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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

JOY LYNN PEARSON

APPELLANT

VS.

NO. 2007-CA-01991

STEVEN ALLEN PEARSON

APPELLEE

APPEAL FROM THE CHANCERY COURT OF PIKE COUNTY, MISSISSIPPI
HONORABLE DEBBRA K. HALFORD, PRESIDING

BRIEF OF APPELLEE
ORAL ARGUMENT NOT REQUESTED

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STEVEN ALLEN PEARSON

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record, in accordance with Rule 28(a) (1) of the Mississippi Rules of Appellate Procedure, 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 this Court may evaluate possible disqualifications or recusal.

Joy Lynn Pearson, Appellant

Eduardo A. Flechas, Attorney for Appellant

Steven Allen Pearson, Appellee

Wayne Smith, Attorney for Appellee



WAYNE SMITH
Attorney for Appellee

TABLE OF AUTHORITIES

CASES:

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STATEMENT OF THE ISSUES

1. Whether or not the trial court and/or the chancellor erred in failing to find a material change in circumstances in any order.

2. Whether or not the chancellor erred in its application of the *Albright Factors*.

STATEMENT OF THE CASE

The appellee agrees with the course of the proceeding and disposition of the case as outlined by the appellant. This is noted as "A" under the appellant's statement of the case.

This is a cause of action that has arisen due to a Petition for Modification of Custody filed by the plaintiff, Steven Allen Pearson, said action being filed with the Chancery Court of Pike County, Mississippi on or about the 9th day of October, 2006.

The parties in this cause of action had previously entered into a no-fault divorce, child custody and property settlement agreement. That according to the terms and provisions of the property settlement agreement, the parties hereto were to have joint legal and physical custody of the minor child, McKenna Claire Pearson, who was born December 2, 2002. That at the time of the agreement, the parties both made their residence in Pike County, Mississippi. Further, the parties were employed by Southwest Mississippi Regional Medical Center and each worked at Southwest Mississippi Regional Medical Center as a pharmacist. The parties hereto were in close proximity one to the other and had a substantial support group within Pike County, Mississippi.

In accordance with the terms and provisions of the child custody and property settlement agreement, each party was to be responsible for certain expenses for the use and benefit of the minor child. (T. 12-16)

Immediately thereafter, Steven Allen Pearson was notified on

or about August 24, 2006, that his former wife and defendant herein, Joy Lynn Pearson, was expressing a desire to relocate her residence to Brandon, Mississippi. (T. 131) That Steven Allen Pearson, at that time, expressed to Joy Lynn Pearson that he did not believe it would be in the best interest of the child that she be moved from a stable environment and support group in Pike County, Mississippi.

The testimony of Joy Lynn Pearson was that she was working through a recruiter in the State of Texas who was looking for job opportunities in the surrounding areas of McComb, Mississippi. (T. 20) Further, that Joy Lynn Pearson moved to Brandon, Mississippi, on or about October 23, 2006. Immediately upon moving to Brandon, Mississippi, Joy Lynn Pearson then proceeded to attempt to dictate policy concerning the joint custody agreement and other issues. These issues included: (a) Changing the child's pediatrician without notifying Steven Allen Pearson. (T. 30) (b) Arbitrarily stating that the child would attend school in Brandon, Mississippi, when the parties had agreed that the child would attend school in McComb, Mississippi. (c) Arbitrarily changing the schedule for custody with the child.

That shortly after Joy Lynn Pearson moved to Brandon, Mississippi, she proposed on the 14th day of December, 2006, to changing the custody arrangement. When Steven Allen Pearson disagreed with Joy Lynn Pearson's new proposal, she threatened to deny Steven Allen Pearson custody during his allotted visitation

time (T. 26) and refused to discuss the issue until Steven Allen Pearson agreed with her. The testimony of Joy Lynn Pearson was that she forwarded a text message to Steven Allen Pearson stating, "If you're ready to talk about changing the schedule, call me." (T. 26) Steven Allen Pearson objected to the schedule, but in order to keep down conflict, he reluctantly allowed the new schedule which was seven (7) days for each party.

Upon further questioning, it was discovered that during the times Steven Allen Pearson would have the child for a full week, Joy Lynn Pearson had a work schedule that provided for a 12:30 a.m. to 9:00 a.m. shift. It was apparent that Joy Lynn Pearson had made sure that Steven Allen Pearson would have custody of the child during this one shift.

The child was quickly approaching school age. This as well as Joy Lynn Pearson's blatant disregard for the joint custody agreement combined caused Steven Allen Pearson a considerable amount of concern about the child's best interest. The main question at that point was whether or not the child could attend school in Brandon, Mississippi, or McComb, Mississippi, while in the custody of either parent. There was also a question as to whether or not Joy Lynn Pearson had entered into the property settlement agreement in good faith, it appearing from the case that she knew at the time the agreement was entered, she fully intended to move to Brandon, Mississippi. The distance between Brandon and McComb is approximately 80 miles, which would cause problems in

transporting the child to and from school.

That Joy Lynn Pearson did testify that she moved from McComb, Mississippi, away from her support group because of stress being applied by her family. That upon cross examination, Joy Lynn Pearson testified that her mother and/or her family did not mention anything concerning her divorce from Steven since the date the divorce was finalized. (T. 248)

The decision to move to Brandon, Mississippi, was a decision made by Joy Lynn Pearson and was made with Joy Lynn Pearson's best interest at hand. In other words, what was good for Joy Lynn Pearson, Joy Lynn Pearson was going to do without consideration for the best interest of the minor child.

The appellant would attempt to lead this court to believe that there was a severe amount of tension between herself and Steven. However, the testimony in the initial court hearing by Joy Lynn Pearson was that she had requested that Steven should also consider moving to Jackson, Mississippi. (T. 14-15)

The main thing that caught the trial court's attention is noted within the transcript at pages 20 and 21. Joy Lynn Pearson entered into the child custody and property settlement agreement agreeing to joint custody knowing at that time that she was discussing with a recruiter the issue of moving from McComb, Mississippi. The questions concerning this issue were as follows:

Question: "Well, when did you first start talking to this recruiter?"

Answer: "I don't remember."

Question: "Was it before the divorce?"

Answer: "I believe it was before."

Question: "Before the divorce?"

Answer: "I believe it was."

Question: "Did you tell Steve that you were looking around to try to get a job with a recruiter?"

Answer: "No."

Question: "At the time you got the divorce?"

Answer: "No."

It is Steven Allen Pearson's position that Joy Lynn Pearson knew at the time of the divorce that she was moving to Brandon, Mississippi, and that she failed to disclose this fact to him.

It is clear that a joint agreement of this nature would not work and would not be in the child's best interest when it came time for her to attend school. That one party or the other was going to have to make a significant drive to allow the child to attend school.

That Joy Lynn Pearson would also attempt to lead this court to believe that there was no indication of any problem with the initial custody rotation until Steven Allen Pearson had notice of Joy Lynn Pearson's intent to relocate to Brandon, Mississippi. It is true that Steven Allen Pearson had no problems with the custody

schedule. However, Steven Allen Pearson did have problems in that Joy Lynn Pearson immediately made changes, most of which were discussed with him after the changes were made. It was based on these circumstances that the court found that there had been a substantial and material change in circumstances that adversely affected the child.

The chancellor further stated, "I do not feel that he (Mr. Pearson) misrepresented to the court that a joint custody arrangement was working at a time when it wasn't. And when it boils right down to it, that's what I've got to find that Ms. Pearson did, when she asked the court to finalize the divorce with joint custody and then immediately have pre-planned a move to another area, contemplated it, was considering it, and immediately did it right after the divorce." (R.53) It appears that the court felt that Joy Lynn Pearson had misled the court in signing the property settlement agreement and representing that it was working in order to procure the final decree of divorce.

There was sufficient findings by the court in its initial ruling and secondary ruling to justify the custody change to Steven Allen Pearson.

At the time of the divorce, the parties were equal in their position concerning the custody of the child. The court had to consider all of the *Albright Factors*. The appellant is of the opinion that the court did not address the issue of the age of the child. Also, that the court should not have considered the

problems that Joy Lynn Pearson has with depression.

In the event the parties are equal, the court would have reviewed the health of each parent. Joy Lynn Pearson has suffered and still suffers from depression. Steven Allen Pearson does not have any physical or mental problems. This hearing was comprised of two (2) days of testimony and the chancellor had ample opportunity to personally observe the parties in this case, including their actions and reactions. Based on these observations and testimony, this ruling was entered.

That the initial ruling of the court and the ruling at the Motion to Reconsider covers all factors raised in this appeal.

SUMMARY OF THE ARGUMENT

The Appellate Court is to apply a standard of review in child custody cases which is quite limited. In order to reverse that, the Appellate Court will not reverse the chancellor's findings. The chancellor must be manifestly wrong, clearly erroneous or have applied an erroneously legal standard. *Hensarling v. Hensarling*, 824 So2d. 583, 586 (Miss. 2002) citing within the case of *Connelly v. Lamney*, 2008-MS-A0521.009.

The first issue is whether or not the court failed to make a finding of a material change in circumstances. The court, in its original decision, found that the child was in a position to begin attending school, a fact that each party testified to. The parties agreed that the child would attend Parklane Academy in McComb, Mississippi. The move by Joy Lynn Pearson would cause Steven Allen Pearson to be approximately eighty (80) miles from Brandon, and to commute the child to school would not be in the best interest of the minor child. Based upon the circumstances of the move, the fact that Joy Lynn Pearson failed to disclose to Steven Allen Pearson and to the Court that she was moving from the McComb area, was, in fact, a substantial and material change in circumstances surrounding the care, custody and control of the minor child. Further, that said change of circumstances would have an adverse effect on the minor child.

The court did not err in finding that there was a substantial and material change in circumstances that would have an adverse effect on the minor child.

The chancellor's task was reviewing the totality of the circumstances surrounding the parties. The court did consider the age of the minor child and found that Steven Allen Pearson was capable and able to care for the minor child. The fact that Steven Allen Pearson did not suffer from any type of physical or mental problems weighed in his favor. In a case of this nature, the court would have to consider the mental health of both parties. It is evident that Joy Lynn Pearson had continued to suffer from depression. This factor alone should weigh in favor of Steven Allen Pearson and the court found such.

ARGUMENT

1. Did the trial court and/or the chancellor err in failing to find a material change in circumstances in any order?

The chancellor, in a case such as the case at bar, is in the best position to determine the credibility of witnesses and to determine the credibility of the testimony. In reviewing the ruling of the court, the chancellor stated that her opinion was that in reviewing the totality of the circumstances, Joy Lynn Pearson had entered into an agreement and represented to the court that the agreement was working and was a viable agreement. This agreement was entered at a time in which Joy Lynn Pearson was searching for other employment. That Joy Lynn Pearson knew of the contemplated move at the time of the divorce and failed to inform Steven Allen Pearson. That first notice of the move was provided to Steven Allen Pearson approximately two (2) weeks after the divorce was finalized.

The minor child, at the time of the divorce, was nearing the age of four (4) years. The parties had frequent discussions as to the school the child would attend and that the child was to attend 4-year old kindergarten the following year. That both parties agreed that the child was about to begin school.

The court, in the case of *Connelly v. Lamney*, 2008-MS-A0521.009, stated that the prerequisites for child custody modification are as follows: (1) whether there has been a material change in circumstances which adversely affects the welfare of the

child and (2) whether the best interest of the child requires a change of custody. The court quoted *Weigand v. Houghton*, 730 So.2d 581, 585 (¶15) (Miss. 1999). The chancellor specifically noted within her opinions that Joy Lynn Pearson had relocated knowing that the child was of the age that the parties had agreed she would begin school and knowing that she would be approximately 80 miles from Steven Allen Pearson. The chancellor did not mention in her rulings that Joy Lynn Pearson had, in fact, attempted to take complete control of the situation knowing that there was a joint custody agreement in place. This effort by Joy Lynn Pearson to control the situation is exemplified by her testimony indicating that she had chosen the doctor for the child, was in the process of choosing the school for the child and dictated policy as to the time that Steven Allen Pearson would have custody of the minor child. Basically, she had indicated to Steven Allen Pearson that if he did not agree to her terms that he would not be allowed to see the child. (T. 26) There is no doubt that the court gave serious consideration to the actions of Joy Lynn Pearson and her attempt to take complete control of the minor child.

These facts, along with the circumstances as ruled by the court, indicates that the court had given sufficient consideration to the issue of modification as to whether there had been a substantial and material change in circumstances which would adversely effect the minor child.

The court then considered the actions of Joy Lynn Pearson and made a decision that, in fact, there was sufficient grounds for a modification. (R.49, 72-73) That the court further enforced and entrenched its position concerning its ruling by making a second ruling on the motion to reconsider stating that there was a material change in circumstances that did adversely effect the best interest of the child. (R.72-73)

The chancellor in this cause of action considered the totality of the circumstances and found that the joint custody agreement was adverse to the best interest of the minor child. That the chancellor may, in determining whether a material change in circumstances has occurred, review the totality of the circumstances. *Creel v. Cornacchione*, 831 So.2d 1179 (Miss.App. 2002)

The parties testified that the child had a stable home environment and an overall stable environment in McComb, Mississippi. That the child was enrolled at and was to attend Parklane Academy in McComb, Mississippi; the child was enrolled in day care in McComb, Mississippi; and the child was enrolled in dance classes in McComb, Mississippi. The child attended church in McComb, Mississippi, and there is a large support group of family and friends in McComb. Upon the initial move from McComb by Joy Lynn Pearson, she did allow the minor child to continue to be involved in activities in McComb, Mississippi.

The testimony was clear that any support that was needed or required for the minor child would have been the family of Joy Lynn Pearson, who was still residing in McComb, Mississippi.

The court should further note that it was apparent, in dealing with the circumstances, that Joy Lynn Pearson felt the agreement was not working. She filed an answer and cross bill requesting that she should have full custody of the minor child. (R.35-37)

In any event, the court, in *Jernigan v. Jernigan*, 830 So.2d 651, 653-654 (Miss.App.2002), may find a material change in circumstances has been established where the parent's relocation is one of several supporting factors. Other factors considered by the court would be Joy Lynn Pearson's attempt to control the custody of the child and circumvent the entire agreement. The court also considered the child's age. Both parties agreed that the child was to begin school in the Fall. Last, but not least, that Joy Lynn Pearson entered into the agreement while contemplating a move from the McComb area.

2. Whether or not the court properly ruled concerning the *Albright Factors*.

In any case, after a finding of a material change in circumstances, the court must apply the *Albright Factors*. The court is well aware of *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983). These factors were addressed by the court in its final ruling in the case at bar. (R.50-52) The Court found the parties equal in several areas. When comparing the physical and

mental health of the parents, the court found in favor of Steven Allen Pearson. The home, school and community record of the child was also found in favor of Steven Allen Pearson. Any other relevant factors appear to be in favor of Steven Allen Pearson. (R.72-74) It is clear that the court did, in fact, address all of the *Albright Factors*. It appears that the appellant is requesting that the court should apply the *Tender Years Doctrine*. The appellant did appropriately point out that MS Code Section 93-5-24(7) in 2001 stated as follows:

"There will be no presumption that it is in the best interest of a child that a mother should be awarded either legal or physical custody."

This is a case in which the parties had previously agreed to joint custody. Both parties in this case had equal rights to the custody of the minor child. The parties had a custody agreement which was later changed by a threat from Joy Lynn Pearson. Further, this joint custody agreement would not be feasible when the child was attending school at a distant location from the mother or the father.

The appellant would lead the court to believe that trial court should not have taken into consideration the factor that Joy Lynn Pearson had suffered from depression at the time of the divorce. The divorce was entered placing the parties on equal footing. The parties agreed at the time of the divorce to a joint custody agreement. Therefore, the court would have to take into consideration an issue of mental health as to determine which

parent would be better suited to have custody of the child. Joy Lynn Pearson stated she was continuing treatment for her depression. Steven Allen Pearson did not have any mental health problems nor did he have any physical problems.

The testimony of Robin Addison, the sister of Joy Lynn Pearson, was that since the divorce her sister has had a lot of problems and had not been herself. (T. 50) Further, that the child had not wanted to go home with her mother. (T. 50-55)

The testimony of Charlotte Wallace, the mother of Joy Lynn Pearson, was that she was concerned about her daughter due to her condition and the problems she has had. (T-100)

The court considered the totality of this testimony to weigh the health and emotional status of both parties in favor of Steven Allen Pearson.

CERTIFICATE OF SERVICE

I, Wayne Smith, do hereby certify that I have this date mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing document to:

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Honorable Debbra K. Halford
Chancery Judge Fourth District
Post Office Box 575
Meadville Mississippi 39653

This the 10th day of September, A.D., 2008.



WAYNE SMITH