

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NUMBER 2008-CA-01253

MELISSA ANN BETTS

APPELLANT

VS.

CHALMUS BARRY MASSEY

APPELLEE

APPELLANT'S REBUTTAL BRIEF

**Appeal from the Chancery Court of Neshoba County No. 2005-323
The State of Mississippi**

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ISSUE ONE: WHETHER THE CHANCELLOR COMMITTED AN ERROR IN FINDING A MATERIAL CHANGE OF CIRCUMSTANCES ADVERSELY AFFECTING THE MINOR CHILD TO CHANGE CUSTODY

In Barry's Brief of Appellee, he erroneously states "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" (Appellee's Brief Page 8).

Neither Melissa nor Barry entered into a stipulation that there was a material change of circumstances. Quoting from *Harper v. Harper*, 926 So.2d 253 (Miss. Ct. App. 2006) that Barry uses to support his position concerning a stipulation, that case went on to say:

"A stipulation of fact is a fact which both parties agree is true." *Id.* ¶10 at page 257. The *Harper* trial court stated in its ruling:

"...the parties stipulated prior to beginning the case that it would be in the best interest and welfare of Kendra to live with her father and that constituted a substantial and material change in which the Court would modify that decree and did so." *Id.* ¶9 at Page 256.

The lower court in the case before the bar made no finding as to approval of a stipulation by Melissa or Barry. It only stated that the issue of modification of custody was raised in the parties' pleadings. (RE 16 CP 62)

Barry, in support of his argument for affirmation of the lower court's decision to modify custody of Ben from Melissa to Barry cites cases which can be distinguished from this case before the Court.

Barry cites *Savell v. Morrison* 929 So.2d 414 (Miss. Ct. App. 2006) that "where the child's health and welfare are timely at risk, there is no rigid test to prevent a chancellor from improving a child's welfare through a modification of custody". (Appellee's Brief Page 8)

In *Savell*, this Court affirmed the lower court's modification of custody of a child from the mother to the father based on its findings that the child's stepfather had been:

"...guilty of much more than the simple use of profanity, as the chancellor pointed out in his opinion. Roger indicated that he did not care if he went to jail or not in the event that he physically disciplined Anna. Added to the facts that Roger has threatened Anna with physical discipline to the point that she turned white with fear and his desires to "pepper" her with paintballs and duct tape her to a chair indicate an increasing level of aggression, which the chancellor identified." *Id.* ¶12 Page 416

No such findings were made that come close to the findings in the *Savell* case or meet the holding in *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996).

Barry cites further in support of the lower court's decision to modify custody of Ben, the case of *Glissen v. Glissen*, 910 So.2d 603 (Miss. Ct. App. 2005). The *Glissen* court found the factors in support of modification of custody to be: the mother chose to cohabit with a married man providing a poor role model as a potential stepfather, that the man the mother was cohabiting with was a convicted felon, which the mother said she just discovered on the day of trial and that he had declared bankruptcy. The chancellor questioned the mother's ability to care for the child if she is living with a convicted felon who is bankrupt. *Id.* ¶6 at pages 607-08. These factors are not involved in this case before the Court.

The lower Court applied clearly erroneous legal standard to modify the custody of Ben from Melissa to Barry.

Although a material change of circumstances which adversely affects the child and in the child's best interest custody should be changed is determined by a totality of the circumstances. *Giannaris v. Giannaris*, 960 So.2d 462, 467 (¶10) "only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change" *Holmes v. Holmes*, 958 So.2d 844, 847 (¶14) (Miss. Ct. App. 2007) (citation omitted). Following a finding of a material change

of circumstances, the finding of an adverse effect on the child as a result of the material change must be a separate and affirmative determination. *Duke v. Elmore*, 956 So.2d 244, 247 (¶7). Further, cohabitation is relevant to a determination of a change of custody only to the extent it is shown such a relationship adversely effects the child. *Sullivan v. Stringer* 736 So.2d 514, 517 (¶16) as does sexual relationships outside of marriage are not, by themselves, sufficient basis for custody modification. *Id.* at 518 (¶19).

The *Giannaris* court reversed both the lower court and the Court of Appeals affirmatives because the chancellor “erred in finding material change in circumstances and then disuniting isolated incidents to find an adverse affect...” *Id.* at 470 (¶12).

Such is the case in this matter where the lower court over emphasized Melissa’s work schedule and her sexual conduct to presume an adverse effect on the child with there being no showing of such.

Based on the lower court’s use of an erroneous legal standard, the change of custody should be and needs to be reversed and rendered.

Respectfully submitted, this the 2^d day of April, 2009.

MELISSA ANN BETTS, APPELLANT

BY:


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CERTIFICATE OF SERVICE

I, the undersigned attorney, Of Counsel for the Appellant, Melissa Ann Betts, hereby certify that I have this day caused a true and correct copy of the above and foregoing Appellant's Rebuttal Brief to be mailed by United States mail, postage prepaid, to the following persons:

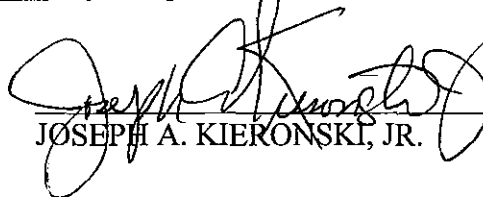
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