

IN THE COURT OF APPEALS 12/12/95

OF THE

STATE OF MISSISSIPPI

NO. 94-CA-00922 COA

ROBIN LEE WARREN PARKS

APPELLANT

v.

KEVIN WINSTON PARKS

APPELLEE

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

TRIAL JUDGE: HON. MELVIN MCCLURE

COURT FROM WHICH APPEALED: DESOTO COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

JAMES W. AMOS

ATTORNEYS FOR APPELLEE:

SUSAN M. BREWER, NANCY M. BALL

NATURE OF THE CASE: DOMESTIC RELATIONS - CHILD CUSTODY

TRIAL COURT DISPOSITION: MODIFICATION OF CHILD CUSTODY GRANTED

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

KING, J., FOR THE COURT:

In this domestic relations case, we are asked to decide whether the chancellor committed reversible

error by modifying the child custody decree. Finding the trial court was not manifestly in error in its modification of child custody, we affirm.

I.

Robin Lee Warren Parks and Kevin Winston Parks were married on April 11, 1986. The marriage produced one child, Winston Warren Parks, born on November 16, 1986. On December 15, 1988, Robin and Kevin obtained an irreconcilable differences divorce. Pursuant to their written agreement, the parties agreed to joint custody and care of the child, Robin was given physical custody of the child, and reasonable visitation was granted to Kevin. This agreement also delineated other provisions, such as child support and maintenance.

In 1991, Kevin filed a petition for modification of child custody in which he alleged a material change in circumstances had occurred which affected the best interests of the child. The trial court denied this petition.

On October 11, 1993, Robin left the minor son, Winston, age 7, home alone while she went to school to take an exam. On October 11, 1993, Kevin filed an application for a temporary restraining order without notice of hearing pursuant to Rule 65(b) of the Mississippi Rules of Civil Procedure. In the petition, Kevin complained that Robin had been arrested for alcohol/drug charges and illegal possession of fire arms, and that on October 11, 1993, Robin left their minor child at home alone. The temporary order was granted on October 12, 1993, and temporary custody was given to Kevin.

On October 20, 1993, Robin filed a motion to dissolve the temporary restraining order. On October 21, 1993, Kevin filed a petition to modify the decree of divorce regarding child custody. In the petition, Kevin alleged that since the final decree of divorce was rendered on December 15, 1988, there had been a material change of circumstances that materially affected the child's welfare in his custodial surroundings. Kevin alleged the following as material circumstances adversely affecting the child: (1) the mother had been arrested on alcohol and drug charges since the original decree; (2) the mother had used controlled substances in the child's presence on many occasions; and (3) on October 11, 1993, Winston, then age 7, was left at home alone. The mother was charged with child neglect.

On October 22, 1993, the chancellor ordered that legal custody of the child vest in the court, and gave the parties weekly physical custody of the child. The motion to dissolve the temporary restraining order was not ruled on and the trial was continued until November 8, 1993.

On November 19, 1993, Robin filed a motion in limine seeking to keep Kevin from presenting evidence of events that took place from the date of the divorce on December 15, 1988, until February 28, 1991, the date of Kevin's first petition to modify child custody. Additionally, on November 19, 1993, Robin filed her answer to Kevin's petition to modify decree of divorce regarding child custody. In her answer, Robin denied that she had been arrested for alcohol and drugs and demanded strict proof thereof. Robin asserted affirmatively that she would show that Kevin was living with a woman to whom he was not married, in open and notorious adultery, and that it would not be in the best interest of the minor child for the child to live with Kevin.

After a partial hearing on November 19, 1993, the chancellor ordered (1) legal custody to remain with the court; and (2) that the Department of Human Services investigate and evaluate each party's

home and make a report to the court on or before February 9, 1994. Temporary physical custody of the child was granted in accordance with a visitation schedule agreed upon by the parties. Trial was set for February 8, 1994.

On February 14, 1994, another order was entered continuing the case for trial on April 13, 1994. Again the visitation schedule was altered granting the father visitation every other weekend until the hearing. The mother was granted visitation all other times until the hearing. The Department of Human Services was again ordered to make an investigation and evaluation of the parents' homes.

After the hearing, the chancellor found on May 26, 1994, that there had been a material change in circumstances since the entry of the decree of divorce and that the best interests of the minor child required that custody be awarded to the father, Kevin Winston Parks. The mother, Robin Warren Parks, was granted reasonable visitation.

On June 6, 1994, Robin filed a motion to alter or amend the modification order or, in the alternative, for a new trial. On June 13, 1994, the chancellor granted the motion for a new trial to the extent that the parties were allowed to put on additional testimony not to exceed four hours each. The trial was set for August 10 and 11, 1994.

On August 10, 1994, the parties presented additional testimony. After the new trial, the chancellor found that there had been a material change in circumstances adversely affecting the child and that it would be in the best interest of the child that custody be changed to the father.

II.

The sole issue presented in this appeal is whether the chancellor erred in changing custody of the minor son, then age 7, from the mother to the father. Robin contends that the chancellor was manifestly in error in making his determination of child custody as if this were an initial custody determination case. *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). Robin Parks argues that even if this Court were to agree that the chancellor properly found that there were material changes in circumstances occurring since the rendition of the original divorce decree, those changes in circumstances were not, per se, adverse circumstances.

The Mississippi Supreme Court has delineated two basic prerequisites with regard to modification of child custody:

First, the moving party must prove by a preponderance of the evidence that, since entry of the judgment or decree sought to be modified, there has been a material change in circumstances which adversely affects the welfare of the child. Second, if such an adverse change has been shown, the moving party must show by like evidence that the best interest of the child requires the change of custody.

Ash v. Ash, 622 So. 2d 1264, 1265-66 (Miss. 1993) (citing *Pace v. Owens*, 511 So. 2d 489, 490 (Miss. 1987)).

In the instant case, the proof indicates that on February 28, 1991, Kevin's petition for modification of

child custody was denied. That same year, Robin began selling sex toys, including dildos, blow-up dolls, candles, and lingerie in what she called an environment similar to a tupperware party. Robin testified she is no longer selling these fun products because most of them were destroyed after the police raided her house for drugs. On April 11, 1991, Robin pled guilty to charges of DUI and unlawful possession of a controlled substance. On March 8, 1992, Robin was charged with the unlawful possession of a controlled substance, marijuana. In 1993, Robin was charged with simple assault against her eighteen (18) year old daughter. In 1993, Robin allowed Winston to stay at an all night skating rink with his eleven year old cousin. On October 11, 1993, Robin left Winston home alone while she went to take an exam at school. Thereafter Kevin requested a temporary restraining order. Robin was charged with neglect for leaving Winston alone.

The proof also shows that Robin is a bar supervisor and manager at Marlow's, a full service restaurant. She normally works three days a week and week-ends, from 7 o'clock p.m. until 3 o'clock a.m. Winston goes to work with Robin occasionally, puts on an apron, and helps her take orders for food and sodas. Kevin is a truck driver with Auto-zone, a division of Malone & Hyde. On January 8, 1994, after the custody dispute began, Kevin married his live-in girl friend.

In his written order, the chancellor found *inter alia*:

13. It is the Court's opinion that since the Court had legal custody of the child pursuant to the October 20, 1993 order, the Defendant/Petitioner did not thereafter have to establish a material change in circumstances adversely affecting the child; the Court simply had to determine what was in the best interest of the child.

14. However, the Defendant/Petitioner did, in fact, establish that there has been a material change in circumstances adversely affecting the best interest of the child, and that the best interest of the child requires that custody be changed to the father.

15. The Court specifically finds that one such material change occurred on October 10, 1993 when the Plaintiff/Respondent left the child home alone. It is the Court's opinion that this incident was not merely a *Tucker v. Tucker*, 453 So. 2d 1294 (Miss. 1984) "isolated incident."

16. The Court further finds that the Plaintiff/Respondent's lifestyle in general has materially changed since the last order dated February 28, 1991, and has adversely affected the child. Specifically, the Court notes the following facts:

- (a) evidence of drug use by Robin Parks and her daughter;
- (b) the sale of sex toys by Ms. Parks and their display in her home;
- (c) the general lack of supervision of the minor child including, but not limited to, the incident of October 10, 1993 and proof that Ms. Parks dropped the child off for the night at an all night skating rink;
- (d) the testimony of Robin Parks' 19 year old daughter, who was

under indictment for bond jumping and who was brought into Court in handcuffs and in prison attire. The daughter testified that she had been working as a topless dancer and planned to babysit Winston when she was released from jail.

17. The Court finds, pursuant to *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984) that Ms. Parks' behavior and lifestyle are likely to remain materially changed for the foreseeable future and such change adversely impacts upon the child. The Court bases this opinion, in part on the testimony of her behavior since the last trial date of April 13, 1994.

18. Ms. Parks should be awarded reasonable visitation as specified in the order dated May 26, 1994.

Although the chancellor was in error when he stated that a material change in circumstance was not the correct legal standard in a child custody dispute, he, nevertheless, found that there had been a material change of circumstances since the original divorce decree which adversely affected the child so as to warrant a change in custody.

When examining the chancellor's findings of fact, we are bound by the following standard of review:

[W]here the chancellor was the trier of facts, his findings of fact on conflicting evidence cannot be disturbed by this court on appeal unless we can say with reasonable certainty that these findings were manifestly wrong and against the overwhelming weight of the evidence. Even if this Court disagreed with the lower court on the finding of fact and might have come to a different conclusion, we are still bound by the chancellor's findings unless manifestly wrong, as stated above.

Travis v. Hartford, 630 So. 2d 337, 338 (Miss. 1993) (citations omitted). Based upon the record before us, we cannot say that the chancellor was manifestly in error in finding that Kevin met his burden and that a change in custody was warranted.

Finding no reversible error, we affirm the judgment of the chancellor.

**THE JUDGMENT OF THE CHANCERY COURT OF DESOTO COUNTY IS AFFIRMED.
APPELLANT IS TAXED WITH THE COSTS OF THIS APPEAL.**

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

