IN THE COURT OF APPEALS FOR THE STATE OF TENNESSEE
MIDDLE DISTRICT AT NASHVILLE

Bill Bob Jones,)
)
Plaintiff/Appellee,)
) **C.A. No.**
v.)
) Circuit Court No.
Mary MARGARET Smith Jones,)
)
Defendant/Appellant.)

BRIEF AND ARGUMENT OF APPELLEE DR. Bill Bob Jones

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ORAL ARGUMENT REQUESTED

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INTRODUCTION

MAY IT PLEASE THE COURT:

This is an appeal by Mrs. Dr. Jones from a final order of the Fourth Circuit Court for Davidson County, Tennessee denying her request to change the custody of two of the parties' minor children from the Father to her. The Father, Dr. Bob Jones respectfully submits that the Trial Court ruled correctly in determining that the Mother failed to prove a material change of circumstances warranting a change in the previous parenting order. Dr. Bob Jones submits that the Order of the Trial Court should be affirmed.

The parties will be referred to as Mrs. Dr. Jones and Dr. Bob Jones. References to the technical record will be denoted (T.R. Vol. __ pg. ___). References to the transcript of evidence will be denoted (T.E. Vol. ___ pg. ___).

APPELLANT'S ISSUES PRESENTED FOR REVIEW

1) **Whether the Trial Court erred by failing to recuse itself.**

2) **Whether the Trial Court erred by failing to adhere to Tenn.R.Civ.P 63.**

3) **Whether the Trial Court erred in refusing to allow the Mother to make offers of proof.**

4) **Whether the Trial Court erred in determining that Mother had failed to prove a material change in circumstances so as to modify the parenting plan.**

STATEMENT OF THE CASE

On July 9, 2002, and on August 5 - 6 and 13, 2002, the Second Circuit Court conducted a trial on the issues of child custody and the Parenting Plan in the divorce action between the parties. (T.R., Vol. 1, p. 1).

On September 19, 2002, an Order of Memorandum Opinion, a Memorandum Opinion and Permanent Parenting Plan were entered. (T.R. Vol. 1 ppg. 1-27) Under the terms of the Order of Memorandum Opinion, Memorandum Opinion, and the Permanent Parenting Plan, Mrs. Dr. Jones was awarded primary custody of Bill Jones, and Dr. Bob Jones was awarded primary custody of Alyssa Jones and Andrew Jones.

A Final Decree was entered in the case on June 10, 2003. (T.R., Vol. , pp. 30-41). The Trial Judge refused to reconsider the parenting plan previously entered by Order entered June 30, 2003. (T.R. Vol. 1 pg. 43)

The Mother pursued an appeal to this Court and by Opinion entered December 23, 2004, this Court affirmed the Order and Parenting Plan set out in the Order of September 19, 2002. (Copy of Opinion in ***Bill Bob Jones v. Mary Margaret Smith Jones***, No. M2003-01550-COA-R3-CV attached)

On September 10, 2003 Dr. Bob Jones filed a motion to set child support, for a restraining order to restrain the Mother from interfering with his parenting of the children, and to modify the parenting plan by reducing the contact between the parties during exchange time of the children. (T.R. Vol. 1 ppg. 49-55) The parties entered into an Agreed Order on December 1, 2003 resolving most of the issues raised by the Father, Dr. Bob Jones regarding exchange of the children. (T.R. Vol. 1 ppg. 69-73)

Shortly after signing said Agreed Order, the Mother, Dr. Mary Jo Jones, filed an Answer to the Petition to set child support and filed a counter petition seeking modification of the parenting plan by placing the primary residence of all children with her. (T.R. Vol. 1 pg. 74-88) The Father, Dr. Bill Bob Jones filed an Answer to the Counter Petition admitting that there had been a material change in circumstances but due to the conduct of the Mother. Dr. Bill Bob Jones denied that the parenting plan should be altered to the extent sought by Dr. Mary Jo Jones. (T.R. Vol 1 ppg. 88-92)

On May 14, 2004 the Mother, Dr. Mary Jo Jones, sought the recusal of the Trial Judge. (T.R. Vol. 1 ppg. 111-116) On May 20, 2004 the Father, Dr. Bill Bob Jones, filed his opposition to the Mother's motion observing that the Mother had successfully sought the recusal of Judge Shipley previously and had presented the same issues presently before the Court to the Juvenile Court in February 2004 in an effort to forum shop her case. Additionally, the Mother had employed seven different lawyers in her representation including one to sue her previous lawyer. (T.R. Vol. 1 ppg. 117-122)

Judge Robinson denied the Mother's Motion to Recuse by Order entered June 3, 2004. (T.R. Vol. pg. 124)

The Trial was conducted on June 7 and 8, 2004 at the conclusion of which the Trial Court set child support, restrained the Mother from interfering with or undermining the parenting of the children by the Father, and found no material change of circumstances relating to the Mother's request for a change of custody. (T.R. Vol. 1 ppg. 129-131) Thereafter the Mother's Motion to Alter or Amend was denied by Order entered September 13, 2004. (T.R. Vol. 1 pg. 139)

Mother's Notice of Appeal was filed October 13, 2004. (T.R. Vol 1. pg. 142)

STATEMENT OF FACTS

The Appellee, Dr. Bob Jones, offers the following as additional facts for consideration by the Court in its determination of this appeal.

Dr. Bob Jones was awarded custody of the parties' two youngest children, Alyssa and Andrew following a hearing in September, 2002. The children have attended St. Bernard's Academy and are presently nine and eleven years old. (T.E. Vol I pg. 24)

The children had been under the care of Dr. Jay Woodman, psychologist, until the Mother withdrew Bill, the oldest child, from treatment. (T.E. Vol I pg. 25) Dr. Bob Jones believes the treatment by Dr. Woodman has been good for both him and the children. Conversely, the Mother has refused to accept the Attention Deficit Disorder diagnosis of Bill and has removed him from schooling at Currey Ingram Academy. (T.E. Vol I pg. 26-28) This is the only school where Bill has made progress. (T.E. Vol I pg. 79) Her attempts to place Bill at another school were apparently hindered by Bill's poor testing which the Mother blamed on the Father. (T.E. Vol I pg. 80) The Mother intended to place Bill in a public school. (T.E. Vol I pg. 81)

Attempts to communicate with the Mother have been a problem since September, 2002 (when Father was given custody of the two youngest children). The Mother refuses to discuss issues related to the children with the Father. She tells the Father what she intends to do regarding the children and will not discuss the matter further. At one point she told him "I'm not going to communicate with you; I'm going to get the children." (T.E. Vol I pg. 82) The Mother accused the Father of bribing the judge to get custody of the two younger children. (T.E. Vol I pg. 83)

Dr. Bob Jones notes that after the children have been with their Mother or after she has seen them at school, they are often more aggressive and tell him they want to live with their Mother. (T.E. Vol I pg. 84) Bill will not take medication given by the Father and all three of the children tell him that he is a bad doctor and mommy is a good doctor. (T.E. Vol I pg. 85)

At the St. Bernard Academy picnic at the opening of school in 2003 an incident occurred where the children were in the possession of the Father and the Mother came to the picnic. Alyssa grabbed on to her Mother and immediately began sucking her thumb. When the Father attempted to leave with the children at the conclusion of the picnic Alyssa and her Mother were continuing to hold on to each other. When asked to let Alyssa go so they could leave, the Mother responded: "No, this is my child; how can you do this; you're a bad daddy; I should have the children; all the kids should be with me." This occurred in the presence of the children. (T.E. Vol I pg. 87)

The Mother has also interfered with the Father and Andrew's decision for Andrew to play football. On two occasions when the Father arrived at Andrew's football practice he observed the Mother with Andrew and away from Andrew's coaches and teammates. On each occasion the Mother claimed that Andrew had suffered an injury and should not be playing further. When the Father encouraged Andrew to at least join his teammates for a meeting with the coaches, the Mother responded in the presence of Andrew: "No, you don't; he's hurt, he can get hurt for life." After Andrew joined his teammates and coaches for a meeting, the Mother confronted the Father and told him that she was smarter than the coach, knows more than he and Andrew could be crippled for life. Andrew has now decided to give up football. (T.E. Vol I pg. 87-89)

Alyssa has been a cheerleader. The Father has observed that when the Mother comes to an event where Alyssa is cheerleading, Alyssa will leave the other girls and go sit in her Mother's lap and suck her thumb while her Mother rocks her back and forth. (T.E. Vol I pg. 92)

The children have told the Father that they are going to live with their mother and that she is going to change their names. (T.E. Vol I pg. 92) The Father then showed the court a water bottle cap on which Andrew had written his initials as ACK (Andrew Smith) rather than his true intials ACS (Andrew Jones). (T.E. Vol I pg. 93) The Father then showed the Court Andrew's and Alyssa's uniform pants for schoool in which the Mother had written the name: Smith Jones. (T.E. Vol I pg. 93-94)

The problem of violence between Bill and the other two children continues to exist when the children are together. On occasion Andrew will also strike Alyssa. (T.E. Vol I pg. 95) Dr. Bob Jones has not spanked Bill since advised two and one-half years ago by Dr. Woodman that he shouldn't spank Bill. On occasion Dr. Bob Jones will spank Andrew for incidents of striking others including his sister and for not obeying a teacher, parent, or his care giver, Ms. Mary Horner. (T.E. Vol I pg. 95)

Three months prior to the hearing, Alyssa had broken her arm in an accident at a skating rink on a Saturday while in the possession of her mother. The Father learned of this by a voice mail left at his office on Monday morning by the Mother asking him if he could take Alyssa to an orthopedic doctor that day. (T.E. Vol I pg. 96-97)

The children have told the Father that they want to live with their Mother. This usually occurs after they return from visiting with their Mother. On one occasion when the Mother returned the children to the Father, all three children got out of her car and began

chanting, “We want to live with Mommy, we want to live with Mommy, we want to live with Mommy, we don’t want to live with Daddy.” At that point the Mother encouraged the children by stating: Oh, children, I love you so much.” It took twenty minutes to get the children into the house. (T.E. Vol I pg. 97)

After Alyssa had broken her arm, Dr. Bob Jones took her to Dr. Christofersen, a pediatric orthopedic specialist. When he discussed with Dr. Christofersen, Alyssa’s thumb sucking issues, they agreed to put on a full cast from the tip of her fingers back above the elbow for a period of three weeks to treat the fracture but also to help in decreasing the thumb sucking. Later that evening Alyssa was talking to Ms. Dr. Jones on the telephone. In that conversation, Ms. Dr. Jones told Alyssa that: “Daddy is wrong; Daddy shouldn’t have made the doctor put the elbow cast on; Daddy’s a bad doctor; Daddy is upset that you suck your thumb in public now, and it’s all Daddy’s fault because you moved in with Daddy since the divorce; that’ll change; Daddy is a bad Daddy.” (T.E. Vol I pg. 99-101) There was another occasion where the Father terminated a telephone conversation between the Mother and Alyssa when the Mother was upsetting Alyssa by saying: “You should live with me; the Judge is bad, the Judge is wrong; I’m going to get you; don’t worry; keep complaining.” (T.E. Vol I pg. 106)

Dr. Bob Jones stated that he continues to use spankings as a means of discipline with Andrew, but he has prohibited the care giver, Mary Horner, from spanking Andrew for the past six months (T.E. Vol I pg. 130-131)

Dr. Jay Woodman is a licensed psychologist. (T.E. Vol I pg. 31) Dr. Woodman began treating all three of the Jones children in 1999 when the parties were still married. He was selected by both parents to treat the children. (T.E. Vol I pg. 34)

Bill, the oldest child, had school adjustment issues and the parents could not agree on the appropriate use of discipline with him and the other children. (T.E. Vol I pg. 36) At this point in the proceedings the trial judge sustained the objection by the Mother's counsel to any further testimony concerning the Mother's parenting of Bill on the grounds that a change of custody of Bill was not an issue before the Court. (T.E. Vol I pg. 36-37)

Dr. Woodman observed that recently when Alyssa and Andrew would come to sessions he would greet them and they would immediately state that they wanted to live with their mother. "When I would greet them and say, hi, they frequently would respond with a response about wanting to live with their mom." (T.E. Vol I pg. 39) Dr. Woodman's statement that this appeared to be programming by the Mother was objected to by the Mother's counsel and the objection sustained by the Court. However, the Court noted: "I know both of these parents, Dr. Lady Jones more than him, have encouraged these children a little bit. If they were with her, we wouldn't be here today. I mean, that's obvious. But, I am more interested in what are the problems with these children, and what do you (Woodman) recommend, and who is the problem here?" (T.E. Vol I pg. 42)

Dr. Woodman testified that Alyssa suffered from some regressive behaviors including thumb sucking but they did not appear to get in the way of her overall social development. Alyssa was doing incredibly well at school. Additionally, her relationship with Dr. Bob Jones had improved. While Andrew was more outspoken in his desire to live with his Mother, Dr. Woodman believed that he was caught up in the turmoil between the parties. Both children would voice objections about being with their Father only to subsequently make statements about enjoying time with their Father. The relationship between the younger children and their Father has improved under Dr. Woodman's care,

but they continue to voice a desire to live with their Mother which in part contributes to the turmoil in the family. (T.E. Vol I pg. 42-43)

The children are usually aware when the parties are going to court and what's anticipated to happen and further report that they will be going to live with their Mother after court. Dr. Woodman's impression is that knowledge of court proceedings comes from the Mother and this creates an increased amount of anxiety and concern on the part of the children. Additionally, the children have told him that it's the Mother that is talking to them about the court proceedings. (T.E. Vol I pg. 43-44) The Mother has also criticized the Father to the children with statements concerning the Father having gambled away the price of a house. This causes the children to think the Father to be less capable and competent to care for them than the Mother would be. (T.E. Vol I pg. 44) This is further reflected in the statements of the children that their Mother knew how to care for them and their Father didn't. When pressed for further explanation by Woodman, the children responded that their Father was a bad doctor and their Mother was a good doctor. (T.E. Vol I pg. 45)

Dr. Woodman believed that the children could be appropriately diagnosed as suffering from an adjustment disorder dealing with the problems between their parents. (T.E. Vol I pg. 45)

Since Dr. Woodman began seeing the children he has seen improvement in the Father's skills in managing the children and growth by him in his parenting role. He has also noted improvement in the relationship between the Father and the children. (T.E. Vol I pg. 46)

Both children are currently excellent students displaying no behavioral issues at school and that has been true since the Father has had custody of the two children. (T.E. Vol I pg. 46, 48) Copies of the children's grades were made Exhibits 6-8. (T.E. Vol I pg. 102-103) The children had perfect attendance at school. (T.E. Vol I pg. 105)

Dr. Bob Jones solicits advice from Dr. Woodman on issues relating to parenting the children. He brings up questions about how to handle issues with the children and how to be responsive to them. He tries to be cooperative. (T.E. Vol I pg. 47)

Dr. Woodman's prognosis for the children was grounded in the continuing difficulties between the parents suggesting that until that subsides the children will continue to suffer from some adjustment disorder because it was making it difficult for the children to build trusting relationships. However, given the progress the children had made he was confident the children's issues would improve. (T.E. Vol I pg. 47)

The Mother has withdrawn Bill from treatment with Dr. Woodman and he was unaware of what if any treatment the Mother was pursuing for him. Dr. Woodman believes that Bill needs to continue in treatment. (T.E. Vol I pg. 48)

Dr. Woodman recounted an incident occurring at his office August 15, 2003. While the children were present for counseling with him the Mother appeared demanding that the children be turned over to her claiming it was her weekend with the children. The Mother had not previously come to his office to pick up the children nor has she since this incident. The Father also arrived and both parties met with Dr. Woodman to attempt to reconcile their disagreement over which parent had the right to possession of the children that weekend. Both parties were assertive of their right to the children on this particular weekend. Dr. Bob Jones proposed as a compromise that they split time with the children

that weekend. Ms. Dr. Jones refused. Dr. Bob Jones then gave in to Mrs. Dr. Jones to avoid further controversy. (T.E. Vol I pg. 50-52)

Dr. Woodman was also aware of the Father's attempts to put in writing a schedule to avoid controversy over which parent had the children in the future. While the Mother initially agreed to this idea, it was not clear that she ever followed up. (T.E. Vol I pg. 53)

Dr. Woodman opined that it would not be in the best interest of the children to be counseled by the Mother to use her last name when they were in her home such as Alyssa Smith and Andrew Smith rather than their legal names of Jones. (T.E. Vol I pg. 54)

Having seen the children pre divorce and post divorce, Dr. Woodman observed that the children had minimal problems prior to the divorce. Once the divorce began, the children, who were living with the Mother, there was a great deal of anger by the children directed at the father, a fear of him and not liking him or wanting to be with him. They expressed hostility toward the Father in a variety of ways. Since the divorce a lot of that problem has subsided. While the children continue to voice a desire to live with their Mother, a positive relationship has developed between the children and their Father. (T.E. Vol I pg. 55)

Dr. Woodman expressed concerns about the impact on the children of the Mother's behavior in going to their school and having the children sit on her lap at lunch due to the way that would be perceived by the children's classmates. (T.E. Vol I pg. 69-70)

Andrew has complained to Dr. Woodman about his Father grabbing him and spanking him, but Andrew has never described it as being grabbed by the neck from behind with significant force being applied to his neck. (T.E. Vol I pg. 74-75)

Ms. Mary Louise Horner testified that she is a retired Metro Schools math teacher and she has been working for Dr. Bob Jones helping him take care of the children since December, 2001. Initially, she worked part time but after Dr. Bob Jones was awarded custody of the two youngest children she began working for him full time. (T.E. Vol. I pg. 140) Ms. Horner arrives at the Jones home at 6:30 to 7:00 a.m., fixes breakfast for the children and sees that they are dressed for school. She assists the children in gathering their belongings for school and on Monday, Wednesday and Friday sends the children off to school with Dr. Bob Jones. She next picks the children up from school at 3:05 p.m., assists them with homework and often takes them to the park. Dr. Bob Jones usually arrives home at 6:30 p.m. (T.E. Vol. I pg. 141) Dr. Bob Jones takes over the children at that point and the family eats the dinner meal prepared by Ms. Horner. (T.E. Vol. I pg. 142) Andrew has told her that he likes to use his new name, ACK which he refers to as mommy's maiden name. Ms. Horner also overheard Alyssa tell Andrew: "Remember, we must tell everybody we want to live with mommy; we want to live with mommy" (T.E. Vol. I pg. 143) Ms. Horner recalled observing Mrs. Dr. Jones holding Alyssa in her arms during a girl scout's meeting in March, 2003 as if Alyssa was three years old. Alyssa was crying and everyone at the meeting was looking at her and her mother. As Ms. Horner put the children in the car, Mrs. Dr. Jones told the children she loved them very much. Their response was that they wanted to go home with Mrs. Dr. Jones who responded "Remember, tell it to somebody." (T.E. Vol. I pg. 146-147) During the time she has worked for Dr. Bob Jones, Mary Horner has never seen him do anything inappropriate to the children. (T.E. Vol. I pg. 148)

Sister Helen Kain testified that she is employed at St. Bernard's Academy and has been there for the past thirty four years. She teaches mostly third and fourth grade math and taught Alyssa math the previous school year. (T.E. Vol.II pg. 156) During that year while supervising children at lunchtime she had the opportunity to observe Mrs. Dr. Jones's interaction with Alyssa. Mrs. Dr. Jones would sit very close to Alyssa almost pulling her into her lap and would cuddle her during almost the entire lunch period. (T.E. Vol.II pg. 157) Mrs. Dr. Jones would cuddle and rub Alyssa's back while talking very softly to her. Compared to the conduct of the other parents this behavior seemed an infantile way of treating Alyssa and Sister Kain was concerned it would set Alyssa up to be made fun of by other children. (T.E. Vol.II pg. 158) When Sister Kain shared her concerns about this behavior with Mrs. Dr. Jones, she didn't like it and didn't understand why Sister Kain thought the conduct inappropriate. Sister Kain told Mrs. Dr. Jones that she was welcome to come to lunch but she and the other teachers would appreciate it if she didn't treat Alyssa in that fashion in front of the other children. After that conversation, Mrs. Dr. Jones changed her behavior for a short while only to resume her behavior near the end of the school year. (T.E. Vol.II pg. 159) Sister Kain observed that Alyssa's thumb sucking was indicative of infantile behavior which was less mature than the behavior of her peers. (T.E. Vol.II pg. 159)

Mrs. Dr. Jones admitted that she has counseled the children to tell others including Dr. Woodman that they want to live with her. (T.E. Vol.III pg. 240) She admits to whispering in Andrew's ear when she visits school for lunches with him and to wiping his mouth in the presence of other children, which embarrassed him . (T.E. Vol.III pg. 245) Both she and her mother have lunch with the children at school once a week.. (T.E. Vol.III

pg. 248) Sister Kain testified that it was normal for a parent to have lunch with a child two to three times per year at St. Bernard's.(T.E. Vol. II pg. 158) Additionally, Mrs. Dr. Jones goes to the school once per week for art class with Andrew and Alyssa. She does not have lunch regularly with Bill at his school. . (T.E. Vol.III pg. 248)

Mrs. Dr. Jones admitted that she had spoken to Andrew and Alyssa about her attempts to gain custody of them through a Juvenile Court proceeding. She advised Andrew that there was a possibility he would be coming home with her and that Alyssa would follow later. . (T.E. Vol.III pg. 250)

Mrs. Dr. Jones admitted that she failed to report Alyssa breaking her arm to Dr. Bob Jones within twenty four hours as required by the Parenting Plan. She stated that she didn't consider the broken arm to be a major illness or injury. She further admitted that she failed to seek treatment for the broken arm, but advised Dr. Bob Jones on Monday following the injury on Saturday that he could take her to the doctor if he chose or she would take her. (T.E. Vol.III pg. 255-57) Mrs. Dr. Jones also admitted to telling Alyssa that she thought the full arm cast was inappropriate. (T.E. Vol.III pg. 257-58)

Mrs. Dr. Jones admitted that she had reported Dr. Bob Jones on one occasion to DHS and that he was reported several times via Dr. Woodman. Mrs. Dr. Jones would not answer whether the allegations were determined unfounded, but stated DCS advised the file would remain open. (T.E. Vol.III pg. 259-60)

Mrs. Dr. Jones admitted that she had told the children their father had a gambling problem and that he had probably gambled away the value of a home. (T.E. Vol.III pg. 260)

Andrew Jones testified that he is seven years old. He testified that he would rather live with his mother because she treats him better and punishes him in a better usage (sic) than his father. His father spanks him and that teaches you to hit. It is abusive. He further stated that his father had not spanked him in about three months. (T.E. Vol.III pg. 276-77) Andrew admitted that his mother had told him about his father's gambling saying that she use to pull him out of casinos when he didn't have any money, and he started to use his credit card and now he goes to gambling classes to stop gambling.(T.E. Vol.III pg. 282) He admitted that when his mother whispers in his ear at school it embarrasses him. He stated that his mother sometimes speaks poorly of his father. (T.E. Vol.III pg. 284) Andrew has chores at his father's house, but none at his mother's home. (T.E. Vol.III pg. 284)

Alyssa Jones testified that she is nine years old. (T.E. Vol.III pg. 287) She testified that she would rather live with her mother, but could not explain why. When asked again she stated that she is just happier at her mother's because she gets to play more and can do her homework without someone checking it. (T.E. Vol.III pg. 289)

SUMMARY OF ARGUMENT

The Appellee, Dr. Bill Bob Jones, submits that the Appellant, Dr. Mary Jo Jones seeks to use this appeal as another opportunity to seek review of the initial child custody decision made by Judge Shipley in 2002. Mrs. Dr. Jones vigorously argued her position to this Court in the previous appeal and this Court found no error in the placement of two of the children with Dr. Bob Jones, under the circumstances of this case. While the first appeal was pending before this Court, Mrs. Dr. Jones sought the intervention of the Juvenile Court claiming the children to be dependent and neglected and instituted a second custody proceeding in the Circuit Court based on a similar claim. This appeal results from the Circuit Court's refusal to alter the parenting arrangements which have been in place for approximately three years at this time. Upon hearing the proof in this matter, the Trial Court determined that Mrs. Dr. Jones was interfering with the parenting of the children by Dr. Bob Jones and enjoined her from such further conduct. The Trial Court further found no material change in circumstances that would warrant a change in the parenting plan entered in this case. Dr. Bob Jones submits that the Trial Court's Order should be affirmed and that he should be granted his reasonable attorneys fees incurred in the defense of this appeal.

I. THE TRIAL COURT DID NOT ERR IN REFUSING TO RECUSE ITSELF.

The Appellant's first issue claims that the Trial Court erred in not recusing itself on the Motion of Mrs. Dr. Jones. As grounds for the issue, the Appellant claims recusal was necessary due to the fact that a former counsel for the Appellee served as Special Master to the Trial Court and that the Trial Judge made such egregious errors in the proceedings as to evidence a bias or prejudice requiring recusal.

In ***Holley v. Holley***, No. 03A01-9812-CH-00391, 1999 WL 1131322 (Tenn.Ct.App.1999), the trial judge refused to recuse himself even though an expert witness for one of the parties had prepared the judge's tax returns for several years. On Page 4 of the Court's Opinion appears the following language:

> The exercise of discretion by a trial judge to sit on a case will not be reversed "unless a clear abuse appears on the fact of the record." ***Young v. Young***, 971 S.W.2d 386 at 390 (Tenn.Ct.App.1997). The relationship between the Chancellor and the witness is that the witness or someone in his office, prepares the Chancellor's tax returns. This relationship, without more, is not grounds for disqualification. The rules governing disqualification of a judge list instances in which "a judge shall disqualify himself":
>
> (a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (b) the judge served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;
>
> (c) the judge knows that he or she. . . or the judge's spouse, parent or child wherever residing, or any other member of the judge's family residing the judge's household, has an economic interest in the subject matter in controversy or in a party to the proceeding. . .
>
> (d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such person:

(i) is a party to the proceeding, or an officer, director or trustee of a party;
(ii) is acting as a lawyer in the proceeding;
(iii) is known by the judge to have more than de minimus interest that could be substantially affected by the proceeding;
(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

The relationship between the Trial Judge and the Special Master does not fall within one of these prohibited categories.

The trial judge in ***Embry v. Chimenti***, No. 02A01-9305-CV-00116, 1994 WL 81221, 4 (Tenn.Ct.App.1994) described his duty as follows:

> ... I have taken a sworn oath to uphold the law of the State of Tennessee. I have got a duty under the law and under the Judicial Code to hear a case when I feel I can be fair, I have got a duty not to transfer it to another Court just because it's a difficult case...

There the Court on Appeal held:

> ... A judge cMaryot be recused on the ground that he has already decided the case, merely by motion supported by affidavit so stating. It must appear beyond any doubt that such decision has been made. If the judge denies such to be the fact, that ends the controversy; and it cMaryot be pursued further, or reexamined on that point. ***In Re Cameron***, 126 Tenn. At 659, 660; ***In Re Murphy***, 726 S.W.2d 509 (Tenn.1987). A motion for recusal, based upon the alleged bias or prejudice of the trial judge, addresses itself to the sound discretion of the trial court. ***Wiseman v. Spaulding***, 573 S.W.2d 490 (Tenn.App.1978); ***Memphis Bd. Of Realtors v. Cohen***, 786 S.W.2d 951 (Tenn.App.1989); ***Caruthers v. State***, 814 S.W.2d 64 (Tenn.Crim.App.1991).

There is no allegation or proof in the record that the Special Master heard any part of this case or had any communications with the Trial Judge concerning these parties. This complaint is without merit.

Next the Appellant cites errors by the Trial Judge in the previous proceeding and the alleged errors in this proceeding in the Trial Court as further reason supporting claims of bias and prejudice against the Appellant. It should be first noted that the Opinion of the Court of Appeals finding various errors in the Trial Court's handling of the original divorce proceedings as successor judge was not released until three months after the hearing on the Appellant's request for modification. At the time of the hearing on which this appeal is based, the Trial Court had not been put on notice by the Court of Appeals as to errors made during the original divorce proceeding.

In rationalizing why this Court failed to reverse the Trial Court in the Appellant's first appeal, the Appellant observes "because this action was pending in the Trial Court justice and judicial economy would be better served by allowing the pending modification to proceed." (Appellant's brief pg. 30) At page 14 of its Opinion in the Appellant's appeal of the 2002 custody Order the Court states:

> The fact that the parenting plan at issue in this case has been in place since September 2002 has influenced our analysis of the issues in this case. Children have the best opportunity to thrive when thy live in stable environments (citations omitted). As a result of the current parenting plan, the children caught up in the dispute between Drs. Jones and Smith have at least had some measure of stability.
>
> Our decision in this case is a narrow one. We have not decided that some other parenting plan would not have been more appropriate in 2003 had the trial court considered additional evidence regarding the children's circumstances at that time. Nor have we foreclosed the possibility of altering the current parenting plan should either party present evidence of a material change in circumstances warranting an alteration. We have determined only that the present record does not support Dr. Smith's assertion that the 2002 parenting plan is not in the best interest of the parties children.

The clear holding of this Court was that it was in the best interest of the children based on the evidence before the Court that the parenting arrangement established in 2002 remain in place to promote stability for the children in the midst of an unstable relationship between the Mother and Father. This Court found that it was error for the Trial Court to fail to certify familiarity with record of the previous proceedings and to refuse to hear any additional evidence regarding the circumstances of the children in June, 2003. Despite the finding of error in rulings by the Trial Court, the Court of Appeals made no suggestion that the Trial Court exhibited bias for or against either party, nor was there any suggestion that another judge should hear the modification proceeding of 2004. Additionally, this Court suggested that after a thorough review of the record, it found no error in the custody Order entered in 2002. (Opinion pg. 12, 14)

The Appellant also claims as a ground for reversal of the recusal decision and as a separate ground for appeal, that the Trial Court erred when it failed to certify familiarity with the original Trial Record prior to hearing evidence on the Appellant's modification request. Appellant claims this to be a violation of Rule 63 T.R.Civ.P. Appellant cites no authority to support this position. While the Trial Court's failure to certify familiarity with the record in the previous proceeding was held error, there was no such requirement for the Trial Court to make such a certification in this case. Here, the Appellant sought the modification of a previous custody Order. The burden of proof was on the Appellant to establish a material change in circumstances which by its nature requires that Appellant prove the circumstances at the time of the original custody Order and then demonstrate a change. The burden is not on a Trial Court in a custody proceeding to independently familiarize itself with the circumstances under which the previous custody Order was

entered and Appellant can point to no authority that would require such. This Court has never placed such a burden on a Trial Court considering a modification petition and it would be wholly impractical to impose such a requirement in light of the plethora of modification actions that are pursued in Trial Courts other than the Court making the original custody determination. This argument clearly lacks merit.

Appellant next claims that the Trial Court erred by failing to allow the Appellant to make an offer of proof and that this further indicates the bias and prejudice of the Trial Court in light of the Court of Appeals holding in the original appeal. Unfortunately for all parties and the Court, the Trial Court did not have the benefit of the Order and Opinion of the Court of Appeals at the time the hearing was conducted on the Appellant's request to modify custody. This proceeding was conducted on June 7-8, 2004 in the Trial Court. The opinion of the Court of Appeals on which Appellant relies was released September 9, 2004. Even the hearing on Appellant's Motion to Alter or Amend was conducted and ruled on prior to the release of the Opinion of the Court of Appeals in the original appeal. Appellee submits the Trial Court did not commit an error in this proceeding by denying the requested offer of proof. Even if this Court considers the ruling by the Trial Court to have been an error, it was not an error committed under such circumstances to evidence a bias or prejudice against the Appellant.

Appellee, Dr. Bob Jones submits that the Appellant has failed to demonstrate that the Trial Court erred by failing to grant the Appellant's Motion to Recuse. The records of both proceedings reflect that it is the Appellant whose knee jerk reaction to either unwanted advice of counsel or a ruling by the Trial Court is to seek a change in counsel or the Trial Judge. Her attempts to forum shop her claims under the guise of a dependent

and neglect action instituted against the Father in the Juvenile Court and which was dismissed as dealing with the same issue pending before the Circuit Court evidences this fact. (Opinion, pg. 6) The Trial Court did not err in refusing to recuse itself.

II. THE TRIAL COURT DID NOT ERR BY FAILING TO CERTIFY FAMILIARITY WITH THE RECORD OF THE ORIGINAL PROCEEDINGS.

Appellant raises this issue as one justifying recusal of the Trial Judge and also as a separate basis upon which the decision of the Trial Court should be reversed. Appellee submits that neither argument should result in reversal of the Trial Court's decision by this Court.

Appellant has embraced the holding of this Court from the appeal of the original divorce proceeding in which the Trial Judge serving as a successor Judge failed to certify familiarity with the record of proceedings as required by Rule 63 TRCivP as a basis for reversal of the this Order. However, Appellant fails to cite authority or any logical basis for extending the requirements of Rule 63 TRCivP to a custody modification proceeding.

Rule 63 TRCivP by its own terms applies to successor proceedings where the Trial Judge who has handled the case has become disabled and a successor has stepped in who will enter an Order disposing of the issues actually heard by another judge. Here, Judge Robinson was not a successor judge for purposes of Rule 63 TRCivP but was the original judge. All proceedings before this Court and for which review is sought by Appellant were heard and determined by Judge Robinson. Rule 63 TRCivP does not apply to the proceedings upon which this appeal is based.

The party seeking a change of custody has the burden of proof to establish that there has been a material change in circumstances regarding the children which could not have been reasonably anticipated by the parties or the Court at the time of the original custody decision. ***Smith v. Haase***, 521 S.W.2d 49, 50 (Tenn. 1975); ***Hoalcraft v. Smithson***, 19 S.W.3d 822, 830 (Tenn.Ct.App. 1999); ***Blair v. Badenhope***, 940 S.W.2d 575, 576 (Tenn.Ct.App. 1996); ***McDaniel v. McDaniel***, 743 S.W.2d 167, 169 (Tenn.Ct.App. 1987).

Here the burden was on the Appellant to establish the circumstances from the time of the original custody decision in 2002 in order to justify a material change of circumstances. Such a burden was a matter of proof to be presented by the Appellant, not a claim of a duty on the part of the Trial Court to certify familiarity with a previous trial record.

Ironically, the Appellant claims prejudice by the Court not considering evidence concerning the oldest child Bill when Appellant objected to attempts by Appellee to present such evidence. (T.E. Vol. I pg. 35-36) Appellee's position is that she could not waive Bill's privilege with his therapist during the testimony of Dr. Jay Woodman. Appellant sought to present evidence that the Appellant had withdrawn Bill from needed counseling and therefore would be less fit to have primary custody of the two younger children. Mother objected to the evidence and the Trial Court sustained the objection. It therefore becomes ludicrous on the part of the Mother to claim the Trial Judge erred by sustaining her objection. This issue is not only without merit but has been waived by the Appellant.

III. THE TRIAL COURT'S FAILURE TO ALLOW APPELLANT'S OFFER OF PROOF WAS NOT ERROR AND IF ERROR IS NOT REVERSIBLE ERROR.

Appellant next argues that because she was denied the opportunity to make an offer of proof regarding statements by the youngest child, Andrew to her and her family members the decision of the Trial Court should be reversed.

Appellant has taken this Court's concerns expressed in its previous opinion on the direct appeal of the original divorce proceedings regarding the failure of the Trial Judge to allow an offer of proof as to changed circumstances of the children in 2003 and attempted to bootstrap and apply it to two rather benign occurrences at the trial of this matter. Appellee submits that it is not clear that the Trial Court erred in its ruling and certainly clear that the error if any should not affect the result in this case. Rule 36(b) TRAP.

Appellant first claims error that the Trial Judge would not allow the Appellant's sister to recount a statement made by the youngest child Andrew expressing animosity towards his Father and wishing that he would suffer specific harm. (T.E. Vol. I pg. 178) The Trial Court sustained the Appellee's hearsay objection and declined to allow Appellant to make an offer of proof. (T.E. Vol. I pg. 178)

The second occurrence for which complaint is made was during the testimony of Appellant's younger sister. Appellant's counsel inquired concerning the sister witnessing an occurrence at dinner at the Appellant's house where Andrew became upset and ran from the dinner table. The witness testified that she observed the child upset and asked him what was wrong. The child responded that he didn't want to talk to her. Further statements from the child were excluded on hearsay grounds with the Court observing that Andrew was going to testify and that the

information could be presented at that time. The Mother's request to make an offer of proof was declined by the Trial Judge. (T.E. Vol. II pg. 181-182)

Later in the proceedings, Andrew Jones was called as a witness by the Appellant. At no time during the examination did Appellant's counsel attempt to question Andrew about either incident where the hearsay objection had been previously sustained and the offer of proof denied. (T.E. Vol. III ppg. 276-280) There was no suggestion that Andrew failed to remember either incident or that he was not capable of recounting the events if asked. The substance of the evidence sought by Appellant to be admitted through the testimony of her sisters was adequately presented through the testimony of Andrew who stated that he preferred to live with his Mother and that he did not approve of the discipline used on him by his Father. This appears to be the same point the Mother wished to establish through the limited testimony of her sisters. The Trial Court appeared to realize the purpose of the testimony and advised the Appellant that she did not find it helpful to the Appellant's case. "You know, as the trier of the facts in this case, this is what I see. He says they do the same thing at his house, and then they do the same thing at her house. So really this evidence is pretty poor. It's the same old tit for tat, the same old he hates her, she hates him, and they're going to put these children in the middle, come heck or high water." (T.E. Vol. II pg. 177)

In bringing this specific complaint before the Court for review the Appellant asserts that reversible error occurred. It appears that Appellant relies more heavily on the failure of the Trial Court to allow her offer of proof as the reversible error rather than the exclusion of the testimony which was the subject of the request for the offer of proof. Appellee submits that neither ground should result in reversal of the Trial Court's Order.

Appellant correctly restates Rule 103 TRE in her brief at page. 35. This rule controls the weight to be given to any erroneous evidentiary ruling on appeal. First, the ruling must have affected a substantial right of the party seeking admission of the evidence. Further in order to preserve the issue for appeal, the offering party must make known the substance of the evidence and the evidentiary basis supporting admission by offer or ***such was apparent from the context.*** The reason for such a rule is to allow this Court to be able to review the propriety of the decision excluding the evidence. ***Alley v. State***, 882 S.W.2d 810, 815 (Tenn.Crim.App. 1994)

In this case it is clear that the evidence sought to be admitted concerned statements made by Andrew concerning his feelings for his Father and his desire to do him harm. Whether the statement should have been admitted into evidence or not is capable of being determined by this Court without any further offer of proof. The context of the statement was animosity held by the child towards his Father. The record therefore meets the requirements of Rule 103 (a)(2) TRE allowing review by this Court.

Appellee submits that the Trial Court's evidentiary rulings on these two issues can be sustained by this Court.

The Trial Court rejected the Appellant's claim that Andrew's statements were hearsay exceptions under Rule 803(3) TRE. While the state of mind of a declarant can be an exception to the hearsay rule the statement would be admissible only for the purpose of proving conduct of the declarant (Andrew). Only the declarant's "conduct," not some third party's conduct, is provable by this hearsay exception. ***State v. Long***, 45 S.W.3d 611, 624 (Tenn.Crim.App. 2000); ***State v. Leming***, 3 S.W.3d 7, 17-18 (Tenn.Crim.App. 1998); ***State v. Farmer***, 927 S.W.2d 582, 594-596 (Tenn.Crim.App. 1996)

Here the purpose of the testimony was to establish that Andrew had made statements indicating a dislike of his Father and a desire to do him harm. Such statements do not qualify for the exception set forth in Rule 803 (3) TRE.

Notwithstanding the Court's determination of whether the statement was admissible under Rule 803 (3) TRE, the Appellee submits that the exclusion of this evidence is an insufficient basis to reverse the decision of the Trial Court. As noted earlier, the decision to exclude the evidence must affect substantial rights under Rule 103 (a) TRE to be determined error on review by this Court. In this case, Andrew was called as a witness and Appellant was afforded the opportunity to ask Andrew any questions she chose regarding his experiences with his father, his fears or his desires. Appellant makes no claim that she was unable to present evidence of these matters to the Trial Court. In effect this evidence if admitted would have been cumulative of evidence presented through other witnesses including the Appellee himself who recounted numerous instances of the children including Andrew returning from visits with their Mother and chanting they wanted to live with the Appellant.

Appellee submits that the error claimed in this assignment is without merit and even should error be found it had no effect on any substantial rights of the Appellant or affected the result of the hearing. Rule 36(b) TRAP.

IV. THE TRIAL COURT DID NOT ERR IN DETERMINING THAT THE MOTHER HAD FAILED TO PROVE THAT A MATERIAL CHANGE OF CIRCUMSTANCES HAD OCCURRED.

The Appellant asserts that the Trial Court erred by failing to find that a material change of circumstances has occurred since the entry of the custody Order in September, 2002 and that primary custody of the two youngest children should be placed in her. Appellee submits that the Trial Court ruled correctly that no material change in circumstances had been proved by Appellant.

The Supreme Court recently set forth the standard to be applied in cases between parents seeking modification of a previous custody Order in ***Kendrick v. Shoemake***, 90 S.W.3d 566 (Tenn. 2002). Adopting the standard set forth in ***Blair v. Badenhope***, 77 S.W.3d 137 (Tenn. 2002) the Court stated that the issue was whether a material change in circumstances has occurred after the initial custody determination which makes a change in custody in the child's best interests. ***Kendrick*** at pg. 570. In determining if a material change in circumstances has occurred the Trial Court is to consider: (1) whether a change has occurred after the entry of the order sought to be modified; (2) whether a change was not known or reasonably anticipated when the order was entered; and (3) whether a change is one that affects the child's well-being in a meaningful way. ***Id*** at pg. 570. Also pursuant to T.C.A. 36-6-101(a)(2)(B) (2002) a material change in circumstances may include, but is not limited to, failures to adhere to the parenting plan or circumstances which make the parenting plan no longer in the best interest of the child.

Should the Trial Court find a material change in circumstances it must next determine whether modification of custody is in the child's best interest using the factors enumerated in T.C.A. §36-6-106 (2001) ***Cranston v. Combs***, 106 S.W.3d 641, 633-634 (Tenn. 2003).

None of the recent decisions cited above have modified the longstanding rule regarding modification actions which states that the previous custody Order is res judicata and is conclusive in a subsequent proceeding unless some new fact has occurred which has altered the circumstances in a material way so that the welfare of the child requires a change of custody. ***Hoalcraft v. Smithson***, 19 S.W.3d 822, 828 (Tenn.Ct.App. 1999) citing ***Long v. Long***, 488 S.W.2d 729 (Tenn.Ct.App. 1972)

In support of her claim of having demonstrated a material change of circumstances the Appellant cites four factors which she states the Court of Appeals recognized as forming the basis of the Trial Court's original custody decision. Appellant cites the Court to pages 11 and 12 of the Court of Appeals opinion in the original appeal for this claim. Those factors as stated by Appellant are: (1) the court's determination that each parent had faults; (2) the nature of the child's relationship with the parents, particularly that Bill had a very negative relationship with Father and was afraid of him; (3) the court's determination that Bill had physically abused Alyssa; and (4) the preferences of the individual children.

Appellee disagrees with this assertion. The Court of Appeals stated at page 11 of its Opinion:

> The principal substantive issue is this case is the propriety of the custody arrangement that has been in place for over two years. Dr. Smith asserts that the portion of the September 19, 2002 order placing Alyssa and Andrew in Dr. Jones's custody is not in their best interests because Dr. Jones is unfit to be the children's primary custodial parent. Having carefully reviewed the voluminous record, we determined that it does not contain sufficient evidence to warrant overturning the existing custody arrangement.

Thereafter the Court of Appeals simply responded to issues raised by the Appellant to justify a change in the custody decision of the Trial Court. The Court of Appeals did not limit the Trial Court's findings to these four issues.

Appellant asserts that she has changed since the entry of the Order in 2002 by now following the advice of Dr. Woodman to some extent. Additionally, she asserts that she modified her behavior in cuddling Alyssa during lunch at St. Bernard's after being advised by Sister Kain from St. Bernard's Academy that the teachers did not think the behavior was appropriate. (Appellant's Brief pg. 46) Initially, Dr. Bob Jones would note that this does not appear to be an appropriate consideration for a change of custody material change in circumstances. The change in circumstances to be considered by the Court is that of the children, not the parents. ***McGain v. Grim***, No. 01A01-9711-CH-00634, 1999 WL 820216 at pg. 2 (Tenn.Ct. App. 1999). Notwithstanding this limitation, the evidence fails to support Mrs. Dr. Jones's claim.

Dr. Woodman and Sister Kain painted quite a different picture of the behavior and attitude of Mrs. Dr. Jones during their testimony. While Dr. Woodman was generally prohibited from testifying to any extent concerning Bill, he did state that Ms. Dr. Jones had withdrawn him from therapy and that he was not aware of what therapy Bill was receiving. Dr. Woodman stated that Bill needed to be in therapy. (T.E. Vol. I pg. 48)

Sister Kain stated that Mrs. Dr. Jones's behavior at lunch during the 2003-2004 school year was to sit very close to Alyssa and to pull her into her lap. She would cuddle her and rub her back while speaking softly to her which seemed quite different than the behavior demonstrated by other mothers towards their children. Sister Kain was concerned that Mrs. Dr. Jones's infantile way of treating Alyssa would result in Alyssa being teased by other students. For this reason she

mentioned to Mrs. Dr. Jones that neither she nor other teachers thought her behavior toward Alyssa at lunch was appropriate. Mrs. Dr. Jones's reaction was negative saying that she didn't understand why Sister Kain would feel that way. While Mrs. Dr. Jones's behavior changed for a while the behavior resumed near the end of the school year. Sister Kain observed that Alyssa demonstrates infantile behavior by sucking her thumb during class. (T.E. Vol 1 ppg. 157-159)

Mrs. Dr. Jones next claims that Alyssa now sucks her thumb more than when she lived with Mrs. Dr. Jones and therefore this regressive behavior, by implication, is caused by Dr. Bob Jones's parenting. The Mother has offered no expert witness to corroborate this assertion. The testimony of Sister Kain would support a finding that the behavior of Mrs. Dr. Jones toward Alyssa at school contributes to Alyssa's infantile or regressive behavior.

This behavior by Mrs. Dr. Jones is consistent with the findings by the Trial Court and the Court of Appeals in the original divorce proceeding.

> The record clearly shows that the children are Dr. Smith's first priority. She is motivated by a commendable desire to nurture and protect her children from the vagaries of the world. Yet, paradoxically, Dr. Smith has been unwilling or unable to realize that many of her parenting strategies have proved to be ineffective and actually detrimental to her children. She has reacted defensively and hostilely to the advice and suggestions of persons who are concerned about the children's welfare, including their teachers, physicians, and family members. Her inability to appreciate how her conduct has affected the parties children is troubling.

Opinion of Court of Appeals pg. 12.

Dr. Bob Jones's testimony concerning the conduct of Mrs. Dr. Jones regarding Andrew playing football further demonstrates her over protectiveness and her inability to allow the children to develop normally. (T.E. Vol. I ppg. 87-89)

The parties continue to disagree on the use of discipline with the children. Dr. Bob Jones admits that he continues to use spankings as a means of discipline for Andrew, but at Dr.

Woodman's advice has stopped spanking Bill or allowing the care giver, Mary Horner to spank either Andrew or Alyssa. (T.E. Vol 1 ppg. 95, 130-131)

Mrs. Dr. Jones's abhorrence to any physical discipline of the children is reflected in her reports to Dr. Woodman of accusations of physical abuse of Bill and Andrew. Although several reports were made to the Department of Children's Services, no report was determined to be founded. (T.E. Vol. I pg. 260)

Mrs. Dr. Jones next attacks Dr. Bob Jones for working and not staying home full time with the children alleging this to be a change in circumstances. She further criticizes him for employing a nanny to care for the children while he works and claims that because Alyssa would rather be cared for by her than by the nanny, primary custody should be changed. (Appellant's Brief pg. 49-50) Both parents are employed. Dr. Bob Jones has taken positive steps in bringing Mary Horner into the home to provide care for the children while Dr. Bob Jones works. This does not constitute a material change in circumstances. Clearly at the time Dr. Bob Jones was awarded primary parental responsibilities for Andrew and Alyssa his employment status was known by the Court and it was anticipated that assistance such as that provided by Mary Horner would be needed. Ms. Horner was actually employed by and working in a care giver capacity for Dr. Bob Jones when the custody Order was entered in September, 2002. The Trial Court did not award custody of the children to Dr. Bob Jones on a whim or in a vacuum. The Trial Court conducted four days of custody hearings and authored a memorandum opinion of sixteen pages in length. (Opinion pg. 3and 4). The child care arrangements in existence at the time of the hearing in June, 2004 were an anticipated development.

Regarding the desire of Alyssa and Andrew to be with their mother, the record is rife with examples of Mrs. Dr. Jones's attempts to alienate the children from Dr. Bob Jones and undermine his parenting of the children. The Trial Court found that Mrs. Dr. Jones since the entry of the custody Order in September, 2002 had interfered with Dr. Bob Jones's parenting of Andrew and Alyssa and felt it necessary to restrain and enjoin her from interfering or undermining his parenting procedures, because she promotes discord. (T.E. Vol III pg. 304)

Evidence was presented that Bill continues to pose a danger to Andrew and Alyssa by hitting them almost every time they are together. Dr. Bob Jones testified that Bill continued to be assaultive of both Alyssa and Andrew, and Andrew was now showing aggression towards Alyssa. (T.E. Vol. I pg. 95) The Court of Appeals in its Opinion on the original divorce proceeding noted that splitting up the children should be done rarely but that the instant case presents one of those cases where it is appropriate. ***Rice v. Rice***, 983 S.W.2d 680, 684 (Tenn.Ct.App. 1998) Bill's behavior towards Alyssa merited separation of the children with the Court of Appeals finding that no court in good conscience could permit Bill and Alyssa to live together under the facts as shown in the Trial Court without a cohesive plan to address Bill's aggressiveness and to prevent Alyssa's future abuse. (Opinion pg. 13) No such plan was suggested by Mrs. Dr. Jones in 2002 and she presented no such plan to the Trial Court in 2004. While the preferences of the children can be considered by the Trial Court, there is no obligation to consider the preferences given the ages of the children. As stated above, Mrs. Dr. Jones's interference with Dr. Bob Jones's parenting of the children is no doubt a contributing factor to the children wanting to live with their mother. Dr. Bob Jones lives in a house with rules and discipline for the children. Mrs. Dr. Jones does not. Andrew testified that he wants to live with his mother because "she punishes me in a better usage than my

dad does." "My dad, he spanks me." " If you think about it, it kind of teaches you to hit." (T.E. Vol. III pg. 277) The orchestrated chanting of the children that they wanted to live with their mother both as expressed to Dr. Bob Jones when he picks the children up from visits with Mrs. Dr. Jones (T.E. Vol. I pg. 97) and when the children see Dr. Woodman (T.E. Vol. I pg. 39) speak volumes as to the programming of these children. Mrs. Dr. Jones denies that she has coached the children, but admits that she has urged them to freely express their feelings to anyone who will listen. (T.E. Vol. III pg. 240). Mrs. Dr. Jones also admits telling the children about court appearances and encouraging them to believe they will soon be living with her. (T.E. Vol. III pg. 250)

Mrs. Dr. Jones has also spoken negatively to the children about their father and his parenting decisions. She has advised Andrew that she use to pull his father out of casinos and that he was going to gambling classes. (T.E. Vol. III pg. 282) Andrew says that Mrs. Dr. Jones whispers in his ear at lunch at school and that embarrasses him. She also sometimes speaks poorly of his father. (T.E. Vol. III pg. 284) Mr. Dr. Jones criticized Dr. Bob Jones's decision regarding putting a full arm cast on Alyssa when she fractured her arm, telling Alyssa that her father was wrong having the cast put on her arm and that daddy is a bad doctor. She also told Alyssa that the reason she sucks her thumb is because she is having to live with her father, but that would change soon. (T.E. Vol. I ppg. 99-101)

Mrs. Dr. Jones refuses to discuss issues related to the children with Dr. Bob Jones. She has told him: "I'm not going to communicate with you; I'm going to get the children." She even accused him of bribing the judge to get custody of Andrew and Alyssa. (T.E. Vol. I pg. 82-83) Following through on this threat to not communicate with him, since the entry of the original custody Order, Mrs. Dr. Jones waited from Saturday until Monday to advise Dr. Bob Jones that

Alyssa had broken her arm at a skating event. (T.E. Vol. I pg. 96-97) Since the entry of the original custody Order, Mrs. Dr. Jones has stated to Dr. Bob Jones at a school function in front of the children: "how can you do this; you're a bad daddy; I should have the children; all the kids should be with me. (T.E. Vol. I pg. 87) The children have told Dr. Bob Jones that they are going to live with their mother and that she is going to change their names. (T.E. Vol. I pg. 92) Andrew has written his initials as ACK (Smith) rather than ACS (Jones) (T.E. Vol. I pg. 93) Mrs. Dr. Jones has written the name Smith Jones in the children's school uniform pants. (T.E. Vol. I pg. 93-94)

Dr. Bob Jones submits that there has been no showing of a material change in circumstances other than his showing that Mrs. Dr. Jones has substantially interfered with his parenting of the children and has worked tirelessly and doggedly to alienate the children from him in her attempts to become the primary residential parent for all three children. This was in essence the finding of the Trial Court and a finding that is adequately supported by the proof adduced at the trial of this matter.

CONCLUSION

For the reasons stated herein, Dr. Bob Jones submits that the Order of the Trial Court denying the counter petition for a change of custody should be affirmed by this Court, the costs taxed to Mrs. Dr. Jones and Dr. Bob Jones awarded his reasonable attorneys fees and costs for this appeal pursuant to the authority of T.C.A. §36-5-103(c), ***Rubin v. Kirshner***, 948 S.W.2d 742, 746 (Tenn.Ct.App. 1997), and ***Salisbury v. Salisbury***, 657 S.W.2d 761, 770 (Tenn.Ct.App. 1983).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was served on Mr. Thomas F. Bloom, 911 Marengo Lane, Nashville, Tennessee, attorney for Appellant, by placing a copy in the United States Mail postage prepaid this the ___day of July, 2005.

____

JOHN J. HOLLINS, SR.