

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EMILY LOUISE PARKER DeVITO

APELLANT

VS.

CAUSE NO.2006-CA-01108

THOMAS PETER DeVITO, JR.

APPELLEE

CERTIFICATE OF INTERESTED PARTIES

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

- | | | |
|----|----------------------------|--------------------------|
| 1. | Thomas Peter DeVito, Jr. | Appellee |
| 2. | Honorable Thomas L. Zebert | Rankin County Chancellor |
| 3. | Emily Louise Parker DeVito | Appellant |
| 4. | Michael P. Younger, Esq. | Attorney for Appellant |

DATED this the 27th day of March 2007.

Respectfully Submitted,

THOMAS PETER DeVITO, JR., *Appellee*

By:

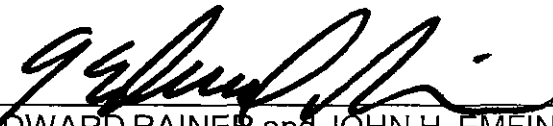

J. EDWARD RAINER and JOHN H. EMFINGER
Attorneys of Record for Thomas Peter DeVito, Jr.

Table of Contents

I.	Statement of Issues	p.1
II.	Statement of Case	p.1
III.	Summery of Argument	p. 2
IV.	Argument: The Rankin County Chancery Court Accurately Awarded Child Custody of the Parties' Minor Child to the Appellee, Thomas Peter DeVito, Jr.	p. 2 -8
V.	Conclusion	p. 9
VI.	Certificate of Service.	p. 10

Table of Cases, Statutes, and Rules

1. Albright vs. Albright, 437 So.2d 1003 (Miss. 1983) p. 2, 3, 9
2. Clerk's Papers (C.P.) p. 2, 3, 4, 6, 8
3. Hammers vs. Hammers,
890 So.2d 944 at 953 (Miss. CT App. 2004) p. 8
4. Ivy vs. Ivy, 863 So.2d 1010 at 1013, 1014
(Miss. CT App. 2004) p. 2, 8
5. Pacheco vs. Pacheco,
770 So.2d 1007 at 1009 (Miss. CT App. 2000) p. 3
6. Powell vs. Ayars, 792 So.2d 240 at 244 (Miss. 2001) p. 2
7. Transcript Record of
Hearing in Rankin County Chancery Court (R.) p. 4, 5

IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

EMILY LOUISE PARKER DeVITO

APPELLANT

VS.

CAUSE NO.2006-CA-01108

THOMAS PETER DeVITO, JR.

APPELLEE

APPELLEE'S BRIEF

I. STATEMENT OF THE ISSUE

The Rankin County Chancery Court Accurately Awarded Child Custody of the Parties' Minor Child to the Appellee, Thomas Peter DeVito, Jr.

II. STATEMENT OF THE CASE

Tommy initiated these proceedings by filing his COMPLAINT FOR DIVORCE AND OTHER RELIEF in the Chancery Court of Rankin County, Mississippi, on September 22, 2004. As grounds for divorce, Tommy alleged uncondoned adultery, habitual cruel and inhuman treatment and irreconcilable differences. (C.P. 4-17). While Emily filed a COUNTERCLAIM FOR DIVORCE (C.P. 18-27), at the conclusion of the trial, the Court found that Tommy was entitled to a divorce on the ground of uncondoned adultery. (C. P. 82-103). In addition to the Court's division of the marital property, the Court awarded legal and physical care, custody and control of the parties' minor child, Grayson, to Tommy. It is from this decision that this appeal arises.

III. SUMMARY OF THE ARGUMENT

After hearing three (3) days of testimony and upon a full consideration of the evidence presented, the trial court issued its **FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING ALBRIGHT FACTORS AND CHILD SUPPORT.** (C. P. 63-81). In the trial court's on-the-record analysis of the Albright factors (C. P. 76-80), the Chancellor found eight (8) factors which favored the award of custody of Grayson to Tommy, and the remaining four (4) factors did not favor either parent. Albright vs. Albright, 437 So.2d 1003 (Miss. 1983). In the Chancellor's analysis, not a single factor favored the award of custody to Emily. Accordingly, Tommy was awarded legal and physical custody of Grayson, subject to Emily's enumerated visitation rights. Tommy contends that the Chancellor's decision was supported by credible evidence and should be affirmed.

IV. ARGUMENT

In the present case, the Chancellor followed the dictates of this Court in reaching his decision as to the award of custody of the minor child of the parties. In Ivy v. Ivy, 863 So. 2d 1010 (Miss. Ct. App.2004), the Court said:

In order to have a meaningful appellate review of the chancellor's decision on custody matters, precedent requires that the chancellor make on-the-record findings of fact as to issues relating to custody as well as some analysis of how these facts affected the ultimate custodial decision. Case law suggests the need to utilize the framework of the enumerated *Albright factors* in making these findings and conclusions. *Powell v. Ayars*, 792 So.2d 240, 244 (Miss.2001). As a practical matter, a part of that assessment involves the chancellor's determinations as to witness credibility and what weight and worth to afford to various aspects of the testimony. In our limited review of such matters, we are not permitted to re-weigh the evidence to make our own independent determination of where we think the

weight of the evidence lies. *Id.* at 243. Rather, we must give due deference to the fact that the chancellor heard the witnesses face-to-face and, as a result, was best positioned to make those difficult subjective decisions as to credibility and trustworthiness of the witnesses. We are obligated to affirm unless we are convinced that the chancellor was plainly in error. *Pacheco v. Pacheco*, 770 So.2d 1007, 1009 (Miss. Ct. App.2000).

863 So. 2d at 1013-1014

The application of the rules set forth above should control the Court's disposition of the present appeal.

The trial court herein gave an on-the-record analysis of the evidence presented within the framework of the **Albright** factors. (C. P. 76-80). **Albright vs. Albright**, 437 So.2d 1003 (Miss. 1983). In considering the weight and worth of the evidence and in judging the credibility of the witnesses, the Chancellor ruled that Tommy is the best suited parent to be awarded custody of Grayson. The Chancellor, under each **Albright** factor, specifically pointed out his view of the evidence and his judgment as to the credibility of the witnesses as they relate to each factor. **Albright vs. Albright**, 437 So.2d 1003 (Miss. 1983). As stated above, while four (4) factors were determined by the Chancellor to specifically favor neither parent, not a single factor was found in favor of Emily in the award of custody of the parties' minor child. Alternatively, eight (8) factors favored Tommy in the award of custody of the parties' minor child, and the Chancellor's findings of fact clearly show that there is credible evidence to support his decision. The Court's analysis is as follows:

A. Age, Health and Sex of Child.

The Chancellor found that one parent was not favored over the other parent based on these factors.

B. Determination of the Parent that had the Continuity of Care Prior to the Separation of the Parties.

The Chancellor found that the best evidence in this case shows that until Grayson was approximately 3½ years of age, Tommy and Emily shared equally in the care and nurturing of Grayson. (R. 187-196). When Emily began working in the restaurant business, she would often work into the night and, sometimes stay even later to socialize. During this time, Emily provided less and less care for Grayson and Tommy became the primary care giver for Grayson. (R. 197-199). Based upon this and other testimony, the Court found that this factor favored the award of custody to Tommy.

C. Which Parent Has the Best Parenting Skills and Which Has the Willingness and Capacity to Provide Primary Child Care.

Based upon the totality of the testimony adduced at the trial, the Court found that Tommy has the best parenting skills and demonstrates the greater willingness and capacity to provide the primary care for Grayson. The Chancellor specifically mentioned, in his findings of fact, Emily's purchase of a BB gun for Grayson. The packaging for the BB gun clearly indicated that the gun was for children over the age of 10 years and

Grayson, at that time, was only seven years old. (R.79-80). Emily admitted to allowing Grayson to possess pocket knives and to allowing Grayson to play with same. (R.81-84). Emily has had multiple speeding violations prior to the Temporary Order with warning, and she has received at least one (1) violation subsequent to the Temporary Order for traveling at an excessive rate of speed while Grayson was with her in her vehicle; and, she was subsequently arrested for suspended license and expired tag after receiving such a warning. (R. 45-48). The entire testimony of Cindy Walker (R.110-129) and Jerri Lynn Hartness (R.91-109) supports the Chancellor's findings that Tommy is the most supportive of Grayson's educational and extracurricular activities. Based upon this evidence, as well as other evidence, the Chancellor found this factor to favor the award of custody to Tommy.

D. The Employment of the Parent and the Responsibilities of that Employment.

Tommy has been employed with the same employer since January of 2003. (R. 200). Emily has had several different jobs during this same period of time. Neither her past employment or her present employment are conducive to rearing a school age child. R. 37-52). The Chancellor's

finding that this factor favors the award of custody to Tommy is supported by all the testimony in this case.

E. Physical and Mental Health and Age of the Parents.

The Court found that this is not a factor that would effect either party for the custody of Grayson.

F. Emotional Ties of the Parents and Child.

The Chancellor found that the totality of the evidence in this case supports a finding that the stronger emotional ties are between Grayson and Tommy and that this factor favors the award of custody to Tommy.

G. Moral Fitness of the Parents

The Court found: "Emily has admitted under oath that she has committed adultery. Emily has admitted that she has had multiple speeding violations. She admits to drinking alcohol; she admits to drinking and driving; she admits to having her license suspended for failure to pay fines; she admits to ignoring warnings to pay tickets; she admits to subsequent arrests for failing to pay attention to the warnings; and, she admits to attending nude strip clubs. On the other hand, though Emily has tried to paint Tommy as a pornography freak and as an adulterer, she has failed on both accounts. Tommy has no arrest record. Clearly, Tommy is favored on the moral fitness factor for custody of Grayson." (C. P. 78-79). Clearly

the Chancellor considered all the evidence and found Tommy's to be more credible and found Emily's, on these issues, to be insufficient.

H. The Home, School, and Community Record of Grayson.

The Court found that Grayson's academic record was solid. He is attending the same church he has always attended. He is in the same house, the same bedroom and same school. He continues to be active, with Tommy's support, in extracurricular activities. The Chancellor found that because these things are true and will continue to be true if custody is awarded to Tommy, that this factor favors Tommy.

I. Grayson is Not Yet 12 Years of Age, and Therefore, He Cannot Express a Preference As to Who Should Get Custody.

The lower court obviously found that this factor favored neither party.

J. Stability of Home Environment and Employment of Each Parent.

The Chancellor found that the testimony, taken as a whole, clearly favors the award of custody to Tommy under this factor. The Court repeated the findings he had previously mentioned relative to Grayson's present home environment and the employment situation of both parents.

K. Other Factors Relevant to the Parent/Child Relationship

Again, in the Court's opinion, the evidence as a whole favored the award of custody to Tommy. Not a single factor favored the award of custody to Emily.

From a review of the Appellant's brief, it is clear that Emily wants this Court to reconsider the evidence. Emily wants this Court to find that Tommy is a "pornography freak and an adulterer". This position was clearly and expressly rejected by the Chancellor when he noted that Emily's proof "had failed on both accounts." (C.P. 79). Pursuant to Ivy v. Ivy, *supra*, this Court must give due deference to the Chancellor's finding on this point.

To be sure, the Appellant's position, as expressed in her brief, is that the lower court should have given different testimony, greater weight. Emily's entire argument is based upon the premise that, on appeal, this Court should look at the evidence more favorable to her position and discount the evidence more favorable to Tommy. That simply is not the standard of review this Court is required to use on appeal. Instead, this Court must affirm the decision of the Chancellor herein, even if this Court's own analysis of the evidence, on appeal, would have given greater weight to different testimony. This Court should view the evidence in the light most favorable to Tommy. Because there is ample credible evidence to support the Chancellor's decision, it should be affirmed. See Hammers v. Hammers, 890 So. 2d 944, 953 (Miss. Ct. App. 2004).

V. CONCLUSION

The Chancellor watched and heard the witnesses testify in this matter. The Chancellor was in the best position to judge the credibility of each witness and to determine the weight and worth of each evidentiary fact. He applied the proper law when he considered the evidence within the framework of the Albright factors. Albright vs. Albright, 437 So.2d 1003 (Miss. 1983). Based upon his analysis, he found that Tommy is the best suited parent to be awarded custody of Grayson. The law does not allow this Court to do what the Appellant suggests. This Court, on appeal, is not permitted "to re-weigh the evidence to make our own independent determination of where we think the weight of the evidence lies". Instead, because the Chancellor's decision is supported by credible evidence, custody of Grayson must be affirmed in Tommy.

DATED, this the 27th day of March, 2007.

Respectfully submitted,

THOMAS PETER DEVITO, JR., *Appellee*

By:


J. Edward Rainer and John H. Emfinger
Attorneys for the Appellee

CERTIFICATE OF SERVICE

I, J. Edward Rainer, of the law firm of the Rainer Law Firm, PLLC, attorney for Appellee herein, do certify that I have this day delivered a true and correct copy of the above and foregoing BRIEF OF APPELLEE to the following person, as attorney for Appellant, in a manner authorized by law:

**MICHAEL P YOUNGER ESQ
1700 WEST GOVERNMENT STREET
BUILDING B, SUITE 102
BRANDON MS 39042**

and

**HONORABLE THOMAS L. ZEBERT, CHANCELLOR [RETIRED]
20TH JUDICIAL DISTRICT
POST OFFICE BOX 1437
BRANDON, MISSISSIPPI 39043**

**HONORABLE THOMAS L. ZEBERT, CHANCELLOR [RETIRED]
115 LOYD STREET
PEARL, MS 39208**

DATED, this the 27th day of March, 2007.



J. Edward Rainer

PREPARED BY:

J. EDWARD RAINER, MB # [REDACTED]
JOHN H. EMFINGER, MB# [REDACTED]
RAINER LAW FIRM, PLLC
2006 Courtside Drive
Post Office Box 258
Brandon, MS 39043-0258
Telephone: (601) 825-0212
Facsimile: (601) 825-0219