

**IN THE COURT OF APPEALS 06/18/96**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00057 COA**

**LEE OVERBEY**

**APPELLANT**

**v.**

**RACHEL LEE OVERBEY AUSTIN**

**APPELLEE**

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

TRIAL JUDGE: HON. HARVEY T. ROSS

COURT FROM WHICH APPEALED: CHANCERY COURT OF LEFLORE COUNTY

ATTORNEY FOR APPELLANT:

LUKE J. SCHISSEL

ATTORNEYS FOR APPELLEE:

WILLIAM R. WRIGHT AND LEE ANN RIKARD

NATURE OF THE CASE: MODIFICATION OF CHILD CUSTODY DECREE

TRIAL COURT DISPOSITION: ORIGINAL CHILD CUSTODY DECREE MODIFIED TO  
GRANT PRIMARY CUSTODY FROM FATHER TO MOTHER

BEFORE THOMAS, P.J., BARBER, AND PAYNE, JJ.

BARBER, J., FOR THE COURT:

Lee Overbey (Lee) appeals from a judgment of the Chancery Court of Leflore County modifying a child custody decree. Pursuant to this modification, custody of Lee's son Bradford (Brad) was

awarded to the mother, Lee's former wife, Rachel Lee Overbey Austin (Rachel). Finding error in the proceedings below, we reverse and remand for a new trial.

## I. FACTS

Lee and Rachel were married on December 22, 1986. On September 22, 1987, Rachel gave birth to Brad.

Trouble soon developed in the marriage. Lee and Rachel separated and on December 4, 1989, Lee filed a complaint for divorce and prayed for custody of Brad. On February 20, 1990, Rachel filed a counterclaim for divorce against Lee and also sought custody of Brad. On July 20, 1990, Lee and Rachel were granted a divorce. In the final judgment, custody of Brad was awarded to Lee, subject to visitation rights in favor of Rachel.

Because Lee developed back problems, Lee's parents, Arthur and Lorraine Overbey, assumed almost total parental responsibilities for Brad. This arrangement continued for a period of three years. The child lived and slept at the grandparents' house where he was clothed, fed, and supervised by them. On September 15, 1993, Rachel, who by this time had remarried and moved to Texas, filed a motion for the modification of the divorce decree to award custody of Brad to her. Specifically, Rachel charged that Lee had voluntarily surrendered care and custody of Brad to the Overbey grandparents, which state of affairs constituted a material change in circumstances adversely affecting the welfare of the child.

After a hearing on the motion, the chancellor found that the grandparents had become Brad's primary custodians, a material change in the custody provisions of the divorce decree, which had designated Lee as the child's primary custodian. The chancellor further found that Brad displayed serious behavioral and emotional disorders as a result of the change and that Brad's interests had therefore been adversely affected. As a result of these findings, the chancellor concluded that the best interests of the child required a change in primary custody from Lee to Rachel. Lee now appeals from the chancellor's decision.

## II. DISCUSSION

### A) The Correctness of the Chancellor's Findings

In awarding custody to Rachel, the chancellor stated:

This Court specifically finds that there was a material change in circumstances between the time of the final judgment of divorce and the date of the filing of the motion for modification that adversely affected the welfare of Brad. This Court further finds that it will be in the best interest of Brad that the child custody and support provisions of the judgment of divorce be modified.

Lee's first three assignments of error are as follows:

- I. A material change in circumstances does not occur simply because a child spends a significant amount of time with his grandparents.
- II. The grandparents' relationship with the child did not adversely affect the child.
- III. A change in custody was not in Brad's best interests.

After carefully considering Lee's arguments under these assignments of error, we are of the opinion that all involve a challenge to the factual correctness of the chancellor's findings. In effect, Lee is re-arguing the facts and the evidence presented to the chancellor in the hope that we will come to conclusions different from those of the chancellor. Such attempts, however, must fail.

With respect to the standards for reviewing a chancellor's modification of an initial custody award, the Mississippi Supreme Court has stated:

*Findings of fact made by a chancellor simply may not be set aside or disturbed on appeal unless manifestly wrong.* It is similarly so whether the fact be found expressly or by necessary implication. This is so whether the finding of fact relates to an evidentiary fact or, as here, an ultimate fact. This limitation upon our scope of review applies to our review of the specific ultimate fact question at issue here, *viz.* whether there has been a material change in circumstances adversely affecting the welfare of a child.

*Spain v. Holland*, 483 So. 2d 318, 320 (Miss. 1986) (citations omitted) (emphasis added).

We are of the opinion that, in view of the evidence that he had before him, the chancellor's findings are not manifestly wrong. Nonetheless, as we will discuss in section II.D and II.E of this opinion, because the chancellor erred in failing to consider evidence that was highly relevant in making these findings, we decline to affirm them.

#### B) Did Rachel's Rehabilitation Constitute a Material Change In Circumstances?

In making his final ruling, the chancellor found that Rachel had rehabilitated herself of certain emotional problems that had troubled her during her marriage. Without conceding the validity of this finding, Lee argues that the rehabilitation of a noncustodial parent during the time period after a divorce is, by itself, legally insufficient to constitute a material change in circumstances sufficient to justify a modification of a custody arrangement.

We find no merit to this argument. A review of the chancellor's bench opinion shows that it contains a finding that since the divorce, Lee had relinquished his custodial duties to his parents and that this circumstance was the primary reason that a material change had occurred. Thus, any assertion that Rachel's rehabilitation alone prompted the chancellor to modify the custody arrangement is inaccurate.

#### C) The Trial Court Erred in Not Making Specific Findings of Fact

Lee asserts that the trial court erred in denying his post-trial motion for amended findings of fact arguing that the chancellor failed to make specific findings of fact as required by Rule 52 of the

Mississippi Rules of Civil Procedure. We find this contention without merit.

In filing his post-trial motion, Lee did not challenge the chancellor on the basis that his findings were *not specific enough*. Rather, Lee challenged the *correctness* of the chancellor's findings in that Lee asserted that the chancellor should have come to different conclusions. Implicit in this position is a tacit admission that the chancellor's findings were legally adequate from the standpoint that the necessary findings had been made to justify a modification in the custody arrangement, *i.e.*, that a material change in circumstances adverse to Brad's best interests had occurred. As a result, we find that the contention that the chancellor erred in not making sufficiently specific factual findings was waived. This contention therefore fails.

D) Did the Trial Court Err By Denying Lee's Motion for Additional Time to Prepare His Expert Witness?

Lee asserts that prior to trial, Rachel's counsel advised Lee's attorney that no expert medical or psychological expert testimony concerning the state of Brad's psychological health would be presented at trial. Lee contends that he relied on this representation, and consequently did not attempt to prepare his own psychiatric expert, Charles C. Coleman, M.D., for trial. Lee further maintains that four days prior to the commencement of trial, Rachel changed her position and announced that her own psychological expert, Michael Whelan, Ph.D., would testify as an expert witness. Lee considered Rachel's change regarding her presentation of expert testimony as an "ambush" tactic. Dr. Coleman, one of the few Mississippi specialists in the area of child psychiatry, was not available to testify at trial on such a late date. Lee therefore filed a motion in the trial court for additional time to prepare Dr. Coleman. Because the chancellor denied this motion, Whelan's testimony to the effect that Brad was suffering from severe emotional and psychological disorders remained unrebutted and played a crucial role in the chancellor's determination that Brad had been adversely affected by Lee's relinquishment of his custodial duties. Lee now challenges as erroneous the chancellor's decision to deny his motion for additional time so that he could prepare and present his medical expert.

During the course of rendering his bench opinion, the chancellor stated with an emphasis:

*[Rachel's] medical testimony is not rebutted here. This is the only professional testimony the court has before it. There is simply no conclusion under this testimony that this Court can reach other than that the child's interests have been adversely affected by the change of circumstances, so therefore, this Court feels it has no alternative but to modify the decree to grant physical custody of the child to the child's mother.*

The Mississippi Supreme Court has stated that "[i]n child custody cases, the chancellor's duty is to determine what is in the best interest of the child. As such, chancellors should consider any and all evidence which aids them in reaching the ultimate custody decision." *Murphy v. Murphy*, 631 So. 2d 812, 816 (Miss. 1994).

Rachel disputes that any trickery or "ambush" occurred. Thus, the issue is in dispute. We believe that because Dr. Coleman's deposition would have rebutted Dr. Whelan's testimony, the chancellor abused his discretion by not granting a continuance so that Dr. Coleman's testimony could be received for the court's consideration. Such evidence was indispensable in making a balanced decision regarding the best interests of the child. Moreover, section 99-15-29 of the Mississippi Code states that "[a] denial of a continuance shall not be ground for reversal unless the [reviewing court] shall be satisfied that injustice resulted therefrom." Miss. Code Ann. § 99-15-29 (1972). We are so satisfied. There is something fundamentally unjust in a trial court's hinging its decision upon the fact that expert testimony was unrebutted when the trial court's denial of a continuance prevented such rebuttal. Accordingly we reverse and remand for a new trial in which Dr. Coleman can testify regarding his examination and evaluation of the child's emotional and psychological health.

E) Did the Trial Court Err in Refusing to Consider Evidence of Facts that Occurred Prior to the Entry of the Final Judgment of Divorce?

Lee contends that the trial court erred by refusing to consider evidence relating to the factual situation that existed prior to the final judgment of divorce. Lee asserts that the court's failure to consider this evidence prevented it from accurately determining that a material change in circumstances had in fact occurred.

We agree with Lee's contention. In making his ruling that a material change in circumstances had occurred, the chancellor relied primarily upon his finding that Lee had surrendered his custodial duties to his parents and secondarily upon his finding that Rachel had rehabilitated herself. We think that evidence relating to the situation that existed before the divorce decree as to the extent to which Brad was cared for by his grandparents, the extent to which this was the situation contemplated by both sides, and the extent of the psychological problems from which Rachel suffered, were all relevant to determining whether a material change in circumstances had occurred. We therefore hold that the chancellor abused his discretion in not considering such evidence and that this error provides another ground upon which to reverse and remand for a new trial.

F) Did the Judgment of Modification Accurately Reflect the Trial Court's Ruling?

Lee asserts that the trial court erred by adopting a proposed judgment of modification submitted by Rachel's counsel rather than entering a judgment that followed its oral opinion of September 21, 1994. Lee argues that the visitation awarded to Lee in the "Judgment of Modification" was too slight and failed to give Lee maximum visitation in conformity with the statement that the chancellor made in the bench opinion that he rendered at the conclusion of the hearing.

At the conclusion of the modification hearing, the chancellor announced that the evidence was sufficient to warrant a modification of the original custody decree. The chancellor awarded custody to Rachel subject to visitation rights vested in Lee. In his bench opinion, the chancellor addressed the issue of visitation as follows:

I want, I hope counsel would work out visitation arrangements with this father. I want them to be maximum. It may be that the exiting schedule is satisfactory. Before I rule on a schedule I want counsel to at least try to work that out. I want the father's visitation during the school year *to be the maximum that he feels he can exercise in view of the distance.*

Rachel and Lee live over 400 miles apart. The chancellor obviously recognized the impact of this distance when deciding Brad's visitation schedule with Lee. The chancellor awarded Lee visitation during one weekend a month, during every spring break, during certain holidays and during five consecutive weeks during the summer. The visitation awarded Lee was reasonable under the circumstances and clearly conformed to the parameters that he stated in his bench opinion. The chancellor has broad discretion when determining appropriate visitation and the limitations thereon. *Harrington. v Harrington*, 648 So. 2d 543, 545 (Miss. 1994). Because we find that the chancellor did not abuse his discretion when he set forth Lee's visitation rights, we refuse to find any error.

G) Did the Chancellor Correctly Deny Lee's Post-Trial Motions?

After the trial court entered its judgment of modification, Lee filed various post-trial motions. The chancellor summarily denied them all. Lee now asserts that the chancellor's actions in doing this, without giving specific reasons, comprised error. Lee makes this argument, however, without citing any supporting authority. Accordingly, this issue also fails.

H) Did the Trial Court Err in Looking to a West Virginia Case as Persuasive Authority?

In entering its judgment of modification, the chancellor cited a West Virginia decision, *Garska v. McCoy*, 278 S.E. 357 (1981), in concluding that Lee's parents and not Lee himself had become Brad's primary care giver. Lee now asserts that the trial court erred in relying on case law from another jurisdiction. However, in doing so, Lee fails to show any conflict with Mississippi law or that the West Virginia decision is not applicable to the case *sub judice*. Accordingly, we find no merit in Lee's last issue.

### III. CONCLUSION

In view of the preceding discussion, we reverse and remand for a new trial.

**THE JUDGMENT OF THE CHANCERY COURT OF LEFLORE COUNTY IS REVERSED AND REMANDED FOR A NEW TRIAL CONSISTENT WITH THIS OPINION. COSTS ARE ASSESSED TO THE APPELLEE.**

**FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.**