IN THE SUPREME COURT OF MISSISSIPPI

RONNIE DANIELLE DAVIS HARDIN	**APPELLANT**
VS.	**NO. 2010-CA-00947**
JONATHAN KYLE HARDIN	**APPELLEE**

APPEAL FROM THE CHANCERY COURT OF THE SECOND JUDICIAL DISTRICT OF PANOLA COUNTY STATE OF MISSISSIPPI

Lower Court No. B-08-06-280

BRIEF FOR APPELLANT

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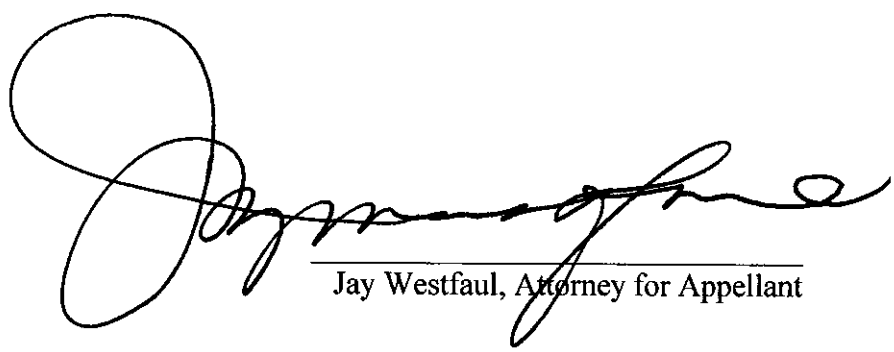
CERTIFICATE OF INTERESTED PERSONS

The undersigned counselor of record for the appellant in this case 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. Jay Westfaul, Attorney for the Appellant
2. Honorable Vicki B. Cobb, Chancellor
3. Honorable Adam A. Pittman, Attorney for the Appellee
4. Ronni Danielle Davis Hardin, Appellant
5. Jonathan Kyle Hardin, Appellee

Certified, this 14th day of October, 2010.



Jay Westfaul, Attorney for Appellant

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STATEMENT OF THE CASE

A. PROCEDURAL HISTORY

Appellant, Ronni Danielle Davis Hardin[1], was divorced from Appellee, Jonathan Kyle Hardin[2], on August 5, 2008 in the Chancery Court of Panola County, Mississippi, Second Judicial District, on the ground of irreconcilable differences. (R.12) As part of their divorce proceedings a "Child Custody and Property Settlement Agreement" was agreed upon, and made a part of, the final divorce decree. (R.14)

Ronni filed a petition to modify the final decree on April 3, 2009. (R.7) In response, Jonathan answered and filed a counter-petition for finding of contempt as well as modification of the decree on June 12, 2009. (R.28) Same was timely answered by Ronni on June 25, 2009, denying the allegations. (R.36) Trial was held on March 2, 2010, (R.50) and a subsequent order was entered on May 19, 2010 (R.51). Ronni was found in willful contempt of court on several issues, and the court modified its previous judgment, making Jonathan the physical custodian of the parties' two-year-old daughter. (R.51) Ronni, feeling aggrieved, timely perfected her appeal to the Supreme Court of Mississippi.

B. FACTS

Two days after the divorce papers were signed, Ronni moved from Batesville back to South Mississippi. Both parties were aware of her intention to do so when the decree was entered. (TR.11) Ronni transferred to Regions Bank in Picayune and moved into an apartment in Poplarville with the parties' child for a couple of months. She then moved to an apartment in Picayune to be closer to work. (TR.37) During the time she lived in Picayune she lost her job at Regions after reviewing Jonathan's bank balance. (TR.38) She then stayed with her parents for a week before moving in with her cousin. (TR.38) After moving out of her cousin's house,

[1] Hereafter referred to as "Ronni" for clarity.
[2] Hereafter referred to as "Jonathan" for clarity.

Ronni stayed with her parents for another week as she and her child made the transition from living with her cousin to their new home. (TR.38) For the eight months leading up to the trial in March, Ronni had lived in her house in Poplarville. (TR.9) These are the only two instances where she has temporarily stayed with her parents while in the process of moving. She never resided with her parents as determined by the Chancellor in the contempt order. (R.51)[3]

Ronni was responsible for the health insurance of the child as per the divorce agreement. (R.18) She obtained the insurance through her employment at Regions. (TR.25) When Ronni lost her employment with Regions she enrolled the child in the CHIPS program after realizing she was qualified to do so. (TR.25) This provided insurance for the child through the Mississippi Children's Health Act. This also provided that the child had continuous, uninterrupted medical coverage.

In January of 2009, Ronni's GMC Envoy was declared a total loss after being involved in an accident. (TR.32) Per the divorce agreement, she was responsible for the monthly payments on the vehicle. (R.18) The insurance covered the value of the car, and there remained a balance of $4,200 left on the loan. (TR.23) Jonathan voluntarily paid the loan off without telling Ronni. (TR.23) Ronni stated that she would continue to make monthly payments to Jonathan on the debt. (TR.24) However, she was held in contempt for not paying the entire $4,200 balance at once. (R.52)

Since August 2009, Ronni has attended school full-time and was working part-time. She lives in a nice three-bedroom house with the child. (TR.58) She accomplishes her school and work between 8:00 and 5:00 which does not impede her ability to take care of the child while pursuing a degree in elementary education. (TR.15) The child had a stable routine and regularly attended a certified daycare during the weeks Ronni would have the child. (TR.15). At the same

[3]The parties had agreed in their child custody and property settlement agreement that the minor child would not reside with either or both of Ronni's parents. (R.18)

time, Jonathan is, and was, cohabiting with a nineteen-year-old child without benefit of marriage –even while the parties' child is with him. (TR.18) The Chancellor failed to carefully consider the best interests of the child, and the Court's *Albright* analysis was clearly erroneous and against the overwhelming weight of the evidence.

SUMMARY OF THE ARGUMENT

* The Chancellor was manifestly erroneous in holding Ronni in contempt of court for staying with her mother and father on two separate occasions for one week each. Ronni did not reside with her parents during these two occasions, and, considering the plain meaning of the property settlement and child custody agreement, could not have been held in contempt.

* The Chancellor was manifestly erroneous in holding that the Mississippi Children's Health Insurance Program is a "welfare" program inferior to that administered by private insurers. Miss.Code Ann. § 41-86-9. Ronni should not have been held in contempt for obtaining health insurance through the state when she lost her insurance through her employer.

* Ronni made the monthly payments due on her vehicle as ordered by the court until the vehicle was declared a total loss in a subsequent unforeseeable intervening car accident. The Chancellor was manifestly erroneous in holding Ronni in contempt for failing to pay the entire indebtedness due on the vehicle at once. She wasn't even given the opportunity to make arrangements to settle the debt because Jonathan rushed to pay it. If anything, a modification of the decree would have been warranted, but certainly not contempt.

* The Chancery Court was manifestly erroneous in analyzing the *Albright* factors, as discussed fully in the argument below. The analysis was against the overwhelming weight of the evidence, and the modification of custody should be reversed.

ARGUMENT

I. **Standard of Review.** It is well settled in Mississippi Jurisprudence that the findings of a Chancellor are upheld unless those finding are clearly erroneous or an erroneous legal standard was applied. *Hill v. Southeastern Floor Covering Co.*, 596 So.2d 874, 877 (Miss.1992). A finding of fact is "clearly erroneous" when, *after a review of the entire record*, the reviewing court is left with a definite and firm conviction that a mistake has been made. *UHS-Qualicare, Inc. v. Gulf Coast Community Hosp., Inc.*, 525 So.2d 746, 754 (Miss.1987)(emphasis added). Broad discretion is afforded a Chancellor in his findings of fact *given the evidence adduced as a whole. McEwen v. McEwen*, 631 So.2d 821, 823 (Miss.1994)(emphasis added).

A. THE CHANCERY COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN FINDING MS. HARDIN IN WILLFUL CONTEMPT OF COURT FOR STAYING WITH HER PARENTS FOR A WEEK ON TWO OCCASIONS.

Paragraph five of the child custody agreement states, "The Husband and Wife agree that it is in the best interest of the minor child to not reside in the home either or both of the maternal the best interest of the minor child to not *reside* in the home either or both of the maternal grandparents." (R.18) (emphasis added). There is no evidence in the record that Ronni resided at her parents' house with the minor child. There is no evidence that allowing the child to visit her grandparents was in any manner detrimental to the child. There is no evidence in the record that the child's grandparents are dangerous or immoral. It is clearly contrary to the plain language of the one sentence in the agreement to suggest that the parties intended to restrict the minor child from visiting her grandparents. It is not the law of this state that one "resides" everywhere one happens to visit - or stay temporarily - for a short week-long period. To hold otherwise would infer that one becomes a resident of Florida upon visiting there on vacation.

During the two transitional periods in which Ronni was moving, she stayed with her parents as a guest on those two separate occasions for a week each time. (TR.12-13) When she

moved in with her cousin, her furnishings remained in the home of her parents because her cousin's house was fully furnished. (TR.13)

Merriam-Webster defines "reside" as "to dwell permanently or continuously: occupy a place as one's legal domicile." If it was the intention of the husband that the minor child not stay at the maternal grandparents' home for even just a week, it would have been quite simple to state the fact in the agreement accordingly, but the language wasn't inserted because that wasn't the agreement.

The Chancellor erred in finding that a temporary stay of a week rose to the level of a finding of contempt of the sentence on page five of the property settlement and child custody agreement.

B. THE CHANCERY COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN FINDING MS. HARDIN IN WILLFUL CONTEMPT OF COURT FOR USING THE CHIPS PROGRAM TO PROVIDE HEALTHCARE FOR THE CHILD.

Paragraph seven of the child custody agreement states that Ronni "agrees to maintain" insurance on the parties' minor child. (R.18) Ronni was able to provide insurance for the minor child through her employment until she lost her job in August 2008. The child was then immediately insured through the Mississippi Children's Health Insurance Program pursuant to Miss.Code Ann. §41-86-5. Thus, the minor child has always been insured. (TR.25) There is no finding whatsoever that the child enjoyed anything but uninterrupted medical coverage. Whether Jonathan approves of the legislature's provision is inconsequential. Ronni did as she was ordered. She did everything she could do under the circumstances. She maintained insurance. The legislature provided that the children's health insurance program would provide children with health, medical, dental, and optical benefits. Moreover, state law mandates that . . . "The benefits and services offered and available to state employees under the State and School

Employees Health Insurance Plans shall be used as the benchmark for benefits and services under the program. . ." Miss.Code Ann. § 41-86-17.

While cross-examining Ronni, opposing counsel made the point that Ronni is not providing the insurance. (TR.45) He makes his belief clear that if Ronni is not paying for the insurance coverage, then she is not abiding by the terms of the divorce agreement. This is ridiculous because the Decree never mandated that Ronnie "pay" for insurance. It said that Ronni was to "maintain" insurance. If the parties' intention was for Ronni to personally pay for the insurance of the child, then it should have specifically stated so – for whatever such a provision would be worth. Ronni maintained uninterrupted insurance coverage for the minor child. Placing her in contempt for availing herself of an insurance program created by the legislature was manifest error. Worse, the Court utilized its erroneaous analysis as a major factor in its *Albright* analysis which changed custody of the child. (Discussed below.)

C. THE CHANCERY COURT APPLIED AN ERRONEOUS LEGAL STANDARD IN FINDING MS. HARDIN IN WILLFUL CONTEMPT OF COURT FOR FAILING TO SATISFY THE DEBT OWED ON A VEHICLE WHICH WAS DESTROYED IN AN ACCIDENT AFTER THE DIVORCE.

Paragraph eight of the child custody and property settlement agreement disposes of marital debt, among other things. (R.18) The parties' 2004 GMC Envoy automobile is mentioned in sub-paragraph (B) of the section. It necessarily implies that the wife shall pay the monthly notes on the vehicle. When the vehicle became a total loss, Ronni could not pay the lump sum difference between what was owed on the note and what was paid by insurance. (TR.23) Jonathan paid the entire amount due without so much as consulting Ronni. (TR.23, L.27) The parties never intended to have to pay a $4,000.00+ lump sum, as they didn't foresee that the vehicle would be wrecked before the note was finally paid. (TR.23). A modification of the agreement due to the unforeseeable intervening event (the wreck) would have been more appropriate than the extreme sanction of contempt.

D. THE CHANCERY COURT FAILED TO CORRECTLY APPLY AND/OR CONSIDER MANY OF THE *ALBRIGHT* FACTORS.

There are twelve factors that are to be used in the Chancellor's determination of a custody award. *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss.1983). The Chancellor committed manifest error in failing to perform a proper analysis, and the analysis as a whole was against the overwhelming weight of the evidence and failed to achieve that which is in the child's best interest.

The first factor incorrectly ruled on was that which dealt with continuity of care prior to separation. The Chancellor determined that the factor favored neither, as the child has been with both parents. (TR.166) The appellate courts have ruled that periods of caretaking after separation should be considered. *Caswell v. Caswell*, 763 So.2d 890, 893 (Miss.Ct.App.2003). Ronni has provided clothing, bathed, fed, and taken the child to daycare since being divorced. (TR.26) These facts are relevant in determining who has been the primary caretaker. *Watts v. Watts*, 854 So.2d 11, 13 (Miss.Ct.App.2003). Ronni admits her parents have helped occasionally. (TR.26) However, when the child stays with Jonathan, she is cared for by a host of people, including, but not limited to, Jonathan's nineteen-year-old live-in girlfriend. Consider the daily routine of the child when she is with Jonathan, ". . .whether she is going to Day Care, or if she is going to be with Jordon [the minor live-in girlfriend], or if she is going to be with my mother, whatever family member she is going to be with. . . ." (TR.108) Also, when the child was transported for visitation purposes, the majority of the time it was the parents of Jonathan who would pick up or drop off the child. (TR.20) The testimony as a whole clearly shows that Ronni should have prevailed on this issue. Jonathan lets others take care of the child when he has her. If most factors are equal, custody should be awarded to the primary caretaker. *Moak v. Moak*, 631 So.2d 196, 198 (Miss.1994).

On the next issue involving capacity to provide primary childcare and the best parenting skills, the Chancellor committed manifest error. THE CHANCELLOR: "One of the things that impressed me, though, is that, as far as the willingness and capacity to provide for the child care is the fact that Dad, even though your Divorce Decree says Mom is supposed to provide the health insurance for the child, Mom decided to not provide that out of her own pocket, and to place the child on the welfare rolls . . ." (TR.167) The Court was manifestly erroneous in finding that Ronni had allowed the child to be placed on the "welfare rolls" for the reasons set forth in the foregoing section relative to the Mississippi Children's Health Insurance Program. The error was in no way harmless because such great weight was placed on the Court's assumption that the Mississippi Children's Health Insurance Program is inferior to other insurance, even though the legislature mandated that the plan would be every bit as good as a state employees plan. Miss.Code Ann. § 41-86-17. This was a great factor under the Court's *Albright* analysis, and it was clearly erroneous.

Moreover, the record as a whole shows that Jonathan just shuffles the child around to whoever can sit with her, making it impossible for a routine to be established for the young child. The fact that Jonathan would allow a nineteen-year-old girl, who would cohabit repeatedly out of wedlock, to spend so much time with the young child – all while exhibiting an immoral lifestyle – demonstrates a lack of parenting skills on the part of Jonathan. To say they are equal when Ronni does so much and Jonathan does so little is clearly in error.

The Chancellor erred in the moral fitness factor by deciding it was equal. (TR.169) The Chancellor concluded that Ronni was equal to Jonathan in this regard over one action that wasn't made in the presence of the child. Ronni lost her job at Regions for abusing her position as she looked at Jonathan's bank balance. (TR.170) This has nothing to do with her moral fitness as a parent, nor did it negatively affect the child. Jonathan has a teenaged child living with him,

claiming they are going to get married. The nineteen-year-old child, in testifying, goes as far as saying "this little girl is my whole life." (TR.124) Such a statement should raise a red flag. The nineteen-year-old child is delusional in her relationship with the other infant. A parent who is clearly the better custodian on other factors may be awarded custody notwithstanding cohabitation. *Boaz v. Boaz*, 817 So.2d 627, 629 (Miss.Ct.App.2002). There is nothing in the record that indicates that Jonathan is clearly the better custodian. Ronni did not prevail on this issue due to an isolated occurrence, while at Jonathan's home there is a continuous immoral occurrence in the presence of the child.

Jonathan prevailed on the *Albright* factor dealing with the home, school, and community record of the child. (TR.171) The Chancellor speaks of the "family meals" shared with the child between Jonathan and his live-in teenaged girlfriend as evidence to favor Jonathan in this category. (TR.171) These meals are in no way beneficial to the infant. The Chancellor also errantly allows the decision on this issue to be swayed by the fact that Jonathan hasn't moved since the child was born. (TR.171) This factor is based on the record of the child, not where the father lives. When the child is with Ronni, she consistently attends a certified daycare where family and friends work. (TR.17) She does very well in this day care and is considered to be one of the smartest ones in her age group. (TR.62) *Bass v. Bass*, 879 So.2d 1122, 1125 (Miss.Ct.App.2004) (sided with the mother on this factor due to the fact that her child was doing well in daycare and there were friends in the area). When this young child spends time with so many different people as is the case when she is with Jonathan, it would be impossible for her to have a record as opposed to the stable day care routine she enjoys with Ronni.

Lastly, Jonathan prevailed on the issue of stability of home environment and employment of each parent. (TR.172) As noted, Jonathan lives with a nineteen-year-old child who cohabited with another man before moving in with Jonathan. If a parent is cohabiting, that

home is not stable for a young child and should factor into this analysis. *Richardson v. Richardson*, 790 So.2d 239, 242-243 (Miss.Ct.App.2001). Although Ronni has moved since the divorce, as contemplated by the parties prior to the divorce, she is very stable and has been for the past year. It was with the knowledge of both parties when divorced that Ronni would move. (TR.162) Ronni was faced with the task of starting anew in south Mississippi in order to provide for her child. She has stable employment and is furthering her education to be a teacher. Jonathan didn't have to alter his lifestyle at all, but he chose to, by inviting a nineteen-year-old child to live with him without the benefit of marriage.

Given the record as a whole, the Chancery Court committed manifest error in finding that Jonathan prevailed in the *Albright* analysis. The health insurance issue, which impressed the court so and favored Jonathan (TR.167), clearly should not have been a part of the *Albright* analysis.

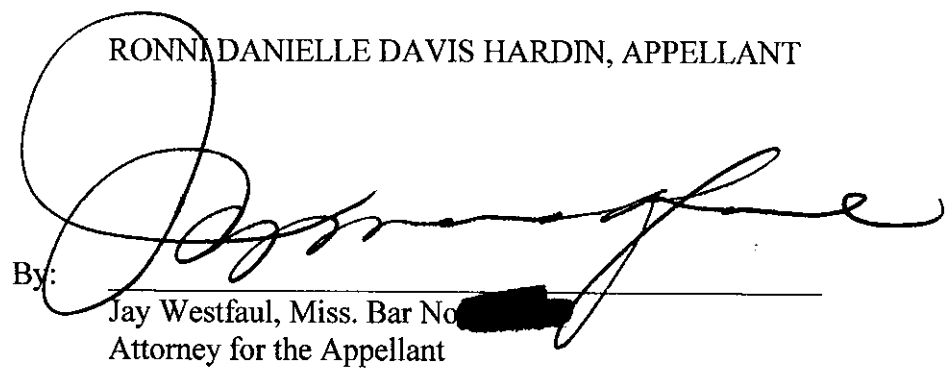
CONCLUSION

For the reasons stated above, the Appellant most respectfully moves the court to reverse the decision of the Panola County Chancery Court.

This the 14th day of October, 2010.

Respectfully submitted,

RONNI DANIELLE DAVIS HARDIN, APPELLANT



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CERTIFICATE OF SERVICE

I, Jay Westfaul, Attorney for Appellant, certify that I have this day served a copy of the foregoing Brief of Appellant via first Class United States mail with postage prepaid on the following persons at the addresses so noted:

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CERTIFIED, this the 14th day of October, 2010.

Jay Westfaul, Attorney at Law