IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

2006-CA-01930

DEMETRI MARSHALL **APPELLANT**

VS.

LIKITHA HARRIS **APPELLEE**

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.

1. Demetri Marshall, Appellant
2. Jessie L. Evans, Attorney for Appellant
3. Likitha Harris, Appellee
4. Melvin McFatter, Attorney for Appellee
5. The Honorable George Ward, Claiborne County Chancery Judge

RESPECTFULLY SUBMITTED, this the 15th day of June, 2007.

Jessie L. Evans
Attorney of Record for
Demetri Marshall, Appellant

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STATEMENT OF THE CASE

The present case is the result of a romance gone bad. Demetri Marshall, a physician, became involved in a relationship with Likitha Harris, a nurse. This relationship began in 1997 when appellee Harris was a nursing student. (R. at 57) Out of this relationship two children, both males, were born, Malik G. Marshall, born March 3, 1999; and O'Naja A, Marshall, born April 24, 2005.

Like many relationships that end on unpleasant terms, both parties determined to get the upper hand by making the children the focus of their battles. Appellant Marshall sought custody of the oldest child Malik along with liberal visitation with O'Naja, whom Appellant Marshall referred to as Sekou[1]. Appellee Harris sought custody of both children as well as generous child support from Marshall, who as stated above, was a physician practicing out of a medical clinic in Port Gibson, Mississippi.

When the couple met in 1997, Marshall at the time had already fathered six or seven children. He had been married once and had two children by his wife who was deceased. By the time of the lower court hearing, appellant Marshall admitted that he was the father of ten children, two of whom were adopted and the other eight had five different mothers, including his deceased wife.[2]

According to appellant Marshall, the parties' final breakup had its roots in Dr. Marshall's devotion of what was perceived as an inordinate amount of time with his former wife in helping her and her children to cope with the cancer from which she was dying. (T. at 8) Appellee Harris states

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[1]The parties had quarreled over the naming of O'Naja. Marshall had wanted the child to be given the name Sekou in a naming ceremony; Harris preferred the name O'Naja, since Marshall, according to her, had named the first son Malik.

[2]The lower court refers to the wife as a "former lover" (R. at 58) While in the technical sense this description is true, it appears that the court placed her in the same category as Marshall's other "lovers".

that the problem began when she learned the appellant had fathered another child shortly before the birth of her son O'Naja in April of 2005. That event apparently turned their relationship into a tailspin, according to appellee Harris. Regardless of which version one accepts, the relationship ended in early 2006 with a race to the Courthouse, appellee filing a paternity suit and appellant filing a custody/visitation petition.

In any event, the parties during their better times resided together in a rental home in Jackson, Mississippi.[3] When the relationship soured, appellant Marshall moved to one end of the home; appellee Harris moved to the other end. The children met in the middle. Two of the children that resided in the home were appellant Marshall's adopted son Mario and Assata, the daughter of his deceased wife. The remaining two children were Malik and Sekou, the children of appellant and appellee.

Appellant Marshall, because his medical practice was in Port Gibson, had established a routine whereby he would spend Tuesday, Wednesday and Thursday in Jackson and the remaining time would be spent in Port Gibson, where he owned a residence. His son Mario attended school in Port Gibson and his daughter Assata attended Jim Hill High School in Jackson. This routine, of course, necessitated a lot of travel between Jackson and Port Gibson, approximately a one hour to an hour and fifteen minute driving distance between the two cities. The parties' older son Malik attended Adiambo. a private Afro-centric school in Jackson. The younger son O'Naja (called Sekou by Marshall) was in daycare since both parties worked.

As noted above, both parties filed actions in the Chancery Court of Claiborne County asking

[3]There was testimony of record that appellant Marshall had owned this home, but later sold it, and then still later leased it from the purchaser.

for relief. Appellee, filing her action first, requested custody, child support, medical benefits for the children and other related relief; appellant requested custody and/or liberal visitation. The Court on August 15, 2006, or thereabout consolidated the two actions. (R. at 49)

By time of the hearing on the merits on August 25, 2006, appellee had moved from the rental home in Jackson to an apartment complex in Jackson. At the hearing both parties along with their witnesses presented testimony supporting their respective positions. However, at the end of the hearing, the chancellor stated he would subsequently render his decision and he assured appellee that part of that decision would not entail the court's changing custody of the children. (T. at 147) This decision, the lower court stated, was based on the holding that "case law prohibits a judge from separating siblings". (T. at 147)

On October 3, 2006, the Chancellor entered his final judgment adjudicating, among other things, appellant Marshall to be the natural father of Malik and O'Naja, awarding custody of the children to appellee Harris, ordering child support in the amount of $1000.00 per month along with medical benefits payable by Marshall, and awarding visitation every other weekend to appellant, including extended visitation for the month of July, as well as certain specified holiday visitation. (R. at 62)

In rendering this decision, the court noted that both parties were more than fit and capable of raising the two children in question, further pointing out that although appellant had fathered a number of children by different women and was considerably older than appellee, he was supporting all children, cared about all of them, and was a good father to all of them. (R. at 60)

Feeling aggrieved by the above decision, appellant Marshall made timely appeal to this Court.

SUMMARY OF THE ARGUMENT

Appellant, as pointed out in the argument that follows, submits that the Chancellor applied an erroneous legal principle in awarding full custody of both children to appellee. Appellant further submits that he presented ample evidence for the lower court to award more liberal visitation, and the failure to do so, in fact, harmed his son Malik and was not in Malik nor his brother's best interest.

Argument

I. WHETHER THE CHANCELLOR PROPERLY APPLIED THE LEGAL PRINCIPLE STATED IN SPARKMAN V. SPARKMAN

At the close of testimony, the lower court, speaking to appellee Likitha Harris stated the following:

> In any event, I know it has caused you a lot anxiety. I'm not going to remove custody from you, so you can rest easy on that. The main reason outside of the Allbright factors *is that the case law prohibits a judge from separating siblings* as in your case; you have two children, and the law prefers that siblings stay together, which, of course, would be impossible to do by removing one from your home.

(T. at 147) And in rendering its final judgment, the lower court went through the following analysis:

> Moreover, Dr. Marshall has suggested to the Court that it is in the children's best interest to be separated. The main basis of his opinion is that Malik is at an age when he needs his father. While the Court agrees that all children need their father, they also need their mother. Moreover, it is presumed that it is in siblings best interest to keep them together as a family unit. *Sparkman v. Sparkman, 441 So.2d 1351 (Miss. 1983)* Dr. Marshall has offered little evidence to overcome this presumption except that it is his desire.

(T. at 60) While appellant would show that he presented ample evidence to support his position of an award of Malik's custody to him – including being able to furnish a home as opposed to an apartment for Malik, giving the child a safe place to play and teaching the child the things that are most effective coming from a father, for instance, something so simple as throwing a baseball – he equally believes the lower court misstated the law regarding the separating of siblings, and this fact erroneously became the determining factor in the court's ruling. The fact that the lower court up front assured the mother, appellant Harris, that she need not be concerned with the possibility of a separation of the two siblings demonstrated the misapplication of the case law and showed that this

factor was uppermost, and in fact the guiding principle, in the court's reaching a custody determination.

More precisely, while cases have generally stated that courts prefer not to separate siblings, nowhere has it been said that this preference is a hard and fast rule. At best it is a presumption that is subject to rebuttal:

> None of the cases cited by the Mother holds that siblings cannot be separated. These cases hold that this is but one factor, usually in the context of Albright, to be considered by the court in matters of custody.

C.A.M.F. v. J.B.M, 2007 So.2d (2005-CA-02227-COA)

The Court's attention is also directed to *C.W.L v. R.A,* where in the following was stated:

> After thoroughly weighing the evidence and each *Albright* factor, the chancellor awarded custody of Angel to Anderson. We find that the record contains substantial evidence to support this conclusion.
>
> Finally, Ladner contends that the chancellor should have given more consideration to the relationship between Angel and her half-brother before separating them. Ladner argues that it is not in Angel's best interest to be separated from her brother. We note that there is no general rule in this state that the best interest of siblings is served by keeping them together. *See Sellers v. Sellers,* 638 So.2d 481, 484 (Miss.1994) (citing *Sparkman v. Sparkman,* 441 So.2d 1361, 1362 (Miss.1983)). Accordingly, we find that the chancellor did not err in awarding physical custody to Anderson.

C.W.L. v. R.A, 919 So.2d 267 (Miss. 2005).

In the instant case, the child Malik, a six year old male, had for all practical purposes been living with his father for the last three years of his life, although his mother, the appellee herein, during the last year of those three years was living in separate living quarters but in the same house with the appellant. Appellant had made sure that there had been close contact between other siblings that he fathered and the child Malik, particularly with his half-brother Mario and half sister Assata:

> Appellant: Yes, that was the routine during the school year. They would come down on Monday nights and stay in Port Gibson. Tuesday, Wednesday, and Thursday night we would stay in Jackson, and Thursday -- and Friday night if it was Malik's weekend with us, then he would be with us for the weekend. If not, he would be with his mother.

(T. at 15) The infant O'Naja at the time of the hearing below was a year or a little over a year old and there had not developed the degree of attachment Malik had with the siblings who lived with appellant Marshall. Additionally, it had been the custom for Malik to spend the entire month of July with appellant as they would often visit appellant Marshall's parents in California. (T. at 14)

In the case at bar, the lower Court certainly considered the *Albright* factors and it is conceivable that these factors alone would have carried the day for appellee. However, by prefacing this case under the misstated rule of *Sparkman* and thus conveying the assumption that this case turned on the rule allegedly found in *Sparkman,* the Court gave the impression that consideration of the *Allbright* factors was more of an afterthought.

Moreover, as pointed out above, this case is one with special circumstances which could called have allowed for separation of the two siblings. This separation in all likelihood would not have been as wrenching as the lower court may have contemplated, particularly where a chancellor can fashion scenarios allowing the siblings to be together as much as reasonably possible:

> The chancellor recognized that "it is an unusual and is usually best not to split custody of the children," but stated that he believed it to be justified and called for in this case for the reasons stated.
>
> In the case of *Bell v. Bell,* 572 So.2d 841, 846 (Miss. 1990), this Court affirmed the chancery court decree awarding custody of the divorced couple's seven-year-old son to the mother and custody of the thirteen-year-old son to the father. While noting its general policy of discouraging the separation of siblings, the Court was satisfied that "the decree we approve today makes elaborate provision for assuring that [the children] are together as much as is reasonably practicable given their residence in separate communities and their attendance at different schools." *Bell,* 572 So.2d at

> 846. Likewise, the chancellor in the case *sub judice* awarded to each parent visitation rights such that Jason and Jeremy would be together during weekends, summers and holidays.

Bowen v. Bowen, 688 So.2d 1374,1382 (1997) Appellant Marshall rented a home in Jackson and was in Jackson anywhere from three to five days per week. This home contained roomy living quarters and a back yard where the children could play and roam as opposed to being cooped up in the confines of a two bedroom apartment to which appellee had moved shortly before trial. At appellant Jackson home, Malik could still interact with his older siblings and could keep frequent and close ties with his infant brother and his mother. Given that appellant was a physician working in Port Gibson, there probably would be some logistic problems; however, they were not insurmountable as demonstrated by appellant's other children, one of whom was in the International Baccalaureate Program at Jim Hill High School. (T. at 46).

While in custody matters it is unchallenged that the controlling issue is always the best interest of the child, it is equally important that, "in custody [matters] involving an illegitimate child, when the father acknowledges the child as his own, the father is deemed on equal footing with the mother as to parental and custodial rights to the child." *C.W.L. v. R.A, id.* Separation of the two brothers should have been only one of the factors in the Court's determination of which parent should have been awarded custody.

II WHETHER THE LOWER COURT UNDULY CURTAILED THE EXERCISE OF APPELLANT'S VISITATION WITH THE MINOR CHILDREN

The lower court granted appellant standard visitation with the minor children, principally allowing visitation every other weekend, alternating various holidays, and allowing for visitation in the summer month of July. Under ordinary circumstances, arguably the granting of visitation in this manner would be sufficient. However, in this case, there is a father who has actively participated

in the children's life, particularly with his older son Malik, seeing or visiting with him several days during the week and on weekends, although not on every weekend. Although appellant is in Jackson three and sometimes five days per week, he under the Chancellor's ruling only has access to his son every other weekend, a far cry from the previous amount of time appellant had been spending with Malik.

The upshot of the Court's order was to diminish the amount of time Appellant had been spending with his son. The curtailing of this visitation somewhat contradicts the lower court's comments to appellant at trial:

> In any event, I know that's caused you some anxiety; I know you've had anxiety because you felt like she tried to keep the children, and I can assure you that isn't going to happen either; and I'm going to take into consideration -- when I do this visitation schedule, I'm going to take into consideration all the requests that you've made as far as being able to see your children for extended times, both your children. And, of course, the older your youngest one gets, you'll have extended time with him as well.

(T. 147)

Although visitation is in the discretion of the Chancellor, there are some generalities that a Chancellor should take into consideration:

> Visitation is a matter within the chancellor's sound discretion. Mixon v. Mixon, 724 So.2d 956, 961 (15) (Miss. Ct. App. 1998). The chancellor is charged with fashioning a visitation schedule that is in the best interests of the children, and the chancellor's visitation decision is afforded great deference by this Court. Id. at 960 (14). **A minimum liberal visitation provision includes five weeks' summer visitation** . Chalk v. Lentz, 744 So.2d 789, 792 (9) (Miss. Ct. App. 1999). However, the chancellor is vested with the discretion to determine whether the best interests of the children mandate liberal visitation or instead a more limited visitation provision. Horn v. Horn, 909 So.2d 1151, 1162 (39) (Miss. Ct. App. 2005) (citing Chalk, 744 So.2d 789 at 792 (9)).

Gilliland v. Gilliland, 2007 So.2d (2005-CA-01568-COA) Our Supreme Court has set out criteria

and parameters as to what liberal visitation should entail for the non-custodial parent:

> The supreme court has addressed the very issue of what would encompass the minimum of a liberal visitation provision and held that "children at the least are entitled to the company of [the non-custodial parent] two full weekends a month during the school year, with the visitation to terminate late Sunday afternoon as opposed to Sunday morning, and a five-week period during summer vacation." *Crowson v. Moseley,* 480 So.2d 1150, 1153 (Miss.1985). The best interests of the minor child should be the paramount consideration when establishing any visitation provision, while respecting the rights of the non-custodial parent and the objective of creating an environment conducive to developing as close and loving a relationship as possible between parent and child.

Chalk v. Lentz, 744 So.2d 789 (Miss. 1999)

The court below, although finding appellant to be equally fit to have custody, in fact, reduced the time appellant had been previously spending with the children. This reduction probably left appellant's son somewhat puzzled since he had been seeing his father three to five times per week, and now would see him every two weeks, thus diminishing the positive influence an adult male could provide. As stated above, appellant will be in Jackson three to five times a week and until his visitation period arrives, he is not given access to his children, particular the oldest son Malik who undoubtedly has established a close bond with his father.

CONCLUSION

The parties herein had at one time been close and both loved and cared for the children born of their relationship. Unfortunately, when relationships sour, the parties are often blinded by their desire to strike the last blow, permanently crippling his or her former mate. Too often the parties use the children born out of failed relationship as pawns.

Chancellors are called in to make the tough decisions as to custody, support and visitation.

Appellant, based on the above analysis, respectfully submits that the Chancellor applied an erroneous legal principle in awarding full custody of both children to appellee. Appellant further submits that he presented ample evidence for the lower court to award more liberal visitation than it did, and the failure to do so in fact harmed his son Malik and was not in Malik's best interest.

Respectfully submitted,

Demetri Marshall, Appellant

BY: Jessie L Evans
JESSIE L. EVANS

CERTIFICATE OF SERVICE

I, Jessie L. Evans, attorney for appellant **Demetri Marshall** hereby certify that I have this day by United States Mail, postage prepaid, forwarded a copy of the above and foregoing *Brief of Appellant* to the following interested persons:

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The Honorable George Ward
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This the 14th day of June, 2007.

Jessie L Evans
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