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

FRANKIE WADE, JR., APPELLANT

VERSUS CASE NO.: 2006-CA-01504

KATINA WADE APPELLEE

Appealed from the Chancery Court of Forrest County, Mississippi
Cause No. 2005-0710-GN-TH

BRIEF OF THE APPELLANT

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

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 Justices of the Supreme Court and/or Judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable Nita L. Chase
Attorney at Law
10345 D'Iberville Boulevard, Suite D
Biloxi, MS 39540

Honorable James H.C. Thomas, Jr.
Chancellor
P. O. Box 807
Hattiesburg, MS 39403-0807

Kameshia Yolanda Latasha Wade – Minor child of the parties.

William Clark – Minor child of the Appellee.

DATED this the 23rd day of March 2007.

CHARLES E. LAWRENCE, JR.
Attorney for Appellant

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STATEMENT OF THE CASE

This is an appeal from a decision of the Chancellor of Forrest County vacating a portion of a judgment of divorce that was granted uncontested and changing the custody of the minor child that had previously been awarded to the Appellant and granting custody to the Appellee. Further, the court made a division of the marital assets which the Appellant contends was not equitable and just after the court would not award the property to the Appellant in the uncontested proceeding.

STATEMENT OF THE FACTS

The Appellant and the Appellant are the parents of one child. (Tr. pages 10 and). On November 15, 2005 the Appellant filed a Complaint for Divorce seeking a divorce from the Appellee. (R.E. page 3). A copy of the complaint and a summons was personally served upon the Appellee on November 15, 2005. (R. E. page 2). The Appellee nor anyone on behalf of the Appellee ever responded to the complaint nor made any effort to contact the attorney for the Appellant to indicate a desire to contest or dispute the complaint for divorce. (R. E. pages 2, 13-16) and (Tr. pages 30-31). After the passage of more than thirty, (30), days the Appellant proceeded with his complaint for divorce and obtained a divorce from the Appellee on January 10, 2006. (R. E. pages 8-12). In the complaint for divorce the Appellant prayed for and requested the following relief:

1. A divorce absolute of and from the defendant;
2. Care and custody of he minor child of the parties subject to Appellee's visitation rights;
3. A reasonable sum to be paid by Appellee for child support and for the Appellee to maintain health, hospitalization and ental insurance on the minor child;
4. Appellee to maintain a life insurance policy upon herself in the minimum amount of $100,000 and to name the minor child as beneficiary;
5. Appellee to be responsible for the college education and expenses of the minor child;

6. Award Appellant exclusive sole possession and ownership of the real property and the personal property set forth therein and to award the Appellee the sole ownership and possession of the personal property set forth therein; (R.E. page 5);
7. Each of the parties to be responsible for their own respective bills and to pay for the property they were awarded and to hold each other harmless from the payment thereof;
8. Assess all cost to the Appellee; and
9. General relief.
(R. E. page 6).

The court upon hearing the Appellant's complaint as an uncontested matter in open court granted to Appellant a divorce on the grounds of habitual cruel and inhuman treatment and awarded custody of the parties minor child to the Appellant and ordered the Appellee to contribute towards the support of said minor child by paying $200.00 per month child support. (R.E. pages 8-12). The court refused to award the Appellant the property he prayed for in his complaint and instead took the matter under advisement. (R. E. pages 10 and 12). A copy of the judgment of divorce was forwarded to the Appellee and she filed a motion to set aside the judgment pursuant to Rule 59 of the Mississippi Rules of Civil Procedure (R.E. page 15). Subsequent thereto the Appellee argued for and requested custody of the minor child together with child support and an equitable division of the marital property. The Court upon hearing arguments on the Appellee's motion entered an order that granted the Appellee's Rule 59 motion in part. (R. E. pages 18-20). Thereafter, a hearing was held on the issue of custody, support and division of property on June 27, 2006 and the court changed custody of the minor child from the Appellant to the Appellee and awarded the Appellee child support and divided the marital property. (R. E. pages 36-43).

SUMMARY OF THE ARGUMENT

The court abused its discretion by reopening the issue of custody to consider the Fulbright factors when the Appellee sat upon her rights and thereafter modified the judgment of

divorce and changed custody of the minor child from the Appellant to the Appellee. The Chancellor abused his discretion by holding in abeyance a decision on the awarding of property to the Appellant when the Appellant sought it in his request for relief and the Appellee had personal notice thereof and failed to contest the issue.

ARGUMENT

I. The chancellor abused his discretion by revisiting that portion of the judgment of divorce, which granted the Appellant custody of the minor child of the parties and applied the wrong legal standard as no material change in circumstances had occurred since the date the Appellant was awarded custody.

The court awarded the Appellant an uncontested divorce on January 10, 2006. (R. E. pages 8-12). The Appellee never entered an appearance in the proceeding until the motion to set aside was filed on January 20, 2006 (R. E. page2). The Appellee testified that she spoke with an attorney and thought that said attorney was going to represent her but she never retained the attorney by paying him a fee. (Tr. page 30-31). The Appellee offered no proof that she had spoken with an attorney by producing such proof as a receipt for a consultation.

The chancellor "revisited" (R.E. page 19), the issue of custody and thereby vacated the custody provision of the judgment of divorce in order to apply the factors as established in case of Albright v. Albright, 437 So.2d 1003, 1005 (Miss 1983). The court in its order of April 24, 2006 (R. E. pages 18-20), did not by its order set aside or vacate the custody provision of the judgment of divorce but rather ruled that the issue of custody would be "revisited" base upon the Albright factors. The Appellee never argued nor contended that the Appellant was unfit or possessed any characteristics, which would be detrimental to the minor child if he was allowed to retain custody of the minor child. The Appellee and her witness both testified that the Appellant was a good father. (Tr. pages 46 and 56).

Albright, id at page 1005, established ten (10) specific factors and one (1) general factor that the court must consider in determining the best interest and welfare of the child for the purpose of establishing which of the parents should be awarded custody. However, Albright does not mandate that the custodial parent must possess a simple majority of the factors or that each factor is to be given equal weight. Of the factors considered, three (3) favored the mother, one (1) favored the father, two (2) were not applicable and the remainder were equal. (R.E. pages 38-39 and Tr. pages 124-127).

Since the Appellant had custody of the minor child, the question becomes whether the three, (3) factors that favored the Appellee were sufficient to bring about a change in custody. Stated another way, after the Appellant was awarded custody of the minor child, do the three factors that favored the mother under the Albright test rise to the level of a material change in circumstances which necessitates a modification of the judgment of divorce by granting a change in custody. After the Appellant was awarded custody of the minor child there was a material change in the number of days the child was absent from school and the improvement in her school performance. (R. E. Exhibits 3 and 4 and Tr. pages 36-38). If the minor child's performance in school was an indicator of how being in the Appellant's custody affected her, then it certainly had a positive effect and was not negatively impacted by the factors, which favored the Appellee. Further, the Appellee as the moving party seeking a change of custody was obligated to prove a material change in circumstances had occurred since the original order was entered, which was adverse to the best interest of the child. *See*, Grissom v. Grissom, 2005-CA-01738, page 5 (Miss. App. 3-20-2007) citing Mabus v. Mabus, 847 So.2d 815, 818 (Miss. 2003).

The Appellant was very capable of providing for and taking care of the minor child of the parties. The best interest of the child, as proven by the evidence, for her to attend school

regularly and achieve academically would have been to remain with the Appellant. The Court in reaching its decision to change the custody of the minor child from the Appellant to the Appellee based upon the Appellee's Rule 59 Motion failed to make a finding that it was altering or amending the judgment due to a mistake in law or fact that had been previously made, or that an injustice would attend allowing the judgment to stand. *See*, Mayoza v. Mayoza, 526 So.2d 547, 549 (Miss. 1988).

As in Mayoza the Appellee made no showing of newly discovered evidence and offered no reason why she could not have appeared at the January 10, 2006 trial and offered her evidentiary defenses. *See*, Mayoza, *id.* at page 550.

II. The Chancellor abused his discretion when he held in abeyance a decision on awarding the Appellant property he sought in his request for relief at the time the divorce was granted.

There was no legal basis for the Chancellor to hold in abeyance a decision on the issue of awarding the Appellant the property he requested in his prayer for relief when the Appellee had notice of the complaint and the relief requested. If the Appellee had entered an appearance and contested the Appellant's requested award of property the court would have been bound to first determine what was marital property under Hemsley v. Hemsley, 639 So.2d 909 (Miss. 1994), and then apply the factors as established in Ferguson v. Ferguson, 639 So.2d 921, 928 (Miss. 1994). *See also*, Stewart v. Stewart, 864 So2d. 934, 937 (Miss. 2003). However, since the Appellee failed to enter an appearance or respond to the complaint the Chancellor had no authority or legal basis to deny the Appellant the relief he requested.

The Appellant in his complaint for divorce requested that he be awarded ownership of the real property, three (3) automobiles, a bass boat, big screen television and stereo equipment. The

Appellant further requested that the court award to the Appellee the mobile home together with the furniture therein and an automobile. The Appellant was very specific with identifying the property as set out in paragraph 9 of his complaint. Once the complaint was served upon the Appellee she had full notice of the property that the Appellant sought to be awarded by the Court and she had full knowledge of property that the Appellant requested to be awarded to her. However, at the time the divorce was granted on January 10, 2006 the Chancellor held in abeyance a decision on the division of property even though it was not contested.

In the case of Wilson v. Wilson, 820 So.2d 761 (Miss. App. 2002) the Appellant was awarded a divorce on his counterclaim for divorce after the Appellee petitioned the court to dismiss her complaint for divorce through correspondence to the court. The court upon hearing Mr. Wilson counterclaim awarded him sole possession of the marital home. The Chancery Court subsequently vacated that portion of the judgment of divorce relating to the division of marital property and awarded Mrs. Wilson a one-half interest in the marital home. (Id at page 762). The Court of Appeals determined that the chancellor vacated the property division based upon principles of equity. (Page 763).

The Appellee never testified as to what contributions she made toward the acquisition of the personal property that was in question. (Tr. pages 27-28, 48-50). The Appellant testified that he purchased the four-wheelers, the utility trailer, the Chrysler Sebring, and the Chrysler Conquest. (Tr. pages 89-92).

The Appellant also testified that he gave the Appellee the money to purchase the real property where the mobile home of the parties was located. (Tr. page 74-75). The Appellee never disputed this fact and never testified that she made any contributions toward the purchase of the real property. However, despite this fact the Appellant agreed that the Appellee could purchase

his one-half interest out of the land for the appraised value. (R. E. page) The Appellant made every effort to be fair and equitable in dividing the property, including giving up any equity he may have had in mobile home and its furnishings.

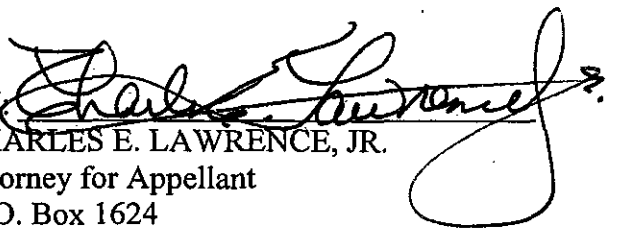
It was an abuse of discretion for the chancellor to hold in abeyance a division of the marital property when the Appellant had pled for possession and ownership of specific property and further had plead that the Appellee be awarded specific property. Further, it was an abuse of discretion for the chancellor to award the Appellee the Chrysler Sebring automobile when the Appellee did not contribute towards the acquisition of said property.

CONCLUSION

The decision of the chancellor to modify the judgment of divorce and award custody of the minor child to the Appellee should be reversed and custody of said child returned to the Appellant. Further, the decision of the chancellor to hold in abeyance a decision regarding the division of marital property when it has been specifically plead and the property identified and award to Appellee the Chrysler Sebring automobile should be reversed and said automobile should be awarded to the Appellant.

Respectfully submitted,

FRANKIE WADE, JR., Appellant



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CERTIFICATE OF SERVICE

I, CHARLES E. LAWRENCE, JR., Attorney for Appellant, Frankie Wade, Jr., do hereby certify that I have this day mailed by U. S. mail, postage prepaid a true and correct copy of the above and foregoing Appellant's Brief to the following:

Honorable Nita L. Chase
Attorney at Law
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Honorable James H.C. Thomas, Jr.
Chancellor
P. O. Box 807
Hattiesburg, MS 39403-0807

THIS the 23rd day of March 2007.

CHARLES E. LAWRENCE, JR.