

**IN THE SUPREME COURT OF
THE STATE OF MISSISSIPPI**

2006-CA-01108

EMILY LOUISE PARKER DEVITO

APPELLANT

VS.

THOMAS PETER DEVITO, JR.

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF
RANKIN COUNTY, MISSISSIPPI**

BRIEF OF APPELLANT

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Oral Argument is Requested

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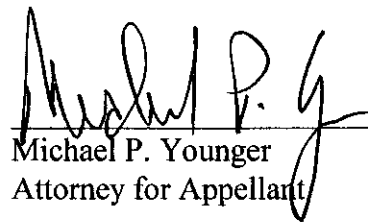
APPELLEE

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following parties have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Emily Louise Parker DeVito, Appellant
2. Thomas Peter Devito, Jr., Appellee
3. Michael P. Younger, Esq., attorney for Appellant
4. J. Edward Rainer, Esq., attorney for Appellee
5. Honorable Judge Thomas L. Zebert, Rankin County Chancery Court Chancellor

Respectfully submitted,



Michael P. Younger
Attorney for Appellant

TABLE OF AUTHORITIES

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STATEMENT OF THE CASE

CASE

On September 22, 2004, the Appellee filed a Compliant for Divorce against the Appellant in the Chancery Court of Rankin County, Mississippi. (R.E. 5) (T.4)

The main grounds for divorce were adultery.

There was one child born to the marriage, namely Grayson Thomas DeVito, whose birthday is September 23, 1998.

An Answer and Counter Complaint was filed by the Appellant on October 7, 2004. (R.E. 19) (T. 18)

A temporary hearing was conducted and during said hearing the Appellant admitted to a two week affair with a man that was conducted outside the presence of the child.

The lower court awarded temporary custody to the Appellee. The temporary hearing was conducted on November 15, 2004 and the trial on the merits was conducted in January of 2006 on the 25th, 26th, and 27th.

More than a year elapsed between hearings and it is important to note that the Appellant, being the non-custodial parent, was not allowed to even pick up the minor child from school during this time.

The issue at the lower court level that is the subject of this appeal is not the divorce itself, but rather the awarding of custody to the Appellee.

At the lower level, the issues involving the Appellee were as follows, to-wit:

1. Viewing massive amounts of pornography during the marriage, some of which was stored in the computer that the child played video games.
2. The veracity of the Appellee

3. Proof of adultery on the part of the Appellee with one Amy Smith, all in the presence of the child.
4. The Appellee's spotty job history.

The lower court paid no attention to the proof submitted on these issues which amount to manifest error.

STATEMENT OF THE FACTS

The Complaint for Divorce was filed on September 22, 2004 by the Appellee. (R.E. 5)

The Appellant filed her counter suit with each party asking for custody of their minor son, Grayson, whose birthday is September 23, 1998.

Most all of the parties' property was divided with custody of the child being the primary issue.

A temporary hearing was conducted in November of 2004. This was followed by a trial on the merits on January 25, 26 and 27 of 2006.

At the temporary hearing in 2004 the Appellate admitted to a two week affair with a man not her spouse conducted outside the presence of the child. (R.E. 83) (T.24)

The court awarded temporary custody of Grayson to the father. It is important to note that this temporary order was in effect for more than one year which caused the Appellant to lose continuity of care with the child.

The Appellant was called by the Appellee as the first witness and she recited her education and job history as well as her going to church at Pine Lake Baptist Church. (R.E. 85-91) (T.35-41) (R.E. 93) (T.71)

In the more than one year between hearings the Appellee began a relationship, which will be discussed later, with one Amy Smith who herself was married with two children. This is important as it relates to some of the Appellee's witnesses.

The next witness was Terri Lynn Hartness. She worked for the child's day care at Oakdale Church.

The Appellant had summer time visitation with the child and Ms. Hartness admitted that the child never missed being at Oakdale during the summer when the Appellant had the child.

(R.E. 96) (T.102)

In fact, Amy Smith had checked Grayson out of school eight times in 2004 and 2005 while claiming to this witness that she was not married. (R.E. 98-99) (T.104-105)

The next witness, Cindy Walker, was Grayson's teacher at school. Her testimony was that both parents attended school events and the Appellant missed only one and she called the teacher and made that meeting up at a later date. (R.E. 102-103) (T.126-127)

At this point it is important to realize that the Appellant's position was that the Appellee was addicted to hard core pornography, some of which was on the computer the child used to play on in their home and that he had began a relationship with Amy Smith that consisted of Grayson sleeping with her children while the Appellee slept with Ms. Smith.

The Appellee had admitted to viewing pornography on the child's computer in sworn request for admissions, interrogatories and in his deposition. (R.E. 28) (R.E. 159-160) (T.270-272)

In light of these allegations and admissions, the Appellee's next witness was Gary Fallon who owned a computer business. He had examined the hard drives of the two computers in question. He was called as an expert for the Appellee.

At the time of the separation the Appellant who was suspicious of her husband's use of these two computers took the machines to a computer repair place and had them to remove the hard drives and then mailed them to a computer expert named Matt Bombeck. (R.E. 287-288) (T.414-415)

Fallon, the Appellee's "expert" testified that pornography had been purposely deleted from the computers' software but was still stored in the hard drive. (R.E. 107-108) (T.155-156)

Fallon was not aware that the Appellee had admitted under oath that he had viewed

pornography. (R.E. 113) (T.161)

Under cross-examination Fallon was asked about specific hard core pornography that he pulled off the computer and he admitted that there was a large volume of it. (R.E. 114-123) (T.163-171)

Fallon was aware that pornography was on the child's computer and admitted that a child could accidentally pull these images up. (R.E. 124-127) (T.172-180)

Exhibit D-14 was introduced through Fallon which was just one example of the type of pornography being accessed.

The Appellee was called next. He denied under oath that he had viewed pornography on the two computers despite having previously admitted same under oath in three sworn documents. (R.E. 127) (T.180)

He admitted wrapping Christmas presents for Grayson with Amy Smith but denied a sexual relationship. He also stated he had no future plans with Ms. Smith. (R.E. 1301-32) (T.185-187)

The Appellee's testimony was stopped at this point so that Leah Smith could be called out of turn.

Leah had known both parties all of their married life. (R.E. 133) (T.202)

Leah stated that the Appellant was a very good parent with good parenting skills and she had a nice home where Grayson had his own room. (R.E. 135-140) (T.204-209)

In fact, Leah and her husband had made arrangements for the Appellant to be legal guardian of their own child in the event of their death. (R.E. 141) (T.210)

She described three incidents involving the Appellee and herself that were crass and lewd and stated she would not leave her child with the Appellee. (R.E. 143-147) (T.212-216)

The Appellee then resumed the testimony.

He denied viewing pornography and was completely impeached by his answers to interrogatories, admissions and deposition testimony. (R.E. 159-161) (T.278-272)

Previously Exhibit D-18 had been marked for identification through Fallon. The Appellee denied the pornography again despite the fact that his own expert testified that pornography was on his computers in great volumes. (R.E. 166) (T.277)

An important note that will be relevant later, the Appellee did not know his whereabouts on August 30, 1999, July 17, 2004, June 5, 2001 and October 8, 2004. (R.E. 168-169) (T.279-280)

The next topic addressed to the Appellee was his relationship to Amy Smith.

He first started seeing Amy Smith in April of 2005 and knew that she was married to Jason Smith who separated from Amy in August of 2005. (R.E. 174) (T.285)

He admits that he and Amy Smith had hugged and would spend time with each other at their respective houses when the children of both were with the non-custodial parent. (R.E. 178) (T.289) Also, he admitted they were at each other's homes when the children were present.

Prior to the trial in this cause the undersigned took the deposition of Amy Smith. The Appellee was present at the this deposition and during the trial was questioned about Amy Smith's deposition testimony. (R.E. 181-190) (T.293-300)

The Appellee was well aware that Amy Smith's husband was seeking a divorce from Amy because the husband believed a sexual relationship had developed between Amy Smith and the Appellee.

The Appellee again testified that he was with Amy Smith three or four days a week yet he stated he did not know when Amy Smith's divorce was going to be final. (R.E. 199) (T.310)

The Appellee, on direct, stated that he, during the course of the marriage was only out of work one or two weeks. As will be discussed later, the Appellant's position on this was that the Appellee was unemployed for long periods of time forcing her to work long hours to support the family.

It is very important now to note that the Appellee was impeached totally where his work record was concerned. (R.E. 206-212) (T.317-323)

He drew California unemployment checks totaling \$6,000 while the parties lived in California and while the Appellant was going to school.

As has been stated before, the Appellant's position concerning the Appellee's request for custody focused on his use and abuse of pornography even on his own child's computer, his conducting a relationship with Amy Smith in the presence of Grayson and his spotty work record.

Small children talk about what they see and in the fall and early winter of 2005 the Appellant became concerned about the living arrangements at the Amy Smith household and at the household of the Appellee. The child, on several occasions, stated that he slept with Ms. Amy's kids while his dad slept with Ms. Amy.

This is why the next witness is so important to the issue of custody.

Bear in mind that Amy Smith's home is two doors down from the home of the Appellee.

Archie McKay was a private process server who was given a trial witness subpoena to be served on Amy Smith.

On December 7, 2005 Mr. McKay went to the home of Amy Smith at 4:00 p.m. The outside Christmas lights were on and no one was home. He saw a water disconnect notice on the door and went back at 8:20 p.m. and stayed until 10:00 p.m. No one was home. He did notice

the water notice had been removed.

He goes back to the residence at 6:30 a.m. on December 8, 2005 and stayed until 8:00 a.m. and no one was home. (R.E. 243-248) (T.350-355)

The Appellee and Amy Smith Testified Mrs. Smith was at the Appellee's house on December 7, 2005 wrapping Christmas for Grayson when the Appellant arrived at 8:30 p.m. to deliver the child. (R.E. 203) (T.314)

The Appellee stated that Mrs. Smith and her kids left at 8:45 p.m. and came back a few minutes later to bathe the Smith children and then the Smith kids and Amy went to her house before 9:00 p.m., being a total contrast to McKay's testimony.

Matt Bombeck was qualified as an expert for the Appellant in the area of retrieving information from computer hard drives. (R.E. 248-272) (T.355-388)

Bombeck's testimony was that he was sent three computer hard drives by the Appellant who had asked him to examine same for their contents.

What he found were volumes upon volumes of all types of photography dating back to 1999 on two of the hard drives including Grayson's hard drive. (R.E. 260-261) (T.367-368)

Bombeck stated that the user accessing this pornography would have to be seeking same intentionally for this information to show up on the hard drives. The pornography sites had been deleted from the software but not the hard drive and the deletion was intentional.

The Appellant will later testify that the Appellee had a key to the marital home after the separation and she had someone look at the software who saw pornography. The next day she came home from work and the software had been deleted.

Bombeck downloaded some of the pornography on to a C.D. and printed out some examples of the thousands of pages of pornography located in the family computer and the

child's computer.

He stated that the pornography was located in files within files on these two computers and that with this volume of material it could not be an accident.

At this point in the trial exhibits D-18, D-20, and D-21 were introduced showing a random sample of the material on these two hard drives.

D-20 is important in that it is a sampling of four random pornographic hits with specific dates and times. The four dates are the dates the Appellee had no explanation of his whereabouts.

A close examination of exhibits D-18, D-14, D-20, and D-21 show the depraved nature of the user who not only accessed these sites, but accessed them on the child's computer.

Bombeck was adamant that there was no likelihood that someone had tampered with hard drives due to the sheer volume of the pornographic material (R.E. 271-272) (T.387-388)

Fallon the Appellee's expert was re-called as a witness and again, on cross, he admitted that there were large volumes of pornography in these hard drives and in order for them to be in the drives they would have to be accessed by a user.

Bombeck had previously testified that a child could double click on these computers and accidentally access same. (R.E. 263) (T.370)

The Appellant took the witness stand to testify. She stated that the Appellee's computer name was tdevito@bellsouth.net (R.E. 281) (T.408)

This is the same web site where Bombeck says he found pornography.

The Appellant knew her exact whereabouts on the four dates and times listed in Exhibit D-20 (R.E. 281-283) (T.408-410)

She explained the unbroken chain of custody of the two computer hard drives in her

efforts to supply Bombeck with same. (R.E. 287-288) (T.414-415)

She testified that since before the November 2004 temporary hearing she had seen no one romantically. (R.E. 291) (T.418)

The Appellant described the continuity of her care of Grayson from birth until the trial itself. (R.E. 292-302) (T.419-429)

She described the Appellee's work history and pointed out that for long periods of time the Appellee would be out of work and she would hold one or even two jobs to pay family bills. (R.E. 300-301) (T.427-428)

The Appellant was also present at Amy Smith's deposition and she told the court that she heard Amy Smith, while under oath, state that her husband, Mr. Smith, was convinced that Smith and the Appellee were having a sexual affair. The Appellant also quoted Amy Smith as saying she and the Appellee had hugged and had a future together. (R.E. 316-318) (T.443-445)

The Appellant described what she saw at the Appellee's house on December 7, 2005 and what times she dropped Grayson off and what time she called Grayson that night and heard other children in the background (R.E. 318-319) (T.445-446)

The Appellee made an issue out of the Appellant giving Grayson a B.B. gun and the Appellant explained that the gun's only use was to shoot Dr. Pepper cans. (R.E. 325) (T.425)

Lastly, the Appellant told the Court that she and Grayson attend Pine Lake Baptist Church when she has him. (R.E. 326) (T.453)

The last witness was a reluctant Amy Smith who testified that the Appellee was her very best friend. (R.E. 341) (T.490)

ARGUMENT

A Chancellor's findings of fact will be upheld unless they are shown to be manifestly wrong, clearly erroneous or an erroneous legal standard was applied. G.B. "Boots" Smith Corp. v. Cobb, 960 So. 2d 774 (Miss. 2003) The standard of review for questions of law is de novo. Parkerson v. Smith, 817 So. 2d 529 (Miss. 2002)

ISSUE ONE

THE CHANCELLOR COMMITTED REVERSIBLE ERROR IN AWARDING
CUSTODY OF GRAYSON DEVITO TO THE APPELLEE.

After conducting the trial in January of 2006, the Chancellor entered his Findings of Fact and Conclusions of Law (R.E. 32) (T.63) Vol. 1

As has been stated above, the Appellant had a brief affair with a man before the separation but not in the presence of the minor child. This equated to grounds for divorce; however, should not have been considered as the driving force to give the Appellee custody.

The evidence at the trial strongly suggest that the Appellee, since April of 2005, was having a relationship with Amy Smith, a married mother of two children, which said relationship was openly being conducted in the presence of Grayson DeVito.

The evidence addressed at trial showed that after November of 2004 the Appellant exhibited no conduct in the presence of Grayson that was anything other than normal. In fact, the basis for the Chancellor's findings appear to rest solely on the temporary hearing and not the evidence adduced at trial.

In the Chancellor's Findings of Facts, in referring to Jerri Lynn Hartness, he states that she never saw the Appellant at day care in the summer of 2005.

In fact, the Appellant had possession of the child during the summer of 2005 and Ms. Hartness said Grayson never was absent from said day care. The Appellant, during this summer, provided all the transportation to and from the day care and Ms. Hartness admitted she did not normally see who picked up kids from Oakdale.

The findings of fact as they pertain to Gary Fallon's testimony stated that the Appellee denied visiting web sites that would have resulted in the images that were found on the hard drive. (R.E. 38) (T. 69) Vol. 1

The Court completely ignored the Appellee's three admissions in discovery, under oath, where he confessed to watching pornography on both computers in the home.

Also, the Court found Exhibit D-18 and D-20 did not amount to much since one image dated October 17, 2004 was visited after the Appellee left the marital domicile.

The Court completely ignored the testimony of the Appellant who testified she had someone come to the home before November of 2004 and this computer person found pornography on the software. She testified that the Appellee still had a key to the home and was coming and going and that the day after the software was seen, it got deleted while she was at work.

If the Appellant was trying to "frame" the Appellee with pornography, why would she have destroyed the software? It makes no logical sense.

Both computer experts agreed that volumes of pornography were on the hard drive and that the software had been deleted.

In examining the Exhibits D-14, D-18, D-20, and D-21 it is clear that whoever pulled up the images is depraved and immoral.

Both experts agreed that some user with good computer knowledge could pull up and

then hide the images.

The only person with access to the two computers were the Appellant, the Appellee, and the child.

Who do you believe? The Appellee who handles computer work for a living and who admitted three times under oath to viewing pornography on both computers, or the Appellant whose only computer knowledge was e-mail opening and making patient appointments for her doctor employer?

Such computer images should have been given much greater weight to the custody situation than they were.

The Findings of Fact almost insinuate that the Appellant was responsible for this material when the greater and larger body of evidence points to the Appellee.

The Appellee's expert even admitted it would take a very literate computer person to delete that much information from the software.

The issues of the relationship between Amy Smith and the Appellee was not even taken into consideration by the Court.

The Appellant had been hearing things about this relationship from her child and testified that on many occasions when she either picked up Grayson or dropped him off, that Amy Smith and her children would be present.

The Court completely ignored the testimony of Archie McKay and the Appellant in regards to December 7 and 8 of 2005.

By the admission of all, Amy Smith was at the Appellee's house that night.

McKay testified that on December 2, 2005, a school night, he was at Amy Smith's house until 10:00 p.m. and no one was home. He came back on December 8, 2005, a school day, from

6:30 a.m. to 8:00 a.m. and no one was home.

This totally contradicts the Appellee's story and that of Ms. Smith who stated she was home no later than 9:00 p.m.

The Appellee and Ms. Smith testified that they gave each other hugs and were in each other's homes three or four days a week and they spent time alone with each other when their kids were gone and when their kids were present.

That means that at least three or four times a week prior to trial, Grayson DeVito was in the presence of a woman with children who was not his mother and was married to someone else.

Amy Smith's deposition clearly showed that her husband was accusing the Appellee of breaking up his marriage.

This relationship with Ms. Smith began in April of 2005 with Mr. Smith leaving her the following August.

What could be more clear? Plainly the Appellee and Amy Smith were conducting themselves in front of Grayson in a manner that was immoral and probably very confusing to Grayson.

Amy Smith, since April of 2005, was on the pick up list at Grayson's school, just like a parent, and the Appellee would not allow the Appellant to pick the child up.

As the Court has recited in past decisions, there are several factors to consider when making a custody award. Albright v. Albright, 437 So. 2d 1003 (Miss. 1983)

The factors are as follows:

1. The age, health and sex of the child;
2. Which parent had continuing care of the child prior to separation;
3. Which parent has the best parenting skills;

4. Which has the willingness and capacity to provide primary child care;
5. Employment responsibility of both parents;
6. Physical and mental health and age of parents;
7. Emotional ties of the parent and child;
8. Moral fitness of the parents;
9. Home, school and community record of the child;
10. Age preference at age 12;
11. Stability of the home environment and employment of each parent;
12. Other relevant facts.

Albright also states that neither the relative financial conditions of the parents, nor differences in religion, personal values or lifestyles should be the sole basis for a custody decision.

With regard to marital fault, this Court has stated that sexual behavior alone is not enough to deny custody to a parent. Moak v. Moak, 631 So. 2d 196 (Miss. 1994)

In McGraw v. McGraw, 631 So. 2d 1181 (Miss. Ct. App. 2003) this Court held and supported custody to the wife even though the wife admitted to romantic involvement with two different men.

In looking at the Albright factors, factor number one favors both parents equally.

In looking at number two, continuity of care, the evidence was clear that for the first four years of the child's life, the Appellant had the total continuity of care. She took the child to school with her when the parties lived in California and then was forced to work one and two jobs during the long periods when the Appellee was not working. The Court should not subsidize laziness with an award of custody.

When both parents became employed at the same time, Leah Smith and her mother acted as day care for the parties.

At best, the Appellee only gained continuity of care after the temporary hearing in November of 2004.

As to Factor 3, the best parenting skills, again Leah Smith testified that should something happen to she or her husband, in that event, the Appellant was to be their child's guardian.

I looking at Factor 4, willingness and capacity, it was shown that during the marriage the Appellee was employed for long stretches and had held five separate jobs.

The Court notes that the child should be with his friends and doing homework, the Court ignored the fact that primarily after school the child was with Amy Smith.

Factor 6 favors neither parent.

In Factor 7, the emotional ties, the Court again ignored Leah Smith's testimony and the Appellant's concerning the Appellant's ties to the child. The child has strong ties with both parents and the Court should have ruled that neither party outweighed the other in this category.

In Factor 8, moral fitness, the Court totally ignored the following testimony:

1. Appellee smokes at home and in the car;
2. Grayson rides in the car;
3. Appellee is openly pursuing an active relationship with Amy Smith in the presence of Grayson;
4. Appellee viewed pornography for year on family computers, one of which the child used to play video games; and,
5. Appellee kept the Appellant from picking up the child from school;

The only instance of any activity involving the Appellant and the child was a speeding

ticket. This came as a result of the Appellee threatening the Appellant with jail if the child was not returned early from her visitation. There is no testimony in the record that the Appellant drank and then drove a car.

CONCLUSION

Much testimony was given in the trial concerning the ability of both parents to have custody. All of the lower Courts finding came from the temporary hearing, which was conduct not involving Grayson.

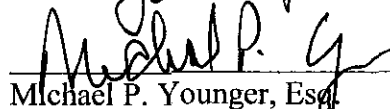
All of the tesimony adduced concerning the Appellee's fitness was totally ignored.

These issues are grave and serious and could have a long term impact on Grayson.

The Court should have given serious consideration to the conduct of the Appellee in front of the child- i.e. Amy Smith- and the type, kind and nature of the pornogrphahy involved in this case.

It is respectfully requested that the custody decision be reversed.

Respectfully submitted this the 3 day of January, 2007.



Michael P. Younger, Esq.

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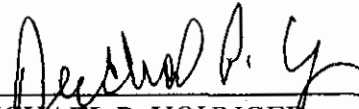
CERTIFICATE OF SERVICE

I, Michael P. Younger, do hereby certify that I have this date mailed a true and correct copy, via U.S. Mail, of the above and foregoing to:

Thomas L. Zebert, Chancellor
Rankin County Chancery Court
HAND DELIVERED

J. Edward Rainer, Esq.
HAND DELIVERED

This 3rd day of January, 2007



MICHAEL P. YOUNGER