

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CAUSE NO. 2008-CA-01253

MELISSA ANN BETTS
APPELLANT

V.

CHALMUS BARRY MASSEY
APPELLEE

ON APPEAL FROM THE CHANCERY COURT
OF NESHOPA COUNTY, MISSISSIPPI
CIVIL ACTION NO. 2005-323
HONORABLE EDWARD C. FENWICK

BRIEF OF APPELLEE
CHALMUS BARRY MASSEY

ORAL AGRUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to *Miss. R. App. P. 28(a)(1)*, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of the Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Melissa Ann Betts, (Appellant);
2. Chalmus Barry Massey (Appellee);
3. Honorable Joseph A. Kieronski, Jr., William B. Jacob, and Daniel P. Self, attorneys for Appellant;
4. Honorable D. Joseph Kilgore, Guardian ad Litem;
5. Honorable Edward C. Fenwick, Chancellor, 6th District, Neshoba County, Mississippi; and
6. Tanya L. Phillips and Robert M. Logan, attorneys for Appellee.

RESPECTFULLY SUBMITTED,
CHALMUS BARRY MASSEY

BY:

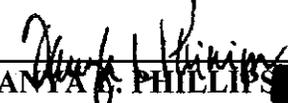

TANYA L. PHILLIPS
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STATEMENT OF THE ISSUE(S)

- I. The evidence was sufficient for the Court to find there was a material change in circumstances in the custodial home, which adversely affected the child and warranted a modification of custody to the father based upon the Court's weighing of the *Albright* factors.

STATEMENT OF THE CASE

a. Nature of the case.

Chalmus Barry ("Barry") Massey, Appellee, asks this Honorable Court to affirm the decision of the Chancery Court of Neshoba County, Mississippi, in Cause No. 2005-323, a case for modification of custody of the minor child, Benjamin Lee Massey, as filed by Defendant Barry Massey and as also filed in an opposing pleading by the custodial parent, Melissa ("Melissa") Ann Betts, Appellant.

b. Disposition of the case.

The litigation began with the filing of Melissa's *Petition for Writ of Habeas Corpus* in Cause No. 2008-148. The Writ was entered and filed on April 10, 2008. (Rec. Pg. 8-9). The Court consolidated the matter of the Writ with prior cause No. 2005-323. (Rec. Pg. 58). Melissa filed a *Complaint to Cite Respondent for Contempt and Other Relief* on April 3, 2008, against Barry citing his failure to pay child support and his failure to return the child to her. (Rec. Pg.1-2). Melissa also alleged a material change of circumstances and requested a change from joint legal custody to sole legal custody. (Rec. Pg. 2). These parties were never married but their relationship produced the subject child, Benjamin Lee Massey, born September 8, 2004. *Id.* The

parties had entered into a voluntary custody, visitation and child support agreement in Cause No. 2005-323 when the child was an infant. (Rec. Pg.5-7). Just prior to Melissa filing her Complaint, the Chancellor had ordered the Department of Human Services of Neshoba County to take physical and legal custody of the minor child due to physical evidence of child abuse and allegations of child abuse alleged by both Barry and Melissa. (Rec. Pg. 8). Barry filed a *Motion for Temporary Custody and Motion for Appointment of Guardian Ad Litem* on April 11, 2008. (Rec. Pg. 10-13). Barry filed an *Answer and Defenses to Complaint to Cite Respondent for Contempt and Other Relief and Counter-Complaint for Custody and Child Support* on April 25, 2008. (Rec. Pg. 15-21). The Court entered an Order appointing Honorable D. Joseph Kilgore guardian ad litem. (Rec. Pg. 22-23). Matters concerning Barry's child support were handled by DHS and Judgment approving a stipulated agreement with Barry was entered on May 2, 2008. (Rec. Pg. 24). The guardian ad litem submitted a preliminary report on June 2, 2008. (Rec. Pg. 36-54). Trial on the merits was held on June 2, 2008, and concluded on June 4, 2008. The Court entered its opinion and ruling on June 10, 2008, (Rec. Pg. 57-66), and a Final Judgment was filed in accordance with the Judge's ruling on July 2, 2008. (Rec. Pg. 67-71). Aggrieved with the Chancellor's decision, Melissa filed her *Notice of Appeal* on July 18, 2008. (Rec. Pg. 72-73).

c. Facts.

Barry Massey is the natural father of Benjamin ("Ben") Lee Massey, age 3 at the time of trial. Barry and Melissa were never married but had entered into a voluntary judgment establishing paternity, custody and child support. (Rec. Pg. 67). Litigation began in March 2005 when it was discovered Ben had severe bruises and marks on his buttocks. (Rec. Pg. 58). During the course of litigation and at trial, it was determined Ben had suffered physical abuse in or around the weekend of March 8-10, 2008. (Rec. Pg. 58, 145). On Friday, March 7 through

Saturday March 8, Ben had been with his father, who took him camping with his uncle and cousins. (Trans. Pg. 227-228). Barry returned Ben to his mother on Saturday, March 8, 2008, between 7:30 – 8:00 a.m. (Trans. Pg. 228). On Saturday afternoon, March 8, Barry's wife, Natalia, picked up Ben from Melissa to keep him overnight from Saturday to Sunday morning while Melissa worked the night shift at the Silver Star Casino in Philadelphia. (Trans. Pg. 199, 229). Ben stayed with Natalia at their home until the early morning hours of Sunday, March 9, when she contacted Melissa to pick up Ben . (Trans. Pg. 199-200). Natalia was working as a certified nursing assistant at Choctaw Residential Center in Philadelphia and was scheduled to go to work on Sunday, March 9, at 7:00 a.m. (Trans. Pg. 187, 200). Ben went home with his mother between 3:30 a.m. – 4:00 a.m. because he had woken up about 1:00 a.m. and would not go back to sleep. (Trans. Pg. 95, 200-201). Ben remained with Melissa from 4:00 a.m. until 9:00 a.m. when she took Ben to the home of his aunt and uncle, Malia and Craig Massey. (Trans. Pg. 95-96). Melissa's babysitter, Megan Howington, picked up Ben from the Masseys Sunday afternoon approximately 2:30 –3:00 p.m. (Trans. Pg. 96). Melissa testified she and her boyfriend at the time, now husband, Jerry Bailey, attended a wedding on Sunday. (Trans. Pg. 95-96). Melissa and Jerry returned home Sunday evening between 6:30- 7:00 p.m. (Trans. Pg. 110-111). Melissa testified her boyfriend discovered the bruises on Ben around 10:00 p.m. Sunday, March 9. (Trans. Pg. 94). She stated it was late when she looked at him and was tired and would take him to the pediatrician the next morning because emergency room personnel were not equipped to handle child abuse cases. (Trans. Pg. 94). Melissa testified she examined Ben on the morning of Monday, March 10, and was alarmed by what she see saw and immediately left her home to take Ben to his pediatrician, Dr. Melody Byram. (Trans. Pg. 96-97). Melissa also contacted her mother, Nancy Kubin, who was working as a nurse practitioner at Laird Hospital in Union. (*Id.*).

After Melissa met her mother, they drove together to Dr. Byram's office in Union. (*Id.*). Also present at Dr. Byram's office was Natalia Massey and her two sons. (Trans. Pg. 201-202). Barry Massey was in California at the time the bruises were discovered; however, Melissa called Barry to inform him of the situation. (Trans. Pg. 230). Melissa, Ben, Nancy, Natalia and her sons, ate lunch together in Philadelphia after the meeting at Dr. Byram's office. (Trans. Pg. 97). They all then traveled to the Philadelphia Police Department to file a report. (*Id.*). Ben remained with his mother for three (3) days until Barry returned home from California on Friday, March 14, when at that time, Melissa allowed Barry to take Ben for weekend visitation. (*Id.*). Barry reported to DHS for an interview when he returned from California on March 14. (Trans. Pg. 232). Ben was scheduled for a forensic interview, which Barry took him to on March 17. (Trans. Pg. 99.). Barry did not return Ben to Melissa on March 17 upon the advice of the police department. Ben was returned upon the hearing on the writ of habeus corpus on March 25, 2008, but the Court ordered the child to be put in the immediate custody of DHS. (Rec. Pg. 58). The child was temporarily placed with foster-parent, Judy Ward, until DHS determined the home of his grandmother, Nancy, was suitable for family placement. (Trans. Pg. 15).

At trial Dr. Byram testified the child was physically abused with force. (Trans. Pg. 139-141). Dr. Byram identified handprints and petechial hemorrhaging in the photographs she took of the child's injuries on March 10, 2008. (Trans. Pg. 138-139). DHS determined there was substantial evidence of physical abuse but no conclusive evidence as to the identity of the abuser. (Rec. Pg. 59). The testimony of Carrie Cumberland, licensed social worker for DHS, showed Barry, Natalia, Melissa and her boyfriend, Jerry, complied with components of their individual DHS service agreements, which included completion of parenting classes and supervised visitation. (Trans. Pg. 24). Both parents' homes were adequate for the child, but DHS

recommended Barry have custody of the child due to stability in his home, including working hours, and the child's extreme emotional attachment to his father. (*Id.*). Ms. Cumberland also testified Melissa exhibited more concern about her perceived lack of fairness in the investigation- it being slanted against her- and was less concerned about Ben's overall welfare. (Trans. Pg. 19-20). Melissa's witnesses, her babysitter, Megan Howington, her brother Bryant Betts and her mother, Nancy, testified the child was with his mother the majority of the time. (Rec. Pg. 59). Barry and Natalia testified Ben spent the majority of his time with them, because Melissa worked five (5) nights a week on the late shift at the Silver Star Casino, and she only saw Ben on her days off. (Rec. Pg. 59-61; Trans. Pg. 164-165,193-197; and Appellant's Rec. Exc. Pgs. 71-94). The guardian ad litem, D. Joseph Kilgore, conducted an independent investigation and determined it was in Ben's best interest to be placed with his father for a number of reasons, those being (a) a stable atmosphere in Barry's home; (b) Melissa's successive relationships with men, wherein at the time of trial she was four (4) months pregnant by Jerry Bailey and not married; (c) Melissa's working hours not being conducive to raising a child; (d) Melissa's general lack of concern about Ben; and (e) the substantially close relationship between Ben and his father, in addition to the overall concern about the incidence of physical abuse. (Rec. Pg. 60; Trans. Pg. 259-260). After two days of hearing the parties' witnesses, the Court entered its opinion and ruling modifying custody in favor of Barry Massey, and setting visitation and child support payments for Melissa. (Rec. Pg. 61-66).

SUMMARY OF THE ARGUMENT(S)

The Chancellor rightly modified the original custody decree in favor of Barry Massey. In so doing, the Chancellor applied the legal standard in modification cases, that being a showing by a preponderance of the evidence there has been a material change in circumstances adversely affecting the welfare of the child which came about in the custodial home since the time of the entry of the original decree establishing custody. If the Chancellor, as in this case, found an adverse change in circumstances, he must further determine whether a change in custody is in the best interest of the child and in so doing, he must weigh those factors in light of the totality of the circumstances. In two days of trial, the Chancellor took testimony from several key witnesses, and in weighing the testimony and credibility of those witnesses and the evidence submitted, including the investigations developed by DHS and the guardian ad litem, the Chancellor found an adverse change in circumstances had occurred, the triggering event being the physical abuse of Ben. With the parties submitting to investigations by DHS and the guardian ad litem, the door was opened to reveal there were other events occurring in Ben's life to cause the Court to find modification necessary. Looking at the totality of the circumstances surrounding the child, the Court found there had been a *de facto* change in custody as Ben spent most nights in the home of his father and stepmother, than at his mother's house, with his mother's consent; Melissa's late night work hours were not conducive to raising a small child; Just days prior to trial, she obtained a daytime work schedule and attempted to marry her boyfriend; Melissa, who was four months pregnant and not married, testified Ben had been allowed to sleep in the bed with her and the boyfriend; and the overall fact that Ben had been physically abused.

Once the Court found there had been a material change adverse to Ben in his mother's home, the Chancellor applied the *Albright* factors to determine the best interest of Ben, whether

to modify custody in favor of Barry, or to modify the joint legal status in favor of sole custody to Melissa. The Court found custody should be modified in favor of Barry because: (a) Melissa's late night work schedule was a detriment to raising a young child and caused her to be overly-dependent on babysitters; (b) strong emotional ties between father and son; (c) Melissa demonstrated poor moral character in allowing Ben to sleep in the same bed with her and the boyfriend; and (e) stability of the father's home environment.

ARGUMENT(S) AND AUTHORITIES

The modification of custody in favor of the non-custodial parent should be affirmed, as there was an agreed material change in circumstances adversely affecting the minor giving the Court a green light to conduct an *Albright* analysis for modification.

To effect a modification of custody, it is well-established there must be proof that clearly establishes a material change of circumstances, since the entry of the decree sought to be modified, in the custodial home, adverse to the child, and the child's best interest requires a change of custody be made. *Miss. Divorce, Alim. And Child Custody*, § 18:5 (6th ed.)(citing *Cavett v. Cavett*, 744 So.2d 372 (Miss. Ct. App. 1999), *McCracking v. McCracking*, 776 So.2d 691 (Miss. Ct. App. 2000)). The movant must make his showing by a preponderance of the evidence. *Staggs v. Staggs*, 919 So. 2d 112 (Miss. Ct. App. 2005); *Glissen v. Glissen*, 910 So.2d 603 (Miss. Ct. App. 2005). The material change must have occurred in the custodial home. *Mabus v. Mabus*, 847 So.2d 815 (Miss. 2003). All events that have occurred since the issuance of the decree sought to be modified may be considered by the Chancellor. *Savell v. Morrison*, 929 So.2d 414. 417 (Miss. 2006).

The triggering event in this case was the physical abuse inflicted upon Ben between March 8-10, 2008. The Court found Barry and Melissa had agreed there was a material change in

circumstances adverse to their child, but disagreed as to the application of the best interest test. When there is a stipulation as to the change of circumstances, no evidence of such is required, and it is proper for the court to move to the next step of consideration of the *Albright* factors. *Harper v. Harper*, 926 So. 2d 253, 255 (Miss. Ct. App. 2006). Remarriage of the custodial parent will not by itself justify a change in custody, *Wright v. Stanley*, 700 So.2d 274 (Miss. 1997), nor will indiscretions of the custodial parent, standing alone, *Smith v. Jones*, 654 So. 2d 480 (Miss. 1995). It is insufficient for a non-custodial parent to show, given the opportunity, he could do a better job with the children. *McCracking v. McCracking*, 776 So. 2d 691 (Miss. Ct. App. 2000). However, in cases where the child's health and welfare are truly at risk, there is no rigid test to prevent a chancellor from improving a child's welfare through a modification of custody. *Savell v. Morrison*, 929 So.2d 414 (Miss. Ct. App. 2006)(citing *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996)). When the environment provided by the custodial parent is found to be adverse to the child's best interest, and the circumstances of the non-custodial parent have changed such that he is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly. *Glissen v. Glissen*, 910 So. 2d 603 (Miss. Ct. App. 2005), *Riley*, 677 So. 2d at 745. The polestar consideration is the well-being of the child. *Sellers v. Sellers*, 638 So.2d 481 (Miss. 1994). A chancellor's hands should not be shackled by a minor child's resilience to harm or ability to remain unscathed despite living in an adverse home environment. *Riley*, 677 So.2d 744.

All aspects of the lives of these parties and Ben, since the entry of the original custody order, were well within the Chancellor's "sphere of consideration" when he determined there had been a material change of circumstances. The Chancellor found there had been a *de facto* change in custody from Melissa to Barry as evidenced by the conduct of the parties. The

Mississippi Court of Appeals affirmed such a change in custody as a “material change of circumstances” when the change was based on the stipulation of the mother and father. *Harper*, 926 So.2d at 256. It was obvious Barry’s visitation rights were not in question in this case. While the original custody order provided Melissa would have primary physical custody of Ben, there was evidence that Ben spent the majority of time being cared for by his father and stepmother since he was an infant. Barry and Natalia began calendaring the instances when Ben stayed with them, which began in 2006, a little more than two years before the litigation began. (Trans. Pg. 194-197). There was more than mere reliance on Barry and his family to babysit Ben when Melissa worked. Evidence showed Barry and his wife had become Ben’s primary caregivers, even to such an extent that his stepmother provided health insurance for Ben through a family policy provided by her employer. (Trans. Pg. 205). Evidence also showed that while Melissa had been regularly and gainfully employed, her working hours were not conducive to parenting a young child. Her testimony showed that in addition to depending on Barry and Natalia to keep Ben while working, she had a young lady babysitting, who kept him when Barry and Natalia were not available. She also kept him when Melissa wanted to go out on her nights off. Melissa’s mother only kept him occasionally. The guardian ad litem, Mr. Kilgore, testified that it was not detrimental for Melissa, as a single parent, to maintain steady employment, but he noted Melissa expressed a preference to work the late shift from 6:00 p.m. to 3:00 a.m. to earn more tips, however, she changed her schedule to more conventional daytime hours just a couple of weeks before trial. Mr. Kilgore saw there was a difference in the priorities between the two (2) households – Barry and Natalia holding regular employment and maintaining normal schedules, versus Melissa working five nights a week and sleeping days. The Court found the stability in Barry’s home to be one of a few major factors in modifying custody.

Melissa's relationships were also an issue with the Court. Since Barry and Melissa were in a relationship, Barry had married Natalie and settled down with her and her two children on his family's land. Melissa, on the other hand, and according to the guardian ad litem, "flew" into relationships with at least three men. The Court duly noted Melissa was pregnant with her second child by her boyfriend, Jerry Bailey, who is now her husband. At the time she had been dating Jerry for a short period of time, six months or less, and the guardian ad litem had determined Jerry had been spending some nights in Melissa's home. On more than one occasion, Ben had been sleeping in the same bed with Melissa and Jerry. The guardian ad litem reported Melissa and Jerry had attempted to hurriedly get married in Alabama just a few days before trial but changed their minds.

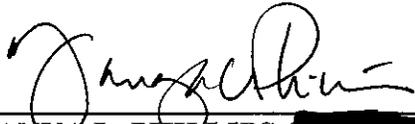
CONCLUSION

The Chancellor was correct in determining and finding there had been a material change in circumstances adversely affecting the child. The decision of the Chancellor was not manifestly wrong, nor did he apply an incorrect legal standard. Furthermore, his job was made easier in finding a material change as the parties had agreed, for differing reasons, there had been a material change – Barry, for the reason his child had been abused, and Melissa, for the reason Barry had not returned the child to her after visitation following the abuse. Since the parties agreed there had been a material change, the Chancellor proceeded to the next step of analysis in weighing an *Albright* analysis to determine if modification was in the best interest of Ben. In weighing those factors, and taking into consideration the investigations of the Department of Human Services and the guardian ad litem, as well as testimony from the witnesses, including that of the child's pediatrician who diagnosed the abuse, the Chancellor found there were a

combination of reasons to modify custody in favor of Barry: (1) stability in Barry's home; (2) poor moral character on the part of Melissa; (3) a de facto change in custody with the child primarily being in Barry's home; and (4) Melissa's work hours not being conducive to raising a small child. It was apparent the Chancellor was deliberate in weighing all factors and the totality of the circumstances to find it was in the best interest of Ben to be placed with his father. Barry Massey respectfully requests this Honorable Court not disturb the decision of the trial court, but affirm as the Chancellor had appropriately applied the correct legal standard.

**RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE

I do hereby certify that I have this day mailed, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to the following:

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