

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DEBORAH FIERRO THURMAN (formerly Johnson)

APPELLANT

VERSUS

DOCKET NO. 2007-CA-00713

GLEN P. JOHNSON


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

1. Deborah Fierro Thurman (formerly Johnson), Appellant
2. Glen P. Johnson, Appellee
3. Kelly Michael Rayburn
Counsel of Record for Appellant
4. John V. Woodfield
Trial Counsel for Appellant
5. William E. Tisdale
Counsel of Record for Appellee
6. Honorable James Persons
Chancellor, Eight Chancery Court District

This the 28 day of February, 2008.



WILLIAM E. TISDALE

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STATEMENT OF THE ISSUES

THE CHANCELLOR PROPERLY APPLIED THE ALBRIGHT FACTORS IN AWARDING PHYSICAL CUSTODY OF THE MINOR CHILD, TYLER JOHNSON, TO THE APPELLEE, GLEN JOHNSON.

STATEMENT OF THE CASE
AND STATEMENT OF THE FACTS

I.

STATEMENT OF THE CASE

The Appellant, Deborah Fierro Thurman (formerly Johnson) hereinafter Deborah, and the Appellee, Glen P. Johnson, hereinafter Glen, were married on April 27, 1997, in Alaska. Glen was stationed in Alaska as a member of the U. S. Air Force. Deborah has two (2) children by a prior marriage.

Glen was transferred to Keesler Air Force Base, Biloxi, Mississippi, in 1999. The family moved to Mississippi, purchased a house in Biloxi, and they had a child of their marriage, Tyler Johnson, born October 16, 1999.

Glen was sent to Iraq by the military for a short tour in March, 2004, and both parents agreed that Tyler would stay with the paternal grandparents in Montana while Glen was in Iraq.

Upon Glen's return from Iraq, the locks on the marital home had been changed and he filed a Complaint for Divorce on June 21, 2004, citing Irreconcilable Differences. On August 12, 2004, Glen filed an Amended Complaint seeking a divorce on the ground of adultery and requested that he be awarded custody of the minor child, Tyler, and other relief.

On April 7, 2005, Deborah subsequently filed an Answer to the Amended Complaint and a Counter Complaint for Divorce on the ground of habitual cruel

and inhuman treatment and requested that she be awarded custody of Tyler and other relief.

Trial on the merits was had on April 12, 2005, January 10 and 11, 2006, and a Judgment of Divorce was filed August 18, 2006. The Judgment of Divorce granted Glen a divorce from Deborah on the ground of adultery; awarded Glen custody of the minor child, Tyler, established visitation and child support; and specified certain property and economic issues. Subsequently, Deborah filed a Motion for New Trial or in the Alternative for Reconsideration on August 25, 2006.

On November 3, 2006, Deborah's post trial Motion was heard, the parties announced all economic issues had been resolved, the Court had received the report of Freida Kaletsch on the housing status of Glen on October 27, 2006. The Court reserved ruling on Deborah's motion to reconsider custody of Tyler.

On March 30, 2007, the Court entered an Order denying the relief requested in Deborah's Motion for Reconsideration as concerning custody of Tyler. Deborah filed her notice of appeal on April 7, 2007.

II.

STATEMENT OF THE FACTS

Glen and Deborah were married on April 27, 1997, in Alaska, separated on or about March 5, 2004, in Biloxi, Mississippi, and they have one (1) child, Tyler Johnson, male, born October 16, 1999. TR6. Deborah has two (2) older children by a prior marriage, Nicole Fierro age 13 and Andrew Fierro age 10. RE40.

Glen and Andrew participated in scouts and Tyler would go with them. RE40-41,43. Tyler went to day care on base and Glen would bring him in the morning and pick him up in the afternoon. RE42. Glen would take Tyler for medical needs. RE43. When Glen and Deborah were living together Glen would get Tyler dressed in the morning most of the time and Tyler would eat breakfast at school. RE44

When Tyler would stay with Deborah, Mr. Thurman would be there overnight. RE43.

Deborah is 35 years old, in good physical health, in good mental health. RE45. Deborah has no family in the local area, most of her family is on the east coast. RE 46-47, 286, 302. Glen has no family here they are in Montana. RE 47. Glen and Tyler were very close. RE46.

Glen takes antidepressants. He took these medications before they were married. Deborah has multiple sclerosis but has had no attacks since June, 2001. RE47.

While Glen and Deborah were living together neighbors would see Glen playing with Tyler and doing yard work at their residence. RE48.

Since the separation Glen cares for Tyler on a daily basis when Tyler is with him. Glen gets Tyler up, gets him dressed, fixes meals for the child, bathes him, plays with him, gets him ready for bed, takes him to the park, plays on the trampoline. Tyler appears to be in good health. RE50-55, RE134. Glen and the stepson, Andrew, participated in cub scouts. Tyler would go with them and Glen would participate as a parent with Andrew and Tyler. They went camping together. RE50-55. When Deborah was there she did not participate as a parent. RE53-54. Other witnesses saw Glen at the park with Tyler. RE94.

Deborah's sister visited Deborah just before Glen left for Iraq. Deborah found a wooden pipe. Deborah found the pipe and tried to hide it from the kids. Glen later found the pipe in Deborah's jewelry box and turned it in to the police. RE56, 70.

Deborah and Mike Thurman share a joint bank account, spend the nights together when Tyler is present, and sleep in the same bedroom while Tyler is there. RE57. Glen says after he got back from Iraq Deborah told him that she had sex with her ex-husband while they lived in Alaska in June, 2004. RE58-59.

Glen has taken and completed a YMCA parenting class. RE60-61, 80.

Tyler is in good health. Glen would take the child for medical care. Glen would get Tyler up in the morning, take him to daycare, Tyler would have breakfast at school. RE62-64. Deborah would get Tyler up on Monday,

Wednesday and Friday. Glen went jogging those mornings. RE64. Tyler would get dressed the night before and sleep in his clothes. RE65. Glen would prepare supper for the family. RE65-66. Deborah would do the laundry for the family and the majority of the grocery shopping. RE66. Glen and Deborah split the housework. RE66. Glen did most of the yard work. The family went to church a few times. RE66. Glen's job in the military is primarily a carpenter. He has done some welding. He is in good physical health. He is in good mental health. He currently takes prescription drugs primarily for depression. He has been taking prescription medications for about nine (9) years. RE81. His family has a history of depression. RE67-68, 82. Three or four years ago Deborah had a vision and paralysis problem. RE68. She wanted to go to Florida and take Tyler with her. Glen refused to let Tyler go. RE69.

Deborah agreed to let Tyler go the paternal grandparents in Montana while Glen was in Iraq. Glen was scheduled to be in Iraq for three (3) month but was gone for three and one half (3 1/2) months. RE69. When Glen returned to Mississippi the house locks had been changed. RE70. Deborah called Tyler in Montana a couple of times. RE71. Glen then began a split the rent arrangement and lived in an apartment for a short time. RE71. Tyler was still in Montana. RE72.

Glen's work schedule at trial was Monday through Thursday, 7:00 a.m. to 4:45 p.m. and every other Friday from 7:00 a.m. to 3:45 p.m. He would be able to take Tyler to day care on base and pick Tyler up at the end of the day. He

would be available in the event Tyler became ill at day care. At that time Glen's work place was about a quarter mile from the daycare. RE72-73. Glen disciplines Tyler by talking to him or scolding him. RE74.

When the parents lived together Glen and Tyler would play together, go to the park, tried bike riding, frisbee, play ball in the yard, go fishing. RE74-75. Since Glen has returned from Iraq he and Tyler go to the beach, go fishing a lot, go to the park, they often stop after day care. RE75-76. Glen attends to the daily needs of Tyler when he is with the child since the separation. Glen does the washing of clother, preparation of meals. If granted custody Glen would apply for military housing to live on base. RE76-77. (The Court must be aware that the first day of trial was before hurricane Katrina August 29, 2005.) The kindergarten school and first grade school is about two (2) blocks from the marital residence. Glen has arranged for after school care if he gets custody. RE77-78.

Glen and Deborah have both attended an anger management course. RE78, RE132.

As a small child, Glen would frequently carry Tyler. RE79, RE 326-327. When Tyler would cry Glen would be the parent to pick him up to stop the crying. RE79, RE120, RE130. Deborah breast fed Tyler for five (5) weeks. RE84. After Glen and Tyler visited his parents in Montana, Deborah stopped breast feeding and Glen was the primary care giver for Tyler. Glen would get up

at night for the child, would take him to the doctor. RE85. Tyler has a stronger emotional tie with Glen rather than Deborah. RE87.

Deborah's relationship with Tyler would be strained because as an infant Glen would not put him (Tyler) down. Glen carried Tyler everywhere. He (Tyler) became dependent on Glen to be put to sleep at night. He would go to sleep on Glen's chest. RE88. Tyler would always go to Glen if he needed anything. He (Glen) seemed like he was the dominant parent. RE89. Deborah would frequently go out at night with her friends and leave Tyler with Glen. RE91. Deborah would sometimes stay out until 2:00, 3:00 and 4:00 a.m. RE92. Glen was home with Tyler. RE93.

Other witnesses have seen Glen take Tyler to the park and daycare. RE94. Deborah has told me she has had sex with Mike Thurman. RE97.

At the resumption of trial on January 10-11, 2006, Glen had pled guilty to larceny and was sentenced to ten (10) months incarceration by the military. The sentence was subject to review by a higher command in the military. RE97-98.

Glen supports Tyler by buying food, clothing and providing a place for Tyler to stay when he is with him. RE99.

If Glen get custody of Tyler and is allowed to leave the state he would go home, Missoula, Montana, where he has a job waiting in construction. If Glen does not get custody he will remain here (Mississippi) and work in construction.

RE100-101. Glen provided child care for a female friend one weekend and stayed the night at her house with Tyler. RE103.

Shortly after Tyler was born he was placed in daycare. When Tyler went to day care on base Glen would take him in the morning and pick him up after work. RE105. While Glen and Deborah lived together (Glen) would carry Tyler everywhere, he would bathe with him in the tub together. RE79, RE119, RE130. Glen would mother Tyler. RE106. Glen would cook supper most of the time. RE108.

After the hurricane Tyler has no friends in the neighborhood (marital residence) they all moved away. RE110. Both parents helped Tyler with school work since the storm. Deborah only since Glen was incarcerated in December (2005). RE111.

Deborah began having an intimate relationship with Mike Thurman in late 2003 or early 2004, before Glen had left for Iraq. RE112.

Deborah is employed as a dental assistant and has some college. RE113. The drug paraphernalia that Deborah found at her house belonged to her sister. The sister has been smoking marijuana since she was sixteen, she is now forty two years old. She doesn't do dope in the house. I found the pipe and put it in my jewelry box. RE117.

Tyler attends Jeff Davis school which is a block and a half from the marital residence. Tyler walks to school. RE114. Deborah got married to Mike Thurman on August 23, 2006, relocated her residence to that of Mr. Thurman

and as a result Tyler will be attending a different school about two miles from her now residence. RE141. Deborah registered Tyler for the new school on July 24, 2006, and lists Mike Thurman as the step father on the school check out list prior to her marriage to Thurman. RE141.

Deborah has two (2) older children, Andrew and Nicole. Andrew is in the fifth grade and went to school in Arizona for the fourth grade and is attending school in Arizona for the fifth grade. Nicole is 14 years old. She went to school in Biloxi for the seventh grade and is attending school now in Arizona for the eighth grade. RE114-115.

Deborah would continue to sleep with Mike Thurman even when Tyler was staying overnight. RE121. Deborah and Mike Thurman are living together even with the child present. RE122. In March, 2004, while Glen was paying the house note, Tyler was in Montana with the grandparents, Deborah's two older children were living with her in the marital residence and Mike Thurman would spend the night. RE 125-126.

Glen and Deborah had been keeping Tyler for a week at a time. RE126. Deborah had been the sole parent for Tyler since Glen was incarcerated on December 13, 2005, and she had helped Tyler with school work for a total of 15 days (at the time of trial). RE126. Both parents had assisted Tyler with school work prior to Glen's incarceration. RE126.

In October, 2005, Deborah and Glen swapped weekends for having Tyler. Tyler's birthday is October 16, Deborah's birthday is October 12. During that

weekend when Tyler was with Glen, Deborah and Mike Thurman went to Boston, MA, from Wednesday to Sunday. Thurman paid the expenses for the trip. RE128-129.

On one occasion Deborah, Mike Thurman and Tyler were at the military base exchange and Tyler saw Glen and went to Glen and hugged him. RE127.

Deborah has M.S. and was placed on medication but is no longer taking the medication as she feels it was not necessary. RE123-124.

At the hearing for the Appellant's Motion To Reconsider on November 3, 2006, counsel for both parties made oral arguments. The Court had the benefit of reviewing Ms. Kaletsch's report dated October 27, 2006, which the Court had previously requested as concerning the current living situation of Glen prior to Glen having actual physical custody of Tyler. RE135-136, RE140. The Court's custody ruling, Glen having physical custody, was made after Glen had been released from incarceration by the military. RE137. The Court was made aware that Glen was going to relocate to Montana with Tyler. RE139. The Court made specific and detailed findings of fact as concerning the Albright factors in its August 18, 2005, Judgment of Divorce ruling. RE140.

The Chancellor made detailed findings of fact as to the conduct of the parties during the marriage in the Judgment of Divorce filed August 18, 2006. RE 10-13.

The Chancellor made detailed findings and discussed each Albright factor as concerning custody of the minor child in the Judgment of Divorce filed

August 18, 2006. RE16-20. Deborah was slightly favored in two (2) factors, employment of the parent, physical & mental health of the parent. Glen was favored in one (1) factor, moral fitness. Additionally, the Chancellor had a subsequent home study report on the residence of Glen provided by Ms. Freida Kaletsch, the Harrison County Court Social Worker. RE20.

SUMMARY OF THE ARGUMENT

THE CHANCELLOR PROPERLY APPLIED THE ALBRIGHT FACTORS IN
AWARDING PHYSICAL CUSTODY TO THE APPELLEE, GLEN JOHNSON.

The Chancellor made detailed findings of fact as concerning all of the
Albright factors in awarding custody of Tyler Johnson to Glen Johnson.

ARGUMENT

THE CHANCELLOR PROPERLY APPLIED THE ALBRIGHT FACTORS IN AWARDING PHYSICAL CUSTODY OF THE MINOR CHILD, TYLER JOHNSON, TO THE APPELLEE, GLEN JOHNSON.

“The standard of review in child custody cases is well-established. These matters fall within the sound discretion of the chancellor. *Sturgis v. Sturgis*, 792 So.2d 1020, 1023(¶ 12) (Miss.Ct.App. 2001). Therefore, when this Court reviews an award of child custody, the decision of the chancellor will be affirmed unless the decision is manifestly wrong, clearly erroneous, or the chancellor applied an erroneous legal standard. *Roberson v. Roberson*, 814 So.2d 183, 184(¶ 3) (Miss.Ct.App. 2002). The chancellor’s decision must be supported by substantial evidence in the record. *Id.*” *Norman v. Norman*, 962 So.2d 718 (Miss.App. 2007).

The appellate court’s standard of review was once again restated in *Jordan v. Jordan*, 963 So.2d 1235 (Miss.App. 2007) as follows, “Our scope of review in domestic relations matters is limited by the substantial evidence/manifest error rule. *Mizell v. Mizell*, 708 So.2d 55, 59(¶ 12) (Miss. 1998) (citing *Stevison v. Woods*, 560 So.2d 176, 180 (Miss. 1990)). “This Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Bell v. Parker*, 563 So.2d 594, 596-97 (Miss.1990). This Court is required to respect the findings of fact made by a chancellor which are supported by credible

evidence and not manifestly wrong. *Newsom v. Newsom*, 557 So.2d 511, 514 (Miss. 1990). This is particularly true “in the areas of divorce and child support.” *Mizell*, 708 So.2d at 59(¶ 13) (Miss. 1998) (quoting *Nichols v. Tedder*, 547 So.2d 766, 781 (Miss. 1989)).

“In light of our standard of review in child custody cases, we must give deference to the chancellor's determination regarding the weight and credibility of the evidence. *Alderson v. Alderson*, 810 So.2d at 629(¶ 4) (Miss. Ct. App. 2002). As an appellate court, we may not substitute our judgment for the chancellor's but must determine if the chancellor's ruling is supported by substantial evidence. *Brewer v. Brewer*, 919 So.2d 135, 141(¶ 23) (Miss.Ct.App. 2005). “So long as there is substantial evidence in the record that, if found credible by the chancellor, would provide support for the chancellor's decision, this Court may not intercede simply to substitute our collective opinion for that of the chancellor.” *Id.* (citing *Bower v. Bower*, 758 So. 2d 405, 412(¶ 33) (Miss. 2000)).” *Norman v. Norman*, 962 So.2d 718 (Miss.App. 2007).

In determining the issue of child custody, the chancellors are required to use the twelve factors set forth in *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983), which states, “[T]he polestar consideration in child custody cases is the best interest and welfare of the child. The age of the child is subordinated to that rule and is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the

child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.”

“The Albright factors guide chancellors in reviewing evidence relevant to custody. They are not, as the supreme court has noted, “the equivalent of a mathematical formula.” *Lee v. Lee*, 798 So.2d 1284, 1288 (Miss. 2001). Although chancellors are instructed to weigh parents’ relative merits under each factor, a parent who “wins” on more factors is not necessarily entitled to custody. In some cases, one or two factors may control an award. *Divers v. Divers*, 856 So.2d 370, 376 (Miss. Ct. App. 2003). Furthermore, a chancellor’s ultimate decision is guided by additional considerations - the credibility of witnesses, the weight of their testimony, and the weighing of evidence capable of more than one interpretation. *Johnson v. Gray*, 859 So.2d 1006, 1013-1014 (Miss. 2003).” *Bell on Mississippi Family Law*, §5.03.

The Chancellor made detailed findings and discussed each Albright factor as concerning custody of the minor child in the Judgment of Divorce filed

August 18, 2006. RE16-20. Deborah was slightly favored in two (2) factors, employment of the parent, physical & mental health of the parent. Glen was favored in one (1) factor, moral fitness. Additionally, the Chancellor had a subsequent home study report on the residence of Glen provided by Ms. Freida Kaletsch, the Harrison County Court Social Worker.

CONCLUSION

In the case at bar, the chancellor's findings were supported by credible evidence from the record. The chancellor considered the Albright factors, and properly articulated his rationale for each when stating his findings of fact and conclusions of law in awarding custody to Glen. There was substantial evidence to support the chancellor's ruling, thus this Court should find no error with awarding primary physical custody of Tyler Johnson to Glen Johnson. Deborah Fierro Thurman sole issue as concerning custody is without merit. and the chancellor's judgment should be affirmed.

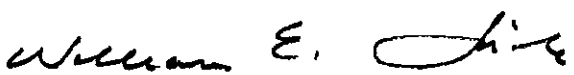
CERTIFICATE OF SERVICE

I William E. Tisdale, counsel of record for the Appellee herein, do certify that i have this day mailed by United States mail, postage prepaid, to the Clerk of this Court the original and three (3) copies of the Brief of the Appellee, along with an electronic disk containing the Brief of the Appellee; and further 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 the Appellee to the following at their regular business mailing addresses:

Honorable James Persons, Chancellor
Post Office Box 457
Gulfport, MS 39502

Honorable Kelly M. Rayburn
P. O. Box 2566
Gulfport, MS 39505

This the 29 day of February, 2008.



WILLIAM E. TISDALE