

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS DALE WATTS

APPELLANT

VERSUS

NO: 2010-CA-00613

KIMBERLY J. WATTS

APPELLEE

APPEAL

APPELLANT'S BRIEF

**APPEAL FROM THE CHANCERY COURT OF
HARRISON COUNTY, MISSISSIPPI**

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ORAL ARGUMENT REQUESTED

Appellant respectfully submits that the issues in this appeal are sufficiently important to require Oral Argument. The case presents issues rarely encountered: the Chancellor made findings of fact contrary to uncontroverted facts to deny consideration of the child's wishes and to award joint custody; awarded attorneys fees following trial on the merits for the wrongful obtaining of a TRO, which was never served or challenged; and awarded substantially more alimony than the spouse testified she needed, finding "fault" based on the husband's single episode of drug usage in 12 years of marriage, occurring at work two years before the separation. Where the mother refuses to be cordial in the presence of the parties' minor son, engages in abusive conduct toward the parties' minor son (as confirmed by her own psychiatrist) and subjects the child to ridicule and scorn for his father, the Court has a rare case in which to address the appropriateness of joint custody under MISS. CODE ANN. § 93-5-24 (1972).

The Chancellor misapplied the law to overrule the father's post-trial motion, which was based, in part, on the occurrence of more abusive conduct following trial. The mother's psychiatrist, after confirming that uncontroverted events established emotional abuse by the mother, testified that if he thought she would ever do it again, he could not recommend that she be allowed to have *any* custody. Following trial, she did exactly that. This conduct was incorporated into the father's Rule 59 motion, and alternatively, a Rule 60 motion and/or motion for modification. The Court held, in essence, this "was more of the same", and then applied the wrong standard to deny the Rule 59 motions.

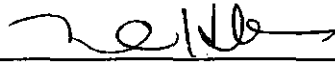
The Appellant anticipates that oral arguments will focus the arguments that the Court finds more relevant and in need of clarification.

CERTIFICATE OF INTERESTED PARTIES

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.

1. Thomas Watts, Appellant
2. Kim Watts, Appellee
3. Dean Holleman, Appellee's Counsel
4. Mike Holleman, Appellant's Counsel
5. Gail Nicholson, former Appellant's Counsel
6. George Bass, Fire Chief, Long Beach, Mississippi, brother in law of the Kim Watts, Appellee
7. Joey Holcomb, brother of Kim Watts, Appellee, part-time Bailiff for Honorable Carter Bise, presiding Chancellor
8. Honorable Carter Bise, presiding Chancellor

This 24th day of November 2010.



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I. STATEMENT OF THE ISSUES

- Issue 1:** A Chancellor must accept as true uncontroverted evidence and may not make “quantum leaps” from the evidence to reach unsupported findings. Where the evidence is uncontroverted that the mother engaged in a pattern of abuse and alienation conduct toward her 12-year-old child, over the nine months prior to separation, for the admitted purpose of making him feel shameful of his father; and that the father never said a negative word to his son about his mother, attempted to avoid arguments and shield his son from her abusive behavior; it was an abuse of discretion for the Chancellor to apply five *Albright* factors based on a finding that the father manipulated their son against the mother by “setting her up” to commit the abuse. The Chancellor abused his discretion in his findings and application of the *Albright* factors.
- Issue 2:** Joint physical and legal custody is not appropriate for a 12-year-old son, where the father serves in a significant supporting relationship with the son in school and extra-curricular activities, which the mother cannot provide; and where the mother has engaged in a pattern of abuse for the stated purpose of making the son feel *shameful* about his father; refuses to speak or confer with the father, cannot hide her negative views of the father and has refused to act civilly toward the father in the presence of their son.
- Issue 3:** Where, following a 12-year marriage, the Chancellor granted wife’s request for ½ of all marital assets, including husband’s retirement pension and wife testified to her need for temporary alimony of \$500.00 for twelve (12) months, the Chancellor’s award of permanent alimony of \$1000.00 a month was an abuse of discretion. The Chancellor’s finding of fault in awarding alimony was an abuse of discretion.
- Issue 4:** The Chancellor’s ruling that Thomas misled the Chancellor in his Affidavit submitted with his *ex parte* request for a TRO and awarding attorney fees to Kim for defense of the Affidavit and TRO was erroneous in that it was an error of law to consider the issue at trial on the merits and the ruling was not supported by substantial evidence, was manifestly wrong and a clear abuse of discretion.
- Issue 5:** Thomas maintained a Journal, on the instructions of his attorney, which Kim introduced in evidence. The Journal was uncontroverted in material facts. The Chancellor’s ruling that the Journal was not trustworthy was a clear abuse of discretion.
- Issue 6:** The Chancellor applied the wrong standard to Thomas’ post judgment motions under Miss.R.Civ.P. 59(a), abused his discretion in denying the motion under Miss.R.Civ.P. 59(e), and failed to rule on the Motion for Modification, or alternatively, abused his discretion in failing to grant the Motion for Modification. Alternatively, the Court failed to make appropriate findings of fact and conclusions of law, as required when Thomas requested such pursuant to Miss. R. Civ. P. 52(a).

II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from the Chancery Court of Harrison County, Honorable Carter Bise presiding, where the Court decided issues by consent of the parties, who had agreed to a divorce of the grounds of Irreconcilable Differences. The appeal challenges rulings of the Chancellor regarding custody, alimony, attorney fees and Appellant's post-trial motions.

B. Course of Proceedings and Disposition Below

Following months of abusive, overtly alienation conduct by his wife, the Appellee, Kimberly Watts, toward their then 11-year-old son, Trevor, culminating in her arrest on July 5, 2008, following one of her outrages, the Appellant, Thomas Watts, filed for divorce and sought temporary and permanent custody Trevor¹. On July 10, 2008, Thomas obtained a Temporary Restraining Order, based on his 13-page Affidavit, detailing Kim's conduct toward Trevor and touching on evidence relating to the *Albright* factors.² See *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). The TRO granted Thomas temporary custody of Trevor, appointed a Guardian Ad Litem [GAL] and set a hearing for July 22, 2008. (RE 122-124; CP Vol. 1, 37-39)³ Kim filed no pleadings challenging the propriety of the TRO.

On July 22, 2008, after counsel conferred in chambers with the Chancellor, the parties agreed to an Order for Temporary Relief, which the Chancellor entered on July 31, 2008. (RE 125-127; CP Vol. 1, 40-42) The Order for Temporary Relief appointed a new GAL, provided

¹ Where possible, the brief will refer to the parties by their first names, "Kim", "Thomas" and "Trevor".

² The Affidavit (Ex 5, 10, RE 107 et seq.) was introduced into evidence twice without objection (Ex 5, Vol. 3 Tr. 96; Ex 10, Vol. 3 Tr. 148). Thomas Watts affirmed the Affidavit at trial and testified in detail about most of the events in it.

for supervised visitation for the mother, pending the GAL's interim report, and ordered the parties and Trevor to undergo psychological evaluation by Dr. William Gasparini and psychiatric evaluation by Dr. Jule Miller. The parties and Trevor met separately with the doctors and the GAL, who recommended a specific unsupervised visitation schedule for Trevor with his mother, which the parties followed by agreement. The Chancellor later entered a First Amended Order for Temporary Relief and Consolidation, setting up a specific visitation schedule. (RE 128-130; CP Vol. 1, 60-62)

Trial was conducted on March 2-5, 2009. The parties filed a Voluntary Consent to Divorce on the Grounds of Irreconcilable Differences on March 4, 2009, the third day of trial.⁴ In the Voluntary Consent, Thomas Watts reserved his objection to consideration, during the trial on the merits, of the TRO, which was never served and expired without challenge. (RE 66-70; CP Vol. 1, 63-67)

The Chancellor issued the ruling from the bench on March 9, 2009, the transcript of which was incorporated into the Final Judgment entered on April 16, 2009. (CP Vol. 1, 84-119; Bench Ruling, Vol. 7 705; RE 81, et seq.) The Chancellor found that Thomas *"set Mrs. Watts up"* (Bench Ruling, Tr. 713; RE 89); *"play[ed] Trevor against Mrs. Watts"* (Bench Ruling, Tr. 715; RE 90); *"manipulated Trevor's relationship with Mrs. Watts"* (Bench Ruling, Tr. 714-15; RE 90-91); *"destroyed Trevor's true free will"* by *"stag[ing] things at home"* (Bench Ruling, Tr. 717; RE 93); *"actively interfered with the relationship between Mrs. Watts and Trevor"*

³ Unbeknownst to Thomas, Kim retained an attorney, the brother of Thomas' attorney, and filed for divorce on the same day. Both attorneys offered to withdraw, but each client requested that they continue as their attorney and waived any potential conflict. (Vol. 3 Tr. 2-4)

⁴ The trial proceeded with an understanding that the Consent would control, as soon as it could be drafted and executed. Therefore, the testimony focused, not on grounds, but on the issues ultimately incorporated into the Consent.

(Bench Ruling, Tr. 718; RE 94)' and "*poisoned Trevor against his mother*" (Bench Ruling, Tr. 716; RE 92) The Chancellor used these findings to award joint custody and alimony.

The Court granted attorney fees to the wife based on the TRO and awarded alimony in a much greater amount and duration that the wife testified she needed, finding fault by Thomas, in part, based on the finding of manipulation and the TRO. (Bench Ruling, Vol. 8 Tr. 725; RE 101)

Following entry of the Final Judgment, on April 28, 2009, Thomas filed a motion under M.R.C.P. 59 to Set Aside, Alter or Amend the Final Judgment. (CP Supp. Vol. 1, 9-41) On July 13, 2009, Thomas filed an amended motion under M.R.C.P. 59 and 60 to Set Aside, Alter or Amend the Final Judgment, to Reopen the Evidence and/or for a New Trial. (CP Vol. 1-2, 122-173) On November 18, 2009, Thomas filed an Amended and Supplemental Motion under M.R.C.P. 59 and 60 and for Modification. (CP Vol. 2, 174-211) Thomas also moved the Court to make findings of fact and conclusions of law with regard to the motions. (CP Vol. 2, 215-216) Following hearing, the Chancellor issued an Order denying the motions. (CP Vol. 2, 217-222)

C. Statement of Relevant Facts

The material facts are largely uncontroverted.

Thomas and Kim were married on May 4, 1996 (TW Vol. 3 Tr. 23), while Kim was pregnant with their only child, Trevor, who was born on August 21, 1996. (TW Vol. 3 Tr. 18) They separated on July 5, 2008, after Kim's arrest on a domestic violence charge at their home.

In 1994, before they met, Thomas entered the Mississippi Board of Nursing Recovery Program for addicts/alcoholics, following his release from Pine Grove Recovery Center for prescription drug abuse. Thomas went to work at Gulf Coast Community Center Hospital in Biloxi, Mississippi and Kim, a nurse, was assigned to handle the medications that Thomas was

not allowed to handle during his first year back at work. (TW Vol. 3 Tr. 21-23) Kim was fully aware of Thomas' prior drug usage and his involvement in the Nursing Recovery Program.

In November 2006, Thomas used a short-acting prescription narcotics three times at work before self-reporting to a doctor. He returned to Pine Grove for a one-day evaluation, which recommended only out-patient treatment". On his own, he decided to go to Lakeview a 21-day in-patient recovery center in Florida in late December 2006-early January 2007. He enrolled again in the Nursing Recovery Program, which he is in today. This is the only drug episode or alcohol episode, involving Thomas, in the 12-year marriage of the parties. (TW Vol. 3 Tr. 50-53)

1. Thomas' significant involvement with Trevor in his formative years

Trevor is a good student (TW Vol. 3 Tr. 30-31), who was encouraged to be involved in extra curricular activities, mostly supported by his father's efforts. He loved going to church and Sunday school, at Thomas' urging. (TW Vol. 3 Tr. 51) His mother opposed some of the Christian teachings, e.g., she objected to teaching Trevor about the "Holy Sprit", which she equated with "evil spirit". (TW Vol. 3 Tr. 82) Although Thomas worked full-time, Thomas' involvement in his son's life was and is phenomenal by any standard.

The Chancellor found that Thomas is extremely good with Trevor. He spends a lot of time with Trevor. He is deeply involved in Trevor's school activities, his sports activities, and his church activities. (Bench Ruling, Vol. 7 Tr. 714; RE 90) For example:

1. Thomas encouraged Trevor to attend Sunday school and participate in Church Youth activities. Every night at bedtime, Thomas and Trevor would read his daily spiritual reading; discuss it and then share prayer together. (TW Vol. 3 Tr. 33, 35);
2. In Trevor's first and second grades, Trevor was in Advanced Reading Program. Thomas would come to school after classes and sit with Trevor, while he read the assigned books (TW Vol. 3 Tr. 37);

3. During Trevor's first and second grades, Thomas would personally visit with Trevor's teachers, *three or four times a week*, to check on his progress. In his later grades, he would do this weekly (TW Vol. 3 Tr. 37-38);
4. Thomas and Trevor together built a large storage cabinet (cubicles) for Trevor's second and third grade class. (TW Vol. 3 Tr. 36);
5. Thomas and Trevor built a reading loft for his second grade class, complete with lighting for reading. Kim helped with the final stages garnishing the loft. (TW Vol. 3 Tr. 36);
6. When Trevor's school did not have the funds to purchase the new science books for the class, Thomas purchased them (Carter Vol. 3 Tr. 11);
7. If Trevor received a less than satisfactory paper on an assignment, his teacher testified, she would see Thomas after school (Carter Vol. 3 Tr. 10) and he would visit her regularly to see how Trevor was doing (Carter Vol. 3 Tr. 12-13) Trevor's teacher, Paulette Carter: *"And I can honestly tell you that out of all of the parents, I saw him the most"*, describing Thomas as *"...one of the excellent parents that I've ever had in teaching."* (Carter Vol. 3 Tr. 14);
8. Thomas was the predominant parent (70% of the time) in encouraging and supporting Trevor's extracurricular activities, including Sea Camp, Invention Camp, Golf, Space Camp, Lynn Meadow's and Discovery Center programs (TW Vol. 3 Tr. 35, 38-40);
9. For two years prior to trial and through the present Thomas has been the mentor for Trevor's competition Robotics program, an activity sponsored by Lego in which the 20-30 kids design and build a robot. Thomas and Trevor built a Robotics table for the class and built another for Trevor to use at home. Thomas attends 90 percent of the two meetings a week during the season, and attends daily in the last two weeks before competition. (TW Vol. 3 Tr. 40-42);
10. Thomas served as mentor for Trevor's sixth grade Chess Club (TW Vol. 3 Tr. 43-44);
11. Thomas was predominantly responsible for taking Trevor to the dentist, the orthodontist, and the pediatrician (TW Vol. 3 Tr. 42);
12. When Trevor was in Violin class for several years, which met one hour after school, Thomas would go to school and wait with him until Violin class started and then bring him home afterwards. Thomas attended all of his recitals; Kim missed one. (TW Vol. 3 Tr. 44-45);
13. When Trevor was at home, Thomas and he would do what fathers and sons do. They would hit golf balls, shoot BB guns, play paintball, throw Frisbees, kick the soccer ball, things fathers do with their son (TW Vol. 3 Tr. 46)

2. Kim's abusive, alienation conduct toward Trevor

According to Thomas, his wife exhibited rapid mood changes during the marriage. She can be normal and in a matter of moments, be "angry, upset, hostile, threatening" and sometimes "she can have long bouts of a depressive-like state where she's withdrawn and upset." (TW Vol. 3 Tr. 49) According to Dr. Gasparini, she has "sufficient *antisocial and aggressive personality* traitsto contribute to *tension, acting out, hostility*, and a tendency to blame others for problems," and "*very significant paranoid tendencies*", which often led to conflict. (Ex 11, Gasparini, Kim Watts, pp. 6-7, RE 180-181) This left Thomas and Trevor walking on eggshells. (TW Vol. 3 Tr. 49)

In October 2007, Kim's father died following a long illness. Shortly after the death of her father, Kim told Thomas she wanted a divorce. (TW Vol. 3 Tr. 123; KW Vol. 7 Tr. 629) Thomas opposed a divorce and wanted desperately to save his marriage. (TW Vol. 4 Tr. 157; KW Vol. 6 Tr. 541)

In anticipation of divorce, Kim sought to change Trevor's view of his father. Over the course of the next nine months, Kim engaged in numerous instances of hostility and emotional abuse toward Thomas and Trevor, attempting to impress Trevor's mind with a most wicked images of his father for the *stated purpose* of teaching Trevor to feel *shameful* of his father. (TW Vol. 3 Tr. 86) This persistent emotional abuse forced Thomas to change his mind about the divorce and to take steps to protect Trevor. These events were the focus of the trial. Too numerous to detail here⁵, there are several that bear detailed description to understand the magnitude of the Chancellor's erroneous findings.

⁵ The material testimony and exhibits are arranged by incident in the Record Excerpts (RE 1-54).

In the fall of 2007, Kim and Thomas were having an argument in the kitchen. Kim wanted Thomas to leave the house. When he refused, Kim called Trevor from his room to the kitchen and told him, that his parents could not get along and that if his father did not leave the house, she was going to call the police. She told the child that *the police would take him to "juvie"* (juvenile detention) and not allow him to come back. This frightened Trevor tremendously. (TW Vol. 3 Tr. 48) Trevor was *"almost crying, shaking, head down, very upset"*. (TW Vol. 3 Tr. 56; RE 1-3)

Throughout this period, Kim constantly tried to teach Trevor that his father was a bad person. Sometimes she would just blurt it out, *"Your Dad is a liar⁶, don't grow up to be like him."*⁷

In November 2007, the three of them were in the family car coming back from soccer, when Kim pulled into a parking lot at AutoZone and instructed Trevor to look into his father's eyes, while she told him that his father had lied to him last year, when he had really been in rehab. Under protest from Thomas, she continued, *"Your father is a liar. He's lied to me. He's lied to you. He's going to continue lying to you. He lied about where he was last year."* This shook up the child tremendously. He had his head down and was visibly frightened from the situation. (TW Vol. 3 Tr. 37-38) (RE 3-6)

In early January 2008, Kim and Thomas went to Emeril's restaurant for dinner, where Kim got drunk from wine. (RE 7-15) On their return, Kim started a fight in the bedroom, telling Thomas that he could shower or stay on that side of the house. Wishing to avoid an argument, "without words or incident", Thomas took his shower and retreated to the other side of the house, where he and Trevor had set up a tent in the television room to watch movies and "camp out".

Kim pursued. Thomas sent Trevor out of the room to insulate him from what was coming. However, Kim commanded Trevor to stand between her and Thomas. Angrily, she started in on Trevor, *"Your father's a liar. He's lied to you. He's lied to me. He's lied to everybody. He's going to continue to lie to you. He's lied so much that the State of Mississippi has to step in and regulate him."* (TW Vol. 3 Tr. 62) Thomas tried to stop her. *"I try to stop her. I try to, "Kim, this is not appropriate. Do not do this. Do not involve the child. This is wrong. You're scaring him. Please don't do this.""* (TW Vol. 3 Tr. 62) After enduring this for several minutes, Trevor was shaking and had tears in his eyes. (TW Vol. 3 Tr. 62-63)

⁶ It is not clear exactly why Kim called Thomas a "liar", a "defect" she sought for months to impress on Trevor, but it apparently originates from two things. First, Kim was upset that Thomas took the medications at work and did not tell her that he was doing it. (TW Vol. 3, Tr. 81) Second, Thomas and Kim had decided that when he went to treatment in late 2006, Trevor was not old enough to handle that information about his father. Therefore, Thomas did not tell his ten-year-old child that he was in recovery and had gone to treatment. (TW, Vol. 3, Tr. 37)

⁷ See, e.g., incident at breakfast table (TW, Vol. 3 Tr. 54); ride home from soccer, (TW, Vol. 3 Tr. 65).

Finally, she left them alone and they were almost asleep in the tent, when Kim returned and made Trevor go to his room, stating, *"If I'm going to be miserable, we're all going to be miserable, so he can just go to bed."* (TW Vol. 3 Tr. 63-64) Thomas followed Trevor to his room, tucked him in his bed, and read his nightly devotion with him. Comforting him, Thomas told Trevor, *"You know, I'm sorry that this didn't happen. It's not about you. Your mother's mad at me. Don't take offense to it. We'll make it better later. You know, everything's going to be okay."* (TW Vol. 3 Tr. 64; RE 8) ⁸

On February 2, 2008, Kim returned from a **Mardi Gras parade** in an angry mood and started complaining about her family. (RE 17-26) When Tom refused to engage and went to watch TV with Trevor, Kim pursued and angrily pelted Thomas with questions. Thomas protested, *"Please don't have this conversation in front of Trevor. This is so wrong to do this."*

When Thomas still refused to engage her, Kim turned to Trevor and instructed him to speak directly to his father, *"Trevor, ask your father. Ask him why he lied. Ask him why he did drugs. Ask him why he took care of patients while under the influence. Ask your father why he says he loves me and wants to be in this family, yet he'll go and do drugs."*

Trevor went from happily sprawled out watching TV to ball up with his arms around his knees staring at the couch and fidgeting with his hands, as he does when he is nervous. At one point, Trevor started viciously tearing up a piece of paper, he was so shaken.

Kim demanded that Trevor ask his father. When Trevor starts to do as instructed, Thomas interjected, *"This is not going to happen. I am not having this conversation."*

Kim continued, *"Your father's lied to you. He's lied to me. He's lied to everybody." "The State has to regulate him. He's going to lie to you again."*

Trying to stop her, Thomas stated, *"Kim, you're scaring this child. You've got to quit this. You cannot do this."*

After it was over, Trevor crawled into Thomas' lap and Thomas held him. Thomas told him, *"It's not about you. This is nothing to do with you. Don't ever think it has anything to do with you. Your mom's mad at me. This is her just being mad at me, and I'm so sorry it has happened."* (TW Vol. 3 Tr. 65-68; RE 18-26)

The next morning, Sunday, February 3, Trevor and Thomas were at the kitchen table waiting to go to Sunday school. Kim came down and starts in on Trevor again, *"Your dad's a liar. You know, the State... has to run him. You know, he can't live his life without the State running him."* (TW Vol. 3 Tr. 80; RE 26-27)

⁸ Thomas had to spend the night locked in the computer room, while his out-of-control wife banged on the door for 30 minutes trying to get in.

On June 3, 2008 (RE 29-33), Kim accused Thomas of doing something with the emails on her phone. Thomas had not touched her phone, but Kim persisted. She then turned angrily toward Trevor, *"Trevor, your father's done something with my emails. He's not being honest. He's lying. He's not telling me the truth. This is just like when he did drugs and didn't tell me. Here he is again lying to me some more."*

"The State [has] to regulate your Daddy because [he's] such a big liar. ...If you grow up and continued to be like your Daddy, ... the State is going to have to step in and regulate you, too." (TW Vol. 3 Tr. 86-87)

In late June 2008 (RE 33-37), Kim started an argument over whether Thomas loved her. When he could not convince her, he joined Trevor, who was playing on the floor in his room. Kim pursued, telling Trevor, *"Your father doesn't care for me"*. Thomas asked her to stop, stating this was bad parenting. This really angered her.

Kim got up in Trevor's face, telling him, "Trevor, let me tell you what bad parenting is:

Bad parenting is when *your father lies*.

Bad parenting is when *your father steals drugs*.

Bad parenting is when *your father goes to the restroom and shoots up drugs in his arm*.

Bad parenting is when *your father takes care of patients while he's under the influence*."

Thomas pleaded with her, *"We cannot be doing this. This is not right. This is not proper. Please don't do this."*

Trevor attempted to leave but Kim stopped him, *"It's bad parenting when your father steals, isn't it, Trevor? It's bad parenting when your father takes care of patients while he's under the influence of drugs, isn't it?"*

Thomas again pleaded with her to stop. Kim responded, "We don't need to keep secrets from him anymore. He needs to know what's going on in this household. *He needs to learn to be shameful of what you've done* because people are going to discriminate against him his whole life for what [you've] done." (TW Vol. 3 Tr. 83-86; RE 34-38)

On July 5, 2008, the date of their separation, Kim started an argument, which ended with Trevor locking himself in the bathroom to keep Kim from getting to him. Trevor would not come out until the police arrived, at which point they arrested Kim for domestic violence. (TW Vol. 3 Tr. 87-91; RE 38-53)

3. The negative impact of Kim's conduct

Trevor's demeanor over the course of this period changed from a happy, gleeful boy to more depressed and withdrawn when his mother was around. (TW Vol. 3 Tr. 92-93) Trevor

walked on “eggshells” around his mother. (TW Vol. 3 Tr. 49) “When Kim is around, he takes very lengthy showers, he stays in the bathroom, he stays in his room. If his mom's not there, he comes out, he roams around the house, he plays, he has fun. When she drives up, he becomes recessive, and he goes and hides out in his room.” (TW Vol. 3 Tr. 93)

Kim’s expert, Dr. Jule Miller, testified that Kim’s conduct was “*abusive*” (Miller Vol. 5 Tr. 396, LL 3-4; Vol. 6 Tr. 498 LL 9-10; Vol. 5 Tr. 401 LL 21-23); was “*certainly inappropriate behavior*” having a “*negative impact*” on Trevor, (Miller Vol. 5 Tr. 408-410); “*put Trevor under stress and that’s not good*” (Miller Vol. 5 Tr. 403); and “*would definitely have a negative impact*” on Trevor (Miller Vol. 5 Tr. 407) Kim “*overstepped bounds, acted inappropriately, put her son under undue stress*”, (Miller Vol. 5 Tr. 409) Kim’s conduct would cause Trevor “*to feel very stressed out*”, (Miller Vol. 5 Tr. 495); and was “*alienation conduct*” (Miller Vol. 5 Tr. 395, 396.)

Trevor told Dr. Gasparrini that he was anxious, “*Just around mom*”; *She’ll get mad and drag me into another conversation or argument.*” (Ex 11, Gasparrini Evaluation, Trevor Watts, 9-4-08, P. 4, RE 196) This is consistent with Trevor’s brief trial testimony in chambers, when he told the Court he wanted to live with his Daddy because “*I just like my dad a little bit more. Mom always like involved me whenever they got in a fight or something, so ... I like my dad a little bit more.*” (Trevor, Vol. 6 Tr. 486)

Dr. William Gasparrini examined and tested Kim, Thomas and Trevor over the course of different visits by each. Dr. Gasparrini diagnosed Kim with significant emotional issues and psychotherapy. He recognized correctly that Trevor aligned and wanted to live with his father. Dr. Gasparrini opined that Trevor was “capable of expressing himself clearly and he can easily explain directly to the judge the preference he has for placement and the reasons for that preference.” (Ex 11, Gasparrini, Trevor, p. 9, RE 201)

Dr. Miller met with each, but conducted no tests. Dr. Miller had a “feeling” (Miller Vol. 5 Tr. 360) that Thomas may have subtly influenced Trevor. *“He tends to side with his father’s view of the marital conflict, which is not uncommon in these situations.”* (Ex. 12, Miller, RE 202) Moreover, Miller conceded the obvious, as did Kim in her testimony, that Kim’s conduct was alienation conduct, which would naturally turn Trevor away from his mother. (Miller Vol. 5 Tr. 394-95, 396-97, 433) Miller testified that a child’s allegiance to one parent is normal in cases where one party has custody and the child and parent are of the same sex. (Miller Vol. 5 Tr. 348, 431-32)

4. Kim’s post-trial abusive, alienation conduct

Dr. Miller, who opined that he believed Kim could (not should) exercise custody, added one major *caveat*: “And I don’t believe she would do those kind of things anymore. *Otherwise, I wouldn’t say that she would be okay to ... have her son.*” (Miller Vol. 5 Tr. 409)

Dr. Miller, as it turned out, was optimistic about Kim changing her ways. Unfortunately, for Trevor, while the first M.R.C.P. 59 Motion was pending, Kim demonstrated that she would stoop to any low in her attempts to brainwash her son into believing his very extraordinary father is a bad person. In May 2009, Thomas received a series of disturbing text messages from Trevor that became the basis for his First Amended M.R.C.P. 59 Motion:

TREVOR: well mom was saying that *your lawer has gone to jail and is a bad lawer because he is for u* and that his brother is the better person because he chose his mom

TREVOR: when their parents got divorced and saying how *this whole thing was your fault*

TREVOR: mom said she hasnt ever done anything wrong and that you did everything to makle this divore happen and that *youre a troublee maker and liar*

TREVOR: well she was doing legal stuff and she started talking to me about it and then she said our lawers are brothers and ther parents are divorced and she was saing

TREVOR: how her lawer chose his mom and everything and he is cool and how *your lawer went to jail and every thing and thats the only reason he liked you* and all that

TREVOR: how her lawer is good like her because he choose his mother and you lawer is bad like you cause he chose his dad and went to jail and yall did drug

(First Amended M.R.C.P. 59 Motion, CP Vol. 1, pp. 123-124)

Trevor testified in the post-trial hearing concerning this conversation with his mother. Trevor testified that his mother told him that his Daddy's lawyer had been to jail and like his Daddy, had done bad things in his life, was a liar and a bad person. She also told the child that Daddy's lawyer did drugs, like his Daddy. After making the "bad-lawyer-bad daddy" association, she told Trevor her lawyer (the brother of his Daddy's lawyer) was a good person, who chose to live with his mother when their parents divorced, while his Daddy's' lawyer (the bad one) chose to live with his father. (Trevor, Tr. 805-08) ⁹

Despite Miller's ominous warning, the Chancellor, in denying the motions, ruled, in essence, this was just more of the same.¹⁰

III. SUMMARY OF THE ARGUMENTS

Issue 1: A Chancellor must accept as true uncontroverted evidence and may not make "quantum leaps" from the evidence to reach unsupported findings. Where the evidence is uncontroverted that the mother engaged in a pattern

⁹ This evidence, unlike most in the trial on the merits, is controverted. While the source of this information given to Trevor is apparent based on content alone, Kim claims that Trevor mixed two conversations, one with her and Trevor in March 2009 and another between her and her sister in May 2009, in which the sister made most of the derogatory comments and Trevor simply overheard them. She claimed Trevor cannot distinguish her sister's voice from his mother's. Kim claims Trevor's testimony is the product of Thomas's influence, even though the allegations by Trevor happened when she had custody. Importantly, she did not call her sister as a witness to corroborate her story.

¹⁰ "The Court finds that there is no showing of any change. There were allegations of negative comments before." (Order, 3-11-10; RE 136)

of abuse and alienation conduct toward her 12-year-old child, over the nine months prior to separation, for the admitted purpose of making him feel shameful of his father; and that the father never said a negative word to his son about his mother, attempted to avoid arguments and shield his son from her abusive behavior; it was an abuse of discretion for the Chancellor to apply five *Albright* factors based on a finding that the father manipulated their son against the mother by “setting her up” to commit the abuse. The Chancellor abused his discretion in his findings and application of the *Albright* factors.

Apparently angered that Thomas had led him¹¹ into, unknowingly, issuing a TRO against the sister of one of his bailiffs, the Chancellor claimed Thomas “manipulated” and “misled” him in his Affidavit in support of the request for a TRO. The Chancellor’s findings regarding the Affidavit are contrary to uncontroverted facts. This colored the Chancellor’s view of the evidence, causing him to perceive evidence that did not exist and to overlook evidence that was uncontroverted and uncontested. The Chancellor’s punitive view of Thomas is evident in his findings of fact, which amounted to an “assassination” of an extraordinary father, who, along with his child, was a victim of abusive wife and mother.

Without *any* evidence in support, the Chancellor found that Thomas “*set Mrs. Watts up*” (Bench Ruling, Vol. Tr. 713; RE 89); “*play[ed] Trevor against Mrs. Watts*” (Tr. 715; RE 90); “*manipulated Trevor’s relationship with Mrs. Watts*” (Tr. 714-15; RE 90-91); “*destroyed Trevor’s true free will*” by “*stag[ing] things at home*” (Tr. 717; RE 93); “*actively interfered with the relationship between Mrs. Watts and Trevor*” (Tr. 718; RE 94) and “*poisoned Trevor against his mother*” (Tr. 716; RE 92). The Chancellor then used these erroneous findings to support several important *Albright* factors, namely, “parental skills”, “moral fitness”, “preference of the child”, and “parental interference”.¹²

¹¹ (Bench Ruling, Vol. 7 TR. 725; RE 101)

¹² The Chancellor found that “emotional ties” favored Thomas, but found this was due to his manipulation of Kim and Trevor. (Bench Ruling Vol. 7 Tr. 714-715, RE 91-92)

There is *not a single fact* in the record that would support these findings. It is uncontroverted that Kim started *every* incident. These were not arguments, but one-sided tirades by Kim. Also uncontroverted is the evidence that Thomas tried to avoid the incidents and protect Trevor from her abusive conduct. After the more damaging instances, Thomas comforted Trevor in an appropriate manner, never exploiting Kim's abuse to his advantage. It is clear that Trevor's attachment to his father is the product of the quality of his performance as a father and, as Kim admitted, Kim's conduct toward Trevor. Even her expert, Dr. Miller, admitted this was so.

The Chancellor enjoys broad, but not unfettered discretion. The Chancellor is not free to base his decision on speculation, or conjecture or outside the rule of law. *Taylor v. Taylor*, 755 So. 2d 33, 38 (Miss. App. 1999) (holding that the Chancellor's findings were "reckless" and a "quantum leap", revealing "the chancellor's bias resulting in his abuse of discretion"). Nor is the Chancellor free to reject arbitrarily uncontroverted evidence. *Matter of Estate of Taylor*, 609 So. 2d 390, 393 (Miss. 1992).

The Chancellor's punitive stance against Thomas is palpable in his rulings. The Chancellor misstated evidence; ignored undisputed, corroborated material facts and engaged in rank speculation, conjecture and surmise to find opposing facts; referenced non-existent testimony; mischaracterized Thomas' testimony and ignored or misstated uncontroverted medical evidence and testimony. The Chancellor made "quantum leaps" to reach "reckless" punitive findings, "revealing a bias leading to an abuse of discretion". *Taylor v. Taylor*, 755 So. 2d at 38.

Since the erroneous findings influenced at least five of the *Albright* factors, the decision must be reversed. In addition, the Court erroneously applied the following additional *Albright*

factors: “willingness and ability to provide child care”, “health of the parents”, “home school and community record” and “substance and alcohol abuse”.

Issue 2: Joint physical and legal custody is not appropriate for a 12-year-old son, where the father serves in a significant supporting relationship with the son in school and extra-curricular activities, which the mother cannot provide; and where the mother has engaged in a pattern of abuse for the stated purpose of making the son feel *shameful* about his father; refuses to speak or confer with the father, cannot hide her negative views of the father and has refused to act civilly toward the father in the presence of their son.

In addition to erroneous findings on the *Albright* factors, the circumstances of this case make it especially improper to award joint physical and legal custody.

Most jurisdictions recognize that “the *cardinal criterion* for an award of joint custody is the agreement of the parties and their *mutual ability to cooperate* in reaching shared decisions in matters affecting the child's welfare.” *Waller v. Waller*, 754 So. 2d 1181, 1183 (Miss.

2000)(citing Vitauts M. Gulbis, *Annot., Propriety of Awarding Joint Custody of Children*, 17 ALR4th 1013, 1016 (1982)(collecting cases). MISS CODE ANN. § 93-5-24 (1972) provides:

(e)....An award of joint physical and legal custody *obligates the parties to exchange information* concerning the health, education and welfare of the minor child, and unless allocated, apportioned or decreed, *the parents or parties shall confer with one another* in the exercise of decision-making rights, responsibilities and authority.

Miss Code Ann. § 93-5-24 (1972) (Emphasis added)

“It is the Chancellor’s responsibility to insure that the parents are *capable of cooperating* in a joint custody arrangement.” *Phillips v. Phillips*, 2008-CA-02019-COA ¶33; *Crider v. Crider*, 904 So. 2d 142, 148 ¶8-11(Miss. 2005).

While most fathers occupy in a special role with their sons in the formative years, the relationship of Thomas and Trevor is exemplary. Because of the joint physical custody award, Trevor is denied for alternating two-week periods the benefits of this important influence in his life. Instead, he is forced to live with a parent who hates his father and cannot hide her feelings

for the benefit of her child. Although a full-time working professional, Thomas Watts' service to and support of his son in his school and extra-curricular activities is nothing short of extraordinary. Trevor's expressed desire to live with his father has been ignored on the unsupported findings by the Chancellor that Thomas destroyed his "free will".

The evidence demonstrates that Kim is unable to act civilly toward Trevor's father in his presence, which makes Trevor feel sad and awkward. Kim continues to try to poison Trevor against his father. Kim refuses to cooperate and confer in the joint custody arrangement as required by MISS CODE ANN. § 93-5-24 (1972). This is clearly not a case where joint physical and legal custody is in the best interests of the child.

Issue 3: Where, following a 12-year marriage, the Chancellor granted wife's request for ½ of all marital assets, including husband's retirement pension and wife testified to her need for temporary alimony of \$500.00 for twelve (12) months, the Chancellor's award of permanent alimony of \$1000.00 a month was an abuse of discretion. The Chancellor's finding of fault in awarding alimony was an abuse of discretion.

Thomas and Kim are nurses and both make a good living. The Chancellor awarded Kim all she wanted in equitable distribution, one-half of all the marital property, including Thomas' retirement. Thomas assumed all of the debt. Kim testified that in addition to that she needed \$500.00 per month for 12 months following the divorce. Consistent with other rulings that reveal an unexplained punitive attitude toward Thomas, the Chancellor awarded her \$1000.00 in permanent alimony.

The Chancellor based his award in part on his erroneous finding of "fault" through manipulation of Trevor and the Chancellor and based on the November 2006 episode of drug usage at work. This was the only such episode in 12 years of marriage. The evidence was clear that "fault" rests not with Thomas, but with Kim.

Issue 4: The Chancellor's ruling that Thomas misled the Chancellor in his Affidavit submitted with his *ex parte* request for a TRO and awarding attorney fees to Kim for defense of the Affidavit and TRO was erroneous in that it was an error of law to consider the issue at trial on the merits and the ruling was not supported by substantial evidence, was manifestly wrong and a clear abuse of discretion.

Thomas obtained a Temporary Retraining Order based on a 13-page Affidavit, the material allegations of which were uncontroverted at trial. The Chancellor misstated the clear record in making adverse findings about the Affidavit and assessed \$15,000.00 in attorney fees for less than 6 hours of work.

Moreover, the Chancellor is prohibited from awarding attorney fees or damages following a trial on the merits based on wrongful procurement of injunctive relief, where the injunctive relief is ancillary to the proceedings. *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1270 -1271 (Miss. 1987).

Issue 5: Thomas maintained a Journal, on the instructions of his attorney, which Kim introduced in evidence. The Journal was uncontroverted in material facts. The Chancellor's ruling that the Journal was not trustworthy was a clear abuse of discretion.

Thomas Watts maintained a Journal on the instruction of his attorney. *Kim introduced* the Journal as evidence. Thomas affirmed it. The material facts in the Journal are corroborated by Thomas' Affidavit and the testimony and are uncontroverted. The Chancellor's *sua sponte* ruling that the Journal was untrustworthy, after he allowed it in evidence and Kim used it extensively in her testimony to refresh her memory, was an abuse of discretion.

Issue 6: **The Chancellor applied the wrong standard to Thomas' post judgment motions under Miss.R.Civ.P. 59(a), abused his discretion in denying the motion under Miss.R.Civ.P. 59(e), and failed to rule on the Motion for Modification, or alternatively, abused his discretion in failing to grant the Motion for Modification. Alternatively, the Court failed to make appropriate findings of fact and conclusions of law, as required when Thomas requested such pursuant to Miss. R. Civ. P. 52(a).**

Thomas filed three substantive post-trial motions. On April 28, 2009, Thomas filed a *Motion ...under Rule 59 Motion to Set Aside, Alter or Amend the Final Judgment*. (CP Supp. Vol. 1, 9-41) On July 13, 2009, Thomas filed an *Amended Motion ...under M.R.C.P. 59 and 60 to Set Aside, Alter or Amend the Final Judgment, to Reopen the Evidence and/or for a New Trial*. [First Amended M.R.C.P. 59/60 Motion]. (CP Vol. 1-2, 122-173) The First Amended M.R.C.P. 59/60 Motion sought relief under Miss. R. Civ. P. 59(a) and Miss. R. Civ. P. 59(e), and alternatively Miss. R. Civ. P. 60.

On November 13, 2009, Thomas filed an *Amended and Supplemental Motion under M.R.C.P. 59 and 60 and for Modification* [Motion for Modification], based on the same factual allegations. (CP Vol. 2, 174-211) Thomas also filed a Motion for Findings of Fact and Conclusions of Law as to all of the motions. (CP Vol. 2, 215) The Chancellor heard testimony on February 2-3, 2010, (Vol. 6-7, Tr. 730 et seq.) and entered the Order on March 11, 2010. (RE 131, et seq.).

Thomas asserts error on the post-trial motions on four grounds: **First**, the Chancellor abused his discretion in his findings of facts on the motions. **Second**, the Chancellor applied the wrong legal standard to the First Amended M.R.C.P. 59/60 Motion. The Chancellor applied the standard that applies to the Motion for Modification to the Miss. R. Civ. P. 59 motion. *Porter v. Porter*, 23 So. 3d 438, 446-448 (Miss. 2009). **Third**, the Chancellor did not address the Motion for Modification in his Order, or alternatively, if the Chancellor was addressing the Motion for

Modification, he abused his discretion in failing to grant it. Alternatively, the Chancellor failed to make adequate findings and conclusions after Motion pursuant to Miss. R. Civ. P. 52(a).

IV. ARGUMENT

Issue 1: **A Chancellor must accept as true uncontroverted evidence and may not make “quantum leaps” from the evidence to reach unsupported findings. Where the evidence is uncontroverted that the mother engaged in a pattern of abuse and alienation conduct toward her 12-year-old child, over the nine months prior to separation, for the admitted purpose of making him feel shameful of his father; and that the father never said a negative word to his son about his mother, attempted to avoid arguments and shield his son from her abusive behavior; it was an abuse of discretion for the Chancellor to apply five *Albright* factors based on a finding that the father manipulated their son against the mother by “setting her up” to commit the abuse. The Chancellor abused his discretion in his findings and application of the *Albright* factors.**

The Chancellor’s findings on the *Albright* factors were:

Moral fitness favors Kim, based on manipulation and poisoning of Trevor against his mother. (Vol. 7 Tr. 716; RE 92)

Emotional ties favor Thomas, but only because Mr. Watts has manipulated his relationship with Trevor and he has manipulated Trevor's relationship with Mrs. Watts. (Vol. 7 Tr. 715-716; RE 91-92)

Parenting skills favor Kim, because Thomas “set her up”, “plays the victim in front of Trevor”; played Trevor against Kim. (Vol. 7 Tr. 713-15; RE 89-91); changed to neither on post-trial ruling, still based on these negative findings (Order 3-11-10, RE 133)

Preference of the child favors Kim, because Thomas staged and did things at home destroying his free will. (Vol. 7 Tr. 717; RE 93)

Parental interference favors Kim, because Thomas “actively interfered with the relationship between Mrs. Watts and Trevor” (Vol. 7 Tr. 718; RE 93-94)

Health of the parents favors Kim (Vol. 7 Tr. 711-712; RE 87-88)

Substance and alcohol abuse favor Kim (Vol. 7 Tr. 717; RE 93)

Age of the child favors neither (Vol. 7 Tr. 710-711; RE 87)

The child’s health favors neither (Vol. 7 Tr. 711; RE 87)

Continuity of care favors neither (Vol. 7 Tr. 712-713; RE 88-89)

Willingness and ability to provide child care favor neither (Vol. 7 Tr. 715; RE 91)

Home school and community record of Trevor is unclear (Vol. 7 Tr. 716; RE 92)

Sex of the child favors Thomas (Vol. 7 Tr. 711; RE 87)

Employment duties favor Thomas (Vol. 7 Tr. 715; RE 91)

Stability of employment favors Thomas (Vol. 7 Tr. 716-717; RE 92-93)

A. Standard of Review

The standard for challenging a Chancellor's findings of fact is very high, as it should be. Appellant accepts this burden fully and begs the Court's indulgence to review these facts thoroughly.

This Court employs a limited abuse of discretion standard of review on appeals from chancery court. *Miler v. Pannell*, 815 So. 2d 1117, 1119 (Miss. 2002). The Court will not disturb a chancellor's findings unless they are manifestly wrong or clearly erroneous or the court has applied an incorrect legal standard. *Estate of Ladner v. Ladner*, 909 So. 2d 1051, 1054 (Miss. 2004). The chancellor's interpretation and application of the law is reviewed de novo. *Id.*

The Chancellor's findings must be supported by "substantial evidence". *Mullins v. Ratcliff*, 515 So. 2d 1183, 1189 (Miss. 1987). A finding of fact is "clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Morris v. Morris*, 783 So. 2d 681, 687 (Miss. 2001). The Chancellor is not free to make "quantum leaps" from the evidence or arbitrarily reject evidence of uncontroverted facts. *Taylor v. Taylor*, 755 So. 2d 33, 38 (Miss. App. 1999); *Matter of Estate of Taylor*, 609 So. 2d 390, 393 (Miss. 1992); *Lucedale Veneer Co. v. Rogers*, 211 Miss. 613, 634, 53 So. 2d 69, 75 (1951); *Dunn v. Dunn*, 911 So. 2d 591, 599 (Miss. App. 2005).

- B. Against overwhelming, mostly uncontroverted evidence and without a substantial and credible factual basis, the Chancellor decided five *Albright* factors based on a finding that Thomas “set Mrs. Watts up”, to abuse her child, “manipulated the relationship” and “poisoned” his child against his mother.**

If Thomas Watts has anything he can be supremely proud of, it is that he is an exceptional father to his now 14-year-old son, Trevor. All evidence points to a father who maintained a healthy, loving relationship with his son, a relationship which no doubt endeared Trevor to his father in a way that *should be applauded*. For reasons not explained by the evidence, this Court recklessly stripped from Thomas the thing that he valued most, the characteristic about which all would agree represented excellence.¹³ In doing so, the Chancellor damaged a relationship that is important to the development of this young man in his formative years.

The Chancellor found that Thomas “*set Mrs. Watts up*” (Bench Ruling, Tr. 713; RE 89); “*play[ed] Trevor against Mrs. Watts*” (Bench Ruling, Tr. 715; RE 90); “*manipulated Trevor’s relationship with Mrs. Watts*” (Ruling, Tr. 714-15; RE 90-91); “*destroyed Trevor’s true free will*” by “*stag[ing] things at home*” (Bench Ruling, Tr. 717; RE 93); “*actively interfered with the relationship between Mrs. Watts and Trevor*” (Bench Ruling, Tr. 718; RE 94)’ and “*poisoned Trevor against his mother*” (Bench Ruling, Tr. 716; RE 92)

There is *not a single fact* in the record and certainly not “substantial evidence” that support these findings. The Chancellor’s punitive view of Thomas is palpable in his rulings. The Chancellor’s findings are “reckless” and a “*quantum leap*”, having no factual basis in the record and which “*reveal the chancellor’s bias resulting in his abuse of discretion.*” *Taylor v. Taylor*, 755 So. 2d 33, 38 (Miss. App. 1999).

The Chancellor used these erroneous findings to support several important *Albright* factors, namely, “parental skills”, “moral fitness”, “preference of the child”, “parental interference” and “emotional ties”. The Chancellor awarded joint physical and legal custody to Thomas and Kim, a custody decision not otherwise supportable by the evidence and clearly contrary to Trevor’s best interest.

Since the erroneous findings influenced five of the *Albright* factors, the decision must be reversed. In addition, the Court erroneously applied the following additional *Albright* factors: “willingness and ability to provide child care”, “health of the parents”, “home school and community record” and “substance and alcohol abuse”.

1. **The Chancellor harsh indictment of Thomas’ efforts to save his marriage and protect his son from the abusive misconduct of his mother cannot be reconciled with the facts.**

There is not a *scintilla* of factual testimony that supports the Chancellor’s findings that Thomas “*set Mrs. Watts up*” to abuse Trevor or that he in anyway tried to *manipulate* or *poison* Trevor to side with him against his mother. On the contrary, the evidence is that once Thomas refused Kim’s request for a divorce, Kim embarked on nine-month campaign to influence Trevor against his father, to make Trevor feel *shameful* of his father. (TW Vol. 3 Tr. 86; RE 34) This misconduct has continued since the Chancellor awarded her joint physical and legal custody, despite her own expert’s warning that another incident would disqualify her as custodial parent. (Miller Vol. 5 Tr. 409)

The following material facts are overwhelmingly established and/or are uncontroverted:

¹³ One only has to consider the testimony of Trevor’s 1st grade teacher and 6th grade Robotics teacher, Trena Attipoe (Attipoe Vol. 4 Tr. 191-199), and his 5th grade teacher, Paulette Carter (Carter, Vol. 3, Tr. 5-18) to understand the excellence demonstrated by Thomas Watts as a father.

1. Between October 2007 and July 2008, when the parties separated, Kim instigated numerous confrontations, during which she improperly involved Trevor, then 11-years old (RE 1-53);
2. In each incident involving Trevor, Kim involved him by either directing her harmful negative comments to Trevor or requiring Trevor to stand in as her proxy, to ask the demeaning rhetorical questions of his father (e.g., June 27, 2008);
3. In these many instances, Kim attempted to alienate Trevor against his father by threatening that his father will cause Trevor to have to go to 'juvie' or be regulated by the state; or telling Trevor that his father is a drug addict, has to be regulated by the state, has hurt hundreds of people, is a liar, who has and will continue to lie to Trevor, steals drugs, goes to the restroom and shoots up drugs in his arm and takes care of patients while he's under the influence of drugs (RE 1-53);
4. Kim's stated purpose was to make Trevor feel *shameful* of his father (TW Vol. 3 Tr. 86; RE 34);
5. Thomas tried to disengage from Kim's clashes, pleaded with her to stop and ultimately on July 5, 2008 blocked her from getting to Trevor, who had locked himself in the bathroom to escape her threats to take him. Trevor refused to come out until the police arrived. (RE 39-40);
6. According to Kim's doctor, her conduct toward Trevor ranged from bad to abusive, was "alienation conduct", had a negative impact of Trevor and would account for Trevor's choice to live with his father, discussed *infra*;
7. Kim admitted that her conduct had the effect of driving Trevor away from her. (KW Vol. 7 Tr. 648, 666);
8. Thomas' conversations with and explanations to Trevor after these traumatic episodes were appropriate and rather than exploit Kim's misconduct to his advantage with Trevor, *he would take the blame, telling Trevor that his mother was only angry with Thomas, not Trevor, infra*; and
9. Kim's medical diagnosis accounted for her conduct; discussed *infra*; (Ex 11, Gasparrini, Kim, pp. 6-7, RE 180-181)

These facts are uncontroverted and often corroborated by Kim, the medical evaluations, the testimony of Dr. Miller and by Trevor's statements to Dr. Miller, Dr. Gasparrini and the Court. In all of the period covered by the testimony, there is *not an allegation of single incidence* of Thomas trying to negatively influence Trevor's view of his mother, not even while

Kim was attempting to damage Trevor's image of his father. Kim admitted that Thomas never told Trevor she is a "liar", because she was always telling Trevor the truth. (KW Vol. 6 Tr. 646; RE 13)

- 2. The evidence establishes a history of abusive, alienation conduct by Kim toward Trevor, which had a negative impact on him and explains his leanings toward his father. The record is void of any proof that Thomas engaged in any inappropriate behavior toward Trevor.**

- a. The material facts are uncontroverted.**

Thomas Watts testified in detail concerning the most significant events, involving Kim and Trevor between October 2007 and July 5, 2008. On that date, Kim was arrested for domestic violence, after Trevor locked himself in the bathroom to prevent her from removing him from the house following one of her rages. Thomas' Affidavit in support of his request for a Temporary Restraining Order was admitted in evidence. (Affidavit, Ex. 5, 10, RE 107-119) Kim also introduced as evidence the Journal Thomas kept at the request of his attorney. (Journal, Ex. 9, RE 137, et seq.)

Kim did not refute with positive testimony the material facts in Thomas' testimony, his Affidavit or his Journal. In fact, she was not even asked about 95% of misconduct allegations in her direct testimony. On cross-examination, she was often evasive, but did not place the material facts in controversy by her testimony.¹⁴ Although Kim admitted the core allegations of each incident, Kim often reverted to "I don't know", "I don't remember" or the like when confronted with the specific language she used. (See, Table of Responses, RE 53-56) Such testimony does not place facts in controversy. "Testimony of a witness that [she] does not remember whether a certain event took place does not contradict positive testimony that such event or conversation

¹⁴ See, Record Excerpts, pp. 1-59, collating by event all evidence relating to each event.

took place.” *McClellan v. David*, 439 P.2d 673, 677 (Nev. 1968); See, *Dunn v. Dunn*, 911 So. 2d 591, 599 (Miss. App. 2005) (positive testimony required).

b. The evidence of the negative impact of Kim’s conduct on Trevor is substantially corroborated and uncontested.

Anyone *should* see the obvious negative impact that this abusive behavior by a mother would have on an 11-year old boy. Dr. Miller, who performed an evaluation of Trevor and testified for Kim, confirmed, repeatedly, that Kim’s conduct was abusive and/or had a negative impact on Trevor.

About Kim’s conduct in the car at the Auto Zone, **Dr. Miller testified** that this conduct “*would have a negative impact*” on Trevor, was “certainly not a good thing”, and “*would make him feel stressed out*”. It would be a “*difficult place for him to be*”. He testified her conduct was “*alienation conduct*”. (Miller Vol. 5 Tr. 394-95; RE 5-6) His mother’s threats that he was going to be put in “*juvie*” or under state regulation “*frightened Trevor tremendously*”. (TW Vol. 3 Tr. 48; RE 2) **Dr. Miller testified** that this conduct *would cause fear* in a child of 11 years old and could be “*abusive*”. (Miller Vol. 5 Tr. 394; RE 3)

Dr. Miller testified Kim’s conduct following drinks at Emeril’s in early January, 2008 (RE 7-15), was “*abusive*”, “*had a negative impact*” on Trevor, caused Trevor “*emotional distress*” and can lead the child to “*feel especially badly about himself*”. This conduct is also “*alienation conduct*” by Kim that could lead to Trevor having a negative view of his mother. Telling Trevor that his Daddy has hurt “*hundreds of peoples*” is “*abusive*”. (Miller Vol. 5 Tr. 395-98; RE 13-15)

Dr. Miller testified that Kim’s Mardi Gras parade day explosion (TW Vol. 3 Tr. 66-67; RE 18-20), was an example of a third level of abuse, where Kim is making Trevor stand in as her proxy to ask her demeaning rhetorical questions of his father for her. He testified that her

conduct here was “*abusive*”, more “*severe*” and “*pretty bad*”. (Miller Vol. 5 Tr. 401-02; RE 25-36) About the June 3, 2008 incident (RE 29-33), **Dr. Miller testified** Kim’s conduct would “*definitely have a negative impact*” on Trevor, would “*stress Trevor out a great deal*” and will make him “*feel badly about himself*”. He looks up to his Dad and, *psychologically*, and *any criticism of his Dad is criticism of him*. (Miller Vol. 5 Tr. 406-407; RE 32-33) **Dr. Miller testified** Kim’s conduct in the late June 2008 incident (RE 33-37) would have a “*negative impact on Trevor*”, and is “*certainly inappropriate behavior*”. There is “*no doubt*” Mrs. Watts “*overstepped bounds, acted inappropriately, put her son under undue stress*”. (Miller Vol. 5 Tr. 409; RE 37)

During the July 5, 2008 incident (RE 38-53), for which she was arrested, Trevor locked himself in the bathroom and would not come out, even in response to Kim’s coaxing, until the police arrived. (TW Vol. 3 Tr. 89-90; RE 39-41)

After conceding that Kim’s conduct was abusive, much of which he had been previously unaware, Dr. Miller added a caveat, “I don’t believe she would do those kind of things anymore. Otherwise, **I wouldn’t say that she would be okay to ... have her son.**” (Miller Vol. 5 Tr. 409) Kim’s misconduct was *so bad* that her own expert testified that just a single additional incident would disqualify her as a custodial parent.

Kim’s abusive conduct naturally had a negative impact on Trevor’s view of his mother. When Kim was around, he took very lengthy showers; he stayed in the bathroom or in his room. If Kim was not there, he would come out, roam around the house, play, he had fun. When she drove up, he became recessive, and hid out in his room. (TW Vol. 3 Tr. 92-93)

As with many other rulings, the Chancellor reveals his favor of Kim by characterizing Kim's conduct as her simply wanting Thomas *"to admit to Trevor what was going on, which Mr. Watts would not do"*. (Bench Ruling, Vol. 7 Tr. 713, RE 89)

- c. During these traumatic events, Thomas attempted to protect Trevor from Kim's behavior and afterwards comforted him, *without exploiting* Kim's abusive conduct to his advantage.**

It is uncontroverted that Kim started *every* incident detailed in this record and in *every* case, Thomas attempted to deescalate the situation, by refusing to engage and removing himself from her presence. Kim not only pulled Trevor into her tirades, while Thomas pleaded for her to stop, but also countermanded Thomas' instructions for Trevor to leave the room, so he could not be targeted. This is confirmed by not only Kim and Thomas, but also Trevor, who told Dr. Gasparrini that he was anxious around his mom, because she drags him into arguments. He stated that his dad tried to keep him out of them. (Ex 11, Gasparrini Evaluation, Trevor Watts, discussed *infra*)

After the most traumatic incidents, Thomas comforted his frightened child, always in an appropriate manner, *without exploiting* Kim's emotional abuse or making a negative comment about his mother. Thomas often took the blame for Kim's anger in his conversations with Trevor, so that Trevor would not feel that Kim's vitriol was about Trevor.

In a drunken state following dinner at Emeril's, Kim angrily told Thomas that their bedroom was on her side of the house and that he would have to leave. He left "without words or incident". Kim pursued and when Thomas asked Trevor to leave the room, she ordered Trevor to return and stand between them, where she emotionally abused him, trying to poison the positive image he held of his father. (TW Vol. 3 Tr. 61-62; RE 7-9) Thomas pleaded with her

to stop, *"Kim, this is not appropriate. Do not do this. Do not involve the child. This is wrong. You're scaring him. Please don't do this."* (TW Vol. 3 Tr. 63; RE 8)

After it was over, Thomas went to Trevor in his room, tucked him in, read their nightly devotion with him, and comforted him. Thomas told Trevor, *"It's not about you. Your mother's mad at me. Don't take offense to it. We'll make it better later. You know, everything's going to be okay."* (TW Vol. 3 Tr. 64; RE 9)

During the Mardi Gras post-parade incident, Thomas pleaded, *"Kim, don't do this. Please don't have this conversation in front of Trevor. This is so wrong to do this."* (TW Vol. 3 Tr. 66; RE 17-19) In the late June incident, Thomas tried to defuse Kim's anger by leaving her presence. Kim pursued and began abusing Trevor. Thomas pleaded with her, *"We cannot be doing this. This is not right. This is not proper. Please don't do this."*

Trevor tried to leave the room, but Kim stopped him and continued her emotional abuse.

On the night of July 5, 2008, when Kim angered over her inability to print photographs from the computer, Thomas left Trevor outside where they had been playing and went inside, so that Kim could continue her tirade away from Trevor. (TW Vol. 3 Tr. 88; RE 38)

Thomas testified that he never spoken derogatively of Trevor's mother to Trevor, because he "loves her very much". (TW Vol. 3 Tr. 68) Asked how he deals with his 11-year-old boy after incidences like these, he testified:

It's full of big hugs and loving. In that situation, the couch had a part that flops down in the middle. We flopped it up. He came and crawled up on me. I held onto him. We watched television. I tell him, "It's not about you. This is nothing to do with you. Don't ever think it has anything to do with you. Your mom's mad at me. This is her just being mad at me, and I'm so sorry it has happened." (TW Vol. 3 Tr. 68)

Regarding the July 5, 2008 incident, Thomas made the decision, as Trevor's father, that he needed to reassure Trevor. "A lot had gone on. He had seen his mom acting angry, upset, frustrated. The police department had come in. The family had come in. There was a lot of activity going on. He needed to be comforted." Thomas considered it important to have that conversation with him. "I find it much more detrimental to leave the child wondering and pondering about a situation versus having a little information to know what's going on and to know that he wasn't the cause or he wasn't the problem." (TW Vol. 4 Tr. 180-182) ¹⁵

Trevor further corroborated Thomas' testimony in his statement to Dr. Gasparrini, "Trevor was asked if either parent says anything negative about the other parent and he said that *his dad does not say anything bad to him about his mom, but his mom says bad things to him about his dad.*" (Ex 11, Gasparrini Evaluation, Trevor Watts, P. 5, RE 197)

Finally, even Kim's expert, Dr. Miller, conceded that Thomas' decisions to have these conversations with his son after Kim's abusive outbursts were a parent's judgment call and were not inappropriate. (Miller Vol. 5 Tr. 416-19)(Compare the Chancellor's finding that Thomas' comforting Trevor was somehow equivalent Kim's abusive conduct, discussed *infra*)

In all fairness, what more would this Chancellor or this Court have Thomas do? It seems the only legitimate criticism of Thomas' actions is that he did not seek the protection of the Chancery Court sooner.

3. The medical evidence strongly corroborated Thomas.

While both Dr. Miller and Dr. Gasparrini noted Trevor's obvious (and natural) leanings toward his father, found neither that Thomas said or did anything inappropriate. Neither

¹⁵ Kim also talked to Trevor about that night. The difference being that her primary aim was to assign fault to Thomas. (KW Vol. 6 Tr. 570)

excluded Kim's abusive conduct as the source of Trevor's choice. Neither found, as did the Chancellor, that Trevor's choice was not his free will. In fact, Dr. Gasparrini opined that Trevor was capable of expressing his desires to the judge.

a. Dr. William Gasparrini

Psychologist William Gasparrini evaluated Trevor, Kim and Thomas, performing a myriad of tests on each.

i. Dr. Gasparrini's evaluation of Trevor corroborated the undisputed testimony regarding Kim's conduct and its effect on Trevor.

Dr. Gasparrini's evaluation of Trevor further supported the obvious negative impact that Kim's aggressive, angry, hostile and manipulative "acting out" behavior had on Trevor. In the safety of the doctor's office, the observations of this 11-year old boy about his parents speak volumes:

"I was always scared of mom because she would ...get mad for no reason. She dragged me into mom and dad's arguments. All of them. So, for right now, I like it better with just dad there." (Ex 11, Gasparrini, Trevor, p. 3, RE 195)

When asked if he experiences *anxiety*, he said, *"Just around mom."* When asked what he was thinking at that time, he said, *"That she'll get mad and drag me into another conversation or argument."* When asked how that would occur, he said, *"She'll say, 'Trevor, come here. We have to talk about something. Then she'll tell me what the argument is about, like at work, how people are doing something wrong or, at home, something about dad, She'll say he's a liar'."* All of this got Trevor upset when it occurred and he was able to describe these events pretty clearly.

He was asked, *"Does your dad draw you into their arguments?"* He responded, *"No. He tries to keep me out of them."*

(Ex 11, Gasparrini Evaluation, Trevor Watts, P. 4, RE 196)

Trevor states that his *dad does not say anything bad to him about his mom, but his mom says bad things to him about his dad.* (Ex 11, Gasparrini, Trevor, p. 5, RE 197)

Incredibly, the Chancellor found in his Rule 59 ruling that his findings that Thomas “set Mrs. Watts up”, “manipulated” and “poisoned” Trevor against his mother, destroying his free will were supported by Dr. Gasparrini’s evaluation of Trevor. The Chancellor made his “quantum leap” specifically from Gasparrini’s statement that Trevor “*does appear to accept his dad's explanations of the conflicts between his parents and the reasons for their divorce*”. (Ex 11, Gasparrini, Trevor, p. 4, RE 196) Clearly, this is not substantial evidence to support the Court’s reckless findings. Trevor was there. He experienced the abuse. It would be shocking, if Trevor did not side with his father.

Moreover, Gasparrini made clear that Trevor’s expressions of desire to live with his father were his and his alone. Gasparrini *directly* addressed the issue decided adversely by the Chancellor: “[Trevor] *is capable of expressing himself clearly and he can easily explain directly to the judge the preference he has for placement and the reasons for that preference.*” (Ex 11, Gasparrini, Trevor, p. 9, RE 201) This evidence is uncontroverted. There is no support in Gasparrini’s reports for the Chancellor’s findings. To the contrary, Gasparrini’s evaluation only reveals more carelessness in the Chancellor’s findings.

ii. Gasparrini’s findings in his evaluation of Kim corroborated the experiences of Thomas and Trevor.

Dr. Gasparrini’s findings corroborated the negative experiences of Thomas and Trevor. Gasparrini found that Kim suffered from Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, which caused her to be depressed, anxious, and irritable and to “act out”.

Dr. Gasparrini found that Kim may try to avoid weakness or vulnerability by developing a *critical, judgmental, or manipulative* attitude towards others and “has sufficient *antisocial and aggressive personality* traitsto contribute to *tension, acting out, hostility*, and a tendency to blame others for problems.” “Mrs. Watts has a risk of *cognitive distortion* secondary to her

sensitivity, mistrust and resentment.” (Ex 11, Gasparrini, Kim Watts, pp. 6-7, RE 180-181)

Dr. Gasparrini concluded:

Mrs. Watts is 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*. She has a problem with *anger and hostility*. She has *aggressive and antisocial personality traits*, as well as passive-aggressive tendencies. She shows *histrionic personality traits* and *very significant paranoid tendencies*. She has been quite angry with her husband and she tends to project blame onto him for all problems that occur in her life.

She may not have a full personality disorder, but *she certainly has paranoid traits that contribute to conflict in her marriage*, as well as some *antisocial and histrionic traits*. Her paranoid traits cause her to mistrust her husband and fears that he will resume drug abuse. He has been abstinent from drugs abuse for a long while. *She probably should participate in psychotherapy*.

(Ex 11, Gasparrini, Kim Watts, p. 8, RE 182)(Emphasis added)

Gasparrini’s findings were also consistent with Kim’s attempts to manipulate Trevor’s view of his father. According to Dr. Miller, manipulative behavior is a trait of both an antisocial and a histrionic personality. Antisocial personality traits include *poor behavioral controls*, including expressions of irritability, annoyance, impatience, threats, aggression, and *verbal abuse* and include *inadequate control of anger and temper, a tendency to violate the boundaries and rights of other people and disregard for the safety of self or others*. (Miller Vol. 5 Tr. 372-73)

Dr. Gasparrini’s report fully corroborates the anger, hostility and manipulation exhibited in Kim’s course of conduct over nine months. Thomas and Trevor were her primary targets.

- iii. **Kim’s “very significant paranoid tendencies” contributed to the marital discord and led to incidents of Kim’s abusive, alienation conduct toward Trevor.**

These *very significant paranoid tendencies* contributed to the marital discord¹⁶ and often led to the situations, in which Kim “acted out” and negatively affected Trevor. Examples of this include Kim’s belief that Thomas had glued a toy puzzle to embarrass her (TW Vol. 3 Tr. 78-80; RE 27); the June 3, 2008 incident, which started because Kim accused Thomas of doing something with her emails on her phone, which Thomas had not touched (TW Vol. 3 Tr. 86-87; RE 29-33); Kim’s belief that Trevor was doing something inappropriate with his cell phone leading her to falsely accuse him (TW Vol. 3 Tr. 78); and Kim’s unfounded belief that Trevor had stuck his tongue out behind her back, which led her to falsely accuse Trevor of dishonesty. (TW Vol. 3 Tr. 77)

Even when Trevor was not directly involved, her *very significant paranoid tendencies* manifested in constant false accusations and disharmony. Thomas’ statement to his mother on the phone that, “Kim’s right here.” in response to a simple inquiry, led to two hours of accusations, all in the closet, that Thomas and his mother were talking about her behind her back (TW Vol. 3 Tr. 74); Kim’s refusal to believe that the message from ATT concerned a work fax phone led her to access the hospital’s phone records from home, disrupting services, for which she had to apologize and explain to Thomas’ employer. (TW Vol. 3 Tr. 70-72)

Herman Watts and Helen Watts, Thomas’ parents, corroborated this strange behavior. On one occasion, Kim called them to the house at 2 AM and on another brought Thomas and Trevor to their house. On both occasions, she insisted that Thomas had been *lying* and *doing bad things* to her and she wanted Thomas to tell them about it. In the first incident, when Thomas could not identify what she was talking about, Mr. Watts asked Kim to tell him, so he could

¹⁶ See, Thomas Watts Affidavit, pp. 8-10, Para. 15a-i, EX. 5, RE 114-115.

address them. “She kept repeating it. *He's been lying to me. He's been doing bad things. I want him to tell you what it is.*” (Herman Watts, Vol. 4 Tr. 211-212)

Similarly, in November 2007, Kim brought Thomas and Trevor by the Watts’ home. Kim told Herman Watts, “*I want you to get Tommy to tell you all the lies he's been telling me and all the things he's been doing to hurt me.*” Thomas said he did not know what she was talking about. Kim kept repeating herself, all the while alternately sitting, and then pacing the floor. Finally, Herman suggested they get a piece of paper and list the things that Kim was referring to so they could address them. After he retrieved paper and pen, in over 45 minutes she could not list one lie or bad thing. She just kept repeating, “*Make Thomas tell you. He knows what he's been doing.*” (Herman Watts, Vol. 4 Tr. 213-14; see, also, Helen Watts, Vol. 4 Tr. 237-38; Thomas, Vol. 3 Tr. 58-59)

iv. Kim’s antisocial personality traits and her failed attempts to manipulate the medical evaluators with “a case of murder”.

Kim demonstrated her manipulative traits when she tried to blame her abusive conduct and the demise of her marriage on a concocted murder story. When it failed to convince the doctors, she abandoned the claim altogether.

In Kim’s initial interview with both doctors, she attempted to manipulate the doctors by attributing to Thomas a confession of the murder of his grandmother. As she related it, Thomas had admitted *before* they were married that he had killed *someone*, but did not initially identify the victim. Then 7-8 years ago he said it was his grandmother and it had bothered her ever since. (Ex 11, Gasparrini, Kim Watts, p. 4, RE 178; Ex 12, Miller, Kim Watts, p. 2, RE 212) She told Dr. Miller that she got drunk that night at Emeril’s, the night she emotionally abused Trevor, because seeing her brother had triggered memories about Thomas killing his grandmother. (Ex 12, Miller, Kim Watts, p. 2, RE 212) She left this out of her story to Dr. Gasparrini.

Mrs. Watts reported that she thought part of the problem in her marriage was that her husband had revealed to her that when he was a teenager, he killed his grandmother. She was very ill with arthritis and he smothered her. He had told her that she had begged to die. Mr. Watts was asked about this allegation and he said there was absolutely no truth to it. He indicated that that was a serious allegation and that nothing like that had occurred. He said his grandmother died in her sleep and was about 98-years-old when she died. (Ex 11, Gasparrini, Kim Watts, p. 4, RE 178)

The story had significant inherent credibility issues. First, Kim had no problem 12 years earlier with Thomas having killed *someone*, but was repulsed when she learned it was a mercy killing of his 98-year-old grandmother. Second, in all of the rage, venom, and poison she produced over a long period, not once did she mention that Thomas was a murderer, not to Thomas, not to anyone. Only after her abusive conduct was exposed did she make this allegation.

Her expert, Dr. Miller, also thought it odd that Kim would not object to a murder, but would object 12 years later to information that it was a mercy killing of his 98-year-old grandmother who had begged to be killed. This caused Dr. Miller concern, "because, according to her, she knew before they got married that he had killed somebody...so why it was such a big issue now, that did stick out in my mind." Dr. Miller did not think it was relevant. (Miller Vol. 5 Tr. 441-42)

When the doctors failed to support Kim's murderer defense, she abandoned it completely. In her testimony, she did not mention this "murder confession" or that it caused her to get drunk and engage in abusive conduct toward Trevor, as she claimed to Dr. Miller. Nor did she mention that the "murder confession" contributed to her desire to divorce Thomas. Instead, she was promoting Thomas, the drug addict and liar, as the cause of her problems, based on the November 2006 drug incident at work, the only drug or alcohol usage by Thomas in 12 years of marriage.

b. Though reluctant and admittedly biased in favor of Kim, Dr. Miller's testimony thoroughly supported Thomas' case.

i. Miller admitted he was biased in favor of Kim.

Although Dr. Miller was extremely supportive of Thomas' case in his testimony, he was reluctantly so. The reasons for his reluctance became apparent in cross-examination.

Miller, as a court-appointed evaluator, inappropriately entered into a therapeutic relationship with Kim, which *he admitted* caused him to be *biased* in his testimony. The American Psychological Associations' Code of Ethics 3.5 provides:

A psychologist refrains from entering into a multiple relationship if the multiple relationship could reasonably be expected to impair the psychologist's objectivity, competence, or effectiveness in performing his or her functions as a psychologist.¹⁷

The Chancellor appointed Miller to serve as an unbiased evaluator. Instead, he chose to enter into a relationship with Kim, such that he was forced to admit at trial that he was biased in her favor. (Miller Vol. 5 Tr. 357, 358) Counsel's attempt to rehabilitate Miller, did not help, "I can certainly say I was unbiased up through the original reports." (Miller Vol. 5 Tr. 450)

Miller defended the obvious conflict of interest by testifying that once his evaluations were complete, he "was free to see whoever [he] chose". (Miller Vol. 5 Tr. 357) Not only is this incorrect under the Code of Ethics, since he may have to testify, but the records show that he was in a therapeutic relationship with Mrs. Watts, *at the time* he rendered his evaluations.¹⁸

¹⁷ See also, *Guidelines for Child Custody Evaluations in Family Law Proceedings* (Feb. 2009) ("The inherent complexity, potential for harm, and adversarial context of child custody evaluations make the avoidance of conflicts of interest particularly important. The presence of such conflicts will undermine the court's confidence in psychologists' opinions and recommendations, and in some jurisdictions may result in professional board discipline and legal liability.") (CP 163)

¹⁸ See, therapeutic office note dated "8/21/08" (Ex 13, Miller, Kim Watts, P. 3, RE 219), the same day as his Evaluation Reports (Ex 12, Joint Report, RE 202; Thomas RE 203; Trevor, RE 207; Kim Watts, RE 211). Unfortunately, Dr. Miller also saw his role initially as a marriage counselor, hoping initially to solve the marriage difficulty. (Miller Vol. 5 Tr. 363) This caused Miller to reject

- ii. **Miller's initial evaluations were based on "feelings", "something unseen" and "reading between the lines", which were in turn based on demonstratively false and/or incomplete assumptions.**

Miller evaluated Trevor based on single, one-hour interview.¹⁹ In the written report,

Miller stated:

My assessment of this session is that Trevor has taken his father's side in the marital dispute. His mother is seen as the one at fault, while his father seems without blame. The words he chose at times, the way he contradicted himself at others, strongly suggest that his father has taken an active part in influencing how he feels about his mother. (Ex 12, Miller, Trevor Watts, P. 4, RE 210)

On the same day, Miller issued a joint report to the Court that stated: "[Trevor] tends to side with his father's of the marital conflict, which is not uncommon in these situations." (Ex 12, Miller Joint Report, RE 202)

In the Rule 59 Order, the Chancellor cited the first passage from Miller's report as support for his ruling. That the Court could only find support for its harsh ruling in a report that *suggests* a conclusion, demonstrates the "quantum leap" made here. Moreover, the second passage and Miller's trial testimony, which the Chancellor ignored completely, thoroughly undermined the Chancellor's interpretation of Miller's statement.

First, Miller explained that his evaluation of Trevor was based on "feelings", "something unseen" and "reading between the lines", not objective evidence. (Miller Vol. 5 Tr. 360, 425, 428, 434, 439) Under cross-examination, the foundation for Miller's "feelings" evaporated. (See, Miller's testimony regarding each basis for his "feeling": Trevor's friends comment, Miller, Vol. 5 Tr. 424-25; hoping his mom would get anger management, Tr. 430-31; using the

uncontroverted evidence of misconduct by Kim toward Trevor, because "he didn't know it was true" and it might "stack the deck" against Kim for him to have that information. (Miller Vol. 5, Tr. 366)

¹⁹ In making his initial evaluation based on this single interview, Miller had one caveat: "*The safest course would be to have her son return for a visit with me after regular unrestricted visitation has occurred for at least a month.*" (Ex. 12, Miller, Kim Watts, p. 5 RE 170). After Trevor began seeing his mother on a regular unsupervised schedule, Dr. Miller did not see Trevor again.

pronoun “we” for he and his father, Tr. 431-32; Thomas’ conversations with Trevor about his mother’s conduct, Tr. 432, not inappropriate Tr. 416-19)

Third, Miller’s testimony was that what he was seeing in Trevor is *normal* in cases where one party has custody and the child and parent are of the same sex. (Miller Vol. 5 Tr. 348) Miller testified that Trevor’s alliance to Thomas is more of a result of what *his emotional needs* are at that moment, than what either parent has done or not done. (Miller Vol. 5 Tr. 340) In his report, he also made this clear. (Ex 12, Miller Joint Report, RE 202)

Fourth, Miller testified that Kim’s misconduct explains Trevor’s attachment to his father. Miller did not have a single example of *any statement or conduct* by Thomas that portrayed Kim in a negative light to Trevor. Yet, Miller testified that Kim’s conduct was alienation conduct, which, instead of the intended consequence, could have the reverse impact of damaging Trevor’s relationship with his mother. (Miller Vol. 5 Tr. 394-95, 396-97, 433) “[Kim’s] conduct would definitely have an impact on the child -- no doubt about it – *and may affect what he says as far as where he wants to live.*” (Miller Vol. 5 Tr. 433) *Even Kim admitted* that her conduct had the effect of driving Trevor away from her. (KW Vol. 7 Tr. 648, 666)

That Trevor would gravitate toward his father for his emotional needs instead of his mother, who had been emotionally abusive to him over an extended period, is no surprise and this Court needs no expert to explain it.

Fifth, some of Miller’s negative assumptions were uncontrovertibly false. For example, Miller testified that the fact that Thomas had kept a Journal was a “significant factor” that *weighed against Thomas* in reaching his conclusions. However, if he knew that Thomas kept the Journal at the instruction of his attorney, he admitted it would make a difference. (Miller Vol. 5

Tr. 363-364) It is uncontroverted that Thomas kept the Journal at the instruction of his attorney. (TW Vol. 3 Tr. 126)

Furthermore, even if Miller had not clarified his “feelings-based” statement, it would be insufficient, standing alone and definitely when considered with the uncontroverted evidence, to support the Chancellor’s findings. An expert’s opinion cannot be based on speculation and must be based on what is known, i.e., the uncontroverted facts. Miss. R. Evid. 702; *Miss. Transp. Comm’n v. McLemore*, 863 So. 2d 31, 37 (Miss. 2003); *Hill v. Mills*, 26 So. 3d 322, 329-330 (Miss. 2010).

iii. Miller testified that even one more occurrence of misconduct by Kim would disqualify her as a custodial parent for Trevor.

After conceding that Kim’s conduct was abusive, much of which he had been unaware, Dr. Miller added a caveat, “I don’t believe she would do those kind of things anymore. Otherwise, **I wouldn’t say that she would be okay to ... have her son.**” (Miller Vol. 5 Tr. 409) That is how serious even her own expert viewed her misconduct.

“youre a trouble maker and liar... you lawer is bad like you cause he chose his dad and went to jail and yall did drug”

After she was granted joint custody, Kim attempted to alienate Trevor by the same methods with the added persuasion of guilt by association, by telling him information that could only come from her. The essence of this attempted alienation was to tell Trevor that your daddy’s lawyer is a bad person, who is a liar, went to jail, and did drugs like your daddy and that is why he chose your daddy. She also told him that her lawyer (the good one) chose his mom when they got divorced, while daddy’s lawyer (the bad one) chose his dad. (See, Trevor, Vol. 8 Tr. 804-808) The M.R.C.P. was pending at the time and Trevor might again have an opportunity to express his preference.

This illustrates some of the problems with an *antisocial personality*. In addition to being manipulative, they have poor behavioral controls, including verbal abuse, inadequate control of anger, a tendency to violate the boundaries and rights of other people and disregard for the safety of others. (Miller Vol. 5 Tr. 372-73) Despite hearing her own expert testify that what she was doing to Trevor was abusive, Kim *could not control* her conduct to prevent further harming her son. She heard Miller testify that if she did this one more time his opinion would be that she should not exercise custody of Trevor. Yet, she could not control it.

Miller claimed that he had addressed this with Mrs. Watts in his “treatment” of her. Yet, in the notes of her “treatment” by Miller, following the initial evaluation, *the only mention* of this misconduct is when Kim expressed *fear* that *Thomas may have tape-recorded her abusive outrages* and the judge may get to hear it. (Miller Office Notes, 1-9-09, RE 220)

Miller’s reluctant testimony strongly supported Thomas’ contentions. He established that Kim’s conduct was abusive and harmful to Trevor and *so severe* that one more event would disqualify her as a custodial parent. Moreover, Dr. Miller’s testimony was supported by actual uncontroverted facts, which, according to Miller, explained Trevor’s fear of Kim and his desire to live with Thomas.

That the Chancellor’s cherry picked from Miller’s single-visit evaluation report, while ignoring Miller’s report and his testimony that what he was seeing was normal in these circumstances and not indicative of any improper behavior by Thomas, is disconcerting.

4. The Chancellor’s finding, after reviewing the transcript, that *neither* doctor found that Kim’s conduct was “abusive” is troubling.

In his Order on the Rule 59 Motion, the Chancellor found that neither Dr. Miller nor Gasparrini characterized Kim’s conduct as “*abusive*”. (Order 3-11-10, RE 132) This is yet another even more troubling instance of the Chancellor making findings against uncontroverted

testimony. Without restating in full each instance, Thomas directs the Court's attention to the following testimony by Dr. Miller: The Emeril's incident: "***Q. Is this abusive conduct? A. Yes.***" (Miller Vol. 5 Tr. 396, LL 3-4); "***Q. You agree that it's abusive? A. Yes.***" (Miller Vol. 6 Tr. 498 LL 9-10); Mardi Gras post-parade incident: "***Q: Are these comments abusive to an 11-year-old boy? A. Yes.***" (Miller Vol. 5 Tr. 401 LL 21-23) Moreover, even when Miller was reluctant adopt the word "abusive" to describe other conduct, he made clear that the misconduct was serious and damaging to Trevor.²⁰

Dr. Gasparrini did not testify, so was not asked if this conduct was abusive, although there is no reason to believe his answers would be different. The Chancellor's perception notwithstanding, *the only testimony* from either doctor on the issue was the uncontroverted testimony that Kim's misconduct was "***abusive***" and emotionally damaging to Trevor.

In *Taylor v. Taylor*, 755 So. 2d 33, 38 (Miss. App. 1999), 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 find reveals the chancellor's bias resulting in his abuse of discretion.*" *Id.* [Emphasis added].

In this case, the Chancellor, in disregarding Trevor's clear preference, found, "[t]he child's desires favor Mr. Watts, also, but, again, *I'm not convinced that this is not because Mr. Watts has staged things.* And, therefore, I find that Trevor's preference is not the result of a true,

²⁰ See e.g., "***certainly inappropriate behavior***" having a "***negative impact***" on Trevor, Miller, Vol. 5 Tr. 408-410; threatening Trevor with "***Juvie***" ***put Trevor under stress and that's not good***, Miller, Vol. 5 Tr. 403; June 3 incident, ***would definitely have a negative impact***", Miller, Vol. 5 Tr. 407; June 27 incident, Kim "***overstepped bounds, acted inappropriately, put her son under undue stress***", Miller, Vol. 5 Tr. 409; Kim's conduct will cause Trevor "***to feel very stressed out***", Miller, Vol. 5 Tr. 495; Kim's conduct was "***alienation conduct***". (Miller, Vol. 5 Tr. 395, 396)

free choice, but is rather the result of what Mr. Watts has done at the home.” (Bench Ruling, Vol. 7 Tr. 717; RE 93) Kim’s burden of proof was more than to leave the Chancellor “*not being convinced*” that she was wrong. She must prove this absurd claim by a preponderance of evidence. A Chancellor’s decision, especially one that stamps a victim as the perpetrator, must be grounded on substantial evidence, not rank speculation and conjecture.

5. The Chancellor’s findings reveal a “bias resulting in his abuse of discretion”.

The source of Chancellor’s apparent bias against Thomas is not completely evident in this record. While Thomas carries no burden to prove the reasons behind the Chancellor’s errors, three additional findings are enlightening.

The Chancellor appeared angered by the Affidavit that Thomas filed to obtain the TRO. Later, in awarding alimony, he added this finding: “I also find that he manipulated me on July the 10th of 2008.” (Bench Ruling, Vol. 7 TR. 725; RE 101) The uncontroverted testimony confirmed *every material fact* in the Affidavit. Sometime after the Chancellor was moved by the Affidavit to issue a TRO, his *view* of these material facts changed. The *facts* never changed.

Connected, it seems, was the Chancellor’s announcement during Kim’s testimony (the last witness) that he had a relationship with Kim’s brother, significant enough that he stated on the record he had addressed this with counsel before trial and “everyone agreed that there was no conflict”. (KW Vol. 6 Tr. 492-493) After hearing that statement and briefly speaking with his client at the counsel table while the Chancellor, the witness and her counsel waited, Thomas’ counsel announced, “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*”. (KW Vol. 6 Tr. 493)

There was no disclosure of this relationship before the Chancellor announced it during the last witness. Presumably, Kim knew of the relationship. When Thomas’ counsel corrected

the Chancellor's statement, neither Kim's counsel, nor the Chancellor disputed the correction. (KW Vol. 6 Tr. 493)

What is known is that Kim's brother, as a substitute bailiff for the Chancellor, was charged with his personal safety and would have an extremely close relationship to him when assigned to him. The fact that the Chancellor's son worked with the Bailiff's son implies another, perhaps, social aspect of the relationship. (KW Vol. 6 Tr. 492-493)

Perhaps Thomas' counsel waived recusal by his statement to the Court following disclosure.²¹ However, Thomas clearly did not waive his or Trevor's right *to an unbiased trier of fact*. A challenge to a Chancellor is not the kind of accusation that should be made lightly, nor is the failure to object the kind of waiver that should be allowed to occur casually during the course of trial. The Chancellor is a good Judge and a good man; but his disclosure came too late to avoid the appearance of impropriety or in time for counsel to investigate and confer privately with his client. Judges are human and all humans are susceptible to bias.

Whatever the source, conscious or not, the Chancellor's repeated negative treatment of Thomas demonstrates a bias in his perception of the evidence. The following are additional illustrations.

a. The Chancellor failed to perceive accurately the record regarding the Affidavit's representation of potential harm in support of the Temporary Restraining Order.

Although having no jurisdiction to consider the issue in a trial on the merits (See Issue Number 4, *infra*), the Chancellor nevertheless based an award of alimony, attorney fees and his

²¹ This Court would have authority to review this issue under a "plain error" analysis. M.R.A.P. 28 (a)(3), holds that plain error review is appropriate when (i) a party has failed to preserve an error for appellate review and (ii) a substantial right is affected. *In re: Guardianship of Duckett*, No. 2006-CA-01738-SCT (Miss. 2008) at ¶44.

custody decision, in part, on Thomas Watt's Affidavit submitted in support of the request for a Temporary Restraining Order. In doing so, the Chancellor perceived and stated incorrectly *both* the content of the Affidavit and the testimony at trial:

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. And I found that that affidavit, now that it has been *tested under the fire of cross-examination* in a full-blown hearing, was *not substantially true in material aspects*. At the time that that affidavit was signed, at the time that the ex parte order was granted, *Mrs. Watts was not a danger to herself and to others*. She was certainly not a danger to Trevor. In the affidavit, *Mr. Watts stated both of those things*, and yet between the time that Mrs. Watts was charged with domestic abuse and the time that the temporary restraining order was granted, *he allowed Trevor to go with her unsupervised*. If, in fact, Mrs. Watts was such a danger to herself or others, commitment procedures would have also been equally available at a much less disruptive, and damaging to Trevor, means of dealing with the problem. (Bench Ruling, Vol. 7 Tr. 708-10; RE 84-85)

..... In fact, at one point when Mr. Watts was asked about the affidavit, his response was that his attorney's office had prepared it, and they had put certain information in there, *as if he had no responsibility towards the creation of the document*. (Bench Ruling, Vol. 7 Tr. 710; RE 85-86)

Mrs. Watts, I believe with Dr. Miller, admitted to an episode or a period of binge drinking which apparently is under control. The *affidavit that was presented to me indicated a problem with alcohol abuse*, but, as was pointed out, the only episode of alcohol abuse was Mr. Watts' birthday party at Emeril's, and that is the only episode that I was able to find in the affidavit. I find that the issue of substance or alcohol abuse around Trevor favors Mrs. Watts. (Bench Ruling, Vol. 7 Tr. 717; RE 93)

Thomas presented his 13-page affidavit and proposed TRO to the Chancellor on July 10, 2008. The Chancellor, reviewing this evidence, issued the TRO. Both parties introduced the Affidavit at trial, which Thomas affirmed in his testimony. In his testimony, Thomas also related most of the events contained in the Affidavit. The Court's perceptions notwithstanding, *every* material allegation in the Affidavit was supported by *uncontroverted* evidence.²² The Affidavit may have been "*tested under the fire of cross-examination*", but it survived without as much of a scratch.

First, the Affidavit *did not represent*, as the Chancellor found, that Mrs. Watts was a danger to herself or others, which the Chancellor equated with the civil commitment standard. The Affidavit relates *facts*, uncontroverted facts, including instances of very bad and abusive conduct by Kim over nine months, which ended with her son locking himself in the bathroom to get away from her, refusing to come out until the police arrived.

At the time the Court issued the TRO, Mrs. Watts had not been “treated” by Dr. Miller and the escalating danger evidenced by her conduct in the previous few weeks was still clear and present.²³ As Thomas testified, he sought the TRO because he was concerned what Kim might do between the time of the filing of the Complaint and the first temporary hearing.

She has made our son very, very fearful of her. I must admit, at times, I'm fearful myself of her actions. She involves our son in all kinds of inappropriate conversations and actions. I was fearful that it would heighten and escalate if I didn't get emergency relief that when she found out I was filing for divorce, that would take him away, say something to him, do something, cause some more harm to him.

(TW Vol. 3 Tr. 95)

I was fearful that she might remove him from the state. ...I was fearful that she might click over into one of her anger fits and say and do things to him. I was fearful that something might happen to him physically.

(TW Vol. 3 Tr. 150)

Dr. Miller confirmed Thomas' reason for heightened concern during this period. (Miller Vol. 5 Tr. 364)

Second, Thomas *did not allow* Trevor to visit with Kim unsupervised before obtaining the TRO, as the Chancellor found. After Kim's arrest, but before the TRO, Thomas allowed visitation, beginning on July 6, *only with supervision* by her family. (TW Vol. 3 Tr. 141-145)

²² See Record Excepts, correlating the testimony and Affidavit, RE 1-54.

²³ See, e.g., June 3 incident, RE 29-33; late June incident, RE 33-37; July 5 incident, RE 38-53.

On July 9, 2008, Trevor reported, as recorded in the Journal (Ex 9, p. 35, RE 171), that Kim left her mother's house with Trevor and went to the pet store and the Subway. However, Thomas *never gave her permission* to see Trevor unsupervised. (TW Vol. 4 Tr. 156-57) He filed his Complaint that day and obtained an order early the next morning at 8:40 AM.²⁴

The Chancellor's findings misstate both the Affidavit and trial testimony.

b. The Chancellor erroneously finds that Thomas misrepresented Kim's alcohol use in the Affidavit, contrary to corroborated and uncontroverted facts.

The Chancellor also found that the "Affidavit that was presented to me indicated a problem with alcohol abuse". There is only one Affidavit and it speaks for itself. It touches on the *Albright* factors, including drug and alcohol usage of *both parents*. Regarding Kim, it presented the uncontroverted facts, as they were established at trial. The Emeril's incident was alcohol-related and the Affidavit presents a milder, abbreviated version of those events. (RE 9, 109-110) Then, in Paragraph 13, it states:

When Kim drinks alcohol, it makes her mean. She drinks in front of Trevor. Trevor has seen the results of Kim drinking too much and has even asked me to take him to school because, he was afraid she would not be capable the next morning. Trevor has stated on many occasions that he wish she did not drink. He has seen her impaired on several occasions. Once he came to me and told me how she was running into walls in his room, unable to turn on his radio and having trouble talking. *Since March, Kim has reduced her drinking.* (RE 113)

These facts are also uncontroverted. The Affidavit describes her conduct when drinking as mean, which is clearly true. Trevor stated that drinking made her "crazy". The only specific instance presented was the Emeril's incident, following which, according to her, her doctor, Thomas and Trevor, she was abusive to Trevor. Kim admitted to the doctors that she was a

²⁴ TRO, RE 124. The TRO was, in fact, never served on Mrs. Watts, but a copy was left at her mother's house. (KW Vol. 7 Tr. 603). On that same day, counsel had an agreement that the supervised

binge drinker (“impaired on several occasions”) and that her drinking contributed to her bad behavior.²⁵

In fact, this is the *only* drug or alcohol induced behavior by either party that had a *direct negative impact on Trevor*. The Affidavit fairly and accurately represented the uncontroverted facts. Moreover, it ends by stating, “*Since March, Kim has reduced her drinking.*”

Once again, the Chancellor ignores the uncontroverted evidence to make negative findings against Thomas.

c. The Chancellor mischaracterizes the testimony of Thomas concerning the Affidavit to find that he claimed no responsibility for the content of Affidavit.

Oddly, the Chancellor was moved to mischaracterize Thomas’ testimony regarding the Affidavit, i.e., that he acted “as if he had no responsibility towards the creation of the document.” This is simply not true.

Thomas kept a Journal at his attorney’s instruction, which he emailed to his lawyer. His counsel decided how much of the nine months needed to go into the Affidavit. Because of the urgency, some of the later, but even worse incidents were not included, (e.g., June 3, 2008 incident, June 27, 2008 incident). Some, often more aggravating, details were omitted. Even so, the Affidavit was 13 pages long, probably longer and more detailed than 99.9% of affidavits filed in support of requests for a TRO.

Thomas never acted *as if* he had “no responsibility towards the creation of the document”. He testified that he gave all the information to his attorney, who decided what

visitation would continue by agreement until the temporary hearing.

²⁵ “Regarding substance abuse, she does admit to drinking too much on several occasions. If further episodes of binge drinking occur, then she might be reevaluated for substance abuse.” (Ex 12, Miller Evaluation, Kim Watts, P. 4-5, RE 169-170); Consistent with the Emeril’s incident, Trevor

should be in the affidavit. "*I did not prepare the affidavit. I just presented [my lawyer] with information. His office prepared it. That is what they placed in it.*" (TW Vol. 4 Tr. 151) The testimony on this point was direct, truthful and complete.

The Chancellor's negative view of Thomas is palpable in his rulings regarding the Affidavit. The Chancellor made it clear that he believed Thomas manipulated him to issue the TRO. The Chancellor's anger was not justified. His beliefs were the product of flawed discernment of the Affidavit and testimony.

d. The Chancellor finds contradiction between Thomas' objection to Kim's misconduct over nine months and Thomas comforting Trevor after he witnessed his mother's arrest.

Thomas Watts ...contradicted himself. One of the main contradictions was it was okay for Trevor to know that Kim had been arrested, but it was not okay for Trevor to know the truth about Mr. Watts' addiction. (Bench Ruling, Vol. 7 708; RE 97)

The Court characterizes Kim's persistent, abusive, attempted poisoning of Trevor against his father simply as a desire *to tell Trevor the truth about his father's addiction*. If this was her motive, she accomplished that goal in the November 2007 incident at the AutoZone. All else that followed was for *another purpose*.

No one, not even Kim, can dispute that in the occurrences that followed Mrs. Watts acted out of *anger*. Her conduct was intended to damage a child's love and affection for his father. Her *stated purpose* was to make Trevor feel *shameful* of his father and to fear consequences that his father's past would bring on him. (TW Vol. 3 Tr. 86; RE 34)

There is no equality of conduct here and there is no contradiction in Thomas' response to the circumstances. Thomas' conduct with Trevor in comforting him following traumatic events ending in the arrest of his mother was appropriate (discussed *supra*). (Miller Vol. 5 Tr. 416-19)

reported to Dr. Gasparini, "*You can tell when mom gets drunk because she gets crazy.*" (Ex 11,

The Chancellor, not being present, not being the father involved and not responsible for Trevor's welfare at the time of these events, is second-guessing this exceptional father's response to these unfortunate circumstances. Even in hindsight, Thomas' responses were appropriate and his restraint commendable.

In the final analysis, whether the Chancellor was biased in reaching such reckless conclusions is not important, since the evidence of bias derives most clearly from the unsupported findings. Reversal is required based on the evidence, without a finding of bias.

6. The Chancellor should have found that "parental skills", "moral fitness", "emotional ties" and "preference of the child" favored Thomas.

a. The evidence demonstrated that Thomas possessed the best parenting skills for Trevor.

Initially the Chancellor found that parenting skills favored Kim because of Thomas' alleged manipulation of Trevor (he "*set Mrs. Watts up*"), but upon consideration of post-trial motions he changed his ruling and found that, "this factor favors neither parent". The Chancellor acknowledges that "*Thomas Watts was and is extremely involved in Trevor's life...[h]e is an excellent father,*" who is extremely involved in Trevor's schooling and his extra curriculum activities. (Order 3-11-10 CP Vol. 2, 219; RE 133) Kim even admits Thomas is involved in Trevor's activities, "more so than any parent I know," "in a good way." (KW Vol. 8 Tr. 860)

Reference to the interviews with the doctors reveals that Trevor loves to go to church and his dad is the one who takes him. His mother doesn't like to go to church. Kim objected to Thomas' bible readings with Trevor about the "Holy Spirit", which she equated with "evil spirits". (TW Vol. 3 Tr. 82)

Trevor's fifth grade teacher, Paulette Carter corroborated Thomas' excellence as a
.parent:

Q: Compared to the - your experience with most parents and their interaction with the teacher, how would you rate Tommy Watts?

A: **Absolutely excellent.** And I can honestly tell you that out of all the parents, I saw him the most, you know, and it was a sincere interest in how Trevor was doing, you know, and what he would do to help him and **just one of the excellent parents that I have ever had in teaching.**

(Carter, Vol. 3 p.14)

Trena Attipoe, Trevor's first and second grade teacher and coach for the Robotics team, testified to Thomas taking part in the Robotics Program and actually working with all the students as well as Trevor. She testified about Trevor and Thomas building a reading loft for the class and then building a big storage unit for the books and supplies. Trevor was in the robotics class during the sixth and seventh grade and remains so. Ms. Attipoe described Thomas' involvement in the Robotics class:

Q: How is his father involved in the Robotics class?

A: Mr. Watts has been there just about every time we have a meeting that he can be there. **He's always there with us helping Trevor** and the rest of the students.

Q: What has he done for the Robotics class?

A: He has, actually, helped us prepare for our competitions. He has shown us a lot about how the robot works, the programming part of it, even the building. Because it's a student-based program, the student has to build the robot. He kind of, like, listens to their idea and says, that is a good idea or that probably might not work, you know. He has given input with the students on the building and design of the robots.

Q: How many students are in the class on the average?

A: We have about 13 students.

Q: **How many parents provide the type of support that Mr. Watts does?**

A: **He is the only one.**

(Attipoe, Vol. 4 pp. 196-198)

Chancellors generally give the testimony of teachers significant weight, as they are seen as being there for the child and not partisan to either parent. However, the opinion of the

Chancellor makes no mention of the significant testimony of Trevor's teachers, which was highly favorable to Thomas.

Francis Renn, a neighbor of the Watts described watching Tom and Trevor play basketball, go bike riding, leave for fishing trips, dress up in costumes for Halloween and decorate the yard. (Renn Vol. 4 Tr. 199-202) Trevor's grandfather, Herman Watts, Jr., testified to his grandchild attending church with Thomas, Thomas assisting him with his athletic and musical activities. His testimony was that Thomas was by far the more active parent with Trevor. (Herman Watts Vol. 4 Tr. 208- 210)

There is no comparable testimony for Kim.

In deciding parenting skills, the Chancellor cited non-existent evidence that Thomas "*plays the victim in front of Trevor.*" ("I agree with Dr. Miller that Mr. Watts plays the victim in front of Trevor."; Bench Ruling, Vol. 7 p. 714) There is no testimony or statement by Dr. Miller to this effect. Moreover, there was no evidence that remotely suggests how this vague characteristic affected Trevor.

The Court also found significant that Thomas "played the victim" during his Sunday school class, when he complained about being asked, at Kim's insistence, to leave the Sunday school class Christmas party, after he had brought the Ham and presents. He was asked to leave by Kim's brother-in-law, George Bass, all in front of Trevor. (TW Vol-3, Tr. 103-104; Bass, Vol. 4, Tr. 291-292) More to the point, since Trevor did not witness Thomas "playing the victim" in the Sunday school class, the Court's analysis is flawed. This appears to be just another revealing swipe at Thomas by the Chancellor.

b. Moral Fitness

The Chancellor again favors Kim, this time on the issue of moral fitness, citing Thomas' conduct in "manipulating the relationship." Parsing morality is always tricky, but if the standard is who engaged in abusive, alienation conduct and attempted manipulation, there is only one answer: Kim, and Kim alone. Abusive conduct directed at an 11-year-old child, which caused visible negative and damaging reactions bears on morality, more than anything else in this record did. There is no moral high ground for Kim in this record.

The Chancellor's minimization of Kim's misconduct and conjecture of bad conduct by Thomas reveals a bias leading to an abuse of discretion.

c. Emotional Ties

The Chancellor concedes that the emotional ties between Thomas and his son are very strong but then holds this against Thomas whom he finds has, "*manipulated Trevor's relationship with Mrs. Watts.*" (Vol. 7 Tr. 715-16; RE 91)

Dr. Miller testified that this is normal for a custodial parent of the same sex and is a reflection of Trevor attaching himself to the parent *who can meet his emotional needs.* (Miller Vol. 5 Tr. 348, 431-32) That the Chancellor would ignore Kim's pattern of misconduct toward Trevor, which she admits drove Trevor away from her, Trevor's age and sex, his emotional needs; as well as Thomas' involvement in his child's home, school and extracurricular activities, his spiritual development and his overall devotion to Trevor as *the source* of these emotional ties is perplexing and clearly erroneous.

d. The child's preference

Trevor has never waived in his desire to live with his father. The reasons should be obvious to anyone familiar with the facts. The Chancellor's ruling that Thomas destroyed Trevor's "free will" is contrary to the uncontroverted evidence, particularly Dr. Gasparini's

opinion that Trevor was expressing his free will, Kim's admission that her conduct drove Trevor away, and Miller's opinion that her conduct would have this effect. Moreover, following a long period when Trevor was in the custody of Kim one-half of the time and free from any "negative influence" of his father, he still testified that he wants to live with his father. (Trevor, Vol. 8 Tr. 811)

C. The Chancellor's finding that health of the parents favored Mrs. Watts was an abuse of discretion and manifest error.

The Chancellor found originally that Kim was "diagnosed with certain mental and emotional tendencies, but she *was really not given a diagnosis by either Dr. Gasparrini or Dr. Miller*, but Dr. Miller found that she did need some treatment". In fact, Dr. Gasparrini did make a diagnosis and found significant emotional issues, which contributed to her "acting out" behavior and her misconduct with Trevor. He recommended psychotherapy.

On the Rule 59 Motion, the Chancellor modified this finding by finding that "neither (doctor) found that she had any mental illness that would prevent her from exercising custody or unrestricted visitation." (Order 3-11-10 CP Vol. 2, 218-219; RE 132-133) The statement is not completely accurate. Miller opined that if Kim committed one more abusive incident, he would not recommend that she have *any* custody of Trevor. Moreover, whether there is "mental illness" which would *prevent* a parent from exercising custody applies this *Albright* factor too narrowly, again for Kim's benefit. This is an erroneous application of the law, for which there is always "de novo" review.

The medical evidence established that Kim suffered from an Adjustment Disorder with Mixed Disturbance of Emotions and Conduct, including anxiety, depression, and irritable, acting out behavior; that she has a problem with *anger and hostility*; has *aggressive and antisocial personality traits*, as well as passive-aggressive tendencies; and shows *histrionic personality*

traits and very significant paranoid tendencies. Moreover, it is clear that her condition contributed to the marital disharmony and her abusive behavior toward Trevor.

Yet, the Chancellor left intact his finding that the health of the parents favored Kim. The Chancellor relied on Thomas' very brief episode of prescription drug usage in November 2006. "However, as, Mr. Watts admitted, '*once an addict, always an addict.*' I believe that the health of the parents favors Mrs. Watts". (Bench Ruling, Vol. 7 p. 712; RE 88)

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.

The record does reflect that during the course of this 12-year marriage, Thomas used short-acting, prescription narcotic three times within one two-week period at work. Thomas immediately turned himself in for inpatient treatment for twenty-one (21) days. Thomas did not engage in this activity around Trevor and there was no testimony of any negative conduct with Trevor while under the influence. (TW Vol. 3 Tr. 51-52) This isolated incident, fueled by her *very significant paranoid tendencies*, became the basis of Kim's persistent assault on Trevor's love for his father.

On the other hand, it is undisputed that Kim's emotional illnesses and her drinking had a direct negative impact on Trevor. Both doctors recommended treatment for Kim. Neither recommended treatment for Thomas.

Moreover, Kim's continued misconduct, which is directly related to her health by Gasparrini, demonstrates that her emotional issues and tendencies continue to have a negative impact on Trevor. It is clear that Dr. Miller's assessment that Kim would not "act out" again was wrong.

The Court's finding that the health of the parents favored Kim was manifest error and an abuse of discretion.

D. The Chancellor's finding that continuity of care was favored neither parent was not supported by the substantial evidence.

The opinion of the Court on continuity of care reflects the pattern of minimizing evidence favorable to Thomas. The Court noted that:

Mr. Watt's schedule gave him a lot of afternoon time with Trevor that Mrs. Watts did not have. On the other hand and to me one of the key things that Mrs. Watts said was that in the afternoon while Mr. Watts was playing with Trevor outside, Mrs. Watts was preparing dinner.

(Bench Ruling, Vol. 7 Tr. 713; RE 88-89)

Both of these parents are nurses. The fact that Thomas' schedule was such that allowed him time with Trevor is no accident. There is no testimony that Kim's schedule over the whole time span of Trevor's school years prevented her from participating in Trevor life to the same degree as Thomas, if she had so desired. Testimony of teachers, neighbors and relatives reflect the quality time spent by Thomas with Trevor.

While the testimony of teachers, neighbors, and relatives concerning Thomas' parenting skills and continuity of care over a time span literally of years receive no mention in the opinion, the Court finds it significant that "...when Mr. Watts was in rehab, at which time continuity of care was solely the responsibility of Mrs. Watts." (Bench Ruling, Vol. 7 Tr. 713; RE 89)

Mr. Watts was in rehab for 21 days of the 12 years of Trevor's life. This was in December 2006/January of 2007, over two full years prior to the trial in this matter. While this factor may not feature large in the total *Albright* spectrum, these continuing barbs directed at Thomas do not reflect even-handed consideration of the evidence as to each party.

E. The Chancellor's failure to find that willingness and ability to provide Trevor's care favored Mr. Watts was an abuse of discretion and manifest error.

The Chancellor found that willingness and *ability* to provide for Trevor's care even. Paradoxically, he based this decision on Kim's "*inability*" to provide the same level of care as Thomas because of their different work schedules.

Mr. Watts is extremely active with everything that Trevor is doing in school and out of school, but at the same time, I find that Mrs. Watts is also willing and able to provide the necessary childcare for Trevor. She participated in those events, also. She didn't participate to the extent that Mr. Watts did, but *I believe that that's because of his employment duties*. So I find that the willingness and ability to provide child care is even.

(Bench Ruling, Vol. 7 Tr. 715; RE 91)

While Kim may be willing, the Court's ruling establishes that *she is not able* because of her work schedule to provide for all of Trevor's needs. This may be a proper point for balancing of the *Albright* factors, but it does not change the fact that Thomas is both willing and able. Moreover, a father, especially this one, is better able to meet the needs of a young pre-teen and teen boy than his mother. For example, Trevor's Robotics interests have suffered because he is not living with his father full time, where he has a Robotics table on which he can practice with his father. (Trevor, Vol. 8 Tr. 809-810)

F. The Chancellor's failure to find that the home, school and community record of Trevor favored Mr. Watts is manifest error.

The testimony was overwhelming that Thomas' involvement in Trevor's school and extracurricular activities is exceptional and predominant, especially at this point in Trevor's life. His "extremely active" involvement has been an important part of Trevor's development. The testimony from two superb teachers on behalf of Thomas demonstrates the significance and importance of Thomas involvement in Trevor's school and community. It is significant that Mrs. Watts did not call a single teacher, school, Sunday school or other, to testify on her behalf.

The Court's devaluing of Thomas' extraordinary involvement in Trevor's home, school and community by reasoning that Kim was unavailable due to her other duties (e.g., work, cooking, etc) is error. Such conflicts may explain some absences, but not all. All parents have conflicts. They demonstrate to their children that they value them by not allowing those conflicts to interfere with the parent-child relationship.

Moreover, while there may be a legitimate reason that a parent is not involved in a child's home, school and community; this does not make it less so. Whatever Kim's reasons for lack of involvement, they do not change the fact that this factor favors Thomas by a wide margin. Failure to find that this factor favors Thomas was an abuse of discretion.

G. The Chancellor abused his discretion in holding that alcohol and drug usage favored Mrs. Watts.

Thomas Watts used a short-acting drug three times at work in November of 2006. He never used drugs or was under the influence in front of his son. He never used alcohol. There was no evidence that he ever did anything while impaired that negatively impacted Trevor.

Contrast this with Kim, who admitted binge drinking, some of which had a negative impact on Trevor. The Emeril's incident occurred while she was intoxicated, during which she was abusive to Trevor and actively involved him in her attempt to make him feel *shameful* of his father. Trevor's statements of concern regarding her drinking as related in Thomas' affidavit and to Dr. Gasparrini are uncontroverted. *"My mom drinks....you can tell when mom gets drunk because she gets crazy."* (Ex 11, Gasparrini, Trevor Watts, p. 3, RE 195)

The Chancellor's ruling that alcohol and drug usage favored Mrs. Watts is an abuse of discretion and manifest error.

Issue 2: Joint physical and legal custody is not appropriate for a 12-year-old son, where the father serves in a significant supporting relationship with the son in school and extra-curricular activities, which the mother cannot provide;

and where the mother has engaged in a pattern of abuse for the stated purpose of making the son feel *shameful* about his father; refuses to speak or confer with the father, cannot hide her negative views of the father and has refused to act civilly toward the father in the presence of their son.

In addition to erroneous findings on the *Albright* factors outlined above, the circumstances of this case make it especially improper to award joint physical and legal custody. Thomas, throughout these proceedings conducted himself in a kind and gentle manner toward Kim, while she refuses to act with common civility when circumstances placed them together in Trevor's presence. She has announced that she will not speak to Thomas or allow him in her presence.

Most jurisdictions recognize that "the *cardinal criterion* for an award of joint custody is the agreement of the parties and their *mutual ability to cooperate* in reaching shared decisions in matters affecting the child's welfare." *Waller v. Waller*, 754 So. 2d 1181, 1183 (Miss. 2000)(citing Vitauts M. Gulbis, *Annot., Propriety of Awarding Joint Custody of Children*, 17 ALR4th 1013, 1016 (1982)(collecting case). MISS CODE ANN. § 93-5-24 (1972) provides:

(e)...An award of joint physical and legal custody *obligates the parties to exchange information* concerning the health, education and welfare of the minor child, and unless allocated, apportioned or decreed, *the parents or parties shall confer with one another* in the exercise of decision-making rights, responsibilities and authority.

Miss Code Ann. § 93-5-24 (1972) (Emphasis added).

"It is the Chancellor's responsibility to insure that the parents are *capable of cooperating* in a joint custody arrangement." *Phillips v. Phillips*, 2008-CA-02019-COA ¶33; *Crider v. Crider*, 904 So. 2d 142, 148 ¶8-11(Miss. 2005). As these cases note, the paramount concern, as always, is the best interest of the child. *Crider* at 148.

Dr. Miller testified that it was important that Thomas and Kim are able to be in Trevor's presence *without frowning* in front of their child, or *to be kind to each other* in front of the child for the Trevor's sake. (Miller Vol. 5 Tr. 445-446)

During the pendency of the divorce, Kim demonstrated that she cannot cooperate with Thomas and cannot manage even mild civility in Trevor's presence. For example, when the parents attended Trevor's Regional Robotics Competition, Kim texted Thomas and instructed him not to speak to her during the event. (TW Vol. 3 Tr. 104-105) At church, when they were in Trevor's presence together, Kim objects to even the slightest civility exhibited by Thomas toward her. (TW Vol. 3 Tr. 105-106) During the separation, Kim had Thomas removed from their Sunday school Christmas party by her brother-in-law *in front of Trevor*, after he inquired about her finger. (TW Vol. 3 Tr. 103-104; Bass, Vol. 4, Tr. 291-292)

For reasons best understood by Dr. Gasparrini's evaluation, Kim is unable to cooperate in a joint custody arrangement. Whatever the source of her conduct leading up to the separation, it continues to act on her and continues to have a negative impact on Trevor.

Thomas has always acted civilly toward Kim in Trevor's presence. He will state such pleasantries, as "*Good morning, good evening, hi, how are you, good to see you, have a good day, you look nice.*" Kim is nonresponsive, verbally, sometimes she will look away or glare. (TW Vol. 8 Tr. 833) The exchanges are stressful for Trevor. Kim does not allow Thomas near her or to speak to her. (TW Vol. 8 Tr. 832)

Trevor testified that when his parents are in the same area, "*Dad will try and say 'hi, how are you'*" and Mom *just keeps a straight face* and doesn't really say much of anything." Trevor says this makes him feel *awkward*. (Trevor, Vol.8, Tr. 808) Thomas describes Trevor's visible reaction to his mother's demeanor as disappointed. (TW Vol. 8 Tr. 833)

Thomas, who is the parent heavily involved in Trevor's extracurricular endeavors, must see Kim at functions during her periods of custody. Trevor is required to endure the lack of common civility exhibited by his mother toward his father exacerbated by the frequent interaction compelled by the joint custody award.

Kim has stated that she does not want Thomas to come near her or to say “hello”. (KW Vol. 8 Tr. 794-796) “I’m fearful because at this point, he can lie, he can say anything he wants, and I am left to have to defend myself. I don’t feel safe around him, and I don’t want to be around him”. (KW Vol. 8 Tr. 796)

This is familiar territory. Her fears have no reasonable basis in fact and arise purely out of her “*very significant paranoid tendencies*” diagnosed by Dr. Gasparrini, for which she is at risk for “cognitive distortion” (e.g., unfounded fears).

Whatever the cause, the evidence clearly demonstrates that Kim is unable to comply with the requirements of a joint custody arrangement. If you cannot speak, you cannot confer. She is not capable of exchanging information or conferring as mandated by MISS. CODE ANN. § 93-5-24(e) (1972). The Chancellor failed to insure that the parents were capable of cooperating in a joint custody arrangement. *Phillips v. Phillips*, 2008-CA-02019-COA ¶33; *Crider v. Crider*, 904 So. 2d 142, 148 ¶8-11 (Miss. 2005).

This is a textbook case for *not* awarding joint custody. In addition to the erroneous findings and application of the *Albright* factors, the Chancellor abused his discretion in awarding joint physical and legal custody. The Court should reverse and render, awarding physical and legal custody of Trevor to Thomas, with reasonable visitation to Kim.

Issue 3: Where, following a 12-year marriage, the Chancellor granted wife’s request for ½ of all marital assets, including husband’s retirement pension and wife testified to her need for temporary alimony of \$500.00 for twelve (12) months, the Chancellor’s award of permanent alimony of \$1000.00 a month was an abuse of discretion. The Chancellor’s finding of fault in awarding alimony was an abuse of discretion.

In awarding alimony, the Chancellor once again reveals a punitive stance against Thomas leading to an abuse of discretion. Kim requested and was awarded one-half of all marital property, including one-half of Thomas’ retirement pension, one-half of the equity in the house;

one-half of furniture as per a list she provided; and the better of the two automobiles. In addition, Kim testified that she needed \$500.00 per month for 12 months following the divorce. The Chancellor gratuitously awarded her \$1000.00 per month for life.

In considering alimony, the Chancellor must make findings and weigh the factors as enumerated in *Armstrong v. Armstrong*, 618 So. 2d 1278, 1280 (Miss. 1993). The *Armstrong* factors relevant to this appeal are the income and expenses of the parties; the health and earning capacities of the parties; the needs of each party; the length of the marriage; fault or misconduct; and wasteful dissipation of assets by either party.

Both of the parties are professionals making a good living, although Thomas is also a CRNA and has a higher income. The marriage was a 12-year marriage, not short and not long by many standards. Thomas paid all of the credit cards, the experts, and was left with two notes totaling approximately \$244,771.01 on their relatively new home, with only \$13,000.00 in equity, after paying Kim \$13,000.00 for her equity in the home.

In assessing alimony, the Chancellor assessed *fault* leading to the divorce on Thomas, based on his single, brief relapse in November 2006 and his “manipulation of Trevor”. (Bench Ruling, Vol. 7 Tr. 725; RE 101) Thomas has addressed the alleged manipulation. On this erroneous ruling alone, the alimony award must be reversed. He also considered that Thomas manipulated him in his Affidavit (Bench Ruling, Vol. 7 TR. 725; RE 101), which is not a proper basis for finding fault in the demise of a marriage, logically or legally.

Misconduct leading to the demise of a marriage is a proper consideration, even if based on a sickness, including alcoholism, drug addiction, depression, Adjustment Disorder, Antisocial Personality, very significant paranoid tendencies or the like. However, the *disease is not misconduct*. This is consistent with MISS. CODE ANN. § 93-5-1 (1972), which provides that “*habitual drunkenness*” and “*habitual and excessive use of opium, morphine or other like drug*”

are grounds for divorce. Addiction is a disease,²⁶ but it doesn't mean that the addict or alcoholic or addict is engaging in the conduct of drinking or using drugs. Millions of alcoholics and addicts *never* drink or use drugs.

There was no allegation or evidence that Thomas committed misconduct in the marriage while using drugs. He used drugs at work for a very brief period (three doses) once in the 12-year marriage. Thomas' medical condition is not *fault* that led to the demise of this marriage.

Neither of the doctors found that Thomas' 2006 drug episode was the cause of the marital discord. Dr. Gasparrini attributed the cause to her paranoid traits. "*Her paranoid traits cause her to mistrust her husband and fears that he will resume drug abuse. He has been abstinent from drugs abuse for a long while. She probably should participate in psychotherapy.*" (Ex 11, Gasparrini, Kim Watts, p. 8, RE 182) Dr. Miller reported:

She focuses a lot on his substance abuse, yet he has only slipped up one time in all those years, sought treatment quickly, and it did not seem to influence him to abuse or neglect her. She cannot stand that he did not tell her right away when he began using again, but it sounds like the time he spent using was a matter of a few weeks. She does not like it that he told his father and the doctor at work first, but he told her within 24 hours of telling them. I kept looking for reasons for her to want to leave him that I could relate to but found none.

(Ex 12, Miller, Kim Watts, p. 4, RE 169)

Dr. Miller opined that the source of Kim's problems and the marital discord was the death of her father in October 2007, just before she stated she wanted a divorce:

I believe that the death of her father has not only stirred up a hornet's nest of conflicts regarding him but has also reawakened unresolved issues regarding the loss of her first son. All that is too much for her to deal with directly and she is trying to cope by

²⁶ See generally Amicus Curiae Brief of the American Medical Association and the American Psychiatric Association, *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (1988); Amicus Curiae Brief of the National Council on Alcoholism, Inc., *Traynor v. Turnage*, 485 U.S. 535, 108 S. Ct. 1372, 99 L. Ed. 2d 618 (1988), cited in concurring opinion in *Mississippi Employment Sec. Com. v. Martin*, 568 So. 2d 725, 729 (Miss. 1990), declining to reach that issue.

blaming her current feelings on her husband and by leaving him. Instead of that I recommend that she go to counseling and that an antidepressant be considered.

(Ex 12, Miller, K. Watts, p. 4, RE 214); See also, Miller, Vol. 5 Tr. 350.

Clearly, it was Kim's *misconduct* over a nine-month period that led to the divorce.

Thomas did not want a divorce, testifying at trial that he still loved her and expressing at every chance that she would only get some help and the marriage would survive.²⁷ Thomas was forced to file suit to protect his son from her emotional abuse and even then, he wanted most for her to get help. (Ex 5, 10, Para. 3, RE 107) Clearly, Kim's misconduct led to the divorce.

Moreover, Kim did not testify that Thomas' 2006 drug episode was the cause of her marriage breakup. Yet, the Chancellor, *sua sponte*, found that it was and punished Thomas by awarding even more alimony than she testified she needed.

The only misconduct affecting this marriage, as shown by undisputed evidence, was Kim's nine-month campaign of emotional abuse and attempted manipulation of Trevor. It was an abuse of discretion to award Kim more alimony that she testified she needed and to find Thomas at fault in awarding alimony. The Chancellor should have denied alimony based on Kim's clear fault in causing the divorce. *Retzer v. Retzer*, 578 So. 2d 580, 592 (Miss. 1990) ("[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.").

The award of alimony should be reversed and rendered, denying any alimony.

Alternatively, the Court should award her no more than she testified she needed: \$500 for 12 months.

Issue 4: The Chancellor's ruling that Thomas misled the Chancellor in his Affidavit submitted with his *ex parte* request for a TRO and awarding attorney fees to

²⁷ "Her husband stated that he would be willing to participate in marriage counseling to try to save the marriage." (Ex 11, Gasparrini, Kim Watts, p. 8, RE 137)

Kim for defense of the Affidavit and TRO was erroneous in that it was an error of law to consider the issue at trial on the merits and the ruling was not supported by substantial evidence, was manifestly wrong and a clear abuse of discretion.

- A. The Chancellor finding that Thomas had misled the Chancellor in his affidavit is contrary to the overwhelming and uncontroverted evidence.**

The Chancellor based his award of attorney fees, in part, on Thomas Watt's Affidavit, which he erroneously and mysteriously ruled contained material misrepresentations. This is thoroughly addressed, Issue No. 1, B5, pp. 42-49, *supra*.

- B. The Chancellor had no jurisdiction in a trial on the merits to decide whether the TRO, which was never served and had expired within a few days, was improvidently sought.**

The injunctive relief, initiated to protect the child from further abuse, from an out-of-control mother, during the initial days of the divorce action, was ancillary to the divorce and custody case. The Chancellor had no authority to award attorneys fees based on the TRO.

For one thing, the TRO was never served. More importantly, the Chancellor is prohibited from awarding damages for wrongfully obtaining a TRO following a trial on the merits, where the injunctive relief is ancillary to the proceedings. "Where the prayer for injunction is ancillary to the main relief sought and the entire case is heard finally, and not separately on any preliminary motion to dissolve, attorneys fees should not be allowed." *Rice Researchers, Inc. v. Hiter*, 512 So. 2d 1259, 1270 -1271 (Miss. 1987); citing *Kendrick v. Robertson*, 145 Miss. 585, 598, 111 So. 99, 102 (1927) (attorneys fees on dissolution of an injunction are not allowable when the dissolution was upon final hearing on the merits).

- C. The evidence did not support the Chancellor's finding that Kim's attorney spent substantial time defending the TRO and Affidavit.**

The TRO was never served on Kim and expired when the parties announced agreement on a Temporary Order. No pleadings or oral motions were filed challenging the TRO or the

Affidavit. Even if the Chancellor awarded all of the time spent between July 10 and July 22, 2008, when an agreement for a Temporary Order was reached, the total time spent was 6 hours according to the Fee Statement in Evidence. (Ex 27, Dean Holleman Fee Statement) Most, if not all, of these 6 hours were spent on prosecuting and defending the two pending divorce complaints.

The Chancellor's finding that much of Kim's \$30,000.00 in attorneys fees related "primarily to the temporary restraining order and dealing with the consequences of that temporary restraining order" is not supported by any evidence. The award of \$15,000 in attorney fees to Kim was a clear abuse of discretion.

Issue 5: Thomas maintained a Journal, on the instructions of his attorney, which Kim introduced in evidence. The Journal was uncontroverted in material facts. The Chancellor's ruling that the Journal was not trustworthy was a clear abuse of discretion.

Kim wanted a divorce; Thomas did not. Wisely, Thomas sought the advice of counsel, who advised him to keep a journal, in case she ever filed. Kim, not Thomas, introduced Thomas' Journal in evidence. Thomas affirmed its accuracy, as did Kim as to the material events.

Unable to defend her conduct toward Trevor, Kim "set up a straw man, to knock him down" by introducing the Journal and then criticizing parts of it that had little to do with the case. The Journal, like Thomas' Affidavit and testimony, provides an account of the events covering November 2007 to July 2008; events concerning conduct, which Dr. Miller testified were abusive to and had a negative impact on Trevor. Despite Kim's criticism of the Journal,²⁸ when cross-examined about the specific instances of misconduct, she insisted on using the

Journal to refresh her memory of the facts. (See e.g., KW Vol. 7 Tr. 640, 643, 648, 660, 663) She conceded that the Journal contained positive statements about her. (KW Vol. 7 Tr. 633) More importantly, she failed to provide positive testimony that refuted the material allegations contained in Thomas Watt's testimony, the Affidavit and the Journal.

In another effort to help Kim avoid the consequences of her own proof, the Chancellor, *sua sponte*, apparently undertook a partial hearsay analysis of the Journal under Miss. R. Evid. Rule 803(24), which has a trustworthiness component. Miss. R. Evid. 803(24); See, *Cummins v. State*, 515 So. 2d 869, 874 (Miss. 1987). Absent some limited exceptions, not applicable here, the Journal could not have been used or admitted by Thomas over Kim's objection. Kim waived any hearsay objection, however, when she offered the Journal as evidence and it was admitted. See, *Rubenstein v. State*, 941 So. 2d 735, 764 (Miss. 2006); *Morris v. State*, 963 So. 2d 1170, 1177-1178 (Miss. Ct. App. 2007).

The Journal is not important evidence for Thomas. However, in light of this consistency between the Journal, Affidavit and the testimony and the fact that the important events related in each are uncontroverted, the Chancellor's finding that the Journal was untrustworthy, after Kim used it extensively in her testimony, is another troubling ruling that reveals a possible bias against Thomas. It was an abuse of discretion to disregard the Journal as evidence.

²⁸ Kim related three instances of Thomas' conduct that were not in the journal. None involved Trevor. (KW Vol. 6 Tr. 548-50). In fact, one of these events is actually in the journal. (Journal Ex 9, p. 18, LL 792-802, RE 100)

Issue 6: The Chancellor applied the wrong standard to Thomas' post judgment motions under Miss.R.Civ.P. 59(a), abused his discretion in denying the motion under Miss.R.Civ.P. 59(e), and failed to rule on the Motion for Modification, or alternatively, abused his discretion in failing to grant the Motion for Modification. Alternatively, the Court failed to make appropriate findings of fact and conclusions of law, as required when Thomas requested such pursuant to Miss. R. Civ. P. 52(a).

Thomas filed three substantive post-trial motions. On April 28, 2009, Thomas filed a *Motion ...under Rule 59 Motion to Set Aside, Alter or Amend the Final Judgment*. (CP Supp. Vol. 1, 9-41) On July 13, 2009, Thomas filed an *Amended Motion ...under M.R.C.P. 59 and 60 to Set Aside, Alter or Amend the Final Judgment, to Reopen the Evidence and/or for a New Trial*. [First Amended M.R.C.P. 59/60 Motion]. (CP Vol. 1, 122-173) The First Amended M.R.C.P. 59/60 Motion sought relief under Miss. R. Civ. P. 59(a) and Miss. R. Civ. P. 59(e), and alternatively Miss. R. Civ. P. 60.

On November 13, 2009, Thomas filed an *Amended and Supplemental Motion under M.R.C.P. 59 and 60 and for Modification* [Motion for Modification], based on the same factual allegations. (CP Vol. 2, 174-211) Thomas also filed a Motion for Findings of Fact and Conclusions of Law as to all of the motions. (CP Vol. 2, 215) The Chancellor heard testimony on February 2-3, 2010, (Vol. 7-8, Tr. 730 et seq.) and entered the Order on March 11, 2010. (Order 3-11-10, RE 131, et seq.)

Thomas asserts four errors on the post-trial motions. First, the Chancellor abused his discretion in his findings of facts on the M.R.C.P. 59 motions. An appeal from a denial of a M.R.C.P. 59 motion is an appeal from the case on the merits and is subject to an abuse of discretion standard of review. *Wade v. Wade*, 967 So. 2d 682, 684 -685 (Miss. App. 2007). Therefore, Thomas' arguments about the findings of fact on the M.R.C.P. 59 motions are incorporated into the arguments under the previously argued Issues. Second, although the Court

heard testimony and decided the motions under Miss. R. Civ. P. 59, the Chancellor applied the wrong legal standard to the First Amended M.R.C.P. 59/60 Motion.

The Chancellor listed correctly the four motions pending before the Court in the lead paragraph of his Order, including the Motion for Findings of Facts and Conclusions of Law. Under a section titled by the original M.R.C.P. 59 motion, the Chancellor appears to limit its review to the trial record. Under the next section titled by the First Amended M.R.C.P. 59/60 Motion, *"II. Amended Motion to Set Aside, Alter or Amend the Judgment and to Reopen the Evidence and/or for a New Trial"*, the Court addresses the evidence offered in the hearing on that motion.

In deciding the First Amended M.R.C.P. 59/60 Motion, the Chancellor applied the standard that applies to the Motion for Modification, citing *Porter v. Porter*, 23 So. 3d 438, 446-448 (Miss. 2009), which deals with requirements of modification of joint custody decrees. This is the wrong legal standard for deciding cases under Miss. R. Civ. P. 59 or the alternate grounds asserted in the First Amended M.R.C.P. 59/60 Motion under Miss. R. Civ. P. 60(b)(3)²⁹ & (6)³⁰.

The guiding principle for motions under Miss. R. Civ. P. 59(a) & (e) regarding child custody is the "best interests of the child," using the *Albright* factors. *Street v. Street*, 936 So. 2d 1002 (Miss. App. 2006); See, generally, *Grave v Maples*, 950 So. 2d 1017 (Miss. 2007); *Wade*, *supra*.

²⁹ Miss. R. Civ. P. 60(b)(3) provides for relief from a judgment if (1) the evidence was discovered following the trial; (2) due diligence on the part of the movant to discover the new evidence is shown or may be inferred; (3) the evidence is not merely cumulative or impeaching; (4) the evidence is material; (5) the evidence is such that a new trial would probably produce a new result. *Moore v. Jacobs*, 752 So.2d 1013, 1017(¶ 18) (Miss.1999).

³⁰ "Relief under Rule 60(b)(6) is reserved for extraordinary and compelling circumstances." *Briney v. United States Fid. & Guar. Co.*, 714 So. 2d 962, 966 (Miss. 1998). "Rule 60(b)(6) 'stands as a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses, or when it is uncertain that one or more of the preceding clauses afford relief.'" *Id.* at

The Court never addresses the Motion for Modification, but erroneously applies the requirements for modification of a joint custody award to the First Amended M.R.C.P. 59/60 Motion, citing *Porter v. Porter*, 23 So. 3d 438, 446-448 (Miss. 2009). If the Court intended to decide the Motion for Modification, then it failed to decide the First Amended M.R.C.P. 59/60 Motion.

Since a motion under Motion under Miss. R. Civ. P. 60(b)(3)&(6) is the alternative to an untimely Motion under Motion under Miss. R. Civ. P. 59, and the Court clearly did not address the Rule 60 motion, the Chancellor received the testimony under and decided the First Amended M.R.C.P. 59/60 Motion under Rule 59. This is the motion the Chancellor listed before discussing the testimony. This Court should consider the evidence under Miss. R. Civ. P. 59(a) and apply the abuse of discretion standard of review, using the *Albright* factors. *Street v. Street*, 936 So. 2d 1002 (Miss. App. 2006).

In *Street*, the Chancellor awarded custody of the parties' children to the mother, and then on a Rule 59 motion, reversed that decision. During the separation, the mother had become involved with a man named Zinn, an active alcoholic, with a violent criminal past. At trial, Carla testified that she had broken off her relationship with Zinn. After the ruling awarding her custody, Zinn moved back in with the mother and the children. The father filed a motion for reconsideration and for a new trial, alleging that Zinn had returned. After receiving evidence, the Chancellor granted the motion for reconsideration and awarded custody to the father.

On appeal, the Court found that the Chancellor had properly granted the father's motions under Miss. R. Civ. P. 59(a), seeking reopening of the testimony and (e), seeking to alter or amend the ruling. *Street*, 936 So. 2d 1002, 1008.

969. Review is subject to the abuse of discretion standard. *Burkett v. Burkett*, 537 So. 2d 443, 446 (Miss. 1989).

Here the Chancellor decided the original case based on Dr. Miller's belief that Kim was cured and would not abuse Trevor again. Otherwise, she should not have custody. Kim did abuse him again, this time with the added argument of guilt by association. The Chancellor ruled, in essence, that it is just more of the same. The Chancellor's indifferent treatment of such a serious issue, while consistent, is no less an abuse of discretion.

Third, the Court failed to address the Motion for Modification or, alternatively, abused its discretion because the evidence was sufficient to justify a change in custody under *Porter*, in that there was a material change in circumstance adversely affecting the child. It was material because the original custody award was based on Dr. Miller's opinion that Kim would never commit the abuse again. He was wrong.

The Chancellor's finding that there was no adverse impact ignores the testimony of Dr. Miller, discussed in detail above, that this conduct was abusive and negatively impacted Trevor, so much so that if she would do it again, *she should not have custody*. Trevor testified that he felt "awkward", which the Chancellor held was insufficient.

Ignoring the uncontroverted evidence regarding the negative impact this conduct has on Trevor, including from Kim's doctor, the Chancellor found that that "there has been no testimony regarding an adverse effect on Trevor." (Order 3-11-10, RE 136)

"Awkward" is a child's word. Dr. Miller put it in terms the Chancellor should have understood. Miller testified at trial that this type of conduct was "abusive" and would make Trevor "feel very stressed" (Miller Vol. 5 Tr. 396); "can lead Trevor to feel especially badly about himself" (Miller Vol. 5 Tr. 397); and would definitely have a negative impact on Trevor (Miller Vol. 5 Tr. 407) "[T]he biggest thing in that situation is he's going to feel badly about himself. You know, that's his dad. He looks up to his dad. And any criticism of his dad is really criticism of him. That's how it can be felt psychologically." (Miller Vol. 5 Tr. 407)

The "adverse effects" requirement is satisfied in custody modification by finding *reasonably foreseeable adverse effects* if the child continues in the adverse environment.

"Where a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment." *Gilliland v. Gilliland*, 984 So. 2d 364, 368 (Miss. Ct. App. 2008).

Finally, to the extent that the Chancellor failed to make appropriate findings of fact and conclusions of law, as required when Thomas requested that he do so pursuant to Miss. R. Civ. P. 52(a), the rulings should be reversed and remanded with instructions.

V. CONCLUSION

The unassailable truth arising from this record is the love and close bond of this child for his father and the father's complete devotion to his son. Chancellors have immense discretion, but a Chancellor's finding should not be allowed to prevail when it is so thoroughly refuted by the evidence and testimony from a diverse field of witnesses. Teachers testified that Thomas was the parent most important to Trevor. Relatives testified to this also. Both Court experts offered opinions that clearly buttress a finding that the best interest of Trevor is to be with his dad. Kim has taken a public position that she wants no contact with Thomas, an attitude that should bar consideration of joint custody.

The Chancellor's findings that Thomas "set Mrs. Watts up", "play[ed] Trevor against Mrs. Watts"; "manipulated Trevor's relationship with Mrs. Watts"; "destroyed Trevor's true free will" by "staging things at home"; "actively interfered with the relationship between Mrs. Watts and Trevor" and "poisoned Trevor against his mother" amounted to reckless speculation and conjecture and are clearly not supported by substantial evidence. Whatever the source of these

findings, they are not based on *any* evidence. The Chancellor abused its discretion in its consideration of the *Albright* factors to award custody.

The arguments as to alimony and attorney fees, as set forth herein, demonstrate errors and shine more light on the Court's attitude toward Thomas.

The record support a joint custody analysis required by Miss Code Ann. § 93-5-24 (1972) and *Crider*: the Chancellor did not make the mandatory analysis of the parties' ability to cooperate for joint custody. It could not have so found, given Kim's unfounded refusal to confer or even speak with Thomas and her unrelenting attacks on him to Trevor.

It is respectfully requested that this Court review the record due to the Chancellor's abuse of discretion and the misapplication of the law with regard to determination of custody, and that, upon *de novo* review, it find the best interest of Trevor is to be in the full physical and legal custody of his dad. Further, Thomas also respectfully asks the Court to reverse the award of alimony and attorney fees. Alternatively, Thomas request that the Court reverse and remand as to each error with proper instructions.

Respectfully submitted, this 24th day of November 2010.

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CERTIFICATE OF SERVICE

I, Michael B. Holleman, attorney for Appellant, THOMAS WATTS, certify that on November 24, 2010, I served an original and four copies of the **Appellant's Record Excerpts**, including CD ROM, by United States mail with postage prepaid to:

Honorable Kathy Gillis, Clerk
Supreme Court of Mississippi
Court of Appeals of the State of Mississippi
Post Office Box 249
Jackson, MS 39205-0249

and personally served a copy to:

Honorable Carter Bise
Harrison County Chancery Court Judge
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Dean Holleman, Esq.
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This 24th day of November 2010

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