SUPREME COURT OF MISSISSIPPI
Case # 2009-CA-01435

CHAD GREGORY POTTS — APPELLANT

VS.

FELICIA DAWN WINDHAM — APPELLEE

APPEALED FROM THE
CHANCERY COURT OF
ALCORN COUNTY, MISSISSIPPI
CAUSE NUMBER 2000-515-02(M)

BRIEF OF APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel for the Appellee, Felicia Dawn Windham, hereby 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:

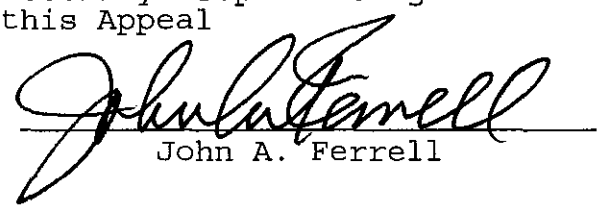
1. Jacqueline Estes Mask, Chancery Court Judge
   First Chancery District, State of Mississippi
   and presiding Judge in this case

2. Chad Gregory Potts,
   Plaintiff/Appellant

3. Felicia Dawn Windham,
   Defendant/Appellee

4. Honorable Phil R. Hinton,
   Attorney representing Chad Gregory Potts
   at trial

5. John A. Ferrell & J. Deborah Martin of
   Ferrell & Martin, P.A., Attorneys representing
   Felicia Dawn Windham in this Appeal



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RESPONSE TO STATEMENT OF FACTS

In his brief, Appellant, Chad Gregory Potts, (Chad), sets forth certain alleged facts concerning the issues in this case. Appellee, Felicia Dawn Windham, (Felicia), will, throughout this brief, make reference to certain facts but would add at this point in her brief the following factual information for consideration by the Court.

Chad and Felicia were formerly husband and wife, said marriage having ended in divorce by a Decree of Divorce entered in this cause on October 25, 2000. (C.P. 18-31)

The divorce was granted on the ground of irreconcilable differences pursuant to a Property Settlement Agreement that the parties had entered into on or about August 18, 2000. (C.P. 7-17)

One child was born as a result of that marriage, namely: Cody Wayne Potts (Cody), who was born on December 21, 1995. (C.P. 8)

The Decree of Divorce awarded the parties joint legal custody of Cody with Felicia having the physical custody of him. (C.P. 20)

Chad was granted specific rights of visitation (C.P. 21-22) and was ordered to pay child support in the amount of $300.00 per month beginning September, 2000. (C.P. 22)

He was also ordered to maintain a health policy on the minor child with the parties dividing equally all expenses not covered by that insurance. (C.P. 23)

After the divorce, Chad moved to Florida, residing there from 2002 until sometime in 2006 or 2007. (Tr. 116)

While in Florida, he visited some with Chad though he did miss some of his Court Ordered visitation with him. (Tr. 117)

Chad never paid child support as ordered by the Court and from the date of the divorce, October 25, 2000, until the time of the filing of his Complaint herein, June 26, 2008, Chad was in arrears in the payment of child support in the amount of $22,969.00. (Tr. 64) This represents over six years of failing to pay child support.

Further, Chad did not provide health insurance as ordered by the Court until June or July of 2008. (Tr. 97)

Felicia provided heath insurance for Cody through her husband, Durand. (Tr. 217)

The Final Decree of Divorce allowed Chad to claim Cody as a dependant for tax purposes and Felicia was directed to execute whatever documents were necessary upon request of Husband to allow him to do so. (C.P. 28)

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INTRODUCTION AND STANDARD OF REVIEW

Chad prosecutes this Appeal claiming that the Lower Court committed reversible error on three issues:

1. The Court erred by failing to give him credit for income tax refunds that Felicia obtained by claiming the child;

2. The Chancellor erred in finding there was no material and substantial change in circumstances adverse to the best interest of the child Cody;

3. The child having stated a preference, the Court erred in not articulating on the record why the change of custody was not in the child's best interest.

The standard of review in a custody case has been stated numerous times by the Court. Before a Chancellor will be reversed, the Court must find that the Chancellor's ruling was manifestly wrong or clearly erroneous, that the Chancellor abused her discretion or that she applied an erroneous legal standard. Eason v. Kosier 857 So. 2nd 188 ¶6 (Miss.App. 2003)

The scope of review in domestic relation matters is strictly limited. Brawdy v. Howell 841 So. 2nd 1178 ¶8 (Miss.App. 2003) The Supreme Court does not reevaluate the evidence, retest the

credibility of witnesses or otherwise act as a second fact finder. Bower v. Bower 758 So. 2nd 405 ¶31 (Miss. 2000) In the final analysis, the Courts have consistently held that the Chancellor is necessarily vested with substantial discretion and a review in this Court must give deference to the Chancellor's decision and may reverse only if the Chancellor has abused his decision, was manifestly wrong, clearly erroneous or applied an erroneous legal standard. Eason at ¶6

When the applicable standard of review is applied to the facts in the case at bar, it is evident that this Appeal is without any merit whatsoever on any of the issues raised by Chad and the Lower Court should, therefore, be affirmed.

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SUMMARY OF THE ARGUMENT

In this Appeal, Chad complains that the Trial Court failed to give him any credit for the savings to Felicia by her claiming Cody as a Dependant on her taxes for the years 2002-2007. Chad claims that this was an agreement of the parties which Felicia denies. The proof clearly shows there was no such agreement as Chad sporadically paid some support during the years that Felicia claimed the child and when he finally needed the deduction for taxes (2007), he claimed the child. This shows no agreement but indicates Chad's willingness to do whatever is in Chad's best interest regardless of what he was ordered to do in the Decree or what was in Cody's best interest.

Even if there had been an agreement, same was not presented to the Court for approval and based in part on this, Judge Mask held that there was no entitlement to credit. In addition, it is obvious that Chad sought relief from this Court though he came into Court with unclean hands. He failed to pay child support for almost six years, failed to maintain health insurance as ordered for over six years and did not even visit with Cody as ordered by the Court until sometime in 2007 or 2008. By virtue of his coming

into Court with grossly unclean hands, he is not entitled to any relief as relates to credit for unpaid child support.

On the issue of change of custody, there is absolutely no evidence of the existence of a substantial and material change of circumstances adverse to the welfare of the child since the entry of the Final Decree of Divorce. The insignificant amount of testimony offered does not rise to the level of warranting a change of custody and it is obvious that Cody is thriving living in the home of Felicia and her husband, Durand.

The statement of Cody's alleged preference to live with his father, while suspect due to his somewhat recantation of that statement does not even come into play until Chad meets the burden of proving a substantial and material change of circumstances adverse to Cody's welfare as that must first be found before a change of custody can be considered.

The Court did not commit any error in this case and the case should be affirmed.

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ARGUMENT

1. The Trial Court did not commit any error by failing to give Chad credit for income tax refunds that Felicia obtained by claiming Cody as a dependant for Federal and State Income Tax purposes.

As noted, Chad complains that Felicia claimed Cody as a Dependant on her income tax returns for the tax years 2002 through 2007. He claims that she did so as part of an agreement between the parties that she could claim the child as a Dependant in lieu of Chad's paying child support. Chad testified that such was their agreement. (Tr. 94) Felicia vehemently denied that there was ever any such agreement. (Tr. 222)

In her Opinion, Chancellor Mask denies Chad any credit because of Felicia's utilization of the child as a dependant on her tax returns for the stated years, finding that in part, the reason for said denial was that the alleged agreement was never submitted to the Court for approval pursuant to the case of Wilburn v. Wilburn 991 So. 2nd 1185 (Miss. 2008). (C.P. 55, R.E. 23)

The Court was certainly correct in denying any credit to Chad for not only the reason stated in her Judgment and supplemental Judgment but other reasons as well. In the Answer and Counterclaim filed by Felicia herein, she raised the affirmative defense of the clean hands doctrine. (C.P. 36) If anyone ever came into Court seeking relief with unclean hands, it is Chad. In Bailey v. Bailey 724 So. 2nd 335, ¶6 (Miss. 1998) this Court held that the clean hands doctrine prevents a complaining party from obtaining equitable relief when he is guilty of wilful misconduct in the transaction at issue. Since the entry of this Final Decree of Divorce, and has done little or nothing that was ordered of him by the Court. He paid little child support and was ultimately found to be in arrears in the sum of $21,469.00. That sum equals almost six years of child support payments that Chad did not make, offering as an excuse only that he did not have the income. (Tr. 83) In addition, he did not provide health insurance on Cody until June or July of 2008 and therefore, went some eight years without complying with that portion of the Decree as well. (Tr. 97-98) Further, Chad did not even visit with the child as ordered by the Court acknowledging that while he lived in Florida, he did not exercise all of his weekend visits. (Tr. 92)

Felicia acknowledged that she did claim Cody as a Dependent for the tax years 2002 through 2007 simply because Chad was not paying any child support for the child to speak of, was not providing health insurance coverage which her husband was and in

essence, she was the sole responsible party for all of the financial needs of Cody. However, she denies ever having an agreement with Chad concerning claiming the child in lieu of child support (Tr. 222) and the facts show there was no such agreement.

Felicia claimed the child in 2007, but so did Chad. If they had an agreement that she would claim the child in lieu of his paying support, why did he claim the child in 2007. (Tr. 95) The fact of the matter is that on that issue, just like every thing else having to do with Cody, Chad did what Chad wanted to do regardless of the requirements of the Court Decree and regardless of the needs of the child. 2007 was the first year that he had any significant income where claiming the child would help him so he claimed the child. (Tr. 73, Exhibit 2, Tr. 95) All of the other years that Chad did not claim the child and Felicia did, he did not have sufficient income that claiming the child would have realized him one cent. Therefore, it cost him nothing by her claiming the child for tax purposes. She was solely responsible for all of the financial needs of the child including medical expenses and insurance and for him to come into Court and try to get credit for her having claimed the child is frankly absurd. A large number of such contemptuous "dads" are incarcerated for much less arrearage.

In addition, as noted by the Court, the alleged agreement was never passed on by the Court. It is also important to remember that child support is not the money of the custodial parent but is the child's money and may not be forgiven. The Court has held that

the law remains that Court Ordered support payments vest in the child as they accrue and may not thereafter be modified or forgiven, only paid. Bryant v. Bryant 924 So.2d 627 ¶8, (Miss.App. 2006)

Cases which have allowed extra-judicial modifications by the parties typically turn on the concept of unjust enrichment as in the Bryant case cited herein. However, in this case, not only did Chad not pay child support as ordered, he failed to provide medical insurance for the child for at least six or seven years (Tr. 97) which saved him in all likelihood thousands of dollars. When asked about his obligations as set forth in the decree, Chad acknowledged the obligations though he simply chose to not comply with them. (Tr. 148) While the exact savings to Chad by his not maintaining health insurance as ordered is unknown, he did acknowledge that when the cost of the insurance got up to $600.00 per month shortly after the divorce he could not afford it. (Tr. 148) It is obvious that had he carried health coverage like he should have instead of Felicia's husband carrying it, he would have been out a lot more money than the credit that he is seeking and for this reason as well, his contemptuous failing to comply with the Court's decree should not result in a benefit to him.

Chad's accusation about Felicia filing taxes in the wrong way through the years has no relevance to this case. Such is between Felicia and the IRS and Mississippi State Tax Commission and Chad has no standing to question anything about her manner of

filing as it is simply irrelevant to the issue in this case as to whether or not he should receive any credit for her claiming the child. It is also ironic how one who has so contentiously failed to comply with a Court Decree could in any way expect to be heard on an issue alleging another person has filed their taxes in a wrong manner.

There is no evidence on this point that Chancellor Mask abused her discretion, was manifestly in error or applied an erroneous legal standard as she simply held that he was not entitled to any credit. She set forth the proper legal standard and she should not be reversed on this issue.

2. The Chancellor did not err in finding there was no material and substantial change in circumstances adverse to the best interest of the child Cody, nor did the Court commit any error in not making on the record findings as to why the change of custody was not in child's best interest based upon the alleged statement of preference by Cody.

The two issues have been joined for discussion as they are certainly related. The Trial Court found that there was no substantial and material change of circumstances adverse to the welfare of Cody and denied Chad's request for a change of custody. The proof clearly shows the Court was correct in this finding as Chad failed to meet his burden of proof in his request for a change of custody.

The Court has held that proceedings that address a request for modification of custody should follow these steps:

> 1. The initial burden is on the party seeking the change to demonstrate that there has been a material change in the circumstances affecting the child;
>
> 2. If that is shown, it must also be shown that the change is detrimental to the child's welfare;
>
> 3. Finally, the Chancellor must find that the change in custody is in the child's best interest. Robison v. Lanford 822 So. 2nd 1034, ¶10 (Miss.App. 2002)

If the party requesting the modification is successful in the above three elements, then and only then does the Chancellor look to the Albright Factor as to who should have the custody once a change is warranted. Eason at ¶9

Taking these in reverse order, on the issue of the child stating his preference, the statement of preference by a child of sufficient age is only one of the factors in Albright. Albright v. Albright 437 So. 2nd 103 (Miss. 1983) Our Courts have held in a long line of decisions that although a child's preference should be duly considered by the Chancellor, a preference to live with one parent absent other supporting evidence does not "constitute the type of adverse material change in circumstances that would warrant a custody modification". Best v. Hinton 838 So. 2nd 306, ¶8 (Miss.App. 2002) Of course, the Court does not even get to the inquiry of the issue of preference until such time as the moving party has shown a substantial and material change of circumstances

adverse to the welfare of the child. The fact that the child has stated preference does not in any way change the procedure that is to be followed as set forth in the Eason case.

The only evidence that Chad presented in this case bearing on the issue of a substantial and material change of circumstances was the testimony of Cody. Cody testified that he was tired of his mother and stepfather arguing (Tr. 7), his stepfather Durand criticized him on occasion (Tr. 11) the physical violence between his mother and stepfather which he said occurred on two occasions (Tr. 14-15) and his mother's profanity. (Tr. 14)

In cross examination, however, Cody acknowledged that his mother did not necessarily curse at him, but merely cursed into the air. (Tr. 21) Durand coached him in his athletic endeavors for years (Tr. 21, 30) and both his mother and stepfather attended his sporting events on a regular basis even if Durand was not coaching them. (Tr. 31, 33) Durand carried him hunting and golfing (Tr. 33-34) and Cody even hesitated when asked whether he had rather do certain activities with his own father, Chad, or Durand (Tr. 38), indicating that his relationship with Durand was a good one. Cody also acknowledged that though he may have stated his preference to live with his father, when his father pressed him about his not doing his homework and threatened him with corporal punishment, he got mad at Chad and told him he did not want to live with him either. (Tr. 29) He also acknowledged that his father cusses to some extent (Tr. 29), that he has a nice home at his mother's

house, having his own room (Tr. 23, 32) and in general has a happy life where he is. (Tr. 24, 32-33) He also has two half sisters that he gets along with, though they do have disagreements like all children. (Tr. 23)

From the testimony of Cody, it appears that this child has experienced nothing adverse from living with his mother over the years since the divorce was granted in 2000. The opposite is frankly true as is shown by the testimony of other witnesses, including Ricky Taylor, who along with Durand coached Cody's teams for several years. (Tr. 42) Mr. Taylor testified that he never saw any mis-treatment of this child at all, that Felicia and Durand were always at the games but that Chad never attended except perhaps one time. (Tr. 44) Mr. Taylor testified that Cody was a good child, had a good reputation at school, made good grades, had lots of friends, all of whom were welcome in the Windham home as they were frequently there for cookouts that Durand held for him. (Tr. 45-46) He, too, acknowledged that Durand took Cody hunting and golfing and that he had accompanied them on some of those trips in years past. (Tr. 47)

Felicia denied as did Durand the "violence" that Cody had testified to. The child was certainly embellishing what occurred on those occasions as well as both Durand Windham and Felicia Windham denied that there was any violence whatsoever in either of the events but that this was merely "horseplay" between two adults. (Tr. 232-233, 298-299)

Maria Crabb testified that Cody was a happy child as well.

In addition, as noted, Chad was never a good father to Cody prior to filing this Complaint for Modification. He did not pay child support, he did not provide medical benefits, he did not visit with the child as ordered and the filing of this Modification is apparently a belated attempt on the part of Chad to make up for lost time with Cody. Felicia has always encouraged Chad to be a good father to Cody and since his return to Mississippi and becoming more involved with Cody's activities, she has allowed Cody to go with his father at extra times so that they can engage in the horse show endeavors that he enjoys. (Tr. 33-34) Cody acknowledged that this was the case (Tr. 33-34) as did Chad. (Tr. 117-118)

The lack of evidence and the best indicia of the Chancellor's ruling correctly was the exchange that took place on page 124 of the transcript during cross examination of Chad:

Question: ..., but there is nothing that you can point to that would indicate to you that this child has suffered any adverse effect from being in my client's custody, can you?

Answer: No sir.

There is simply no evidence, much less substantial evidence of any substantial and material change of circumstances that has occurred since the entry of the Decree of Divorce that adversely effects this child warranting a modification of custody. The Supreme Court held in one case that "only parental behavior that poses a clear danger to the child's mental or emotional health can

justify a custody change". Morrow v. Morrow 591 So. 2nd, 829, 833 (Miss. 1991) Here, there is nothing to show any change of circumstances adverse to the welfare of the child warranting a modification of custody.

The only change of circumstances occurring since the Entry of the Decree of Divorce is that finally Chad has decided to be a father to Cody. Beginning sometime in 2007, he finally began to pay child support on a fairly regular basis, finally obtained health insurance for the child and finally had some involvement with the child's activities. However, a change for the better on the part of the non-custodial parent cannot and should not be the basis for a modification of custody. McCracking v. McCracking 776 So. 2nd 691, ¶9 (Miss.App. 2000)

CONCLUSION

In conclusion, the Trial Court's denial of credit against child support arrearage for the benefit to Felicia by claiming the child on her taxes is without any merit. Chad comes into Court with unclean hands which negates his seeking any equitable relief by the Court. Further, there was no agreement to that effect and even if there had been, same was not passed on by the Court. For these reasons alone, the Court was correct in her decision to deny him any credit.

Finally, the issue of change of custody is not even close. There is no evidence whatsoever that would justify the Court's finding a substantial and material change of circumstances adverse to the welfare of Cody as such evidence simply does not exist. The child's statement of preference cannot formulate the basis for change of custody and Chad clearly failed to meet his burden of proof on the change of custody issue.

Therefore, the Trial Court's decision on all points raised in this appeal should be affirmed.

Respectfully submitted,

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CERTIFICATE OF MAILING

This is to certify that I, John A. Ferrell, attorney for Appellee, have this day mailed by United States mail, postage prepaid, the original and three (3) copies of the Appellee's Brief to Kathy Gillis, Clerk, Supreme Court of Mississippi at the address of said Court, P. O. Box 249, Jackson, Mississippi, 39205-0249.

This the 26th day of May, 2010.

JOHN A. FERRELL

CERTIFICATE OF SERVICE

I, John A. Ferrell, do hereby certify that I have this day forwarded by United States Mail, postage prepaid, a true and correct copy of the above and foregoing Appellee's Brief to the following:

Honorable Jacqueline Estes Mask
Chancellor
P. O. Box 7395
Tupelo, MS 38802

Honorable Phil R. Hinton
WILSON, HINTON & WOOD
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THIS the 26th of May, 2010.

JOHN A. FERRELL