



It is from the Judgment that an appeal resulted. The primary issue on appeal was whether the trial court was erroneous in granting custody to the father, appellee.

The appeal raises the following issues:

(1) Was the wrong legal standard applied? In other words, was this an initial custody proceeding in tribal court or was tribal court modifying a prior Youth Court Ruling?

The Appellant filed an Answer and Counter-Claim in February 2005. She did not assert and present any relevant evidence that she was challenging the court's jurisdiction, nor did she raise an issue claiming res judicata. She asserts for the first time on this appeal that a "modification" burden of proof should have been applied by the Court. She now argues that the prior Youth Court custodial placements adjudicated her as the custodial parent. The Trial Court was never presented an opportunity to rule on this legal issue. Considering, the issue is raised for the first time on appeal, this Court finds that this was filed, tried and conducted as an initial custody hearing by both parties. Thus, this argument is without merit.

(2) Should the Court apply the Plain Error Rule to purported hearsay evidence presented during the trial?

If the Plain Error Rule is applied, this Court must find that a substantial or manifest injustice to the extent that public fairness or integrity of the judicial proceeding was created by the admission or failure to admit the objectionable evidence.

Since the Appellant admits that few, if any, objections were made to the alleged hearsay statements or documents to preserve any potential errors for appeal; then the remaining focal argument could only be that the court should have not allowed the evidence

as the “gatekeeper” of inadmissible evidence. Of course, this theory is flawed, because the Court in this case could not know the validity or relevance of the testimonies or documents as to either party. Thus, without objection, the Court must rely on the attorney’s discretion and strategy in the presentation of its evidence. Obviously, the information was relevant, if otherwise admissible, so without objection the Court was not within its discretion to interject its own objection. This, was not error to consider relevant properly admitted evidence. As provided in Gatlin v. State, 724 so. 2d 359 (Miss. 1998), this argument is not properly before the Court due to the failure to make a contemporaneous objection. Further, there is no “Plain Error” to be resolved by this Court. *See Choctaw Rule of Evidence Rule 103.*

(3) Does the Court’s Judgment conflict with the provisions of Choctaw Code §9-3-9?

Choctaw Code §9-3-9 states:

*In any case of separation of husband and wife having minor children, or whenever a marriage is declared void or dissolved, the court shall make such order for the future care and custody of the minor children as it may deem just and proper. In determining custody, the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties and the natural presumption that the mother is best suited to care for the young children. The court may inquire of the children’s desires regarding the future custody; however, such expressed desires shall not be controlling and the court may, nevertheless, determine the children’s custody otherwise.*

The Court to correctly apply this code section is required to examine the relevant evidence related to the present and past conduct of potential custodial parents. The environment, both past and present, are pertinent factors to be of concern. Additionally, the natural presumption of the mother is statutorily created. However, this presumption can be

rebutted by clear and convincing evidence. To find the quality of evidence to follow this mandate, the instructions and guidelines of Bacon including the Albright factors should be adjudicated in all custodial cases. It is clear in this case that the court considered the dictates of Bacon to reach its custodial adjudication; therefore, there is no error. Bacon vs. Bacon, 3 C.S 2003-01 and Albright v. Albright, 437 So. 2d 1003, 1005 (Miss. 1983).

(4) Did the Appellee's arrearage in child support previously ordered through DHS implement the "Clean Hands Doctrine" to bar his custodial claim?

It is distinctly noted by the Appellant and undenied by the Appellee that he was behind approximately \$1727.00 in child support ordered to be paid to DHS through a Youth Court Order. The Appellant challenged the Appellee's fitness by presenting evidence that he resided in an unwed relationship, his employment was unstable or totally dependent on his paramour and his household consisted of multiple dependents. However, no meaningful attempt was made to relate these factors to his ability with respect to his parenting skills or lack thereof. Appellee with clarity addressed convincing evidence of past and present poor home environment or conduct by alcohol abuse, multiple dui arrests, poor or sub-standard housing, lack of parental commitment to meeting with DHS parental training criteria. These factors together with opinions of the lay witnesses did, by clear and convincing evidence does overcome the mother's statutory presumption. The fact that child support was in arrears does not override the best interest of the child.

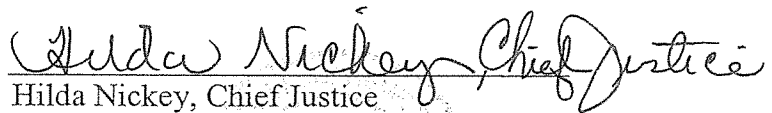
CONCLUSION

Our standard of review is did the trial judge commit manifest error or abuse it's discretion or apply the wrong legal standard in awarding custody to the Appellee. The polestar consideration being the best interest of the child and after reviewing the applicable case law and the pertinent code sections, this court finds that the court did correctly apply these standards to reach the judgment of custody and support by Judgment filed March 18, 2005 and same, is hereby affirmed. The Supreme Court of Mississippi reached a similar conclusion as stated below:

*"As stated, our scope of review is limited. Here, the chancellor, after taking testimony from both Harry and Carolyn, determined that Carolyn's assessment of the arrearage was the more accurate. The chancellor was in the best position to access the credibility of the witnesses and their respective testimony regarding the mattes at issue. As is well-established, the chancellor is vested with assessment of witness credibility, and "the interpretation of evidence where it is capable of more than one reasonable interpretation...." Crow v. Crow, 622 So.2d 1226, 1229 (Miss.1993); Rainey v. Rainey, 205 So.2d 514, 515 (Miss. 1967)".*

**TRIAL COURT AFFIRMED  
COSTS TAXED TO APPELLANT**

**This Opinion is concurred in by Chief Justice Nickey and Justice Pipestem.**

  
Hilda Nickey, Chief Justice

  
Robert Jones, Associate Justice

  
Brenda T. Pipestem, Associate Justice