

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

NO. 2010-CA-01916

JIMMY SCOTT THOMPSON

APPELLANT

-VERSUS-

TAMMY R. THOMPSON HUTCHISON

APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF RANKIN COUNTY,
MISSISSIPPI

REPLY BRIEF OF APPELLANT

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I. CLARIFICATION OF THE FACTS

There are several factual inaccuracies in Tammy's brief that should be clarified. Foremost of these is the repeated use of "choking," in quotation marks, as if to imply it was something else. Upon questioning by the Chancellor, the parties minor son, Hayden, testified as follows;

Q: All right. Well, your step-daddy used to be a policeman. You don't - - there's got to be more to it than you just feel safer. There's got to be a reason for feeling safe?

A: And then I'm scared of Tony.

Q: And why are you scared of Tony?

A: Because he had choked me one time.

Q: Because he choked you?

A: Yes, sir.

(Tr. 131).

The testimony was not equivocal, Hayden testified that Tony had choked him. Of course Tony's testimony attempted to minimize the incident, but even Tony admits that, "I do remember doing something on his neck and leaving a mark because my wife [Tammy] brought it to my attention." (Tr. 82).

Tammy, in her brief, admitted that Tony "put his finger on Hayden's cheek." (*Brief of Appellee*, Pg. 5). However, Hayden's direct testimony was that Tony "shoved his finger in my face." (Tr. 131). Tony, through testimony, and Tammy, through her brief, attempt to minimize their conduct towards the minor children, however the adults minimizing their own behavior does not disprove or make an incident of choking and shoving a finger in a child's face less likely to have occurred, nor does DHS NOT taking action mean it is "unfounded," as Tammy claims. (*Brief of Appellee*, pg. 4).

II. Addressing Family Violence Statute was MANDATORY

The Chancery Court failed to address the Domestic Violence Statute. *Mississippi Code Annotated Section 93-5-24 (9)* applies to “**every proceeding** where the custody of a child is in dispute.” *Miss. Code Ann. § 93-5-24 (9)(a)(i)*(emphasis added).

Tammy attempts to distinguish *Lawrence v. Lawrence*, but factually the number of instances of violence were similar and a hole in the wall and a bloody nose, as in *Lawrence*, are not required to invoke the Domestic Violence Statute, but are examples that require it be addressed. *Lawrence v. Lawrence*, 965 So.2d 251 (Miss. App. 2006).

In *Boyd vs. Boyd*, 2010-CA-00200, a case just decided by the Mississippi Court of Appeals the issue of the Domestic Violence Statute was addressed. In *Boyd*, neither party raised the Domestic Violence Statute, but the Chancellor, on her own accord, did so. In *Boyd*, instances that served to warrant the Domestic Violence Statute to be invoked was the husband pushing, possibly accidentally, the wife, which caused her to break her tail bone when she fell. It included the husband “grabbing” a child’s neck, swatting another child with a fly swatter and spanking her in a fashion that caused her to tumble down the stairs. The husband, of course, denied any violence took place though he admitted to spanking the children and that the wife broke her tail bone when she jumped on his back and fell off. *Id. at ¶ 37*. Further, the GAL in the Boyd matter investigated the claims of violence. The Chancellor concluded that based on testimony, the GAL report, the fact that the father (the alleged violence perpetrator) had completed a voluntary anger management course, was seeing a counselor and was abstaining from alcohol that the Domestic Violence presumption was overcome, not that it need not be addressed. No such analysis was included in the case at bar, nor was the Domestic Violence Statute even considered. That is error.

III. GAL Should Testify.

The appointment of the GAL in this matter was mandatory. Guardians Ad Litem best serve their wards by being a “vigorous advocate free to investigate, consult with them at length, marshal evidence and subpoena and cross-examine witnesses.” *Interest of R.D. and B. D. v. Linda D.*, 658 So.2d 1378, 1383 (Miss. 1995). In *McDonald vs. McDonald*, the mother argued that the GAL exceeded the proper role of a GAL by offering hearsay testimony, as well as taking “on a role as a litigant/expert” by providing a written report to the court, making recommendations, discussing the views of the court-appointed counselor, filing a motion, testifying, examining witnesses, and meeting ex-parte with the chancellor.” *McDonald Vs. McDonald*, 39 So.3d 868 (Miss. 2010). The Mississippi Supreme Court determined that;

”Other than offering hearsay testimony as discussed below, the GAL was simply following the provisions of the GAL statute and the pronouncements of this Court. This Court dealt recently with a similar issue in *S.G. v. D.C.*, 13 So.3d 269 (Miss.2009).”

The GAL in the case at bar should have testified. Tammy argues that Scotty could have called the GAL and perhaps chose not to. However the role of the GAL is ever evolving with many cases concerning the role of GAL’s currently being decided. *McDonald* holds that a GAL testifying and otherwise participating in the matter “is following the provisions of the GAL statute and pronouncements of this Court.” Perhaps Scotty should have called the GAL, however the GAL appointment was mandatory and GAL’s testifying is provided for in case and statutory law.

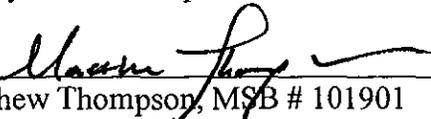
CONCLUSION

Chancellor's have an unenviable job when deciding matters of child custody. However, our law provides a framework which is to be followed not only to aid the Court in determining its judgment, but to aid the appellate Court's when matters are to be reviewed. The Chancellor in this matter failed to consider the Domestic Violence Statute. There were certainly enough instances requiring same to be invoked. The failure to consider the Domestic Violence Statute is reversible error. It means the Chancellor failed to presume that Custody favored Scotty and that must be overcome by Tammy for the Court to rule as it did. Proper consideration of statutory law and requiring a mandatory GAL to be subject to examination is not unreasonable or unduly burdensome on the Courts.

Scotty respectfully requests that this matter be reversed and remanded for a hearing on the merits concerning Domestic Violence and the serious medical concerns raised in his prior brief and that the Court be instructed to perform an Albright analysis thereafter to determine the best interest of the minor children.

Respectfully Submitted,

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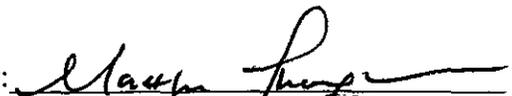
CERTIFICATE OF SERVICE

The undersigned counsel does hereby certify that this day a true and correct copy of the foregoing instrument has been delivered to the following persons:

Chancellor Daniel H. Fairly
P.O. Box 1437
Mississippi 39043

Kevin W. Brady
109 Millcreek Corners Ste, B
Brandon, Mississippi 39047

This the 2nd day of November, 2011.

By: 
Matthew Thompson, MSB# 