

IN THE SUPREME COURT FOR THE STATE OF MISSISSIPPI

KELLY DIANE (HARPER) RIMMER,

Appellant,

v.

No. 2007-CA-01337
APPEAL

STEPHEN CRAIG HARPER,

Appellee.

BRIEF OF THE APPELLANT

ORAL ARGUMENT REQUESTED



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

Kelly Diane (Harper) Rimmer

Stephen Craig Rimmer

Cynthia Chandler-Snell, Hobock Law Firm, PC, attorney of record for Kelly Diane (Harper) Rimmer.



Cynthia Chandler-Snell

STATEMENT IN SUPPORT OF REQUEST FOR ORAL ARGUMENT

Comes now counsel for the Appellant and in support of her request for oral argument would state that the issues presented in this appeal are appropriate for oral argument. Counsel submits that the transcript and statements of the Chancellor may be further explained by counsel for the parties with greater clarity than the Briefs will provide. The Court may have questions regarding each counsel's interpretation of the Chancellor's ruling that reach beyond the scope of the Briefs in this matter.

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DESIGNATIONS AND REFERENCES TO THE RECORD

This is an appeal, filed by the Plaintiff / Appellant, Kelly Diane (Harper) Rimmer, from the Chancery Court of Desoto County, Mississippi, from the Chancellor's ruling, documented in the Order entered with the Court on July 16, 2007, which was heard on or about June 11, 2007.

For purposes of clarity, the Appellant-Plaintiff, KELLY DIANE HARPER, will be referred to as the "Appellant" or "Mother." The Appellee-Defendant, STEPHEN CRAIG HARPER will be referred to as the "Appellee" or "Father."

References to the Trial Record will be designated by the abbreviation "[T.R. ____]" which shall reference the page number as set forth in the Table of Contents in the Trial Record filed by the Chancery Court Clerk. References to the Transcript will be designated by the abbreviation "[R. ____]" which shall reference the actual page number of the Transcript referenced.

STATEMENT OF ISSUES

- I.** Whether the Trial Court erred because its finds of fact and conclusions of law are manifestly wrong and not supported by the evidence of the case.
- II.** Whether the Trial Court abused his discretion by failing to consider the factors as enumerated at Miss. Code §93-27-202 regarding the Mother's claim of inconvenient forum.
- III.** Whether the Trial Court erred by failing to find that sufficient contacts exist outside the State of Mississippi for the Court to decline jurisdiction.
- IV.** Whether the Trial Court erred by failing to find that there are sufficient contacts within the State of Tennessee to establish it as the forum state.
- V.** Whether the Trial Court erred by failing to find that the Chancery Court of Carroll County, Tennessee is a more appropriate forum to hear the disputed issues of child custody.
- VI.** Whether the Trial Court failed to consider the best interest of the children in denying the Mother's request for the Court to decline further jurisdiction and transfer this matter to the Chancery Court of Carroll County.

STATEMENT OF THE FACTS

The procedural history is largely undisputed in this matter. The parties settled the original divorce complaint pursuant to a property settlement agreement entered with the Court on June 28, 2001 which also outlined the parties' respective parental obligations for the care and maintenance of the two minor children. The parties were subsequently divorced pursuant to the terms of that agreement by Decree of Divorce [T.R. 14]. The parties filed subsequent petitions for contempt and change of custody and ultimately settled these matters pursuant to an Agreed Order filed with the Court on May 5, 2003 [T.R. 8].

Subsequent to the parties' divorce, in July, 2002, the Appellant and the children relocated to Carroll County, Tennessee, located in the Northwest portion of that State. The approximate distance between Huntingdon, the county seat of Carroll County and the Defendant's residence, 2250 Greencliff Drive, Southaven, Mississippi, is one hundred forty (140) miles with the majority of the distance within the State of Tennessee.

The parties' respective parenting time is governed by the terms of the May 5, 2003 Agreed Order. [T.R. 8]. It is undisputed that the Mother consented to the jurisdiction of the Court on that occasion. In accordance with the terms of the 2003 Agreed Order and the property settlement agreement, the children resided primarily with the Mother. The Father received parenting time with the parties' two minor children on the first (1st) and third (3rd) weekends of each month, as well as alternating holiday vacation periods. The Father received additional parenting time with the minor children during the summer vacation period, with the Mother making the children available on the last day of the school year with the Father returning the children no later than the last day of the summer vacation period.

On or about March 22, 2007, the Mother filed a Notice of Transfer for the above titled

matter [T.R. 8]. For procedural purposes, such Notice was in accordance with the Uniform Child Custody Jurisdiction and Enforcement Act pursuant to Mississippi Code Annotated § 93-27-207 as it relates to Inconvenient Forum and was recognized as such by the Trial Court. [R. 4]. The Father, on or about March 28, 2007, filed with the court a Motion in Opposition to Notice of Transfer and Motion to Dismiss [T.R. 23]. The parties appeared before the court for final disposition of this matter on June 11, 2007 [T.R. 8] and the Trial Court denied the Appellant relief.

The Trial Court, in its finding, asserted that the remedy of transferring jurisdiction on the grounds of inconvenient forum by the relocating party, the Father in this case, was unavailable to the Mother [R. 17]. The Trial Court reasoned that that such a remedy would have been available to the Father under the same circumstances based upon the tenets of the Uniform Child Custody Jurisdiction Action. The Trial Court further reasoned that the relative short distance between the parties did not require the court to transfer jurisdiction to Tennessee. [R. 17]

The Mother set forth in her Memorandum and oral argument a number of factors that weighed in favor of transferring jurisdiction to Tennessee, including, but not limited to the best interest of the children. The Trial Court, however, limited the scope of its ruling to the issues as set forth in the preceding paragraph.

SUMMARY OF THE ARGUMENT

The Chancellor's ruling that this case should not be transferred to the children's home state of Tennessee was manifestly wrong and erroneous. While the Chancery Court of Desoto County, Mississippi, had original jurisdiction, the proof presented was that one minor child had absolutely no contact with the state since 2003. The other child visited his father in Mississippi on alternating weekends and for summer vacation. The Mother and children have resided in Tennessee continuously since the divorce. This lack of contact with Mississippi, when paired with the substantial connections to Tennessee, justified transfer.

The chancellor further erroneously applied and interpreted the law, stating that the Mother could not, under Mississippi statute, move to transfer the case based on inconvenient forum, because that right was reserved for the party who had not relocated, although no law was cited by either the Chancellor or the Father. The Chancellor further ruled that the distance between the locations in the two states was "short," which is not a factor provided for consideration. The chancellor failed to properly evaluate the evidence and ruled in error.

ARGUMENT

An Appellate Court will not disturb a Chancellor's findings unless the chancellor abused his discretion, was manifestly wrong, was clearly erroneous or applied an erroneous legal standard. *Turpin v. Turpin*, 699 So. 2d 560, 564 (Miss. 1997). In domestic relations cases, the scope of the Appellate Court is limited by the substantial evidence / manifest error rule. *Jundoosing v. Jundoosing*, 826 So.2d 85, 88 (Miss.2002).

Mississippi, as well as a number of other jurisdictions, has adopted the Uniform Child Custody Jurisdiction Act. Before 1968, State courts throughout the United States could exercise jurisdiction over a child custody case based upon a child's presence in that given state. Courts also freely modified sister States' orders because U.S Supreme Court rulings never settled the question of whether the Full Faith and Credit clause of the U.S. Constitution applied to custody decrees. U.S. Constitution, Article IV § 1.

Given the interstate nature of the problem, an interstate solution was needed. The National Conference of Commissioners on Uniform State Laws responded in 1968 with the Uniform Child Custody Jurisdiction Act, which governed the existence and exercise of jurisdiction in initial custody determinations and cases involving modification of existing orders. The Uniform Child Custody Jurisdiction Enforcement Act is a uniform State law that was approved in 1997 by the National Conference of Commissioners on Uniform State Laws (NCCUSL) to replace its Uniform Child Custody Jurisdiction Act. *Uniform Child Custody Jurisdiction Act*, 9 (1A) U.L.A. 271 (1999).

The Uniform Child Custody Jurisdiction Enforcement Act based jurisdiction on a child's close affiliation with a State. Adopted in Mississippi in 2004, the Act specifically established

four (4) jurisdictional grounds: 1.) Home State (reserved for the State in which the child has lived for at least six (6) months preceding commencement of the action). 2.) Significant Connection (exists when a State has substantial evidence about a child as a result of the child's significant connection to that State). 3.) Emergency (governs situations such as abandonment or abuse that require immediate protective action). 4.) Vacuum (applies when no other jurisdictional basis exists). Under the Uniform Child Custody Jurisdiction Act, a court with initial jurisdiction; exclusive, continuing jurisdiction; or modification jurisdiction may decline to exercise jurisdiction on two (2) grounds: inconvenient forum and unjustifiable conduct. Since the latter does not apply in the instant matter, the Mother focused the Trial Court's attention to the former. Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, Juvenile Justice Bulletin (December, 2001).

I. WHETHER THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE MANIFESTLY WRONG AND NOT SUPPORTED BY THE EVIDENCE OF THE CASE.

The Father asserted in his Motion to Dismiss and in Opposition to Notice to Transfer Jurisdiction that the issue was better decided in accordance with Mississippi Code §93-27-202, which states in pertinent part that the Chancery Court of Mississippi, having made the initial child custody determination in the Decree of Divorce, should retain "exclusive, continuing jurisdiction" over the issues of child custody until such a time as it is determined that neither the children nor one of the parents resides in the State of Mississippi [T.R. 23] .

The relevant authority the Father and the Court largely relied upon and as asserted in the proceeding paragraph is stated verbatim as follows:

- (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 this 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.

Miss. Code. § 93-27-202 (West 2004).

The Trial Court, in rendering its decision, noted that it held the opinion that the Uniform Child Custody Jurisdiction Act or the related Acts gave the only person who did **not** relocate the opportunity to file in the new jurisdiction because of the inconvenient forum issues [R.17]. This assertion is wholly unsupported by statute, case law or argument by counsel.

The Supreme Court has ruled in past decisions that a Chancellor's finding of fact is subject to reversal only when there is "no substantial credible evidence in the record" to justify his finding. *Johnson v. Johnson*, 650 So.2d 1281, 1285 (Miss.1994). The Chancellor's ruling failed to address the connections in Tennessee and the lack of connections with Mississippi. Rather, the Chancellor believed that the "short distance" was not far enough. [R.17] Mississippi law does not address the distance between the locations within separate states, but instead focuses on the fact

that two separate states are, indeed, involved. The Trial Court's reasoning is arbitrary and is not supported by any statute. The ruling was without support in the record and clearly erroneous, subject to reversal.

II. WHETHER THE TRIAL COURT ABUSED ITS DISCRETION BY FAILING TO CONSIDER THE FACTORS AS ENUMERATED AT MISS. CODE §93-27-202 REGARDING THE APPELLANT'S CLAIM OF INCONVENIENT FORUM.

The Court has previously held that the appropriate standard of review for issues of manifest error (abuse of discretion) on the part of the Chancellor is highly deferential to the Court. *Brocato v. Brocato*, 731 So.2d 1138,1141 (Miss.1999). However, the Mother's arguments supported under Miss. Code §93-27-207 were largely ignored by the Trial Court. Mother argued under section (2) of that section, citing the length of time the child has resided outside of the state, the distance between the court in Mississippi and the court in Tennessee which would assume jurisdiction, the relative financial circumstances of the parties, the nature and location of the evidence required to resolve the pending litigation, and the ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence. The statute reads that only after a consideration of those factors and others enumerated in that section may a Trial Court make a conclusion regarding an argument of inconvenient forum.

The Trial Court systematically dismissed Mother's arguments without consideration of the merits. The Trial Court interjected that many of the records at issue might be submitted through agreement and did not seem to considered counsel's argument that the records could not be cross-examined and thus, would require the presence of individuals in addition [R. 5]. The Trial Court submitted that any inconvenience in distance for witnesses could be overcome by

taking depositions (R. 5, 11]. Mother's argument that depositions do not afford the judge the opportunity to examine the witnesses himself or to judge the witnesses' demeanor and affect were ignored or discounted by the Trial Court. [R. 11, 12].

Additionally, the Trial Court in the instant matter offered some semblance of prejudice toward the Mother due to her relocation outside of the jurisdiction. The Trial Court, in questioning counsel for the Mother as to a possible alternative motive for the relocation of the Mother, offered a hypothetical situation in which a party relocated to a distant jurisdiction (Alaska), for the purpose of frustrating the other parent's relationship with the child [R.9]. However, the facts and circumstances of this case speak contrary to such a hypothetical situation. The Mother's relocation to the State of Tennessee was a never for the purpose of frustrating the Father's relationship with the children and no such assertion was ever made. The parties even entered a subsequent modification agreement to accommodate the distance between the parties [T.R. 8]. Further, counsel for the Mother stated that society, in general, was mobile by its very nature and the Mother's relocation was a foreseeable circumstance from the divorce [R.9,10].

The Father, in his Brief to the Trial Court, argued that the Mother's move, being unilateral and voluntary, weighed against the Mother in her request for transfer of jurisdiction [T.R. 36-37]. However, the very language of the Uniform Child Custody Jurisdiction Enforcement Act is contrary to that assertion. Under § 201, or as codified at Miss. Code § 93-27-202, of the Uniform Child Custody Jurisdiction Enforcement Act, the original court retains exclusive continuing jurisdiction unless the state no longer has "a significant connection" with the child, the parents, or a person acting as parent, or when "substantial evidence ... concerning the child's protection, training, and personal relationships' is no longer available in the state. Miss. Code § 93-27-202 (West 2004).

A careful reading of the statute clearly indicates that Miss. Code §93-27-207 applies when it is found that a forum established by Miss. Code §93-27-202, such as the Desoto County Chancery Court in this case, is an inconvenient forum under the factors enumerated in the statute. Thus, it was well within the Trial Court's discretion to engage in a comparative analysis, as enumerated in Miss. Code §93-27-207 and had the Trial Court considered such factors, the evidence would have clearly preponderated in favor of the foreign forum. The Trial Court's blatant refusal to consider such factors was an abuse of its discretion and contrary to law.

III. WHETHER THE TRIAL COURT ERRED BY FAILING TO FIND THAT SUFFICIENT CONTACTS EXIST OUTSIDE THE STATE OF MISSISSIPPI FOR THE COURT TO DECLINE JURISIDCTION.

It is undisputed that the Mother and the parties' two (2) children relocated to Huntingdon, Carroll County, Tennessee, in July, 2002 and have exclusively resided in that locale since the parties' divorce [T.R.52]. Both children are enrolled in the Carroll County, Tennessee school system and both are active in extracurricular activities in that locale. [T.R.54]. It is further important to note that the Father has not exercised visitation with the parties' elder child since 2003 [T.R. 52-53], [R.6]. Such an intentional abdication of responsibility, as it relates to the strengthening and nurturing of that child, certainly weakens the Father's claim to the current forum. That child has had no contact with the state of Mississippi in four years.

Under § 201, or as codified at Miss. Code §93-27-202, of the Uniform Child Custody Jurisdiction Enforcement Act, particular emphasis is placed on the child's "home" state. The original court retains exclusive continuing jurisdiction unless the state no longer has "a significant connection" with the child, the parents, or a person acting as parent, or when "substantial evidence ... concerning the child's protection, training, and personal

relationships' is no longer available in the state. Miss. Code §93-27-202 (West 2004). The fact that the Harper children reside primarily with the Mother in Tennessee during the year, the Father has failed to exercise visitation rights to the elder child in four years, and the children have substantial contacts within Tennessee, as it relates to their extracurricular activities, certainly gives credence to the argument that Mississippi is no longer the convenient and proper forum to adjudicate future matters concerning the parties and their children. Given the substantial amount of contacts with Tennessee and that such contacts weigh in favor of the foreign forum, the Trial Court erred in failing to consider such factors.

IV. WHETHER SUFFICIENT CONTACTS EXIST WITHIN THE STATE OF TENNESSEE FOR THAT STATE TO BECOME THE FORUM STATE.

While the Father continues resides in Mississippi [T.R.48], the children have resided primarily with the Mother in Tennessee since the parties' divorce. The Father receives parenting time with the parties' minor children on the 1st and 3rd weekend of each month and from the day school is released for the summer until the day before school is set to resume. [T.R.8]. The substantial majority of the children's educational, social and familial network is within Carroll County, Tennessee. Given that the parties' eldest child's contact with the State of Mississippi has been nonexistent for several years, as the Father has not had parenting time with the daughter since 2003, absolutely no evidence or testimony regarding the eldest child's circumstances or well-being is within the State of Mississippi. [T.R.55]. In light of the facts and circumstances as set forth above, this clearly weighs in favor of Tennessee as the forum state and the Trial Court erred in its failure to consider such factors in its findings and ruling in this matter.

[T.R. 55]. The Trial Court erred in failing to consider such factors in its findings and ruling in the matter.

VI. WHETHER THE TRIAL COURT ERRED IN FAILING TO CONSIDER THE BEST INTEREST OF THE CHILDREN IN DENYING THE APPELLANT'S REQUEST FOR THE COURT TO DECLINE FURTHER JURISDICTION AND TRANSFER THIS MATTER TO THE CHANCERY COURT OF CARROLL COUNTY, TENNESSEE.

The polestar consideration in child custody proceedings is the best interest and welfare of the child. *Albright v. Albright*, 437 So.2d 1003 (Miss.1983). In this matter, the proof was disputed as to the causation for the parties' younger child's academic shortcomings, but undisputed that his grades had declined during the most recent academic year [T.R. 38,54]. Furthermore, there was undisputed proof as to the Father's failure to exercise parenting time in accordance with the parties' Agreed Order with the elder child for the past three (3) years, constituting a material change of circumstances. [R.6,7], [T.R. 36, 37].

Case law dictates that circumstances that adversely affect the welfare of the child can be considered by the Court in subsequent modification proceedings. *Brocato v. Brocato*, 731 So.2d 1138,1141 (Miss.1999). Certainly the Father's absence from the minor child's life for the past four (4) years was a circumstance that should have been considered by the Court in consideration of the Mother's claim. The Court's failure to consider the facts and circumstances affecting the children present day is reversible error under relevant statutory authority and case law.

CONCLUSION

In the case at bar, the crux of the Mother's request for appellate relief lies at the findings of facts and conclusion of law of the Trial Court. The Mother would assert that the Trial Court's findings of facts, and the conclusions based upon those findings of facts, were in gross contradiction with the facts, circumstances and relevant law presented by the Mother, and admitted in some respects by the Father. The Trial Court's failure to consider such factors in its reasoning and final conclusion is reversible error under the appropriate standard of review applicable in domestic relations cases.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies a true copy of the foregoing Brief of the Appellant has been served on:

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by depositing the same in the United States Mail, postage prepaid, addressed as shown above, on this the 25 day of January, 2008

By: 
Cynthia Chandler-Snell

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APPEAL


STEPHEN CRAIG HARPER,
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APPELLANT'S CERTIFICATE OF SERVICE ON THE TRIAL COURT JUDGE

The undersigned certifies a true copy of the Brief of the Appellant has been served on the Trial Court Judge, Hon. Mitchell M. Lundy, Jr., at P.O. Drawer 471 Grenada, MS 38901 by depositing the same in the United States Mail, postage prepaid, addressed as shown above, on this the 30 day of January, 2008

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CERTIFICATE OF SERVICE

The undersigned certifies a true copy of the foregoing has been served on Steven G. Roberts, Esq., 6263 Poplar Avenue, Suite 1032, Memphis, TN 38119 by depositing the same in the United States Mail, postage prepaid, addressed as shown above, on this the 30 day of January, 2008


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