THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRADLEY J. SUDDUTH — APPELLANT

vs. — **NO. 2007-CA-00575**

MELISSA MOWDY (Allen) — APPELLEE

On Appeal from the Chancery Court of the Twelfth Chancery Court District,
Lauderdale County, Mississippi

BRIEF OF APPELLEE, MELISSA MOWDY (Allen)

(ORAL ARGUMENT NOT REQUESTED)

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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

1. Bradley J. Sudduth, Appellant
2. Hannah Sudduth
3. Melissa Mowdy (Allen), Appellee
4. Honorable Jerry G. Mason, Trial Court Judge
5. James C. Mayo, Attorney for Appellee
6. Thomas G. Bittick, Attorney for Appellant

So certified this 3 day of January, 2008.

By: James C. Mayo
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ATTORNEY FOR APPELLEE
MELISSA MOWDY (Allen)

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STATEMENT OF THE FACTS

The learned Chancellor and trier of the facts carefully recites the procedural history and facts introduced at trial in his opinion, dated February 2, 2007 (RE 78 thru RE 135). Such facts recited by the Court are herein incorporated by Appellee *in toto.*

SUMMARY OF THE ARGUMENT

The trier of the fact in the Court below carefully and correctly summarized each and every point of attack by Appellant on the life and conduct of Appellee in being the custodial parent of the minor child of the Parties, Hannah Sudduth. In determining what is in the best interest of the minor and to whether or not a change in custody was warranted; the Court being supported by substantial evidence and applying applicable law determined providently that Appellee was entitled to the continued custody of Hannah. The trial Court opined the Appellant failed to prove by the evidence that such material changes, if any, had an adverse effect on the child, Hannah Sudduth, which is a summary of Appellee's argument.

The Court is given great deference in deciding whether to grant a new trial. The facts in this case justify the denial of the Rule 59 Motion filed by Appellant. A denial of a motion for new trial will not be reversed unless there was substantial abuse of discretion such as when the decision was contrary to the weight of the evidence or it was the result of bias, passion or prejudice. Nothing in this record supports the granting of the Motion.

ARGUMENT

1. THE STANDARD OF REVIEW BY THIS COURT IN THE CASE AT BAR IS "UNLESS THE TRIAL COURT ABUSED HIS DISCRETION, OR APPLIED AN IMPROPER LEGAL STANDARD" THEN SUCH DECISION SHOULD NOT BE OVERTURNED. *Denson v. George,* 642 So2d 909,913 (Miss.1994)

POINT OF ERROR ONE

Appellant argues Hannah was adversely affected by (1) an unstable home, (2) inappropriate relationships, (3) dental problems, (4) administering an inappropriate drug, and (5) inability to provide care for twenty (20) months, (*res judicata,* Civil Action No. 05-768M, MB 651, Page 507, 12th August, 2005).

Appellee submits to this Court that all incidents of unstable home, inappropriate relationships, dental problems, inappropriate drugs, failure to provide care urged by Appellant for the most part occurred prior to August 12, 2005, the date of the entry by the Court of its Bench Opinion and Judgment in Civil Action No. 05-768M (RE-131). The Court in this Judgment awarded the continued custody of Hannah to Appellee and in said opinion of August 12, 2005 recites:

> "The Court does find that the Defendant (Appellant herein) has failed to affirmatively prove that the custodial parent is otherwise unfit to continue to exercise custody over Hannah Sudduth." (RE-134)

The relationship with Rod, allegedly occurred in 2000; Ray Beaudin, 2002; Julio, 2004; Robert, March 2005 (RE 279). All of these incidents occurred prior to the finding and adjudication by the Court on August 12, 2005 in the habeas decision. The conduct of Appellee,

both before and after August 12, 2005, does not warrant a custody change and by the Trial Court in this cause was properly denied.

Appellee dated James in February 2006, but no proof or admittance of wrongful behavior (RE-9). Appellant next refers to Appellee's courtship with "T-Bone", whose real name is James Allen. Once again the record fails to reveal any inapropriate behavior by Appellee with James Allen. (RE-9)[1]

Appellee argues to the Court that Appellant's reliance on events occurring prior to September 12, 2005 is *res judicata* (emphasis added). No appeal was taken by Appellant from this separate opinion and judgment in Cause No. 05-768M.

None the less, the Court considered all the relevant contentions of Appellant, since 2000, and carefully summarized all, and recites:

> "The indiscretion of Appellee are not ignored, but the evidence does not develop that her indiscretions have adversely affected Hannah." (RE-118)

The Trial Court further recites:

> "(The Court) has considered the evidence relevant to the environment provided by the (Appellee) as the custodial parent of Hannah. This Court finds that the (Appellant) has failed to prove by a preponderance of the evidence that the custodial environment by the 'Appellee' for Hannah is adverse to the welfare and best interest of Hannah." (RE-118)

The lower Court denied the custody modification.

The trier of fact summarized principles of law relevant to child custody modification actions quite thoroughly (same will be referred to and adopted herein by Appellee) (RE-108 thru RE-116) The two prerequisites to modification:

[1]James Allen and Melissa Mowdy, Appellee, were married February 13, 2007 after an eleven (11) month courtship and now reside with Hannah in their home.

1. Material change in circumstances which adversely (emphasis added) affects the welfare of the child;

2. If such adverse change has been shown, moving party must show by like evidence that the best interest of the child requires change of custody.

The Supreme Court of Mississippi in *Tucker v. Tucker,* 453 So2d 1294 (Miss. 1984) P 1297:

"The rules of law applicable to cases such as these are well-settled. A decree for child custody shall not be modified so as to change custody from one parent to the other unless, subsequent to the original decree, there has been a material change in circumstances under which the child is living with the custodial parent which adversely affects the child's welfare. *Denney v. Denney,* 453 So2d 693, 694 (Miss.1984); *Kavanaugh v. Carraway,* 435 So2d 697, 700 (Miss.1983); *Cheek v. Ricker,* 431 So2d 1139, 1143 (Miss.1983); *O'Neal v. Warden,* 345 So2d 610 (Miss.1977).

The sort of change which would indicate the desirability of a change of custody, legally speaking, is one in the overall living conditions in which the child is found. The "totality of the circumstances" must be considered. *Kavanaugh v. Carraway,*435 So2d at 700. An isolated incident, e.g. an unwarranted striking of a child, does not in and of itself justify a change of custody. Before custody should be changed the chancellor should find that the overall circumstances in which a child lives have materially changed and are likely to remain materially changed for the foreseeable future and, of course, that such a change adversely impacts upon the child.

Even though the chancellor finds a material adverse change in circumstances, a change in custody is not automatic. The finding is merely the first step, the one which then authorizes and indeed challenges the chancellor to then go forward and determine whether the best interests of the child justify a change of custody.

In this context, we would reiterate what this Court said in *Bowden v. Fayard,* 355 So2d 662 (Miss.1978):

"Once the Court has determined which parent should have custody of the children, then they should be allowed the stabilizing influence of knowing where home is." 355 So2d at 664.

As Justice Hawkins has reminded us in *Ballard v. Ballard,* 434 So2d 1357 (Miss.1983), a change in custody is a "jolting, traumatic experience. It is only that behavior of a parent which clearly posits or causes danger to the mental or emotional well-being of a child (whether such behavior is immoral or not), which is sufficient basis to seriously consider the drastic legal action of changing custody." 434 So2d at 1360.

Accordingly, even though the court finds that a material change n circumstances has occurred and that this change in circumstances adversely affects the child, the court must then ask the second question, is it in the best interests of the child to change custody, for in the final analysis the best interest and welfare of the child are always our polestar considerations. *Denney v. Denney,* 453 So2d 693, 694 (Miss.1984); *Albright v. Albright,* 437 So.2d 1003, 1005 (Miss.1983); *Buntyn v. Smallwood,* 412 So2d 236, 2387 (Miss.1982).

In *Phillips v. Phillips,* 555 So2d 698 (Miss.1986), P 699, 701, the Court held:

"The thrust of the testimony to support the change in custody was that Mrs. Phillips had a romantic and sexual relationship with Mr. Coe. The record is limited in regard to the best interest of young Justin. The trial proceeded as though the question was whether the custodial parent's sexual relations with a third person outside of marriage warranted modification of the child custody order. Such a relationship by itself does not.

The Chancellor must not only look to the well-being of a child in his present custodial circumstance, but he must note with attention to specifics the environment and conditions pertaining to the child in the future."

A case analogous to this cause where in Appellant relies heavily on the twenty (20) months Hannah lived with Appellant (though previously adjudicated by the Court in the *habeas* decision September 11, 2005), is *Arnold v. Conwell,* 562 So2d 97 (Miss.1990); the Court considered a case where the child was with the non-custodial parent for eighteen (18) months and the custodial mother resumed full custody. The trial court granted custody to father but the Supreme Court reversed and stated:

"In his opinion, the chancellor relies inversely upon the rule for modification of a child custody decree. For instance, he stated that the divorce is not an issue; that the child has already been adversely affected in that sense; and

that the child is not going to be able to live with both natural parents in a family unit but that he has lived with his father for the last sixteen months in a family unit. Without question, the chancellor was looking toward what he considered to be in the best interest of Johnathan. He attempted to apply the law for the best interest of the child.

.....,The only change of circumstances, upon which appellee can rely, and which the Court accepted, was the fact the father had custody for sixteen months while the appellant, mother, had liberal visitation with the child.

Simply, the facts of this case do not reflect a material change in circumstances of the parties and the child, which adversely affected John, to the extent that his custody should be granted from appellant to appellee. Neither did the motion so charge nor the chancellor so find. We recognize that in some cases and under some circumstances, which we do not find here, there may be exceptions to this hard and difficult rule."

The learned chancellor in this case carefully and meticulously (53 pages) outlined and reviewed all evidence and applied existing law finally holding that "(Appellant) has failed to prove by a preponderance of the evidence a material change in circumstances subsequent to September 20, 2000, that are adverse to the welfare of Hannah Sudduth" RE 188. The Chancellor did not abuse his discretion and applied the proper legal standards in denying the custody change. The best interest of Hannah Sudduth was served by the ruling of the trial court.

POINT OF ERROR TWO

The Chancellor did not abuse his discretion in denying Appellant's Rule 59 Motion. The record is wholly void of any evidence that would produce a different result or was relevant to the issues to warrant re-litigation.

The Court on March 9, 2007 (RE 39-41) properly denied (Appellant's) Rule 59 Motion.

The Supreme Court in *Oden v. Roberts,* 606 So2d 114 (Miss.1992) recites:

"The court is given great deference in deciding whether to grant a new trial. The Supreme Court will not reverse an award of damages if the jury verdict is

supported by substantial evidence, the award is not so large or inadequate to shock the conscience of the Court, or the award is not the result of prejudice, bias or passion. 59(a)"

In *W. J. Runyon & Son, Inc. v. Davis,* 605 So2d 38 (Miss.1992):

"A denial of a motion for a new trial will be reversed unless there was a substantial abuse of discretion such as when the verdict was contrary to the weight of the evidence or it was the result of bias, passion or prejudice."

This cause over the past years has been litigated and re-litigated. The Chancellor, as trier of the fact and observant of all witnesses, acting in the best interest of Hannah Sudduth, did not abuse his discretion in the denial of the Rule 59 Motion.

CONCLUSION

The lower Court was correct in continuing the custody of Hannah Sudduth with her mother, and denying the Rule 59 Motion; the Chancellor did not abuse his discretion. The judgment of the lower Court by this Honorable Court should be affirmed.

Respectfully submitted,

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Appellee

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CERTIFICATE OF SERVICE

I, JAMES C. MAYO of FAIR & MAYO, ATTORNEYS do hereby certify that I have this day mailed by United States mail postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to

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Judge Jerry G. Mason
Chancellor
P. O. Box 6581
Meridian, MS 39302

This, the 3 day of January, 2008.

James C. Mayo
JAMES C. MAYO