

**IN THE COURT OF APPEALS 12/29/95**

**OF THE**

**STATE OF MISSISSIPPI**

**NO. 95-CA-00007 COA**

**CONNIE RAE ATKINSON RILEY**

**APPELLANT**

**v.**

**BILLY WAYNE DOERNER**

**APPELLEE**

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

TRIAL JUDGE: HON. GEORGE D. WARNER, JR.

COURT FROM WHICH APPEALED: LAUDERDALE COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

LESLIE GATES

ATTORNEY FOR APPELLEE:

EARL P. JORDAN, JR.

NATURE OF THE CASE: DOMESTIC RELATIONS- CHANGE IN CHILD CUSTODY

TRIAL COURT DISPOSITION: MOTHER'S DRUG USE AND BEST INTEREST OF CHILD  
JUSTIFIED CHANGE IN CUSTODY.

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

DIAZ, J., FOR THE COURT:

This case comes to us from the Chancery Court of Lauderdale County on appeal of Connie Rae Atkinson Riley (Riley). In April 1989, the Chancery Court of Lauderdale County issued an agreed judgment of paternity, child custody, and related matters. The judgment gave Riley and the father, Billy Wayne Doerner (Doerner) joint custody of their minor child, Desiree Nicole Doerner, with a provision that the child would live with Riley. In October 1993, Doerner filed a motion to modify child custody. The chancellor granted Doerner's motion after a hearing. Riley is aggrieved from the decision of the chancellor to change the primary physical custody of her daughter, Desiree, to Doerner. On appeal, Riley asserts the following issues: (1) the lower court erred in changing custody of the child; and (2) the chancellor exceeded his authority in ordering a drug test on the mother. Finding no reversible error in the proceedings below, we affirm the chancellor's decision.

### FACTS

Doerner and Riley lived together for three years before they parted ways. As a result of their relationship, they had a daughter, Desiree. In 1989, after the couple separated, the chancery court entered an agreed judgment of paternity, child custody and related matters. The agreement gave Riley and Doerner joint custody of Desiree, with a provision that she would live with Riley. In October 1993, Doerner filed a motion to change child custody on the grounds that there were material changes in circumstances adversely affecting the child. He alleged that Riley was living in an immoral and improper atmosphere, thereby subjecting the child to a detrimental lifestyle.

Riley's trial testimony was contradictory in several places, not only to her daughter's testimony, but also to her own deposition testimony. Her testimony at trial revealed that she has moved several times since 1989, and that as a result, Desiree has had to change schools several times. Riley has lived with several men, has been arrested for possession of marijuana and issuing bad checks among other things. She has applied to credit card companies using Desiree's name and social security number. She has a delinquent phone bill under Desiree's name. She lived with her current husband, Jack Riley for about ten months before she married him the day before the trial. When asked if she had a regular income, she replied, "I have a husband that's going to have a paycheck every week." However, Mr. Riley testified that he repairs cars on and off for income, and he insisted that he had no idea what his annual income was. Riley admitted that she lied about living with Jack Riley before they were married, she admitted she lied about smoking marijuana, and insisted that she had not smoked it in a long time.

Desiree testified that the family was planning on moving into a trailer house where she was going to have to sleep on a couch until Mr. Riley builds her a bedroom. She testified that she had seen Riley doing drugs in her bedroom, and that Riley keeps her drugs back in the bedroom. Riley's testimony reflects that the trailer has three bedrooms, and that she never told Desiree she would have to sleep on a couch in the trailer until they build an extra bedroom.

The record shows that Doerner has been married since December 1992 and has lived with his wife in a three-bedroom house. At the time of trial, he had been working as a tank painter for the same company for three and a half years.

### DISCUSSION

#### MODIFICATION OF CUSTODY

This Court will not reverse a chancery court's findings when it is supported by substantial evidence unless the chancellor abused his discretion, was manifestly wrong, clearly erroneous or an erroneous legal standard was applied. *Smith v. Jones*, 654 So. 2d 480, 484 (Miss. 1995) (citations omitted). The prerequisites that must be met before a modification of child custody is granted are: (1) proving a material change in circumstances which adversely affects the welfare of the child; and (2) finding that the best interest of the child requires the change of custody. *Smith*, 654 So. 2d at 485. Despite the fact that the chancellor did not find a material change in circumstances that particularly had an adverse effect on the child, he modified the child custody agreement based on the best interest of the child.

In *Westbrook v. Oglesbee*, the supreme court stated in dicta that it was a material change in circumstances, and that the mother was not entitled to have custody of the child when after her divorce, she lived with several men, was arrested several time for drug possession, took drugs with her boyfriends, and kept drug paraphernalia in her trailer. *Westbrook v. Oglesbee*, 606 So. 2d 1142, 1144 (Miss. 1992). A review of material change in circumstances however, is restricted to changes subsequent to the original decree. See *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984). Accordingly, the chancellor in the present case could not find material changes in circumstances since the time of the original agreed judgment. On the other hand, the chancellor found that Doerner's circumstances had materially changed for the better.

After reviewing the record, we cannot find that the chancellor was manifestly wrong. We must stress that we are not in any way retreating from the long standing rule stated above regarding child custody, but merely emphasize that the best interest of the child is the chief concern of this Court. *Kavanaugh v. Carraway*, 435 So. 2d 697, 700 (Miss. 1983). "In all child custody cases, the polestar consideration is the best interest of the child." *Sellers v. Sellers*, 638 So. 2d 481, 484 (Miss. 1994) (citations omitted).

Riley analogizes that misdemeanor use of marijuana is the same as cohabitation, and that since cohabitation is not presumptively detrimental to the child, neither is misdemeanor use of marijuana. We see no correlation in this line of argument. "The chancellor cannot use the indiscretion of the custodial parent as the sole grounds to change custody, but must look at the overall facts such as education, involvement in extracurricular activities at school and in the social life at the present location. *Kavanaugh*, 435 So. 2d at 700. This is exactly what the chancellor did here, and accordingly modified the child custody agreement.

#### CHANCELLOR'S AUTHORITY TO ORDER DRUG TEST--PROCEDURAL BAR

The chancellor issued an order requiring both Mr. and Mrs. Riley to submit to a drug test. If either one of them failed the test, the chancellor stated that he would remove custody from Riley. There was no objection to the order. Jack Riley's results came back negative, however, Connie Riley tested positive for marijuana. Riley now contends that the chancellor overstepped his authority when he ordered the Riley's to submit to a drug test. Riley further argues that even though there was no contemporaneous objection made, her motion to amend judgment, and her motion to set aside judgment should be considered as her objections.

The Mississippi Rules of Civil Procedure do not have a provision allowing independent medical

examinations. *Swan v. I.P., Inc.*, 613 So. 2d 846, 858 (Miss. 1993). Mississippi has specifically declined to adopt the federal version of Rule 35 which would give the court authority to order a party whose *physical or mental condition was in issue*, to submit to an independent examination. *Swan*, 613 So. 2d at 858. Furthermore, section 9-3-63 of the Mississippi Code provides:

Rules prescribed pursuant to section 9-3-61 to 9-3-73 shall not abridge, enlarge or modify any substantive right of any litigant and shall preserve the right of trial by jury as at common law and as declared by Article 3, Section 31 of the Constitution of this state; and, as declared by Amendment VII to the Constitution of the United States. Rules of evidence prescribed hereunder shall not alter any statutory provision respecting privileged communications or competency of witnesses.

Miss. Code Ann. § 9-3-61 (Rev. 1991).

The chancery court erred when it ordered the Riley's to submit to a drug test. We have not been able to find any rule, statutory provision or case law precedent that authorizes this sort of testing by the chancellor. Therefore, we agree with Riley's contention. However, since this issue was not objected to until appeal, Riley is procedurally barred from raising this issue now for the first time on appeal.

It is well settled that, for preservation of error for review on appeal, there must be a contemporaneous objection at the trial level. *King v. State*, 615 So. 2d 1202, 1205 (Miss. 1993) (citing *Smith v. State*, 530 So. 2d 155, 161-62 (Miss. 1988)). If a timely objection is not brought up at trial, an alleged error is waived. *King*, 615 So. 2d at 1205; *see also Holland v. State*, 587 So. 2d 848, 868 n.18 (Miss. 1991) (an error cannot be complained of if not presented to the trial judge for decision at trial). Although the Uniform Chancery Court Rule 4.03 provides that the chancellor shall not be interrupted while rendering an oral opinion, counsel for either party is allowed to make suggestions or requests after he has concluded. Unif. Ch. Ct. R. 4.03. Riley had an opportunity to make a contemporaneous objection on the record and failed to do so, therefore we conclude that Riley has failed to preserve the point.

#### CONCLUSION

After reviewing the record, we find that the chancellor's findings were supported by substantial evidence to modify the child support for the best interest of the child. As to the issue of the chancellor ordering the drug test, he did not have the authority to do so; however, Riley is procedurally barred from raising the issue on appeal since it was not objected to at trial. Accordingly, we affirm the judgment of the Chancery Court of Lauderdale County.

**THE JUDGMENT OF THE LAUDERDALE COUNTY CHANCERY COURT MODIFYING THE CHILD CUSTODY AGREEMENT AND TRANSFERRING CUSTODY FROM CONNIE RAE ATKINSON RILEY TO BILLY WAYNE DOERNER IS AFFIRMED. COSTS ARE TAXED TO THE APPELLANT.**

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

