

**ORIGINAL**

SUPREME COURT AND COURT OF APPEALS  
STATE OF MISSISSIPPI

**FILED**

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SUPREME COURT  
COURT OF APPEALS**

No. 2017-CP-00828

MICHAEL T. GERTY AND STATE OF  
MISSISSIPPI, JIM HOOD ATTORNEY  
GENERAL, APPELLANTS

VERSUS

JOESIE R. GERTY, APPELLEE

APPEAL FROM

THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI  
FIRST JUDICIAL DISTRICT

HONORABLE JENNIFER SCHLOEGEL, PRESIDING TRIAL JUDGE

# APPELLANT'S MOTION FOR REHEARING

**MOTION#**

**2018**

27

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The Supreme Court of Mississippi failed to follow its own precedent which states that the best interest of a child is of utmost importance. *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983) The Mississippi Rules of Appellate Procedure clearly does not allow a request for a mere repetition of an argument already considered by the court but the Supreme Court of Mississippi did not consider the child custody at all in its original findings. The Supreme Court of Mississippi's findings covered 25 pages and more than 6500 words but the totality of its discussion of Child Custody accounted for 7 words: "We affirm the chancellor's finding regarding custody..." (Page 5) **This can be viewed only as a complete disregard of the single most important aspect of this case, the custody of Michael's minor son, Jayden.** The only other reference made by the Supreme Court of Mississippi to the Chancery Court's Child Custody finding was buried 8 pages into the section titled "Facts and Procedural History" (page 13) but this reference was not made as an explanation but merely made as a statement of fact, as if in-passing.

The Supreme Court of Mississippi found that the Chancery Court's judgement with regard to all aspect outside of Child Custody to be filled with manifest error, poor judgement, and incorrect application of legal standards to such an extent that the Supreme Court of Mississippi ordered a reversal on all subjects with the exception of Child Custody. It is not reasonable to believe that the Chancery Court's judgement on all other subjects could be so poor but its judgement with regards to Child Custody would be so spot on that the Supreme Court of Mississippi would not need to so much as review the Chancery Court's Albright analysis. I implore The Supreme Court of Mississippi to perform its due diligence and review the Appellants' Brief in regard to Child Custody and the Chancery Court's Albright analysis. There is no doubt that The Supreme Court of Mississippi will find the same poor judgement, manifest error, incorrect application of legal standards as well as a full display of the Chancery Court's bias throughout the Chancery Court's Albright analysis. Michael's Appellant's Brief details all of the above.

The Supreme Court of Mississippi noted Joesie's lies and deceit throughout the hearing. These lies discredit her testimony not only with regard to her marital infidelity but most certainly to her answers regarding child custody. The Chancery Court made a poor judgement in not only placing greater weight to Joesie's testimony but in completely disregarding Michael's testimony. Michael's testimony did not contain any lies or deceit.

The Chancery Court made significant mistakes applying relatively simple law and precedent regarding condonation. Even after Michael's attorney detailed the rules regarding condonation, not only in the hearing but also in Michael's plea for reconsideration, using the exact same precedent and wording used by the Supreme Court of Mississippi in its finding, the Chancery Court refused to acknowledge her mistakes. The Chancery far exceeded the limits on her authority with regard to declaring Mississippi law unconstitutional. The Supreme Court of Mississippi wrote in its finding that these limits are very clear and well established. But once again, when presented with three identical arguments from Michael's attorney, Joesie's Attorney, and the Attorney General explaining the Chancery Court's error the Chancery Court refused to acknowledge her mistake and insisted on filing a judgement that had a 100% chance of being reversed by the higher court. This decision caused unnecessary delay in the judicial process forcing the parties to live in limbo for over a year. It is very clear that the Chancery Court did not have the best interests of any party involved in this litigation but was instead focused only on pushing through a personal agenda. The Chancery Court willfully disregards the law in an effort to push a personal agenda on the citizens of Mississippi. The Chancery Court is undermining and circumventing the fundamental institutions that make up the rule of law in Mississippi.

It was prejudicial and demonstrated a clear bias for the Chancery Court the rule that Michael's military service was disruptive to the party's marriage considering: Michael was in the military when the parties first met; he made a deployment while the parties were dating; he was in the military when

the parties married; he made another deployment prior to the parties deciding to have a child; Joesie was fully aware of Michael's military service; and entered the marriage with open eyes and without reservations. Yet the Chancery Court still weighed Michael's military service against him during the hearing and in her judgement.

A father should not be forced to stay in a failed marriage with a spouse who has repeatedly shown no interest in maintaining a positive relationship for fear that the Chancery Court will remove his child from his custody because he is in the military. When Michael asked the Chancery Court to reconsider her decision on child custody the Chancery Court not only denied Michael's request outright, refusing to revisit her Albright analysis, but the Chancery Court then abused its authority and reduced Michael's visitation with his son and increased his monetary responsibility to Joesie to punish Michael for challenging the Chancery Court's opinion.

The Chancery Court's bias was on full display when she sighted precedent in ruling that Michael's military retirement was to be considered a marital asset and therefore at the discretion of the court to divide as it sees fit but then ignoring this exact same precedent when the Chancery Court not only failed to perform a full analysis of the couple's marital assets, as called for by the precedent, but then awarding 100% of a nearly identical marital asset to Joesie, namely Joesie's 401k plan. This unbalanced application of the law is a clear demonstration of the Chancery Court's bias.

The Supreme Court of Mississippi stated that: "This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused [his or her] discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." (Page 16) There can be no doubt that the Chancery Court was manifestly wrong and abused its discretion throughout its judgement. Going so far as to declaring Mississippi law unconstitutional so as to ignore or hide the marital indiscretions, lying, and abandonment of parental duties by Joesie. It is not believable to think that the Chancery Court's unwillingness to adhere to Mississippi law and its abuse of discretion did

not touch upon its child custody ruling. How can the State of Mississippi feel that a mother who has demonstrated a lack of commitment to her child, demonstrated no contrition for her marital infidelity, and patently lied to the court as the best fit for custody of a minor child? This opinion is especially troubling considering that the father has clearly demonstrated an unwavering commitment to raising his son and did raise his son for two years in the absence of his mother.

Joesie and Michael may have lacked the authority to make a legally binding decision regarding the custody of their own son but at the time that they entered into their agreement they believed that they did have this authority. Joesie acknowledged in court that at the time of entering into the party's PSA and Child Custody Agreement she felt that the agreement regarding custody was permanent. Even with the belief that she was granting Michael permanent custody of Jayden, Joesie choose to move in with her boyfriend's family instead moving with her son to the Great Lakes region.

By disregarding Michael's appeal as to Child Custody the Supreme Court of Mississippi is neglecting its duty and is jeopardizing the future of this child. Jayden deserves to be raised by the parent who has demonstrated an unwavering commitment to his best interest. During the marriage as well as during the couple's separation Michael always made Jayden's well-being his number one priority. Michael implores the Supreme Court of Mississippi to revisit Michael's Appellant's Brief, weigh the best interest of Jayden, and return him to his father's custody.

For the record Jayden's birthday is December 01, 2009. He just recently turned 9 years old.

#### **ARGUMENT:**

**The Chancery Court Abused its Discretion, was Manifestly Wrong, Applied the Wrong Legal Standard, and Erred in its Analysis of the Albright Factors which should have Favored the Father**

The Court's Albright analysis was not supported by the record and manifestly wrong. Within the Court's analysis of the *Albright* factors, the Court abused its discretion by placing too much weight

upon the unsupported allegations made by the mother and ignoring the voluminous evidence presented supporting the father as the preferred custodial parent. *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss.2001) **It is clear from the record that the Court's defining consideration in determining custody of Jayden centered on the unsupported allegations of Michael's infidelity.** *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss.2001)

Additionally, the Court abused its discretion and erred as a matter of law by presuming that a mother should be favored in a child custody determination. (*Dkt. 19* Page 5); (*T.* Page 159)

It is in the best interest of the **MOTHER** that the mother be granted custody of the child.” [emphasis added]

A. Age, Health, and Sex of the Child

In sharp contrast to *Miss. Code § 93-5-24 (7)* and judicial precedence the Court ruled that the Age, Health, and Sex factor was in favor of the mother in the *Temporary Order*. (*Dkt. 19* Page 2) Any reliance on Tender Years Doctrine would have been outdated and inconsistent with the evidence presented, namely Joesie agreed that it was in the best interest of Jayden to be in Michael's custody when Jayden was three years old. (*T.* Pages 79 - 80; 160 - 161; 348) Jayden is a male child well beyond Tender Years, he was 5 years old at the temporary hearing. Additionally, Jayden's health was excellent while in Michael's primary custody. The Court changed this factor to favor both parents in its *Amended and Restated Judgment of Divorce* but this factor clearly states that gender should be a consideration. (*Dkt. 45* Page 77) The Court of Appeals of Mississippi and the Supreme Court of Mississippi agree that a father should be favored in a case of a male child if the age and health aspects are neutral. *Flowers v Flowers*, NO. 2010-CA-01957-COA (2010); *Mercier v Mercier*, No. 96-CA-00564-SCT (1998); *Montgomery v Montgomery*, NO. 2008-CA-00641-COA (2008)

It would be a greater benefit to Jayden, a male child, to be in the custody of his father. The Age, Health, and Sex of the Child factor favors the father.

B. Parenting Skills and Willingness and Capacity to Provide Primary Care

## 1. Willingness to Provide Primary Care

The Court abused its discretion and erred as a matter of law by omitting the Williness to Provide Primary Care aspect of the Parenting Skills and Willingness and Capacity to Provide Primary Care factor. *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983) This omission occurred in both the *Amended and Restated Judgment of Divorce* as well as the *Temporary Order*. (*Dkt. 45* Pages 47 and 48); (*Dkt. 19* Page 3) By neglecting the Willingness to Provide Primary Care aspect, the Court was missing a key ingredient needed to determine the best interest of the child. The Court abused its discretion by ignoring evidence that supported the father as the preferred custodial parent. *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss.2001) Joesie made a choice to spend time with Kyle at Jayden's expense. (*T. Pages 72, 89, 360 - 361, 392 - 394, 572 - 573*) Joesie admitted to multiple overnight trips to Gulf Shores with Kyle, (*Ex. 16* Pages 1, 3, 19, 20); (*T. Page 72*) trips to Bellingrath gardens, (*Ex. 16* Pages 7 – 11); (*Ex. 28* Pages 1 – 2); (*T. Pages 393 - 394*) nights drinking and dancing with Kyle (*Ex. 16* Pages 4 - 6, 12 - 18, 21, 28 - 31) (*T. Pages 394*) Joesie testified that she and her close-knit Filipino community went out to night clubs while Michael cared for Jayden. (*T. Page 394*) Joesie declined to go on a family vacation in the summer of 2013. (*T. Page 360*) Finally, Joesie refused to move with Michael and Jayden instead she secretly moved in with Kyle's family. (*T. Pages 565, 638*) There is little doubt that Joesie was less involved in her parental duties during the time of her adulterous affairs. *Montgomery v Montgomery*, NO. 2008-CA-00641-COA (2008)

In contrast to Joesie's demonstrated lack of willingness to provide care, Michael had always and continues to place top priority on raising Jayden. Michael called Jayden daily when Jayden was with his mother. (*T. Pages 102, 192, 355, 395, 415*) Michael made extensive efforts to communicate with Jayden's school. Michael called the school and had a phone conference with Mrs. Halstead, Jayden's teacher. (*Ex. 24* Pages 2 – 3); (*T. Pages 496 – 497*) Michael also had a phone conference with Jayden's behavior counselor. (*Ex. 15* Page 2); (*T. Page 497*) Michael communicated through e-mails

multiple times per week to keep track of Jayden's progress. (Ex. 15 Pages 1, 3 - 5) Joesie repeatedly claimed Michael was not in communication with her but admitted she had made no effort to communicate with Jayden's preschool or anyone else for that matter. (T. Pages 349 - 350, 392 - 393) Joesie was confused whether Jayden attended preschool or not. (T. Page 120) She didn't recall dropping Jayden at his first day of preschool (T. Pages 377 - 378)

In rebuttal to Joesie's unsupported claims of Michael's lack of communication, Michael presented phone records and text messages that demonstrated he was in constant communication with Joesie. Michael presented text messages in which he specifically asked about Jayden's wellbeing in 15 separate text messages between October 2015 and February 2016. (Ex. 24 Pages 1 - 8); (T. Pages 497 - 498) The phone records show that between August 2014 and December 31st, 2014 there were 161 phone calls between Joesie and Michael, 40 to 50 of which were clearly after Jayden's bedtime. (T. Page 488 - 489) The Court's omission of the Willingness to Provide Primary Care aspect allowed the Court to ignore all of these facts that clearly demonstrated a disparity in the willingness to provide primary care. *Carter v Escovedo*, NO. 2014-CA-01817-COA (2014)

As to parenting skills, the chancellor found Escovedo wanted to teach Kylee discipline and responsibility. Escovedo was "looking at the big picture," putting Kylee's interests "first and foremost above his own," and was "willing to do whatever it takes" to parent Kylee, even if it meant "communicating with the mother who he does not get along with anymore." To the chancellor, Escovedo's willingness to work with Carter spoke "volumes" for his "maturity and parenting skills." She found this factor favored Escovedo.

The Willingness to Provide Primary Care aspect overwhelmingly favors the father.

## 2. Parenting Skills

The Court's opinion that there was no evidence that either party had bad parenting skills was not supported by the record. (*Dkt.* 45 Page 47) Jayden was suspended from kindergarten three times while in Joesie's custody. (Ex. 23 Pages 2 - 3); (T. Page 492) Joesie testified that she was unwilling to



discipline Jayden for the biting incidents because she did not believe the teachers' assessment of the events. (T. Page 649)

To be honest, I'm not there how the incident happens, I think sometimes I would say honestly the teacher may just overreact things. I can't punish my son because of the biting.

Jayden received repeated reprimands for his poor behavior in school while in Joesie's care. (Ex. 23 Pages 2 - 3); (Ex. 15) The Court completely disregarded the photos of massive wax build up in Jayden's ears while in Joesie's care. (T. Pages 355, 361, 506 - 507) (Ex. 21) Joesie misunderstood conversations with Jayden's doctor leading to a misdiagnosis of Combined ADHD. (T. Pages 663, 606, 617, 659 - 663)

In contrast, Jayden displayed model behavior while in Michael's care. (T. Pages 146, 182 - 183, 507) Jayden did not exhibit any ADHD factors while in Michael's care. (T. Page 507)

The Court distorted the facts and changed the timeline of events to avoid acknowledging the dramatic change in Jayden's behavior after the temporary hearing. (Dkt. 45 Page 47)

At the time of the temporary hearing, the child was experiencing some behavioral problems which could be attributable to the breakup of the marriage; enduring extended periods of absence from one parent or the other; problems with discipline in the home of either parent; and problems with attention.

Jayden had a single isolated incident when he was disruptive in class while he was in Michael's primary custody during the two years after his parents separated in September 2013. Michael worked with Jayden's teacher to correct Jayden's behavior and the poor behavior was not repeated. (T. Page 183) It was only after being placed in Joesie's custody that Jayden developed these concerning behaviors. (T. Pages 146, 182 - 183, 412, 492, 673) Removing Jayden from Michael's primary care at the temporary hearing was a bad decision that caused distress to Jayden. It was inconsistent with the testimony and evidence for the Court to dismissively state that there was no evidence of Joesie's bad parenting skills.

(*Dkt. 45* Page 47) The Court abused its discretion by minimizing the dramatic change in Jayden's behavior since the Court placed Jayden in his mother's care. (*Dkt. 45* Page 49)

The child has experienced some behavioral problems at school while in his mother's custody, however, the evidence does not establish these problems are due to Joesie's parenting skills.

Certainly, three suspensions from kindergarten, repeated reprimands from his teacher, and a misdiagnosis of ADHD, justify a description more significant than "some behavioral problems."

Further, the Court abused its discretion by giving credit to Joesie for being the primary caregiver following the issuance of the *Temporary Order* but not finding her responsible for the dramatic changes in Jayden's behavior. (*Dkt. 45* 47 - 48); (*Dkt. 45* Page 47) The Court abused its discretion by unjustly exonerating Joesie for failing to live up to her parental responsibilities. Prior to the temporary hearing, while in Michael's care, Jayden had endured almost two years devoid of his mother's presence without suffering any negative effects on his behavior. The Parenting Skills aspect strongly favors the Father.

### 3. Capacity to Provide Primary Care

The Court muddled the waters by going against convention when it combined the Capacity to Provide Primary Childcare aspect and the Employment Responsibilities factor while addressing the Parenting Skills aspect as its own factor. (*Dkt. 45* Pages 47, 48); (*Dkt. 19* Page 3) There is no mandate that a Chancellor must follow the Albright factors verbatim, as long as all the factors are sufficiently addressed, but by combining the Capacity to Provide Childcare aspect with Employment Responsibilities factor the Court improperly altered the meaning of the Capacity to Provide Care aspect to the detriment of the father; effectually double counting the Employment of the Parent and Responsibilities of that Employment factor.

Michael provided continuous care for Jayden since his birth. Michael was the primary caretaker of Jayden under the *Child Custody Agreement* for two years. Jayden flourished while in Michael's care

despite the absence of his mother. Michael did utilize the assistance of friends and a childcare agency but so did Joesie while Jayden was in her care. (T. Pages 25 - 29, 125) Just the same as the family had done all of Jayden's life. *Montgomery v Montgomery*, NO. 2008-CA-00641-COA (2008); *Flowers v Flowers*, NO. 2010-CA-01957-COA (2010) Michael took Jayden to the dentist and to doctors when needed, leaving work on more than one occasion to care for Jayden. (T. Pages 293 - 294, 326, 453, 488, 506, 536) Michael took Jayden to get all his inoculations to prepare him for kindergarten. (T. Page 488) Michael enrolled Jayden in kindergarten in Illinois prior to Jayden visiting his mother for the summer of 2015. (T. Page 139) Michael attended Jayden's weekly ice skating classes. (T. Pages 342, 455, 534 - 535) The Capacity to Provide Primary Care aspect is, at worst for the father, neutral.

When grouped together, the Parenting Skills and Willingness and Capacity to Provide Primary Care factor overwhelmingly favors the father.

#### C. Employment of the Parent and Responsibilities of that Employment

The Court found this factor neutral in the *Temporary Order* but changed its ruling to favor the mother in the *Amended and Restated Judgment of Divorce*. (Dkt. 19 Page 3); (Dkt. 45 Page 48) Michael had the same job at the time of both hearings. Michael had the same job when Joesie said it would be in Jayden's best interest to be in the father's primary care. (T. Pages 80, 348) **Michael successfully provided the primary care for Jayden for two years while at this same job without Joesie's assistance** (Discussed in the previous factor). Joesie and Michael both used friends and childcare providers to fill the gaps while they were at work. (T. Pages 25 - 29, 125) The Employment of the Parent and Responsibilities of that Employment factor is neutral.

#### D. Moral Fitness

The Court determined, in both the *Temporary Order* and the *Amended and Restated Judgment of Divorce*, that this factor slightly favors the father. The Court's explanation, however, made it very clear that the Court placed no weight in its own determination but in fact weighed this factor against the

father. (*Dkt. 19* Pages 3 - 4); (*Dkt. 45* Pages 48 - 49) In the *Temporary Order*, the Court expended zero words detailing Joesie's shortcomings but instead wrote a paragraph on why mere uncorroborated accusations of wrong doing, made by his estranged wife, were enough to call Michael's moral fitness into question. (*Dkt. 19* Pages 3 - 4) In the *Amended and Restated Judgment of Divorce*, the bulk of the Court's discussion revolved around the father's lack of credibility but did not cite any evidence to support that doubt. (*Dkt. 45* Pages 48 -49)

At the temporary hearing, the Court presumed Michael was guilty of infidelity and stated that it was his obligation to prove his innocence. (*Dkt. 19* Pages 3 – 4)

There was not a sufficient explanation of his part to rebut the clear inference made by the plaintiff that just following their vacation in California of 2014, where the parties continued in a sexual relationship, and then sometime within a month of that time at the end of January that it was, in fact, him that called off the reconciliation and insisted on the divorce.

The Court's requirement that Michael prove his innocence and presumption of Michael's guilt continued through the *Amended and Restated Final Judgment of Divorce* but with the added twist that Michael must also prove that he did not have thoughts of infidelity. (*Dkt. 45* Page 19); (*Dkt. 45* Page 49)

The change in Michael's attitude was more likely due to his involvement with another woman rather than any disgust toward Joesie, real or otherwise.

The Defendant did not present a sufficient explanation to negate the clear inference of his own infidelity at least in thought if not in deed.

Michael always maintained that his arrangement with Amy was platonic and never testified to having any thoughts to the contrary. Additionally, Joesie did not present any evidence at all to support her allegations. Notwithstanding whether thoughts of infidelity existed or not, there is no legal basis or precedence for using unspoken thoughts of infidelity when deciding custody of a child.

**It is clear from the record that the Court's defining consideration in determining custody of Jayden centered on the unsupported allegations of Michael's infidelity. *Hollon v.***

*Hollon*, 784 So.2d 943, 946 (Miss.2001) The Court changed the timeline of events to better support its presumption of Michael's infidelity, (*Dkt. 19* Page 4); (*Dkt. 45* Page 49); (*Dkt. 45* Page 17)

The only intervening event between those two times was the fact that he had moved in with two other women.

The only intervening event between those two circumstances was the fact that the Defendant moved and began to reside with two other women.

Joesie learned Michael was living with Amy and Cherie in December 2014 after the parties vacationed together in California.

Michael and Jayden had been living in Amy's home since September 2013. (*T. Page 13*) In December 2014, **prior to the parties' trip to California**, Michael and Jayden together with Amy and Cherry moved to Hainesville. (*T. Pages 147, 146, 134, 14*) It is important to note that Amy testified that the move was necessary because she was ordered by the Wisconsin Court to leave her Wisconsin residence because she was not planning on fighting for the house in her divorce from Joe. (*T. Pages 431, 437, 583*)

The Court was one-sided when it stated, (*Dkt. 19* Page 4)

-it was, in fact, him that called of the reconciliation.

The Court found that Michael failed to explain the timing and motivation of his decision to finalize his divorce from a wife who admitted to continuous and undisclosed contact with her paramour up to and including the parties' trip to California in 2014. (*T. Pages 267, 332 - 336, 345 - 346, 364 - 365, 394, 570, 573 - 576, 638, 666 - 667*) The Court, however, did not hold Joesie to the same standard of speculation; the timing of Joesie's decision to finally rejoin the family was never questioned by the Court even though it coincided with Kyle graduating college and moving to Florida. (*T. Page 87, 274, 480*)

In clear rebuttal to any inference, spawned from unsupported allegations made by his estranged wife, Michael did file a counter suit for divorce on the grounds of adultery and he explained

his reasoning for the timing of his insistence on completing the divorce. (T. Pages 40, 137 - 138, 478, 573)

Michael did not press for the divorce to be finalized prior to January 2015 because his priority was caring for Jayden. (T. Page 137) Since Jayden was in his care Michael let the divorce stay on the back burner. (T. Page 138) After many reconciliation attempts Michael came to the realization that Joesie was not truly repentant for the damage she had done to the marriage and to Jayden's wellbeing. (T. Pages 477 - 478) Michael felt a lack of intimacy for and from Joesie. (T. Page 473, 568) Michael felt Joesie would soon grow to resent being in the marriage and would once again commit adultery. (T. Pages 149, 474) Joesie's testimony that she had never been satisfied with her sex life with Michael demonstrated that she had not taken responsibility for her actions but instead blamed Michael for her on-going affair. (T. Page 626) Joesie's continued relationship with her paramour even during the parties' reconciliation attempts demonstrate that Joesie was not acting in good faith. (T. Pages 267, 332 - 336, 345 - 346, 364 - 365, 394, 570, 573 - 576, 638, 666 - 667) The substantial evidence proved that Michael's realizations were correct.

The Court was free with its disparaging words concerning Michael's character, but only addressed Joesie's credibility when forced to respond to Michael's *Motion for Reconsideration*.

- "the father's credibility here is in question" (T. Page 157)
- "it does raise the question of the Defendant's morality here." (Dkt. 45 Page 49)
- "The change in Michael's attitude was more likely due to his involvement with another woman rather than any disgust toward Joesie, real or otherwise." (Dkt. 45 Page 19)
- "The evidence that Michael may have had an adulterous inclination or infatuation toward Amy is scant, although common sense might dictate otherwise." (Dkt. 45 Page 19)
- "The Defendant did not present a sufficient explanation to negate the clear inference of his own infidelity, at least in thought if not in deed." (Dkt. 45 Page 49)
- "It is not believable" (Dkt. 45 Page 42)
- "... at least on paper." (Dkt. 45 Page 45)
- "He was not honest with Joesie in December 2014 about their relationship." (Dkt. 45 Page 46)

- The Court, however, also finds Michael's testimony regarding his relationship with Amy to be questionable as well. (*Dkt. 45* Page 6)
- Michael is not, however, without fault. He proved to be a controlling husband and unsupportive of Joesie with regard to her two daughters. (*Dkt. 45* Page 46)
- The Court finds Joesie's testimony was credible on most issues but questionable on the extent of her relationship with Kyle Rebstock. (*Dkt. 45* Page 5)

The Court's determination that Joesie is credible is not supported by the record and is manifestly wrong. Joesie was repeatedly caught in lies to the Court but the Court took an unsupported claim of adultery made by Joesie as a logical point of fact even after the Court noted that there was "scant" evidence to prove such allegations. (*Dkt. 45* Page 19) Contrastingly, Michael's testimony was supported by physical evidence and the testimony of Joesie and her witnesses. Joesie admitted to lying multiple times to the Court but was neither admonished nor was her testimony questioned by the Court until the Court was forced to address the issue because of Michael's *Motion for Reconsideration*.

Joesie confessed that she deceived the Court as to Jayden's residence. (*T.* Pages 111, 317 - 318, 363, 391) Joesie testified that Michael followed the original *Child Custody and Property Settlement Agreement* but then after being asked leading questions by her attorney Joesie claimed that things did not go as planned. (*T.* Pages 129, 80, 109, 110, 323) Joesie was deceitful about her financial statements. (*T.* Pages 319 - 320, 328 - 329) Joesie denied that she sent money to the Philippines to support her family. (*T.* Page 319) Even after being reminded of the transactions she continued to deny they happened. (*T.* Page 319) Only after being shown her bank statements did Joesie relent and admit to her lie. (*T.* Page 320) Joesie was dismissive of her relationship with Kyle, calling it "just a fling that I was messing with." (*T.* Page 631, 124) Joesie never gave an accurate timeline for her sexual relationship with Kyle Rebstock. The Court wrote that Joesie's adultery began in 2012, (*Dkt. 45* Pages 17, 20) which Michael supported with dated photographs, (*Ex. 28*) but Joesie clearly testified that her sexual relationship with Kyle did not begin until the summer of 2013. (*T.* Page 635, 320, 631 - 632) Joesie lied about her knowledge of Jayden's preschool. Multiple times Joesie stated that she knew nothing of Jayden

attending preschool and even when shown a picture of her dropping Jayden off for the first day of preschool she claimed not to remember the day. (T. Pages 377 - 378) Joesie attended Jayden's preschool graduation but still claimed to know nothing of Jayden's preschool. (T. Page 646) Joesie's lies continued when she pretended not to know that Jayden was participating in ice skating classes. (T. Page 342) Joesie claimed to know nothing of Michael's work schedule but admitted to visiting while Michael was working. (T. Page 372) Joesie was deceptive when asked about suicidal comments she made. (T. Pages 332, 375, 376) Joesie lied when asked about Jayden's multiple suspensions from kindergarten. Joesie vehemently insisted that there was only one biting incident involving Jayden. (T. Pages 395 - 398) It was only after submitting Jayden's school records did Joesie change her story claiming to have not been thinking clearly. (T. Page 673) Joesie testified that she disciplined Jayden for the biting incidents but later confessed that she was unwilling to discipline Jayden for the biting incidents because she did not believe the teachers' assessment of the events. (T. Pages 648 - 649) Joesie made false accusations that Michael did not communicate with her. (T. Pages 283 - 284, 349, 374, 393, 400 - 401) Michael presented phone records and text messages that demonstrated he was in constant communication with Joesie. Michael presented text messages in which he specifically asked about Jayden's wellbeing in 15 separate text messages between October 2015 and February 2016. (Ex. 24 Pages 1 - 8); (T. Pages 497 - 498) The phone records show that between August 2014 and December 31st, 2014 there were 161 phone calls between Joesie and Michael, 40 to 50 of which were clearly after Jayden's bedtime. (T. Page 488 - 489) Joesie claimed Michael did not inform her that he was communicating with Jayden's school in Mississippi. (T. Page 294) Michael called and texted Joesie on November 6, 2015, prior to speaking to Jayden's teacher, Mrs. Halstead, to ask Joesie to add his name to the contact list. (Ex. 24 Page 2) (T. Page 496 - 497) Michael texted and called Joesie, on November 10, 2015 to let her know that he had a phone conversation with Mrs. Halstead. (Ex. 24 Pages 2 - 3) Michael sent Joesie copies of e-mails between him and Mrs. Halstead. (T. Page 353) Joesie admitted



to overhearing conversations between Michael and his son talk about Michael's communication with Mrs. Halstead. (T. Page 352 - 353) Michael presented text messages to support all of the above communications. (Ex. 24 Page 2 - 3)

Joesie made false claims that Michael did not communicate with her while Jayden was in Michael's care but it was Joesie who was guilty of not communicating Jayden's documented behavioral and medical issues. (T. Pages 291 - 292, 598 - 601, 605, 617, 662 - 663) Michael only found out about Jayden's first two suspensions through communication with Mrs. Halstead. (Ex. 15 Page 4, 7) Joesie admittedly did not tell Michael because she claimed to have been trying to figure it out. (T. Page 401) Joesie did not communicate Jayden's doctor visits or his misdiagnosis of ADHD. (T. Pages 291 - 292, 598 - 601, 605, 617, 662 - 663)

Not only did Joesie lie but Joesie's witnesses also lied. In the temporary hearing Ms. Haffner testified that she had witnessed Michael being a good father to Jayden (T. Pages 73) Ms. Haffner later changed her testimony and claimed never to have seen Jayden and Michael together. (T. Page 264) Ms. Haffner also falsely stated that she only saw Joesie without Michael being present one time. (T. Pages 67 - 68) Joe Dunka lied about having a record of phone calls between Michael and Amy. (T. Page 218) Michael submitted his phone records to the plaintiff months prior to the beginning of the proceedings. These phone records detailed all incoming and outgoing phone calls. Joe's accusations were very specific. Joe claimed multiple phone calls every other night in excess of five and ten minutes each. Michael's phone records clearly show that no such phone calls existed. (T. Pages 451 - 452, 454)

In stark contrast to Team Joesie's deceitfulness no evidence was produced to contradict any of Michael's testimony. If Michael had been committing adultery for two years, why is there no evidence? Not a single picture, text message, social media posting, or any testimony of anyone witnessing any romantic relationship between Michael and Amy. Joesie admitted to lying to the court

multiple times but the Court placed such credibility in her accusations to the point of calling them “logical” and a “clear inference.” (*Dkt. 45* Pages 20; 49)

The Court erroneously applied the excited utterance exception to the hearsay rules to allow Joesie to admit prejudicial testimony. (*T.* Pages 296 - 299); (M.R.E. 803(2))

A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.

Even the most lenient proponent of this exception would feel that it was abusive to use this exception to allow a party in a child custody dispute to retell detailed conversations with a five-year-old boy to identify the specific details of the conversations. A five-year-old boy crying does not meet the criteria of a startling event or being under the stress of a startling event.

Joesie chose not to return to the marriage but the Court did not think her voluntary separation from her family combined with the photos of Joesie and Kyle in intimate embraces, after January 2014, warranted so much as an inference of not acting in good faith or even any mention at all when discussing the Moral Fitness factor. (*Ex. 16* Pages 28 - 31); (*Ex 19* Page 6) (*Dkt. 45* Pages 48 - 49)

The Court abused its discretion and mischaracterized the record, (*Dkt. 45* Page 48)

She admits to adultery during her current marriage also, which occurred prior to the initial separation of the parties.

The Court only used Joesie’s testimony and even in that the Court edited Joesie’s testimony to show Joesie in an unjustly favorable light. Joesie admitted the adultery started prior to the separation but even Joesie admitted that she secretly continued the adulterous affair after the separation in September 2013. Joesie claimed the affair ended permanently in January 2014 but admitted that Michael was unaware of her continued contact with Kyle after September 2013. (*T.* Pages 267, 332 - 336, 345 - 346, 364 - 365, 394, 570, 573 - 576, 638, 666 - 667)

The Court abused its discretion by ignoring all the evidence that Michael presented detailing Joesie’s ongoing relationship with Kyle through December 2014. The Court also failed to mention the

clear inference that Joesie had multiple affairs. (*Ex.* 16 Pages 22 - 27); (*T.* Pages 386 - 389, 419 - 420, 466 - 467) Unlike Joesie's completely unsupported accusations, this inference was supported by multiple photographs and testimony that Joesie discussed these multiple affairs in 2012 with Amy in a documented Facebook conversation. (*Ex.* 16 Pages 22 - 27); (*T.* Pages 386 - 389, 419 - 420, 466 - 467)

The Moral Fitness factor overwhelmingly favors the father.

#### E. Continuity of Care Prior to Separation

The Court erroneously interpreted the Continuity of Care Prior to Separation factor as a mathematical calculation of Caretaking Time covering Jayden's entire life. (*Dkt.* 45 Pages 47 - 48); (*Dkt.* 19 Pages 2 - 3) The Court failed to properly weigh that Joesie did not have custody of Jayden during the parties' separation, nor express any interest in becoming the custodial parent until Kyle graduated college and moved to Florida. (*T.* Pages 86 - 87, 274, 480) *Hollon v. Hollon*, 784 So.2d 943, 946 (Miss.2001)

The Court's phrase, "during a portion of their separation" inequitably minimizes the time that Jayden spent in Michael's primary care following the parties' separation. (*Dkt.* 45 Pages 47 - 48)

Joesie voluntarily allowed Michael to have primary physical custody of the child as per their Agreement during a portion of their separation.

The parties agreed that it would be in Jayden's best interest to be in Michael's primary care during the school year and in Joesie's primary care during the summer months. (*T.* Pages 79 - 80, 160 - 161, 348)

It was inconsistent with the evidence presented to find that the mother was the primary caretaker of Jayden prior to the separation in September 2013. (*Dkt.* 19 Page 2) The only time that the father was not physically present to care for Jayden was during two military deployments, the last of which ended nine months prior to the separation. (*T.* Page 24) From the time the father returned from his military deployment in December 2012 until the date of the temporary hearing he alone provided

the continuity of care of Jayden. The only time that Michael was separated from Jayden after December 2012 was during the summer months of 2014 and 2015 as per the *Child Custody Agreement*.

Joesie testified that during the time immediately prior to the marital separation she took multiple trips to Gulf Shores, (T. Page 72, 393 - 394, 632) did not attend a family vacation in the summer of 2013, (T. Page 360) and generally spent many hours away from the family. *Montgomery v Montgomery*, NO. 2008-CA-00641-COA (2008) The Court did not mention any of these uncontested facts when discussing this factor. (Dkt. 45 Pages 47 - 48) This factor should have weighed heavily in the father's favor at the temporary hearing. The Court did not mention the time immediately prior to the marital separation at all in its *Amended and Restated Judgment of Divorce*. (Dkt. 45 Pages 47 - 48)

The Court relied on Joesie's testimony almost word for word when describing why the father had primary physical custody of Jayden after September 2013 repeating Joesie's claim that she allowed Michael to have custody of Jayden to make up for time Michael spent on deployment. (Dkt. 45 Pages 47 - 48) Joesie reliability, however, is in question, after Jayden moved with Michael, Joesie immediately moved in with Kyle's family and by her own admission continued in a sexual relationship with Kyle. Further, the Court did not mention that Michael returned from his last military deployment a full nine months prior to moving with Jayden to Wisconsin.

The Court's statement that it was during this time that Joesie admitted to an extra-marital relationship was not supported by the record and manifestly wrong. (Dkt. 45 Page 48) Joesie testified that she kept her relationship with Kyle a secret from Michael following September 2013. (T. Pages 267, 364 - 365, 394, 565, 638) Joesie claimed the affair ended in January 2014. (T. Pages 81, 635, 664, 665) To say that it was during this time that Joesie admitted to an extra-marital relationship mischaracterizes the truth of the events and is prejudicial. Joesie was continuously evasive and deceptive when talking about the extent of her relationship with Kyle. (T. Pages 124, 631); (Dkt. 45 Page 5)

It is important to note that the Court made the decision to remove Jayden from his father's care at the temporary hearing even though Michael provided the continuity of care for Jayden since December 2012. Due to the Court's ill-advised decision Jayden spent more time with his mother since the temporary hearing but Michael clearly remained in close contact with Jayden through daily phone calls, holiday visits, and summer visits. (*T.* Pages 102, 192, 355, 395, 415) Returning Jayden to his father's care is in Jayden's best interest. The Continuity of Care Prior to Separation factor favors the father.

#### F. The Home, School, and Community Record

The Court's ruling at the temporary hearing that the Home, School, and Community Record favored the mother was manifestly wrong and in error. **Prior to the Temporary Hearing:** Jayden attended two years of preschool in his father's care, graduating in May 2015. (*T.* Pages 125, 139, 471) Contrastingly Jayden did not attend a single day of school while in his mother's care. Jayden's primary residence was with his father, spending the school year living with his father and summer months living with his mother. (*Dkt. 19* Pages 2 - 3) Michael taught Jayden how to read prior to starting kindergarten. (*T.* Pages 173, 342, 514) Michael had prepared Jayden to start kindergarten by updating his immunizations, dental readiness, and enrolled him in Prairieview Elementary School in Illinois. (*T.* Pages 488, 139) To justify this opinion the Court credited Joesie with having friends available to help care for Jayden while Michael was penalized for having friends available to help care for Jayden. (*Dkt. 19* Page 5)

In the *Amended and Restated Judgment of Divorce* the Court penalized Michael for no longer having the live-in assistance of Amy and Cherry. (*Dkt. 45* Page 49)

Michael relied upon child care assistance from the two women, Amy and Cherry, living in the home with him. Michael lives alone presently.

Michael moved out of the Hainesville home and into the Grayslake home as a response to the Court's repeatedly expressed displeasure of Michael and Jayden sharing a residence with Amy and Cherry.

(*Dkt. 19* Pages 3, 4, 5); (*Dkt. 45* 19, 49, 49) This is a classic catch-22 situation where the Court penalized Michael for living with Amy and Cherry at the temporary hearing and then penalized him for no longer having their assistance in his home in the *Amended and Restated Judgment of Divorce. Hollon v. Hollon*, 784 So.2d 943, 946 (Miss.2001)

The chancellor effectively penalized her for responding to his threat, exhibiting classic Catch-22 logic.

The language that the Court used to describe Joesie's "close-knit Filipino community" is almost word for word the language used by Joesie's attorney. (*Dkt. 19* Page 4); (*T.* Pages 26, 28) Conversely, the Court used a pejorative tone when talking about the father's childcare arrangements – "two women living in the home." (*Dkt. 19* Page 4)

Joesie testified that she and her close-knit Filipino community went out to night clubs while Michael cared for Jayden. (*T.* Page 394) It was members of this close-knit Filipino community who went on overnight trips, clubbing, and attending birthday dinners with Joesie and Kyle. (*T.* Pages 72, 393, 632, 635) It was a member of this close-knit Filipino community who introduced Joesie and Kyle. (*T.* Page 73)

The Court numerous times took great displeasure in the fact that Michael was sharing a residence with Amy and Cherry. (*Dkt. 19* Pages 3, 4, 5); (*Dkt. 45* 19, 49, 49) But the fact is that Amy had been hand selected by Joesie to provide childcare for Jayden when Joesie chose to not move with her family but instead secretly moved in with Kyle's family. (*T.* Pages 565, 638) Jayden and Michael lived in Amy's house since September 2013, at the recommendation of Joesie. (*T.* Pages 111 - 112) Amy had provided childcare for Jayden since he was less than a year old. (*T.* Page 25) Only after Amy was forced to leave her marital residence by the Wisconsin court did Amy and Michael choose to continue their arrangement in Hainesville, IL. (*T.* Pages 431, 437, 583)

The Supreme Court of Mississippi stated that it is only concerned about relationships that will have a definite adverse effect on the child. *Cheek v Ricker*, 431 So. 2d 1139 (Miss. 1983) Michael's

primary child care provider, Amy, was a longtime family friend who had known Jayden since the day he was born and with whom Jayden had been living since September 2013 at the suggestion of Joesie. (T. Page 428, 52) The presence of Amy was a stable positive influence on Jayden not a negative influence.

The Court would have been more accurate to describe the father's community as follows:

The father has a mutually beneficial arrangement with Amy, a long-time family friend and member of the close-knit Filipino community. Amy has known Jayden since the day he was born and has provided her assistance to the Gerty family throughout Jayden's life. The father reciprocates providing childcare for Amy's daughter, Shiloh, whenever required. The father also benefits from the assistance of Cherry, yet another member of the close-knit Filipino community, whenever necessary. The three shared a residence to split costs as well as provide each other with mutual support. Although they no longer share a residence, Amy and Michael have pledged to continue assisting each other as necessary.

In the Final Judgment, the Court once again ruled that this factor favored the mother. (*Dkt.* 45 Page 49) The Court distorted the facts and changed the timeline of events to avoid acknowledging the dramatic change in Jayden's behavior after the temporary hearing. (*Dkt.* 45 Page 47)

At the time of the temporary hearing, the child was experiencing some behavioral problems which could be attributable to the breakup of the marriage; enduring extended periods of absence from one parent or the other; problems with discipline in the home of either parent; and problems with attention.

Jayden had a single isolated incident when he was disruptive in class while he was in Michael's primary custody during the two years after his parents separated in September 2013. Michael worked with Jayden's teacher to correct Jayden's behavior and the poor behavior was not repeated. (T. Page 183) It was only after being placed in Joesie's custody that Jayden developed these concerning behaviors. (T. Pages 146, 182 - 183, 412, 492, 673) Removing Jayden from Michael's primary care at the temporary hearing was a bad decision that caused distress to Jayden. It was inconsistent with the testimony and evidence for the Court to dismissively state that there was no evidence of Joesie's bad parenting skills. (*Dkt.* 45 Page 47)

The Court dismissed this disparity by stating, (*Dkt. 45* Page 49)

The child has experienced some behavioral problems at school while in his mother's custody, however, the evidence does not establish these problems are due to Joesie's parenting skills.

Certainly, three suspensions from kindergarten, repeated reprimands from his teacher, and a misdiagnosis of ADHD, justify a description more significant than "some behavioral problems."

Further, the Court abused its discretion by giving credit to Joesie for being the primary caregiver following the issuance of the *Temporary Order* but did not find her responsible for the dramatic changes in Jayden's behavior. (*Dkt. 45* 47 - 48); (*Dkt. 45* Page 47) The Court abused its discretion by unjustly exonerating Joesie for failing to live up to her parental responsibilities. Prior to the temporary hearing, while in Michael's care, Jayden had endured almost two years devoid of his mother's presence without suffering any negative effects on his behavior. The Home School, and Community Record factor favors the father.

#### G. Stability of the Home Environment and Employment

Joesie's choice to commit adultery and her subsequent choice not to move with Michael and Jayden caused instability in Jayden's home. The Stability of the Home Environment and Employment factor favors the father.

#### H. Other Factors

The Court cannot ignore the fact that Michael and Joesie already reached an Agreement as to the best interest of Jayden and that the parties had been abiding by the Agreement for nearly two years prior to the temporary hearing. The Court must weigh the *Albright* factors considering the totality of circumstances. *Ash v. Ash*, 622 So.2d 1264, 1266 (Miss.1993) It was not in the best interest of Jayden to be removed from the stabilizing influence of his father at the temporary hearing and no argument can be made that Jayden did not suffer as a direct result of that decision.

The totality of the Albright analysis overwhelming favors the father.



- Age, Health, and Sex of the Child – Favors the Father
- Continuity of Care Prior to the Separation – Favors the Father
- Parenting Skills and Willingness and Capacity to Provide Primary Child Care – Overwhelmingly Favors the Father.
- Employment of the Parents and Responsibilities of that Employment – Neutral
- Physical and Mental Health and Age of the Parents – Neutral
- Emotional Ties of the Parent and Child – Neutral
- Moral Fitness of the Parents – Overwhelmingly Favors the Father
- Home, School, and Community of Record – Strongly Favors the Father
- Preference of the Child – Not Applicable
- Stability of Home Environment and Employment of Each Parent – Favors the Father
- Other Factors – Overwhelmingly Favors the Father

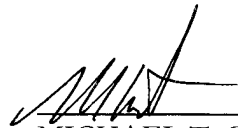
### CONCLUSION

Appellant Michael Gerty submits that the Chancery Court abused its discretion, employed the wrong legal standards, was manifestly wrong, and committed error as regards to the matters set forth above. Appellant Michael Gerty urges this Court as follows:

1. That this Court reverse the Chancery Court and find the parties' *Child Custody and Property Settlement Agreement* not only "adequate and sufficient" but also in the best interest of Jayden.
2. That this Court reverse the Chancery Court as regards to Child Custody.

Appellant Michael Gerty asserts that this Court should do the following: reverse.

RESPECTFULLY SUBMITTED, this the 27th day of December, 2018.

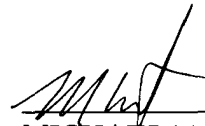


MICHAEL T. GERTY, APPELLANT

CERTIFICATE OF SERVICE

I, Michael T. Gerty, Defendant/Appellant, do hereby certify that I have on this date filed this Appellant's Motion for Rehearing with the Clerk of this Court, and have served a copy of same via US Mail to the Honorable Jennifer Schloegel, Chancellor, Harrison County Chancery Court and to Michael C. Powell, Attorney for the Plaintiff/Appellee.

So certified this the 27th day of December, 2018.

A handwritten signature in black ink, appearing to read 'M. T. Gerty', is written over a horizontal line.

MICHAEL T. GERTY, APPELLANT

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