IN THE SUPREME COURT OF MISSISSIPPI

BRIAN E. WIKEL	**APPELLANT**
VERSUS	**CASE NO. 2009-CA-00106**
BETHANY J. WIKEL MILLER	**APPELLEE**

APPEAL FROM

THE CHANCERY COURT OF OKTIBBEHA COUNTY, MISSISSIPPI

BRIEF OF APPELLEE

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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 the Judges of the Court of Appeals may evaluate possible disqualifications or recusal.

Bethany J. Wikel Miller, Appellee

Carrie A. Jourdan, Attorney for Appellee

Honorable Kenneth M. Burns, Chancery Court Judge

Brian E. Wikel, Appellant

Michelle D. Easterling, Attorney for Appellant

James C. Helveston, Attorney for Appellant

Rebecca A. Younger, trial Attorney for Appellee

Micchael C. Farrow, trial Attorney for Appellee

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STATEMENT OF THE ISSUE

I. WHETHER THE CHANCELLOR'S DECISION TO DENY THE APPELLANT'S MOTION FOR MODIFICATION OF CHILD CUSTODY WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE, AS REFLECTED IN THE RECORD?

II. THOUGH A CROSS-APPEAL WAS PERFECTED, THE APPELLEE, BETHANY J. WIKEL MILLER, BELIEVES HER CLAIMS WERE MERITORIOUS AT TRIAL, AND HEREBY RESERVES ANY RIGHTS SHE MAY HAVE TO SEEK SUBSEQUENT MODIFICATION, SHE DOES NOT BELIEVE IT IS IN HER BEST INTEREST TO PURSUE THOSE CLAIMS IN THIS APPEAL AND WILL PRESENT NO DIRECT ISSUES ON CROSS-APPEAL.

STATEMENT OF THE CASE

The Appellee is satisfied with the Appellant's Statement of the Case.

SUMMARY OF THE ARGUMENT

I. The father submits that the Chancellor abused his discretion denying his Motion (Complaint) to Modify Child Custody. The Chancellor, by detailed factual findings, found that the children had not suffered a material adverse change in circumstances. In fact, the Chancellor found that the children were undergoing the stresses associated with the breakup of the parental marriage and their respective parents' new relationships. As such, there was no need for an *Albright* factor analysis. The Chancellor, supported by material evidence in the record, did not abuse his discretion.

ARGUMENT

I. Factual Background

The parties were divorced on January 5, 2005. (R. 15-25). They shared joint legal custody of their two minor children, Zachary, born September 1, 1998, and Garret born February 26, 2001, with primary physical custody granted to Bethany, hereinafter referred to as "Mother". (R. 15-25). Visitation rights given to Brian Wikel, hereinafter referred to as "Father". No provision of for summer visitation was made. R. 15-25.

The father had been working inWest Point Mississippi; but his workplace closed. The Father was able to obtain a transfer to a facility in Florence, Alabama some 150 miles away. This caused stress and difficulty with the prior-ordered visitation schedule. The children, were well adjusted, with no behavior or school performance issues prior to the divorce. For some time after the divorce, the children began to have some emotional and behavioral problems. The Mother sought counseling help for the children. Both parents participated in some counseling.

The most highly disputed facts concern the counselor, Melanie Benson. Her testimony is discussed in detail in the argument section of this brief. The Father believes that the counselor found certain conduct of the Mother was detrimental the children's mental health, while the Mother believes that the children were undergoing the stresses associated with divorce in general, and not specifically the Mother's conduct after the divorce (R.E. 5, 7).

Several issues concerning visitation were presented and the Chancellor expressed his belief that the visitation arrangements were not satisfactory and issued extensive provisions modifying the visitation arrangement.

II. Argument

I. WHETHER THE CHANCELLOR'S DECISION TO DENY THE APPELLANT'S MOTION FOR MODIFICATION OF CHILD CUSTODY WAS MANIFESTLY WRONG, CLEARLY ERRONEOUS, AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AS REFLECTED IN THE RECORD?

"In domestic relations cases, [the appellate court's] scope of review is limited by the substantial evidence/manifest error rule." *Samples v. Davis,* 904 So.2d 1061, 1063-64(¶ 9) (Miss.2004) (citing *Jundoosing v. Jundoosing,* 826 So.2d 85, 88(¶ 10) (Miss.2002)). "[The appellant court] will not disturb the chancellor's opinion when supported by *substantial evidence* unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied." *Id* at 1064(¶ 9) (quoting *Holloman v. Holloman,* 691 So.2d 897, 898 (Miss. 1996)).

In *Mabus v. Mabus,* 847 So.2d 815, 818(¶ 8) (Miss. 2003) (citations omitted), the Supreme Court stated the legal standard for a child custody modification proceeding is as follows:

> [The] burden of proof is on the movant to show by a preponderance of the evidence that a material change in circumstances has occurred in the custodial home. 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 child's welfare; and (3) that the child's best interests mandate a change of custody.

The Supreme Court has enumerated several factors to help chancellors determine what is in the "best interest" of the child in a custody dispute. *Albright v. Albright,* 437 So.2d 1003, 1005 (Miss. 1983). These factors include:

> [age,] health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral

> fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship.

Id. at 1005. The *Albright* factors are not to be treated as "the equivalent of a mathematical formula." *Lee v. Lee,* 798 So.2d 1284, 1288(¶ 15) (Miss. 2001).

While addressing a case similar to this one, the Supreme Court stated that, "a non-custodial parent's right to visitation is a "right more precious than any property right." One parent . . . cannot be permitted to unilaterally deny the other's right to visit with his child. At the same time, "a change in custody will not be made for the purpose of rewarding one parent or punishing the other." *Ash v. Ash,* 622 So.2d 1264, 1266 (Miss. 1993) (internal citations omitted).

In the case before this Court, the non-custodial Father is appealing the Chancellor's denial of his Motion to Modify previous Final Decree of Divorce as to the issue of child custody. The primary factor the Father relied upon in his Motion was the lack of moral fitness of the Mother. He alleges abuse of discretion or manifest error, but instead simply argues that the Chancellor got it wrong. In general, absent abuse of discretion or manifest error, that is insufficient grounds to reverse the findings and ruling of the Chancellor, no matter how passionately presented.

The Father's primary disagreement is with the Chancellor's findings in Paragraphs 14, 15, and the beginning of 16 of the Chancellor's Opinion and Judgment entered December 3, 2008, which states (R.E. 7):

> The children are doing well in school. Bethany has been married to Will Miller for over two (2) years. Melanie Benson, the counselor testified for Brian, attributes the sons' problems to the parental divorce, the children not living with both parents, the transition between both parent's home and the tension between the parents. Most children of divorce experience these same problems and child being the individuals they are, will often react differently. If these two parents will cooperate with each other regarding the children, the Court doubts that the children would suffer the way that they do.

> Our Supreme Court has said that modification of custody is a "jolting, traumatic" experience which should not be ordered without serious cause. *Lipsey v. Lipsey*, 755 So.2d 564 (Miss. Ct. App. 2000).
> This case is close. If the Court were making an initial custody determination, [Father] would probably prevail. But this is a modification and for the legal reasons expressed above, the Court is unable to modify custody at this time. ...

In other words, the Chancellor found that the harm the children had been suffered has been as the result of the divorce and tension between the mother and father, and not the lack of moral fitness of the mother or an adverse material change warranting a change in custody. The Chancellor made no *Albright* analysis. In paragraph 13 of his opinion, the Chancellor states:

> The Court should provide findings with regard to (1) whether a material change has occurred; (2) if so, whether the children were adversely affected; and (3) if so, whether modification is in the children's best interest. **If the court finds an adverse material change and proceeds to a best interest analysis, the Court must make findings with respect to the *Albright* factors.** (emphasis added).

The court made no change of custody nor an *Albright* analysis. It is a logical conclusion that the Chancellor found that no adverse material change occurred; or even if it did, modification would not be in the best interest of the children because the Chancellor stated that if he found a material adverse change, he had to perform an *Albright* analysis. In support of his decision, the Chancellor noted the fact that the mother had been remarried for over two years and that the children were doing well in school. The Chancellor was concerned about communication and visitation between the parties and modified the previous decree to establish an extensive, specific, rule-based visitation and joint legal custody regimen that should leave any future conflict without a doubt as to its origin (R.E. 8-21).

The Father in his brief performs a *pro forma, Albright* analysis. The Mother does not agree that such a speculative analysis should be done considering that the trial court itself did not perform such an analysis. It is speculative, not meaningful, and only confuses the issue for this Court.

There are two important factual issues that do need to be clarified in the Father's so-called "*Albright* analysis". In the first full paragraph of page 16 of his principal brief, the Father stated that the counselor, Melanie Benson, testified that the Mother's actions with overnight male company, **causally related** the children's emotional problems. (T. 159-160). The testimony of Benson, even taken in a light most favorable to the Father, does not support such a conclusion. The testimony that is conflated together to lead to this alleged causal relationship is as follows: T. 158-9:

> Q. (Counsel for Father) What concerns, if any, do you have with regard to Mrs. Wikel's – prior to her marriage to Will Miller, the presence of overnight male company in her home?
>
> A. (Melanie Benson) I have concerns, because it something that was brought up and was not adhered to because of the detachment, that it would – you know, may further promote detachment with the boys' father in presenting a new father figure in the house, the inconsistency in the home, like I mentioned earlier, the moral teachings. You know, if we're talking about Mr. Miller at this time, they are married, and so he is in a different position, but my concern would have been if they had not gotten married and broken up, the boys had already established a relationship.

Here, the counselor, in response to the question about prior to the Mother's remarriage about the presence of overnight male company, had concern about new attachments to a father figure, which would have been damaging if the relationship had terminated. That, in fact, did not, happen. No suggestion of causal relationship with overnight male company was suggested here. The Mother and Will Miller had been married for two years at the time of the modification hearing (R.E. 5). Testifying further (T. 159):

Q. Let me ask you this way: Do you have an opinion as to whether Mrs. Wikel's activities with overnight male company in the home caused or contributed to Zachary Wikel's adjustment disorder and adjustment disorder with depressed mood and mixed anxiety?

A. I think so, and the reason being because there was the pressure that I felt like the children felt even when they came to therapy, whether it was okay to talk about, in particular, Will Miller or not, if it was okay to tell dad things about Will Miller or not, and just that pressure. You know, I cant say that Mrs. Miller ever said, do not tell Ms. Melanie or do not tell your dad that Will Miller spent the night, I don't know, but I do know that there was some pressure there, particularly for Zachary. For Garrett, I don't think he quite understood.

All the counselor said was she thought there had been some pressure about discussing Will Miller in counseling and that may have caused some issues with Zachary. The Counselor never testified that anything before Will Miller caused any problems. The sexual relationship between the mother and Will Miller was not the cause of the anxiety, but perhaps a natural anxiety over displacing his natural father when a new father figure came into the child's life. Any anxiety was about Will Miller's presence in the Mother's life and not anonymous "overnight male company." The Chancellor's opinion at Paragraph 14 (R.E. 7) is a reasonable interpretation of this testimony, and is not in any way in conflict with the testimony. The counselor did not testify to what the Father stated in his brief that there was a causal relationship.

Another area of concern was in the Father's principal brief was his statement at page 14 paragraph "9", "that since final judgment of divorce in this cause, Bethany has permitted the younger child of the parties, Garrett, at the age of five (5) years to hunt with a real gun and live ammunition under the supervision of a 17 year-old boy". As stated, it appears the Mother just

gave a gun, ammo, and a lunchbox with some casual teenager to go into the woods and fire away. A careful review of the testimony revels that the actual circumstances are more normal and responsible. The Mother and Will Miller were present at the hunting trip where Zachary held the gun (T. 75). The 17 year-old boy was Will Miller's brother, Blake (T.74-75). Further, Will Miller is employed as a wildlife specialist with the United States Department of Agriculture, (T. 227). Hunting is clearly a family activity. Though a matter better discussed with the Father in advance, this was not a reckless act. No teaching children proper firearm use and safety in a home with firearms would be a reckless act.

Simply put, the Father has attempted to re-litigate his Motion hearing. Reading the Chancellor's length opinion, it becomes clear that Chancellor Burns conducted a proper and thorough review of all the facts and circumstances in this case and decided that the Father failed to meet his threshold burden of showing by a preponderance of the evidence that a material change in circumstances adversely affecting the interests of the children had occurred. The Father argues that Chancellor Burns did not make a proper *Albright* analysis; however, he would only have had to do so after finding a material change in circumstances had occurred. Even if this Court conducted a *de novo* review of the facts, the Appellant is attempting to piggyback pre-divorce behavior onto post-divorce behavior to make his allegations more outrageous. Though an admirable attempt to inflame the passions of the Chancellor and this Ccourt have been made, the pertinent law in this matter minimizes or precludes such consideration. The Chancellor heard the facts, considered the facts, applied the law, wrote detailed findings and an opinion, and arrived at the proper conclusion. Accordingly, no *Albright* analysis was required.

CONCLUSION

The Appellee, Bethany J. Wikel Miller, submits to this Court that the Chancery Court of Oktibbeha County did not commit error in denying her former Husband Brian E. Wikel's Motion to Modify Child Custody. The Chancellor was correct and supported by the evidence that no adverse change of circumstances had occurred in the children's lives. Therefore, this Court should affirm the opinion and findings of the Chancellor.

Dated: 10/13, 2009.

Respectfully Submitted,
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CERTIFICATE OF SERVICE

I, Carrie A. Jourdan, attorney for the Appellee, do hereby certify that I have this day mailed, via United States Mail, postage prepaid, a true and correct copy of the foregoing Appellant's Brief to the following:

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James C. Helveston
Counsel for Appellant
P.O. Box 835
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Hon. Kenneth M. Burns
Chancery Court Judge
P.O. Box 110
Okolona, MS 38860

This the 13th day of October, 2009.

Carrie A. Jourdan
CARRIE A. JOURDAN

CERTIFICATE OF MAILING

I, Carrie A. Jourdan, attorney for the Appellee, do hereby certify in accordance with M.R.A.P. 25 (a), that I am this day depositing in the United States Mail, first class, postage-prepaid, one original and three copies of the Brief in the matter of *Brian E. Wikel (Appellant) v. Bethany J. Wikel Miller (Appellee)*, case number 2009-CA-00106, for filing with the Clerk of the Supreme Court/Court of Appeals.

This the 13th day of October, 2009.

Carrie A. Jourdan

CARRIE A. JOURDAN