

IN THE COURT OF APPEALS 11/28/95
OF THE
STATE OF MISSISSIPPI
NO. 94-CA-01118 COA

MARTHA LOPER APPELLANT

v.

KENNETH REGINALD BENNETT APPELLEE

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

TRIAL JUDGE: HON. GERALD E. BRADDOCK

COURT FROM WHICH APPEALED: SUNFLOWER COUNTY CHANCERY COURT

ATTORNEY(S) FOR APPELLANT(S): MARTIN A. KILPATRICK

ATTORNEY(S) FOR APPELLEE(S): P. J. TOWNSEND, JR.

NATURE OF THE CASE: DOMESTIC RELATIONS - CHANGE OF CUSTODY

TRIAL COURT DISPOSITION: CHANGE OF CUSTODY OF TWO MINOR SONS FROM
MOTHER TO FATHER.

BEFORE BRIDGES, P.J., McMILLIN, AND PAYNE, JJ.

PAYNE, J., FOR THE COURT:

STATEMENT OF THE FACTS

This is a change of custody case involving the two minor sons of Martha Loper (Loper) and Kenneth Reginald Bennett (Bennett). Loper and Bennett were divorced in August 1988. Loper was granted

legal and physical custody of their two children, Justin and Daniel, and Bennett was granted visitation rights. Loper later married Scott Loper (Scott). In October 1993, Bennett was granted specific visitation rights with his sons. Prior to the fall 1994 school term, Loper agreed to Justin's living with Bennett. In August 1994, Bennett moved the chancery court for modification of the prior decree and sought legal and physical custody of both minors. In September 1994, the court granted Bennett's motion and thereby granted custody of both minors to Bennett. The court found a material change in circumstances adversely affecting the welfare of the minor children and that it was in the best interest of both children that custody be granted to Bennett. The court therefore awarded custody of both Justin and Daniel to Bennett. Loper appealed this decision regarding Daniel, since Justin had previously expressed his desire to live with Bennett and Loper had agreed to that arrangement. This decision was based on evidence of violent activity including physical altercations involving the children and Scott, Loper's denial of visitation to Bennett, and Loper's taping of the minors' phone conversations with Bennett. The court found a material change in circumstances that justified modifying custody of Daniel to Bennett as well.

Loper's mother and Billy Ray Jenkins, a friend of Bennett, testified to seeing evidence of physical abuse of the boys while in Loper's care. Loper's mother and father testified that the boys wanted to live with their father. Justin testified that he did not want to be separated from Daniel, nor to go live with his mother and Scott. Both Loper and Bennett testified that it would be in the boys' best interests if they stayed together.

ARGUMENT

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). The appellate scope of review is limited since 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. *Steen v. Steen*, 641 So. 2d 1167, 1169 (Miss. 1994) (citation omitted). We are required to respect a chancellor's findings of fact that are supported by credible evidence, particularly in the areas of divorce and child support. *Id.* (citations omitted).

We have reviewed the record and are satisfied that the chancellor's finding of fact was supported by substantial, credible evidence. The court made a finding of fact, based on all the facts, evidence, and testimony presented, that a material change in circumstances existed. This material change justified a transfer in physical and legal custody from Loper to Bennett. The court believed the change was necessary in order to keep the two brothers together and to avoid what physical harm to the boys the court thought was possible if one or both remained with Loper and Scott. We will not disturb the trial court's finding of fact. The chancellor's decision was not in error and was not based on an erroneous legal standard.

Loper argues that Exhibits R-2 through R-4, character letters written by various individuals on behalf of Scott, should have been admitted into evidence. Mississippi Rule of Evidence 404 states that evidence of a person's character or a trait of that character is inadmissible to prove conduct in conformity therewith on a particular occasion, except that evidence of the character of a witness is admissible as provided in Rules 607, 608, and 609. M.R.E. 404(a)(3). Of these three rules, only Rule

608 even approaches applicability. However, Rule 608 is limited to opinion and reputation evidence of character related to truthfulness or untruthfulness. M.R.E. 608(a)(1). Mississippi Rule of Evidence 405 states that, in cases where character evidence is admissible under Rule 404, reputation or opinion testimony is allowed, subject to proper cross-examination regarding relevant specific acts of conduct. M.R.E. 405(a).

Here, these letters were inadmissible hearsay since they were statements, other than ones made by the declarants while testifying at the trial, offered in evidence to prove the truth of the matter asserted. M.R.E. 801(c). Loper argues admissibility based on Scott's reputation for peacefulness and non-violence, but Rule 608 limits character opinion and reputation evidence to truthfulness or untruthfulness. Moreover, even if admissible under Rule 404, the letters themselves provide no means for proper cross-examination under the methodology for proving character of Rule 405(a). These letters, obviously drafted in preparation for litigation, were therefore inadmissible.

Loper also argues that Exhibits R-5 and R-6, written by two entities on behalf of Loper and Scott, should have been admitted into evidence under Mississippi Rule of Evidence 803(24). This rule states that a hearsay exception may exist if a statement offered has circumstantial guarantees of trustworthiness and reliability. M.R.E. 803(24). The Mississippi Supreme Court, in discussing the admissibility of hearsay exceptions, has also stated that there must exist some circumstance in making the statement that indicates reliability. *Jones v. Hatchett*, 504 So. 2d 198, 203 (Miss. 1987). "[T]he guarantee of trustworthiness must derive from the circumstances under which the statement was made." *Id.* In the present case, sufficient circumstantial guarantees of trustworthiness in these documents do not exist. No circumstance, in the writing of the letters, indicates their reliability. The mere fact that they were written by a counseling center and a county department of human services does not, by itself, indicate reliability or trustworthiness in the writing of the letters. They were, like Exhibits R-2 through R-4, written in anticipation of trial. Moreover, they present the type of unsworn testimony that the hearsay rule is designed to prohibit from admission at trial.

Finally, admitting any of these letters would not have altered the chancellor's finding of fact of the existence of a material change in circumstances. The judgment of the trial court is therefore affirmed.

**THE JUDGMENT OF THE SUNFLOWER COUNTY CHANCERY COURT IS AFFIRMED.
COSTS OF THIS APPEAL ARE TAXED TO THE APPELLANT.**

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