IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2011-CA-00037-COA

DAWN SMITH SHANNON CLIFTON **APPELLANT**

v.

THOMAS R. SHANNON **APPELLEE**

DATE OF JUDGMENT:	01/14/2011
TRIAL JUDGE:	HON. VICKI B. COBB
COURT FROM WHICH APPEALED:	DESOTO COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT:	MITZI CONAR JOHNSON
ATTORNEY FOR APPELLEE:	JOHN THOMAS LAMAR JR.
NATURE OF THE CASE:	CIVIL - CUSTODY
TRIAL COURT DISPOSITION:	PHYSICAL CUSTODY OF MINOR CHILD MODIFIED AND AWARDED TO APPELLEE
DISPOSITION:	AFFIRMED IN PART AS TO JURISDICTION AND REVERSED AND REMANDED IN PART: 06/26/2012
MOTION FOR REHEARING FILED:	
MANDATE ISSUED:	

EN BANC.

FAIR, J., FOR THE COURT:

¶1. Dawn Clifton appeals a judgment transferring physical custody of her daughter to Thomas Shannon, her father. Because the chancellor failed to make findings of fact required for a proper determination of custody, we reverse and remand the chancery court's judgment.

FACTS

¶2. Thomas and Dawn were divorced in DeSoto County, Mississippi, in 1999. Dawn was awarded custody of their daughter Ashley who was born on May 16, 1996. Both parents

were given joint legal custody, and Thomas was awarded reasonable visitation.

¶3. Dawn moved to Colorado in December 2005, and shortly thereafter remarried. Thomas also remarried and remains in DeSoto County. In 2006, Thomas's visitation schedule was modified by agreement, as it was impractical due to the travel distance between the parties. Thomas filed a petition for contempt and modification of custody in 2010, and Ashley joined in the petition. He claimed that a material change in circumstances adversely affecting the child had occurred. Dawn objected to the chancery court's jurisdiction.

¶4. Because Ashley's school year would begin in August, an emergency hearing was held in July to address the issue of temporary custody. Meeting with the chancellor in camera, Ashley described her experiences in the homes of both parents and expressed her preference to reside in her father's home in Mississippi. The chancellor, retaining jurisdiction over issues of custody, awarded Thomas temporary custody in August. Five months later, the chancellor entered a judgment awarding "primary physical custody" to Thomas, determining that it was "in the best interest of the minor child . . . ." The decision to modify custody was based in major part on Ashley's testimony and expressed preference to reside with her father. The chancellor noted Ashley's participation in extra-curricular activities in Mississippi, church involvement in Mississippi, and the fact that she "is well-adjusted with her step-mother and step-sister" in Mississippi. The chancellor also explained that Ashley "does not desire to reside with her [mother] and feels more comfortable living with her father, as opposed to her mother, her mother's current husband, and her mother's new child."

¶5. Dawn now appeals questioning the court's jurisdiction, asserting that the evidence was

insufficient to support a modification of custody, and seeking attorney's fees for this appeal. We affirm the chancery court's jurisdiction and find an award of attorneys fees unsupported. However, finding that the chancellor failed to make findings of fact and conclusions of law as required in a custody modification case by the Supreme Court of Mississippi, we reverse and remand for further proceedings and compliance with the mandates of the supreme court.

DISCUSSION

1. Jurisdiction

¶6. Dawn argues that because the chancery court did not have continuing exclusive jurisdiction, Thomas's petition should have been dismissed. She cites the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA), codified in Mississippi Code Annotated sections 93-27-101 to 402 (Rev. 2004 & Supp. 2010), to support her argument that jurisdiction should have been in Colorado. She claims that because Colorado has been Ashley's home for four and a half years, there are no significant connections to Mississippi that warrant the exercise of jurisdiction over the custody-modification matter.

¶7. "Whether a court had jurisdiction under the UCCJEA to hear a child-custody dispute is a question of law, which we review de novo." *Miller v. Mills*, 64 So. 3d 1023, 1026 (¶11) (Miss. Ct. App. 2011) (citing *Yeager v. Kittrell,* 35 So. 3d 1221, 1223 (¶¶12, 14) (Miss. Ct. App. 2009)). However, the factual findings underpinning the jurisdiction question are reviewed under the familiar substantial evidence and abuse of discretion standard. *See White v. White*, 26 So. 3d 342, 346-48 (¶¶10, 14) (Miss. 2010).

¶8. In *Yeager*, this Court stated "[a] court issuing an initial determination has continuing

jurisdiction over the parties; no other court may modify the decree." *Yeager*, 35 So. 3d at 1224 (¶16) (citing Miss. Code Ann. § 93-27-201 (Supp. 2009)).

> However, even if only one party remains in the state, a second state may modify the order if the issuing court finds that neither the child, nor the child and one parent, have a significant connection with the state, and that substantial evidence is no longer available in the issuing state. Only the issuing state may make this determination.

Id. (internal citation omitted).

¶9. There was sufficient evidence that Ashley still maintained a significant connection to Mississippi because her father and extended family reside here. In a recent opinion addressing a chancery court's jurisdiction over a proceeding for modification of custody, the Mississippi Supreme Court held that since the father had continuously resided in Mississippi:

> [I]t was within the chancellor's discretion to determine that both the child and [the father] had a "significant connection with this state." Therefore, the chancery court properly has retained continuous, exclusive jurisdiction over [the] matter . . . .

White v. White, 26 So. 3d 342, 347-48 (¶14) (Miss. 2010).

¶10. The DeSoto County Chancery Court was the court of original jurisdiction. Nothing in the record suggests that the chancellor erred in retaining jurisdiction. In fact, the Colorado court, where Dawn filed another custody action, had declined jurisdiction on the emergency relief that was requested and did not assume jurisdiction.

¶11. Dawn further contends that Mississippi is an inconvenient forum, as "the overwhelming abundance of substantial evidence and witnesses" with regard to the child's home life are located in Colorado. She cites Mississippi Code Annotated section 93-27-207, which states in pertinent part:

(1) A court of this state which has jurisdiction under this chapter to make a child custody determination *may decline* to exercise its jurisdiction at any time if it determines that it is an inconvenient forum under the circumstances and that a court of another state is a more appropriate forum. The issue of inconvenient forum may be raised upon motion of a party, the court's own motion, or request of another court.

(2) Before determining whether it is an inconvenient forum, a court of this state shall consider whether it is appropriate for a court of another state to exercise jurisdiction. For this purpose, the court shall allow the parties to submit information and shall consider all relevant factors, including:

(a) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(b) The length of time the child has resided outside this state;

(c) The distance between the court in this state and the court in the state that would assume jurisdiction;

(d) The relative financial circumstances of the parties;

(e) Any agreement of the parties as to which state should assume jurisdiction;

(f) The nature and location of the evidence required to resolve the pending litigation, including testimony of the child;

(g) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present the evidence; and

(h) The familiarity of the court of each state with the facts and issues in the pending litigation.

(Emphasis added.)

¶12. While Colorado may have been a more convenient forum for Dawn, the chancery court is endowed with the discretion to make that decision. Prior custody proceedings were

conducted in Mississippi, and Ashley spent several weeks in Mississippi during the year visiting her father and family. We find that Mississippi was an appropriate forum and that the chancery court properly retained exclusive jurisdiction.

2. Custody Modification

¶13. To order a change in custody, the chancellor was first required to find a material change of circumstances and then to undertake an *Albright* analysis to determine the child's best interests. *McDonald v. McDonald*, 39 So. 3d 868, 880 (¶37) (Miss. 2010); *Albright v. Albright*, 437 So. 2d 1003, 1005 (Miss. 1983). The chancellor failed to follow this controlling authority, as she did not make specific findings of fact regarding a material change in circumstances or the *Albright* factors.

¶14. In *Estate of Langston v. Williams*, 57 So. 3d 618, 622 (¶17) (Miss. 2011), the supreme court held that when a chancellor applies an incorrect legal standard, an appellate court must remand rather than render. The error here is essentially a failure to apply the correct legal standard and to do so of record. *See, e.g.*, *Johnson v. Johnson*, 823 So. 2d 1156, 1160 (¶9) (Miss. 2002); *Sandlin v. Sandlin*, 699 So. 2d 1198, 1204 (Miss. 1997) ("[T]he failure to make findings of fact and conclusions of law . . . requir[es] reversal and remand.")

¶15. The two separate opinions written in this matter discuss the evidence that may have been considered by the chancellor in making her decision to remove Ashley from her mother's custody and award custody to her father. Both opinions contain more discussion of the weight and sufficiency of evidence and factual conclusions than is contained in the record before us.

¶16. Chief Judge Lee's opinion favors affirming the award and emphasizes the weight that should be given to certain evidence in support of a change in custody. He also suggests that if the evidence is insufficient to support a material-change finding, then this case is so unusual and compelling that the general rules set out above should be disregarded in favor of an overall best-interests-of-the-minor determination as occurred in *Riley v. Doerner*, 677 So. 2d 740, 745 (Miss. 1996).

¶17. Judge Barnes favors reversing and rendering the judgment, finding that the evidence is insufficient to support a modification and that custody should remain with Dawn.

¶18. Because the required findings were not made by the chancellor as our supreme court has directed, this Court must reverse and remand her judgment. On remand, the chancellor should make such findings and hold such hearings as may be necessary in light of the time that has passed since custody of the child was changed. Ashley is now sixteen years old and has been living with her father in Mississippi for almost two years. The chancellor should consider the present circumstances as well as those existing when the original decision to change custody was entered.

3. Attorney's Fees

¶19. Dawn briefly asserts that she should be awarded attorney's fees on appeal. The chancellor held that each party would be responsible for their respective attorney's fees. "Attorney['s] fees are not normally awarded in child custody modification actions." *McCraw v. Buchanan*, 10 So. 3d 979, 985 (¶24) (Miss. Ct. App. 2009) (quoting *Mixon v. Sharp*, 853 So. 2d 834, 841 (¶32) (Miss. Ct. App. 2003)). Since attorney's fees were not awarded by the

chancellor, we will not grant them on appeal. *See Rankin v. Bobo*, 410 So. 2d 1326, 1329 (Miss. 1982). Therefore, we decline to award attorney's fees in this matter.

¶20. **THE JUDGMENT OF THE DESOTO COUNTY CHANCERY COURT IS AFFIRMED IN PART AS TO JURISDICTION AND REVERSED AND REMANDED IN PART. ALL COSTS OF THIS APPEAL ARE DIVIDED EQUALLY BETWEEN THE APPELLANT AND THE APPELLEE.**

ISHEE, ROBERTS, MAXWELL AND RUSSELL, JJ., CONCUR. LEE, C.J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY CARLTON, J. BARNES, J., CONCURS IN PART AND DISSENTS IN PART WITH SEPARATE WRITTEN OPINION JOINED BY IRVING AND GRIFFIS, P.JJ.

LEE, C.J., CONCURRING IN PART AND DISSENTING IN PART:

¶21. I must respectfully dissent as I find the chancellor was correct in modifying custody. I concur with the majority regarding the jurisdiction of the chancery court and denial of attorney's fees.

¶22. In *Riley v. Doerner*, 677 So. 2d 740, 745 (Miss. 1996), the Mississippi Supreme Court held: "In weighing a request for modification of child custody, a chancellor's ultimate concern must always be whether such change would be in the child's best interest." Although the requirement of a material change in circumstances is listed first in the test for a change of custody, the chancellor must consider the totality of the circumstances with the child's best interest in mind. *Id.* I find the chancellor's ultimate concern in this case was Ashley's best interest.

¶23. Regarding whether a material change in circumstances occurred, I must defer to our standard of review and the chancellor's discretion. The chancellor met privately with Ashley

in chambers to discuss Ashley's living arrangement. The chancellor considered that Ashley had been moved to Colorado from her home in Mississippi shortly after the divorce. This was one factor that created a material change of circumstances. She was uprooted from her established life and surroundings in DeSoto County. While in DeSoto County, Ashley was near her maternal and paternal grandparents, as well as aunts and uncles. The chancellor noted that while in her father's care in Mississippi, Ashley was happy and well-adjusted; she was near extended family; she enjoyed living with her step-sister, who is close to Ashley's age; she had been re-baptized and joined her father's church; and she was involved in extra-curricular activities. Ashley was fourteen years old at the time of the hearing; thus, she was old enough to state her preference. The chancellor found Ashley was "very adamant" in her desire to move back to Mississippi. The chancellor noted Ashley had thought about her decision for a long time, and it was not a "knee-jerk reaction." It was clear to the chancellor Ashley was happier and more involved in family and school activities while living in Mississippi.

¶24. As for Ashley's living situation in Colorado, the chancellor considered that Ashley felt uncomfortable around her stepfather, Ashley's mother had recently had another child, and the family did not do as many activities together as a whole as Ashley's family in Mississippi. The chancellor also took into account the timing of the decision to change custody, which was July 26, 2010, since Ashley was about to start a new school year. I find the chancellor's first consideration was Ashley's best interest, and it was not an abuse of discretion for the chancellor to modify custody. Thus, I would affirm the chancellor's decision and find this

issue without merit.

CARLTON, J., JOINS THIS OPINION.

BARNES, J., CONCURRING IN PART AND DISSENTING IN PART:

¶25. I concur with the majority's findings regarding Issues I and III. As to Issue II, I also agree that the chancellor's modification of custody warrants reversal. However, I dissent from the majority's decision to remand for further findings. The custody modification was based solely on Ashley's preference to live with her father in Mississippi, and there simply was no evidence presented that a material change in circumstances adversely affecting Ashley had occurred in the custodial home. *See Self v. Lewis*, 64 So. 3d 578, 584 (¶29) (Miss. Ct. App. 2011). Therefore, I would render the chancery court's judgment and return Ashley to her mother's custody.

¶26. It is clear from the record that the only basis for the modification of custody was Ashley's preference. Thomas provided no evidence of a material change in circumstances; nor did the chancellor make any factual findings that a material change in circumstances had occurred. When asked on cross-examination if there was any other basis for the request for modification, other than the child's preference, Thomas admitted: "No, ma'am." Ashley freely admitted that she loved both parents and that she experienced a stable and satisfactory atmosphere in both homes. In regard to accommodations, she stated that "both are really nice houses." Ashley also stated she had a good relationship with her mother and that they were "like sisters." She said they had no disagreements, other than normal parent-child arguments. She noted that she and her mother would go shopping and to the movies, and that her mother

even took her occasionally to a local rock-climbing facility. She also testified that her mom was supportive of her calling her dad whenever she wanted. Similarly, she enjoyed activities with her father, participating in hunting, camping, and fishing. She was the same age as her step-sister in Mississippi, and they were friends.

¶27. "A child's preference of where to live is a factor to be considered in determining child custody." *Potts v. Windham*, 56 So. 3d 589, 593 (¶15) (Miss. Ct. App. 2011) (citing *Albright v. Albright,* 437 So. 2d 1003, 1005 (Miss. 1983)). However, if there is no finding of a material change in circumstances, then there is no occasion for an analysis of the *Albright* factors. *See id*. In a similar case, *Dykes v. McMurry,* 938 So. 2d 330 (Miss. Ct. App. 2006), we upheld a chancellor's refusal to modify custody, as the only basis for modification presented by the non-custodial parent was one of the children's stated preference to live with his father. We noted that there was no evidence that the child suffered any abuse or felt threatened at his custodial home; in fact, the child appeared to be "healthy and well-adjusted in his mother's home." *Id*. at 336 (¶22). Therefore, we concluded that the evidence was insufficient "to show there ha[d] been a material change in circumstances adverse to his children's well-being sufficient to warrant a change in custody." *Id*. This Court has recognized:

> Mississippi Code Annotated Section 93-11-65 (Rev. 2004) allows a child who has attained the age of 12 to state her preference to the court as to whether she would rather live with her mother or father. However, the trial court is not bound to follow the child's preference. *See Polk v. Polk,* 589 So. 2d 123 (Miss. 1991). Furthermore, *we have found no authority to support a conclusion that a child's statement, in and of itself, of his or her preference to live with the non-custodial parent would rise to the level of a material or substantial change of*

circumstances.

In re E.C.P., 918 So. 2d 809, 824 (¶62) (Miss. Ct. App. 2005) (emphasis added); *see also Best v. Hinton*, 838 So. 2d 306, 308 (¶8) (Miss. Ct. App. 2002) (modification of custody based upon the child's preference was reversed because "such an expression, *supported by nothing more*" is not "the type of adverse material change in circumstance that would warrant a custody modification.") (emphasis added). Were it otherwise, a child might attempt to blackmail the custodial parent into granting favors for fear of losing custody; or a non-custodial parent might attempt to bribe the child into requesting a change in custody.

¶28. In determining whether to modify custody, the chancellor noted Ashley's testimony that she felt uncomfortable around her stepfather. During the in camera testimony before the chancellor, Ashley explained:

> A. It's because of my stepdad, like, I just – I feel kind of nervous around him. Like, I know he's not going to physically hurt me or anything.
>
> Q. Right.
>
> A. But I'm also scared for my mom because he has threatened her before. *It's only happened once*, and it was a really big fight. But that still really freaked me out.
>
> . . . .
>
> So, yes, I was in the house and it was just scary for me to be there because we had – it was the first year we moved there, so I was only, like, eight or nine.

(Emphasis added). The chancellor later observed:

> She – I know, Mom, that you testified that she and her stepfather were very close and spend a lot of time together. That is not what I got from her. She

> said she's very nervous around her stepfather. She is uncomfortable around him, and she is fearful at times for you . . . . She feels uncomfortable. She feels – she doesn't feel very close to him.

However, the incident where Dawn and her husband fought happened on only one occasion, two years before any petition for modification was filed. In a recent case, *Potts*, 56 So. 3d at 593 (¶14), this Court affirmed the chancellor's findings that allegations the child's mother and stepfather argued and cursed in front of the child, and two occasions of physical violence between the mother and her husband, described as "isolated incidents," were "insufficient to warrant a modification of custody." Ashley acknowledged that she was in no danger, and Dawn gave no indication that there was any trouble in the marriage. Ashley also admitted that she was rarely disciplined, stating that her stepfather had grounded her on only one occasion for not doing her homework. Dawn testified that the only change that has occurred in the family recently was that she had given birth nine months prior to the hearing. Dawn quit her part-time job as a result and was a stay-at-home mom.

¶29. The chancellor also noted Ashley's testimony that her family in Colorado did not do a lot of activities as a whole family, which the chancellor compared to the testimony that her Mississippi family did activities "as a family." Ashley stated that some Colorado family activities, such as going to church regularly, did not include her stepfather; however, Dawn explained that was because he was a different religious denomination and went to his own church. Plus, it was noted that family activities had declined because of the arrival of the new baby. None of these incidences warrant a finding of a material change in circumstances adversely affecting the welfare of the child. The issue of custody is extremely important to

a family, which is why this standard is so crucial to the determination of whether custody should be modified.

¶30. In *Ortega v. Lovell*, 725 So. 2d 199, 204 (¶26) (Miss. 1998), the Mississippi Supreme Court held that "[b]ecause there was no showing of a material change in circumstances," the chancellor erred in modifying custody, and it reversed and rendered the judgment of the chancery court. In this case, the chancellor simply stated that the modification was in the "best interest of the child,"and made no attempt to discuss whether there was a material change in circumstances in Dawn's home adversely affecting Ashley's welfare. Furthermore, the record would not support such a finding.

¶31. Accordingly, I would reverse and render the chancellor's judgment and return Ashley to the custody of her mother.

IRVING AND GRIFFIS, P.JJ., JOIN THIS OPINION.