IN THE COURT OF APPEALS 02/11/97

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

ON MOTION FOR REHEARING

EN BANC:

PAYNE, J., FOR THE COURT:

The motion for rehearing is granted. The opinion rendered on June 18, 1996, is withdrawn, and this opinion is substituted therefor.

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 no error in the proceedings below, we affirm.

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 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 rearguing 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.

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 Lee waived the contention that the chancellor erred in not making sufficiently specific factual findings. 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.

Rachel, however, disputes Lee's allegation that she "ambushed" him. Rachel contends that Lee's total reliance on information given to him by her former attorney was error on his part especially since he was aware that she had changed attorneys some five months before trial. Rachel states that at no time did her new attorney, William Wright, indicate to Lee that no experts would testify at trial nor did Lee or his attorney ever inquire about the use of experts. Rachel asserts that her attorney asked Lee at an August 15, 1994, deposition if he planned to use expert testimony and Lee stated that such decision would be up to his attorney. Rachel states that no similar question was posed to her or Mr. Wright despite the fact that Lee was fully aware that Brad had been evaluated by Dr. Whelan.

Rachel contends and Lee admits that Lee's attorney, Luke Schissel, became aware on September 15, 1994, four days before trial, that Dr. Whelan would testify at trial. Mr. Schissel admitted that he did not call Dr. Coleman until September 19, 1994. Dr. Coleman indicated that he would be unable to appear at trial on September 21 but would give a deposition. No deposition was taken nor was Dr. Coleman subpoenaed. On September 21, 1994, Lee filed a motion for additional time to prepare Dr. Coleman. The caption of the motion read as follows:

> MOTION FOR AN ORDER ALLOWING PLAINTIFF A REASONABLE LENGTH OF TIME TO SCHEDULE, OBTAIN, AND SUBMIT THE DEPOSITION OF DR. CHARLES COLEMAN, A PSYCHIATRIST, AFFILIATED WITH THE MISSISSIPPI NEUROPSYCHIATRIC CLINIC, BEFORE A RENDERING OF A FINAL DECISION IN THIS CASE

The motion is not a request for a delay or continuance of the trial, itself. Rather, the motion specifically asks that the court allow the proof to proceed as scheduled. Lee does, however, request

that the chancellor delay his final decision and provide Lee with additional time following the end of the trial to schedule, obtain, and submit to the court the deposition of Dr. Coleman. The chancellor denied the motion stating, "This is an absolute novel motion as far as I'm concerned. In my eighteen years, I've never seen a similar motion." Lee contends that 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). We believe that the chancellor in the present case had sufficient evidence on which to base his decision. We do not think that Dr. Coleman's deposition would have changed the outcome in this case. Dr. Coleman's written evaluation of Brad was attached to Lee's motion for more time when it was filed. As a matter of fact, Dr. Coleman's evaluation of Brad also appears two other times in the clerk's court file. The evaluation is attached as an exhibit to Lee's "Amended Response To Motion For Modification Of Final Judgment Of Divorce" filed on September 19, 1994, and the evaluation is attached to Lee's "Response To Motion For Emergency Relief" filed on November 16, 1994. The chancellor's denial of Lee's motion for more time prevented the evaluation from becoming a part of the record evidence; however, the frequent appearance of this evaluation persuades us that had the chancellor believed that the contents of Dr. Coleman's report indicated new or alarming information, he might have been more inclined to grant the somewhat irregular motion. Furthermore, we are of the opinion that Dr. Coleman's deposition or in-court testimony would have been nothing more than a regurgitation of his written evaluation which merely stated that he found that Brad had no problems, the opposite of Dr. Whelan's evaluation. As such, we see no need to prolong this highly emotional legal entanglement between these parties. The chancellor, in addition to Dr. Whelan's testimony, had before him testimony from Ms. Johnson, Brad's school teacher, that she had witnessed Brad's disturbing behavior as well as testimony from Rachel regarding Brad's behavior. In addition, Lee and his mother had testified that Br ad had no problems; therefore, Dr. Coleman's evaluation would have been repetitious to testimony already in evidence. We do not see how Dr. Coleman's evaluation which was based on one thirty-minute session with the child could have rebutted the testimony provided by Rachel, Dr. Whelan, and Ms. Johnson.

Furthermore, we must agree with the chancellor in that the motion filed by Lee is one not known to our jurisprudence. Lee argues that his motion was a request for a continuance, although it was not framed as such. A "continuance" is defined as "[t]he adjournment or postponement of a session,

hearing, trial, or other proceeding to a subsequent day or time; usually on the request or motion of one of the parties." Black's Law Dictionary 321 (6th ed. 1990). As we stated previously, Lee did not ask that the hearing be postponed or adjourned, he merely requested that the chancellor delay his decision until such time as Lee could produce Dr. Coleman's deposition. Notwithstanding the oddity of Lee's motion, however, we are of the opinion that Lee was seeking something akin to a continuance.

Although motions for a continuance are not unusual in the practice of law, such motions are not granted as a matter of course and tend to be disfavored. Warner George D., Jr., Warner's Griffith, Mississippi Chancery Practice (Rev. Ed. 1991) § 561. Generally, there are two chief requirements necessary to sustain an application for a continuance: (1) diligence must be shown; and (2) the testimony or other matters sought to be brought before the court must be pertinent and material. *Id.* (citation omitted). Additionally, a trial judge or chancellor is not obligated to delay a trial to await the coming of an expert witness, however eminent he may be in his profession. *Id.* (citation omitted).

The Mississippi Supreme Court has held that "[t]he granting or denying of a continuance is ordinarily a matter committed to the sound discretion of the trial judge. Reversal on appeal is considered seriously only where the failure to grant a continuance represents a clear abuse of discretion." *Leonard v. Leonard*, 486 So. 2d 1240, 1241 (Miss. 1986). In the present case, we find that the chancellor did not abuse his discretion in denying Lee's motion for more time. We believe that the chancellor was in the best position to determine the necessity of the information Lee sought to provide; and, as we stated previously, we do not believe that Dr. Coleman's deposition would have sufficiently rebutted the evidence presented by Rachel regarding Brad's disturbing behavior. We find the Appellant's arguments to be without merit and therefore affirm the decision of the

lower court.

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 disagree with Lee's contention. Our concern in considering this issue is the time-frame in which the evidence to be presented falls. Here, Lee wants to present 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. However, the law in Mississippi simply will not allow one to go behind the divorce decree to establish a need for modification of the child custody

order. *Bubac v. Boston*, 600 So. 2d 951, 955 (Miss. 1992). The prerequisites for modification of child custody are well established: (1) "the movant must prove by a preponderance of the evidence *that since the 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"; and (2) "if such adverse change has been shown, the moving party must show by preponderance of the evidence that the best interest of the child requires the change in custody." *Newsom v. Newsom*, 557 So. 2d 511, 515-16 (Miss. 1990) (emphasis added); *Pace v. Owens*, 511 So. 2d 489, 490 (Miss. 1987); *Smith v. Todd*, 464 So. 2d 1155, 1157 (Miss. 1985); *Tucker v. Tucker*, 453 So. 2d 1294, 1297 (Miss. 1984); *Cheek v. Ricker*, 431 So. 2d 1139, 1143 (Miss. 1983).

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 are satisfied that the chancellor had before him sufficient evidence to determine whether a material change in circumstances had occurred *since* the divorce. We also find that the evidence of Rachel's rehabilitation following the divorce was sufficient to support the chancellor's finding. We see no need to go behind the divorce decree to make such determinations nor do we have the authority to instruct the chancellor to do so as such instruction would be contrary to the law of this State. We therefore hold that the chancellor did not abuse his discretion in refusing to consider such evidence and find that no error was committed.

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. 2d 357 (1981), in concluding that Lee's parents and not Lee himself had become Brad's primary caregivers. 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 affirm the decision of the lower court.

THE JUDGMENT OF THE CHANCERY COURT OF LEFLORE COUNTY IS AFFIRMED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLANT.

FRAISER, C.J., BRIDGES AND THOMAS, P.JJ., DIAZ, KING, MCMILLIN, AND SOUTHWICK, JJ. CONCUR. BARBER, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN, J.

IN THE COURT OF APPEALS 02/11/97

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

BARBER, J., DISSENTING:

I respectfully dissent and I do so somewhat reluctantly because of the excellent and erudite opinion prepared by the author of the majority. Further, I hope that this dissent will not appear redundant since these arguments have been repeatedly advanced for more than half a year.

The principal issue is whether the trial court erred by denying Lee's motion for additional time to prepare his expert witness and whether such denial constituted reversible error. Prior to the motion, the chancellor heard Rachel's psychological expert, Michael Whelan, Ph.D. In his findings of fact, the chancellor, without any response from Lee, described Whelan's testimony as the only "medical testimony" in the record. It appears that the trial court having heard Michael Whelan's "expert" testimony would in all fairness accord an opportunity for Dr. Charles Coleman, a medical doctor and specialist in child psychiatry, to be heard by the court even in the late stages of the trial.

Lee's motion was styled as a "motion for an order allowing plaintiff a reasonable length of time to schedule, obtain, and submit the deposition of Dr. Charles Coleman, a psychiatrist, affiliated with the Mississippi Neuropsychiatric Clinic, before a rendering of a final decision in this case." In denying Lee's motion, the chancellor stated that "[t]his is an absolute novel motion as far as I'm concerned. In my eighteen years, I've never seen a similar motion." It appears that, although the motion may have been "novel" to the chancellor, it was sufficiently clear so as to put him on notice that Lee needed additional time in which to prepare an expert to rebut the testimony of Whelan. In arriving at this conclusion, I do not wish to imply that the chancellor should have done the motion drafter's work for him. Rather, I am convinced that the motion, while admittedly awkward and poorly drafted, was sufficient to convey Lee's request. My position on this issue is based on the principles embodied in the Mississippi Rules of Civil Procedure, which dictate that substance shall prevail over mere form. *See* MRCP 1, cmt. (stating that "the rules be interpreted liberally in order that the procedural framework in which litigation is conducted promotes the ends of justice and facilitates decisions on the merits, rather than determination on technicalities.")

By denying Lee's motion, the chancellor prevented Lee from having an opportunity to dispel the testimony of Michael Whelan, Ph.D., which the chancellor had erroneously considered "medical testimony." These twin errors, of giving Whelan's testimony the same weight as that which would be accorded to a medical doctor, coupled with the denial of Lee's request for an opportunity to counter the "medical" testimony, resulted in an injustice to Lee. It is well settled 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). It is this writer's opinion that the chancellor's rejection of Lee's motion, so as to allow the testimony of Whelan to stand unchallenged, did not satisfy the chancellor's duty to consider all the evidence and therefore constitutes reversible error. Accordingly, I respectfully dissent.

COLEMAN, J., JOINS THIS SEPARATE WRITTEN OPINION.