BEFORE THE SUPREME COURT OF THE STATE OF MISSISSIPPI
COURT OF APPEALS

STEPHANIE BOLTON — APPELLANT

VS. — NO.: 2009-TS-01288

RANDY BOLTON, JR. — APPELLEES

APPELLANT'S REPLY BRIEF

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REPLY ARGUMENT

A. The Interim Order

Appellee counters Appellant's argument that the trial court improperly changed custody of Tyler from Appellant to Appellee when the trial court executed an interim order extending visitation on July 25th, 2008 and allowing Tyler to continue residing with Appellee through the upcoming school semester.[1] Counsel for Appellee points out in Appellee's Brief the correct standard for modification of custody found in *Shepherd v. Shepherd*, 769 So. 2d 242, 245 (Miss. Ct. App. 2000). *Brief of Appellee* at 13. However, the trial court's ruling on the record and subsequent *Interim Order* is void of any finding that the current visitation arrangement was not working or that an interim change in visitation was in the best interest of Tyler. *T.* at 249-251, *Appellant's Record Excerpts* at 21. The Court's ruling on July 25th, 2008 is reproduced as follows:

> I am not going to enter an order as it relates to custody because I have not heard the case to make a decision concerning custody. And I want both of you to know that my goal is not to help or hurt either one of you, but to simply apply the law to the facts once they've been completed. But at this point in the case, I've got to make a decision concerning some issues because we're in a situation where the mother lives in California, the father lives in Mississippi, and we can't have the child going back and forth week to week or that sort of thing because of school.
>
> On an interim basis -- I am not changing custody. Tyler's custody will remain with his mother, but I am going to allow for some extended visitation with his father. I'm going to allow Tyler to stay here visiting with his father until we can finalize the case. Now, I am going to set it for December the 15th and December 16th as a first setting. If you desire to hear it sooner than that, Mr. Weddle, in light of the distance of your client, I am certainly going to give you an opportunity to do that. So the only thing that will be modified in the order is that Tyler's visitation will be extended with his father until we finalize the case, with that being no later than December the 15th and 16th. Ms. Bolton will be given the week of Thanksgiving, but that will be at Ms. Bolton's expense. And you may not

[1] Tyler was already present in Mississippi with Appellee for the summer pursuant to an existing visitation schedule

> have to deal with that Thanksgiving visitation, because hopefully we will finalize the case before that Thanksgiving visitation. Any questions or comments, Mr. Tharp? You are the moving attorney.

At that time, Randy's counsel inquired about whether visitation would be modified for the remaining two minor children. The Court responded as follows:

> The visitation as it related to the other two children will remain exactly as it is in the prior order. I'm just giving Ms. Bolton the opportunity to visit with Tyler during that week since we may not hear the case until December, and she needs to visit with Tyler.

The trial court adjusted visitation pursuant to its own motion. The trial court implied that visitation needed adjusting due to the long distance between the parties. However, the parties had already addressed the visitation issue in an *Agreed Order* dated August 15, 2007, almost a year earlier, wherein the parties handled the issue of distance between the parties as it relates to the need for a modified visitation schedule. *Appellant's Record Excerpts* at 18. The Court approved and executed this Order and there had not been a subsequent request, either upon written or oral motion, by either party to modify visitation. Tyler had already spent the entire summer with his father pursuant to the aforesaid *Agreed Order*. Tyler was already enrolled in School in California; the *Interim Order* required Tyler to be enrolled in the Itawamba County School System. *Appellant's Record Excerpts* at 21. It is worth considering that if the Court believed the current visitation schedule was not working, it would have entered the interim order with respect to all the minor children; and not limited its decision to Tyler. The *Agreed Order* addressed visitation for Appellee with respect to all the minor children. The trial court properly identified the change in visitation as a *de facto* change in custody when it

referred to Appellant's week at Thanksgiving as her "opportunity to visit with Tyler." *T.* at 251.

Examples of the Court upholding a modification of visitation include mid-week visitation that was disruptive to the minor child and interfered with stability; mid-week visitation involving a parent who remained in Mississippi and one who had moved to Florida. *See McCracking v. McCracking,* 776 So. 2d 691, 695 (Miss. Ct. App. 2000) and *Fountain v. Fountain,* 877 So. 2d 474, 480-81 (Miss. Ct. App. 2003) respectively. These cited cases and the cases cited by Appellee on modification of visitation all deal with a permanent modification; not a modification on an interim basis.

Appellee also cites *Newsom v. Newsom,* 557 So. 2d 511 (Miss. 1990) wherein the Court held that the mother's instability and previous abduction of the minor children in defiance of the court order was ample justification of the restricted visitation ordered by the Chancellor. *Id.* at 517. Most would concur with that finding. It seems Appellee would correlate the *Newsom* case with the case at bar by pointing out testimony from Libby and Tyler regarding allegations of Appellant's temper toward Tyler. It seems disingenuous for Appellee to compare the allegation against Appellant for losing her temper and yelling at Tyler with a mother in the *Newsom* case who exhibited behavior that was a "cognizable danger" to the minor children and based upon a clear intent to protect the minor children. *Id.* The Chancellor in the instant case made no such finding. As stated in Appellant's Brief, the interim extended visitation effectively changed custody and provided Appellee with an advantage in the ultimate decision by the trial court to modify custody on a permanent basis.

B. Material Change in Circumstances Adversely affecting

Appellee cites the case of *Ballard v. Ballard*, 434 So. 2d 1357 (Miss. 1983) in its response to Appellant's argument regarding whether a material change in circumstances existed adverse to Tyler. The two cases have little correlation. In *Ballard*, the Court held that behavior of a parent which clearly causes danger to the mental or emotional well-being of a child is sufficient for modifying custody. *Id.* at 1360. The *Ballard* case involved an appeal from a Chancellor's decision granting a custody modification due to the mother, who had custody, allowing her boyfriend to frequent her home and spend the night while the minor child was present. *Id.* at 1359-60. The Supreme Court reversed and rendered holding that it was manifest error to hold that the facts and circumstances of the case supported any modification of custody and reiterated the well-accepted requirement that danger to the mental or emotional well being of the child be proven. *Id.* Appellee also cited *Jones v. Jones,* 878 So. 2d 1061 (Miss. Ct. App. 2004) for basically the same principal contained in *Ballard.* The Court in *Jones* held that because the daughter was so unhappy in the father's home that it was psychologically unhealthy for her, a modification of custody to the mother was warranted. *Id.* at 1065. In *Jones*, however, the proof demonstrated that the minor child was psychologically affected to the extent that she sought help from the school counselor. *Id.* The children in *Jones* were clearly negatively affected by the father's bizarre behavior including inventorying the children's items when they returned from the mother's home, eavesdropping on conversations between the children and their mother, and invasion of the oldest daughter's privacy by reading her emails. *Id.* at 1066. The behavior of the father in *Jones* caused one of the minor children to have frequent stomach aches, fits of anger, and

outbursts of tears, as well as the aforementioned need for counseling. *Id.* The proof in the case at bar is that Tyler performed well in school in California and the extra-curricular activities he enjoyed. *T.* at 5, 18, 229, 332, 169-170, 429-439. There is no proof of the necessity for counseling nor was there sufficient proof of adverse affects such as those found in *Jones.*.

C. *Albright* Factors

As stated in Appellant's Brief, by awarding the Appellee extended visitation, the Chancellor was able to attribute the *Continuity of Care* and *School Record Albright* factors to the Appellee; factors that would not have favored Appellee had the chancellor not entered the *Interim Order*. *See Record Excerpts* at 57-59. Appellee counters this argument by pointing to the other *Albright* factors that favored Appellee. However, as Appellee states: "the difficult question of custody between two fit parents can never be reduced to a formula. Each case is different" *Deborah H. Bell, Bell on Missississpi Family Law* § 5.02 (1st ed. 2005). *See also Lee v. Lee*, 798 So. 2d 1284, 1288 (Miss. 2001). In other words, application of the *Albright* factors is more than a mere scoring process. In some cases, one or two factors may control an award. *See Divers v. Divers*, 856 So. 2d 370, 376 (Miss. Ct. App. 2003) and *Ellis v. Ellis,* 952 So. 2d 982, 997 (Miss. Ct. App. 2006). Had the trial court not granted the extended visitation in the interim order, there would not have been the finding that resulted in the *Supplemental Opinion* wherein the following finding was made with respect to Continuity of care:

> This factor previously favored the mother, insofar as she had primary physical custody and the child resided with her in California. However, the factor currently favors the father, with whom the child has resided since 2008.

Record Excerpts at 57. Under the Home, school, and community record of the child factor, the trial court also was able to give the advantage to Appellee due to the improvement in grades and church attendance in Mississippi. *Record Excerpts* at 58-59. Had the Appellee not enjoyed the advantage in these two factors as a result of the trial court *sua sponte* extending visitation, the *Albright* factors would have been analyzed differently. Accordingly, the proper remedy is reversal.

D. Child Support Credits

Appellee argues that the trial court was correct in applying credits to Appellee's past due child support. In the *Supplemental Opinion*, the trial court clearly found that Appellee was in contempt for his failure to pay child support in the amount of $14,537.00. *Record Excerpts* at 60. Appellee would have the Court accept that all the amounts used to adjust the arrearage were amounts that Appellee paid in child support payments. *See Appellee's Brief* at 23. However, the only proof presented to the trial court as proof of actual payments for child support that should be used to adjust the arrearage amount is reflected in item Paragraph 72 item (A); $2,939.00 paid via Western Union funds. *Record Excerpts* at 60. Item (B) was not payment in the form of child support. No documentation was produced in evidence to support credit for child support paid under items (C) and (D). The trial court under item (E) simply takes away Appellee's child support obligation that was previously ordered by the same court due to the time Tyler resided with Appellee after the July 25th, 2008 *Interim Order* was entered. As stated by Appellant and reiterated by Appellee, "past due child support amounts cannot be modified by the Court." Neither should accrued child support payments

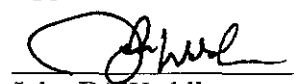
previously ordered by the court that were paid by Appellee be "unordered" and the amounts credited toward child support arrearage.

CONCLUSION

Based upon the foregoing argument and authorities, the Chancellor's decision to modify custody of Tyler should be reversed. Although courts clearly have the authority to execute orders on an interim basis, the use of the interim order in this case permeates every aspect of the trial court's ruling; from the initial *de facto* change in custody - to the created advantage for Appellee in the trial court's analysis of the *Albright* factors - to the trial court's granting relief for previously ordered, and paid, child support payments during the extended visitation and the application of credit for past due child support in an equal amount.

Respectfully submitted this the 27th day of September, 2010.

Stephanie Bolton
Appellant



John D. Weddle
Counsel for Appellant

CERTIFICATE OF SERVICE

I, John D. Weddle, Counsel of Record for Appellant, do hereby certify that I have, this date, postage pre-paid, mailed via United States Postal Service First Class mail, a true and correct copy of the foregoing Appellant's Reply Brief to the following at their usual business addresses:

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So certified this the 27th day of September, 2010.

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