IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
CAUSE NO. 2008-CA-00237

ELIZABETH GAINEY **APPELLANT**

V.

DONNIE EDINTON **APPELLEE**

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 disqualifications or recusal.

1. Elizabeth Gainey
   Appellant

2. Donnie Edington
   Appellee

3. J. Mark Shelton and Jana L. Dawson of
   Shelton & Dawson, P.A., Attorneys for Appellee

4. Ben M. Logan and Kelly Mims of
   Mims & Logan, LLC, Attorneys for Appellant

THIS the 17 day of February, 2009.

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SUMMARY OF THE ARGUMENT

Elizabeth Gainey's argument in this case is essentially that the chancellor erred in dismissing her case based upon a lack of proof to establish a "material change in circumstances adverse to the best interests of the minor children." The Court stated while it "may not approve of behavior" engaged in by Donnie, "it is not the function of the chancery court to police behavior conducted in the privacy of the bedroom unless that behavior can be shown to adversely impact the children. There has been no proof of such a nexus or connection in this case." [T.Vol.II, p.217 lines 8-16 (*underline mine*)] Indeed there was no such proof as to an adverse impact offered to the Court. Instead, Elizabeth argues in her brief that there was a "prospective" adverse affect. This argument likewise must fail in that the proof established in the trial of this case falls woefully short of that proof from which a chancellor could find an adverse impact will likely occur in the future if custody is not changed.

The true basis for Elizabeth's request for a modification of custody can be ascertained by her own testimony:

> Q. And so then you come in in 2004, and despite the fact that you are Johnny Come Lately, three and a half years later, now, suddenly, you are telling the Court, well, I've got my life right and I want custody now. Right?
>
> A. Yes, sir.

> Q. And that, basically, boils down the case, doesn't it, Mrs. Gainey? You didn't feel like you were in a position of custody at the time of the divorce, now you feel like, with your remarriage and different things, now you're in a good position for custody and you want your girls back. Right?
>
> A. Yes, sir, I do.

[T.Vol.I, p.124 lines 16-28] The chancellor must certainly have been aware that this is an insufficient basis to change custody under our applicable case law. That the fact that her circumstances have improved since the entry of the divorce decree in no way, alone, gives her any standing to obtain custody. *Riley v. Riley,* 884 So.2d 792, 793 (Miss.Ct.App.2004) *citing Bowden v. Faynard*, 355 So.2d 662, 664 (Miss.1978). "As the Supreme Court has held, it is not enough to require a change in custody that a parent show that she has recovered or been rehabilitated from whatever problems previously made custody improper. Improvement in the condition of the non-custodial parent does not justify making a change. *Touchstone v. Touchstone*, 682 So.2d 374, 377 (Miss.1996)." *Thompson v. Thompson*, 799 So.2s 919, 926 (Miss.Ct.App.2001).

The chancellor was correct in dismissing Elizabeth's case based upon a failure to offer proof as to an adverse impact upon the children. As such, there was no reason for the chancellor to proceed with an *Albright* analysis.

ARGUMENT

The scope of review in an appeal involving a domestic relations matter is very limited.

> When this Court reviews domestic relations matters, our scope of review is limited by the substantial evidence/manifest error rule. *See R.K. v. J.K.*, 946 So.2d 764, 772 (Miss.2007) (citing *Mizell v. Mizell*, 708 So.2d 55, 59 (Miss.1998)). Therefore, we will "not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Id.*

Giannaris v. Giannaris, 960 So.2d 462, 467 (Miss.2007). In *Giannaris v. Giannaris*, the Court reminded us of the difficulty the movant faces when trying to change child custody:

> [T]he polestar consideration in child custody cases is the best interest and welfare of the child." *Albright*, 437 So.2d at 1005. This Court has previously noted that a change in custody is a "jolting, traumatic experience." *Ballard v. Ballard*, 434 So.2d 1357, 1360 (Miss.1983). As such, "children do not need to be bounced back and forth between their parents like a volleyball[.]" *Tucker v. Tucker*, 453 So.2d 1294, 1298 (Miss.1984). See also *Cooley v. Cooley*, 574 So.2d 694, 699 (Miss.1991) (overruled on other grounds) ("The best interest of the child requires that the child have some degree of stability in his or her life.") Therefore, "[a] change in custody should never be made for the purpose of rewarding one parent or punishing the other." *Tucker*, 453 So.2d at 1297. All courts must be consistent, diligent, and focused upon the requirement that "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change." *Morrow v. Morrow*, 591 So.2d 829, 833 (Miss.1991). See also *Ballard*, 434 So.2d at 1360 ("It is only that behavior of a parent which clearly posits or causes danger to the mental or emotional well-being of a child (whether such behavior is immoral or not), which is sufficient basis to seriously consider the drastic legal action of changing custody.").

Giannaris v. Giannaris, 960 So.2d at 467. Indeed it is a "jolting, traumatic experience" for a child to be removed from his or her home. The minor children, Tara and Mia, ages 11 and 10 at the time of the trial, had been in the custody of Donnie since the parties were divorced on April 17, 2001. Elizabeth argues in her brief: "Much ado was made by Donnie Edington at trail (sic) about Elizabeth's failure to visit with the girls between April 2001 and when she filed for custody in 2004." [Appellant's Brief, p.3] The reality is that Elizabeth made a voluntary decision to give up custody in her divorce without even demanding any visitation rights. The

reality is that Elizabeth voluntarily failed to have virtually any contact with the children for more than three (3) years prior to filing her complaint seeking a change in custody. These actions simply cannot be explained away by her argument that "Donnie kept her from seeing the girls." [Appellant's Brief, p.3]

Elizabeth admitted under cross-examination that she had seen her children "about four hours total in three and a half years." [T.Vol.I, p.123 lines 10-21] Even though Elizabeth knew where the children were in school, she never once during that time went to school to see them. [T.Vol.I, p.123 lines 22-25] She never once during that time hired an attorney to seek visitation rights. [T.Vol.I, p.124 lines 2-4] It is interesting that during this same period of time, Elizabeth never paid any financial support to, or for the benefit of, the children. [T.Vol.I, p.133 lines 4-23]

A request for a change of custody cannot be, and should be not, viewed in a vacuum. The "jolting, traumatic experience" by the change in custody addressed in *Giannaris* is obviously more likely to occur, and to be greater in intensity, where one parent has essentially been non-existent for years as far as the children are concerned. As *Giannaris* makes so abundantly clear, a decree modifying a change in custody should be hastily or easily granted. Much is required, and much should be. In this particular case, the proof presented by Elizabeth was woefully inadequate to justify a change in custody, as will be shown below.

A. Elizabeth in her brief states: "The Chancellor abused his discretion in finding that no material change in circumstances existed as the decision was not supported by the substantial evidence, manifestly wrong, clearly erroneous and failed to apply the appropriate legal standards of considering the totality of the circumstances and prospective adverse affect." [Appellant's Brief, p.10] It is interesting that Elizabeth felt compelled to use the word "prospective" before

"adverse affect" and indeed she was being very accurate. It is readily apparent from the record that no proof was offered to suggest any actual "adverse affect" upon the minor children. Thus, Elizabeth is left with no alternative but to argue that the Chancellor should have considered the "prospective" affect. It is true that the Supreme Court has found that there may be certain instances where the Chancellor's hands need not be tied where it is "reasonably foreseeable" that a child will suffer adverse affects where the custodial home is "clearly detrimental" to the child's well-being *Gilliland v. Gilliland,* 984 So.2d 364, 368 (Miss.Ct.App.2008). In support of this argument, Elizabeth suggests to the Court four cases: *Riley v. Dorner, Johnson v. Gray, Glissen v. Glissen* and *Savell v. Morrison.* These cases are easily distinguishable from the case at hand.

In *Riley v. Doerner*, the proof established that there was illicit drug use within the custodial home. The minor child had "flunked first grade" and had changed schools many times while in the care of her mother. Furthermore, the child's mother had lived with several men without the benefit of marriage, and had only married her husband the day before the trial. *Riley v. Doerner*, 677 So.2d 740, 742 (Miss.1996).

In *Johnson v. Gray*, the mother [Julie] clearly had substantial lifestyle problems: "Once again, [the father] was able to present an abundant amount of evidence to prove that [the child] was in danger when she was in her mother's company . . . . Testimony revealed that Julie was involved in car accidents, arrests, and fits of rage, all attributable to her alcoholic stupors. He brought forth an insurmountable amount of evidence showing Julie's alcoholism, drug addiction, and psychological problems." *Johnson v. Gray*, 859 So.2d 1006, 1014 (Miss.2003).

In *Glissen v. Glissen*, the custodial parent (the mother) displayed horrible parenting skills, often arising from her choice of boyfriends.

> The chancellor was disturbed with the actions of [the mother] in choosing Nixon for a boyfriend, and he was concerned that Nixon would be a poor role model as a potential stepfather. The chancellor found that [the mother] had been cohabitating with a married man. The chancellor found that the continuing effect of this cohabitation led to a potential for a material change in circumstances. In addition to the cohabitation, the chancellor was concerned that [the mother] was living with a convicted felon, which [the mother] testified she discovered the day of the hearing. Nixon also declared bankruptcy, and his home and car were repossessed as a result of this bankruptcy. The chancellor questioned [the mother's] ability to take care of the girls if she is living with a convicted felon who is bankrupt. He also questioned [the mother's] judgment because she was unaware of Nixon's felony conviction until the day of the hearing.

Glissen v. Glissen, 910 So.2d 603, 606-07 (Miss.Ct.App.2005).

In *Savell v. Morrison*, there were constant threats of violence by the new step-father aimed against the minor child. "As the lower court pointed out, this would mark the first time [the child] would live with [the step-father] and her mother as husband and wife. What would follow over the next several months would show a pattern of obscene language and threats of violence directed at [the child] by [the step-father] . . . . He apparently took advantage of this advice when he admitted that he screamed at [the child] on an almost daily basis. Additionally, [the step-father] admitted that he wanted to repeatedly hit, or "pepper," [the child] with paintballs and duct tape her to a chair. Finally, [the step-father] threatened [the child] with a belt as a result of her talking back to her mother, scaring [the child] to the point that she turned white." *Savell v. Morrison*, 929 So.2d 414, 416-17 (Miss.Ct.App.2006).

As can easily be seen, the home environment in the case at hand does not even approach the type of environment present in those cases cited. If Elizabeth was to obtain custody of these minor children, she must have satisfied the three-prong test. The Chancellor correctly found that she failed to do so.

Elizabeth's true basis for seeking a change of custody can be best summed up by using her own words:

> Q. And so then you come in in 2004, and despite the fact that you are Johnny Come Lately, three and a half years later, now, suddenly, you are telling the Court, well, I've got my life right and I want custody now. Right?
> A. Yes, sir.
>
> Q. And that, basically, boils down the case, doesn't it, Mrs. Gainey? You didn't feel like you were in a position of custody at the time of the divorce, now you feel like, with your remarriage and different things, now you're in a good position for custody and you want your girls back. Right?
>
> A. Yes, sir, I do.

[T.Vol.I, p.124 lines 16-28] In this, Elizabeth ignores the very well-settled law in Mississippi that the fact that her circumstances have improved since the entry of the divorce decree in no way, alone, gives her any standing to obtain custody. *Riley v. Riley,* 884 So.2d 792, 793 (Miss.Ct.App.2004) *citing Bowden v. Faynard*, 355 So.2d 662, 664 (Miss.1978). "As the Supreme Court has held, it is not enough to require a change in custody that a parent show that she has recovered or been rehabilitated from whatever problems previously made custody improper. Improvement in the condition of the non-custodial parent does not justify making a change. *Touchstone v. Touchstone*, 682 So.2d 374, 377 (Miss.1996)." *Thompson v. Thompson,* 799 So.2s 919, 926 (Miss.Ct.App.2001).

During the trial, Elizabeth attempted to satisfy her burden of proof by presenting evidence of the sexual habits and lifestyle of Donnie. Indeed, the majority of facts cited in Elizabeth's brief refers to the proof presented on this subject. However, as the Chancellor correctly found, no proof was presented that the children had been adversely affected by any

such behavior. In stating that the Court "may not approve of behavior" engaged in by Donnie, "it is not the function of the chancery court to police behavior conducted in the privacy of the bedroom unless that behavior can be shown to adversely impact the children. There has been no proof of such a nexus or connection in this case." [T.Vol.II, p.217 lines 8-16 (*underline mine*)] The Chancellor further stated: "In the instant case, it is true that there may have been somewhat aberrant sexual behavior. However that is no proof at all of an impact upon the children." [T.Vol.II, p.219 line 28- p.220 line 2]

In Elizabeth's brief, beginning on page 11, she attempts to list seventeen (17) items which are cited as "proof which she argues constituted material change in circumstances of the custodial household." [Appellant's Brief, p.11] One must get all of the way to item number ten (10) before it can even be suggested that the item caused an "adverse affect" on the minor children. These items include "diminishing grades", "recurrent and ongoing ear problems", "staph infections", and poor dental care. With respect to these items, the Chancellor correctly found that those "issues are not the type of substantial changes which would meet the test for modification." [T.Vol.II, p.220 lines 11-13] Those changes cited by Elizabeth clearly are insufficient to justify a change in custody.

Even Elizabeth admitted under cross-examination that she had no proof of any adverse affect on the children (although she suggested she had "hearsay").

The change in circumstances must be one which clearly exposes the minor child to physical, emotional or mental harm.

> [A] non-custodial parent must first sufficiently prove a material change in circumstances which has an adverse effect on the child that 'clearly posits or causes danger to the mental or emotional well-being of a child[,]' 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. Our body of law could not be clearer.

Giannaris v. Giannaris, 960 So.2d at 468 (citations omitted). It simply cannot be genuinely argued that those items cited by Elizabeth in her brief are of the type, nature and degree which "clearly posit or cause danger" to the children.

Honorable Sidra Winter was the Court-appointed *Guardian Ad Litem* serving on behalf of the minor children in this matter. Prior to the beginning of the trial, the *GAL* announced ready to proceed. [T.Vol.I p.2 lines 25-26] The *GAL* conducted a thorough investigation in the allegations raised by Elizabeth. At the conclusion of Elizabeth's case-in-chief, counsel for Donnie made a motion *or tenus* for a dismissal of the complaint based upon a failure to meet the first two prongs of the three-prong test. After argument by both counsel, the Court asked the *GAL* whether she had anything to add. The *GAL* stated: "Your Honor, I will leave it to the Court's discretion as to whether or not there has been a material change in circumstances." [T.Vol.II, p.212 lines 13-16] While perhaps it could have been more articularly stated, certainly if the *GAL* had felt the children were being exposed to circumstances which "clearly posit or cause" danger to the children, this would have been conveyed to the Court.

B. Elizabeth in her brief states: "Particularly damaging to the lower court's analysis of the prospective adverse effect, the Chancellor erred by excluding introduction of evidence of Defendant's "MySpace" public account which was rife with sexually explicit, highly suggestive, and violent content ranging from bondage and human slavery to sado-masochism." [Appellant's Brief, p.16]

Elizabeth argues in her brief that the "Chancellor did not understand how publicly accessible Edington's internet footprint was, and the exclusion of this evidence deprived the Court of being able to fully assess the totality of the custodial home and the reasonably foreseeable adverse impact on the children." [Appellant Brief, p.17] Donnie would assert initially that Elizabeth did not properly preserve her ability to complain of this error on appeal in that no offer of proof was made with respect to preserving for appellate review the precise material Elizabeth complains was improperly excluded. *Rule 103* of the *Mississippi Rules of Evidence* provides that error may not be predicated upon any ruling excluding evidence unless an offer of proof was made or it was "apparent from the context within which questions were asked." *Rule 103* of M.R.E. Here Donnie was asked about chat room activity, MySpace accounts, E-cards, movie reviews, sex toy sales, etc. It cannot be said that it was "apparent" from the context the precise nature of the information which Elizabeth now complains was improperly excluded. Without an offer of proof which would allow this Court to review precisely what material was excluded, it is extremely difficult, if not impossible, for the Court to determine whether the material should have been admitted.

Even assuming, however, that this issue was properly preserved for appeal, there was clearly no error on the part of the Chancellor and Elizabeth's argument is without merit. It can be easily ascertained by reading the transcript that Elizabeth tried in vain to create a case for modification of custody by making references to Donnie's sexual behavior and practices even though no proof whatsoever was offered that the behavior and practices were ever exposed to the children. Even if the Chancellor had erred in not allowing the introduction of certain evidence involving Donnie's computer activity, this would constitute nothing more than "harmless error"

since not one scintilla of proof was ever offered to suggest any exposure of the children to Donnie's computer activity. Without some proof that there was a connection between the computer activity and the minor children, the introduction could not have impacted the ultimate decision of the Chancellor. Accordingly, the Chancellor's decision to exclude the introduction of this material, even if improper, would be "harmless error" in that it would not have changed the outcome of the case.

The reality, however, is that the Chancellor did not err in excluding this evidence. Donnie was questioned extensively about his use of a "MySpace" computer site, and about other computer internet use. On multiple occasions the Chancellor stated from the bench that there had been no proof that either child had been exposed to this computer activity.

> MR. SHELTON: I object as to the relevance of what some other person may have gotten on a MySpace account and posted a E-card or whatever those are called when there's been no nexus between the children gaining access to that, nor has it even been shown that my client posted any of those. I object, your Honor.
>
> THE COURT: Mr. Logan, I'm inclined to agree with that.

[T.Vol.I, p.57 lines 2-10] After additional questions of Donnie about his computer internet activity, another objection was made on the basis of relevance in that "there's been no allegations that the children have somehow gotten access to this site or that my client has posted the children or have [sic] involved them." [T.Vol.I, p.59 lines 12-16] The Chancellor explained to Elizabeth the problem with this proof concerning Donnie's computer activity was the lack of any proof connecting the use to the children. "But before you get into that, you are going to have to show a material and substantial change in circumstance. And I suppose that's what you are going towards, but I don't see how you can show a material and substantial change in circumstance, *Mabus v. Mabus* made it very clear that you have got to show an impact upon the children." [T.Vol.I, p.60 line 23 – p.61 line 1] Yet despite the Chancellor giving Elizabeth a clear

understanding of what was lacking from the proof being presented concerning Donnie's computer activity, still no proof was even attempted by Elizabeth to make the connection between the computer activity and the children.

Elizabeth rested her case-in-chief without any proof being offered which would in any way create a nexus between Donnie's computer activity and the children or their well-being. Without a showing of this nexus or connection, the proof concerning Donnie's computer activity is completely irrelevant and was properly excluded under *Rule 401* of the *Mississippi Rules of Evidence*. The "moral fitness" factor outlined in *Albright v. Albright* does not become an issue for the trial court until the first two prongs of the three-prong test have been satisfied. In this case, clearly those first two prongs were not. Accordingly, the evidence concerning Donnie's "MySpace" account was properly excluded.

C. Elizabeth complains in her brief that the Chancellor erred in not hearing from the *Guardian Ad Litem*. This argument is also without merit. First, there is nothing contained within the record to suggestion what the report of the *Guardian Ad Litem* would have been. No offer of proof was made so as to preserve for appellate review the recommendation of the *GAL*. Second, it can only be assumed by the lack of any comment on the part of the *GAL* at the time the Chancellor was considering Donnie's motion to dismiss that there were no concerns over abuse or neglect if custody was not changed. Finally, the recommendation of the *GAL* with respect to one parent over the other parent was irrelevant since Elizabeth failed to meet her burden of proof with respect to the first two prongs. Even if the *GAL* had stated on the record that her recommendation was that the children be placed in the custody of Elizabeth, the

Chancellor would have had no authority to do so with the first two prongs being satisfied. A recommendation by a *GAL* does not excuse the movant's requirement to satisfy the burden of proof with respect to the first two prongs.

CONCLUSION

The chancellor correctly dismissed Elizabeth's request for a modification of custody at the conclusion of her case-in-chief based upon a complete lack of proof as to adverse impact. This was proper based upon all applicable statutory and case law. The decision of the chancellor should be affirmed.

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CERTIFICATE OF MAILING

This is to certify that I, J. Mark Shelton, attorney for Appellee, have this day mailed by United States Mail, postage prepaid, the ORIGINAL and three (3) copies of the *Brief of Appellee, Donnie Edington* to Betty W. Sephton, Clerk, Supreme Court of Mississippi at the address of said Court, Post Office Box 249, Jackson, Mississippi 39205-0249.

THIS the 17 day of February, 2009.

J. MARK SHELTON, [redacted]

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CERTIFICATE OF SERVICE

I, J. Mark Shelton, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing *Brief of Appellee, Donnie Edington* to the following:

Honorable Michael Malski
CHANCELLOR
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THIS the 17 day of February, 2009.

J. MARK SHELTON, [redacted]