

**IN THE COURT OF APPEALS 08/20/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00042 COA**

**PATRYSHA TEWHILL SMITH**

**APPELLANT**

**v.**

**SYDNEY ALLEN SMITH**

**APPELLEE**

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND  
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. WILLIAM STEWART

COURT FROM WHICH APPEALED: HARRISON COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

WALTER W. TEEL

ATTORNEY FOR APPELLEE:

DEAN HOLLEMAN

NATURE OF THE CASE: CIVIL: CHILD CUSTODY MODIFICATION

TRIAL COURT DISPOSITION: CUSTODY MODIFIED

BEFORE BRIDGES, P.J., KING, AND McMILLIN, JJ.

BRIDGES, P.J., FOR THE COURT:

Dr. Sydney Smith and Patrysha Smith were married and thereafter divorced on September 14, 1990. They are the parents of one son, Zachary, who was approximately six (6) years old at the time of the hearing. Dr. Smith was awarded a divorce on the ground of habitual, cruel, and inhuman treatment

and awarded full custody of Zachary. In September of 1991, the Smiths entered into an agreed judgment whereby the court appointed Dr. Pamela Cutrer to counsel the Smiths and their son. The Smiths were to follow the recommendations of Dr. Cutrer.

Dr. Cutrer diagnosed Zachary with an adjustment disorder, a disorder that generally is resolved within six (6) months. She then recommended certain themes that she wanted the Smiths

to convey to Zachary. Written from the point of view of the mother, these themes included:

1. It's okay for you to love both mom and dad.
2. You will always be loved by mommy and daddy.
3. Whether you live with your father or with me you will always be able to see and love the other parent.
4. When you are with me you don't have to worry about dad, he will be fine, when you are with him you don't have to worry about me, I'll be fine.
5. You are a wonderful boy and mommy, daddy and Jessie, your half sister, all love you very much.
  6. There are rules for people to follow and mommy must follow them that's why I am not with you all of the time. I want to be with you all of the time but I also want you to learn to follow the rules so I am setting this example for you.
  7. I love you, loved your father very much when you were in my tummy and when you were born and I wanted you very much and I still do and always will.
  8. People are not made perfect. Neither your father nor mother have all the answers to things but both of us will try as hard as we can to do good things for you and make sure you are safe.

Mrs. Smith disagreed with these recommendations, and informed Dr. Cutrer that she would not continue the sessions unless Dr. Cutrer gave her more visitations with her son. Dr. Cutrer refused to do this until Mrs. Smith was "willing to give Zachary appropriate messages and until there [was] more appreciation on [Mrs. Smith's] part for boundaries and for following the visitation rules that [were] already established." Mrs. Smith refused to return to the sessions.

Mrs. Smith filed a motion for modification of custody in late 1992. The parties amicably resolved the issues, and a consent order was entered on December 10, 1992, giving the parties joint legal custody of Zachary. The order stated as follows:

- A. The parties agreed and the Court granted Dr. Smith and Mrs. Smith joint legal custody of Zachary, with Dr. Smith retaining the paramount physical custody; and
- B. The parties agreed and the Court granted Mrs. Smith certain additional specific

visitation and telephone rights with Zachary; and

C. The parties agreed and the Court found that "Pamela Cutrer, Ph.D., Clinical Psychologist, would continue to be Zachary's court appointed psychologist and no other psychologist, psychiatrist, counselors, or like care providers would treat, confer, counsel, or render therapy to Zachary without specific order from the Court; and

D. The parties agreed and the Court found that Mrs. Smith would participate in counseling or other sessions at her election, however, Mrs. Smith would attend any and all conferences or sessions deemed necessary by Dr. Pamela Cutrer; and

E. The parties agreed and the Court found that the Smiths were to "act in the best interest of Zachary and both shall comply with and follow the directions and instructions" of Dr. Cutrer.

This agreement gave Mrs. Smith joint legal custody and more extended visitation. According to Mrs. Smith, this arrangement allowed her to have Zachary "forty-eight percent" of the time. In return, Mrs. Smith was to cooperate with Dr. Cutrer.

Mrs. Smith participated in one session, then missed her next appointment. Shortly thereafter, she wrote a very hostile letter to Dr. Cutrer. On March 26, 1992, Mrs. Smith attended a session wherein she stated she was not in agreement with the counseling and was attacking toward Dr. Smith, the judge, and others, claiming she had been repeatedly victimized. Following this session, Dr. Cutrer repeatedly tried to contact Mrs. Smith in an attempt to resume counseling. On April 22, Mrs. Smith phoned Dr. Cutrer's office stating that she did not have any spare time for counseling until May 15. In an attempt to cajole her into counseling, Dr. Smith informed Mrs. Smith that he would attend the sessions at any time convenient for her and reschedule his patients. This effort was to no avail.

Mrs. Smith resumed counseling sessions on her own volition in July of 1992. At that time, she appeared to be participating as required and using the guidelines and recommendations of Dr. Cutrer. However in November, Mrs. Smith called Dr. Cutrer's office stating she could not attend sessions for the next two weeks. She did not return to the counseling sessions.

On July 14, 1993, Dr. Smith filed his motion for contempt and modification alleging there had been substantial and material changes in circumstances which had a detrimental and adverse

effect on the emotional welfare of Zachary. Mrs. Smith counterclaimed that Dr. Smith was "engaged in a course of conduct willfully and deliberately designed to alienate the minor child from her"; that Dr. Smith attempted to circumvent Mrs. Smith from her visitation rights; and asked the court to "cease and desist taking the minor child to any further counseling" without further order. Thereafter, the chancellor removed the joint custody provisions and awarded Dr. Smith paramount custody and restricted Mrs. Smith's visitation.

In November of 1993, Mrs. Smith agreed to resume counseling sessions. Dr. Cutrer found that Mrs. Smith was willing to follow her instructions and recommendations. In January of 1994, Jessica, Mrs. Smith's daughter from a previous marriage, also began attending the sessions. The Smiths and the

children began to participate in dinner outings together. Zachary began to accept the "working together of his parents" and began to show emotional improvement.

In February of 1994, Dr. Smith took his fiancé and both children on a weekend trip to Greenwood. On February 28, the Smiths again attended a counseling session with Zachary. According to Dr. Cutrer, all of the sessions from November 1993 until the February 28 session had been positive. Mrs. Smith had been following all of Dr. Cutrer's recommendations and instructions without complaint. After the session, however, Mrs. Smith refused to attend further sessions despite the repeated requests by Dr. Cutrer until May.

On May 24, 1994, Mrs. Smith returned to Dr. Cutrer. This was the final session she attended. According to Dr. Cutrer, Mrs. Smith refused to work on the objectives and instead contended that Dr. Smith was wrong and should admit to that fact, that he was untrustworthy, never loved Jessica, and that he kicked her out of the house. She refused to work with Dr. Smith again through any type of treatment. After the session, Mrs. Smith made a scene in the lobby by picking Zachary up and

insisting on taking him to school although it was outside of the visitation schedule. Believing that Mrs. Smith could not be worked with, and that her behavior had a detrimental and traumatizing effect on Zachary, Dr. Cutrer recommended to the lower court that all counseling sessions cease.

In her recommendation to the court, Dr. Cutrer stated that Mrs. Smith had not been cooperative, repeatedly dropped out of sessions, believes that Dr. Smith is "evil" and that he took Zachary away from her, that Judge Morris (because of his custody ruling) should burn in hell, and that she was glad he "was in the ground." Dr. Cutrer also relayed to the court that in a session, Zachary had stated that his mother told him that she did not like Dr. Smith, that he was mean, that when he was old enough Zachary could tell the court he was going to go live with his mother, and that "God says you're supposed to live in your mama's house and you cannot live at your daddy's." Zachary had also stated that Mrs. Smith had told him not to kiss his father, and that he felt threatened because Mrs. Smith spoke to him of his "daddy being killed, the judge being shot, and [Mrs. Smith] thinking about whether she can have her son."

## ARGUMENT AND DISCUSSION OF THE LAW

### I. WHETHER THERE WAS SUFFICIENT CHANGE IN CIRCUMSTANCES TO JUSTIFY A MODIFICATION OF CUSTODY.

#### A. Standard of Review.

"On appeal this Court will not reverse a chancery court's [factual] findings, be they of ultimate fact or of evidentiary fact, where there is substantial evidence in the record supporting those findings." *Cooper v. Crabb*, 587 So. 2d 236, 239 (Miss. 1991) (citing *Mullins v. Ratcliff*, 515 So. 2d 1183, 1189 (Miss. 1987)).

#### B. Discussion.

The Mississippi Supreme Court has stated:

There are in our law two prerequisites to a modification of child custody. First, the moving party must prove by a preponderance of the evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which *adversely* affects the welfare of the child. Second, *if* such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody.

*Pace v. Owens*, 511 So. 2d 489, 490 (Miss. 1987) (emphasis added). "Also, findings of fact made by a chancellor may not be set aside or disturbed on appeal unless manifestly wrong." *Smith v. Todd*, 464 So. 2d 1155, 1157 (Miss. 1985).

In his bench opinion (a copy of which is appended to this Opinion), the chancellor found that Mrs. Smith's actions were detrimental to Zachary's psychological and emotional well-being. He further found that Mrs. Smith had refused to cooperate with the court-appointed psychologist, and that this refusal to cooperate was harmful to Zachary. Moreover, the chancellor found:

Any change in circumstances which is detrimental to the child's well-being must be considered material. In her capacity as Court appointed psychologist, we have relied heavily upon the expert opinion of Dr. Pamela Cutrer. Dr. Cutrer has worked with Zachary for almost four years now. She has also had occasion to meet and discuss Zachary with each of the parties on an individual basis. More importantly, Dr. Cutrer has had the opportunity to observe Zachary's interactions with each of the parties. Her opinion, revealed in both her testimony, and her reports to the court, is that Ms. Smith's hostility towards her ex-husband has a severely unsettling effect on Zachary.

After reviewing the record, we are of the opinion that there was sufficient evidence presented at trial to support the chancellor's findings, that his findings were not against the overwhelming weight of the evidence, that his findings were not "manifestly wrong," and that his findings and rulings were in line with the legal standards set forth in *Pace v. Owens*. While there may have been conflicting evidence presented pertaining to various factual issues, the chancellor, as the finder of fact, was ultimately charged with the responsibility of resolving these conflicts by making the appropriate findings. We cannot say that the evidence weighed so overwhelmingly in favor of Mrs. Smith as to render the chancellor's conclusions wrong. Accordingly, we find that Mrs. Smith's appeal is without merit, and we affirm the chancellor's decree.

**THE DECREE OF THE CHANCERY COURT OF HARRISON COUNTY IS AFFIRMED.  
ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

**FRAISER, C.J., DIAZ, KING, McMILLIN, AND SOUTHWICK, JJ., CONCUR. BARBER, J., CONCURS WITH SEPARATE WRITTEN OPINION, JOINED BY PAYNE, J. THOMAS, P.J., AND COLEMAN, J., NOT PARTICIPATING.**

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**BARBER, J., CONCURRING:**

While I agree with the majority that the chancellor did not commit reversible error in this case, I have grave misgivings about the court's original order which places almost absolute discretion in the opinion and findings of the court appointed psychologist, Dr. Pamela Cutrer. From the facts, it appears that Dr. Cutrer is never going to be able to work satisfactorily with Mrs. Smith in resolving the problems of her son, Zachary. Because Dr. Cutrer was appointed by the court and her services to Dr. and Mrs. Smith and their son have been continued by the court, and in view of the fact that Dr. Cutrer has admittedly failed to make much progress with either the Smiths or their son, perhaps the court should on its own motion re-examine the exclusive appointment of Dr. Cutrer pursuant to the court's order of December 10, 1992.

"Pamela Cutrer, Ph.D., Clinical Psychologist, would continue to be Zachary's court appointed psychologist and no other psychologist, psychiatrist, counselors, or like care providers would treat, confer, counsel, or render therapy to Zachary."

**PAYNE, J., JOINS THIS SEPARATE WRITTEN OPINION.**

