IN THE SUPREME COURT OF MISSISSIPPI

MATTHEW TYLER MCMULLIN — APPELLANT

V. — CASE NO. 2010-CA-01539

KIMBERLY SCOTT SIMMONS MCMULLIN — APPELLEE

APPEAL FROM THE RANKIN COUNTY CHANCERY COURT

REPLY BRIEF OF APPELLANT

Oral Argument Requested

George C. Nicols (MSB #[redacted])
Attorney At Law, PLLC
P.O. Box 12282
Jackson, MS 39236
(601) 853-1061(phone)
(601) 853-2878 (fax)
gcnicols@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF THE ISSUES

1) Whether, the Court Incorrectly Failed To Consider Continuity of Care.

ARGUMENT

1)Whether, the Court Incorrectly Failed To Consider Continuity of Care.

Kimberly spends a great deal of her brief arguing that the Chancellor has the right to review any temporary order *de novo* when the matter comes before the Court for the final hearing. However this argument is irrelevant to the argument presented tothis appellant court and presents nothing more than an attempt by Kimberly to cloud the issue of continuing care.

Foremost the Appellant does not argue that the Chancellor can review a temporary order *de novo* when the matter comes up for a final hearing. What the Appellant argues is that the Court incorrectly stated, "I don't even consider continuity of care because that has - - *Albright* was a divorce case and it refers to continuity of care prior to separation, which doesn't make sense to me. Continuity of care after a divorce has been granted is established by court order." (Tr. Pg. 230-231.) Essentially stating continuity of care does not apply to modification cases.

However, in *Richardson v. Richardson*, 790 So. 2d 239, 243 (Miss. Ct. App. 2001) in a modification case the father was found to have provided primary care during this period prior to trial based on the agreement of the parties. "The court found that the continuity of care was in the father's favor because the mother agreed for the children to live and go to school in Senatobia." *Id.* at 240.

Therefore continuity of care is a valid factor for determining the best interest of the children regardless if the case is a divorce or modification. As such Matthew proved he provided the primary care prior to that hearing both by the parties' agreement and by the Court's temporary order. The Court is obviously free to determine that the custody arrangement in the temporary order was not in the best interest of the children. But the Court was in plain error to state that continuity of care does not apply because the case was a modification and was a factor the Court should have addressed when determining what was in the best interest of the minor children.

Additionally Kimberly discusses the Court's application of the tender years doctrine as but one factor for the Court to consider. However it's more than the fact that it is one factor that should have been outweighed because of the great potential harm for the minor children the Court attributed to Kimberly's drug abuse. It's the fact that if the Court correctly ruled Matthew provided the

continuity of care then the tender years doctrine does not apply. "The maternal preference in this case may not be warranted in light of the fact that the father had primary care-giver status for the ten months prior to the custody hearing." *Blevins v. Bardwell*, 784 So. 2d 166, 173 (Miss. 2001). In this case it was the five months prior to the custody hearing.

Finally, Kimberly attempts to make an issue as to when Matthew filed his petition to modify because Kimberly filed her contempt motion first. However Matthew testified that he had met with a lawyer to discuss filing his petition prior to having any knowledge of Kimberly's motion. (Tr. Pg. 108-109). Matthew's testimony actually stated that he chose to file to modify the custody when Kimberly returned from rehab and wanted to return to the custody agreement as stated in the parties' final divorce decree as opposed to the custody they had agreed upon during her stay in rehab. (Tr. Pg. 90-91).

CONCLUSION

Kimberly tries to confuse the issues with arguing about whether or not a chancellor can review a temporary order *de novo* when the case comes for a final hearing. The real issue is whether or not it was in error to state that continuity of care does not apply in modification cases and if so was it error to fail to address this factor in the father's favor because by nature of the parties' agreement and the

Court's temporary order he provided the greater continuity of care prior to the final hearing.

Respectfully Submitted,

MATTHEW MCMULLIN, APPELLANT

GEORGE C. NICOLS (MSB #[redacted])

GEORGE C. NICOLS
Attorney at Law; PLLC
P.O. Box 12282
Jackson, MS 39236

CERTIFICATE OF SERVICE

I, George C. Nicols, do hereby certify that I have this date forwarded via U.S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

Honorable John Grant
Rankin County Chancery Court
P.O. Box 1437
Brandon, MS 39043

Barry C. Campbell, esq.
Baker Donelson Bearman
P O Box 14167
Jackson, MS 39236-4167

This the 14th day of September, 2011.

George C. Nicols