IN THE SUPREME COURT OF MISSISSIPPI

DAWN SMITH SHANNON CLIFTON, APPELLANT

V. DOCKET NO. 2011-CA-00037

THOMAS R. SHANNON, APPELLEE

ON APPEAL FROM THE CHANCERY COURT OF
DESOTO COUNTY, MISSISSIPPI
Cause No. 99-02-0275

BRIEF OF APPELLEE

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ORAL ARGUMENT NOT REQUESTED

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

Dawn Smith Shannon Clifton P. O. Box 157 Castle Rock, Colorado 80104	Appellant
Thomas R. Shannon 2730 White Oak Drive Nesbit, Mississippi 38651	Appellee
Mitzi C. Johnson, Esq. 185 North Main Street, Suite 102 Collierville, Tennessee 38017	Attorney for Appellant
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Honorable Vicki B. Cobb Chancellor P.O. Box 1104 Batesville, Mississippi 38606	

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STATEMENT OF ISSUES

I. Whether or not the trial court properly retained continuing, exclusive jurisdiction to hear this matter.

II. Whether or not the trial court properly found a material change of circumstance which adversely affected the welfare of the minor child.

III. Whether or not the trial court properly considered the child's preference among factors in assessing the child's best interests.

IV. Whether or not the Appellee established a material change of circumstance which adversely affected the minor child by a preponderance of the evidence.

STATEMENT OF THE CASE

The Appellee, Thomas R. Shannon, ("Father"), and the Appellant, Dawn Smith Shannon Clifton, ("Mother"), were divorced in the Chancery Court of DeSoto County, Mississippi on July 26, 1999, on the ground of irreconcilable differences. (R. 2) The marriage produced one child, Ashley Nicole Shannon, who was born on May 16, 1996. (R. 15) Mother was awarded physical custody of the minor child with Father and Mother enjoying joint legal custody. (R. 18) Father was awarded reasonable visitation. (R. 18)

Mother moved with minor child to Colorado on December 31, 2005, and shortly thereafter remarried. (Tr. 49) Father filed a Petition for Contempt and Modification, etc. on June 9, 2010, citing a material change in circumstances, which adversely affected the minor child. (R. 6- 13) Mother was properly served with the Petition and on July 8, 2010, counsel for Mother filed a Notice of Special Appearance objecting to jurisdiction. (R. 42)

At the hearing on July 26, 2010, the Court determined that it retained continuing, exclusive jurisdiction over the matter, pursuant to Mississippi Code Annotated §93-27-202. (Tr. 25-30) Father was awarded temporary custody of the minor child by Order dated August 17, 2010. (R. 48-50) The action was continued for review by the Court on December 13, 2010. (R. 49) After review,

the Court ruled that permanent custody would be awarded to Father by Order dated January 14, 2011. (R. 54-58)

SUMMARY OF THE ARGUMENT

The trial court properly retained jurisdiction pursuant to the Uniform Child Jurisdiction Enforcement Act (UCCJEA). In Mississippi, the UCCJEA provides that a court which has made a custody determination has continuing, exclusive jurisdiction over the determination either until (1) both parties and the child move from the state or (2) a court finds that either the child, or the child and one parent, no longer have a significant connection to Mississippi and substantial evidence regarding the child's care, protection, training, and personal relationships is no longer available in the state.

Additionally, the trial court properly found a material change of circumstance which adversely affected the welfare of the minor child and modified custody, based on the child's best interests. The record indicates that upon finding a material change in circumstance the chancellor properly considered the child's preference, among other factors, in evaluating the child's best interests, as required by Mississippi law. Appellee submits that the trial court's order should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

In custody modification proceedings, a chancellor's findings of fact will not be disturbed or set aside on appeal unless they are manifestly wrong or not supported by substantial credible evidence. McDonald v. McDonald, 39 So.3d 868, 880 (Miss. 2010) citing Bredemeier v. Jackson, 689 So.2d 770, 775 (Miss. 1997). Such findings of fact are afforded great deference. Brooks v. Brooks, 652 So.2d 1113, 1117 (Miss. 1995). However, where the law has been erroneously applied or interpreted, the standard of review for questions of law is *de novo*. Id. Whether the chancery court had jurisdiction to hear a particular matter is a question of law which the Court reviews *de novo*. In re Guardianship of Z.J., 804 So.2d 1009, 1011 (Miss. 2002).

II. THE TRIAL COURT PROPERLY RETAINED CONTINUING, EXCLUSIVE JURISDICTION TO HEAR THIS MATTER.

Under the Uniform Child Custody Jurisdiction Enforcement Act (UCCJEA), the court issuing an initial custody decree has continuing, exclusive jurisdiction to modify the order. The court loses its jurisdiction when both parties and the child have moved from the state. Deborah H. Bell, Bell on Family Law §18.07 at 448 (2005). Pursuant to Mississippi Code Annotated §93-27-202, a

Mississippi court which has made a child custody determination has exclusive, continuing jurisdiction over said determination until:

> (a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships.

The Mother contends that the child's "only connection" to the state of Mississippi is her father who is a Mississippi resident, and therefore, the child has no "significant connection" to the state. In 2010, the Court addressed a similar contention and concluded that because the non-custodial parent had remained in Mississippi since the initial custody determination, the child had a "significant connection" to the state, sufficient to satisfy §93-27-202. White v. White, 26 So.3d 342, 347-348 (Miss. 2010). The Court held that it was within the chancellor's discretion to make such a determination, and the trial court had continuing, exclusive jurisdiction to modify the original custody decree. Id.

In this case, the chancellor determined that the child continued to have a significant connection to the state of Mississippi, having lived here for over nine years and after having moved to Colorado on December 31, 2005. (Tr. 49) The chancellor pointed out that the child's father resided in Mississippi, the child had extended family in Mississippi, the child enjoyed

extended visitation in Mississippi, the child participated in activities in Mississippi, and the child attended church in Mississippi. (Tr. 32-33)

It was within the chancellor's discretion to determine that the child maintained significant connections to the state of Mississippi. Therefore, the chancery court properly retained continuing, exclusive jurisdiction over this matter.

As for Mother's *forum non conveniens* argument, Mississippi Code Annotated §93-27-207 provides that:

> (1) A court of this state which has jurisdiction under this chapter to make a child custody determination ***may*** decline to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.
>
> (2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:
>
> (a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;
>
> (b) The length of time the child has resided outside this state;
>
> (c) The distance between the court in this state and the court in the state that would assume jurisdiction;
>
> (d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(Miss. Code Ann. §93-27-207) (emphasis added)

Mother contends that the chancellor abused her discretion by failing to conduct an analysis of the above factors. However, this argument ignores the plain language of §97-27-207. The statute does not mandate such a review. Instead, the statute is worded so as to give the court discretionary power to decline jurisdiction if it determines that it is an inconvenient forum. Again, the statute is clear in that the issue may be raised by motion of a party, the court's own motion, or the request of another court. In this case, Mother did not raise the issue of *forum non coveniens* at the custody modification hearing and failed to offer any evidence on the issue. This Court should not consider a matter raised for the first time on appeal. Further, there is no evidence in the record that another court requested the chancellor to review the issue of whether or not the forum was convenient, and in fact, the only record evidence concerning another court was that a Colorado court

had declined to assume jurisdiction over a matter related to the case. (Tr. 33)

Moreover, the Mother's suggestion that the chancellor did not consider the factors set forth in Mississippi Code Annotated §93-27-207 is inaccurate. While the chancellor did not explicitly cover each of the factors listed above, her findings were sufficient to show that the factors were considered. The record reflects that the chancellor considered the minor child's testimony about her step-father's threats to her mother and her feeling "nervous" around her step-father. (Tr. 64) The record also indicates that the chancellor considered the length of time, approximately four years, the child had been in Colorado. (Tr. 6, 32) Further, the chancellor addressed Mother's argument regarding the location of evidence in Colorado and found it unpersuasive. (Tr. 32) Lastly, the record contains evidence showing the chancellor's familiarity with the parties and the facts of the case. (Tr. 32) Nothing in the record suggests that the chancellor abused her discretion on the issue of whether Mississippi was an inconvenient forum.

III. THE TRIAL COURT PROPERLY FOUND A MATERIAL CHANGE IN CIRCUMSTANCE WHICH ADVERSELY AFFECTED THE WELFARE OF THE CHILD.

IV. THE TRIAL COURT PROPERLY CONSIDERED THE PREFERENCE OF THE MINOR CHILD AMONG OTHER FACTORS IN ASSESSING THE CHILD'S BEST INTERESTS.

V. THE APPELLEE ESTABLISHED A MATERIAL CHANGE OF CIRCUMSTANCE WHICH ADVERSELY AFFECTED THE WELFARE OF THE MINOR CHILD BY A PREPONDERANCE OF THE EVIDENCE.

"To succeed in an attempt to modify child custody, the non-custodial parent must show: (1) a material change in circumstances has occurred since the issuance of the judgment or decree sought to be modified, (2) the change adversely affects the welfare of the child, and (3) the proposed change in custody would be in the best interest of the child." Ellis v. Ellis, 952 So.2d 982, 989 (Miss. Ct. App. 2006). In considering whether a material change in circumstances has occurred, the trial court must consider the totality of the circumstances. In re E.C.P., 918 So.2d 809, 823 (Miss. Ct. App. 2005). In the case *sub judice*, the record indicates that, based on the totality of the circumstances, a material change in circumstances occurred which adversely affected the welfare of the minor child, and it was in the child's best interest to modify custody.

Although the Chancellor did not use the magic words to expressly find a material change of circumstances, it is clear from her orders that she did find such change to exist. The record is replete with evidence showing a material change in circumstance which adversely affected the minor child. In chambers, the child confided to the chancellor that her step-father made her feel "nervous." (Tr. 7) She further told the chancellor that she was

scared for her mom because, "he (the step-father) has threatened her before," and it "really freaked me out." (Tr. 7) Even if the step-father's threatening the child's mother was an isolated incident as Mother contends, the chancellor determined that the argument left a lasting impression on the child. Based on the child's testimony, the chancellor specifically found that the child felt "uncomfortable" around her step-father. (Tr. 63) As the chancellor explained:

> I know, Mom, that you testified that she and her stepfather were very close and spend a lot of time together. That is not what I got from her. She said she's very nervous around her stepfather. She is uncomfortable around him, and she is fearful at times for you. She—she said that, obviously, there's something that happened pretty soon after y'all moved to Colorado that caused her a lot of concern, some fight that you and your husband had, and that bothers her. She feels uncomfortable. She feels—she doesn't feel very close to him.

(Tr. 63)

Mother's assertion that the effect of the step-father's threatening behavior on the child is diminished by the father's failure to file for custody at the time the threats were made is undermined by the absence of record evidence indicating that the father actually knew about the threats. The record does, however, contain sufficient evidence of a material change in circumstances, based on a totality of the circumstances. The child also clearly expressed her desire to live with her father in Mississippi. (Tr.

7) Expounding on the reasons she wanted to live with her father, the child cited her desire to be closer to extended family on both her father and mother's sides. (Tr. 24-25) The child also described her father's stable home environment and the various activities she participated in with her father including hunting, camping, and attending church. (Tr. 8, 12, 22-23) As the chancellor stated:

> When she talked about- upon my questioning about activities that she participates in in Colorado versus the activities she participates in in Mississippi, she said, my mom and I do this. My mom and I do that. My mom and I in Colorado, but in Mississippi, it's the whole family. You know, her dad and her stepmom, and her stepsister, they go to church as a family, they do activities, they do—they're involved in a lot of activities.

The mother does not dispute that the father's home is a suitable environment. On cross examination, the mother conceded that the child's father was "a great father," and that he offered the child a loving environment. (Tr. 55) When questioned about why the child should not live with her father, the mother offered only:

A: I don't think it's best for her. I -

Q: Best because you don't want it; is that a fair statement?

A: Probably.

(Tr. 57)

Moreover, the chancellor thoroughly questioned the child on the record about whether she had been pressured into saying she wanted to live with her father.

> Q: Well, I mean do you -- has your dad pressured you into doing this or is he…
>
> A: Oh, no, ma'am.
>
> Q: Do you feel like he's the one, the reason you want do this, or you're just wanting to do it because -
>
> A: I want to do this. Like, I never felt any pressure or anything during this whole thing from when I first told him that I want to live with you - is that possible - to now. I don't feel any pressure.

(Tr. 10)

After her discussion with the child, the chancellor determined that the child had not been influenced by her father and was "adamant" in expressing her preference. (Tr. 62)

While a court is not required to respect a child's preference to live with one parent over the other, it is within a court's authority to do so. Bell v. Bell, 572 So.2d 841, 846 (Miss. 1990). In Bell, the lower court split custody of a seven year old child and a thirteen year old child who testified of her preference to

reside with the mother. Mrs. Bell was awarded custody of the seven year old and the father was awarded custody of the thirteen year old. Further, the Court refused to disturb the chancellor's findings in this modification proceeding at least in part because the child was over fifteen (15) years of age at the time of the appeal. Bell at 846. In this case, the minor child turned fifteen (15) in May, 2011. Indeed, a child's expressed preference of custodial parent is not outcome determinative in a custody modification proceeding, however, the chancellor must consider such preference when determining the child's best interest. Holmes v. Holmes, 958 So.2d 844, 848 (Miss. Ct. App. 2007).

The trial court specifically found that the child preferred living with her father and was more comfortable in her father's home. (R. 55) Though the court cited the child's preference as a factor in its determination to modify custody, it also properly considered the testimony of the parties and the minor child and the totality of the circumstances. As a result, the trial court did not abuse its discretion in modifying custody.

CONCLUSION

In conclusion, based on the foregoing reasons, the father, Thomas R. Shannon, respectfully requests the Court to affirm the trial court's decision and award him reasonable attorney fees and costs in having to defend this appeal. In the alternative, because

the parties were limited to less than one hour to present their case, and should this Court find the record to be insufficient, the Father would urge this Court to remand this case back to the lower court for a full hearing on the issue of custody of the minor child.

Respectfully submitted,

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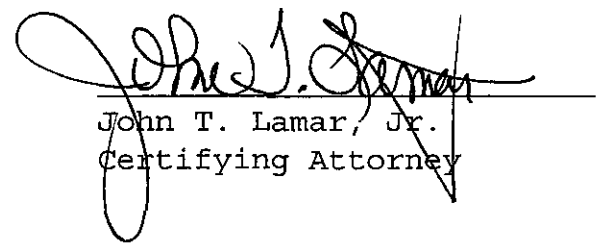
CERTIFICATE OF SERVICE

I, John T. Lamar, Jr., attorney for Appellee, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief to Mitzi C. Johnson at her address of 185 North Main Street, Suite 102, Collierville, Tennessee 38017, and the Honorable Vicki B. Cobb, Chancellor, at her address of P.O. Box 1104, Batesville, Mississippi 38606.

This the 27th day of September, 2011.



John T. Lamar, Jr.
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