IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2002-CA-01582-COA

CATHERINE GIVENS **APPELLANT**

v.

TODD NICHOLSON **APPELLEE**

DATE OF TRIAL COURT JUDGMENT:	8/19/2002
TRIAL JUDGE:	HON. JOHN C. ROSS, JR.
COURT FROM WHICH APPEALED:	UNION COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	DEEDY BOLAND
ATTORNEY FOR APPELLEE:	TODD NICHOLSON (PRO SE)
NATURE OF THE CASE:	CIVIL - CUSTODY
TRIAL COURT DISPOSITION:	MODIFICATION TO INCREASE APPELLEE'S VISITATION RIGHTS, INCLUDING ONE WEEKEND PER MONTH TO PATERNAL GRANDPARENTS.
DISPOSITION:	AFFIRMED: 3/02/2004
MOTION FOR REHEARING FILED:	
CERTIORARI FILED:	
MANDATE ISSUED:	

BEFORE KING, P.J., LEE AND CHANDLER, J J.

KING, P.J., FOR THE COURT:

¶1. Catherine Rae Cullum Pasco Nicholson Givens appeals from an order of the Union County Chancery Court modifying visitation. Todd Lamar Nicholson filed a petition for modification of child custody and Givens filed a counter-complaint for an increase in child support. The chancellor denied both motions, but modified the visitation schedule. Feeling that the chancery court judge abused his discretion in altering the visitation schedule, Givens raises the following issues on appeal:

1. Whether the Chancellor erred by granting grandparents' visitation rights when no petition was filed by the grandparents requesting these visitation rights

2. Whether the Chancellor erred in granting grandparents' visitation rights without specifically addressing the applicable *Martin* factors and when sufficient evidence was not presented with regard to these factors.

FACTS

¶2. Givens and Nicholson were divorced by the Circuit Court of Shelby County, Tennessee on December 8, 1993. Givens was awarded primary custody of their minor child, Todd Aaron Nicholson , born on December 19, 1990. Nicholson was granted visitation and ordered to pay child support to Givens.

¶3. Since the divorce Aaron has lived with his mother and older half-sister. The family has lived in a number of residences since the divorce. The family first lived in Bartlett, Tennessee, where they were residing when Givens and Nicholson divorced.

¶4. When Aaron was three, he began medicated treatment for attention deficient hyperactivity disorder. While in preschool Aaron began to exhibit violent behavior, began having night terrors, and suffered from depression. After Aaron's behavioral problems continued in pre-school and kindergarten, Givens decided to move the family to Mumford, Tennessee where Aaron completed first grade. In the middle of his second year in Mumford, Aaron began to have serious behavioral problems in school and his grades fell dramatically. By the end of Aaron's third grade year, Givens decided to move to Vicksburg. Givens married again and the blended family of Givens and her two children, her new husband, and his son moved to Vicksburg. After only nine months in Vicksburg, the family moved to New Albany. In a period of three years Aaron lived in four different cities.

¶5. In the fall of 2001, while in fifth grade at New Albany Middle School, Aaron drew a picture of his classmate with an arrow through his head that said, "you are dead." After this incident Aaron was admitted to Parkwood Hospital in the pre-adolescent psychiatric unit, and remained there about two weeks. During his stay at Parkwood, Aaron was diagnosed as having bipolar disorder, with symptoms of attention deficit disorder with hyperactivity.

¶6. Because Aaron had extreme difficulty getting along with other children, upon his discharge from the hospital, his doctors advised that Givens home school Aaron. The doctors felt that if Aaron, who is dyslexic, could learn to read on his age level that it would help curb his frustration and lower his anxiety. In addition to being home schooled, Aaron saw a reading tutor three times a week.

¶7. Nicholson moved to Connecticut before the divorce was finalized and has since remained there. Nicholson has also remarried, but has no other children. He is a senior customer service agent with Federal Express and has been employed there for twelve years. Since the divorce, Nicholson has maintained regular contact with Aaron, calling him on Sunday nights. However, he has seen Aaron an average of three times per year since the divorce. Nicholson received about three weeks of vacation per year and spent the majority of that time in Memphis visiting with his parents, where he would also see Aaron on the weekends.

¶8. Prior to September 11, 2001, as an employee of Federal Express Nicholson was able to "jump seat" from Connecticut, to Memphis, Tennessee free of charge. After September 11, the Federal Aviation Agency ended all jump seating.

¶9. On October 12, 2001, Nicholson filed a petition in the Chancery Court of Union County seeking permanent custody of Aaron, and the discontinuation of child support paid to Givens. Givens answered the petition and filed for modification of Nicholson's summer visitation and an increase in child support paid by Nicholson. Following a hearing on February 14, 2002, the Chancellor ordered that Aaron reside with

his father in the State of Connecticut during the summer months of 2002, and held all other matters in abeyance.

¶10. On August 1, 2002, a second hearing was conducted in the matter. The chancellor's opinion and judgment entered on August 19, 2002, denied Nicholson's request to modify custody and Given's request for an increase in child support. However, the chancellor modified visitation and ordered that Aaron spend spring break, the entire summer break , and one week during the Christmas holidays with Nicholson. The chancellor also ordered that Nicholson be allowed "other visitation" by giving Givens one week's notice, and that such visitation could occur at any place of Nicholson's choosing, and was to last no more than seventy-two hours. Finally, the chancellor ordered that the minor child be delivered to his paternal grandparents' home in Memphis, Tennessee the second Friday of each month, so that Nicholson would have a definite monthly visitation period to see the child, whether or not he is able to travel to Memphis.

ISSUES AND ANALYSIS

I.

Whether the Chancellor erred by granting grandparents' visitation rights when no petition was filed by the grandparents requesting these visitation rights

¶11. In cases involving a request for modification of custody, the chancellor's duty is to determine if there has been a material change in the circumstances since the award of initial custody which has adversely affected the child and which, in the best interests of the child, requires a change in custody. *Sanford v. Arinder*, 800 So.2d 1267, 1271 (¶ 15) (Miss. Ct. App. 2001) (citations omitted). "Therefore, the non-custodial parent must satisfy a three part test: a substantial change in circumstances of the custodial parent since the original custody decree, the substantial change's adverse impact on the welfare of the child, and the necessity of the custody modification for the best interest of the child."*Id.* at 1271 (¶ 15) (citations

omitted). A modification of custody is warranted in the event that the moving parent successfully shows that an application of the *Albright* factors reveals that there has been a material change in those circumstances which has an adverse effect on the child and a modification of custody would be in the child's best interest, considering the totality of the circumstances. *Id.* at 1272 (¶ 18).

¶12. The best interest of the child is the polestar consideration in all cases dealing with child custody and visitation. *Sellers v. Sellers*, 638 So.2d 481, 485 (Miss.1994)*; Albright v. Albright*, 437 So.2d 1003, 1005 (Miss.1983). The chancellor clearly found that the best interest of Aaron would be to spend more time with his father.

¶13. On visitation issues, as with other issues concerning children, the chancery court enjoys great discretion in making its determination of what is in the best interest of the child. *Clark v. Myrick*, 523 So. 2d 79, 82 (Miss. 1988). The specification of times for visitation rights is committed to the broad discretion of the chancellor. *Cheek v. Ricker*, 431 So.2d 1139, 1146 (Miss.1983); *Buntyn v. Smallwood*, 412 So.2d 236, 238 (Miss.1982).

¶14. Givens argues that the chancellor's modification of the visitation schedule is tantamount to awarding grandparent visitation to the paternal grandparents who were not a party to the suit, and filed no petition requesting such visitation. Givens contends that the chancellor awarded grandparent visitation and that the issue was not properly before the court and she was deprived of notice and an opportunity to be heard on the issue. As a result, Givens contends the chancellor abused his discretion.

¶15. Unlike child custody matters, modification of a non-custodial parent's visitation does not require a change in circumstances; all that is required is a showing that the current schedule is not working. *Cox v. Moulds*, 490 So. 2d 866, 869 (Miss. 1986).

¶16. Nicholson resided in Connecticut and Givens resided in Mississippi. Nicholson and his brother testified that when Nicholson was on vacation in Memphis that he did not always get to spend as much time with the child as desired because his visits were limited by Givens. Nicholson testified that his visits with Aaron were strictly subject to Givens' consent. The chancellor clearly found that the current visitation schedule was not working and modified it to give definite visitation periods to the non-custodial parent.

¶17. The children of divorced parents should be encouraged to have a close, affectionate and, under the circumstances, as normal as possible a parent-child relationship. *Cox v. Moulds*, 490 So. 2d 866, 870 (Miss. 1986). That this ideal is seldom achieved is no reason for the law to impose obstacles to its achievement. *Id.* The chancellor's order reflects his intent to encourage as nearly as possible the achievement of that ideal. That a secondary benefit of his effort is increased contact with the paternal grandparents does not make it error, nor does it make the scheduled visitation grandparent visitation.

¶18. Not allowing a child to maintain a normal relationship with his extended family would be an obstacle to the achievement of an ideal parent-child relationship that we are unwilling to impose.

II.

Whether the Chancellor erred in granting grandparents' visitation rights without specifically addressing the applicable *Martin* factors and when sufficient evidence was not presented with regard to these factors.

¶19. Having found that the chancellor did not grant visitation rights to the grandparents we find no merit to this issue.

¶20. We find that the chancellor did not award the paternal grandparents visitation, and further find that he did not abuse his discretion when modifying visitation.

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

McMILLIN, C.J., SOUTHWICK, P.J., BRIDGES, THOMAS, LEE, IRVING, MYERS, CHANDLER AND GRIFFIS, JJ., CONCUR.