IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

KATHRYN C. KLINK — APPELLANT

VS

DOCKET NO. 2006-CA-01827

MARC V. BREWSTER — APPELLEE

APPELLANT'S BRIEF

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

ORAL ARGUMENT NOT REQUIRED

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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 this Court may evaluate possible disqualification or recusal.

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The Trial Judge:
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Appellant does not believe that an oral argument will be helpful to the Court.

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ISSUE II: The Court committed reversible error in not giving sufficient weight to the age of the minor child and in giving undue weight to the sex of the child, despite the fact that the continuity of care favored the natural mother.

ISSUE III: The Court committed reversible error in finding that the Appellee had better parenting skills.

ISSUE IV: The Court committed reversible error in finding that the employment responsibiities favored the father.

ISSUE V: The Court committed reversible error in finding that the moral fitness of the parties favored the natural father.

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STATEMENT OF THE CASE

This appeal is a result of the decision of the Chancery Court of Desoto County, Mississippi, which granted custody of a child born out of wedlock to the natural father, Marc V. Brewster, Appellee herein. The case was instituted by the natural mother, Appellant herein, who filed a "Complaint for Custody and to Establish Paternity" on June 6, 2005. The natural father filed an "Answer to Complaint for Custody And to Establish Paternity and Counter-Complaint to Establish Paternity, For Custody and Child Support" in response on August 16, 2005. This matter was heard before the Honorable Percy Lynchard on September 11, 2006, and the Chancellor by opinion and order of the same date established the Appellee as the natural father and granted him custody of the parties' minor child, with the Appellant paying child support of $100.00 per month. (T. Vol. II P. 169-181), (Clerks Record Vol. I P. 60-64).

The Appellant, being aggrieved as to the Chancellor's Opinion and Final Decree, filed a timely notice of appeal from the final judgment (Clerk's Record Vol. I P. 67).

STATEMENT OF THE FACTS

The parties to the lawsuit were not married at the time of the filing of the complaint and were never married. During their relationship Katie Klink became pregnant with Marc Brewster's child, Johnathon James Brewster, born January 15, 2005, in Desoto County, Mississippi. The parties resided together for a period of only three (3) months after the child was born, and thereafter the only contact Mr. Brewster had with the minor child were during his periods of visitation. (T. Vol. 1, P. 15).

During the three (3) month period that the parties lived together, the parties had established a routine wherein Katie Klink would go to work cleaning houses and take the parties minor child with her, along with her other minor children. Mr. Brewster was employed at that time with Asics, working a full 40 hour shift and sometimes more. (T. Vo. I P. 16) It was established at the trial of this cause that the parties were essentially working the same hours and at the same jobs as when they lived together.

Subsequent to the separation of the parties and prior to the trial date, both parties had married. Katie Klink had married Chris Burris and was living in a three bedroom house with him , her son, Johnathon, and her three (3) other children, ages seven (7), five (5) and three (3), and Katie had custody of all three. All of the children, including Johnathon Brewster, had lived with her since birth. Her husband is a computer implementation specialist for DHL. (T. Vol I P. 5-9). At the time of the hearing Marc Brewster was married to Chystal Brewster and they had a five (5) month old son living with them in a townhouse in Horn Lake, Mississippi. (T. Vol. I. P. 72-73). Crystal babysits at home as her employment.

At the trial of this cause Marc Brewster through counsel moved to exclude witnesses to

be called on behalf of Katie Klink, as the witnesses' identities and information were not provided to his Counsel until two (2) days prior to trial, in violation of a previous order of the Court. The Court further ruled that the only person who would be able to testify would be the Appellant herself, Katie Klink. (T. Vol. I, P. 2-4) .

Testimony began with Katie Klink, who testified, as earlier stated, that she lived in Olive Branch, Mississippi, with her husband and four (4) young children. She testified that her only source of income was cleaning houses, and that she had a gross income of approximately $1,050.00 per month from her job, and that she received $600.00 per month in child support for her children. (T. Vol. I, P. 10). She testified at length about her daily routine with her jobs and her children, stating that she would get her two (2) older children ready for school and make sure they got on the bus, which stopped at the end of her driveway. (T. Vol I, P. 12). She would then wait on her two (2) younger children to wake up, including the child who is the subject of this action, and leave around 10:00 A. M. to go to her jobs. Katie would take the children with her to the house or houses she cleaned, and made provision each day for taking care of the children while she worked. For example, she took a playpen with her and they would nap or play while she was cleaning. (T. Vol. I, P. 12). She would be back home each day by the time her older children got out of school, and would take care of them until they went to bed that night. (T. Vo. 1, P. 14).

Katie also testified at length about the special relationship her three children had with Johnathon, and the difficulties the family had when he was away if only for periods of visitation. (T. Vol. 1, P. 19). She was adamant that she had always taken care of all of her children, and that she had never been accused of not doing so prior to the hearing in this cause,

either by Marc Brewster of the fathers of her other children. Katie testified as to the close family ties and extended family living in close proximity to her house, and their willingness and ability to assist in the care of Johnathon. (T. Vol. 1, P. 19). She testified to her childrens' active involvement in her church, and the special relationship her small church had with her family. (T. Vol. 1, P. 24). Her health is good, and she and her children live a normal, happy life.

Marc Brewster's case in chief began with the testimony of his best friend, Christopher White, who testified that he believed Mr. Brewster to be the better parent to have custody of the parties' child. He stated that he had seen Katie drunk with the children present and had smoked marijuana with her once, facts that she vigorously denied, and he objected to people who had stayed or lived at her house in the past. (T. Vol. 1, P. 62-66). He also testified that he had used cocaine and was still actively smoking marijuana. (T. Vol. 1, P. 67, 68). Mr. White also testified that he had two children by two different mothers, was not paying child support, and had no idea where one of his children lived. (T. Vol. 1, P. 70).

Crystal Brewster, Marc Brewster's wife, testified next. Her testimony primarily consisted of criticizing the parenting skills of Katie Klink, based on her observations of a year before the trial. (T. Vol. 1, P. 81). She took pictures and a video of the inside of Katie's house in an effort to establish that she was a messy housekeeper, and testified that she entered Katie's house on more than one occasion uninvited and observed Katie asleep. (T. Vol. 1, P. 95). She also took pictures of her own home and testified to the parenting skills of her husband as opposed to Katie Klink. She admitted that she and Katie Klink had a bad relationship and that her opinion of Katie as a mother was based on her experience with her one child of five (5) months. (T. Vol. 1, P. 95.)

Vicki Howard testified next as the mother in law of Marc Brewster, and her chief complaint against Katie was that every single time she saw the child Johnathan he was dirty, smelled and had diaper rash. (T. Vol. 1, P. 110). When questioned on cross exam, however, she admitted that she had only been in the doorway of Katie Klink's house one time, and had zero information as to substance of her observations. (T. Vil. 1, P. 116).

The most interesting observations, perhaps, came from Marc Brewster's next witness, his twin brother, who, as it turns out, was the only witness adverse to Katie Klink who had spent any time in her home. Although he testified to cocaine and marijuana use, and admitted to at least two (2) DUI convictions, he testified that he lived with Katie a year and a-half, and was intimate with her one time. (T. Vol. 1, P. 117-119). He testified that he had never seen Katie drunk, and that her children were well kept and her house clean. (T. Vol. P. 126). (When Katie Klink was next called by counsel as an adverse witness, it was established that Marc Brewster had, in fact, raped her while living in the home with her). (T. Vol. 1, P. 129).

Lastly, the Appellee, Marc Brewster testified. He testified that he was the better parent to have custody of the minor child, yet admitted that Katie's living room was clean when he picked up the child and his room was in a "little bit of a mess" because he was a child. (Vol. II, P. 137.) There was some testimony about picking the child up with diaper rash, but no serious health issues raised by him during direct testimony. (T. Vol. II, P. 144). He did admit that he only lived with Katie Klink for three (3) months after the baby was born, and was having sex with his current wife while still living in Katie's house. (T. Vol. II, P. 152). He admitted more than once that he had no objection to Katie taking care of his child or as a mother while he was living with her, even though he was working all night. (T. Vol. II, P. 161) He also agreed that Katie Klink

took care of her children, was good mother, and kept the house clean. (T. Vol. II, P. 161).

This concluded the case, and the Court then rendered its opinion after a short recess.

SUMMARY OF THE ARGUMENT

The Appellant believes the Court erred in awarding custody of a twenty (20) month old child to the natural father as opposed to the natural mother, who the records shows was the primary care giver of the minor child both before and after the temporary hearing during the pendency of the litigation. .

Prior to the start of the trial and upon Motion of the Appellee, the Court excluded all witnesses of the Appellant except the Appellant herself. The Appellant failed to comply with the Court's Order concerning the naming of witnesses to be used at trial until two (2) days prior to trial. It is the Appellants position that this action by the Chancellor was overly punitive, particularly in a case involving the care and custody of a minor child.

During the trial itself the Chancellor addressed the Albright factors, and found that the child was a tender years child which favored the mother, but the child being a male favored the father. Thus, the Court found that the age and sex of the child favored neither party. The Appellant would submit that the sex of the infant child was of little importance, and thus the Court should have found that this factor favored the natural mother, Appellant herein. Although the Court did find that the continuity of care fell in favor of the natural mother, it is the Appellant's position that due to the tender years of the child and other factors favoring the natural mother, this factor was not given its due weight.

The Court wrongly found two important factors to favor the Appellee, the parenting skills and employment responsibilities. The sole reason given by the court for favoring the natural father in regard to the parenting skills was the fact that the father handled the child's medical needs, which were not serious and which consisted solely of an Asthma condition.

Likewise, it was clear that while both parents were employed, the Appellant was able to actually take the child with her to her work in cleaning houses and was effectively able to be with the child as much as any "stay at home" mom.

The Appellant also believes that the Court was in error in finding her not morally fit to have the custody of the minor child, based chiefly on her past relationships and the fact that she had four (4) children from four (4) different men and testimony from two (2) of the Appellee's witnesses as to occasional drinking and past smoking of marijuana . It is the Appellant's argument that this did not negate her abilities as a mother and sole care giver of her four small children.

Lastly, by awarding custody of the baby to the natural father, the Court separated him from his three older sisters, all of whom he had lived with since birth and who had "doted" on him. Although the Appellee himself had married and had a baby, it is the Appellant's position that taking the child away from his siblings was extremely detrimental both to the child in this case and his sisters.

In essence, it is the Appellant's view that the best interest of the minor child was not served by ruling against the Appellant on the herein stated Albright factors. Had the Court given the Appellant the opportunity to present other testimony as to the Appellant's parenting abilities and fitness, perhaps the custody decision would have been different.

ARGUMENT

ISSUE I: The Court committed reversible error in excluding the testimony of all witnesses of the Appellant except the appellant herself.

The Court ruled prior to the start of testimony that all witnesses other than Katie Klink herself would be prohibited from testifying. The Court found that the witnesses' identities had not been provided to Counsel for Marc Brewster until two (2) days prior to trial, August 21, 2007, in violation of the previous order of court. The case had been continued on June 30, 2006 on motion of Katie Klink and it was specifically ordered at that time that discovery requests were to be complied with by July 21, 2006.

The appellant would argue that the exclusion of her witnesses in matters involving child custody was reversible error. The appellee was advised of the witnesses and had opportunity to examine them if he so choose prior to the start of the trial. The fact that the witnesses were not tendered to Counsel for the Appellee in the time frame designated by the trial court could have been grounds for contempt of court. However, the outright exclusion of these witnesses' testimony was overly punitive, particularly when dealing with the best interest and welfare of an infant child.

Although the Mississippi Rules of Civil Procedure specify sanctions for the failure to abide by orders regarding discovery , the Appellant believes that the the fact that it is well settled that in child custody cases the **polestar** consideration is the best interest of the minor child overrides the interest in timely discovery when a court decides upon the exclusion of witnesses. Thus, whatever sanctions the court in the case at bar chose toimpose, we do not believe the exclusion of witnesses was proper.

ISSUE II. The Chancellor committed reversible error in not giving sufficient weight to the age of the minor child and in giving undue weight to the fact that the toddler is a male child, despite the fact that the continuity of care favored the natural mother.

The child in this case is a twenty (20) month old child who has been in the continual care of the appellant since birth. Although the "Tender Years Doctrine" has been weakened over the years, there is still a presumption that a mother is generally better suited to raise a young child. Passmore vs Passmore, 820 So. 2d 750 Miss. Ct. App. (2002).

In the case at bar, there was a 20 month old child which the court found to be of tender years, and yet held that the fact that the child was male negated any presumption in favor of the mother. (T. Vol II, P. 173) The appellant would submit that the sex of a baby or toddler is of little or no consequence under the "Albright" factors in our case. Obviously, if the minor child was a male child approaching puberty or the teenage years, it would follow that a strong male figure in the minor's life would be a consideration for the court. It does not follow that a baby who had been in the care of his mother since birth would need the father as a custodial parent merely because of his or her sex.

The trial court, in fact, held that the continuity of care favored the natural mother, since the child had been in the custody of the mother since birth and subsequent to the temporary order. (T. Vol II, P. 173). The continuity of care is an extremely important element for this young child. In Caswell v. Caswell, 763 So.2d 890, 893 (Miss. Ct. App. 2000) the Court addressed the continuity of care both prior to the separation and after the separation of the parties, and stated that both time periods should be given equal weight. The Chancellor's ruling in our case specifically stated that the minor child was largely in the custody of the appellant prior to the temporary order and was "exclusively" in the custody of

the appellant after the temporary order. (T. Vol II, P. 173). Adding further importance to this factor is that all four of Katie Klink's young children had lived with her since birth, and she testified that she had been the sole care giver of the children for the majority of the time since their birth. (T. Vol I, P. 8, 9). It is the appellant's position that this factor alone is critical in determining custody and that the Chancellor committed reversible error in not giving the same its deserved importance.

ISSUE III: The Court committed reversible error in its finding that the Appellee had the better parenting skills.

The sole reason given in the Court's opinion that the father had better parenting skills was that he took it upon himself to seek medical treatment for the minor child in the majority of the cases. (T. Vol II, P. 173, 174.) It is the appellant's position that parenting skills encompass a great deal more than taking a child to the doctor or buying certain medication, particularly when there is no serious medical condition present.

The Appellant testified that she took care of all four of her children from 5:30 in the morning until they went to bed at night. She got up at 5:30 A. M., fixed breakfast, got her two older children ready for school, and put them on the bus just outside her house. (Her oldest daughter, who was in the second grade at the time of the hearing, was in the "Spotlight" accelerated program. (T. Vol. I, P. 56). She then waited for her two younger children to wake up, including the child who is the baby in this case, and then left to clean whatever home she was scheduled to take care of that day. She always got home in time to meet the bus and take care of the children the rest of the day. This had been her routine for three (3) years. (T. Vol I, P. 12, 13).

Katie Klink further testified that she bathed, cooked, cleaned and took care of the home for

all of her children. (T. Vol. I, P. 14-16). She did all of these things during the brief time (3 months) the parties lived together. (T. Vol I, P. 14-16).

ISSUE IV: The Court committed reversible error in finding that the employment responsibilities favored the natural father.

The Appellant admits that the Appellee had worked essentially the same job since their relationship began, and admitted also that he worked a forty (40) hour week, with some overtime. However, the Chancellor's finding that her employment responsibilities were not well defined and subject to different schedules was incorrect. (T. Vol I, P. 174). Not only did the Appellant work at her job (cleaning homes) for three years, but it enabled her to take her children with her to work. Also, her job enabled her to be home when her two older children got off the bus, a flexible and workable job schedule that was far better for the baby than the Appellee's. Her work schedule remained the same, and her schedule only varied according to the different homes that she cleaned. In Massey v. Huggins, 799 So. 2d. 902, 906, 907, (Miss. Ct. App. 2001) the court dealt with two parents who had essentially the same work schedules. The Court in that case granted custody to the natural father because his flexible schedule allowed him to spend more time with the minor children. There is no question in our case that Katie Klink was essentially able to be with her children all of the time due to the nature of her work , and there should have thus been no question as to this factor being in her favor.

ISSUE V: The Court committed reversible error in finding that the moral fitness of the parties favored the natural father.

The Court cited the drug use or tolerance of drug use by the natural mother in her home, the numerous relationships resulting in four children from four fathers, only one to whom she was married. (T. Vol II, PP. 176, 177). The Appellant testified that she was now married, that

she was taking the children to Church regularly, and that there are lots of children in the Church, who love her family. (T. Vol. I, P. 24). She clearly stated to the Court that, other than her friend Erin and her daughter, not one person had physically lived with her in the house since the baby had been born. (T. Vol. I, P. 55). The only testimony about any drug or alcohol use came from the natural father's best friend, an admitted cocaine and marijuana user, (T. Vol I, PP. 67-68), who stated that he smoked marijuana one (1) time with her. (T. Vol. I, P. 71), and that he witnessed her being drunk once or twice in front of the children. (T. Vol. I, P. 62).

Furthermore, this Court in the case of Beasley v. Scott, 900 So. 2d 1217 (Miss. Ct. App. 2005) found that the natural mother drank alcohol and occasionally smoked marijuana. The Court also noted that there was testimony that she had lived with her boyfriend at one time, and had relationships, "platonic and otherwise, with men of dubious character". Id.
In spite of this finding, the Court awarded custody to the natural mother, and the appellant would submit that, despite her past, the same should have been done in this case.

ISSUE V: The Court committed reversible error in separating the minor child from his sisters.

In our case, the Appellant testified that the toddler, Jonathan, and his sisters are "best friends", playing, fighting and loving one another. (T. Vol. I, P. 18). When asked what kind of relationship the girls had with the young child, she reaffirmed that they loved him very much, and in fact adored him and mothered him. (T. Vol. I, P. 19). In fact, Katie testified, things are just not the same without the baby. His sisters have trouble sleeping, getting up in the morning, etc. His absence by the court's ruling has created a tremendous gap, not only in his life, but in the lives of his sisters.

In quoting Dicta from Mixon v. Bullard, 217 So.2d 28 (Miss. Ct. App. 1968) the court in

Sellers vs Sellers, 636 So. 2d 481 (Miss. Ct. App. 1994), stated:

> The Court shall in all cases attempt insofar as possible, to keep the children together in family unit. It is well recognized that the love and affection of a brother and sister the ages of these children is important in the lives of both of them and to deprive them of the association ordinarily would not be in their best interest.
>
> This expresses a common sense recognition of the ordinary facts of life, that in the absence of some unusual and compelling circumstances dictating otherwise, it is not in the best interest of children to be separated.

To restore this relationship by placing custody with the appellant and the rest of her family would be in the best interest of the child, without question. The Appellant does not believe the fact that he now has a younger sibling living with the Appellee should detract from this position.

CONCLUSION

It is the opinion of the Appellant that the Court reached its decision on the Albright factors based on matters that were not critical to the findings thereon, and that the Appellant was perceived as unfit because of her age and history. The fact that she was married, living in a home with a husband with a good job, and herself had stable employment was not considered by the Court, and any critical testimony of her past living arrangements and lifestyle was based on the testimony of those who had both an axe to grind and who were themselves guilty of continuing to do the things of which they accused Katie Klink. It is the Appellant's position that there would have been a different result in this case had the Court correctly applied the Albright factors, and that the baby would still be with the family he had been with his entire life.

CERTIFICATE OF SERVICE

I, LESLIE B. SHUMAKE, JR., attorney for Appellant, Kathryn C. Klink, certify that I have on this day served a copy of this Mandatory Record Excerpts by United States Mail, postage prepaid on the following persons at these addresses:

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This the 19th day of June, 2007.

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