

CASE NO. 2016-CA-01779

IN THE COURT OF APPEALS FOR THE STATE OF MISSISSIPPI

JULIA N. BENNETT
APPELLANT

V.

ANDRE D. BENNETT
APPELLEE

On Direct Appeal to the Court of Appeals for the State of Mississippi

APPELLEE'S RESPONSE TO THE BRIEF OF THE APPELLANT

ORAL ARGUMENTS REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Julia N. Bennett v. Andre D. Bennett No.: 2016-CA-01779

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28(a)(1) have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Andre D. Bennett	Appellee
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/s/ Tameika L. Bennett
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REPLY STATEMENT OF THE ISSUE

WHETHER THE CHANCERY COURT COMMITTED MANIFEST ERROR WHEN THE FAMILY MASTER RECOGNIZED THE PREFERENCE OF THE MINOR CHILD ACCORDING TO ALBRIGHT V. ALBRIGHT BUT DETERMINED IT WAS IN THE BEST INTEREST OF THE CHILDREN TO BE PLACED IN THE CUSTODY OF THEIR FATHER.

REPLY STATEMENT OF FACTS

This is a Custody matter on appeal of an Order Citing Defendant for Contempt, Provisionally Modifying Custody and Denying the Defendant's Counter-Claim for Modification.

This matter ultimately arises out of a dispute between the Appellant, Julia N. Bennett and the Appellee, Andre D. Bennett regarding the custody of their minor children, namely, Mallory Bennett and Cameron Bennett. The parties were legally divorced as of April 1, 2011. The parties executed a Property Settlement Agreement in which the parties were awarded joint physical and legal custody of the minor children subject to specific provisions outlining the custodial periods of the parties.

Andre D. Bennett filed a Petition to Cite the Defendant for Contempt, Modification of Temporary and Permanent Child Custody and Other Relief on July 29, 2016 upon being notified by Julia N. Bennett that she would be relocating to St. Louis, Missouri with the minor children the following month, terminating joint custody. (MEC Doc #2, R. Vol. 1, Page 6). Andre D. Bennett, subsequently filed a motion for emergency relief due to Julia N. Bennett's failure to enroll the minor children in school, which would result in irreparable harm if the Court determined the children could not relocate to St. Louis. (MEC Doc #11, R. Vol.1, Page 43). The Court granted Andre D. Bennett's Motion for emergency relief on August 11, 2016, requiring the Appellee and the Appellant to enroll the minor children into school pending the hearing scheduled on August 19, 2016. (MEC Doc #12, R. Vol.1, Page 46). Subsequently, Julia N. Bennett filed a motion to Dissolve Emergency Relief on

August 11, 2016. (MEC Doc #14, R. Vol.1, Page 49). The Court denied in part and granted in part her motion to Dissolve Emergency Relief, finding that the children still needed to be enrolled in the Rankin County School District until the subsequent hearing on August 19, 2016. (MEC Doc #16, R. Vol.1, Page 55). The Family master, upon hearing all evidence presented found Julia N. Bennett in Contempt, provisionally modified child custody to Andre D. Bennett, due to the anticipated move, and denied Julia N. Bennett's counter complaint for modification finding that she created the material change in circumstances adverse to the wellbeing of the minor children. (MEC Doc #25, R. Vol.1, Page 70).

Julia N. Bennett filed a motion for new trial alleging various incorrect applications of legal standards including the trial Court's denial of f Mallory Bennett's preference on September 19, 2016. (MEC Doc #26, R. Vol. 1, Page 78). Andre D. Bennett filed a response in opposition to the motion for new trial on September 21, 2016 rebutting specifically the preference of the minor child being outcome determinative. (MEC Doc # 27, R. Vol. 1, Page 85). The Court heard arguments and subsequently denied Julia N. Bennett's motion for a new trial finding (1) that the Court did not error in the Contempt finding, that the Plaintiff's conduct did not warrant incarceration, however, her actions were in violation of the previous order thereby warranting the award of attorney's fees; (2) that the provisional modification of custody is permissible pursuant to the law; (3) that the minor child's preference was addressed and acknowledged, however due to evidence presented, the preference was not honored; (4) that the parties have joint physical and legal custody;

and (5) Julia N. Bennett was given additional time to provide a life insurance policy in an amount acceptable to the parties for the benefit of the minor children. (MEC Doc #32, R. Vol. 1, Page 99). Julia N. Bennett filed another motion for reconsideration on December 8, 2016 alleging the Court applied the incorrect legal standard in the imposition of attorney's fees. (MEC Doc #33, R. Vol. 1, Page 102). Julia N. Bennett's motion for reconsideration was scheduled to be heard on January 13, 2017, however, the hearing was cancelled due to the filing of Julia N. Bennett's notice of appeal on December 19, 2017. (MEC Doc #35, R. Vol. 1, Page 107).

The Appellant attempts to persuade the Court that she was the primary care giver of the minor children, although the parties were exercising joint custody at the time of trial. The Appellant and the Appellee testified that the parties were alternating weeks of custodial periods. The Appellee explained and testified that the minor children flourished under the current custody arrangement and that it was ultimately in their best interests for the parties to continue to conduct themselves in this manner. (R. Vol. 3, 12-15).

The Appellant further contends that her relocation to St. Louis, Missouri was for an employment opportunity, however, she testified that she terminated lucrative employment yielding approximately Five Thousand Two-Hundred Dollars (\$5,200.00) per month within the state of Mississippi to further her relationship with her boyfriend. Additionally, the Appellant provided testimony that she had a contract with her new job, First Choice Partners since July 2016, however, at the time of trial she had never received any compensation. Her testimony revealed that she was

essentially unemployed. Further, the Appellant testified that she would receive a base salary of Two Thousand Dollars (\$2,000) per month for a period of ninety (90) days, which reflected a decrease in income of approximately Three Thousand Two-Hundred Dollars (\$3,200.00) monthly. (R. Vol. 3, 119). She stated that she resigned from her position to pursue a life changing event. She further testified that at the time of the trial she had not set a marriage date. (R. Vol. 3, 144). The Appellant also acknowledged several other incidents of questionable behavior since the final judgment of divorce including criminal charges, an investigation by the Mississippi Department of Human Services, frequent relocation, eviction notices, several changes in employment history, and exposure of the children to a variety of men including a convicted felon.

Subsequently, Mallory Bennett, the fourteen (14) year old daughter of the parties, testified regarding her preference to reside with the Appellant. The minor child also testified regarding the closeness of her relationship to the Appellee. She also provided the Court with insight regarding the cooperation between the Appellant and Appellee. The minor even went as far as to describe the parties as friends. (R. Vol. 3, 220-221). Additionally, she stated that she would obey the court's order if the Court decided that she would have to stay in Brandon with the Appellee. (R. Vol. 3, 225).

REPLY ARGUMENT SUMMARY

The lower court properly applied the legal standard adopted by the Court in *Albright v. Albright*, 437 So.2d 1003 (Miss. 1983). The Albright standard requires

that the Court evaluate several factors including the (1) the age, health, and sex of the child; (2) a determination of the parent who has the continuity of care prior to the separation; (3) which parent has the best parenting skills and which has the willingness and capacity to provide primary childcare; (4) the employment of the parent and the responsibilities of that employment; (5) the physical and mental health, and age of the parents; (6) the emotional ties of the parent and the child; (7) moral fitness of the parents; (8) the home, school, and community record of the child; the preference of the child at the age sufficient to express a preference by law; (10) the stability of the home environment; (11) other factors relevant to the parent-child relationship. *Id.* at 1005.

The Court evaluated each factor on the record and held that the factors favored the Appellee, warranting a provisional modification. The Appellant's legal argument is flawed and not well taken. The Appellant simply was not granted the relief in which she requested and is using available legal remedies to harass and molest the Appellee against the best interest of the minor children. The Appellant orchestrated the facts surrounding the material change in circumstances adverse to the children. The Court's disposition is clear in that it heard testimony from the minor child, Mallory Bennett in accordance to Miss Code Ann. § 93-11-65, however upon review of the evidence presented it was in the best interests of the minor children to be placed in the physical custody of the Appellee if the Appellant continued to relocate to St. Louis, Missouri.

The statute at issue does not require the Chancellor to honor the preference of a minor child regardless of evidence presented. Here, the Court held that the parties were acting in the best interest of the minor children under their current agreement. The Court determined that the provisional modification standard would only apply if the Appellant relocated, therefore the preference of the minor child would only be addressed if the Appellant moved. A child's suggestion of preference, without supporting evidence that there has been a material change in circumstances adverse to the child's best interests, is not sufficient to justify a modification of a custody order. *Best v. Hinton*, 838 So. 2d 306, 308-09 (Miss. Ct. App. 2002). It has been well settled that regardless of a child's preference, in order to modify a custody order, a party must show that the custodial situation has so deteriorated since the earlier adjudication as to adversely affect the child's welfare. *Id.* at 309. The Court summarily found that as long as the parties continued to reside in Rankin County there would be no material change requiring an *Albright* analysis, therefore, the custody modification would be based upon the best interests of the minor child which is solely in the discretion of the court.

The Appellant argues that the court did not articulate on the record why it did not honor the request of the minor child, however, the record clearly reflects that the court not only took testimony from the minor child, but used the totality of the circumstances and evidence upon weighing each *Albright* factors and found in favor of the Appellee, due to the instable conduct of the Appellant. The court closely analyzed each of the factors on the record and determined that a material change in

circumstances would only occur if the Appellant relocated. In fact, the court stated that it was trying to strike a balance between what was in the best interest of the minor children and the Appellant's desire to move. (R. Vol. 3, 234). The court ultimately held that there was no material change in circumstances adverse to the minor children, therefore the preference would not be honored in favor of the Appellant or the Appellee in this instance. The mere fact that the Court mentioned the best interest of the children indicates that it was correctly applying the adopted legal standard. Subsequently, at the hearing regarding the Appellant's motion for new trial the Court further articulated reservations regarding the honoring of the child's preference based on the totality of circumstances, evidence presented, and the weight of the other Albright factors. (R. Vol. 3, 256).

REPLY ARGUMENT

The Appellant has argued that the standard of review regarding the Court's decision to modify custody provisionally to the Appellee is a question of law which would warrant a de novo standard of review. However, at foremost issue in this case is the issue of custody in which the correct legal standard of review is Abuse of Discretion. It is well settled in Mississippi, that an appellate court will not disturb a Chancellor's judgment when supported by substantial evidence unless the Chancellor abused his discretion, was manifestly wrong, clearly erroneous, or an erroneous legal standard was applied. *Benal v. Benal*, 22 So. 3d 369, 372 (Miss. Ct. App. 2009) (quoting *Chapel v. Chapel*, 876 So. 2d 290 (Miss 2004). Further, if the

Chancellor's findings are supported by substantial evidence, then we will affirm. *Minter v. Minter*, 29 So. 3d 840, 850 (Miss. Ct. App. 2009).

ISSUE

Whether the Chancery Court committed manifest error when the Family Master recognized the preference of the minor child according to *Albright v. Albright* but determined it was in the best interest of the children to be placed in the custody of their father.

This case involves a custody dispute between the Appellant and the Appellee. The parties were operating under an agreement of joint legal and physical custody since their final judgment of divorce, which was entered April 1, 2011. The parties were able to peaceably operate under the guidelines of their agreement for a period of over five (5) years until the Appellant actively began relocating to St. Louis, Missouri in August of 2016. For purposes of the record, the Appellant had moved to St. Louis and failed to enroll the minor children in school without consulting the Appellee, which would terminate their current exercise of joint custody and result in a modification of their property settlement agreement. The Appellant also violated the statutory definition of joint legal custody pursuant to Miss. Code. Ann. § 93-5-24(4)(d), which clearly defines joint legal custody and proffers that the parents or parties share the decision-making rights, the responsibilities and the authority relating to the health, education and welfare of the child. Joint legal custody obligates the parties to exchange information concerning the health, education and welfare of the minor child, and to confer with one another in the exercise of decision-making rights, responsibilities and authority. In this instance,

the Appellant elected to remove the minor children from the jurisdiction without conferring with the Appellee. Additionally, in this case, the Appellant established on the record that she did not comply with the parties' property settlement agreement and continued to make unilateral decisions regarding the medical and psychological care of the minor children.

The Court has defined the standard for the modification of joint custody in *Porter v. Porter*, 23 So.3d 438 (Miss 2009). The *Porter* Court held that pursuant to Miss. Code. Ann. § 93-5-24(6) that any order for joint custody may be modified or terminated upon the petition of one (1) parent showing that a material change in circumstances has occurred. Additionally, in joint custody cases the Supreme Court of Mississippi has stated that in order to modify custody, it must be proven that a material change in circumstances has occurred that has adversely affects the welfare of the child. The Supreme Court of Mississippi has stated that an *Albright* analysis is proper when it would be impractical to leave custody as it stood at the time of the hearing. *Lackey*, 755 So. 2d at 1088. See also *Elliot v. Elliot*, 877 So. 2d 450, 454 (Miss. Ct. App. 2004; *Rinehart v. Barnes*, 819 So. 2d 564, 566 (Miss. Ct. App. 2002). The case at bar is almost identically to that of *Porter*. In this instance, the Appellant proceeded to move and transfer the minor children without conferring with the Appellee. The Appellee proceeded to file a petition based upon the actions of the Appellant including moving from her apartment, placing her belongings in storage, and failing to enroll the minor children in school without his consent. Like the mother in *Porter*, the Appellant was moving. Due to the Appellant's desire to

relocate, the Court conducted an *Albright* analysis and held that it was in the best interest of the minor children to reside with the Appellee if the Appellant based upon the evidence presented. The court found that the material change in circumstance adverse to the minor children would only occur if the Appellant relocated, therefore the *Albright* analysis was anticipatory. The court analyzed each issue separately just as the court did in *Porter* and held that the factors favored the Appellee over the Appellant, thereby granting him sole custody only if the current joint custody award was terminated by the Appellant.

The Appellant raises the issue of whether or not the court placed enough detail on the record regarding its decision not to honor the preference of Mallory Bennett, theorizing that the parents were fit and proper persons to have custody of the minor children, citing the *Polk* finding. However, the Appellant fails to articulate that Miss. Code. Ann. § 93-11-65 was amended in 2006 weakening the power of a child's preference in a custody determination. Simply put, the child has the privilege of choosing which parent to live with as long as both parents were fit and it correlated with the best interest of the child. Mallory Bennett's preference to reside with her mother in St. Louis was determined by the court to not be in her best interest, which is within the Court's discretion to decide based upon the evidence presented. Here, the Appellant argues that the court did not provide details regarding why it did not honor the request of Mallory Bennett. This claim is inherently false and was addressed during the Appellant's hearing regarding the motion for new trial. The Court further emphasized that Mallory Bennett's

preference was not honored due to the weight of the other *Albright* factors. The Appellant is simply displeased with the findings of the Court. It is well settled since the amendment of the statute that; the child's preference is not outcome determinative. *Holmes v. Holmes*, 958 So. 2d 844, 848 (Miss. Ct. App. 2007). Further, the trial court is not obligated to follow the child's stated preference. *Anderson v. Anderson*, 961 So. 2d 55, 58-59 (Miss. Ct. App. 2007) (citing *D.A.P. v. C.A.P.R.*, 918 So. 2d 809, 824 (Miss. Ct. App. 2005)). The ultimate issue is the best interest of the child.

The *Phillips* court reiterated that the trial court has broad discretion to determine the best interest of the child after all evidence is presented. *Phillips v. Phillips*, 45 So. 3d 684 (Miss. Ct. App. 2010). The Appellant in this case contends that the Chancellor failed to provide a detailed explanation as to why the preference of the minor child was not honored, but the court clearly articulated its reasoning, finding that the *Albright* factors were more favorable to the Appellee rather than the Appellant, which could have resulted ultimately in the Appellee receiving primary legal and physical custody of the children with the Appellant receiving weekend visitation, however the court granted the parties joint custody finding it in the best interest of the children to spend equal time with both parents. Similarly, to the Appellant in this case the Appellant in the *Phillips* case also cited to *Polk v. Polk*, 589 So. 2d 123 (Miss. 1993) to support her contentions however the application in *Polk* is prior to the statutory amendment and the current case law has not

reversed a Chancellor's custodial ruling for failing to give a detailed explanation on the record. 45 So.3d 693.

Synonymous with the case at bar, the court's analysis of *Albright* indicated that it made a decision according to the best interest of the minor children if the Appellant moved. The court determined that if the Appellant failed to move then there would be no material change in circumstances adverse to the wellbeing of the children resulting in the parties continuing to exercise joint custody as they had been for the last five (5) years. The court further explained that her counter complaint for modification was denied primarily due to her creating the material change in circumstances. The Appellant here quit her job, moved from her apartment, failed to enroll the children in school and was determined to relocate to St. Louis, Missouri without any petition to the court regarding the status of the Appellee's custodial periods.

The Appellant continuously violates the agreement of the parties by failing to notify the Appellee regarding medical and psychological treatment of the minor children. Here, she sought counselling to bolster Mallory Bennett's preference without the consent of the Appellee further violating their joint custody award. In an effort to present impartial evidence to the court she subjected the impressionable child to counseling on the eve of trial. The introduction of the Exhibit G-1 was for identification purposes only and was never corroborated by any witness.

The Appellant also argues that an anticipatory move does not constitute a material change in circumstances *per se*, but the Appellant's answer and counter

complaint argued for a modification in custody. Here, the Appellant is merely disappointed with the decision of the Court.

CONCLUSION

The lower Court properly analyzed and addressed the applicable statutes in regard to custody in the present case. The Court did not err or commit manifest error in its assessment. The polestar standard is the best interest of the child, and here the Court determined that it was in the best interest for the minor children to remain in the joint custody of the Appellant and the Appellee, and in the event the Appellant relocated it was in the best interest of the minor children to continue to reside in Rankin County based upon their home, school, and community record. The Appellant's displeasure with the ruling does not amount to an error in applicable law, it merely indicates and illustrates which parent ultimately has the best interest of the minor children as his foremost concern.

WHEREFORE, PREMISES CONSIDERED, the Appellee requests that this Honorable Court affirms the rulings of the Chancery Court of Rankin County, based upon the reasons, logic, and law set forth herein.

Respectfully submitted, this the 25th day of October, 2017.

Andre D. Bennett, Appellee

By: /s/ Tameika L. Bennett
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CERTIFICATE OF SERVICE

I, the undersigned, do hereby certify that I have electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to the following:

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THIS the 25th day of October, 2017.

/s/ Tameika L. Bennett
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