IN THE SUPREME COURT OF MISSISSIPPI

DOUGLAS MERCIER — APPELLEE

VS. — CAUSE NO.: 2008-TS-00596

MARLA MERCIER — APPELLANT

BRIEF FOR APPELLANT

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Marla Mercier, Defendant/Appellant,
2. Lisa Scruggs Rohman, Attorney for Marla Mercier,
3. Douglas Mercier, Plaintiff/Appellee
4. H.R. Garner, Attorney for Plaintiff/ Appellee,
5. Honorable Judge Lundy,

This the 19th day of Sept, 2008.

Lisa S. Rohman

LISA SCRUGGS ROHMAN

TABLE OF AUTHORITIES

Mississippi Courts:

Other Sources:

STATEMENT OF ISSUES

1. Whether the trial court erred in finding that there has not been a substantial material change in circumstances adverse to the minor children's welfare such that the Court denied the Appellant's Complaint to Modify Custody.
2. Whether the Court erred in not finding that the parties should share equally for any amounts owed on the Mercedes lease vehicle.
3. Whether the Court erred in modifying the visitation schedule the parties previously agreed upon.
4. Whether the Court erred in ordering child support.

STATEMENT OF THE CASE

On May 4, 2007 Douglas Mercier, (hereinafter Appellee) filed a Petition for Citation for Contempt and Modification and Other Relief in the Chancery Court of Tate County. Marla Mercier (hereinafter Appellant) filed an Answer and Counter-Claim on May 21, 2007. The Appellee filed his Answer and Defenses to Counter-Claim on May 29, 2007. This matter was heard on November 26, 2007 and November 30, 2007 respectively.

Upon Conclusion of all testimony and evidence the Court instructed that both parties file Proposed Findings of Facts and Conclusions of Law. The Court submitted its Findings of Facts and Conclusions of Law on January 29, 2008. The final Order in this Matter was filed on March 8, 2008. The Court ruled in pertinent part that "the Respondent/Counter-Petitioner, Marla Veronica Davis Mercier, has failed to prove by a preponderance of the evidence that there has been a substantial change in circumstances that has transpired since the issue of the custody decree; and this

change adversely affects the children's welfare and best interest. That the Modification of Child Custody is denied." (Ref. "Order p. 3 Par. 5).

SUMMARY OF ARGUMENT

The Court erred in its finding that the Appellant, Marla Mercier, failed to prove by a preponderance of Evidence that there had been a substantial change of circumstances which adversely affects the Children's welfare and best interest. The Court further erred in ordering that the appellant is solely responsible for amounts owed on the Mercedes lease vehicle, amending the child visitation schedule, and ordering that the Appellant pay child support.

ARGUMENT

The Court failed to properly consider all the facts and law precedent to this matter and erred in judgment by failing to grant the Appellant a Modification of Custody. The Court's standard of Review in domestic relations matters is limited. The Court "will not disturb a chancellor's findings unless manifestly wrong, clearly erroneous, or if the chancellor applied an erroneous legal standard." *Jundooshing v. Jundooshing.* 826 So.2d. 85 (Miss. 2002). See also: *Andrews v. Williams.* 723 So.2d. 1175 (Miss. Ct. App. 1998).

I. THERE HAS BEEN A MATERIAL SUBSTANTIAL CHANGE IN CIRCUMSTANCE THAT HAS TRANSPIRED SINCE ISSUANCE OF THE CUSTODY DECREE THAT ADVERSELY AFFECTS THE CHILDREN'S WELFARE AND THEREFORE THE JUDGMENT SHOULD BE REVERSED.

The case in which the lower Court references, *Bubac v. Boston.* 600 So. 2d. 951 (Miss. 1992). as the "traditional test in a modification," is in fact a case which in no way is similar to the instant action and involved a writ of habeas corpus. The *Bubac* Court did however correctly quote the Court in previous cases as stating:

"In the ordinary 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 children's' welfare; and (3) that the child's best interests mandate a change of custody." See *Smith v. Todd.* 464 So.2d 1155 (Miss. 1985).

The trial Court made reference to the three factors to be considered, but did not fully explore all three factors, and clearly ignored crucial evidence that should have been used to prove the modification necessary.

First, the trial Court states that "improvement in a non-custodial parent's home does not satisfy the traditional adverse material change test for modification." (Ref. Finding of Fact and Conclusion of Law p. 6). This statement is not a correct analysis of the "traditional modification" test. The Court should have first recognized that there has been a material, substantial change in circumstances.

The Appellant testified in Court that among other material changes in circumstances she now has her own home, and has started school. This is an obvious betterment of circumstances on the part of the non-custodial parent which could lead to an adverse effect on the children if her circumstances have significantly improved over that of the custodial parent's. The Appellant also testified that at the time of the divorce she agreed that the children's best interest would be served by them remaining in the

marital home where the Appellee resides until she was able to procure a suitable home and better living situation. The children had lived in the home with their mother and father, but particularly the mother (Appellant), as a home maker, their whole lives prior to the divorce. At the time of the divorce it was an extra-ordinary burden and would have adversely affected the children to live with the Appellant, because during that time she was living with her parents. Subsequently, the Appellant has had a significant betterment of her circumstances. Because the mother was the primary caregiver during the marriage, now that she is able to return to that role the children are adversely affected by the current custodial arrangement.

The trial Court makes mention of *McCracking v. McCracking,* 776 So.2d. 691 (Miss. Ct. App. 2000). The Court makes use of this case to show that the Appellant's statements regarding the betterment of her living situation was not sufficient to modify custody. To be clear, the *McCracking* Court did establish that such considerations do not arise until there has been a showing a "material change of circumstance detrimental to the children since the earlier custody award. *Id.* The *McCracking* Court more fully states that "in a custody modification proceeding, the question of which parent will better serve the welfare of the children as custodial parent is not reached unless the chancellor has previously found a material change in circumstance detrimental to the child's best interest. *Id.* [See also: *McGehee v. Upchurch* 733 So.2d. 364 (Miss. Ct. App. 1999), *Clark v. Clark.* 739 So.2d. 440 (Miss. Ct. App. 1999).]

In contrast to the facts in the *McCracking* case, here the Appellant is arguing most strongly that the current home environment of the children has materially changed and it adversely affects the children. The parties' minor children are Olivia Davis Mercier, age

16, Jackson Douglas Mercier, age 9, and Lily Catherine Mercier, age 7. (Transcript at 13). Respondent is not seeking custody of Davis, the parties' fifteen year old, because she desires to complete high school and continue cheering at Senatobia High School. (Transcript at 17, 18, 34). Since the parties' divorce on December 20, 2006 and on or about June 3, 2007, Petitioner remarried Linda Biel Mercier. (Transcript at 12, 25, 210, 237, 238). Respondent became engaged to Matt Stewart. (Transcript at 57, 58, 59, 60, 61, 62, 301). The appellant testified that her oldest daughter has called on numerous occasions reporting:

> lots of drinking and drinking and driving Jack and Lily [the younger 2 children] around. Recently they went to a wedding in Nashville, and Davis [the oldest child] called me at three o'clock in the morning because she was left with the two children in the hotel room while they were out. And the next night they came in and Davis called and was upset because they came in and drove Jack and Lily. And Linda, his wife now, fell down with Lily and hit her head, was carrying Lily. (Transcript at 25, 45, 46, 318).

This testimony was not objected to as hearsay.

Davis Mercier testified that Petitioner and his new wife drink frequently, become intoxicated around the children, and at least on one occasion, drove with the children in the car while intoxicated. Doug Mercier denied drinking and driving with the children in the care but Linda Mercier and Davis both testified that he did. Davis testified that Petitioner and Linda drink almost every night and that they "buy cases a lot." She has seen them become intoxicated at home on several occasions. Davis stated on one

occasion after they had been out to dinner, "you could tell they were drunk". According to Davis, it embarrassed her. (Transcript at 182, 183, 185, 193, 216). Davis further testified that she attended a wedding with her father and stepmother and observed Linda drinking all night. When her dad and Linda returned with the children from the wedding party, "it was kinda bad because I had the room key and my dad was upset because Linda fell and busted her head open because she was holding Lily....". In her text about the Nashville trip she stated that, "dad drove Jack and Lily home, very drunk and they were both so drunk, Linda fell and busted her head open and dad was slurring his words. (Transcript at 183, 187, 190, 193, 196, 197). Linda Mercier admitted drinking at the wedding and admitting to driving the younger two children back to the hotel room approximately ten (10) minutes from the wedding. (Transcript at 216, 238-239, 241-242; *See also;* Exhibit 4). She also testified that when they go out to eat as a family Petitioner and Linda have a drink and then drive with her and the other children in the car. (Transcript at 185). Davis testified further that her father and Linda have cookout and racing parties and couples "stay really late and are really loud." (Transcript at 189). The evidence is undisputed that appellee drinks and drives the children in the car; even to the point of intoxication on at least one occasion.

At the time of the divorce, Respondent did not know the Petitioner was drinking and driving with the children. (Transcript at 27, 45, 90). Respondent testified that "Davis is old enough to bathe herself and not ride with somebody-she knows better than to ride with somebody that's drinking. There are some things that Jack and Lily can't help." (Transcript at 74). Matt Stewart and Respondent testified that neither of them drink or smoke around the children and that neither would ever drink with the children in the car.

(Transcript at 45, 61, 316, 317, 327). Davis testified that she has never seen her mother drink and drive. (Transcript at 194).

The Appellant also testified that Lily, a seven year old child was taking baths with her new step-mother, which is questionable at best as appropriate behavior. (Transcript at 27-28). The Appellant further testified to the rampant use on numerous instances of aggressive behavior and foul language in the presence of the children including but not limited to slanderous curse words directed at the Appellant and to the oldest child by both the Appellee, and his wife. (Transcript at 46, 47, 49, 93). The Appellant and Matt both clearly testified that this language, and in particular at least one incident where the children were obviously adversely affected by the use of said language, and the actions of the Appellee and his wife. (Transcript 30, 39-44, 304-314). It is not unlikely that if the Appellee would act this way in public he would certainly be worse in the home. (Transcript at 46). Appellant testified that she and Matt did not curse or use aggressive behavior in front of the children. (Transcript at 62).

The trial Court dismisses the Appellee's use of alcohol as not adversely affecting the children. However it is not in question that had the Appellee been arrested for D.U.I. it would have adversely affected the children. There is clear scientific evidence that even one beer or alcoholic drink can cause a person to be over the legal limit to operate a motor vehicle. *NHTSA*, see www.nhtsa.gov. The trial Court quotes the oldest daughter as "talking about Dad and stepmother eating out and would have a beer but they weren't drunk, and would drive us back." Further, "(Dad and stepmother) drink at night after Jack and Lily go to bed," and "has seen Dad and stepmother intoxicated, but younger kids were not there. The trial court fails to address that there was cumulative testimony

that the minor children were driven by an intoxicated parent approximately five (5) to ten (10) miles after a wedding. Even one occasion of driving drunk with the children in the car should warrant an adverse material change in circumstances.

In *Schmidt v. Bermudez* 2008-MS-A0116.001, the Court held that although one isolated incident will not justify a material change in circumstances, the reaction, or effect that one incident has upon the minor child(ren) can rise to justify a material change in circumstances which adversely affects the child(ren). Clearly in the instant case there is more than one incident and those incidents taken together have adversely affected the children.

The record was replete with evidence that Appellee and his wife use profanity around the minor children and make disparaging comments to them and around them about their mother. (Transcript at 49, 226, 227, 244, 245-246, 332; Exhibit 9). Linda Mercier admitted telling Davis (the oldest child). that her family was "F-U-C-K-E-D up." (Transcript 226, 227, 231, 244, 245-246). Davis testified that Appellee and Linda talked openly and in a negative light about the Appellant in the presence of the children. The Appellee stated in a taped message that he would tell the children "what a baby killer their mother is." (Transcript at 332; Exhibit 9). Additionally, there was cumulative testimony concerning an incident during a visitation exchange where Appellee and his wife berated the Appellant using profane language in the presence of the children. Appellee even shouted "how does it feel to be with somebody who has sucked a big black D-I-C-K?" The Appellant confirmed that the children heard the statements and were visibly upset and scared.

These behaviors clearly pose physical, mental, and emotional danger to the children's well being. These events which may not alone be significant material change, but in combination provide basis for modifying custody. Evidence that a child is exposed to dangerous behavior may justify modification even without a finding that the child has suffered negative effects from the behavior. *Riley v. Doerner,* 677 So.2d. 740 (Miss. 1996). [1] When circumstances in the custodial parent's home create a strong likelihood that the child will be damaged, a court may change custody without a showing that adverse effects have already occurred. "When 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. *Id. at* 744. (*See also, Duke v. Elmore* 956 So.2d. 244 (Miss. Ct. App. 2006)). Further, the *Riley* Court does not require that the environment has to include illegal behavior such as drug use, or drunken driving in order to find that an adverse environment exists. The trial Court erred in not finding a material change in circumstances adverse to the children, and further erred by not weighing the *Albright* factors in deciding custody.

Finally, the trial Court noted that "the mother is only asking for custody of the younger children." The Court elaborated that the Appellant had not established that there were unusual or compelling circumstances which would dictate allowing the children to be separated. Here, the Court did not consider the practical reasoning for the request for custody of the two younger children. There were numerous statements and testimony by the Appellant regarding this matter. The Appellant stated that her oldest daughter Davis,

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1The Court found in regard to the negative behavior, "fortunately it has not adversely affected the minor children **yet**." (emphasis added)

who at the time was a 16 year old female child was "old enough to decide who she wanted to live with." Additionally, Davis is in high school and has established friendships and relationships at her school and in her community. The Appellant simply did not intend to try to force her oldest daughter to move to a different area at such a critical period of her adolescence. (Transcript at 73-74). The trial Court obviously overlooked cases such as *Bowen v. Bowen* 688 So.2d. 1374 (Miss 1997), *Bell v. Bell* 572 So.2d. 841 (Miss. 1990), or *Carson v. Natchez Children's home* 580 So.2d. 1248 (1990). The Court in *Owns v. Owens* 950 So.2d. 202 (Miss. Ct. App. 2006) states that "while the placement of children with their siblings is not a concern that 'overrides' the best interest of the child, our case law makes it clear that keeping siblings together is assumed to be in the best interest of a child, absent a showing that the circumstances in a particular case are to the contrary." Here there is an obvious overriding of the assumption that the best interests of the children are served by keeping them together. First, the large age gap between the oldest and the youngest child lend to the fact that the oldest child has less of a significant relationship with the younger two. Second, the younger two children are much more dependant on the custodial parent, and while the oldest child could take over and drive for a drunken parent, neither of the younger two children could, therefore making them much more vulnerable. The younger children are of far more significant tender years, and as such should not be allowed to hear such language or witness such actions as the Appellee and his wife demonstrate or be subjected to the peril of riding in a moving vehicle with a parent who is intoxicated. These are certainly unusual and compelling circumstances that would dictate the separation of the oldest child and the younger two children.

II. THE APPELLANT SHOULD NOT BE SOLELY RESPONSIBLE FOR THE AMOUNT DUE ON THE PARTIES' MERCEDES LEASE VEHICLE.

There was certainly not any clear and convincing evidence that the Appellant committed any fraud upon the Court which would warrant the Court's re-writing the parties' agreement which was ratified, confirmed and approved by the Judgment of Divorce on December 20, 2005. Said agreement provided "wife will return the leased Mercedes Benz automobile and **each** party will be responsible for the penalties" (Emphasis added). (Transcript at 22-23, 36-39). The same language was reiterated as item number "16" under provision " (C) other." Further, it is untenable that Appellant would have agreed to assume full responsibility for over $4,000.00 owed on the lease car when she was unemployed, had no secondary education, and was to live on $ 2,000.00 per month for 12 months as rehabilitative income. (Transcript at 11, 12, 77). The Court committed error and abused its discretion in providing that Appellant owed the entire amount due on the parties' lease vehicle.

III. THE COURT SHOULD NOT HAVE MODIFIED THE VISITATION AND TRANSPORTATION SCHEDULE OF THE PARTIES.

Alternatively, the Court erroneously modified the Appellant's visitation schedule by reducing her weekend visitation from 3 weekends each month (the 1st, 2nd, and 4th weekends) to every other weekend. The parties' agreement had previously specified that Appellant was to have 3 weekends each month and one day during the week following her non-visitation weekend. Appellee testified that, "it's the three weekends of each month are- they're every weekend it seems like we have to arrange our entire weekend to

drive an hour or an hour and 15 minutes to New Albany to pick up the kids." Petitioner repeatedly testified about the children's visitation and transportation as being inconvenient to him. (Transcript at 117). Appellant's Aunt Jane testified that Appellee admitted that the reason he wanted to alter the visitation schedule was that is was not convenient for him. (Transcript at 165). In order to modify visitation, appellee must prove the visitation order is not working and that it is in the child's best interest to modify the order. (*See, Christian v. Wheat*, So.2d 341,345(Miss 2004); *Shephard v. Shephard*, 769 So. 2d 242, 245 (Miss Ct App. 2000) father's desire to spend more time with children not reason to alter schedule). One parent's dissatisfaction with the arrangement does not necessarily warrant modification. (*See, Hadden v. Hadden*, 806 So.2d 1017, 1020 (Miss 2000)). Certainly it is in the best interest of the children to see their mother, who was a stay at home mom and raised them from birth until the divorce in December 2006, as much as possible. The appellee's mere inconvenience is not enough to change that. Accordingly, there was no reason for the reduction of Appellant's previously agreed visitation time to be reduced or changed. The visitation schedule of the parties prior to the trial Court's judgment should be reinstated.

IV. THE APPELLANT SHOULD NOT BE REQUIRED TO PAY CHILD SUPPORT

The Court committed error and abused its discretion in ordering Appellant to pay child support. The parties' agreement signed December 19, 2006 gave Appellee physical custody of the children and provided "neither party shall pay child support." At no time did Appellee seek child support or to alter their previous agreement with respect to child support. The Courts will not intervene and overrule a parties' agreement on child support

unless and until such time as a petition for the same is filed. *Forrest v. McCoy.* 941 So.2d. 889. (Miss. Ct. App. 2006). [See also: *Lacey v Lacey.* 822 So.2d. 1132, (Miss Ct. App. 2002), *Mississippi Department of Human Services v. Shelby.* 802 So.2d 89, (Miss.2001)]. Because the Appellee never petitioned the Court for an order of support, and more practically because the Appellee is well within his means of providing for children financially, the provision of the former agreement should remain in place and Appellant should not be required to pay child support.

CONCLUSION

The trial Court erred in its failure to find a material change in circumstances which adversely affects the children, and modifying custody accordingly. Custody of the two minor children should be placed with the Appellant. The Court further erred in not finding that the parties should be equally responsible for payment of amounts owed on the Mercedes vehicle.

In the alternative, should this Court determine that the trial Court did not err in its determination of custody, the trial Court was nevertheless erroneous by reducing the Appellant's amount of visitation, the transportation to and from said visitation, and by awarding the Appellee child support.

For the foregoing reasons, the Appellant requests that the Judgment of the Chancery Court be reversed and that the case be remanded with instructions to the Chancery Court to enter Judgment in favor of the Appellant.

Respectfully Submitted,

Attorney for the Appellant

DATED: 9/18/08

CERTIFICATE OF SERVICE

I, LISA SCRUGGS ROHMAN, Attorney for Defendant, do hereby certify that I have this day deposited in the United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief for Appellant to the following:

Honorable Judge Lundy
Tate County Court Judge
PO BOX 471
Grenada, MS 38901

Honorable H.R. Garner, Esq.
PO BOX 443
Hernando, MS 38632

DATED this the 18th day of September, 2008.

LISA SCRUGGS ROHMAN