IN THE

Supreme Court of Mississippi

NO. 2009-CA-01082

ORAL ARGUMENT NOT REQUESTED

MICHAEL HADEN, *Appellee*

VERSUS

TRACY GRAVES, *Appellant*

On Appeal from the Chancery Court
Lamar County, Mississippi

REPLY BRIEF

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IN THE SUPREME COURT OF MISSISSIPPI

MICHAEL HADEN	**PLAINTIFF**
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TRACY GRAVES	**DEFENDANT**

REPLY BRIEF

Appellant submits this Reply Brief in response to several arguments raised by the Brief of Appellee filed in this appeal. Appellant will not repeat arguments originally set forth in her opening brief, but certainly does not waive those arguments.

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

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

In *Mabus v. Mabus,* 847 So. 2d 815 (Miss. 2003), the Supreme Court made clear that in modification proceedings the Movant most show a substantial change in circumstances has transpired since issuance of the custody decree sought to be modified. Appellee does not appear to challenge this concept but makes the astounding statement that the decree sought to be modified in this case was the Order for Paternity Affiliation, Custody and Support and Name Change on Birth Certificate filed on May 16, 2006, claiming that the court should therefore

consider evidence since May 16, 2006. However, the Complaint for Citation of Contempt, Modification and Other Relief filed on October 13, 2008 by Mr. Haden (C.P. 40) contradicts Appellee's argument and clearly sets forth that Mr. Haden was seeking to amend not the Order of Paternity entered on May 17, 2006, but the Agreed Order entered on February 19, 2008. Paragraph VI of the Complaint filed on October 13, 2008 specifically provides a follows, to-wit:

> "There has been a substantial change in circumstances in the custodial home since the entry of the Agreed Order and the substantial change has had an adverse and detrimental effect on the welfare of the minor child and the necessity of custody modification is necessary to protect the best interest of the child." (C.P. 40) (Emphasis supplied.)

Pursuant to *Mabus* and pursuant to the allegations set forth in Appellee's Complaint, the court should have only considered those events that occurred since the Agreed Order of February 19, 2008 (C.P. 33).

The Chancellor himself acknowledged that the decree in question was the Agreed Order of the parties. In his Judgment the Chancellor specifically states as follows:

> "Following the Agreed Order of the parties as to custody, the legal test now must be a showing of material changed circumstances which have an adverse affect on the minor, justifying a change of custody in the child's best interest." (C.P. 62)(Emphasis supplied.)

It is simply disingenuous for Appellee to come before this Court and now claim that the decree sought to be modified was the Order for Paternity dated May 16, 2006.[1]

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[1]Appellee also contends that evidence proffered in the June 25, 2009 Motion hearing "cannot be considered for the purposes of appellate review." Whether this statement is ordinarily true or not, in this case the Chancellor opened the door by including in his Judgment as a finding speculation that "[s]hould the current pattern of Defendant's life continue she will have more children, by more men, and Kayden will be caught in that circle of life." The fact proffered at

[a] Residential Changes Since Initial Custody Order

First, and foremost, as noted in Appellant's opening Brief, the Chancellor fails in his Judgment to identify the "material changed circumstances" which have had an adverse affect on the minor child, "justifying a change of custody in the child's best interest." The Chancellor acknowledges that this allegation, i.e., Defendant's movement "from place to place (C.P. 61)" was one of the reasons for the requested change in custody. But the court never makes a finding as to what the court considers the required material change in circumstances which would have had an adverse affect on the minor child allowing for a change in custody.

Second, pursuant to *Mabus* and Plaintiff's own pleading, the court should not have considered any moves prior to the Agreed Order of February 19, 2008.

Third, and perhaps most importantly, the record is totally devoid of any evidence showing an adverse impact on the minor child of the parties occurring as a result of any residential move on the part of Appellant Tracy Graves.

[b] Moral Change in Circumstances

This argument on the part of Appellee is a pure "red herring" and a further attempt to go outside of the framework of *Mabus* and the long line of cases setting forth the requirements for a change in custody. None of the factors cited by Appellee regarding this issue changed between February 2008 and the trial in this matter. In February 2008, Tracy was still married to Derek Graves and had given birth to her child, Paige Graves. She was the mother of three (3) children

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the Motion hearing, i.e., that since the trial Ms. Graves has had her "tubes tied" (T. 163) factually rebuts the Chancellor's finding that "she will have more children, by more men." (C.P. 63)

in February 2008. In fact, she was married to Derek Graves and the mother of three children back on May 16, 2006 when the Order for Paternity was entered, the date which Appellee claims to be the relevant starting date regarding evidence in this case.

Mr. Haden's claim of moral superiority is highly debatable, given the fact that he did not hesitate to commit adultery with Ms. Graves and father Kayden.

Again, perhaps most importantly, there is no evidence whatsoever in this record to show that any act on the part of Tracy Graves or any specific event has had an adverse impact on the minor child.

[c] Financial Change in Circumstances.

Appellee's argument regarding an alleged financial change in circumstances should be rejected for two (2) basic reasons.

First, the record has no evidence whatsoever to show that there has been a change in Appellant's financial circumstances.

Second, Appellee's argument is contrary to the specific mandate in *Albright v. Albright,* 437 So. 2d 1003 (Miss. 1983) in which the Supreme Court specifically stated as follows:

> "Relative financial situations is not controlling since the duty to support is independent of the right to custody." (1005)

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

The Court's decision in *Duke v. Elmore,* 946 So. 2d 244 (Miss. Ct. App. 2006), cited by Appellee in his Brief, does not support a change of custody in this case. In *Duke v. Elmore,* the Chancellor made a specific finding that the "totality of the circumstances...does affect the child's welfare." (956 So. 2d at 249). Here, the record does not support any finding of an adverse affect

or impact on the minor child. Likewise, without a showing or finding of adverse impact, the analysis set forth by the Mississippi Supreme Court in *Riley v. Doerner,* 677 So. 2d 740 (Miss. 1996) has no application in the present circumstances.

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

As set forth in Appellant's opening Brief, the lower court should not have even considered the *Albright* factors in making its decision in this case. The *Albright* factors only become a consideration if the Petitioner is able to meet the basic requirements of *Mabus* or alternatively, *Riley v. Doerner.*

However, as noted Appellant's opening Brief, even assuming *per arguendo,* that the court was correct in applying *Albright,* the court failed to correctly resolve the two (2) *Albright* factors he deemed to be in conflict, namely a conflict between the continuing care of the child which is favorable to Tracy and the stability of the home environment and employment which appears favorable to Mr. Haden.

Those cases cited by Appellee with reference to this issue do not withstand analysis.

In *Price v. McBeath,* 989 So. 2d 444, 453-59 (Miss. Ct. App. 2008), the court found four (4) factors favored the father, to whom custody was ultimately awarded, whereas only one (1) factor favored the mother. Likewise, in *Jordan v. Jordan,* 963 So. 2d 1235, 1241 (Miss. Ct. App. 2007) the court found two (2) factors to favor the father to whom custody was ultimately awarded, while only one (1) factor favored the mother. Here, the two (2) factors in question are even and should balance one another out. Thus, even under *Albright*, there is no basis for a change in custody. Further in order to reach his decision in this case, the Chancellor had to give

undue weight to the alleged improvement in Mr. Haden's circumstances. See *Mercier v. Mercier,* 11 So. 3d 1283 (Miss. App. Ct. 2009); *McCracking v. McCracking,* 776 So. 2d 691 (Miss. App. Ct. 2000).

Finally and perhaps most importantly, the Chancellor admittedly went outside the *Albright* factors in reaching his decision in this case (C.P. 63).

The final case cited by Appellee regarding this issue, *Bradley v. Jones,* 949 So. 2d 802, 805 (Miss. Ct. App. 2006) is also not applicable. In *Bradley v. Jones,* the court found that a single factor may weigh so heavily that custody should be granted on that basis. However, as Appellee notes in his Brief, the "Chancellor also found that the factor of moral fitness slightly favor [sic] the father." Emphasis supplied, Brief of Appellee, page 9.

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

Appellee appears to argue that Appellant's Notices of Appeal somehow does not address the issues discussed in her Brief.

Since Appellant filed a post-trial Motion, her appeal runs from the Order denying that Motion as opposed to the original Judgment. See Rule 4, Mississippi Rules of Appellate Procedure. Further, in her Motion for a New Trial to Alter and Amend Judgment and for Reconsideration dated July 1, 2009 (C.P. 67-70), Appellee raised all of the issues discussed in her opening Brief.

In her Motion for a New Trial, Appellant asked the Chancellor to reverse the Judgment and allow Tracy Graves to retain primary physical custody of the parties' minor child. In her motion, Appellant specifically argued that Mr. Haden had completely failed to show that there

was a material change in circumstances between February 19, 2008, the date on which the parties entered into their Agreed Order, and October, 2008 when the Plaintiff filed his petition to change custody. In her motion, Appellant specifically argued that the court had gone outside the factors set forth in *Albright v. Albright, supra.* In her post-trial motion, Appellant specifically argued that the decision in *Riley v. Doerner, supra,* was not applicable and that there had been no showing of an adverse impact on the minor child. In her post-trial motion, Appellant specifically argued that most of the *Albright* factors in this case are even and that the two (2) in dispute balance one another out.

Appellant submits that Appellee's argument regarding this issue is totally without merit. In the case cited by Appellee in support of his position, *Conservator of Eldridge v. Sparkman,* 813 So. 753 (Miss. Ct. App. 2001), the court found that based on appellant's Statement of Facts and the fact that there was ongoing litigation regarding other issues, the court would limit its review to one (1) issue, i.e., whether a conservatorship should have been established for Mrs. Eldridge. *Eldridge* involved an interlocutory appeal. In the present case, there is a logical progression from the lower court's original Judgment to Appellee's Motion for a New Trial, to Alter and Amend Judgment and for Reconsideration to the lower court's Order denying that Motion.

Appellee's argument regarding this issue was specifically rejected by the Mississippi Court of Appeals in *Alexander v. Greer,* 959 So. 2d 586 (Miss. Ct. App. 2007). In *Alexander v. Greer,* the court specifically discussed its earlier decision in *Conservator of Eldridge* and stated as follows:

"For support, Greer cites *Eldridge v. Sparkman,* 813 So. 2d 753

> (Miss. Ct. App. 2001). *Eldridge* was not a full trial on the merits. In fact, it involved an interlocutory appeal on the appointment of a conservator, while other motions were still pending. Id. At 755 (¶ 3). This case is much more akin to *Kiddy v. Lipscomb,* 628 So. 2d 1355 (Miss. 1993). The supreme court noted that 'it is clearly the better practice to include all potential assignments of error in a motion for a new trial. However, this approach is not always practical.' *Id.* at 1359. In light of that rationale, the supreme court went on to hold that 'when the assignment of error is based on an issue which has been decided by the trial court and duly recorded in the court reporter's transcript, such as the admission or omission of evidence, we may consider it regardless of whether it was raised in the motion for new trial'." (959 So. 2d at 589)(Emphasis supplied.)

The argument against Appellee's position on this issue is even stronger in this case, since all of the issues raised in Appellant's opening Brief were raised in her Motion for a New Trial.

CONCLUSION

For the reasons set forth in Appellant's original Brief and for the reasons set forth in the above and foregoing Reply Brief, the Judgment of the Chancellor should be reversed and custody should be restored to Tracy Graves with Michael Haden ordered to pay reasonable child support and allowed reasonable visitation.

RESPECTFULLY SUBMITTED, this 26TH day of JAN., A.D., 2010.

TRACY GRAVES

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CERTIFICATE OF SERVICE

I, Michael Adelman, counsel for Defendant/Appellant, Tracy Graves herein, do hereby certify that I have this day served by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Reply Brief to:

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