

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

No. 2009-CA-01082

TRACY GRAVES

APPELLANT

v.

MICHAEL HADEN

APPELLEE

**APPEAL FROM THE CHANCERY COURT OF
LAMAR COUNTY, MISSISSIPPI**

BRIEF OF APPELLEE

ORAL ARGUMENT NOT REQUESTED

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v.

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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.

1. Judge James H.C. Thomas, Jr.
Chancellor for the 10th District including Lamar County
2. Tracy Graves (Appellant)
3. Michael Haden (Appellee)
4. Michael Adelman, Attorney for the Appellant
5. Sheila H. Smallwood, Attorney for Appellee


SHEILA H. SMALLWOOD

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RESTATEMENT OF ISSUES

- I. WHETHER THE CHANCELLOR ERRED IN FINDING A SUBSTANTIAL CHANGE IN CIRCUMSTANCES WARRANTING A CUSTODY MODIFICATION.
- II. WHETHER CHANCELLOR ERRED IN THE APPLICATION OF THE *ALBRIGHT* FACTORS.
- III. WHETHER THE ISSUES SET FORTH IN TRACY GRAVES BRIEF ARE PROPERLY BEFORE THE COURT BASED ON THE NOTICE OF APPEAL.

RESTATEMENT OF THE CASE

Tracy Graves [hereinafter "Tracy"] and Michael Haden [hereinafter "Michael"], were never married but established a relationship which produced a child, Kayden Haden, born May 18, 2005. On May 16, 2006, an Order for Paternity, Affiliation, Custody and Support and Name Change on Birth Certificate adjudicated Michael the father, set specific visitation and awarded Tracy a monthly child support award in the amount of \$400.00 per month (R. at 24). On February 19, 2008, an Agreed Order was entered granting the parties joint legal custody and additional visitation for Michael (R. at 33). On October 13, 2008, Michael filed his Complaint for Contempt, Modification and Other Relief seeking a finding of contempt for failure to allow visitation and seeking physical custody of Kayden. (R. at 40). Tracy filed her Answer on November 10, 2009. (R. at 46). A Temporary Order was entered on November 17, 2008, which expanded his visitation to one full week per month based on Tracy's move to Texas. That a trial on merits took place on March 11, 2009 in Lamar County. A transcript of the proceedings has been made a part of the record herein.

At the conclusion of the testimony, the Chancellor requested the parties to submit letter briefs setting forth any authority that balanced the stability of the home environment versus the psychological effect that a custody change would have on Kayden (Tr. at 159 - 161). That after the submission of the letter briefs by both counsel, the Court issued its Judgment granting Michael custody of his son, Kayden (R. at 60). Aggrieved by the decision, Tracy filed her Motion for a New Trial, to Alter and Amend Judgment and for Reconsideration (R. at 67). Tracy also filed a Motion for Stay of the Proceedings pursuant to Rule 8 of the Mississippi Rules of Appellate Procedure (R. at 71). The trial court heard both motions on June 25, 2009 which he denied (Trans. at 161 - 171). The Order entered on July 1, 2009, set forth the denial and also

required Tracy to pay the sum of \$175.00 per month in child support and clarified the visitation schedule (R. at 79). The next day, Tracy filed her Notice of Appeal (R. at 84) seeking appellate review of the Order entered on July 1, 2009.

SUMMARY OF ARGUMENT

The testimony and documentary evidence presented at the trial met the legal standard for a modification of physical custody from Tracy to Michael. The Chancellor correctly applied the law to the facts in this case and found that a change of circumstances had occurred which warranted a modification of custody. The issues on appeal are limited to the findings set forth in the trial Court's Order entered on July 1, 2009 as indicated in the Notice of Appeal filed on July 2, 2009.

ARGUMENT

The standard of review for child custody cases is very limited. *Johnson v. Gray*, 859 So.2d 1006, 1012 (Miss. 2003). An appellate court "will not disturb the findings of a chancellor unless the chancellor was manifestly wrong, clearly erroneous or an erroneous legal standard was applied". *Webster v. Webster*, 2008-CA-00518-COA, ¶6 (August 25, 2009) citing *Fancher v. Pell*, 831 So.2d 1137, 1140 (Miss. 2002). The appellate court is limited to searching for an abuse of discretion, otherwise, its duty is to affirm the chancellor. *Carter v. Carter*, 735 So.2d 1109, 1114 (Miss. Ct. App. 1999). Any resolution of factual disputes is always a matter entrusted to the sound discretion of the chancellor. *Murphy v. Murphy*, 631 So.2d 812, 815 (Miss. 1994). Because of his presence in the courtroom, the chancellor is best equipped to listen to the witnesses, observe their demeanor, and determine their credibility. *Murphy*, 631 So. 2d at 815.

I. WHETHER THE CHANCELLOR ERRED IN FINDING A SUBSTANTIAL CHANGE IN CIRCUMSTANCES WARRANTED A CUSTODY MODIFICATION.

The appellate courts have established a traditional three part test to determine whether modification of custody is appropriate. A non-custodial party must prove [1] that there has been

a material and substantial change in circumstances affecting the child; [2] that the change adversely affects the child's welfare and [3] that a change in custody is in the child's best interest. *Minter v. Minter*, ¶26 2008-CA-01114-COA citing *Johnson v. Gray*, 859 So.2d 1006, 1013 (Miss. 2003).

The first prong of the traditional test is whether there has been:

[1] *Material and Substantial Change in Circumstances Affecting the Child in the Custodial Home*

Whether a material change has occurred depends on the totality of circumstances. *Wright v. Stanley*, 700 So.2d 274, 280 (Miss. 1997). Events which would not, alone, be a sufficient material change may in combination provide a basis for modifying custody. *Duke v. Elmore*, 956 So.2d 244 (Miss. Ct. App. 2006). Additionally, Tracy argues that the Chancellor should have only considered those events that occurred since the February 19, 2008, Agreed Order (R. at 33) was entered when making its determination of whether or not there was a material change in circumstances. This is an incorrect application of the law. All events that have occurred since the issuance of the *decree sought to be modified* may be considered by the chancellor. *Savell v. Morrison*, 929 So.2d 414, 417 (Miss. Ct. App. 2006). Therefore, the relevant time for review in this case is the period from the entry of the Order for Paternity, Affiliation, Custody and Support and Name Change on Birth Certificate filed on May 16, 2006 through the trial in the matter, March 11, 2009. Evidence presented favorable to Tracy and proffered in the June 25, 2009, Motion hearing cannot be considered for the purposes of appellate review.

[a] *Residential Changes Since Initial Custody Order*

The testimony at trial reflected that Tracy has moved at least five times since the initial custody order was entered in May of 2006. Trial Exhibit 12 reflects that Tracy signed a lease

agreement on April 1, 2006 for a residence located at 107B Crestwood Cove in Clinton, Mississippi (Tr. at 5 -19) where she resided until January of 2007. Tracy and the children then moved to Yazoo City, Mississippi (Tr. at 9). She testified that her mailing address was 1314 Holloman Road in Bentonia, Mississippi as reflected on Kayden's Immunization Record entered as Trial Exhibit 10 (Tr. 10). Tracy filed her 2007 Tax Return claiming her home address to be 5735 Hwy 34 in Eros, Louisiana (Trial Exhibit 9). Her testimony, however, indicated that she did not actually live there (Tr. At 11). Then in August of 2008, Tracy moved the children to 1404 E. 27th Avenue in Bryan, Texas where she lived with her sister, her sister's ex-husband, their three children and Tracy's boyfriend, Ryan Hanten (Tr. at 12). The Texas residence was approximately seven hours from Michael's home in Purvis which adversely affected his ability to exercise his visitation with Kayden (Tr. at 55). Tracy and her husband, Derek Graves, signed a Joint Bill for Divorce on January 14, 2009, and indicated in that pleading that she lived at 1670 Alana Drive in Terry, Mississippi (Trial Exhibit 3). Tracy testified that she and the children (including Kayden) resided there with her aunt (Tr. at 23). At some point thereafter, Tracy moved again with the children to an apartment in Canton, Mississippi. Her testimony indicated that she took over the lease for her sister's boyfriend. (Tr. at 18). This was her residence at the time of the trial.

[b] Moral Change in Circumstances

At the time of the trial, Tracy was still married to Derek Graves and they had a child together prior to their separation, Paige Graves (Trial Exhibits 3, 6). Tracy has had two other children while still married to Derek. Kayden, the child at issue, and Ethan Graves whose father was Uriel Castilla (Tr. at 24- 25, 28). Mr. Castilla was murdered while he and Tracy were together at a restaurant (Tr. 29). Tracy acknowledged her current relationship with her boyfriend,

Ryan Hanten, with whom she lived and shared a bed with in Bryan, Texas in the presence of her children (Tr. 28).

[c] Financial Change in Circumstances - At the time of the trial, Tracy was unemployed and had not worked the entire year of 2009 (Tr. at 21). According to Tracy's financial disclosure, her income consisted only of disability income for her daughter and child support from Kayden's father which total \$1,070.00 per month (Tr. Ex. #4). Her financial disclosure reflects expenses of \$2,600.00 per month. Based on her testimony, Tracy and Ryan have an account together and he assists her in paying her monthly expenses (Tr. at 19). Without her boyfriend's assistance, and help from other family, she cannot financially support herself nor her children. Her ability to obtain gainful employment is limited based on her tenth grade education, lack of GED, and no work experience.

Based on the totality of the circumstances approach set forth in *Wright*, there has been a substantial change in circumstances in custodial home satisfying the first prong of the modification standard.

The second prong of the traditional test is whether:

[2] *The Change Adversely Affects the Child's Welfare*

Custody may be modified when there is a combination of adverse circumstances. Bell on Mississippi Family Law §5.11 (5)(a)(2005). Events which would not, alone, be a sufficient material change may in combination provide a basis for modifying custody. *Duke v. Elmore*, 956 So.2d 244 (Miss. Ct. App. 2006). Our supreme court has indicated that in limited circumstances, adverse effects exist if it is shown that it is reasonably foreseeable that the child will suffer adverse effects because the child's present custodial environment is clearly detrimental. *Savell*, 929 So.2d at 418. Further, the Court in *Fletcher v. Shaw*, 800 So.2d 1212 (Miss. Ct. App.

2001), modified an original custody order and transferred physical custody to the father based on the mother's sporadic employment, lack of a stable home environment along with other factors. In *Powell v. Powell*, 976 So.2d 358 (Miss. Ct. App. 2008), the Court reversed the finding of the chancellor when he failed to consider the "nomadic relocation and sporadic employment" of the custodial parent. The appellate court in *Minter v. Minter*, ¶39, 2008-CA-01114-COA (October 13, 2009) affirmed the chancellor's modification of custody to the father when the mother moved to five different residences and had been "constantly living with and utilizing the assistance of relatives". The court held that while the case did not show the severe adverse material changes in circumstances found in some child custody modification cases, that the chancellor's determinations were proper. *Minter v. Minter* at ¶36 (2009). Although Kayden appears to remain unscarred by his surroundings, this in itself does not preclude the chancellor from placing Kayden in a healthier environment. *Riley v. Doerner*, 677 So.2d, 740, 744 (Miss. 1996); *Duke v. Elmore*, 956 So.2d at 250. Kayden deserves a stable home and should not be punished for his resilience. As such, based on the combination of the above factors and the foreseeable adversity in the home of the mother, the Chancellor's determinations were proper and not an abuse of discretion.

Should the Court find that the traditional test of modification is inapplicable, the appellate court should apply the alternate *Riley* test to the facts herein. The while not abandoning the material change in circumstances standard, "when the environment provided by the custodial parent is found to be adverse to the child's best interest, *and* that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent", custody may be modified. *Minter v. Minter* at ¶27 citing *Duran v. Weaver*, 495 So.2d 1355, 1357 (Miss. 1986). Clearly based on the testimony and

the chancellor's findings, Michael can provide a more stable and healthier environment for Kayden than his mother. Michael married his wife, Jennifer, in March of 2006 (Tr. At 59) and they have two children who are younger than Kayden. Michael has been employed by Boatright Company for eleven years (Tr. At 58) and his financial disclosure reflects sufficient income to take care of his family, including Kayden. (Trial Exhibit 5). Michael has lived in Lamar County for the past five years. (Tr. At 60). As such, Michael has a more stable environment in which to raise Kayden.

[3] *Whether a Change in Custody is in Kayden's best interest*

After finding a material change in circumstances, the lower court must analyze the factors found in *Albright v. Albright*, 437 So.2d 1003, 1005 (Miss. 1983) to determine whether a change in custody is in the child's best interest. See argument below.

II. WHETHER CHANCELLOR ERRED IN THE APPLICATION OF THE *ALBRIGHT* FACTORS.

That at the conclusion of the testimony, the Court withheld a finding of a material change in circumstances but made a preliminary *Albright* analysis. The Chancellor deemed neutral all of the factors except the continuity of care which favored Tracy, and the employment responsibilities and the stability of the home environment which favored Michael (Tr. at 152-159). The Chancellor also found that the factor of moral fitness slightly favor the father. Tracy argues that the continuity of care should be weighed heavier than the other factors on which Michael prevailed. However, the appellate courts have vested custody in parents who were not the primary caregiver when they prevailed on other factors. In *Price v. McBeath*, 989 So.2d 444, 453-59 (Miss. Ct. App. 2008) the appellate court found that although the mother was favored on continuity of care, the child's age and sex, moral fitness, home record, stability of home and

employment and parenting skills, favored the father and awarded him custody. In addition, the appellate court in *Jordan v. Jordan*, 963 So.2d 1235, 1241 (Miss. Ct. App. 2007) affirmed custody to the father with better parenting skills and a more stable home environment over the mother who provided the primary care.

The Court addressed Tracy's moral fitness finding that:

Ms. Graves is married and she's had two children since she separated from her husband, and that doesn't bode well. It's not the example that you set for a child. The way you do that is to get out of the marriage and get a divorce and then get into another one if you want to, but if you're going to live your life going from man to man to man, your creating children that are confused, and if that's the example they set, heaven help our society in the future if it goes that way and we don't look at the family as a basis of what gives us the stability in our social life....if you take the steps to correct those problems, like marry somebody you are living with then you cure the problem, and that's been done on the part of the plaintiff in the matter. (Tr. at 157)

The Court in *Bradley v. Jones*, 949 So.2d 802, 805 (Miss. Ct. App. 2006) found that the appellate court did not err considering a mother's moral fitness a strong factor in awarding custody to the father when the proof revealed that she had followed her boyfriend to live in another state. A single factor may weigh so heavily that custody should be granted on that basis; however, in that case, the Chancellor found that other factors, such as lack of employment, weighed against the mother. *Bradley v. Jones*, at 805. The Chancellor, in the present case, incorporated another relevant factor finding that Kayden's best interest turns on the maturity of his parents as they nurture him (R. at 63). Since the Chancellor found that Tracy's touch with reality was lacking at best and her decisions were based on the short term, this additional factor favored Michael as well. Therefore, based on the application of the *Albright* factors, the maturity of parents, and the applicable case law, the Chancellor correctly found that a modification of custody was in Kayden's best interest.

III. WHETHER THE ISSUES SET FORTH IN TRACY GRAVES ARE PROPERLY BEFORE THE COURT BASED ON THE NOTICE OF APPEAL.


Rule 3 (c) of the Mississippi Rules of Appellate Procedure requires that the notice of appeal specify the party against whom the appeal is taken and designate “as a whole or in part the judgment or order appealed from”. The Notice of Appeal (R. at 84) filed by Tracy on July 2, 2009, seeks an appeal from the Order Denying Motion for a New Trial, to Alter and Amend Judgment and for Reconsideration dated July 1, 2009. That Judgment denied Tracy’s post trial motions, awarded child support and clarified visitation. As such, the only issue that is properly before the Court is the whether the Chancellor should have denied the Motion for Stay and the Motion for a New Trial, to Alter and Amend Judgment and for Reconsideration (R. at 67, 71). No other issue can be considered since they are outside the scope of review by the appellate court. This Court has previously found that issues not contained in the judgment designated for review in the notice of appeal were not properly before the court and refused to hear them on appeal. *Conservator of Elridge v. Sparkman*, 813 So.2d 753, 755 (Miss. Ct. App. 2001). The only issue, therefore, is the denial of Tracy’s post trial motions. The Chancellor properly denied the Motion for Stay pursuant to Rule 8 of the Mississippi Rules of Appellate Procedure. A stay is not appropriate based on the fact that the subject matter of the case is custody of a minor child, not a money judgment as required by the rule. The denial of both motions were proper.

CONCLUSION

The lower court considered all of the sworn testimony and documentary evidence found that based on the “totality of circumstances” a material change in circumstances had occurred in the custodial parent’s home caused a foreseeable adverse effect on Kayden and that a modification in physical custody was in his best interest, as determined by application of the

Albright factors. This child is entitled to “the stabilizing influence of knowing where home is” *Bowden v. Fayard*, 355 So.2d 662, 664 (Miss. 1978). Kayden will begin school in the fall of 2010 and needs to be in a secure, permanent and stable environment that only his father has demonstrated that he can provide. The case of *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996) indicated it best by holding that “a child’s resilience and ability to cope with difficult circumstances should not service to shackle the child to an unhealthy home, especially when a healthier home beckons”. Based on the trial testimony, the exhibits presented and the foregoing analysis and authority, the Chancellor did not commit manifest error and properly granted Michael custody of Kayden.

RESPECTFULLY SUBMITTED,



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CERTIFICATION OF SERVICE

I, Sheila H. Smallwood, counsel for Michael Haden, hereby certify that I served a copy of the foregoing Brief of Appellee on all parties to this matter by United States Mail, postage prepaid to the following on the date listed below:

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This the 19th day of January, 2010.



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