IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI
CASE # 2010-CA-01693

JERRY M. STENNETT, JR. APPELLANT

VERSUS

LUANN ROBERSON DAWSEY 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 the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualifications or recusal.

TRIAL COURT JUDGE

Honorable Carter Bise
Chancellor
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Respectfully submitted this the 16th day of June, 2011

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STATEMENT OF THE CASE

On or about September 10, 2004, an Agreed Judgment of Filiation, Support and Visitation was entered wherein the lower court, having received the DNA paternity testing into evidence, found that the Appellant, Jerry M. Stennett, Jr., is the natural and legal father of Zander Stennett, a male child born to the parties on April 10, 2001, and Makenna Shea Stennett, a female child born June 2, 2003. At that time, Luann Dawsey was awarded the paramount care, custody and control of the minor children subject to reasonable and generous visitation by Jerry M. Stennett, Jr. {R. p. 2; R.E. Tab 3].

The matter currently before this Court began with the filing of a Petition for Modification and a Motion for Emergency Ex Parte Relief. Stennett sought an award of immediate custody of the two minor children of the parties due to a substantial and material change in circumstances that were adverse to the best interests of the children. Specifically in his Petition, Stennett alleged that Dawsey had a serious alcohol and drug abuse problem that required a three month period of rehabilitation for a methamphetamine issue; Dawsey has lived with two men to whom she was not married and exposed the children to these men; Dawsey does not have a stable living environment; and Dawsey cannot hold a job. [R. pp. 32-23; R.E. Tab 2].

The Motion for Emergency Ex Parte Relief was granted on February 3, 2010. On the date that the Ex Parte was obtained, Stennett went to his children's school, retrieved the children, and took them to Arkansas where he now lives with his new wife and child. The children were enrolled in school, extracurricular activities and remained in

Arkansas with Stennett until approximately September 3, 2010, until the conclusion of the hearing on the Motion for Modification. [R. p. 37; R.E. Tab 2].

At the hearing held on August 30, 2010, the testimony established that Stennett is the proprietor of an Outback Steak House in Jonesboro, Arkansas and has a flexible work schedule. [Transcript p. 74; R.E. Tab 4]. The testimony further established that the children, while in Arkansas, were involved in sports and dance and their grades improved to the extent that they obtained achievement awards. [Transcript pp. 69-71; R.E. Tab 4]. In fact, Makenna's benchmark test while in the custody of Dawsey reflected a grade of "67/D". [Exhibit "2", R.E. Tab 6]. However, during the months that Makenna was in the custody of Stennett, she received numerous achievements awards from her school. [Exhibit "1"; R.E. Tab 5].

Further, the testimony established that Dawsey currently and for the past 14 years has lived with her parents with the exception of two periods of time that she lived with other men. [Transcript p. 131; R.E. Tab 4]. Moreover, Dawsey admitted to sporadic employment, using crystal meth and attending a rehabilitation facility. [Transcript p. 159; R. E. Tab 4].

Despite the above mentioned facts the lower court found that Stennett has shown nothing more than isolated incidents which do not amount to a substantial and material change in circumstances adverse to the best interests of the children. Furthermore, the trial court stated that "[a]dmittedly, without the assistance of her parents, Dawsey would be adrift is a sea of economic uncertainty . . . ." [R. p. 36; R.E. Tab 2]. It is the

parent's circumstance which must be considered and not the grandparents, as such, the trial erred in falling to transfer custody.

SUMMARY OF ARGUMENT

"The totality of the circumstances must be considered in determining whether there was a material change in circumstances." *Mabus v. Mabus*, 847 So.2d 815, 818 (¶ 8) (Miss. 2003) (citing *Bredemeier v. Jackson*, 689 So.2d 770, 775 (Miss. 1997). "In all cases involving child custody, including modification, the polestar consideration is the best interest and welfare of the child." *Id. at* 1013; *Riley v. Doerner*, 677 So.2d 740, 744 (Miss. 1996). The chancellor characterized Dawsey's behaviors as isolated when in fact her conduct is a pattern which is detrimental to the parties' children's welfare. On the other hand, Stennett through systematic effort during the post-custody agreement period has improved his lifestyle such that he could and has provided a living situation for the parties' children that is more suitable than the situation created by Dawsey. By not considering the totality of the circumstances, the chancellor failed to apply a complete legal standard in refusing to modify the custody agreement. As such, the chancellor's judgment must be reversed.

ARGUMENT

Whether the chancellor erred in applying an incorrect or rather, an incomplete legal standard by failing to consider the totality of the circumstances in a child custody modification case

The law on custody modification is well established. "[A] non-custodial party must prove [that]: (1) there has been a substantial change in circumstances affecting the child; (2) the change adversely affects the [child's] welfare; and (3) a change in custody

is in the best interest of the child." *Johnson v, Gray,* 859 So.2d 1006, 1013 (¶ 33) (Miss. 2003). As this Court is well aware, "[i]n all cases involving child custody, including modification, the polestar consideration is the best interest and welfare of the child." *Id. at* 1013; *Riley v. Doerner,* 677 So.2d 740, 744 (Miss. 1996). "The totality of the circumstances must be considered in determining whether there was a material change in circumstances." *Mabus v. Mabus,* 847 So.2d 815, 818 (¶ 8) (Miss. 2003) (citing *Bredemeier v. Jackson,* 689 So.2d 770, 775 (Miss. 1997).

In the instant case the chancellor failed to consider the totality of the circumstances in determining whether the children's best interest would be served by a change in custody. The chancellor characterized Dawsey's behaviors as isolated when in fact her conduct is a pattern which is detrimental to her children's welfare. [R. p. 36; R.E. Tab 2]. "[W]hile parents indeed possess the freedom to choose various behaviors, they nonetheless must face the consequences of the impact that their choices have upon their child[ren's] welfare." *Masters v. Masters,* 52 So.3d 1279, 1283 (¶19) (Miss. App. 2011). Since the entry of the original custody agreement, Dawsey has lived with her parents with the exception of two instances where she lived with two other men. [Transcript p.131; Tab 4]. She has admitted to using crystal meth to the extent that it "scared her" into a rehabilitation facility. [Transcript p. 159; R.E. Tab 4]. Further, she has not held gainful employment, but rather has relied upon her parents and child support to support her children. Further, Dawsey stated that she was unaware that her daughter's school benchmark score was a 67/D. Academic struggles are certainly a circumstance which must be viewed in regards to a custodial arrangement. *See Powell v.*

Powell, 976 So.2d 358, 362 (Miss. App. 2008). Taken as a whole, such conduct is not isolated, but is a detrimentally systematic. Simply put, the chancellor findings failed to acknowledge the negative effects such parental examples has and will have on the children.

The proof showed, on the other hand, that Stennett is the proprietor of an Outback Steak House, and is married living in his own home which supplied the children with their own room during the seven months they lived with him. More importantly, while the children lived with Stennett, their grades improved to the extent that received achievement awards and both children participated in extracurricular activities. [Exhibit "1", R.E. Tab 5]. Here, the chancellor "applied an incorrect, or rather, an incomplete legal standard" when he should have recognized the teachings of *Riley v. Doerner*, 677 So.2d 740 (Miss. 1996), rather than dismissing them. *Powell v. Powell*, 976 So.2d 358, 362 (Miss. App. 2008).

This Mississippi Supreme Court, in *Riley v. Doerner, Supra,* in apparent recognition that such a technical application of the rule regarding change of custody could lead to nonsensical results, stated:

> In earlier opinions of this subject, we have held that a change in the circumstances of the non-custodial parent does not, by itself, merit a modification of custody. We adhere to that holding today. However, we further hold that when the environment provided by the custodial parent is found to be adverse to the child's best interest, and that the circumstance of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly.

Id. at 744. Without a doubt, Stennett is able to provide an environment more suitable than that of Dawsey. Stennett has not only the financial ability to provide for his children, his employment allows for the proper nurturing of his children as evidenced by their improvements and achievements in school. As recognized by the chancellor, "without her parents' assistance, Dawsey [as well as her children] would be adrift in a sea of economic uncertainty . . . ." [R. p. 36; R.E. Tab 2].

Considering the totality of the circumstances, the children's best interest will be served by modifying the custody arrangement. This case is analogous to *Hill v. Hill*, 942 So.2d 207 (Miss. Ct. App. 2006), where the Court found that the mother's unstable lifestyle warranted a modification of custody. In *Hill*, Mary Hill Jackson had been granted, by agreed order, primary physical custody of her minor child. *Id.* at 209 ¶(1). Mary dated and cohabited with several men and moved multiple times after the initial custody order. *Id.* at 210-11 (¶¶9-14). The chancellor found that "Cary had matured significantly and that Mary had presented no evidence that Cary was morally unfit." *Id.* at 213 (¶24). The chancellor found that a modification of custody was warranted under these facts because Cary could now provide a more stable environment for the couple's child. *Id.* at 213 (¶25). The Court noted that while the child was not currently demonstrating any adverse effects, that did not preclude the chancellor from considering that the child was suffering, and would suffer, harmful [e]ffects in the foreseeable future. *Id* at 212 (¶18). The same is true here. Stennett can provide a better and more stable home environment than Dawsey as Dawsey relies on others for her and the children's environment. *See also Graves v. Haden*, 52 So.3d 407 (Miss. App. 2010).

Such reliance and questionable judgment more likely than not will result in harmful effects to the children in the foreseeable future. As such, a change in custody is appropriate. "This Court has indicated that under certain circumstances, adverse effects can be shown where it is reasonable foreseeable that a child will suffer adverse effects because a child's present custodial environment is clearly detrimental to his or her well-being." *Gainey v. Edington,* 24 So.3d 333, 337 (¶15) (Miss. App. 2009) (quoting *Gilliland v. Gilliland,* 984 So.2d 364, 368 (¶12) (Miss. Ct. App. 2008); *Johnson v. Gray,* 859 So.2d 1006, 1014 (¶39) (Miss. 2003).

Dawsey's pattern of judgment and reliance on others produces an environment which could foreseeably result in detrimental effects on the parties children. However, Stennett through his efforts has improved his lifestyle such that he could provide a living situation for the children that are substantially better than what currently exist. A change in custody should have been granted.

CONCLUSION

In failing to consider the totality of the circumstances, the chancellor committed an error in applying only a partial legal standard. As such, the chancellor's judgment must be reversed.

CERTIFICATE OF SERVICE

I, the undersigned counsel, certify that I have this day mailed, via U.S mail postage prepaid the above and foregoing Brief of Appellant to the forgoing persons of record:

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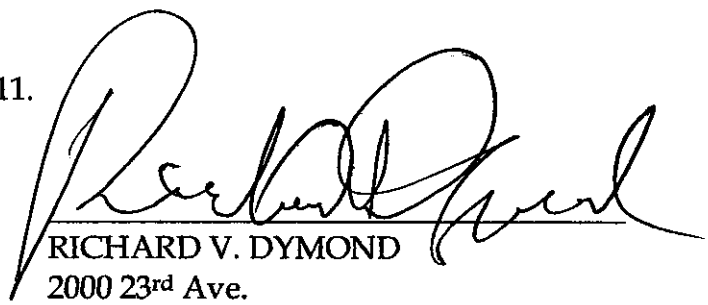
SO CERTIFIED this the 14th day of June, 2011.



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