IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NUMBER 2007-CP-00401

THOMAS G. BITTICK **APPELLANT**

VS.

STACY ELIZABETH BITTICK **APPELLEE**

BRIEF OF THE APPELLEE
ORAL ARGUMENT REQUESTED

Appeal from the Chancery Court of Lauderdale County No. 04-608(S)(P)
The State of Mississippi

COUNSEL FOR THE APPELLEE:

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

THOMAS G. BITTICK **APPELLANT**

VS. **DOCKET NUMBER 2007-CP-00401**

STACY ELIZABETH BITTICK **APPELLEE**

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 this Court may evaluate possible disqualifications or recusal.

Appellant:

Thomas G. Bittick, Esquire *in propria persona*

Appellee:

Stacy Elizabeth Bittick

Attorneys for Appellee:

Joseph A. Kieronski, Jr., Esquire; William B. Jacob, Esquire; Daniel P. Self, Jr., Esquire; Self, Jacob & Kieronski, LLP.

Other Interested Parties:

The Honorable Sarah P. Springer, Chancery Court Trial Judge, Honorable Lawrence Primeaux, Chancery Court Judge, John J. Morse, Trial Attorney for the Appellee, William E. Ready and Leigh Ann Key, Trial Attorneys for the Appellant.

Respectfully submitted, this the ____ day of _____, 2007.

JOSEPH A. KIERONSKI, JR.

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STATEMENT OF THE CASE

Course of Proceedings and Disposition of Court below:

The Appellant Thomas G. Bittick [hereinafter Thomas] and Appellee Stacy Elizabeth Bittick [hereinafter Stacy] were divorced by the lower court on August 20, 2004. Incorporated within the Judgment of Divorce was a Property Settlement and Custody Agreement, prepared by Thomas' attorney, out of which gave rise to Stacy's Complaints for Contempt and to Modify Decree of Divorce, the first being filed on November 3, 3004, barely three months after the divorce and Thomas followed by filing of four Complaints/Counter Claims for Contempt and Child Custody, the first being on December 10, 2004. After numerous continuances and resettings of trial, Thomas' and Stacy's complaints, except for Thomas' last Complaint for Contempt dated August 4, 2006, went to trial on August 16, 17, 29, 2006 and October 4, 2006. The case was set for two additional days of trial on December 20-21, 2006, but prior to the December trial dates, Stacy's trial attorney John J. Morse was suspended from the practice of law and the trial judge was going off the bench on December 31, 2006. Thomas and Stacy approved and had entered an Order on December 20, 2006, allowing the trial judge to make her ruling based on the testimony presented and evidence received as of that date.

On December 21, 2006, the trial judge rendered and entered her thirty-five (35) page Memorandum Opinion and Judgment including Visitation Schedules to which Thomas took exception. Thomas timely filed his Motion pursuant to Rules 59 and 60 of the Miss. Rules of Civil Procedure on January 2, 2007 and that Motion was overruled by the new sitting Chancellor on February 12, 2007. On March 6, 2007, Thomas filed his Notice of Appeal of Chancellor Sarah P. Springer's decision of December 21, 2006.

ARGUMENT

STANDARD OF REVIEW

In child custody modification cases, unless the chancellor was manifestly wrong, clearly erroneous, abused his discretion, or applied an erroneous legal standard, we must uphold his decision. *Barnett v. Oathout,* 883. So.2d 563(Miss. 2004). The chancellor has the responsibility to evaluate the credibility of witnesses and evidence and we, as the reviewing court, "will not arbitrarily substitute our judgment for that of the chancellor who is in the best position to evaluate all factors relating to the best interests of the child" *Id.* Additionally, findings of fact made by the chancellor may only be disturbed if they are not supported by substantial, credible evidence. *Johnson v. Gray,* 859 So.2d 1006(Miss. 2003). *Ellis v. Ellis*, 952 So.2d 982(Miss. Ct. App. 2006).

DISCUSSION

ISSUE ONE: THE COURT CORRECTLY FOUND NO MATERIAL CHANGE ADVERSE TO THE CHILD TO CHANGE CUSTODY.

To modify custody, the noncustodial parent must first show a material change in circumstances has occurred since the issuance of the judgment or decree sought to be modified, the change adversely affects the welfare of the child and the proposed changes in custody would be in the best interest of the child. *Lambert v. Lambert*, 872 So.2d 679(Miss. Ct. App. 2003). In making this determination, the totality of the circumstances must be considered. *Ash v. Ash*, 622 So.2d 1264 (Miss. 1993).

Stacy's and Thomas' Property Settlement and Custody Agreement stated:

"(A) Custody of Children: The parties agree that joint custody shall be given to the HUSBAND and the WIFE but, due to the young age of said child, Wife shall have the physical custody of Michael Austin Bittick, a male, born on July 10, 1996, who shall reside with Wife subject to the provisions of this Agreement. During all reasonable times, including holiday and vacation periods., Husband shall visit said child, and said child with him, at such times, places and for such periods of time as the parties have mutually agree, being at a minimum while he is in school, as follows:

1. Husband shall have said child two weekends per month at his discretion with two day's notice given to Wife. Husband will pick up the said child at 6:00 p.m. on Friday and will keep him until 6:00 p.m. on Sunday.
2. Husband and wife shall be allowed to have nightly calls with the children.

3. Husband shall have the child one month each summer and Husband will have his choice of which summer month. It is the intent of Parties that Wife can visit with Husband's two other children for one month each summer, the month being agreed upon by both parties.
4. Husband and Wife shall be equally responsible for transportation for visitation with the children, being one each way" (C.P. 15-16 RE 40-41).

The lower court found that "Thomas' main complaint in support of his request for a custody change is the lack of visitation" (C.P. 95 L 15-16 RE 19). The Court further found the way "to correct those problems is with a specific visitation schedule, not with a change in custody." (C.P. 95L 19-21 RE 19).

The case cited by Thomas, *Ash (supra)*, in support of this challenge to the lower court's findings, upon a closer reading of it would show a uniqueness of facts not present in the case *sub judice*.

"The Special Chancellor in this case sub judice was in the unenviable position of resolving a dispute which two prior chancellors and six attorneys, in more than ten (10) court proceedings, tackled and could not settle. Whether Cathy's attitude and actions would have changed had she previously been held in willful contempt and housed in the county jail, will forever remain unknown. The better rule would be for a chancellor to enforce contempt orders through incarceration, when necessary, to insure compliance with custody provisions rather than resorting to a change of custody" *Id.* Page 1266.

In the case before the court there was only one hearing, though it lasted for four days (C.P. 81 L 9-12 RE 5). Between November 3, 2004, when the first Complaint and the others that followed were filed after the divorce and August 16, 2006, nearly two years later, there were five (5) different orders of continuance and resetting of this Action (C.P. 36, 51, 52, 68, 74 RE 49-53). The Court, in *Ash* went on to say

"clearly a decision to change custody, perhaps more so than an original custody determination, must not be made hastily or without ample justification...we have said repeatedly that a child is entitled to 'stabilizing influence of knowing where home is' (cite omitted). To that end, we have stated that ' children do not need to be bounced back and forth between parents like a volley

ball' (cite omitted)...At the same time 'a change in custody will not be made for the purpose of rewarding one parent or punishing the other.' (cite omitted) *Id. At 1266.*

Ash was recently cited in *Ellis (supra)* (¶18). Here again, the facts of *Ellis* are easily distinguishable from the case before the bar, i.e., "three custody modification hearings with three different chancellors, an appeal to this Court and an emergency order granting visitation..." *Id.* ¶20. These cases are distinguishable from this case on appeal.

The lower court found, in support of not changing custody, that "...Stacy and Thomas...both...have contributed substantially to the conflicts. Thomas has been autocratic and demanding, Stacy has reacted with setting conditions precedent for visits which Thomas is unwilling to accept." (C.P. 100 L 22-27 RE 24).

Since the lower court found "none of the Complaints that Thomas has about Stacy rises to the level of a material and substantial change in circumstances such as to justify a change in custody.", it followed the MS Supreme Court's guidance in *Giannaris v. Giannaris*, 960 So.2d 462 (Miss. 2007) wherein it stated:

"...a noncustodial parent must first sufficiently prove a material change in circumstances which has an adverse effect on the child that 'clearly poses danger to the mental or emotional well-being of a child [,] *Ballard*, 434 So.2d at 1360, as a condition precedent to reweighing the *Albright* factors. The *Albright* factors may ebb and flow yearly, quarterly, monthly or even less, but in the absence of a substantial adverse effect upon the child, physical custody changes are not only unwarranted, they are unwise." (¶10).

The chancellor below was correct in her finding that none of Thomas' complaints justified a change in custody. (C.P. 99 L 20-22 RE 23).

ISSUE TWO: THE LOWER COURT WAS JUSTIFIED IN MODIFYING THE ORIGINAL VISITATION SCHEDULE, ORDERING THOMAS TO PAY CHILD SUPPORT ARREARAGE AND NOT REQUIRING STACY TO PAY ON THE HOUSE NOTE

Thomas' basic argument is that the agreement, freely and voluntarily entered into is a binding contract absent fraud, mistake or overreading (Appellant's brief p. 35).

a. Modifying Visitation Schedule: As for a court's authority to change a visitation; this Court previously stated that lower courts have the authority to change visitation schedule, physical and telephone, on a showing that the original schedule is not working. *H.L.S. v. R.S.R.*, 949 So.2d 794(Miss. Ct. App. 2006). The Chancellor below made the specific findings that "their visitation schedule was not working and could not work due to the unmitigated hostility and animosity which poisoned their relationship." (C.P. 101 L 13-15 RE 25) and "...that a specific visitation is in the best interest of the children and the parties,..." (C.P. 91 L 1-2 RE 15). "The Chancellor has broad discretion when determining appropriate visitation and the limitations thereof. (cite omitted)" *Fountain v. Fountain*, 877 So.2d 474(¶26)(Miss. Ct. App. 2003). The lower court correctly made the appropriate changes after considering all the facts before it.

b. Child Support Arrearage (Two Month Grace Period): Thomas quarrels with the lower court's finding: "[e]ven though Thomas was preparing for the bar exam, he was not 'unemployed' due to the fact he is a captain in the Air National Guard and grosses $725.00 per month. He [Thomas] also took out a $10,000.00 loan to tide him [sic] over while he took the bar exam, and it certainly cannot be said under these circumstances that a grace period was 'needed'". (Memorandum Opinion and Judgment)(C.P. 93, L 21-27 RE 7) (Appellant's Brief p. 40)."

Thomas quotes Miss. Code Ann. §71-5-11(J)(5)(c)(iii) (Supp. 2006) as support that being a member of the Mississippi State National Guard or Air National Guard is not considered

employment. But as Thomas correctly states this is only for eligibility for unemployment compensation benefits (Appellant's Brief, p. 40). The controlling and appropriate statute concerning income is Miss. Code Ann. §43-19-101(3)(a)(1972) (Supp. 2006) which includes a wide variety of potential services available to the absent parent and definitely wages or salary from the Mississippi National Guard falls within the code's consideration of income.

Further, Thomas while under direct examination stated the following:

"Question: And she [Stacy] testified that you called her, I think, a couple of months ahead of time and told her that you didn't need the grace period. Is that true or not true?
Answer: She actually asked me and I told her that at that time I didn't anticipate it. But later on I saw where I was going to need it. I did not realize how much like the bar brief prep course, the course that gets you ready for the bar, was going to cost." (T. 409 L 20-29)
Question:...But as far as notifying her about that that changed [sic] did you do that?
Answer: I did.
Question: And what did you tell her at that time?
Answer: That I was going to exercise that 60 day period.
Question: Okay, and did you tell her why?
Answer: Yes, ma'am.
Question: And what did you tell her?
Answer: I had increased expenses. (T 410 L 13-22)"

Thomas was under cross-examination and testified as follows:

"Question: Well, I'm asking you that Mr. Bittick. What was the difference between May and June, that you could afford it [child support] in May and not in June.
Answer: I had some unanticipated expenses.
Question: With respect to employment, how did your employment change from May to June that would have prevented you from paying it?
Answer: There was no employment change. I was waiting on a separate loan for the summer.
Question: So at some point during June you got a loan?
Answer: Yes sir. It is called a bar loan, I think.
Question: How much was it?
Answer: $10,000.00.
Question: How much was your bar brief course?
Answer: Eighteen.
Question: Hundred?
Answer: Eighteen hundred, yes sir.
Question: So, $8,200.00 was left over– after paying bar brief?
Answer: No, well, yes, sir. From the $10,000.00.

Question: From the $10,000.00 could you have taken maybe $200.00 of that and paid your child support for June?
Answer: Those...I Never considered it. I honestly never considered it. I thought I had the 60 day option and I exercised it (T 478-479 L 22-21)

Further, when cross examined on his Rule 8.05 Financial Disclosure Form:

Question: Based on the copy you provided me, you have listed $2,500.00; is that right?
Answer: Yes, sir.
Question: And out of that $2,500.00 you weren't able to pay child support for June and July?
Answer: I never testified to being unable, sir.
Question: But you were able then?
Answer: I had the money, but it was earmarked for other purposes. I had a grace period of 60 days that I was allowed to get employment and I took it."
(T484-85 L 26-6)

As revealed by the record, there was no change in employment from May to June of 2006, and the only reasons Thomas gave for not paying the $200.00 a month for June and July were because his expenses were higher than he originally thought and never considered paying those payments from the funds in his bank accounts. His only defenses were he had other things to do with it and he had a 60 day grace period he exercised, even though he had no change in employment. The lower court was correct in finding that Thomas owed the $200.00 a month in back child support for the months of June and July, 2006.

The Mississippi Supreme Court has held "...Mississippi law requires the party claiming benefit from the settlement must prove by a preponderance of the evidence that there was a meeting of the minds" *Hastings v. Guillott*, 825 So.2d 20(Miss. 2002). The Court placed the burden on Thomas to show he was unemployed (T. 40 L. 7-18) and later found that he was not "unemployed" since he was making $725.00 a month as a Captain in the Air National Guard and secured at $10,000.00 loan to tide him over which he took the bar exam and therefore this grace period was not needed. (C.P. 93 L21-27 RE 17), The Court was correct in its finding.

c. $5,531.00 in Mortgage Arrearage:

The record is unclear as to how the $5,531.00 in mortgage arrearage was arrived at by Thomas. There is testimony by Thomas of how the mortgage note was divided, the use of child support monies to pay a portion of Stacy's half of the mortgage note and then at some unspecified date renters took possession of the house until it was sold to them in December, 2005. (T 365-66 L7-15). Thomas admits he received the total amount of the sales amount after payments of the mortgages and associated costs. (T 373 L10-11, Ex. 7 RE 55-56). Thomas testified he had been named as an unsecured creditor in Stacy's bankruptcy. (T 336 L 10-14). By reviewing Ex. 7, HUD Settlement Statement, Thomas was the only seller signature to the sale. Stacy's signature was not needed for the sale to go through. Again, the record does not speak to why the former marital residence had a lien placed against it that required it to be paid off since Stacy was the only debtor. However, Thomas agreed to pay the judgment Stacy owed in return quitclaiming her interest in the former marital residence, although his testimony is vague on how much the debt was. (T 371 L21-27).

The learned chancellor found that Stacy could not afford the mortgage and utilities for such a large house (5,000 square feet) and filed bankruptcy. The lower court further found that Thomas rented the house to others until it was sold, using some $2,000.00 to finance a vacation to Las Vegas for himself and his boys (C.P. 92 L 1-15 RE 16). The Court found that Stacy was unable to comply with the provision of the agreement concerning the mortgage payments, awarded Thomas all remaining monies in the Court registries and denied his request for Stacy to pay him additional monies over and above the sale proceeds (CP 102 L 3-15 RE 26).

"When a Chancellor has made no specific findings, this Court will proceed on the assumption

that he resolved all such fact issues in favor of the Appellee." *Goode v. Village of Woodgreen Homeowners*, 662, So.2d 1064(Miss. 1995). The Court was correct in its finding.

ISSUE THREE: THE TRIAL COURT DID NOT ERR IN NOT FINDING STACY IN CONTEMPT OF COURT

The lower Court made the finding that "the visitation schedule was unworkable and therefore the Court does not find Stacy should be held in contempt for positions about visitation. Her reactions, although at times overblown, were precipitated by Thomas' conduct". (C.P. 101 L 21-25 RE 25).

The case of *Balius v. Gaines*, 958 So.2d 213(Miss. Ct. App. 2005) stated:

"In *Moulds v. Bradley*, 791 So.2d 220, 224 (¶6)(Miss. 2001), the Court distinguished between civil and criminal contempt. The purpose of civil contempt is to coerce action which criminal contempt is to punish for violation of an order of court: *Id.* While a jail sentence imposed for a violation of civil contempt ceases upon the contempt nor "purging himself of contempt...a criminal contempt proceeding is maintained solely...to vindicate the authority of the Court or to punish otherwise for conduct offensive to the public in violation of an order of the Court." *Id.* (citations omitted).

"A citation for criminal contempt is only appropriate 'when the contemner has wilfully, deliberately, contumaciously ignored the Court.' (citations omitted). The party asserting criminal contempt must prove each element beyond a reasonable doubt (citations omitted). Furthermore, it is well settled that 'contempt matters are committed to the substantial discretion of the trial court which, by institutional circumstances and both temporal and visual proximity, is infinitely more competent to decide the matter that we'" (citations omitted). *Id.* ¶*21*.

Thomas in all of his pleadings requested that Stacy be found in contempt and, with the exception of his first Counterclaim, asked that Stacy be placed in jail for criminal contempt (C.P. 58, 72, Appellant's Brief page 42).

The lower court correctly resolved this issue in favor of Stacy by not finding her in contempt.

ISSUE FOUR: WHETHER STACY CAME INTO COURT WITH UNCLEAN HANDS

A review of Thomas' pleadings and the trial transcript do not show Thomas in his pleadings

or he requested the Court to take notice of the alleged "unclean hands" of Stacy.

"Furthermore, the maxim of equity that he who comes into equity must come with clean hands is supplemented by the maxim that 'he who seeks equity, must do equity" (cite omitted) *Balius (supra)*.

The Court made a finding that although Thomas and Stacy, by their agreement (C.P. 82 L8-14 RE 6) contemplated Stacy's continuing her relationship with Thomas' older boys. Thomas discontinued contact between Stacy and his sons after she enjoyed only about two or three visits after the divorce" (C.P. 87 L6-10). The first time this affirmative defense has been asserted is on appeal and "...this Court has held that it need not address issues raised for the first time on appeal" (citations omitted). *Goode (supra)*. To attempt an appeal to raise the issue of unclean hands is improper and should be denied.

CONCLUSION

The lower court found after listening to four (4) days of trial, that failed to carry his burden of proof on any of his claims and denied the relief he sought through his many pleadings. (C.P. 101-03 L 11-5 RE 25-27). Thus, all issues Thomas as presented on appeal should be deemed not well founded and therefore denied.

Respectfully submitted, this the 26th day of October, 2007.

STACY ELIZABETH BITTICK,
APPELLEE

BY: _____
JOSEPH A. KIERONSKI, JR.,
COUNSEL FOR THE APPELLEE

CERTIFICATE OF SERVICE

I, the undersigned attorney, Counsel for the Appellee, Stacy Elizabeth Bittick, hereby certify that I have this day caused a true and correct copy of the above and foregoing Brief of the Appellee to be mailed by United States mail, postage prepaid, to the following persons:

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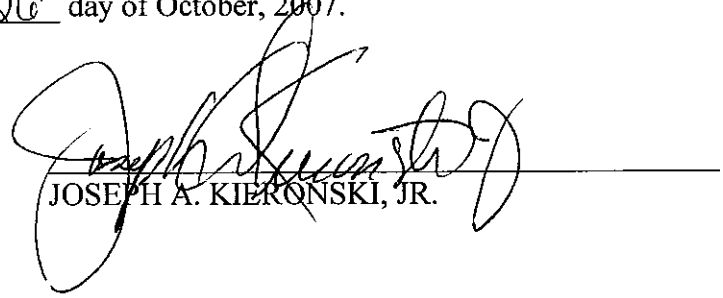
Respectfully submitted, this the 26th day of October, 2007.



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