IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 95-CA-01114 COA

JULIE H. BRELAND BREWER **APPELLANT**

v.

MARK ALAN BRELAND **APPELLEE**

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

DATE OF JUDGMENT:	09/20/95
TRIAL JUDGE:	HON. FRANK MCKENZIE
COURT FROM WHICH APPEALED:	JONES COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	JAMES R. HAYDEN
ATTORNEY FOR APPELLEE:	THOMAS T. BUCHANAN
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	ON MOTION FOR MODIFICATION OF CUSTODY, APPELLEE GRANTED PRIMARY CUSTODY OF MINOR CHILD.
DISPOSITION:	AFFIRMED 10/21/97
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	11/12/97

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

BRIDGES, C.J., FOR THE COURT:

Julie H. Breland Brewer appeals from a judgment of the Chancery Court of Jones County modifying a child custody decree. Mark Alan Breland (Mark) asked the court to modify the existing custody arrangement between him and his ex-wife, Julie H. Breland Brewer (Julie), who had been granted custody of the minor child in the judgment of divorce. The court granted Mark's motion to modify child custody, and Julie appeals citing the following errors: 1) that it was manifest error for the Chancellor to modify its former judgment granting permanent custody of the minor child to the father, and 2) that there was insufficient evidence of a material change in circumstances to support the chancellor granting custody of the minor child to the father. Finding no errors in the proceedings below, we affirm.

FACTS

Mark and Lisa were married on December 3, 1988, in Jones County, Mississippi. They had one child, Alanah Nicole Breland. Subsequently, the parties divorced on March 5, 1993, based upon irreconcilable differences, by order of the Chancery Court of Jackson County, Mississippi. The terms of the child custody agreement were incorporated into the final judgment and specified that Julie would have "paramount [sic] care, custody and control" of the minor child with reasonable visitation rights in favor of Mark. Additionally, Mark was ordered to pay $40 per week in child support.

The case was transferred to Jones County, Mississippi on June 4, 1993. On June 23, 1993, Mark filed a motion for citation for contempt and motion for modification seeking permanent custody of the child. Mark's basis for his motion to modify custody was that a substantial and material change had occurred because Julie consistently refused Mark's visitation rights. Julie filed a written answer on July 7, 1993, admitting the violations of Mark's visitation rights, but denied open, willful, and contemptuous behavior. Julie filed a cross bill alleging that Mark was abusing the minor child, as well as a cross bill for contempt for failure to pay alimony, child support, and attorney's fees. These motions were heard on July 22, 1993, by Judge Shannon Clark. Judge Clark ordered an evaluation of Mark, Julie, and Alanah by Dr. Beverly Smallwood. This order was subsequently amended by Judge Clark on August 4, 1992, stating that Dr. Kathy Meeks Dixon would conduct the evaluation instead of the doctor stipulated in the previous order.

On July 22, 1993, Mark filed another motion for citation for contempt and a motion for specific temporary visitation stating that he had complied with the court's order in meeting with Dr. Kathy Meeks Dixon, but that Julie had failed and refused to go for her evaluation. He alleged that he continued to be deprived visitation with his minor child. Additionally, Dr. Paul A. Davey, who had been assigned to this case, had written a letter recommending that Mark be allowed specific periods of temporary visitation. A hearing on this matter was held October 7, 1993, by Judge Shannon Clark. The court entered an order of contempt and evaluations setting a final hearing date for November 9, 1993. In addition, the court ordered specific visitation rights of Mark and Julie stating that pick up and delivery would only be allowed at the Jones County Sheriff's Office.

On December 7, 1993, Judge Shannon Clark heard the motions and held that the allegations of sexual abuse were not supported by credible evidence, that Julie was in contempt for failing to allow visitation rights, and that temporary custody would be awarded to Mark, subject to liberal visitation rights on the part of Julie. Furthermore, the court stated that if Julie desired a permanent order regarding custody, she would have to be evaluated by Dr. Davey. The court would then review Dr. Davey's recommendation concerning the permanent care, custody and control of the minor child and enter a permanent custodial order. The order stated that pick up and delivery of the minor child would take place in Hattiesburg at either the Youth Court or the Department of Human Services.

Mark filed a motion for permanent order, motion for emergency relief, and motion to modify on February 22, 1994, stating that there had been a material change in circumstances adversely affecting the rights of the minor child and endangering the minor child's emotional and physical well-being. On November 10, 1994, the Chancery Court of Jones County entered an opinion on the motions stating that the court would withhold making any decisions until Julie had received adequate psychological counseling.

Julie filed a motion for permanent order and to cite respondent for contempt on May 26, 1995,

stating that she had complied with the court order in seeking an evaluation by Dr. Davey and therefore, was seeking permanent custody of the minor child. Additionally, she was citing Mark for contempt for failure to pay attorney's fees and arrearage of child support. On July 10, 1995, Mark filed his answer and filed a cross-motion for contempt and modification alleging that there had been a material change in circumstances adversely affecting the minor child and that Mark should be awarded permanent care, custody and control of the minor child. Additionally, his cross motions alleged that Julie had failed to follow the former decrees of the court. Julie filed her written answer on September 7, 1995, setting out certain admissions and denials of allegations in the cross-motion.

This matter came before Judge Frank McKenzie on September 7, 1995, in the Chancery Court of the Second Judicial District of Jones County, Mississippi. All parties were present at the hearing and testified as to their knowledge of the facts and circumstances in the case. The court held that Mark had been the primary custodian for almost two years and that no evidence had been presented to support a finding that it would not be in the child's best interest for it to continue. The court granted Mark primary physical custody of the minor child on a permanent basis and granted liberal standard visitation to Julie, commenting that if she continued to make unfounded allegations of sexual or physical abuse of the minor child, the court would "consider limiting her custodial [sic] rights." The court found from the evidence that Julie had "planted into the mind of the child that she had been sexually abused."

Mark filed a petition for habeas corpus on September 20, 1995, alleging Julie's refusal to abide by the court order. Special Chancellor Billy Joe Landrum entered a judgement on the motion for permanent order and to cite respondent for contempt and cross-motion for modification on September 20, 1995. This order stated that the former opinions of the court would be modified to grant Mark the primary physical custody of the minor child on a permanent basis with Julie to have specific visitation rights. Additionally, the order stated that a copy of the opinion of the court should be attached to the decree and it by reference incorporated into the decree as the court's findings of facts and conclusions of law.

A motion for relief from judgment was filed by Julie on October 17, 1995, stating that new evidence, previously unavailable, had been discovered. A notice of appeal was filed with the Mississippi Supreme Court on October 17, 1995.

ARGUMENT AND DISCUSSION OF THE LAW

I. WHETHER IT WAS MANIFEST ERROR FOR THE CHANCELLOR TO MODIFY ITS FORMER JUDGMENT GRANTING PERMANENT CUSTODY OF THE MINOR CHILD TO THE FATHER.

II. WHETHER THERE WAS SUFFICIENT EVIDENCE OF A MATERIAL CHANGE IN CIRCUMSTANCES TO SUPPORT THE CHANCELLOR GRANTING CUSTODY OF THE MINOR CHILD TO THE FATHER.

Since Julie's issues both deal with the chancellor's findings, we shall discuss them together. When reviewing a chancellor's decision to modify child custody, this Court's scope of review is limited. The Mississippi Supreme Court has held that, on appellate review, a chancellor's findings of fact will not be disturbed if substantial evidence supports those factual findings. *Brooks v. Brooks*, 652 So. 2d

1113, 1124 (Miss. 1995) (citations omitted). In a domestic relations context, this Court will not disturb the findings of a chancellor unless the chancellor was manifestly wrong or clearly erroneous, or if an erroneous legal standard was applied. *Setser v. Piazza*, 644 So. 2d 1211, 1215 (Miss. 1994) (citations omitted). This Court is required to respect a chancellor's findings of fact that are supported by credible evidence, particularly in the areas of divorce and child support. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994). Where evidence conflicts, the Mississippi Supreme Court typically defers to the chancellor as fact finder. *Morrow v. Morrow*, 591 So. 2d 829, 832 (Miss. 1991); *McElhaney v. City of Horn Lake*, 501 So. 2d 401, 403 (Miss. 1987). We have reviewed the record and are satisfied that the chancellor's findings of fact were supported by substantial, credible evidence.

It is well settled that in all child custody modification cases, the polestar consideration is the child's best interest. *Riley v. Doerner*, 677 So. 2d 740, 744 (Miss. 1996) (citing *Sellers v. Sellers*, 638 So. 2d 481, 485 (Miss. 1994); *Moak v. Moak*, 631 So. 2d 196, 198 (Miss. 1994); *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)). The long-established standard for justifying a change in custody from one parent to another required a showing by a preponderance of the evidence of (1) a material change in the circumstances, and (2) an adverse effect on the child as a result of the change in circumstances. *Ash v. Ash*, 622 So. 2d 1264, 1265 (Miss. 1993). On appeal, Julie argues that Mark failed to prove a material change in circumstances and any subsequent adverse effect on the minor child. Julie bases her argument on a Mississippi Supreme Court case stating that certain factors must be considered in ascertaining the best interest of the child. We agree with the holding in this case; however, it is this Court's opinion that the chancellor's modification of custody in the case sub judice was based on the best interest of the child.

The Mississippi Supreme Court's most recent statement on modification of child custody came in the case of *Riley v. Doerner*, 677 So. 2d 740 (Miss. 1996). In *Riley*, the chancellor found that the best interest of the child would be served by transferring custody to the father; however, the chancellor refused to modify custody despite the best interests of the child because he could not find a material change in circumstances or an adverse effect on the child. *Id.* at 742. Nonetheless, the chancellor did stipulate that if the mother failed a court-ordered drug test, then custody would be given to the father. *Riley*, 677 So. 2d at 740. The mother subsequently failed the drug test, and the chancellor transferred custody to the father. *Id*. The mother appealed to the Mississippi Supreme Court, which deflected the case to the Mississippi Court of Appeals. The court of appeals affirmed the chancellor's decision, and the supreme court granted the mother's petition for writ of certiorari to clarify the standard for modification of child custody decrees. She cited as error the chancellor's failure to find a material change in circumstance and an adverse effect on the child. *Id.* at 743. The court of appeals held that although the chancellor had failed to find a material change in circumstances having an adverse effect on the child, modification was nonetheless justified because it was in the child's best interest. *Id.* The supreme court quoted the following language from the court of appeals' decision:

> We must stress that we are not in any way retreating from the long standing rule stated above regarding custody, but merely emphasize that the best interest of the child is the chief concern of this Court. In all child custody cases, the polestar consideration is the best interest of the child.

Id. (quoting *Riley v Doerner*, No. 95-CT-00007-COA, slip op. at 4 (Miss. Ct. App. Dec. 29, 1995)).

The supreme court went on to elaborate on the chancellor's comments that even though the child's father's life had undergone a material change for the better, the chancellor could not justify a change in custody based only on the child's best interests and the father's significant improvements. *Id.* at 744. The supreme court stated that while the general rule was that a positive change in the non-custodial parent's life did not alone justify custody modification, "when the environment provided by the custodial parent is found to be adverse to the child's best interest, and that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly." *Id.*

In explaining that it was in no way dispensing with or disregarding the straightforward application of the standard test for custody modification--a material change adversely affecting the child--the supreme court emphasized that "a chancellor is never obliged to ignore a child's best interest in weighing a custody change; in fact, a chancellor is bound to consider the child's interest above all else." *Id.* at 744-45. The supreme court continued, stating:

> The test we have devised for custody modification need not be applied so rigidly, nor in such a formalistic manner so as to preclude the chancellor from rendering a decision appropriate to the facts of an individual case. In particular, it should not thwart the chancellor from transferring custody of a child from one parent to another when, in the chancellor's judgment, the child's welfare would be best served by such transfer.

Id. at 745. The supreme court reiterated that the totality of the circumstances must be considered when determining the best interests of the child. *Id.* at 743 (citations omitted).

In light of the supreme court's recent opinion on custody modification, Julie's argument that the chancellor failed to find a material change adversely affecting the child does not convince this Court that the chancellor was not justified in changing custody. The chancellor found that the best interests of the child would be served by changing physical custody from Julie to Mark because of Julie's refusal to allow visitation rights to Mark, her continuous allegations of sexual abuse despite prior rulings by the court that the accusations were unfounded, and the opinion by the court-appointed psychotherapist that she needed professional help. Under *Riley*, the chancellor was justified in modifying custody even absent a specific finding of a material change and its adverse affect on the child, when the totality of the circumstances warranted a custody change. Moreover, under *Riley*, the chancellor was justified in transferring custody because the environment provided by Julie was adverse to the child's best interest, while the environment provided by Mark was stable and secure. *Id.* The chancellor's decision was supported by substantial evidence and thus, we find this claim to be without merit.

THE JUDGMENT OF THE JONES COUNTY CHANCERY COURT MODIFYING THE FINAL JUDGMENT OF DIVORCE TO AWARD PERMANENT CUSTODY OF THE MINOR CHILD TO MARK ALAN BRELAND IS AFFIRMED. COSTS OF THIS APPEAL ARE TAXED TO APPELLANT.

McMILLIN AND THOMAS, P.JJ., COLEMAN, DIAZ, HERRING, HINKEBEIN, KING, PAYNE, AND SOUTHWICK, JJ., CONCUR.