

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DOCKET NUMBER 2008-CA-01253

MELISSA ANN BETTS

APPELLANT

VS.

CHALMUS BARRY MASSEY


APPELLEE

BRIEF OF THE APPELLANT

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

COUNSEL FOR THE APPELLEE:

**JOSEPH A. KIERONSKI, JR.,
WILLIAM B. JACOB
DANIEL P. SELF, JR.
SELF, JACOB & KIERONSKI, LLP
Post Office Box 949
Meridian, Mississippi 39302-0949
601/693-6994**



IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MELISSA ANN BETTS

APPELLANT

VS.

DOCKET NUMBER 2008-CA-01253

CHALMUS BARRY MASSEY

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:

Melissa Ann Betts

Appellee:

Chalmus Barry Massey

Attorneys for Appellant

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

Attorneys for the Appellee

Tanya L. Phillips, Esquire, Robert M. Logan, Esquire; The Logan Law Firm, P.A.

Other Interested Parties:

The Honorable Edward C. Fenwick, Chancery Court Trial Judge,
D. Joseph Kilgore, Guardian Ad Litem.

Respectfully submitted, this the 10th day of December, 2008.


JOSEPH A. KIERONSKI, JR.

TABLE OF CONTENTS

<u>CERTIFICATE OF INTERESTED PARTIES</u>	<u>i</u>
<u>CITATION OF AUTHORITIES</u>	<u>iii</u>
<u>STATEMENT OF ISSUES</u>	<u>1</u>
<u>STATEMENT OF THE CASE</u>	<u>2</u>
<u>STANDARD OF REVIEW</u>	<u>3</u>
<u>DISCUSSION</u>	<u>3</u>
<u>ISSUE ONE: WHETHER THE CHANCELLOR COMMITTED AN ERROR IN FINDING A MATERIAL CHANGE OF CIRCUMSTANCES ADVERSELY AFFECTING THE MINOR CHILD TO CHANGE CUSTODY</u>	<u>3</u>
<u>ISSUE TWO: WHETHER THE CHANCELLOR COMMITTED AN ERROR IN WEIGHING THE <i>ALBRIGHT</i> FACTORS TO CHANGE CUSTODY</u>	<u>14</u>
<u>CONCLUSION</u>	<u>20</u>
<u>CERTIFICATE OF SERVICE</u>	<u>21</u>

CITATION OF AUTHORITIES

CASES

<i>Albright v. Albright</i> , 437 So.2d 1002,2003 (Miss. 1983)	18
<i>Ash v. Ash</i> , 622 So.2d 1264, 1266 (Miss. 1993)	3
<i>Bailey v. Jones</i> , 949 So.2d 802, 804-05 (¶10)(Miss. Ct. App. 2006)	10
<i>Ballard v. Ballard</i> , 434 So.2d 1357 (Miss. 1983)	14
<i>Cheek v. Richer</i> , 431 So.2d 1139 (Miss. 1989)	18
<i>Davidson v. Cort</i> , 899 So.2d 904, 913 ¶34 (Miss. Ct. App. 2005)	18
<i>Davis v. Davis</i> , 451 So.2d 316,319 (Ala. Civ. App. 1984)	11
<i>Divers v. Divers</i> , 856 So.2d 370, 375 ¶24 (Miss. Ct. App. 2003)	20
<i>Forsythe v. Akers</i> , 768 So.2d 943,947 (¶11)(Miss. Ct. App. 2000)	13
<i>Giannaris v. Giannaris</i> , 960 So.2d 462 (Miss. 2007)	14, 20
<i>Henderson v. Henderson</i> , 622 S.W. 2d 7 (Mo. Ct. App. 1981)	11
<i>In Re: Marriage of Whipp</i> , 962 P.2d 1058 (Kan. 1998)	11
<i>Kavanaugh v. Carraway</i> , 435 So.2d 697, 700 (Miss. 1983)	13
<i>Lambert v. Lambert</i> , 872 So.2d 679,683-84 (¶8) (Miss. Ct. App. 2003)	3
<i>Lewis v. Lewis</i> , 974 So.2d 265, 266 (¶13)(Miss. Ct. App. 2008)	3
<i>Mixon v. Sharp</i> , 853 So.2d 834 (Miss. Ct. App. 2003)	10
<i>Powell v. Powell</i> , 976 So.2d 358, 361 (¶10) (Miss. Ct. App. 2008)	3
<i>Sorenson v. May</i> , 944 P.2d 429 (Wyo. 1997)	8
<i>Sudduth v. Mowdy</i> , NO. 2007-CA-00575 COA	13

OTHER AUTHORITIES

Griffith Mississippi Chancery Practice, Section 42 (2d Ed. 1950) 10

STATEMENT OF ISSUES

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

ISSUE TWO: WHETHER THE CHANCELLOR COMMITTED AN ERROR IN WEIGHING THE *ALBRIGHT* FACTOR THE CHANGE CUSTODY

STATEMENT OF THE CASE

The case pending before the Court concerns the modification of custody of Benjamin Lee Massey [hereinafter Ben], a four (4) year old, born September 8, 2004, from his mother Melissa Ann Betts [hereinafter Melissa] to his father, Chalmus Barry Massey [hereinafter Barry].

Barry and Melissa were not married when Ben was born and by a December 9, 2005 Agreed Judgment of Paternity and an Order of Child Support and Other Relief they were granted joint legal custody of Ben with Melissa having physical custody.

On April 1, 2008, Melissa filed her Complaint to Cite Barry for contempt and other relief which included a modification of custody because Barry would not return Ben at the end of his visitation period. Barry thereafter, on April 11, 2008, filed his Motion for Temporary Custody and Motion for Appointment of Guardian Ad Litem and subsequently on April 24, 2008 he filed his Answer and Defenses to Complaint to Cite Respondent for Contempt and Other Relief and Counter-Complaint for Custody and Child Support.

Attorney D. Joseph Kilgore was appointed as Ben's Guardian Ad Litem and he filed his Preliminary Report of Guardian Ad Litem on June 1, 2008. This action was tried beginning June 1, 2008. After a two day trial wherein eleven (11) witnesses were called, the Court filed its opinion on June 11, 2008 and entered a Final Judgment Modifying Prior Agreed Judgment for Custody, Support and Visitation on July 2, 2008 changing custody of Ben from Melissa to Barry and ordering Melissa to pay child support in the amount of \$250.00 per month.

Melissa being aggrieved with the modification of custody timely filed her appeal.

STANDARD OF REVIEW

“A Chancellor’s 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 standard has applied” *Powell v. Powell*, 976 So.2d 358, 361 (¶10) (Miss. Ct. App. 2008) (citing)

DISCUSSION

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

In a modification proceeding, the non-custodial party must prove: (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child’s welfare; and (3) that the child’s best interest mandates a change of custody. *Lambert v. Lambert*, 872 So.2d 679,683-84 (¶8) (Miss. Ct. App. 2003). In making this determination, the totality of circumstances must be considered. *Ash v. Ash*, 622 So.2d 1264, 1266 (Miss. 1993). Even though under the totality of the circumstances a change has occurred, the Court must separately and affirmatively determine that this is one which adversely affects the child. *Lewis v. Lewis*, 974 So.2d 265, 266 (¶13)(Miss. Ct. App. 2008).

The Chancellor in this case found under the totality of the circumstances that a material change in circumstances had occurred adversely affecting Ben because of three reasons. They were:

1. “That Ben already spends most nights with his father and stepmother which the Court finds to be a *defacto* change of custody with the mother’s consent;
2. Melissa’s work hours from 6:00 p.m. to 2:00 a.m. which is not a schedule conducive to raising a small child as a single parent;
3. Melissa finding herself 4 months pregnant by a man she began dating six (6) months

ago [;] she...on occasions has allowed Ben to sleep with her and her boyfriend in bed.” (CP 61-62)
(RE15-16)

a. **Defacto Change in Custody**

Incorporated within the Agreed Judgment of Paternity and Order of Child Support and Other Relief dated December 9, 2005, Exhibit 1 (RE 21-25), there is a Visitation Schedule which provided “Other Visitation: “The non-custodial parent may visit at all other reasonable times and places agree to by the parties. The celebration of Benjamin’s birthday will be worked out by his parents”(RE 24).

Melissa had been employed with the Pearl River Resort for three years beginning in March 2005 (T.281) as a bartender (T.85) and from February 2006 until two weeks (T.281) before trial her work schedule was from 6:00 p.m. to 2 a.m. in the morning (T.124) five days a week (T.86). While Melissa was working these hours, Megan Howington (the baby sitter), Natalia (Barry’s wife) and her mom (Nancy Kubin) took care of Ben (T.86). The reason for working the night schedule was because “I made a little bit more money in tips ...I couldn’t rely on the child support to come in every month, so I had to make sure I had an adequate amount of money to provide Ben with the things that he needed (T.124).” To be a cocktail waitress on day shift would be \$2.00 an hour less in pay. (T282). Apparently the babysitting duties were shared with Barry and his wife Natalia before Natalia and Barry married. During direct examination of Natalia, she was asked

“Q. And during the time that you were dating and first got married to Barry, did you ever have an occasion to keep Ben, to babysit?

A. Yes, ma’am.

Q. Can you recall what that occasion was?

A. Yes, ma’am.

Q. What is that?

A. Barry had to go to work. Melissa was also at work. Barry called Melissa and let her know that I was going to be there with Ben. But I stayed over a Malia's (Barry's sister-in-law) because she was not comfortable with me keeping him because she didn't know anything about me at the time. When she got there to pick him up, we talked for a little while. And [sic] she needed a babysitter the next day. I told her that I would be happy to keep him and if it would make her feel comfortable that I would even stay at my sister-in-law Malia's house so she would feel more comfortably about me keeping Ben.

Q. Is that what took place?

A. Yes, ma'am.

Q. From that point on can you describe what your relationship has been with Melissa as far as Ben's care goes. [sic]

A. Yes, ma'am. Me and Melissa have always been able to work things out. If she had anything that she wanted to object to me about, we discussed it. We always tried to work it out." (T.192-193).(RE 55-56)

Under cross examination, Natalia stated concerning the two years of calendar notations. (Exhibit 3)(RE 71-94).

"Q. Two years of the calendar and during the time that Ben was with you, you had no objection with Ben?

A. No sir.

Q. You wanted him to be with you. Is that correct? And with his father. Is that correct?

A. Yes sir.

Q. And I'm assuming that because of the way you and Melissa were working--you said you worked together to take care of Ben. That was not a big problem. Is that correct?

A. No sir.

Q. And that this was advantageous for Melissa because she worked at night and it also

gave a chance for your husband Mr. Massey to see his son. Is that correct?

A. Yes, sir.

Q. And it meant that he could see his son more than the established visitation that was attached to the judgment. Is that correct?

A. Yes sir.

Q. So it worked to the benefit of both your husband and Ben's mother, Melissa. Isn't that true?

A. Yes sir.

Q. Okay. Everything seemed to work until we get to March 10 of 2008 when the bruises that have been testified about that you observed on Monday the 10th on Ben. Is that correct?

A. Yes sir." (T.208-09)(RE 57-58).

Even Barry admitted that Ben spending a lot of time with him and/or his wife was a satisfactory arrangement. On cross-examination Barry said the following speaking about Exhibit 3.

"Q. Okay. Let's just take the first page which will be April of 2006. It just says "Ben spent the night." Is that correct?

A. Yes sir.

Q. It doesn't say anything about the daytime, does it?

A. Doesn't say when he left.

Q. It just says at night, correct?

A. That's what the calendar says.

Q. And that's what it is on May 2006, June 2006, July 2006, etc., etc. It just indicates the night. Is that correct?

A. Yes sir.

Q. And during this entire time, Melissa was working at night. Isn't that true?

A. That's right.

Q. That was a satisfactory arrangement for you and satisfactory arrangement for Melissa. Isn't that true?

A. That's right. "(T.245-46)(RE 59-60).

Barry stated when questioned by the Court:

"Q. And I take it until the incident on the weekend of March 8th and 9th, until that weekend y'all had pretty well worked this [night visitation] out between yourselves, hadn't you?

A. Pretty much. We did up until Melissa filed charges against me...the end of 07" (T.249)

Under further cross-examination Barry stated:

Q. "I understand that had indicated, Mr. Massey, that you and Melissa were able to pretty well work things out exchanging Ben until sometime in late 2007?

A. That's right.

Q. And even after that, you and she still worked things out as to where the exchange of Ben would take place. Is that correct?

A. Her and my wife would pretty much do that after that.

Q. All right. You delegated authority to her.

A. Yes sir.

Q. And it was acceptable to you for Melissa to work with your wife to exchange Ben. Is that correct?

A. Yes sir. "(T.252)(RE 61)

The Guardian Ad Litem in his report to the Court concerning the conflict that developed after

March 10, 2008 stated in his report:

"Out of the saddest things about this case is that before all this happened...everyone got along for the most part. There was a great spirit of cooperation in raising and caring for Ben. Melissa and Barry got along and Melissa placed a great deal of trust in Natalia and Malia and other Massey

family members. Likewise Barry thinks very highly of Melissa's babysitter Megan. The natural parents had some very difficult working hours, but there was always someone who was happy to keep Ben. I am not sure that the parties can get back to that, and that is truly a shame for Ben"(CP 51)(RE 42)

When questioned by Melissa's attorney, the Guardian Ad Litem (GAL) stated:

"Q. And so up until we get to this one incident, the parents and the families of the parents were managing to cooperate and deal in the best interest of Ben. Is that correct?"

A. Yes". (T.271)

When asked under direct examination, the Guardian Ad Litem described his observation of Ben as:

"Ben's a great kid. He has a lot of fun. He came in and wanted to--very inquisitive about things going on in the office and very friendly. I was talking to his grandmother at the time, Nancy, and he came around to where I was and was kind of drawing on my papers. They were his papers actually, so I didn't mind. He was very friendly and outgoing." (T259-60).

He further stated that he found no material change of circumstances adverse to Ben from December 2005 to March 10, 2008 although he added that he was not looking for a change in circumstances he was just to determine what was in Ben's best interest (T.266-67).

No witness testified nor any document introduced into evidence concluded that the time sharing arrangements between Melissa and Barry had in fact been a *defacto* change of custody. No case law in this State has been found that finds such time sharing arrangement indicates a *defacto* change of custody. The only case that addresses a situation somewhat analogous as to this case is *Sorenson v. May*, 944 P.2d 429 (Wyo. 1997) wherein the husband, Sorenson, and ex-wife, May, were granted joint custody of their two children with physical custody to be with each parent six months out of every year, and each parent waived paying child support. Because the children were in school at the time of the divorce, they stayed with Sorenson after his six months to prevent them from being

moved to a different city and school where May lived. Sorenson, approximately 18 months after the divorce, filed a petition to modify custody to be the sole custodial parent because the children were not spending one-half of the year with May as the divorce decree contemplated. The lower court denied Sorenson's Petition finding no material change in circumstances wherein the trial judge found:

"...[I]t appears that the best interest of the children ha[s] been admirably served all along here. I don't see where it would be in their best interest to do any change, because thanks to the very mature and responsible way these two parents have acted vis-a-vis their daughter, it appears to me it wouldn't necessarily be in her best interest for any change of custody, nor would it be at any time because she was enjoying a relationship with her father and her mother, which is one of the chief goals in any custody and visitation situation."

"...[I]t occurs to me that [the father] and [the mother] have acted in a very admirable and honorable fashion here, contrary to the situation that one sees in the District Court too often..." *Id.* at ¶431.

The Wyoming Supreme Court affirmed the denial of the Petition to change custody and commended the parties to continue to work together for the best interest of their children. *Id.* at ¶433.

The Guardian Ad Litem is the case subjudice found basically the same environment of cooperation as stated *supra*.

The lower court was in error to find this factor was an adverse effect.

b. The mother's work hours from 6:00 p.m. to 2:00 a.m. which was not a schedule conducive to raising a small child as a single parent.

Melissa worked as a bartender on the night shift because she earned \$2.00 per hour more than being a cocktail waitress on the day shift (T.282). Also she could not rely on getting child support each month (T.124) because Barry failed to pay his Court ordered child support the arrearage amounted to \$2,618.75 as of March 31, 2008 (CP 5-7) which the Guardian Ad Litem expressed surprise when questioned about his report.

“Q. I think you had also indicated that you were somewhat surprised that he [Barry] was something over \$2,600.00 behind in child support. Is that correct?

A. Yes.

Q. And, apparently, he had done this in a unilateral manner. He just stopped paying child support. Is that correct?

A. Right. I understood his reasoning that he felt he had Ben. But as you know, the proper remedy is to come back to Court or seek to get your child support cut off.

Q. And he had not done that?

A. That I know of, no.

Q. And according to the Court file, there apparently has been where there's been an adjudication, and he agreed that he was some \$2,600.00 in debt on back child support. Is that correct?

A. That is correct.” (T.265-66)(RE 62-63)

Since the Agreed Judgment required Barry to pay \$352.00 per month as child support (Exhibit 1) the arrearage amounted to him being over 7 months in child support behind. It is difficult to understand how the Court can reconcile its finding that Melissa's work schedule somehow adversely impacts Ben when Barry is materially in arrears in his support payments. Child custody is a matter of equity which requires more than the votes in favor of the mother or father. *Bailey v. Jones*, 949 So.2d 802, 804-05 (¶10)(Miss. Ct. App. 2006) “He who comes into equity must come with clean hands.” Griffith Mississippi Chancery Practice, Section 42 (2d Ed. 1950). In the case of *Mixon v. Sharp*, 853 So.2d 834 (Miss. Ct. App. 2003), decided by this Court with facts very analogous to the case *subjudice*, the father was the initial custodial parent when two years later the mother filed her Motion [sic] for Modification wherein the mother [Sharp] was granted custody by the lower court finding in part because the father's

“[Mixon]’s work schedule is not conducive to his providing primary care for Amber...Mixon did not change his schedule until after he remarried. Until then, he worked day so that he would be able to take care of Amber when she was home from school. We are not aware of any Mississippi cases that directly apply to this case, but guidance may be gained by looking to the case law of other jurisdictions” *Id.* 389 (¶11).

Finding no cases in Mississippi on point, the Court reviewed cases from Alabama, Kansas and Missouri for that guidance.

In the Alabama case, *Davis v. Davis*, 451 So.2d 316,319 (Ala. Civ. App. 1984) the affirmed the change of custody from the custodial parent when that parent began working at night and there was no safe and suitable supervision for the child. *Id.* ¶12.

The Missouri case of *In Re: Marriage of Whipp*, 962 P.2d 1058 (Kan. 1998) affirmed the change of custody by the trial court because of the father working at night and the 4 year old child was no longer supervised by McGowan, with whom the child had built a close relationship *Id.* at 1063-64.

A Missouri case that was particularly relevant to this Court was *Henderson v. Henderson*, 622 S.W. 2d 7 (Mo. Ct. App. 1981) wherein the Missouri Court of Appeals reversed the trial court’s change of custody from the mother to the father because she worked at night. The Appellant Court found that:

“There was no substantial evidence that the mother was an unfit custodian nor that the arrangements made for the children while she worked at night were unsatisfactory. Mother’s election to work at night, thereby earning fifteen (15) percent more income, was not a sufficient change to rebut the presumption that mother, as custodial parent, remained suitable (cite omitted)” *Id.* at 10 (¶12).

Mixon found “This case suggests that as long as the child is safe and supervised while the parent must be at work, a change in a work schedule is not a material change in circumstances. That is this Court’s holding as well” *Id.* 838 ¶15 and “Finding no material change in circumstances, we

hold it was clear error for the chancellor to change custody of Amber.” *Id.* at ¶17 and reversed and rendered. *Id.* ¶33.

The testimony as shown in section “a” above is very close to the *Henderson* facts.

The lower court was in error to find this factor was an adverse effect

c. **Melissa finding herself 4 months pregnant by a man she began dating six (6) months ago[:] she...on occasions has allowed Ben to sleep with her and her boyfriend in bed.**

The Chancellor questioned Melissa concerning some findings in the Guardian Ad Litem’s report, namely:

“Q. There’s also some evidence in this Guardian Ad Litem [sic] report that Ben sometimes has slept in the same bed with you and Jerry [Melissa’s fiancé]. Is that correct?

A. Maybe one or two times at most.

Q. Okay. So Jerry has spent the night with you on occasions when Ben was there?

A. Yes sir.

Q. And sometimes even slept in the bed with you and Ben?

A. Ben came and got in the bed with us one time that I can remember” (T.122-23)

Under direct examination Melissa admitted that she was engaged to Jerry Bailey (T.90) and that at trial time she was four (4) months pregnant (T.91). What was interesting in the Chancellor’s finding of adverse affect that was he didn’t mention that Ben was sleeping with his father and his stepmother. Malia Massey, Barry’s sister-in-law, under cross examination, said:

“Q. I think that when you spoke to the Guardian Ad Litem that you had indicated that Ben usually sleep with his father. Is that correct?

A. Yes.

Q. Is that true?

A. Yeah, a lot of the times. You know that's what I've been told.

Q. That's what you've been told by your brother-in-law. Is that correct?

A. Right." (T.175)(RE 64)

Further the Guardian Ad Litem stated under cross examination on the subject of Ben sleeping with his parents:

"Q. Okay. Now, I think that you were asked a question concerning the sleeping arrangements with Ben and Melissa and Jerry. You also received information and it was confirmed from the stand that Ben sleeps with his father and his wife. Is that correct?

A. Yes.

Q. On a regular basis. Is that correct?

A. Yes." (T.264-65)(RE 65-66).

Further, it was testified that Barry was dating his present wife three (3) months prior to her divorce from her former husband and married him within two weeks of her divorce (T.206-07).

In the case of *Sudduth v. Mowdy*, NO. 2007-CA-00575 COA September 30, 2008 (mandate issued October 21, 2008), this Court affirmed a Chancellor's denial of a request for modification of "...custody of a 6/7 year old girl even though the mother, the custodial parent, was alleged that she was not promptly caring for the child's teeth, that the mother had numerous inappropriate relationships and that the mother had given the child a powerful anti-psychotic drug. *Id.* ¶9 and 11. This Court stated "In regard to Melissa's relationship history, it is well established that 'the relationship or indiscretions of the mother are never enough by themselves to constitute a material change in circumstances' *Forsythe v. Akers*, 768 So.2d 943,947 (¶11)(Miss. Ct. App. 2000) (citing *Kavanaugh v. Carraway*, 435 So.2d 697, 700 (Miss. 1983))" *Id.* ¶14.

“Even though under the totality of the circumstances a change has occurred, the Court *must* [emphasis added] separately and affirmatively determine that this change is one which adversely affects the children” *Lewis* at 267 ¶13. In *Ballard v. Ballard*, 434 So.2d 1357 (Miss. 1983), Justice Hawkins reminds us that a change in custody is a “jolting, traumatic experience. It is only that “...behavior 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 action of changing custody.” *Id.* 1360.

In *Giannaris v. Giannaris*, 960 So.2d 462 (Miss. 2007) the Court stated:

“...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 damage to the mental or emotional well-being of a child’ ... *Id.* at 1360, as a condition precedent to reweighing the *Albright* factor. 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* [emphasis added], they are unwise. Our body of law could not be clearer.” *Id.* at 468 ¶10 (Miss.2007).

No where in the record is there testimony or an exhibit that shows that Ben was adversely affected by sleeping with his parents or Melissa being pregnant.

The lower court was in error to find this factor was an adverse effect

ISSUE TWO: WHETHER THE CHANCELLOR COMMITTED AN ERROR IN WEIGHING THE *ALBRIGHT* FACTORS TO CHANGE CUSTODY

Notwithstanding the showing that the Chancellor should not have gotten to the point of reweighing the *Albright* Factors, the Chancellor misweighed them.

Of the twelve *Albright* factors, seven (7) facts the Chancellor favored neither parent. The factor of employment of each parent favors Melissa and the remaining four (4) favor Barry (CP 62-64)(RE16-18) They are:

- a. Which parent has the willingness and capacity to provide primary child care;

- b. The emotional bonds between the parent and child;
- c. Moral fitness of the parents; and
- d. Stability of the home environment of each parent.

Looking at each factor in turn:

a. **Which parents has the willingness and capacity to provide primary child care:**

This finding is based upon the facts that Melissa's past work schedule at night, and that she had to depend on a babysitter or on Barry and/or his wife Natalia to care for Ben. (CP 63) (RE 17). The reasons for Melissa's work schedule has been addressed in Issue I. It is surprising that the Chancellor found this factor to favor Barry since Melissa, being a single parent with her work schedule, found an excellent babysitter in Megan Howington, and even Barry "thinks very highly of Melissa's babysitter Megan" (CP 51), and at other times Ben was with Barry and Natalia at night (EX 3)(RE 71-94). But there is more to being a parent than just having him present with one at night that is caring for him. Other than Natalia taking Ben to the doctor sometime prior to December 2005 and in early 2008 (T212). Melissa was with Ben in the hospital in 2006 and took him to the ER for the flu in February 2008 after being left with Barry for three days along with the antibiotics which were not taken (T289). The work schedule of Barry was not looked at closely by the Chancellor. From October 2007 on, Barry reported to Carrie Cumberland, the Department of Human Services caseworker for Ben, that he worked for Comm-Struett, that he was "at home usually three to four days a week" and he "goes on some runs out of town, some longer than others". (T17) Further, Barry became \$2,618.75 behind in child support as of March 31, 2008.

Barry says he is home five nights a week but he takes odd jobs as a truck driver, when work is slow and he has been gone up to two weeks (T225-26). Prior to September/October 2007 Barry had

several jobs. According to Melissa, "There were some periods of time that he worked offshore, and he was gone for weeks at a time. Barry's had several jobs over the last couple of years. When he's been a truck driver, he would be gone eight to nine days at a time. Sometimes he'd be gone less than that. It just depended on his work schedule" (T123).

It is difficult to reconcile this finding in favor of Barry when other matters shown are considered.

b. The emotional bonds between the parent and child.

The Chancellor found that "Ben is close to both of his parents, the overwhelming weight of the evidence leads to the inescapable conclusion that his strongest emotional ties is to his father." (T63). To determine the basis of the "overwhelming evidence" one has to cast aside family and close friends in order to get an outsiders determination. Those who testified as an "outsider" are Carrie Cumberland, Judy Ward and Joey Kilgore, the Guardian Ad Litem.

Carrie Cumberland states on her own personal observations that:

"Ben immediately asks for his father. I have to tell him we're going to see his mother as well. He is not upset when the visits are over with his mother, granted that could be because he knows he will see his father immediately after they're done." (T18-19)

When asked "Did you ever reverse the visitation schedule?"

"A. No.

Q. Okay. So we have no feeling as to what it would have been had Ben went to see his father first before he saw his mother as to how he would have reacted to those reverse visitation schedules. Is that correct?

A. It is "(T19).

Judy Ward testified on direct for Barry that she cared for Ben from March 25 to April 11 (T152) and she would call DHS to have Barry call each day at night to settle Ben down (T153).

Under cross examination about contact with the mother, she testified:

“Q. In other words you didn’t ask for the mother to be able to speak with Ben during that time that he was with you. Is that correct?

A. That’s correct.

Q. ...during this period of some almost two weeks as I calculate, about two weeks, you made no indication to Melissa that she could call your home to speak with Ben. Is that correct?

A. No. I never talked to Melissa but one time.

Q. Was that prior to or after you have possession of Ben?

A. Afterwards.

Q. Okay. And that was occasioned by what?

A. It was bad weather and she called with the indication of wanting to know what type of home I lived in.

Q. So she was concerned about Ben’s welfare. Is that correct?

A. That’s right “(T155-56)(RE 67-68)

Further on cross examination, she testified that she has known Barry’s father all her life (T158). This should have given pause to the Chancellor in accepting her testimony at face value.

Joey Kilgore, the Guardian Ad Litem, testified on direct examination by Barry’s attorney that he had been contacted by DHS to allow Ben more time with his parents. He said “She [Melissa] and her mother and other people on the Massey side, too, said that Ben just needs to be around his parents. He needs to be around his dad. He needs to be around his mom...and I worked with DHS to try to

facilitate that.” (T256-57). Apparently his finding of a strong bond between Ben and Barry were based on Melissa’s prior relationships and her work schedule as not showing a priority for Ben (T259) but he acknowledged sometimes that single parents had to go to extraordinary lengths to take care of [their] child (T268-69).

This factor should not favor the father based on the record.

c. Moral Fitness of the Parents:

“Moral fitness of the parents is merely one of several factors which may be considered in deciding issues of child custody, it should not be weighed disproportionately. *Albright v. Albright*, 437 So.2d 1002,2003 (Miss. 1983). The question of a parent’s moral fitness addresses his/her core values, his/her standards of right and wrong, and the rules by which he/she lives” *Davidson v. Cort*, 899 So.2d 904, 913 ¶34 (Miss. Ct. App. 2005) dissent.

It is an established fact that Melissa spent nights with her fiancé Jerry at her home, Ben had gotten into bed one time (T123), that Melissa was four (4) months pregnant with Jerry Bailey’s child (T91) and that she had two dating relationships prior to Jerry (T91-92). The lower court in this case found it to favor Barry without explaining how Melissa’s relationships affected Ben.

In the similar case of *Cheek v. Richer*, 431 So.2d 1139 (Miss. 1989) the Court stated in their modification case,

“Whether Pamela developed a romantic relationship with another man after a divorce is not relevant to the extent-and only to the extent-that such a relationship can be shown to have had a definite adverse effect on the child.” *Id.* At 1144.

Such was not done in their case and the Chancellor over emphasized the factor in her analysis of the *Albright* factors. This factor is not supported by the evidence.

d. Stability of the Home Environment of Each Parent.

In today’s culture the factor of stability of the home environment is an amorphic concept.

During the Court’s questioning of Melissa, she testified without contradiction about Barry’s

work history for the past two years as follows:

"A....There were some periods of time that he worked offshore, and he was gone for weeks at a time. Barry's had several jobs over the last couple of years. When he's been a truck driver, he would be gone eight to nine days at a time. Sometimes he'd be gone less than that. It just depended on his work schedule.

Q. When he worked offshore what was his work schedule?

A. Sometimes he'd be gone for two weeks. Sometimes he'd be gone for three. He'd be home for a couple of days, or he might be home for a week. And Ben still wasn't with him for that whole week that he was home.

Q. Okay. Most guys that work offshore work two on and two off, three on and three off. You say he'd be only home for a couple of days?

A. I think the longest I ever remember him being gone was a little over two weeks.

Q. Okay. And he wouldn't be home for two weeks after that?

A. No sir."(T123-24)

The Guardian Ad Litem testified that Barry changed jobs pretty regularly, although it was unclear why(T265).

Mrs. Natalia Massey testified that Barry had driven a truck on long hauls for a long time but stopped in September 2007 (T218), and that even with his job with Comm-Structt he had two long distance drives since September 2007, one for a week and another for four to five days (T223).

Although there exists a serious dispute over the accuracy of Exhibit 3, which Barry and his wife prepared for trial (T207) that exhibit reflects only nights Ben spent with Barry or his wife. The days were with Melissa.

Mrs. Howington testified:

"Q. And how do you know him [Ben]?

A. I have babysat for him for the last two years.

Q. What age did you start him at if you recall? How old was he when he first came to you?

A. Eighteen months.

Q. When was the last time you baby sat him?

A. It would be November 2007.

Q. Okay. During that time, what was the frequency that you babysat for Ben?

A. I had Ben four or five nights a week.

Q. And why was that?

A. I kept Ben with Melissa was at work. I didn't have him the two days that she was off." (T31-32) (RE 69-70)

The stability of the home environment for the Chancellor's opinion was based on the work schedules of Melissa and Barry. Barry's work schedule was uncertain throughout the two years from the first custody order to the time of hearing whereas Melissa's was fixed.

Ben spent his nights with a trusted babysitter, Barry's wife and Melissa's mother. The days were with Melissa. This factor should have favored Melissa or neither of them. *Divers v. Divers*, 856 So.2d 370, 375 ¶24 (Miss. Ct. App. 2003).

CONCLUSION

The lower court erred when it found a material change of circumstances that adversely affected Ben. *Giannaris v. Giannaris*, 960 So.2d 462, 468 ¶10 (Miss. 2007) states in pertinent part:

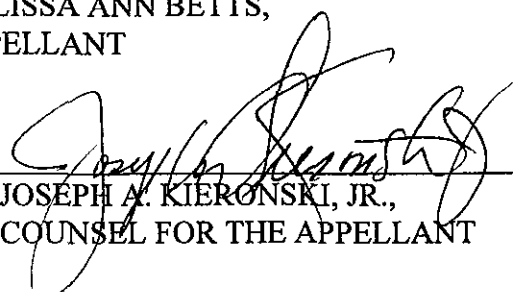
"[A] non-custodial parent must first sufficiently prove a material change of circumstances which has an adverse effect on the child that clearly posits or causes damage to the mental or emotional well-being of a child" *Ballard* 434 So.2d at 1360, as a conditional precedent to reweighing the *Albright* factors. The *Albright* factors may ebb and flow yearly, quarterly, monthly or even less, but in absence of a substantial adverse effect upon the child, physical custody changes are not only *unwarranted* [emphasis added] they are unwise."

This case should be reversed and rendered.

Respectfully submitted, this the 10th day of December, 2008.

MELISSA ANN BETTS,
APPELLANT

BY:


JOSEPH A. KIERONSKI, JR.,
COUNSEL FOR THE APPELLANT

CERTIFICATE OF SERVICE

I, the undersigned attorney, 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 Brief of the Appellant to be mailed by United States mail, postage prepaid, to the following persons:

Mississippi Supreme Court
Carroll Gartin Justice Building
Post Office Box 249
Jackson, Mississippi 39205

Honorable Edward C. Fenwick
Chancellor, Sixth Chancery Court District
230 W. Washington Street
Kosciusko, Mississippi 39090

Tanya L. Phillips, Esquire
The Logan Law Firm
Post Office Box 218
Newton, Mississippi 39345

D. Joseph Kilgore, Esquire
Guardian Ad Litem
Post Office Box 96
Philadelphia, Mississippi 39350

Respectfully submitted, this the 10th day of December, 2008.


JOSEPH A. KIERONSKI, JR.

JOSEPH A. KIERONSKI, JR.
WILLIAM B. JACOB
DANIEL P. SELF, JR.
SELF, JACOB & KIERONSKI, LLP
Post Office Box 949
Meridian, Mississippi 39302-0949
601/693-6994
