

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 of recusal.

1. The Honorable Jacqueline Estes Mask, Chancellor
2. Lee Ann Williams, the Appellant
3. Nicholas Joe Willis, the Appellee
4. James D. Moore, Attorney for Appellant
5. Rebecca Coleman Phipps, Attorney for Appellee
6. Joey Cobb, Guardian *Ad Litem*



REBECCA COLEMAN PHIPPS
ATTORNEY OF RECORD FOR
APPELLEE

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Williams v. Williams, 656 So. 2d 325, 330 (Miss. 1995)

STATEMENT REGARDING ORAL ARGUMENT

Appellee believes that this Honorable Court can make an informed and appropriate decision without oral argument. Therefore, no oral argument is requested.

STATEMENT OF THE ISSUES

Whether or not the Chancellor erroneously found that the Appellant had failed to meet her burden of proof that there had been a material change of circumstances since the last order, that adversely affected the child.

STATEMENT OF THE CASE

This matter began January 11, 2001 when Nicholas Joe Willis, by and through his attorney of record, namely Rebecca Coleman Phipps, filed a Complaint to Establish Paternity, Child Support and Visitation and Rights, Etc. in the Chancery Court of Alcorn County, Mississippi asking that he be adjudicated the true, natural and biological father of a minor child born to the parties, namely Makenzie Cheyenne Stogner, whose date of birth was June 1, 2000. He alleged that he was willing to pay the statutory rate of child support and carry insurance. A DNA test had been performed in September 2000, showing that he was in fact the natural father of said child. This matter was first set for hearing on January 20, 2001 and was continued on a Motion of the Honorable Gregory D. Keenum, the first attorney for Lee Ann Stogner, and the matter was re-set for April 16, 2001. Thereafter, the Honorable Gregory D. Keenum filed to withdraw as counsel on April 12, 2001, showing that a substantial difference of opinion on how to proceed with this case had occurred.

Thereafter, the Honorable Billy W. Shelton (her 2nd attorney) entered an appearance representing Lee Ann Stogner. The Honorable Billy Shelton then filed an answer to the Complaint to Establish Paternity, Etc. and Counter-Complaint. A Temporary Order of Custody, Child Support and Visitation was entered on May 4, 2001 by the Honorable Chancery Court of Alcorn County, Mississippi adjudicating that Nicholas Joe Willis and Lee Ann Stogner were the natural and biological parents of a minor child, ordering Nicholas Joe Willis to pay child support, awarding Lee Ann Stogner temporary physical custody and awarding visitation to Nicholas Joe

Willis. Thereafter an Order was entered June 1, 2001 adjudicating Nicholas Joe Willis as the natural and biological father and ordering the Bureau of Vital Statistics to amend said Birth Certificate to reflect that he was the father and to change the child's name to Makenzie Cheyenne Willis. The Court also ordered Nicholas Joe Willis to pay child support, to carry a major medical insurance policy, awarding Lee Ann Stogner the custody of said minor child and granting Nicholas Joe Willis specified visitation with said child.

Thereafter, Billy Joe Willis, Helen Willis (the paternal grandparents) and Nicholas Joe Willis, by and through their attorney of record, namely Rebecca Coleman Phipps, filed a Complaint for Custody against Lee Ann Stogner on May 2, 2003 alleging that she did not have a permanent residence and could not provide a stable home for the minor child. The Honorable Louis J. Holliday, Jr. (Lee Ann Stogner's third attorney) filed a Motion for Continuance and Return of Child in the Chancery Court of Alcorn County, Mississippi. An Agreed Order was entered on May 6, 2003 ordering that the minor child and Lee Ann Stogner reside with Eva Stogner, the maternal great-grandmother of said child. Said Court also ordered that, at any time Lee Ann Stogner and the minor child should move from Eva Stogner's residence, that Court would immediately review the matter. The Court also entered a redirection of child support payments so that Nicholas Joe Willis' child support was paid to Eva Stogner.

Thereafter, on January 14, 2004, Billy Joe Willis, Helen Willis and Nicholas Joe Willis, by and through their attorney, Rebecca Coleman Phipps, filed a second Motion to Review alleging that Lee Ann Stogner had failed to reside with the maternal great-grandmother. The matter was never heard because Lee Ann moved back into Mrs. Stogner's home.

Thereafter, on June 27, 2005, Billy Joe Willis, Helen Willis and Nicholas Joe Willis, by and through their attorney of record, namely Rebecca Coleman Phipps, filed another (3rd) Motion for Review notifying the Court that Lee Ann Stogner had failed to reside with the maternal great-grandmother, Mrs. Eva Stogner. Again, Lee Ann moved back I with Mrs. Stogner and the matter was not heard.

Thereafter, on March 31, 2006, Nicholas Joe Willis, by and through his attorney of record, namely Rebecca Coleman Phipps filed a fourth (4th) Motion for Emergency Review alleging that Lee Ann Stogner had once again moved out of the home of Eva Stogner and alleged a material change of circumstances had occurred and that the Order should be modified so that Nicholas Joe Willis would be awarded custody of the minor child. On June 23, 2006, this Court entered an Order allowing the original Complaint to be amended so that Nicholas Joe Willis solely was asking for custody of said child, and not jointly with his parents. The Honorable Joey Cobb was appointed guardian *ad litem* for said child.

On June 13, 2006, Nicholas Joe Willis filed a Complaint for Modification of Former Order for Custody of Child alleging that Lee Ann Stogner had once again

moved out of the home of Eva Stogner and that Nicholas Joe Willis should be granted custody. (This pleading was filed to “clean up” all the Motions To Review that had been filed prior to this date.) This matter was set for trial on December 14, 2006, and thereafter was continued by Motion to Continue by the Honorable Sunny Phillips (Lee Ann Stogner’s fourth attorney) Said case was continued until March 28, 2007.

On December 18, 2006, this Court entered a Temporary Order acknowledging that the Honorable Joey Cobb, the appointed guardian ad litem for this child had recommended that the minor child be given a more stable environment for educational purposes. This Court found that on a temporary basis, this Court modified the Former Order of the Chancery Court so that both parties were granted the joint legal and physical custody of the minor child with the Father having physical custody during the week, with the Mother having the child three weekends per month.

Thereafter, the Honorable Daniel K. Tucker (Lee Ann Stogner’s fifth attorney) filed an Answer to the Complaint for Modification. On July 13, 2007. The Chancery Court entered a Temporary Order allowing for summer visitation of both parties changing the pick-up and delivery point to be McDonalds, Alcorn County, Mississippi.

On August 23, 2007, the parties entered into an Agreed Order of Modification with all the parties being granted the joint legal custody of the minor child and

awarding Nicholas Joe Willis physical custody of said child during the school year and Lee Ann Stogner the physical custody during the summer months.

On December 3, 2007, Lee Ann Stogner (Williams) filed a Complaint for Modification and Contempt, by and through her attorney of record, namely James D. Moore (her sixth attorney) A hearing was set for February 4, 2008. There was testimony at a later hearing that Nicholas Joe Willis had been told by Lee Ann Stogner (Williams) that the matter had been settled and that he did not have to be present in Court on February 15, 2008. On February 15, 2008, without Nicholas Joe Willis being present, the Chancery Court found Nicholas Joe Willis to be in contempt of this Court for failing to keep Lee Ann Stogner (Williams) fully notified of medical appointments, awarding her one additional weekend per month and setting this matter for review for June 11, 2008.

Thereafter, on May 22, 2008, Lee Ann Williams filed a Complaint for Contempt and Modification, alleging that there had been a material change of circumstances and seeking primary custody of the minor child of the parties. The honorable Joey Cobb was re-appointed as guardian ad litem for minor child for this hearing. The hearing was held in this matter on May 27, 2009. The Chancery Court entered an order on May 27, 2009 finding that there had been no proof of a material change of circumstances that had occurred that had adversely affected the minor child since the last order of this Court and denying that Lee Ann Stogner (Williams) should be granted the primary custody of said child. The Court awarded certain visitation rights

with said child and found that Nicholas Joe Willis had failed to timely pay attorney fees to James Moore for the previous hearing.

Lee Ann Stogner (Williams), by and through her attorney, James D. Moore filed her Notice of Appeal on June 12, 2009.

SUMMARY OF THE ARGUMENT

This Court should reaffirm the Opinion and Final Order rendered by the Chancery Court of Alcorn County, Mississippi on the May 27, 2009.

THE ARGUMENT

This Court may disturb a Chancery Court's decision **ONLY** if the Chancellor's findings were not supported by substantial evidence and were manifestly or clearly erroneous or the Chancellor implied an incorrect legal standard. This Court must review the facts underlying a divorce decree most favorable to the Appellee.

It is well settled that a Chancellor's findings of fact that are supported by substantial evidence will remain undisturbed on appeal "unless the Chancellor abused his discretion, was not manifestly wrong, clearly erroneous or an erroneous legal standard was applied". *Sanderson v. Sanderson* 824 So. 2d 623, 625-26 (¶.8)(Miss.2002) (quoting *Kilpatrick v. Kilpatrick*, 732 So. 2d 876, 880, 13) (Miss. 1999)

Moorman v. Moorman 2008-CA-0172-COA (November 10, 2009) stated that "in order to reverse a Chancellor's findings, the Chancellor must be manifestly wrong, clearly erroneous, or have applied an erroneous legal standard.

Parker v. South 913 So. 2d 339 (Miss. App. 2005) states:

The standard of review in child custody cases is narrow. Reversal of a chancellor's judgment requires that the chancellor be manifestly wrong or have "applied an erroneous legal standard." *Lee v. Lee*, 798 So. 2d 1284, 1288 (Miss.2001) (citing *Williams v. Williams*, 656 So. 2d 325, 330 (Miss.1995)). An appellate court is to affirm findings of fact by chancellors in domestic cases when they are "supported by substantial evidence unless the chancellor abused [her] discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied." *Holloman v. Holloman*, 691 So. 2d 897, 898 (Miss.1996). It is the role of the chancellor to ascertain whether witnesses and evidence are credible

and the weight to give each. *Chamblee v. Chamblee*, 637 So. 2d 850, 860 (Miss. 1994)

This Court found on January 5, 2010 in *T.K. Appellant v. H.K. Appellee* No.

2008-CA-01969-COA as follows:

This Court is bound by limited standard of review regarding a Chancellor's decisions regarding child custody determinations. *Johnson v. Gray* 859 So. 2d 1006, 1012 (¶. 31) (Miss. 2003). Pursuant to that limited standard of review, we will not reverse a Chancellor's factual determination unless it was manifestly wrong or clearly erroneous. *Id.* Stated differently, we will not disturb the Chancellor's findings of fact if those findings are supported by substantial, credible evidence. *Id.* (citing *Marascalco v. Marascalco*, 445 So. 2d 1380, 1382) (Miss. 1984) However, we will reverse the chancellor's judgment if we find that the chancellor applied an erroneous legal standard.

"In a bench trial, the trial judge has sole authority to determine the ability of the witness." *Bell v. Parker*, 563 So. 2d 594

Porter v. Porter 2006-CT-01592-SCT (Dec. 3, 2009) says as follows:

Mississippi Code Section 93-5-24(6) provides that "[a]ny order for joint custody may be modified or terminated upon the petition of both parents or upon the petition of one (1) parent showing that a material change in circumstances has occurred." Miss. Code Ann. § 93-5-24(6) (Rev. 2004). However, in joint custody cases, this Court has stated that "[i]n order to modify child custody, it must be proven that a material change of circumstances has occurred that adversely affects the welfare of the child..." *Lackey*, 755 So. 2d at 1088. See also *Elliott v. Elliott*, 877 So.2d 450, 454 (Miss.Ct. App. 2004); *Rinehart v. Barnes*, 819 So. 2d 564, 566 (Miss. Ct. App. 2002). Any suggested conflict between the statute, which is silent as to requiring adverse effect on the welfare of the child, and the caselaw is, in practice, not a conflict. The statute addresses the content of the petition, while the caselaw addresses the requisite proof for modification.

Parker v. Parker 913 So. 2d 339 (Miss. App. 2005) *Teresa L. Parker v. Timothy*

South 2004-CA-0035-42-COA April 12, 2005 states as follows:

(¶10)The decision whether to grant a modification of child custody has been said involve a two step analysis. The Robison case frames that analysis as follows, "In

proceedings to modify custody, ‘the prerequisites [are] (1) proving a material change in circumstances which adversely affects the welfare of the child and (2) finding that the best interest of the child requires the change of custody.’ ” *Robison*, 841 So. 2d at 1124 (¶. 16) (quoting *Brocato v. Brocato*, 731 So. 2d 1138, 1141, (¶. 9)(Miss. 1999)). Yet, other decisions have split the first step of the analysis into two steps, thus making the decision whether to grant a modification to involve a three step analysis. An example of this is the case of *Mabus v. Mabus*, 847 So.2d 815 (Miss.2003). There the court declared, “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.” *Id.* At 818, (¶. 8) (citing *Bubac v. Boston*, 600 So. 2d 951, 955 (Miss.1992)). The three step analysis may be somewhat neater analytically, but the elements are ultimately the same, whether they are analyzed as two or three separate elements. In this opinion, we will use the three step analysis and, thus, employ our limited standard of review to determine if the chancellor committed manifest error in finding (1) that there was a material change in circumstances, (2) that this change adversely affected the child, and (3) that a modification was in the best interests of the child.

Martar v. Martar 914 So. 2d 743 (Miss. 205) (2004-CA-00472-COA) states “when considering a modification of child custody, the proper approach is to properly identify the specific change in circumstances, and then analyze and apply the Albright factors in light of that change.

The Supreme Court of Mississippi has rightly said on numerous occasions that the trial court is in a far better position to analyze the witnesses and determine the credibility of each witness. In this matter, after many witnesses testified, this Court found that there was no proof that a material change of circumstances had occurred and therefore failed to modify the prior order of the Court and grant Lee Ann Stogner (Williams) the primary physical custody of the minor child.

The only real allegation of abuse made by the Appellant was concerning certain marks on the minor child that had allegedly been caused by the step-mother, namely Cheryl Willis. The Court found that Appellant was unable to give any specifics other than they were “fingernail marks”. The guardian ad litem, the Honorable Joey Cobb, told the Court:

“I do not believe there has been a material change of circumstances.... and as you know I am a proponent of parents getting as much visitation as they can with their children, however - - Ms. Williams came in and we talked at some great length and I talked to Cheyenne about the injury to her arm that she complained of, and there was an injury and she told me how it happened. But as much as neither did the pleadings here rise to allege abuse or anything that was even tantamount to neglect, I did not find that one lone and single incident amounted to abuse or neglect or tantamount to neglect, so I find no abuse or neglect....But from February to whenever it was until now, I see some changes, ever so slight, in her grades from where she was, like in the first grade, ok. But the changes that are complained of here happened within the last year, and by her own testimony, this happened in the last year. If anything, this is when she spent more time with her as opposed to less time with her. So I do not think that there is anything here that is a material change....and I surely don't see anything at this point that is a detriment to this child.”

After Chancellor Jacqueline Mask heard from all parties, she ruled that the Appellee's Rule 41 Motion should be sustained, finding that there had been no proof of a material change of circumstance that adversely affected the child.

Therefore, the Alcorn County Chancery Court decision in this matter should be sustained.

CONCLUSION

In conclusion, Appellee contends that the trial court, namely Chancery Court of Alcorn County, Mississippi, decided correctly that the Appellee had failed to meet her burden of proof that a material change of circumstances had occurred since last Order in this matter that adversely affected the child.

CERTIFICATE OF SERVICE

I, Rebecca Coleman Phipps, attorney for the Appellee in the above styled and numbered cause, do hereby certify that I have this day mailed a true and correct copy of Brief of Appellee to all counsel of record and the Trial Court Judge by placing said copy in the United States Mail, postage-prepaid, addressed as follows:

Hon. James D. Moore
Attorney for Appellant
PO Box 911
Tupelo, MS 38802

Hon. Joey Cobb
Attorney at Law
PO Box 773
Iuka, MS 38852

Hon. Jacqueline Estes Mask
Chancellor
PO Box 7395
Tupelo, MS 38802-7395

This the 13th day of January, 2010.


REBECCA COLEMAN PHIPPS
ATTORNEY FOR THE APPELLEE

CERTIFICATE OF FILING

I, Rebecca Coleman Phipps, attorney for the Appellee in the above-styled and numbered cause, do hereby certify, pursuant to Miss. R. App. P. 25(a), that I have this day filed the Brief of Appellee by mailing the original of said document and three (3) copies thereof via United States Mail, to the following:

Ms. Betty W. Sephton
Supreme Court Clerk
PO Box 249
Jackson, MS 39295-0248

This the 13th day of JANUARY, 2010.


REBECCA COLEMAN PHIPPS