IN THE SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NUMBER 2009-TS-00310

LORI D. BROWN
Plaintiff - Appellant

VERSUS

CHRISTOPHER CRUM
Defendant - Appellee

APPEAL FROM THE CHANCERY COURT OF LINCOLN COUNTY, MISSISSIPPI

APPELLANT'S BRIEF ON BEHALF OF LORI D. BROWN

ORAL ARGUMENT REQUESTED

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COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2009-TS-00310

LORI D. BROWN **PLAINTIFF/APPELLANT**

V.

CHRISTOPHER CRUM **DEFENDANT/APPELLEE**

CERTIFICATE OF INTERESTED PERSONS

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 Supreme Court and/or the Judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Hon. Judge Edward E. Patten, Jr., Chancellor of the Fifteenth Judicial District
2. Lori D. Brown, Plaintiff/Appellant
3. Christopher Crum, Defendant/Appellee
4. Edwin L. Bean, Jr., Esq, P. O. Box 1322, McComb, MS 39649
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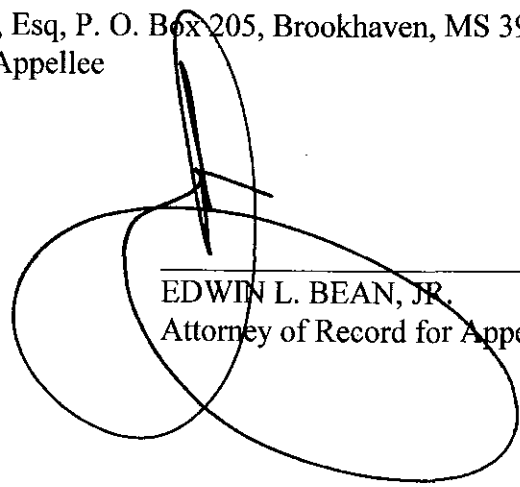

EDWIN L. BEAN, JR.
Attorney of Record for Appellant

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STATEMENT OF THE ISSUES

1. The Chancellor Improperly Treated The Proceeding As An Initial Determination Of Custody and Consequently Used The Wrong Legal Standard When He Failed to Apply The "Material Change" in Circumstances Test.

(A). The facts of this case and the distinction of the previous determination of custody distinguish the present case from the previous cases, and a different standard should be used. Custody in this case has already been determined.

(B). The Mississippi DHS support order and execution thereof should be considered an initial custody determination.

(C). The parties previously agreed to a determination of custody.

2. Crum waived his entitlement to an *Albright* analysis because of his delay in asserting custody.

STATEMENT OF THE CASE

1. Procedural History

On October 8, 2008, the Chancery Court of Lincoln County awarded custody of Caelan and Brendon Crum, ages five and four years old respectively, from their mother, Lori Brown (hereinafter referred to as "Lori"), the appellant, to their father, Christopher Crum (hereinafter referred to as "Christopher"). After the Court awarded the children to Chris, Lori timely filed a Motion for Reconsideration which was denied by the Court. Aggrieved by the lower court's ruling, Lori perfected this appeal.

2. Statement of the Facts

At the time of the hearing, Christopher and Lori were the parents of two children, Caelan Sylvia Crum, five years of age and Brendon Jacob Crum, four years of age. (R.8.). At the time of the hearing, Lori lived at 1585 Fox Road, SE, Bogue Chitto, Mississippi, where she has lived for 5 ½ years. (R.14,85). At the time of the hearing on October 8, 2008, Christopher Crum lived in Arlington, Tennessee where he had lived for 2 ½ years. (R.8). Prior to that Christopher lived in Mendenhall in Bogue Chitto, Mississippi. (R.8). At the time of the hearing, Lori was a full-time nursing student attending Southwest Mississippi Community College. (R.14).

At the time of the hearing, Christopher was paying Lori the sum of ($393.00) dollars per month as child support and had been paying that since their son was born. (R.22). Christopher was under a Department of Human Services Child Support Order at the time of the hearing. (R.19). Lori has the children on a regular bedtime schedule which is 8:30 every night while school is in. (R.28). Christopher and Lori met in Vaiden to exchange the children and that pattern

had existed for a year in a half prior to the hearing. (R.11). The parties exchanged the children on an every other weekend basis. (R.8,11,16). Although there is no court ordered visitation, Lori allowed Christopher to visit with the children on holidays. (R.36-37). There are times that Christopher would stay home and take care of his two step-children while his current wife, Lisa, exchanged his and Lori's children for weekend visitations. (R.12). Christopher has been married twice once in 1997, which lasted for six months. At the time of the hearing he was married to Lisa Jodie Crum to where he married her on January 7, 2006, and resided with her and her two boys from a prior marriage. (R.9,89).

SUMMARY OF THE ARGUMENT

The court should have applied the "material change in circumstances which adversely affects the child and subsequent best interest test", because at the time of trial, custody had been vested in the mother for five years with the father agreeing to a visitation schedule and continued payment of his child support obligations per a support order issued by DHS. DHS has the statutory authority to initiate and enforce support obligations, and therefore should have the authority to determine custody. Lori and Christopher agreed on the custody of the children and that agreement was executed for years without objection.

Christopher waived his right to an Albright analysis because of his delay in bringing the custody proceeding, and upon doing so, he should have been held to a higher evidentiary standard.

ARGUMENT

I. THE CUSTODY PROCEEDING AT HAND SHOULD HAVE BEEN DEEMED A PROCEEDING FOR MODIFICATION OF CUSTODY. THE COURT ERRED IN USING THE WRONG STANDARD

The custody proceeding at hand should have been deemed a proceeding for modification of custody thereby instituting the standard of the " material change in circumstances test." The "material changes"standard used in modification proceedings is dependent on there being a prior determination of custody. *Williams v. Stockstill*, 990 So.2d 774 (Miss.2008) citing *Law v. Page*, 618 So.2d 96 (Miss.1993). "Unless a prior custody determination has been made, custody is determined by the *Albright* factors." *Williams*, at 776, citing *Law*, 618 So.2d at 101; *Romans v. Fulgham*, 939 So.2d 849, 852 (Miss.Ct.App.2006); *C.W.L. v. R.A.*, 919 So.2d 267, 271 (Miss.Ct.App.2005); *S.B. v. L.W.*, 793 So.2d 656, 658 (Miss.Ct.App.2001). Historically, this rule of *Law* has been interpreted to require a judicial determination of custody. *Id.*

However, Justice Griffis, in a separate written dissent joined by Justices Southwick and Chandler, state that the rule only looks for "'a prior determination' of custody. It does not require an express determination, nor an explicit ruling on custody." citing *Romans*, at 857 (Griffs, J., dissenting). As stated in the rule above, a mere *determination* of custody should be all that is needed to illicit a "material change" in circumstances test. Lori submits to this Court that custody in this matter had previously been determined and therefore the Chancellor used an incorrect legal standard in applying the initial determination of custody standard as presented in *Albright*.

A. The present case presents a clear determination of custody, one not found in previous cases.

The present case is distinguished from previous cases that have developed the law in this area. In *Law*, the father simultaneously petitioned for custody after his legal rights and duties as a father began. *Law*, at 97. Prior to the proceedings in *Law*, there was no DHS support order or any other determination documenting the responsibilities and duties of each of the parents. Christopher, on the other hand, not only acknowledged paternity of his children upon birth, but also accepted without objection the DHS support and visitation order initiated. (R.20,21,25). Lori testified that she had been receiving child support from Christopher in the amount of "$393, total. ...Since right after my son was born." (R.25). Therefore, in sum, for years after acknowledging his children, Christopher accepted his role as "non-custodial parent" and duty to pay child support.

The father in *S.B.*, much like Christopher, acknowledged his child soon after birth. *S.B. v. L.W.*, at 657. However, in *S.B.*, there was no child support or visitation order from DHS in place. *Id.* The mother and father, living close and working opposite shifts, both cared equally for the child on a daily basis and shared equal custody with the child for the first five years. *Id.* There was no determination or difference in roles between the parents in *S.B.* as they shared equally in the care of the child.

In the present case, the difference is blatantly and patently obvious. The children have lived in the same home with Lori since birth. Unlike the father in *S.B.*, Christopher, did not provide daily care for his children nor did he spend spend equal time with them. Instead, he decided to move 300 miles away from his natural children in order to live with another woman

and *her two children*. Hence, Lori provided the daily care to the children as their primary care giver. Christopher and Lori had in place a DHS order and had previously determined custody and their subsequent roles, unlike in *S.B.* where no DHS support order was initiated and the parental roles were equal.

In *Williams*, the most recent case on this issue, a father instituted a paternity and support action but did not mention custody. *Williams*, at 775. The Chancellor held a conference. *Id.* Considering no custody claim from the father, the Chancellor awarded custody to the mother with provisions that the parties attend counseling and ordered the father to pay support. *Id.* A full hearing was never conducted. *Id.* Subsequent to the Chancellor's order, the father was allowed to supplement and amend his original petition adding a claim for primary physical custody. *Id.* After a full evidentiary hearing, the court used the initial determination of custody standard and granted custody to the father. *Id.* In the present case, Christopher's paternity was acknowledged and support ordered before any subsequent custody claim was made. In *Williams*, the conference and hearing were all one proceeding. The father was allowed to supplement and amend his *original* petition to include a claim for custody. *Williams*, at 775 (emphasis added). Therefore, the proceeding was one of paternity, support, and custody. *Id.* In the present case, Christopher acknowledged the children, and a DHS support order was in place prior to the custody proceeding. The present case is distinguished from *Williams*, and clearly shows a previous custody determination. Paternity had previously been acknowledged by Christopher. A DHS child support order was in place. The children lived with Lori in the same home for their entire lives. Christopher moved to Tennessee, 300 miles away from the children and has lived there for three years. The previous list of facts proves a determination was made as to the children's

interests and the roles of each parent. None of the previous cases that warranted an *Albright* analysis encompass the extent of facts that are included in the present case to prove a previous determination of custody. A more distinct, official, and sufficient determination existed prior to the proceedings in the current case, thereby warranting a different standard.

B. The Mississippi DHS support order and execution thereof should be considered a custody determination

Christopher, the acknowledged natural father of the two minor children, and Lori previously entered into a DHS support order. The Chancellor in the present case, despite the previous DHS child support order and acknowledged paternity, labeled the proceeding as an initial determination of custody. The very nature of a child support obligation is that one parent cares for the children on a daily basis and the other parent should provide assistance for that daily care. "Indeed, an order for child support necessarily rests on a determination that one parent is *awarded custody* and the other is not." *Romans*, at 857 (Griffis, J., dissenting). DHS has statutory authority to establish, initiate, and enforce child support orders. *See* Miss.Code Ann. § 43-19-31 (Rev.2004). Furthermore, DHS' purpose includes providing child support enforcement services or other services required by federal law or regulation. Miss.Code Ann. § 43-19-31(o) (Rev.2004).

In the federal appropriations act for the child support enforcement agency, the distinction of "custodial" and "non-custodial" is found 26 times. 42 U.S.C.A. § 666. Also, in the 1996 amendments to the federal statute, the legislature substituted the term "non-custodial" in place of the term "absent." *Id.* Also, as stated in the federal statute authorizing appropriations to states for child support services to needy families, "For the purpose of enforcing the support obligations

owed by non-custodial parents...there is hereby authorized to be appropriated...a sum sufficient to carry out the purposes of this part." 42 U.S.C.A. § 651. The statutes, amendments, and substitutions show the legislative intent and expectation for DHS to make a determination of custody thereby separating the parents into "custodial" parent and "non-custodial" parent in order to enforce, distribute, and initiate child support orders.

According to the current Mississippi case law, a DHS support order is not a determination of custody, and therefore cannot be enforced against a parent until he is given the distinction of "non-custodial" parent by a court. This would allow non-custodial parents to usurp their obligations with no consequence until they were given such distinction by a court. This is clearly not the intent of the legislature. The court should not limit the power and authority of DHS. DHS is authorized by statute to enforce support orders, and therefore also has the statutory authority to determine custody if necessary. The determination of custody in itself is what gives way to the enforcement against the "non-custodial" parent. If DHS is given the authority to initiate and enforce support orders, they must inherently have the authority to determine the parental distinctions needed. DHS must determine custody in order to fulfill its statutory duties. Furthermore, the Mississippi DHS application for a support order, is separated into two sections for information about the parents, one for "custodial parent" and the other for "non-custodial parent." Thereby creating an agreement or determination of custody between both parties, natural mother and father and supervised or approved by a statutory government authority. To say this is not a custody determination defies all logic, common sense, and reasoning. Claiming DHS does not have this authority would hinder the effectiveness of child support enforcement initiatives, and would be contradictory to federal statute requiring that states have procedures in

place to improve the effectiveness of child support enforcement. 42 U.S.C.A. § 666.

DHS has statutory authority and can provide custody determinations. It is illogical to say that DHS *cannot* determine custody but alternatively, *can* decide who owes child support and who receives it. Child support orders in there very nature are reliant upon a determination of custody. It must logically follow that if they have that authority they must also have same authority to make a decision that the support order previously relied on. Therefore Lori submits to this Court that DHS support orders are previous custody determinations by federal statute and the laws of the state of Mississippi cannot circumvent that federal statute and its intent. Furthermore, evidencing the legislative intent for higher standards of review, it is stated in federal statute that a state must have in place procedures for adjusting support orders **after three years** upon a showing by the party of a "substantial change in circumstances." 42 U.S.C.A § 666(a)(10)(B). The legislature, thereby, imposes a higher standard on custodial parents with longstanding DHS support orders, and Mississippi law should recognize this statutory designation and impose those same standards.

C. The parties previously agreed by their actions to a determination of custody.

Lori and Christopher previously had a custody agreement. Much like a contract, the two parties executed their responsibilities to this agreement and it lasted without objection from either party for years. Christopher executed his portion of the agreement by paying his monthly child support obligations and enjoying visitation, and Lori by allowing visitation and maintaining the children in her home as custodial parent. This agreement lasted from birth of the youngest child until filing of the petition.

In *McCracking v. McCracking*, 776 So.2d 691, 694 (Miss.Ct.App.2000), the court held

that the non-custodial parent must do more than convince the Chancellor that they could do a better job with the child when the prior custody arrangement had previously been agreed upon by the parents. Since Brendon's birth in 2004, Lori had full physical custody, with visitation to Christopher and no court challenges, objections or interference from him.

This idea of *de facto* custody is not new. Chief Justice King, in his dissent joined by Justice Carlton, in *Williams, Supra* stated that even though custody is not judicially determined by the court, ignoring the simple fact that one parent is the person responsible for the care and support of a child, thereby making then a "*de facto* custodian" is "contrary to reason and common sense ... Where a child has an established and longstanding custodial relationship, I think the court must consider and address the issue of " *de facto* custody." *Williams*, at 779 (King, C.J., dissenting). As custody had already been determined by agreement of the parties, sound logic dictates that Christopher must now show a substantial and material change in circumstances to modify that agreement.

II. CHRISTOPHER WAIVED HIS ENTITLEMENT TO AN *ALBRIGHT* ANALYSIS BECAUSE OF HIS DELAY IN ASSERTING CUSTODY

Christopher relinquished his rights to an *Albright* analysis due to his delay in petitioning for custody. Lori immediately asserted her custodial rights and fulfilled the role of custodial parent from the birth of the children while Christopher delayed for almost five years in asserting custodial rights. Christopher's delay should result in his forfeiture of an *Albright* analysis, in which each parent has equal status. Christopher's delay in bringing the custody action should subject him to a higher standard. The standard to be used after a failure to bring a timely custody proceeding should be that of the material change in circumstances test.

The Supreme Court of Mississippi concluded that in the absence of special factors, "all jurisdictions recognize the mother of an illegitimate child, if the mother is a suitable person, has the primary right to the child's custody." *Smith v. Watson,* 425 So.2d 1030, 1033 (Miss. 1983) citing *H. Clark, Jr., Law of Domestic Relations* 176 (1968); Annot., 98 A.L.R.2d 417, 420 (1972). "[U]pon acknowledging the child as his own, the father has an equal claim, with the mother, to the parental and custodial rights to the child." *Id.* citing *N. Hand, Jr., Mississippi Divorce, Alimony and Child Custody* 271 (1981). The Court then held, "If neither parent is fit or has abandoned the child, then the court is empowered to grant custody to some other suitable party." *Id.*

At the time a father asserts his paternity, he is deemed an equal parent. Once a father acknowledges his child he has an equal claim to custody. The equality rectifies the original presumption of maternal custody, but not the subsequent realities of maternal custody. If a father does not assert that equal custodial right upon acknowledgment then the equal footing status is forfeited. As stated in *Osborne v. Vince*, 129 So.2d 345, 348 (Miss.1961), "it is a well-established maxim that equity aids the vigilant, not those who slumber on their rights." Much like other areas of law do not allow parties the right to assert claims after the passage of time, the Court cannot do it here. The point in time meaning of the equal footing rule is shown by further reading. The next sentence states, "If neither party is fit or has abandoned the child, then the court is empowered to grant custody to some other suitable party." *Id.* Therefore, at the time of acknowledgment, the parties are equal, and if, at that time, neither is fit the court will grant custody to another. *Id.* The court will not wait to grant custody to another. If they are not fit at the time, they will lose their custodial rights, the court does not wait for them to become fit.

Similarly, if a father does not petition for custody at that time, he loses his equal right. The equal footing status does not attach to his custody right unless asserted at the time of acknowledgment. Suffice it to say, that upon acknowledgment by a father the previously automatic presumption of maternal custody is gone, but the present reality of continued custody remains.

The evidence in this case shows that Christopher officially acknowledged the two children at their birth or shortly thereafter. He had an equal claim to custody at that time. However his equal footing stumbles as time passes. The children have lived at home with Lori all their lives. After his acknowledgment of the children, Christopher did not petition to assert his equal custodial rights. Instead, he moved 300 miles away from his children and married into a custodial relationship with two other children. Furthermore, the present case is distinguished. Both *Law* and *Williams*, are cases where the father petitioned for paternity and custody simultaneously. *Law* at 97; *Williams* at 775. In the present case, the children were previously acknowledged following birth, and Christopher failed to pursue any custodial rights for almost five years after that; thereby denying him the equal footing he could have enjoyed at the time he acknowledged the children as his own. Christopher was allowed to postpone his custodial rights and improve his own situation before taking on the added daily responsibilities of caring for two children. Lori was not afforded that same option.

The court has displayed interest in making parents of illegitimate children equal by weakening the "tender age doctrine" which gave mothers an advantage over fathers. *Albright v. Albright*, 437 So.2d 1003, 1004 (Miss.1983). In keeping with that trend, this Court should weaken, if not bury, the idea of continuous equal footing status. Furthermore, in *Romans*, neither party made the argument that the father "waived his entitlement to an *Albright* analysis by virtue

of his delay in bringing the custody proceeding. Thus, we find this case is not the appropriate vehicle to alter the law in this area." *Romans*, 939 So.2d 853. Lori encourages this Court to use her case and subsequent arguments to reconsider and distinguish this area of the law.

In the case *sub judice* the Chancellor state, "I must say, this was a slim record for me to make such an important decision." By the Chancellor's own admission, this case needed further testimony and facts in order to make a proper decision. If there were not enough facts on the record to warrant a decision, the Chancellor should have just allowed the children to keep living the only lives they knew. The court, with admittedly little evidence justifying such a drastic measure, tore these children from their loving mother and the only home they have ever known. Such a drastic measure with such horrifying consequences done with admittedly very little reason or evidence is manifestly erroneous and clearly not in the best interest of the children involved. As such, because there is little if any evidence to justify such a result, the decision of the court should be reversed.

Furthermore, considering the totality of the circumstances in this case, how can it be in the best interest of the children to rip them from the home, a family, and a town they have known their entire life, from a mother who has been their primary care giver since day one, and send them out of state to live with a family they barely know? The decision of the Chancellor was erroneous and if justice exists, then Lori implores this Court to reverse the findings of the Chancellor and return them to their home. Lori has been a caring, loving mother who has raised her children well since birth. Nowhere in the court's decision does the Chancellor find Lori is an unfit mother.

CONCLUSION

This case provides the court with the facts and arguments to reconsider the current law in this area and finally rectify a gross inequality that exist. Allowing fathers of illegitimate children to just lie-in-wait while the mother who doesn't have that option takes care of their children. Isn't it at that point, when the parental roles are distinguished, that custody is determined? Shouldn't those reluctant fathers, at that point, have to prove a material change of circumstances in order to succeed in attaining custody. The father is allowed to improve and continue his life without the daily responsibilities of children whereas the mother must daily care for those children, and then this previous court has allowed those same fathers to use this against the mothers. Stop giving parents of illegitimate children advantages over the same mothers who have selflessly cared for those children without hesitation or delay since their birth. It is time for this court to breathe logic and common sense into this area of law. Lori submits to this Court that the present case provides the relevant facts and arguments to be the vehicle to finally change this area of the law. Plaintiff wishes to bring to this courts attention as well as encourage it to follow a noticeable trend in this area of the law toward change.

CERTIFICATE OF SERVICE

I, Edwin L. Bean, Jr., do hereby certify that I have this day mailed postage prepaid by U.S. Mail, a true and correct copy of the above and foregoing documents to the following:

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This the 19th day of June, 2009.

EDWIN L. BEAN, JR.