**IN THE COURT OF APPEALS**
**OF THE**
**STATE OF MISSISSIPPI**
**NO. 95-CA-00984 COA**

**LAURA S. HOWORTH** **APPELLANT**

**v.**

**ANDREW K. HOWORTH** **APPELLEE**

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

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| DATE OF JUDGMENT: | 08/16/95 |
| TRIAL JUDGE: | HON. ANTHONY THOMAS FARESE |
| COURT FROM WHICH APPEALED: | LAFAYETTE COUNTY CHANCERY COURT |
| ATTORNEY FOR APPELLANT: | MICHAEL MALSKI |
| ATTORNEY FOR APPELLEE: | LESTER SUMNERS |
| NATURE OF THE CASE: | CIVIL - DOMESTIC RELATIONS |
| TRIAL COURT DISPOSITION: | CHILD CUSTODY TRANSFERRED TO APPELLEE |
| DISPOSITION: | AFFIRMED - 10/7/97 |
| MOTION FOR REHEARING FILED: | 10/22/97 |
| CERTIORARI FILED: | |
| MANDATE ISSUED: | 12/23/97 |

BEFORE BRIDGES, C.J., HERRING, AND PAYNE, JJ.

HERRING, J., FOR THE COURT:

Andrew K. Howorth filed this action against his former wife, Laura Stewart Howorth, seeking to modify the original judgment for divorce of the Chancery Court of Lafayette County, Mississippi, which granted primary physical custody of the two minor children of the parties to their mother. The trial court granted most of the relief sought by Mr. Howorth, and Mrs. Howorth now appeals to this Court. After reviewing the record and applicable law, we affirm.

## I. THE FACTS

Laura Stewart Howorth and Andrew K. Howorth, both of whom are attorneys, were married on December 8, 1985, and had two children, Marian Stewart Howorth, born June 28, 1989, and John Stewart Howorth, born April 7, 1992. Marian was five years old and Stewart was three at the time of

the divorce. The parties were divorced on November 15, 1994, on the grounds of irreconcilable differences. A settlement agreement was entered into by the parties and made a part of the judgment for divorce. This agreement provided, *inter alia*, that the parties would exercise joint legal and physical custody of the children. However, the father's periods of physical custody of the children were limited to two weekends per month, six weeks during the summer months of each year, and normal alternating holiday periods. Furthermore, Mr. Howorth agreed to pay to Mrs. Howorth the sum of $650 per month for the support and maintenance of the two minor children. Both parties represented themselves in the divorce action and also agreed that if Mrs. Howorth chose to move from the Oxford-Lafayette County area, such a move would constitute a material change of circumstances resulting in Mr. Howorth becoming the "paramount and primary custodial parent" subject only to reasonable visitation with the children being vested in Mrs. Howorth.[(1)]

Howorth filed a "Petition for Enforcement or Modification of Decree" wherein he stated that Mrs. Howroth had advised him of her intent to move her residence to a location outside Lafayette County to a point in Florida, approximately 600 miles away.[(2)] Thus, Mr. Howorth requested (1) that he be awarded primary legal and physical custody of the two minor children in accordance with the provisions of paragraph 14 of the settlement agreement, or in the alternative, (2) that the judgment for divorce be modified so as to award him custody of the children. In his petition, Mr. Howorth alleged that his former wife was emotionally unstable and that moving the children to an area approximately 600 miles away would pose a "serious emotional and physical risk to the children." Furthermore, "[t]he only reason the Petitioner agreed initially to voluntarily permit Respondent to maintain such a prominent parenting role was because of the other stipulations and agreements in the Property Settlement Agreement which Respondent now intends to dishonor." Mr. Howorth further requested that Mrs. Howorth be required to pay him a reasonable sum each month for the support of the children and also be required to pay his attorneys' fees. Mrs. Howorth responded by filing a motion requesting the chancellor, Anthony F. Farese, to recuse himself since Mr. Howorth was an active and local attorney at law who made regular appearances before the chancellor, thus raising a question as to the appearance of his impartiality.

On May 17, 1995, the trial court denied the motion to recuse filed by Mrs. Howorth, set up temporary visitation schedules between both parents and the children, and set the action for a trial on its merits. After a lengthy hearing on the merits, the trial court modified its judgment for divorce, dated November 15, 1994, and entered its "Decree of Modification" on August 28, 1995. In its new judgment, the prior judgment was modified, *inter alia*, as follows: (1) paramount and primary care and custody of the two minor children was awarded to the father, Mr. Howorth, subject to the mother's right to have visitation with the children in accordance with a prescribed schedule as shown in the decree and (2) Mrs. Howorth was required to pay to Mr. Howorth the sum of $379 per month for the support and maintenance of the children except for those weeks when she exercised summer visitation with the children. In its bench opinion, the trial court observed that both Mr. Howorth and Mrs. Howorth were sexually promiscuous, but there was no proof that Marian, age six and in the first grade at the time, had been harmed by their promiscuity. Furthermore, the Howorth children were adjusted and well settled in Oxford, Mississippi, where they had lived all their lives. Thus, the court held that for Mrs. Howorth to take them to Tallahassee, Florida, an uncertain environment, would constitute a substantial change of circumstances adverse to the best interests and welfare of the children. Moreover, Mr. Howorth had a large extended family in Oxford to interact with the children,

while Mrs. Howorth had none in Florida. According to the trial court, both parents had equal parenting skills, but "Laura has more concern for herself than for her children. Her actions appear to be selfish to the detriment of her children - almost to the point of neglect. . . ," and Mr. Howorth's "medical and mental condition are better than Laura's."[(3)] Throughout the trial, the chancellor stressed:

It seems to me that we are dealing here with two intelligent young parents -- brought into the world these two children. I can make the decision. To be honest with you, up to this point I think both of you love the children, both of you probably would make good parents to your children, both of you exercise concern. So if I give the child to Andy as opposed to you, the kids will be okay. If you get the children they will be okay -- you, or with their father. There's more to it than just you and the father. There are other criteria. That's where the difficulty lies. I'm not sure that some parents don't -- I'm not saying this is true with you, some parents just don't understand the situation. I'm not trying to cause you any more grief in your little heart that it's already bearing. It's a tough situation.

I will let you go on with the testimony, we are almost completed. We will see where we go from here.

I'm just appealing to both of you to consider the fact that the children are involved and something needs to be done. *It's a situation created by moving. As long as you lived here there would be nothing adverse*. But that's why they have judges, if people didn't have trouble I would be without a job. I hate that people have trouble, but that's life.

(emphasis added). Thus, it appears clear that the trial court believed that peculiar and unusual circumstances connected with the move of Mrs. Howorth to Florida necessitated the change of custody.

## II. THE ISSUES

The Appellant, Mrs. Howorth, assigns the following errors, verbatim:

1. DID THE HUSBAND MEET HIS BURDEN OF PROOF FOR MODIFICATION OF A PERMANENT CHILD CUSTODY ORDER?

A. DID THE HUSBAND DEMONSTRATE A MATERIAL CHANGE IN CIRCUMSTANCES?

B. DID THE HUSBAND DEMONSTRATE AN ADVERSE EFFECT ON THE CHILDREN?

C. DID THE HUSBAND DEMONSTRATE THAT THE CHILDREN'S BEST INTEREST WOULD BE SERVED BY A TRANSFER OF CUSTODY TO HIMSELF?

2. DID THE CHANCELLOR ERR REVERSIBLY IN DENYING THE WIFE'S MOTION FOR RECUSAL?

## III. ANALYSIS

1. DID MR. HOWORTH MEET HIS BURDEN OF PROOF FOR MODIFICATION OF A PERMANENT CHILD CUSTODY ORDER?

As stated above, the trial court modified the judgment for divorce that it rendered four months earlier, and awarded custody of the two minor children to Mr. Howorth. An appellate court normally defers to the chancellor on factual issues and will not reverse the chancellor unless his findings are not supported by substantial credible evidence, or unless he has either committed manifest error, or applied an erroneous legal standard. *Bredemeier v. Jackson*, 689 So. 2d 770, 775 (Miss. 1997); *Morrow v. Morrow*, 591 So. 2d 829, 832-33 (Miss. 1991); *Milam v. Milam*, 509 So. 2d 864, 866 (Miss. 1987); *see also Brennan v. Brennan* 638 So. 2d 1320, 1323 (Miss. 1994). From the record it is clear that the chancellor utilized the correct legal standard in making his decision on whether or not to modify his original judgment and grant custody of the children to the father. As stated in *Bredemeier*:

In the ordinary modification proceeding, the non-custodial party must prove: (1) that a substantial change in circumstances has transpired since issuance of the custody decree; (2) that this change adversely affects the child's welfare; and (3) that the child's best interests mandate a change of custody.

*Bredemeier*, 689 So. 2d at 775. The non-custodial party has the burden of establishing this proof by a preponderance of the evidence. *Stevison v. Woods*, 560 So. 2d 176, 179 (Miss. 1990). Moreover, in determining whether or not to change the custodial parent the trial court must consider the "totality of the circumstances," always keeping in mind that we must "never depart from our polestar consideration: the best interest and welfare of the child." *Riley v. Doerner*, 677 So. 2d 740, 744 (Miss. 1996). In *Riley*, the Mississippi Supreme Court clearly stated that unusual cases could arise where the test it devised in order to justify custody modification, if applied rigidly, would produce a result contrary to a child's best interest. Thus, the court cautioned trial judges in custody matters to always consider a child's best interests "above all else." *Id.*

The settlement agreement entered into by the parties, both licensed attorneys, at the time of their divorce, contained a provision that should Mrs. Howorth remove herself from Oxford and Lafayette County, Mr. Howorth would become the primary custodial parent. This agreement was approved by the trial court when it was incorporated in the judgment for divorce which was signed by the chancellor and filed on November 15, 1994. Mr. Howorth then sought a custodial change and a modification of the original judgment based upon the express agreement between the parties that Mrs. Howorth's change of residence would dictate a change of custody. However, the trial court ruled after a hearing on the merits that the agreement was in violation of the supreme court's ruling in *Bell v. Bell*, 572 So. 2d 841, 845-46 (Miss. 1990) where the court ruled:

[O]ur courts may not require that children be reared in a single community come what may. If courts may not order this, it follows that divorcing parents may not make such agreements which courts are obligated to enforce.

The trial court was correct in its ruling on this issue. Moreover, the supreme court has held that it is "legally irrelevant" on the issue of permanent custody of children that the custodial parent transports the children to a distant state or even a foreign nation, thereby effectively limiting the visitation rights of a non-custodial parent. *Spain v. Holland*, 483 So. 2d 318, 321 (Miss. 1986). *See also Cheek v. Ricker*, 431 So. 2d 1139, 1144 (Miss. 1983) ("Surely, it must be the law that such a change of residence by the person having custody is not a material change in circumstances which would justify a reconsideration of an order for primary custody."). On the other hand, the Mississippi Supreme Court has also said:

[W]e do not foreclose the consideration by our trial courts of peculiar or unusual circumstances adversely affecting the children over and above the effect attendant upon the mere increase in miles between the children and the non-custodial parent.

*Spain*, 483 So. 2d at 321; *see also Stevison*, 560 So. 2d at 180. In *Stevison*, the mother who was the custodial parent of her minor daughter permanently moved to Alaska to get away from her former husband and took her daughter with her. *Id.* The mother's minor son remained in Mississippi with her former husband, who had been granted primary custody of the son in a prior divorce action. *Id.* While acknowledging that the mother's move to Alaska with her daughter did not, of itself, constitute a material change of circumstances which justified a custodial change, the supreme court ruled that the trial court was not manifestly in error in ordering the daughter be awarded to the father since "unusual circumstances" existed as contemplated in *Spain* which justified the custodial change. *Id.* The court stated that since the two children were emotionally close to each other and visited regularly, the daughter's move to Alaska would have an "adverse effect" upon her, thereby justifying the custodial modification. *Stevison*, 560 So. 2d at 180.

In this case, the trial court ruled, after reviewing *Stevison and Spain*, that unusual circumstances did exist and that a material change of circumstances adverse to the minor children had occurred since the judgment for divorce rendered four months earlier. In making this factual decision, the chancellor emphasized that (1) the mother suffered from depression, took Prozac, and was consulting a psychiatrist; (2) the move to Florida is "unknown, unproven, and speculative . . ." with no assurance that the children will adapt to a new lifestyle in a foreign location; and (3) the minor daughter was hyperactive and took Ritalin, a medication designed to treat attention deficit disorder. Thus, the chancellor concluded that the proposed move to Florida would adversely affect the two children, and after reviewing the familiar factors enumerated in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983), also concluded that the best interests of the children required a change of custody. In making this determination, the trial court took into account that Mr. Howorth had a large and stable extended family in Oxford and that the minor children enjoyed a close and loving relationship with their paternal grandparents, aunts, uncles, and cousins. On the other hand, no such support group existed in Tallahassee, Florida. Based upon the evidence before us, we cannot say that the chancellor's decision was manifestly in error or unsupported by substantial credible evidence. We therefore affirm the chancellor's ruling on this issue.

II. DID THE CHANCELLOR COMMIT REVERSIBLE ERROR BY DENYING MRS. HOWORTH'S MOTION TO RECUSE?

The Appellant moved to recuse the chancellor prior to the trial of this action on its merits. The motion was denied after a hearing was held thereon. On appeal, the Appellant contends that since Mr. Howorth appeared before the chancellor on a regular basis as a practicing attorney, his impartiality might reasonably be questioned pursuant to Canon 3(C)(1) of the Mississippi Code of Judicial Conduct. Mississippi Constitution of 1890, Article 6, Section 165 states:

No judge of any court shall preside on the trial of any cause, where the parties or either of them, shall be connected with him by affinity or consanguinity, or where he may be interested in the same, except by consent of the judge and of the parties. . . .

*See also* Miss. Code Ann. § 9-1-11 (Rev. 1991). Furthermore, Canon 3(C)(1) states:

(1) A judge should disqualify himself in a proceeding *in which his impartiality might reasonably be questioned,* including *but not limited to* instances where:

(a) he has a personal bias or prejudice concerning a party, . . .

(b) he served as [a] lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, . . .

(c) he has. . . a financial interest in subject matter in controversy . . .

(d) [or] he . . . is a party to the proceeding . . . [or] is acting as a lawyer in the proceeding.

(emphasis added). As stated in *Turner v. State*, 573 So. 2d 657, 678 (Miss. 1990), there is a presumption that a judge who takes an oath to administer impartial justice will do so and is qualified and unbiased. In the absence of the establishment of reasonable doubt about the validity of this presumption or other evidence challenging the trial judge's impartiality, a trial judge's decision to deny a motion to recuse will not be overturned. *Id.; Jenkins v. Forrest County Gen. Hosp.,* 542 So. 2d 1180, 1181 (Miss. 1988) (holding that the propriety of a trial judge sitting is subject to review only in a case of "manifest abuse of discretion"). In the case *sub judice*, we are unprepared to say that the chancellor, who took an oath to administer impartial justice, should be required to recuse himself based upon the mere fact that a party litigant, who is also a practicing attorney, appears regularly before the chancellor in other matters. In the absence of other evidence challenging the impartiality of the trial judge, we are compelled to rule that this assignment of error has no merit.

We affirm the ruling of the trial court in this action.

**THE JUDGMENT OF THE LAFAYETTE COUNTY CHANCERY COURT IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

**BRIDGES, C.J., THOMAS, P.J., COLEMAN, DIAZ, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR. McMILLIN, P.J., NOT PARTICIPATING.**

1. This provision is located in paragraph 14 of the settlement agreement.

2. The first day of the trial of this action was held on May 17, 1995, and the remainder of the trial was held on August 17-18, 1995. In the interim, Mrs. Howorth remarried and moved to Florida. She advised the court of her intent to move and remarry prior to trial.

3. According to the testimony, Mrs. Howorth was occasionally seeing a psychiatrist, and was taking Prozac for depression.