SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2009-CA-00802

WILLIAM M. COVINGTON — APPELLANT

VS.

CAROL MONTGOMERY — APPELLEE

APPEAL FROM THE CHANCERY COURT OF HARRISON COUNTY, MISSISSIPPI, FIRST JUDICIAL DISTRICT
CAUSE NO. C2401-03-02082-1
HONORABLE FRANKLIN MCKENZIE, PRESIDING TRIAL JUDGE

BRIEF OF APPELLEE

ORAL ARGUMENT IS NOT REQUESTED

ATTORNEY FOR APPELLEE:

DEAN HOLLEMAN, MSB [redacted]
BOYCE HOLLEMAN & ASSOCIATES
1720—23rd Avenue-Boyce Holleman Blvd.
Gulfport, MS 39501
(228) 863-3142
Telefax (228) 863-9829

SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CAUSE NO. 2009-CA-00802

WILLIAM M. COVINGTON — APPELLANT

VS.

CAROL MONTGOMERY — APPELLEE

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 disqualification or recusal:

William M. Covington, Appellant

Carol Montgomery, Appellee

William Covington, Post Office Box 5394, Diamondhead, MS 39525
Appellant Pro Se

Dean Holleman, Boyce Holleman & Associates, 1720—23rd Avenue-Boyce Holleman Blvd., Gulfport, MS 39501, Attorney for Appellee

Honorable Franklin McKenzie, Trial Judge

Respectfully submitted, this the 22nd day of February, 2010.

DEAN HOLLEMAN
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATEMENT OF THE CASE

In November 2007, William filed a Petition for Modification of Child Custody. CP.11. William also sought emergency relief without notice to Carol, obtaining custody of Ryan and moving him from his Gulfport school to a school in Hancock County, Mississippi. CP.4. The Chancellor granted the emergency relief, without notice, based upon William's allegations that Ryan had been subjected to physical abuse and neglect by Carol. CP.1. Carol filed her motion to dismiss and to dissolve the emergency order on December 13, 2007 and she sought attorney fees. CP.23.

On December 17, 2007, the Chancellor heard testimony on Carol's motion and entered its order setting aside the emergency order, thereby returning Ryan to Carol's custody and to his school. CP.29. The Chancellor's order also appointed Ann Lazarra as Ryan's Guardian Ad Litem. CP.30.

The *guardian ad litem* conducted her investigation and provided her report to the Court. On October 30th and 31st, 2008 the trial was held before Chancellor Franklin McKenzie in the Chancery Court of Harrison County for the purpose of considering William's Petition for Modification and Carol's most recent Motion for Citation of Contempt.

The Court received testimony and other evidence from both parties and also received the recommendations of the *guardian ad litem* through her reports and testimony. At the conclusion of trial, Chancellor McKenzie provided a bench ruling on the custody issue, finding that William had failed to meet his burden and denying William's request for modification of custody.

Tr.174-185. The Chancellor made additional rulings in his Final Judgment, modifying visitation afforded to William and also finding William to be in contempt for failing to pay various fees required by the Court's prior Judgment. On May 7, 2009, William filed his Notice of Appeal, bringing the matter before this Court.

STATEMENT OF THE FACTS

William M. Covington and Carol Montgomery Covington were divorced on January 28, 2005. Carol was awarded the primary physical custody of the parties' minor child, Ryan. William was awarded visitation and was to pay $800.00 in child support, ½ of the medical bills, ½ of a storage fee, $400.00 in periodic alimony, and four (4) annual property settlement payments of $3,375.00 each. Ex. 9.

Within a month or so after the divorce, Carol and Ryan moved to a home in Gulfport Mississippi on Jones Street where they lived from about March 2005 until July 2007. In July 2007, they moved a few blocks away to Middlecoff Drive where they resided at the time of trial in 2008. Both homes were in Ryan's school district where he attended Anniston Elementary. Tr. 115. The evidence shows Ryan to be in good health, a good student and a "fine little boy". Tr.61-62; 84. The testimony elicited by William further showed Carol to be a disciplinarian and to take "pride" in taking care of Ryan. Tr. 74.

In the spring of 2005, Carol dated Kenny Myers. Due to the devastation of Hurricane Katrina, Kenny's home was damaged. Having no home, Kenny

lived at Carol's home for some 4 to 6 months after Katrina at which time he moved back to his repaired home. Tr.67-68.[1]

In his Petition for Modification, William raised a plethora of allegations, all of which were carefully considered by the chancellor during the trial. The chancellor was aware of his task, and clarified it specifically prior to his lengthy and detailed analysis of each allegation. The chancellor confronted each allegation individually and considered carefully the testimony and evidence in making his determination regarding the merit of each allegation. Tr.174-185.

SUMMARY OF ARGUMENT

In his Judgment, the chancellor below made a very detailed and careful review of the evidence presented at trial. Following the dictates of this Court, the chancellor then made a detailed analysis of the evidence and applied the evidence to the law. Tr.174-185. In *Coggin v. Coggin*, 837 So. 2d 772; 2003 Miss. App. LEXIS 64 (Miss.Ct.App., Feb. 11, 2003), this Court stated: "This Court will not substitute its judgment for that of the chancellor, even if this Court disagrees with the findings of fact and would arrive at a different conclusion." Id. The chancellor below applied the correct legal standard in denying William's request to change custody. Tr.175.

[1] Carol and Myers dated from 2005 to mid 2007. (Tr.24,63)

STANDARD OF REVIEW

In matters of domestic relations, the Mississippi Supreme Court's scope of review is limited by the substantial error/manifest evidence rule. *Mizell v. Mizell*, 708 So.2d 55 (Miss. 1998); See also *Lawrence v. Lawrence*, 574 So.2d 1376, 1382 (Miss. 1991) (holding that findings in support of child support rulings are reviewed under the manifest error/substantial). Thus, findings of a chancellor will not be disturbed unless the chancellor was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Id.* (citing *Bell v. Parker*, 563 So.2d 594, 596-96 (Miss. 1990)). As established in the landmark *Albright* decision, which outlined the analysis for custody awards, "Polestar consideration in child custody cases is the best interest and welfare of the child." *Albright v. Albright*, 437 So.2d 1003 (1983). With this premise in mind, Mississippi courts have repeatedly emphasized the need for custodial finality and have sought to avoid unnecessary modification of custody awards. See *Ballard v. Ballard*, 434 So.2d 1357 (recognizing that uprooting a child from his or her environment can be a "jolting, traumatic experience"); *Tucker v. Tucker*, 453 So.2d 1294 (acknowledging that "children do not need to be bounced back and forth between their parent's life a volleyball..."). Further, "All courts must be consistent, diligent, and focused upon the requirement that only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change." *Giannaris v. Giannaris*, 960 So.2d 462 (Miss. 2007) (citing *Morrow v. Morrow*, 591 So.2d 829, 833 (Miss. 1991)).

ARGUMENT

I. **THE CHANCERY COURT OF HARRISON COUNTY DID NOT APPLY AN ERRONEOUS LEGAL STANDARD IN EVALUATING CUSTODY, AND THE COURT CONSIDERED THE TOTALITY OF THE CIRCUMSTANCES IN MAKING ITS DETERMINATION.**

II. **THE CHANCERY COURT OF HARRISON COUNTY EVALUATED THE EVIDENCE UNDER THE APPLICABLE LEGAL STANDARD.**

In making decisions regarding the modification of custody, "chancellors are charged with considering the totality of the circumstances." *Tucker*, 453 So.2d at 1297 (quoting *Kavanaugh v. Carraway*, 435 So.2d 697, 700 (Miss. 1983)); ("Before custody should be changed, the chancellor should find that the overall circumstances in which a child lives have materially changed and are likely to remain materially changed for the foreseeable future and that such change adverse impacts the child"). *Id.* For a non-custodial parent seeking modification of custody, he or she must satisfy the three-part test outlined in *Brawley*: (1) substantial change in circumstances of the custodial parent since the original custody decree, (2) substantial change's adverse impact on the welfare of the child, and (3) necessity of the custody modification for the best interest of the child. *Giannaris*, 960 So.2d at 468 (citing *Brawley v. Brawley*, 734 So.2d 237 (Miss. Ct. App. 1999)).

Consistent with the long-recognized standard for evaluation of custody modifications, no modification was warranted by the Chancellor. There was no significant and credible evidence in the record to demonstrate that a material change in circumstances which was adverse to the best interests of

Ryan had occurred since January 2005 when the divorce was final. William failed to fullfill the burden requiring him, as the non-custodial parent, to prove sufficiently a material change in the circumstances of Carol's home. Furthermore, because William failed to prove a change in material circumstances of Carol's home, it was apparent that he also failed to prove an adverse effect such that posed a danger to Ryan's mental or emotional well-being.

William's argument relies primarily upon the Mississippi Supreme Court's decision in *Hill*, contending that it is "exceptionally analogous" to the instant case. However, the facts of *Hill* are actually very dissimilar from those involved in the current matter. While the Mississippi Supreme Court, in *Hill* did affirm the chancellor's decision to modify custody, the Court based its reasoning upon a plethora of facts in support of the chancellor's finding that a material change in circumstances had occurred which would likely have an adverse effect on the child. *Hill v. Hill*, 942 So.2d 207 (Miss. Ct. App. 2006). In light of Mary Hill's involvement with multiple men since the divorce, her frequent moves, and her continued exhibition of reckless behavior and unnecessary risk-taking, the court believed that she was incapable of providing her son with a stable living environment. *Id.* at 212. Throughout the Hill's divorce and custody proceedings, Mary Hill was involved with at least five men, and had been arrested in connection with accusations that she was stalking her boyfriend's wife. *Id.* at 211. Since the couple's divorce, Mary had moved four times, and she had already been married, divorced and was planning to

remarry yet again at the time of trial. *Id.* Additionally, the chancellor found that Mary kept pornographic material in her home. *Id.* In light of all of these factors, and considering the totality of the circumstances aforementioned, the chancellor believed that the environment provided by Ms. Hill was not a stable living environment for her son, and the Supreme Court found no abuse of discretion in that holding. *Id.*

Despite William's assertions that 'each and every significant factor' in *Hill* is present in the instant case, the situation involved in Hill is quite unlike the situation before us currently. While Mary Hill moved four times, and her son attended three different schools during his first three years of formal education in the instant case the chancellor here noted Carol had mainly lived in two homes: Jones Street (3/2005 to 7/2007) and Middlecoff (7/2007 to trial). Tr.174-185. Additionally, Ryan has never been out of the neighborhood to which he is accustomed and he's remained at the same school. Tr. 179.

In attempting to provide further support for his assertions, William provides a number of Mississippi cases which involve a finding of adverse effects to support custody modification. However, the cases offered involve facts and circumstances substantially extreme in comparison to those argued by William in this matter: In *Johnson v. Gray,* custody was modified after evidence was presented that the custodial parent drank heavily, suffered from an anxiety disorder, depression, and also a nicotine dependency. *Johnson v. Gray,* 859 So.2d 1006 (Miss. 2003). Similarly, in *Riley,* the Court did allow for modification of custody prior to a showing of actual harm if such harm is

reasonably foreseeable, but the custodial parent frequently used drugs in the presence of the child and had a succession of boyfriends who also used drugs. *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996).

Further, the chancellor's decision to modify custody in *Duke* was based upon the mother's cohabitation for ten months in a "barn" with a convicted felon combined with her sporadic employment, and her frequent moves. *Duke v. Elmore*, 956 So.2d 244 (Miss. Ct. App. 2006). In *Savell*, the Supreme Court affirmed modification based upon evidence that the mother denied the father visitation and the stepfather's daily use of obscene language and threats of violence to the minor child, whereby he admitted his desires to "pepper her with paintballs and duct tape her to a chair." *Savell v. Morrison*, 929 So.2d 414, 418 (Miss. 2006). Further, in the *Pruett* case also cited by the Appellant, affirmation of the chancellor's decision to modify custody was based upon the Court's findings that the mother missed several visitation exchanges, allowed her daughter to sleep in the bedroom with her boyfriend for a period of years in the presence of the eight year old minor child, the minor child's exposure to bouts of fighting and domestic violence, the mother's cohabitation with a married man, and the mother's "coaching" her son to lie at trial regarding the specifics of her relationship. *Pruett v. Prinz*, 979 So.2d 745 (Miss. Ct. App. 2008). In light of the severity of the facts involved in the cases relied upon by William, it is difficult to understand his assertion that this case contains many more issues, some of dramatically more severity and importance.

A Court's burden of considering the totality of the circumstances in evaluating modification is undisputed. Contrary to William's assertion that the chancellor below failed to follow the dictates of this Court in making his ruling a review of the chancellor's bench ruling evidences the chancellor's consideration of the correct "standard" and his consideration of each and every allegation unsuccessfully proven by William. A few excerpts of the chancellor's ruling follows:

> I agree the court has to look at the totality of the circumstances. Tr.174.
>
> All right. The standard for modification of a child custody as acknowledged by all counsel is that whether there has been a material change in circumstances which adversely affects the welfare of the child and whether the best interest of the child requires a change of custody. Stated otherwise, a non-custodial parent must first sufficiently prove a material change in circumstances which has an adverse affect on the child that clearly causes danger to the mental or emotional well-being of the child. The Court is required to look at the totality of the circumstances. Tr.175-176.
>
> I do not believe that a material and substantial change in circumstances has occurred which is adverse to the interest of the minor child and which poses a danger which is expected to continue. Tr.176.
>
> The child is making extremely good grades at school in third grade and his asthma is apparently under control. His mother is very concerned about having a healthy environment for Ryan. This child is the center of the universe at his mother's home, and he is well-loved at his father's home, as well. Tr.176-177.
>
> Carol Montgomery is a devoted mother who is attuned to being healthy and fit and thinking green. Tr.177.
>
> Carol Montgomery has primary custody and I see no reason at this time to uproot the child. A change of custody is traumatic for a child and should not be done without good reason. Ryan is a well-groomed and well-dressed young boy. He seems to have a fine sense of self-worth and self-confidence. Your Guardian ad Litem believes that Ryan's needs are being met in his home with his mother. The fact that this little boy treasures his time with his dad and longs for manly pursuits is telling to

> your GAL. Ryan's time with his dad is invaluable to the child and the combination of his relationships with both his parents can serve this child well if the parents can learn to work together for their son's sake. Carol Montgomery and Bill Covington are two very different individuals. Both have a great deal to offer Ryan, and the child needs both of his parents. Tr.176-177.

The chancellor went further in his ruling to address and dismiss each and every one of the eleven allegations made by William to support his request for a change in custody. Tr.179-185. In concluding the chancellor ruled: "Looking at the totality of the circumstances, this court cannot find that there has been a material change in circumstances which adversely affects the best interest of the child in which would warrant a modification of his primary physical custody". Tr.185.

Finally, William argues the chancellor improperly delegated its responsibilities to the *guardian ad litem*. Not only did the Guardian Ad Litem conduct a lengthy investigation and submit a thorough report to the chancellor she testified at trial after hearing the testimony of the witnesses. Tr.94-113; Exhibit 3, Ev.94. As set forth herein above, the Chancellor went to great lengths to carefully analyze each and every allegation made by William. Tr.175-185. To suggest the chancellor utilized the Guardian Ad Litem's report in lieu of fulfilling his own duties is preposterous.

In reviewing the evidence submitted and in determining whether such a change existed, the chancellor was required to consider the totality of the circumstances. He did just that, and his ruling can suggest nothing to the

contrary, as he offers findings upon each and every allegation made. The Chancellor's ruling denying a change in custody should be affirmed.

III. THE CHANCERY COURT OF HARRISON COUNTY PROPERLY DENIED APPELLANT'S REQUEST TO TERMINATE PERIODIC ALIMONY.

The testimony showed that after Hurricane Katrina devastated the Mississippi Gulf Coast on August 29, 2005, Carol's boyfriend, Kenny Myers, was forced to leave his damaged residence and reside at Carol's home for some four to five months until his home was repaired. Tr.65-68. There was no proof offered that Kenny 'cohabitated' and/or 'resided' at Carol's home for any other reasons than Hurricane Katrina's onslaught and Kenny's attempt to rebuild his home. There was no evidence offered that Carol and Kenny share finances or that one supported the other. *Scharwath v. Scharwath*, 702 So.2d 1210, 1211 (Miss. 1997).

Furthermore, despite William's reliance on *Rester*, the facts are actually quite distinguishable. Beth Rester admitted that she and her boyfriend cohabitated, testifying that her boyfriend actually moved into her residence in December 2004, some eight months prior to Hurricane Katrina. *Rester v. Rester*, 5 So.3d 1132 1135 (Miss. Ct. App. 2009). She offered testimony which demonstrated an overwhelming presence of mutual support, including admissions that Beth's boyfriend listed Beth's address as his residence on tax receipts that the couple contributed jointly to the purchase of groceries, that he regularly gave her money, and that the couple performed work on the home

together and bought materials together to make such repairs. *Id.* at 1136-1137. As was reflected in testimony offered by Ryan Montgomery, Carol Montgomery, and Kenny Myers, such was not the case in the current matter. As the Appellant failed to prove that Carol Montgomery did cohabitate, he was also unable to prove that any material change in circumstances had taken place. Carol was not required to overcome a presumption of mutual support. The refusal of the trial court to terminate the alimony obligation was proper, and the decision as to this issue should be affirmed.

CONCLUSION

In summary, in arriving at his result the Chancellor applied the appropriate legal standards and carefully analyzed the evidence. The result is supported by substantial evidence and it cannot be said that the Chancellor was manifestly wrong. Carol requests this Court affirm the Chancellor's denial of modification of custody in this matter and his refusal to modify and/or eliminate William's obligation to pay periodic alimony.

Respectfully submitted, this the 22nd day of February, 2010.

CAROL MONTGOMERY, APPELLEE

BOYCE HOLLEMAN & ASSOCIATES

BY: _____
DEAN HOLLEMAN

CERTIFICATE

I, DEAN HOLLEMAN, do hereby certify that I have on this date forwarded a true and correct copy of the above and foregoing document to William Covington, P. O. Box 6394, Diamondhead MS 39525, and Chancellor Franklin McKenzie, P. O. Box 1961, Laurel, MS 39441-1916, by United States Mail, postage prepaid.

DATED, this the 22nd day of February, 2010.

DEAN HOLLEMAN

DEAN HOLLEMAN, MSE[redacted]
BOYCE HOLLEMAN & ASSOCIATES
1720—23rd Avenue-Boyce Holleman Blvd.
Gulfport, MS 39501
(228) 863-3142
Telefax (228) 863-9829