

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-CA-00522

KRISTY (STRAIT) LORENZ

APPELLANT

V.

TRAVIS STRAIT

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT OF LOWNDES
COUNTY, MISSISSIPPI
Cause No. 2005-0641**

BRIEF OF APPELLANT

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AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 28(a)(1) of the Mississippi Rules of Appellate Procedure, 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 the judges of the Court of Appeals may evaluate possible disqualification or recusal.

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Legend:

R.E. = Record Excerpts of Appelle/Cross-Appellant
R. = Record (clerk's papers)
T.T. = Trial Transcript

STATEMENT OF THE ISSUES

- I. Whether the Court was manifestly in error in its findings of fact when it determined that there had been no material change in circumstances.
- II. Whether the Court erred in vesting custody in the paternal grandmother rather than the Mother in the event that the no-contact order issued by the U.S. Navy prohibiting the Father from having contact with the minor had not been lifted.

STATEMENT OF THE FACTS

The Appellant (hereinafter, “Kristy” or “Mother”) and the Appellee (hereinafter, “Travis” or “Father”) were legally married on October 25, 2003. *R. 3*. At this time, Kristy was seventeen (17) years of age and had already given birth to their child. The parties minor child, Alyssa Marie Strait, having been born on May 31, 2002, was three (3) years of age at the time of the parties’ divorce which became final on December 21, 2005. *R. 3, 11*. The parties filed a joint bill for divorce based on irreconcilable differences and entered into a property settlement agreement dated October 4, 2005. *R. 13*. The parties entered into an amended property settlement agreement on December 19, 2005. *R. 17*.

Subsequently, Kristy obtained her GED, met and married Aaron Lorenz, an Air Force sergeant. Aaron also works as an auxiliary policeman. Kristy has had a second child and is a full-time stay-at-home mom.

Pursuant to the terms of the Final Decree of Divorce and the amended property settlement agreement incorporated therein, the parties shared joint legal custody of the minor child but the primary physical custody of the minor child was vested in the Father subject to visitation rights vested in the Mother. *R. 17*. At the time of the divorce, the Father was stationed in Norfolk, Virginia in the United States Navy and the Mother lived in Columbus, Mississippi. *R. 17*.

On January 31, 2006, the Mother filed a petition to modify final decree whereby she sought custody of the minor child. *R.E. 30*. On April 11, 2006, the

Court denied the Mother's petition to modify custody finding, inter alia, that the marriage and employment of the Mother was not sufficient to change custody. R. 29.

On August 8, 2006, the Mother filed another petition to modify final decree seeking the custody of her minor daughter and supervised visitation only for the Father alleging, among other things, that the Father had allowed the minor child to be sexually and physically abused while in his custody. R.E. 30. On August 22, 2006, the Mother filed a motion for emergency temporary custody order seeking to have the primary physical custody of the minor child placed with her. R.E. 32. The motion for emergency temporary custody was based on, among other things, a trip to the hospital where the minor child related incidents of sexual abuse of her to hospital personnel in Virginia. R. 51. The hospital personnel contacted the Virginia equivalent to the Mississippi Department of Human Services as they were bound to do by law. R. 51. Following interviews of the minor child by the appropriate authorities in Virginia, the Mother was awarded custody of the minor child for ninety (90) days pending further investigation. R. 51. A no contact order was issued by the United States Navy requiring the Father have no contact the minor child. R. 51. The Mother was advised by the authorities in Virginia to bring action in Mississippi since it had jurisdiction to determine custody of the minor child. R. 51.

On August 23, 2006, the Chancery Court of Lowndes County, Mississippi issued an emergency temporary custody order granting temporary physical custody of the minor child to Mother. R.E. 34. On October 18, 2006, the Mother and the

Father, through their respective attorneys, entered into an Agreed Temporary Custody Order which was entered by the Court. *R.E. 35*. The Agreed Temporary Custody Order left temporary physical custody of the minor with the Mother, suspended child support payment, provided for continued healthcare for the minor through the Father and provided for the appointment of a guardian ad litem for the minor. *R. 57-8*. By order of the Court dated December 23, 2006, Nancy H. Stuart, was appointed to act as guardian ad litem for the minor child. *R.E. 37*.

On February 26, 2007, the Court entered its Judgment in this matter whereby custody of Alyssa was immediately returned to the Father or, in the event the Father was still under a no contact order from the United States Navy prohibiting him from having contact with the minor child, custody of Alyssa was to be immediately returned to the Appellee's mother. *R.E. 8*. The Mother subsequently filed on March 5, 2007, a motion to reconsider. *R. 66*. The Court executed an order overruling the Mother's motion to reconsider on March 8, 2007 with said order being entered by the Court on March 12, 2007. *R. 69*. The Mother perfected her appeal of the February 26, 2007 Judgment by filing a notice of appeal on April 2, 2007. *R. 71*.

SUMMARY OF THE ARGUMENT

The guardian ad litem ("GAL") recommended that custody be modified to the Mother. The record and proceedings before the Court clearly evidence that a material change has occurred which adversely affects the child and that modification of custody to the Mother is in the best interest of the child. The Court lost sight of all the

facts supporting the GAL's recommendation and, instead, focused on one fact that was emphasized by parties other than the GAL. By failing to consider all of the facts developed at the hearing, the Court was manifestly in error in its findings of fact which resulted in the Judgment maintaining custody in the father and paternal grandmother. A review of all the facts clearly reveals the manifest error and that modification of custody is warranted and required.

ARGUMENT

I. Standard of Review.

Chancellors are accorded great discretion in resolving disputed questions of fact; awards will not be reversed on appeal unless the chancellor was manifestly in error in the findings of fact or the decision is so oppressive, unjust or grossly inadequate as to evidence an abuse of discretion. Mississippi Family Law, First Edition, Deborah H. Bell (2005)(citations omitted). In contrast, questions of law are reviewed *de novo*. Appellate courts will reverse if a chancellor applied an incorrect legal standard. Id. (citations omitted).

II. The Chancery Court was manifestly in error in its findings of fact supporting its ruling that a material change in circumstances had not occurred.

The Chancellor was required to make specific findings of fact with regard to whether a material change had occurred. McMurry v. Sadler, 846 So.2d 240, 244 (Miss. Ct.App. 2002); Sturgis v. Sturgis, 792 So. 2d 1020, 1025 (Miss. Ct. App. 2001). In addition, because the appointment of a guardian ad litem ("GAL") was necessary

in this action, the chancellor's findings of fact should include a summary of the guardian's qualifications and report. S.N.C. v. J.R.D., Jr., 755 So.2d 1077, 1082 (Miss. 2000). If a court rejects the findings of a mandatory guardian, the court's findings must include its reasons for rejecting the report. Id.

Because of the allegations of sexual abuse/misconduct, a GAL was required for the minor child and Nancy Stuart was appointed GAL for the minor by the Court. *R.E.* 37. The GAL's recommendation that custody be placed with the Mother was based, in part, on the testimony of Ms. Teresa Hubbard, a licensed clinical social worker that counseled with Alyssa in the months following the allegations of sexual misconduct. Ms. Hubbard testified, in pertinent part, as follows:

Q. What the Court - - I'm sorry. It was a bad question. What happened during that session?

A. Okay. Well, she drew a picture of her family that lives in Columbus, and then she started drawing a picture of her father and his girlfriend. And she drew her father, and then when she started on the second face, she said, They take showers together. She just offered that. And I said, Who? And she said, Daddy and Trista and Emma and me. And I asked her if she liked showers and she said No, I like baths. And then I asked her if her daddy had touched her, and she said, Yes, with his hand and no toilet paper. And I asked her where he touched her, and she said, At our house. And I said - and I asked, Where at your house? And she said, In the bathroom. And I asked her if she was taking a bath or using the bathroom, and she said, No, he pushed me down on the floor. And I have written in here, And then she just began to talk. So I - at this point, I'm not asking her any questions. I went potty, and then he touched me with his pee-pee. And he got pee on his hand, and it was dripping, ping, ping, ping, and it was so nasty. And I told him, Daddy, That is so nasty. And he said, I just had to do it. I asked her if her pants were on, and she said, No, that he had pulled her down her panties. and I asked her where he touched her on her body, and she said, My pee-pee, and she pointed to her pubic area. And then I just - I had something on the table there, and I - this

workbook that I use with kids sometimes. And I just – I read the words from the sheet of paper on the table where we were working, and I pointed to the words and said, My body is good. My body belongs to..... And then I stopped. I hesitated to let her finish the sentence, and she said, Daddy. And that's all I have.

.....
R.E. 20-22. (emphasis added). Ms. Hubbard further testified:

- Q. Did she offer any other information, or did you discuss anything else with her during that day?
- A. Well, I had a figure that was drawn, and I asked her to circle on the figure where her dad had touched her. And then I asked her to draw on another figure what her dad had touched her with.
- Q. And what did she, in fact, do?
- A. Well, she drew a circle. I said, I then asked Alyssa to circle on the figure where her daddy touched her, and she circled near the pubic area between the figure's leg and put a dot. And she went, Right there. And I told her to pretend that the next figure was her daddy, and I asked her to circle what her daddy touched her with. And she circled both his hands and his penis.
- And then she offered without any prompt – and then she said without any prompting, He touched his tee-tee with his hand and then he touched my tee-tee.
- And I asked her, What did he touch your tee-tee with? And she said, His tee-tee.
- And then I filed that report with the social worker in Virginia.

R.E. 25-26. Ms. Hubbard commented on the child's veracity as follows:

- Q. Okay. Did anything in the course of the investigation strike you as – the course of the therapy, excuse me, strike you as false, anything about the way she talked to you or interacted with you? Did she appear to use inappropriate words that only a grownup would know, or anything about the interview appear to be false or coached?
- A. No. Whenever – especially – well, the first time when I talked with her and she really just kind of spontaneously shared the information, I had to ask her very few questions.
- I didn't get the impression at all that the child thought that there was anything wrong with what had happened.
- Q. Okay.
- A. So that was a very sort of child-like way of just sharing it. And I didn't get the impression – she didn't act embarrassed or like there was

something to be ashamed of or anything. She just, like, told me.

Q. In her subsequent visits, did she appear to be doing okay in terms of – so she didn't appear – no one had made her embarrassed or ashamed?

A. Right. Right. She didn't act like there was any – I mean, I didn't have to probe her or anything. She just really very much just kind of spontaneously volunteered the information.

Q. In subsequent sessions, how did she appear to you to be in terms of coping with her current situation, being with her mom, being here? How did she appear in those therapy sessions?

A. Well, I just saw her the subsequent time when the social worker asked me to get the additional information. Once again, she's, you know, very spontaneous and just, you know, shared with me what I asked her. And then I only saw her with her mom one more time.

R.E. 27-28. Ms. Hubbard opined that such behavior by the Father was inappropriate for a child of Alyssa's age as follows:

Q. Is that appropriate behavior between a father and a child?

A. No, it's not.

Q. A young girl of that age? I know that seems obvious, but even if you – let me ask you this question: What if there is a logical explanation that maybe doesn't have the degree of sexual connotation where they're all taking showers together, he is using the bathroom in front of her, he is doing other things in front of her? Is that appropriate behavior?

A. Well, I – you know, I wouldn't think that that would be – I mean, for a father to give a child a bath or to help her wipe after she uses the bathroom or help her put her pajamas on, there is nothing wrong with any of that, I mean.

Q. But –

A. Not what she – not what she described to me as what I understand. That would not be appropriate at all.

R.E. 29-30.

In the Judgment being here appealed, the Court summarized the GAL's report and qualifications as follows:

This Court has the utmost confidence in Nancy Stuart and often recommends her as GAL because of her thorough investigation and her love for children.

However, the Court does not agree with her recommendation. The GAL relied on Ms. Hubbard's testimony. Ms. Hubbard's question were suggestive such as, "where did your dad touch you". This Court has had the opportunity to hear from a number of forensic experts and this type of question is never asked a child. Alyssa never mention her dad's "pee pee" to any person other than Ms. Hubbard. The Court does not suggest that Ms. Hubbard is not sincere but believes that Alyssa's comments might have been suggested by others. The Court further believes that Travis' touching of his daughter was for the application of Destin to her diaper rash. R.E. 7.

The Court's finding of facts and its disagreement with the GAL's recommendation for custody is manifestly in error. The Court bases its findings of fact on one question asked by Ms. Hubbard and the child's response thereto. The Court totally disregarded the remainder of Ms. Hubbard's testimony and totally disregarded the factual basis for the GAL's recommendation to modify custody to the Mother.

Even if the Court was justified in disregarding this one aspect of the testimony of Ms. Hubbard, it is apparent that the GAL did not base her recommendation of custody solely on that part of Ms. Hubbard's report which focused on the child's response to her question "where did your dad touch you". Nor did the GAL base her recommendation solely on the testimony of Ms. Hubbard. The GAL testified, in pertinent part, as follows:

Q. Okay, we have admitted in to evidence Exhibit G1?

A. Yes, Your Honor.

Q. Okay. Is there anything you want to add to that?

A. Yes, Your Honor. That was a preliminary report. I was not able to give a recommendation because I have not heard from – at that time from the social worker that had interviewed the child, and I also have not heard from the therapist from Tupelo, who I know only by Melissa.

Now, Melissa didn't testify today, so I don't have the benefit of that to go on. But I did hear Mrs. Teresa Hubbard testify, and I took notes and added that to what I've already – the notes I have already taken in this matter.

So, based on that, I do have a recommendation at this time.

I would just like to add to this report, when I talked – well, when I talked with Alyssa, she was very, very, relaxed and calm, and she had eye contract. We sat on the floor together. It was in private, so I feel like she was not under any – I didn't feel like she was under any pressure. I didn't feel like she made anything up or that she felt there was a right or wrong answer.

She – well, I won't – it's in the report, so I won't go into that. But based on my interview with Alyssa, talking to the – I listed about fourteen people, I think, thirteen of them I actually got to talk with.

But, based on all that, she has apparently named Mr. Strait as the person who touched her inappropriately to her mom, to the therapist, to an aunt Mandy Wilson I believe, and to me. So she has consistently named one person.

She appeared not to be rehearsed or coached. She was a – she was a ton of fun in her interview, but she didn't – you know, she didn't appear to be waiting on the next question and answer.

And hearing Mrs. Hubbard this afternoon testify was probably, you know, the thing that weighed it more where I have gone to my recommendation. When she said that Alyssa filled in, My body belongs to.... And then she filled in Daddy, that – that was a chilling statement to me.

She circled on the drawing of a male the hands and the genital area. There was testimony from Mr. Strait that she had no exposure to that, so and I'm also concerned about Mr. Strait's drinking. I'm glad he has gone into rehab. I'm sure he will be successful with it, but it does cause me some concern at this time.

Also, the bite marks that Alyssa told me she keeps getting from little Emma, and the cold sore that I have seen pictures of, and it was atrocious looking.

So based on all my interviews, that's why I don't recommend this lightly, but in this case I think there has been a change. I would just

recommend that the child be placed with her mother with supervised visitation in the home of the paternal grandmother. I think she will – I think she will protect this child.

R.E. 9-14. (emphasis added).

A cursory review of the GAL's testimony reveals that the Court did not consider in its findings of fact, nor did it address, important facts considered and testified to by the GAL in making her recommendation including, but not limited to, the following. First, the GAL interviewed some thirteen (13) people before making her recommendation that custody should be vested in the Mother. Thus, she had the input of many other individuals in addition to Ms. Hubbard.

Secondly, the GAL placed more emphasis on the one question that Ms. Hubbard did ask Alyssa which can not be characterized as leading or suggestive: "My body belongs to" with Alyssa filling in "Daddy". As stated by the GAL, this was a "chilling statement". *R.E. 11.*

Third, the GAL considered not only the allegations of sexual abuse at issue, but also the Father's apparent drinking problems, the repeated bite marks suffered by the child while in the father's custody and the child's cold sore left unattended by the Father. *R.E. 11.*

In addition to these facts testified to and considered by the GAL, the Court did not address nor consider other important and telling facts in its findings of fact. For example, Ms. Hubbard testified that Alyssa described the fact that she had showered with her father, her father's girlfriend and her father's girlfriend's daughter. *R.E. 21.*

Alyssa's description of such showers was not in response to leading or suggestive questions from Ms. Hubbard but, instead, a fact volunteered totally without suggestion from anyone. *R.E. 21*. And whether the child meant that her father and his girlfriend showed together, or that all four of them showered together, such activity should not be exposed to a child of this age.

There is apparent from the record a combination of adverse circumstances justifying modification of custody. The Father's escalating alcohol abuse resulting in arrest. *R.E. 11, T.T. 123-124*. See, e.g., Johnson v. Gray, 859 So. 2d 1006, 1014 (Miss. 2003). The Father's failure to attend to the child's medical needs. *R.E. 11*. The Father's lack of cooperation in visitation by the Mother. *T.T. 9-11*. And although cohabitation may not, in and of itself, be grounds for modification, it can be if it adversely affects the child. Forsythe v. Akers, 768 So. 2d 943, 948 (Miss. Ct. App. 2000). Here, the father's cohabitation with a girlfriend has resulted in a very young female child's exposure to the father and girlfriend taking showers together. When all of the facts are considered together, it is apparent that the child is living in genuinely adverse circumstances or an adverse environment which justifies modification of custody. See, e.g., Carter v. Carter, 735 So. 2d 1109, 1114 (Miss. 1999).

Clearly, the Court's failure to consider these important facts established by the GAL and others at trial was manifest error. Further, given the fact that a material change had obviously occurred at the time of the hearing, it is equally clear that the

child was adversely affected and that modification of custody is in the best interest of the child. Accordingly, the Court's judgment to maintain custody of the minor child in the father under the facts in the record should be not only reversed, but rendered in favor of the Mother being awarded custody.

III. The Court erred in awarding temporary custody to the paternal grandmother in the event the no contact order had not been lifted.

As part of the Court's Judgment, it ordered that custody was to be immediately returned to the father and, in the event that the no contact order issued by the U.S. Navy against the father had not been lifted, that custody was to be immediately returned to the paternal grandmother. *R.E. 7.* The Court erred in so ruling.

The law in Mississippi is well settled that parents "have a natural right to the nurture, care and custody of their children". Bell on Mississippi Family Law. As a general rule, a third party must prove that a parent has abandoned the child, is unfit to have custody or has engaged in conduct so immoral as to be detrimental to the child. Id.

No proof ,whatsoever, was submitted at the hearing tending to show that the Mother had abandoned the child, was unfit to have custody or had engaged in conduct so immoral as to be detrimental to the child. To the contrary, the record shows that the Mother not only had custody of the child at the time of the hearing, but that she also was fit and the proper person to have custody of the child. It is the Father who is unfit to have custody of Alyssa.

Thus, the Court's judgment is manifestly in error in this regard as well.

CONCLUSION

A review of the record and proceedings in this matter clearly evidences that the Court was manifestly in error in its findings of fact and that the wrong legal standard was applied when custody was returned to the Father and/or paternal grandmother. When all facts established by the record and proceedings in this matter are considered together, there can be no doubt that a material change occurred which adversely affects Alyssa and that modifying custody of Alyssa to her Mother is in the child's best interest. The "thorough" GAL recommended that custody be modified to the Mother and her recommendation is well-grounded in facts not considered by the Court. Accordingly, the Judgment of the Court should be reversed and rendered in favor of modification of custody of Alyssa to her Mother.

Respectfully submitted this the 20th day of November, 2007.

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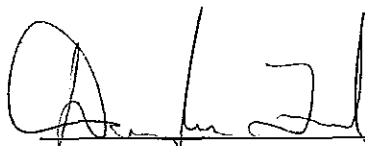
CERTIFICATE OF SERVICE

I, the undersigned, J. Douglas Ford, do hereby certify that I have this day mailed, postage prepaid, by United States mail, a true and correct copy of the above and foregoing instrument to the following:

Honorable Kenneth M. Burns
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SO CERTIFIED this the 20th day of November, 2007.



J. DOUGLAS FORD