

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

TRAVIS STRAIT

APPELLANT

VS.

CAUSE NO. 2013-CA-00334

KRISTY LORENZ

APPELLEE

ON APPEAL FROM
THE CHANCERY COURT OF LOWNDES COUNTY, MISSISSIPPI

APPELLEE'S BRIEF

ORAL ARGUMENT NOT REQUESTED

MATTHEW D. WILSON (MS Bar # 102344)
The Law Office of Matthew Wilson, PLLC
PO Box 4814
Mississippi State, MS 39762
Telephone - (662) 323-2889
Attorneys of Record for the Appellee

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

TRAVIS STRAIT

APPELLANT

VS.

CAUSE NO. 2013-CA-00334

KRISTY LORENZ

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record hereby 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.

Chancellor: The Honorable Kenneth Burns

Appellant: Travis Strait

Appellee: Kristy Lorenz

Guardian ad Litem: Lee Ann Turner
Starkville, Mississippi

Attorney For Appellant: William Starks
Columbus, Mississippi

Former Attorney
for Appellee: Douglas Ford
Columbus, Mississippi

Current Attorney
for Appellee: Matthew Wilson
Starkville, Mississippi

/s/Matthew Wilson
Matthew Wilson
Attorney of Record for the Appellee

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ii

TABLE OF CONTENTS..... iii

TABLE OF AUTHORITIES v

STATEMENT OF ISSUES 1

STATEMENT OF THE CASE..... 2

 I. Procedural History2

 II. Statement of the Facts6

SUMMARY OF THE ARGUMENT 15

ARGUMENT..... 20

 I. Standard of Review20

 II. The Chancellor Was Correct in Modifying Custody in Favor of
 Kristy.....20

 A. Travis’ Alienation of Alyssa from Kristy Rose to the Level of a
 Material Change in Circumstance21

 B. Travis’ Alienation of Alyssa from Kristy Adversely Affected the
 Health and Well-Being of Alyssa.25

 C. The Chancellor Served the Best Interests of the Child by
 Transferring Custody from the Father to the Mother.....27

 III. The Chancellor Did Not Err By Adopting the Report of the
 Guardian ad Litem Because Her Report Comported With His Own
 Observations31

 IV. The Chancellor Did Not Err By Finding Travis in Contempt of
 Court32

 V. The Chancellor Did Not Err By Awarding Attorneys’ Fees to
 Kristy.....33

 VI. The Chancellor Did Not Err By Assessing the GAL Fees and
 Assessing the Majority to Travis34

VII. The Chancellor Did Not Err By Denying Travis’ <i>Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens</i>	36
CONCLUSION.....	38
CERTIFICATE OF SERVICE	39

TABLE OF AUTHORITIES

Cases

<u>Albright v. Albright</u> , 437 So. 2d 1003 (Miss. 1983).....	27, 30, 31
<u>Ash v. Ash</u> , 622 So.2d 1264 (Miss. 1993).....	7, 24
<u>Biglane v. Under the Hill Corp.</u> , 949 So.2d 9 (Miss. 2007)	20
<u>Bounds v. Bounds</u> , 935 So. 2d 407 (Miss. Ct. App. 2006).....	34
<u>Canton v. Ross</u> , 157 Miss. 788, 128 So. 560 (1930).....	34, 35
<u>Carter v. Carter</u> , 735 So. 2d 1109 (Miss. Ct. App. 1999)	20
<u>Chamblee v. Chamblee</u> , 637 So.2d 850 (Miss. 1994)	20
<u>Cooley v. Cooley</u> , 574 So.2d 694 (Miss. 1991).....	21
<u>Elliott v. Rogers</u> , 775 So.2d 1285 (Miss. Ct. App.2000).....	34
<u>Ellis v. Ellis</u> , 952 So. 2d 982 (Miss. Ct. App. 2006).....	21, 22, 23, 25
<u>Evans v. Evans</u> , 75 So. 3d 1083 (Miss. Ct. App. 2011).....	32, 33
<u>Hensarling v. Hensarling</u> , 824 So.2d 583 (Miss. 2002).....	31
<u>Janssen v. Janssen</u> , 96 So. 3d 23 (Miss. Ct. App. 2012).....	32
<u>Lee v. Lee</u> , 798 So.2d 1284 (Miss. 2001).....	20, 27
<u>Lorenz v. Strait</u> , 987 So.2d 427 (Miss. 2008).....	2
<u>Mabus v. Mabus</u> (" <u>Mabus I</u> "), 847 So. 2d 815 (Miss. 2003)	20, 25, 27, 30
<u>Mabus v. Mabus</u> (" <u>Mabus II</u> "), 910 So.2d 486 (Miss. 2005).....	33
<u>Magee v. Magee</u> , 661 So.2d 1117 (Miss. 1995)	34
<u>McIntosh v. Dep't of Human Servs.</u> , 886 So. 2d 721 (Miss. 2004)	32
<u>McKee v. McKee</u> , 418 So.2d 764 (Miss. 1982)	34
<u>O'Connor v. Dickerson</u> , 188 So. 2d 241 (Miss. 1966).....	24

<u>Purvis v. Purvis</u> , 657 So. 2d 794 (Miss. 1995)	25
<u>R.K. v. J.K.</u> , 946 So. 2d 764 (Miss. 2007)	32
<u>Riley v. Doerner</u> , 677 So. 2d 740 (Miss. 1996)	26, 27
<u>Rogers v. Rogers</u> , 662 So.2d 1111 (Miss. 1995)	33
<u>Story v. Allen</u> , 7 So.3d 295 (Miss. App. 2008)	28
<u>T.K. v. H.K.</u> , 24 So. 3d 1055 (Miss. Ct. App. 2010)	20, 25
<u>Tucker v. Tucker</u> , 453 So.2d 1294 (Miss. 1984)	21
<u>U.S. v. Clinkscales</u> , 45 C.M.R. 693 (A.F.C.M.R. 1972)	25
<u>White v. White</u> , 26 So. 3d 342 (Miss. 2010)	36, 37
<u>Wilson v. State</u> , 574 So.2d 1338 (Miss. 1990)	36

Statutes

10 U.S.C. § 886	25
Miss. Code §§ 93-27-101, et seq.	36
Miss. Code Ann. § 93-27-202	36
Miss. Code Ann. § 99-15-17	36

Other Authorities

U.C.C.R. 8.06	7, 33
---------------------	-------

STATEMENT OF ISSUES

- I. WHETHER THE CHANCELLOR WAS CORRECT IN AWARDING CUSTODY TO KRISTY.
- II. WHETHER THE CHANCELLOR WAS CORRECT IN ADOPTING THE FINDINGS OF THE GUARDIAN AD LITEM.
- III. WHETHER THE CHANCELLOR WAS CORRECT IN FINDING TRAVIS STRAIT IN CONTEMPT OF COURT.
- IV. WHETHER THE CHANCELLOR WAS CORRECT IN AWARDING KRISTY LORENZ ATTORNEYS' FEES.
- V. WHETHER THE CHANCELLOR WAS CORRECT IN CALCULATING THE GUARDIAN AD LITEM FEES AND ASSESSING THE MAJORITY TO TRAVIS STRAIT.
- VI. WHETHER THE CHANCELLOR WAS CORRECT IN REFUSING TO TRANSFER THE CASE TO ANOTHER FORUM.

STATEMENT OF THE CASE

I. Procedural History

After marrying in 2003, the parties, Travis Strait (“Travis”) and Kristy Lorenz (“Kristy”), were divorced on December 21, 2005. The *Final Decree of Divorce* incorporated the parties’ agreement to share joint legal custody of their daughter, Alyssa Marie Strait (“Alyssa”), born in 2002. The parties also agreed that Travis would have physical custody of Alyssa and that Kristy would have visitation and provide child support [R. at 253].

On January 31, 2006, Kristy filed a *Petition to Modify the Final Decree of Divorce* seeking change of custody, which the lower court denied. Kristy filed a new *Petition to Modify Final Decree* on August 8, 2006, alleging child abuse by Travis and seeking a change of custody. These issues were fully litigated through an appeal to the Supreme Court of Mississippi, and custody of Alyssa remained with Travis. Lorenz v. Strait, 987 So.2d 427 (Miss. 2008) (holding that the Chancellor’s decision was not manifestly erroneous) [R. at 253-54].

Kristy filed two *Petitions to Cite (Travis) for Contempt and to Modify Custody* that were litigated prior to the one presently at issue: one in 2009, and one 2010. Both actions resulted in judgments that considered the lack of contact Kristy was able to have with Alyssa. Each judgment established clear visitation rights for Kristy, but neither judgment modified Travis’ custody of Alyssa [R. at 254].

On April 21, 2011, Travis filed a *Petition for an Order of Protection on Behalf of a Family or Household Member* (“Hawaii Petition”) with the Family Court for the First District of the State of Hawaii (“Hawaii Court”) alleging that Alyssa had been molested by Kristy’s husband, Aaron Lorenz (“Aaron”) [T. at 43-44]. As such, Travis automatically received a *Temporary Restraining Order* (“Hawaii TRO”) against Kristy until the date of the hearing, June

1, 2011 [T. at 44, 57]. Subsequently, authorities from Hawaii and Mississippi conducted a joint investigation of Aaron [T. at 15].

In the interim, Kristy initiated the present action on May 26, 2011 by filing her *Petition to Cite (Travis) for Contempt, to Modify Custody and Other Relief* (“Kristy’s *Petition*”) with the Chancery Court of Lowndes County [R. at 254]. A *Fiat* was issued setting the matter for hearing on June 28, 2011. On May 31, 2011, Rule 81 summons was issued [R. at Docket (p.4)].

On June 1, 2011, the Hawaii Court conducted a hearing on the Hawaii *Petition*. Present at the hearing was Travis, as well as Kristy’s attorney, while Kristy was present via telephone. Also present were a social worker for Child Welfare Services and a Deputy Attorney General for the State of Hawaii. After considering the report provided by Child Welfare Services, the Hawaii Court dissolved the Hawaii TRO citing “insufficient evidence” [T. at 58-59; R. at 98].

On or about June 2, 2011, Travis transferred to San Diego, California [T at 33, 64].

On June 13, 2011, the Rule 81 summons was returned to the Chancery Clerk after having been personally served upon Travis [R. at Docket (p.4)]. Three days later, on June 16, 2011, Travis petitioned the Family Court of San Diego County, California (“California Court”) for a *Temporary Restraining Order* (“California TRO”) [T at 64]. After obtaining the California TRO, a hearing was scheduled, but was later continued to October 2011 [T at 73].

Meanwhile, on July 11, 2011, Travis filed a *Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens* in the Chancery Court of Lowndes County, Mississippi [R. at 68-74]. Simultaneously, he filed a *Motion to Appoint Guardian ad Litem*, to which Kristy objected [R. at 75-76, 95-97]. Travis also filed his response to Kristy’s *Petition*, in which he expresses concern that Alyssa had been sexually abused by Aaron [R. at 88-94]. Despite his concern about Alyssa’s safety, Travis makes no request (be it for direct or alternative relief) for the Chancery Court to suspend or to restrict Kristy’s visitation rights [R. at 88-94].

A hearing was conducted on both of Travis' motions on July 13, 2011 [T. at 2-22]. At the hearing, the Chancellor denied Travis' *Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens* [T. at 2-22; R. at 255]. Afterwards, by agreed order, the Chancellor appointed the Hon. Lee Ann Turner to serve as Guardian ad Litem ("GAL"), ordering her to "thoroughly investigate and report factual information to the court concerning the minor child and the allegations of sexual abuse, and [to] report and make recommendations to the Court regarding the child's best interests" [R. at 160-64].

In October 2011, the California Court dissolved the California TRO [T at 64].

On January 23, 2012, the GAL filed a *Notice of Failure to Cooperate with Guardian ad Litem's Investigation and to Comply with Court Order*; the motion was set for status conference on March 22, 2012 [R. at 256]. Meanwhile, on March 5, 2012, Kristy filed a *Motion for Temporary Emergency Custody*. Therein, Kristy alleges that Travis had not let her see Alyssa since December 2010, even outside the presence of Aaron, and that she had not had any telephone contact with Alyssa for over a year. She also alleges that Travis had not given her any information about Alyssa's wellbeing [R. at 256].

Following the March 22, 2012 status conference, the Chancellor ordered Travis to deliver the child to Kristy on or before April 2, 2012. The Chancellor also mandated "the manner of delivery," ordering that Alyssa "be flown" to one of three specified airports [R. at 166-67]. The Chancellor also transferred legal and physical custody of Alyssa to Kristy for the month of April [R. at 167]. Travis moved to reconsider this Order; however, no hearing was ever set on his motion [R. at Docket (p.6), 169-72].

On April 18, 2012, Kristy filed her *Motion for Order Authorizing Counselling and/or Evaluation of the Minor Child by Dr. Criss Lott and for Other Relief*. The Court granted this motion on April 23, 2012 following a hearing [R. at 173-76; T at 22-32]. On May 1, 2012,

Travis moved to compel Allyssa's return. On May 7, 2012, the Court set the matter for trial, entering an order that no further pleadings would be filed on present issues unless there was good cause [R. at 257].

On July 10, 2012, the GAL submitted her *Preliminary Report*. The first two days of trial were held on this matter on July 26 and 27, 2012. Following trial, the minor child began summer visitation with Kristy, which was scheduled to end on August 26, 2012 [R. at 258].

The GAL submitted her *Supplemental Report* on August 17, 2012, providing further support for her conclusions. On August 20, 2012, Kristy moved the court for emergency temporary custody so that the child could be enrolled in school in Lowndes County [R. at 258].

Travis filed a response to Kristy's motion the following week. Travis also moved that the GAL be removed from her position and that her report be stricken. The court granted Kristy's motion on August 29, 2012, citing that the GAL and Kristy has provided August dates for the final day of trial, but that Travis' attorney was not available until September, which was well after the end of visitation. The court also cited the strong likelihood that Kristy would win and that the minor child would be at a disadvantage to not be enrolled in a local school [R. at 259].

On September 20, 2012, the final day of trial was held. The GAL submitted her *Revised Preliminary Report of the Guardian ad Litem*. On October 12, 2012, the court entered an order to release the initial \$3,000.00 funds on file toward her services. On October 22, 2012, Travis filed his objections to the bill [R. at 259].

On November 1, 2012, the Chancellor entered his *Opinion and Judgment*, transferring custody of Alyssa from Travis to Kristy [R. at 253-81]. The Chancellor found that "[e]very aspect of the GAL's reports comported with the Court's own observations throughout the course of the case, and particularly at trial" [R. at 263].

On November 7, 2012, Kristy filed a *Motion to Alter or Amend Judgment and/or to Clarify Judgment and a Request to Supplement the Record Necessary to Accord Certain Relief*. Therein she asks that Travis be found in contempt of court and that she be reimbursed for her attorney's fees and expenses [R. at 283-88].

On November 13, 2012, twelve days after entry of the *Opinion and Judgment*, Travis moved for a new trial [R. at 289-306]. Kristy objected because, *inter alia*, the motion was untimely [R. at 307-11].

On December 21, 2012, the Chancellor denied Travis' motion for new trial. That same day the Chancellor granted Kristy's request that Travis be found in contempt of court and awarded her \$10,000.00 in attorney's fees [R. at 314-18].

On January 22, 2013, Travis moved for an extension of time to file a notice of appeal, alleging "good cause" [R. at 319-21].¹ The Court granted this motion, allowing him to file a notice of appeal on or before February 21, 2013 [R. at 322]. Travis filed his notice of appeal on February 21, 2013 [R. at 323-24].

II. Statement of the Facts

Travis and Kristy were divorced on December 21, 2005. The *Final Decree of Divorce* incorporated the parties' agreement to share joint legal custody of their daughter, Alyssa. The parties also agreed that Travis would have physical custody of Alyssa and that Kristy would have visitation and provide child support [R. at 253].

On January 31, 2006, Kristy filed a *Petition to Modify the Final Decree of Divorce* seeking change of custody, which the lower court denied. Kristy filed a new *Petition to Modify*

¹ The motion mistakenly computes the deadline for filing the *Notice of Appeal* as being Tuesday, January 22, 2013, when the correct deadline was actually Monday, January 21, 2013. Although Travis submitted the motion to the Chancellor via email on the 21st, the Clerk did not file it until the 22nd.

Final Decree on August 8, 2006, alleging child abuse by Travis and seeking a change of custody. These issues were fully litigated through an appeal to the Supreme Court of Mississippi, and custody of Alyssa remained with Travis. [R. at 253-54].

On March 16, 2009, Kristy filed her *Petition to Cite Defendant for Contempt and to Modify Custody*. On August 24, 2009, the Chancellor found, *inter alia*:

This case was heard on July 27, 2009 on the various pleadings of the parties. After hearing the testimony, considering the exhibits and the post-trial memoranda, the Court does find and adjudicate as follows:

21) The most compelling argument Kristy made for modification of custody is that Travis has not allowed Kristy to have contact with Alyssa. Until a week before the hearing, Kristy had not seen her daughter in over 15 months. This is alarming to the Court. However, the Court believes that neither party tried as they should to see that Alyssa saw her mother. ...

22) Neither Kristy nor Travis has abided by [Rule 8.06 of the Uniform Chancery Court Rules] and they are hereby enjoined to strictly follow this Rule in the future

23) In Ash v. Ash, 622 So.2d 1264, 1266 (Miss. 1993), our Supreme Court said the following:

a non-custodial parent's right to visitation is a 'right more precious than any property right.' One parent ... cannot be permitted to unilaterally deny the other's right to visit with his child. At the same time, 'a change of custody will not be made for the purpose of rewarding one parent or punishing the other.'

24) Travis' disinterest in Alyssa seeing her mother approaches the facts in the Ash case, but the Court does not believe it rises to that level. Travis and Kristy are ordered to strictly follow the visitation schedule given later in this Order.

[R. at 48, 52-53].

In June 2010, she filed another *Petition to Cite the Defendant in Contempt and to Modify Custody* [R. at Docket (p.4)]. In October 2010, the Chancellor found, *inter alia*, that:

7. Prior to this hearing, Kristy had not seen Alyssa in 14 months. ...

9. The telephone visitation will continue as previously ordered. ...

10. The visitation is hereby modified as follows:

- a) The child shall visit with her mother in even-numbered years for Christmas vacation....
- b) The child shall visit with her mother every summer from one week after school is dismissed for the summer break until one week before the child's school resumes.

- d) Each party will be responsible for one-half of the cost of the total airfare and of the checked baggage, if any cost is incurred, for Alyssa (and a companion, if required) to and from Hawaii for the Christmas and summer visitation. Kristy shall send to Travis, by e-mail, the proposed travel arrangements for Christmas and summer, a minimum of 30 days before each visitation period shall begin. Travis shall have 10 days to determine if he can find a less expensive travel plan, which he must send to Kristy by e-mail. The travel may be to Golden Triangle Regional Airport (GTR), Memphis Regional Airport (MEM), Birmingham International Airport (BHM) or Jackson, Mississippi Regional Airport (JAN), whichever is least expensive. Within five days of the agreement on the travel plans, which shall be the least expensive of Kristy's or Travis' proposal, Travis will mail, by registered mail, one-half of the airfare to Kristy. Kristy will then purchase the tickets and must keep proof of purchase. If for any reason she does not purchase or use the tickets, she must refund Travis the money received from him for the airfare.

[R. at 59-62].

Pursuant to the October 2010 judgment, Kristy enjoyed Christmas visitation with Alyssa in December 2010 [T. at 38]. The visitation period ended on January 1, 2011, after which time Alyssa informed Travis that she wanted to live with her mother [T at 38-39].

From January 18, 2011 to March 10, 2011, Alyssa saw various doctors for different reasons—including for “adjustment disorder.” At no time during this period did she mention

being touched inappropriately by Aaron [T. at 45-55]. Instead, she reiterated her desire to live with Kristy, going so far as to say, “If I can’t live with my mother, I might as well die” [T. at 48].

Alyssa’s summer vacation was scheduled to begin on June 1, 2011 [T. at 63]. As early as March 2011, Kristy began sending Travis’ flight proposals via email, but by Travis’ own admission at trial, he never responded to them [R. at 65; T at 41]. So, Kristy sent these flight proposals to Travis via certified mail, return receipt requested [R. at 65; T at 41-42]. Travis signed the return receipt card for this travel proposal on April 14, 2011 [T at 42].

Travis’ reaction to Kristy’s flight proposal was discussed at trial:

Q. Mr. Strait, you never responded to that flight proposal that you got by certified mail to Kristy, did you?

A. No, sir.

Q. Okay. What you did do instead was you went to the Hawaii family court in Hawaii and filed a petition for a TRO or a protective order against Kristy, didn’t you?

A. Yes.

[T. at 42-43].

The Hawaii Petition, as filed by Travis with the Hawaii Family Court on April 21, 2011, alleges that Alyssa was molested by her step-father, Aaron Lorenz, during the December 2010 Christmas holidays. Specifically, it describes Alyssa being subjected to inappropriate touching by Aaron in the shower. The petition also states that Travis first learned about these allegations on April 19, 2011 (exactly five days after he had received Kristy’s certified letter), when Alyssa purportedly had told him [T. at 43, 45]. On April 20, 2011, Alyssa was taken to a doctor where she reiterated these allegations [T. at 55-56].

Travis automatically received the Hawaii TRO, which was effective until the date of the June 1, 2011 hearing [T. at 44, 57]. During the period the TRO was in effect, an interview and

forensic investigation was performed on Alyssa. As Travis admits at trial, these reports concluded that there was no evidence of sexual abuse of Alyssa by Aaron [T. at 57].

On June 1, 2011, the Hawaii Court conducted a hearing on the Hawaii Petition. Present at the hearing was Travis, as well as Kristy's Hawaii attorney, while Kristy was present via telephone. Also present was a social worker for Child Welfare Services and a Deputy Attorney General for the State of Hawaii. After considering the report provided by Child Welfare Services, the Hawaii Court dissolved the Hawaii TRO citing "insufficient evidence" [T. at 58-59, R. at 98].

In the following colloquy between Travis and Mr. Ford, Kristy's attorney at the trial of this matter, Travis admits that he had misrepresented certain facts to the Hawaii Court:

Q. Okay. Now move forward to Page 30, Line 18 [of the transcript of the June 1, 2011 Hawaii hearing], Mr. Stone, who was Kristy Lorenz' attorney at this hearing, asked you, "And isn't it a fact that it was on April, April 19th, to be exact, or April 20th, when you first reported this to the Department of Human Services?" Do you see that question?

A. Yes.

Q. Okay. And you said – read your response.

A. "No, sir. That's only when the Department of Human Services took the case. I've been trying to get CPS or Department of Human Services to listen to this since February."

Q. We've talked about this this morning for quite a bit of time, and you made it clear that you didn't know about this until April 19th, correct?

A. Yes.

Q. But you're telling him at this hearing that you knew about it in February and you were trying to get it taken care of then, right?

A. I did say that, yes.

Q. Okay, so that would be inaccurate, wouldn't it, Mr. Strait?

A. It would.

[T. at 61-62].

After the Hawaii TRO was dissolved, Travis refused to permit visitation [T. at 63]. Although he alerted Kristy and her Hawaii attorney that he was about to move to San Diego, California, he did not file notice with the Chancery Court of his change of address [T. at 63].

On or about June 2, 2011, Travis transferred to San Diego, California [T at 33, 64]. On June 16, 2011, within days of being served with process in this matter—and within a fortnight of moving to California—Travis petitioned for and obtained the California TRO [R. at Docket (p.4); T at 64]. After obtaining the California TRO, a hearing was scheduled, but was subsequently continued to October 2011, at which time it was dissolved [T at 64, 73]. In the meantime, Travis used the California TRO as a justification to prevent Kristy from having summer visitation with Alyssa [T. at 71].

Even though the California TRO had expired by October 2011, Travis admitted at trial that he refused to allow Kristy to have any contact whatsoever with Alyssa – not even telephone visitation – from April 2011 to April 2012 [T. at 73, 318-19]. In fact, Travis was quite blatant at trial regarding his contempt of the Chancellor’s October 2010 order:

Q. Well, you were speaking in response to some of Mr. Starks’ questions, and you said, Oh, yeah, Kristy likes to follow the order when it is convenient for her; otherwise, she didn’t want to follow the order. Do you remember that?

A. I don’t believe that’s the direct quote, but it’s close.

Q. Okay. Well, if she was ordered to have visitation with her child and you prevented that, you would be violating the court order, right?

A. Yes.

Q. Okay. If the Court told you to fly the child here for a visitation and you refused to do that, you would be violating the court order, wouldn’t you?

A. It’s possible, yes.

Q. Okay. If you refused to allow her to have telephone calls and communication with her child that the court called for, you would be violating the court order, correct?

A. Yes.

Q. And you have done all that, haven't you, Mr. Strait?

A. I have made it no secret that between April of 2011 and April 2012, I did prevent contact, yes.

[T. at 319-20].

On direct examination, Travis stated that he had suspended all communication between Alyssa and Kristy out of a genuine fear for Alyssa's safety; he also admitted that he still held a grudge against Aaron. However, Travis volunteered that he no longer believes that Aaron molested his daughter:

A. However, I kept Alyssa from communicating and visiting with her mother because I had a genuine fear for her safety. I honestly thought that Aaron had abused her, you know. That's obviously changed now. And so I pray to God nothing happened, but to feel that kind of pain, to think that your daughter has been hurt like that, that's kind of hard to let go of. It's a hard grudge to drop, and I'm trying. But I have no plans at keeping Alyssa away from her mother without reason.

[T. at 308].

In April 2012, Alyssa was ordered to return to Mississippi for a month-long visit with her mother [R. at 166-68]. Although Travis was ordered to fly Alyssa, he instead drove her to Mississippi, causing her to arrive late [T. at 82-84]. While visiting with Kristy, Alyssa met with Dr. Criss Lott [R. at 177-78]. When meeting with Dr. Lott, Alyssa "repeatedly denied" the allegations she had previously made about Aaron [T. at 267-68. 277].

At trial, Dr. Lott listened to Travis' cross-examination as well as Kristy and Aaron's respective testimonies. From these statements, and from his previous interviews with Alyssa, he gave his professional opinion that Travis had severely alienated Alyssa from Kristy by virtue the restrictions on Kristy's visitation with Alyssa [T. at 270-71]. He further opined that he did not

believe that Alyssa had been abused [T. at 268]. Dr. Lott opined that Alyssa was confused, that her confusion was exacerbated by her alienation from Kristy, and that a reversal of custody would significantly improve Alyssa's condition:

Q. And this degree of confusion you talk about that Alyssa seems to suffer from, would you agree with me that the degree of confusion is based largely in part on the interference and/or alienation that she's experiencing from her mother at the hands of her father?

A. I think that it is significantly exacerbating her relationship and her – and I think its exacerbated and created some real problems in the things that she's told people, you know. I read what the teachers said. I read and heard the statements all of the DHS workers have said, and I understand their concern. If I'm told something, like that, I'm going to respond in a very conservative manner as well. For her to say those things, and, yet, have done things in the interim that are so contrary to the allegations, its just – you know, to me, that suggests there's some real confusion here.

Q. And if that pattern has been demonstrated, time and time again, changing custody would cure that?

A. Well, if the parent has been alienated and there's severe alienation going on, then it would certainly help, significantly improve it.

[T. at 270, 279]. He also stated that if this confusion is not addressed, she will have significant emotional problems in the next five to ten years [T. at 274].

At trial, Travis admitted that Mississippi is his home state:

Q. Okay, Now, you lived in Hawaii, you lived in California. You haven't lived in Mississippi in a while, have you?

A. No, I haven't.

THE COURT: Where is your home of record?

MR. STRAIT: It's here in Columbus.

BY MR. FORD:

Q. Okay. And that's why you have an expired Mississippi driver's license?

A. Yes.

Q. It expired on March 18, 2009, correct?

A. Yes.

Q. Okay. So how is this a valid driver's license?

A. Military members can have an expired license when they don't reside in their home state.

[T. at 84-85].

Aaron and Kristy spent \$1,500.00 to hire an attorney in Hawaii [T. at 135]. They spent \$3,289.64 for their attorney in California [T. at 136]. They spent \$25,000.00 for Aaron's criminal defense, \$37,545.89 for the representation of Mr. Ford, Kristy's Mississippi attorney, and \$3,600.00 for other costs [T. at 136].

The GAL spent 122 hours on this matter, billing at a rate of \$100.00 per hour [R. at 279]. In the *Opinion and Judgment*, the Chancellor assessed two-thirds of the GAL's bill to Travis, in accordance with a previously-entered *Agreed Order* [R. at 164, 279].² This was modified by a subsequent order in which the Chancellor requires Travis to pay Kristy \$1,000.00 to offset her share of the GAL's bill; the Chancellor also orders Travis reimburse Kristy for \$10,000.00 of her attorney's fees [R. at 314-18].

² Although the order is styled an *Agreed Order*, attorneys for neither party signed the rendered order. The record is silent as to why a copy, unsigned by either party, was entered.

SUMMARY OF THE ARGUMENT

I. Standard of Review

The factual findings of a chancellor may be disturbed only when it is reasonably apparent that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. The chancellor has the sole responsibility to determine the credibility of witnesses and evidence, and the weight to be given each. Resolution of factual disputes is always a matter entrusted to the sound discretion of the chancellor.

II. The Chancellor Was Correct in Modifying Custody in Favor of Kristy

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. In determining whether a material change in circumstances has occurred, the chancellor must consider the totality of the circumstances.

A. *Travis' Alienation of Alyssa from Kristy Rose to the Level of a Material Change in Circumstance*

There comes a time when the severity of interference with a non-custodial parent's visitation rights rises to a level that justifies a finding of a material change in circumstances. Kristy respectfully submits that this is that time.

The Chancellor chastened Travis in 2009 for his “disinterest in Alyssa seeing her mother.” In 2010, the Chancellor ordered Travis to send Alyssa to Mississippi for summer visitation. In 2011, Travis blocked all communication between Kristy and Alyssa for the space of an entire year, using back-to-back TROs from Hawaii and California to justify his disobedience of the Chancellor’s order.

Travis claims that he had “a good faith reason” to disobey the Chancellor. However, he never demonstrated good faith by asking the Chancellor to suspend Kristy’s visitation after the abuse allegations had been lodged against Aaron. Instead of filing a counterclaim with the lower court, to which he had just been summoned only a few days before, Travis obtained the California TRO in a failed attempt to sidestep the Chancellor’s jurisdiction.

Given Travis’ disdain for the Chancellor’s orders, Kristy respectfully submits that this Court should find that Chancellor Burns did not abuse his discretion by deeming Travis’ interference with Kristy’s visitation a material change in circumstance.

B. *Travis’ Alienation of Alyssa from Kristy Adversely Affected the Health and Well-Being of Alyssa.*

At trial, Dr. Criss Lott was the only medical professional to testify. He gave his professional opinion that Travis had severely alienated Alyssa from Kristy by virtue of the restrictions on Kristy’s visitation with Alyssa. He further opined that he did not believe that Alyssa had been abused. Dr. Lott believed that Alyssa was confused, that her confusion was exacerbated by her alienation from Kristy, and that a reversal of custody would significantly improve Alyssa’s condition. He also opined that if Alyssa’s confusion were not addressed, she would have significant emotional problems in the next five to ten years.

Having the sole responsibility to determine the credibility of witnesses and evidence, and the weight to be given each, Chancellor Burns heeded Dr. Lott’s advice to address these problems by transferring custody of Alyssa from Travis to Kristy.

C. *The Chancellor Served the Best Interests of the Child by Transferring Custody from the Father to the Mother*

At trial, the GAL’s Preliminary Report was entered into evidence, and her analysis was adopted by the Court. Kristy submits that the GAL’s analysis is well-reasoned and, except for a

few items, accurately and completely reflects the evidence presented at trial, hence the reason the Chancellor notes that it “[comports] with the Court’s own observations throughout the course of the case, and particularly at trial.”

Kristy notes that Dr. Lott testified at trial that Alyssa was confused and that her confusion would create “significant emotional problems in the next five to ten years” if left uncorrected. For this reason, the health of the child factor should weigh heavily toward Kristy.

In addition, Kristy echoes the finding of the GAL with respect to Travis’ propensity to disobey the orders of the Court. Kristy contends that Travis’ decision to bring an action in California after having been served with process in this matter, in and of itself, was disrespectful to the authority of Chancellor Burns.

Lastly, Kristy would note that Travis’ credibility and character for truthfulness is suspect. At trial, he admitted to having misrepresented certain facts to the Hawaii Court at the June 1, 2011 hearing. His admitted history of misrepresenting facts to a court of law should be a strike against him in the area of moral fitness, further buttressing the GAL’s analysis.

III. The Chancellor Did Not Err By Adopting the Report of the Guardian ad Litem Because Her Report Comported With His Own Observations

On August 11, 2011, by agreed order, the Chancellor appointed the Hon. Lee Ann Turner to serve as GAL in this matter, directing her to “thoroughly investigate and report factual information to the court concerning the minor child and the allegations of sexual abuse, and [to] report and make recommendations to the Court regarding the child’s best interests.”

Chancellor Burns was not bound by the GAL’s report, because he—and not the GAL—is the ultimate finder of fact. Thus, when he found that the GAL’s report “comported with the Court’s own observations throughout the course of the case, and particularly at trial.” he made it

crystal clear that the *Opinion and Judgment* is his own assessments and not simply a rubber stamp of the GAL's findings.

The Chancellor had plenty of legal and factual basis, beyond the report and testimony of the GAL, to ascertain that Alyssa had experienced a material, adverse change in circumstances. Her investigation merely confirmed the Chancellor's findings. The Chancellor made his opinion independently of the GAL; therefore, Travis' objections to the GAL's report are without merit.

IV. The Chancellor Did Not Err By Finding Travis in Contempt of Court

Travis concedes that no visitation or contact was allowed between Alyssa and Kristy between April 2011 and April 2012. However, Travis claims that he had "a reasonable, good faith belief that his daughter had been abused when he refused to allow visitation or contact."

In Mississippi, good faith is not a defense against a charge of contempt. Even if it were a defense, Travis did not act in good faith. Therefore, the Chancellor was well within his discretion to cite Travis in contempt of Court.

V. The Chancellor Did Not Err By Awarding Attorneys' Fees to Kristy

The general rule in divorce and child custody actions is that appropriate attorney's fees should be awarded in an amount to secure a competent attorney. However, in contempt actions, attorney's fees are awarded "to make the plaintiff whole."

The Chancellor awarded Kristy reimbursement for \$10,000.00 of what she paid Mr. Ford, her local attorney, plus an additional \$1,000.00 to reimburse her for what she had been ordered to pay to the GAL. In view of the Chancellor's broad discretion to award attorney's fees, this was perfectly acceptable.

VI. The Chancellor Did Not Err By Assessing the GAL Fees and Assessing the Majority to Travis

Travis raised certain allegations of child abuse concerning Kristy's husband. Travis' allegations necessitated the appointment of a GAL. Kristy opposed the appointment of a GAL. Ultimately, the GAL's recommendation was adverse to Travis. Since he moved the Court for the GAL's appointment, and since her report was adverse to him, he should be responsible for most of the GAL's costs. Also, the GAL's fees were reasonable.

VII. The Chancellor Did Not Err By Denying Travis' Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens.

Travis claims in his *Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens* that neither he nor Alyssa had had any significant connection with Lowndes County, Mississippi for years. Despite this purported lack of significant connection, Travis admitted at trial that his home of record is Lowndes County and that Mississippi is his home state. This alone bars a change in jurisdiction.

As for a change of forum, the alleged abuse had supposedly occurred in Lowndes County. The Mississippi Department of Human Services had done an investigation in this matter, in conjunction with out-of-state authorities. Furthermore, little evidence exists in California, where the child and her father resided at the time of trial.

ARGUMENT

I. Standard of Review

The factual findings of a chancellor may be disturbed only when it is reasonably apparent “that the chancellor abused his discretion, was manifestly wrong, clearly erroneous or applied an erroneous legal standard.” Biglane v. Under the Hill Corp., 949 So.2d 9, 13-14 (Miss. 2007). The chancellor has the sole responsibility to determine the credibility of witnesses and evidence, and the weight to be given each. Lee v. Lee, 798 So.2d 1284, 1288 (Miss. 2001) (citing Chamblee v. Chamblee, 637 So.2d 850, 860 (Miss. 1994)). Resolution of factual disputes is always a matter entrusted to the sound discretion of the chancellor. Carter v. Carter, 735 So. 2d 1109, 1114 (Miss. Ct. App. 1999).

II. The Chancellor Was Correct in Modifying Custody in Favor of Kristy

It is well settled that the polestar consideration in any child custody matter is the best interest and welfare of the child. T.K. v. H.K., 24 So. 3d 1055, 1062 (Miss. Ct. App. 2010). Modification of a child custody order must be based on conduct of the custodial parent that poses a danger to the mental or emotional health of the child. Id.

“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.” Mabus v. Mabus, 847 So. 2d 815, 818 (Miss. 2003) (“Mabus I”). In determining whether a material change in circumstances has occurred, the chancellor must consider the totality of the circumstances. T.K., 24 So. 3d at 1062.

Although Travis's *Appellant's Brief* (p. 18) cites Tucker v. Tucker, 453 So.2d 1294, 1298 (Miss. 1984) for the proposition that "children do not need to be bounced back and forth between their parents like a volleyball," such would necessarily be the effect of the relief Travis seeks. Prior to August 2012, Alyssa had remained in the custody of her father since at least 2008 [R. at 253-54]. Since August 2012, Alyssa has lived with Kristy [R. at 222-24]. To reverse the custody modification that Chancellor Burns entered more than eighteen (18) months ago would create the very back-and-forth volleyball-like situation that Travis decries in his brief. Since Travis cites Cooley v. Cooley, 574 So.2d 694, 699 (Miss. 1991) for the proposition that a child should "have some degree of stability in his or her life," Kristy respectfully implores this Court to take Travis' advice and preserve Alyssa's present stability by denying his appeal.

A. *Travis' Alienation of Alyssa from Kristy Rose to the Level of a Material Change in Circumstance.*

"While visitation issues should not normally be considered by the lower court when hearing a plea for custody modification, the Supreme Court has identified that interference with visitation may constitute a material change in circumstances given sufficient severity." Ellis v. Ellis, 952 So. 2d 982, 994 (Miss. Ct. App. 2006). Put another way, "there comes a time when the severity of interference with a non-custodial parent's visitation rights rises to a level that justifies a finding of a material change in circumstances." Id. at 990.

Kristy respectfully submits that, like Ellis, this is that time.

In Ellis, the lower court had ruled that the custodial mother's continued violation of court orders pertaining to visitation and her continued alienation of the child from the non-custodial father were, collectively, a material change of circumstances. Id. at 990-91. Although the mother appealed this ruling, the lower court's order was affirmed. See id. at 998.

The case at bar is quite similar to Ellis. Each case involves one daughter. See id. at 997. In both matters, there had been extensive litigation between the parties leading up to the change of custody. See id. at 985. In both cases, the custodial parents had moved outside of Mississippi while the non-custodial parents lived in Mississippi.³ See id. at 987. In both matters, the non-custodial parents' visitation periods had been modified to adjust for the distance between the parties. See id. In both situations, the respective Chancellors had chastised the custodial parents for impeding the non-custodial parents' access to their respective child. See id. at 986-87.

Like Travis, the custodial mother in Ellis had deprived the non-custodial father of his summer visitation. See id. at 988. For four months, Mrs. Ellis blocked all but one telephone call from Mr. Ellis to his daughter. See id. Compare this to Travis who, by his own admission, blocked all telephone calls and visits between Kristy and Alyssa for the space of an entire year:

Q. Okay. If you refused to allow her to have telephone calls and communication with her child that the court called for, you would be violating the court order, correct?

A. Yes.

Q. And you have done all that, haven't you, Mr. Strait?

A. I have made it no secret that between April of 2011 and April 2012, I did prevent contact, yes.

[T. at 319-20].

Mrs. Ellis' attempts to restrict Mr. Ellis' access to their daughter had been addressed by the lower court in previous orders; nevertheless, she used the advice of an Oklahoma attorney to justify her continued disobedience. See id. at 986-88. Similarly, in 2011, Travis used back-to-back TROs from Hawaii and California to justify his disobedience to the summer visitation order

³ Although Travis was still domiciled in Mississippi as evidenced by his Mississippi driver's license and by his admission at trial that Mississippi is his home of record [T. at 84], he was stationed away from Mississippi.

that Chancellor Burns had entered in 2010—even though the Chancellor had chastened Travis in 2009 for his “disinterest in Alyssa seeing her mother” [T. at 319-20; R. at 48, 52, 59-62, 71].

By July 2009, Kristy had gone fifteen months without seeing her daughter, prompting a contempt petition [R. at 52]. Then from July 2009 to October 2010, Kristy went another fourteen months without seeing her daughter, prompting another contempt petition [R. at 59-62]. Finally, after enjoying her first Christmas with Alyssa in three years, Kristy went another year with no access whatsoever with her daughter—not even a phone call [T. at 319-20].

Travis admits in his *Appellant’s Brief* (p. 20) that he did interfere with Kristy’s visitation from April 2011 to April 2012, but he claims that he had “a good faith reason” to do so. In similar fashion, Mrs. Ellis “claimed that she failed to abide by the court’s decree because of the stress and trauma [her daughter] experienced as a result of visits with [the father].” See id. at 986. Mrs. Ellis claimed that her daughter would “beg her not to go and would cry herself to sleep the nights before she was to visit” her father. Id. Compare this to Allyssa’s diametrically-opposite reaction when she left Kristy: “If I can’t live with my mother,” she said, “I might as well die” [T. at 48]. Kristy respectfully submits that if a child’s pleas not to visit with the non-custodial parent are insufficient justification to hinder court-ordered visitation, then a child’s pleas to live with the non-custodial parent would be even less justification for such interference.

Although Travis claims to have disobeyed the Chancellor’s order in good faith, he actually demonstrated bad faith. Travis was served with the Rule 81 summons sometime between May 31, 2011 and June 13, 2011 [R. at Docket (p.4)]. Instead of filing a counterclaim against Kristy to suspend her visitation with Alyssa, Travis obtained the California TRO on June 16, 2011 in a failed attempt to sidestep the Chancellor’s jurisdiction [T. at 64]. Moreover, Travis alleges in his July 11, 2011 response to Kristy’s *Petition* that “... the only detrimental effect upon [Alyssa] was occasioned by the sexual abuse of [Kristy’s] husband,” and that the Chancellor

should “deny [Kristy’s] now annual attempt to have custody changed.” Although Travis uses the sexual abuse allegations against Aaron to justify his request that Kristy’s *Petition* be denied, he makes no concomitant request for the Chancellor to suspend Kristy’s visitation with Alyssa [R. at 92]. By seeking the California TRO just days after being summoned to court, Travis had shown a blatant disregard for the Chancellor’s authority; but then, just a few weeks later, Travis had the audacity to ask the Chancellor to deny Kristy’s *Petition* without also seeking a modification of the previous visitation orders. Travis failed to do equity; therefore, he was not entitled to receive equity. Cf. O’Connor v. Dickerson, 188 So. 2d 241, 246 (Miss. 1966) (“Equity courts still faithfully follow the ancient maxim that ‘He ... who seeks equity, must do equity.’ The Chancellor applied this maxim and we affirm his action in so doing.”)

Travis is quick to note in his *Appellant’s Brief* that he had never been cited with contempt prior to the judgment under appeal. Nevertheless, the Chancellor had expressed dissatisfaction with Travis’ unwillingness to foster the relationship between Alyssa and Kristy [R. at 48, 52]. Such “disinterest,” as the Chancellor describes it [R. at 52], turned into a “hard grudge” against Aaron [T. at 308] in which Travis used back-to-back TROs obtained in two states (Hawaii and California) to circumvent the Chancellor’s orders [T. at 43, 45, 71]. Even after these TROs had expired, Travis continued to prohibit Kristy from telephoning her daughter, despite the clear mandate of the October 2010 order [T. at 319-20; R. at 59-62].

Travis points to Ash v. Ash, 622 So.2d 1264, 1266 (Miss. 1993) for the proposition that “[t]he better rule would be for a chancellor to enforce contempt orders through incarceration, when necessary, to insure compliance with custody provisions rather than resorting to a change of custody.” Although this would be the preferred approach in most situations, the case *sub judice* is not such a situation. Even if one momentarily sets aside the egregious nature of Travis’

attempts to keep Alyssa from Kristy, which alone are sufficient for a change of custody, his employment situation would have made incarceration for contempt impractical.

Travis is a member of the United States Navy who, at the time of trial, was stationed in San Diego, California [T. at 305; R. at 35, 59]. As such, he was required by federal law to be at “his appointed place of duty at the time prescribed.” 10 U.S.C. § 886. In some cases, civil confinement is a defense to the charge of being absent without leave (or AWOL), but not in all cases. See, generally, U.S. v. Clinkscales, 45 C.M.R. 693, 696 (A.F.C.M.R. 1972). Regardless of whether Travis would have been charged with AWOL had he been incarcerated for contempt, the United States Navy would have been without his services for up to six months. Cf. Purvis v. Purvis, 657 So. 2d 794, 798 (Miss. 1995) (holding the maximum sentence for criminal contempt following a non-jury trial is six months in jail). In view of the totality of the circumstances, see T.K., 24 So. 3d at 1062, incarcerating Travis could have yielded unintended consequences reaching far beyond the scope of this matter.

In Ellis, the Court of Appeals found that Chancellor Littlejohn did not abuse his discretion by deeming Mrs. Ellis’ interference with Mr. Ellis’ visitation a material change in circumstance. See id. at 986-88. Likewise, this Court should find that Chancellor Burns did not abuse his discretion by deeming Travis’ interference with Kristy’s visitation a material change in circumstance [R. at 264]. Thus, Kristy respectfully submits that the first prong of the Mabus I standard is met.

B. *Travis’ Alienation of Alyssa from Kristy Adversely Affected the Health and Well-Being of Alyssa.*

Having established that Travis’s behavior vis-à-vis Kristy caused a material change in Alyssa’s circumstances, the next question is whether this material change was adverse to her welfare. See Mabus I, 847 So. 2d at 818.

At trial, Dr. Criss Lott was the only medical professional to testify. He had listened to Travis' cross-examination as well as Kristy and Aaron's sworn testimonies. From these statements, and from his previous interviews with Alyssa, he gave his professional opinion that Travis had severely alienated Alyssa from Kristy by virtue of the restrictions on Kristy's visitation with Alyssa [T. at 270-71]. He further opined that he did not believe that Alyssa had been abused [T. at 268]. Dr. Lott believed that Alyssa was confused, that her confusion was exacerbated by her alienation from Kristy, and that a reversal of custody would significantly improve Alyssa's condition:

Q. And this degree of confusion you talk about that Alyssa seems to suffer from, would you agree with me that the degree of confusion is based largely in part on the interference and/or alienation that she's experiencing from her mother at the hands of her father?

A. I think that it is significantly exacerbating her relationship and her – and I think its exacerbated and created some real problems in the things that she's told people, you know. I read what the teachers said. I read and heard the statements all of the DHS workers have said, and I understand their concern. If I'm told something, like that, I'm going to respond in a very conservative manner as well. For her to say those things, and, yet, have done things in the interim that are so contrary to the allegations, its just – you know, to me, that suggests there's some real confusion here.

Q. And if that pattern has been demonstrated, time and time again, changing custody would cure that?

A. Well, if the parent has been alienated and there's severe alienation going on, then it would certainly help, significantly improve it.

[T. at 270, 279].

The Supreme Court has held that “where a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment.” Riley v. Doerner, 677 So. 2d 740, 744 (Miss. 1996). If the Chancellor has the discretion to remove a child from her custodial environment when she “somehow appears

to remain unscarred,” id., then the Chancellor should have all the more discretion to remove the child when she exhibits severe confusion.

In the case *sub judice*, Dr. Lott opined that if Alyssa’s confusion were not addressed, she would have significant emotional problems in the next five to ten years [T. at 274]. Having the sole responsibility to determine the credibility of witnesses and evidence and the weight to be given each, see Lee, 798 So.2d at 1288, Chancellor Burns heeded Dr. Lott’s advice to address these problems by transferring custody of Alyssa from Travis to Kristy. This could hardly have been an abuse of the Chancellor’s discretion; as such, Kristy respectfully submits that the second prong of the Mabus I standard is met.

C. The Chancellor Served the Best Interests of the Child by Transferring Custody from the Father to the Mother

Once the Chancellor has determined that a material change in circumstances has occurred and that this material change adversely impacts the welfare of the child, the Chancellor must perform a best interests analysis by evaluating the factors set forth in Albright v. Albright, 437 So. 2d 1003 (Miss. 1983).

At trial, the GAL’s Preliminary Report was entered into evidence [R. at Exhibit G1]. It outlines the GAL’s Albright analysis, which was adopted by the Court [R. at 263]. It is listed below:

1. Age of the child. Alyssa is ten years old and not of tender years, as she can be equally cared for by either parent.
2. Health of the child. Alyssa is generally a healthy and happy child, although she experienced stomach pains due to missing her mother and not being allowed to live with her mother in January and February of 2011.
3. Sex of the child. Alyssa is a female child. Kristy and Alyssa appeared to have developed a close relationship with each other during April 2012 and Kristy can assist Alyssa with issues related to womanhood as she grows up. For example Kristy helped Alyssa with issues related to facial acne and with learning to style

her own hair in April. Alyssa told me she felt comfortable discussing “girl” issues with her mother.

4. Continuity of care prior to the separation. Travis has been the primary care giver for the child since the entry of the Divorce Judgment. However, Alyssa’s separation from her mother has been due to her father’s conduct and the father’s interference with the child’s communications and visitations with her mother. Therefore, this factor, in equity, cannot be allowed to favor Travis over Kristy, and at best should be considered by the Court to be a neutral factor. See Story v. Allen, 7 So.3d 295 (Miss. App. December 9, 2008).
5. Which parent has the better parenting skills and the willingness and capacity to provide primary child care. Both parents appear to be willing and able to provide primary care for the child. However, I am concerned about Alyssa’s comments about her access to adequate amounts of food being restricted in her father’s home and being limited to taking only two or three showers in a week there.
6. The employment of the parent and the responsibilities of that employment. Travis is still in the Navy working approximately 40-hour weeks as a meteorologist and oceanographer. He is susceptible to being stationed anywhere the Navy directs. He was in Mississippi for approximately 4 weeks in August – September 2011 and Alyssa stayed in San Diego with her step-mother and step/half-sisters. Kristy is a stay-at-home mother to her three sons.
7. Physical and mental health and age of the parents. Kristy and Travis both appear to be in good physical health and are currently 26 and 29 years old, respectively.
8. Emotional ties of parent and child. The child has strong emotional ties with both parents as of the end of April 2012, and wants desperately to feel unconditionally loved and wanted by both parents without repercussions to her from her father. Travis’s actions have grossly interfered with Kristy’s ability to maintain an ongoing relationship with Alyssa and he failed to cultivate a relationship for Alyssa with her mother. As such, equity demands that this factor not favor Travis, but that it be considered neutral at best. See Story v. Allen, 7 So.3d 295 (Miss. App. December 9, 2008).
9. Moral fitness of the parents. Both parents appear to be morally fit for parenting at the present time.
10. The home, community and school record of the child. Alyssa is a bright child, but appears to be only an average student. She is well-behaved and friendly with other children. She spoke of her best friend that she had to leave behind in Hawaii. Alyssa does not appear to participate in many non-school activities in her father’s home.
11. Preference of the child. Alyssa is not old enough to state a preference regarding her custody under current Mississippi law.

12. Stability of home environment and employment of each parent. Travis lives in military housing with his current wife and their five daughters (Alyssa, two of Trista's daughters from a previous marriage, and two daughters who are Travis and Trista's together). He has moved from Virginia to Mississippi to Hawaii and now California, where he is currently scheduled to stay until June 2013 when he could be stationed elsewhere. Kristy and her husband own a four-bedroom home in the Caledonia school district, and Alyssa has her own nicely decorated bedroom there. Both parents' employment/financial situations appear to be stable with the husbands working and the wives staying at home with children.
13. Other factors relevant to the parent-child relationship. The child has three half-siblings in her mother's home and two step-siblings and two half-siblings in her father's home. My observations of the child and communications with others indicate that she is a very loving and caring older sibling.

Both Kristy and Travis have members of their extended families in the Columbus area to be able to visit Alyssa and assist with her care. Travis has no family in the San Diego area other than his wife and their children.

Travis and Kristy do not seem to be currently capable of regular, productive communications with each other regarding Alyssa which could cause problems for her regardless of the custodial placement. Children do best following divorce when the parents are able to put aside their animosity to work cooperatively in co-parenting for the child's best interests. However, that certainly does not appear to be happening in this case.

Travis's past and present actions indicate that he will not follow the orders of this Court.

Kristy contends that this analysis is well-reasoned and, except as set forth below, accurately and completely reflects the evidence presented at trial, hence the reason the Chancellor notes that it "[comports] with the Court's own observations throughout the course of the case, and particularly at trial" [R. at 263].

Although not included in the above analysis, Kristy would note that Dr. Lott testified at trial that Alyssa was confused and that her confusion would create "significant emotional problems in the next five to ten years" if left uncorrected [T. at 270, 279]. For this reason, the health of the child factor should weigh heavily toward Kristy.

In addition, Kristy echoes the finding of the GAL with respect to Travis' propensity to disobey the orders of the Court. As previously mentioned, Travis was served with process

sometime between May 31, 2011 and June 13, 2011 [R. at Docket (p.4)]. Although he had just been summoned to appear before the Chancellor to answer Kristy's charge of contempt—and even though he had just lost his request for a restraining order in Hawaii—Travis obtained a TRO from the California Superior Court on June 16, 2011 instead of seeking the same relief via a counterclaim to Kristy's *Petition* [T. at 58-59, 64; R. at 98]. Kristy contends that this action, in and of itself, was disrespectful to Chancellor Burns' authority, further evincing Travis' inclination to isolate Alyssa from Kristy regardless of what the Chancellor orders.

Lastly, Kristy would note that Travis' credibility and character for truthfulness is suspect. At trial, he admitted to having misrepresented certain facts to the Hawaii Court:

Q. We've talked about this this morning for quite a bit of time, and you made it clear that you didn't know about this [Alyssa's claim of abuse] until April 19th, correct?

A. Yes.

Q. But you're telling him [Kristy's Hawaii attorney] at this hearing [the June 1, 2011 hearing in Hawaii] that you knew about it in February and you were trying to get it taken care of then, right?

A. I did say that, yes.

Q. Okay, so that would be inaccurate, wouldn't it, Mr. Strait?

A. It would.

[T. at 61-62]. Travis's admitted history of misrepresenting facts to a court of law should be a strike against him in the area of moral fitness, further buttressing the GAL's analysis of the Albright factors.

For the reasons set forth above, Kristy contends that the third prong to the Mabus I test was met, and that the Chancellor did not abuse his discretion in modifying his previous order of custody.

III. The Chancellor Did Not Err By Adopting the Report of the Guardian ad Litem Because Her Report Comported With His Own Observations

On August 11, 2011, by agreed order, the Chancellor appointed the Hon. Lee Ann Turner to serve as GAL in this matter, ordering her to “thoroughly investigate and report factual information to the court concerning the minor child and the allegations of sexual abuse, and [to] report and make recommendations to the Court regarding the child’s best interests” [R. at 160-64]. After the GAL had submitted her report and trial was held, the Chancellor entered his *Opinion and Judgment* on November 1, 2012, transferring custody of the minor child from Travis to Kristy [R. at 253-81].

Chancellor Burns was not bound by the GAL’s report, because he—and not the GAL—is the ultimate finder of fact. See Hensarling v. Hensarling, 824 So.2d 583, 587 (Miss. 2002). Thus, when he found that the GAL’s report “comported with the Court’s own observations throughout the course of the case, and particularly at trial” [R. at 263], the Chancellor made it crystal clear that the *Opinion and Judgment* is his own assessments and not simply a rubber stamp of the GAL’s findings.

As set forth in the previous sections, the Chancellor had plenty of legal and factual support, beyond the investigation of the GAL, to find that Alyssa had experienced a material, adverse change in circumstances. The GAL’s investigation merely confirmed the Chancellor’s own observations. In effect, she became the Chancellor’s second pair of eyes, giving him a different perspective, but otherwise validating his own conclusions. This, however, is not to diminish the GAL’s report because her thoughtful analysis of the Albright factors aided the Chancellor in his decision. Still, it was the Chancellor’s decision, not the GAL’s, and he based this decision upon the testimony of the parties and their general behavior throughout the proceedings [R. at 263].

Travis' *Appellant Brief* goes to great length to discredit the GAL's report, even though the GAL was appointed as a result of his motion and despite Kristy's initial objections [R. at 95-97, 160-64]. However, the GAL's report, though required by law, was a redundant means for supporting the Chancellor's own opinions. The Chancellor made his opinion independently of the GAL; therefore, Travis' objections about the GAL's report, and about her purported bias, are without merit.

IV. The Chancellor Did Not Err By Finding Travis in Contempt of Court

"Whether to hold a party in contempt is subject to the discretion of the chancellor." Janssen v. Janssen, 96 So. 3d 23, 27 (Miss. Ct. App. 2012) (citing R.K. v. J.K., 946 So. 2d 764, 777 (Miss. 2007)). "Contempt is an issue of fact to be decided on a case-by-case basis." Id. The "[f]ailure to comply with a court order is prima facie evidence of contempt." Evans v. Evans, 75 So. 3d 1083, 1087 (Miss. Ct. App. 2011) (citing McIntosh v. Dep't of Human Servs., 886 So. 2d 721, 724 (Miss. 2004)). In order "[t]o rebut a prima facie case of contempt, a defendant must show ... 'that the default was not willful, that the provision [violated] was ambiguous, or that performance was impossible.'" Id.

Travis concedes in his *Appellant's Brief* (p. 37), that he permitted no visitation or contact between Alyssa and Kristy between April 2011 and April 2012; he also stated this at trial [T. at 319-20]. However, Travis claims that he had "a reasonable, good faith belief that his daughter had been abused when he refused to allow visitation or contact."

In Mississippi, good faith is not a defense against a charge of contempt. Cf. id. at 1087. Even if it were a defense, Travis did not act in good faith, as evidenced by the fact that he sought the California TRO only a few days after he had been summoned back to court in this matter [R. at Docket (p.4), 98; T. at 58-59, 64]. If Travis had been acting in good faith, he would have used

the occasion of being summoned to appear in Mississippi for court on June 28, 2011 to file a counter-petition for suspension of visitation. Instead, he sought to undermine the Chancellor's authority by seeking relief from the California Superior Court—just days after the Hawaii Family Court had denied him similar relief [T. at 58-59, 64; R. at 98].

Travis' purported excuse demonstrates that his disobedience to the Chancellor's order was conscious and willful. Cf. id. The October 2010 order unambiguously delineates Travis' responsibilities regarding visitation [R. at 59-62]. Nevertheless, he disregarded them, while never asserting impossibility as an affirmative defense [R. at 88-93]. Therefore, Travis' "good faith" does not fall within the applicable defenses to contempt. See id.

In addition to violating the Chancellor's orders regarding visitation, Travis failed to alert the Chancery Clerk of his change of address, in violation of the Chancellor's strict order to obey U.C.C.R. 8.06 [R. at 52; T. at 63]. Likewise, when the Chancellor expressly told him to fly Allysa back to Mississippi so that she could spend the month of April 2012 with her mother, he drove her back, causing her to arrive late [R. at 166-67; T. at 82-84]. These instances, combined with his unilateral decision to suspend all contact between Alyssa and Kristy, show just how little Travis respects the authority of Chancellor Burns. Thus, the Chancellor was well within his discretion to cite Travis in contempt of Court.

V. The Chancellor Did Not Err By Awarding Attorneys' Fees to Kristy

The general rule in divorce and child custody actions is that appropriate attorney's fees should be awarded in an amount to secure a competent attorney. Mabus v. Mabus, 910 So.2d 486, 490 (Miss. 2005) ("Mabus II"). However, in contempt actions, attorney's fees are awarded "to make the plaintiff whole." Id. (citing Rogers v. Rogers, 662 So.2d 1111, 1116 (Miss. 1995)). "When a party is held in contempt for violating a valid judgment of the court, then attorney's fees

should be awarded to the party that has been forced to seek the court's enforcement of its own judgment." Elliott v. Rogers, 775 So.2d 1285, 1290 (Miss. Ct. App.2000). Moreover, in contempt actions, there is no obligation to follow the factors found in McKee v. McKee, 418 So.2d 764 (Miss. 1982). Cf. Bounds v. Bounds, 935 So. 2d 407, 412 (Miss. Ct. App. 2006).

Aaron and Kristy spent \$1,500.00 to hire an attorney in Hawaii [T. at 135]. They spent \$3,289.64 for their attorney in California [T. at 136]. They spent \$25,000.00 for Aaron's criminal defense, \$37,545.89 for Mr. Ford's representation, and \$3,600.00 for other costs [R. at 285; T. at 136]. The Chancellor awarded Kristy reimbursement for \$10,000.00 of what she paid Mr. Ford, her local attorney, plus an additional \$1,000.00 to reimburse her for what she had been ordered to pay to the GAL [R. at 314-18].

In view of the Chancellor's broad discretion to award attorney's fees, see Magee v. Magee, 661 So.2d 1117, 1127 (Miss. 1995), it was not an abuse of discretion for him to award Kristy a fraction of her attorney's fees, particularly given Travis' egregious behavior as previously described.

VI. The Chancellor Did Not Err By Assessing the GAL Fees and Assessing the Majority to Travis

In Canton v. Ross, 157 Miss. 788, 128 So. 560, 562-63 (1930), the Mississippi Supreme Court held, "Chancery courts have large discretion in apportioning costs. Nevertheless, the exercise of such discretion is not final, but is reviewable on appeal, and if it appear[s] that the decree apportioning the costs works a manifest injustice on any of the parties, the decree will be reversed." After articulating this general principle, the Supreme Court held:

We are of opinion that, under the facts in this case, the decree charging the appellants each with one-third of the costs of the special master did them a manifest injustice. Estelle Montgomery, one of the heirs, alone instituted the proceedings which resulted in the appointment of the special master. The appellants, as shown above, had no part whatever in instituting and conducting the proceedings. The proceedings were fruitless so

far as the estates were concerned. The chancellor found, on the report of the special master, that the administrator had not been guilty of any maladministration of the estates. No assets of the estates were found unreported by the administrator. The cost of this fruitless effort on the part of Estelle Montgomery was the special master's fees and expenses, amounting to between fourteen and fifteen hundred dollars.

Id.

Travis raised certain allegations of abuse concerning Kristy's husband, Aaron [R. at 75-76]. Similarly, Mrs. Montgomery, in Canton, alleged maladministration by the executor of the estate. See id. Travis' allegations necessitated the appointment of a guardian ad litem [R. at 75-76]. Likewise, Mrs. Montgomery's allegations necessitated the appointment of a special master. See id. Kristy opposed the appointment of a guardian ad litem [R. at 95-97] just like the appellants in Canton had opposed the proceedings necessitating a special master. See id. The GAL's recommendation was adverse to Travis [R. at 263]. Likewise, the special master's recommendation was adverse to Mrs. Montgomery. See id.

In Canton, the Supreme Court reversed the lower court, holding that there was no reason to saddle the appellants, who had not moved for the special master, with any of the special master's costs. See id. By the same logic, it would have been proper for the Chancellor to have saddled Travis with the entire bill for the GAL, if he had desired to do so, given Travis' similar behavior. Instead, the Chancellor followed the *Agreed Order* that had previously codified Travis' greater share [R. at 160-64], only modifying it slightly to allow Kristy additional reimbursement for her share of the costs [R. at 314-18]. Therefore, Travis' lamentation about having to bear the greater share of the GAL's costs is without merit.

The Chancellor's *Opinion and Judgment* found that the GAL had performed 122 hours of work at a rate of \$100.00 per hour [R. at 279]. The aforementioned *Agreed Order* directs her, *inter alia*, to "thoroughly investigate and ... report and make recommendations to the Court regarding the child's best interests" [R. at 160-64]. The Court did not limit her work to the

investigation of allegations of sexual abuse, but extended her mandate to make recommendations about the child's best interests. Her bill itemizes her time and effort in pursuit of this broad mandate [R. at 237-47].

Since the Chancellor was not appointing counsel for an indigent defendant in a criminal case, *cf. Wilson v. State*, 574 So.2d 1338, 1339 (Miss. 1990), he is not bound by the statutory fee-cap found at Miss. Code Ann. § 99-15-17 that is referenced by Travis in his *Appellant's Brief* (p. 42). Therefore, the Chancellor did not abuse his discretion in approving the GAL's fees or in apportioning the majority to Travis.

VII. The Chancellor Did Not Err By Denying Travis' Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens.

Custody determinations are governed by the *Uniform Child Custody Jurisdiction and Enforcement Act*, Miss. Code §§ 93-27-101, et seq. Pursuant to Miss. Code Ann. § 93-27-202, a court which has issued an initial custody order 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." See *White v. White*, 26 So. 3d 342, 347-348 (Miss. 2010).

Travis claims in his *Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens* that neither he nor Alyssa had had any significant connection with Lowndes County for years [R. at 79]. Despite this purported lack of significant connection to the area, Travis admitted that his home of record is Lowndes County and that Mississippi is his home state:

Q. Okay, Now, you lived in Hawaii, you lived in California. You haven't lived in Mississippi in a while, have you?

A. No, I haven't.

THE COURT: Where is your home of record?

MR. STRAIT: It's here in Columbus.

BY MR. FORD:

Q. Okay. And that's why you have an expired Mississippi driver's license?

A. Yes.

Q. It expired on March 18, 2009, correct?

A. Yes.

Q. Okay. So how is this a valid driver's license?

A. Military members can have an expired license when they don't reside in their home state.

[T. at 84-85]. If continuous residency would be a "significant connection to the state," see id., then continuous domicile should likewise be a significant connection, barring the transfer of jurisdiction away from Mississippi.

As for Travis' claim of forum *non conveniens*, this also is without merit. A determination of forum *non conveniens* is in the complete discretion of the Chancellor, irrespective of whether an analysis of the factors is performed. See id. at 348. Travis had transferred to California and had sought a TRO within days of losing his case in Hawaii [T. at 58-59, 64; R. at 98]. Therefore, there hardly could have been a significant amount of information available to the courts in California. Conversely, the alleged abuse had supposedly occurred in Mississippi and the Mississippi Department of Human Services had begun an investigation along with the out-of-state authorities [T. at 15]. Therefore, it was not an abuse of discretion for the Court to deny Travis' claim of forum *non conveniens*.

Accordingly, the Chancellor was correct in denying Travis' *Motion to Dismiss for Lack of Jurisdiction and Forum Non Conveniens*.

CONCLUSION

WHEREFORE, PREMISES CONSIDERED, KRISTY LORENZ, the Appellee, respectfully requests that this Honorable Court, after a review of both parties' briefs and the record in this case, affirm the Chancellor's *Opinion and Final Judgment*, as well as the subsequent orders entered in this matter.

Moreover, the Appellee requests general relief, whether legal or equitable, that this Court may deem meet and proper in the premises.

Respectfully submitted, this the 1st day of April, 2014.

KRISTY LORENZ

BY: /s/Matthew Wilson
MATTHEW WILSON
(MS Bar # 102344)

Prepared by:
The Law Office of Matthew Wilson, PLLC
PO Box 4814
Mississippi State, MS 39762
(662) 323-2889
FAX: 662-323-9988

CERTIFICATE OF SERVICE

I, Matthew Wilson, counsel for the Appellee, do hereby certify that I have on this electronically filed a true and correct copy of this brief with the Clerk of this Court, via the MEC system, which in turn transmitted a true and correct copy of the same electronically to

The Hon. William Starks
william@starkslaw.com

I further certify that I have emailed a true and correct copy of this brief to the Chancellor and to the Guardian ad Litem:

The Hon. Kenneth Burns
Chancery Judge
burn876@bellsouth.net

The Hon. Lee Ann Turner
Guardian ad Litem
LTurner@perrywinfield.com

Respectfully submitted, this the 1st day of April, 2014.

BY: /s/Matthew Wilson
MATTHEW WILSON
(MS Bar # 102344)