

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

COURT OF APPEALS OF THE STATE OF MISSISSIPPI

IN RE: ELIZABETH GAINNEY v. DONNIE EDINGTON

NO. 2008-CA-00237

APPEAL FROM THE CHANCERY COURT OF
PONTOTOC COUNTY, MISSISSIPPI

APPELLANT'S BRIEF

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* Oral Argument is requested.

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record for the Appellant in this matter 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 disqualification or recusal, pursuant to Rule 28 (1) of the Rules of Appellant Procedure.

1. Elizabeth Gainey – Appellant and Petitioner below, represent by Ben M. Logan, Esq., Post Office Box 826, Tupelo, MS 38802.
2. Donnie Edington – Appellee and Defendant, represented by J. Mark Shelton, Esq., Post Office Box 228, Tupelo, MS 38802.

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I. STATEMENT OF ISSUES

I. The Chancellor abused his discretion in finding that no material change in circumstances existed as the decision was not supported by substantial evidence, manifestly wrong, clearly erroneous and failed to apply the appropriate legal standards of considering the totality of the circumstances and prospective adverse effect.

II. Particularly damaging to the lower court's analysis of the prospective adverse effect, the Chancellor erred by excluding introduction of evidence of Defendant's "My Space" internet account which was rife with sexually explicit, highly suggestive, and violent content ranging from bondage and human slavery to sado-masochism.

III. In basing his finding of no material change in circumstances primarily on the lack of proof of adverse impact on the children on one issue, the Chancellor erred in ruling that no report from the guardian ad litem was needed on these issues, even though the guardian ad litem had interviewed the children and the parties' respective families, and was waiting to deliver her report and recommendations after the conclusion of all the testimony.

II. STATEMENT OF THE CASE

A. Nature of the Case

The case below was a modification of the child custody provisions of an April 17, 2001, irreconcilable differences decree filed by the non-custodial parent, Elizabeth Gainey, against her former husband, Donnie Edington. The children involved are two minor daughters, Tara Edington, age 11, and Mia Edington, age 10.

B. Course of the Proceedings:

On September 1, 2004, Elizabeth Gainey filed her Petition for Modification of Custody, Temporary Establishment of Reasonable Visitation, and in the Alternative, Permanent Establishment of Liberal Visitation. Donnie Edington answered. A Temporary Agreed Order was entered November 8, 2004. Aggrieved at Donnie Edington's lack of compliance with the Temporary Agreed Order, Elizabeth Gainey filed a second petition for Contmpt and modification on July 8, 2005. Edington again answered. On September 6, 2006, the first Chancellor below, Rodney Shands appointed Honorable Sidra P. Winter as Guardian Ad Litem. A hearing was held on June 20, 2007, September 4, 2007 and September 5, 2007 before the Honorable Judge Michael Malski.

C. Disposition

At the conclusion of Plaintiff's case-in-chief, Defendant Donnie Edington moved ore tenus to dismiss on the basis of no showing of a material change in circumstances adverse to the best interest of the children. The Court below rendered a bench opinion sustaining and granting the motion, and a memorandum Opinion and Judgment of the Court was signed December 10, 2007, nunc pro tunc, September 5, 2007, and filed December 13, 2007. From the bench opinion and Opinion and Judgment of the Court, Petitioner Elizabeth Gainey brings this instant appeal.

D. Statement of Facts

As a teenager, Elizabeth Gainey was molested by her father. (Transcript, P. 121-122, L28-2; P 126, L2-29). Her mother did not believe her allegations, and her parents stayed together. (Transcript, P. 127, L1-5). While married, Elizabeth and Donnie suspected that Elizabeth's father might be molesting the girls due to their acting out inappropriately. (Transcript, L6-13). The couple contacted the Department of Human Services, but Elizabeth's father was not prosecuted. (Clerk's File, P. 63; Transcript, P. 126, L 27-29).

Christmas of 2000 saw events that would change the family forever. Elizabeth and her mother went to Boaz, Alabama to shop. Her father accompanied them. Upon returning to Mississippi, Donnie and Elizabeth argued, and he kicked her out of the house, keeping their two daughters and Shannon, Elizabeth's son by a relationship before the marriage. (Transcript, P. 140, L16-28). With no place to turn, Elizabeth went first to her grandparents, then to SAFE House, a shelter for women and families in crisis. (Transcript, P 140-141, L29-7). Hopeless, Elizabeth tried to take her own life, but luckily failed, and currently takes anti-depressant medication. (Transcript, P. 141, L8-11; P. 128, L7-27).

In this situation, Elizabeth made the most fateful decision of her life. Unable to obtain legal aid or afford the cost of a contested divorce, Elizabeth opted to file an irreconcilable differences divorce. (Transcript, P 141-142, L25-2). With little bargaining power and no means to provide for the girls, she gave full custody to Donnie, and the issue of her visitation was not addressed in the April 2001 divorce decree. (Clerk's file, P. 013-021).

Much ado was made by Donnie Edington at trial about Elizabeth's failure to visit with the girls between April 2001 and when she filed for custody in 2004. Elizabeth argued that Donnie kept her from seeing the girls during this time. (Transcript, P. 92-94). She outlined the

precious few times that he allowed contact, and she basically resorted to mailing notes and leaving gifts on the porch of Donnie's house. (T. 94). However, she did not give up, and when her finances allowed, she hired an attorney to prosecute this action. (T. 94-95). Temporary visitation was set out in November 2004, and Elizabeth has exercised her visitation religiously. Donnie continued his obstinance and penchant for control and non-communication. (T.95-97). Elizabeth was forced to file a contempt action during the pendency of this matter just to get the summer and holiday visitation that was granted in the temporary order. (Clerk's Record 066-068). During the pendency of this ancillary pleading, Donnie would drive right by Elizabeth's house to allow the girls to stay with his then-girlfriend instead of allowing Elizabeth her summer visitation in 2005. (T. 98). He neglected to inform Elizabeth of the girls' baptisms at a church where he acts a a "lay minister," leaving it up to the girls to tell her. (T. 14). Though Donnie argued that Elizabeth "abandoned" the girls for two and a half years, his actions post-petition supply ample support for Elizabeth's contention that he kept the girls from her during this time – simply because he could.

The November 2004 temporary order had three other important provisions. First, no contact was to be had between the girls and their maternal grandfather. None ever occurred, nor was it alleged. Second, Elizabeth was to pay \$150 per month in child support. She paid this faithfully, and it was never suggested that she didn't. (Although the Chancellor made such an erroneous finding from the bench. Finally, the parties and children were to attend a parenting program, "Children in the Middle." (Clerk's Record 004-006). Elizabeth attended, as did her new husband Cary Gainey, his son and Shannon, her son. Donnie nor the girls under his care attended; he blamed his attorney for failing to arrange it or provide details and soon just forgot about it. (T. 8).

Donnie began seeing Christie in 2003. They were ultimately married in 2004, and Christie had a child during the marriage in May of 2004 that Donnie believed to be his. (T. 9). Mia and Tara believed it to be their sibling. (T. 70). While married to Christie, Donnie admitted to one evening of spouse swapping with another married couple at the home. (T. 41). The children were not there, but at their paternal grandmother's house down the road. (T. 42). Donnie denied any other instances of swinging, claiming that any other allegations of such were a setup by Christie using his "The Lord Phantom" Dungeons and Dragons alias and computer username. (T. 42). While married to Christie, he amassed a rather large assortment of sex toys and aids, some of which he still retains for use, plus additions and replacements. (T. 44). Christie and Donnie separated in late 2004 and divorced in early 2005. (T. 46). The child of the marriage turned out not to be his, and he explained to Mia and Tara (ages seven and nine at the time) that their baby sibling was not his baby and not their sibling. "They were fine with it." Donnie agreed that Christie was not the best person to have around the girls. (T 71-72).

Donnie next married Suzanne in the late summer of 2005. Suzanne had a son and daughter by a previous marriage, the son about the age of the girls and the daughter much younger. Despite graduating with a teaching degree from Blue Mountain College, Suzanne did not work outside the home in her field of study. She also had been sent home from school while student teaching at New Albany for being inappropriately dressed. (T. 190). By her own admission, she spent a great deal of time on the internet. (T. 194). Photographs taken by Donnie of Suzanne were introduced as evidence where she had posted them on publicly-accessible web pages or sites. (Exhibit 7, P. 037-038). She described them as "just being playful," but did admit that she would have been upset with the kids if they posed similarly, and also admitted that good church goers at the church where Donnie preached as a lay minister would not approve. (T.

196). Her only employment through the date of hearing was as a sex toy and device "consultant" hosting Passion Parties either at the home or the homes of others. (T. 193-94). For a time she kept her inventory at home, of course, in boxes that the kids couldn't get into. (T. 194).

Sidra Winter, Esq. was appointed guardian ad litem by Chancellor Shands on September 25, 2006, in response to Suzanne's motion suggesting abuse or neglect. (Clerks Record P. 82).

By this time, the home environment and care by Donnie seemed to be having an impact on the girls. Mia was failing in several classes and could not maintain suitable grades. (T. 22-26). Despite Suzanne's background in education, it was necessary to employ an after school tutor. (T. 25-26). At the time of the first day of trial in late June 2007, Donnie had still not received the girls' grades, claiming that he put a 39 cent stamp instead of a 41 cent stamp on the return envelope for the grades. (T. 26). Mia had been seen at the Shriner's Hospital in Louisiana for a gait derangement, which at the time of trial was uncorrected. (T. 35-37). Donnie could not give a name for the condition and had discontinued further treatment, deferring the surgical decision to his daughter if she didn't outgrow it. (T. 35). The only physical therapy she received is a "karate class" that her and Tara take from her aunt's husband, a former military man. (T. 37-39). The girls were made to do pushups in the back yard, and Mia has complained that it hurt her leg. (T. 39). Both girls had numerous cavities and poor oral hygiene, so bad that needed orthodontics could not be pursued because of the condition of their teeth. (T. 29-31, Exhibits 1-2, P. 004-008). Donnie was unable to state how many cavities the girls had, and deferred orthodontic work until his ten and eleven year old daughters "stop sucking their finger and thumb." (Transcript. P. 30). Both girls contracted staph infections after their step-mother, Suzanne, had a bout with it. (T. 26-28). Mia had failed hearing tests at school and months later showed up for visitation at Elizabeth's with a terrible, untreated

ear ache. After Elizabeth took the child to an ear-nose-throat specialist, Donnie had tubes put in the child's ears. (T. 33-35). Donnie allowed the girls to be kept unsupervised over the years at the home of his neighbor and cousin Frank Florez. At the time of the second day of trial in September 2007, Frank Florez had been sentenced to the penitentiary for the crimes of possession of a controlled substance with intent to distribute and possession of cocaine with intent to distribute. The girls had stayed at his home during the first day of trial in June 2007, before his sentencing. (T. 82-84).

Donnie and Suzanne maintained MySpace and other public and quasi-public accounts under the pseudonyms of The Lord Phantom and Lady Sedetha. Donnie tried to deny an active use of his MySpace account, but admitted that he had posted a blog about illegal immigrants the very morning of the first day of trial in June 2007. (Transcript. Page 51, L 10-19). Other blogs written by him included the statement "poor kids" when referring to Mia and Tara visiting with their mother during the 2006 holidays. (T. 54). Under his "My Pictures" MySpace section, he had taken and posted a picture of Suzanne in a French maid costume. (Exhibit 7). Under his "My Videos," although he initially denied placing it there, he maintained a movie trailer called "The Pet." (T. 52-54). Donnie described the movie as a bondage movie, but couldn't clearly remember that the trailer included a naked woman sold into slavery and kept by her master in a cage like a dog. (Transcript. P. 53-54). He explained that the movie trailer was made more palatable by describing the woman's plight as "all consensual." (Transcript. P. 53-54).

At trial, Edington was offered a stack of photographs representing postcards sent by him or received by him from "My Friends." (Transcript. P. 56). Counsel for Donnie objected to their introduction and counsel or Elizabeth moved on three occasions for Chancellor Malski to view the site or other similar My Space accounts to understand the process and concept. (T. 56

The Chancellor denied introduction of photographs printed from the MySpace account and refused to view the publicly accessible account unless counsel or Elizabeth could demonstrate that the site contained illegal matters referable to the United States Attorney's office or prove that the children had seen the site. (T. 64-65). Edington did admit that a picture of Charles Manson was on the account as was a video of Ronald McDonald being shot in the face. (T. 62). The guardian ad litem, who had seen the site, stated, "I would leave that to the deference of the Court." (Transcript, Page 61, Lines 19-20).

Both Elizabeth and her husband Cary Gainey testified, expressing their concerns about the children's educational needs, healthcare needs and concern for the environment in which the children were living as set out above. Elizabeth and Cary testified about their willingness, ability and suitability to better raise Mia and Tara. Cary had custody of his son, and had assisted Elizabeth in raising her son Shannon. Cary had helped Mia and Tara with schoolwork during visitations, and corroborated Elizabeth's observations and concerns.

At the close of Elizabeth's proof, counsel for Donnie moved for a directed verdict. Argument by both counsel was made, and the Chancellor asked the guardian ad litem if she had anything to add, to which she answered, "Your Honor, I will leave it to the Court's discretion as to whether or not there has been a material change in circumstances." (Transcript, P. 212, L13-16). The Chancellor ruled that the "aberrant sexual behavior" was not proven to have an impact on the children and listed his concerns of poor dental hygiene, staph infections and recurrent ear infections as not rising to the level of substantial change. (Transcript, P. 212-221). Accordingly the Chancellor sustained the motion to dismiss. Further, the Chancellor ruled that unless all three prongs of the standard to modify were not proven, "There is no need, in my opinion, for a

report from the guardian ad litem.” (Transcript, P. 219, L14-27). The Chancellor did state that had the three pronged test been met, “Quite frankly, if I were having to make that decision, I might well have decided in favor of the noncustodial parent in this particular case.” (Transcript, P. 219, L 7-10).

Aggrieved by the ruling Elizabeth lodged her appeal herein.

III. SUMMARY OF THE ARGUMENT

The Chancellor below found that allegations of aberrant sexual behavior on the part of Donnie Edington was not proven to have an adverse impact on the minor children, and consequently Elizabeth Grainey failed to meet the second prong of her burden of proof. Other factors, including poor dental hygiene of both girls and thumb and finger sucking at age ten and eleven, inability to pursue orthodontics; Mia’s uncorrected gait derangement; Mia’s recurrent ear infections; Mia’s poor grades; both girls’ contracting staph after their step-mother had the condition; supervision by a neighbor and relative who was sentenced to the penitentiary during the phases of the trial; the environment present where the first step-mother’s child born in the household turned out not to be their father’s and the high likelihood of exposure to inappropriate material on the internet maintained at all times at issue publicly by their father and step-mother, were either disregarded or not deemed rising to the level of a material change in circumstances by the Chancellor, despite the obvious health, educational and emotional impact on the children. The Chancellor’s finding of no material change was not supported by the almost unrefuted, contrary substantial evidence of several major material changes, but certainly adverse material changes in light of the totality of the circumstances and prospective

adverse effect standards. The Chancellor compounded the application of these two legal standards by excluding evidence or refusing to view the Edington's MySpace accounts, placing the onus on Elizabeth Gainey to prove that the matters had to be criminal in nature rather than relevant to a child custody modification. Further, the absence of a written report by the guardian ad litem and the Chancellor's failure to seek an oral report from the guardian ad litem at the conclusion of all the proof, both deprived the children of "being heard" upon issues that the guardian ad litem had knowledge.

IV. ARGUMENT

A. The Chancellor abused his discretion in finding that no material change in circumstances existed as the decision was not supported by substantial evidence, manifestly wrong, clearly erroneous and failed to apply the appropriate legal standards of considering the totality of the circumstances and prospective adverse effect.

The appropriate standard of review of a chancellor's findings is that such findings will not be disturbed on appeal, "When supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." Sanderson v. Sanderson 824 So.2d 623, 625-26 (Miss. 2002) (Emphasis added). The Court of Appeals in Connelly v. Lammey, 2008-MS-A0521.009 (Court of Appeals, Miss. 2008), defined the review of whether the chancellor applies proper legal standards in deciding custody cases as a de novo review. Connelly, citing Morgan v. West, 812 So.2d 987, 990 (Miss. 2002). The case at bar presents an issue of whether or not substantial evidence supported the Chancellor's finding of no material change, and whether or not the Chancellor's finding of no proof of adverse impact on the children as to one finding of material change failed to apply the appropriate legal standards of totality of the circumstances and prospective or reasonably

foreseeable adverse harm.

In order to modify custody the non-custodial parent must prove the following:

- (1) a material change in circumstances has occurred since the issuance of the judgment or decree sought to be modified.
- (2) the change adversely affects the welfare of the child, and
- (3) the proposed change in custody would be in the best interest of the child.

Lambert v. Lambert, 872 So.2d 679, 683-84 (Miss. Ct. App. 2003).

Elizabeth Gainey adduced the following proof which she argues constituted material change in circumstances of the custodial household:

- (1) denial of any meaningful visitation between the entry of the divorce decree in April 2001 and her ability to hire counsel to pursue her legal remedies in August 2004; and
- (2) at least one incident of "spousal swapping" occurring in Edington's home between mid-2003 and September 2004, involving Donnie and his second wife Christie;
- (3) the pregnancy and birth of a child by Christie which later became known to the children as not belonging to their father;
- (4) the separation and divorce of Donnie and Christie;
- (5) the admission by Donnie that Christie was not a good person to have around the children;
- (6) the maintenance of a supply of sexual aids and toys, including collars, whips and chains (Exhibit 3, p. 009)
- (7) the marriage of Donnie to third wife Suzanne within the same year of the

divorce from Christy;

(8) Suzanne's employment as a sex toy consultant hosting some "Fun" parties in the home and maintaining her inventory there;

(9) Suzanne's extensive time spent on the internet while at home, including posting suggestive pictures of herself taken by Donnie on various websites;

(10) Donnie's continued thwarting of Elizabeth's visitation in the face of an order granting summer and holiday visitation;

(11) Mia's diminishing grades and academic progress warranting a tutor and jeopardizing her advancement to the next grade.

(12) Mia's gait problem that continues to be inadequately treated;

(13) Mia's recurrent and ongoing ear problems that were finally treated when brought to light by Elizabeth;

(14) both Tara's and Mia's staph infections subsequent to Suzanne's serious staph infection

(15) the deplorable condition of both girls teeth, so bad that orthodontics could not be pursued until their mouth, teeth and gum condition improved;

(16) the allowing of supervision by a family member and neighbor ultimately imprisoned for selling drugs;

(17) the maintenance by Donnie and Suzanne of publicly – accessible MySpace accounts which at a minimum of admitted evidence contained photos of Charles Manson; a short video of Ronald McDonald being shot in the face; a movie trailer of a naked young woman collared and in a cage and kept as a slave by her master,

entitled "The Pet;" and pictures of Suzanne , one in a French maid's outfit in fishnet stockings and the other with Suzanne in a mini-skirt and high heels with one foot propped on a door knob.

In viewing this evidence the Chancellor below cited the appropriate three-pronged test. However he did not follow the legal standards on the first two prongs. The Chancellor failed to adequately view the totality of circumstances in applying the first prong. As to the one material change he found, the Chancellor failed to evaluate and apply the legal doctrine of reasonably foreseeably adverse impact.

The Chancellor below cited most of the evidence offered by Elizabeth including most of that detailed above. However, in his analysis – application—his ruling boiled down to the following three key points:

In the instant case, it is true that there may have been somewhat aberrant sexual behavior. However, there is no proof at all of an impact on the children (Transcript, Page 219-220, L.28-2)

While they concern this Court, poor dental hygiene, a staph skin infection of unknown ideology, recurrent ear infections and similar health issues are not the type of substantial changes which would meet the test for modification. (Transcript, P. 220, L8-13).

Quite frankly, if I were having to make that decision, I might well have decided in factor of the non-custodial parent in this particular case. I might well have given the children, in other words, to Mrs. Gainey. This isn't a case of initial custody determination, however. (Transcript, P.219, L7-13)

By de-linking the one material change the Chancellor found from the several others cited and many disregarded, the Chancellor did not apply the totality of circumstances standard.

The appellate courts of this state have further defined the three-pronged analysis. "Modification must be based on conduct of the custodial parent that poses a danger to the mental or emotional health of the child." Giannaris v. Giannaris, 960 So.2d 1264, 1266 (Miss. 1993).

And the “change in circumstances is one in the overall living conditions in which the child is found.” Hill v. Hill, 942 So.2d 207, 210 (Miss. Ct. App. 2006). In Powell v Powell, 2008-MS-A0305.005 (Miss. Ct. App. 2008), the Court of Appeals found that the chancellor ignored evidence that supported a finding that the children’s overall living conditions had materially changed to their detriment. Powell, Slip Opin. P. 3. In Powell, the material changes found sufficient to warrant modification were a subsequent marriage, the child being raped while under the mother’s care, a dispute between the custodial parent’s mother and her husband where a gun was drawn, and several moves and job changes. “Finally, the trial court may not consider each factor in a bubble, but must weigh them all together and make a determination in consideration of the totality of the circumstances.” Elliott v. Elliott, 877 So.2d 450 (Miss. Ct. App. 2003).

While focusing on the lack of proof of adverse impact of the sexual aberrancy in the household, the Chancellor below disregarded the adverse impact of the other circumstances such as the following;

- (1) health issues involving Mia to include her leg problem, her ear problems, the staph infection, and her dental problems
- (2) health issues involving Tara involving her dental problems
- (3) educational shortcomings of Mia
- (4) the emotional impact of having a sibling one day, but then having it explained to you that step-mom is gone and the baby wasn’t your dad’s – at age 7 and 9.
- (5) Your dad’s and second step-mom in one years seeming obsession with the computer instead of interacting as a family.
- (6) The constant exclusion of anything but minimal contact with your mother by your father.

These circumstances, while none along would amount to a material change, all had impact on the emotional and physical well-being of the children.

The Chancellor failed to apply the reasonably foreseeable adverse impact to the admitted wife-swapping, sex toys, whips and chains, sado-masochistic computer material and voyeurism engaged in by Donnie and both his second and third wives.

The Court would note parenthetically that while the Court may not approve of behavior such as spouse swapping or S and M bondage behavior, it is not the function of the chancery court to police behavior unless that behavior can be shown to adversely impact children. There has been no proof of such a nexus or a connection in this case. (Transcript, P. 217, L8-16).

While seldom prosecuted, adultery is still a crime in this state. Leaving your children next door at the drug dealer's house is not a crime--albeit drug dealing is—but is bad parenting. The children may not have known about the sexual escapades in the house while they were gone, but they saw firsthand at age seven and nine the effects of such—pregnancy by another man, separation and divorce. What are all those boxes that step-mom is delivered? What are daddy and step-mom so interested in on the computer all the time?

“Our Supreme Court has indicated that under certain circumstances, adverse effects can be shown where it is reasonably foreseeable that a child will suffer adverse effects because the child's present custodial environment is clearly detrimental to his or her well-being.” Gilliland v. Gilliland, 2008-MS-A0611.001, Page 2 (Miss. Ct. App. 2008). Further:

[W]here a child living in a custodial environment clearly adverse to the child's best interest, somehow appears to remain unscarred by his or her surroundings, the chancellor is not precluded from removing the child for placement in a healthier environment. Evidence that the home of the custodial parent is the site of illegal or dangerous behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that such environment has adversely affected the child's welfare. A child's resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home when a healthier one beckons.

Riley v. Doerner, 677 So. 2d 740, 744 (Miss. 1996).

Appellant offers the following cases as further definition of the reasonably foreseeable adverse harm rationale, Johnson v. Gray, 859 So. 2d 1006 (Miss. 2003), Glissen v. Glissen, 910 So. 2d 603 (Miss. Ct. App. 2005) and Savell v. Morrison, 929 So. 2d 414 (Miss. Ct. App. 2006).

“Additionally, this Court has stated that the Chancellor need not wait for the minor child to actually be injured before finding an adverse effect.” Savell, 929 So. 2d at 418.

While what goes on between consenting adults may be all right if the children don’t see or know about it, the Chancellor disregarded the reasonably foreseeable adverse effects of the Edington home and the actual adverse effects of the failed marriage of Christie and Donnie being repeated with Donnie and Suzanne. In trying to avoid passing judgment on Donnie’s lifestyle, the Chancellor forgot, “As in any custody modification determination, the polestar consideration is the well being of the child.” Savell, 929 So. 2d at 419.

B. Particularly damaging to the lower court’s analysis of the prospective adverse effect, the Chancellor erred by excluding introduction of evidence of Defendant’s “My Space” public account which was rife with sexually explicit, highly suggestive, and violent content ranging from bondage and human slavery to sado-masochism.

Seeing that the Court below was unfamiliar with the use of internet accounts such as MySpace, counsel for Gainey, having been prevented from offering into evidence photographs printed from it, moved three times ore tenus to conduct a view of Edington’s lurid MySpace account, as it was at the time of trial significantly publicly accessible. (Transcript P. 50-68). The ultimate ruling was stated, “Now on the other hand, as an officer of the Court, if you represent to me that there is some kind of criminal activity involved, I will look into it and make an appropriate referral to the United States Attorney’s Office.” (Transcript, P.61, L8-14). Such a high standard of admissibility is not supported by the law or its rules of procedure. “All relevant

evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Mississippi, or by these rules.” Miss. R. Evid. 401. 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.

C. Basing his finding of no material change in circumstances primarily on the lack of proof of adverse impact on the children the Chancellor erred in ruling that no report from the guardian ad litem was needed on these issues, even though the guardian ad litem had interviewed the children and the parties’ respective families, and was waiting to deliver her report and recommendations after the conclusion of all the testimony.

The guardian ad litem had previously interviewed the children and families, but had not prepared a written report. The guardian ad litem had attended all three days of trial. She had not questioned any of the witnesses, but had reserved the right to question Donnie Edington until after Edington’s counsel put him on during his case in chief. The Chancellor ruled on Edington’s motion after Gainey had made her case in chief and rested. He ruled that if material change in circumstances was not proven that the guardian ad litem need not render a report. The childrens’ representative was not heard.

V. CONCLUSION

Elizabeth Gainey provided the court below substantial evidence that both actual and reasonably foreseeable material changes in circumstances adversely affecting her children, had occurred in Donnie Edington’s custodial home. Consequently, his finding of no adverse impact of the sexual aberrancy and insufficient other material change was against the overwhelming weight of the evidence and not supported by substantial evidence. The Chancellor below