IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 2001-CA-01379-COA

STEPHANIE (SADLER) MCMURRY **APPELLANT**

v.

WILLIAM SADLER **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	08/24/2001
TRIAL JUDGE:	HON. EDWARD C. PRISOCK
COURT FROM WHICH APPEALED:	NESHOBA COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	LAUREL G. WEIR
ATTORNEY FOR APPELLEE:	STEVEN DETROY SETTLEMIRES
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	DISMISSED MOTION FOR MODIFICATION FOR FAILURE TO ALLEGE THAT A MATERIAL CHANGE IN CIRCUMSTANCES HAD OCCURRED WHICH ADVERSELY AFFECTS THE MINOR CHILDREN
DISPOSITION:	AFFIRMED - 08/06/2002
MOTION FOR REHEARING FILED:	8/13/2002
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE SOUTHWICK, P.J., BRIDGES, AND BRANTLEY, JJ.

BRANTLEY, J., FOR THE COURT:

¶1. Stephanie Sadler McMurry sought to regain custody of her two minor children in a motion for modification and change of former judgment. The Chancery Court of Neshoba County dismissed her motion for failing to state or allege that a material change in circumstances has occurred which adversely affects the children. Stephanie appeals, asserting that the chancellor erred in dismissing the motion without a hearing on the merits. Finding no error, we affirm.

FACTS AND PROCEDURAL HISTORY

¶2. The parties herein, William Sadler and Stephanie Sadler McMurry, were divorced in April 1991. Two children were born of the marriage, namely, Thomas J. Sadler, born August 23, 1988, and Christopher A. Sadler, born August 22, 1989. Primary custody and care of the minor children of the parties was awarded to Stephanie. In February 1997, following a modification hearing, William was awarded primary care and custody of the children and Stephanie was granted visitation privileges. In 1999, William moved to South Carolina taking the children with him. In 2000, William agreed for Thomas to temporarily return to live with

Stephanie for the 2000-2001 school year so he could attend a local school and be taught by his grandmother.

¶3. On June 2, 2001, William brought Christopher to join his mother and brother for an agreed visitation set out in the modified order. Both children were supposed to return to South Carolina at the end of the visitation. On June 28, Sadler attempted to contact and inform Stephanie that he would pick the children up in Talladega, Alabama, on June 30 according to their agreement. William went to the location, but Stephanie and her two sons were not there. William drove to Mississippi to pick up his children the following week. Christopher was there, but Thomas was not. Stephanie did not return Thomas as provided for in the court order. William then, without success, requested the sheriff's department to aid him in the return of Thomas.

¶4. On July 16, 2001, William filed a writ of habeas corpus requesting the court to require Stephanie to appear with Thomas and show cause why physical custody should not be immediately restored to William. The hearing began on this matter and Stephanie was present, but not represented by counsel. After the hearing that day, she obtained counsel and filed her response to the writ and a motion for modification and change of former judgment seeking custody of the children. The motion asserted improved changes in the non-custodial home, a possible arrest of William on false pretense, a mere assertion that William was not rearing, training, or educating the boys as they should be, and claims that William travels away from the home for weeks while leaving the boys with a live-in girlfriend. The motion also stated that it would be detrimental for the boys to leave her home, especially Thomas Jeremy Sadler, because his grades improved while staying with her. The hearing on the writ of habeas corpus was continued the next day. An order in response to the writ of habeas corpus was entered by the chancery court immediately returning custody of Thomas to William.

¶5. William filed an answer to Stephanie's motion for modification and change of former judgment, wherein he included the following affirmative defenses: "[t]he motion fails to state a claim upon which relief can be granted" and "[t]he motion fails to show that if indeed a material change in circumstances has occurred, as alleged, that said material change in circumstances is adverse to the best interest of the minor children." William also included in his filing a motion to dismiss.

¶6. At the beginning of the hearing on August 14, 2001, for Stephanie's motion for modification and change of former judgment, William objected to the motion contending that the motion did not state or allege that a material change in circumstances had occurred which adversely affected the minor children. In response, Stephanie asserted that the motion did contain allegations of material changes in the circumstances and parties involved. The chancellor stated that a material change is not enough and asked Stephanie's counsel twice, "what is the other word that is missing," to which the chancellor also answered, "adverse."

¶7. Stephanie's counsel responded, "that is just a conclusion that we have got to reach. Words alone, that ain't the facts we allege." He further noted that they could amend the statement by including, "that it would be adverse for the children to stay with [William]." The chancellor replied "that is not the case law either."

¶8. The chancellor then sustained the motion to dismiss with leave to amend, noting that the substance of the amendment "has got to be adverse." The chancellor also stated that "the pleadings were insufficient" and "not in a position now to go to trial." Stephanie's counsel amended her motion *ore tenus*. The substance of the amendment was that if the modification granting the mother custody was not allowed, the children would be adversely affected. The chancellor responded, asking counsel twice to confirm that the substance of the

motion to amend was "that if the decree is not modified there will be an adverse effect." Counsel affirmatively responded both times.

¶9. Following the amendment, counsel for William renewed his motion to dismiss asserting that the amendment failed to state or allege that a material change in circumstances *had* occurred which adversely affected the minor children. The chancellor sustained William's motion and dismissed the case. A final order was entered on August 23, 2001, dismissing the motion for modification and change of former judgment with prejudice.

STANDARD OF REVIEW

¶10. The chancellor's determination that the motion did not meet the pleading requirements was a finding of law. Therefore, this court reviews the chancellor's interpretation and application of the law *de novo*. *McCubbin v. Seay*, 749 So. 2d 1127 (¶5) (Miss. Ct. App. 1999).

ASSIGNMENTS OF ERROR

I. WHETHER THE COURT ABUSED ITS DISCRETION BY NOT CONDUCTING A HEARING AND AWARDING APPELLANT CUSTODY OF HER TWO MINOR CHILDREN.

II. WHETHER THE PLEADINGS AND THE FACTS EFFICIENTLY SHOW A CHANGED CONDITION AND CIRCUMSTANCE THAT ADVERSELY AFFECTED THE MINOR CHILDREN AND WHETHER THE COURT ERRED IN NOT GRANTING THE MODIFICATION AND AT LEAST HAVING A HEARING ON THE MERITS.

DISCUSSION

¶11. In this case, the chancellor ruled the pleadings filed by Stephanie as a matter of law were not in proper form to go to trial because they did not state there had been a material change in circumstance which adversely affected the children. She was given two additional opportunities by the chancellor to correctly amend her pleadings but still failed to incorporate the necessary language to permit the case to proceed on its merits. Although Stephanie specifically presents the above two issues as assignments of error, these issues are being consolidated into one issue for review.

I. WHETHER THE CHANCELLOR ERRED BY DISMISSING THE MOTION FOR MODIFICATION.

¶12. Stephanie argues that the court erred by dismissing her motion without a hearing on the merits. In order for a chancellor to have the inherent power and duty to proceed with a custody modification hearing and to render a judgment, the court must have jurisdiction of the parties and the subject matter and in such a proceeding, the issue must be before the court by proper pleadings and supported by competent evidence. *See Wansley v. Schmidt*, 186 So. 2d 462, 465 (Miss. 1966). The chancellor found that the pleadings as a matter of law failed to state or allege that a material change has occurred which adversely affects the children.

¶13. We now look to see whether a motion for modification of custody must allege that a material change in

circumstances has occurred which adversely affects the minor children. The Mississippi Supreme Court held that the prerequisites to the modification of child custody are: (1) proving a material change in circumstances which adversely affects the welfare of the child and (2) finding that the best interest of the child requires the change of custody. *Touchstone v. Touchstone*, 682 So. 2d 374, 377 (Miss. 1996). In addition, for the custody order to be modified so as to transfer custody to the non-custodial parent, the non-custodial parent must prove that since the entry of the decree or order sought to be modified, a material change of circumstances has occurred within the custodial home which adversely affects the minor child's welfare. *Polk v. Polk*, 589 So. 2d 123, 129 (Miss. 1991). Therefore, in order for the court to proceed on a matter for custody modification, the pleadings must contain allegations that a material change has occurred which adversely affects the child.

¶14. In the present case, we find that Stephanie did not specifically state or allege in her original motion that a material change has occurred which adversely affects the children and did not correctly amend her pleadings to include such an allegation. Inconsistent with prevailing case law, her amendments only alleged that an adverse effect *would* occur if the modification was not granted. The court properly dismissed the motion with prejudice since her original motion and amendments were insufficient to proceed on the merits of the case. *See Wansley*, 186 So. 2d at 465. Therefore, we find that the chancellor did not err and this assignment of error is without merit.

¶15. **THE JUDGMENT OF THE NESHOBA COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, MYERS AND CHANDLER, JJ., CONCUR. KING, P.J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY LEE AND IRVING, JJ.

KING, P.J., DISSENTING:

¶16. I dissent from the majority opinion herein. The majority affirms the chancellor's refusal to consider the merits of McMurry's motion to change custody because it did not contain the magic word "adverse."

¶17. Pleadings in our trial courts are governed by the Mississippi Rules of Civil Procedure. In this case the relevant rule is M.R.C.P. 8(a)(1), (e) (1) and (f), which provides:

> (a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counter-claim, cross-claim, or third-party claim, shall contain
>
> (1) a short and plain statement of the claim showing that the pleader is entitled to relief, ...
>
> (e) Pleading to Be Concise and Direct: Consistency.
>
> (1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required. . . .
>
> (f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice.

¶18. The adoption of this Rule eliminated the necessity of formal technical pleading, so called magic words pleading. Instead a claimant is merely required to state his claim and its basis. In my belief, McMurry did

so.

¶19. The relevant portion of her motion reads as follows:

> As shown by the Court file a judgment was entered granting custody of the minor children to the mother and later modified and changed and the mother has paid the child support ordered for the minor children even though she has had the exclusive care and custody of the minor child Thomas Jeremy Sadler for more than one (1) year. The judgments are made a part of this Motion by reference just as if copied fully therein.
>
> 1. *There has been a material change in the parties and circumstances involved since the last judgment was entered and the mother is now the most suitable, fit, and proper person to have permanent care and custody of the minor children and the father is not. The* mother has remarried and is living a good Christian life and is an active member of Camp Dixon Church of God, and the minor children have been in attendance at a Christian Youth Camp this summer under the directions of the mother and they are of age and desire to live with their mother and it would be to their best interest that they do so. *The father William Sadler has been arrested for such crimes as False Pretense in January of this year and is not rearing, training, and educating the boys as they should be reared.* The mother, Stephanie (Sadler) McMurry is the Movant and she makes William Sadler the respondent in this Motion.
>
> 2. Both of the children have lived with the mother in Neshoba County, Mississippi, for the last month and one of the children, Thomas Jeremy Sadler, has lived with the mother for more than one (1) year and gone to school in Neshoba County, Mississippi, and it would be detrimental to their education and they will loose the friends they have created if required to move. Thomas Jeremy Sadler last year had failing grades and the father promised him that he would bring the child to the mother if he passed and the child has greatly improved in his grades in school, and *the father travels away for weeks at a time and he left the children with a live in girlfriend.* The children are Thomas Jeremy Sadler born August 22, 1988, and Christopher---

¶20. While McMurry's motion was perhaps subject to more artful drafting, it was nevertheless sufficient to place Sadler on notice of her claim and entitle her to a resolution of that claim on its merits. One need only read the passages of McMurry's pleading, which I have emphasized above to understand the nature and basis of her claim. McMurry's pleading complies with M.R.C.P. 8 (a) (1) and (e) (1), which requires a simple, concise and direct statement showing an entitlement to relief.

¶21. While McMurry's pleading is inartfully drafted, the chancellor and this Court's majority seem oblivious to M.R.C.P. 8(f) which requires "[a]ll pleadings shall be so construed as to do substantial justice."

¶22. There is no justice, substantial or otherwise, in the refusal of the chancellor or this Court's majority to decide Mrs. McMurry's case on the merits.

¶23. For these reasons, I would reverse and remand for a hearing on the merits of McMurry's claim.

LEE AND IRVING, JJ., JOIN THIS SEPARATE WRITTEN OPINION.