IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CIVIL CAUSE NO.: NO. 2009-CA-01701

APRIL M. WATKINS
APPELLANT

VS.

JEREMY R. WATKINS
APPELLEE

APPELLANT'S REPLY BRIEF IN SUPPORT OF APPEAL

ORAL ARGUMENT REQUESTED

APPEAL FROM THE CHANCERY COURT OF ALCORN COUNTY, MISSISSIPPI

Amy D. Saling
MSB No.: [redacted]
Waller & Waller, Attorneys
Post Office Box 4
220 South President Street
Jackson, Mississippi 39205
(601) 354-5252
Attorney for the Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

I. RESTATEMENT OF THE FACTS

In his brief, the Appellee provided a Statement of the Facts somewhat contrary to the Statement of the Facts provided by the Appellant. The Appellant re-emphasizes the history of the case and facts provided in her initial Statement of the Facts and respectfully disagrees with certain portions of the Appellee's recitation of the same.

In discussing April's physical condition, the Appellee's brief states that April's spinal chord was crushed in an automobile accident. If this were so, April would not be able to stand at all. In fact, April is able to walk and/or stand for short periods of time with the assistance of a walker or other object to hold on to. (T 21, R.E. 110). As a result of the car accident she uses a wheelchair as an incomplete paraplegic.

In the Appellee's brief, he states " The allegation against Ralph, whom Kelsi called "Pops" was first made in February 2005, when Kelsi was twenty-three (23) months old. (T.96). Kelsi allegedly made a statement that Pops had touched her when she was staying with Laura Michael. (T.p. 300). Laura, who was an over-the-road truck driver, had taken a few days to take care of April's children. Laura Michael was not an over-the-road truck driver at the time of the first disclosure of abuse. Laura Michael was a realtor with Coldwell Banker Real Estate Agency. This fact is a misstatement by the Appellee. There is also a misstatement in the Appellee's brief concerning the facts surrounding the second disclosure of abuse. Appellee's brief states "However, in December 2007, Kelsi and April had gone again to visit April's mother Laura. (T.p. 532). After the visit with Laura, April decided to question Kelsi about whether Pops had touched her. (T. P. 141). Laura Michael testified that she and her husband were on the road when Kelsi made her second disclosure to April. She testified that "The conversation was I called her. We were planning on going over there in December, on December twenty-third, to have

Christmas with them. My husband– we had just pulled into Wal-Mart there, I can't remember where we were at now, but I had been driving, and I was just getting more and more depressed because of the whole situation, and my husband was like, what's wrong, and I said I can't take it any more...so I called April, and I told her, I said April, I don't know what we are going to do. I said but you're going to have to do something. What are you going to do? You're going to have to do something. I said I can't go on like this. You know–I'm sorry. (T. 380). Therefore, according to testimony by Laura Michael, the second disclosure could not have been after a visit from Laura Michael when as she testified she and her husband were on the road and actually planning an upcoming visit with April and her family for Christmas.

In regards to the abuse accusations relayed in the Statement of the Facts, the Appellee's brief states that "Additionally, Ralph's wife Darlene testified that she was frequently around Ralph and the grandchildren. Darlene testified that Ralph had never done anything remotely inappropriate and was no danger to children. Similarly, Jeremy's sister, April Rae Watkins testified that she observed Ralph around the children and that Ralph never did anything inappropriately." However, in the testimony given at the hearing from Jill Franks and her reports, it was clearly stated that Ms. Franks asked Kelsi if anyone ever saw Pops touch her and she said "no, Gan Gan was asleep". Kelsi also stated that they were always at Gan Gan and Pops house when Pops touched her. While Darlene and April Rae may have testified that they had never seen Ralph do anything remotely inappropriate and while such statements that they had never seen anything inappropriate may be true, these statements are not compelling evidence that the abuse simply did not take place. Kelsi's statements not only to Jill Franks but also to Laura Michael, April Watkins, Jeremy Watkins and Xander Watkins was that the abuse happened, Gan Gan did not see it happen and that the abuse always took place at Pops and Gan Gan's house.

Her statements were consistent each time and the fact that Darlene and April Rae never saw such activity is not conclusive evidence that the abuse did not happen. Further, the Appellee's brief stated that "during the DHS investigation, Xander told the social worker that he had never seen Pops touch Kelsi Inappropriately; however, that report stated that he told the DHS worker that Kelsi had **told** him that Pops had touched her. (Ex. 99, R.E. 146) Finally, the Appellee's brief states "No witness testified that Ralph abused Kelsi and there was no credible evidence in this regard produced at trial". However, there was testimony by Jill Franks, the DHS investigator and DHS records admitted into evidence that indicated that there was evidence that Kelsi had in fact been abused.

In regards to the apportionment of household duties relayed in the Statement of the Facts, the Appellee's brief states that "Jeremy did most of the cooking in the Watkins household before the separation...Jeremy did the housework and bathed the children". April's mother, Laura Michael testified at the hearing in this matter that "When April first had her accident, I never saw her cry except one time . . .You know, that's just April, but as far as –April has optic nerve damage, and that's really the only thing that she can't do is drive. It's quite amazing the way she keeps her home, you know. It's just beautiful, and she keeps her home so clean and keeps the children clean. She's a good mom". (T. 295, R.E. 130). April's father, Ricky Michael, testified when asked who appeared to be the primary caretaker for these children, "Well, it would be their mama, April, of course. If they wanted a drink of water, if they cut their finger, or skinned their knee, or whatever...". (T. 404, R.E. 133). April testified at the hearing that after she had her children she was the one who took care of the children on a daily basis (T. 23, R.E. 112). They were living in Florence, Alabama when the kids were born and lived there for a year and a half before moving to Corinth, Mississippi. (T. 23, R.E. 112) There were no family members in the immediate vicinity of

their home, and April was the one at home taking care of the children. There was no evidence presented at the hearing contrary to the facts that from the time they were born, April stayed at home with the children and was their primary caretaker in the home. To state that Jeremy was the one who did most of the cooking, household chores and took care of the children is just not true according to the testimony presented at trial.

Lastly, the Appellee's Statement of the Facts makes several references that the children were spending up to four (4) nights per week at extended family's homes. April testified at the hearing that while it was true that her kids did visit with their grandparents and aunt a good bit, it was not because she called them stating she needed a break or that she could not handle the kids. She stated, "a lot of that was them calling me, can I take them here, hey, I'm going here, can they go with me, and they would get mad if I ever said no to them. They would get mad, and I didn't feel like it was right to punish my kids just because I wasn't able to go and take them places. I let them go. I let them go." (T. 638, R.E. 137). April denied that the children were in the care of extended family four (4) nights per week.

II. ARGUMENT

The first section of the Appellee's brief was entitled "**A. The Chancellor properly considered April's physical disability, but did not overemphasize this factor**". The Appellant respectfully disagrees with the Appellee's position in this regard. The Appellee continues throughout his brief to emphasize the fact that "April would rely largely on parents or other family who lived nearby. However, the undisputed proof showed that April's parents were over-the-road truck drivers who were often away for a month at a time." While it is true that her parents were over-the-road truck drivers, April had many other family members including a cousin, aunts, uncles, sister and friends who could help her with transportation. The Appellee

uses the fact that April requires assistance from family and friends as a negative. However, he conversely uses the fact that "Jeremy's parents testified that they stood ready to offer financial or other necessary assistance if needed" as a positive. The Appellee's brief also links April's inability to drive to the children's participation in extra curricular events. The Appellee states "Clearly, April's disability makes normal aspects of childcare more difficult. Her disability prevents her from transporting the children on her own and reduces the activities in which they can engage in their mother's care." April testified that it is more difficult to sign the children up for extracurricular activities because they were out of town every other weekend for visitation with Jeremy. (T.89, R.E. 119). She was going to sign Xander up for baseball but as many of the games and practices are on the weekend, he would be missing a lot of games (T. 89, R.E. 119). In fact, the baseball park is across the street from April's home and April could take them to all games and practices. During the eleven (11) months that April had custody of the children since the separation, there was not one (1) time or situation where the fact that April could not drive caused a situation that endangered the children or adversely affected the children as a result of said inability to drive. (T. 81, R.E. 118).

The second section of the Appellee's brief was entitled "**B. The Chancellor's factual finding that Ralph Watkins did not abuse the minor child was supported by overwhelming Record evidence.**". The Appellant again respectfully disagrees with the Appellee's position in this regard. The Appellee again states that the second allegation made in December 2007 was also made immediately following a visit with Laura. Laura Michael testified that she and her husband were on the road when Kelsi made her second disclosure to April and planning a visit to visit April, Jeremy and the children for Christmas. The Appellee is trying to make a connection between the two (2) disclosures by Kelsi and two (2) visits by Laura Michael; however the

second disclosure was not made to Laura Michael or made immediately following a visit by Laura Michael.

The Appellee is also quick to point out that "In the wake of this allegation, Ralph Watkins maintained his innocense, cooperated with law enforcement and took and passed a polygraph examination." Even though polygraph tests are generally inadmissable and said test was never presented into evidence, Ralph Watkins' alleged polygraph examination was mentioned in testimony at the hearing in this matter several times and also in the Appellee's brief. In regards to Ralph Watkins' polygraph test, the DHS case notes state:

> Detective Rogers stated that Mr. Watkins has agreed to take a Polygraph as so long as he does not have to pay for it. Det. Rogers stated that Polygraphs are not 100% which is why Polygraphs are not admissible at trial but it is at Grand Jury. Det. Rogers stated that some red flags he saw are that Mr. Watkins is willing to take a Polygraph but not going to pay for it and he was making up excuses as why he might fail it such as him having a pacemaker and a defibulator that might interfere with the results of the test. These all sounded like convenient excuses to Det. Rogers. (Ex. 98, R.E. 145).

The alleged polygraph test coupled with the testimony of Ralph, his wife and his daughter was the basis of the Appellee's argument that the sexual abuse to Kelsi Watkins never happened. Laura Michael also took and passed a lie detector test; however this fact seemingly had no impact on the Court's final ruling.

The Appellee's brief also points out more than once that there were inconsistent versions of what Kelsi Watkins told Laura Michael as recounted by Laura Michael regarding the abuse. The inconsistencies of which the Appellee is referring is a difference between the words "in the vagina" and the words "on the vagina". Laura admitted at the hearing that she may have made a mistake in using "in" instead of "on"; however this mistaken word does not indicate that there was no abuse. In her testimony at the hearing, Jill Franks stated that "children so many times,

there's not any physical evidence when there's been fondling, because fondling is fondling. It's outside the body" (T. 246, R.E. 129). The mere lack of physical damage is not conclusive proof that there had been no abuse. To make issue over the difference between the word "in" and the word "on" is simply ludicrous.

The Appellee's brief gives much credence to the fact that "Kelsi later recanted the allegation and said that she had just been "tricking" her mother". However, Kelsi never stated that she was "tricking" her brother, Laura Michael, Ricky Michael, Jeremy Watkins or Jill Franks. The Appellant addressed this issue in her original brief and recited case law to that point. Much like the case at hand, *R.L.N. v. C.P.N.*, So.2d 620, (Miss. App., 2005), the testimony at the hearing concerning the abuse was conflicting between certain sources. The cases were also similar in that at some point or another the abused child stated they had made up the allegation or it was alleged that someone told them to say that they were abused. However, in this case, Kelsi's story never changed and DHS reports confirmed that Kelsi was telling the truth and somehow all of the evidence that corroborated Kelsi's statements were not enough for the court to establish that she was sexually abused. Had the court used the appropriate standard as did the court in *R.L.N. v. C.P.N.*, the outcome of primary physical custody and visitation would have most certainly had a different outcome and as such should have been awarded to April.

The third and final section of the Appellee's brief was entitled "**C. The Chancellor properly considered each *Albright* factor and made appropriate factual findings supported by the evidence produced at trial.** ". The Appellant again respectfully disagrees with the Appellee's position in this regard. Many of the issues that the Appellee sets forth in the final section of his brief have already been addressed in the above paragraphs of Appellant's brief and as not to be repetitive, the Appellant moves on to her final issue. The Appellee states "As noted,

the Court found that the continued attention to Kelsi and the pursuit of the false allegations of sexual abuse were bad for the child". After the first disclosure by Kelsi, April and Jeremy had a nurse come and examine Kelsi. They tried to give Ralph the benefit of the doubt; however, when a second disclosure was made, it would not have been in the child's best interest to simply let the accusations go unnoticed. The Appellant did everything she knew to do by taking action with DHS. The court continues to punish the Plaintiff for believing in her daughter's statement that she had been sexually abused, statements that she took very seriously and reported to DHS. DHS took those statements by Kelsi and found that Kelsi was telling the truth and was not coached in her disclosures to the forensic interviewer. If the above factor should favor either party, it should favor the Plaintiff, April Watkins who has always had her daughter's best interest, health and safety in mind. Instead, the court favored the Defendant who only half -heartedly participated in the DHS investigation and seemed to place more energy into defending his father rather than defending his daughter.

V. CONCLUSION

In the case at hand, the chancellor's findings were not supported by substantial evidence and his discretion was manifestly wrong and clearly erroneous. In making such a determination of child custody, the lower court failed to make a proper *Albright* determination, and the court erred in placing primary physical custody of the children with Jeremy Watkins. On this basis, the lower court's Opinion and Judgment Dated August 14, 2009 and Final Judgment Dated September 21, 2009 awarding Jeremy Watkins primary physical custody of the minor children should be reversed and this Court should render a decision in favor of April Watkins.

CERTIFICATE OF SERVICE

I, Amy D. Saling, the undersigned counsel of record for the Appellant, do hereby certify that I have this date mailed, postage prepaid, by United States mail a true and correct copy of the foregoing Brief of Appellant upon the following:

R. Shane McLaughlin
McLaughlin Law Firm
338 North Spring Street
Suite 2
Tupelo, Mississippi 38804

Honorable John A. Hatcher, Chancery Court Judge Alcorn County
P.O. Box 118
Booneville, Mississippi 38829

SO CERTIFIED, this the 7th day of October, 2010.

AMY D. SALING (MSB #[redacted])
Attorney for the Appellant, April M. Watkins