem to show that she had not 'mental illness' and there no danger that prevented her from having contact with and unrestricted visitation with her son. None of the consequences would have ever existed but for the unfounded allegations made by Thomas. While Thomas asserts the temporary restraining order and the affidavit were old news and not before the Chancellor, it is important to point out that the supporting affidavit was still being used at the trial of this cause having been offered into evidence by Thomas. Further, it must be pointed out that Thomas' initial pleading filing for divorce continued to seek a 'permanent injunction' upon the conclusion of the divorce proceeding all of which was based on Thomas' unfounded accusations against Kim that she had a mental illness and was a danger. The manipulation by Thomas through his Affidavit and the Journal upon which it was based, began on July 9, 2008 and continued through the trial's conclusion on March 5, 2008. The Chancellor's recognition of Kim's having to defend against this manipulation was not in error and was based upon the substantial credible evidence in the record as set forth herein above. Belding v. Belding, 736 So.2d 425 (Miss.App.1999); Thweatt v. Thweatt, 4 So.2d 1085 (Miss.App.1999); Trim v. Trim, 33 So.3<sup>rd</sup> 471 (Miss.2010); Donaldson v. Convington County, 846 So.2d 219 (Miss.2003). The Chancellor was not in error in the denial of relief under MRCP 59.

Thomas' attorney chose to have his MRCP 60 motion and Motion for Modification considered together. Designed to remedy errors in the court's Judgment, motions under Rule 60(b) are purposefully left to the sound discretion of the trial court and should not be used as an attempt merely to "relitigate" an issue which has already been settled. *Askew v. Askew*, 699 So.2d 515, 520 (Miss. 1997). In accordance with Mississippi Rule of Civil Procedure 60(b)(3), the Court may relieve a party from final judgment if there is "newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Mississippi Courts, relying upon the Fifth Circuit's construction of Rule 60(b)(3) have held that "newly discovered evidence must be evidence in existence of which a party was excusably ignorant." *January v. Barnes*, 621 So.2d 915, 920 (Miss. 1993) (also holding evidence must be material and not cumulative or impeaching, and must be such as to require a different result).

The Chancellor found no new evidence. Further, there had been no substantial and material changes in circumstances warranting a modification. Mr. Watts' contentions are based upon reasoning similar to that maintained by the Husband in *Gray v. Gray*, 562 So.2d 79 (Miss. 1990), a case decided by the Mississippi Supreme Court and repeatedly offered as authority on the issue of what constitutes "newly discovered evidence" for the purposes of interpreting Rule 60(b)(3). After the Court awarded Mrs. Gray a divorce from her husband and granted her both periodic and lump sum alimony, Mr. Gray filed a Motion for Relief from Final Judgment under Rule 60(b)(3), alleging that at the time of the trial, Mrs. Gray's net salary was \$93.31 per week, but since the entry of decree, her salary had increased to \$250.00 per week. *Id.* at 81. Mr. Gray essentially centered his

entire motion around the alleged change in income, which occurred undisputedly after the trial. *Id.* at 82.

As was noted in *Gray*, the federal counterpart of Miss.R.Civ.P. 60(b)(3) is Fed.R.Civ.P. 60(b)(2), and the Supreme Court “often looks to federal authority when construing state rules of civil procedure modeled after federal counterparts.” Gray v. Gray, 562 So.2d 79 (Miss. 1990). In considering such federal authority, the Mississippi Supreme Court acknowledged the unanimous holding that for evidence to meet the requirement of Federal Rule 60(b)(2), “it must have been in existence at the time of trial or at the time of the judgment which is allegedly in need of correcting.” *Id.* at 82. Ben Gray’s allegations only dealt with evidence which did not exist at the time trial or at the time of the judgment of divorce, and as a result, the Court considered Rule 60(b)(3) inapplicable, denying Mr. Gray relief from the judgment. *Id.*

While Mr. Watts attempts to support his motion with a variety of allegations which he claims constitute newly discovered evidence, he seems to have forgotten the basis for relief under Rule 60(b)(3). Mr. Watts relies entirely upon alleged facts (May 2009 emails) which did not exist at the time of trial. It appears that Mr. Watts, rather than proceed under a Motion for Modification which would impose upon him a significant burden of proof, has attempted to convince this Court that he is entitled to relief from the Final Judgment, a judgment reflective of the chancellor’s proper findings. Mr. Watts is not entitled to a relitigation, and because his allegations pertain only to evidence not in existence at the time of trial, Rule 60(b)(3) is not applicable.

Based upon the aforementioned authority and the analysis of the facts involved in the current matter, the Chancellor was not in error in denying Thomas relief under his multiple post trial motions.

### **Conclusion**

The Chancellor below was the one who actually heard the testimony of witnesses and he observed their demeanor. He observed Thomas' affidavit and journal tested under cross examination: When was it prepared? Why was it prepared? Who prepared it? What was included? Why? What was not included? Why? What was the Watts household like prior to the journal's beginning date? Who was involved in Trevor's parenting?

The Chancellor was in a "unique position to judge the credibility of the witnesses". This Court's role is never to undermine a chancellor's authority by replacing his judgment with its own. Madden v. Rhodes, 626 So.2d 608, 616 (Miss.1993). As previously quoted from Belding v. Belding, 736 So.2d 425 (Miss.Ct.App.1999), "[t]his Court does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact finder. If there is substantial evidence in the record to support fact-findings, no matter what contrary evidence there may also be, we will uphold the chancellor." Smith v. Jones, 654 So.2d 480, 485 (Miss.1995).

In this case, the chancellor heard testimony, made detailed findings of fact and conclusions of law, and determined that the best interest of Trevor would be served by his being placed in the joint legal and joint physical custody of both his parents. Although Thomas asserts there was no contrary evidence presented that refutes Thomas' version of events, the record shows sufficient evidence, including the testimony of the parties, Dr. Miller, the teachers, family members, a neighbor, and Kim's coworkers to support the

chancellor's finding as to Thomas and Kim's parenting roles and that the best interest of the child would be served awarding joint custody.

This Court should not retest the credibility of witnesses, and in this case, after having the benefit of observing the witnesses while they testified, the Chancellor clearly indicated that he did not find Thomas' testimony and/or evidence credible in many respects. It is the duty of this Court to find error when the Chancellor does not make findings of fact or his findings of fact are not supported by the evidence. Accordingly, the chancellor's decisions on all issues should be upheld.

Respectfully submitted, this the 14<sup>th</sup> day of March, 2011.

KIMBERLY J. WATTS, APPELLEE

BOYCE HOLLEMAN & ASSOCIATES

BY:   
DEAN HOLLEMAN

### CERTIFICATE

I, DEAN HOLLEMAN, do hereby certify that I have on this date forwarded a true and correct copy of the above and foregoing Brief of Appellee to Michael B. Holleman, Post Office Box 1596, Gulfport, MS 39502, and to Chancellor Carter Bise, Post Office Box 1542, Gulfport, MS 39502, by United States Mail, postage prepaid.

DATED, this the 18<sup>th</sup> day of May, 2009.



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