

IN THE COURT OF APPEALS 12/17/96

OF THE

STATE OF MISSISSIPPI

NO. 96-CA-00358 COA

LISA ANN PHILIPPINO HOBSON

APPELLANT

v.

RANDY LAMAR HOBSON

APPELLEE

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

TRIAL JUDGE: HON. THOMAS L. ZEBERT

COURT FROM WHICH APPEALED: RANKIN COUNTY CHANCERY COURT

ATTORNEY FOR APPELLANT:

PAUL E. ROGERS

ATTORNEY FOR APPELLEE:

ROY D. POWELL

NATURE OF THE CASE: DOMESTIC-CHILD CUSTODY MODIFICATION

TRIAL COURT DISPOSITION: CUSTODY OF CHILDREN TRANSFERRED TO FATHER

BEFORE FRAISER, C.J., BARBER, COLEMAN, AND MCMILLIN, JJ.

FRAISER, C. J., FOR THE COURT:

This case involves a motion for modification of child custody. Randy Hobson (Randy) asked the

Rankin County Chancery Court to modify the existing custody arrangement between him and his ex-wife Lisa Ann Philippino Hobson (Lisa). Lisa originally had physical custody of their two minor children, but asked Randy to keep the children until she got her life together. Six months into that unofficial arrangement, Randy asked the court to grant him physical custody of the children and allow Lisa standard visitation. The court granted Randy's motion to modify child custody, and Lisa appeals citing the following error:

I. WHETHER THE APPELLEE PRESENTED SUFFICIENT EVIDENCE OF A MATERIAL CHANGE IN CIRCUMSTANCES ADVERSELY AFFECTING THE MINOR CHILDREN OF THE PARTIES WHICH WARRANTED A CHANGE IN CUSTODY FROM APPELLANT TO APPELLEE.

Finding no error, we affirm.

FACTS

Randy and Lisa were married October 17, 1985, in Rankin County, Mississippi. They had two children--Kevin Lamar Hobson, born June 19, 1988, and Kristi Lynn Hobson, born January 28, 1993. The final judgment of divorce based on irreconcilable differences was entered in the Rankin County Chancery Court on April 15, 1994. The terms of the child custody agreement were incorporated into the final judgment, and specified that the couple would have joint custody of the two minor children, with Lisa maintaining physical custody. Randy was ordered to pay \$450.00 a month in child support.

One year after the divorce, Lisa told Randy that she had some problems in her own life, and until she could work them out she wanted the children to live with him. While this arrangement was informal and not filed with the court, the court did enter an order modifying Randy's support obligations to \$250.00 a month. On October 26, 1995, Randy filed a motion to modify the final judgment of divorce to grant him physical custody of the two children who were presently living with him and his new wife. Randy's basis for his motion to modify custody was a material change in Lisa's circumstances because by her own admittance that she was having personal problems, in addition to having an affair with a married man. Randy testified that Lisa told him that she saw no problem with her having an affair with a married man. While there was no evidence as to exactly what Lisa's personal problems were, the evidence is uncontradicted that they were to an extent justifying her giving custody of the children to Randy while she attempted to resolve them. Moreover, Randy's new wife, Vonita Hobson (Vonita) testified that Lisa forfeited one of her weekend visitations with the children to go out of town with her boyfriend.

Brad Brister (Brister), a private investigator, testified that on several occasions he observed Lisa's boyfriend's vehicle parked outside her house at night, and the vehicle was in the same place the next morning. The boyfriend's vehicle was parked in front of Lisa's house the morning of the custody hearing. In addition to Brister's testimony, Randy testified that Lisa was up front about the relationship and found nothing wrong with it. Vonita testified that Lisa had discussed the affair with her and told her that she had on occasion left the children with her boyfriend while she went shopping. Lisa rested her case without putting on any testimony. The chancellor found that Randy proved by a preponderance of the evidence that Lisa was having an affair with a married man.

In addition to that finding, the chancellor found that Lisa had a lack of concern for her children in the way she often put her boyfriend above their needs. The chancellor modified the custody agreement not on the fact that Lisa had a boyfriend, but because she was having an affair with a married man which adversely affected the children. Not only was Lisa having an illicit affair, but she was battling other problems which led her to relinquish voluntarily the physical custody of the children to their father. The chancellor found that it was in the children's best interest to continue the stable home environment they had enjoyed for over nine months with their father.

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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, Lisa argues that Randy failed to prove a material change in circumstances and any subsequent adverse effect on the children. Lisa bases her argument on several 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 Lisa's case, the chancellor did not modify custody on the basis of her relationship alone. Unrefuted evidence showed that Lisa voluntarily gave up her children to Randy so that she could get her life together. Moreover, not only was she simply dating another man and having him sleep over, she was dating a married man. Lisa offered no proof that this situation would change. Moreover, Lisa offered no testimony to prove that she had overcome the personal problems that led to her voluntary modification in the first place.

The Mississippi Supreme Court's most recent statement on modification of child custody came 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 effecting 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 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)).

In light of the supreme court's most recent opinion on custody modification, Lisa's argument that the

chancellor failed to find a material change adversely affecting the children does not convince this Court that the chancellor was not justified in changing custody. The chancellor found that the best interests of the children would be served by changing physical custody from Lisa to Randy because of Lisa's affair with a married man, her voluntarily giving the children to Randy while she got her life back together, and the instances when she put her boyfriend's needs above that of her children. Under *Riley*, the chancellor was justified in modifying custody even absent a specific finding of a material change and its adverse effect on the children, when the totality of the circumstances warranted a custody change. Moreover, under *Riley*, the chancellor was justified in transferring custody because the environment provided by Lisa was adverse to the children's best interest, while the environment

provided by Randy had become stable and secure. *Riley*, 647 So. 2d at 744. The chancellor's decision is supported by substantial evidence, and we find no error.

THE JUDGMENT OF THE RANKIN COUNTY CHANCERY COURT MODIFYING THE FINAL JUDGMENT OF DIVORCE TO TRANSFER CUSTODY OF THE TWO MINOR CHILDREN FROM LISA HOBSON TO RANDY HOBSON IS AFFIRMED. COSTS OF APPEAL ARE TAXED TO APPELLANT.

BRIDGES AND THOMAS, P.JJ., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.