

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

No. 2014-CA-00292

KELLY R. BURGE

APELLANT

V.

CAUSE NO.: 2015-CA-01580

CRAIG A. BURGE

APPELLEE

BRIEF OF THE APPELLANT

**APPEAL FROM THE CHANCERY COURT OF FORREST COUNTY, MISSISSIPPI
HONORABLE M. RON DOLEAC, CHANCELLOR, PRESIDING**

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

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Chancellor, Lamar County

The Honorable Deborah Gambrell
Chancellor, Lamar County

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Ms. Kelly Burge
Appellant

Mr. Craig Burge
Appellee

Mr. Chad Sharff
Appellee

s/PHILLIP LONDEREE

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STATEMENT OF THE ISSUES

- I. WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE NATURAL PARENT PRESUMPTION HAD BEEN OVERCOME AS TO KELLY BURGE
- II. WHETHER THE TRIAL COURT ERRED IN MODIFYING CAUSE NO. 2003-0358-GN-G FOR RELIEF MADE BY A PARTY WHOSE CLAIMS WERE SUBJECT TO INVOLUNTARY DISMISSAL

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Lower Court

This is a divorce and child custody case, originally brought by appellee Craig Burge seeking a divorce from his wife, Kelly Burge, on grounds of adultery. Custody of two minor children born to appellant Kelly Burge in her previous marriage to Chad Sharff was also considered by the trial court; subsequent to Craig Burge's divorce filing, Chad Sharff filed a modification action in the previous divorce, and Sharff and Craig Burge then successfully petitioned the Court for consolidation of the two cases, which was granted.

Craig Burge filed his *Complaint for Divorce & Related Relief* on March 21, 2013 seeking custody of the two children of his marriage, the two children of Kelly Burge's previous marriage, and a divorce on the grounds of adultery, habitual cruel and inhumane treatment, habitual and excessive drug use, desertion, and irreconcilable differences. (Rec. Ex. 2 at 32-33; Clerk's Papers 0031-0038). Subsequently on April 9, 2013 a Rule 81 hearing was convened, and the Court entered a *Temporary Order* on April 26, 2013 ordering that Craig Burge have temporary physical custody and outlining visitation. (Rec. Ex. 3; Clerk's Papers 0051-0054).

While no indication exists on the record that Chad Sharff was ever served process in this cause, he filed in the Burge matter his *Answer and Petition to Join Party Needed for Just Adjudication* on August 1, 2013. (Rec. Ex. 4; Clerk's Papers 0057-0065). Therein Sharff denied that Craig Burge was *in loco parentis*, but joined Craig Burge's request for custody of all four minor children, including the two Sharff children. Sharff also sought modification of the previous divorce judgment, but only to suspend his child support obligation to Kelly and

to claim the two Sharff children as tax dependents. No similar filing was made in the Sharff divorce matter at this time. On June 18, 2014, a trial setting, Craig Burge raised an *ore tenus* motion to consolidate the Burge and Sharff divorces; Kelly Burge objected, and the court sustained that objection and granted a continuance until June 17, 2014 for the purpose of a new modification action being filed in the Sharff divorce to make that case ripe for consolidation. (Transcript, 22-49). The same was not accomplished on that date, and additional time was provided by the Court for the same purpose. (Transcript, beginning at 50).

On June 20, 2014 Chad Sharff filed his *Petition for Modification of Child Custody and Motion to Transfer 2003-0358-GN to Join and Consolidate With 2013-0166-GN-DO* in Cause No. 2003-0358-GN. Chancellor Deborah Gambrell entered the *Order Consolidating 2003-0358-GN-G with Cause Number 2013-0166-GN-DO* on October 10, 2014. (Rec. Ex. 6). It is noteworthy that in his filings in the Burge divorce case Sharff sought a transfer of custody of his children to Craig Burge; in the Sharff divorce modification, Sharff sought custody for himself, and only alternatively for Burge. A *Motion to Consolidate* was subsequently filed in the Burge divorce matter, followed by an *Order Consolidating 2003-0358-GN-G with Cause Number 2013-0166-GN-DO*. (Rec Ex. 7; Clerk's Papers 0110-0112 and 8; Clerk's Papers 0120-0121).

This matter was re-set for trial on December 11, 2014 pursuant to the trial court's *Order* of December 9, 2014, ultimately being completed on July 2, 2015. This Court entered its *Opinion and Final Judgment* on September 16, 2015. (Rec. Ex. 1; Clerk's Papers 0167-256). It is from that Judgment that this appeal is taken.

SUMMARY OF THE ARGUMENT

This appeal is based in both substantive and procedural grounds, and in both instances speaks to the trial Court's judgment granting custody of all four minor children – including two children from Kelly Burge's previous marriage – to Craig Burge. “A chancellor's custody decision will be reversed only if it is manifestly wrong or clearly erroneous, or if the chancellor applied an erroneous legal standard.” *In re Waites*, 152 So.2d 306 (¶13) (Miss. 2014); *Smith v. Smith*, 97 So.3d 43, 46 (Miss. 2012).

In this case it is the contention of the appellant that the trial court was manifestly wrong in finding that the natural parent presumption of Kelly Burge was rebutted due to her relationship with Burke Williamson, her paramour, and her failure to comply with the Court's temporary orders directing that she remit funds to the appellee and prevent contact between Burke Williamson and the minor children. Similarly, the appellant contends that the trial court applied an erroneous legal standard, having found in effect that engaging in a post-separation affair and acting in contempt of a court order constitutes moral and/or mental unfitness sufficient to rebut the natural parent presumption.

Questions of law are reviewed *de novo*. *In re Custody of M.A.G.*, 859 So.2d 1001, 1003 (¶4) (Miss. 2003). In this case, the Chancellor granted a consolidation of Chad Sharff's modification of his divorce judgment from Kelly Burge with the divorce action filed against Kelly Burge by Craig Burge. In the former, Chad Sharff sought to modify the judgment as to custody, alleging to seek custody for himself, but expending effort only in the attempt to have custody of his two children vested in Craig Burge. Craig Burge sought similar relief in his divorce of Kelly Burge.

It is the contention of the appellant that after the dismissal of Chard Sharff's modification action pursuant to Miss. R. Civ. Pro. 41(b), no prayers for relief seeking to modify the Sharff divorce survived. As a result, it is legally impossible that such a modification be granted in this case; in essence, here the chancellor dismissed the Sharff modification action, then granted Craig Burge a modification in the Sharff divorce – to which he is not a party, and in relation to which he had no standing.

I. *Substantive Argument; Issue One*

Substantively, the Chancellor ruled that Kelly Burge's natural parent Presumption had been rebutted due to findings that she had engaged in conduct so immoral as to be detrimental to the children, and that she was unfit, mentally or otherwise to have custody. (See Rec. Ex. 1 at 53; Clerk's Papers 0219). These findings are based on the fact that Kelly Burge had a boyfriend, Burke Williamson, prior to her divorce being finalized, and due to failure to comply with the Court's temporary orders directing that child support be remitted to Craig Burge and that the minor children not be exposed to Burke Williamson.

The natural parent presumption must be rebutted by clear and convincing evidence that a parent has engaged in conduct so immoral as to be detrimental to the minor children. *In re Dissolution of Marriage of Leverock and Hamby*, 23 So.3d 424, 431 (¶24) (Miss. 2009). Having a boyfriend, post-separation, during more than two years of divorce litigation does not meet this burden; neither does contempt of a temporary order through exposing teenage children to a paramour or failing to remit child support funds. Notably, no party

alleged any detrimental effect on the minor children resulting therefrom, and no such finding was made by the Court.

Similarly, a finding that Kelly Burge is mentally or otherwise unfit was made by the trial court, based on substantially the same grounds; that Kelly Burge maintained a relationship with Burke Williamson; that she did not remit support payments made to her by Chad Sharff to Craig Burge; that she disobeyed temporary orders prohibiting contact between the minor children and Burke Williamson, and that she did not appear to find it harmful for the minor children to be spend time in Burke Williamson's company.

Again, this conduct falls well short of mental or other unfitness sufficient to rebut the natural parent presumption, for the same reasons. Here the trial court specifically notes that Kelly Burge's decisions in relation to Williamson call her parental and mental fitness into question, referencing exhaustive testimony regarding Williamson, but failing to make any findings of fact as to whether or how Williamson is or has been a danger to, or detrimental to, the minor children. No testimony on the record provides a basis for this finding.

It has not, should not, and can not be the practice of Mississippi Courts to abandon the natural parent presumption because some parents engage in post-separation affairs, and it is an unacceptably extreme and unjust sanction for contempt of a court's temporary order.

II. Procedural Argument; Issue Two

The judgment at issue in this appeal was made after the consolidation of the Burges' divorce action and a modification action – filed later by Chad Sharff – in Kelly Burge's previous divorce case against her ex-husband, Sharff pursuant to Miss. R. Civ. Pro. 42(a).

This consolidation was made over the strenuous objection of Kelly Burge, and the trial court provided continuances to allow for the modification action to be brought into the posture necessary for consolidation.

It may be beyond the purview of the appellate courts, but the record strongly supports the Guardian ad Litem's conclusion, found in his preliminary report, that Chad Sharff, aggrieved ex-husband of Kelly Burge, and Craig Burge, aggrieved present husband (previous to the judgment appealed here) colluded with the intention of doing harm to Kelly Burge's interests in a shameful misuse of the procedural processes provided in Mississippi Law.

In short, in order to achieve the goal of depriving Kelly Burge of custody of all four of the minor children at issue in this cause, Chad Sharff filed a complaint seeking modification of his previous divorce action, seeking custody of the minor children or, alternatively, that custody of the minor children be vested in Craig Burge. On its face, a desire to see one's minor children raised by a third party raises certain suspicions. In this cause, Craig Burge lacks standing to seek a modification of the Sharff divorce, and Chad Sharff presented no evidence in and did not attend the vast majority of the trial in this consolidated matter.

Subsequently, the Court granted Kelly Burge's motion pursuant to Miss. R. Civ. Pro. 41 (b) seeking involuntary dismissal of Chad Sharff's claims. Upon the dismissal of Chad Sharff's prayers for relief in the form of a change in custody in favor of Craig Burge, this Court's jurisdiction over the Sharff divorce was ended. Because Craig Burge lacks standing in the Sharff divorce, no sustainable motion for any modification of custody survived in that

cause, and this Court lacked the grounds and the jurisdiction to modify Cause No.: 2003-0358-GN-G.

Consistent with the foregoing, Kelly Burge asks this Court to find that the Chancellor in this cause erred in finding that her natural parent presumption had been rebutted by clear and convincing evidence; and that this case be remanded for proceedings consistent therewith; and

That this Court find that the Chancellor in this cause lacked any basis for the modification of Cause No.: 2003-0358-GN-G following the dismissal of Chad Sharff's claims; that no evidence in support of a material change in circumstances was offered therein, and remand this case for proceedings consistent therewith.

ARGUMENT

ISSUE ONE: WHETHER THE TRIAL COURT ERRED IN FINDING THAT THE NATURAL PARENT PRESUMPTION HAD BEEN OVERCOME AS TO KELLY BURGE

Mississippi law presumes strongly that it is in the best interest of a child to remain with natural parents rather than any third party. *K.D.F. v. J.L.H.*, 933 So.2d 971, 980 (Miss. 2006); Miss. Code Ann. § 93-13-1 (Rev. 2004)(“The father and the mother are the joint natural guardians of their minor children and are equally charged with their care, nurture, welfare and education ... If either father or mother die or be incapable of acting, the guardianship devolves upon the surviving parent.”)

The natural parent presumption is rebuttable upon a showing by clear and convincing evidence that 1.) The parent has abandoned the child; 2.) The conduct of the parent is so immoral as to be detrimental to the child; or 3.) The parent is unfit mentally or otherwise to have custody. Absent clear proof of one of the above circumstances, the natural parent is entitled to custody of his or her child. *Rutland v. Pridgen*, 493 So.2d 952, 954 (Miss. 1986); *McKee v. Flynt*, 630 So.2d 44, 47 (Miss. 1993). A finding that a third party is *in loco parentis* is not sufficient to overcome the presumption. *Smith*, 97 So.3d at 46-47. Neither is a finding grounded in totality of circumstances and long-term care on the part of a third party. *In re Custody of Brown*, 66 So.2d 726 (Miss. Ct. App. 2011).

Generally speaking, “... as long as a parent adequately cares for his or her child (i.e., *is fit*) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning

the rearing of that parent's children." *Traxel v. Granville*, 530 U.S. 57 120 S.Ct. 2054, 2056, 147 L.Ed.2d 49 (2000).

Providing clarity as to 'unfitness', the Mississippi Court of Appeals ruled that "We find that denial of custody to a natural parent in favor of a third party should be granted only when there is a clear showing that the natural parent has relinquished his parental rights, that he has no meaningful relationship with his children, or that the parent's conduct is clearly detrimental to his children." *In Re Guardianship of Brown*, 902 So.2d 604, 607 (Miss. Ct. App. 2004)(citing Miss. Code Ann. § 93-15-103(3)). "In overcoming this presumption, especially when making the determination on miscellaneous grounds, a court should look for factors that indicate a natural parent's absence of a meaningful relationship with his child or behavior of the parent that is clearly detrimental to his child." *In re Custody of Brown*, at 609. A finding of exceptional circumstances to rebut the natural parent presumptions requires more than the proposition that a child's best interests may be served by a third party; there must be evidence of serious physical or psychological harm or a substantial likelihood of such harm. *Wilson v. Davis*, 181 So3d 991 (¶8) (Miss. 2016)(citing *Watkins v. Nelson*, 163 N.J. 235, 748 A.2d 558, 565 (2000)).

In this case, the Chancellor's finding that Kelly Burge's natural parent presumption had been rebutted lacked most if not all of the requirements outlined above. (Rec. Ex. 1 at 53; Clerk's Papers 0219). The Court's findings that Kelly Burge maintained a relationship with a paramour, and then both permitted her children to spend time in his company and misappropriated child support funds do not reflect the absence of a meaningful relationship with the minor children; nor does it constitute behavior that is clearly detrimental to the

minor children. It is clear that the Court deemed Burke Williamson to be a danger to the children, but there are no findings of fact or testimony in the record supporting such an assertion. The Chancellor's findings of detriment to the minor children must be supported by credible evidence. *Irle v. Foster*, 175 So.3d 1232 (¶20) (Miss. 2015) (notably, in *Irle* the chancellor found that the intention of the mother to move her minor child into the home of a sex-offender whose victim had been a child; that the mother had four out-of-wedlock children; that she had failed a drug test, reading positive for cocaine use; and that the minor children would be living with another unmarried couple). Here, the Chancellor references no evidence tending to demonstrate that Burke Williamson is dangerous to the minor children, and no such evidence is present in the record. (Rec. Ex. 1 at 25; Clerk's Papers 0191).

As to the Chancellor's clear implication that Kelly Burge's relationship with Burke Williamson is evidence of unfitness, appellate courts have noted that maintaining an extramarital relationship, including overnight stays with a member of the opposite sex to whom the parent is not married does not constitute immoral behavior requiring custody modification. *See Robison v. Robison*, 722 So.2d 601, 605 (Miss.1998); *Harrington v. Harrington*, 648 So.2d 543, 547 (Miss.1994); *Dunn v. Dunn*, 609 So.2d 1277, 1286 (Miss.1992). For such facts to be sufficient, there must also be objective proof that the overnight visitation is detrimental to the children. *See Harrington*, 648 So.2d at 547; *Dunn*, 609 So.2d at 1286. No such proof is present in the record in this case.

Similarly, the only mental health issues the record reflects on the part of Kelly Burge is depression, anxiety, and intermittent insomnia; none of these were shown or even alleged to represent potential harm to the minor children. (Rec. Ex. 1 at 25; Clerk's Papers 0191).

It is true that the Chancellor found that Craig Burge was *in loco parentis*; the Chancellor also noted, however, that a person *in loco parentis* has rights inferior to those of a natural parent, and that a natural parent remains entitled to custody unless the natural parent presumption is rebutted; “[t]he doctrine of *in loco parentis* does not, by itself, overcome the natural-parent presumption.” *Smith*, 97 So.3d at 46-47.

ISSUE TWO: WHETHER THE TRIAL COURT ERRED IN MODIFYING CAUSE NO. 2003-0358-GN-G FOR RELIEF MADE BY A PARTY WHOSE CLAIMS WERE SUBJECT TO INVOLUNTARY DISMISSAL

Involuntary dismissal pursuant to Miss. R. Civ. Pro. 41(b) operates as an adjudication upon the merits absent a basis in lack of jurisdiction, improper venue, failure to join a party pursuant to Rule 19, or specification otherwise by the court. No such specifications or issues apply in this case, and the Chancellor granted the motion of Kelly Burge, *ore tenus*, for dismissal pursuant to Rule 41(b) as to Chad Sharff's requests for custody of the Sharff children. (Rec. Ex. 1 at 46; Clerk's Papers 0212 see Rec. Ex. 4; Clerk's Papers 0057). This had the effect of dismissing Chad Sharff's modification action, and no other requests for relief as to custody remained therein.

Following the dismissal of Chad Sharff's prayers for modification as to the custody of the Sharff children, this Court granted modification of the Sharff divorce judgment in favor of Craig Burge. The appellant contends that because the modification action was dismissed, there can be no change in the previous judgment of the court as to the Sharff judgment.

Further, the dismissal of the modification action filed by Chad Sharff constitutes an adjudication upon the merits thereof, and as such is final and total, subject to appeal; no such appeal or cross-appeal has been filed by Chad Sharff, making the adjudication made by the Chancellor in granting Kelly Burge's Rule 41 (b) motion final.

Nonetheless, the Chancellor ordered that the Sharff Judgment be modified as to custody, visitation and child support. (Rec. Ex. 1 at 63; Clerk's Papers 0229). Because Chad Sharff's prayers for relief were dismissed pursuant to Rule 41(b) and Craig Burge

never entered an appearance in or sought relief in that cause, there is no basis or surviving prayer for relief that permits modification therein. The appellant further contends that had such an attempt been made by Craig Burge, he would lack standing to seek a modification in the Sharff divorce.

In short, a current husband has no basis for seeking a custody modification of a spouses' previous divorce action; even if such an oddity as this procedural chimaera were possible, it could not be sustained unless the current and past husbands were the same individual, and that person filed a complementary modification action in the previous case in his own name.

CONCLUSION

This case presents a set of facts and a procedural twist that may constitute questions heretofore unanswered by our courts. As the cultural identity of the conventional family shifts over time, such questions may become more common, but in the case *sub judice* they retain their novelty.

The court is left with two fundamental questions in this cause; “Can the natural parent presumption be rebutted by a finding that the natural parent has defied court order, misappropriated funds, maintains a post-separation paramour, and permits her minor children to spend time in the presence of that paramour?” and “In a judgment following a consolidation of a modification of a divorce judgment and a divorce action, can modification survive the dismissal of claims for modification filed only in the modification action where the plaintiff in the divorce action filed no entry of appearance or requests for relief in the modification action?”

As reflected above, it is the respectful submission of Kelly Burge to this Court, as it was her respectful submission to the eminent jurist considering this matter at trial, that in the present case Kelly Burge engaged in no conduct approaching that manner and character of conduct necessary to demonstrate by clear and convincing evidence that she was morally, mentally, or otherwise unfit; nor is there any credible evidence on the record establishing detriment or the probability of detriment to the minor children caused thereby.

Further, it is the additional submission of Kelly Burge to this Court that there is no basis for modification of a divorce judgment by a third party who has entered no appearance therein, and has sought no relief therein; and that upon consolidation of such a matter with

another chancery cause, a dismissal pursuant to Miss. R. Civ. Pro. 41(b), constituting an adjudication on the merits, makes any ‘cross-modification’ under the aegis of the remaining cause impossible.

Consistent therewith, Kelly Burge asks that this Court, upon considering the arguments of counsel and the record of evidence from the court below, find that the appellees failed to rebut the natural parent presumption, and finding that no basis for modification of custody in the Sharff divorce cause survived the dismissal of Chad Sharff’s prayers for relief pursuant to Miss. R. Civ. Pro. 41(b), and upon such findings reverse and remand this cause for further proceedings consistent therewith.

CERTIFICATE OF SERVICE

I, the undersigned attorney for KELLY BURGE, do certify that I have, this date, electronically filed this, the Brief of Appellant via MEC, and have thereby provided an electronic copy to the following:

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s/PHILLIP LONDEREE
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