

**IN THE SUPREME COURT OF MISSISSIPPI**

**MICHAEL HADEN**

**PLAINTIFF**

**v.**

**NO.: 2009-CA-01082**

**TRACY GRAVES**

**DEFENDANT**

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**CERTIFICATE OF INTERESTED PERSONS**

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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 evaluate possible disqualification or recusal:

- |    |   |                            |
|----|---|----------------------------|
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**BRIEF OF APPELLANT**

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**STATEMENT OF THE ISSUES**

1. Whether the trial court erred in changing custody where there was no finding of a material change in circumstances adverse to the minor child or, alternatively, an environment adverse to the minor child's interest *and* a showing of improved circumstances on the part of the non-custodial parent.
2. Whether the trial court should have applied the *Albright* factors in this case and, if so, whether the Court erred in its analysis of the *Albright* factors.

**STATEMENT OF THE CASE**

- i. Proceedings.<sup>1</sup>

An Order for Paternity Affiliation, Custody and Support and Name Change on Birth Certificate was entered on May 17, 2006 (C.P. 26), finding that Tracy Graves and Michael

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<sup>1</sup>References are to the one volume Clerk's Papers (C.P. \_\_) and the one volume Transcript (T. \_\_).

Haden are the biological parents of Kayden Graves, born on May 18, 2005 (C.P.6; C.P. 24-26).

An Agreed Order modifying the May 16, 2006 Order, specifically concerning visitation and custody, was entered on February 15, 2008. Said Agreed Order grants joint legal custody with Tracy Graves to have primary physical custody of the minor child, Kayden Haden (C.P. 33). Said Agreed Order also provides a detailed visitation schedule for Michael Haden (C.P. 33-36).

Less than eight (8) months later, on October 13, 2008, Mr. Haden filed a Complaint for Citation of Contempt, Modification and Other Relief (C.P. 40). Tracy Graves filed a timely Answer to Complaint for Citation of Contempt, Modification and Other Relief on November 10, 2008 (C.P. 46-49). At the hearing in this cause, the only issue was modification, not contempt. (C.P. 79-82).

On June 8, 2009, the Chancellor entered his Judgment reversing the custody and visitation set forth in the Agreed Order entered on February, 2008 and thus granted paramount physical custody of said minor child to Michael Haden with Tracy Graves to have standard visitation (C.P. 60-64).

On June 10, 2009, Tracy Graves filed Motion for a New Trial to Alter and Amend Judgment and for Reconsideration (C.P. 67-70) as well as Motion to Stay Judgment (C.P. 71-73). In an Order dated July 1, 2009, the Chancellor denied both post-trial Motions, ordered Tracy Graves to pay the sum of One Hundred Seventy-Five Dollars (\$175.00) per month in child support beginning July 15, 2009 and set forth a specific visitation schedule for Tracy Graves (C.P. 79-82).

Tracy Graves filed a timely Notice of Appeal on July 2, 2009 (C.P. 84-85) and her appeal is presently pending before the Court.

ii. Facts.

At the time of the parties' Agreed Order in February, 2008, Tracy Graves resided in Yazoo City, Mississippi (T. 8-9). She subsequently moved to Bryan, Texas where she resided from approximately August, 2008 until January, 2009 (T. 13). She moved to Canton, Mississippi in January, 2009 where she presently resides and where she resided at the time of the hearing in this case (T. 13). She and Kayden live in the Links Apartments in a two-bedroom apartment (T116). Ms. Graves provided the court with numerous photographs of the apartment and the complex in which she and Kayden live (Exh.1-23, photographs). The Links is gated at night, provides a children's playground and a children's swimming pool (T. 116). Ms. Graves testified during the hearing that she has no intention of returning to Texas and has every intention of remaining in her apartment in Canton, Mississippi (T. 37).

Ms. Graves was married but separated at the time that she and Mr. Haden had a sexual relationship and at the time they conceived their child Kayden (T. 66-67). She remained married but separated at the time of the Agreed Order and at the time of the hearing in this case (T. 22-23). Neither Ms. Graves nor Mr. Haden are high school graduates and neither has obtained a GED (T. 19; 72). Ms. Graves was the mother of three (3) children at the time of the Agreed Order and at the time of the hearing in this cause (T. 8). Mr. Haden has had one (1) charge of DUI (T. 72). Ms. Graves has never been charged with DUI or any other crime (T. 32).

Over counsel's objection, Mr. Haden was allowed to testify regarding his income and

the alleged financial disparity between Mr. Haden and Ms. Graves (T. 57-59).

Tracy Graves and her son Kayden have a close loving relationship (T. 104; 117). From the time of the child's birth until he was approximately one year old, Mr. Haden had no role in the child's life (T. 44). From the time that the child was born, Ms. Graves was responsible for every aspect of his life, whether it was putting the child to bed at night, tending to his medical needs, toilet training or any other aspect of his life (T. 43-45; 46; 48; 70-71). Mr. Haden had no relationship with the child while the child was an infant and essentially did not begin to have a relationship with the child until he was a toddler (T. 70-71).

Tracy's aunt, Bama Price, and her mother Teresa McDaniel both testified that it was in the child's best interest that custody remain with Tracy (T. 120; 137-138).

Witness after witness testified regarding Kayden Haden's strong emotional health, his resilience, his excellent adjustment both physically and mentally, his ability to get along with other people and his "all boy" interest in life activities ( T. 41; 42-42; 48; 68-69; 94; 99; 117; 135).

### **SUMMARY OF ARGUMENT**

The decision of the Chancery Judge in this case flies in the face of well established decisions by both the Mississippi Supreme Court and Mississippi Court of Appeals regarding modifications of final judgments which result in a change of custody. The court in this case has granted a change in custody where there is no evidence of a material change in circumstances, let alone a material change in circumstances adverse to the child's best interest. The court has admittedly gone outside of the *Albright* factors and reached a decision based on pure speculation,



i.e., that because Ms. Graves has had three (3) children, she will continue to have numerous other children. In fact, the court has maintained this speculation despite the proffer at the hearing on Ms. Graves' Motion for New Trial, that shortly after the trial in this case she had her "tubes tied." (T. 163)

The court's conclusion that Mr. Haden can provide a more "stable" environment is no less speculative than his decision that Ms. Graves will continue to have additional children. There is no evidence whatsoever that Ms. Graves has not provided for Kayden's needs, whether those needs are financial, emotional or otherwise. Neither Ms. Graves nor Mr. Haden is a high school graduate and neither has passed a GED test. In alluding to Mr. Haden's "nice home", the court has obviously taken into consideration the alleged financial disparity between Mr. Haden and Ms. Graves. The fact of the matter is that based on the record in this case, Mr. Haden's home is no nicer than Ms. Graves'.

The court has virtually ignored the fact that Mr. Haden's character is such that he was willing to take advantage of Ms. Graves and have a sexual relationship with Ms. Graves while she remained married but separated. The court has virtually ignored the fact that Mr. Haden, not Ms. Graves, has a history of being charged with a DUI. The court has virtually ignored the fact that during the child's formative infant years, Mr. Haden was nowhere to be found. He did not establish a relationship with the child until the child was at least one year of age.

The decision in this case punishes Ms. Graves because she has not lived a life of which the court approves. But, between the Agreed Order in February, 2008 and the time at which Mr. Haden filed his Petition for a Change of Custody, in October, 2008, nothing had changed. She

was married but separated in February, 2008.<sup>2</sup> She was the mother of three (3) children in February, 2008. She took care of the daily needs of Kayden in February, 2008 and she took care of the daily needs of Kayden in October, 2008. Every witness in this case, although some begrudgingly, described Kayden as well-adjusted, emotionally and physically, “all boy,” and a spectacularly healthy child. In addition to speculation regarding the fact that Ms. Graves will have additional children, now a physical impossibility, the court also speculated that Kayden’s well-adjusted personality, good maturation, good physical and emotional health, would deteriorate if he were allowed to stay with Ms. Graves in her apartment at the Links in Canton, Mississippi.

All of these conclusions, regarding the fact that Ms. Graves would have additional children, regarding the fact that Mr. Haden could provide a more stable home, regarding the fact that Kayden’s personality would deteriorate, are based on pure speculation.

### **ARGUMENT**

#### **I. THERE IS NO BASIS IN LAW OR FACT FOR THE LOWER COURT’S CHANGE IN CUSTODY.**

The facts in this case do not come close to justifying the Chancellor’s change in custody under any theory of law recognized in Mississippi.

In his Judgment, the Chancellor, under the Section entitled “Holding”, 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 effect on the minor, justifying a change of

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<sup>2</sup>At the hearing on the Motion for a New Trial, Ms. Graves also proffered information that since the trial in this case, she had finally received her divorce and was now remarried. (T. 162).

custody in the child's best interest. *Sanford v. Arinder*, 800 So. 2d 1267 (Miss. Ct. App. 2001). In making such a determination, the totality of circumstances must be considered, *Gilliland v. Gilliland*, 984 So. 2d 364, 367 (Miss. App. 2008) (citing *Ash v. Ash*, 622 So. 2d 1264 (Miss. 1993)). However, in all custody modification proceedings the polestar consideration is the best interest of the minor child. See *Gilliland*, 984 So. 2d at 367 (citing *Sellers v. Sellers*, 638 So. 2d 481, 485 (Miss. 1994))." (C.P. 62)

Despite the above statement by the Chancellor in his Judgment, the Chancellor fails in his Judgment to identify the "material changed circumstances" which have had an adverse effect on the minor child, "justifying a change of custody in the child's best interest." The Chancellor merely states that this is the standard and then leaps to a consideration of the so-called *Albright* factors, see *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983).

The Court's decision in this case is a flagrant violation of the very cases which the Court cites, such as *Sanford v. Arinder*, *Gilliland v. Gilliland* and *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996). The Court makes no attempt to follow the proper legal standard for modification as set forth in *Mabus v. Mabus*, 847 So. 2d 815 (Miss. 2003) in which the Supreme Court made clear that in modification proceedings the Movant must show "(1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely effects the child's welfare; and (3) that the child's best interest mandate a change of custody." *Mabus* at 818 (paragraph 8).

While ostensibly relying on *Riley v. Doerner*, *supra* and *Savell v. Morrison*, 929 So. 2d 414 (Miss. App. 2006), the Chancellor turns those cases on their head as well.

In *Riley v. Doerner*, the Mississippi Supreme Court held that even without a material change of circumstances, custody may be modified under the following circumstances:

“...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, the Chancellor may modify custody accordingly.” (677 So. 2d at 744). (Emphasis original)

The Court in *Riley v. Doerner* continued as follows:

“Evidence that the home of the custodial parent is the site of dangerous and illegal behavior, such as drug use, may be sufficient to justify a modification of custody, even without a specific finding that such environment has adversely effected the child’s welfare. A child’s resilience and ability to cope with difficult circumstances should not serve to shackle the child to an unhealthy home, especially when a healthier one beckons.” 677 So. 2d at 744.

In *Riley v. Doerner*, the mother, “Connie,” failed a drug test, and maintained a home which was the site of illegal drug use. Connie lived with a man who admitted to smoking marijuana “every once in a while.” Further, the child in *Riley v. Doerner* had attended several different schools due to moves on the part of the mother and had actually flunked the first grade.

In *Savell v. Morrison, supra*, the Mississippi Court of Appeals applied the language from *Riley v. Doerner* in finding that the Chancellor need not wait for the minor child to actually be injured before finding an adverse effect. In *Savell*, the custodial mother had remarried a man named Roger Savell. Subsequent to the mother’s remarriage, the minor child, Anna, was returned to the Savell household in December, 2003. The court found that what followed over the next several months was “a pattern of obscene language and threats of violence directed at Anna by Roger.” (929 So. 2d at 415).

However, in the present case, the court has simply ignored the first or initial requirement under *Riley v. Doerner*, i.e., that there be a showing of an environment or circumstances adverse

to the child's best interest. There is no evidence in the present case of any drug use or any other type of illegal behavior on the part of Ms. Graves and the minor child's development has been exceptional, not simply resilient. Ms. Graves and Kayden have a loving relationship. In this case, the court has used *Riley v. Doerner* and *Savell v. Morrison* to focus entirely on the alleged improved circumstances of the non-custodial parent, Mr. Haden. In *Mercier v. Mercier*, 11 So. 3d 1283 (Miss. App. 2009), in applying the dictates of *Riley v. Doerner*, the Mississippi Court of Appeals specifically held that "a change of circumstances in the home of the parent who does not have physical custody is not sufficient to authorize modification." (11 So. 3d at 1286) (paragraph 10). An improvement in the non-custodial parent's circumstances, standing alone, "is irrelevant" and does not support a change in custody. (11 So. 3d at 1286)(paragraph 10).

In this case, the Court by its own self-admission has gone outside of the *Albright* factors and reached a decision based on pure speculation, i.e., that because Ms. Graves has had three children, she will continue to have numerous other children. In fact, the court has maintained this speculation despite the proffer at the hearing on Ms. Graves' Motion for a New Trial, that shortly after the trial in this case, she had her "tubes tied." (T. 163).

There is no evidence whatsoever that Ms. Graves has not provided for Kayden's needs, whether those needs are financial, emotional or otherwise. Neither Ms. Graves nor Mr. Haden is a high school graduate and neither has passed a GED test. The decision in this case punishes Ms. Graves because she has not lived a life of which the court approves. But, between the Agreed Order in February, 2008 and the time at which Mr. Haden filed his petition for a change of Custody, in October, 2008, nothing had changed. She was married but separated in February,

2008.<sup>3</sup> She was the mother of three children in February, 2008. She took care of the daily needs of Kayden in February, 2008 and she took care of the daily needs of Kayden in October, 2008. Every witness in this case, although some begrudgingly, described Kayden as well-adjusted, emotionally and physically, “all boy,” and a spectacularly healthy child. There is no evidence in this case that Kayden was living in an environment adverse to his physical or mental well-being. In addition to speculation regarding the fact that Ms. Graves will have additional children, now a physical impossibility, the Court also speculated that Kayden’s well-adjusted personality, good maturation, good physical and emotional health, would deteriorate if he were allowed to stay with Ms. Graves at her apartment at The Links in Canton, Mississippi. All of this is speculation. None of this reasonably foreseeable.

Likewise, the conclusion that Mr. Haden can provide a more “stable” environment is no less speculative than the Court’s decision that Ms. Graves’ will continue to have additional children. The Court has virtually ignored the fact that Mr. Haden’s character is such that he was willing to take advantage of Ms. Graves and have a sexual relationship with Ms. Graves while she remained married but separated. The Court has virtually ignored the fact that Mr. Haden, not Ms. Graves, has a history of being charged with a DUI. The Court has virtually ignored the fact that during the child’s formative infant years, Mr. Haden was nowhere to be found. He did not establish a relationship with the child until the child was at least one year of age.

All of the Court’s conclusions, regarding the negative aspect of Ms. Graves’ future life, and the suitability of Mr. Haden’s home, are speculative. There is no basis in the fact and there

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<sup>3</sup>*Ibid.*

is no basis in the law to support the decision of the Chancellor in this case.

Tracy Graves submits that the lower court utterly failed to follow the requirements of *Mabus* and despite Mr. Haden's failure of proof, changed custody. Mr. Haden did not show a material change in circumstances let alone an adverse material change in circumstances or under *Riley v. Doerner* conditions or circumstances adverse to the minor child's best interest. For these reasons, the lower court should not have even considered the *Albright* factors in making its decision. The *Albright* factors only become a consideration if the Petitioner is able to meet the basic requirements of *Mabus* or alternatively, *Riley v. Doerner*. See *McCracking v. McCracking*, 776 So. 2d 691 (Miss. App. 2000); *Smith v. Todd*, 464 So. 2d 1155 (Miss. 1985). These cases clearly establish that the *Albright* factors do not become relevant unless the moving party proves by substantial evidence an adverse material change in circumstances or an environment adverse to the child's best interest.

However, even assuming *per arguendo*, that the Court correctly applied *Albright*, the Court failed to correctly resolve the two *Albright* factors it 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.<sup>4</sup>

In *McCracking*, the Mississippi Court of Appeals specifically stated that in regards to changes of custody, the law gives "some favor" towards maintaining the status quo. *McCracking* at paragraph 9.

In February, 2008, Mr. Haden entered into an agreement with Tracy Graves regarding

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<sup>4</sup>The Court found none of the other *Albright* factors favored one party or the other.

the primary physical care and custody of Kayden, i.e., the parties would have joint legal custody and Tracy Graves would have the primary physical custody. Eight months later, without any visible change in circumstances, Mr. Haden filed his Petition to Change Custody. At every level, Mr. Haden's Petition should have been denied based on existing case precedent from both the Mississippi Supreme Court and the Mississippi Court of Appeals. Mr. Haden failed to show an adverse material change in circumstances or an environment adverse to Kayden's best interest. The testimony clearly established Kayden to be a child without any physical or mental problems. Until the decision in this case, Tracy had the continuing care of Kayden since Kayden's birth and this fact alone should trump the alleged stability of Mr. Haden's home and employment.

In numerous cases, a parent's role as primary caretaker has been the determining factor in a custody award. Custody has been awarded to mothers who are primary caretakers in spite of adulterous affairs, see *Brekeen v. Brecken*, 880 So. 2d 287 (Miss. 2004); *Bass v. Bass*, 879 So. 2d 1122 (Miss. Ct. App. 2004); *Ivy v. Ivy*, 863 So. 2d 1010, 1014 (Miss. Ct. App. 2004), or even a bigamous second marriage, see *Harmon v. Harmon*, 757 So. 2d 305, 310 (Miss. Ct. App. 1999). Even where there is evidence that a mother had suffered from a past serious emotional problem, the fact that she was the primary caregiver was the deciding factor in determining custody. See *Passmore v. Passmore*, 820 So. 2d 747, 751 (Miss. Ct. App. 2002).

At every level, on every issue, the Court should have ruled in favor of Tracy Graves and held that she was entitled to retain custody of her son Kayden. Petitioner presented no reason that is legally sufficient to compel a change of custody in this case. Again, the Court's ruling is substantially based on speculation, not facts, not even on reasonably foreseeable behavior.

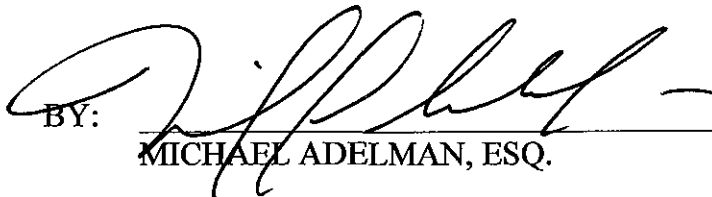


**CONCLUSION**

For the reasons set forth in the above and foregoing 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 26~~th~~ day of Oct., A.D.,  
2009.

TRACY GRAVES

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**CERTIFICATE OF SERVICE**

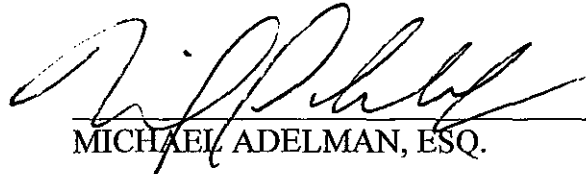
I, Michael Adelman, counsel for Defendant/Appellant, Tracy Graves herein, do hereby certify that I have this day served by United States Mail, postage fully prepaid, a true and correct copy of the above and foregoing Brief of Appellant to:

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Chancellor, District 10  
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THIS, the 26<sup>th</sup> day of October, A.D., 2009.

  
MICHAEL ADELMAN, ESQ.