

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2007-CA-01337

KELLY DIANE (HARPER) RIMMER,

PLAINTIFF/APPELLANT

v.

STEPHEN CRAIG HARPER,

DEFENDANT/APPELLEE

BRIEF OF APPELLEE

Appeal from the Chancery Court of DeSoto County, Mississippi
Cause No. 01-3-0465

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PLAINTIFF/APPELLANT

v.


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CERTIFICATE OF INTERESTED PARTIES

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. Kelly Diane (Harper) Rimmer, Plaintiff/Appellant;
2. Stephen Craig Harper, Defendant/Appellee;
3. Cynthia Chandler-Snell, Attorney for the Appellant
4. Steven G. Roberts, Attorney for the Appellee;
5. Honorable Mitchell M. Lundy, Chancellor.



Steven G. Roberts
Attorney for the Appellee

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STATEMENT OF THE ISSUES

- I. THE FILING OF A "NOTICE OF TRANSFER" WAS AN INSUFFICIENT PLEADING TO RAISE THE ISSUE OF INCONVENIENT FORUM.
- II. THE CHANCELLOR DID NOT ABUSE HIS DISCRETION IN RETAINING JURISDICTION PURSUANT TO THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT
- III. THE CHANCELLOR DID NOT ABUSE HIS DISCRETION IN REFUSING TO TRANSFER BASED UPON INCONVENIENT FORUM

STATEMENT OF THE CASE

This matter is currently before the Court based upon a document filed March 22, 2007, by the Appellant, Kelly Diane (Harper) Rimmer, in the Chancery Court of DeSoto County, Mississippi, entitled "Notice of Transfer." The document was mailed, postage prepaid, to the Appellee, Stephen Craig Harper, at his residence in DeSoto County, Mississippi. (R. 20) A Motion in Opposition to Notice of Transfer and Motion to Dismiss was filed on behalf of Stephen Craig Harper. (R. 23) Pursuant to a Notice of Motion filed on behalf of Stephen Craig Harper, the Parties appeared before the Chancery Court of DeSoto County, Mississippi on May 15, 2007. Upon meeting with the Chancellor, the Parties agreed to submit the matter to the Court upon Memorandums and oral argument. Upon review of the pleadings, the Memorandums, and oral arguments of counsel for the Parties, the Court found that the Chancery Court of DeSoto County, Mississippi should retain "exclusive, continuing jurisdiction" in this cause and that the request to transfer jurisdiction to the Chancery Court of Carroll County, Tennessee, should be denied. (R. 29)

STATEMENT OF THE FACTS

The Parties were divorced pursuant to a Final Decree of Divorce entered in the Chancery Court of DeSoto County, Mississippi on July 24, 2002, which incorporated therein the Property Settlement Agreement entered into by and between the Parties.

(R.14) On May 5, 2003, an Agreed Order setting forth the current joint physical and legal custody arrangement was entered in this Cause. (R. 8) The Agreed Order provided in part that the Mother, Plaintiff/Appellant, Kelly Diane (Harper) Rimmer, would have physical custody during the school year and the Father, Defendant/Appellee, Stephen Craig Harper, would have physical custody during the summer months, plus each parent would have every other weekend visitation while the children are with the other parent. (R. 9-10)

In July 2002, immediately after the entry of the Final Decree of Divorce, the Mother, Kelly Diane (Harper) Rimmer, with the Parties' minor children, moved to Carroll County, Tennessee. (R. 33; Appellant's Brief p.4) The decision to move by the Mother to Carroll County, Tennessee (approximately 140 miles) was the sole/unilateral decision of the Mother. (R. 33) After moving to Carroll County, Tennessee, the Plaintiff/Appellant and Defendant/Appellee filed Petitions for Contempt and Change of Custody actions against the other in the Chancery Court of DeSoto County, Mississippi. (R. 5) It was not until after the hearing on the Petitions had begun and the Court had heard some of the testimony, that the Parties entered into the Agreed Order, dated May 5, 2003.

Stephen Craig Harper has continued to exercise his summer and every other weekend visitation since the entry of the Agreed Order in May, 2003. (R. 36) There has been an issue with the of the exercise of visitation with the Parties' oldest child. The Father has repeatedly requested that the Mother, Kelly Diane (Harper) Rimmer, have both children ready for the custody exchange, but she refuses to make the daughter available. (R. 36-37)

The youngest child has some learning difficulties. It was the Father, Stephen Craig Harper, who sought help with this issue by placing him in the Sylvan Learning Center in Southaven, Mississippi, during the summer 2006 custody period. (R. 38) The Mother, Kelly Diane (Harper) Rimmer, refused to continue the learning sessions during the 2006-2007 school year and the child's grades declined as the year progressed. (R. 38, 43)

While this matter was pending before the Chancery Court of DeSoto County, Mississippi, the Mother, Kelly Diane (Harper) Rimmer, did take the youngest child to Dr. Peter Zinkus for an initial psychological evaluation (April 10, 2007). (R. 44) The report, based upon social information provided by the Mother, indicates that "the father is seldom in the picture." (R. 44)

In March 2007, the Plaintiff/Appellant, Kelly Diane (Harper) Rimmer, filed a pleading in this Cause titled "Notice of Transfer." (R. 20) The Defendant/Appellee, Stephen Craig Harper, filed a Motion in Opposition to Notice of Transfer and Motion to Dismiss. (R. 23) The Parties appeared before the Court on May 15, 2007, on the Motion of the Defendant, Stephen Craig Harper, in Opposition and Motion to Dismiss, at which time the Court requested Memorandums from the Parties, and the Parties agreed

to submit the matter to the Court on the Memorandums. On June 11, 2007, the Parties appeared before the Chancellor and presented oral arguments. The Chancellor found that the Chancery Court of DeSoto County, Mississippi, would retain "exclusive, continuing jurisdiction" and that the request of the Mother to transfer the matter to Carroll County, Tennessee, was denied. (R. 29)

SUMMARY OF ARGUMENT

The filing of a "Notice of Transfer" by the Mother, Kelly Diane (Harper) Rimmer, in the Chancery Court of DeSoto County, Mississippi, was an insufficient pleading or an improper procedure by which to raise the issue of inconvenient forum or for the transfer of subject matter jurisdiction. The issue of subject matter jurisdiction (and any subsequent transfer thereof) in child custody actions is controlled by the Uniform Child Custody Jurisdiction and Enforcement Act as codified in M.C.A. § 93-27-101 *et seq.* The mere filing of a "Notice of Transfer" is not a pleading or procedure recognized under the Uniform Child Custody Jurisdiction and Enforcement Act or the Mississippi Rules of Civil Procedure.

The Chancellor was correct and did not abuse his discretion in ordering that the Chancery Court of DeSoto County, Mississippi retain "exclusive, continuing jurisdiction." Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (M.C.A. § 93-27-101 *et seq.*), the Chancery Court of DeSoto County, Mississippi, having made the initial custody determination in the Final Decree of Divorce, and having modified said Order in May 2003, the Chancery Court of DeSoto County, Mississippi, pursuant to M.C.A. § 93-27-202, retains "exclusive, continuing jurisdiction" over the issues of child custody until such time as it is determined that neither the children nor one of the parents resides in the State of Mississippi and that there is not a significant connection with the State of Mississippi and that significant evidence is no longer available in Mississippi.

The Chancellor did not abuse his discretion in failing to transfer jurisdiction, based on inconvenient forum, to Carroll County, Tennessee. The "Notice of Transfer"

did not request, state, or plead inconvenient forum. Further, there was no pending litigation to transfer. No custody action had been filed by the Mother. The only filing by the Mother was the "Notice of Transfer" which specifically limited the contest to the residency of the Parties and/or children.

ARGUMENT

STANDARD OF REVIEW

The standard of review by the appellate courts of a chancellor's decision in a domestic relations matter, as stated in Pierce v. Chandler, 855 So.2d 455, 457 ¶ 8, (Miss. App. 2003), is as follows:

Our scope of review in domestic matters is limited. This Court will not disturb the findings of a chancellor when supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. Denson v. George, 642 So.2d 909, 913 (Miss. 1994). This is particularly true "in the areas of divorce and child support." Nichols v. Tedder, 547 So.2d 766, 781 (Miss. 1989). This Court is not called upon or permitted to substitute its collective judgment for that of the chancellor. Richardson v. Riley, 355 So.2d 677, 668-69 (Miss. 1978). A conclusion that we might have decided the case differently, standing alone, is not a basis to disturb the result. *Id.*

ISSUE I:

THE FILING OF A "NOTICE OF TRANSFER" WAS AN INSUFFICIENT PLEADING TO RAISE THE ISSUE OF INCONVENIENT FORUM.

Pursuant to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) as codified in Mississippi Code Annotated §93-27-101 *et. seq.*, the issues of "exclusive, continuing jurisdiction" (M.C.A. §93-27-202) and "inconvenient forum" (M.C.A. §93-27-207) in child custody matters are controlled by The Act (UCCJEA). The Mother, Kelly Diane (Harper) Rimmer's, "Notice of Transfer" is not a pleading recognized by The Act or the Mississippi Rules of Civil Procedure.

In the Prayer for Relief as contained in the "Notice of Transfer" the Mother states:

The non-requesting party can appeal this request for transfer within fifteen (15) days of the date the notice was mailed by filing a motion

to oppose the same in the Chancery Court of DeSoto County, Mississippi. (R. 21)

There is no provision within the UCCJEA which provides for a Notice of Transfer and a fifteen (15) day period for the non-requesting party to oppose said notice. Likewise, there is no provision within the Mississippi Rules of Civil Procedure for such a procedure.

The Plaintiff's "Notice of Transfer" appears to be an effort by the Mother, without a Court finding, to declare the Chancery Court of DeSoto County, Mississippi, to be an "inconvenient forum." However, M.C.A. §93-27-207(1) provides that an issue of inconvenient forum may be raised by 1) motion of a party, 2) the court's own motion, or 3) request of another court. All three (3) options presuppose an action being filed or pending to raise the issue of inconvenient forum, not the mere filing of a "Notice of Transfer." Specifically, M.C.A. §93-27-207(2)(f) states as one of the factors in resolving the issue of inconvenient forum is "evidence to resolve pending litigation."

As there was no "litigation" pending, no Motion to Transfer, no Complaint to Modify, etc.; the only pleading was the Father's Motion to Dismiss the Notice of Transfer. The Notice fails to state a cause of action pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure, as raised by the Father, Stephen Craig Harper, in his original Motion to Dismiss.

The "Notice of Transfer" did not request that the Court transfer jurisdiction based upon inconvenient forum. (R. 20-22) Specifically, the "Notice of Transfer" limited any contest of the Notice as follows:

A contest of this transfer shall be limited to whether one party or the children continue to reside in the transfer county (DeSoto County)

or whether the children have resided in the transferee count(y) [sic] (Carroll County, Tennessee) for at least six (6) months. (R. 21)

Pursuant to M.C.A. §93-27-202, and the limitation contained in the Notice, as the Defendant, Stephen Craig Harper, continued to reside in DeSoto County, Mississippi (R. 20, 24), the Chancery Court of DeSoto County, Mississippi, having made an initial child custody determination (Final Decree of Divorce – 2002) and a modification determination (Agreed Order – 2003), retained “exclusive, continuing jurisdiction” over the issue of child custody.

ISSUE II:

THE CHANCELLOR DID NOT ABUSE HIS DISCRETION IN RETAINING JURISDICTION PURSUANT TO THE UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

Once a Court has made an initial custody determination consistent with the requirements of the Mississippi Uniform Child Custody Jurisdiction and Enforcement Act (M.C.A. §93-27-201), as the DeSoto County Chancery Court did upon the entry of the Final Decree of Divorce (R. 14) and the Agreed Order of May 2003 (R. 8), the Court retains "exclusive, continuing jurisdiction" pursuant to M.C.A. §93-27-202, which provides as follows:

Exclusive, continuing jurisdiction.

(1) Except as otherwise provided in Section 93-27-204, a court of this state which has made a child custody determination consistent with Sections 93-27-201 or 93-27-203 has exclusive, continuing jurisdiction over the determination until:

(a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in this state.

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 93-27-201. (Emphasis Added)

The Appellant's argument in Issue III and IV of her brief that the Chancellor erred by failing to find sufficient contacts outside the State of Mississippi (Issue III) and sufficient contacts within the State of Tennessee (Issue IV) are misplaced. Pursuant to M.C.A. §93-27-202 (1)(a) for a Court of this State to retain "exclusive, continuing jurisdiction" the issue is not contacts outside of Mississippi or contacts within the State

of Tennessee, but whether there is a significant connection with the State of Mississippi and whether substantial evidence is available in the State of Mississippi.

In the case at bar, the Chancellor clearly did not abuse his discretion in ruling that the Chancery Court of DeSoto County should retain “exclusive, continuing jurisdiction” pursuant to M.C.A. §93-27-202. (R. 29) The Father, Stephen Craig Harper, lives in DeSoto County, Mississippi (R. 24); the Parties were awarded joint physical and legal custody in DeSoto County (R. 8); the Father exercises his joint custody (summers) and every other weekend visitation in DeSoto County; (there is a dispute as to the visitation of the Father with the oldest child and the Mother’s refusal to have the daughter available for the custody and visitation periods.) (R. 36-37); the Father’s family and child’s paternal relatives live in DeSoto County, Mississippi; and the tutoring/extra-educational assistance provided to the youngest child is available through The Sylvan Learning Center in DeSoto County, Mississippi. (R. 38)

ISSUE III:

THE CHANCELLOR DID NOT ABUSE HIS DISCRETION IN REFUSING TO TRANSFER BASED UPON INCONVENIENT FORUM

As previously noted, the "Notice of Transfer" filed by the Mother, Kelly Diane (Harper) Rimmer, did not contain a request, prayer, or reference to a motion of inconvenient forum. (R. 20-22) The reference to the Notice as a possible motion for inconvenient forum was contained in the Father's Motion to Dismiss for failure to state a cause of action pursuant to Rule 12(b)(6) of the Mississippi Rules of Civil Procedure. (R. 23)

Assuming arguendo, that the issue of inconvenient forum was properly before the trial court, the Chancellor did not err or abuse his discretion in refusing to transfer the matter to Carroll County, Tennessee. The issues and factors to be considered by a Court in determining the issue of inconvenient forum are set forth in M.C.A. §93-27-207(2):

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

- (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
 - (b) The length of time the child has resided outside this state;
 - (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
 - (d) The relative financial circumstances of the parties;
 - (e) Any agreement of the parties as to which state should assume jurisdiction;
 - (f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
 - (g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence;
- and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

Before determining whether it is an inconvenient forum, the court must first determine whether it is appropriate for another state to exercise jurisdiction. The transfer of subject matter jurisdiction would not automatically give the Tennessee courts personal jurisdiction over the Father. Additionally, contrary to the statements of the Mother that she did not move to Carroll County, Tennessee, to punish the Father or alienate the children from their Father, this is exactly what she has done. The Mother has refused to make the oldest child available for custody and visitation periods. (R. 36-37) While the Mother says she is concerned about the youngest child's learning difficulties and checked into the Star Center in Jackson, Tennessee, she made no efforts to continue the Sylvan Learning program initiated by the Father, nor did she enroll the youngest child in the Star Center during the nine (9) months a year she has custody.

In an effort to bolster her position before the Chancery Court of DeSoto County, Mississippi, the Mother did take the youngest child for a psychological exam, not a doctor in Carroll County or even Jackson, Tennessee, but to Dr. Peter Zinkus in Memphis, Tennessee. Dr. Zinkus saw the youngest child on April 10, 2007. Dr. Zinkus' initial Report of Psychological Evaluation did not state that he was dyslexic. It was not until after the Father requested a copy of the Report that an Addendum to the Report was prepared dated May 30, 2007, stating that the child was Dyslexic. (R. 44-47) Also, it is important to note that the initial report of Dr. Zinkus states, "...the father is seldom in the picture." Did the Mother not mention that the Father gets his son every other weekend and all summer? Did Dr. Zinkus just miss this point or did the Mother mislead

Dr. Zinkus in providing erroneous information that would be necessary and pertinent information to assist Dr. Zinkus in child's evaluation and medical care.

In a move away case involving the predecessor to the UCCJ&EA, the UCCJA, the Mississippi Supreme Court held in Hasse v. Shane, 717 So.2d 718, 720 (Miss. 1998), that the fact that the mother's unilateral action in moving the children to Maryland was not a valid justification for the Mississippi Courts to decline jurisdiction.

The statute addressing the issue of inconvenient forum presupposes the filing of a custody action. Specifically, M.C.A. §93-27-207(2)(f) states one of the factors to be considered by the court includes:

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child. (Emphasis Added)

There was no pending litigation for the Chancellor to consider. The Mother did not file a custody action, a Complaint to Transfer for Inconvenient Forum, or a Complaint of any type. She merely filed a "Notice of Transfer" limiting the contest of the transfer to the residency of the Parties and/or children.

The Mother argues that the Chancellor erred in failing to consider the best interest of the children in denying her request for the Court to decline further jurisdiction. (Appellant's Brief p. 15) However, before the Court can consider the Albright factors related to the best interest of the children, the Mother must first establish a substantial and material change, since the entry of the custody decree, adversely affecting the children's welfare. Riley v. Doerner, 677 So.2d 740 (Miss. 1996) and Mabus v. Mabus, 847 So.2d 815, 818 (Miss. 2003). Again, absent the filing of some pleading by the Mother to allege such substantial material change of circumstance, there is nothing before the court for the court to consider. Therefore, the Chancellor could not consider

or even address the factors set forth in Albright v. Albright, 437 So.2d 1003 (Miss. 1983).

The Appellant/Mother asserts in her Brief (p. 12) that the Chancellor abused his discretion in failing to "engage in a comparative analysis" of the factors related to inconvenient forum and had the Chancellor performed such an analysis the evidence would have "clearly preponderated" in favor of the foreign jurisdiction. The standard of review for an appeal is not "clearly preponderated," The standard of review is did the Chancellor abuse his discretion, was he manifestly wrong, or clearly erroneous. Pierce at 457. The Chancellor did not abuse his discretion or err in finding that the Chancery Court of DeSoto County, Mississippi, should maintain "exclusive and continuing jurisdiction" and that subject matter jurisdiction should not be transferred to Carroll County, Tennessee.

CONCLUSION

For the above and foregoing reasons, the Appellee/Father, Stephen Craig Harper, asserts that the Chancellor did not abuse his discretion and that the decision from the Chancery Court of DeSoto County, Mississippi, should be affirmed.

Respectfully Submitted,

A handwritten signature in cursive script, reading "Steven G. Roberts", written over a horizontal line.

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CERTIFICATE OF SERVICE

I, Steven G. Roberts, do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Brief of Appellee to:

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This the 27th day of March, 2008.



Steven G. Roberts