

IN THE SUPREME COURT OF MISSISSIPPI

MATTHEW TYLER MCMULLIN

APPELLANT

V.

CASE NO. 2010-CA-01539

KIMBERLY SCOTT SIMMONS MCMULLIN

APPELLEE

APPEAL FROM THE RANKIN COUNTY CHANCERY COURT

BRIEF OF APPELLEE
(ORAL ARGUMENT NOT REQUESTED)

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CERTIFICATE OF INTERESTED PERSONS

The undersigned hereby certifies that the following persons and entities have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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SUGGESTION REGARDING ORAL ARGUMENT

Appellee, Kimberly Scott Simmons McMullin, believes that Oral Argument will *not* be necessary in this matter.

STATEMENT OF THE FACTS

Appellant, Matthew Tyler McMullin, ("Matthew") and Appellee, Kimberly Scott Simmons McMullin ("Kimberly") were married on March 10, 2006, and during the course of their marriage had two male children. (R. 33) Subsequent to the children's birth, differences between Matthew and Kimberly arose and they were granted a Final Judgment of Divorce on December 12, 2008. (R. 33). The judgment of divorce included a Child Custody Agreement which gave each parent joint physical and legal custody of the two minor children. (R. 18-20).

On August 13, 2009, Matthew filed a Petition for Modification of Child Custody and Other Relief in which he alleged that subsequent to the granting of divorce on December 12, 2008, material changes in circumstances had arisen which created an adverse effect on the minor children, including allegations that Kimberly had a substance abuse problem and that she was co-habiting outside the bonds of matrimony. (R. 33-34). As relief, Matthew requested primary physical custody of the two children. (R. 34).

Prior to a Hearing on Matthew's Petition for Modification, Matthew was granted temporary custody of the minor children on January 29, 2010. (R. 41). At the conclusion of the May 12, 2010 Hearing, the trial court found that a material change in circumstances existed; however, based on the testimony adduced at the hearing, custody was ordered to be equally shared between Kimberly and Matthew. (TR. 204-218). An Order was entered on May 26, 2010, reflecting the Court's ruling (R. 42-44), and Matthew then filed on June 4, 2010 a Motion to Alter or Amend Trial or in the alternative for a new trial on. (R. 45-49) The trial court conducted a hearing on that Motion on August 25, 2010 in which it denied Matthew's motion; a final Judgment was entered on August 27, 2010. (TR. 224-239; R. 55). Thereafter, Matthew filed the subsequent Notice of Appeal to this Court on September 22, 2010. (R. 56).

SUMMARY OF THE ARGUMENT

Appellee argues that the trial court was correct in its ruling in awarding equal joint physical and legal custody of the two minor children. Although the trial court found that a material change in circumstances had occurred, this material change did not *necessitate* a change in custody. The trial court properly weighed the *Albright* factors in relation to the evidence presented to find that, despite Kimberly's *past* behavior, the children's best interest would be served by equal custody with both parents. *Albright v. Albright*, 437 So. 2d 1003 (Miss. 1983). Further, the Court correctly awarded joint physical and legal custody of the minor children despite Appellant's misplaced reliance on the January 2010 Temporary Order allowing him primary physical custody of the minor children.

Although the Court recognized that Appellee's prescription drug abuse was *a* factor in the Court's consideration of all the evidence, that single fact alone did not outweigh the whole of the *Albright* factors and was, instead, another consideration relied upon by the Court in its decision to award joint physical and legal custody.

Finally, the trial court did not err in applying the tender years doctrine as a factor in its consideration of granting joint custody. Appellant's arguments that the tender years doctrine was incorrectly applied is overcome by the fact that the tender years doctrine was but one analysis made by the trial court.

ARGUMENT

Standard of Review

Mississippi appellate courts review all questions of law under a *de novo* standard of review. *Russell v. Performance Toyota, Inc.*, 826 So. 2d 719, 721 (Miss. 2002). This *de novo* standard of review is further limited in domestic relations cases by the substantial evidence/manifest error rule, and an appellate court may only reverse a chancellor's findings of fact when

there is substantial and/or credible evidence in the record to justify his finding. The scope and review in domestic relations matters is further governed by the rule that an appellate court will not disturb a chancellor's findings unless he or she was manifestly wrong, clearly erroneous, or if he or she applied an erroneous legal standard. *Jundoosing v. Jundoosing*, 826 So. 2d 85, 88 (Miss. 2002).

I. Although the Court found that a material change in circumstances existed, after considering all the evidence presented ruled that the children's best interest would be served by joint physical and legal custody.

On May 12, 2010, the trial court found that a material change in circumstances had, in fact, occurred. (TR. 204). This single finding thus satisfies the first of three showings a petitioner must make for a modification of custody, those being: (1) a substantial material change in circumstances that have occurred since the entry of the judgment of divorce; (2) that those material changes and circumstances have adversely impacted the children and; (3) whether the children's best interest will be served by modifying custody. (TR. 202). *Richardson v. Richardson*, 790 So. 2d 239, 242 (Miss. Ct. App. 2001). This finding was thus required to be considered in the trial court's overall analysis and final judgment.

Appellant relies on the fact that a material change in circumstances existed to support his position that the trial court erred in granting joint physical and legal custody as contemplated by, and agreed to in the original child custody agreement. More specifically, Matthew argues the trial court should have continued the custody arrangement detailed in the January 2010 Order.

Appellant specifically argues that because a material change in circumstances had occurred since the time of divorce and entry of the original custody agreement, the trial court erred in awarding joint physical and legal custody. While it is true that a material change occurred since the divorce, the trial court was not necessarily bound to rely on the January 2010 Order for two reasons. First, the January 2010 Order was, by its own terms, temporary. In fact,

the Order is styled as such and even states on its face that it would become void following the May 12, 1020 Hearing. (R. 41). Second, and more controlling, the Supreme Court has previously stated that when a custody order is temporary, a chancellor is "free to make a *de novo* original award of custody based on the factors in *Albright*." *Blevins v. Bardwell*, 784 So. 2d 166, 170 (Miss. 2001). Therefore, it was not an error for the trial court to find that although a material change had occurred, joint physical and legal custody was appropriate as a *de novo* award based on the *Albright* factors.

II. Although the trial court found that a material change in circumstances existed, there was no evidence that this change had an adverse impact on the children.

The trial court was clear when it found that a material change in circumstances had, in fact, occurred since entry of the original child custody agreement. (TR. 202, 204). Based on that finding, the Court had to then determine whether the material change in circumstances (Kimberly's drug history) had an adverse impact on the children. *Richardson v. Richardson*, 790 So. 2d 239 (Miss. Ct. App. 2001). Specifically, after noting that there was a lack of evidence showing adverse harm or impact, the trial court stated that it must determine whether there was a showing of a "connection between what Kimberly has done and [whether there] is...any harm or impact on the children? I don't think it is here, and it is because of the children's age." (TR. 207). The trial court did rule, however, that Kimberly's behavior and lifestyle *could* lead to *potential* harm to the minor children and found that there was the *possibility* of adverse harm to the children. (TR. 208). Despite this finding, however, and with the benefit of having heard all the testimony and evidence, the trial court did not find any potential harm to be an *actual* harm requiring a change in custody.

There is no denying that the trial court found that Kimberly's behavior might have a potentially adverse impact on the children; in fact, when analyzing the facts against those in

Riley v. Doerner, 677 So. 2d 740 (Miss. 1996), the trial court stated on the record that Kimberly's lifestyle "is certainly one of potential harm . . . for these two little boys" (TR. 208). Even with a finding of potential harm, and presumably mindful that as a chancellor he had the authority to modify custody without a specific finding that Kimberly's behavior and home environment posed a specific threat of adverse harm, the trial court still weighed what was in the children's best interest and opted to award joint physical and legal custody to both parents. *Riley v. Doerner*, 677 So. 2d 740, 744 (holding that a "chancellor is *never* obliged to ignore a child's best interest in weighing a custody change; in fact, a chancellor is bound to consider the child's best interest above all else."). After listening to all of the evidence presented, and following case authority that the "polestar consideration" is what is in the children's best interest, the trial court awarded joint physical and legal custody. *Riley v. Doerner*, 677 So. 2d at 743 (TR. 217-18).

III. The Trial Court's *Albright* analysis was correct.

Appellant argues that the trial court committed errors in relation to its *Albright* analysis. First, Matthew argues that the trial court improperly gave weight to all *Albright* factors, rather than giving certain factors more weight than others. Appellant also argues that the trial court, in general, improperly weighed the *Albright* factors to grant joint physical and legal custody.

As Appellant notes, child "custody is a matter of equity which requires more than counting the votes in favor of the mother or father. A single factor can weigh so heavily in favor of one party that equity would require granting custody to that parent." *Divers v. Divers*, 856 So. 2d 370, 376 (Miss. Ct. App. 2003). Matthew argues that the trial court's determination that Kimberly has a drug addiction outweighs any other *Albright* consideration. He bolsters this position by arguing that Kimberly's drug addiction prevents her from providing a stable home environment for the children and that this drug abuse overshadows her time with the children as a mother and caregiver.

Matthew further relies on *Johnson v. Gray*, 859 So. 2d 1006, to support his argument that the Court of Appeals held in a similar case that it was proper to award custody to the father due to the mother's drug and alcohol addiction. (Miss. 2003). While it is true that the trial court determined Kimberly to have a drug problem, and that the mother in *Johnson v. Gray* lost custody, the Supreme Court's analysis in that case is beneficial to an analysis in the instant case. First, the *Johnson* Court found that all of the factors in the mother's favor—age, health and sex of the child—were "dependent on something extrinsic to her capacity as a parent." *Johnson v. Gray*, 859 So. 2d at 1013. Here, however, the trial court found that *both* parents were equal in terms of parenting skills, noting in regard to Kimberly that, "I don't think there's any doubt *because* Kimberly is—because she is working in her home, because she is—in terms of capacity she has the greater capacity to provide child care, primary child care." (TR. 210). Parenting capacity is not, as the *Johnson* Court held, an *extrinsic* factor, but one that is intrinsic and weighs in Kimberly's favor.

Johnson v. Gray is also important for the proposition that findings of "fact made by a chancellor may not be set aside or disturbed on appeal if they are supported by substantial, credible evidence." *Johnson*, 859 So. 2d at 1013 (citations omitted). Likewise, *Johnson* is illustrative for the holding that a "chancellor has the ultimate discretion to weigh the evidence the way he sees fit." *Id.* As the trier of fact, and having heard all of the testimony presented at the hearing, the trial court was in the best position to decide who should have custody. The Chancellor's decision, based on the facts and evidence presented at the May 2010 hearing, cannot be overturned unless he was "manifestly wrong, legally erroneous, or [applied] an erroneous legal standard." *Mabus v. Mabus*, 847 So. 2d 815, 818 (Miss. 2003).

In support of his argument that the trial court generally improperly weighed the *Albright* factors, Appellant correctly notes that the trial court ruled the parties equal on emotional ties and

home stability (Appellant's argument notwithstanding). (TR. 213-16). The trial court found that the age, health and sex (the tender years doctrine) and capacity to provide care favored Kimberly. (TR. 208-212). Being even more specific, the trial court divided parenting skill into two aspects—capacity and good judgment—which the trial court determined in favor of Kimberly and Matthew, respectively. (TR. 210-12). Matthew argues any finding by the trial court as to Kimberly's capacity to provide primary care was erroneous, yet the trial court having the benefit of having heard all of the evidence presented, and being the trier of fact, still found that Kimberly has the "greater capacity to provide child care, primary child care." (TR. 210); *see, supra*. Matthew tries to steer the Court's attention on this factor toward his own view that Kimberly's occupation making and selling picture frames left her at home with few responsibilities. Contrarily, Kimberly openly testified that she was at "home 24/7, and when my children are at my house they are with me 24/7." (TR. 59).

Appellant strenuously, and continuously, argues that he was the primary custodian, thus satisfying *Albright's* continuity of care analysis, despite the trial court's finding that continuity of care was equal between both parents. (TR. 209). Specifically, Appellant argues that he was the primary caregiver as evidenced by two events; Kimberly's in-patient drug rehabilitation in 2009 and his award of physical custody from January to May 2010. While at first glance these two events appear to fully support his position, several points merit discussion. First, Kimberly did enter an in-patient drug rehabilitation facility for fifty-six days beginning in February, 2009. (TR. 26). During that time, Matthew kept the children. (*Id.*). Kimberly further testified that Matthew offered to take the children during her treatment. (TR. 26-28). At no time during her treatment did the parties enter into an agreed order regarding physical custody, nor did she ever receive a petition for custody modification contemporaneous to, or immediately following, her 2009 rehabilitation treatment. (TR. 27). In fact, her testimony reveals that Matthew did not file

a modification petition until *after* Kimberly filed a Petition for Contempt. (TR. 27-28). The lack of the contemporaneous filing of a modification petition to Kimberly's rehabilitation treatment and the actual filing of a petition *after* her filing a contempt petition begs the question that if continuity of primary custody was so important, why was it not raised in early 2009? This suspect timing undercuts Appellant's continued reliance on his continuity of care argument.

Second, Matthew argues that the five month period of time prior to the custody hearing during which he had primary physical custody reflects continuity of care in his favor. He repeatedly refers to the January, 2010 Order awarding custody, but rarely notes that this Order was temporary in nature. (R. 41). As noted on its face, and discussed *supra*, the Order was to be void following the May 12, 2010 hearing. (*Id.*). Appellant should not be allowed to utilize this temporary order, limited in time by its very language, to prove continuity of care and prevent the trial court from entering an Order that is in the children's best interest. The Supreme Court has previously held that a temporary custody order allows a chancellor to "make a de novo original award" of custody based on the *Albright* factors. *Blevins v. Bardwell*, 784 So. 2d 166, 170 (Miss. 2001). The trial court was thus not governed by the January 2010 temporary order and was free to consider all evidence regarding continuity of care when conducting its *Albright* analysis.

Finally, Appellant argues that the trial court erred by improperly applying the tender years doctrine to favor Kimberly when, he urges, the doctrine should not apply. Matthew urges this Court to essentially hold that "because both children [are] boys, as well as noting the law's compelling interest in keeping siblings together . . ." the tender years presumption was outweighed by other factors. *Steverson v. Steverson*, 846 So. 2d 304, 306 (Miss. Ct. App. 2003). The tender years doctrine is but one factor a chancellor is to consider in a custody case. *Steverson*, 846 So. 2d at 306. The "polestar consideration" is, of course, the children's best interest. *Albright*, 437 So. 2d at 1005. Here again, after hearing all of the testimony and having

the benefit of having all of the evidence before it, the trial court concluded that the children's best interest would be best served by joint custody between both mother and father. (TR. 202-218).

CONCLUSION

After having the opportunity to hear all evidence presented, the trial court made an informed analysis and application of the facts to the law that it was indeed, in the children's best interest to that it was indeed, in the children's best interest to be with both Kimberly and Matthew the trial court thus used its discretion to award joint custody to both Kimberly and Matthew. The trial court did not commit manifest error, nor did it apply an erroneous legal standard. Absent this or any other error, the trial court's decisions, supported by credible evidence, cannot be disturbed. Appellee, Kimberly Scott Simmons McMullin prays that this Court will affirm the Rankin County Chancery Court's decision.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I, Barry C. Campbell, do hereby certify that I have hand delivered a true and correct copy
of the foregoing documents to:

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THIS, the 2^d of August, 2011.


BARRY C. CAMPBELL