

**IN THE COURT OF APPEALS
OF THE
STATE OF MISSISSIPPI
NO. 96-CA-00644 COA**

JOSEPH TODD HAMPTON

APPELLANT

v.

NANCY LOU HAMPTON

APPELLEE

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

DATE OF JUDGMENT:	05/31/96
TRIAL JUDGE:	HON. VICKI R. BARNES
COURT FROM WHICH APPEALED:	WARREN COUNTY CHANCERY COURT
ATTORNEYS FOR APPELLANT:	SAMUEL DAVID HABEEB J. MACK VARNER
ATTORNEY FOR APPELLEE:	RICHARD E. SMITH, JR.
NATURE OF THE CASE:	CIVIL - CUSTODY
TRIAL COURT DISPOSITION:	DENIED MOTION TO CHANGE CUSTODY
DISPOSITION:	REVERSED AND REMANDED - 10/21/97
MOTION FOR REHEARING FILED:	November 5, 1997
CERTIORARI FILED:	
MANDATE ISSUED:	3/30/98

BEFORE BRIDGES, C.J., HINKEBEIN, AND KING, JJ.

BRIDGES, C.J., FOR THE COURT:

This case involves a motion filed in the Warren County Chancery Court to modify the custody of a minor child. Nancy Hampton and Todd Hampton were divorced on the ground of irreconcilable differences in November, 1993. The couple's one child, Joshua Hampton, was born April 10, 1990. Nancy was granted primary custody of Josh. In November, 1995, Todd filed a motion to modify the custody on the ground of Nancy's full time living arrangement with her boyfriend without the benefit of marriage. The chancellor refused to modify custody. On appeal, Todd presents the following issue for our consideration:

**I. THE CHANCELLOR'S DENIAL OF THE MOTION TO CHANGE CUSTODY IS
MANIFESTLY ERRONEOUS BECAUSE OF THE SUBSTANTIAL EVIDENCE OF**

ADVERSE ENVIRONMENT ATTRIBUTABLE TO NANCY, AND THE PROOF THAT TODD WILL PROVIDE A HEALTHY HOME FOR JOSH.

We agree with Todd's contention, and therefore reverse this cause and remand.

FACTS

Todd and Nancy divorced in 1993, and Nancy was given primary custody of Josh. Nancy also has a daughter, A. H., from a previous marriage who was eleven at the time of the motion to modify custody. Nancy has sole custody of her daughter. Although Todd never adopted A. H., he supported her and treated her as if she were his own child. Todd has since remarried, and he and his wife, Melissa, live in a four bedroom trailer, and are both gainfully employed. Melissa has three children from a previous marriage and shares the children jointly with her ex-husband. Her three children stay with her six months out of the year. When Josh goes to Todd and Melissa's house for visitation, A. H. also goes.

On the other hand, since her divorce from Todd, Nancy has been openly living with and having sexual relations with Henry Graham. Nancy and Henry live in Henry's two bedroom trailer without the benefit of marriage. Henry and Nancy share one bedroom, while A. H. and Josh share a double bed in the other bedroom. Todd repeatedly expressed his concern to Nancy about her living with Henry without the benefit of marriage and the adverse effect it would have on Josh. On several occasions Todd asked Nancy when she and Henry were going to marry, and Nancy would reply, "Eventually." Nancy stated that she and Henry were living together to see if they were both absolutely sure they wanted to marry one another. At trial, Nancy admitted that what she was doing was not morally right, and that she was not setting a good example for her children. Even so, Nancy gave no indication that she and Henry were going to change their living situation. Two of Nancy's own witnesses testified that Nancy's living with Henry without the benefit of marriage was wrong, and it was not good for the children.

In addition to his concern about the adverse effect Nancy's sex life had on Josh, Todd was also upset that A. H. and Josh still shared the same bed at the time of the trial. A. H. was almost a teenager at that point, and Todd thought it highly inappropriate for Josh to be sleeping in the same bed with her. Nancy admitted that it was not a good situation. Todd testified that Josh had confided in him that A. H. had "fooled with" him. Josh explained to Todd that this meant that A. H. had touched him. It was revealed at trial that A. H. was in therapy because she had been raped by a cousin. The rape occurred in Josh's presence.

In addition to the lack of appropriate sleeping quarters in the trailer, the condition of Henry's trailer was called into question at trial. Testimony indicated that the trailer needed serious repairs, and there were large holes in the floor. Todd has serious doubts about the stability Henry provided Nancy, Josh and A. H., having no legal obligation to support them. On at least one occasion Nancy brought the children to Todd because she and Henry had a fight, and she had to leave his trailer. At the time of trial, Nancy had finally obtained a job at the trailer park collecting rent, but instead of wages, she received a break on Henry's trailer rental.

There was testimony at trial that Nancy habitually used profanity and vulgarity in front of the children. Todd testified that Josh is disruptive and disrespectful when he comes to visit, and frequently curses. According to Todd, he could hear Nancy cursing and yelling in the background when he would be on the phone with the children. Additionally, Todd testified that Nancy left the children unattended for hours after school. One of Nancy's neighbors testified that Josh and A. H. had found the spare key to her trailer and let themselves in. Stacy Ahner testified that Josh and A. H. made a habit of letting themselves into the trailer she shared with her disabled father. Stacy stated that even after she began taking the children to the store for after school snacks with Nancy's permission, Nancy did not make an effort to make Stacy's acquaintance.

The chancellor found that Todd failed to prove a material change adversely affecting Josh, and therefore refused to modify custody.

I. THE CHANCELLOR'S DENIAL OF THE MOTION TO CHANGE CUSTODY IS
MANIFESTLY ERRONEOUS BECAUSE OF THE SUBSTANTIAL EVIDENCE OF
ADVERSE ENVIRONMENT ATTRIBUTABLE TO NANCY, AND THE PROOF THAT
TODD WILL PROVIDE A HEALTHY HOME FOR JOSH.

It is well settled that in all child custody modification cases, the polestar consideration is the child's best interest. *Riley v. Doerner*, 677 So. 2d 740, 744 (Miss. 1996) (citing *Sellers v. Sellers*, 638 So. 2d 481, 485 (Miss. 1994); *Moak v. Moak*, 631 So. 2d 196, 198 (Miss. 1994); *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983)). The long-established standard for justifying a change in custody from one parent to another required a showing by a preponderance of the evidence of (1) a material change in circumstances, and (2) an adverse effect on the child as a result of the change in circumstances. *Ash v. Ash*, 622 So. 2d 1264, 1265 (Miss. 1993). On appeal, Todd rebuts the chancellor's finding that he failed to prove a material change in circumstances and any subsequent adverse effect on the children. The chancellor's findings mirror several recent Mississippi Supreme Court cases that state that one parent's post-marriage sexual relationship does not in and of itself justify a change in custody. *See Morrow v. Morrow*, 591 So. 2d 829, 833 (Miss. 1991) ("An extramarital relationship is not, per se, an adverse circumstance."); *Phillips v. Phillips*, 555 So. 2d 698, 701 (Miss. 1989) (Custodial parent's sexual relations outside the marriage does not by itself warrant change in custody.); *Ballard v. Ballard*, 434 So. 2d 1357, 1360 (Miss. 1983) (Immoral sexual conduct alone is insufficient to modify custody). However, in Nancy's case, she has been openly living with and having sexual relations with a man for three years without the benefit of marriage, and she refuses to commit to any date in the future on which she will marry. She herself admitted that what she is doing is morally wrong, and she is setting a bad example for her children. Nancy offered no proof that this situation would change.

The Mississippi Supreme Court recently spoke to modification of child custody in the case of *Riley v. Doerner*, 677 So. 2d 740, 740 (Miss. 1996). In *Riley*, the chancellor found that the best interest of the child would be served by transferring custody to the father; however, the chancellor refused to modify custody despite the best interests of the child because he could not find a material change in circumstances or an adverse effect on the child. *Riley*, 677 So. 2d at 742. However, the chancellor did stipulate that if the mother failed a court-ordered drug test, then custody would be given to the father. *Id.* The mother subsequently failed the drug test, and the chancellor transferred custody to the father. *Id.* The mother appealed to the Mississippi Court of Appeals, citing as error the chancellor's

failure to find a material change in circumstance and an adverse effect on the child. *Id.* at 743. The Court of Appeals held that although the chancellor had failed to find a material change in circumstances having an adverse effect on the child, modification was nonetheless justified because it was in the child's best interest. *Id.* The supreme court quoted the following language from the Court of Appeals' decision:

We must stress that we are not in any way retreating from the long standing rule stated above regarding custody, but merely emphasize that the best interest of the child is the chief concern of this Court. In all child custody cases, the polestar consideration is the best interest of the child.

Riley, 677 So. 2d at 743 (quoting *Riley v. Doerner*, No. 95-CT-00007-COA, slip op. at 4 (Miss. Ct. App. Dec. 29, 1995)). The supreme court went on to elaborate on the chancellor's comments that even though the child's father's life had undergone a material change for the better, the chancellor could not justify a change in custody based only on the child's best interests and the father's significant improvements. *Riley*, 647 So. 2d at 744. The supreme court stated that while the general rule was that a positive change in the noncustodial parent's life did not alone justify custody modification, "when the environment provided by the custodial parent is found to be adverse to the child's best interest, and that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly." *Id.* at 744.

In explaining that it was in no way dispensing with or disregarding the straightforward application of the standard test for custody modification--a material change adversely affecting the child--the supreme court emphasized that "a chancellor is never obliged to ignore a child's best interest in weighing a custody change; in fact, a chancellor is bound to consider the child's best interest above all else." *Id.* at 744-45. The supreme court continued, stating:

The test we have devised for custody modification need not be applied so rigidly, nor in such a formalistic manner so as to preclude the chancellor from rendering a decision appropriate to the facts of an individual case. In particular, it should not thwart the chancellor from transferring custody of a child from one parent to another when, in the chancellor's judgment, the child's welfare would be best served by such transfer.

Id. at 745. The supreme court reiterated that the totality of the circumstances must be considered when determining the best interests of the child. *Id.* at 743 (citations omitted).

In particular, the supreme court has expressed their dissatisfaction with living together without the benefit of marriage in the presence of minor children:

This Court has always encouraged a strong family unit and society demands that this unit be an honorable estate of marriage between parties. They should not simply take up and begin living together without the benefit of marriage and this is particularly true when the parties have minor children living in the home with them. We do not condone such activities now and have never done so, and on the contrary we highly condemn same.

Kavanaugh v. Carraway, 435 So. 2d 697, 701 (Miss. 1983). More recently, in *Anderson v.*

Anderson, the supreme court stated that it had previously "expressed its displeasure with cohabitating outside of marriage." 692 So. 2d 65, 71 (Miss. 1997). In *Hammonds v. Hammonds*, the supreme court, in discussing modification of alimony, referred to a Louisiana statute that refers to a man and woman's living together in a permanent relationship without the benefit of marriage as "open concubinage." 641 So. 2d 1211, 1217 (Miss. 1994). The court stated that "Mississippi has no such statute, although, of course, cohabitation itself is illegal." *Id.*

In reviewing the chancellor's decision in the case sub judice, we are constrained by our familiar standard of review. This Court's scope of review in domestic relation cases is limited. *Ferguson v. Ferguson*, 639 So. 2d 921, 930 (Miss. 1994). In order to disturb the findings of fact of the chancellor, this Court must find that the findings were manifestly wrong or clearly erroneous. *Id.* "On appeal this Court is required to respect the findings of fact made by a chancellor supported by credible evidence." *Id.* (quoting *Newsom v. Newsom*, 557 So. 2d 511, 514 (Miss. 1990)). The chancellor below was wrong in leaving Josh in Nancy's custody. While there may not have been a bright line change in material circumstances, or a blatant adverse effect on Josh, it is clearly in Josh's best interest to live with his father and stepmother. Nancy's behavior is admittedly not a good example for Josh, nor is it condoned by the supreme court of this state. In fact, the supreme court has stated that a man and woman living together with minor children should do so only with the benefit of marriage. *See Kavanaugh v. Carraway*, 435 So. 2d 697, 701 (Miss. 1983). Additionally, Nancy and Henry's current living situation is unlawful. The record shows that Todd provides a wonderful home life for Josh where he is well taken care of and provided for. Josh has his own bedroom at his father's house, and will no longer have to share a bed with an older female sibling. Todd has proven that he and his wife are both gainfully employed and provide a nice, clean, suitable environment for Josh. The chancellor was clearly erroneous in leaving Josh in Nancy's custody. We reverse this cause and remand for proceedings not inconsistent with this opinion.

THE JUDGMENT OF THE WARREN COUNTY CHANCERY COURT REFUSING TO MODIFY CUSTODY OF THE MINOR CHILD IS REVERSED AND THIS CAUSE REMANDED FOR PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS OF THIS APPEAL TAXED TO APPELLEE.

McMILLIN AND THOMAS, P.JJ., DIAZ, HERRING, HINKEBEIN, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, PAYNE, AND SOUTHWICK, JJ.

KING, J., DISSENTING:

I respectfully dissent from the majority opinion.

Because the facts as presented by the majority opinion are incomplete, I deem it appropriate to

augment them based on my reading of the trial testimony.

Todd and Nancy Hampton were married in September of 1987 and divorced in November of 1993. Nancy was given primary custody of Josh, the one child born of that union. Pursuant to a settlement agreement, the court ordered Todd to pay \$175 bi-weekly to Nancy as child support for Josh.

Nancy was married previously and had sole custody of a daughter born of that marriage. Because of testimony of sexual abuse of that child, we refer to her as Debbie in this opinion. Debbie was ten years old at the time of the custody hearing. The couple testified that Todd accepted Debbie as his own during the marriage and after the divorce. As a result, Debbie was always included in Todd's visitations with Josh.

Nancy has not remarried, but has lived with Henry Graham since the fall of 1993. Nancy did not work during her marriage to Todd, but began working at the trailer park where she resides with Henry and the children about a month prior to the custody hearing. She does not receive a monetary payment. Instead, she and Henry were excused from paying a trailer lot rental fee. During the time that Nancy and the children have resided with Henry, his employment has been sporadic. This was mostly attributable to his working as a seasonal farmhand. At the time of the custody hearing, he was employed as a farmhand earning around \$6 an hour.

Since divorcing Nancy, Todd has married Melissa. Melissa has three children from a former marriage. She shares joint physical custody of her three children with their father. Melissa has custody six months of the year, and her former husband has custody the remaining six months. At the time of the custody hearing, Todd and Melissa were both employed and were purchasing a four bedroom trailer and lot.

In November of 1995, Todd filed a Motion to Modify Former Decree. Todd asked the court to award him the permanent care, custody, and control of Josh, who was six years old at the time of the hearing. Todd alleged that there had been a material change in circumstances that affected Josh's best interests. During the hearing, Nancy and Todd offered conflicting testimony about Nancy's care, discipline, and supervision of Josh. The parties' witnesses also offered conflicting testimony. Each witness was either a family member, best friend, or co-worker to one of the parties. The only testimony not in conflict was that the Josh was well fed and clothed and had not missed any days in school since it began.

At the time of the hearing, Josh was then in kindergarten. From age three, until beginning kindergarten, he attended Headstart.

The testimony revealed that while not married, Nancy Hampton and Henry Graham had lived together for over two years. The couple shared a two bedroom trailer with Debbie and Josh. Nancy and Henry shared a bedroom, while the children slept in a queen sized bed in the second bedroom. Todd told the court that he had often expressed his concern to Nancy about her living with Henry and the adverse effect it would have on Josh. Nancy told the court that Todd had not protested to the extent to which he testified. She said that Todd asked her on occasion when she and Henry were getting married, and she would tell him, "Eventually." Nancy stated that she and Henry had not married because they wanted to be sure about making the commitment. She, particularly, did not want to enter into a third marriage without being sure about the commitment. However, Nancy did

not feel that her relationship and living arrangement with Henry was harmful to Josh. She indicated that both, she and Henry loved and cared for Josh.

Todd testified that he thought it inappropriate for Debbie and Josh to share the same bed due to their age difference. Nancy admitted that it was not a good situation but indicated that she was looking for a trailer with additional bedrooms. At one point, Todd testified that Josh told him that Debbie had "fooled with" him. However, Todd also testified that Josh told Nancy that while attending a family picnic with Todd someone had "fooled with" him. Todd was also concerned that Debbie had been the victim of a sexual assault by her sixteen-year-old cousin, while visiting her uncle and aunt's house. According to Todd, Josh was present during the assault.

Todd and Nancy gave conflicting testimony about the condition of the trailer that Nancy and the children shared with Henry Graham. Todd testified that there were large holes in the hallway of the trailer. Contrary to this, Nancy testified that on the one occasion that Todd had been in the hallway he could only have seen a couple of small holes in the floor. She stated that because Henry worked very long hours, he was not able to make the repairs. Nancy also testified that she had asked the owner of the trailer park to find them another trailer, but was doing the best that she could at the time.

Todd testified that he had some concern that Nancy's living with Henry did not provide stability for the children. He testified that on one occasion, Nancy and Henry had a fight, and she and the children left the trailer. She asked Todd if the children could stay with him for a week. He agreed.

There was conflicting testimony that Nancy often used profanity and vulgarity in the children's presence. Todd testified that he had heard Nancy cursing in the background during phone conversations with the children. He testified that Josh sometimes cursed at his home during visits and on one occasion at school. Nancy testified that she did not curse in front of the children, and she had never heard Josh use profanity.

According to Todd and Melissa, Josh was disruptive and disrespectful when he first arrived at their home for visits. On one occasion, while visiting Todd and Melissa, Josh jumped out of a window of the trailer. On another occasion, Josh got into a fight at school during an extended visit with Todd and Melissa.

There was testimony that Nancy allowed the children to run around, unattended at the trailer park. Stacy Ahner testified that Josh and Debbie made a habit of letting themselves into the trailer she shared with her disabled father. Stacy stated that she took the children to the store for after school snacks with Nancy's permission, but Nancy did not make an effort to make Stacy's acquaintance. Contrary to Stacy's testimony, Nancy testified that she had met Stacy and her father. She testified to having asked Stacy's father on several occasions if the children were any problem, and was told, "No." Nancy said that Josh liked to go there because he liked watching Stacy's father clean fish.

During Stacy's testimony the chancellor questioned her about possible family ties with Todd's wife Melissa. Stacy told the chancellor that Melissa's former husband was her uncle and that she worked with Melissa.

The chancellor determined that, after reviewing all of the evidence and applying the applicable law,

Todd had failed to prove a material change in circumstances which adversely affected Josh that warranted a modification custody and that it was in the best interest of Josh that Nancy maintain custody. The chancellor denied Todd's Motion to Modify Former Decree.

ANALYSIS

In seeking to vent its moral indignation, the majority has overstepped its authority, and now seeks to substitute its findings of fact for those of the chancellor.

This Court is an appellate body, and as such, exercises that authority appropriate to such a court. *Love v. Bennett*, 611 So. 2d 205, 207 (Miss. 1992); *Allgood v. Allgood*, 473 So. 2d 416, 421 (Miss. 1985). As an appellate body, this Court does not ordinarily decide anew questions of fact but generally accepts and limits its actions to the facts as determined by the appropriate finder of facts, be it the trial judge or jury. *Morreale v. Morreale*, 646 So. 2d 1264, 1266 (Miss. 1994) (Stating that the appellate court sits as a review court and not as trier of fact *ab initio*).

This is an appeal from a decision of the chancery court declining to modify child custody. As such we do not try the issues here anew, but rather consider the facts, as determined by the Chancellor, in light of our standard of review. *Love*, 611 So. 2d at 207. Under that standard of review, we will not disturb the findings of a chancellor unless he, (1) abused his discretion, (2) was manifestly wrong, (3) was clearly erroneous or (4) applied an erroneous legal standard. *Worley v. Jackson*, 595 So. 2d 853, 855-56 (Miss. 1992).

The majority holds that the chancellor was clearly erroneous in her holding. The majority states as its reason, that it is inappropriate for a man and woman to live together without benefit of marriage. As legal authority for this holding the majority cites *Kavanagh v. Carraway*, 435 So 2d. 697, 701, (Miss 1983) stating, "In fact, the Supreme Court has stated that a man and woman living together with minor children should do so only with the benefit of marriage."

That holding must be read in conjunction with the paragraph immediately following it, which states:

In a proper case where such conduct is shown to exist and that such conduct has produced a substantial detrimental effect upon the children-the chancellor should consider same in determining what is the best interest of the children. Therefore, when weighed in light of the totality of the circumstances such conduct may constitute a material change in circumstance.

In a very thorough opinion, the chancellor gave appropriate consideration to this, as well as the other factors cited in *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983) and after having done so held:

The best interest of the minor child is the paramount concern of this Court (emphasis added). After reviewing all of the evidence before the Court and after applying the applicable law, the Court found that Mr. Hampton has failed to prove a material change in circumstance which adversely affects the minor child of the parties warranting a modification of the custody of the minor child.

The majority in its opinion has not identified (1) a specific detrimental impact on Josh or (2) facts which demonstrate the lack of evidence supporting the chancellor's actions. It attempts to do so in

making the allegation that "... it is clearly in Josh's best interest to live with his father and stepmother." While such an assertion may be clear to the majority, because we are a court of appellate jurisdiction, the majority is obligated to offer a factual basis for that holding. They have not done so.

While the majority bases its opinion on the residential relationship of Nancy Hampton and Graham, there were other issues put before the chancellor such as discipline, proper care and supervision of Josh. On these issues, the chancellor found the evidence in dispute. Under such circumstances she was the finder of fact, and this Court cannot substitute its judgment for that of the chancellor. *Allgood*, 473 So. 2d at 421. In this case, it would seem that each witness had something more than an objective interest in the outcome of the custody hearing. In such an instance, the chancellor is the better judge of credibility because she had the opportunity to hear the testimony and observe the demeanor of each witness.

While we might disapprove of Nancy's life style and of her child rearing techniques, absent sufficient proof of both a detriment to Josh's present welfare and to his future well-being our law does not mandate a change of custody. *Phillips v. Phillips*, 555 So. 2d 698, 701 (Miss. 1989). In his pursuit of custody, Todd failed to indicate detriment to either Josh's present welfare or to his future well-being. There was no indication of Josh not being able to thrive in the environment in which he lived with his mother and sister, both of whom he had lived with since his introduction into this world. Further, there was no indication that placing Josh in the home with his father would be in his best interest. In fact, Josh seemed more disruptive when visiting his father, which was evidenced by his jumping from the trailer window and getting into trouble at school. While the facts suggest that Todd and his wife, Melissa, may be able to offer Josh more materially, material possessions alone should not sway the Court to change custody. *Albright*, 437 So. 2d at 1005. The chancellor realized that a change in custody must not be made in haste and that the polestar consideration must always remain the best interest and welfare of the child. *Ash v. Ash*, 622 So. 2d 1264, 1266 (Miss. 1993). The chancellor determined it was in Josh's best interest that his custody remain with Nancy.

Based on the record, I find the chancellor's actions (1) to be supported by credible evidence, (2) were not an abuse of discretion, (3) were not clearly erroneous, (4) were not manifestly wrong, and (5) did not apply an erroneous legal standard.

For these reasons I would affirm.

COLEMAN, PAYNE AND SOUTHWICK, JJ., JOIN THIS OPINION.