

BEFORE THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

PANEL B

IN RE: ALVIN D. CLAY

ARKANSAS BAR ID# 96075

CPC DOCKET NO. 2003-190

FINDINGS AND ORDER

The formal charges of misconduct upon which this Findings and Order is based arose from information provided to the Committee by the Honorable Jim Travis Hamilton, Circuit Judge for the Twenty-Second Judicial District, Tennessee. The information related to the representation of Christina Mitchell by Alvin D. Clay, Attorney at Law, Little Rock, Arkansas. Following a ballot vote decision from Panel A of the Committee on Professional Conduct, Attorney Clay requested a *de novo* hearing pursuant to Section 11 of the Procedures Regulating Professional Conduct of Attorneys at Law. A hearing was held before Panel B of the Committee on Professional Conduct on June 18, 2004.

Alvin Clay represented Christina Mitchell in a custody matter that started in Alabama and the Tennessee before an action was commenced in Arkansas. In summary, Ms. Mitchell is the mother of a minor child. Paul Kelley, a resident of Wayne County, Tennessee is the father of the child. Mr. Kelley and Ms. Mitchell began living together in 1991 when Mitchell separated from her husband. Ms. Mitchell and her husband did not divorce. In 1994, Ms. Mitchell gave birth to Mr. Kelley's child in Oklahoma. Ms. Mitchell and Mr. Kelley lived together in Alabama for approximately four years.

In 1998, Ms. Mitchell filed for a protective order from Mr. Kelley in Alabama where they were living. Mr. Kelley responded, filed to be declared father of the child, and requested to be awarded custody. The Alabama Court declared Mr. Kelley to be the father of the minor child and awarded him custody. Mr. Kelley thereafter moved to Tennessee with the minor child. Ms. Mitchell moved to Tennessee in 1999. Ms. Mitchell appealed to the Alabama Court of Civil Appeals which ruled on January 28, 2000, that Mr. Kelley lacked standing and that the Alabama trial court did not have subject matter jurisdiction, as Ms. Mitchell's husband

was presumed to be the father of the minor child. The Trial Court was directed to dismiss the case and the Alabama case was dismissed on July 18, 2000.

On June 1, 2000, Mr. Kelley filed a Petition for Temporary Custody in Wayne County, Tennessee and was granted custody of the minor child. Ms. Mitchell opted to exercise visitation with the minor child and picked the child up from Mr. Kelley on July 5, 2000. She thereafter refused to return the child to Mr. Kelley. Mr. Kelley filed a Petition for Temporary Emergency Custody on July 18, 2000, in Wayne County, Tennessee. The Honorable Jim T. Hamilton granted Mr. Kelley temporary emergency custody of the minor child.

Ms. Mitchell and her husband reconciled and Ms. Mitchell moved to Arkansas where Mr. Mitchell resided. In September 2000, Ms. Mitchell filed a Petition for Emergency Custody in Union County Circuit Court. Ms. Mitchell was at the time represented by Jack Barker, Attorney at Law, El Dorado, Arkansas. Mr. Barker testified that during his representation of Ms. Mitchell, she had expressed concerns about Judge Jim Hamilton of Wayne County, Tennessee. Mr. Barker stated that he called the attorney who represented Ms. Mitchell in the Tennessee matter and inquired about Ms. Mitchell's legal matters there.

In Tennessee, Ms. Mitchell filed a motion to dismiss the proceedings in Wayne County, Tennessee. A hearing was held on the motion and Judge Hamilton ruled against Ms. Mitchell. Ms. Mitchell appealed the decision to the Tennessee Court of Appeals. On April 21, 2001, the Tennessee Court of Appeals ruled that Wayne County had jurisdiction over the paternity and custody matters, but that the temporary emergency custody order was invalid because the child was not present in the State of Tennessee. The Court remanded the matter to Wayne County Circuit Court for a hearing on the paternity and custody.

A hearing was held in Wayne County, Tennessee on the issue of paternity and custody on August 6, 2001. Ms. Mitchell failed to appear at the hearing. The Trial Court heard testimony and found that Ms. Mitchell lived in Tennessee from October 1999 until July 2000 and that her moving to Arkansas during the pendency of a custody proceeding did not establish residency in Arkansas. Judge Hamilton found that DNA evidence provided clear and convincing evidence that Mr. Kelley was the biological father of the minor child and ordered the minor child to be returned immediately to the care and custody of Mr. Kelley. Ms. Mitchell

appealed the decision of the Wayne County Court to the Tennessee Court of Appeals. The Tennessee Court of Appeals affirmed Judge Hamilton's decision to establish paternity but reversed his decision that Tennessee was the "home state." The Court of Appeals stated that there was no "home state" of the child, but it would allow a Tennessee Court to assume jurisdiction if the child, or one of the parents had a significant connection with the state other than physical presence. The matter was remanded to the Wayne County Circuit Court for hearings.

On November 13, 2002, a hearing was held pursuant to the Tennessee Court of Appeals directive. Ms. Mitchell again failed to appear at the hearing and failed to return the child to Mr. Kelley. Judge Hamilton heard testimony from numerous witnesses. Judge Hamilton found that there was clear and convincing evidence that from October 1999 until July 2000, Ms. Mitchell was a resident of the State of Tennessee; that living in Arkansas while a custody proceeding was pending in Tennessee did not establish residency in Arkansas; that Tennessee custody proceedings were filed and pending prior to any court proceeding in Arkansas; that both parties, as well as the minor child, had significant connections with Tennessee; and that Wayne County had jurisdiction. Judge Hamilton also stated that while there was some allegation made of physical abuse to the child by the Petitioner during a previous hearing, the Court found by a clear preponderance of the evidence that no such abuse had occurred. Further, the Court found that there was no other evidence or testimony that had been properly presented to the Court from which any other decision may have been reached. Ms. Mitchell was found to be in contempt of court. No appeal was taken from the November 25, 2002, Order and the Order became the final adjudication of the matter. The November 25, 2002, Order was duly registered in Union County, Arkansas and Ms. Mitchell was thereafter incarcerated by the Arkansas Court for refusing to disclose the location of the minor child. Until the child's location was discovered, Ms. Mitchell was incarcerated for eight (8) months.

Ms. Mitchell testified that she learned in 2002 of an alleged relationship between Judge Jim Hamilton and Mr. Paul Kelley, the biological father of her child. Ms. Mitchell stated that her attorney in Tennessee appeared at a hearing on her behalf in Wayne County, Tennessee. Following the hearing, her attorney informed her that Mr. Kelley, his attorney and the Judge were all good friends. Ms. Mitchell stated that she believed the

information to be credible. She stated that while she was incarcerated, a series of newspaper articles were printed in the El Dorado, Arkansas, newspaper, *El Dorado News Times*, about her case. Ms. Mitchell testified that an article which appeared in the newspaper on March 18, 2003, contained proof that Judge Hamilton had a relationship with Mr. Kelley.

Ms. Mitchell testified that in 1987 she and her husband moved to Arkansas. During Desert Storm, Ms. Mitchell's National Guard unit was activated and she relocated to Oklahoma, during which time she and her husband separated. Ms. Mitchell stated that following the birth of her child, she and Mr. Kelley moved to Alabama where they lived for approximately four years. When Ms. Mitchell and Ms. Kelley separated, Ms. Mitchell testified that she moved to Tennessee where she had temporary employment. According to Ms. Mitchell, she always considered her residence to be Union County, Arkansas. Ms. Mitchell and her husband reconciled and she moved back to Arkansas in 2000.

Alvin Clay testified that he became involved in Ms. Mitchell's matter in 2003. Mr. Clay stated that Ms. Mitchell informed him about an alleged relationship that existed between Mr. Kelly, his attorney and Judge Hamilton and that she could not get a fair hearing in Tennessee. Mr. Clay stated that he consulted with Ms. Mitchell's former attorney, Jack Barker, who informed him that he had spoken to Ms. Mitchell's Tennessee attorney who said the same. Mr. Clay stated that he spoke with Jim Mitchell, Ms. Mitchell's husband, who echoed what Ms. Mitchell had been saying about the Tennessee proceedings. Mr. Clay stated that he spoke to Toni Walthall, the reporter for the *El Dorado News Times* who wrote the series of articles about Ms. Mitchell's legal proceedings in Arkansas and Tennessee. Mr. Clay stated that the reporter confirmed what Ms. Mitchell had been telling him. Mr. Clay also testified that Mary Edelmann, a client of his, had done considerable research about the relationship between Mr. Kelley, his attorney and Judge Hamilton. Mr. Clay said Ms. Edelmann's research found an extensive relationship between the Judge and Mr. Kelley.

After receiving the information from the various sources, Mr. Clay stated that he filed a Petition for Temporary Emergency Custody with the Union County Juvenile Court on May 5, 2003. In the Petition for Temporary Emergency Custody, Mr. Clay stated that "[Judge Hamilton] ultimately awarded custody of [minor

child] to Kelley without making any inquiry into the safety risk and the potential harm related to Kelley's contact with this child." Mr. Clay also stated in the Petition that "[Paul] Kelley is childhood friends with the Chancery Judge [Hamilton] in Wayne County [Tennessee] who ultimately determined that Kelley is Alex' [sic] biological father".

In a Petition to Terminate Parental Rights also filed in Union County, Mr. Clay stated in the Petition to Terminate Parental Rights that "as a result of [Mr.] Kelley's relationship with Judge Hamilton, Kelley was awarded temporary emergency custody of the [minor child]."

Upon consideration of the formal complaint, the response to the formal complaint, the testimony heard, the exhibits introduced, and the Arkansas Model Rules of Professional Conduct, Panel B of the Arkansas Supreme Court Committee on Professional Conduct finds:

1. That Alvin D. Clay violated Model Rule 3.3(a)(1) when he stated that Judge Jim Travis Hamilton, Circuit & Chancery Judge for the Twenty-second Judicial District of Tennessee, ultimately awarded custody of the minor child to Mr. Hamilton without making inquiry into the safety risk and potential harm related to Mr. Kelley's contact with the minor child, which is a false statement of material fact. Model Rule 3.3(a)(1) requires that a lawyer not knowingly make a false statement of material fact or law to a tribunal.

2. That Alvin D. Clay violated Model Rule 8.2(a) when he stated in a Petition for Temporary Emergency Custody filed in Union County, Arkansas, that "[Paul] Kelley is childhood friends with the Chancery Judge in Wayne County [Tennessee] who ultimately determined that [Paul] Kelley is Alex' [sic] biological father", and that "[Judge Hamilton] ultimately awarded custody of Alex to [Paul] Kelley without making any inquiry in to the safety risk and the potential harm related to Kelley's contact with the child; and when he stated in the Petition to Terminate Parental Rights that "as a result of Kelley's relationship with Judge Hamilton, Kelley was awarded temporary emergency custody of Alex", all of which were without a basis in fact. Model Rule 8.2(a) requires, in pertinent part, that a lawyer not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.

WHEREFORE, it is the decision and order of the Arkansas Supreme Court Committee on Professional Conduct, acting through its authorized Panel B, that ALVIN D. CLAY, Arkansas Bar ID# 96075, be, and hereby is, CAUTIONED for his conduct in this matter and assessed costs in the amount of ONE HUNDRED DOLLARS (\$100.00). The costs assessed herein shall be payable by cashier's check or money order payable to the "Clerk, Arkansas Supreme Court" delivered to the Office of Professional Conduct within thirty (30) days of the date this Findings and Order is filed of record with the Clerk of the Arkansas Supreme Court.

ARKANSAS SUPREME COURT COMMITTEE ON
PROFESSIONAL CONDUCT - PANEL B

By: _____

J. Michael Cogbill, Chair

Date: _____