

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

TRINA SULLIVAN

APPELLANT

VS.

CA NO.2010-CA-01847

KENNETH SULLIVAN

APPELLEE

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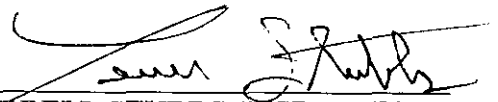

CERTIFICATE OF INTERESTED PARTIES

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 the Court of Appeals may evaluate possible disqualification or recusal.

1. Trina Sullivan Childress, Appellant/Plaintiff
2. Terrell Stubbs, Esq., counsel of record for the Appellant/Plaintiff
3. Kenneth Sullivan, Appellee/Defendant
4. Robert R. Marshall, Esq., counsel of record for the Appellee/Defendant
5. April Taylor, Esq., Guardian Ad Litem
6. The Honorable Johnny L. Williams, Chancellor

Respectfully Submitted,

TRINA SULLIVAN

By: 
TERRELL STUBBS (MSB No. )
Attorney for Trina Sullivan, Appellant

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None.

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STATEMENT OF THE ISSUES

I. WHETHER THE CHANCELLOR ERRED BY NOT FOLLOWING THE GUARDIAN AD LITEM'S RECOMMENDATION AND NOT STATING THE REASONING FOR NOT ADOPTING THE GUARDIAN AD LITEM'S RECOMMENDATION IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.

#3 II. WHETHER THE CHANCELLOR ERRED IN DETERMINING A MATERIAL CHANGE IN CIRCUMSTANCES ADVERSELY AFFECTING THE CHILD DID NOT EXIST.

#3 [III. WHETHER THE CHANCELLOR ERRED IN APPLYING THE ALBRIGHT FACTORS.

IV. WHETHER THE CHANCELLOR ERRED IN NOT ALLOWING THE CHILD TO TESTIFY OR NOT INTERVIEWING THE CHILD TO DETERMINE HER PREFERENCE OF WHICH PARENT SHOULD HAVE PRIMARY PHYSICAL CUSTODY.

V. WHETHER THE CHANCELLOR ERRED IN DETERMINING THAT IT IS IN THE BEST INTEREST OF THE CHILD FOR PRIMARY PHYSICAL CUSTODY TO REMAIN WITH THE FATHER.

VI. WHETHER THE CHANCELLOR ERRED BY ACCEPTING DR. FONTAINE AS AN EXPERT AND ALLOWING DR. FONTAINE'S OPINION TESTIMONY INTO EVIDENCE.

STATEMENT OF THE CASE

A. Nature of the Case

This matter involves a petition for modification of final judgment of divorce and or prior orders filed by Trina Sullivan, Plaintiff, in the Chancery Court of Forrest County, Mississippi against Kenneth Sullivan.

Trina Sullivan and Kenneth Sullivan were married on December 5, 2001. There was one child born of their union, Kenzie Michelle Sullivan, a female, born November 6, 2002. The parties were divorced on December 2, 2005. Kenneth Sullivan was awarded primary physical custody of their child, Kenzie, pursuant to the Final Judgment of Divorce.

Trina filed her petition for modification on March 31, 2008 asserting that there has been a material and substantial change in circumstances adversely affecting the child and it would be in the best interest of the parties' child to award Trina primary physical custody; terminate child support being paid by Trina to Kenneth; and require Kenneth to pay a reasonable sum of child support and other expenses to Trina; require Kenneth to maintain medical and hospitalization insurance on the parties' child and pay all medical, dental, hospital , doctor and drug expenses not covered by such insurance. More specifically, Trina alleged:

- (1) Kenneth failed to properly care and provide for the child;
- (2) Kenneth does not himself provide a home for the child and does not himself care for the child;
- (3) Kenneth has failed to provide a stable home environment for the child, which has adversely affected the child;
- (4) Kenneth exposed the child to circumstances, which have adversely affected the child;

- (5) Kenneth has done things to and with the child, which have adversely affected the child mentally and/or physically; and
- (6) Kenneth has been arrested and charged with a felony.

Kenneth Sullivan responded to Trina's Petition by filing a motion to dismiss, answering the same, and filing a counter-petition. Trina timely responded to Kenneth's counter-petition.

April Taylor was appointed by agreed order as guardian ad litem in behalf of Kenzie on July 21, 2008.

Kenneth's Motion to Dismiss was denied and the matter went to trial. Following the trial of this matter, the Court ruled in favor of Kenneth Sullivan finding that there has been no material change in circumstances since the original Judgment of Divorce that has adversely affected the welfare of Kenzie.

B. Course of Proceedings Below

On February 17, 2010, the parties appeared for the trial of this matter and presented evidence both oral and documentary. (T. p. 2) The hearing continued over to February 18, 2010. (T. p. 227).

On June 29, 2010, the Chancery Court of Forrest County, Mississippi, issued its Finding of Fact, Conclusions of Law and Final Judgment. (R.E. Tab 2). The same was filed with the Clerk on said date. (R. p. 000110-121). On July 7, 2010, Trina Sullivan filed her Motion to Reconsider, Alter or Amend The Findings of Facts and Conclusions of Law and Final Judgment. (R. p. 000122-124). Kenneth Sullivan filed his response on October 1, 2010. (R. p. 000127-128). On October 13, 2010, the trial court denied Trina's Motion. (R. p. 000129-130). On November 8, 2010, Trina timely filed her Notice of Appeal in this matter appealing the trial court's ruling on the Petition for Modification of Final Judgment of Divorce and or Prior Orders

and the denial of the Motion to Reconsider, Alter or Amend by order entered on October 13, 2010. (R. p. 000131-132).

C. Statement of Facts

Trina Sullivan and Kenneth Sullivan were married on December 5, 2001. (R. p.000016). There was one child born of their union, Kenzie Michelle Sullivan, a female, born November 6, 2002. (R. p.000014). The parties were divorced on December 2, 2005. (R. p.000013-24). Kenneth Sullivan was awarded primary physical custody of their child, Kenzie, pursuant to the Final Judgment of Divorce. (R. p.000013-24).

In March 2006, Kenneth and Kenzie moved from their house in Hattiesburg, Mississippi and moved in with Kenneth's parents in Wesson, Mississippi. (T. p. 20). Kenneth and Kenzie still lived there at the time of the trial of this matter on February 17, 2010. (T. p. 20). Residing in the Sullivan family home at the time of trial were Dale and Nancy Sullivan, Kenneth's parents; Kamryn Sullivan, Kenneth's sixteen (16) year-old sister; Kenneth Sullivan; and Kenzie Sullivan. (T. p. 20). Kamryn and Kenzie each have their own bedrooms on the second story of the Sullivan house. However, Kenneth sleeps in a makeshift bedroom at the top of the stairs. (T. p. 80, 175). There is no door to his room and the walls are made up of office partition walls. (T. p. 80). Kenzie has to walk through Kenneth's bedroom to get to her room. (T. p. 84).

Kenneth stated that he would have his own residence during the divorce proceedings. (T. p. 374 – 375). Kenneth relies on his parents and sixteen year old sister to provide care for Kenzie. (T. p. 236 -237, 293 -297). Kenneth worked at the University of Mississippi Medical Center in Jackson, Mississippi at the time of the hearing on this matter. He commuted every day from Wesson, Mississippi to Jackson, Mississippi for work. (T. p. 28).

In June 2007, Trina married Stephen Childress. (T. p. 118). Trina and Stephen reside in a two-story house with 4 bedrooms, 3 bathrooms in Mt. Olive, Mississippi with Stephen's two children, Kyle, 5 years old, and Olivia, 7 years old. (T. p. 118). Kenzie has her own room at the Childress house. (T. p. 120). Trina is a stay-at-home stepmother. Stephen works for AT&T earning approximately \$75,000 annually, and he supports the family with this income. (T. p. 131).

Trina and Steven have used drugs in the past and once worked as confidential informants for law enforcement. They both have not performed work as a confidential informant since 2007. (T. p. 142).

After the divorce, Kenneth has made a series of poor decisions that have had a material adverse impact on Kenzie and even put her life at risk. This behavior includes, Kenneth's tendency to drink and drive with Kenzie, his tendency to allow Kenzie to ride in his lap in his vehicle unrestrained, his acquaintance with drug dealers, and improper sexual encounters.

Shortly after the divorce, Kenneth threw a party celebrating his divorce and award of custody. Kenneth invited and allowed known drug dealers, Jason Lee and Rick Harper, to attend the party. (T. p. 29-34). Jason Lee and Rick Harper were witnesses for Kenneth in the divorce proceedings. (T. p. 272-273). Rick Harper apparently only came to the cookout to collect some money from Kenneth after testifying in Kenneth's favor in the divorce proceedings. (T. p. 272-273). David Hosey, a friend of Kenneth and Rick, was in the vehicle with Rick Harper when Kenneth gave him an envelope of money. (T. p. 96-97). David Hosey also testified to having done crystal meth with Kenneth, and that he no longer associates with Kenneth because "he is trouble". (T. p. 98, 109).

Many witnesses testified that Kenneth drinks and drives, including Kenneth himself. (T. p. 54-56, 219-223, 260-261). Kenneth admitted to having beer with his friends and his girlfriend

and then driving himself home. (T. p. 54-56). He also purchased alcohol for Hannah Thorton, a nineteen (19) year old girl he was dating at the time. (T. p. 222-223). Hannah testified that Kenneth drank and drove seventy percent (70%) of the time they were together. (T. p. 219-223). Kenneth also admitted to driving with Kenzie in the vehicle after drinking alcohol. (T. p. 54-56, 282). Kenzie herself reported to the Guardian Ad Litem that she has been in the vehicle with Kenneth while he was drinking alcohol. (T. p. 379). Additionally, Kenneth drives Kenzie around in his lap unrestrained. (T. p. 168-169, 233-234, 290, 376).

On or around Halloween 2008, Kenneth, thirty-two years old at the time, snuck a nineteen-year-old girl, Hannah, into his parents' home and had sex with her while the rest of the family was sleeping. (T. p. 73-79, 308-311). Both Kenzie and his sixteen (16) year old sister, Kamryn, were sleeping on the same floor and just down the hall while this was taking place in Kenneth's open, makeshift bedroom. (T. p. 73-79, 308-311, 336-339).

Kenneth's bedroom is a sitting area at the top of the stairs sectioned off with no door or ceiling. Kamryn and Kenzie each have to walk through Kenneth's room to get to their own rooms. (T. p. 375). Kamryn and Kenzie could have heard the actions or walked through Kenneth's room while the sexual act was taking place. (T. p. 308-310). Kenneth's mother, Nancy, discovered them both in his bed the next morning. (T. p. 319-322). Kamryn saw Hannah in the house the next morning. (T. p. 216).

Kenneth began dating Hannah Thorton when she was nineteen years old in October of 2007, and their relationship continued until October 2008. (T. p. 62, 210-215). One weekend Kenneth, Hannah, and Kenzie took a trip to Hattiesburg and Petal. That Friday night, they all stayed in one room together at a Motel 6. (T. p. 65-70, 217). Kenneth and Hannah both stated that they slept in separate beds at the motel. (T. p. 65-70, 217, 310-311). However, Kenzie reported to the GAL that she laid in the bed between Kenneth and Hannah that night. (T. p. 380).

That Saturday night, Kenneth, Hannah, and Kenzie stayed at Kenneth's friend's house in Petal. Kenzie slept in separate room apart from Kenneth and Hannah. (T. p. 72-73).

After the divorce, Trina retained physical custody of Kenzie after the Court awarded Kenneth primary physical custody. Instead of going through the proper legal procedure to regain custody, Kenneth met with Jason Lee, Rick Harper, and David Hosey at Rick Harper's house to discuss kidnapping Kenzie from Trina's house. (T. p. 98, 108-109). Kenneth was arrested on charges for conspiracy to kidnap, however, those charges were later dropped. (T. p. 111, 258).

Nancy Sullivan, Kenneth's mother, is an assistant principal at the school Kenzie attends in Wesson, Mississippi. (T. p. 318). The school allows parents to visit with their children during school hours, however, the administration would not allow Trina on the campus to visit with Kenzie during school hours. (T. p. 172-173). Nancy Sullivan attempted to explain that it is a school policy that the non-custodial parent has to be listed on an emergency card before being allowed on campus. (T. p. 363-366). However, Nancy later admitted that she was not aware of this policy actually being in the school handbook. (T. p. 365-366).

In April 2008, Kenneth took Kenzie to see John Fontaine, PhD psychology, because he had concerns that she may be experiencing anxiety due to the divorce. (T. p. 197). Dr. Fontaine diagnosed Kenzie with adjustment disorder and anxious mood on this initial visit. (T. p. 199-200). This was based on his interview with Kenneth and his interviews of and observations of Kenzie at this initial visit. (T. p. 199-200). Dr. Fontaine saw Kenzie on two or three more occasions in 2008 and again in January 2010. (T. p. 199-201). However, Kenneth failed to inform Dr. Fontaine of his reckless behavior, association with drug dealers, and improper sexual encounters. (T. p. 206).

Dr. Fontaine did not attempt to contact Trina on any occasion to interview her during his sessions with Kenzie. (T. p. 198, 202). Dr. Fontiane did not contact Trina until February 8,

2010, nearly two years after the initial visit and approximately 9 days before the hearing of this matter. (T. p. 198, 202). Trina informed Dr. Fontaine of Kenneth's behavior and her concerns. (T. p. 194).

Dr. Fontaine testified on Kenneth's behalf at the hearing on this matter. (T. p. 181). Dr. Fontaine was tendered as an expert in the field of psychology and the court accepted him as such over the objection of Trina's counsel. (T. p. 181-186). Although Dr. Fontaine admitted that a thorough investigation into the circumstances surrounding Kenzie was not conducted, Dr. Fontaine stated that in his opinion Kenneth and his family had not caused any adverse effects on Kenzie. (T. p. 190, 196). Dr. Fontaine stated that the American Psychological Association encourages that both parents be involved in the evaluation process. (T. p. 198). He also admitted that he should have spent more time with Trina. (T. p. 196). After hearing all of the testimony presented at the hearing of this matter on February 17, 2010, Dr. Fontaine stated that in his opinion, Kenneth's behavior was not detrimental to Kenzie. (T. p. 203 -206).

On May 5, 2008, Trina filed a Motion to Appoint Guardian Ad Litem. (R. p. 000072-74). On July 21, 2008, the Court appointed April Taylor as Guardian Ad Litem ("GAL") in behalf of Kenzie Sullivan. (R. p. 000097-98).

The GAL conducted home visits at the home of Trina and Stephen Childress and the Sullivan residence. The GAL interviewed Kenzie separately at both home visits. The GAL also interviewed Dr. Fontaine and Kenzie's kindergarten teacher. (T. p. 373).

In her initial report, the GAL found that a material change in circumstances adversely affecting the child did not exist, and custody should remain with Kenneth. (T. p. 373). However, after hearing and considering the testimony given during the trial of this matter, the GAL recommended that it would be in Kenzie's best interest to award Trina primary physical custody. (T. p. 374-382). The GAL found that though Kenneth's conduct has not directly affected

Kenzie's mental health, rather Kenneth's conduct since the divorce establishes a pattern of poor judgment and immaturity where he puts his own wants and self-gratification over the safety and well-being of not only his child but over a minor girlfriend (Hannah) and his own sister. (T. p. 378). The GAL's findings were based on:

- (1) The fungal infection of Kenzie's finger that went untreated while in Kenneth's custody. (T. p. 374)
- (2) The fact that Kenneth stated during the divorce proceedings that he would have his own residence, and then moved in with his parents three months after the divorce where he still resides with Kenzie. (T. p. 374, 375).
- (3) Kenzie and Kamryn have to walk through Kenneth's "bedroom" to get their own. (T. p. 375).
- (4) Kenneth stated that he was going to get his own residence, but has failed to do so. (T. p. 375).
- (5) Kenzie informed the GAL of at least one instance where Kenzie and Kamryn were in a vehicle with Kenneth while he was drinking and driving. (T. p. 375-376).
- (6) Kenneth drinking and driving with passengers and providing alcohol to his minor girlfriend at the time. (T. p. 376).
- (7) Kenneth allowing Kenzie to ride in his lap while driving and in other vehicle's unrestrained. (T. p. 376).
- (8) Kenneth sneaking his minor girlfriend into his parents' house at night and having sex with her outside Kenzie and Kamryn's rooms. (T. p. 377).
- (9) Kenneth's association with known drug dealers (T. p. 377-378).
- (10) Kenneth relies on his parents to help him make responsible decisions. (T. p. 388).

(R.E. Tab 4 p. 374 – 378)

The GAL stated that these circumstances are inherently adverse to the best interest of Kenzie by instilling in her that it is appropriate to drink and drive, have premarital sex, and that certain laws do not apply when you are having fun. (T. p. 380-389; R.E. Tab 4 p. 380-389). The GAL found that under *Riley v. Doerner*, it would be in the best interest of Kenzie to transfer primary physical custody to Trina. (T. p. 389; R.E. Tab 4 p. 389).

The GAL also testified at trial that Dr. Fontaine's finding were unreliable because he did not observe Trina and Kenzie together and only interviewed Trina ten (10) days before the trial. (T. p. 382-383; R.E. Tab 4 p. 382-383).

SUMMARY OF THE ARGUMENT

The Guardian Ad Litem appointed in this case was in the best position to determine what was in the best interest of Kenzie. After the trial of this matter, the GAL determined that it would be in Kenzie's best interest to award Trina primary physical custody. Kenneth's behavior clearly endangers the life of Kenzie, as recognized by the chancellor. The chancellor erred by not adopting the GAL's recommendation. Additionally, the chancellor erred by not stating the reasoning for not adopting the GAL's recommendation in the court's Findings of Fact and Conclusions of Law.

The chancellor, in his Findings of Fact and Conclusions of Law felt it necessary to recognize and warn Kenneth that his drinking and driving and immoral behavior "could very well prove fatal to the well-being of Kenzie." That recognition alone by the chancellor should be grounds for reversal. Notwithstanding the fact that Kenneth's behavior could be fatal to Kenzie, the totality of the evidence indicates that there is an adverse material change in the custodial home and it is in the best interest of Kenzie to modify custody in favor of Trina.

The chancellor also erred in his application of the *Albright* factors, as the majority if not all of the factors clearly favor Trina. Additionally, the chancellor erred by not allowing Kenzie, seven (7) years old at the time, to testify or at a minimum interview her in chambers.

The chancellor erred by accepting Dr. Fontaine as an expert and allowing his testimony into evidence. Dr. Fontaine was not provided as a potential witness for Kenneth's case in chief, nor was he designated as an expert as required by the Uniform Chancery Court Rules. Furthermore, Dr. Fontaine's opinion testimony did not meet the requirements of Miss. R. Evid. 702, and, therefore, should have been excluded from evidence.

The record evidence and findings by the chancellor clearly indicate that there is a substantial material change adversely affecting Kenzie, and it is in her best interest to award primary physical custody to her mother, Trina. Therefore, this Court must reverse the trial court's decision and award Trina primary physical custody of her daughter, Kenzie, terminate Trina's child support obligations and remand for a determination of Kenneth's child support obligations.

ARGUMENT

Standard of Review

"The standard of review employed in domestic relations cases is limited to the substantial evidence/manifest error rule. *Mosely v. Atterberry*, 819 So.2d 1268, 1272 (Miss. 2002). The chancellor's findings will not be disturbed unless the trial court was manifestly wrong, clearly erroneous, or applied an erroneous legal standard. *Cooper v. Ingram*, 814 So.2d 166, 167 (Miss. Ct. App. 2002).

- I. THE CHANCELLOR ERRED BY NOT FOLLOWING THE GUARDIAN AD LITEM'S RECOMMENDATION AND NOT STATING THE REASONING FOR NOT ADOPTING THE GUARDIAN AD LITEM'S RECOMMENDATION IN ITS FINDINGS OF FACT AND CONCLUSIONS OF LAW.**

The Guardian Ad Litem appointed in this case was in the best position to determine what was in the best interest of Kenzie. After the trial of this matter, the GAL determined that it would be in Kenzie's best interest to award Trina primary physical custody. Kenneth's behavior clearly endangers the life of Kenzie, as recognized by the chancellor. The chancellor erred by not adopting the GAL's recommendation. Additionally, the chancellor erred by not stating the reasoning for not adopting the GAL's recommendation in the court's Findings of Fact and Conclusions of Law.

Although a chancellor is not required to defer to the findings of the guardian ad litem, it is mandatory that the chancellor include at least a summary review of the qualifications and recommendations of the guardian ad litem in the court's findings of fact and conclusions of law. *Gainey v. Edington*, 24 So.3d 333, 340 (Miss. Ct. App. 2009). If "a chancellor's ruling is contrary to the recommendation of a statutorily required guardian ad litem, the reasons for not adopting the guardian ad litem's recommendation shall be stated by the court in the findings of fact and conclusions of law." *Gainey v. Edington*, 24 So.3d 333, 340 (Miss. Ct. App. 2009) (quoting *S.N.C. v. J.R.D., Jr.*, 755 So.2d 1077, 1082 (Miss. 2000)).

On May 5, 2008, Trina filed a Motion to Appoint Guardian Ad Litem. (R. p. 000072-74). On July 21, 2008, the Court appointed April Taylor as Guardian Ad Litem ("GAL") in behalf of Kenzie Sullivan. (R. p. 000097-98).

The GAL conducted home visits at the home of Trina and Stephen Childress and the Sullivan residence. The GAL interviewed Kenzie separately at both home visits. The GAL also interviewed Dr. Fontaine and Kenzie's kindergarten teacher. (T. p. 373; R.E. Tab 4 p. 373).

In her initial report, the GAL found that a material change in circumstances adversely affecting the child did not exist, and custody should remain with Kenneth. (T. p. 373; R.E. Tab 4 p. 373). However, after hearing and considering the testimony given during the trial of this

matter, the GAL recommended that it would be in Kenzie's best interest to award Trina primary physical custody. (T. p. 374-382; R.E. Tab 4 p. 374-382).

The GAL found that though Kenneth's conduct has not directly affected Kenzie's mental health, rather Kenneth's conduct since the divorce establishes a pattern of poor judgment and immaturity where he puts his own wants and self-gratification over the safety and well-being of not only his child but over a minor girlfriend (Hannah) and his own sister. (T. p. 378). The GAL's findings were based on:

- (1) The fungal infection of Kenzie's finger that went untreated while in Kenneth's custody. (T. p. 374)
- (2) The fact that Kenneth stated during the divorce proceedings that he would have his own residence, and then moved in with his parents three months after the divorce where he still resides with Kenzie. (T. p. 374, 375).
- (3) Kenzie and Kamryn have to walk through Kenneth's "bedroom" to get their own. (T. p. 375).
- (4) Kenneth stated that he was going to get his own residence, but has failed to do so. (T. p. 375).
- (5) Kenzie informed the GAL of at least one instance where Kenzie and Kamryn were in a vehicle with Kenneth while he was drinking and driving. (T. p. 375-376).
- (6) Kenneth drinking and driving with passengers and providing alcohol to his minor girlfriend at the time. (T. p. 376).
- (7) Kenneth allowing Kenzie to ride in his lap while driving and in other vehicle's unrestrained. (T. p. 376).

- (8) Kenneth sneaking his minor girlfriend into his parents' house at night and having sex with her outside Kenzie and Kamryn's rooms. (T. p. 377).
 - (9) Kenneth's association with known drug dealers (T. p. 377-378).
 - (10) Kenneth relies on his parents to help him make responsible decisions. (T. p. 388).
- (R.E. Tab 4 p. 375-388).

The GAL testified that these circumstances are inherently adverse to the best interest of Kenzie by instilling in her that it is appropriate to drink and drive, have premarital sex, and that certain laws do not apply when you are having fun. (T. p. 380-389; R.E. Tab 4 p. 380-389). The GAL found that under *Riley v. Doerner*, it would be in the best interest of Kenzie to transfer primary physical custody to Trina. (T. p. 389; R.E. Tab 4 p. 389).

The chancellor, however, did not follow the GAL's recommendation. According to *Gainey v. Edington*, the chancellor shall state the reasons for not adopting the guardian ad litem's recommendation in the court's findings of fact and conclusions of law. The chancellor's failure to follow the GAL's recommendation and his failure to state his reasoning for not following said recommendation was erroneous, and, therefore, his Court must reverse the trial court's decision and award Trina primary physical custody of Kenzie.

II. THE CHANCELLOR ERRED IN DETERMINING A MATERIAL CHANGE IN CIRCUMSTANCES ADVERSELY AFFECTING THE CHILD DID NOT EXIST, AND NOT ALLOWING KENZIE TO TESTIFY OR INTERVIEW HER IN CHAMBERS.

The chancellor, in his Findings of Fact and Conclusions of Law felt it necessary to recognize and warn Kenneth that his drinking and driving and immoral behavior "could very well prove fatal to the well-being of Kenzie." That recognition alone by the chancellor should be grounds for reversal. Notwithstanding the fact that Kenneth's behavior could be fatal to Kenzie, the totality of the evidence indicates that there is an adverse material change in the custodial

home and it is in the best interest of Kenzie to modify custody in favor of Trina. Therefore, this Court must reverse the trial court's decision and award Trina primary physical custody of Kenzie.

In order for a chancellor to modify a child custody decree, the noncustodial parent must prove the following: "(1) that a material change of circumstances has occurred in the custodial home since the most recent custody decree, (2) that the change adversely affects the child, and (3) that modification is in the best interest of the child." *Gainey v. Edington*, 24 So.3d 333,336 (Miss. Ct. App. 2009). However, the polestar consideration in any child-custody matter is the best interest and welfare of the child. *Minter v. Minter*, 29 So.3d 840, 847 (Miss. Ct. App. 2009) *cert. denied* 29 So.3d 774 (Miss. 2010). "A change in circumstances is a change in the overall living conditions in which the child is found, and the totality of the circumstances must be considered." *Gainey v. Edington*, 24 So.3d 333,336 (Miss. Ct. App. 2009) (quoting *Tucker v. Tucker*, 453 So.2d 1294, 1297 (Miss. 1984). "Adverse effects can be shown where it is reasonably foreseeable that a child will suffer adverse effects because a child's present custodial environment is clearly detrimental to his or her well-being." *Gainey v. Edington*, 24 So.3d 333,336 (Miss. Ct. App. 2009) (quoting *Gilliland v. Gilliland*, 984 So.2d 364, 368 (Miss. Ct. App. 2008).

Moreover, "when the environment provided by the custodial parent is found to be adverse to the child's best interest, and that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly." *Riley v. Doerner*, 677 So.2d 740, 744 (Miss. 1996) "The test for custody modification need not be applied so rigidly, nor in such a formalistic manner so as to preclude the chancellor from rendering a decision appropriate to the facts of an individual case." *Riley v. Doerner*, 677 So.2d 740, 745 (Miss. 1996).

The chancellor acknowledged and discussed in detail Kenneth's tendency to drink and drive, his acquaintances with possible drug dealers, and improper sexual encounters (R. 000111-000113, 120). However, the chancellor did not find a material change in circumstances in the custodial parent adverse to the welfare of Kenzie after considering the totality of the evidence, the *Albright* factors, and the best interest of the child. (R. 000120).

But, the chancellor felt that it was "necessary to warn Kenneth ...that his drinking and driving, and immoral behavior is severely frowned upon by the Court. This type of behavior could very well prove fatal to the well being of Kenzie, if not rectified." (R. p. 000120).

That statement alone by the chancellor acknowledges that Kenzie's well being is constantly in jeopardy in Kenneth's custody. Moreover, that statement by the trial court alone should be grounds for reversing the trial court's decision under any test for custody modification and awarding Trina full physical custody of Kenzie.

The facts clearly indicate that a material change in circumstances in the custodial home adversely affecting Kenzie exists and its in her best interest that physical custody be modified in favor of Trina. Those facts are as follows:

- (1) Three or four months after their divorce, Kenneth, 32 years old at the time moved in with his parents and sixteen year old sister and still resides there unto this day. (T. p. 20)
- (2) Kenneth's sexual misconduct outside his daughter and sister's room at his parent's home. (T. p. 73-80, 73-79, 308-311, 336-339).
- (3) Kenneth associates with admitted and known drug dealers. He loaned Rick Harper, an admitted drug user, money at a cookout where his entire immediate family was present. He allowed Kenzie to be photographed with Jason Lee, a known drug dealer. (T. p. 42-45, 96-97, 272-273).

- (4) Kenneth admitted to drinking then driving with Kenzie in the vehicle. Kenzie reported to the GAL that she has been in a vehicle with Kenneth while he was drinking alcohol. Hannah Thorton, a minor, testified to the same and that Kenneth drank and drove with her 70% of the time in a vehicle. (T. p. 54-56, 219-223, 375-376).
- (5) Kenneth allowed a fungal infection in one of Kenzie's fingers to fester and go untreated. (T. p. 235, 166-167, 374).

Although the chancellor found that a material change in circumstances did not exist and there were no adverse effects on Kenzie, the chancellor went on to analyze and make findings under *Albright* factors. The chancellor erred in applying and analyzing the *Albright* factors in favor of Kenneth. The errors committed in the chancellor's application will be discussed under each *Albright* factor below as well the error of not interviewing the child or allowing her to testify:

a. *Age, Health, and Sex of the Children:*

The chancellor did not err in finding that this factor favored Trina because Kenzie is the only child at issue and she was a seven (7) year old female at the time.

b. *Continuity of Care:*

The chancellor erred in finding that this factor favors Kenneth. This factor clearly favors Trina. Both parents have exercised care and custody of Kenzie at different times in her life.

The chancellor's decision on this factor was solely based on the fact that Kenneth had primary care and custody since the couple's divorce. However, the chancellor failed to consider Trina's parenting skills and the more stable home environment she can provide; which is an appropriate consideration under this factor.

See Deborah H. Bell, *Bell on Mississippi Family Law* 105 (2004) citing *Clay v. Clay*, 837 So. 2d 215, 218 (Miss. Ct. App. 2003). Additionally, “[a] parent who claims to be the primary caretaker will not be favored if primary care was actually provided by a third-party. *Id* (citing *Divers v. Divers*, 856 So. 2d 370, 374 (Miss. Ct. App. 2003). There was record evidence that demonstrated that Kenneth relied on his parents and his teenage sister to care for Kenzie. (R. p. 000116; T. p. 295-297; R.E. Tab 2 p. 7).

c. *Parenting Skills:*

The chancellor did not err in finding that this factor favors Trina. Trina is a stay at home mother, who cares for her two-stepchildren. Trina testified to keeping a schedule for the children who are in her care, shops for the kids, and has “girls’ days” with Kenzie. (R. p. 000116; T. p. 127; R.E. Tab 2 p. 7).

The chancellor recognized there was minimal testimony indicating Kenneth’s “good parenting skills”, there was ample testimony showing the reckless behavior and bad habits of Kenneth. Therefore, the chancellor was correct in finding this factor favors Trina. (R.E. Tab 2 p. 7).

d. *Willingness and Capacity to Provide Primary Care:*

The chancellor erred in finding that this factor favors Kenneth. The chancellor’s reasoning under this factor clearly favors Trina, however, he found it favors Kenneth because he is gone for most of the day for work, his father is retired and his mother is the assistant principal at the school where Kenzie attends. (R.E. Tab 2 p. 8).

“A parent who claims to be the primary caretaker will not be favored if primary care was actually provided by a third-party.” *Id*.

Trina is a stay-at-home mother and can provide Kenzie with continuous care. However, the chancellor held this against Trina in stating that Trina has absolutely no income and is completely financially dependent. (R.E. Tab 2 p. 8). It is erroneous and discriminatory for the chancellor to consider Trina's position as a stay-at-home mother against her. In *Cavett v. Cavett*, 744 So.2d 372, 377 (Miss. Ct. App. 1999), a homemaker/mother was favored over a working father because of her ability to provide primary care.

e. *Employment of the Parent and Responsibilities of Employment:*

The chancellor erred in finding this factor was neutral. Analysis of this factor should be focused on the suitability of a parent's job for providing childcare.

Deborah H. Bell, *Bell on Mississippi Family Law* 107 (2004). "The fact that one parent's work schedule allows more time with children weighs in favor of that parent." *Id* (citing *Massey v. Huggins*, 799 So.2d 902, 906-07 (Miss. Ct. App. 2001); *Moak v. Moak*, 631 So.2d 196, 198 (Miss. 1994); *Ivy v. Ivy*, 863 So.2d 1010, 1014 (Miss. Ct. App. 2004).

The chancellor's analysis under this factor was erroneous. The chancellor acknowledged that Trina would be available to Kenzie all hours of the day and night because she was a stay-at-home mother, but held the fact that she chose not to work and was supported by her husband against her. (R.E. Tab 2 p. 8).

Kenneth, on the other hand, was/is employed with the University of Mississippi Medical Center in Jackson. His hours are 8:00 a.m. to 5:00 p.m. and he must commute every day to work from Wesson, Mississippi. The chancellor seems to base his finding on the fact that Kenneth's parents are available to care for Kenzie during the workday. This reasoning is erroneous because the court should not

consider the care provided by third parties. Deborah H. Bell, *Bell on Mississippi Family Law* 105 (2004) (citing *Divers v. Divers*, 856 So. 2d 370, 374 (Miss. Ct. App. 2003)).

f. *Mental and Physical Health and Age of the Parents:*

The chancellor was erroneous in finding this factor is neutral. This factor clearly favors Trina given the reckless behavior and bad habits recognized by the chancellor. (R.E. Tab 2 p. 2-4, 11). The chancellor found that Kenneth's behavior "could very well prove fatal to the well-being of Kenzie." (R.E. Tab 2 p. 11). Courts have awarded custody based on conduct that would very well not prove fatal to a child.

g. *Emotional Ties with the Parent and Child:*

The chancellor was erroneous in finding this factor is neutral. This factor clearly favors Trina because Kenzie is now an eight (8) year old female that has a good relationship with her mother. The chancellor failed to consider this fact in his analysis, also failed to interview Kenzie in chambers or on the witness stand.

h. *Moral Fitness of the Parents:*

The chancellor erred in finding that this factor favors Kenneth. This factor clearly favors Trina.

The chancellor spent much of the time in his Findings of Fact and Conclusions of Law chastising Kenneth for his conduct of among other things, associating with drug dealers, using drugs, drinking and driving with Kenzie, questionable morals. (R.E. Tab 2 p. 2-11). The chancellor also states in his analysis under this factor that "Kenneth seems to be unstable by himself, and the fact that he is residing in the same home as his parents and sister could work in his favor." (R. E. Tab 2 p. 9). Kenneth

is in his mid-thirties in years of age. The fact that Kenneth's parents are required to stabilize him should weigh against him under this factor.

The chancellor found that Trina appears to be more stable at this point in her life, disassociated with drug dealers from her past, has married, lives in a nice home, and cares for her two step-children. (R.E. Tab 2 p. 9). However, the chancellor found Kenneth to be the more morally fit parent, which is erroneous.

i. *Home, School, and Work Record of the Children:*

The chancellor erred in finding that this factor favors Kenneth. This factor should at most be neutral. Kenzie would have access to a good school and all other extracurricular activities if she lived with her mother.

j. *Preference of the Children at an Appropriate Age:*

The chancellor erred in finding this factor irrelevant and neutral. The chancellor simply held that Kenzie was not of sufficient age. The chancellor also erred in not allowing Kenzie to testify or conduct an interview of the child in chambers.

Under the rules of evidence, every person is competent to be a witness. Miss. R. Evid. 601. The chancellor held that because Kenzie was seven years old at the time, he would not allow her to testify. (T. p. 85-86). The chancellor did not make any other findings for not allowing Kenzie to testify or at least interview her in his chambers.

The chancellor also erred in not allowing Trina's counsel to make a proper offer of proof. The chancellor did not allow Trina's counsel an opportunity to examine Kenzie on the record. (T. p. 85 – 91). The chancellor only allowed Trina's counsel to make an offer as to what Kenzie would testify to. Trina's counsel made an offer of proof stating that Kenzie's testimony would demonstrate that:

- (1) Kenzie is scared of her grandmother;
 - (2) Kenneth tells her to say bad things about her mother;
 - (3) Kenzie has ridden with Kenneth while he was drinking and driving;
 - (4) Kenzie has slept in the same bed with Kenneth and one of his girlfriends.
- (T. p. 86-91).

k. *Stability of the Home Environment:*

The chancellor erred in finding this factor to be neutral. The chancellor's analysis and conclusion contradict one another. This factor clearly favors Trina because the chancellor found Kenneth to be "unstable" in his analysis under this factor and requires the constant influence and care of his parents at thirty-three years of age. (R. p. 000119; R.E. Tab 2 p. 10).

Again, the chancellor held the fact that Trina is a stay-at-home mother for two stepchildren against her. This is contrary to case law and is error. Courts have consistently favored a parent who is remarried with a stable home life and other children in the home over a parent with the lack thereof. *See Richardson v. Richardson*, 790 So. 2d 239, 242 (Miss. Ct. App. 2001); *Stark v. Anderson*, 748 So.2d 838, 842-43 (Miss. Ct. App. 1999).

Moreover, the court should not consider the care provided by third parties in its best-interest-of-the-child analysis. Deborah H. Bell, *Bell on Mississippi Family Law* 105 (2004) (citing *Divers v. Divers*, 856 So. 2d 370, 374 (Miss. Ct. App. 2003).

l. *Other Relevant Factors:*

The chancellor erred in not considering Kenneth and his family's intentional interference with Trina's visitation with Kenzie at school. (T. p. 172-173, 363-366; R.E. Tab 2 p. 4). Parental interference with the other parent's relationship with a

child is an appropriate consideration under this factor. *See Ferguson v. Ferguson*, 639 So. 2d 921, 932 (Miss. 1994); *Mabus v. Mabus*, 890 so.2d 806, 818 (Miss. 2003)

Although the chancellor failed to consider Kenneth and his family's intentional interference with Trina's right to visit with Kenzie at school under this factor, he did find the testimony surrounding the incident "disturbing". (R. p. 000113; R.E. Tab 2 p. 4).

These facts should have favored Trina, therefore, the chancellor committed error by not considering these facts in his *Albright* analysis.

The standard for modifying custody is well settled, and the polestar consideration is the best interest of the child. The record evidence in this matter clearly demands a modification of primary physical custody in favor of Trina under any standard or test. Kenneth's behavior is so reckless and immoral that the chancellor was compelled to warn that his behavior could be fatal to Kenzie. Moreover, the majority, if not all, of the *Albright* factors favor the mother, Trina. Therefore, this Court must reverse the trial court's decision and award Trina primary physical custody of Kenzie.

III. THE CHANCELLOR ERRED BY ACCEPTING DR. FONTAINE AS AN EXPERT AND ALLOWING DR. FONTAINE'S OPINION TESTIMONY INTO EVIDENCE BECAUSE HE WAS NOT DESIGNATED AS AN EXPERT WITNESS AND HIS OPINION TESTIMONY WAS INADMISSIBLE

The chancellor erred by accepting Dr. Fontaine as an expert and allowing his testimony into evidence. Dr. Fontaine was not provided as a potential witness for Kenneth's case in chief, nor was he designated as an expert as required by the Uniform Chancery Court Rules. Furthermore, Dr. Fontaine's opinion testimony did not meet the requirements of Miss. R. Evid. 702, and, therefore, should have been excluded from evidence. However, the chancellor accepted Dr. Fontaine as an expert, and Dr. Fontaine concluded based upon his interviews with

Kenneth, Kenzie, and Trina and the testimony heard at trial that Kenneth's conduct and his family have not caused any adverse effects on Kenzie. (T. p. 190).

Mississippi Rule of Civil Procedure 26(f)(1) states in part:

...A party is under a duty seasonably to supplement that party's response with respect to any question directly addressed to (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the testimony.

Uniform Chancery Court Rule 1.10 (A) states:

...Absent special circumstances the court will not allow testimony at trial of an expert witness who was not designated as an expert witness to all attorneys of record at least sixty days before trial.

On April 10, 2008, Trina propounded her first set of interrogatories to Kenneth.

Interrogatory #7 stated: Identify each person whom you expect to call as an expert witness at the trial; state the subject matter to which the expert is expected to testify; state the substance of facts and opinions to which the expert is expected to testify; and provide a summary of the grounds for each opinion.

On May 16, 2008, Kenneth responded by stating: "Respondent has not made a determination as to who will be called as an expert. This response will be supplemented once the determination is made.

Kenneth took Kenzie to see Dr. Fontaine on 3 occasions in April, May, and June of 2008. (T. p. 197, 199-200).

An Agreed Order setting this matter for trial on the 17th and 18th of February 2010 was entered on October 12, 2009.

Dr. Fontaine was never designated as an expert in the record as required by Uniform Chancery Court Rule 1.10. Dr. Fontaine was called to testify at the trial of this matter over Trina's counsel's motion in limine and objection on the grounds that Dr. Fontaine was not

provided as a witness through discovery responses per Mississippi Rules of Civil Procedure 26(f). (T. p. 2-13, 181-206). Further, there is no record evidence that Dr. Fontaine was designated as an expert 60 days before trial as required by Uniform Chancery Court Rule 1.10.

Therefore, the chancellor committed error by accepting Dr. Fontaine as an expert in Kenneth's case-in-chief in violation of the rules of civil procedure and the uniform chancery court rules.

Furthermore, for expert testimony in the form of an opinion to be admissible, Mississippi Rule of Evidence 702 requires that: (1) the testimony is "based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." Miss. R. Evid. 702.

Dr. Fontaine's testimony failed to meet any of the requirements set out in Rule 702. The facts that Dr. Fontaine based his opinion on were clearly not sufficient. He only interviewed Kenneth and Kenzie on 3 occasions in 2008. (T. p. 197, 199-200). Kenneth did not disclose any behavior that might have concerned Dr. Fontaine during any of those visits. (T. p. 194). Dr. Fontaine did not make any effort to contact Trina until 2010, nearly a year and a half after Kenzie's initial visit, when the trial of this matter was approaching and Kenneth determined that he would call Dr. Fontaine in his case-in-chief. (T. p. 194). He also admitted that he should have spent more time with Trina. (T. p. 196).

Dr. Fontaine's testimony is clearly not the product of reliable principles and methods. Dr. Fontaine testified that the American Psychological Association encourages interviewing both parents. (T. p. 198). There was nothing precluding Dr. Fontaine from interviewing Trina. In fact, Trina responded affirmatively when Dr. Fontaine attempted to contact her. Trina came to Dr. Fontaine's office at his request. (T. p. 201). He also admitted that he should have spent more time with Trina. (T. p. 196).

The GAL testified at trial that Dr. Fontaine's findings were unreliable because he did not observe Trina and Kenzie together and only interviewed Trina on one occasion ten (10) days before the trial. (T. p. 382-383).

The chancellor committed error by accepting Dr. Fontaine as an expert in Kenneth's case-in-chief in violation of the rules of civil procedure and the uniform chancery court rules. Furthermore, Dr. Fontaine's opinion testimony did not meet the requirements of Miss. R. Evid. 702, and, therefore, should have been excluded from evidence. Therefore, this Court must reverse the trial court's decision and award Trina primary physical custody of Kenzie.

CONCLUSION

The Guardian Ad Litem appointed in this case was in the best position to determine what was in the best interest of Kenzie. After the trial of this matter, the GAL determined that it would be in Kenzie's best interest to award Trina primary physical custody. Kenneth's behavior clearly endangers the life of Kenzie, as recognized by the chancellor. The chancellor erred by not adopting the GAL's recommendation. Additionally, the chancellor erred by not stating the reasoning for not adopting the GAL's recommendation in the court's Findings of Fact and Conclusions of Law.

The chancellor, in his Findings of Fact and Conclusions of Law felt it necessary to recognize and warn Kenneth that his drinking and driving and immoral behavior "could very well prove fatal to the well-being of Kenzie." That recognition alone by the chancellor should be grounds for reversal. Notwithstanding the fact that Kenneth's behavior could be fatal to Kenzie, the totality of the evidence indicates that there is an adverse material change in the custodial home and it is in the best interest of Kenzie to modify custody in favor of Trina.

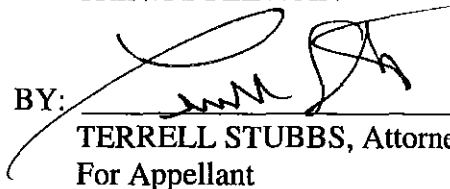
The chancellor also erred in his application of the *Albright* factors, as the majority if not all of the factors clearly favor Trina. Additionally, the chancellor erred by not allowing Kenzie, seven (7) years old at the time, to testify or at a minimum interview her in chambers.

The chancellor erred by accepting Dr. Fontaine as an expert and allowing his testimony into evidence. Dr. Fontaine was not provided as a potential witness for Kenneth's case in chief, nor was he designated as an expert as required by the Uniform Chancery Court Rules. Furthermore, Dr. Fontaine's opinion testimony did not meet the requirements of Miss. R. Evid. 702, and, therefore, should have been excluded from evidence.

The record evidence and findings by the chancellor clearly indicate that there is a substantial material change adversely affecting Kenzie, and it is in her best interest to award primary physical custody to her mother, Trina. Therefore, this Court must reverse the trial court's decision and award Trina primary physical custody of her daughter, Kenzie, terminate Trina's child support obligations and remand for a determination of Kenneth's child support obligations.

Respectfully submitted,

TRINA SULLIVAN

BY: 
TERRELL STUBBS, Attorney
For Appellant

CERTIFICATE OF SERVICE

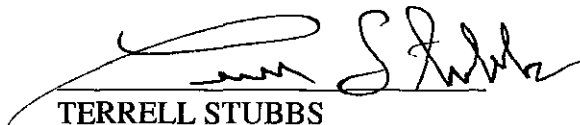
I, TERRELL STUBBS, attorney of record for APPELLANT, TRINA SULLIVAN, do hereby certify that I have this day mailed postage prepaid a true and correct copy of the above and foregoing Brief of Appellant to the following:

Robert R. Marshall, Esq.
Erik M. Lowery, P.A.
525 Corinne Street
Hattiesburg, MS 39401

Honorable Johnny L. Williams
P.O. Box 1664
Hattiesburg, MS 39403

April D. Taylor, Guardian Ad Litem
P.O. Box 1526
Prentiss, MS 39474

This the 8th day of Sept, 2011.



TERRELL STUBBS
ATTORNEY AT LAW
THE STUBBS LAW FIRM, PLLC
ATTORNEY FOR APPELLANT
120 W. COURT AVENUE
P.O. BOX 157
MENDENHALL, MS 39114
601-847-4811-Telephone
601-847-5938-Fax
MB# [REDACTED]
terrellstubbs@thestubbslawfirm.com