

SUPREME COURT AND COURT OF APPEALS
STATE OF MISSISSIPPI

FILED

No. 2017-CP-00828

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SUPREME COURT
COURT OF APPEALS

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

VERSUS

JOESIE R. GERTY, APPELLEE

ORIGINAL

APPEAL FROM

THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT

HONORABLE JENNIFER SCHLOEGEL, PRESIDING TRIAL JUDGE

APPELLANT'S BRIEF

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IN THE SUPREME COURT AND COURT OF APPEALS
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MICHAEL T. GERTY AND STATE OF
MISSISSIPPI, JIM HOOD ATTORNEY
GENERAL

APPELLANTS

VS.

JOESIE R. GERTY

APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Court may evaluate possible disqualification or recusal.

1. Michael T. Gerty, Appellant.
2. State of Mississippi, Jim Hood Attorney General, Appellant
3. Joesie R. Gerty, Appellee.
4. Michael Channing. Powell, 1915 23rd Ave.
Gulfport, Mississippi, Attorney for Appellee
5. Honorable Jennifer Schloegel, Chancellor of Place One, Post Office Box 986
Gulfport, Mississippi
6. Thomas W. Teel, Perry, Murr, Teel & Koenenn, P.A., Post Office Box 7158
Gulfport, Mississippi, Attorney for Appellant.

Respectfully submitted, this the 9th day of October, 2017.


MICHAEL T. GERTY, APPELLANT

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STATEMENT OF THE ISSUE

Appellant, Michael Gerty, asserts as follows: The Chancery Court was manifestly wrong, employed the wrong legal standard, and erred in finding, "it is incumbent upon it to determine the best interests for the custody of the child herein despite the prior agreement of the parties." (*Dkt. 45* Page 39), the Chancery Court was manifestly wrong, employed the wrong legal standard, and erred in its analysis of the Albright factors which should have favored the father, the Chancery Court employed the wrong legal standard and erred in not granting Michael a divorce on the grounds of adultery; the Chancery Court's *Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as amended* is moot, the Chancery Court was manifestly wrong, employed the wrong legal standard and erred when it amended the agreed upon property settlement agreement, the Chancery Court was manifestly wrong for significantly limiting the father's summer visitation.

STATEMENT OF THE CASE

In this case the parties, Michael and Joesie Gerty, married on May 7, 2005 and separated in September 2013, in Harrison County, Mississippi. The parties had one child, age 3, at the time of separation. The parties signed a *Joint Complaint for Divorce (Irreconcilable Differences)* which included a *Separation and Child Custody and Property Settlement Agreement* on September 18, 2013, in Harrison County, Mississippi. On June 10, 2015 Appellee, Joesie R. Gerty (hereinafter "Joesie"), filed her *Withdrawal of Consent to Divorce on Irreconcilable Differences* and subsequently on June 17, 2015 Joesie filed her *Complaint for Divorce and Motion for Temporary Relief* against the Appellant, Michael T. Gerty (hereinafter "Michael"). On July 10, 2015 Michael filed his *Affirmative Defenses, Answer to Complaint and Counter Complaint*. Prior to answers and discovery, a temporary hearing was held on July 14, 2015.

Court's Temporary Order

On August 6, 2015, the Chancery Court of Harrison County, First Judicial District, entered its *Temporary Order* awarding temporary custody of Jayden Gerty to his mother, Joesie Gerty.

Motion to Reconsider the Temporary Order

On August 10, 2015 Michael filed his *Motion for Reconsideration of Court's Ruling on Temporary Relief*. The Court denied Michael's *Motion for Reconsideration of Court's Ruling on Temporary Relief*. (T. Pages 382 – 383)

Yes, except – well, okay, but I'm not reading Mr. Teel's motion. He filed a written Motion for Reconsideration, and so, in any event, I would make no findings. I just simply deny the Motion for Reconsideration, and that – and I would just say to the parties, I wouldn't normally reconsider a temporary order if there was not some pressing need to do so.

Post Initial Judgment Motions

On November 15, 2016 the Chancery Court of Harrison County, First Judicial District, entered its *Final Judgment of Divorce and Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended*. On November 22, 2016 Michael filed his *Motion for Reconsideration of Court's Judgment under MRCP 59 and 60*. On November 23, 2016 Joesie filed her *Motion to Reconsider Final Judgment of Divorce*. On December 06, 2016 the State of Mississippi *ex rel.* Jim Hood, Attorney General (the "State") filed its *Motion to Alter or Amend, or for Other Relief from, "Final Judgment of Divorce and Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended"*.

Post Reconsideration Hearing Briefs

On March 23, 2017, a reconsideration hearing was held. On April 7, 2017 Michael filed his *Brief of Michael Gerty in Support of his Post Judgment Motion under MRCP 59 and 60*. Also on April 7, 2017 Joesie filed her *Brief of Plaintiff Joesie R. Gerty in Support of her Motion to Reconsider Final Judgment of Divorce*.

Court's Amended and Restated Judgment of Divorce

On June 8, 2016 the Chancery Court of Harrison County, Mississippi, First Judicial District denied Michael's *Motion for Reconsideration of Court's Judgment under MRCP 59 and 60*, denied the Attorney General's *Motion to Alter or Amend, or for Other Relief from, "Final Judgment of Divorce and Notice*

of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended”, and denied in part and granted in part Joesie’s *Motion to Reconsider Final Judgment of Divorce* and entered its *Amended and Restated Judgment of Divorce* as follows:

IT IS THEREFORE ORDERED AND ADJUDGED that Joesie Gerty’s complaint for Divorce on the ground of willful, continued and obstinate desertion for the space of more than one year, on the ground of adultery, and on the ground of habitual cruel and inhuman treatment is hereby denied. It is further (*Dkt. 45* Page 51)

ORDERED AND ADJUDGED that pursuant to Mississippi Rules of Civil Procedure 57 and 15(c), SECTION 93-5-2 OF MISSISSIPPI CODE OF 1972, AS AMENDED, IRRECONCILABLE DIFFERENCES DIVORCE, is hereby declared unconstitutional to the extent that it requires mutual consent of the parties. It is further (*Dkt. 45* Page 51)

ORDERED AND ADJUDGED that pursuant to Mississippi Rules of Civil Procedure 21 and 19(a) the Attorney General of the State of Mississippi was properly joined and added as a necessary party hereto. It is further (*Dkt. 45* Page 51)

ORDERED AND ADJUDGED that the bonds of matrimony heretofore existing between Joesie Gerty and Michael Gerty are hereby dissolved and held for naught; that Joesie Gerty and Michael Gerty are hereby granted full, final and complete divorce from each other on the ground of irreconcilable differences. It is further (*Dkt. 45* Page 51)

ORDERED AND ADJUDGED that Separation and Child Custody and Property Settlement Agreement (attached hereto as Exhibit “[3]”) executed by the parties on September 18, 2013 is binding upon the parties and remains in full force and effect with the exception of the child custody and support provisions modified by the Court herein. It is further (*Dkt. 45* Pages 51 – 52)

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded 50.5 months (half of the marital portion) or approximately 22% of Michael’s total military retirement benefit, which shall be paid to her by Michael upon his retirement on the 5th day of each month. It is further (*Dkt. 45* Page 52)

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded 100% of the value of her 401k retirement plan. It is further (*Dkt. 45* Page 52)

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded \$300 per month alimony for a period of five (5) years commencing on the date of the original judgment, November 15, 2016 to be paid on the 15th of each month. It is further (*Dkt. 45* Page 52)

ORDERED AND ADJUDGED that Michael Gerty is hereby awarded all right, title and interest in and to property described herein located on Steeplechase Drive, Gulfport, Mississippi. Michael is further responsible for all mortgage or other liability against said property. It is further (*Dkt. 45* Page 52)

ORDERED AND ADJUDGED that Joesie Gerty is hereby awarded the exclusive use and possession of the property described herein located on Blue

Meadows Road, Pass Christian. She shall be financially responsible for all upkeep and repairs to the property. She is awarded the right to lease the property and collect income. Michael Gerty shall be responsible for all mortgages, insurances, taxes and liens associated with this property. Upon the sale of said property, each party shall share equally in the proceeds of the sale after the satisfaction of the current debt against the property and less any expenses associated with the sale. It is further (*Dkt. 45* Page 52)

ORDERED AND ADJUDGED that JOESIE GERTY is hereby awarded primary physical custody of the minor child herein and that MICHAEL GERTY is hereby awarded visitation consistent with the provisions set forth herein. The parties are further awarded joint legal custody of the minor child. It is further (*Dkt. 45* Page 53)

ORDERED AND ADJUDGED that each party entitled to reasonable telephone and/or electronic visitation with the child when the other party is exercising custody or visitation rights at the expense of the calling parent. Reasonable telephone visitation is defined as the right to call the children at the other party's house during the evening hours between 5:00 P.M. and 9:00 P.M. Both parents shall continue to have means of receiving messages from the other parent or child (i.e. voice mail or answering machine), and messages left on said device for the child shall be returned as soon as possible no later than eight (8) hours. Neither parent shall refuse to answer the call or turn off the phone in order to deny the other parent telephone contact the child. The child may call either parent whenever she[sic] wants during reasonable hours. It is further (*Dkt. 45* Page 53)

ORDERED AND ADJUDGED that the Father, MICHAEL GERTY, shall maintain health insurance for the child either privately or through government benefits. Both parties shall fully and completely cooperate with the filing of any and all insurance claims for the benefit of the minor child. Should health insurance become available to the Mother for the children through her employment, the child shall be insured through this employment if financially feasible and more beneficial with the father bearing the cost to insure the child. The parents shall equally pay all uncovered health related costs (i.e., medical, dental, orthodontic, optical, pharmaceutical, etc., which shall include, but not be limited to dental exams and procedures, orthodontics [including retainers], x-rays, MRI's, psychological and counseling, hospital expenses, pharmaceuticals, physical therapy, eye glasses, eye exams, contact lenses, dermatologist visits, etc.), of the children[sic]. It is further (*Dkt. 45* Pages 53 – 54)

ORDERED AND ADJUDGED that pursuant to Uniform Chancery Court Rule 8.06 both parties shall keep each other informed of his/her full address, including state, city, street, house number, and telephone number, if available, unless excused in writing by the Court. Further, within five (5) days of the party changing his/her address, he/she shall, so long as the child remains a minor, notify in writing the Clerk of Court which has entered the order providing for custody and visitation, of his/her full new address and shall furnish the other party a copy of such notice. The notice shall include the Court file number. Additionally, in the event of a threat, disaster, or other emergency, such as a hurricane, which causes emergency evacuation, any party who has custody of the

minor child (physical custody or while exercising visitation) has a duty to notify the other parent of the location and well being of the minor as soon as reasonably possible. (*Dkt. 45* Page 54)

ORDERED AND ADJUDGED that JOESIE GERTY shall be allowed to claim the child for income tax purposes. It is further (*Dkt. 45* Page 54)

ORDERED AND ADJUDGED that MICHAEL GERTY shall pay child support pursuant to the statutory guidelines of 14% of his adjusted gross income, at \$764.00 per month beginning December 1, 2016, and continuing on the first of each month until such time as the minor child attains the age of twenty-one years, or otherwise becomes emancipated, or until further order of the Court. (*Dkt. 45* Page 55)

Notice of Appeal

On June 14, 2017 Michael filed his *Notice of Appeal* alleging that the Court erred in the grounds upon which the divorce was granted, custody, alimony and other matters. On June 20, 2017 the State of Mississippi ex rel. Jim Hood, Attorney General filed its *Notice of Appeal from the Amended and Restated Judgment of Divorce entered in this case on June 8, 2017 [Dkt. 45], and from all rulings and orders precedent thereto and merged therein.*

STATEMENT OF FACTS

Facts Related to the *Joint Complaint for Divorce (Irreconcilable Differences)* and the *Accompanying Separation and Child Custody and Property Settlement Agreement*

Michael Gerty and Joesie Gerty were married on May 7, 2005. The minor child, Jayden Gerty, was born on December 1, 2009. During Michael's military deployment in 2012, Joesie announced her unhappiness in the marriage. (*T. Pages 468, 470*) Upon Michael's return from deployment in December 2012 Joesie moved out of the parties' marital bedroom. (*T. 37, 98, 632 - 633*) Michael discovered Joesie's extra-marital relationship with Kyle Rebstock in August of 2013 and subsequently confronted Joesie on the subject. (*T. Pages 197, 566*) Joesie admitted to the extra-marital relationship and the parties engaged in conversations about the future. (*T. Pages 123, 134, 197*) Michael wanted Joesie to move with him and Jayden to the Great Lakes region of Illinois and work on their marriage together. (*T. Page 196, 468, 476*) Joesie initially agreed to the move but later decided that she would be happier staying in the Gulfport, Mississippi area. (*T. Pages 82, 197, 468*)

The parties discussed and mutually drafted the *Joint Complaint for Divorce (Irreconcilable Differences)* and the accompanying *Separation and Child Custody and Property Settlement Agreement*. (T. Pages 80, 109, 110, 323) In the Agreement: (Dkt. 3)

- Michael would have physical custody of Jayden during the school year and Joesie would have physical custody of Jayden during the summer months.
- A weekend and holiday visitation schedule was also established.
- Michael would pay to Joesie monthly alimony in the amount of \$300 for a period of five (5) years and monthly child support in the amount of \$400 when Jayden was in Joesie's physical custody as long as Jayden remained a minor.
- Joesie would enjoy full use and possession of the home in Pass Christian while Michael was responsible for the mortgage, insurance, taxes, and any liens associated with the property. In the event that the parties agreed to sell the home the parties agreed that they would equally distribute any net proceeds generated by the sale of the home.
- Michael would take full possession and responsibility of the home in Gulfport.
- The division of all other assets, marital or otherwise, was agreed upon.

The parties signed the *Joint Complaint for Divorce (Irreconcilable Differences)* and the accompanying *Separation and Child Custody and Property Settlement Agreement* on September 18, 2013 in the presence of a notary at the Gulfport courthouse. (Dkt. 2); (Dkt. 3); (T. Page 323) Michael and Jayden moved to Kenosha, Wisconsin in the last week of September 2013. Joesie temporarily moved in with her friend, Robin Caldwell, and from there moved into the Pass Christian home in January 2014. The parties agreed that it was in Jayden's best interest to be in his father's care (T. Page 348) and that they followed the mutually agreed upon *Separation and Child Custody and Property Settlement Agreement* until the date of the temporary hearing. (T. Pages 108 - 109, 323, 347)

On June 10, 2015 Joesie filed her *Withdrawal of Consent to Divorce on Irreconcilable Differences* and subsequently on June 17, 2015 Joesie filed her *Complaint for Divorce and Motion for Temporary Relief*. The Court concluded that Joesie's withdrawal of consent to the *Agreement* and the *Joint Complaint for Divorce* did not work to nullify the agreement between the parties. (Dkt. 45 Pages 37; 55)

Facts Related to the Temporary Hearing and Temporary Order

On June 17, 2015 Joesie filed her *Plaintiff's Motion for Temporary Relief*. Less than 30 days later, on July 14, 2015, a temporary hearing was conducted. At the time of the temporary hearing discovery had not been completed, the Court stated that the *Temporary Order* was a strictly temporary matter and the Court further stated that a full Albright analysis was not conducted at the temporary hearing. (T. Pages 155 - 156, 518 -519) Nevertheless, the Court completely reversed the *Child Custody Agreement* stating, "It is in the best interest of the **MOTHER** that the mother be granted custody of the child." [emphasis added] (Dkt. 19 Page 5); (T. Page 159)

Facts Related to Jayden Gerty's Residence

Jayden Gerty was born on December 1, 2009. At that time, he resided with Michael and Joesie at 10578 Steeplechase Dr., Gulfport, Mississippi. In June of 2013, together with Michael and Joesie, Jayden moved to White Pine Cir., Gulfport Mississippi. As per the original *Child Custody Agreement*, in late September 2013, together with Michael, Jayden moved to 6420 53rd Ave., Kenosha, Wisconsin. (T. Page 80) In December 2014, together with Michael, Jayden moved to 400 N. Patriot Drive, Hainesville, IL. As per the *Child Custody Agreement*, Jayden visited his mother in the summer months of both 2014 and 2015. (T. Pages 451, 487)

In her *Complaint for Divorce*, Joesie falsely stated that Jayden resided with her at the Pass Christian home and had so resided since January 2014. (Dkt. 8); (T. Pages 317-318) Joesie doubled down on her first statement by further stating that from time to time the child visited Michael in Kenosha, Wisconsin and Hainesville, Illinois. (Dkt. 8); (T. Pages 317-318) Joesie testified that her attorney advised her to wait to file her *Complaint for Divorce*, which contained the statements that were known to be false, until Jayden was living with her during the summer visitation period. (T. Pages 111 and 363, and 391)

Facts Related to Jayden Gerty's School Attendance

On October 11, 2013 Jayden Gerty began attending preschool at La Petite Academy in Kenosha, Wisconsin. (T. Page 471) Jayden continued to attend La Petite Academy in Kenosha, Wisconsin through January 2015 at which date Jayden transferred to the La Petite Academy preschool near Hainesville, Illinois. (T. Pages 139) In May 2015 Jayden graduated from La Petite Academy preschool in a ceremony attended by both Michael and Joesie. (T. Page 466)

In August 2015 Jayden began kindergarten at Lizana Elementary School in Gulfport, Mississippi. (T. Page 412) On October 22, 2015 Jayden was suspended for the remainder of the school day for actions related to poor behavior. (T. Page 492) On February 15, 2016 Jayden was suspended for the remainder of the school day for biting a fellow student. (T. Page 492) Jayden was subsequently suspended from school for three (3) days for biting a second student on the 22nd of February. (T. Page 492); (Ex. 23 Pages 2 - 3)

SUMMARY OF ARGUMENT

The Chancery Court was manifestly wrong, employed the wrong legal standard, and erred in finding, "it is incumbent upon it to determine the best interests for the custody of the child herein despite the prior agreement of the parties." (Dkt. 45 Page 39), the Chancery Court was manifestly wrong, employed the wrong legal standard, and erred in its analysis of the Albright factors which should have favored the father, the Chancery Court employed the wrong legal standard and erred in not granting Michael a divorce on the grounds of adultery; the Chancery Court's *Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as amended* is moot, the Chancery Court was manifestly wrong, employed the wrong legal standard and erred when it amended the agreed upon property settlement agreement, the Chancery Court was manifestly wrong for significantly limiting the father's summer visitation.

SUMMARY ARGUMENT I:

The Chancery Court was Manifestly Wrong, Applied the Wrong Legal Standard, and Erred in Finding, “it is Incumbent Upon it to Determine the Best Interests for the Custody of the Child Herein Despite the Prior Agreement of the Parties.” (Dkt. 45 Page 39)

Albright reaffirmed that the courts’ polestar consideration is to the best interest of the child. *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983) *Albright* **did not** find that it is incumbent upon the court to determine the best interests for the custody of the child despite the prior agreement of the parents. The Court erred in not following *Wright v. Wright*, 737 So. 2d 408 (1998) in which the Supreme Court of Mississippi affirmed the enforcement of a never filed but followed agreement. The Court erred in not following *Cheek v Ricker*, 431 So. 2d 1139 (Miss. 1983) regarding who is more capable of devising a child custody arrangement. The Court employed the wrong legal standards *Pace v. Owens*, 511 So. 2d 489 (Miss. 1987); *Duran v. Weaver*, 495 So.2d 1355, 1357 (Miss. 1986); *Tucker v. Tucker*, 453 So.2d 1294, 1297 (Miss. 1984) to support its ruling.

SUMMARY ARGUMENT II:

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

The Court erred as a matter of law by presuming Michael was guilty of infidelity and stating that it is his obligation to prove his innocence. The Court erred as a matter of law by ruling that Michael must prove he did not have thoughts of infidelity. The Court erred by placing too much weight in its presumption that Michael committed infidelity. The Court made a presumption that the mother should be favored in a child custody dispute contrary to *Miss. Code* § 93-5-24 (7). The Court erred as a matter of law by renaming and regrouping *Albright* factors. The Court was manifestly wrong in its *Albright* analysis and erred as a rule of law in not following *Flowers v Flowers*, NO. 2010-CA-01957-COA (2010); *Montgomery v Montgomery*, NO. 2008-CA-00641-COA (2008); *Mercier v Mercier*, No. 96-CA-00564-SCT (1998); *Carter v Escovedo*, NO. 2014-CA-01817-COA (2014); *Cheek v Ricker*,

431 So. 2d 1139 (Miss. 1983). The Court was manifestly wrong for ignoring evidence due to an error in finding that Michael condoned Joesie's adultery through December 2014. The Court was manifestly wrong in placing undue credence in the testimony of the mother. The Court was manifestly wrong for not acknowledging that Jayden suffered as a result of the Court's ruling at the temporary hearing.

SUMMARY ARGUMENT III:

The Chancery Court Employed the Wrong Legal Standard and Erred in Not Granting Michael a Divorce on the Grounds of Adultery; The Chancery Court's *Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended* is Moot

The Court erred as a matter of law in not following *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 6 1970); *Brewer v Brewer*, 919 So. 2d 134, 139 (Miss. Ct. App. 2005); *Johnson v Johnson*, No. 2010-CA-01193-COA regarding the rules for avoiding the defense of condonation. The Court erred as matter of law in citing *Lindsey v. Lindsey*, 818 So.2d 1191, 1195 (Miss. 2002) to support its ruling that Michael must prove post-condonation adultery to avoid the defense of condonation. Michael should have been granted a divorce on the grounds of adultery, therefore, the Court's *Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as amended* is moot.

SUMMARY ARGUMENT IV:

The Chancery Court was Manifestly Wrong, Employed the Wrong Legal Standard and Erred when it Amended the Agreed Upon Property Settlement Agreement

The Court was manifestly wrong in its interpretation of *Ferguson* and *Hemsley* when it ruled that the Court was "obligated" to divide Michael's military retirement. *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994); *Hemsley v Hemsley*, 639 So.2d 909 (Miss 1994) The Court erred as a matter of law in not following *Crosby v. Peoples Bank of Indianola*, 472 So.2d 951, 955 (Miss. 1985) regarding the ratification date of the parties' *Property Settlement Agreement*. The Court's *Ferguson* analysis was

manifestly wrong and the Court erred as a matter of law in not following *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994) regarding the assessment of the fair market value of the parties' assets. The Court erred as a matter of law in not following *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994); *Hemsley v Hemsley*, 639 So.2d 909 (Miss 1994) when it did not reduce Michael's alimony obligation when the Court increased Joesie's share of the parties' marital assets.

SUMMARY ARGUMENT V:

The Chancery Court was Manifestly Wrong for Significantly Limiting the Father's Summer Visitation

The Court was manifestly wrong for not following the parties' agreed upon summer visitation schedule.

ARGUMENT I:

The Chancery Court was Manifestly Wrong, Applied the Wrong Legal Standard, and Erred in Finding, "it is Incumbent Upon it to Determine the Best Interests for the Custody of the Child Herein Despite the Prior Agreement of the Parties." (Dkt. 45 Page 39)

The Court was manifestly wrong for not completing a full Albright analysis during the temporary hearing but still completely reversing the agreed upon *Child Custody Agreement* that had been followed by the parties for two years. (T. Pages 155 - 156, 518 -519)

Well, I didn't even do a full analysis of the Albright factors. And I say that. I mention every one of them, but I say particularly that I am not doing a full Albright analysis, and that I wasn't even citing any case authority, which I normally do.

At the time of the temporary hearing discovery had not been completed, the Court stated that the *Temporary Order* was a strictly temporary matter and the Court further stated that a full Albright analysis was not conducted at the temporary hearing. (T. Pages 155 - 156, 518 -519) Nevertheless, the Court completely reversed the *Child Custody Agreement* stating, "It is in the best interest of the **MOTHER** that the mother be granted custody of the child." [emphasis added] (Dkt. 19 Page 5); (T.

Page 159) This decision was made despite the fact that the parties had agreed that the *Child Custody Agreement* was in the best interests of Jayden and that the parties had been abiding by the Agreement for 20 months prior to the temporary hearing. (T. Pages 80, 109, 110, 323, 347)

Further, the Court was manifestly wrong for stating in the *Amended and Restated Judgment of Divorce* that a full Albright analysis was conducted during the temporary hearing. (Dkt. 45 Page 5)

In the present case, the Court conducted an Albright analysis both at the temporary hearing and again at the trial in order to determine the best interests of the child herein. This was the Court's duty under the circumstances considering no original custody decree had been entered and the parties were disputing custody. *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss.1983). The Court's Albright analysis was conducted fairly and thoroughly based upon all the evidence presented.

The Court's judgment that it was in a better position to determine the best interests of Jayden "despite the prior agreement of the parties" was an error. (T. Page 160 - 161); (Dkt. 45 Page 39)

But I believe what my finding there was that just because **the parties agreed what was in the best interest of the child as to custody** and visitation in 2013, that I do not think the Court should be bound by that or should take that simply carte blanche as the Court's findings. [emphasis added]

Therefore, the Court finds it is incumbent upon it to determine the best interest for the custody of the child herein **despite the prior agreement of the parties**. [emphasis added]

Albright v Albright established guidelines for courts to consider when rendering child custody decisions; specifically reaffirming that the courts' **polestar consideration** must be to the best interest of the child. *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983) This statement, however, is **manifestly different** than saying that it is incumbent on the Court "to determine the best interests for the custody of the child herein **despite the prior agreement of the parties**." [emphasis added] (Dkt. 45 Page 39)

The Court cites *Albright* plus three cases: *Pace v. Owens*, 511 So. 2d 489 (Miss. 1987); *Duran v. Weaver*, 495 So.2d 1355, 1357 (Miss. 1986); *Tucker v. Tucker*, 453 So.2d 1294, 1297 (Miss. 1984). (Dkt.

45 Page 39 None of these cases support the Court's ruling that it is incumbent on the courts to determine the best interest of a child despite the prior agreement of the child's natural parents.

The Court also sites *Bell v. Bell*, (Dkt. 45 Page 5)

Not only must the Court determine the custody agreement is "adequate and sufficient", **it must always make a determination** it is in the best interest of the child. *Bell v. Bell*, 572 So.2d 841 (Miss. 1990) ("Children of divorcing parents are, in a very practical sense, wards of the court which is by law charged to **regard their best interests**"). *Owens v. Huffman*, 481 So.2d 231, 244 (Miss.1985); *Tighe v. Moore*, 246 Miss. 649, 151 So.2d 910, 917, cert. denied, 375 U.S. 921, 84 S.Ct. 265, 11 L.Ed.2d 164 (1963). [emphasis added]

The Court's interpretation of *Bell v. Bell* is in error. There is a manifest difference between the Court's stance that "**it must always make a determination**" and the Supreme Court's stance in *Bell* that the courts must "**regard their best interests.**" *Bell v. Bell*, 572 So.2d 841 (Miss. 1990)

The Court misquoted and misapplied *McManus* to support its ruling. (Dkt. 45 Page 5)

In *McManus* the Court held that "**a court may not subordinate its authority and be bound by a custody agreement**" without some further determination of the best interests of the child at stake: "The welfare of the children and their best interest is the primary objective of the law, and the courts must not accord to contractual arrangements such importance as to turn the inquiry away from that goal." *Id.* at 1215-16. [emphasis added]

The accurate quote from *McManus* follows: *McManus v. Howard*, 569 So.2d 1213 (Miss. Ct. App. 1990)

The court then denied the declaratory judgment without addressing the issue of **whether or not the court may subordinate its authority and be bound by the Custody Agreement which called for change in custody, without further court action or approval, upon the happening of certain events.** In so doing we find that the Chancellor was in error. Being given jurisdiction by Miss. Code Ann. 93-5-24(6) (Supp. 1990) and the children being wards of the state, *Tighe v. Moore*, 246 Miss. 649, 666, 151 So. 2d 910, 917 (1963) and there being an ample body of the case law for the guidance of the court, *Arnold v. Conwill*, 562 So. 2d 97, 99 (Miss. 1990); *Rutledge v. Rutledge*, 487 So. 2d 218, 219 (Miss. 1986), the court simply cannot surrender or subordinate its jurisdiction and authority as to the circumstances and conditions which will cause a **change in custody.** [emphasis added]

In *McManus*, the Miss. Ct. App. concluded that agreements as to the custody of children cannot contain language which subordinates the court's authority but does not conclude that the courts

should ignore a child custody agreement made between the child's parents. The *Child Custody Agreement* made between Michael and Joesie did not in any way subordinate the Court's authority.

The Supreme Court of Mississippi encourages parents to make extrajudicial agreements without burdening the courts. *Varner v. Varner*, 588 So. 2d 428, 434 (Miss. 1991)

Without doubt or hesitation, we encourage post-divorce detente that parents may cooperate in rearing their children. It follows that, from time to time, adjustments can and should be made without burdening the courts.

Morris v Morris is a case in which the Supreme Court of Mississippi incorporated an extrajudicial child custody agreement into the final judgment for divorce. *Morris v Morris*, 541 So. 2d 1040 (Miss. 1989) Neither party was represented by an attorney, either in the divorce proceedings or in drawing up the agreement.

The Supreme Court of Mississippi affirmed that parents can agree to modify child custody arrangements **provided the child is still being financially supported in a manner keeping with the spirit of the Court's orders.** *Varner v. Varner*, 588 So. 2d 428, 434 (Miss. 1991); *Wright v. Wright*, 737 So. 2d 408 (1998); *Alexander v. Alexander*, 494 So.2d 365 (1986); *Roberts v. Roberts*, 110 So. 3d 820, 829 (Miss. Ct. App. 2013) In these cases, a change in child support was precipitated by an extrajudicial agreement to modify court ordered child custody. By ruling that parents may legally modify court ordered child support the Supreme Court of Mississippi is giving credence to the legality of parents using extrajudicial agreements to determine child custody arrangements that are in the best interest of the child. The Supreme Court of Mississippi affirmed the enforcement of a never filed but followed agreement because the agreement was not a unilateral move by one party but was agreed on by both parties after negotiation. *Wright v. Wright*, 737 So. 2d 408 (1998)

Vikki's first assignment of error alleges that the chancellor erred in enforcing the never-filed agreement regarding the reduction in child support for the summers of 1994 and 1995. True, the agreement was never filed, but it was followed by both Vikki and Mims under their good faith beliefs that the order had been entered as a formal modification to their 1992 divorce decree.

...

The modification was not a unilateral move by Mims, but was agreed to by both Vikki and Mims after negotiation. We cannot say that the chancellor's action in enforcing the agreement in this case is inconsistent with the present precedents of this state, and we do not find that the chancellor abused his discretion or was manifestly wrong in his decision in this regard. Accordingly, we affirm the chancellor's decision to enforce the mutual agreement between Vikki and Mims in this case.

Joesie acknowledged she negotiated the agreement with Michael and that she felt that it was in Jayden's best interest to be in Michael's custody. (T. Pages 80, 348) Joesie also acknowledged she understood this *Child Custody Agreement* was binding and permeant. (T. Pages 325, 670) Joesie is not naïve to child custody agreements as she was previously party to such an agreement from her first divorce. *Morris v Morris*, 541 So. 2d 1040 (Miss. 1989) (Ex. 18 Pages 14 - 22)

The Court is indeed tasked with placing paramount importance in protecting the best interest of the child. *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983) This responsibility does not, however, give the Court the clarity necessary to completely ignore a child custody agreement made between the child's natural parents who have together raised the child since birth and together made an agreement as to the best interest of the child. (T. Pages 79 - 80, 348) This reasoning is especially germane in the present case seeing as the family had been abiding by this agreement for nearly two years in which time the child flourished. (T. Page 347) The higher courts agree that a child's natural parents "are infinitely more capable of devising a workable custody plan than are the judges of this state." *Cheek v Ricker*, 431 So. 2d 1139 (Miss. 1983) The higher courts also agree that it is in the best interest of all parties if the parties can reach an agreement without involving the Chancery Court system. *Brewer v Brewer*, 919 So. 2d 134, 139 (Miss. Ct. App. 2005)

Mississippi code states that a written agreement for the custody of children made between parties seeking divorce may be incorporated into the final judgment provided the agreement is adequate and sufficient. *Miss Code § 93-5-2 (2013)* Mississippi code states that the agreement must be

“adequate and sufficient” it does not say, ‘provided the opinion of the Court would have been identical to the agreement.’

Joesie and Michael did reach an agreement regarding the best interest of Jayden. (T. Pages 79 - 80, 348) The agreement was not a unilateral decision by Michael but represented the negotiations between Michael and Joesie to determine the best interest of Jayden. (T. Page 323) The parents negotiated in good faith and drafted a *Child Custody and Property Settlement Agreement*. Both parties signed this *Child Custody Agreement* in the presence of a notary at the Gulfport courthouse. The mutual agreement was never signed by a Judge but both parties agreed that the agreement was followed for the two years prior to the temporary hearing. (T. Pages 346 - 347)

Joesie’s actions following September 2013 demonstrated that, even though she agreed that the custody agreement granting Michael primary custody of Jayden during the school year was permanent, she did not plan on returning to the marriage. Joesie secretly moved in with Kyle’s mom. (T. Pages 565, 638) Joesie continued to have sex with Kyle, by her own admission through May 2014. (T. Page 332) By her own admission, she remained in constant contact with Kyle and his family through December 2014. (T. Pages 345 - 346, 666 - 667) Michael presented clear and convincing evidence that Joesie’s romantic relationship with Kyle lasted through December 2014 (Discussed infra - Argument III).

The Appellate Court and the Supreme Court of Mississippi acknowledge that they may not always agree with a chancellor’s decision but will overturn a chancellor’s decision “only when the decision of the trial court was manifestly wrong, clearly erroneous, or an erroneous legal standard was employed.” *Brewer v Brewer*, 919 So. 2d 134, 139 (Miss. Ct. App. 2005); *Yates v. Yates*, 284 So. 2d 46 (Miss. 1973) The Chancery Court should be held to the same standard. The Chancery Court should only modify a child custody agreement drafted by the child’s natural parents if it is manifestly wrong, clearly erroneous, or in which an erroneous legal standard was employed. Mississippi code

states that the agreement must be “adequate and sufficient,” it does not say that the opinion of the Court would have been identical to the agreement. *Miss. Code* § 93-5-2 (2013) To completely reverse a child custody agreement, after the parties had agreed upon the best interest of the child and had been abiding by the agreement for two years with no material change in circumstances, erroneously assumes that the Court is in a better position than the child’s natural parents to determine the best interest of the child.

Joesie renounced and withdrew her consent to the Agreement because, (*Dkt. 6*)

“ Plaintiff has learned that the minor child is not being cared for properly, is not staying in the custody of his father and is in fact being raised by a woman now living with the Defendant ...”

None of this was true, nor proven. Michael has provided excellent care for Jayden his entire life. (Discussed *Infra* – Argument II, B) It was not in the best interest of Jayden for the Court to stray from the existing Agreement especially considering that the Court acknowledged that it did not complete a full Albright analysis at the temporary hearing (*T.* Pages 518 - 519) and the Court claimed, at the temporary hearing, that it was “looking at this as strictly a temporary matter.” (*T.* Pages 155 - 156) The Court’s decision to remove Jayden from the stabilizing influence of his father at the temporary hearing caused a severe disruption in Jayden’s life (Discussed *infra* – Argument II, B) and set the tone for the remaining proceedings.

ARGUMENT II:

The Chancery Court 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 Bellingsrath 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

ARGUMENT III:

The Chancery Court Employed the Wrong Legal Standard and Erred in Not Granting

Michael a Divorce on the Grounds of Adultery; The Chancery Court's *Notice of*

***Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as Amended* is Moot**

The Court erred as a matter of law when it found that Michael condoned Joesie's admitted adultery through December 2014. (*Dkt. 45* Pages 6, 21) Michael agrees with the Court in part and finds error in part. Michael agrees that he condoned Joesie's adulterous behavior between the summer of 2013 until **September 18, 2013** but not before or after these dates. Michael cannot condone what he does not know. (*T.* Pages 267, 332 - 336, 345 - 346, 364 - 365, 394, 570, 573 - 576, 638, 666 - 667) The parties did resume a sexual relationship and were discussing reconciliation, although plans were never finalized. (*T.* Page 40) Michael requested a divorce on the grounds of adultery because Michael discovered that Joesie was secretly continuing her sexual relationship with Kyle after the parties separated and at the same time that the parties were discussing reconciliation. (*T.* Pages 267, 332 - 336, 345 - 346, 364 - 365, 394, 570, 573 - 576, 638, 666 - 667) Joesie did not show good faith to the parties' reconciliation attempts.

The Court repeatedly classified Joesie's relationship with Kyle as admitted or condoned. (*Dkt. 45* Pages 17, 17, 20, 21, 48, 48) The Court often extended the timeline of Joesie's admission to better support Joesie's defense of condonation. (*Dkt. 45* Page 48); (*Dkt. 45* Page 17); (*Dkt. 45* Page 20)

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

The parties separated originally due to Joesie's admitted adultery in 2012 and the parties then entered into their Agreement in 2013, discussed supra.

Joesie admits to committing adultery with Kyle in 2012, which became the impetus for the Joint Complaint for Divorce and Separation, Property and Child Custody Agreement in 2013.

Joesie, however, testified that her sexual relationship with Kyle began during the summer of 2013 and testified to many dates on when her relationship with Kyle ended. (*T.* Pages 320, 632, 632, 576 - 577) Joesie's most consistent date for the end of the relationship was January 2014 which was months after the parties' initial separation in September 2013. (*T.* Pages 374 - 375) Joesie

alternatively testified that her sexual relationship with Kyle did not end until May 2014 (*T. Page 332*); (*Ex. 19 Page 6*) and that she continued to go out with Kyle as late as October 1st, 2014 (*T. Page 274*) and that she referred to Kyle as “Babe” on October 22, 2014 (*T. Page 667*) and again on December 12, 2014 (*T. Page 575, 667*) and that she made phone calls to Kyle during the parties’ trip to California in December 2014. (*T. Page 667*)

Michael cannot condone what he does not know. The Court wrote in the final judgment that Joesie claims she cut off the affair permanently in January 2014. (*Dkt. 45 Page 20*) Furthermore, Joesie testified that after admitting to her adulterous affair in September 2013 she did not tell Michael of any continued contact with Kyle. (*T. Pages 267, 332 - 336, 345 - 346, 364 - 365, 394, 570, 573 - 576, 638, 666 - 667*) Joesie’s own witness, Marion Haffner, confirmed that Michael was unaware of a continued relationship between Joesie and Kyle after September 2013. (*T. Page 267*) Joesie’s sexual relationship with Kyle, without Michael’s knowledge, between September 2013 and January 2014 is enough to revive Michael’s right to a divorce on the grounds of adultery. *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 6 1970) Michael’s prior condonation of Joesie’s admitted adultery with Kyle prior to September 2013 does not give Joesie carte blanche to commit adultery for the remainder of their marriage. *Brewer v Brewer*, 919 So. 2d 134, 139 (Miss. Ct. App. 2005)

The Court employed the wrong legal standard, (*Dkt. 45 Page 21*)

Michael did not establish with clear and convincing evidence that Joesie resumed her adulterous affair sufficient to overcome his condonation during this time period. See *Lindsey v. Lindsey*, 818 So.2d 1191, 1195 (Miss. 2002)

The Court’s conclusion that Michael must establish with clear and convincing evidence that Joesie resumed her adulterous affair to avoid the defense of condonation is an error as matter of law. In *Lindsey*, The Supreme Court of Mississippi did conclude that in that specific case that the wrongful party had continued to commit the marital offense but **did not** conclude that as a general rule a wronged party **must** establish with clear and convincing evidence that a wrongful party has resumed

an adulterous affair to avoid the defense of condonation. *Lindsey v. Lindsey*, 818 So.2d 1191, 1195 (Miss. 2002)

Lee v. Lee and *Johnson v. Johnson* more accurately reflect the Supreme Court of Mississippi's opinion on avoiding the defense of condonation. *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 6 1970); *Johnson v Johnson*, No. 2010-CA-01193-COA

In such cases the offender is placed on probation, and any subsequent grave or serious misconduct, indicating an intent or purpose not to keep or perform the conditions of the condonation in good faith, will be sufficient to avoid it, in itself.

The effort to endure unkind treatment as long as possible is commendable and the patient endurance by the wife of her husband's ill-treatment should not be allowed to weaken her right to a divorce." *Id.* Likewise, in *Lindsey v. Lindsey*, 818 So.2d 1191, 1195 (¶17-18) (Miss.2002), the Supreme Court found the doctrine of condonation inapplicable under the facts of the case. The husband had forgiven his wife for her past acts of adultery, but the wife proceeded to commit adultery again. "Condonation can be avoided if the marital offense is repeated."

Joesie admitted to committing adultery with Kyle and was, therefore, "placed on probation." *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 6 1970) (quoting Bunkley & Morse, *Amis on Divorce and Separation* in Mississippi Section 4.02 (1957) As such, Michael was not required to prove anything above Joesie's intent not to keep the conditions of his prior condonation. *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 6 1970)

The Supreme Court of Mississippi, in *Dillon v Dillon*, reminds us that, while the evidence needs to be clear and convincing, divorce proceedings are a civil matter not a criminal matter, therefore, the "evidence need not prove the alleged acts beyond a reasonable doubt and the plaintiff is not required to present direct testimony as to the events complained of due to their secretive nature." *Dillon v Dillon*, 498 So. 2d 328-29, 330 (Miss. 1986)

By not moving with Michael and Jayden, Joesie provided herself with ample opportunity to satisfy whatever urges existed between her and Kyle. Joesie characterizes her relationship with Kyle

as a close friendship rather than a love affair. The Supreme Court of Mississippi, in *Holden v Frasher-Holden*, described a similar relationship between Jerry and Bonnie. *Holden v Frasher-Holden*, 680 So.2d 795, 798 (Miss. 1996) Joesie admitted to keeping her relationship with Kyle a secret from Michael after September 2013, (T. Pages 267, 332 - 336, 345 - 346, 364 - 365, 394, 570, 573 - 576, 638, 666 - 667) photographs of Joesie and Kyle snuggling (May 2014) (Ex 19 Page 6) and cheek to cheek (October 2014) (Ex 16 Page 28), Joesie accepted a puppy as a Christmas gift in 2014 (Ex 19 Pages 1, 4); (T. Page 359), Joesie admitted to calling Kyle “Babe” on October 22, 2014 (T. Page 667) and again on December 12, 2014 (T. Page 575, 667), both Kyle and his mom refer to Joesie as Kyle’s girlfriend as late as December 20, 2014 (T. Pages 666 – 667), Joesie admitted to making phone calls to Kyle while on a trip with Michael in December 2014 (T. Page 667), Joesie testified that her sexual relationship with Kyle did not end until May 2014 (T. Page 332) (corroborated by photographs of her snuggling with Kyle posted in May 2014) (Ex 19 Page 6); (T. Page 334), and Joesie freely choose to live separate from Michael and Jayden since September 2013 (T. Page 80, 323) constitute clear and convincing evidence enough to prove adultery.

There is no innocent explanation for the evidence and admissions. *Holden v Frasher-Holden*, 680 So.2d 795, 798 (Miss. 1996) Moreover, as distinguished from *Holden v Frasher-Holden*, Joesie was on probation for her admitted adulterous relationship with Kyle. Joesie’s claim that her relationship with Kyle is a close friendship rather than a love affair is a matter of semantics. The clear and convincing evidence of both an adulterous inclination and a reasonable opportunity to satisfy that inclination is enough to support divorce on the grounds of adultery and **overwhelmingly proves that Joesie had intent not to keep the conditions of Michael’s prior condonation.** *Holden v Frasher-Holden*, 680 So.2d 795, 798 (Miss. 1996); *Dillon v Dillon*, 498 So. 2d 328-29, 330 (Miss. 1986); *Lee v. Lee*, 232 So. 2d 370, 373 (Miss. 6 1970); *Johnson v Johnson*, No. 2010–CA–01193–COA

The Court abused its discretion by placing the Court's interests above that of Jayden's and the parties'. The Court ignored the evidence and the law and used this case as a vehicle to further Court's interests. Michael should have been granted a divorce on the grounds of adultery therefore the Chancery Court's *Notice of Unconstitutionality of Section 93-5-2 of Mississippi Code of 1972, as amended* is moot.

ARGUMENT IV:

The Chancery Court was Manifestly Wrong, Employed the Wrong Legal Standard and Erred when it Amended the Agreed Upon Property Settlement Agreement

A. Awarding Joesie a Portion of Michael's Military Retirement was not Consistent with the Legal Standard and was an Error

The Court concluded "Joesie's withdrawal of consent to the Agreement and the Joint Complaint for Divorce did not work to nullify the agreement between the parties." (*Dkt. 45* Page 37) Despite finding the *Property Settlement Agreement* to be legally binding the Court ruled that silence is consent and made significant changes to the distribution of the parties' property. (*Dkt. 45* Pages 6 - 7)

Accordingly, the Court construes the ambiguity and silence of the Agreement as to Michael's military retirement and Joesie's 401k retirement plan as the consent and agreement of the parties for the Court to decide the division of this property.

The Court's ruling that silence is consent is an error as a matter of law. *Wideman v. Wideman*, 909 So.2d 140, 146(¶ 22) (Miss.Ct.App.2005)

However, he is limited to the resolution of those issues specifically identified and personally agreed to in writing by the parties.

Further, section 7, 10, and 17 of the *Property Settlement Agreement* cover Michael's military retirement plan and Joesie's 401k retirement plan. (*Dkt. 3*) Private citizens of Mississippi should not be required to write contracts that protect themselves from the Court. The Court should not be an advisory to

either party in a civil agreement. The Court should not search for a loop hole to enter a private agreement. In cases where agreements are found to be ambiguous the Court has an obligation to understand the intent of the agreement. By acknowledging that the Court has jurisdiction the parties are not giving the Court the right to fundamentally change an agreement without first finding that the agreement was unfair or misleading. *Miss. Code* § 93-5-2.

The parties' retirement plans were not a secret from one another. Both, Joesie and Michael signed a *Waiver of Rule 8.05 Financial Statements and Disclosures* in which the parties "acknowledge that both of them are familiar with the work history of the other during the period of the marriage and are generally familiar with their individual and joint assets, liabilities, debts, income and expenses." (Ex. 3 Pages 15 - 16)

Michael's military retirement, unlike Joesie's 401k retirement plan, has no present monetary value and will not pay out unless Michael completes a minimum of 20 years of military service. Joesie will not begin to draw from her 401k retirement plan for many years. For these reasons, Michael and Joesie considered Michael's military retirement and Joesie's 401k retirement plan as future earnings. The Court's consistent reference to the assets as "Michael's military retirement" (*Dkt. 45* Pages 6, 7, 7, 7, 8, 40, 41, 42, 42, 44, 46) and "Joesie's 401k retirement plan" (*Dkt. 45* Pages 7, 7, 8, 41, 42, 44, 46, 52) further demonstrates why Michael and Joesie, not being lawyers, would assume that these assets would be considered future earnings. Michael's military retirement plan as well as Joesie's 401k retirement plan were not specifically mentioned in the Agreement because both Michael and Joesie, considered these assets as future earnings not because the parties were silently consenting for the Court to distribute Michael's military retirement.

It is not consistent with *Hemsley, Ferguson, or Myrick* for the Court to award Joesie part of Michael's retirement plan and 100% of her own 401k retirement plan. *Hemsley v Hemsley*, 639 So.2d 909 (Miss 1994); *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994); *Myrick v. Myrick*, 186 So.3d

429, 433 (Miss. Ct. App 2016) Again, both retirement plans were known to both parties when both parties agreed to the *Property Settlement Agreement*. The Court is overreaching when it says that silence is the same as consent. (*Dkt. 45* Page 7)

The Court's opinion that it is "obligated" to divide the parties' retirement plans is not consistent with the legal standard and is in error. (*Dkt. 45* Page 8) The Supreme Court of Mississippi neither in *Hemsley* nor in *Ferguson* ruled that a court is "obligated" to equitably divide significant marital assets. In *Hemsley*, the Supreme Court stated that the parties filed consent in writing for the court to resolve the questions of alimony and property rights. *Hemsley v Hemsley*, 639 So.2d 909 (Miss 1994) The parties in *Hemsley* did not have a pre-agreed upon *Property Settlement Agreement* as the parties in the present case had. Contrary to the Court's statement of obligation, *Ferguson* specifically states that there is no automatic right to an equal division of jointly-accumulated property. *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

It was not equitable for the Court to distribute Michael's military retirement because the parties had already agreed to an equitable distribution of the parties' assets and both parties were aware of the other's retirement plans. *Myrick v. Myrick*, 186 So.3d 429, 433 (Miss. Ct. App 2016)

B. Notwithstanding the Previous Error, the Court was Manifestly Wrong and in Error in its Assessment of the Fair Market Value of Significant Marital Property

Ferguson is very clear, "During this stage, marital assets should be assessed their fair market value." *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994) The Court admittedly did not know the fair market value of significant marital property, namely the value of the two homes and the value of Michael's military retirement. (*Dkt. 45* Pages 42 - 43, 41) The Court inequitably placed greater weight in Joesie's testimony, labelling Michael's testimony as "not believable". (*Dkt. 45* Page 42) Joesie valued the Gulfport home at \$189,000 which was the purchase price of the home in 2007. (*Dkt. 45* Page 42) Michael testified that the home was currently listed for sale and that the highest offer that

he had received was \$108,000. (T. Pages 463, 464, 540, 541) Michael also submitted an updated and signed 8.05 which lists the value of the Gulfport home as \$108,000 which reflected the highest offer that he received for the sale of the home. (T. Pages 463, 464, 540) Believable or not, the house was most recently listed for sale by the bank for \$105,000. Without a reliable assessment of the fair market value of the parties' marital assets it is impossible for the Court to equitably distribute the parties' assets. *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994)

C. Notwithstanding the Previous Errors, the Court's Distribution of Marital Assets was not Equitable

The parties had a signed and notarized agreement in which the parties had already agreed to an equitable distribution of their assets. (Ex. 3) The Court agreed that this Agreement was not unfair regarding the property division and alimony. (Dkt. 45 Pages 8 - 9) The Court agreed that the Agreement was fair but then made significant inequitable changes to the distribution of marital assets. The most significant change the Court made was awarding Joesie approximately 22% of Michael's military retirement but not awarding Michael any percentage of Joesie's 401k retirement plan. (Dkt. 45 page 52) The Court's Ferguson analysis was in error and resulted in an inequitable distribution of marital assets. (Dkt. 45 Page 41)

During periods of time the couple agreed to participate in a marital relationship, Joesie's domestic contributions outweighed Michael's, especially during times of Michael's deployments. ... Michael's deployments and time away from Joesie caused instability. However, it was Joesie's eventual extra-marital relationship which was the ultimate catalyst for the marital demise. [emphasis added]

The Court's use of the word "especially" suggests that Joesie's domestic contribution outweighed Michael's during the times that Michael was not on deployment. This characterization is not consistent with Joesie's testimony that she and Michael shared domestic responsibilities. (T. Page 137) Further, the Court highlighting that Joesie's domestic contribution was greater than Michael's especially during Michael's military deployments is contrary to the Supreme Court of Mississippi's

view that a marriage is a partnership. *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994), *Hemsley v. Hemsley*, 639 So.2d 909 (Miss 1994)

And under the equitable distribution system, the marriage is viewed as a partnership with both spouses contributing in the manner they have chosen.

We assume for divorce purposes that the contributions and efforts of the marital partners, whether economic, domestic, or otherwise, are of equal value.

Michael was in the military when Joesie and Michael met. Joesie was aware of Michael's need to deploy prior to the marriage. Joesie and Michael agreed that Michael's contribution to the family would include deploying in defense of their country.

The Court stated, (*Dkt. 45* Page 41)

Michael's deployments and time away from Joesie caused instability. However, it was Joesie's **eventual** extra-marital relationship which was the ultimate catalyst for the marital demise. [emphasis added]

The Court's choice of the word "eventual" immediately following a statement that says Michael's military service caused instability suggests that it was a foregone conclusion that Joesie would be forced into an extra-marital relationship because Michael was in the military. The Court is promoting marriage for profit by holding the wronged party responsible for the wrongful party's actions and subsequently financially rewarding the wrongful party.

The Court abused its discretion by continuing its attack on Michael: (*Dkt. 45* Page 46)

Michael is not, however, without fault. He proved to be a controlling husband and unsupportive of Joesie with regard to her two daughters. He was not honest with Joesie in December of 2014 about their relationship.

The Court ruled that Michael condoned Joesie behavior then contrasting found Michael to be controlling. Neither assessment is consistent with the record.

Joesie made no allegations that Michael was a controlling husband. Joesie moved out of the marital bedroom by her own choice because she was not happy in the marriage, (*T. Pages 37, 80, 82, 98, 323*) Joesie testified that she made the decision to not move with Michael and Jayden but instead

secretly moved into Kyle's mother's house. (T. Pages 565, 638) Joesie testified that the *Joint Complaint for Divorce* and the attached *Child Custody and Property Settlement Agreement* were a result of mutual discussion. (T. Pages 80, 109, 110, 323) Michael paid for all of Joesie's transportation costs so that she could maintain her visitation with Jayden. (T. Pages 107, 113 - 114) Joesie complained that the parties' marital troubles arose because Michael was quiet and that Michael was a boring lover. (T. Pages 118, 625 - 626)

Joesie made no allegations that Michael was unsupportive of her two daughters. Joesie and her witnesses testified that Michael was a good father. (T. Pages 101, 329) Michael testified that he considered Joesie's two daughters as his own daughters. (T. Pages 19, 534, 613) On the other hand, Joesie testified that she did not pay her court ordered child support for her daughters. (T. Page 328) Joesie took her eldest daughter on a date with Kyle. (Ex. 16 Page 3); (T. Page 254)

The Court's finding that Michael was not honest with Joesie in December of 2014 is not consistent with the evidence or the testimony. It was Joesie who admitted that she secretly had phone conversations and Facebook messaging with Kyle while the parties were in California. (T. Pages 667, 345 - 346) Michael's attempts to reconcile were always honest, it was Joesie who continued to lie to Michael. (T. Pages 475 - 477)

As part of deciding the equitable distribution the Court makes an erroneous assumption as to Michael's financial future if he sells the Steeplechase property. (Dkt. 45 Page 45) The Court is erroneously assuming that the value of the house is \$174,500. The fair market value of that house is \$108,000, the highest offer that Michael had received on the house. Michael will not be able to sell the Gulfport house without incurring a significant financial loss.

The Court abused its discretion and was manifestly wrong for insinuating that Michael filed a false 8.05. (Dkt. 45 Page 45)

Because Michael is saddled with the taxes, mortgage debt and insurance on both homes, as well as alimony and child support from a previous marriage, his expenses exceed his income... at least on paper.

Joesie was given a copy of Michael's 8.05 and was present for all the testimony but did not object to the validity of Michael's 8.05; with the exception of disagreeing about the value of the two homes. Additionally, the Court was wrong when it stated the Michael was saddled with alimony and child support from a previous marriage. Michael was never married prior to his marriage to Joesie and Jayden is the only child that Michael has fathered.

The Court also failed to consider that Michael took on all responsibility for the parties' joint credit cards that both Joesie and Michael used during the marriage. (*Ex. 26 Page 7*) This is a substantial marital debt that Michael assumed.

Similar to the Court's assessment of the parties' moral fitness, the Court clearly does not place any weight in its own Ferguson analysis. All Ferguson factors demonstrated that the parties' *Property Settlement Agreement* was written to the benefit of Joesie. (*Dkt. 45 Pages 40 - 46*) The Court agreed that the *Property Settlement Agreement* was not unfair. (*Dkt. 45 Pages 8 - 9*) Nevertheless, the Court abused its discretion and distributed a large percentage of Michael's military retirement to Joesie while Joesie was awarded 100% of her own 401k retirement.

D. Notwithstanding the Previous Errors, the Court Erred in Not Reducing Alimony Payments

When It Distributed the Michael's Retirement Plan

The Court increased Joesie's award of marital assets but did not adjust the amount of alimony that Michael must pay to Joesie. (*Dkt. 45 Page 44*) *Ferguson* is very specific that if the Court increases the amount of assets distributed to Joesie then the alimony payments she receives must be decreased. *Ferguson v. Ferguson*, 639 So.2d 921, 929 (Miss. 1994); *Hemsley v Hemsley*, 639 So.2d 909 (Miss 1994)

E. The Chancery Court Erred when it Ruled that the Court Ratified the Agreement on November 16, 2016 for Alimony Purposes Only

The Court found, that it ratified the Agreement of the parties on November 15, 2016 when it rendered its Final Judgment of Divorce on November 15, 2016. (*Dkt. 45* Page 44) This finding is inconsistent with the Court's prior findings that Joesie's withdrawal of consent did not nullify the agreeemnt. (*Dkt. 45* Pages 51 - 52, 8, 37, 42) The Supreme Court of Mississippi has ruled that the effective date of written agreements for property settlement agreements is not dependent on a no-fault divorce being granted. *Crosby v. Peoples Bank of Indianola*, 472 So.2d 951, 955 (Miss. 1985)

Joesie testified that Michael had been making alimony payments to her since the parties' signed the Agreement on September 18, 2013. (*T. Page 109*) The date of ratification of the parties' *Property Settlement Agreement* is September 18, 2013.

ARGUMENT V:

The Chancery Court was Manifestly Wrong for Significantly Limiting the Father's Summer Visitation

When addressing summer visitation during the temporary hearing, the Court stated, "I just prefer the parties set out – they basically set out ... So I see no reason to alter that." (*T. Page 160*) In the Amended and Restated Judgment of Divorce the Court significantly reduced the father's summer visitation to one month and potentially less depending on the start of the school year. (*Dkt. 45* Page 50)

The father shall exercise summer visitation as follows: in even numbered years the month of June; in odd numbered years the month of July, provided child is home for a reasonable and adequate readjustment and preparation period prior to the next school year beginning.

The original *Child Custody Agreement* made between the parties detailed the parties' agreement as to summer visitation. The non-custodial parent would have custody of Jayden starting seven (7) days after school ended for the year until seven (7) days prior to the beginning of the next school

year. (*Dkt. 3* Pages 1 - 2) Not only does the Court inequitably minimize the Father's visitation but the Court's ruling is unnecessarily vague.

CONCLUSION


Appellant Michael Gerty submits that the Chancery Court 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.
 - a. If not then remand to the Chancery Court with instructions to follow the parties' agreed upon summer visitation schedule.
3. That this Court reverse and grant Michael a divorce on the grounds of adultery.
4. That this Court reverse as regards the distribution of Michael's military retirement.
 - a. If not then remand to the Chancery Court with instructions to adjust the amount of alimony that Michael must pay to Joesie equivalent to Joesie's share of Michael's military retirement.
5. That this Court reverse as regards to the ratification date of the parties' *Property Settlement Agreement* as it applies to alimony.

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

RESPECTFULLY SUBMITTED, this the 9th day of October, 2017.

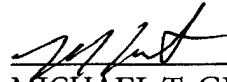


MICHAEL T. GERTY, APPELLANT

CERTIFICATE OF SERVICE

I, Michael T. Gerty, Defendant/Appellant, do hereby certify that I have on this date filed this Brief of the Appellant 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, to Michael C. Powell, Attorney for the Plaintiff/Appellee, and to Justin Matheny, Counsel for the State of Mississippi ex rel.

So certified this the 9th day of October, 2017.



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