IN THE SUPREME COURT OF MISSISSIPPI

DAWN SMITH SHANNON CLIFTON — APPELLANT

VS. — DOCKET NO. 2011-CA-00037

THOMAS R. SHANON — APPELLEE

BRIEF OF APPELLANT

Appeal from the Chancery Court of DeSoto County
Cause No. 99-02-0275

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant 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.

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2. Whether or not the trial court committed error by transferring temporary and permanent custody of the minor child from Mother/Appellant to Father/Appellee without a finding of a material change of circumstance adversely affecting the welfare of the minor child.
3. Whether or not the trial court committed error by transferring temporary and permanent custody of the minor child from Mother/Appellant to Father/Appellee based solely upon the desire of the minor child, which is only a factor to be considered after a finding of a material change of circumstance is made.
4. Whether or not the Father/Appellee proved by a preponderance of the evidence that there was a material change of circumstance adversely affecting the welfare of the minor child upon which the Court could base a temporary and/or permanent change of custody of the minor child.

STATEMENT OF THE CASE

The Appellant, Dawn Smith Shannon Clifton, (hereinafter referred to as "Mother"), and the Appellee, Thomas R. Shannon, (hereinafter referred to as "Father") were divorced on July 26, 1999. (R. 2) One child was born of the union, namely Ashley Nicole Shannon, date of birth May 16, 1996. (R. 15)

On June 9, 2010, Father filed a Petition for Contempt and Modification, Etc. in which the minor child joined alleging a substantial and material change of circumstance. (R. 6-13) Mother was served with the Petition, and through counsel filed a Notice of Special Appearance to object to jurisdiction. (R. 42)

At the initial hearing, Mother by and through counsel objected to jurisdiction and argued that not only did Mississippi not have jurisdiction but counsel also argued that Mississippi was an inconvenient forum in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act as codified at Miss. Code Ann. 93-27-101 et seq. (Tr. Vol. 1, pp. 25-30) The Court ruled that it had exclusive continuing jurisdiction and proceeded with a hearing regarding the temporary custody of the parties' minor child. (Tr. Vol. 1, pp. 30-34) The Court awarded temporary custody to Father by Order dated August 10, 2010. (R. 48-50). The matter was continued to December 13, 2010, for a final hearing. (R. 48-50)

At the final hearing there was no additional proof as to any change of circumstance and the Court ruled that permanent custody would be transferred to Father and entered the Order dated January 14, 2011. (R. 54-58)

STATEMENT OF FACTS

Mother and Father were divorced on July 26, 1999. (R. 14-33) There is one minor child born of their marriage, namely Ashley Nicole Shannon, date of birth May 16, 1996. (R. 15) On June 9, 2010, Father filed a Petition for Contempt and Modification, Etc. in which the minor child joined alleging a substantial and material change of circumstance. (R. 6-13) Mother was served with the Petition and through counsel filed a Notice of Special Appearance to object to jurisdiction. (R. 42)

A hearing on the "emergency" temporary issues was had on July 26, 2010. (Tr. Vol. 1, pp. 1-73) At such hearing, Mother again, by and through counsel objected to jurisdiction and argued that Mississippi was an inconvenient forum in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act as codified at Miss. Code Ann. 93-27-101 et seq. (Tr. Vol. 1, pp. 25-30) After arguments of counsel for the parties, the Court ruled that it had exclusive continuing jurisdiction and proceeded with a thirty (30) minute hearing regarding the temporary custody of the parties' minor child. (Tr. Vol. 1, pp. 30-34)

The Court awarded temporary custody to Father by Order dated August 10, 2010. (R. 48-50) The matter was continued to December 13, 2010, for a final hearing. (R. 49) At the final hearing only the minor child testified, and apparently no record was made of the testimony. It is clear, however, from the Order that there was no additional proof as to any change of circumstance as required by law, however, the Trial Court ruled that permanent custody would be transferred to Father and entered the Order dated January 14, 2011. (R. 54-58)

It is from the final Order entered on January 14, 2011, that Mother has appealed.

SUMMARY OF ARGUMENT

According to Mississippi law, for a modification of custody, the parent seeking the modification must prove (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody. Without a change of circumstance in the home of the custodial parent adverse to the minor child, such a modification should be denied. A child's preference is not a change of circumstance but only a factor to be considered under *Albright* once a material change of circumstance has been found to exist.

Further, since the material change of circumstance must exist in the custodial parent's home, it stands to reason that the proof, should any exist, would be in the home state of the custodial parent making the original state, in this case Mississippi, an inconvenient forum. Since Mother and the minor child lived in Colorado for the four years preceding the filing of Father's petition, it stands to reason that the proof of a material change , if any exists, would be in Colorado where Mother and the minor child resided. As such, Mississippi is an inconvenient forum and Colorado is the home state of the child. As the home state of the child, Colorado has jurisdiction under the Uniform Child Custody and Jurisdictional Enforcement Act.

LAW AND ARGUMENT

1. Whether or not the trial court had jurisdiction to hear this matter.

Whether or not Mississippi has continuing exclusive jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act as codified at Miss. Code Ann. §93-27- et. seq. is the first issue to be resolved. If Mississippi did not have jurisdiction to hear the matter, then the Order entered by the Trial Court is void and the Petition should be dismissed.

The Uniform Child Custody Jurisdiction and Enforcement Act, (hereinafter "UCCJEA"), codified at Miss. Code Ann. §93-27-101 et seq. is applicable to this case. The parties were divorced in the DeSoto County Chancery Court by Final Decree of Divorce entered on July 26, 1999. (R. 14-33) Thereafter, on or about December 30, 2005, the Appellant, Dawn Smith Shannon Clifton, (hereinafter referred to as "Mother"), and the parties' minor child relocated to Colorado where they have resided for the past four and a half (4 ½) years. (Tr. Vol. 1, p. 26; Tr. Vol. 1, p. 47)

On or about June 9, 2010, the Appellee, Thomas R. Shannon, (hereinafter referred to as "Father"), filed a Petition for Contempt and Modification, Etc. in which the minor child joined. (R. 6-13) Mother was served with the Petition, and through counsel filed a Notice of Special Appearance to object to jurisdiction. (R. 42) A hearing on the "emergency" temporary issues was had on July 26, 2010. (Tr. Vol. 1, pp. 1-73) At such hearing, Mother again, by and through counsel objected to jurisdiction and argued that Mississippi was an inconvenient forum in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act as codified at Miss. Code Ann. 93-27-101 et seq. (Tr. Vol. pp. 25-27 and 28-30) After arguments of counsel for the parties, the Court ruled

that it had exclusive continuing jurisdiction and proceeded with a thirty (30) minute hearing regarding the temporary custody of the parties' minor child. (Tr. Vol. 1, pp. 30-34)

It is undisputed that Mother and the parties' minor child have lived in Colorado for the past four and a half (4 ½) years. Pursuant to *Miss. Code Ann. §93-27-202*, Mississippi no longer has exclusive continuing jurisdiction. *Miss. Code Ann. §93-27-202* states as follows:

> (1) Except as otherwise provided in Section 93-27-204, a court of this state which has made a child custody determination consistent with Section 93-27-201 or 93-27-203 has exclusive, continuing jurisdiction over the determination **until:**
> (a) A court of this state determines that neither the child, **nor the child and one parent,** nor the child and a person acting as a parent **have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships;** or
> (b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in this state.
> (2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 93-27-201.

In the case at bar, the child and Mother no longer reside in Mississippi and have not since December 2005. (Tr. Vol. 1, p. 47) The only connection to the state of Mississippi is that Father resides here and the child enjoys visitation here. The initial issue in a modification case is whether or not there has been a material change of circumstance in the custodial home. *Riley v. Doerner, 677 So. 2d 740, 743 (Miss. 1996); see also Mabus v. Mabus, 847 So. 2d 815 (Miss. 2003).* Since a modification is based on circumstances in the custodial home, logic dictates, therefore, that the

majority of information and proof of any circumstances in the custodial home would naturally be where the custodial home is located, which in the case at bar is Colorado. Further, the overwhelming substantial evidence with regard to the child's care, protection, training and personal relationships would also be in Colorado where the child has resided since December 2005. The child's step-father, teachers, friends, medical providers and others with information regarding the child's care, protection, training, and personal relationships reside in Colorado and any information of an alleged change of circumstance in the custodial home would likewise be in Colorado. The child's educational and medical records are in Colorado. Thus, the overwhelming abundance of substantial evidence and witnesses with regard to the child's care, protection, training, personal relationships and circumstances in the custodial home is in Colorado. Mississippi is an inconvenient forum as there is no evidence in Mississippi which would relate to any alleged change of circumstance in the custodial home. Mississippi no longer has jurisdiction under the UCCJEA, Mississippi is an inconvenient forum, and the Petition should have been dismissed.

In the case of *Yeager v. Kittrell, 35 So. 3rd 1221, (2009)*, the Mississippi Supreme Court gave an explanation of the history and applicability of the UCCJEA as follows:

> Jurisdiction over interstate custody disputes is governed by the UCCJEA and the PKPA. *Deborah H. Bell, Bell on Mississippi Family Law § 18:09 at 454 (2005)*. The UCCJEA regulates the ability of chancery courts to enforce or modify child custody judgments entered in another state. *Shadden v. Shadden, 11 So.3d 761, 763(¶ 8) (Miss.Ct.App.2009).*
>
> The predecessor of the UCCJEA, the Uniform Child Custody Jurisdiction Act (UCCJA), was created to establish uniformity in state decisions and to limit forum shopping by custody litigants seeking to enforce or modify custody. *Bell on Mississippi Family Law § 18:09*.

Some states were slow to adopt the UCCJA, which led Congress to pass the PKPA in 1980. *Id.* The PKPA contains requirements almost identical to the UCCJA. *Id.* Although the two Acts were created to ensure consistent results in interstate custody decisions, the differences between the Acts led to confusion. *Id.* The UCCJEA, promulgated in 2001 and subsequently adopted in Mississippi in 2004, was intended to bring the UCCJA into compliance with the PKPA. *Id.*

Under the UCCJEA, only one court may assert jurisdiction after an initial custody order has been entered. See *Miss. Code Ann. § 93-27-201 (Supp.2009)*. A court issuing an initial determination has continuing jurisdiction over the parties; no other court may modify the decree. Id. However, even if only one party remains in the state, a second state may modify the order if the issuing court finds that neither the child, nor the child and one parent, have a significant connection with the state, and that substantial evidence is no longer available in the issuing state. See *Miss. Code Ann. § 93-27-202(1)(a)*. Only the issuing state may make this determination. Additionally, a court with continuing jurisdiction may decline to modify custody if another court is a more appropriate forum. See *Miss. Code Ann. §§ 93-27-203(a) (Supp.2009); 93-27-207.*

The PKPA mandates that a state must give full faith and credit to "any custody determination or visitation determination made consistently with the provisions of this section by a court of another [s]tate." The PKPA also directs that:

A court of a [s]tate may modify a determination of the custody of the same child made by a court of another [s]tate, if -

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other [s]tate no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.
28 U.S.C. § 1738A(f) (2006).

In the present case, Mississippi had jurisdiction to make the initial child custody determination under section 93-27-201(1)(a) since, at the time of the initial determination, Mississippi was "the home state of the children on the date of the commencement of the proceeding."

However, section 93-27-207 provides that:

> (1) A court of this state which has jurisdiction under this chapter to make a child custody determination may decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.
>
> (2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (b) The length of time the child has resided outside this state;
>
> (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (d) The relative financial circumstances of the parties;
>
> (e) Any agreement of the parties as to which state should assume jurisdiction;
>
> (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
>
> (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and
>
> (h) The familiarity of the court of each state with the facts and issues in the pending litigation.

In the case at bar, there was no consideration given with regard to the above factors. In a matter where the basis of a modification is required to be based on a change in the

circumstances of the custodial home which is adverse to the minor child, the proof (should any exist) would lie in the state in which the custodial home and the custodial parent is located, which in this case is Colorado. There was no proof in the record as to any change in the custodial home since the entry of the last custody order. Regardless, the Trial Court should have dismissed the Petition for lack of jurisdiction and/or for being an inconvenient forum.

2. Whether or not the trial court committed error by transferring temporary and permanent custody of the minor child from Mother/Appellant to Father/Appellee without a finding of a material change of circumstance adversely affecting the welfare of the minor child.

In the case at bar, Father filed a Petition for Contempt and Modification, Etc. on or about June 9, 2010, alleging that there has been a material and substantial change in circumstances since the rendition of the decree of divorce that adversely affects the welfare of the parties' minor child. (R. 9) A preliminary hearing was had on July 26, 2010, at which Father, Mother and the minor child testified. Father's proof consisted of his home life, his family in Mississippi, etc. There was no proof that there was any substantial change of circumstance in Mother's home that was adverse to the minor child as required in *Riley v. Doerner, 677 So. 2d 740, 743 (Miss. 1996); see also Mabus v. Mabus, 847 So. 2d 815 (Miss. 2003)*. (Tr. 37-43) On cross examination, Father admitted that there was no other basis for the filing of his Petition other than his daughter request to reside with him. (Tr. 43-44) Such a request in and of itself is not a material change of circumstance adversely affecting the welfare of the minor child as required by law. *(See Brown v. Brown, 764 So. 2d 502 (Miss. Ct. App. 2000)* Father also admitted on cross examination that Mother had been a good

mother. (Tr. 44) There is nothing in Father's testimony or any other proof presented that establishes a material change of circumstance adversely affecting the minor child. The Trial Court, therefore, committed error in temporarily and then permanently granting custody to Father solely based upon the child's preference. No other factors or considerations besides the child's preference were made by the Court in making its decision to change custody from a Mother who had been the primary caregiver for the minor child since 1999 to Father.

The Supreme Court of Mississippi in *Mabus v. Mabus, 847 So. 2d 815, (Miss. 2003)*, states as follows:

> In a case disputing child custody, the chancellor's findings will not be reversed unless manifestly wrong, clearly erroneous, or the proper legal standard was not applied. *Hensarling v. Hensarling, 824 So. 2d 583, 587 (Miss. 2002)*. See also *Wright v. Stanley, 700 So. 2d 274, 280 (Miss. 1997); Williams v. Williams, 656 So. 2d 325, 330 (Miss. 1995)*. The burden of proof is on the movant to show by a preponderance of the evidence that a material change in circumstances has occurred in the custodial home. *Riley v. Doerner, 677 So. 2d 740, 743 (Miss. 1996)*.
>
> In the ordinary modification proceeding, the non-custodial party must prove: (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody. *Bubac v. Boston, 600 So. 2d 951, 955 (Miss. 1992)*.
>
> In considering whether there has been such a change in circumstances, the totality of the circumstances should be considered. *[Spain v. Holland, 483 So. 2d 318, 320 (Miss. 1986).]* Even though under the totality of the circumstances a change has occurred, the court must separately and affirmatively determine that this change is one which adversely affects the children. *Id. Bredemeier v. Jackson, 689 So. 2d 770, 775 (Miss. 1997)*. Furthermore, it is well settled that the polestar consideration in any child custody matter is the best interest and welfare of the child. *Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983)*.

In *Mabus*, Mother filed to modify custody, Father countered to modify custody. The Court making its determination, Mother appealed. The Court found no material change in circumstances after Mother attempted to present evidence of seventeen different areas which would, taken together, amount to a material change in circumstances. Mother argued that the Court should have applied the *Albright* factors, however, the Supreme Court determined that since there was no material change of circumstance found, that there was no need to conduct an *Albright* analysis. The Supreme Court further stated:

> As the Court of Appeals has correctly held, in a modification hearing, the chancellor will only apply the *Albright* factors after the non-custodial parent has proven a material change in circumstances. *McGehee v. Upchurch, 733 So. 2d 364, 369 (Miss. Ct. App. 1999)*.
> We do not reach Mr. McCracking's various complaints with the criteria for determining custody set out in *Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983)*. In a custody modification proceeding, the question of which parent will better serve the welfare of the children as custodial parent is not reached unless the chancellor has previously found a material change in circumstance detrimental to the child's best interest. *McGehee v. Upchurch, 733 So. 2d 364, 369 (Miss. Ct. App. 1999)*. Once such a change of circumstance has been found, the factors in *Albright v. Albright* ought to play a significant role in the chancellor's ultimate determination of a suitable custody arrangement. However, by failing to prove a change in circumstance detrimental to the children's best interests, Mr. McCracking's case fell short of the point where such issues could be considered by the chancellor. *McCracking v. McCracking, 776 So. 2d 691, 694 (Miss. Ct. App. 2000)*.

It is clear from the record that the Trial Court's ruling was manifestly wrong, clearly erroneous, and the proper legal standard was not applied. There was no finding (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that

the child's best interests mandate a change of custody. *Bubac v. Boston, 600 So. 2d 951, 955 (Miss. 1992)*. Further, the only testimony showed that the child had a desire to live with her Father to go fishing, hunting and camping and that Father waited a year before filing the Petition so that the child would be of an age to tell the Court her preference. There was no other proof as to any basis for the custody of the child to be modified from Mother to Father.

3. Whether or not the trial court committed error by transferring temporary and permanent custody of the minor child from Mother/Appellant to Father/Appellee based solely upon the desire of the minor child, which is only a factor to be considered after a finding of a material change of circumstance is made.

The Court in *Brown v. Brown, 764 So. 2d 502 (Miss. Ct. App. 2000)* involved a post divorce modification wherein Father filed for a change of custody of his two sons who were in the primary care of their Mother. Unlike the case at bar, in *Brown* there were factual circumstances alleged against Mother, such as having three different men live with her in a one-bedroom apartment forcing the children to sleep on the couch; delinquency in paying utility bills causing her utilities to be cut off; moving six times within six years; using fowl language in front of the children; among other things. Additionally, the parties' twelve year old son stated his preference that he be allowed to reside with his Father. The Court, hearing all of the evidence, determined that there was no material change of circumstance to warrant a change of custody from Mother to Father. Father appealed. As part of Father's appeal, Father argued that the Court should have considered the child's preference to reside with him in the totality of the circumstances. The Court quoting *Westbrook v. Oglesbee, 606 So. 2d 1142, 1147*

(Miss. 1992), stated: "Even if the court was to consider [the child's] preference as a factor in the custody determination, it would be merely one element of many to be weighed by the chancellor. The chancellor is not in any way bound to respect the desires of the child, since the main objective remains the best interests of the child." The Court of Appeals in *Brown* held that the child's "statement of preference alone cannot be weighed so heavily as to, on its own, modify custody." Unfortunately, the Court in the case at bar found that the child's preference was the basis for a modification and modified custody from Mother to Father based solely on such preference. Such is against the laws of the State of Mississippi and the Chancellor committed error in making her decision. The Trial Court was manifestly wrong in its decision to modify custody solely on the basis of a child's preference. The Court's ruling was clearly erroneous and the proper legal standard was not applied. The legal standard for a modification of custody is set forth in *Mabus* as follows:

> ...the non-custodial party must prove: (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody. *Bubac v. Boston, 600 So. 2d 951, 955 (Miss. 1992)*.

The Trial Court did not apply the proper law as it currently exists in the State of Mississippi. In the case at bar, there was no proof of a substantial change in circumstances since the last custody decree that adversely affects the child's welfare such that a modification would be in the child's best interest. There was no proof of anything other than a minor child's request to know what it is like to live with the other parent and go fishing and hunting. Such is not sufficient under Mississippi law to modify custody of a child from a loving, caring, stable and good parent to the non-custodial

parent. The ruling of the Trial Court was not based in any way on the law and should be reversed.

4. Whether or not the Father/Appellee proved by a preponderance of the evidence that there was a material change of circumstance adversely affecting the welfare of the minor child upon which the Court could base a temporary and/or permanent change of custody of the minor child.

The law in Mississippi is clear that there must be a material change of circumstance adversely affecting the welfare of the minor child for a court to modify custody. The Supreme Court in *Giannaris v. Giannaris, 960 So. 2d 462 (Miss. 2007)* states:

> All courts must be consistent, diligent, and focused upon the requirement that "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change." *Morrow v. Morrow, 591 So.2d 829, 833 (Miss.1991)*. *See also* Ballard, 434 So.2d at 1360 ("It is only that behavior of a parent which clearly posits or causes danger to the mental or emotional well-being of a child (whether such behavior is immoral or not), which is sufficient basis to seriously consider the drastic legal action of changing custody.").

In the case at bar, the only testimony as to anything was that the minor child testified:

> "I would like to live in Mississippi with my dad.
>
> ...
>
> It's because of my stepdad, like, I just—I feel kind of nervous around him. Like, I know he's not going to physically hurt me or anything.
>
> ...
>
> But I'm also scared for my mom because he has threatened her before. It's only happened once, and it was a really big fight. But that still really freaked me out.

...

Like, actually, I was upstairs, but it was kind of easy to hear.

...

So, yes, I was in the house and it was just scary for me to be there because we had—it was the first year we moved there, so I was only like, eight or nine.

...

So it was—yeah. I think I was just about to turn 10, and yeah. I also, with my dad, me and him do a lot of stuff that I enjoy doing here, like we go hunting and fishing together all the time. We go camping every year. But there, we don't do any of that. Like, we've gone camping, like, I think twice now, but it was a long time ago." (Tr. 7-8)

The Court goes on to state in Giannaris:

> Additionally, chancellors are charged with considering the "totality of the circumstances." Tucker, 453 So.2d at 1297 (quoting Kavanaugh v. Carraway, 435 So.2d 697, 700 (Miss.1983)). In other words:
>
> [a]n isolated incident, e.g., an unwarranted striking of a child does not in and of itself justify a change of custody. *Before custody should be changed, the chancellor should find that the overall circumstances in which a child lives have materially changed and are likely to remain materially changed for the foreseeable future* and, of course, that such change adversely impacts upon the child.
>
> Tucker, 453 So.2d at 1297 (emphasis added). "The test for a modification of child custody is: (1) whether there has been a *material change in circumstances*[8] *468 which *adversely affects*[9] *the welfare of the child and* (2) whether the *best interest of the child requires a change of custody.*" Floyd v. Floyd, 949 So.2d 26, 29 (Miss.2007) (citing Weigand v. Houghton, 730 So.2d 581, 585 (Miss.1999)) (emphasis added). *See also* Sanford v. Arinder, 800 So.2d 1267, 1272 (Miss.Ct.App.2001) (quoting Brawley v. Brawley, 734 So.2d 237

(Miss.Ct.App.1999)) ("the *non-custodial parent must* satisfy a three part test: 'a substantial change in circumstances of the *custodial parent* since the original custody decree, the substantial change's adverse impact on the welfare of the child, and the necessity of the custody modification for the best interest of the child.' ") (emphasis added).

Therefore:
the non-custodial parent's request does not simply mean a re-weighing of the *Albright* factors to see who now is better suited to have custody of the child. *Although a re-weighing of Albright factors may be triggered, in reviewing the circumstances, there must be shown ... a material change-not just a change-in circumstances, that has had an adverse affect* [sic] *on the child and which requires, or mandates, a change in custody for the best interests of the child.*

Sanford, 800 So.2d at 1272 (emphasis added). Stated otherwise, a non-custodial parent must first sufficiently prove a material change in circumstances which has an adverse effect on the child that "clearly posits or causes danger to the mental or emotional well-being of a child[,]" *Ballard, 434 So.2d at 1360,* as a condition precedent to re-weighing the *Albright* factors. The *Albright* factors may ebb and flow yearly, quarterly, monthly or even less, but in the absence of a substantial adverse effect upon the child, physical custody changes are not only unwarranted, they are unwise. Our body of law could not be clearer.

The law is clear that the party seeking the modification must sufficiently prove a material change in circumstances which has an adverse effect on the child prior to any modification of custody. See *Giannaris, p. 468*. The law is also clear that an isolated event does not constitute a material change of circumstance. See also *Giannaris, p. 468*. There was no testimony by the minor child as to any material change of circumstance. There was only testimony as to one isolated incident of an argument

between her mother and stepfather, which argument occurred at least four years ago as the minor child is now fourteen years. It was not of such importance that Father chose to file for custody at the time of the occurrence, thus, it should be of no importance now.

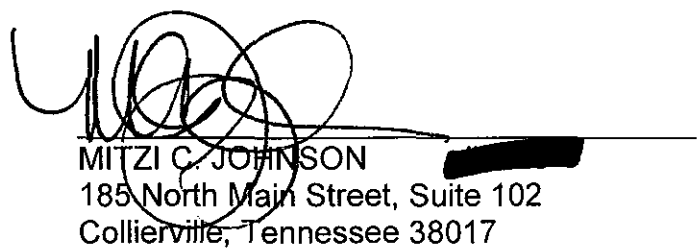
Likewise, the child's preference is not a material change of circumstance, but only a factor under Albright to be considered once a material change of circumstance has been proven. See *Giannaris, p. 468*.

The Father's Petition should have been dismissed as Father failed to meet the burden of proving the existence of a material change of circumstance.

CONCLUSION

The Trial Court stated "...if this is a mistake, it's going to be my mistake because I'm going to allow her on a temporary basis to change where her primary residence is just between now—just this next semester of school." The Trial Court did make a mistake. The Court failed to apply the law as it currently exists in the State of Mississippi. For each of the reasons stated herein, Appellant/Mother, Dawn Smith Shannon Clifton, respectfully requests this Court to reverse the Trial Court's order modifying custody and granting custody to Appellee/Father and return rightful custody to Appellant/Mother. Additionally, Mother should be awarded her reasonable attorney fees on appeal pursuant to Miss. Code Ann. 36-5-103(c).

Respectfully submitted,



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Attorney of Record for Appellant

CERTIFICATE OF SERVICE

I, Mitzi C. Johnson, Attorney for Appellant, Dawn Smith Shannon Clifton, certify that I have this day served a copy of the foregoing and attached brief for Appellant by United States Mail with postage prepaid on the following persons at these addresses:

Honorable Vicki B. Cobb
P.O. Box 248
Senatobia, Mississippi 38668

Honorable John T. Lamar
Attorney for Appellee
214 South Ward Street
Senatobia, Mississippi 38668

This the 8th day of July, 2011.

Mitzi C. Johnson
Attorney for Dawn Smith Shannon Clifton
185 North Main Street, Suite 102
Collierville, Tennessee 38017
901-853-2780

CERTIFICATE OF FILING

I, Mitzi C. Johnson, Attorney for Appellant, do hereby certify that I have this day deposited in the United States mail, postage prepaid, the original and three (3) copies of the Brief of Appellant for delivery to :

Kathy Gillis
Mississippi Supreme Court Clerk
P.O. Box 249
Jackson, Mississippi 39205-0249

This the 8th day of July, 2011.

Mitzi C. Johnson