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2006-CA-00251-COA
Brief of Appellant

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STATEMENT OF ISSUES

I. THE CHANCELLOR ERRED IN RULING THAT THE APPELLANT HAD NOT MET HER BURDEN OF PROOF IN PROVING THAT A MATERIAL CHANGE OF CIRCUMSTANCES ADVERSELY AFFECTING THE BEST INTERESTS OF THE MINOR CHILDREN HAD OCCURRED SINCE THE ENTRY OF FINAL JUDGMENT OF DIVORCE ON SEPTEMBER 20, 2004, AND THAT SUCH RULING IS AN ABUSE OF JUDICIAL DISCRETION.

II. THE CHANCELLOR ERRED WHEN SHE FAILED TO COMPLY WITH THE MANDATE OF **ALBRIGHT** AND ERRED IN ITS APPLICATION OF THE **ALBRIGHT** FACTORS IN FINDING THAT IT WOULD BE IN THE BEST INTEREST OF THE TWO MINOR CHILDREN, JONATHAN AND SUSAN, FOR THEM TO REMAIN IN THE PRIMARY PHYSICAL CUSTODY AND CARE OF THE FATHER.

III. THE CHANCELLOR ERRED IN NOT MAKING SPECIFIC FINDING AS TO WHY JONATHAN'S PREFERENCE TO LIVE WITH HIS MOTHER WAS NOT IN JONATHAN'S BEST INTERESTS.

STATEMENT OF THE CASE

Appellant, Cynthia Bell Gray asks this Court to reverse the November 21, 2005, Final Decree of the Chancery Court of the Ninth Judicial District of Washington County, Mississippi, Honorable Jane R. Weathersby denying the Petition by, Cynthia Bell Gray, (hereinafter "Cindy") to modify custody of the parties' minor children, Jonathan Tyler Gray, (hereinafter "Jonathan") age 13, born February 19, 1992, and Susan Rebecca Gray, (hereinafter "Susan"), age 7 born October 13, 1998, from that of the Appellee, Glenn Van Gray, (hereinafter "Glenn") to Cindy.

Cindy and Glenn are the biological parents of the two minor children, Jonathan and Susan. On September 20, 2004, a Final Judgment of Divorce was entered awarding primary physical custody of the minor children to Glenn. Cindy brought the instant action in the Chancery Court of Washington County, Mississippi to modify that custody of the two minor children. The Chancery Court conducted a hearing in Indianola, Mississippi on October 26, 2006 and on November 21, 2006, entered its Order denying Cindy's Petition to Modify Custody. It is that Order that is the subject of this Appeal. Cindy contends that this Order was incorrect and should be reversed as the centerpiece of the instant case is the two minor children, Jonathan and Susan's best interest.

SUMMARY OF THE ARGUMENT

This is the kind of case that leaves people scratching their heads about the rationality and fairness of the American litigation system. This astonishing judgment is the product of numerous errors by the trial court. If allowed to stand, the judgment completely ignores what is in the best interest and welfare of two innocent minor children, Jonathan and Susan.

I. The Chancellor erred in finding that a material change in circumstances that adversely affected the children had not been met. The uncontradicted evidence by the two minor children, Jonathan and Susan, demonstrated that the environment provided by the custodial parent, Glenn, is adverse to the children's best interest and welfare. Additionally, uncontradicted evidence was provided at trial showing that Cindy has changed positively and that she can provide a more suitable home for the minor children.

II. The Chancellor erred in her application of the **Albright** factors in finding that it would be in the best interest of the two minor children for them to remain in the physical custody and care of the father, Glenn.

The proof at trial clearly showed that Glenn routinely fails to supervise the children that he repeatedly interferes with Cindy's relationship with the children that

he is **NOT** employed, that Jonathan and Susan have been adversely affected by Glenn's increasingly controlling behavior, that Susan is without a shadow of doubt being adversely affected by Glenn in that the uncontradicted evidence revealed that not only has she seen her father "naked" on numerous occasions but that she sleeps in the same bed with him every night; that the relocation by Glenn to Springdale, Arkansas was not in good faith and was not in the best interest of the children; that the Chancellor did not consider the extent of the children's involvement with Cindy and the children's maternal grandparents and did not take into account the genuine desire of Jonathan, 12 years of age, to live with his mother.

The Chancellor failed to acknowledge and recognize that Cindy is in school at Mississippi Delta Community College making passing grades; that Cindy has a 3-bedroom apartment where each child has his/her own bedroom and that her apartment is within walking distance of the children's school where the children would attend if still in Mississippi and that the children's lifelong friends and family reside in Greenville, and more importantly that Cindy can provide the physical care, emotional support, discipline and guidance of the children without constant screaming and hollering at the children. The Chancellor failed to review each of the ***Albright*** factors along with the evidence and testimony presented at trial.

III. The Chancellor failed to follow Jonathan's preference to live with his mother and she failed to make specific findings explaining her refusal to honor Jonathan's

genuine desire to live with his mother after hearing compelling reasons to support his request to live with his mother.

ARGUMENT

It is well settled that the totality of circumstances should be considered when considering whether a material change adversely affecting the children has occurred. The polestar consideration and most basic principle of custody modification is the law of what is in the best interest and welfare of the child. The court accomplishes this thru the analysis of the **Albright** factors. **Strugis v. Strugis**, 792 So.2d 1020, 1025. (Miss. Ct. App. 2001)(modification reversal by Chancellor's failure to address each factor). **Brocato v. Brocato**, 731 So.2d 1138,1141 (¶ 9)(Miss.1999)(Quoting **Smith v. Jones**, 654 So.2d 480,486 (Miss. 1995)). When determining the above, a court should look at "the totality of the circumstances." *Id.* (Quoting **Ash v. Ash**, 632 So.2d 1264,1266 (Miss. 1993))). **Crider v. Crider**, 904 So.2d 143,144 (¶ 6)(Miss.2005)(Quoting **Riley v. Doerner**, 677 So.2d 740,744 (Miss. 1996.))

The undisputed evidence showed that the living environment of Glenn is detrimental to the children's best interest. Susan's in camera testimony clearly shows that there has disturbingly been a material change in circumstances adversely affecting her which has occurred since the Final Decree of Divorce on September 20, 2004. Little Susan, a precious 7-year-old girl testified that she sleeps with Glenn every night; that his bed is the only bed she sleeps in, and that she didn't like it very much. TR 137:25-27; 138:1012; 145:3-6. She further testified not only has she seen

her father naked but also that he gets naked in front of her. TR 138: 18-27. Other evidence through Susan's testimony showed, that she has been left alone by herself in the apartment in Arkansas and that she has been left alone in the apartment with an 8-year-old boy. TR 139:5-13; TR 146:9-19. Susan additionally testified that Glenn interferes with her talking to Cindy; that he yells at her a lot and that she has more friends in Mississippi. TR141:3-7; 17-19; TR 143:12-13.

Jonathan's in camera testimony was also appalling. Here we have a 12-year-old boy testifying that his father calls Cindy "a horrible mother, a crack head, a slut and a lot of nasty things." TR 152:10-14. He further testified that Glenn leaves him alone for three or four hours. TR152:20-25. In addition thru Jonathan's testimony we learn that Glenn yells at him and shows him court papers TR 153:3-7. It is evident that Glenn yells at Jonathan constantly as we heard on cross examination that Glenn even yelled at Jonathan on the trip from Arkansas for the court appearance in October. TR160: 9-13. Not only does Glenn interfere with his talking to Cindy but also that Glenn listens to Jonathan's calls with Cindy. TR 154:26-29; 155:1-3; 165:22-29.

Moreover, Jonathan testified that Susan sleeps with Glenn, that she always sleeps with Glenn. TR 154:4-7. Jonathan has his own bedroom and bed but when it comes to little Susan she sleeps with her father and that she doesn't like it very much. Jonathan's testimony combined with Susan's is indeed alarming and sends red flags that the current environment provided by Glenn for the children is without a doubt detrimental. Nancy Bell in her testimony confirmed that Jonathan has his

own room while Susan sleeps with her Dad. TR8:14-21.

Glenn's testimony was interesting to say the least. Not only did he admit that Susan sleeps with him but also that she has seen him **naked on numerous occasions** and this did not seem to concern him as he discounted his disturbing behavior by merely stating that "kids are very inquisitive." TR 43:1-4; 11-20. In addition Glenn admitted that he has called Cindy a sorry excuse for a mother on more than one occasion. TR 47:20-23. Glenn also testified that he was not employed. TR42:4-5. TR9:28-29; 10:1. Glenn admitted on direct examination that he had not looked into moving to any other location other than Springdale, Arkansas. TR113:9-20.

The most revealing testimony about Glenn's move came from Glenn on cross examination when he said, "quit trying to make my life miserable here. He's got my business. He's got my home. Leave me alone or I am going to have to move." TR 52:7-9. "He got my business." TR 52:19-21. Glenn obviously blames Randy Bell for all of his misfortunes and in an effort to get back at Randy he chose to move the children to Springdale, Arkansas. This testimony clearly shows that his move to Arkansas was not made in good faith.

Patsy Gray, Glenn's mother testified that there is a day bed at Glenn's apartment in Arkansas, which is very interestingly, as no one else offered any testimony that one exists. However, her testimony served to confirm the testimony of Susan, Jonathan and Glenn that Susan sleeps with her father. TR 115:11-14.

Randy Bell, Cindy's father and someone who has been close to Jonathan and Susan since their birth testified about the noticeable changes in Jonathan since the divorce. He has observed that Jonathan is more withdrawn and that both of the children, Jonathan and Susan appeared to be scared a lot to say things. TR21:5-10. Randy also testified about the positive changes in Cindy and perhaps more importantly his willingness to provide her with the financial support so that Cindy could go to school because Cindy would then be able to get a good job and maintain herself and the children. TR22:7-15; 16-23.

This line of testimony was confirmed by Nancy Bell. Nancy affirmed that she wasn't aware of any reason why Cindy couldn't care for the children and she was also willing to provide support to Cindy. TR 9:28-29; 10:1; 14:29; 15:1-2. Randy additionally testified that he did not know of any reason why Cindy was not able to take care of the children while he felt that Glenn was not able to do so. His reasons were first that of Glenn not being employed and Glenn's "basic teachings." TR 25:24-29; 26:1; 4-15.

Cindy's testimony supported that of Randy's with regards to the changes in Jonathan since the divorce. Cindy has seen a direct quietness in Jonathan that was not present before the divorce. TR 62:25-29; 63:1-3. Through her testimony we learned that Glenn does not consult with her regarding the children's schooling; that she does not receive progress reports and that he doesn't even let her know when he takes the children to the doctor. TR 72:2-7; 22-29. At Cindy's three bedroom apartment the children have their own rooms. TR 56:18-23. Schooling in Greenville

for the children would not pose a problem. TR64:27-29; 65:1-5.

The evidence at trial did establish the required elements that a substantial change in circumstances has transpired since issuance of the Final Decree of Divorce on September 20, 2004, and that this change adversely affects the children's welfare and that the children's best interest mandates a change in custody. ***Bubac v. Boston***, 600 So.2d 951, 955 (Miss. 1992).

Further, the evidence at trial showed that under a totality of circumstances that there has been a change in circumstances, ***Spain v. Holland***, 483 So.2d 318,320 (Miss. 1986). In addition, under a totality of circumstances analysis the proof at trial demonstrates that the living conditions in the home of Glenn are unhealthy; that a definite material change has occurred in the living conditions at Glenn's while at Cindy's home the environment offers a better option for the children that did not exist at the time the original custody determination was made, and that the Chancellor committed manifest error when she failed to make such a determination.

Accordingly, in this case, the undisputed facts demonstrate that, a material change in circumstances exist that warrant a change in the custody of the minor children, Jonathan and Susan to Cindy.

The Chancellor erred in its application of the ***Albright*** factors in finding that it would be in the best interest of the two minor children for them to remain in the physical custody and care of the father, Glenn. The proof at trial clearly showed that

Glenn routinely fails to supervise the children that he repeatedly interferes with Cindy's relationship with the children that he is **NOT** employed, that Jonathan and Susan have been adversely affected by Glenn's increasingly controlling behavior, that Susan is without a shadow of doubt being adversely affected by Glenn in that the uncontradicted evidence revealed that not only has she seen her father "naked" on numerous occasions but that she sleeps in the same bed with him every night; that the relocation by Glenn to Springdale, Arkansas was not in good faith and was not in the best interest of the children.

The Chancellor did not consider the extent of the children's involvement with Cindy and the children's maternal grandparents and did not take into account the genuine desire of Jonathan, 12 years of age, to live with his mother. The Chancellor failed to acknowledge and recognize that Cindy is in school at Mississippi Delta Community College making passing grades; that Cindy has a 3-bedroom apartment where each child has his/her own bedroom and that her apartment is within walking distance of the children's school where the children would attend if still in Mississippi and that the children's lifelong friends and family reside in Greenville, and more importantly that Cindy can provide the physical care, emotional support, discipline and guidance of the children without constant screaming and hollering at the children.

The Chancellor failed to review each of the ***Albright*** factors along with the evidence and testimony presented at trial. This Court is obliged to find error if a

chancellor improperly considers and applies the **Albright** factors. **Hollon v. Hollon**, 784 So.2d 943 (¶ 11)(Miss. 2001) **Hollon** additionally states to determine if a Chancellor abused her discretion, this Court is to review each factor along with the evidence and testimony presented at trial pertaining to each factor. **Id** at (¶ 13). Cindy requests this Court to do just that.

MISS. CODE ANN. § 93-11-65 (Rev. 2004) is the statute that introduced the idea of “child preference” into custody matters. The statute makes provision for the child, 12 and over, to express a preference...and states that the Court may consider the expressed preference of the child. Miss. Code Ann. §93-5-24(1) directs the Court to make all custody determinations in the best interest of the child.

In the lower court, the Chancellor failed to follow Jonathan’s preference to live with his mother and she failed to make specific findings explaining her refusal to honor Jonathan’s genuine desire to live with his mother after hearing compelling reasons to support his request to live with his mother. **Polk v. Polk**, 589 So.2d 123,130 (Miss.1991). Jonathan’s preference to live with Cindy combined with his supportive evidence as outlined above clearly demonstrates that there has indeed been a material change in circumstances that are definitely adverse to his best interests.

Moreover the evidence presented to the Chancellor is plainly sufficient to justify the modification of the custody order from Glenn to Cindy. As such, the Chancellor abused her discretion in not following Jonathan’s stated preference.

CONCLUSION

The Chancellor after hearing testimony in this matter incorrectly determined that a material change of circumstances adversely affecting the best interests of the minor children had not occurred since the entry of Final Judgment of Divorce. The Chancellor failed to comply with the mandate of Albright and she incorrectly applied the Albright factors in finding that it would be in the best interest and welfare of the two minor children for them to remain in the primary custody and care of the father.

Additionally, the Chancellor did not make specific findings as to why Jonathan's preference to live with his mother was not in his best interest. Evidence has been presented to show that the Chancellor abused her discretion and made manifest errors. This case should be reversed and primary custody of the minor children should be transferred to Cindy Gray.

Respectfully submitted,

CYNTHIA BELL GRAY

By: 

FRITZIE T. ROSS (MSB # )

CERTIFICATE OF SERVICE

I, Fritzie Toney Ross, hereby certify that I have this date mailed, by U.

S. Mail, postage prepaid, a true and correct copy of the above and foregoing to:

Alsee McDaniel, Esquire
Attorney for Appellee
P. O. Box 858
Greenville, MS 38702

Honorable Jane R. Weathersby
Chancery Court Judge
9th Chancery Court District,
Washington County, Mississippi: Presiding Chancellor
P.O. Drawer 1380
Indianola, MS 38751

This 18 day of January, 2007.


FRITZIE T. ROSS (MSB # )