SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
NO.: 2006-CA-00931

LINDY BURGESS PURVIANCE — APPELLANT

VS

STEPHEN CHRISTOPHER BURGESS — APPELLEE

APPEAL FROM THE CHANCERY COURT OF
THE SECOND JUDICIAL DISTRICT OF
HINDS COUNTY, MISSISSIPPI

APPELLANT'S REBUTTAL BRIEF

Submitted By:

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SUMMARY OF THE ARGUMENT

Lindy's argument goes beyond the legal and factual error of the Court in not removing custody from Chris and giving custody to her, but the Court further error legally and factually in *sua sponte* modifying the original Order granting relief that was contrary to the weight of the evidence and certainly not in the best interest of Trettson. The Chancellor's decision is not support by any substantial evidence and is clearly legally erroneous and the Chancellor's ruling should be reversed and rendered.

Lindy's argument regarding the Chancellor's decision to increase her child support obligations are not supported by credible evidence and are clearly an abuse of discretion and contrary to the existing law. Contrary, the facts indicated while in the custody of the Appellee herein, he failed to provide the recommended treatment for the minor child even after the mother had gone to the trouble of scheduling an appointment to enroll the child the in the developmental program at the University Medical Center. He refused to take the child for treatment even though it was absolutely necessary.

ARGUMENT

I. THE CHANCELLOR COMMITTED MANIFEST ERROR AND AN ERROR OF LAW IN FINDING THAT LINDY BURGESS PURVIANCE FAILED TO MEET HER BURDEN OF PROOF IN SHOWING A MATERIAL AND SUBSTANTIAL CHANGE IN CIRCUMSTANCES ADVERSE TO THE INTEREST OF THE MINOR CHILD, TRETTSON BURGESS.

II. THE CHANCELLOR COMMITTED MANIFEST ERROR AND ABUSED HIS DISCRETION IN GRANTING CUSTODY OF TRETTSON AND OTHER RELIEF TO CHRIS BURGESS.

A. Lindy's argument of material change centered around the fact that while in the custody of Chris and Amanda Burgess, the child sustained physical trauma in the form of unwarranted and unexplained bruising, all which Chris Burgess alleges to have occurred at a daycare. Abuse can either be direct or as a result of negligence. The facts indicate that while in the custody of the mother, no bruising occurred. Modifications of child custody should be based on parental behavior "which clearly poses or causes danger to the mental or emotional well-being of a child". *Ballard v. Ballard*, 434 So.2d 1357, 1360 (Miss. 1983.) and *Lambert v. Lambert*, 872 So. 2d 679, 684 (Miss. 2003). The bruising spoken of by Lindy is not necessarily material as to how the bruising happened, it's the fact that it happened while in the custody and control of Chris Burgess and not while the child was in the custody and control of Lindy. The Chancellor's finding that Trettson's developmental problems may have caused frequent injuries is unacceptable. His developmental problems, to the contrary, require more close supervision and closer monitoring of his activities while at school or otherwise, all of which Chris and Amanda Burgess failed to do. Even though the Incident Reports from Willowwood, Trettson's daycare, documented the injuries, the Court erroneously made the assumption that most of the injuries occurred in the classroom or on the playground. The other evidence which the Chancellor points to as the plausible excuse for the bruising is that he injured himself at home while being allowed to climb a bookcase. Therefore, even though the abuse may or may not be direct, it was at least a result of negligence and failure to provide the supervision and control that the minor child's disabilities require. The Appellee cites Dr. Yung's

Opinion Letter of June 14, 2005 in an effort to try to convince this Court that the Chancellor was correct in assuming that the bruising to Trettson was secondary to his normal activities. In said letter, the Doctor specifically says that "most of the bruising in the photographs appear to be secondary to everyday accidents consistent for a boy his age, but there are a few bruises that appear to be non-accidental in nature. Addendum B. If it appears to be non-accidental in nature, then that infers it would have to be intentional. If the bruises were intentional then that is evidence of some sort of physical trauma that was intentionally directed at the child for whatever reason, none of which would be justifiable.

It is ludicrous for the Appellee to rely on the Court's findings that the bruises were minor. The existence of the bruises is evidence of a more menacing problem, all of which the Chancellor here ignored thus allowing the child to remain in an environment where the deep seated problem producing the bruising is left without being addressed.

The Chancellor has overlooked the entire conduct of Appellee herein since Appellee first obtained custody of the minor child. The Appellee's total agenda from that time forward was to totally eliminate the mother from the child's life. All one has to do is read Chris Burgess' testimony in the record. It is not limited to any one page, the theme runs throughout his whole testimony and that of Amanda Burgess likewise. Mr. Burgess wants to explain away the bruises by quoting the expert witness, Dr. Ray, in her report where she said that autistic children are more likely to injure themselves because of their condition. This opinion puts them on notice that this child is going to require more attention and more close supervision than a normal child of his age. The

fact of the matter is that Chris Burgess and Amanda Burgess both had neglected the child and failed to provide him the proper supervision and failed to provide him the proper treatment and education that his condition requires. This is neglect and abuse. Anyway you address it they have failed to provide the necessities for the autistic child as evidenced by Dr. Ray's testimony concerning his improvement while in the custody of his mother, Lindy.

Finally, the Appellee wishes this Court to fall back on the Chancellor's obligation to decide the credibility of the evidence. The strongest evidence presented in this case was the evidence of the medical practitioner and the Appellee's own expert, Dr. Ray. Dr. Ray's testimony and the testimony of all other people who testified, except Chris and Amanda, proved that the minor child was abused and neglected, but the Chancellor chose not to do anything about it. This is an abuse of discretion of the worst kind. If discretion should be abused, it should be an abuse on the side of caution and to grant custody to the mother, Lindy and set this matter for a review 180 days in the future to re-visit the child's best interest. It is obvious that it is not in the child's best interest by destroying any contact that the mother may have with the child, insofar as his education and medical treatment are concerned, this is what the Chancellor did by *sua sponte* destroying the joint legal custody arrangement. This further alienates the child and further undermines the ability of Lindy to maintain a normal parent/child relationship and to have some input to provide a system of checks and balances so that the minor child is being properly cared for based on his condition. The Chancellor's abuse of discretion in terminating Lindy's joint legal custody further drives a wedge between she and the minor child and destroys any

system of checks and balances that was in place for the purpose of insuring that the child's best interest would be paramount.

The Chancellor commits an abuse of discretion in his statement that there is no evidence to establish that Chris was the source of the injuries complained of. The evidence is replete with fact and testimony that the injuries occurred while under his care, custody and control, albeit, a result of the a direct act by him, or someone else or an incident that happened because the child was improperly supervised. The Chancellor's analysis does not cover all reasonable inferences as to the cause of the injury to the child.

The Chancellor further overlooks medical testimony as to the nature of the injuries and relies solely and wholly on the Willowwood Reports, which, at best, only address a portion of the injuries. The medical evidence in this case, specifically says that some of the bruises appeared to be non-accidental in nature and may indicate possible physical abuse. This is the letter given June 14, 2005, of Dr. Kenneth Yung, attached as Addendum A of the Appellee's Brief herein. The medical opinion is totally ignored by the Chancellor.

The bottom line is that the Chancellor erroneously and by way of discretionary abuse totally disregarded the professional opinions of Dr. Ray and Dr. Yung and instead relied on the self serving testimony of the Appellee, Chris Burgess and his new wife, Amanda Burgess.

B. It is obvious that Chris failed to provide proper treatment for Trettson's learning disability as evidenced by the testimony of Chris' own expert, Dr. Kimberly Ray. The fact of the matter is that Lindy had provided an opportunity for the child to

be enrolled at the autistic program at the University Medical Center that was recommended by Dr. Ray during her course of treatment of Trettson. But upon obtaining custody of the minor child, the father, Chris Burgess, did not even take the child to enroll him in the program, therefore waiving the opportunity for the child to participate in the program recommended by Dr. Kimberly Ray. Dr. Ray's own testimony was that Trettson's enrollment at Willowwood and Clinton Park Elementary School were not as good as the treatment provided at the University Medical Center but said enrollment would be better than nothing at all. After Chris started taking Trettson to Dr. Ray, she admitted that she never met with Lindy, the child's biological mother. As a matter of fact, she said she didn't have a chance to meet to visit with the child's mother or her family. [T. Pg. 101, L. 3-18]. When Dr. Ray finally contacted Mrs. Spell, Mrs. Spell was perfectly cooperative in giving her all the information she needed and doing whatever was necessary to provide the best treatment possible for Trettson. [T. Pg. 102, L. 7-22] Dr. Ray was specifically asked by counsel for Appellee:

Q. Okay. Do you have an opinion on which one of the parents – in which each one of the parents the child would fair best with, his psychological problem and autism.

A. I actually do not. I'm not in a position to put forth that without having all the information.

[T. Pg. 105, L. 29; Pg. 106, L. 1-5].

The Chancellor totally ignored this. Dr. Ray was asked. Did Mr. Burgess ever allow her to contact the child's mother and discuss his treatment with her, and Dr. Ray so, No, he didn't. As a matter of fact he misrepresented the facts to her when he told

her he was the primary legal guardian. He didn't anticipate much in the way of physical custody and interaction occurring, that he didn't anticipate much interaction. [T. Pg. 106, L. 13-22]. It is obvious from what Chris Burgess told the treating doctor that he was not going to allow Lindy to have any input into the child's treatment even though she shared joint legal custody. The Appellee wishes you to think that Mr. Burgess did every thing he could to insure the best treatment for Trettson, but in essence, the very program that the Appellant had the child enrolled in was the one that Dr. Ray had recommended, [T. Pg. 108, L. 16-39; T. Pg. 109, L. 1-9]. Dr. Ray further testified that while Trettson had been in the custody of his mother, after, Mr. Burgess refused to enroll him in the University Medical Center, that the child had actually progressed beyond her expectations. [T. Pg. 109, L. 24-29; T. Pg. 110, L. 1-17]. Dr. Ray's testimony is replete with the child's development while in the control of his mother, the Appellant herein, as evidenced by Dr. Ray's testimony. [T. Pg. 111, L. 18-29; T. Pg. 112, L. 1-29; T. Pg. 113, L. 1-29; T. Pg. 114, L. 1-29; T. Pg. 115, L. 1-29; T. Pg. 116, L. 1-29; T. Pg. 117, L. 1-29; T. Pg. 118, L. 1-18]. Dr. Ray found that Lindy would be perfectly acceptable to have custody of the minor child and to have support for him at home as evidenced by her testimony. [T. Pg. 122, L. 16-29; T. Pg. 123, L. 1; T. Pg. 124, L. 11-29; T. Pg. 125, L. 1-3]. Dr. Ray further went on to testify that Trettson's reactions when in the presence of Amanda Burgess would indicate an effort to escape and/or avoid a particular situation. [T. Pg. 132, L 1-14].

C. The Appellee wishes the Court to believe that the combined income of he and his wife, Amanda, is available for providing the treatment that Trettson requires. The financial obligation is not Amanda Burgess' financial obligation, but the

obligation of the natural biological parents, Chris and Lindy. They testified extensively about Amanda's insurance policy at her new job, as well as Chris' policy, but failed to provide any proof to the Court that Trettson would be covered under either policy and that the treatment he required would be medical treatment that the policies would pay. Chris also stated that he intended to obtain a second job to help with expenses. All of this is prospective, self-serving testimony upon which the Chancellor relied upon as part of his discretionary abuse. The record is completely devoid of any evidence of this insurance coverage or what benefits may be available for Trettson or any evidence of this well-intentioned second job. But the Chancellor's finding that "the Court has no doubt that Chris will afford Trettson with as much of the advantage (treatment) as possible" is strictly a finding based on no fact. This finding is merely accepting the self-serving statements of Chris and Amanda without any corroborative fact whatsoever. As a matter of fact, the history reveals that Chris has not taken advantage of treatment opportunities that Lindy has arranged for Trettson by way of the enrollment into the University Medical Center's program which was recommended by Dr. Ray. Chris and Amanda Burgess' testimony that they called Lindy and invited her to Trettson's treatment is totally rebutted by Dr. Ray's testimony wherein she was told by Chris Burgess that the mother, in essence, was not going to participate and should not be called concerning Trettson's treatment. The record does not factually support this testimony as the Appellee would have you believe pursuant to the *Peters v. Ridgely*, 797 So. 2d 1023 (Miss. App. 2001), decision cited in his Brief. It is mere bantering on behalf of Chris and Amanda Burgess. The simple statement is that their words and actions do not correlate. They say one thing for the benefit of the Court,

yet the facts and the record do not substantiate what they say. This is the underlying discretionary abuse by the Court in that the Court has chosen to deny the testimony of Dr. Ray as it pertains to the best interest of the child and Lindy's involvement, but instead chooses to believe the self-serving statements of Chris and Amanda Burgess.

Chris claims that Lindy would go to Trettson's school and disrupt his classes, yet produces no evidence, nothing from the school whatsoever, to corroborate or substantiate this merely self-serving allegation.

Chris' allegation that he would not attend or visit with Trettson at his Birthday or other functions because he was "scared" and wanted to bring his mother. Chris is a grown man and needs to assert his manhood for the best interest of his child. His claim of being fearful of exercising visitation without his mother present indicated or infers that he lacks the responsibility or decision making capacity to do what is in the best interest of his child.

III. THE CHANCELLOR COMMITTED MANIFEST ERROR, ABUSED HIS DISCRETION AND ERRED AS A MATTER OF LAW BY *SUA SPONTE* DISSOLVING LINDY BURGESS PURVIANCE'S JOINT LEGAL CUSTODY OF TRETTSON.

There is absolutely no facts in the record at all that would dictate that dissolving the joint legal custody arrangement in any way would be beneficial to the minor child. To the contrary, it is detrimental to the minor child in that it removes the interaction of Lindy Burgess Spell toward providing the care and treatment that Trettson deserves and needs. Clearly, Dr. Ray's testimony stated that Lindy's involvement would be very beneficial to Trettson yet the Chancellor in his discretion, without any facts to the contrary, dissolved this lifeline for reasons remaining unknown. The Appellee is

correct in his recitation of §93-5-23, Miss. Code Ann., which says that, "The Chancellor may make all Orders touching the care, custody and maintenance of the children as are equitable and just." From the record in this case the Chancellor's erroneous decision to *sua sponte* dissolve the joint legal custody was neither equitable or just. There is absolutely nothing in the record that would justify the Court's findings by way of Rule 15(b) of the Mississippi Rules of Civil Procedure or Rule 54(c) of the Mississippi Rules of Civil Procedure. These merely give the Chancellor the authority to do that where the proof exists. In the instant case, there is no proof.

IV. THE CHANCELLOR COMMITTED MANIFEST ERROR ABUSED HIS DISCRETION AND ERRED BY INCREASING LINDY'S CHILD SUPPORT OBLIGATIONS.

Again, the Court *sua sponte* increased the child support obligation without any proof in the record that such increase was warranted. The expenses of treatment for the child have not changed since the previous hearings in this matter nor has the financial position of Appellant changed that would justify an increase. As a matter of fact, the Chancellor had no updated financial information whatsoever showing an increase in the expenses or showing an increase in Lindy's ability to pay. In essence, what the Chancellor did was modify his previous order without any testimony showing a material change in circumstances that would warrant a financial modification. The cost of the treatment was the same as it had been at that time of the first hearing and the earnings of Lindy are the same as they were at that time. The Appellee's argument under *Tedford v. Dempsey*, 437 So. 2d 410, 422 (Miss. 1983); *McEachern v. McEachern*, 605 So.2d 908, 813 (Miss. 1992), are of no merit since there has been

no material change that would warrant an increase in Lindy's child support obligations.

CONCLUSION

The Chancellor's Judgment in favor of Chris Burgess is manifestly erroneous, incorrect and constitute errors at law. The Chancellor, in reaching his opinion, disregarded the expert testimony of the experts in this matter, the testimony of the Petitioner/Appellant, and all other witnesses on her behalf and based his opinion solely and wholly on the self-serving testimony of Chris and Amanda Burgess and in doing so, the Court has overlooked the"polestar consideration as the best interest and welfare of the child as the Appellee quite adequately cites in his brief. *Ash v. Ash*, 622 So.2d at 1266. This Court should reverse and render in favor of Appellant.

Respectfully submitted, this the 7 day of May, 2007.

LINDY BURGESS PURVIANCE (SPELL)

BY: _____

JOHN R. McNEAL, JR., Appellant's Attorney

CERTIFICATE OF SERVICE

I, John R. McNeal, Jr., do hereby certify that I have this day caused to be delivered by United Postal Service, first class prepaid postage or facsimile/electronic transmission and/or by hand-delivery a true and correct copy of the above and foregoing Rebuttal Brief of Appellant as follows:

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This the 7 day of May, 2007.

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