

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**

BRIEF OF APPELLANT

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed parties have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Jimmy Scott Thompson, *Appellant*

Matthew Thompson, Counsel for *Appellant*

George C. Nichols, Trial Counsel for Thompson

Prentiss Grant, *Guardian Ad Litem*

Honorable Dan Fairly, Chancellor

Tammy R. Thompson Hutchison, *Appellee*

Kevin W. Brady, Counsel for *Appellee*



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STATEMENT OF ORAL ARGUMENT: REQUESTED

Appellee submits that while this ruling it is not due to intricate, confusing or conflicting rules of law, or instances of first impression that oral argument may assist the Court in reaching an ultimate determination.

STATEMENT OF THE ISSUES

I. The Chancellor Erred in Not Finding a Material, Adverse Change in Circumstances.

A. The Court erred in not considering the Domestic Violence statute.

B. The Court erred in its consideration of Trichotillomania and emotional abuse.

II. The Chancery Court erred in failing to make a specific Findings of Facts and Conclusions of Law, which were requested.

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS AND DISPOSITION

Jimmy Scott Thompson, Appellant, (hereinafter "Scotty") and Tammy R. Thompson Hutchison, Appellee, (hereinafter "Tammy") were divorced December 30, 1998. (R.05).¹ The *Final Judgment of Divorce* awarded joint legal custody of the parties two minor children and awarded primary physical custody to Tammy.

The Judgment was modified on or about September 2004. This modification increased Scotty's child support to \$445.40 per month. All other aspects of the parties Judgment remained the same.

On December 18, 2008, Scotty filed a *Petition for Modification of Child Custody and Other Relief* seeking a modification of custody on the basis of a material, adverse change in circumstance. The Court appointed a *Guardian Ad Litem* to investigate concerns of abuse. The appointment of the GAL was mandatory as there were allegations of abuse. Trial was held on June 7, 2010. Scotty presented his case in chief and upon resting Tammy moved for a dismissal. The Court dismissed the case stating there was no showing of a material, adverse change in circumstances. As such, the Court did not conduct an *Albright Analysis*. Scotty timely filed a *Motion for New Trial and for Specific Findings of Facts*. All post trial relief was denied.

¹

Citations to the Record are designated as (R.__), the Record Excerpts as (R.E.__), and the Transcript of testimony as (Tr.__).

II. STATEMENT OF RELEVANT FACTS

Scotty and Tammy were married on September 1, 1994, and divorced December 30, 1998. (R. 05). The parties have two children. At the time of the modification trial in 2010, Kelly Ashton Thompson was 14 and Jonathan Hayden Thompson was 12. (R. 06, Tr. 07) . After the divorce, Tammy married Tony Hutchison and they have 2 children between them, Morgan 6 and Tucker 1 ½ . At trial, Scotty was engaged to be married and has another child as well. Over 10 years has passed since the date of the divorce and the current modification trial.

Scotty pursued a custody modification due to harm he believed the children were suffering. Scotty witnessed bruising on each of the children and observed behavioural issues. Scotty saw bruising on Kelly's legs where the stepfather, Tony Hutchison, had spanked her.

Tony admitted to spanking Kelly and intended to hit her on her bottom, but instead struck her legs and left marks, though he denies the marks were "bruises". (Tr. 78-79). Tony admitted to spanking Hayden with his hands. (Tr. 80). Tony admitted to putting his hands on Hayden and grabbing his neck. (Tr. 80-82). Tony admitted to sticking his finger on Hayden's cheek to punish him for doing the same thing to his step-sister. (Tr. 95). Tony admitted that the police had been called to their home by Tammy due to their arguing. (Tr. 96). Tony admitted the children were present during the argument and heard the argument that resulted in law enforcement being called. (Tr.97-98). Tony admitted that the children were standing in the driveway when the sheriff's deputy arrived. (Tr. 97). Tony admitted that he and Tammy were in an argument and she "locked" the remote for the T.V. and that he threw it down. (Tr. 96). Tony admitted that their marriage was strained and that was an "understatement". (Tr. 96). Tony admitted that Hayden was involved in a four-wheeler accident, hitting a tree that dented the bumper on the four-wheeler. (Tr. 106).

Hayden also had an incident at school. Hayden was severely spanked by a teacher. Photographs of severe bruising were included in the record in this matter. (Ex. P2-photographs). There were no allegations that Tammy or Tony were responsible for causing the bruising, however according to Hayden- - upon telling his mother about the severe spanking she told him to “go to bed.” (Ex. P3, Letter of Tara Mills). Scotty noticed the bruising the next day and reported it to the authorities. The children are changing schools due, in part, to this incident.

Scotty testified that Hayden sustained injuries in a four-wheeler accident during a camping trip with Tony, which left large scrapes on his stomach, legs, knees, calves and shoulders. (Tr. 11.)

Scotty has noticed emotional problems as well with Hayden. (Tr.12- 20.) Scotty testified that, starting about two years prior to the modification trial, that Hayden would have severe diarrhea when it was time to go back to Tammy’s house. This was corroborated by Frankie Thompson, grandmother of Hayden. Frankie testified to personally observing Hayden crying and having diarrhea when having to resume custody with Tammy. (Tr. 186-87). Frankie also corroborated seeing bruises and scrapes on Hayden. (Tr. 196, 200-01).

Hayden also developed a stress and anxiety disorder which had physical manifestations and symptoms. The diagnosis by Dr. Byram, called Trichotillomania, caused Hayden to literally pull his hair out when he is stressed. (Tr. 14-17)(Ex. P-1, medical records). This likewise impacted Hayden’s appearance. *Id.* There have been multiple instances involving the Department of Human Resources (“DHS”) being called to investigate Tony, one instance in 2003 and a second in 2008. (R. at 29-30.) A *Guardian Ad Litem*, Prentiss Grant, was appointed after the most recent report to DHS. (R. at 32.)

SUMMARY OF THE ARGUMENT

The Chancery Court erred in not considering the Domestic Violence statute, which makes a presumption that the children should not be in the custody of the abusing parent, or in this instance a step-parent and the parent which allows the children to be subjected to same.

MCA §93-5-24(9)(a)(I) states there shall be a rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence. The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or a pattern of family violence against the party making the allegation or a family household member of either party. The court shall make written findings to document how and why the presumption was or was not triggered. The Chancery Court did not consider the Domestic Violence statute at all. The Court erred in not considering the rebuttable presumption and making the requisite written findings that are within § 93-5-24.

The Court erred in finding no adverse impact on the minor children. There was testimony and evidence of an anxiety and stress disorder diagnosis suffered by Hayden. Dr. Byram determined Hayden suffered from Trichotillomania in 2009. This causes Hayden to literally pull his hair out due to stress. Tara Mills, counselor for Hayden, reported that his relationship with Tony and living in his mother's home is a stressor. The Court erred in not finding this adverse to the child.

This Court erred in not requiring the *Guardian Ad Litem* to testify. This Court appointed a GAL due to abuse allegations. The GAL did submit a report and supplemental report, however the GAL did not testify at trial. The Court ruled without the GAL being subject to examination by the parties or the Court. The Chancery Court is charged with determining the best interest of the child and this cannot be accomplished without hearing from the person who was specifically appointed to determine the best interest of the child, regardless of whether any party called the GAL as a witness. This is error and does not serve the best interests of the child.

The Court erred in refusing to make specific Findings of Facts and Conclusions of Law pursuant to MCA §93-5-24 of the Mississippi Rules of Civil Procedure. Scotty requested that findings be made and the lack of such findings were wrongfully refused and prejudiced him on appeal.

STANDARD

The test for modification of child custody is: 1) a material change in circumstance adverse to the child in the custodial parent's home; and then 2) what is in the best interest of the child and does that interest justify a change of custody. The polestar consideration in a child custody case is the best interest and welfare of the child. *Albright*, 437 So.2d at 1005. The factors that assist the Mississippi courts in determining what is in the best interest of the child are the *Albright* factors. *Id.* They are as follows:

The age of the child is subordinated to that rule and is but one factor to be considered. Age should carry no greater weight than other factors to be considered, such as: health, and sex of the child; a determination of the parent that has had the continuity of care prior to the separation; which has the best parenting skills and which has the willingness and capacity to provide primary child care; the employment of the parent and responsibilities of that employment; physical and mental health and age of the parents; emotional ties of parent and child; moral fitness of parents; the home, school and community record of the child; the preference of the child at the age sufficient to express a preference by law; stability of home environment and employment of each parent, and other factors relevant to the parent-child relationship. *Id.*

ARGUMENT

The findings of a chancellor may be disturbed or set aside on appeal if the decision of the trial court is manifestly wrong and not supported by the substantial credible evidence, or an erroneous legal standard was applied. *Pearson v. Pearson*, 761 So.2d 157 (Miss. 2000).

This Court will reverse where the chancellor was ‘manifestly wrong, clearly erroneous or an erroneous legal standard was applied.’” *West v. West*, 891 So.2d 203 (Miss. Dec. 2, 2004) (*quoting Perkins v. Perkins*, 787 So.2d 1256, 1260 (Miss. 2001)).

This is a case that is manifestly wrong, clearly erroneous and not supported by the substantial evidence and it must be reversed and rendered in favor of Scotty Thompson.

I. The Chancellor Erred in Not Finding a Material, Adverse Change in Circumstances.

In his Bench Opinion, the Chancellor found no material change in circumstances, nor an adverse impact with regard to the children warranting an *Albright* analysis. (Tr. 214). However, the Chancellor made no mention of the Domestic Violence statute. The Chancellor made no mention of the Trichotillomania diagnosis and minimized Hayden's own testimony of being scared of Tony. (Tr. 214-15, Bench Opinion).

A. The Chancellor failed to consider 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). According to the trial court's Bench Opinion, Scotty emphasized the issue of Tony striking his children. The trial court found the incidents where Tony struck the children and specifically Hayden was a concern. (Bench Opinion). Tony even admitted that there had been multiple DHS investigations and that Tammy had called law enforcement due to his conduct. This testimony and findings in this child custody proceeding were sufficient to trigger the mandatory statutory duty to make “written findings” in this case.

Once such proof of family violence was offered and findings of family violence were made by the trial court, Mississippi Code Annotated Section 93-5-24 (9) required the following:

1. That “there shall be a **rebuttable presumption** that it is **detrimental to the child and not in the best interest of the child** to be placed in sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence.” *Miss. Code Ann. § 93-5-24 (9)(a)(i)*.

2. That the Court “shall make written findings to document how and why the presumption was or was not triggered.” Miss. Code Ann. § 93-5-24 (9)(a)(i).
3. That the presumption that it is detrimental to the children and not in their best interests to be in the family violence perpetrator’s custody be rebutted only by a preponderance of the evidence. Miss. Code Ann. § 93-5-24 (9)(a)(ii).
4. That the six factors set forth in the statute be considered in determining whether the presumption was overcome. Miss. Code Ann. § 93-5-24 (9)(a)(iii)(1-6).
5. That the Court “make written findings to document how and why the presumption was or was not rebutted.” Miss. Code Ann. § 93-5-24 (9)(a)(iv).
6. That if the Court determined that both parents had a history of family violence, that custody “be awarded solely to the parent less likely to continue to perpetrate family violence.” Miss. Code Ann. § 93-5-24 (9)(b)(ii).
7. That the Court “award visitation by a parent who committed domestic or family violence **only** if the court finds that adequate provision for the safety of the child and the parent who is a victim of domestic or family violence can be made.” Miss. Code Ann. § 93-5-24 (9)(d)(I).

Mississippi Code Annotated Section 93-5-24 (9)(emphasis added).

None of those statutory requirements were addressed in the Court’s ruling. In its post trial denial of Scotty’s request for relief, the Court upon being specifically asked to address it refused. This, too was erroneous. *Lawrence v. Lawrence*, 956 So.2d 251 (Miss. App. 2006).

It is clear from a plain reading of the statute that it applies in **all child custody matters**. (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).) Additionally, the statute contains no requirement that a party plead for its application or otherwise specifically raise the issue of the applicability of the statute for it to apply. Instead, the statute explicitly provides for a **mandatory** duty of the trial court to make findings as to whether or not the presumption as to child custody was or was not triggered by the history of family violence of the parties. *Lawrence v. Lawrence*, 956 So.2d 251 (Miss. App. 2006).

Yet, in his bench opinion the Chancellor, himself, referred to Tony disciplining his step children as “stirring up a hornet’s nest.” (Tr. 216). Additionally, Tony’s arguments with Tammy, throwing the remote, losing his temper, and grabbing, choking, and poking Hayden would be sufficient acts of “assault” to press criminal charges of domestic violence against Tony under Mississippi Code Annotated Section 97-3-7(1) & (3). (A person is guilty of simple assault if he (a) attempts to cause or purposely, knowingly or recklessly causes bodily injury to another...or (c) attempts by physical menace to put another in fear of imminent serious bodily harm...” (*Miss. Code Ann. Sec. 97-3-7(1)*)).

This type of violent behavior by Tony cannot be condoned by the trial courts of this state as “normal” or “not bad enough” to at least trigger a written finding as to whether the presumption in the statute applies. A written determination as to whether the statutory presumption applies is to be made by the trial court once evidence of a pattern of family violence is **alleged**, which Scotty did, and Tony admitted, in this case. Mississippi Code Annotated Section 93-5-24 (9)(a)(1) provides:

The court may find a history of perpetrating family violence if the court finds, by a preponderance of the evidence, one (1) incident of family violence that has resulted in serious bodily injury to, or **a pattern of family violence against, the party making the allegation** or a family household member of either party. **The court shall make written findings to document how and why the presumption was or was not triggered.**

Miss. Code Ann. § 93-5-24 (9)(a)(1)(emphasis added).

Tony admitted to leaving marks on Kelly and Hayden (Tr. 78-79). Tony admitted to putting his hands on Hayden and grabbing his neck. (Tr. 80-82). Tony admitted to sticking his finger on Hayden's cheek to punish him for doing the same thing to his step-sister. (Tr. 95). Tony admitted that Tammy called the police on him as the result of an argument. (Tr. 96-98).

Hayden specifically testified that he would like to live with his father. (Tr.132). He stated that he felt "safer" at his father's home. (Tr. 132). Hayden testified that he was scared of Tony because Tony had choked him and he shoved his finger in his face. (Tr. 133).

Upon questioning the Chancellor asked;

Q: Okay. Let me ask you this, if I ordered Tony to never spank you, put his hands on you in any way other than to hug you - - I mean, to use his hands or anything other - - if you heard me order him in court to never touch you for disciplining purposes, and you were in here and heard me order that, would that make you feel safer?

A: No, sir.

Q: Because - - let me add this, and I would tell him that if he ever did, I'd put him in jail.

A: No, sir.

(Tr. 144).

Hayden went on to testify about another instance of Tony putting his hands around his throat that had not been disclosed prior to trial and upon questioning stated Tony did it to quiet him in church and that it scared him. (Tr. 144-46). This questioning by the Court indicates a material change and an adverse impact. The Court was posing the use of jail to alleviate Hayden's anxiety. At a minimum it indicates the Court was considering such measures and using the threat of jail to alleviate the anxiety of a twelve year old boy which shows something is wrong.

The trial court failed to consider the Domestic Violence statute. There was more than enough evidence to raise such concerns regardless of the ultimate outcome. Upon the raising of issues concerning the Domestic Violence statute the Court is required to make a written determination as to whether the statutory presumption applied in this specific case. Because the Chancery court failed to consider the rebuttable presumption that it is detrimental to the child and not in the best interest of the child to be placed in the sole custody, joint legal custody or joint physical custody of a parent who has a history of perpetrating family violence, when the trial court found that Tony's actions were detrimental to Hayden, the Court committed reversible error. *Lawrence v. Lawrence*, 956 So.2d 251 (Miss. App. 2006). This matter must be remanded for the applicable findings concerning the Domestic Violence statute.

- B. The Court erred in its consideration of Trichotillomania and emotional harm.

The Court erred in not properly and fully considering the medical diagnosis of Hayden and the testimony of the emotional impact that Hayden had suffered while living in the primary physical custody of Tammy. Hayden's testimony, diagnosis, the written evaluation from the *Guardian ad litem* and statements of Tara Mills, Counsellor, provide sufficient evidence that Hayden's mental and emotional health have been affected adversely while living with his mother. These effects are a result of Tony's actions and Hayden and Tony's relationship.

Dr. Byram diagnosed Hayden with Trichotillomania. (Ex. P-1). This is an anxiety and stress disorder and was diagnosed when Hayden was 10 years old. *Id.* He was showing signs of this stress disorder prior to the diagnosis. *Id.* Hayden was literally pulling his hair out due to the stress he was under while living at home with Tammy and Tony. The appellate Courts have dealt with Trichotillomania before in *Gilliland v. Gilliland*, 969 So.2d 56, 61 (Miss. 2007). In *Gilliland*, the wife's licensed counsellor testified that she suffered from Trichotillomania, a stress disorder that causes a person to pull their hair out. The wife testified that this disorder was a direct result of her stressful and anxious relationship with her husband, whom she lived with at the time. *Id.* The Court erred in overlooking this diagnosis and not giving it the proper weight as a material change, adverse to the child in Tammy's home.

Hayden testified, under oath, that he would like to stay with his father because he is afraid of Tony and feels safer at his father's house. (R. at 130-131.) Hayden also met with a counsellor, Tara Mills, at the request of Scotty. Hayden had seven therapy sessions

and discussed his relationship with Tony. (R. at 165-166, Ex. P-3). After multiple sessions Hayden did show improvement, however, this should not be used to punish Scotty. Scotty recognized a problem and took steps to make it better and then that improvement being used to show “no material change or adverse change” is wrong and inequitable. What incentive does a parent have to help a struggling child if that parent is then punished, in effect, for helping the child? Tony’s actions and Hayden living in Tammy’s home were and are the cause of Hayden’s stress and emotional distress.

There were two investigations by the Department of Human Services (“DHS”). The first in 2003, regarding Kelly’s spanking and the second in 2008, wherein Tony choked Hayden. The recent call to DHS, in 2008, did involve a hearing wherein the case worker, Ms. Mills testified, and the court appointed a guardian ad litem. (R. at 31-32.) In the report by Ms. Mills, she stated that Hayden was in an adverse situation and he did not feel comfortable at his mother’s house. (R. at 204.) Therefore, based on the report by the DHS case worker and the actions by the stepfather towards Hayden, there is a material change in circumstance that is adverse to Hayden.

Scotty provided sufficient evidence to constitute a material and adverse change in circumstance regarding Hayden. Hayden has suffered from punishment inflicted by Tony, as well the emotional trauma that Tony’s disciplinary actions and conduct have caused him

Neither the Court, nor the GAL, fully appreciated the emotional suffering of Hayden. Neither Hayden nor Scotty should be punished because of serious medical and emotional issues were not as fully fleshed out as they should have been at trial. The fact that a 10-12 year old is living in an environment that causes that child to pull out

his hair, noticeably so, is *per se* proof of a material change and adverse impact. The Court erred in not properly considering the medical diagnosis and emotional turmoil as a material change and adverse impact on Hayden.

II. The Chancery Court erred as a matter of law in refusing to make specific findings of facts.

Counsel for Scotty requested through written motion that the Chancery Court state specifically and set forth separately its Findings of Facts and Conclusions of Law pursuant to Mississippi Rule of Civil Procedure 52. This request was submitted along with Scotty's *Motion for New Trial* and both requests were denied.

When a party requests specific findings of facts and conclusions of law, it is error for the court to fail to make such findings. *Miss. Det of Transp. v. Trosclair*, 851 So.2d 408 (Miss. App. 2003). The Court errs in not making specific findings when the underlying facts are in dispute and there are issues of credibility of witnesses. *Patout v. Patout*, 733. So.2d 770 (Miss.1999).

The Chancery Court stated that its bench opinion "contained sufficient findings of facts and conclusion of law" in denying the request for such. (Tr. 244). However, the Bench Opinion does NOT address the domestic violence statute nor address Hayden's medical diagnosis of Trichotillomania.

CONCLUSION

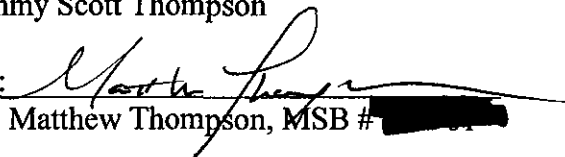
The Chancellor erred in finding there was no material change in circumstance adverse to the Children. This was error because the chancellor failed to address statutory law concerning domestic violence that is required to be addressed in a case such as this one. The Chancellor erred in not addressing the serious medical condition of Hayden that is a direct result of the environment he is living in. Chancery Court is one of equity and determining the best interest of the children is the polestar consideration. This should not be sidestepped because of trial testimony that may have been insufficient. The GAL was a mandatory appointment and should have testified and the Chancellor should have instructed as such.

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

Respectfully Submitted,

Jimmy Scott Thompson

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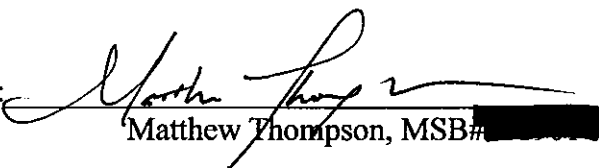
CERTIFICATE OF SERVICE

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 Cors #B
Brandon, Mississippi 39047

This the 10th day of July, 2011.

By: 
Matthew Thompson, MSB# 