

**SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI**

GEORGE CURTIS BLAKELY, JR.

APPELLANT

VERSUS

NO. 2010-CA-01948

TEENA LYNNETTE WILLIAMS BLAKELY

APPELLEE

**APPEAL FROM THE CHANCERY COURT
OF GRENADA COUNTY, MISSISSIPPI
CAUSE NO. 08-10-236 (VC)**

BRIEF OF THE APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

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. Honorable Vicki B. Cobb
Chancellor
2. George Curtis Blakely, Jr.
Appellant
3. Kent E. Smith, Esq.
Attorney for Appellant
4. Teena Lynnette Williams Blakely
Appellee
5. Luther P. Crull, Jr.
Attorney for Appellee

THIS THE 14th day of October, 2011.

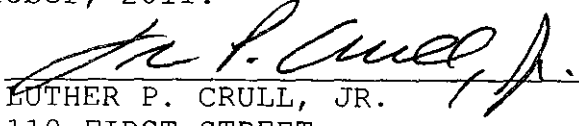

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REFERENCES IN BRIEF TO PARTIES

Appellant George Curtis Blakely, Jr. shall be hereinafter referred to as "George". Appellee Teena Lynnette Williams Blakely shall be hereinafter referred to as "Teena".

REFERENCES IN BRIEF TO TRIAL TRANSCRIPT, CLERK'S PAPERS and RECORD EXCERPTS

References herein to the trial transcript shall be designated by page as [T-__]; reference herein to the clerk's papers shall be designated as [CP-__]; and reference herein to Appellee's record excerpts shall be designated by page as [R-__].

STATEMENT OF THE CASE

This is a child custody case. This case was initiated by Teena on October 15, 2008 by filing her Complaint for Divorce and Other Relief and Petition for Temporary Relief against George. George filed responsive pleadings on January 5, 2009. Teena noticed the hearing on her Petition for Temporary Relief setting the hearing in Senatobia, Mississippi for January 12, 2009. On said date the parties daughter Kayla appeared with George and advised Teena that she would lie to hurt Teena at the temporary hearing. Teena did not want to put her daughter in a position to lie and commit perjury and, therefore, did not proceed with the temporary hearing. Although Kayla was present at the trial on the merits, Kayla did not testify to rebut Teena's testimony that Kayla said she would lie to hurt Teena.

George wilfully alienated the children from Teena and maliciously frustrated Teena's efforts to visit with the children and to have a viable relationship with them.

Teena called up the hearing on her Petition for Temporary Relief after being alienated from her children by George and on February 22, 2010, the Court entered its Temporary Order granting Teena specific visitation with the children. Paragraph 4 of the Temporary Order stated as follows:

"No issues adjudicated herein shall constitute res judicata upon the final hearing of this matter."

After completion of discovery which included written

interrogatories, requests for production and depositions of the parties and a witness, this matter was set for trial for June 16, 2010. On Motion for Continuance filed by George this matter was continued for trial until September 15, 2010.

At George's deposition taken by Teena's attorney on June 11, 2010, it was first learned that George was guilty of adultery and that he had exposed the son Kurt to his paramour-girlfriend.

On June 24, 2010, Teena filed an amendment to her Complaint for Divorce adding adultery as a ground for divorce.

On the day of trial being September 15, 2010, with George's adultery coming to light, the parties entered into a Consent to Entry of Divorce on the Ground of Irreconcilable Differences wherein the parties agreed, among other things, that they would be granted a divorce, each from the other on the ground of irreconcilable difference, that George would have custody of the parties' nineteen (19) year old daughter, and submitted to the Court for decision all other issues, including the issue of which party would exercise physical and legal custody of the parties son Kurt.

After hearing testimony of nine (9) witnesses, including the parties and the son called by George, the Court took the matter under advisement after making certain findings on the record. On September 17, 2010, the Court entered its written opinion and incorporated therein the findings of the Court made into the record on the day of trial at pages 300 through 312 of the transcript.

The Court awarded physical and legal custody of Kurt to Teena, with specific visitation awarded to George.

A Judgment of Divorce was entered consistent with the Court's adjudications.

From that Judgment George appeals to this Court.

STATEMENT OF FACTS

Teena and George were married on May 27, 1989. [T-21] [R-1]
The parties physically separated on January 28, 2009, when George assaulted Teena in the laundry room by shoving and pushing her, which caused Teena to be scared and fear for her safety. [T-23] [R-3] This was Teena's first marriage. [T-21] [R-1]

Two (2) children were born to the marriage and the parties, namely, Kayla Lynn Blakely, a daughter, born October 19, 1991 ("Kayla"); and James Kurtis Blakely, a son, born August 6, 2000 ("Kurt"). [T-22] [R-2]

Teena has been employed by the same lawyer as a legal secretary for twenty (20) years. Teena works Monday through Friday with her work hours being 8:30 a.m. to 4:30 p.m. Monday through Thursday and 8:30 a.m. to 3:00 p.m. on Friday. Her employer-attorney does no trial work so Teena is not required to work overtime nor on the weekends. [T-24] [R-4]

In the past, Teena has worked a second job to supplement the family income. George has never worked two jobs. [T-25] [R-5]

Teena is physically and mentally healthy. She does not take any medication; does not see a doctor regularly for any problem; and has no disability. [T-25] [R-5]

Teena was the primary caregiver for Kurt. When he was an infant, Teena bathed, fed and clothed Kurt. [T-26] [R-6] Teena took fifteen (15) months off work to care for Kurt when he was an

infant. **[T-27] [R-7]** When Kurt began school, Teena was the parent who made sure he was properly dressed, fed and Teena took Kurt to school. Teena helped Kurt with his homework. **[T-27] [R-7]**

Teena read to Kurt and sang nursery rhymes to him. Teena had birthday parties for Kurt and took Kurt to Christmas and Valentine parties. Teena was a hands on mother and went on school field trips with Kurt. Teena was the treasurer of the school Booster Club and worked in the concession stand at sporting events. **[T-28]**

[R-8] Teena met with Kurt's teachers. **[T-29] [R-9]**

The family attended Emanuel Baptist Church in Grenada. Teena taught Wednesday night children's choir classes for Kurt and Kayla. Teena was a member of the church choir. **[T-30] [R-10]** Teena also taught children's Sunday School and was on the children's committee which fostered children's activities at the church. **[T-31] [R-11]**

When it became known that Teena had filed for divorce, the choir director asked Teena to resign from the choir. **[T-30] [R-10]** Teena at that time left that church and now attends church regularly at the First Baptist Church in Water Valley. **[T-31] [R-11]**

Teena was the disciplinarian of the children. George wanted to sugar-coat circumstances with the children. George was like a Santa Claus Daddy to the children. **[T-32 & 33] [R-12 & 13]**

George allowed Kurt to sleep in the bed with him and Teena over Teena's constant objections. The child slept in the bed with the parties every night up until the physical separation in January

2009. **[T-33] [R-13]**

George allowing Kurt to sleep with the parties tore the parties apart. They didn't have a sex life. Prior to the physical separation, it had been nine (9) months since the parties had engaged in sexual intercourse. When Teena would ask George to get Kurt out of the bed, George's response would be "I can't. I've tried. I can't." **[T-34] [R-14]**

Two weeks before the child custody trial George moved Kurt into his own bedroom. George admitted that he moved Kurt out of his bed so he could tell the Court "He's not sleeping with me". **[T-231 & 232] [R-46 & 47]**

George admitted that he was not telling the Court that Teena was an unfit mother. **[T-232] [R-47]**

George admitted that Teena's alleged adulterous relationships did not have any effect on Teena's parenting of Kurt. **[T-232] [R-47]**

Teena had a romantic relationship with Hayden Newton. Teena had sexual relations with Hayden after the physical separation of the parties. Kurt had no contact with Hayden and had never been around Hayden and did not know Hayden. **[T-53 & 54] [R-22 & 23]**

George had a romantic relationship with Jackie Costilow and had sexual relations with Jackie after the separation. Unlike Teena, George exposed Kurt to his relationship with Jackie and allowed Kurt to be with him while he was in Jackie's company. **[T-229,230,237,238] [R-44,45,48,49]**

After the separation, George alienated Kurt from Teena and refused and frustrated her attempts to visit with and care for Kurt. **[T-36 & 37] [R-15 & 16]** Teena on numerous occasions attempted to call Kurt but was refused the ability to talk with Kurt. **[T-36] [R-15]** Teena consistently attempted to arrange visitation with Kurt but was refused by George. Teena would obtain ball game schedules and go to games in which Kurt was playing to have the opportunity to see her son. **[T-37] [R-16]**

Teena had a temporary hearing scheduled in Senatobia to establish temporary custody and visitation. The daughter Kayla at Senatobia advised Teena that she (Kayla) would lie to hurt Teena if Teen called up her Petition for Temporary Relief. Rather than placing Kayla in the position to lie and commit perjury, Teena elected not to call the temporary petition up for hearing. **[T-113 & 114] [R-30 & 31]** Kayla was present at the trial on the merits and was not called to testify to rebut this testimony by Teena.

Teena in August 2009 went to George's residence where Kurt and Kayla were staying to visit the children. **[T-38 & 39] [R-17 & 18]** At that time Kayla screamed through the door to Teena "You're a whore. We don't want you here!" **[T-39 & 115] [R-18 & 32]** Also, the police were called and Teena although not creating a disturbance was told to leave. **[T-38,39,115] [R-17,18,32]**

George wilfully denied Teena visitation with Kurt for approximately thirteen (13) months. **[T-44,77,84] [R-21,26,27]**

When Teena was finally allowed to visit Kurt pursuant to a Temporary Order, George and Kayla would cry in front of Kurt when Teena was picking the child up for visitation. **[T-40,41,105] [R-19,20,28]** This noticeably upset Kurt. **[T-41 & 105] [R-20 & 28]**

When George started working at a job Teena got for him which was shift work and required some night shift work, George would cry in Kurt's presence when he left Kurt to go to work. This too would noticeably upset Kurt **[T-60,61,105,117] [R-24,25,28,34]** George degraded Teena in front of Kurt by saying things such as "going to see my liquor store man and that I ("Teena") spent more time with my legs up in the air than I did in the bed with him" **[T-105 & 116] [R-28 & 33]**

Teena and Kayla have not had a good relationship since Kayla was 12-13 years old. Teena has tried extensively to have a relationship. Teena texted Kayla, tried to talk to Kayla and tried to see her to no avail. Teena purchased Kayla a graduation gift through a local gift shop which Kayla did not pickup. **[T-111 & 115] [R-29 & 32]**

Kayla does not show respect for Teena. Kayla does not show appreciation for Teena's parental efforts. **[T-114] [R-31]** Kayla would call Teena names and a "whore" when Teena attempted to discipline her when the family was together. **[T-115] [R-32]**

Since the separation in January 2009, Kayla has not called Teena **[T-115] [R-32]** and made no efforts to come see her mother.

[T-116] [R-33]

Ricky Smith is a forty-one (41) year old man. **[T-152] [R-35]** Mr. Smith has known Kayla since he moved back to Grenada in 1997 and began going to Emmanuel Baptist Church. Mr. Smith runs the sound system at Emmanuel. **[T-153] [R-36]** Mr. Smith was divorced in August, 2009. **[T-154] [R-37]** Kayla began seeing Mr. Smith in the sound room of Emmanuel Baptist Church. **[T-155] [R-38]** Kayla worked at Blockbuster Video and Mr. Smith would see Kayla there. **[T-154] [R-37]** Mr. Smith would go to Kayla's high school softball games and see Kayla. **[T-155] [R-38]** Mr. Smith talked to Kayla 4-5 times per week on the phone. **[T-156] [R-39]** Mr. Smith and Kayla would text back and forth to each other. **[T-157] [R-40]** Kayla was in the beauty review at Kirk Academy school and although Mr. Smith had no child in the review he went to the review. **[T-157] [R-40]** Mr. Smith went to softball recognition night at a Kirk football game when Kayla's team was recognized. **[T-158] [R-41]** Kayla went alone to Mr. Smith's house 3-4 times. **[T-158] [R-41]** Some of the times she was alone at Mr. Smith's house was at night. **[T-159] [R-42]** George was asked that as a loving father whether or not the above circumstances pertaining to Kayla and Mr. Smith raised suspicions that something inappropriate was occurring and George responded "no". **[T-228 & 229] [R-43 & 44]**

SUMMARY OF THE ARGUMENT

The standard of review of a domestic relations-child custody appeal is limited by the substantial evidence/manifest error rule. The findings of the Chancellor should not be disturbed unless the Chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. Further, the Appellant Court views the facts in a light most favorable to the appellee and will take appellee's testimony and evidence at its best.

The Chancellor was not manifestly wrong; her opinion was not clearly erroneous; the Chancellor did not abuse her discretion; and the Chancellor did not apply an erroneous legal standard. To the contrary, the Chancellor's Albright analysis and opinion were supported by substantial evidence, particularly when viewed in a light most favorable to appellee.

Furthermore, the Chancellor's decision on a child custody case should be affirmed if the record shows any ground upon which the decision maybe justified. The Appeal Court should not arbitrarily substitute its judgment for the Chancellor who was in the best position to evaluate all factors relating to the best interest of the child.

For the reasons stated in appellee's argument, appellant's issues on appeal are without merit. Therefore, the Chancellor's decision should be affirmed in its entirety.

ARGUMENT

STANDARD OF REVIEW

"A chancellor's findings of fact will not be disturbed unless manifestly wrong or clearly erroneous. This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his or her discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." Sanderson v. Sanderson, 824 So.2d 623, 625-626 (¶8) (Miss.2002) (citations omitted). Furthermore, we **"will affirm the [child-custody] decree if the record shows any ground upon which the decision may be justified....We will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interest of the child."** Mosely v. Mosely, 784 So.2d 901, 905-906 (¶15) (Miss.2001) (quoting Yates v. Yates, 284 So.2d 46, 47 (Miss.1973)).

Jackson v. Jackson, 2010-CA-00849-COA; Affirmed 09-06-2011

The standard of review for this Court on this domestic relations appeal is set forth as follows, to-wit:

The scope of review by this Court in domestic relations appeals is limited by the substantial evidence/manifest error rule. Magee v. Magee, 661 So.2d 1117, 1122 (Miss.1995). "This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.* (quoting Bell v. Parker, 563 So.2d 594, 596-97 (Miss.1990)). Additionally, this Court views

the facts in a light most favorable to the appellee, Ms. Labella. See *Rawson v. Buta*, 609 So.2d 426, 429 (Miss.1992). This Court will take her testimony and evidence at its best. *Jones v. Jones*, 532 So.2d 574, 578 (Miss.1988).

Labella v. Labella, 722 So.2d 472, 474 (¶4) (Miss.1998)

As trier of fact, the chancellor "evaluate(s) the sufficiency of the proof based upon his assessment of the credibility of the witnesses and the weight he thinks properly ascribed to their testimony." *Rakestraw v. Rakestraw*, 717 So.2d 1284, 1287 (¶9) (Miss.Ct.App. 1998). Our scope of review is "limited." *Rakestraw*, 717 So.2d at 1287 (¶9). The Mississippi Supreme Court has reiterated that in reviewing a divorce decree: "we view the facts of [the] decree in a light most favorable to the appellee and may not disturb the chancellor's decision unless we find that decision to be manifestly wrong or unsupported by substantial evidence." *Boutwell v. Boutwell*, 829 So.2d 1216, 1220 (¶13) (Miss.2002).

M.W.F. v. D.D.F., 926 So.2d 923, 927 (¶13) (Miss.App. 2005)

The standard of review that must be adhered to by this Court is found in the case of *Wright v. Stanley*, 700 So.2d 274, 280 (Miss. 1997): "This Court does not reevaluate the evidence, retest the credibility of witnesses, nor otherwise act as a second fact-finder. Unless the Chancellor was manifestly wrong, clearly erroneous, or applied an erroneous legal standard, we will affirm." Furthermore, this Court must not overturn the chancellor's decision if there be substantial evidence in the record to support his findings of fact. *Smith v. Jones*, 654 So.2d 480, 485 (Miss. 1995).

Daniel v. Daniel, 770 So.2d 562, 564 (¶5) (Miss.App. 2000)

In a child custody case, an appellate court "will not disturb a chancellor's judgment when supported by substantial evidence unless the chancellor abused his discretion, was

manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." Nonetheless, "our limited scope of review directs that we will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interest of the child." *Copeland v. Copeland*, 904 So.2d 1066, 1074(¶30) (Miss.2004) (citations omitted).

Woodham v. Woodham, 17 So.3d 153, 156 (¶6) (Miss.App. 2009)

"[The appellate court] will not disturb a chancellor's judgment when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." Under this standard of review, our purpose is to determine whether the chancellor's ruling was support by credible evidence, not whether we agree with that ruling. (citations omitted)

Collins v. Collins, 20 So.3d 683, 689 (¶26) (Miss.App. 2008)

[Any] resolution of factual disputes is always a matter entrusted to the sound discretion of the chancellor." *Minter*, 29 So.3d at 850(¶36) (citations omitted)

Wikel v. Miller, 2009-CA-00106-COA (¶12) (MSCA)

TEENA'S RESPONSE TO GEORGE'S ARGUMENT

- A. The Trial Court DID NOT ERR in its denial of continued child support and educational expenses from Teena for the older child Kayla.**

George concedes in the first paragraph of his argument that Teena has proven a "demonstrated animosity" toward her by Kayla.

Kayla calls Teena a "whore". After the separation Teena went to George's residence to see Kayla and Kurt and Kayla said to Teena: "You're a whore. We don't want you here". The police were called and Teena was told to leave.

At the initial scheduled temporary hearing, Kayla told Teena she would lie on the stand to hurt Teena. Teena out of love for Kayla did not want to put the child in that position to lie and commit perjury and therefore did not call up for hearing her Petition for Temporary Relief.

Kayla was at the trial of this matter, but was not called to testify to rebut any of the above testimony by Teena.

Kayla refused to have any relationship with Teena in spite of Teena's continued efforts to see her, text her and talk to her by phone and in person.

Kayla has also joined with her father George in efforts to alienate Kurt from Teena and to cause conflict during Teena's visitations with Kurt. Kayla would be with George and both Kayla and George would be crying when Teena picked up Kurt for visitation

and both would make harassing and hurtful comments to disrupt Teena and Kurt's relationship.

The Chancellor in her opinion made specific findings of Kayla's lack of love and respect for Teena and Kayla's unwillingness to have any relationship with Teena, which refusal continued even after Teena was paying child support for her pursuant to the Temporary Order. **[CP-100] [R-65]**

In Caldwell v. Caldwell, 579 So.2d 543 at page 548 (Miss.1991) the Court ruled that certain situations would warrant termination of child support due to the deterioration of the parent-child relationship. Citing Caldwell, in Dykes v. McMurry, 938 So.2d 330 (¶8) (Miss.App.2006) this Court stated as follows:

The Court found that, in order for a child to reject the parent-child relationship to the point where child support is forfeited, the child's actions would have to be both "clear and extreme".

In Hambrick v Prestwood, 382 So.2d 474 at page 477 (Miss.1980) the Court in finding that a parent's duty to provide for a child's college education is not absolute stated as follows:

The duty of a father to send a child to college, under the circumstances of this case, is not absolute. It is dependent, not only on the child's aptitude and qualifications for college, but on whether the child's behavior toward, and relationship with the father, makes the child worthy of the additional effort and financial burden that will be placed on him. Sending

children to college is expensive and can cause much sacrifice on the part of parents. It cannot ordinarily be demanded, but must be earned by children through respect for their parents, love, affection and appreciation of parental efforts, none of which are present in this instance.

Kayla's actions against Teena have indeed been consistently "clear and extreme". As in Hambrick, their relationship began deteriorating when Kayla was approximately 12-13 years old. When Teena would attempt to discipline or parent Kayla, Kayla would call her mother a "whore". When Teena went to George's residence to see Kayla and Kurt after the separation Kayla called Teena a "whore", said Teena was not wanted there and the police were called. Teena has attempted to call, text and see Kayla, but all of Teena's efforts have been rejected by Kayla. Teena bought Kayla a graduation present, but Kayla refuse to pick up the gift. Kayla has joined George in his efforts to alienate Kurt away from Teena. Kayla even told Teena at the first scheduled temporary hearing that she would lie on Teena to hurt her. Kayla's actions are unquestionably "clear and extreme" and as a result this Court should affirm the Chancellor's judgment of not requiring Teena to pay child support or college expenses for Kayla.

It is respectfully submitted that a child calling her mother a "whore" should never be sanctioned by a court or otherwise.

B. The Trial Court DID NOT ERR in its application of the Albright factors in awarding custody of the parties youngest child Kurt to Mrs. Blakely.

The factors setforth in Albright v. Albright, 437 So.2d 1003 (Miss.1983) provide no mathematical formula for deciding custody cases. Montgomery v. Montgomery, 20 So.3d 39, 42 (¶12) (Miss.App. 2009) "The Albright factors are a guide. They are not the equivalent of a mathematical formula." Lawrence v. Lawrence, 956 So.2d 251, 258 (¶23) (Miss.App. 2006). Although required to make a specific finding pertaining to each Albright factor, it is not necessary for the Chancellor to state which party prevails or wins on each factor. Weeks v. Weeks, 989 So.2d 408, 411 (¶12) (Miss.App. 2008).

The Chancellor's analysis and findings under each of the Albright factors are supported by substantial evidence. The Court's Albright findings are based on the proper legal standard and were not manifestly wrong, were not an abuse of the Chancellor's discretion and were not erroneous.

In his brief, George addressed four of the Albright factors, to-wit:

1. Parenting skills and willingness and capacity to provide primary care;
2. Employment of parents and employment responsibilities;
3. Continuity of care prior to separation; and

4. Moral fitness.

Teena will hereinbelow address each of the above factors as follows:

PARENTING SKILLS AND WILLINGNESS
AND CAPACITY TO PROVIDE PRIMARY CARE

The Chancellor in her opinion under this factor found as follows:

However, the Court has serious reservations about Mr. Blakely's parenting skills, based on the fact that he has not facilitated visitation with Mrs. Blakely during the period of separation, but has frustrated efforts to allow her to have interaction and involvement with the children, thus creating a sense of alienation between the children and Mrs. Blakely, which the Court strongly expressed at the conclusion of the hearing and will not go back into again at the present time. **[CP-95] [R-60]**

As referred to above, the Chancellor in the oral portion of her ruling at the conclusion of evidence made the following findings:

- a. After the separation, George out of spite made a determination that he was not going to allow Teena to have visitation with the children; **[T-305] [R-50]**
- b. Teena continued to attempt to have visitation with the children and George blocked Teena's efforts to visit the children and that George denied Teena visitation; **[T-305 & 306] [R-50 & 51]**
- c. By George refusing to allow Teena visitation with the children, the children developed abandonment issues; **[T-307] [R-52]**

- d. George caused the children a lot of their problems because of negative and ugly statements George made about Teena in front of the children when she came to pick up Kurt and this conduct was disturbing to the Court; **[T-307] [R-52]** and
- e. George crying in front of Kurt when Kurt was being picked up for visitation by Teena caused tremendous undue stress and pressure on the children. The Court found that this conduct was ridiculous and not in the children's best interest; **[T-309] [R-53]**

George wilfully denied Teena visitation with Kurt for approximately 13 months, notwithstanding Teena's relentless efforts to see the child.

In Ellis v. Ellis, 952 So.2d 982 (¶24) (Miss.App.2006) in a contempt modification action the Court addressed the parental alienation syndrome. As defined by an expert who testified in the case, "parental alienation syndrome" is a systematic programmed alienation of a child from one parent brought upon by the other parent".

In Ash v. Ash, 622 So.2d 1264 at 1266 (Miss. 1993), the Court in a child custody modification action held in some extraordinary cases interference with a non-custodial parent's visitation rises to the level where it constitutes a material change in circumstances.

In Masino v. Masino, 829 So.2d 1267 (¶13) (Miss.App.2002) this Court affirmed the Chancellor's judgment in awarding custody of a daughter to the father based in part on the mother's interference with the father's relationship with the child by stating in part as follows:

The Chancellor found that Mrs. Masino's deliberate and ongoing interference in the father-daughter relationship was extreme and not in the child's best interest. Mrs. Masino was highly uncooperative with visitation by Mr. Masino and frequently made extremely derogatory comments about him in their daughter's presence. Masino at page 1271

Based on George's alienation of Kurt from Teena, his crying in Kurt's presence and other aforesaid conduct, the Chancellor found "serious reservations about Mr. Blakely's parenting skills".

Furthermore, in the Chancellor's finding under the emotional ties factor, the Chancellor found that Mr. Blakely "actively tried to play the sympathy card with the child and is trying to get the child to feel a sense of abandonment by the mother". **[CP-96] [R-61]**

As setforth in the statement of facts, Teena clearly has the better parenting skills. Teena bathed, clothed, cooked for and provided virtually all basic care for the children. Teena was active in the church, teaching the children music and Sunday school, and at the children's school where she was secretary of the Booster Club and fully engaged in those activities. Even after the separation when both George and Teena found other relations, Teena never had her boyfriend around Kurt, while George admitted he had his girlfriend, with whom he was committing adultery, in Kurt's presence and involved with Kurt's activities.

The Court found that this factor favored the mother Teena.

This finding was certainly supported by the evidence viewed and heard by the Chancellor who was in the best position to evaluate this factor. Therefore, the Chancellor did not commit reversible error in finding this factor to favor the mother Teena.

EMPLOYMENT OF PARENTS AND
RESPONSIBILITIES OF EMPLOYMENT

Teena has to be at work at 8:30 a.m. George has to be at work at 7:00 a.m. George works on Saturday mornings and Teena does not. George has to get Kurt up early and drop the child off at a third parties residence and Teena does not. Although Teena lives approximately thirty (30) minutes from Grenada, she still will be with the child in the morning and will leave her residence with the child approximately one hour later than George.

The Chancellor in her written opinion made the following finding on this factor in reference to George's continued course of alienating the child at every opportunity:

The father then is not able to get the child ready for school and deliver him to school in the mornings, but has to depend on someone else to do so. Again, although the mother had offered to take care of this responsibility for the father during the time of separation, the father has not allowed the mother to do this, but has delivered the child to an aunt in order to keep the mother from having any more contact with the child than was ordered by the Court. **[CP-95 & 96] [R-60 & 61]**

The Chancellor heard testimony and was in a position to assign weight and credibility to the evidence. There was evidence to

support the Chancellor's finding on this factor and the Chancellor was in a position to evaluate this factor relating to the best interest of the child. Therefore, the Chancellor did not commit reasonable error finding that this factor favored the mother Teena.

CONTINUITY OF CARE PRIOR TO THE SEPARATION

The Chancellor made the following find on this factor:

The next factor the Court has to weigh is a determination of the parent that has had the continuity of care prior to the separation. Undisputed testimony of the parties and the witnesses was that this factor favors Mrs. Blakely. Although Mr. Blakely was involved in the recreational and sporting events of the children, Mrs. Blakely was the primary disciplinarian and had the primary care of the child prior to the separation of the parties. Since the separation of the parties, Mr. Blakely has been the primary custodian and caregiver. However, this is due to the fact that he had not allowed Mrs. Blakely to participate in the care giving of the child.

[CP-94 & 95] [R-59 & 60]

The Chancellor in the oral portion of her opinion summarized herein on pages 18 and 19, subparagraphs (a.) through (e.), found based on substantial evidence that during the period George had custody of Kurt that he did by calculated design alienate the child from his mother and caused the child to suffer from abandonment issues and unnecessary stress and pressure.

Teena cannot argue that she spent more time with Kurt after the separation. However, George's aforesaid conduct and the negative affects on Kurt were matters which the Court considered in

determining the best interest of Kurt.

The Chancellor did not commit reversible error in finding that this factor favored the mother Teena and her finding was supported by sufficient evidence viewed and heard in real time by the Chancellor.

MORAL FITNESS

The Chancellor made the following finding on the moral fitness factor, to-wit:

The next factor is the moral fitness of the parents. The Court did not hear any testimony with regard to any problem with the moral fitness of either parent except the testimony that the mother had an affair during the time of the marriage and possibly more than one affair. However, both parents are involved in church. Neither parent is engaging in any immoral behavior in front of the children, with the exception that the father is allowing the child to be around his girlfriend at the present time. The mother, although admitting that she began her relationship with her boyfriend prior to the marriage being over, did testify that she has not allowed the child to be around the boyfriend at all up to this point. Therefore, the Court finds that this factor favors neither parent. **[CP-97] [R-62]**

George admitted that Teena's alleged adulterous relationships did not affect Teena's parenting of Kurt.

Marital fault should not be used as a sanction in custody awards. Albright at page 1005.

In Carr v. Carr 480 So.2d 1120 (Miss. 1985) the Mississippi Supreme Court stated the law pertaining to the affect adultery has

on the issue of child custody as follows:

This court holds that the fact of adultery alone does not disqualify a parent from custodianship but that the polestar consideration in original custody determinations is the best interest and welfare of the minor child. Carr at page 1121

Applying these guidelines to the case sub judice, this Court notes that moral fitness of a parent encompasses the charge of adultery. But moral fitness is but one factor to be considered, and it is a factor worthy of weight in determining the best interest of the child. Adultery of a parent may be an unwholesome influence and an impairment to the child's best interest, but on the other hand, may have no affect. The trial court should consider this factor along with all others for making original custody determinations. Carr at page 1123

And as stated in Albright, marital fault should not be used as a sanction in custody awards. Carr at page 1123

In Moak v. Moak 631 So.2d 196 (Miss. 1994) the mother of two children ages 13 and 11 admitted to a two year affair with a co-worker and admitted later that she became romantically involved with another co-worker. In affirming the chancellor's order granting custody to the mother, the Supreme Court held as follows:

Although he expressed reservations about awarding physical custody to Dixie, he attempted to focus on the best interest of the children rather than on marital fault. Moak at page 197

However, the evidence in the record shows that Dixie had been the primary caregiver, especially with regard to the children's homework and social and church activities. Moak at page 198

The chancellor found that it was best for the physical custody of the children to remain with Dixie, the person to whom the children had always looked for supervision, food, and clothing. Moak at page 198

In Brekeen v. Brekeen 880 So.2d 280 (Miss. 2004) the Mississippi Supreme Court reversed the chancellor's ruling granting custody of the minor child to the father. In Brekeen, the mother had an extra marital affair, was terminated from her employment, and because of her relationship with a third party left the marital home and her husband and son for over a week without contacting the husband or the minor child. In reversing the chancellor's ruling, the Supreme Court cited the following law from the Carr decision, to-wit:

The fact of adultery alone does not disqualify a parent from custodianship but that the polestar consideration in original custody determinations is the best interest and welfare of the minor child. Brekeen at page 284 (¶6)

Moral fitness of a parent encompasses the charge of adultery. But moral fitness is but one factor to be considered, and it is a factor worthy of weight in determining the best interest of the child. Adultery of a parent may be an unwholesome influence and an impairment to the child's best interest, but on the other hand may have no affect. The trial court should consider this factor along with all others when making original custody determinations. Brekeen at page 284 (¶6)

In Hollon v. Hollon 784 So.2d 943 (Miss. 2001) the Mississippi Supreme Court reversed a chancellor's ruling granting custody of a minor son to the father. In Hollon it was alleged that the mother

was having a homosexual affair with her girlfriend roommate while the child was in the mother's custody. In reversing the chancellor's custody award to the father, the Court concluded as follows:

Within his analysis of the Albright factors, the chancellor abused his discretion by placing too much weight upon the "moral fitness" factor and ignoring the voluminous evidence presented under the remaining factors supporting Beth as the preferred custodial parent. Therefore, we reverse the decision of the Chancery Court of Jackson County and award Beth custody of Zack and remand the case for a determination of Tim's visitation rights and further proceedings not inconsistent with the dictates of this opinion. Hollon at page 952 (¶39)

The finding of the Chancellor that this factor favors neither party is supported by substantial proof.

EMOTIONAL TIES OF PARENT AND CHILD

Although George elected not to discuss this factor, Teena will invite the Court's attention to the following portion of the Chancellor's finding on said factor:

However, the Court feels that any problem that the child may feel toward the mother or any alienations the child may feel in his relationship with the mother is because the father has actively tried to play the sympathy card with the child and is trying to get the child to feel a sense of abandonment by the mother. This factor may slightly favor the father, but the Court feels that this is only because the father has attempted to alienate the child from his mother, and has allowed the child's sister to do so also. Again, the Court will say that it is greatly disturbed by

this behavior on the part of the father and I will not go into another lengthy discussion of this because I did so at the conclusion of the hearing on Wednesday. **[CP-96] [R-61]**

The Chancellor's finding that George played the "sympathy card", attempts to alienate the child from his mother and allowing the sister Kayla to join in the alienation efforts greatly disturbed the Chancellor. George contends that the Chancellor made its finding with "extreme sympathy for Mrs. Blakely". To the contrary, the Chancellor made its findings on the totality of the circumstances, including the father's unacceptable conduct and parenting.

CONCLUSION

The Chancellor's opinion was supported by substantial evidence, particularly when viewed in a light most favorable and at its best to appellee. The Chancellor did not abuse her discretion, was not manifestly wrong and did not apply an erroneous legal standard.

As in Mosely, it is respectfully submitted that in this custody case if the record shows any ground upon which the decision may be justified, this Court should "not arbitrarily substitute our judgment for that of the Chancellor who is in the best position to evaluate all factors relating to the best interest of the child".

In the case sub judice, not only is there "any ground" there

is substantial evidence to support the Chancellor's opinion particularly when the court views the facts in a light most favorable to the appellee.

Therefore, it is respectfully submitted that this Court should grant to Teena the following relief:

1. Affirm in its entirety the decision and opinion entered by the lower Court;
2. Tax all cost of appeal to appellant; and
3. Award Teena attorney fees.

This the 14th day of October, A.D., 2011.

Respectfully submitted:



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CERTIFICATE OF SERVICE

I, LUTHER P. CRULL, JR., attorney for the appellee herein, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the above and foregoing BRIEF OF THE APPELLEE to the following persons:

1. Chancellor Vicki B. Cobb
P.O. Box 1104
Batesville, MS 38606
2. Kent E. Smith
Attorney for Appellant
Smith Whaley, PLLC
P.O. Drawer 849
Holly Springs, MS 38635

This the 14th day of October, A.D., 2011.


LUTHER P. CRULL, JR.