SUPREME COURT OF MISSISSIPPI
COURT OF APPEALS OF THE STATE OF MISSISSIPPI

CASE NO. 2006-CA-00251

CYNTHIA BELL GRAY — **APPELLANT**

VS.

GLENN VAN GRAY — **APPELLEE**

CERTIFICATE OF INTERESTED PARTIES

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:

(1) Cynthia Bell Gray - Appellant
Greenville, MS

(2) Glenn Van Gray - Appellee
1947 Olympic Loop, Apt 204
Springdale, AR 72762

(3) Fritzie T. Ross, Esq. - Attorney for Appellant
P.O. Box 244
Greenville, MS 38702-0244

(4) Alsee McDaniel, Esq. - Attorney for Appellee
North MS Rural Legal Services
P.O. Box 858
Greenville, MS 38702

Appellee Brief

(5) Hon. Jane R. Weathersby - Chancellor
P.O. Drawer 1380 9th Chancery District
Indianola, MS 38751

SO CERTIFIED this the 11th day of April, 2007.

ALSEE MCDANIEL, MSB NO. 2347
North Mississippi Rural Legal Services
Post Office Box 858, 159 N. Hinds Street
Greenville, MS 38702
(662) 335-8203 / (662) 335-7500 (Facsimile)
ATTORNEY FOR APPELLEE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

STATEMENT OF ISSUES

I. WHETHER THE CHANCELLOR ERRED IN RULING THAT APPELLANT HAD NOT MET HER BURDEN OF PROOF OF A MATERIAL CHANGE OF CIRCUMSTANCES WHICH ADVERSELY THE MINOR CHILDREN HEREIN.

II. WHETHER THE CHANCELLOR ERRED IN APPLYING THE ALBRIGHT FACTORS IN FINDING THAT IT WOULD BE IN THE BEST INTEREST OF THE MINOR CHILDREN TO REMAIN IN THE PHYSICAL CUSTODY OF APPELLEE, GLENN VAN GRAY.

III. WHETHER THE CHANCELLOR ERRED IN NOT MAKING SPECIFIC FINDINGS AS TO REASONS WHY JONATHAN'S PREFERENCE TO LIVE WITH APPELLANT WAS NOT IN HIS BEST INTEREST.

STATEMENT OF THE CASE

On September 20, 2004, the Chancery Court of Washington County, Mississippi entered a Final Judgment of Divorce between the parties hereto on the ground of irreconcilable differences. Said Judgment awarded joint legal custody of the two minor children of the parties, namely: Jonathan Tyler Gray, a son, born February 19, 1992; and Susan Rebecca Gray, a daughter, born October 13, 1998. Appellee, Glenn Van Gray was awarded primary physical custody of said children, with visitation granted to Appellant, Cynthia Bell Gray pursuant to the court's standard visitation schedule. (Record, pages 16-24)

On August 5, 2005, Appellant filed her Petition To Modify Final Judgment and for other relief, alleging therein a material change of circumstances which adversely affect the children. (Record, pages 8-15) Upon a trial on said Petition held before Chancellor Jane Weathersby in Sunflower County, Mississippi, a Final Decree was entered on November 21, 2005 denying relief on said Petition. (Record, pages 29-32) In rendering its decision, the Court made a finding that Appellant had failed to meet her burden of proof that a material change of circumstances had occurred which adversely affected the children. In particular, the Court ruled that Appellee's relocation from Washington County to Arkansas was for the purpose of creating a better life for himself and the minor children; that due to Appellant's physical and mental condition and her current circumstances, she was unable to provide care for the children; and that although the minor child, Jonathan Gray, who was age 12, had expressed a preference to live with Appellant, it was not in the best interest of said child to award custody to Appellant, considering her circumstances and the totality of circumstances of the parties. (Tr. Vol. II. Pages 179-180)

Appellant filed her Notice of Appeal to this Court seeking review herein.

SUMMARY OF ARGUMENT

A Chancellor's findings regarding child custody will not be disturbed when supported by substantial evidence unless the Chancellor abused her discretion, was manifestly wrong or clearly erroneous or applied an erroneous legal standard. In an action for modification of custody, there must be proof of a material change of circumstances which is adverse or detrimental to the minor children. Relocation of a custodial parent does not necessarily result in a material change of circumstances sufficient to warrant a modification of custody; nor would a change in the circumstances of the non-custodial parent, in and of itself, justify such a modification.

The Chancellor may consider the preference expressed by a child of 12 years of age or older as to the parent with whom he or she would prefer to live. However, such preference is but one factor to be considered in determining the best interest of the children, the polestar consideration in all child custody cases.

The Chancellor's ruling in the case below was supported by substantial evidence in the record and applied the correct the legal standard for custody modification, i.e., proof of a material change of circumstances which has adverse effects or is detrimental to the best interest of the children. In considering the totality of circumstances of the parties herein, the Chancellor's denial of the Appellant's petition for modification of custody was not erroneous and should be affirmed.

ARGUMENT

WHETHER THE CHANCELLOR ERRED IN RULING THAT APPELLANT HAD NOT MET HER BURDEN OF PROOF OF A MATERIAL CHANGE OF CIRCUMSTANCES WHICH ADVERSELY AFFECT THE CHILDREN

This Court has held that in order to merit a modification of custody, "Normally, it must be shown that a material change of circumstances in the child's custodial home has a present adverse effect on the child or is detrimental to the child." Savell v. Morrison , 929 So.2d 414,418 (Miss. App. Ct. 2006). The Mississippi Supreme Court has further held that "While numerous factors may go into the initial consideration of a custody award, see e.g., Albright v. Albright , 437 So.2d 1003, 1005 (Miss. 1983), only parental behavior that poses a clear danger to the child's mental or emotional health can justify a custody change. Morrow v. Morrow , 591 So.2d 829, 833 (Miss. 1991)

In the instant case, Appellant alleges that Appellee's relocation from Washington County to the State of Arkansas constitutes a material change of circumstances warranting a change in custody. The Mississippi Supreme Court has repeatedly held that relocation of a parent does not necessarily result in a material change in circumstances for modification of custody. Lackey v. Fuller , 755 So.2d 1083, 1088 (Miss. 2000); Spain v. Holland , 483 So.2d 318, 321 (Miss. 1986) (move to England does not require change in custody); Pearson v. Pearson , 458 So.2d 711, 713 (Miss. 1984) (Move to Hawaii not per se basis for interfering in custody) ; Brocato v. Walker , 220 So.2d 340, 344 (Miss. 1969) (600 mile move to San Antonio, Texas not a material in circumstances). In Spain v. Holland , supra, 483 So.2d at 321, the Court concluded:

> "We close our eyes to the real world if we ignore that ours is a mobile society. Opportunity and economic necessity transport perfectly responsible adults many miles from their homes. "

In Brocato v. Walker , supra, 220 So.2d at 344, the Court held that while the removal of the child

to Texas made visitation with her father more difficult, the child's welfare prevailed over the husband's inconvenience in visiting her. The record herein reflects that Appellee Gray moved to Arkansas primarily for economic reasons, i.e., he was a part of a business venture (a pro golf shop). (Tr. I, pp. 117, 120). He had also been subjected to ongoing harassment by Appellant's father and their marital home had been sold through foreclosure to her father. (Tr. Vol. I, pp. 41, 117). However, he still made provisions for the children to visit with Appellant. (Tr. Vol. I, page 118).

Appellant further alleges a material change of circumstances in the living conditions of the children in Appellee's home in Arkansas. Appellant's mother, Nancy Bell, who testified that she had visited Mr. Gray's apartment about seven or eight times, stated that the home was clean, the children appeared to be well-fed and clothed properly. She further testified that Mr. Gray is a good father to the children. (Tr. Vol. I, pp. 11-13). One of the children, Jonathan, testified that Mr. Gray was a "clean freak". (Tr. Vol. II, p. 164). Although the minor child, Susan, usually slept in Mr. Gray's bed rather than her daybed, this was not unusual, because she would also sleep in her mother's bed when she visited with her. (Tr. Vol. I, pp. 42, 79). Mr. Gray did acknowledge that Susan had walked into the bathroom while he was in shower or dressing in his bedroom and she had seen him without clothes on. (Tr. Vol. I, p.42). He also acknowledged that on some occasions, he had left the children in the apartment briefly to go to the store or run an errand, but Jonathan had a cell phone, and he made arrangements with a neighbor when necessary to watch them for a short period. (Tr. Vol. I, pp. 47, 123). Of course, Appellant also acknowledged that she had left the children alone in her apartment occasionally to go to the

gas station. (Tr. Vol. I, p. 81).

None of the conditions cited above by Appellant were shown to have an adverse effect on the minor children and certainly do not rise to the level of a material change of circumstances which would justify a modification of custody. Morrow v. Morrow , supra, 591 So.2d 829,833.

Appellant further contended that her own circumstances have become better since the Final Judgment was entered awarding primary physical custody of the children to Appellee. However, her testimony shows that she is unemployed and totally depends on her parents for support, including the payment of rent, utilities, food and other expenses. She has never applied for employment since the Judgment was entered because she was "depressed" (Tr. Vol. I, pages 84-85). The minor child, Jonathan, testified that Appellant's apartment is "messy a lot of times from clothes. She has a lot of clothes." (Tr. Vol. II, p. 164). The Chancellor , in her ruling, found "It appears from the testimony that Mrs. Gray's housekeeping habits have not changed since the last time that we were in court." (Tr. Vol. II, p. 180). The Chancellor further found that it does not appear that Mrs. Gray can care for the children because she's not caring for herself. (Tr. Vol. II, p. 180).

The Mississippi Supreme Court has made clear that a change of circumstances in the non-custodial parent is not in and of itself sufficient to warrant a modification of custody. Riley v. Doerner , 677 So.2d 740, 744 (Miss. 1996); Duran v. Weaver , 495 So.2d 1355, 1357 (Miss. 1986). Appellant herein has not shown materials circumstances that she is able to provide an environment more suitable than Appellee for the minor children justifying a modification of custody. Even assuming such circumstances were shown, that alone is not sufficient to merit a modification of custody in the court's determination of the best interest of the children taking into consideration the totality of circumstances. Albright v. Albright , supra.

WHETHER THE CHANCELLOR ERRED IN APPLYING THE ALBRIGHT FACTORS IN FINDING THAT IT WOULD BE IN THE BEST INTEREST OF THE MINOR CHILDREN TO REMAIN IN THE PHYSICAL CUSTODY OF APPELLEE

In proceedings concerning custody of children, the paramount consideration is the best interest of the children. Moreover, a chancellor's ruling regarding custody will generally not be reversed on appeal unless the findings and decision are not supported by substantial evidence. Passmore v. Passmore , 820 So.2d 747, 749 (Miss. App. 2002); Touchstone v. Touchstone , 682 So.2d 374 (Miss. 1996).

There is no dispute herein that the Chancellor applied the Albright v. Albright, supra, factors in the initial determination of custody between the parties as contained in the Final Judgment of Divorce. (Record, pp. 16-24). The issue on Appellant's Petition For Mofification of Custody is proof of a material change of circumstances which adversely affect the children. In its ruling on said Petition, the Court made the following findings (at Tr. Vol. II, pp. 180-81) :

(1) That Glenn Gray relocated to better his life and the lives of the children;

(2) That Mr. Gray is a better disciplinarian than Mrs. Gray in terms of parenting skills;

(3) That the only change Mrs Gray has made since the divorce is that she has moved from under her parents roof into an apartment which is paid for by her parents. ... She cannot care for these children because she is not caring for herself;

(4) That Mr. Gray has an adequate home environment and is a good housekeeper; Mrs. Gray's (bad) housekeeping habits have not changed since the last time the parties were in court;

(5) That Mrs. Gray has not even attempted to find employment since the divorce;

(6) That Mrs. Gray's mental and physical condition are of concern, and she appeared to be under the influence of some medication on the stand which she did admit;

(7) That the preference expressed by Jonathan to live with Mrs. Gray would not be in his best interest, considering the circumstances of the parties.

Based upon the standard of proof for modification of custody, and the totality of circumstances of the parties, including the above findings applying the Albright factors, the Chancellor determined that Appellant had not met her burden of proof to show a material change of circumstances that adversely affect the minor children. The court's findings and decision are supported by substantial evidence in the record and should be affirmed.

WHETHER THE CHANCELLOR ERRED IN NOT MAKING SPECIFIC FINDINGS AS TO THE REASONS WHY JONATHAN'S PREFERENCE TO LIVE WITH APPELLANT WAS NOT IN HIS BEST INTEREST.

Under the Albright factors and Miss. Code Ann. Section 93-11-65, a child who is 12 years of age or older may express a preference as to where he or she wants to live. However, said preference is only one factor to be considered by the court in determining the best interest of the child. In the instant case, the Chancellor did consider the preference expressed by the minor child, Jonathan, that he preferred to live with Appellant. The court went on to discuss the conditions and circumstances of the parties applying the Albright factors and made a finding that it was in the best interest of the children to remain in the custody of Mr. Gray. These findings set forth sufficient reasons for refusing to award custody based upon Jonathan's preference. (Tr. Vol. II, pp. 180-81)

The Mississippi courts have long recognized that it is not in the best interest of children to be separated from other siblings, and that children of a family should be kept together.

Sparkman v. Sparkman , 441 So.2d 1361 (Miss. 1983); Sellers v. Sellers , 638 So.2d 481 (Miss. 1994); Mixon v. Bullard , 227 So.2d 28 (Miss. 1968). To the extent that the Court Considers the preference of one child to live with a parent, the above principle should also be considered in awarding or modifying custody. However, the paramount consideration remains the best interest of the children taking into account the totality of circumstances. Touchstone v. Touchstone , supra, 682 So.2d at 377

CONCLUSION

The Chancellor's findings and decision denying Appellant's Petition to modify custody are supported by substantial evidence in the record. The Court applied the proper legal standard and burdens of proof for child custody modification and applied the Albright factors, including consideration of the preference expressed by Jonathan, in determining that it would be in the best interest of the children to remain in the custody of Appellee, Glenn Van Gray. That decision should not be disturbed and the Chancellor's findings accorded due weight and affirmed.

Respectfully Submitted,

GLENN VAN GRAY, APPELLEE

By: _____

ALSEE MCDANIEL
ATTORNEY FOR APPELLEE

CERTIFICATE OF SERVICE

I, Alsee McDaniel, certify that I have served a copy of the foregoing Appellee's Brief upon the following persons by regular U.S. Mail, postage prepaid, addressed to the following:

Hon. Fritzie T. Ross
P.O. Box 244
Greenville, MS 38702-0244

Hon. Jane R. Weathersby
Chancery Court Judge
P.O. Drawer 1380
Indianola, MS 38751

This the 11th day of April, 2007.

ALSEE MCDANIEL
ATTORNEY FOR APPELLEE