IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

EFFIE DARLENE ADAMS (SOFIKITIS) — APPELLANT

VS. — APPEAL NO.: 2009-CA-00803

MITCHELL STEVEN JOHNSON and
KAREN ELIZABETH JOHNSON — APPELLEES

APPEAL FROM THE DECISION OF THE CHANCERY COURT OF COPIAH COUNTY, MISSISSIPPI

RESPONSE BRIEF OF APPELLEES

ORAL ARGUMENT NOT REQUESTED

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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 disqualification or recusal.

Effie Darlene Adams (Sofikitis)	Appellant
Mitchell and Karen Johnson	Appellees
James B. (Rus) Sykes, III	Attorney for the Appellant
David L. Morrow, Jr., John R. Elliott, Jr., Brendan C. Sartin, and Lindsey A. Hill	Attorneys for the Appellees

John R. Elliott, Jr.
One of the attorneys for Appellees

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I. STATEMENT OF THE CASE

Mitchell and Karen Johnson (sometimes collectively referred to as "Johnson") filed a "Petition for Establishment of Guardianship, for Issuance of Letters of Guardianship, and Other Relief" that was tried before the Chancery Court of Copiah County, Mississippi on May 9, 2007. The children's natural father joined in the petition, but the natural mother, Effie Adams ("Effie") contested the petition. Following this hearing, the trial court found, in pertinent part, the following with regards to Effie's conduct and lifestyle (R.E. 3, 4, 5):

1. Effie committed immoral acts;
2. Effie put the children in harm's way;
3. Effie failed two (2) drug screens;
4. Effie was indicted on three (3) felony counts, each involving a controlled substance;
5. The pattern of facts show neglect of the children's welfare; and
6. The children have been exposed to matters of a sexual and drug nature that are genuine, serious dangers to the children.

In its 2007 ruling, the trial court acknowledged that "[t]he laws in Mississippi favor a natural parent having custody of her children," but that "...given the totality of the evidence and circumstances, legal and physical custody of Autumn Nicole Johnson and Alexus Diane Johnson is hereby awarded unto the Johnsons, same being in the best interests of the children." (R.E. 2, 5, 6).

About a year later, Effie's "Amended Motion for Modification and for Other Relief" was heard by the trial court. Per the "Order Dismissing Motions and Awarding Child Support" dated June 2, 2008, the trial court determined that "[t]he natural parent presumption is inapplicable to this case," and that per *Barnett v. Oathout*, 883 So.2d 563 (Miss. 2004) "...the applicable standard of proof is a material change in circumstances in the custodial home which adversely

affects the children, such that it would be in the children's best interest that custody be changed." Ultimately, the trial court determined that the standard of proof was not met by Effie, and dismissed her amended motion. (R.E. 12, 13)

On March 11, 2009, Effie's "Second Amended Motion for Modification" was heard by the trial court. Again, the trial court determined that "Effie failed to show by clear and convincing evidence that a change in custody of the minor children is in their best interest." (R.E. 45) The trial court quoted from *Callahan v. Davis*, 869 So.2d 434 (Miss. App. 2004) when making its ruling, and acknowledged that one difference between *Callahan* and Effie's circumstances was that "Effie did not voluntarily relinquish her rights to the minor children, but rather, previously lost custody of the minor children in a contested matter." (R.E. 45)

Aggrieved by the trial court's decision, Effie appealed to this Honorable Court.

II. SUMMARY OF THE ARGUMENT

Although the trial court referenced different Mississippi Supreme Court and Court of Appeals cases in its 2008 and 2009 opinions, the trial court consistently applied the same, proper legal standard. In its ruling that is now on appeal, the trial court stated that "[t]he issue is, when I look at the testimony here, is there clear and convincing evidence as set forth in the case law that I just cited [*Callahan*] that it's in the best interest of these children to be moved from where they are to some place else." (T. Vol. 2, Pgs. 124-125).

Effie does not assert that, if indeed a proper legal standard was applied, she should have prevailed. Instead, the only issue asserted in Effie's appeal is whether or not the trial court applied an improper legal standard.

To accept Effie's interpretation of the law as accurate, an unfit parent who lost custody would be placed in a better position for a subsequent modification action than a fit parent who voluntarily relinquishes custody. Also, if Effie's argument is followed, it will conflict with this Court's position in *Callahan* that the "stability in the lives of children" is of "great importance" because it will allow Effie to regain custody by simply showing that she no longer uses drugs, no longer has felony charges pending, no longer exposes the children to matters of a sexual and drug nature, etc. *Id.* at 437. Basically, Effie is asking this Court to overturn *Barnett v. Oathout,* 883 So.2d 563 (Miss. 2004) and adopt a new legal standard.

III. ARGUMENT

Effie draws a distinction between her situation and the circumstances within *Callahan v. Davis*, in that Effie's children were taken from her because she was unfit, whereas the mother in *Callahan* "voluntarily relinquished" custody of her children. Effie contends that the natural parent presumption should have the been the legal standard applied by the trial court because she did not voluntarily relinquish or abandon her children. However, our Court of Appeals noted that "custody could be relinquished by 'agreement or otherwise...'" *Hill v. Mitchell*, 818 So.2d 1221, 1225 (Miss. App. 2002). Effie "voluntarily" engaged in the conduct that caused her to be found unfit and lose custody of her children in 2007. Therefore, it stands to reason that past conduct should fall under the "otherwise" category set forth in *Hill.*

However, assuming that Effie's unfitness does not fall within the "otherwise" category of *Hill*, the precedent in *Barnett v. Oathout* will control. In *Barnett*, the natural father did not voluntarily relinquish custody of his children, but instead lost custody of his children in Youth Court. In *Barnett*, the trial court applied the same legal standard as in *Callahan.* The legal

standard placed the burden upon the parent to show "...a substantial change of circumstances which adversely affected the children, where it would be in the children's best interest that custody be changed." *Barnett*, 883 So.2d at 569.

In *Barnett*, the Mississippi Department of Human Services removed the children in 1996 from the natural parents based upon a finding of medical neglect. *Id.* at 565. Two and a half years later, the Foster Care Review Board recommended that DHS initiate proceedings to terminate the parental rights of the natural father, Charles Oathout. The Youth Court opted, in December 1998, to award durable legal custody to the foster mother, Helen Barnett, instead of terminating parental rights. *Id.* Two weeks later, Charles filed a petition in Chancery Court for modification of custody, or in the alternative, for visitation rights (i.e., the first modification proceeding). The Chancery Court denied the motion for a change of custody, but granted visitation. In denying the motion for a change of custody, the trial court stated "[i]n order to warrant a change of custody ... the moving party would be required to show a material change of circumstances since the rendition of the Youth Court Order dated 12/3/98." *Id.* Because the foster mother made it very difficult, if not impossible, for Charles to exercise his visitation rights, Charles filed a petition in July 2000 seeking a change in custody (i.e., the second modification proceeding). *Id.* at 566.

Ultimately, the trial court found that Charles met his burden of proof and awarded him custody of the children. The foster mother, Helen Barnett, appealed the ruling citing that the Chancellor erroneously used the natural parent presumption. *Id.* at 567. The Supreme Court of Mississippi found that Helen's "...suggestion that the chancellor used the natural parent presumption is misplaced" and that "[t]he burden was placed on Charles to show a substantial change in circumstances adverse to the children. This was true both when the first petition for

modification of custody was denied and during the second modification proceeding, in which custody was awarded to Charles." *Id.*

The legal standard quoted above in *Barnett* is the same standard applied by the Chancery Court of Copiah County in the ruling that Effie now appeals.

Also, Effie submits that the precedents set forth in *Rodgers v. Rodgers*, 274 So.2d 671 (Miss. 1973) and *Ethredge v. Yawn*, 605 So.2d 761 (Miss. 1992) should have been followed by the trial court. However, both of those cases are irrelevant and easily distinguished from the circumstances of Effie's appeal.

In *Rodgers*, paternal grandparents sought to modify the custody arrangement set forth in the natural parents' judgment of divorce, which awarded custody of the minor child to the natural mother. This was the paternal grandparents' initial attempt to gain custody (i.e., like the Johnson's situation in 2007). The Mississippi Supreme Court stated that "[t]he real question in this case is whether there has been a clear showing that appellant is morally unfit to have the custody of her child," and that the paternal grandparents must overcome the natural parent presumption by "...a clear showing that the parent has (1) abandoned the child, or (2) the conduct of the parent is so immoral to be detrimental to the child, or (3) the parent is unfit mentally or otherwise to have the custody of his or her child." *Rodgers*, 274 So.2d at 673.

The Chancery Court of Copiah County found Effie to be an unfit parent in 2007 (R.E. 1-8). Thus, the burden of proof for the paternal grandparents as set forth in *Rodgers* was satisfied by the Johnsons in 2007 as stated in the "Judgment Awarding Custody and Granting Guardianship" that was entered on May 29, 2007. While the *Rodgers* case may have been applicable to the initial custody dispute in 2007, it is not relevant to Effie's subsequent modification actions because the burden of proof now rests with Effie.

Further, the *Ethredge* case lacks relevance to this current appeal. In *Ethredge*, the Chancery Court of Covington County mistakenly found that the natural father abandoned his son by signing a waiver of process and entry of appearance. Although the waiver allowed the grandparents to press forward and obtain an order appointing them as guardians of the minor child, the waiver did not state that the father agreed with the relief sought by the grandparents or that he joined in the petition to establish the guardianship. Instead, the waiver only set forth that the father entered an appearance and that the Court may proceed with the matter without notice to him. *Ethredge*, 605 So.2d at 765. The Chancery Court relied solely upon the abandonment theory, and never found the father to be unfit.

Because the Supreme Court ruled that the finding of abandonment in *Ethredge* was error, and because the father was never adjudicated to be unfit, the natural parent presumption applied and the father ultimately was awarded custody. However, Effie was adjudicated "unfit" in 2007, and therefore, the natural parent presumption no longer applies to her subsequent modification actions.

In *Thornhill v. Van Dan*, 918 So.2d 725, 730 (Miss. App. 2005), the Court of Appeals stated that it did not want "...to encourage an irresponsible parent to relinquish their child's custody to another for convenience sake, and then be able to come back into the child's life years later and simply claim the natural parent's presumption as it stands today." Applying this same rationale to the facts at hand, the Court should not allow an irresponsible parent (i.e., Effie) who did not relinquish custody, but instead was found unfit, to come back into the children's lives and simply claim the natural parent's presumption.

Like the grandparents in *Hill v. Mitchell*, the Johnsons "do all the dirty work" and Effie has the children on the weekends and is afforded an opportunity to participate in "...the things

that are kind of fun." *Hill*, 818 So.2d at 1228. The Chancery Court of Copiah County recognized this, and stated in relevant part, the following:

> ...quite frankly, the only thing that I really see in this case is that the children have a lot more fun with their mom; that they're in a situation where the structure that exists is provided by the grandparents, and that the structure is doing chores, doing their school work, going to church, doing all the things they don't [sic] want to do, and then when they go home to mom, they have fun with their mom. And that's a good thing. I think it's good that they are developing a good relationship with their mother. I think that the problem, though, is they think that everything will be rosy and the same if they are returned to their mother's household as it is on the weekends that she has them, and it is a preference to have a more accommodating lifestyle as opposed to the structured, having to be the custodial parent type that they don't particularly care for, or at least Autumn doesn't care for as she goes into her teenage years as further evidenced by the January or February letter that she wrote to her grandmother. (T. Vol. 2, Pages 125-126).

Bottom line, the Johnsons stepped up to the plate and provided a stable home when these young girls needed it the most. "Because stability in the lives of children is of such great importance...," these children should remain in the Johnson's custody. *Barnett*, 883 So.2d at 568.

IV. CONCLUSION

Trite as the expression is, "our actions do speak louder than our words." In court, it is especially important to sort through all of the words to get to the truth. While Effie did not sign a document or state before a judge that she wanted to give up her children, her choices in life clearly show that her children, their emotional welfare, and their physical safety were not important to her. What was important to her were her own needs and gratification.

In the State of Mississippi, any parent knows that your children will be taken away if their welfare is endangered. Effie made a choice; she violated natural maternal instinct and

endangered her children. Her actions were more expressive of her priorities and intentions than any legal document. Therefore, when Effie submits that she did not give up her children, she is splitting hairs. She gave them up for some time before they were taken away.

The legal standard set forth in *Barnett* was followed by the Chancery Court of Copiah County in its ruling that Effie now appeals, albeit through the reference of a different Court of Appeals case. Nonetheless, the trial court correctly refused to follow Effie's "natural parent presumption" theory and held Effie to the same standard established in *Barnett*, which was that Effie must prove by clear and convincing evidence a substantial change in circumstances adverse to the children where it would be in the children's best interest that custody be changed. Therefore, based upon this Court's standard of review, the "Judgment Dismissing Motion and Reducing Child Support" that was entered by the Copiah County Chancery Court on April 17, 2009 should be affirmed.

Respectfully submitted, this the 24th day of November, 2009.

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CERTIFICATE OF SERVICE

I, the undersigned, one of the attorneys for the Appellees, do hereby certify that I have this day mailed, postage prepaid, via United States Mail, a true and correct copy of the above and foregoing to the following:

Honorable Edward E. Patten, Jr.
Chancellor, Copiah County
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Hazlehurst, Mississippi 39083

Mr. James B. (Rus) Sykes, III
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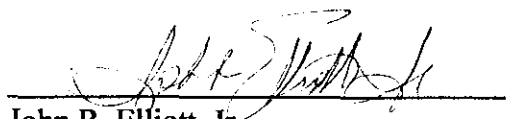
This the 24th day of November, 2009.



John R. Elliott, Jr.