

IN THE SUPREME COURT OF MISSISSIPPI

CASE NO. 2007-TS-00925

JESSICA A. HEWETT

APPELLANT

V.

JONATHAN L. HEWETT

APPELLEE

**ON APPEAL FROM THE CHANCERY COURT OF LOWNDES
COUNTY, MISSISSIPPI
Cause No. 2006-0177-D**

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

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Appellee

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Appellant

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Linda and Jim Hewett

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STATUTES

Miss. Code Ann. § 93-5-24(5)(b) (1972)

Miss. Code Ann. § 93-5-24(5)(d) (1972)

Legend:

R.E. = Record Excerpts of Appellee/Cross-Appellant

R. = Record (clerk's papers)

T.T. = Trial Transcript

STATEMENT OF THE ISSUES

- I. Whether the Court erred in not holding the Mother in contempt when she failed and refused to acknowledge the Father's contractual and statutory rights to determine the care, custody and control of the minor child since he is the parent vested with complete physical and legal custody of the minor child.
- II. Whether the Court erred in awarding temporary physical custody to the Mother when she did not petition the court for a change of custody.
- III. Assuming temporary custody of the minor child was properly before the Court, did the Court err in awarding custody based on the natural parent presumption when the mother had voluntarily relinquished complete physical and legal custody of the minor child to the Father.
- IV. Assuming temporary custody of the minor child was properly before the Court, and assuming the natural parent presumption was applicable to benefit the Mother in a temporary custody determination, did the Court err in awarding visitation to the paternal grandparents so as to acknowledge the Father's contractual and statutory rights to determine the care, custody and control of the minor child.

STATEMENT OF THE FACTS

On March 7, 2006, the Appellant (“Jessica” or “Mother”) and the Appellee (“Jonathan” or “Father”) executed a joint complaint for divorce with said joint complaint having been filed with the Chancery Court of Lowndes County, Mississippi on March 10, 2006. *R. 3.* On August 29, 2006, the Chancery Court of Lowndes County, Mississippi in Cause Number 2006-0177 entered a Final Judgment of Divorce to Jessica and Jonathan based on irreconcilable differences. *R.E. 10.* The parties had one child born unto their marriage, namely Jonathan Connor Hewett (“hereinafter “Connor” or “child”), whose date of birth is January 8, 2005. *R.E. 11.* In the Final Judgment of Divorce, the Father was given “full legal and physical custody of the parties’ minor child”. *R.E. 13.*

At the time of the hearing of this matter, the Father was serving as a private first class in the United States Army. *R.E. 15.* Subsequent to the filing of the joint complaint for divorce, but prior to the entry of the Final Judgment for Divorce in this matter, Jonathan was deployed overseas and eventually to Iraq as part of his military service. *R.E. 16.*

Prior to being deployed, Father and Mother agreed that Mother would take temporary custody of the child and take the minor child to Father’s parents regularly and often and then eventually give the care and custody of the minor child to Father’s parents until he returned from his tour of duty overseas. *R.E. 23.*

Consistent with the parties’ out of court agreement regarding the custody of

the minor child, Father executed various documents prior and subsequent to the entry of the Final Judgment for Divorce by the Court. On or about May 24, 2006, the Father executed a general power of attorney naming his father, James W. Hewett, as his true and lawful attorney-in-fact to act in all matters in his name. *R.E. 31*. On or about October 2, 2006, Father executed a Certificate of Acceptance As Guardian or Escort by which he named his father, James W. Hewett, as the guardian to care for his child. *R.E. 26*. Also, on or about October 2, 2006, Father executed a Power of Attorney which named his father, James W. Hewett, as the guardian of Connor. *R.E. 26*. Both of these forms were provided to Father by the military. *R.E. 15-19*.

Despite their out-of-court agreement regarding custody of the minor child and despite the Final Judgment of Divorce which gives complete legal and physical custody of the minor child to Father, Mother never yielded custody of the minor child to the paternal grandparents and also began a pattern and practice of cutting Father and his family out of the life of the minor child. *R.E. 20-23*. Mother failed to inform Father of the whereabouts of the child, did not obtain his input relative to the care and control of the child and made it difficult, if not impossible, for the Father to have any contact or communication with the minor child while he was deployed overseas. *R.E. 25*.

As a result, Father was forced to seek the aide of the Court to protect his rights and to protect the best interest of his minor child. On or about January 11, 2007, the Father filed a petition to cite the Mother for contempt. *R. 70*. The Mother has never

filed any pleading to modify the legal or physical custody of the minor child.

SUMMARY OF THE ARGUMENT

By a final judgment of divorce entered in this matter and agreed to by the parties to this matter, the Father has full physical and legal custody of the parties' minor child. By statutory definition, "physical custody" means those periods of time which a child resides with or is under the care and supervision of one of the parents. Miss. Code Ann. § 93-5-24(5)(b) (1972), as amended. By statutory definition, "legal custody" means the decision making rights, the responsibilities and the authority relating to the health, education and welfare of a child. Miss. Code Ann. § 93-5-24(5)(d) (1972), as amended. Thus, when one parent has both full legal and physical custody of a child, that parent determines what is in the best interest of the child relative to its care, custody, control, health, education and general welfare.

Jonathan determined that his father, Connor's paternal grandfather, would be the best person to retain the custody, care and control of Connor while he was temporarily deployed overseas in the military. Despite his determination, the Mother took and retained physical and legal custody of Connor and thwarted the Father's attempts to have contact with him. The Mother's actions were intentional and done without any legal authority. She never petitioned the Court to modify custody. She, instead, asked the Court to approve of her conduct and to ratify her unilateral decision to take the custody, care and control of the child despite a court order to the contrary. The Mother should have been held in contempt of court for failing to

acknowledge the Father's contractual and statutory rights to determine the care, custody and control of the minor child. The Court erred in awarding temporary custody to the Mother when she did not petition the Court for a change in custody and when the natural parent presumption did not apply. Alternatively, the Court's ruling attempted to satisfy all concerns and should be upheld if the Mother was legally justified in retaining custody despite the Father's wishes.

ARGUMENT

I. Standard of Review.

Chancellors are accorded great discretion in resolving disputed questions of fact such that awards will not be reversed on appeal unless the Chancellor was manifestly in error in the findings of fact. Powers v. Power, 568 So. 2d 255, 257 (Miss. 1990). However, questions of law are reviewed de novo. Appellate courts will reverse if a Chancellor applied an incorrect legal standard. Brown v. Miss. Dept of Human Services, 806 So. 2d 1109, 1113 (Miss. Ct. App. 1999). In child custody cases, the Chancellor must be manifestly wrong, clearly erroneous, or have applied the wrong legal standard for this Court to reverse. Hill v. Hill, 942 So. 2d 207 (Miss. Ct. App. 2006), citing Williams v. Williams, 656 So. 2d 325, 330 (Miss. 1995).

II. The Chancellor was in error not holding the Mother in contempt for her failure to acknowledge the Father's statutory and contractual rights to make decisions relating to the care, custody and control of the minor child.

Complete physical and legal custody of the parties' minor child is vested in the

Father and has been so vested since entry by the Court of the Final Judgment of Divorce in this matter. *R.E. 10*. Physical custody is defined to mean “those periods of time in which a child resides with or is under the care and supervision of one (1) of the parents.” Miss. Code Ann. § 93-5-24(5)(b) (1972). Legal custody is defined to mean “the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of a child.” Miss. Code Ann. § 93-5-24(5)(d) (1972).

The petition to cite the mother for contempt, which was filed by the Father in this matter, was filed because the Mother was interfering with and refusing to acknowledge the Father’s rights as the physical and legal custodian of the minor child to determine the care, custody and control of the minor child. *R.E. 20-23, 25*.

The father did not know and was not informed by the Mother, even upon request, as to where the child was kept and who was keeping the child at various times when the Mother was at work or out partying. *R.E. 20-23, 25*. The Chancellor was manifestly in error to overlook or ignore the statutory and contractual rights of the Father to make such decisions that related to the minor child and to ignore the fact that the Mother had intentionally thwarted the Father’s attempts to communicate with the minor child. Accordingly, that portion of the Chancellor’s decision finding the Mother not to be in contempt should be reversed and remanded such that the Mother should be responsible for the Father’s attorney fees and costs.

III. The Mother was not entitled to temporary physical custody of the child as she did not petition the court for a change of custody and she failed to prove by clear and convincing evidence that a change of custody would be in the best interest of the child.

Instead of filing a petition to modify/change custody in response to the petition for contempt, the Mother filed a motion to dismiss attempting to rely on what is known as the “natural parent presumption” in order to justify her unilateral decision to take physical and legal custody of the minor child while at the same time ignoring the contractual and statutory rights of the Father. R. 79. The Court ratified the Mother’s actions in taking physical custody of the minor child without prior authority by awarding to her the temporary physical custody of the minor child until the Father returns from his tour of duty with the Army overseas.

Interestingly enough, the Mother recognizes in her Brief that “custody was not pled for nor at issue”. *Appellant’s Brief*, p. 10. The Appellant goes on to argue that “[a]ccording to Judge Griffith’s treatise, the court in the case at bar was without jurisdiction by hearing issues of custody/grandparent visitation when only a contempt of court action was pled.” *Id.* Thus, according to the Mother’s own arguments here on appeal, the Court did not have jurisdiction to award temporary physical custody to the Mother. Physical and legal custody of the minor child was vested in the Father at the time of the hearing on the petition to cite the Mother for contempt and the Mother did not petition the court for a change of custody.

A. The natural parent presumption.

The natural parent presumption is that a natural parent's right to custody is superior to that of third parties, whether grandparents or others. Grant v. Martin, 757 So. 2d 264, 266 (Miss. 2000). However, the natural parent presumption does not apply when parents voluntarily relinquish custody of a minor child through a court of competent jurisdiction. Id.(emphasis added) In that instance, a natural parent who voluntarily relinquishes custody of a minor child, through a court of competent jurisdiction, has forfeited the right to rely on the existing natural parent presumption. A natural parent may reclaim custody of the child only upon a showing by clear and convincing evidence that the change in custody is in the best interest of the child. Id.

B. The natural parent presumption does not apply.

The Mother agreed to the divorce based on irreconcilable differences and executed the property settlement and child custody agreement which is incorporated into the Final Judgment of Divorce. The Mother signed the property settlement and child custody agreement which gives the Father full physical and legal custody of the minor child not once, but twice. She first signed it when the joint complaint for divorce was filed on March 7, 2006 and, again, on August 24, 2006 when she signed an amended property settlement and child custody agreement. *R. 18, 50*. Both the original property settlement and child custody agreement and the amended property settlement and child custody agreement provide that full physical and legal custody are vested in the Father. By agreeing to the terms of custody in the property settlement

and child custody agreement, the Mother relinquished custody of the minor child through a court of competent jurisdiction. Accordingly, the natural parent presumption does not apply in this case.

Since the natural parent presumption does not apply, the Mother was required to file a petition to modify/change custody and then prove by clear and convincing evidence that granting temporary physical custody of the child to her was in the best interest of the child. Id. The Mother filed no such petition to modify and failed to meet the requisite burden of proof to change custody of the minor child to her. Consequently, the decision of the Chancellor should be reversed such that the minor child's paternal grandfather be vested with the temporary physical custody of the minor child pending the Father's return from active duty overseas.

IV. Alternatively, should the natural parent presumption be found applicable, the ruling of the Chancellor as to temporary custody with visitation allowed the paternal grandparents should be upheld.

In the alternative, should the Mother be deemed to have sufficiently pled for a change in custody and the natural parent presumption be found applicable in favor of the Mother, then the Chancellor's decision as to temporary physical custody of the minor child with visitation allowed the paternal grandparents should be upheld. Admittedly, the Father is unable to take physical custody of the parties' minor child while he is serving his country overseas.

However, in anticipation of his temporary absence that would prevent him from taking physical custody of the child, the Father executed various documents

indicating his intent and desire that his father, the minor child's paternal grandfather, be the person who was to take physical and legal custody, care and control of the minor child during his temporary absence from the United States while on active duty in the military. This he has the right, power and authority to do by virtue of the fact that he has sole "legal" custody of the minor child.

Accordingly, the Court's decision to allow the paternal grandparents certain visitation rights with the minor child is not manifestly wrong or erroneous. Rather, the Court has given credence and merit to the Father's contractual and statutory right to determine the care, custody and general welfare of the child while at the same time acknowledging the Mother's right to temporary physical custody during the Father's tour of duty overseas.

Given the totality and uniqueness of the facts and circumstances that were developed during the hearing of this matter, the Chancellor was faced with unique issues. However, the Court crafted an order that attempted to and did address the underlying issues while keeping in mind the polestar consideration of what is in the best interest of the child.

CONCLUSION

First and foremost, the Chancellor should be found manifestly wrong in not holding the Mother in contempt of court for her willful and intentional failure to acknowledge the statutory and contractual rights of the Father to determine the custody, care and welfare of the minor child. The Father was vested with sole and

complete physical and legal custody of the minor child by virtue of the parties' divorce.

Secondly, because the Mother did not petition the court for a change of custody, and because the natural parent presumption does not apply to benefit the Mother in this case, then the Chancellor was in error in awarding temporary physical custody of the minor child to the mother. The Mother did not petition the Court to change custody and the Mother did not prove by clear and convincing evidence that changing custody was in the best interest of the child.

Alternatively, however, should the Mother be deemed to have somehow invoked the Court's jurisdiction to determine custody and should the natural parent presumption be found applicable, than the ruling of the Chancellor vesting temporary physical custody of the minor child with the mother and vesting certain visitation rights in the paternal grandparents should be upheld. By so doing, the Chancellor gave legal and practical effect to the natural parent presumption while, at the same time, acknowledging the Father's statutory and contractual rights as the "legal" custodian to determine the care, custody and general welfare of the minor child. The result is then equitable and not manifestly in error.

Respectfully submitted this the 16th 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 H. J. Davidson, Jr.

Chancery Judge

P. O. Box 684

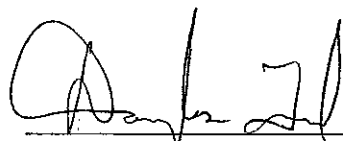
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SO CERTIFIED this the 16th day of November, 2007.



J. DOUGLAS FORD