IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 1998-CA-01383-COA

R. B. S. **APPELLANT**

v.

T. M. S. **APPELLEE**

DATE OF JUDGMENT:	09/21/1998
TRIAL JUDGE:	HON. SEBE DALE JR.
COURT FROM WHICH APPEALED:	PEARL RIVER COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	G. GERALD CRUTHIRD
ATTORNEY FOR APPELLEE:	JAMES R. HAYDEN
NATURE OF THE CASE:	CIVIL - DOMESTIC RELATIONS
TRIAL COURT DISPOSITION:	MOTHER'S AMENDED PETITION FOR MODIFICATION OF JOINT PHYSICAL CUSTODY AGREEMENT AND VISITATION SCHEDULE GRANTED; FATHER'S AMENDED COUNTER-PETITION FOR AWARD OF SOLE CUSTODY OF THE MINOR CHILD DISMISSED WITH PREJUDICE.
DISPOSITION:	AFFIRMED - 08/22/00
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	9/12/2000

BEFORE McMILLIN, C.J., LEE, AND THOMAS, JJ.

McMILLIN, C.J., FOR THE COURT:

¶1. This is a case involving the custody of a male child who was three years old at the time of the divorce of his parents in 1995. The parties originally agreed to joint custody with the physical custody being approximately equally divided between the parents. In October of 1996, the mother, who had since remarried, filed a petition seeking to modify the physical custody arrangement. She presented evidence that she and her new husband had moved to another town. She contended at the hearing that these changed circumstances, combined with the fact that the child had reached school age, rendered the existing equal split of time with the child unworkable.

¶2. The father filed a countering petition seeking sole custody of the child in which he asserted that the child had been sexually abused by his mother and physically abused by the mother's new husband. The chancellor denied the father's request to change custody based on the allegations in his counter petition, and the father has now appealed.

¶3. The chancellor, in his ruling, also altered the time the child would spend with each parent, giving substantially more time to the mother than what was set out in the original judgment. As to this altered physical custody arrangement, the father purports to raise a separate issue that this constituted a custody change unsupported by the necessary finding of a material change in circumstance adverse to the child's welfare. However, the father's brief contains no separate argument or citation to authorities on that proposition. Rather, he confines his argument strictly to his dissatisfaction with the chancellor's refusal to conclude that the child had been abused by his mother and stepfather. We will address that concern only in this opinion.

¶4. The father raises one additional issue that arises indirectly out of the child abuse allegations. Upon reaching the apparent conclusion that the child's paternal grandmother was influencing the child to report incidents of abuse that may not have actually occurred, the chancellor limited the time that the child could spend in the sole care of the grandmother. The father claims this to be an abuse of the chancellor's discretion. We will address that issue at the conclusion of this opinion.

¶5. The chancellor heard extensive testimony that included expert opinion testimony from a number of witnesses working in the area of child abuse. At the conclusion of the evidence, the chancellor entered a lengthy analysis of his findings of fact and the conclusions he felt were warranted based on his findings. His ultimate determination was that the allegations of physical and sexual abuse of the child by his mother and stepfather were not substantiated by the evidence. As a result, he declined to grant the father the relief requested. In reaching the conclusion that abuse was not proven, the chancellor offered the view that the timing of the allegations of sexual abuse was suspect, pointing out that they surfaced only after the mother had commenced her proceeding, though evidence was presented on the father's behalf that, if true, would indicate that he (or his mother) was aware of such behavior prior to that time. The chancellor further concluded that much of the attention the child had received at the hands of various experts during the course of the proceeding was for investigatory purposes only with no therapeutic element attached. The chancellor suggested that a number of the experts appeared to have taken a partisan role in the case at an early stage and noted that the damaging statements made by the child concerning incidents of abuse were made only after the child had been subjected to repeated interrogative sessions with these individuals.

¶6. In weighing the validity of the allegations of abuse, the chancellor also observed that much of the evidence of behavior consistent with an abused child was derived from a journal or chronicle of events supposedly compiled by the child's paternal grandmother. The chancellor was particularly skeptical of the fact that, as mentioned briefly above, this record contained references to a number of events that occurred prior to the time the mother filed her custody modification petition, but that the paternal grandmother did not report any such suspicions to the Department of Human Services until several days after her son was served with the petition to modify.

¶7. The chancellor was critical of the role played by the Department of Human Services caseworker, concluding that the caseworker had acted in a precipitate manner in obtaining an order through the Youth Court to remove the child from the mother's care and place the custody of the child with the paternal grandmother on the flimsiest of evidence and at a time when the caseworker knew that a custody dispute was pending in the divorce proceeding. (This temporary emergency custody order was negated by the chancellor soon after he learned of its entry.) The chancellor was of the view that this caseworker had an inordinate amount of contact with the paternal grandmother as the matter played out and chose to substantially discount the caseworker's testimony in support of the contention of sexual and physical abuse.

¶8. In order to modify an existing child custody order, the chancellor must, at the threshold, determine that there has been a material change in circumstance that is detrimental to the best interest of the child involved. *McRee v. McRee*, 723 So. 2d 1217 (¶6)(Miss. Ct. App. 1998). At the conclusion of the proof in this case, the chancellor decided that the father had not carried his burden of demonstrating either sexual or physical abuse of the child by his former wife and her new husband. Those allegations of abuse were the only reasons advanced by the father to show that a material change of circumstance detrimental to the child's interests had occurred. Therefore, the chancellor declined to modify custody as requested by the father.

¶9. On appeal, the father urges this Court to conclude that the chancellor's findings of fact were clearly erroneous as being contrary to the great weight of the credible evidence presented at the hearing. As to such matters, this Court has a limited scope of review. The chancellor sits as fact-finder and his conclusions regarding witness credibility and what weight and worth to assign to the testimony of the various witnesses are entitled to substantial deference. *Ewing v. Ewing*, 749 So. 2d 223 (¶5)(Miss. Ct. App. 1999). Only if, for reasons that we find persuasive, we are convinced that the chancellor was manifestly wrong or clearly erroneous in his findings may we intercede. *Murphy v. Murphy*, 631 So. 2d 812, 815 (Miss. 1994). In a colorful manner that emphasizes the point upon which our decision must turn in this case, the Mississippi Supreme Court has said:

> The trial judge saw [the] witnesses testify. Not only did he have the benefit of their words, he alone among the judiciary observed their manner and demeanor. He was there on the scene. He smelled the smoke of battle. He sensed the interpersonal dynamics between the lawyers and the witnesses and himself. These are indispensable.

Culbreath v. Johnson, 427 So. 2d 705, 708 (Miss. 1983). Certainly, in this case, there was evidence presented that, if found credible by the chancellor, would have supported an allegation of sexual abuse of this child. Nevertheless, the chancellor, after "smelling the smoke of battle," made detailed findings in which he documented, not only the fact that he refused to put substantial credence in the testimony of a number of the witnesses, but the circumstances, events, and even witness demeanor that led him to find these witnesses' facially-damaging evidence unpersuasive. The father undertakes in his brief, in much the same painstaking manner as that employed by the chancellor, to re-examine the evidence in great detail to point out those matters in evidence that he concludes were substantially damaging to the position of his former wife and her new husband in this litigation. Yet, in this review of the record, the father fails to make any compelling argument as to why this Court should disregard the chancellor's view of the credibility (or lack thereof) of the witnesses supplying such evidence. Absent some indication that the chancellor's assessment of the witnesses' credibility was manifestly in error, this Court is without authority to intervene on this score.

¶10. The father, as a separate issue on appeal, points out that the guardian ad litem appointed for the child during the proceeding recommended that the father should be given primary custody of the child. He urges this Court to conclude that the chancellor abused his discretion in disregarding the view of the guardian ad litem. The father frankly admits that he was unable to find any authority to support such a proposition. It would be surprising, indeed, if such authority existed because such a rule would do nothing other than to substitute the guardian ad litem for the chancellor as the decision-maker in such matters. A guardian ad litem for a minor child is an advocate for the child alone, presumably uninfluenced by the litigating position of either parent since, in some cases, a parent may take a position that, when viewed objectively, actually appears not to be in the child's best interest. *In Interest of R.D.*, 658 So. 2d 1378, 1383 (Miss. 1995). *See also E.M.C. v. S.V.M.*, 695 So. 2d 576, 580 (Miss. 1997) ("A guardian ad litem should be. . . '. . .

unbiased and independent. . . to insure protection for the child's best interests."'). That is an important role, but that role is fulfilled when the guardian vigorously advances a position that the guardian believes to be in the child's best interest. However, there is not, nor ought there to be, any presumption of correctness attached to the litigating position taken by a guardian ad litem. The view of the guardian and the reasoning behind that view are nothing more than additional information to aid the chancellor in making the decision on the merits of the matter in dispute - a matter that ultimately lies with the chancellor and which cannot be delegated by the appointment of a guardian ad litem. *S.N.C. v. J.R.D., Jr.*, 755 So. 2d 1077 (¶¶16-17) (Miss. 2000).

¶11. In summary, we can discover no clearly-identifiable error in the chancellor's decision to discount much of the evidence as the product of biased or prejudiced witnesses. Neither can we say with any degree of certainty that the chancellor was manifestly wrong when he determined, after hearing all the evidence, that certain facially-damaging statements made by the child to others were the product of lengthy investigative sessions conducted with the child in such a manner as to suggest to the child the desired response. The recommendations of the guardian ad litem that run contrary to the ultimate decision of the chancellor as to possible abuse of the child were not so compelling as to give rise to a finding that the chancellor abused his discretion by disregarding those recommendations.

¶12. We find no abuse of discretion in the chancellor's decision to limit the child's interaction with the paternal grandmother. The father's argument on this point consists solely of the contention that the adjudication amounted to a determination of the grandmother's visitation rights in a proceeding to which she was not a party. He cites no authority in support of the proposition and we do not find that to be the case. The chancellor, as a part of his ruling on child custody and visitation in a divorce proceeding, may make reasonable limitations on the activities and contacts of the children during their stay with one parent in the limited instance where an otherwise-unrestricted situation would "present an appreciable danger of hazard cognizable in our law." *Newsom v. Newsom,* 557 So. 2d 511, 517 (Miss. 1990). The chancellor concluded, and there was evidence to support the conclusion, that this child's grandmother's activities, intended to give rise to unwarranted claims of sexual abuse, were materially detrimental to this child's welfare. Based upon that finding, the chancellor proceeded, not to end any contact between the child and the grandmother, but to reasonably limit those opportunities where such efforts could occur. We find the ruling within the range of discretion afforded the chancellor to protect the child from a cognizable danger and we decline to intervene.

¶13. Unable to find reversible error for any of the reasons assigned by the father in this case, we affirm the decision of the chancellor.

¶14. **THE JUDGMENT OF THE CHANCERY COURT OF PEARL RIVER COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.**

KING AND SOUTHWICK, P.JJ., BRIDGES, LEE, MOORE, MYERS, PAYNE, AND THOMAS, JJ., CONCUR. PAYNE, J., CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY IRVING, J. IRVING, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION.

PAYNE, J., CONCURRING:

¶15. I sincerely hope that the chancellor's and not the guardian ad litem's assessment of the evidence is

correct. Child abuse is a serious problem in our nation, and too often no one seems to listen to the children. If the testimony which the chancellor rejected proves to be true, a child will suffer for a lifetime and believe that there is no justice in the world. However, this chancellor is no novice and has a long history in the judiciary, so I concur with the majority in affirming his finding. I just felt the possibility of mistake and the lifelong misery that could be caused thereby had the chancellor based his findings on insufficient evidence should be mentioned to emphasize the gravity of cases such as this.

IRVING, J., JOINS THIS SEPARATE WRITTEN OPINION.

IRVING, J., CONCURRING IN PART, DISSENTING IN PART:

¶16. I concur with the majority's decision to affirm the chancellor's denial of the modification sought by the father in his counterclaim. However, I must respectfully dissent from the majority's refusal to consider the father's second assignment of error. The majority acknowledged that the chancellor denied the modification sought by the father and the mother but, while not granting the exact relief sought by the mother, nevertheless modified the joint custodial arrangement which had been entered at the time of the divorce. The majority concluded it would not address the father's assignment of error on this point because "the father's brief contains no separate argument or citation to authorities on that proposition."

¶17. The second issue, assigned in the father's statement of issues, reads:

> **2. Whether the trial Court erred in its Judgment [sic] in effecting a modification of the joint child custody arrangement set forth in the parties' prior Judgment of Divorce without making an express finding and adjudication that a material change in circumstances which adversely affected the welfare and best interest of the minor child, [J.R.S.], when the evidence of record is considered**.

¶18. In the father's initial brief, he combined his argument of issues one and two, and as observed by the majority focused his argument on issue one. However, during that combined argument, the father set forth the legal authority embodying the prerequisites for modifying a custody order. In the father's reply brief, he addressed issue two in a separate argument and again directed us to legal authority setting forth the requisite threshold requirements for modification of a prior custody order. Given this state of the father's appellate briefing, I believe we are compelled to address his argument as to his second issue.

¶19. In his memorandum opinion, which was incorporated into the judgment, the chancellor made the following observation in his discussion of the issues:

> The Court notes that there has been no prior *independent determination by the Court* of custody award serving the best interest and welfare of J.R.S. nor a determination upon application of the *Albright* factors of the relative fitness and qualification of these parents to exercise custody. [R.B.S.] and [T.M.S.] presented to the Court, and prevailed upon the Court to adopt, , [sic] their agreement which in essence asserted that they each were fit and proper persons to exercise custody of their son, and that their proposed joint legal and shared physical custody would serve the best interest and welfare of J.R.S., who was then 2 & 9/12 years of age. *At least one substantial change of circumstances has occurred, namely, at the time of [T.M.S.]s filing herein J.R.S. was 4 & 8/12 years of age, and at the time of trial he was 6 & 5/12 years of age, and that becomes material in view of school considerations.*

(emphasis in original and emphasis added).

¶20. In his conclusions, the chancellor stated:

> The Court finds no basis to invalidate nor to supplant the basic Joint Legal Custody [sic] agreement executed by T.M.S. and R.B.S. which carries with it the inference that both are fit custodial parents, and therefore the Court finds it reasonable to continue the Joint Legal Custody [sic] of J.R.S. with shared physical custody in the manner hereinafter ordered.

¶21. The chancellor then ordered:

> 1. That R.B.S.'s counter-complaint for award of sole custody of [J.R.S.] to him and imposition of supervised only visitations permitted to [T.M.S.] be and is denied and dismissed with prejudice;
>
> 2. That [T.M.S.]s petition for modification only as to the shared physical custody of [J.R.S.] be and is hereby granted to the following extent, namely:
>
> Physical custody of [J.R.S.] shall be with [T.M.S.] at all times except for the shared periods by [R.B.S.] as follows: the week-end of each month in which the first, third and fifth Saturday falls, the week-end shared period to commence at 6:00 oclock p.m. on Friday and terminate at 6:00 oclock p.m. on Sunday; the summer vacation from school to commence five days after the school session ends and to terminate five days before the Fall school session begins, but with [T.M.S.] to have one week-end in June which shall include the third Saturday of June, and also one full week in July commencing at 6:00 oclock p.m. on a Sunday and terminating at the same hour on the following Sunday and which week shall not include the Fourth of July but otherwise to be selected by her in writing at the beginning of the summer shared time with [R.B.S.], and also the week-end of the first Saturday in August; one-half of the Spring Break week of school, whichever half will adjoin a regular week-end shared period of [R.B.S.]s; a portion of the Thanksgiving holiday commencing at 6:00 oclock p.m. on Wednesday and terminating at 6:00 oclock p.m. on Friday in even numbered years; not less than five full days at Christmas, said period to end at 2:00 oclock pm. on Christmas Day in odd numbered years and to begin at the stated time in even numbered years; all of the day of the Sunday observed as Fathers Day, with the proviso that [T.M.S.] shall have custody all of the Sunday observed as Mothers Day and that irrespective of any other provision for shared custody time with [R.B.S.]. The shared custody specified unto [R.B.S.] is awarded and intended expressly for the benefit of [R.B.S.] and is ordered to be exercised by [R.B.S.], not [his mother] acting in his stead and place, and should it become necessary for [R.B.S.] to obtain a caretaker for [J.R.S.] on occasion or occasions for a time period to exceed three hours duration he shall obtain the services of someone other than [his mother].

¶22. The original judgment of divorce approved, ratified, confirmed and incorporated the following custody provision contained in the Child Custody, Support, Visitation and Property Settlement Agreement executed by the parties:

> That it is agreed that Party of the First Part and Party of the Second Part shall both share joint physical and legal custody or joint custody of the parties minor child, [J.R.S.], as defined, and set forth in Section 93-5-24(1)(a) of the Mississippi Code of 1972, as amended. That Party of the First Part [the father], shall be awarded as his significant periods of physical custody of the parties minor

son, [J.R.S.], each of the five (5) week days weekly from 8:00 a.m. until 5:00 p.m. hereafter, and further, every other weekend beginning Saturday, October 21, 1995, at 8:00 a.m., and continuing on each such weekend until 8:00 a.m. on the following Monday morning. That Party of the Second Part [the mother] shall be awarded as her significant periods of physical custody of the parties' minor son, [J.R.S.], all other times, excepting only the following hereinafter described alternation of holidays and vacation periods. It is further agreed by Party of the First Part and Party of the Second Party that irrespective of the hereinbefore described significant periods of physical custody awarded unto each party, respectively, with their minor son, [J.R.S.], they shall alternate the major holidays of each year as follows: Party of the First Part shall have physical custody of the parties minor son during odd numbered years from December 25 at 3:00 p.m. through January 1 at 3:00 p.m., Thanksgiving Day and Easter Sunday, and during even numbered years from December 18 through January 1 at 3:00 p.m., the day following Thanksgiving Day and the Fourth of July; and Party of the Second Part during odd numbered years shall have physical custody of the parties minor son from December 18 until December 25 at 3:00 p.m., the day after Thanksgiving Day and July 4, and then Party of the Second Part during even numbered years shall have physical custody of the parties aforesaid minor son from December 25 at 3:00 p.m. until January 1 at 3:00 p.m., Thanksgiving Day and Easter Sunday; and further, each party shall have the right to uninterrupted physical custody of their minor son during one (1) two-week period, each year, for vacation purposes provided each party provides the other party with thirty (30) days advance notice of such vacation period of time.

¶23. As readily can be seen from the quoted provisions, the chancellor radically changed the physical custody provision of the original judgment of divorce. There was no allegation in the mother's petition for modification as to what the material change in circumstances was that would warrant a modification of the original custody arrangement. Paragraph 2 of her petition simply alleged: "[t]he Defendant . . . would show that since the rendition of the Judgment [sic] that there has been a material change in circumstances in and that [sic] the visitation is not in the best interest of the minor child. Said visitation should be modified to be in the best interest of the minor child."

¶24. As stated, the chancellor noted only one change, the age of the child. The chancellor considered the change material "in view of the school considerations." I fail to see how the child's attaining school age becomes a material change. It was foreseeable at the time the chancellor approved the initial custody arrangements that the child would attain school age in a few years. Further, since the father was initially given physical custody from 8:00 a.m. to 5:00 p.m., I fail to discern why the child's attainment of school age poses a problem or how his aging has become materially adverse to his interest. The father would simply pick the child up at 8:00 a.m., get him to school and return him to the mother by 5:00 p.m.

¶25. The change ordered by the chancellor was, in my humble estimation, more than simply adjusting the visitation schedule to smooth out some rough edges which he could have done without first finding a material change in circumstances sufficient to change the general or permanent custody from the father to the mother. *See, e.g., Tighe v. Moore*, 151 So. 2d 910 (Miss. 1963). Even the chancellor seemed to recognize that the evidence was insufficient to conclude that material changes adverse to the interest of the child had occurred. That recognition lay in the chancellor's observation that "[t]he Court finds no basis to invalidate nor to supplant the basic Joint Legal Custody [sic] agreement executed by [T.M.S.] and [R.B.S.] which carries with it the inference that both are fit custodial parents, and therefore the Court finds it reasonable to continue the Joint Legal Custody [sic] of [J.B.S]."

¶26. Notwithstanding the chancellor's observation that nothing had occurred tantamount to a material change in circumstances, he proceeded to substantially alter the custody arrangement. I find this to be manifestly wrong and clearly erroneous.

¶27. In *Haddon v. Haddon*, 97-CT-01453-SCT (¶12) (Miss. 2000) (quoting *Clark v. Myrick*, 523 So. 2d 79, 83)), the Mississippi Supreme Court reversed this Court's affirmance of the trial court's change in a visitation schedule approved by the chancellor just six months prior to the petition for modification. There the supreme court observed:

> In cases where the terms of visitation are at issue, our familiar change in circumstances rule has no application. *Cox v. Moulds,* 490 So. 2d 866, 869 (Miss.1986). This is true because the court is not being asked to change the permanent custody of the child. *Cox,* 490 So. 2d at 869; *Sistrunk v. McKenzie, 455* So. 2d 768, 770 (Miss.1984). In *Cox,* this Court stated:
>
> *All that need be shown is that there is a prior decree providing for reasonable visitation rights which isnt working and that it is in the best interest of the children as fostering a positive and harmonious relationship between them and their divorced parents to have custody provisions made specific rather than flexible and attendantly vague.*

Cox, 490 So. 2d at 869 (emphasis added).

¶28. The judgment of divorce, wherein the parties agreed to the visitation arrangements in this case, was filed on November 13, 1995. On October 16, 1996, eleven months later, the mother filed her petition for modification. The mother testified that she had remarried since the divorce and moved from Poplarville to Lumberton. The father still lived in Poplarville. At the time of the filing of the petition for modification, the minor child was only four years old, not even school age. Although the mother had moved from Poplarville to Lumberton, she still worked in Poplarville. Her testimony was that her new home in Lumberton was between five and twenty miles from Poplarville. In an effort to bolster the evidence in support of her petition for modification, the mother testified that sometimes the child cried and complained about his stomach aching before he was dropped off at his father's home in the mornings. This was essentially the evidence upon which the chancellor relied to change the original visitation or custody arrangements.

¶29. Pertinent language in *Haddon* speaks loudly and forcibly to the change in visitation issue in our case. In *Haddon,* the supreme court observed: "[i]t appears that little or nothing had happened between that time [the date of executing the agreed custody agreement] and Scott's complaint for modification that could not have been reasonably anticipated by the parties. Nicholas was older." *Haddon* at (¶13). Likewise, in our case, little or nothing had changed in the eleven months between the original agreement and the date of the petition for modification, and nothing had changed that could not have been reasonably anticipated by the parties. Certainly the parties knew their minor child would get older and attain school age. There is not one shred of evidence indicating that the original visitation schedule was not working.

¶30. Because I cannot discern the evidence upon which the chancellor could have concluded that the prior custody and visitation provisions were either not working or were vague and not specific, I must conclude that the chancellor's decision to change the visitation schedule was manifestly wrong and clearly erroneous. Accordingly, I respectfully dissent.